

CYBERBULLYING:
THE NEW GENDER HARASSMENT AND HOW
LEGISLATURES CAN PROTECT FREE SPEECH WHILE
ENSURING THAT LAWS KEEP PACE WITH
TECHNOLOGICAL ADVANCES

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INTRODUCTION

While bullying and harassment at schools is not a new phenomenon, our advancing communication technologies and reliance on these technologies over the past decade have enabled new forms of abuse, harassment, and humiliation to permeate students' lives beyond the schoolyard.¹ Today, approximately two thirds of youth report going online every day,² and the average teenager sends

1. Warren J. Blumenfeld & Robyn M. Cooper, *LGBT and Allied Youth Response to Cyber-bulling: Policy Implications*, 3 INT'L J. CRITICAL PEDAGOGY 114, 118-19 (2010), available at http://www.stopbullyingworld.org/images/stories/2010confmat/Blumenfeld_LGBTandAlliedYouthResponsestoCyberbullying.pdf; see also SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., TEENS' USE OF TECHNOLOGY (2010), http://www.cyberbullying.us/2010_charts/teen_tech_use_2010.jpg (showing the high percentage of children aged from ten – to eighteen – years old who use some form of online media).

2. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RES. CTR., CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE 2 (2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf [hereinafter HINDUJA & PATCHIN, IDENTIFICATION, PREVENTION, AND RESPONSE].

over three thousand text messages per month.³ Although all school-aged youths are potential targets and instigators of cyberbullying, female and perceived non-heterosexual⁴ students are especially vulnerable to this form of harassment.⁵

The issue of cyberbullying has received both state and federal attention and has presented itself as one of the fastest-growing areas of “cyberlegislation.”⁶ State legislatures have proposed and adopted various laws to confront this issue.⁷ At the federal level, the Megan Meier Cyberbullying Prevention Act (MMCPA) was introduced in Congress on April 2, 2009, to combat cyberbullying by applying federal criminal penalties against individuals convicted of cyberbullying under the Act.⁸ The MMCPA presents a new federal legislative effort to fight cyberbullying by creating a national standard of conduct for cyber-communications.⁹

Lawmakers must effectively address cyberbullying so all students may enjoy an education without the fear of cyber-harassment. However, the proposed MMCPA is not the answer to this growing problem. First, the

3. Ben Parr, *Mashable, Average Teen Send 3,339 Texts Per Month*, MASHABLE, Oct. 14, 2010, <http://mashable.com/2010/10/14/nielsen-texting-stats/>.

4. “Perceived non-heterosexual student” is used in this article to refer to all students harassed based upon their perceived sexual orientation, regardless of their actual sexual orientation.

5. AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, CYBERBULLYING AND ONLINE TEENS 2-3 (2007), <http://www.pewinternet.org/~media/Files/Reports/2007/PIP%20Cyberbullying%20Memo.pdf.pdf> (reporting that teenage girls are more likely than teenage boys to report experiencing cyberbullying, that older girls are more likely to report being bullied than any other age and gender group, and that girls are more likely to report someone spreading rumors about them than boys); Christine Moyer, *Cyberbullying: A High-Tech Health Risk for Young Patients*, AM. MED. NEWS, Nov. 15, 2010, <http://www.ama-assn.org/amednews/2010/11/15/prl21115.htm> (noting that “[a]dolescents who are gay or lesbian, or those who are struggling with their sexuality or gender identity” are among the most vulnerable to cyberbullying).

6. IOWA POL’Y RESEARCH ORG., LEGISLATION ON CYBERBULLYING 1 (2009), available at <http://www.uiowa.edu/~ipro/Papers%202009/Cyberbullying%20Final.pdf>; see also Jesse Lee, *President Obama & the First Lady at the White House Conference on Bullying Prevention*, WHITE HOUSE BLOG, Mar. 10, 2011, <http://www.whitehouse.gov/blog/2011/03/10/president-obama-first-lady-white-house-conference-bullying-prevention> (exemplifying how bullying and cyberbullying received federal attention in the wake of several high profile suicides caused by bullies and cyberbullies).

7. See SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RES. CTR., STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS 1 (2011), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf [hereinafter HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS]; see also Darryn C. Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students’ Free Speech Rights*, 33 VT. L. REV. 283, 291 (2008), available at <http://lawreview.vermontlaw.edu/articles/14%20Beckstrom%20Book%202,%20Vol.%2033.pdf>.

8. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3 (2009).

9. See *id.*

MMCPA goes too far in prohibiting protected First Amendment speech due to the definitional vagueness of the term “cyberbullying.”¹⁰ Second, attaching felony charges to an action that upwards of 20 percent of youths engage in does not rationally address the root of the issue because it could make felons out of a significant portion of this nation’s youth.¹¹ Finally, the MMCPA was motivated by an atypical instance of cyberbullying that involved an exchange between an adult cyberbully and a school-aged female victim, and consequently does not sufficiently target the populations most vulnerable to the effects of cyberbullying.¹²

Going forward, the issue of cyberbullying deserves the nation’s continued attention and a proactive response from lawmakers. Unlike the MMCPA, however, the ideal federal legislative response must first and foremost be conscientious of the First Amendment and resist the temptation to tread on free speech. A national solution also needs to focus on prevention strategies rather than criminal consequences. Finally, federal legislators should pursue a law that provides local policymakers with general guidelines to comply with, and a function in individualizing the policy to emphasize any special concerns or values held by their community.

This article will look at cyberbullying, specifically focusing on its impact when the victims are school-aged females, actual and perceived sexual minorities,¹³ or individuals who have had sexual images of themselves disseminated. This article will also examine different legislative approaches at the federal and state level to combat cyberbullying and propose an alternative legislative model as a solution. Part I discusses what constitutes cyberbullying and some of its unique features that make it challenging to regulate. Part II explores cyberbullying incidents involving especially vulnerable populations, including the case of Megan Meier, who inspired legislation at both the state and federal levels.¹⁴ Part III focuses on some of the special concerns victims cyberbullied based on sexual orientation or disseminated sexual content may have with school reporting policies. It also examines concerns associated with reducing victims’ access to technology to reduce exposure to cyberbullying.

