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Anti-Cyber Bullying Statutes: Threat to Student Free Speech

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ANTI-CYBER BULLYING STATUTES: THREAT TO STUDENT FREE SPEECH

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ABSTRACT & OUTLINE

Abstract

In October 2006, thirteen-year-old Megan Meier committed suicide because of postings on MySpace, an Internet social networking site. As a result, twenty-one states have passed statutes prohibiting cyber bullying, i.e., bullying by electronic means. Many of these laws threaten student free speech. This article examines cyber bullying, the laws it has spawned, how they chill student speech, their constitutionality, and proposes a Model Anti-Cyber Bullying Law.

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By John O. Hayward*

The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web.[1]

I. INTRODUCTION

On October 17, 2006, Megan Meier, a thirteen-year-old girl in Dardenne Prairie, Missouri who had been diagnosed with attention deficit disorder and depression, committed suicide because of postings on MySpace, an Internet social networking site, saying she was a bad person, whom everyone hated and the world would be better off without.[2] As a result, the state revised its harassment and stalking statutes to prohibit using electronic means to knowingly "frighten, intimidate, or cause emotional distress to another person."[3] At the time of this writing, twenty-one states have passed similar legislation with others sure to follow.[4] Many of these statutes were enacted as a result of public hysteria over Megan's death and without due consideration to the threat they pose to freedom of speech. They are intended to combat what has become popularly known as "cyber bullying."[5] This article examines cyber bullying, the laws it has spawned, how they chill student free speech, their constitutionality, and presents a Model Anti-Cyber Bullying Statute.

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[1] Layshock v. Hermitage School District, 496 F. Supp. 2d 587, 597 (W. D. Pa. 2007) (where student created parody profile of school principal using lewd language, court found insufficient "nexus" between off-campus speech and a "substantial disruption of school environment" and overturned his suspension).

[2] http://en.wikipedia.org/wiki/Suicide_of_Megan_Meier (last visited Aug. 03, 2010). Other prominent examples of cyber bullying include Billy Wolfe, Ryan Halligan, and Ghyslian Raza (the so-called "Star Wars Kid"). *See* SAMUEL C. McQUADE, III, JAMES P. COLT & NANCY B. B. MEYER, CYBER BULLYING: PROTECTING KIDS & ADULTS FROM ONLINE BULLIES (Praeger Publishers, Westport, CT; 2009) at 4-7. In Massachusetts, fifteen-year-old Phoebe Prince and eleven-year-old Carl Joseph Walker-Hoover allegedly committed suicide due to cyber bullying. *See* THE BOSTON GLOBE, Mar. 18, 2010 at 1. Their deaths prompted the Commonwealth to pass anti-cyber bullying legislation. *See infra*, note 4.

Commentators report that cyber bullying is a world-wide phenomenon. *See* SHAHEEN SHARIFF, CYBER BULLYING (Routledge, NY; 2008) at 43-88 (describing cyber bullying in Australia, Canada, China, India, Japan, New Zealand, Singapore, South Korea, Thailand, and the United Kingdom). *See also* E. Kraft, *Cyber Bullying: A Worldwide Trend Of Misusing Technology To Harass Oth*ers, 36 THE INTERNET SOCIETY II: ADVANCES IN EDUCATION, COMMERCE, & GOVERNANCE 155 (2006).

[3] Missouri Revised Statutes, §160.261, §565.090, §565.225 (2008).

[4] *See* Laura Brookover, *State Policies on School Cyberbullying* (Table 3) (listing eighteen states) available at http://www.firstamendmentcenter.org/PDF/cyberbullying_policies.pdf. Massachusetts became the nineteenth state with passage of M.G. L. §37O, Chapter 71 on May 3, 2010. *See* *http://www.mass.gov/legis/laws/seslaw10/sl100092.htm*. Georgia followed on May 27, 2010 with SB 250 which revised Chapter 2 of Title 20 of the Official Code of Georgia Annotated. *See* http://www.bullypolice.org/ga_law.html. At the same time New Hampshire approved HB 1523, repealing and re-enacting RSA 193-F:2. *See* http://www.bullypolice.org/nh_law.html. Ohio is considering similar legislation. *See* http://www.dispatchpolitics.com/live/content/local_news/stories/2010/05/18/copy/bills-would-let-schools-tackle- cyberbullying-off-campus.html?sid=101 (all sites last visited Aug. 03, 2010).

[5] The term is attributed to Canadian Bill Belsey, who developed the Webpage www.cyberbullying.ca. *See* Qing Li, *New bottle but old wine: A research of cyberbullying in schools*, 23 COMPUTERS IN HUMAN BEHAVIOR 1777, 1778 (2007).

II. BULLYING AND CYBER BULLYING

A. Traditional Bullying

Traditional bullying is defined as "repeated intimidation, over time, of a physical, verbal and psychological nature of a less powerful person by a more powerful person or group of persons."[6] It is repetitive and encompasses an intrinsic power imbalance between the bully and the person being bullied who generally is incapable of self-defense.[7] It can be physical (e.g., punching), verbal (e.g., name-calling), and/or social (e.g., spreading rumors).[8]

B. Cyber Bullying

Cyber bullying has been defined as

> "Involving the use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging, defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behavior by an individual or group, that is intended to harm others."[9]

It can include: 1) sending spiteful text messages, e-mails, and instant chat messages; 2) forwarding confidential e-mails, text messages, or instant chat messages to other students; 3) bombarding a student with malicious text messages; 4) setting up a derogatory Web site or profile page about a student and inviting others to comment; or 5) using a mobile phone camera to video or photograph another student to embarrass them.[10]

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[6] *See* T. R. Nansel, M. D. Overpeck, R.S. Pilla, W. J. Ruan, B. Simmons-Morton & P. Scheidt, *Bullying Behavior Among U.S. Youth: Prevalence & Association with Psychosocial Adjustment*, 285 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2094 (2001); P.T. Slee, *The P.E.A.C.E. Pack: A Programme for Reducing Bullying in our Schools*, 6 AUSTRALIAN JOURNAL OF GUIDANCE AND COUNSELING 63, 64 (1996). *See also* SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTNG & RESPOND-ING TO CYBERBULLYING (Corwin Press, Thousand Oaks, CA; 2009) at 11-13 (explaining how bullying involves intentional, malicious, repeated behavior designed to exert power over the person bullied).

[7] D. Olweus, *Bully/Victim Problems in School: Facts and Intervention*, 12 EUROPEAN JOURNAL OF PSYCHOLOGYOF EDUCATION 495, 497 (1997); *see also* Shariff, *supra* note 2, at 19-24 (illustrating physical and psychological bullying).

[8] C. Salmivalli, A. Kaukiainen, & K. M. J. Lagerspetz, *Aggression and Sociometric Status Among Peers: Do Gender and Type of Aggression Matter?* 4 SCANDINAVIAN JOURNAL OF PSYCHOLOGY 17, 19 (2000). As to the cause of bullying, some argue it is "a natural consequence of an environment where children lack both a strong program of moral education and strong consequences of preying upon one another." *See* Kevin & Marilyn Ryan, *Phoebe's Legacy*, THE PILOT, June 4, 2010, at 13; s*ee also* McQuade, et al., *supra* note 2, at 23-36 (discussing psychological traits of bullies and the people they bully as well as what the authors term common "myths" about bullying).

[9] Li, *supra* note 5, at 1778, quoting Belsey. *See also* ROBIN M. KOWALSKI, SUSAN P. LIMBER & PATRICIA W. AGATSTON, CYBER BULLYING (Blackwell Publishing, Malden, MA; 2008) at 43-57 (describing cyber bullying and its various types and methods).

[10] M. L. Ybarra, K. J. Mitchell, D. Finkelhor, & J. Wolak*, Internet Prevention Messages. Targeting the Right Online Behaviors*, 161 ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE, 138, 140 (2007); s*ee also* Hinduja, & Patchin, *supra* note 6, at 25-41 (presenting mediums through which cyber bullying often occurs, including e-mail, chat rooms, voting/rating Web sites, blogging sites, virtual worlds, online gaming, instant messaging, cell phones, photo shopping, rumor spreading, flaming and trolling, identity theft or impersonation, and physical threats).

A well-known author provides a more detailed description of cyber bullying.[11] Her categories include the following:

- **Flaming.** Online fights using electronic messages with angry or vulgar language.
- **Harassment.** Repeatedly sending nasty, mean, and insulting messages.
- **Denigration.** "Dissing" or disrespecting someone online. Sending or posting gossip or rumors about a person to damage his or her reputation or friendships.
- **Impersonation.** Pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation.
- **Outing.** Sharing someone's secrets or embarrassing information or images online.
- **Trickery.** Tricking someone into revealing secrets or embarrassing information and then sharing it online.
- **Exclusion.** Intentionally and cruelly excluding someone.

Another expert on cyber bullying offers ten proposals for children, parents and educators to prevent it from recurring.[12] They include:

- Not engaging the person by replying.
- Printing all online communications so that cyber bullying is documented.
- Changing screen names and sharing them with selected friends and family only.
- Not sharing personal information in chat rooms.
- Contacting service providers to identify where negative emails originate.
- Thinking before sending a reply.
- Increasing parental awareness of online tools, applications, games, and other online materials used by their children.
- Involving teachers of children that are being cyber bullied.
- Initiating comprehensive action by teachers, other school staff, students, parents, and community members.

These suggestions are sensible and measured responses to cyber bullying and demonstrate how it can be dealt with effectively without resorting to legislation that tramples on student free speech. Unfortunately, that has not prevented legislators, spurred on by hysterical parents and media

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[11] Nancy E. Willard, *cited* in Ryan E. Winter & Dr. Robert J. Leneway, *CyberBullies – A High Tech Problem: Part 1*, available at http://www.techlearning.com/article/8280 (last visited Aug. 03, 2010); *see also* Kowalski et al, *supra* note 9, at 46-51 (adding to Willard's list cyber stalking and "happy slapping", i.e. recording a premeditated assault on someone and posting the video online).

[12] J. S. Wolfsberg, *Student Safety from Cyber Bullies in Chat Rooms and in Instant Messaging*, 72 THE EDUCATION DIGEST #2, 33-37 (2006), cited in Kelly Duncan, Holly Nikels, Michele Aurand & Gerta Bardhoshi, *Helping Kids & Families Stay Safe: Workshops on Cyber Bullying and On-Line Safety,* available at http://counselingoutfitters.com/vistas08/Duncan.htm (last visited Aug. 03, 2010). *See also* Hinduja & Patchin, *supra* note 6, at 128-150 (to prevent cyber bullying, schools should educate students and staff, implement clear rules about the use of computers and other technological devices, draw on the expertise of students through peer mentoring, maintain a safe and respectful school culture, install monitoring and filtering software, put into practice and evaluate formal anti-cyber bullying programs, and educate parents to communicate and go online with their children as well as monitor their activities).

frenzy, from enacting numerous laws of dubious constitutionality that chill student free expression and stifle creativity.

C. Media Portrayals of Cyber Bullying

In discussing how news media interprets reality and shapes our understanding and interpretation of the world around us, one commentator has remarked that the way the media reports on incidents of cyber bullying casts children and technological devices as villains.[13] By relying too much on reports of police officers in stories dealing with cyber bullying, the topic becomes a matter of law enforcement and contributes to interpreting the event as one whose solution lies in banning and regulating cyber bullying, thus resulting in the plethora of legislation dealt with in this article.[14] Rather than attempting to legislate cyber bullying out of existence (a quixotic dream), a more productive approach would be one that is proactive and educational, while seeking to guide young people in the responsible use of new technology. Though they are experts in manipulating technology, they are clueless as to the social and moral ramifications of its use. Furthermore, they receive little guidance from a mass media saturated with reality shows that glorify demeaning and disrespectful behavior.[15] The media must focus more on the responsibility of parents to educate their children on the responsible use of technology, rather than exploiting the harm done by cyber bullying. No doubt it causes serious harm, but that does not justify legislation that infringes on student free speech rights.