Part IV examines some of the legislative barriers to instituting comprehensive policies such as regulating protected speech, defining a school’s

10. *See id.* (defining “cyberbullying” as any communication intended “to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior”).

11. *See* HINDUJA & PATCHIN, IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 2.

12. *See* Steven Kotler, *Cyberbullying Bill Could Ensnare Free Speech Rights*, FOXNEWS.COM, May 14, 2009, <http://www.foxnews.com/politics/2009/05/14/cyberbullying-ensnare-free-speech-rights/>.

13. The term “sexual minorities” is used to refer to individuals whose sexual orientation, identity, or practices differ from the majority of individuals in society.

14. *See* MO. REV. STAT. § 565.225 (2010); Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

jurisdiction to intervene when cyberbullying occurs, and providing schools with appropriate guidance on and resources for combating cyberbullying. Part V then explores adopted and pending legislation at the state and federal levels, and highlights positive features in the Washington and New Hampshire state cyberbullying laws as well as the Anti-Defamation League's Model Act for combating cyberbullying. Part VI argues that rather than moving forward with the MMCPA or similar laws, the federal government should pass legislation mandating that states implement a federally developed model cyberbullying policy at their public schools that incorporates aspects of Washington's, New Hampshire's, and Anti-Defamation League's Model Act. Lastly, this article offers some concluding remarks on cyberbullying and then advocates for continued attention and action on the issue.

I. BACKGROUND: THE BASICS OF CYBERBULLYING

It is important to identify the defining features of cyberbullying that differentiate it from traditional forms of bullying in order to understand its unique harms. Cyberbullying may include a variety of actions.¹⁵ Many of these distinctive features also create challenges when trying to create laws to address cyberbullying.¹⁶

A. *Cyberbullying Defined and Applying the Definition to Laws*

Cyberbullying is loosely defined as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."¹⁷ The phenomenon of cyberbullying is so new that there has yet to be a consensus reached on whether it is one word or two.¹⁸ It may include the use of websites, e-mail, chat rooms, text messaging, and instant messaging.¹⁹

15. See HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS, *supra* note 7, at 1 (showing how cyberbullying laws in different states apply to many different actions); *see also* H.R. 1966, § 3.

16. Blumenfeld & Cooper, *supra* note 1, at 120.

17. HINDUJA & PATCHIN, IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 2, at 1.

18. Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 106 (2009).

19. Blumenfeld & Cooper, *supra* note 1, at 119.

B. Setting Cyberbullying Apart from Traditional Bullying

Cyberbullying has unique characteristics that set it apart from traditional bullying and present problems for legislatures.²⁰ Unlike traditional face-to-face bullying, victims of cyberbullying are likely to experience harassment, threats, and humiliation even when not on school or public grounds.²¹ The harassment and threats of cyberbullying can go so far as to infiltrate a person's home, even without the victim's immediate knowledge.²²

Another difference between traditional bullying and cyberbullying is that cyberbullies may remain anonymous.²³ Whereas a traditional bully confronts his or her victim face-to-face, a cyberbully may avoid having his or her identity ever known to the victim.²⁴ The fact that a cyberbully and victim might never face each other carries several implications. First, an anonymous cyberbully may act more harshly online and have no incentive to relent because he or she may never see the impact his or her bullying has on a victim and may have no fear of personal repercussions.²⁵ Second, while forty-five states have passed anti-bullying laws, and thirty-one have adopted laws addressing electronic harassment, it is more difficult to enforce cyberbullying laws against a cyberbully who remains anonymous.²⁶ This is because effective prosecution is nearly impossible if the cyberbully is unable to be identified by law enforcement.²⁷

20. See CHRISTINA F. BROWN & MICHELLE K. DEMARAY, SCHOOL-BASED CYBERBULLYING INTERVENTIONS, <http://www.education.com/reference/article/school-based-cyberbullying-interventions/> (last visited Sept. 23, 2011).

21. See *id.*

22. See BROWN & DEMARAY, *supra* note 20; Blumenfeld & Cooper, *supra* note 1, at 119 (explaining that forms of cyberbullying may include anonymously posting private information about individuals on public online forums, having classmates rate individuals based on unfavorable traits, and creating online communities dedicated to disparaging an individual's reputation).

23. BROWN & DEMARAY, *supra* note 20; M.E. KABAY, ANONYMITY AND PSEUDONYMITY IN CYBERSPACE 21 (1998), <http://www.mekabay.com/overviews/anonpseudo.pdf> [hereinafter KABAY, ANONYMITY AND PSEUDONYMITY].

24. See Blumenfeld & Cooper, *supra* note 1, at 119.

25. KABAY, ANONYMITY AND PSEUDONYMITY IN CYBERSPACE, *supra* note 23, at 9-11; see also Blumenfeld & Cooper, *supra* note 1, at 127.

26. See Aimee Fukuchi, Note, *A Balance Of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharassment Law*, 52 B.C. L. REV 289, 317-18 (2011).

27. See *id.* at 317.

C. Attempts to Legislate Cyberbullying

Proactive legislation applying the broad definition of the MMCPA invites criticism for potentially violating the First Amendment.²⁸ However, legislators who are more reactive with legislation also invite criticism for inaction. Refined legislation that makes culpable only the most egregious instances of cyberbullying is also criticized because the language that is used in these laws is vague or incomprehensible to the average citizen.²⁹

It may be especially difficult for adolescents to understand the difference between exercising protected speech and committing criminal cyber-harassment.³⁰ Clarity when regulating cyber-communication, as opposed to typical criminal laws, is particularly important because the law usually presumes that speech is protected under the First Amendment.³¹ Lawmakers are therefore tasked with the challenge of creating laws that are clear enough to be understood by adolescents but also tailored narrowly so as not to tread on free speech.

II. VULNERABLE POPULATIONS AT GREATEST RISK

While any student may fall victim to this form of bullying, many of the most notorious cases of cyberbullying have involved incidents where youths were targeted based on issues regarding their gender, sexual activities, perceived sexual orientation, or apparent sexual orientation.³² Significant

28. Ryanick Paige, *The Megan Meier Cyberbullying Prevention Act*, ASSOCIATED CONTENT FROM YAHOO!, June 11, 2009, http://www.associatedcontent.com/article/1824371/the_megan_meier_cyberbullying_prevention.html?cat=17; see generally Tiffany Emrick, *When Myspace Crosses the School Gates: The Implications of Cyberspeech on Students' Free-Speech Rights*, 40 U. TOL. L. REV. 785 (2009) (discussing legal standards for assessing whether speech is protected under the First Amendment).

29. *Megan Meier Cyberbullying Prevention Act and Adolescent Web Awareness Requires Education Act: Hearings on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on Banking, Hous., and Urban Affairs Comm.*, 111th Cong. 2-3 (2009) [hereinafter *Hearings*] (statement of Harvey Silverglate, author and criminal defense and civil liberties trial lawyer, Cato Institute).

30. See, e.g., Kim Zetter, *Court: Cyberbullying Threats Are Not Protected Speech*, WIRED, Mar. 18 2010, <http://www.wired.com/threatlevel/2010/03/cyberbullying-not-protected/> (discussing a California appeals court ruling that a minor's threatening posts made to another minor on a website were not protected free speech, despite the minor's contention that his comments were inspired by other posts and were intended to be "jocular" and "hyperbolic").

31. See generally David Hudson, Jr., *Cyberspeech*, FIRST AMENDMENT CTR., <http://www.firstamendmentcenter.org/cyberspeech> (last updated Aug. 2008) (discussing cyberspeech and constitutional issues).

32. See Blumenfeld & Cooper, *supra* note 1, at 118.

attention has been given to the issue of cyberbullying due to several recent highly publicized incidents in the media.³³

A. *Riley Best: A Case of Gender-Based Cyber-Harassment*

Cyberbullying can take many forms and the degree of harm can vary vastly.³⁴ The first case presents an example of gender-based cyberbullying that occurred after a female middle school student in Wisconsin joined her local football team and consequently suffered harassment from her peers both on school grounds and beyond.³⁵ Riley Best was a sixth-grade student attending Lodi Middle School in Lodi, Wisconsin, who joined her local football team.³⁶ From then on she was taunted and teased by her classmates to her face as well as through her Facebook account.³⁷ She was constantly ridiculed and told that she “shouldn’t play with the big boys,” and that she should “go play softball or something instead of football.”³⁸

The harassment got progressively worse. Eventually Best’s peers took their taunting to Best’s Facebook page by posting messages on her wall and constantly ridiculing her participation in football.³⁹ These comments were eventually brought to her mother’s attention by another adult.⁴⁰ Within weeks, a meeting conducted by the Madison Police Department was held at the district’s high school in response to the issue of cyberbullying.⁴¹ Best, shortly thereafter, took her anti-cyberbullying message to the airwaves and purportedly appeared on the Dr. Phil Show.⁴²

33. See, e.g., Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1, available at <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html>; *Frontline: Growing Up Online* (PBS television broadcast Jan. 22, 2008); Randi Kaye, *How a Cell Phone Picture Led to Girl’s Suicide*, CNN, Oct. 7, 2010, http://articles.cnn.com/2010-10-07/living/hope.witsells.story_1_photo-new-school-year-scarves?_s=PM:LIVING; *Parents: Cyber Bullying Led to Teen’s Suicide*, ABC NEWS, Nov. 19, 2007, <http://abcnews.go.com/GMA/story?id=3882520&page=1> [hereinafter *Cyber Bullying Led To Teen’s Suicide*]; *Sixth-Grader Speaks Out Against Cyberbullying*, CHANNEL 3000, Oct. 6, 2010, <http://www.channel3000.com/technology/25292966/detail.html> [hereinafter *Sixth-Grader Speaks Out*].

34. Blumenfeld & Cooper, *supra* note 1, at 119.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See *id.*

B. *Hope Witsell: A Case on Sexually Explicit Content (“Sexting”)*

The dissemination of sexual content via cellphones is a growing phenomenon.⁴³ The events leading up to Hope Witsell’s suicide serves as an example of cyberbullying based on the dissemination of sexual content.⁴⁴ Witsell experienced both face-to-face bullying and cyberbullying.⁴⁵ Witsell “sexted”⁴⁶ a picture of her breasts to her boyfriend.⁴⁷ Later, another girl from school gained access to the photo and sent it to students at six different schools in the area.⁴⁸ The photo became widely disseminated and the school alerted Witsell’s parents to the event.⁴⁹

After the photo was disseminated, fellow students would walk up to Witsell at school and call her names like “slut,” “whore,” and “skank.”⁵⁰ Witsell’s friends claimed they had to make a protective wall around Witsell because her peers would try to physically assault her.⁵¹ Some of her peers wrote vulgar messages about Witsell on a Myspace webpage called the “Shields Middle School Burn Book” and started the “Hope Hater Page.”⁵² As a result of the constant torment Witsell used her favorite scarves to hang herself.⁵³

Days after Witsell’s suicide, her older sister discovered that the cyberbullying was still occurring.⁵⁴ Even in death Witsell could not escape being cyberbullied.⁵⁵ People continued putting comments on Witsell’s Myspace page with comments like “did Hope really kill herself? I can’t believe that whore did that” and similar malicious comments.⁵⁶

43. Sameer Hinduja, *Sexting: The Jesse Logan Case, and What Schools Can Do*, CYBERBULLYING RESEARCH CTR., Mar. 10, 2009, <http://cyberbullying.us/blog/sexting-the-jesse-logan-case-and-what-schools-can-do.html>; Stephanie Steinberg, ‘Sexting’ Surges Nationwide, and It’s Not Just Teens Doing It, USA TODAY, July 20, 2010, http://www.usatoday.com/life/lifestyle/2010-07-21-texting21_ST_N.htm.