III. ANTI-CYBER BULLYING LEGISLATION

A. Overview

While forty-three states have anti-bullying statutes,[16] only twenty-one prohibit cyber bullying,[17] which usually is defined as "bullying" conducted by electronic means.[18] Additionally, the laws can be grouped into prohibitions that explicitly include off-campus cyber bullying or implicitly include or exclude it.[19] Typical legislative language is "immediately adjacent to school grounds,"

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[13] Shariff, *supra* note 2, at 104. On how media "frame" reality, *see Id.* at 103-105, and L. Y. Edwards, *Victims, Villains, and Vixens* in S. R. MAZZARELLA (Ed), GIRL WIDE WEB (Peter Lang, NY; 2005) at 13-30. *See also* Noam Chomsky, Preface to *The Myth of the Liberal Media* in D. MACEDO & S. R. STEINBERG (Eds), MEDIA LITERACY: A READER (Peter Lang, NY; 2007) at 24-26.

[14] Shariff, *Id*. at 104.

[15] *See* McQuade et al, *supra* note 2, at 42-46 (discussing how reality shows like *Survivor, The Bachelor* and *American Idol* contribute to a culture that fosters cyber bullying).

[16] http://www.bullypolice.org/ (last visited Aug. 03, 2010).

[17] *Supra* note 4. In 2008, federal legislation concerning cyber bullying was introduced in the House of Representatives. The bill, the Megan Meier Cyber bullying Prevention Act, H.R. 6123, was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on July 28 but failed to pass. *Id.* Critics of the bill said it was "too broad and would act as judge and jury to prove one person 'cyberbullied' another." *See*, Steven Kotler, *Cyberbullying Bill Could Ensnare Free Speech,* available at http://www.foxnews.com/politics/2009/05/14/cyberbullying-ensnare-free-speech-rights/ (last visited Aug. 03, 2010).

[18] *Id. See also* New Hampshire RSA 193-F: 2 defining cyber bullying as "conduct undertaken through the use of electronic devices"; Georgia Chapter 2 of Title 20 stating that bullying is an act that occurs "by use of data or software that is accessed through a computer, computer system, computer network, or other electronic technology…"; and M.G. L. §37O, Chapter 71 defining "cyber bullying" as "bullying through the use of technology or any electronic communication…"

[19] Brookover, *supra* note 4.

"directed at another student or students," "at a school activity," or "at school-sponsored activities or at a school-sanctioned event."[20]

The statutes also usually contain language prohibiting cyber bullying if it results in one or more of the following: (1) causes "substantial disruption" of the school environment or orderly operation of the school, (2) creates an "intimidating," threatening" or "hostile" learning environment, (3) causes actual harm to a student or student's property or places a student in reasonable fear of harm to self or property, (4) interferes with a student's educational performance and benefits, (5) includes as a target school personnel or references "person" rather than "student", and (6) incites third parties to carry out bullying behavior.[21] Five states prohibit cyber bullying if it is motivated by an actual or perceived characteristic or trait of a student.[22] Presumably this protects gay and lesbian students and school personnel from criticism because of their sexual orientation but it could also shield obese, bulimic, short and tall students from disparagement due to their weight or height.

While many applaud anti-cyber bullying legislation, some are concerned that it gives school officials unbridled authority that will be used to burnish their image, not protect bullying victims, or that it threatens student free speech.[23] Furthermore, if their authority is unleashed beyond the schoolyard, it is essentially limitless. Thus no student, even in the privacy of their home, can write about controversial topics of concern to them without worrying that it may be "disruptive" or cause a "hostile environment" at school.[24] In effect, students will be punished for off-campus speech based on the way people *react* to it at school.[25] Many of the terms are so vague that they offer no guidance to distinguish permissible from impermissible speech. In this sense they are akin to campus speech codes that courts invalided in the 1990s for vagueness and overbreath.[26] Consequently, these laws don't simply "chill" student free speech, they plunge it into deep freeze.[27] This article argues that for

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[20] *Id. See also* New Hampshire RSA 193-F: 2 "occurs off of school property or outside of a school-sponsored activity or event"; Georgia Code Section 20-2-751.4 (a) "occurs on school property, on school vehicles, at designated school bus stops, or at school related functions or activities"; and M.G. L. §37O, Chapter 71 "…property adjacent to school grounds, at bus stops and on school buses or on any school owned or leased vehicle."

[21] *Id.*

[22] Iowa, Maryland, New Hampshire, New Jersey, and Washington. *Id.*

[23] Frank D. LoMonte, *Censorship is bullying*, available at http://www.firstamendmentcenter.org/analysis.aspx?id=21421 (last visited Aug. 03, 2010); Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies And The Potential Threat To Students' Free Speech Rights*, 33 Vt. L. Rev. 283 (2008); *see also* Shariff, *supra* note 2, at 211-221 (discussing freedom of expression, privacy, and "disruption" in schools).

[24] *Id.*

[25] *Id.*

[26] Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (university's discrimination policy that prohibited " stigmatizing or victimizing" individuals or groups on the basis of various characteristics held overbroad both on its face and as applied, and its terms so vague that its enforcement violated the Due Process clause); *accord:* McCauley v. Univ. of the Virgin Islands, 2009 U.S. Dist. LEXIS 74661 (invalidating university speech code that prohibited speech that "frightens, demeans, degrades or disgraces any person" on First Amendment grounds); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa.2003); Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky.1998) (university sexual harassment policy declared unconstitutional due to overbreath); similar: UWM Post, Inc., et al v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis.1991) and Corry, et al v. Stanford University, Santa Clara County Court, Case No. 740309 (Feb. 27, 1995). For a chilling account of the damage campus speech codes inflicted on free speech, *see* ALAN C. KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (The Free Press, NY; 1998).

[27] *See* Larry Magid, *Cyberbullying Vs. Free Speech* (questioning whether anti-cyber bullying laws infringe on

these reasons, some anti-cyber bullying laws violate the First Amendment and should be struck down as unconstitutional.

B. Normative Criteria for Anti-Cyber Bullying Statutes

Anti-cyber bullying statutes have similarities and differences.[28] A useful methodology to analyze them is to determine how they compare in several normative criteria.[29] Then we can rank them based on how much protection from cyber bullying they afford students and school personnel. At the conclusion a Model Anti-Cyber Bullying Statute will be presented that in the author's opinion guards against cyber bullying without infringing on First Amendment rights.[30]

1. Prohibits Cyber Bullying Away From School

The statutes of eleven states extend the reach of school officials world-wide by prohibiting cyber bullying originating away from school, i.e. not on school premises or at a school bus stop, or at a school sponsored activity or function and outside of school hours.[31] Five of them (Arkansas, Massachusetts, New Hampshire, Oklahoma, Pennsylvania) specifically mention that cyber bullying is prohibited away from school if it disrupts school activity.[32] Delaware and Florida law provides that the physical location and time of access of the technology-related incident is not a valid defense in a disciplinary proceeding,[33] with Delaware adding the proviso of a "sufficient school nexus."[34]

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constitutionally protected speech) available at http://www.cbsnews.com/stories/2008/01/30/scitech/pcanswer/main3768945.shtml (last visited Aug. 03, 2010). *See also* David L. Hudson, Jr., *Silencing Student Speech – And Even Artwork – in the post Columbine Era: The Revelant Supreme Court Cases, and How They Have Been Misapplied*, describing the over-reaction of school administrators to student poems and artwork that have a violent theme. Available at http://writ.news.findlaw.com/commentary/20040304_jr..html (last visited Aug. 03, 2010).

[28] In terms of length and coverage, Massachusetts leads with a statute eight pages long that provides not only definitions and terms but also dictates what is to be included in school anti-bullying policies. In addition, it is the only statute that brings private schools under its jurisdiction. *See* M.G.L. §37O, Chapter 71, *supra* note 4. Idaho, on the other hand, has opted for brevity with a one-page law. *See* Idaho Statutes, 18-917A. Minnesota goes one step further by simply requiring local school boards to "adopt a written policy prohibiting intimidation and bullying of any student. The policy shall address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use." Minn. Stat. 121A.0695.

[29] *See* TABLE OF ANTI-CYBER BULLYING STATUTES, *infra.*

[30] Advocates of anti-cyber bullying laws have their own Model Statute which they contend also seeks to protect student First Amendment rights while guarding against cyber bullying. *See* "The MORE [*sic*] Perfect Anti Bullying Law" (February 2006) available at http://www.bullypolice.org/ (last visited Aug.03, 2010).

[31] *Supra*, note 29.

[32] Arkansas Statutes §6-18-514 (b)(2)(B)(2):

> "whether or not the electronic act originated on school property or with school equipment, if the electronic act is directed specifically at students or school personnel and maliciously intended for the purpose of disrupting school and has a high likelihood of succeeding in that purpose."

Massachusetts General Laws §37O, c. 71:

> "Bullying shall be prohibited… at a location, activity, function or program that is not school-related… if the bullying creates a hostile environment…".

New Hampshire RSA 193-F:4(I)(b):

> "occurs off of school property or outside of a school sponsored activity or event, if the conduct interferes with a pupil's educational opportunity or substantially disrupts [the] orderly operation of the school…"

Oklahoma Statutes §70-24-100.4(1): "…whether or not originated at school…" ; Pennsylvania 24 P.S. §13-1303.1A(d): "…outside of school setting…" .

[33] Delaware Code, Title14, §4112D(f)(1) and Florida Statutes 1006.147(7)(a).

[34] *Id.*

The remaining four states (Idaho, Iowa, Maryland, Missouri) do not mention location or defenses but simply declare that bullying by electronic means or communication is prohibited.[35]

2. Includes Non-School Electronic Devices

Only three statutes (Arkansas, Massachusetts, Oklahoma) specifically prohibit cyber bullying from computers or equipment that is not owned, leased or used by a school or a school district.[36]

3. Severity of Levels of Harm

The levels of harm anti-cyber bullying statutes seek to prohibit vary widely, but nearly all include (1) physical or emotional harm, (2) damage to property, (3) reasonable fear of harm to the person or his or her property, and (4) disrupting the operation of the school.[37] In addition, the statutes of Arkansas, California, Delaware, Maryland, Massachusetts, New Hampshire, and Oregon include "hostile educational environment" as a proscribed harm,[38] while some amalgamation of "intimidation, humiliation, ridicule, defamation or threatening" shields students or school personnel from harm in Arkansas, Delaware, Idaho, and Rhode Island.[39] Finally, no student or student group may be "insulted" or "demeaned" under the laws of Delaware, Florida, New Jersey, Oklahoma, and South Carolina.[40]

4. Protects School Personnel

Anti-cyber bullying laws protect school personnel as well as students in Arkansas, California, Delaware, Florida, Georgia, Kansas, Missouri, and Oklahoma.[41]

5. Refers To Blogs, Pagers or Web sites

While a reasonable interpretation of "electronic means" or "electronic communication" could include blogs, pagers, or web sites, several statutes specifically refer to them, e.g., Arkansas (pager), California (pagers), Iowa (pager service), Kansas (blogs and web sites), Maryland (pagers), Massachusetts (blogs and web pages), New Hampshire (pagers and web sites), New Jersey (pagers), and Rhode Island ("personal data assistance device").[42]

6. Includes Private Schools

Massachusetts is the only state whose anti-cyber bullying law includes private schools as

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[35] Idaho Statutes 18-917A(2)(b); Iowa Code 280.28(2)(a); Maryland Code Ann. §7-424.1(a)(3); and Missouri Revised Stat. 565.090.1(3) (the law is not student-specific, referring instead to a "person" using electronic communication to "frighten, intimidate, or cause emotional distress."