44. See Kaye, *supra* note 33; see also Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting’*, TODAY, Mar. 3, 2009, <http://today.msnbc.msn.com/id/29546030> (reporting another tragic case of cyberbullying based on the dissemination of sexual content).

45. Kaye, *supra* note 33.

46. See Sameer Hinduja, *Sexting Policies in Schools*, CYBERBULLYING RESEARCH CTR., Oct. 22, 2010, <http://cyberbullying.us/blog/sexting-policies-in-schools.html> [hereinafter Hinduja, *Sexting Policies*] (defining ‘sexting’ as the sending and receiving of naked or semi-naked photos or videos via cell phone).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; Michael Inbar, ‘Sexting’ Bullying Cited in Teen Girl’s Suicide, TODAY, Dec. 2, 2009, http://today.msnbc.msn.com/id/34236377/ns/today-today_people/.

54. Kaye, *supra* note 33.

55. *Id.*

56. *Id.*

This tragic case not only provides an example of cyberbullying based on sexual content, but also presents the issue of a school's responsibility to intervene and protect its students. A spokesperson for Beth Shields Middle School stated that prior to Witsell's death, a social worker became concerned that Witsell was inflicting injury to herself after noticing cuts on her legs.⁵⁷ According to the spokesperson, the social worker called Witsell to her office and had her sign a "no harm contract" in which Witsell agreed to talk to an adult if she wanted to harm herself.⁵⁸ Witsell's mother says she was never told about the "no harm contract," which she found crumpled up in the garbage in her daughter's bedroom after she died.⁵⁹ School officials told CNN they believed the social worker had tried calling Hope's mother to alert her but were not sure if she had left a message.⁶⁰ Although school disclosure is a complicated issue,⁶¹ with a clearer and more effective school intervention procedure, Witsell's cyberbullying and suicide may have been prevented.

C. Ryan Halligan: A Case Involving Perceived Sexual Orientation

The third case provides an example of cyberbullying involving a victim's perceived sexual orientation, which resulted in the suicide of Vermont fifth-grade student Ryan Halligan.⁶² Peers picked on Halligan because of his learning disability, his poor physical coordination, and rumors that he was gay.⁶³ Halligan was repeatedly sent instant messages from middle-school classmates accusing him of being gay,⁶⁴ and was "threatened, taunted and insulted incessantly" after sending an embarrassing story to a classmate he thought was a friend.⁶⁵

To quash the rumor about his sexual orientation, Halligan befriended a girl at his school online over the summer and when Halligan approached the girl in person in front of her friends, she told him he was just "a loser" and that she "did not want anything to do with him" and that she was only "joking" online.⁶⁶

57. *Id.*

58. Inbar, *supra* note 53; Kaye, *supra* note 33.

59. Kaye, *supra* note 33.

60. *Id.*

61. See generally NANCY WILLARD, CYBERBULLYING LEGISLATION AND SCHOOL POLICIES: WHERE ARE THE BOUNDARIES OF THE "SCHOOLHOUSE GATE" IN THE NEW VIRTUAL WORLD? (2007), <http://www.cyberbully.org/cyberbully/docs/cblegislation.pdf> [hereinafter WILLARD, CYBERBULLYING LEGISLATION AND SCHOOL POLICIES].

62. See Ryan's Story, Home, <http://www.ryanpatrickhalligan.org/index.htm> (last visited Mar. 28, 2011) [hereinafter Ryan's Story, Home].

63. *States Pushing for Laws to Curb Cyberbullying*, FOXNEWS, Feb. 21, 2007, <http://www.foxnews.com/story/0,2933,253259,00.html>.

64. Todd Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 258 (2008) (noting that this rumor apparently began when Halligan confided in a friend that his doctor had performed rectal examination on Halligan).

65. Ryan's Story, Home, *supra* note 62.

66. *Frontline: Growing Up Online* (PBS television broadcast Jan. 22, 2008).

Halligan then found out that the girl and her friends thought it would be funny to make him think she liked him and to get him to say personal and embarrassing things that she could copy and paste into instant message exchanges with her friends.⁶⁷

Ryan's parents scheduled him to see a therapist to further help him develop coping skills and to boost his self-esteem.⁶⁸ By the end of the fifth grade, Halligan seemed fine. Based on his therapist's advice, Halligan stopped the sessions.⁶⁹ The bullying problem resurfaced on and off during his first year of middle school, but never to a point that gave his parents great concern.⁷⁰ His parents claimed they had the conventional adult belief that "this was just kids being kids, a part of growing up" and that "encountering mean kids in middle school was just inevitable."⁷¹ However, the situation got much worse for him during the seventh grade,⁷² and Halligan ultimately took his own life.⁷³

In addition to being a case about cyberbullying involving the perceived sexual orientation of an individual, this case also highlights the steps parents frequently take to protect their child and the resistance they may experience in doing so.⁷⁴ First, Halligan's father established rules limiting his child's use of the family computer.⁷⁵ Halligan's father also stated that he wanted to take the cyberbullying problem to the principal and have him put a stop to it.⁷⁶ To that proposal, Ryan exclaimed, "[n]o dad, please don't do that. They will only make it worse. I see it happen all the time."⁷⁷ Instead, Ryan asked that his father help him learn how to fight so he could "beat the heck" out of the kid if he or his eighth-grade friends tried to physically assault Ryan.⁷⁸ This case illustrates the fact that the bullying victim will often object to remedies proposed by parents if it means reporting the issue to school administrations or the removal of access to technology.⁷⁹

In reaction to the suicide of Ryan Halligan, the State of Vermont subsequently enacted the Bullying Prevention Law⁸⁰ and the Suicide Prevention

67. *Id.*

68. *Id.*

69. Ryan's Story, Home, *supra* note 62.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.*

75. *Id.* (including rules against communicating with strangers, disclosing personal information to strangers, sending pictures to strangers, and having secret passwords).

76. *Id.*

77. *Id.*

78. *Frontline: Growing Up Online* (PBS television broadcast Jan. 22, 2008).

79. *See* Blumenfeld & Cooper, *supra* note 1, at 122-23.

80. 2004 Vt. Acts & Resolve 277-78.

Law.⁸¹ The Suicide Prevention Law closely followed a draft submitted by Halligan's father.⁸² It provides measures to assist teachers and others to recognize and respond to depression and suicide risks among teens.⁸³ Interestingly, the Vermont Act fails to mention cyberbullying specifically.⁸⁴

D. Tyler Clementi: Cyberbullying Based on Apparent Sexual Orientation

The fourth case involves a high-profile case of cyberbullying based on a college student's apparent sexual orientation.⁸⁵ The incident resulted in the suicide of Rutgers University student Tyler Clementi.⁸⁶ On the night of the incident, Clementi had requested that his roommate allow him to use the room for the night.⁸⁷ Clementi's roommate later posted a message on Twitter⁸⁸ stating "[r]oommate asked for the room till midnight. I went into molly's [sic] room and turned on my webcam. I saw him making out with a dude. Yay."⁸⁹ Clementi's roommate used a camera in the dormitory room to remotely stream Clementi's intimate encounter with another male live on the internet and broadcast it to other students in the dorm.⁹⁰ Later that night, Clementi posted on his Facebook page "[j]umping off the gw [sic] bridge sorry."⁹¹ Clementi is thought to have taken his own life after learning that his roommate secretly taped his encounter with another male.⁹²

Clementi's roommate and another student have been charged by prosecutors with invasion of privacy and transmitting a sexual encounter on the Internet.⁹³ This case is distinguishable from the three previously discussed because it occurred at the university level. However, legislatures retain

81. 2006 Vt. Acts & Resolve 73-74 (requiring schools to notify the parents of both the bully and the victim and providing that expulsion of the bully may be a consequence of bullying).

82. Ryan's Story, Laws, <http://www.ryanpatrickhalligan.org/laws/laws.htm> (last visited Nov. 6, 2011).

83. *See id.*

84. *See* VT. STAT. ANN. tit. 16, § 11 (2010).

85. *See* Foderaro, *supra* note 33.

86. *Id.*

87. *Id.*

88. Twitter is a social networking and microblogging website.

89. Foderaro, *supra* note 33.

90. *Id.*

91. Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to His Death*, ABC NEWS, Sept. 29, 2010, <http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716>.

92. *See id.*

93. News Release, Middlesex Cnty. Prosecutor's Office, Two Rutgers Students Charged with Invasion of Privacy (Sept. 28 2010), *available at* <http://www.co.middlesex.nj.us/prosecutor/PressRelease/Two%20Rutgers%20students%20charged%20with%20invasion%20of%20privacy.htm>.

authority to address issues that occur at public universities, and in this case the New Jersey legislature took action following Clementi's suicide.⁹⁴

In response to the suicide of Tyler Clementi, New Jersey Governor Chris Christie signed the Anti-Bullying Bill of Rights into law on January 6, 2011.⁹⁵ The law is thought to be among the strongest in the nation.⁹⁶ The law includes specific provisions for cyberbullying or bullying through text messages, the Internet, and social media, and addresses loopholes in a previous anti-bullying measure passed in New Jersey in 2002.⁹⁷

E. *The Case of Megan Meier*

Perhaps the most notorious case of cyberbullying to receive the nation's attention was the case of Megan Meier.⁹⁸ Meier's case could be considered an incident of gender-motivated cyberbullying because her cyberbully used Meier's romantic interest in a fabricated teenage boy to cyberbully and manipulate Meier.⁹⁹ Meier was a thirteen-year-old girl from Missouri, who after creating an account on Myspace,¹⁰⁰ received a message from Josh Evans, a boy who was supposedly sixteen years old.¹⁰¹ However, the message was actually sent by Lori Drew, a forty-nine-year-old woman who had created a fake Myspace account.¹⁰² Drew, in concert with her daughter Sarah, manipulated

94. Teresa Akersten & Karen Yi, *New Jersey's New Anti-Bullying Legislation the Strongest in the Nation: Caldwell-West Caldwell Schools Superintendent Reacts to 'Anti-Bullying Bill of Rights' Signed into Law by Gov. Christie*, CALDWELLS PATCH, Jan. 7, 2011, <http://caldwells.patch.com/articles/new-jerseys-new-anti-bullying-legislation-the-strongest-in-the-nation>; see also *Radio Times with Marty Moss-Coane, Bullying & Cyberbullying, Especially vs. Gay Youth* (WHYY.org radio broadcast Oct. 4, 2010), available at <http://whyy.org/cms/radiotimes/2010/10/04/bullying-cyberbullying-especially-vs-gay-youth/>.

95. Akersten & Yi, *supra* note 94.

96. *Id.*

97. *Id.*

98. See *Cyber Bullying Led To Teen's Suicide*, *supra* note 33.

99. See *id.* Cyber gender harassment invokes women's sexuality and gender in ways that interfere with their agency, livelihood, identity, dignity, and well-being. Danielle K. Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 384, (2009). "The subsequent injuries are unique to women because men do not typically experience sexual threats and demeaning comments suggesting their inferiority due to their gender." *Id.* "This statement is particularly true for heterosexual men who are less likely to face sexual intimidation by women or homosexual men, but less true for gay men who confront sexual taunts when others perceive them as effeminate." *Id.* at 394, n.89.

100. Myspace is an online social networking site.

101. *Cyber Bullying Led To Teen's Suicide*, *supra* note 33. The use of the fake name "Josh Evans" implicates many of the same antisocial behaviors associated with anonymous online communications. See KABAY, ANONYMITY AND PSEUDONYMITY, *supra* note 23, at 7, 35.

102. Jennifer Steinhauer, *Verdict in Myspace Suicide Case*, N.Y. TIMES, Nov. 26, 2008, at A25, available at http://www.nytimes.com/2008/11/27/us/27myspace.html?_r=1&hp.