[36] *See* TABLE OF ANTI-CYBER BULLYING STATUTES, *infra.*

[37] Ark. Stat. §6-18-514(a)(3)(A); Del. Code, Title 14, §4112D(a); Fla. Stat. 1006.147(3)(b); Ga. Stat. 20-2-751.4(a); Idaho Stat. 18-917A(2)(a); Iowa Stat. 280.28(2)(b); Kan. Stat. 72-8256(1); Md. Stat. §7-424.1(a)(2); Mass. G. L. §37O, c.71; Neb. Stat. 79-267; NH RSA 193-F:3(I)(a); NJ C.18A:37-14(2); Okla. Stat. §70-24-100.3(C); Ore. Stat. 339.351(2)(c); Penn. Stat. 24 P.S. §13.1303.1-A; RI Gen. Laws 16-21-26(a)(2); SC 59-63-120; Wash. RCW 28A.300.285(2).

[38] *Id*. and Cal. Ed. Code §32261.

[39] *Supra* note 37.

[40] *Id.*

[41] Ark. Stat. §6-18-514(a)(3)(A); Cal. Ed. Code §48900; Del. Code, Title 14, §4112D(a); Fla. Stat. 1006.147(3)(b); Ga. Stat. 20-2-751.4(a)(1); Kan. Stat. 72-8256(1)(A); MO. Stat. 565.090.1(1); Okla. Stat. §70-24-100.4(1).

[42] Ark. Stat. §6-18-514(a)(3)(B); Cal. Ed. Code §32261(g); Iowa Stat. 280.28(2)(a); Kan. Stat. 72-8256(C)(2); Md. Stat. §7-424.1(a)(3); Mass. G. L. §37O, c.71; NH RSA 193-F:3 III; NJ C.18A:37-14; RI Gen. Laws 16-21-26(a)(3).

well as public or charter schools,[43] though Missouri's legislation, which refers to "person," could arguably include private school students and personnel.[44]

7. Requires Reporting of Cyber Bullying

Incidents of cyber bullying must be reported to school officials under the laws of Arkansas, Delaware, Georgia, Maryland, Massachusetts, Missouri, New Jersey, and South Carolina.[45] Where there is no reporting requirement, laws encourage reporting or are silent on the subject, though all statutes require setting up a procedure to document incidents of cyber bullying if they are reported.[46]

8. Prohibits Reprisal or Retaliation for Reporting Cyber Bullying

Reprisal or retaliation for reporting acts of cyber bullying is prohibited in Delaware, Florida, Georgia, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, Oregon, Rhode Island, and South Carolina.[47] Florida's statute provides that "Reporting an act of bullying or harassment that is not made in good faith is considered retaliation."[48]

9. Mandates Adoption of Policies to Prevent Cyber Bullying

With the exception of Idaho which has a state-wide policy,[49] the remaining twenty states have all enacted statutes with provisions that require school boards or districts to adopt anti-cyber bullying policies.[50]

10. Grants Immunity for Reporting Cyber Bullying or For Failure to Remedy Situation

Florida's statute grants immunity from a cause of action for damages arising out of reporting a cyber bullying incident as well as failure to remedy the situation.[51] Laws in Delaware, Georgia, Iowa, Maryland, and New Hampshire grant immunity to those reporting cyber bullying,[52] while Arkansas, New Jersey, Oregon, Rhode Island, and South Carolina extend immunity to school officials and others who report such incidents if they fail to remedy the situation.[53] In addition, statutes in Massachusetts, New Jersey, South Carolina, Oklahoma, and Rhode Island state that anti-cyber bullying provisions create no separate causes of action or new liability.[54]

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[43] Mass. G. L. §37O, c.71.

[44] MO. Stat. 565.090.1.

[45] Ark. Stat. §6-18-514(a)(4); Del. Code, Title 14, §4112D(b)(2)(E); Ga. Stat. 20-2-751.4(c)(2); Md. Stat. §7-424.1(b)(1); Mass. G. L. §37O (g), c.71; MO Stat. §565.090; NJ C.18A:37-16(4)(b); SC 59-63-130(B).

[46] *See* TABLE OF ANTI-CYBER BULLYING STATUTES, *infra*.

[47] Del. Code, Title 14, §4112D(b)(2)(L); Fla. Stat. 1006.147(3)(d)(1); Ga. Stat. 20-2-751.4(c)(6); Iowa Stat. 280.28(3)(a)(2); Md. Stat. §7-424.1(b)(2)(ii); Mass. G. L. §37O(b), c.71; NH RSA 193-F:4 II (b); NJ C.18A:37-16(a); Ore. Stat. 339.362(1); RI Gen. Laws 16-21-26(f); SC 59-63-130(A)(2).

[48] Fla. Stat. 1006.147(3)(d)(1).

[49] Idaho state law prohibits student bullying and cyber bullying but does not require school boards or districts to enact their own ordinance. *See* Idaho Stat. 18-917A.

[50] Ark. Stat. §6-18-514(a)(2); Cal. Ed. Code §32261; Del. Code, Title 14, §4112D(b)(2); Fla. Stat. 1006.147(d)(4); Ga. Stat. 20-2-751.4(b)(1); Iowa Stat. 280.28(3); Kan. Stat. 72-8256(3)(b); Md. Stat. §7-424.1(b)(1); Mass. G. L. §37O(d), c.71; Minn. Stat. 121A.0695; MO Stat. §565.090; Neb. Stat. 79-2, 137(3); NH RSA 193-F:4(II); NJ C.18A:37-15; Okla. Stat. §70-24-100.4(A); Ore. Stat. 339.356(1); Penn. Stat. 24 P.S. §13.1303.1-A; RI Gen. Laws 16-21-26(c); SC 59-63-140(A); Wash. RCW 28A.300.285.

[51] Fla. Stat. 1006.147(6).

[52] Del. Code, Title 14, §4112D(e); Ga. Stat. 20-2-751.4(e); Iowa Stat. 280.28(5); Md. Stat. §7-424.1(h)(1); NH RSA 193-F:7; s*ee also* TABLE OF ANTI-CYBER BULLYING STATUTES, *infra.*

[53] Ark. Stat. §6-18-514(c); NJ C.18A:37-16(c); Ore. Stat. 339.362(3); RI Gen. Laws 16-21-26(3)(h); SC 59-63-150(B).

[54] Mass. G. L. §37O (i), c.71 ("Act does not create a private right of action."); *see* NJ C.18A:37-18, RI Gen. Laws 16-

11. Offers Professional Development or Training for School Personnel

Two-thirds of the anti-cyber bullying statutes address professional development and training in some fashion. Legislation in Florida, Kansas, Maryland, Massachusetts, New Hampshire, Rhode Island, and South Carolina require professional development or training in recognizing, preventing and responding to cyber bullying for school personnel, parents, or students.[55] The law in Arkansas states only that opportunities need to be provided to participate in anti-cyber bullying programs,[56] while Washington just requires the dissemination of anti-cyber bullying training materials.[57] Statutes in California, Georgia, and Oklahoma simply encourage school personnel to obtain training or professional development, or urge school districts to post information on their web sites or make recommendations as to where such training may be found.[58] Finally, the laws of Iowa and New Jersey say training or professional development will be provided only if funding is available.[59]

12. Imposes Criminal Sanctions for Cyber Bullying

Legislation in three states provides criminal sanctions for cyber bullying. The most severe is Massachusetts, where cyber bullying constitutes "criminal harassment" punishable by up to two and one half years in jail and a fine of not more than $1,000 or both.[60] Missouri's law classifies cyber bullying by someone under twenty-one years of age as a "Class A" misdemeanor.[61] Idaho treats it most leniently by terming it an "infraction."[62]

In addition, several states have established investigative or advisory bodies to study methods to prevent and address bullying and cyber bullying.[63] The special commission set up in Massachusetts is also charged with examining the liability of parents for the bullying and cyber bullying of their children.[64]

C. Paradigms of Anti-Cyber Bullying Statutes

Ideally, grouping the twenty-one state anti-cyber bullying statutes into patterns or models would greatly enhance our understanding of this legislation. However, their great variety and scope make categorizing them nearly impossible. Nevertheless, all these laws contain some of the normative criteria listed above. Some statutes include more than others. Thus a productive way to understand them is count how many criteria they contain. The Table below does exactly this.[65] The

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21-26(l), SC 59-63-150(A) all stating the law "…does not create or alter any tort liability."); *see also* Okla. Stat. §70-24-100.3(D) ("Nothing in this Act shall be construed to impose a specific liability on any school district.").

[55] Fla. Stat. 1006.147(4)(L); Kan. Stat. 72-8256(c); Md. Stat. §7-424.1(g)(2); Mass. G. L. §37O(d), c.71; NH RSA 193-F:5; RI Gen. Laws 16-21-26(j)(1); SC 59-63-140(C).

[56] Ark. Stat. §6-18-514(d).

[57] Wash. RCW 28A.300.285(4).

[58] Cal. Ed. Code §32261(d); Ga. Stat. 20-2-751.4(d); Okla. Stat. §70-24-100 (B)(3).

[59] Iowa Stat. 280.28(43)(a); NJ C.18A:37-17(b).

[60] Mass. G. L. §43A, c.265.

[61] Mo. §565.090(2).

[62] Idaho Stat. 18-917A(3).

[63] *See* Cal. Ed. Code §32261setting up an Interagency Coordinating System; Del. Code, Title 14, §4112D(b)(D) (site-based committee established); Okla. Stat. §70-24-100 (each public school site to set up a six member Safe School Committee); Ore. Stat. 339.359 (each school district encouraged to set up a task force); RI Gen. Laws 16-21-26(i) (encourages setting up bully prevention Task Forces).

[64] Mass. G. L. §37O, c.71 establishes a seven-member commission to report back to the legislature.

[65] The Table omits four normative criteria – #2 (non-school electronic devices), #3 (severity of levels of harm), #6

statutes of Arkansas, Maryland, Massachusetts and South Carolina contain the most criteria so they score highest, while Minnesota's law ranks lowest since it has none but simply requires each school district to draft their own ordinance.

TABLE OF ANTI-CYBER BULLYING STATUTES

Ranking* Based on Selected Characteristics

State	Away from School**	Protects Personnel	Blogs/Web Pages	Must Report	Retaliation Prohibited	Grants Immnity	Criminal Penalties	Staff Training	Ranking
AR	Yes	Yes	Yes	Yes	Yes	Yes††	No	Yes±	Excellent (28)
MD	Yes	No	Yes	Yes	Yes	Yes†	No	Yes	Excellent (24)
MA	Yes	No	Yes	Yes	Yes	No	Yes	Yes	Excellent (24)
SC	Yes	No	Yes	Yes	Yes	Yes††	No	Yes	Excellent (24)
FL	Yes	Yes	No	No	Yes	Yes† ††	No	Yes	Very Good (20)
NH	Yes	No	Yes	No	Yes	Yes†	No	Yes	Very Good (20)
NJ	No	No	Yes	Yes	Yes	Yes††	No	YesΔ	Very Good (20)
GA	No	Yes	No	Yes	Yes	Yes†	No	Yes☼	Very Good (18)
IA	Yes	No	No	No	Yes	Yes†	Yes	YesΔ	Very Good (18)
MO	Yes‡	Yes	No	Yes	No	No	Yes	No	Good (16)
RI	No	No	Yes	No	Yes	Yes††	No	Yes	Good (16)
KS	No	Yes	Yes	No	No	No	No	Yes	Good (12)
OR	No	No	Yes	No	Yes	Yes††	No	No	Good (12)
CA	No	Yes	Yes	No	No	No	No	Yes☼	Fair (10)
WA	Yes	No	Yes	No	No	No	No	Yes↨	Fair (10)
ID	Yes	No	No	No	No	No	Yes	No	Fair (8)
NE	No	Yes	Yes	No	No	No	No	No	Fair (8)
OK	Yes	No	No	No	No	No	No	Yes☼	Fair (8)
PA	Yes	No	No	No	No	No	No	No	Fair (8)
DE	No	No	No	No	No	Yes†	No	No	Poor (4)
MN	No	No	No	***	No	No	No	No	Poor (0)

***Ranking: 0 – 5 Poor 6 – 11 Fair 12 – 17 Good 18 – 23 Very Good 24 – 32 Excellent**

For a "Yes" in each category, a state earned 4 points, except under "Staff Training" where unless training was required, only 2 points.

** Defined as not on school premises or bus stop, or at a school sponsored activity or function, and not during school hours.

‡ Not student-specific.

† No liability for reporting cyber bullying. †† No liability for failure to remedy situation.

± State need only to provide opportunities for training.

☼ State simply encourages school personnel to obtain training.

Δ State to provide training only if funding available.

↨ State requires only dissemination of training materials.

*** Each school board to decide on reporting requirement.

(private schools), and #9 (mandates adoption of cyber bullying prevention policies). The criterion of "non-school electronic devices is encompassed in "away from school." "Private schools" are covered only in Massachusetts. Every state either has a state-wide policy (Idaho) or mandates anti-cyber bullying policies that include essentially similar levels of harm; s*ee supra* notes 49 & 50.

D. A Model Anti-Cyber Bullying Statute

The following model anti-cyber bullying statute incorporates all of the criteria contained in the Table except three – "away from school," "blogs & web pages," and "criminal penalties." All were omitted due to First Amendment concerns, the last reflecting the author's judgment that criminalizing student cyber speech not only chills their free speech but is analogous to using a sledgehammer to swat a fly. The model statute borrows in varying degrees from legislation in Arkansas, Florida, Idaho, and Iowa in attempting to strike a balance between protecting students and school personnel from threats and intimidation and respecting their First Amendment rights.[66]

Model Bill Prohibiting Bullying & Cyber Bullying

Whereas: bullying creates an intolerable and sometimes dangerous educational environment for a student or public school employee who is the target of bullying; and

Whereas: cyber bullying, or bullying carried on through electronic means by the use of computers, the Internet, cell phones, text messaging, chat rooms, and instant messaging to threaten, intimidate or otherwise bully students or school personnel, is a growing problem due to the increased use of such electronic devices on public school premises or at school-sponsored events and functions; and

Whereas: because cyber bullying has the potential for instantaneous distribution to a wide audience, it can impact the educational environment by rapidly reaching a large number of students and public school employees, and creating a threatening and intimidating environment that can substantially disrupt the operation of a public school.

NOW THEREFORE,
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ___________

SECTION 1. Definitions

For Purposes of this statute, unless the context otherwise requires:

(a) "Bullying" means the intentional intimidation, harassment, or threat or incitement of violence by a student against another student or public school employee or volunteer by written, verbal, electronic, or physical act committed during school hours or during any school-sponsored event or function whether or not on school premises that a reasonable person under the circumstances should know will have the effect of:

(i) Harming a student or public school employee or volunteer; or
(ii) Damaging the property of a student, a public school employee or volunteer; or
(iii) Placing a student or a public school employee or volunteer in reasonable fear of harm to his or her person or property; or

[66] As mentioned earlier, advocates of anti-bullying laws have their own Model Statute. *See supra* note 30.

(iv) Creating a substantial disruption of the orderly operation of the school or educational environment.

(b) "Substantial disruption" means resulting in or reasonably may result in, any one or more of the following:

(i) Necessary cessation of instruction or educational activities; or
(ii) Inability of students or educational staff to focus on learning or function as an educational unit; or
(iii) Severe or repetitive disciplinary measures are needed in the classroom or during educational activities; or
(iv) Exhibition of behavior by students or educational staff that substantially interferes with the learning environment.

(c) "Cyber bullying" means bullying carried on by electronic communication;

(d) "Electronic communication" means any communication involving the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means;

(e) "Electronic" includes but is not limited to, electronic mail, internet-based communication, pager service, cell phones and electronic text messaging occurring during school hours or during any school-sponsored event or function whether or not on school premises or done on equipment or a computer system owned, leased, or used by a public school;

SECTION 2. Prohibited Acts; Reporting of Prohibited Acts; Reprisals; Immunity

(a) No student shall intentionally commit, or conspire to commit, an act of bullying or cyber bullying against another student or public school employee or volunteer;

(b) A student, school employee or volunteer who in good faith has reasonable grounds to believe an act of bullying or cyber bullying has occurred shall report it to the school principal;

(c) Reprisals or retaliation against a student or school employee or volunteer for alleging or reporting an incident of bullying or cyber bullying shall be prohibited; reporting an act of bullying or cyber bullying not made in good faith shall be considered retaliation;

(d) A student, school employee or volunteer who in good faith reports an incident of bullying or cyber bullying shall be immune from a cause of action for damages for reporting the incident and for any failure to remedy the situation.

SECTION 3. School Districts to Develop Policy That Includes Counseling and Training

(a) By August 31, 20____ each school district shall adopt a policy prohibiting bullying and cyber bullying of any student or pubic school employee or volunteer of a public

K-12 educational institution. Each school district policy shall be in substantial conformity with this legislation;

(b) Each school district's policy shall include at a minimum:

(i) A statement prohibiting bullying and cyber bullying;

(ii) A definition of bullying and cyber bullying that includes the definitions listed in SECTION 1;

(iii) The consequences for a student or employee of a public K-12 educational institution who is found to have wrongfully and intentionally accused another of an act of bullying or cyber bullying;

(iv) A procedure for reporting an act of bullying or cyber bullying, including provisions that permit a person to anonymously report such an act. However, this paragraph does not permit formal disciplinary action to be based solely on an anonymous report;

(v) A procedure for providing immediate notification to the parents of a student who is bullied or cyber bullied and the parents of the person accused of bullying or cyber bullying, as well as notification to all local agencies where criminal charges may be pursued against the person accused of bullying or cyber bullying;

(vi) A procedure to refer for counseling persons who are the targets of bullying and cyber bullying and the perpetrators;

(vii) A procedure for providing training and instruction to students, parents, teachers, school administrators, counseling staff, and school volunteers on identifying, preventing, and responding to bullying and cyber bullying.

SECTION 4: This Law shall be effective upon passage.

IV. FREE SPEECH IN THE SCHOOLHOUSE

A. Protected vs. Unprotected Speech

Not all speech is protected under the First Amendment. Obscenity,[67] defamation,[68] public safety,[69] inciting to riot,[70] and so-called "fighting words"[71] are areas of unprotected speech. The

[67] *See* Miller v. California, 413 U.S. 15 (1973) (First Amendment does not protect obscene material; test for obscenity is whether the average person, applying contemporary community standards, would find the material appealed to prurient interest, whether the work depicted sexual conduct defined by state law, and whether the work lacked serious literary, artistic, or scientific value). *Accord:* U. S. v. Stevens, 130 S. Ct. 1577 (2010) (Court declines to create new class of unprotected speech and invalidates animal cruelty law because it criminalized depictions of ordinary and lawful activities). S*ee infra* notes 71 & 202; *see also* Ashcroft v. ACLU, 542 U.S. 656 (2004); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

[68] *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (First Amendment prohibits a public official from recovering damages for a defamatory statement unless the statement was made knowing it was false or with actual malice, i.e., reckless disregard for whether it was true or false). *Accord*: BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002); Masson v. New Yorker Magazine, 501 U.S. 496 (1991).

[69] *See* Gitlow v. New York, 268 U.S. 652 (1925) (held freedom of speech and the press not absolute rights, but subject to reasonable limitations by the states, and thus state could punish utterances endangering the foundation of

rationale usually given for unprotected speech is that it contains no ideas or viewpoints and doesn't advance any socially worthwhile goal.[72] In examining the constitutionality of cyber bullying statutes we must begin with four cases the Supreme Court has handed down over the past four decades that set out the nature and extent of student free speech rights.

B. The Tinker Tetralogy

Beginning in 1969, the U.S. Supreme Court addressed student free speech rights in four decisions. The first, *Tinker v. Des Moines Independent Community School District*,[73] concerned the right of high school students to wear black armbands to protest American involvement in the Vietnam War. The second, *Bethel School Dist. No. 403 v. Fraser*,[74] found the Court being asked to decide whether a school could suspend a student for a lewd and suggestive speech given at a school function. The third arose a year later in 1987. *Hazelwood School District v.Kuhlmeier* [75] found the Justices confronted with censorship of a high school newspaper. The last case was handed down in 2007. In *Morse v. Frederick*,[76] the high court was confronted with suspension of a student who, during school hours, unfurled a banner promoting illegal drug. The unfurling took place not on school premises but across the street. At present the box score stands at Students 1, School Officials 3. Let's briefly examine these cases.

1. ***Tinker*** **– The Black Arm Band Saga**

Two high school students and a third in junior high in Des Moines, Iowa, were suspended from school for wearing black armbands to protest U.S. policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting en banc, affirmed by an equally divided court.[77]

The Court held that when wearing armbands the petitioners were quiet and passive. They

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lawful government that threatened to overthrow it by unlawful means). *Accord*: People v. Epton, 227 N.E.2d 829 (NY 1967) (defendant's words and actions created a "clear and present danger" of intensifying riots; conviction for conspiracy to incite riot upheld).

[70] *See* Schenck v. U.S., 249 U.S. 47 (1919) (words created a clear and present danger, and as they would not protect shouting fire in a theatre, conviction for conspiracy upheld). *Accord*: Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), *infra* note 191.

[71] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding a conviction under a statute prohibiting use of "offensive" words, not as defined by what the addressee thought, but by what reasonable men of common intelligence understood as words likely to cause a average addressee to fight, i.e. "fighting words"). *Accord*: U. S. v. Stevens, *supra* note 67 and *infra* note 202. *See also* Cohen v. Calif., 403 U.S. 15 (1971) (conviction reversed for wearing jacket imprinted with four letter expletive in courthouse). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), *infra* note 208.

[72] *Id.* at 572.

[73] 393 U.S. 503 (1969)

[74] 478 U.S. 675 (1986)

[75] 484 U.S. 260 (1987)

[76] 551 U.S. 393 (2007)

[77] Tinker, 393 U.S. at 503.

were not disruptive, and did not impinge upon the rights of others. In these circumstances, it found that their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth.[78] It held further that First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment.[79] Lastly, it ruled that prohibitions against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, are not permissible under the First and Fourteenth Amendments.[80]

In addressing the fear of potential disruption of school activities, the Court remarked:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; [81] *[citation omitted]*
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[82] *[citation omitted]*

Thus the Court laid the foundaton for the "substantial disruption" test that has become the touchstone for all cases dealing with student free speech rights.