Meier by using Meier's romantic interest in "Josh" to get Meier to share personal information about herself.¹⁰³

Megan Meier and "Josh" became online friends, but never met in person or spoke on the phone.¹⁰⁴ Meier began to exchange messages with "Josh," and was described by family as having had her spirits lifted.¹⁰⁵ "Josh" claimed to have just moved to a nearby city and did not yet have a phone number.¹⁰⁶ On October 15, 2006, the tone of the messages changed. For example, posing as "Josh," Drew wrote "I don't know if I want to be friends with you anymore because I've heard that you are not very nice to your friends."¹⁰⁷ Lori Drew shared some of Meier's messages to "Josh" with others, and posted bulletins about her saying "Megan Meier is a slut" and "Megan Meier is a fat ass."¹⁰⁸

According to Meier's father and a neighbor who had discussed the hoax with Drew, the last message sent from the fake Myspace account read, "[e]verybody in O'Fallon knows who you are. You are a bad person and everybody hates you. Have a bad rest of your life. The world would be a better place without you."¹⁰⁹ Meier responded with a message reading "[y]ou're the kind of boy a girl would kill herself over."¹¹⁰ The last few correspondences were made via AOL Messenger instead of Myspace.¹¹¹ After weeks of their online flirtation, Meier's father noticed that Meier was becoming distressed.¹¹² Meier was later found in her bedroom closet; she had hanged herself.¹¹³

i. The Impact of Megan Meier: A State's Response and a Federal Proposal to Combating Cyberbullying

Megan Meier's death resulted in the passage of a cyberbullying law in Missouri,¹¹⁴ and a proposed law at the federal level.¹¹⁵ Both houses of the Missouri State Legislature voted unanimously on May 15, 2008, to criminalize

103. *Id.*

104. *See Cyberbullying Led to Teen's Suicide*, supra note 33.

105. *Id.*

106. *Id.*

107. *Id.*

108. Megan Meier Found., Tina Meier's Biography, <http://meganmeierfoundation.cwsit.org/tinasBiography.php> (last visited July 24, 2011); *see also Cyberbullying Led to Teen's Suicide*, supra note 33.

109. Steinhauer, supra note 102.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* S. 818, 94th Gen. Assem., Reg. Sess. (Mo. 2008) (modifying various provisions relating to stalking and harassment). This law provides that harassment is a class A misdemeanor unless the harassment is (1) committed by a person twenty- one years of age or older against a person seventeen years of age or younger, or (2) the person has previously committed the crime of harassment, in which case harassment is a class D felony. *Id.*

115. *See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3 (2009).

usage of the Internet to harass someone.¹¹⁶ The statute was then expanded to prohibit abusive “communication by any means” and is known as “Megan’s Law.”¹¹⁷ On June 30, 2008, Missouri Governor Matt Blunt signed the bill, effectively expanding the legislative requirement that harassing communication be made in writing or over the phone to include communication involving computers, text messaging, and other electronic devices.¹¹⁸ On April 2, 2009, the MMCPA was introduced in Congress,¹¹⁹ with the purpose of amending the federal criminal code to impose criminal penalties on anyone who “transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.”¹²⁰ The bill was designed to set a federal standard for holding cyberbullies responsible for their actions.¹²¹

According to its sponsor, Representative Linda Sánchez, the behavior must be repeated, hostile, and severe to fall under the cyberbullying definition.¹²² However, the MMCPA has been criticized for its broad language.¹²³ If passed, it would criminalize any online communication transmitted “with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person.”¹²⁴

ii. Subsequent Criminal Legal Developments in the Megan Meier Case

United States v. Lori Drew was the criminal case in which Lori Drew was convicted and subsequently acquitted of violations of the Computer Fraud and Abuse Act based on her behavior toward Meier.¹²⁵ “[J]urors found Drew guilty of only three counts of gaining unauthorized access to Myspace for the purpose of obtaining information on Megan Meier—misdemeanors that potentially

116. See *Internet Law – Missouri Governor Signs Cyberbullying Bill into Law*, INTERNET BUSINESS LAW SERVICES, July 14, 2008, http://www.ibls.com/internet_law_news_portal_view.aspx?id=2095&s=latestnews.

117. *Id.*

118. *Id.*

119. See H.R. 1966.

120. *Id.* § 3.

121. See *id.*

122. David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED, Sept. 30, 2009, <http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/>.

123. See *id.*

124. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3 (2009); see also *Weekend Edition Sunday, Prosecuting Cyber Bullies* (NPR radio broadcast Apr. 5, 2009), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=102761461>. Congress has failed to take any further action on the bill since referring it to committee on September 30, 2009.

125. *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009). The Computer Fraud and Abuse Act was originally intended to address computer-related offenses and was specifically directed toward financial institutions. See 18 U.S.C. § 1030 (2008).

carry up to a year in prison, but most likely will result in no time in custody.”¹²⁶ The jury unanimously rejected the three felony computer hacking charges that alleged that the unauthorized access was part of a scheme to intentionally inflict emotional distress on Megan.¹²⁷ Lori Drew escaped serving any jail time.¹²⁸

iii. Insufficient Laws to Address the Seriousness of Cyberbullying at the Federal and State Level

The modest verdict was a partial rebuke to federal prosecutors, who charged Lori Drew after authorities in Missouri found that Drew’s behavior did not violate any state laws at the time.¹²⁹ Additionally, “[s]ome legal experts and civil libertarians decried the prosecution as an abuse of computer-crime laws.”¹³⁰ Under the Computer Fraud and Abuse Act, prosecutors sought to indict Drew for violating Myspace’s terms-of-service agreement.¹³¹ However, a conviction could have set the dangerous precedent of making anyone who violates an online terms-of-service agreement a felon by expanding the scope of the Act.¹³² Drew’s acquittal suggests that technology has outpaced our laws and ability to prosecute these types of offenses with the seriousness they deserve.