2. *Fraser* – A Certain Kind of Man

In 1986 the Court was asked to decide if a student's free speech rights extended to making lewd and suggestive remarks at a voluntary assembly held during school hours and attended by about six hundred students, many only fourteen-years-old.[83] The Justices declined. In a 7-2 decision, the high court held that though under the First Amendment the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, it does not follow that the same latitude must be permitted to children in a public school.[84] Citing the role of public schools in preparing students for citizenship in a democracy, the Court commented that it is an appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse, and that even Thomas Jefferson in drafting the *Manual of Parlimentary Practice* prohibited "impertinent" speech in the House of Representatives.[85] Since

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[78] *Id.* at 505-506.
[79] *Id.* at 506-507.
[80] *Id.* at 508-509.
[81] *Id.* at 508-509.
[82] *Id.* at 509.
[83] *Supra* note 74. The entire speech was as follows:

> I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most ... of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds. Jeff is a man who will go to the very end - even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president - he'll never come between you and the best our high school can be. *Id.* at 677-678.

[84] Fraser, 478 U.S. at 682.
[85] *Id.* at 681-682.

Fraser's audience included minors, the Justices added that the law has long recognized an interest in protecting minors and children from exposure to vulgar and offensive language.[86]

Given that obscenity has never enjoyed First Amendment protection,[87] the result in *Fraser* is not surprising. Whereas in *Tinker* the students were making a political statement, Matthew Fraser was simply indulging in lewd and offensive speech as adolescents often do. The next case in the tetralogy, however, is more troublesome. The students in *Hazelwood*[88] sought to write about a timely though disturbing topic and were prohibited from doing so.

3. *Hazelwood* – What's Fit to Print

If school officials can suspend students for lewd and offensive speech at a school function during school hours without violating their First Amendment rights, can they delete pages from a school newspaper that is part of a journalism course if they find the subject matter inappropriate for younger pupils? Using a forum-based analysis, the Court answered in the affirmative.

Former high school students who were staff members of the school's newspaper sued the school district and school officials in federal district court alleging that their First Amendment rights were violated by the deletion of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited in a journalism class, as part of the school's curriculum. The principal deleted the pages where the articles appeared. The District Court held that no First Amendment violation had occurred. The Court of Appeals reversed.[89]

Declaring that First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment, the Justices ruled that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.[90] Holding that the school newspaper as part of a journalism course was not a public forum, the court declared that

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.[91] *[citations omitted]*

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[86] *Id.* at 684, citing Ginsberg v. New York, 390 U.S. 629 (1968) (upholding constitutionality of a statute prohibiting sale of obscene material to minors) and FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (the "seven dirty words" case; held FCC can sanction radio station for broadcasting content that, although not obscene, is nevertheless vulgar, offensive, and shocking and not entitled to absolute protection under the First Amendment). The *Pacifica* case has been "explained" and criticized in FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009).

[87] *See* Miller v. California, *supra* note 67.

[88] 484 U.S. 260, s*upra* note 75.

[89] *Id.*

[90] *Id.* at 266.

[91] Id at 267.

The Court also pointed out that editorial control of the student paper was in the hands of the journalism teacher who exercised substantial control over the publication.[92] Finally the Court concluded that

> educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.[93]

The Court did not elaborate on what constitutes "legitimate pedagogical concerns" but in *Morse v. Frederick,*[94] the last case in the tetralogy, it held that conformity with official school policy is one of them.

4. *Morse* – The Wrong Student Message

In January 2002, at a school-sponsored and school supervised-event, a student unfurled a 14ft. banner that read "BONG HiTS 4 JESUS." The school principal interpreted it as advocating illegal drug use which was contrary to official school policy. She told the student to take it down. He refused. The principal conficated the banner and suspended the student. After the suspension was upheld by the school superintendent and school board, the student, Joseph Frederick, sued the principal, Deborah Morse, and the school board for violating his First Amendment rights. The District Court agreed with Morse that a resaonable interpretation of the banner was advocacy of illegal drug use and found no violation of Frederick's First Amendment rights. The Ninth Circuit Court of Appeals reversed. The Supreme Court agreed with the District Court and upheld the suspension.[95]

The Court ruled that because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick.[96] The Court rejected Frederick's argument that his case was not a school speech case because the event occurred during school hours and was sanctioned by the school principal as an approved social event where the district's student-conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, the Court said that Frederick cannot claim he wasn't at school.[97] After reviewing *Tinker,*[98] *Fraser,*[99] and *Veronia School Dist. 47J v. Acton,*[100] the Court concluded that deterring illegal drug use by school children is a compelling

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[92] *Id.* at 268.
[93] *Id.* at 273.
[94] 551 U.S. 393, s*upra* note 76.
[95] *Id.* at 393.
[96] *Id.* at 394.
[97] *Id.*
[98] *Supra* note 73.
[99] *Supra* note 74.
[100] 515 U.S. 646 (1995) (upholding the constitutionality of mandatory drug testing of high school athletes in the face of a Fourth Amendment challenge). *Accord:* Bd. of Education. v. Earls, 536 U.S. 822 (2002) (school policy requiring drug tests for all students participating in extracurricular activities held constitutional because it reasonably served

government interest justifying restricting student speech that promotes such use at a school-sponsored event during school hours.[101]

C. The Tinker Legacy

Clearly the most enduring consequence of *Tinker* is the litmus test of "substantial disruption" of school activities, though as the *Morse* court points out, in *Fraser* that approach was jettisoned.[102] So what precepts can we extract from the *Tinker* tetralogy? Based on holdings as summarized in *Morse*[103], we can glean the following:

1. Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate; [*Tinker*][104]
2. First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. [*Tinker*]][105]
3. Student expression may not be suppressed unless school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school; [*Tinker*][106]
4. Constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings; [*Fraser*][107]
5. School officals may control student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. [*Hazelwood*][108]

Applying the above propositions, we can now examine the extent of school officials' authority to ban cyber bullying and then discuss why much anti-cyber bullying legislation infringes student free speech rights.

D. School Officials' Authority: The On-Campus – Off-Campus Dichotomy

First Amendment protection of student speech depends on whether the speech originated on or off-campus,[109] though occasionally a court will adroitly avoid the issue in reaching a decision.[110]

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the school's important interest in detecting and preventing drug use among its students).

[101] 551 U.S. at 407. It is noteworthy that Thomas, J. in his concurrence argues that *Tinker* has no constitutional basis. *Id.* at 410.

[102] *Id*. at 404.

[103] *Id.* at 403-406.

[104] 393 U.S. at 506.

[105] *Id*.

[106] *Id*. at 513.

[107] 478 U.S. at 682.

[108] 484 U.S. at 273.

[109] *See* Coy v. Bd. of Education, 205 F. Supp. 2d 791 (N.D. Ohio 2002) (Web site created off campus during non-school hours but student used school computer to access it during school; court found no disruption); Layshock v. Hermitage School Dist., *supra* note 1 (off campus during non-school hours student posted parody profile of principal; students accessed it on school computers during school hours; court found no disruption and overturned student suspension); LaVine v. Blaine School Dist., 257 F.3d 981 (9th Cir [Wash] 2001) (student off-campus creates poem describing school shooting, brings it to school and shows schoolmates; court upholds student's suspension); Doe v. Pulaski County Special School Dist., 306 F.3d 616 (8th Cir [Ark] 2002) (away from school student writes letter saying he wants to rape and murder his ex-girlfriend; gives letter to a friend to give to ex-girlfriend at school; court upholds suspension saying letter amounted to a "true threat"); Latour v. Riverside School District, 2005 U.S. Dist.

While campus speech is governed under the *Tinker* tetralogy, the extent to which school officials can regulate off-campus speech is unclear. Frequently courts will make a great effort to find a campus connection to off-campus speech, no matter how tenuous.[111] As one observer noted:

> Every lower court that has ruled on the issue [campus connection of off-campus speech] has required off-campus student expression to have some connection to campus to bring it within the realm of less-protected speech for school disciplinary purposes. The strength of the connection that courts require varies. The variation usually concerns the mental state of the speaker with regard to the presence of the speech on campus. Some courts require that the student directed his speech towards campus. Some require only that the student had knowledge that his speech would reach campus. Other courts require only that it have been reasonably foreseeable that the speech would reach campus. Still others look at a multitude of factors to require a strong nexus between the off-campus speech and the on-campus impact.[112]

While commentators have written that courts confronted with First Amendment protection of off-campus student speech are in disarray,[113] one observer has taken a more sanguine view.[114] Where off-campus student speech has threatened violence[115] or contained lewd or vulgar language,[116] courts

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LEXIS 35919 (W.D. PA) (away from school student puts rap music and lyrics containing profanity and violent imagery on Internet; court enjoins school from expelling him finding no "true threat); J.S. v. Bethlehem School District, 807 A.2d 847 (Pa. 2002) (from home student creates Web page listing reasons to kill a teacher along with graphic drawings of her death; court upholds suspension but finds no "true threat").

After the April 1999 Columbine massacre, school officials and courts have dealt forcefully with student expressions of violence. Some critics believe they have overreacted. *See* Clay Calvert, *Off-campus speech, On-campus punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243 (2001).

[110] Killion v. Franklin Regional School Dist., 136 F. Supp. 446 (W.D. Pa 2001) where the court found no substantial disruption without deciding the locus of the student speech. A similar result was reached in Beussink v. Woodland R-IV School Dist., 30 F. Supp.2d 1175 (E.D. Mo. 1998) (reversal of student's 10-day suspension that resulted when his high school principal viewed his Internet homepage that used crude and vulgar language to criticize his school).

[111] Doninger v. Niehoff, 527 F.3d 41 (2nd Cir [Conn] 2008) (student's blog created on home computer criticizing school principal could result in "a foreseeably reasonable risk of substantial disruption" at school so as to justify school discipline). Commentators have strongly criticized this case. *See* Allison E. Hayes, Note: *From Armbands To Douchebags: How Doninger V. Niehoff Shows The Supreme Court Needs To Address Student Speech In The Cyber Age*, 43 Akron L. Rev. 247 (2010) and Clay Calvert, *Punishing Public School Students For Bashing Principals, Teachers And Classmates In Cyberspace: The Speech Issue The Supreme Court Must Now Resolve,* 7 FIRST AMEND. L. REV. 210 (2009).

[112] Benjamin L. Ellison, Note, *More Connection, Less Protection? Off-Campus Speech With On-Campus Impact*, 85 Notre Dame L. Rev 809, 820 (2010).

[113] Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech,* 2008 BYU L. REV. 971, 990; Tracy Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student,* 82 ST. JOHN'S L. REV. 1087, 1095 (2008).

[114] *Supra* note 112, "This does not indicate disarray" at 821.

[115] Wisniewski v. Board of Education, 494 F.3d 34 (2nd Cir [NY] 2007) (student used an icon depicting a pistol firing a bullet at a person's head and included the caption "Kill Mr. Vander Molen," [student's English teacher] when communicating on AOL Instant Messenger at a computer away from school; the icon was visible to the student's Instant Messenger "buddies," who reported it to Vander Molen; the student was suspended from school for five days; the court applied the *Tinker* standard and found the school's punishment did not violate the student's First Amendment rights because the off-campus communication created a foreseeable "risk of substantial disruption within the school environment."); *see also* LaVine, *supra* note 109.