F. *Technology’s Prevalence Ensures that Cyberbullying Will Continue Especially Among the Most Vulnerable Populations*

The cases above demonstrate that as communication technology becomes more prevalent in everyday life, the ramifications stemming from its abuse can have severe consequences, especially for youths when harassment is based on gender, perceived sexual orientation, or sexual content. The Meier case demonstrated a form of gender – and sex – based harassment¹³³ due to the psychological manipulation inflicted on Meier because of her apparent romantic interest in “Josh Evans.” It also presented an anomaly where an adult cyberbullies a child.¹³⁴

Unlike the other cases discussed, Megan Meier’s bully was an adult posing as a teenage boy through the pseudonym “Josh Evans,” rather than an

126. Kim Zetter, *Lori Drew Not Guilty of Felonies in Landmark Cyberbullying Trial*, WIRED, Nov. 26, 2008, <http://www.wired.com/threatlevel/2008/11/lori-drew-pla-5/>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See MICHELE A. PALUDI & RICHARD B. BARICKMAN, *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 2-5* (1991) (noting that the characteristics of sexual harassment include intimidation, bullying, or coercion of a sexual nature or the unwelcome or inappropriate promise of rewards in exchange for sexual favors).

134. Kotler, *supra* note 12.

identified or anonymous peer.¹³⁵ Because of this unique set of facts, the Meier case, to some, served as a justification to extend regulatory powers to institutions beyond schools so that non-student cyberbullies, such as Lori Drew, could be subjected to punishment under the law.¹³⁶ Thus, the Meier case demonstrated the burgeoning thought that two legal regimes are needed to advance the goal of eliminating cyber-harassment, resulting in the passage of the Missouri law¹³⁷ and the proposed MMCPA.¹³⁸

III. CONCERNS FOR VICTIMS OF CYBERBULLYING WHEN SEXUAL CONTENT OR SEXUAL ORIENTATION IS INVOLVED

School policies supporting parental notification of a cyberbullying incident and limiting a victim's access to technology at home to mitigate exposure to cyberbullies are two tactics used to fight cyberbullying.¹³⁹ These actions, however, may actually deter victims from seeking help from schools or their parents and therefore deserve examination.¹⁴⁰ These two strategies for addressing cyberbullying uniquely impact victims when the cyberbullying involves sexual content or sexual orientation,¹⁴¹ and these especially vulnerable victims¹⁴² deserve to have attentive policymakers that are responsive and understanding of these concerns.

135. *See id.* Another high profile instance of cyberbullying occurred where an openly gay University of Michigan student, Chris Armstrong, was targeted by Assistant Attorney General Andrew Shirvell because Armstrong was serving as the student body president. Michelle Garcia, *State Official Bullies College Student*, *ADVOCATE*, Sept. 16, 2010, http://www.advocate.com/News/Daily_News/2010/09/16/State_Official_Bullies_College_Student/. Shirvell devoted a blog to Armstrong, giving him labels such as "Satan's representative on the Student Assembly," and superimposing a rainbow flag with a swastika on Chris's face. *Id.*

136. *See* Zetter, *supra* note 126.

137. *See* S. 818, 94th Gen. Assem., Reg. Sess. (Mo. 2008).

138. *See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

139. *See, e.g.*, FLA. STAT. § 1006.147(4)(i) (2011); O.C.G.A. § 20-2-751.4(b)(3) (2009 & Supp. 2011); *see also* Diane Trim, *Five Reasons Students Don't Report Cyberbullying*, *INSIDE THE SCHOOL*, Feb. 24 2010, <http://www.insidetheschool.com/articles/five-reasons-students-don%E2%80%99t-report-cyberbullying/>.

140. *See* NANCY WILLARD, *CYBERBULLYING GUIDANCE FOR SCHOOL LEADERS* (2010), <http://www.cyberbully.org/documents/documents/cyberbullyguidance.pdf> (discussing student fears of both technology loss and "losing face" among their peers as a consequence of reporting cyberbullying to administrators).

141. *See* Citron, *supra* note 99.

142. *See* Moyer, *supra* note 5 (identifying "[a]dolescents who are gay or lesbian, or those who are struggling with their sexuality or gender identity" among those most vulnerable to cyberbullying).

A. *Opposition to Reporting*

Efforts designed to confront cyberbullying that lack a considerate system¹⁴³ for reporting incidents could have a disparate impact and effectiveness on students bullied based on their sexual orientation or when sexual content is involved.¹⁴⁴ In a 2010 study, approximately 35 percent of students, regardless of sexual orientation, indicated that they would not report having experienced cyberbullying at home to their parents.¹⁴⁵ The rate of non-heterosexual students affirmatively stating that they would report such an incident was 19 percent lower than their heterosexual peers.¹⁴⁶

A lower percentage of non-heterosexual students, compared to their heterosexual peers, supported a policy where the school notified their parents about instances of cyberbullying.¹⁴⁷ Reasons that students were against reporting instances of cyberbullying to parents also varied between heterosexual and non-heterosexual students.¹⁴⁸ A significant number of non-heterosexual students reported concern for having their sexual orientation revealed to their parents.¹⁴⁹

Due to this concern, LGBTQ victims often choose to suffer harassment in silence out of fear of reprisal by their family or school administrators.¹⁵⁰ Two major concerns that LGBTQ victims have about reporting cyberbullying include the possibility of being “outed”¹⁵¹ to their parents and negative attention being drawn to their sexual orientation even if the student is already “out.”¹⁵² Therefore, these victims are made especially vulnerable because consequences for seeking help may be more devastating for the victim.

143. I use the phrase “considerate system” to refer to any system that takes into account the ramifications a student may face in reporting an incident and makes efforts to ameliorate the possible negative effects (*e.g.*, anonymous or confidential reporting or limiting intimate facts involved with the incident).

144. *See* Blumenfeld & Cooper, *supra* note 1, at 122-23.

145. *See id.* at 122.