[116] J.S. v. Blue Mountain School Dist., 593 F.3d 286 (3rd Cir [Pa.] 2010). Because this decision conflicts with Layshock v. Hermitage School Dist., *supra* notes 1 & 109, the Third Circuit granted a request for En Banc Rehearing that was held on June 3, 2010. *See* http://www.utbf.com/land-zoning/tag/js-v-blue-mountain-school-district/ (last visited Aug. 03, 2010); J.S. v. Bethlehem School Dist., *supra* note 109 (site contained lewd language; court found it created a "substantial disruption").

are likely to find a "sufficient nexus"[117] to the school so that it creates a "foreseeable reasonable risk of substantial disruption"[118] to justify disciplinary action that does not violate the First Amendment. However, absent such language, courts usually find no disruption and so the speech is protected[119] though there are exceptions.[120] Nevertheless, some legal analysts have justifiably been concerned that off-campus student speech has come under increasing attack so that free speech rights are endangered.[121] On the other hand, others have called for tougher anti-cyber bullying laws.[122]

Of course schools have always disciplined students for off-campus behavior[123] but anti-cyber bullying laws are aimed at curbing student *speech*, not conduct, and so present a serious threat to student free speech and expression at a time in their lives when they need it most.

V. THE FIRST AMENDMENT, TRUE THREATS & CYBER BULLYING

A. School Officials Assault On Student Free Speech

The battle public school officials have been waging against student Internet speech has not gone unnoticed by legal commentators.[124] In one especially egregious example, a 13-year-old boy and his friends created a spoof club called Chihuahua Haters of America and a web site called Chihuahua Haters of the World, which contained humorous attacks on Chihuahuas. The student was

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[117] Layshock, *supra* notes 1 & 109.

[118] Doninger, *supra* note 111.

[119] Killion, *supra* note 110; Emmett v. Kent School Dist. No. 415, 92 F. Supp.2d 1088 (W.D. Wash. 2000) (site contained "mock obituaries" of students but court found speech was non-threatening); Beidler v. North Thurston School Dist. No. 3, No. 99-2-00236-6, at 3 (Wash. Super. Ct. July 18, 2000) (though site depicted school principal having sex with cartoon character Homer Simpson, it did not cause "substantial disruption").

[120] Mahaffey v. Aldrich, 236 F. Supp.2d 779 (E.D. Mich. 2002) (student created "Satan's Web page" whose mission was to stab someone but court found "no proof of disruption to the school"); Beussink , *supra* note 110 (lewd language but school did not demonstrate any "disruption").

[121] Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech,* 23 SANTA CLARA COMPUTER & HIGH TECH L. J. 727 (2007); Christi Cassel, Note, *Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions,* 49 WM. & MARY L. REV. 643 (2007); Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech,* 89 VA. L. REV. 139 (2003); Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet Related Student Speech,* 26 LOY. L.A. ENT. L. REV. 65 (2006); *see also* Calvert, *supra* note 109 and Beckstrom, *supra* note 23.

[122] Renee L. Servance, Note, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment,* 2003 WIS. L. REV. 1213; Thomas E. Wheeler, *Lessons from the Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech,* 215 EDUC. L. REP. 227 (2007); Todd D. Erb, Note, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying,* 40 ARIZ. ST. L. J. 257 (2008).

[123] *See* generally Ronald D. Wenkart, *Discipline of K-12 Students for Conduct off School Grounds,* 210 EDUC. L. REP. 531, 533-38 (2006), *cited* in Ellison, *supra* note 112, at 822. Students have been disciplined for fighting, reckless driving, intoxication, and illegal drugs all of which occurred off-campus. *Id.* But *cf.* Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (student could not be suspended for making an obscene gesture to a teacher off-campus because court found "insufficient connection" between the school and the student's action).

[124] Anna Boksenbaum, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123 (2005); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 150 (2000); *see also* articles cited *supra* note 121 and Calvert, *supra* note 109; *see also* Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, NY TIMES, June 27, 2010, at 1 and A.M. Chaker, *Schools Act To Short-Circuit Spread Of "Cyber bullying*," WALL STREET JOURNAL Jan. 24, 2007, at D1.

eventually disciplined for "creating a Web page implicating a Dowell [Middle School] animal hate group." After the ACLU intervened he was reinstated to his computer class and his disciplinary suspension was expunged from his record.[125] While schools have always been able to discipline students for on-campus speech subject to *Tinker's* "substantial disruption" test,[126] in the pre-Internet and pre-Columbine eras it would have been considered absurd that a school could take disciplinary action against a student for *off-campus* speech. In fact a court in the late 1960s stated that such a result made "little sense."[127] But now the Internet and Columbine are facts of life, so students, school administrators and judges are embroiled in a tug-of-war over student off-campus cyber speech. Most courts confronted with this issue have applied the same legal standards as on-campus speech, which is to say, the "substantial disruption" analysis of *Tinker*.[128] They have ruled that where students create speech off-campus but access it on campus,[129] or where it is "reasonably foreseeable" that it will be accessed on campus,[130] they can be disciplined for off-campus speech without violating the First Amendment because substantial disruption is "reasonably foreseeable."[131]

B. True Threats or Political Hyperbole / Rhetoric?

As we move toward exploring the constitutionality of anti-cyber bullying statutes, it is instructive to review some Supreme Court cases that demonstrate the legal principle that words standing alone, absent a call to action, are entitled to First Amendment protection and that courts must examine closely the context and circumstances under which they are spoken.

1. ***Watts* – The President in his Sights**

An informative U.S. Supreme Court case on what does or does not constitute a "true threat" is *Watts v. U.S.,*[132] where the Court held that a young man was wrongfully convicted of making "a knowing and willful threat" against the President of the United States in violation of federal law.[133] At a political rally on the grounds of the Washington Monument during the turbulent anti-Vietnam war years, he proclaimed that if he was drafted and forced to carry a rifle, the first person he would "get into his sights" would be the President.[134] Given the circumstances under which the words were

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[125] Verga, *supra* note 121, at 728, fn. 4, citing Harpaz, *supra* note 124, at 150; s*ee also* Carmen Gentile, *Student Suspended for Facebook Page Can Sue*, NY TIMES, Feb. 16, 2010, at A14 (federal judge in Miami, Fla. rules student can sue former principal for suspending her for creating a Facebook page criticizing a teacher).

[126] 393 U.S. at 509.

[127] Sullivan v. Houston Independent School District, 307 F. Supp 1328, 1340 (1969). To quote:

> In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education.

Accord: Vecchione v. Wohlgemuth, 80 F.R.D. 32 (E.D. Pa. 1978) and Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977).

[128] Verga, *supra* note 121, at 730.

[129] Boucher v. School Board, 134 F.3d 821 (7th Cir [WI] 1998) (underground newspaper article on hacking school computers prepared off-campus but brought on-campus) and cases *supra* note 109.

[130] Wisniewski v. Board of Education, 494 F.3d at 39-40, *supra* note 115.

[131] *Id*. and Doninger v. Niehoff, 527 F.3d at 216-217, *supra* note 111; but *cf*. Thomas v. Board of Education of Granville Central School District, 607 F.2d 1043 (2nd Cir [NY] 1979) (students could not be disciplined for publishing a "morally offensive, indecent, and obscene" underground newspaper off-campus outside of school hours).

[132] 394 U.S. 705 (1969) (per curiam).

[133] 18 U.S.C. § 871(a)

[134] 394 U.S. at 706. The President at the time was Lyndon Baines Johnson.

spoken, the Court held that they were "political hyperbole."[135] The Opinion notes that the statute "makes criminal a form of pure speech that must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech."[136] The decision clearly demonstrates that words must be interpreted in context. Although the Court did not elaborate on what consitutes a "true threat," two months later in June 1969, the Justices addressed the issue more fully in *Brandenberg v. Ohio.*[137]

2. *Brandenberg* – The KKK Defends the White Race

The *Brandenberg* case involved another public speaker. This time it was a hooded Klu Klux Klan leader declaring that if "the actions of our President, our Congress, our Supreme Court continue to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [*sic*] taken."[138] About a dozen hooded Klan members were present along with a reporter who filmed the speech.[139] He was charged and convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[140] His conviction was reversed, the Court holding that the Ohio statute by its words and as applied, purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[141] By so doing, the Court continued, it fell within the condemnation of the First and Fourteenth Amendments.[142] The decision concluded by ruling that freedoms of speech and press do not permit a State to forbid advocacy of lawbreaking or of the use of force except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[143] The Court's decision overruled *Whitney v. California*,[144] where the Justices had decided that in the interest of preserving public peace and security, words alone could be criminalized and punished.[145] So we learn from these two cases that words alone, however incendiary, are under the protective umbrella of the First Amendment.

3. *Claiborne Hardware* – "Breaking the Neck" of Boycott Violators

In 1982 the Justices were again asked to decide the threatening nature of words when *NAACP v. Claiborne Hardware Co*.[146] came before the Court. The factual basis of the case began in 1966 when a local branch of the National Association for the Advancement of Colored people initiated a boycott of white-owned businesses in Claiborne County, Mississippi, to press their demands for racial and economic justice for African-Americans. During the course of the long and

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135 *Id.* at 708.
136 *Id.* at 707.
137 395 U.S. 444 (per curiam).
138 *Id.* at 446.
139 *Id.* at 445-446.
140 *Id.* at 444-445.
141 *Id.* at 448.
142 Id at 449.
143 *Id.* at 447.
144 274 U.S. 357 (1927).
145 *Id.* at 372.
146 458 U.S. 886.

drawn out struggle, a black civil rights leader made a speech in which he threatened to "break the neck"[147] of any African-Americans who patronized white-owned stores. The boycott had its intended economic effect and the white merchants sued the NAACP and others for injunctive relief and damages.[148] While remarking that the First Amendment does not protect violence,[149] the Court characterized the public speeches as "highly charged political rhetoric."[150] Ruling that none of the speeches advocated "imminently lawless action" – the standard enunciated under *Brandenberg* – the Court sought to put them into proper perspective:

> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.[151]

The Justices also addressed the finding of the Mississippi Supreme Court that " 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction' " so as to constitute a basis for civil damages as "flatly inconsisitent with the First Amendment."[152] So even though some may have been "intimidated," the speech did not incite "imminently lawless action" and consequently was entitled to First Amendment protection.

These cases illustrate that language which seemingly threatens or intimidates does enjoy First Amendment protection. So what then are "true threats"? As defined by the Supreme Court, they are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[153] To determine whether statements are "true threats" courts must consider "the speaker's intent, how the intended victim reacted to the alleged threat, whether it was communicated directly to its victim, whether the threat was conditional, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence."[154] Courts also inquire into the context in which the statements were made.[155]

C. Cyber Bullying and True Threats

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[147] His exact words were "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

[148] *Id.* at 890.

[149] *Id.* at 916 citing Samuels v. Makell, 401 U.S. 66, 75 (1971) (affirming dismissal of a complaint requesting declaratory judgment that state statutes under which petitioner was being charged with criminal anarchy were unconstitutional).

[150] Id at 926.

[151] *Id.* at 928.

[152] *Id.* at 921

[153] Virginia v. Black, 538 U.S. 343, 359 (2003) involving a First Amendment challenge to a Virginia statute that criminalized cross burning. The Virginia Supreme Court held the law unconstitutional on its face, and the U.S. Supreme Court affirmed. Although the statute prohibited cross burning only if done "with the intent of intimidating any person or group of persons," it provided that cross burning itself "shall be prima facie evidence of an intent to intimidate a person or group of persons." The U.S. Supreme Court ruled that since cross burning could be done with an intent other than to intimidate (e.g., symbolic expression), it violated the First Amendment to assume that all cross burnings were done with this intent. *Id.* at 365-366.

[154] *Id.* at 359.

[155] Latour, *supra* note 109.

When confronted with cyber bullying in the post Columbine era, school officials have a difficult task distinguishing "true threats" from student exaggeration, taunting and jokes.[156] In one California case, school officials did not suspend or expel students who admitted posting alleged death threats and anti-gay comments on a student's web site after the police and F.B.I. investigated and took no action.[157] The parents of the threatened student sued the students who made the posting for intentional infliction of emotional distress, violating their right to be free from threats of violence under the state's hate crime law, and defamation for calling him a homosexual.[158] Several defendants apologized for the postings and said they were intended as "jocular humor."[159] Their motion to have the case thrown out under the state's anti-SLAPP law (Strategic Lawsuit Against Public Participation) was denied along with their claim that the speech was protected under the First Amendment, the California Appeals Court ruling their cyber speech was a "true threat."[160]

Although the California court determined the students' cyber speech to be a true threat, other courts have taken a different view.[161] In *Latour*, the court found that the rap songs created by a middle school student were not true threats.[162] He did not bring any of the songs or recordings to school. They were written in the rap genre and were "just rhymes" and metaphors. Though some of the songs contained violent language, it was violent imagery and he intended no actual violence. He never communicated these songs to the school or to the individuals who were the subjects of the songs. Hence the court enjoined and restrained the school from expelling the student and from banning him from attending school-sponsored events or from being present on school grounds after hours.[163]

Similarly, in *J.S. v. Bethlehem Area School District*,[164] though the Pennsylvania Supreme Court found the student's Web site caused an actual and substantial interference with the work of the school, it did not find the site to be a true threat.[165] The student posted it from his home. It contained derogatory comments about his school principal and math teacher and drawings of the math teacher. It solicited funds to hire someone to kill the teacher. The student revealed the existence of the site to

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[156] Emmett, *supra* note 119, at 1090 where the court remarked "The defendant argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places." Quoted in Ellison, *supra* note 112, at 810.

[157] The LA TIMES quotes the Los Angeles Police Department detective who initially investigated the hostile Web site postings as saying that their "annoying and immature Internet communications did not meet the criteria for criminal prosecution." See http://latimesblogs.latimes.com/lanow/2010/03/private-school-students-gaybashing-not-free-speech-court-rules.html (last viewed Aug. 03, 2010).

[158] D.C. et al v. R.R. et al, D.C. v. R.R., 182 Cal. App. 4th 1190, 106 Cal. Rptr. 3d 399, 2010 Cal. App. LEXIS 340 (Cal. App. 2d Dist. 2010).

[159] *Id.* at 2. The postings at issue read in part: "I want to rip out your f***king heart and feed it to you…I've wanted to kill you. If I ever see you I'm … going to pound your head in with an ice pick. … I hope you burn in hell."

[160] *See* http://blogs.findlaw.com/injured/2010/03/ca-court-cyberbullying-is-not-protected-speech.html (last viewed Aug. 03, 2010). One judge vigorously dissented saying the majority's ruling "alters the legal landscape to the severe detriment of First Amendment rights."

[161] *See* Latour and J.S. v. Bethlehem School District, *supra* note 109.

[162] *Id.* at 2005 U.S. Dist. LEXIS 35919. But *cf.* Jones v. Arkansas, 64 S.W.3d 728, 736 (Ark. 2002) deciding that a rap song describing the murder of a fifteen-year old female student and her family, which was written by a male student and delivered to the female student, was a true threat).

[163] *Id.*

[164] 807 A.2d 847, *supra* note 109.

[165] *Id.* at 859. The Court characterized the Web site as "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm."

others, who accessed it from school. Eventually, school personnel learned of the Web site and accessed it. The math teacher became upset and had to take a medical leave of absence. Other students became anxious over the site. The principal considered it to have badly disrupted the school's morale. He suspended the student and began expulsion proceedings against him. Eventually the student was enrolled in another school but challenged the constitutionality of his suspension on First Amendment grounds. The school board and lower court upheld the suspension and the student appealed. In ruling on the appeal, the Pennsylvania Supreme Court considered whether the site was a "true threat." It wrote:

> A true threat may be criminally punished and the majority of case law that considers whether certain speech constitutes a true threat arises in the context of a conviction for the violation of a criminal statute that prohibits such threats. Consideration of what constitutes a true threat, however, is not limited solely to the criminal realm.[166] *[citations omitted]*

The court then proceeded to draw on two cases involving a true threat in the context of student speech. The first was a decision by the federal appeals court for the ninth circuit.[167] To quote from the appeals court decision:

> In determining whether speech constitutes a true threat, the standard was whether a reasonable person in the student's position would foresee that the statement would be interpreted as a serious expression of intent to harm or assault. The entire factual context of the alleged threats was to be considered including surrounding events and the reaction of listeners. Other considerations included whether the threat was unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and immediate prospect of execution.[168] *[citation omitted]*

The second case was a decision by the Supreme Court of Wisconsin[169]where it employed an objective reasonable person standard to define a true threat. The court quoted from the Wisconsin decision holding that a "true threat" is

> [A] statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, i.e., to intimidate or inflict bodily harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views or other similarly protected speech.[170]

In engaging in this analysis, the Wisconsin court stated that it was the totality of the circumstances that had to be considered. It was not necessary that the speaker have the ability to carry out the threat. Rather, consideration was to be given to the full context of the statement, including all relevant factors as to how the statement could be interpreted.[171] Continuing, the court

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[166] *Id.* at 856.

[167] Lovell v. Poway Unified School District, 90 F.3d 367 (9th Cir. [Cal] 1996) (student had threatened to shoot her guidance counselor if she did not make changes to her class schedule; court of appeals found it to be a true threat).

[168] J.S. at 857, citing Lovell.

[169] In the Interest of A.S., 626 N.W. 2d 712 (Wis. 2001).

[170] J.S. at 857-858 citing In the Interest of A.S. at 720. The Wisconsin case involved a delinquency petition arising from a disorderly conduct charge based on a factual scenario where A.S., aged thirteen, made threatening comments to other youths. He said he was going to kill everyone at the middle school, that this would occur over ten minutes, and that it would be something similar to the shootings in Columbine, Colorado. He explained in a very-matter-of-fact manner that people would suffer. Furthermore, he described in detail how he was going to hang a local police officer, shoot the middle school principal and a social studies teacher, and rape a fellow student.

[171] *Id. See also* U.S. v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) (motion granted to quash indictment charging defendant with threatening to injure or kidnap another through e-mail messages transmitted via the Internet; court

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> Factors to be considered included how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the makers of the threat had made similar statements to the victim on other occasions; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.[172]

The Pennsylvania court pointed out that the argument that this was an extreme level of "trash talking," was rejected, and applying the test to the statements of A.S., the Wisconsin court found they constituted a true threat.[173]

Though not involving cyber speech, the court in *Doe v. Pulaski County Special School District*[174] ruled that the student's statements were a true threat. A jilted middle school student drafted two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder his ex-girlfriend. He prepared both letters at his home and never delivered them, but he discussed their contents with her and her friends. One of the friends took the letter with his permission and delivered it to the girl at school at the beginning of a new school year. The school district expelled the boy for the entire school year. The court concluded that the boy intended to communicate the letter and just because he did not personally deliver it did not dispel its threatening nature. The court went on to hold that most, if not all, normal 13-year-old girls (and probably most reasonable adults) would be frightened by the message and tone of the letter and would fear for their physical well being if they received it.[175] Ruling that the letter was a true threat, the court found that the school did not violate the boy's First Amendment rights by initiating disciplinary action against him.[176]

VI. HOW ANTI-CYBER BULLYING LAWS CHILL STUDENT SPEECH

A. Vagueness

Because of their vagueness and overbreath, it is likely that many anti-cyber bullying statutes will suffer the same fate as campus speech codes[177] and some anti-harassment policies.[178] They share

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held messages constituted "shared fantasies" and fell short of an unequivocal, unconditional, immediate, and specific threat conveying an imminent prospect of execution and, therefore, were not "true threats"). *Accord:* U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. [Mich.] 1997) holding that e-mails sent by defendant to his online friend concerning a plan to torture, rape, and murder a third person did not constitute communications containing a threat because no reasonable person would perceive the e-mails as intending to effect change or achieve a goal through intimidation. But *cf.* Jones case, *supra* note 162.

[172] J.S. at 858, citing In the Interest of A.S. at 721.

[173] *Id. See also* Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir.[Ore.] 2002) (creation of Internet "Wanted" posters with the names and addresses of abortion providers constituted a true threat after three providers were murdered).

[174] 306 F.3d 616 (8th Cir [Ark] 2002), *supra* note 109.

[175] The court describes the letter as exhibiting the boy's "intent to harm the girl and his pronounced, contemptuous and depraved hate for her." He "refers to or describes her as a 'bitch,' 'slut,' 'ass,' and a 'whore' over 80 times in only four pages. He used the f-word no fewer than ninety times and spoke frequently in the letter of his wish to sodomize, rape, and kill her. The most disturbing aspect of the letter, however, is his warning in two passages, expressed in unconditional terms, that she should not go to sleep because he would be lying under her bed waiting to kill her with a knife." *Id.* at 625.

[176] *Id.* at 627.

[177] Courts may strike them down for vagueness and overbreath. *See* cases *supra* note 26.

many of their characteristics in seeking to prohibit "hostile environments" and end "intimidating" school speech. They usually contain these phrases along with prohibitions against "interfering with a student's educational performance and benefits" or strictures against comments that are "motivated by actual or perceived characteristics or traits of a student."[179] Whether these expressions encompass simple acts of teasing or name-calling among school children the courts will have to decide, but the Supreme Court has said they cannot be a basis for damages under federal anti-discrimination law[180] and so it is doubtful they can withstand a First Amendment challenge.

New Hampshire's revised bullying law is a good example of just how far anti-bullying hysteria can go in silencing student free speech. One section reads

> "Bullying" shall include actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs.[181]

This certainly takes in a large area of speech that could include teasing someone because they are obese, skinny, tall, short, wear eyeglasses, have long, short or no hair, or speak with a high or low pitched voice. One court characterized attempts to prohibit such speech in the context of a anti-harassment policy as "brave, futile, or merely silly."[182] However, the court had harsher words for attempts to censor speech dealing with "beliefs" or "values." To quote:

> But attempting to proscribe negative comments about "values," as that term is commonly used today, is something else altogether. By prohibiting disparaging speech directed at a person's "values," the [anti-harassment] Policy strikes at the heart of moral and political discourse--the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.[183]

Undoubtedly suppressing student speech under the guise of preventing "cyber bullying" is no more permissible than attempting to stifle it under the rubric of "anti-harassment." Both run afoul of the First Amendment's guarantee of free speech.

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[178] Saxe v. State College Area School District, 240 F.3d 200, 217 (3rd Cir. [Pa.] 2001) invalidating SCASD's anti-harassment policy on the grounds of vagueness and overbreath. *Accord*: Bowler v. Town of Hudson, 514 F. Supp. 2d 168 (Mass. 2007) (holding school officials violated students' First Amendment rights by taking down posters advertising a conservative club and displaying a link to a Web site address, which contained a link to another Web site hosting graphic footage of hostage beheadings).

[179] Brookover, *supra* note 4.

[180] Davis v. Monroe County Board of Education, 526 U.S. 629, 652 (1999) (held that private damages could lie against a recipient of Title IX funding in cases of peer harassment, but only where the recipient acted with deliberate indifference to the harassment which must be so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit).

[181] RSA 193-F:3 I(5)I(b), *supra* note 4.

[182] Saxe, *supra* note 178, at 210.

[183] *Id.* citing Texas v. Johnson, 491 U.S. 397, 408-09 (1989) (upholding reversal of conviction for burning an American flag as part of a political speech) which quoted Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (reversing conviction for violating city ordinance for disorderly conduct, Court holding that defendant's constitutional right to freedom of speech was protected unless it was likely to produce a clear and present danger beyond public inconvenience, annoyance, or unrest).

Anti-cyber bullying statutes often include the phrase “hostile environment,” words often found in anti-harassment and anti-discrimination codes. The Massachusetts statute defines the phrase as a “situation in which bullying causes the school environment to be permeated with intimidation, ridicule or insult that is sufficiently severe or pervasive to alter the conditions of the student’s education.”[184] The law does not define “intimidation, ridicule or insult” so students speak to each other at their own peril hoping others won’t be “intimidated, ridiculed or insulted” by what they say. This is the essence of what First Amendment jurisprudence terms a “chilling effect” on free speech. It "chills" speech, or makes it less likely that citizens will exercise their rights to free speech because of the fear of criminal punishment.[185] Generally, a statute is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[186] Therefore the law has always required “a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed.' "[187] Anti-cyber bullying statutes are replete with terms such as “effect of substantially interfering with a student’s education”[188] or “causes emotional distress to a pupil”[189] [a low grade also can cause “emotional distress”]. Anti-cyber bullying laws are more perfidious than speech codes because the latter operate only on school premises whereas many anti-cyber bullying laws seek to regulate student speech off-campus.[190]

B. Overbreath

Anti-cyber bullying laws, like anti-harassment policies, are not only vulnerable to constitutional challenge based on vagueness but also suffer from overbreath because they proscribe protected speech as well as unprotected speech.

A regulation is unconstitutional on its face on overbreadth grounds where there is "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court."[191] To render a law unconstitutional, the overbreadth must be "not only real but substantial in relation to the statute's plainly legitimate sweep."[192] New

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[184] Mass. G.L. §37O, c.71, *supra* note 4.

[185] Michael R. Gordon, *The Best Intentions: A Constitutional Analysis of North Carolina’s New Anti-Cyber Bullying Statute*, 11 N.C. J.L. & Tech. On. 48, 68 n.138, citing GEOFFREY R. STONE, ET AL., THE FIRST AMENDMENT (3d ed. 2008) at 117-18.

[186] *Id.* at 67 citing Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (affirming an interlocutory order enjoining enforcement of a criminal statute because its terms were too vague to be constitutional). *See* John Calvin Jeffries, Jr., *Legality, Vagueness, And The Construction Of Penal Statutes*, 71 VA. L. REV. 189 (1985).

[187] *Id.* citing Grayned v. Rockford, 408 U.S. 104, 109 n.5 (1972) (reversing a conviction under an anti-picketing ordinance and upholding another under an anti-noise regulation, the Court held that it is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined). The Grayned case quoted from Edwards v. South Carolina, 372 U.S. 229, 236 (1963) (reversing convictions of students who peacefully marched to the state house to present a protest of grievances on the grounds that their rights of free speech, free assembly, and freedom to petition were violated).

[188] Georgia Statutes 20-2-751.4(B), *supra* note 4.

[189] New Hampshire statute, *supra* note 181.

[190] Brookover, *supra* note 4; *see also* TABLE OF ANTI-CYBER BULLYING STATUTES, *supra*.

[191] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (reversing a decision holding that a city ordinance was overbroad, the Court ruled that a municipality’s interest in avoiding visual clutter was sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the posting of signs on public property).

[192] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (upholding decision that parts of state personnel administration act were constitutional in the face of allegations they were vague and overbroad).

Hampshire's anti-cyber bullying statute[193] is a good example of overbreath that has rendered similar language in anti-harassment laws unconstitutional.[194] The law speaks of actions based on a "pupil's actual or perceived personal characteristics". The court in *Saxe* found such language in an anti-harassment policy to be "facially overbroad"[195] and consequently invalidated the policy.[196] To quote:

> Certainly, some of these purported definitions of harassment are facially overbroad. No one would suggest that a school could constitutionally ban "any unwelcome verbal . . . conduct which offends . . . an individual because of "some enumerated personal characteristics. Nor could the school constitutionally restrict, without more, any "unwelcome verbal . . . conduct directed at the characteristics of a person's religion. The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.[197]

The court continues by citing *Texas v. Johnson:*[198]

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[199]

The *Saxe* court then applies the *Tinker* "substantial disruption" test to the anti-harassment policy and concludes that it covers substantially more speech than could be prohibited under that rule. Accordingly it held the policy constitutionally overbroad.[200]

Much of the anti-cyber bullying legislation suffers from the same flaw. Without any evidence whatsoever, these statutes proceed to ban vast categories of speech that could not be prohibited under *Tinker*. The Supreme Court made it clear in that case that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[201] Furthermore, the Court has held that a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[202] In prohibiting protected speech as well as unprotected speech, anti-cyber bullying statutes are vulnerable to constitutional challenges based on overbreath.

Just as anti-harassment policies were invalidated for vagueness and overbreath,[203] many anti-cyber-bullying laws will suffer the same fate.

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193 *Supra* note 181.
194 Saxe, *supra* note 178, at 215.
195 *Id.*
196 *Id.* at 217.
197 *Id.* citing Tinker, 393 U.S. at 509 (school may not prohibit speech based on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").
198 491 U.S. 397 (1989), *supra* note 183.
199 *Id.* at 414. *See* also Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *see also* Doe v. University of Michigan, *supra* note 26, at 863.
200 Saxe, *supra* note 178.
201 393 U.S. at 508.
202 U.S. v. Stevens, 130 S. Ct. 1577, 1587 (2010), *supra* note 67 (federal law prohibiting depictions of animal cruelty ruled unconstitutional due to overbreath) (citing Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008)).
203 *Supra* note 26.

C. *Content & Viewpoint Discrimination*

Proponents of anti-cyber bullying laws argue they protect children from offensive speech that may harm them. Of course there is no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause.[204] But as the *Saxe* court stated:

> The free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.[205]

Just as anti-harassment policies and speech codes attempted to regulate oral or written expression on subjects like race, gender, national origin or religion, as pure speech these topics come under the ambit of the First Amendment, however repugnant some of these viewpoints may be.[206] As the *DeAngelis* court noted:

> when anti-discrimination laws are "applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statutes impose content-based, viewpoint-discriminatory restrictions on speech." Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create a "hostile environment"--and thus come within the ambit of anti-discrimination laws--precisely because of its sensitive subject matter and because of the odious viewpoint it expresses.[207]

Similarly, anti-cyber bullying laws, in seeking to protect children from offensive online speech, ban speech based solely on its content or viewpoint and thus violate the First Amendment.[208]

VII. CONCLUSION

Student free speech has been on a bumpy road ever since *Tinker*. First it was buffeted by campus speech codes, then anti-harassment policies, and now the latest assault, anti-cyber bullying laws that attempt to censor student speech not only on school grounds but on the Internet. Even the Supreme Court has not been an ally of student free speech. Backing away from *Tinker*, it held in *Fraser* that lewd and vulgar speech at a school-sponsored forum is unprotected.[209] The Court next handed down *Hazelwood,* giving school administrators editorial control over student expression in a newspaper as long as it involves legitimate pedagogical concerns.[210] Lastly, the Justices pronounced in *Morse* that during school hours at a school-sponsored event not on school premises, student

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[204] Saxe, *supra* 178, at 206.

[205] *Id.*

[206] DeAngelis v. El Paso Mun. Police Officers Ass'n., 51 F.3d 591, 596 (5th Cir. [Tex] 1995) (reversing judgment of lower court that found female police officer sexually harassed; court ruled that four derogatory articles in police association newsletter, absent no other actions, did not constitute sexual harassment). *Accord*: McCauley v. Univ. of the Virgin Islands, 2009 U.S. Dist. LEXIS 74661 (ruling that university speech code that prohibited speech that "frightens, demeans, degrades or disgraces any person" violated the First Amendment), *supra* note 26.

[207] *Id.* at 596-97, cited in Saxe, *supra* note 178, at 206.

[208] S*ee* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) where the Supreme Court struck down a municipal hate-speech ordinance prohibiting fighting words that aroused "anger, alarm or resentment on the basis of race, color, creed, religion or gender." *Id.* at 377. While recognizing that fighting words generally are unprotected by the First Amendment, the Court nevertheless found that the ordinance unconstitutionally discriminated on the basis of content and viewpoint. Quoted in Saxe, *supra* note 178*,* at 206.

[209] 478 U.S. 675.

[210] 484 U.S. at 273.

messages that run counter to official school orthodoxy concerning drug use are not to be tolerated.[211]

Anti-cyber bullying laws are the greatest threat to student free speech because they seek to censor it everywhere and anytime it occurs, using "substantial disruption" of school activities as justification and often based only on mere suspicion of potential disruption.[212] Although the school environment has special characteristics, they do not justify the regulation of vast areas of student speech unless a "substantial disruption" of school activities can be demonstrated.

The **Model Anti-Cyber Bullying Statute** presented above[213] is an attempt to strike a balance between student free speech and the maintenance of academic order and discipline. It outlaws bullying and cyber bullying that threatens to harm a student or public school employee or their property or threatens a substantial disruption of the educational environment. It requires anyone who has reasonable grounds to believe that bullying or cyber bullying has occurred to report it and prohibits reprisals or retaliation against them as well as giving them immunity for a cause of action for damages or for failure to remedy the situation. It requires school districts to develop and implement an anti-bullying and cyber bullying policy and a procedure for notifying parents of students who are bullied or engage in such actions. Also it calls for notification of local agencies where criminal charges may be brought. In addition, it requires setting up a procedure for counseling persons who are bullied or cyber bullied or who engage in such conduct. Lastly, it mandates a procedure for training and instructing students, parents, teachers, school administrators, counseling staff and school volunteers on how to identify, prevent and respond to bullying and cyber bullying. The **Model Statute** accomplishes all of this while respecting student free speech rights, and thus is an ideal vehicle for those who want to legislate an end to bullying and cyber bullying while at the same time maintaining student First Amendment rights.

As *Tinker* held, students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[214] Furthermore, if students can't practice free speech in schools, when will they be able to practice it?[215] Certainly not in the workplace, where the First Amendment holds little sway[216] and the atmosphere is apprehensive over potential sexual harassment litigation and its possible expansion to include bullying.[217] Instead of clamping down on student expression,

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[211] 551 U.S. 393.

[212] *See* e.g., Mass. G. L. §37O, c. 71 ("Bullying shall be prohibited …at a location, activity, function or program that is not school-related , or through the use of technology or an electronic device that is not owned, leased, or used by a school district or school, if the bullying creates a hostile environment at school for the victim…"; *also* Title 14 Del. Code §4112D (f)(1) "The physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action by the school district… provided there is sufficient school nexus." *See also* Florida Statutes, §1006.147 (7)(a) "The physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action initiated under this section."

[213] *Supra* Part III, Section D.

[214] Tinker, 393 U.S. at 506.

[215] It is interesting to note that Florida's anti-bullying law, after prohibiting "teasing," "social exclusion," "public humiliation," and conduct that "demeans," "dehumanizes," or "embarrasses" (Fla. St. §1006.147 (3)(a), (d)(2)), blithely concludes by adding "Nothing in this section shall be construed to abridge the rights of students or school employees that are protected by the First Amendment to the Constitution of the United States." (*id*. at §10). At least the legislators remembered the First Amendment, which is more than can be said for other state legislatures as they rushed headlong trampling student free speech rights under the anti-cyber bullying banner.

[216] *See* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 17 SETON HALL L. REV. 42 (1987).

[217] *See* Kerri Lynn Stone, *From Queen Bees And Wannabes To Worker Bees: Why Gender Considerations Should Inform The Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35 (2009).

our schools ought to inculcate respect and appreciation for free speech and diverse opinions, the bedrocks of freedom in a democratic society.