146. *Id.* (showing 37 percent of heterosexual students stating that they would report an incident to their parent, versus only 18 percent of non-heterosexual students stating that they would report an incident); *see also* DANA MARKOW & JORDAN FEIN, HARRIS INTERACTIVE, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA: A SURVEY OF STUDENTS AND TEACHERS (2005), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/500-1.pdf (explaining that the severity and type of harassment that students experience in school varies by gender, race and ethnicity, and sexual orientation).

147. Blumenfeld & Cooper, *supra* note 1, at 122.

148. *See id.* at 123. Non-heterosexuals more frequently gave as reasons for not reporting cyberbullying a fear of losing access to technology, a feeling that telling their parents would be futile, and a fear that their parents would not believe them. *Id.*

149. *Id.*

150. *See id.*

151. “Outed” refers to the revealing of another person’s sexual identity without their permission.

152. *See* Blumenfeld & Cooper, *supra* note 1, at 123.

LGBTQ students often fear that any cyberbullying investigation launched by a school will inevitably uncover information from which inferences may be drawn regarding the student's sexual orientation.¹⁵³ LGBTQ students additionally worry that by notifying parents about the cyberbullying incident, information regarding the substance of the comments made by the cyberbully will be revealed to the parents.¹⁵⁴ Therefore, LGBTQ students frequently opt not to report incidents out of the fear that their parents or school officials will discover their sexual orientation and react negatively.¹⁵⁵

Students who have been cyberbullied based on content containing sexual images of themselves may similarly decline to report the incidents because they fear embarrassment or loss of privacy.¹⁵⁶ Students who may have transmitted sexual content¹⁵⁷ run the risk of having the image or media file discovered and brought to the attention of the student's parents, or possibly even law enforcement if the student is a minor.¹⁵⁸ Therefore, systems adopted by schools must consider whether parental reporting policies may in fact deter students from seeking intervention due to procedures that may not sufficiently protect the student's privacy.

B. Student Opposition to the Loss of Technology

Parents sometimes try to reduce their child's exposure to cyberbullying by limiting or monitoring their child's Internet or phone use upon learning that their child is the victim of cyberbullying.¹⁵⁹ Removing or limiting the use of

153. *See id.*

154. *See id.*

155. *See id.*

156. *See* Trim, *supra* note 139 (naming embarrassment and fear that cyberbullying would escalate as reasons why a girl whose photo was taken in a locker room and then disseminated to other students did not report the incident to an adult).

157. My use of "transmission of sexual content" is intended to include "sexting," text messaging, or emailing a sexually suggestive or explicit message or image.

158. Many states treat sexting among minors as the dissemination of child pornography regardless of the proximity in age between the people participating. Amanda Hiffa, *OMG Txt Pix Plz: The Phenomenon of Sexting and the Constitutional Battle of Protecting Minors from Their Own Devices*, 61 SYRACUSE L. REV. 499, 509 (2011). The treatment of youth who transmit pornographic content of minors is beyond the scope of this article.

159. *See* AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS, STRANGER CONTACT & CYBERBULLYING 2 (2008), <http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Pew%20Internet%20teens.pdf> (reporting that 53 percent of parents use software to filter their teen's internet content, 45 percent of parents have software to monitor what their teen does online, and 74 percent of teens say that the computer they use is in a public place in the home); WELLER HEALTH EDUC. CTR., CYBERBULLYING 2 (2009), http://www.palisadessd.org/606312071710115/lib/606312071710115/Weller_Center_-_Cyberbullying.pdf (encouraging parents to limit access to technology by keeping computers and use of media devices in public areas and placing message blocking software on media devices during hours when a parent is unable to monitor the child's use); Blumenfeld & Cooper, *supra* note 1, at 122-23.

technology by a victim of cyberbullying is especially feared by LGBTQ students because the online world may be the only way to find other youths similarly situated, especially if they are not “out” in the real world.¹⁶⁰ Many cyberbullied LGBTQ students may feel that the loss of the ability to connect with similarly situated students would have a more devastating impact than being cyberbullied.¹⁶¹ Therefore, many LGBTQ students decide not to report incidents due to the fear of losing access to communication technology.¹⁶² When crafting a policy to address this issue, lawmakers must keep the issue of student privacy at the forefront for any legislation being considered.¹⁶³ Although laws that favor parental disclosure policies seem proactive, they may actually deter some of the most vulnerable populations from reporting.¹⁶⁴ Cyberbullying laws should therefore emphasize prevention strategies to mitigate these concerns.¹⁶⁵

IV. LEGISLATIVE BARRIERS AND CONCERNS: FREE SPEECH, JURISDICTION, AND ESTABLISHING CLEAR SCHOOL GUIDELINES

Free speech, jurisdiction, and providing schools with appropriate guidance are three issues that hinder legislative action to confront cyberbullying in schools.¹⁶⁶ The first two issues directly implicate constitutional concerns.¹⁶⁷ The first issue explores the limits that can be placed on speech under the First Amendment of the United States Constitution.¹⁶⁸ The second issue examines the authority a school may have to investigate instances of cyberbullying, including off-campus incidents. The third issue considers the amount of guidance and resources schools receive when mandated by lawmakers to confront cyberbullying, and the possible liability that may be imposed as a consequence for their action or inaction.¹⁶⁹

160. See Blumenfeld & Cooper, *supra* note 1, at 122-23; Jennifer Egan, *Lonely Gay Teen Seeking Same*, N.Y. TIMES, Dec. 10, 2000, <http://www.nytimes.com/2000/12/10/magazine/lonely-gay-teen-seeking-same.html> (discussing gay youths' dependence on the internet as a source to communicate with similarly situated teens).

161. See Blumenfeld & Cooper, *supra* note 1, at 128.

162. See *id.* at 122.

163. See Shaheen Sharif & Dianne Hoff, *Cyberbullying: Clarifying Legal Boundaries for School Supervision in Cyberspace*, 1 INT'L J. CYBER CRIMINOLOGY 76, 100-03 (2007).

164. See Blumenfeld & Cooper, *supra* note 1, at 122-23.

165. See Hinduja, *Sexting Policies*, *supra* note 46 (detailing potential policies schools can put in place to prevent sexual content from being transmitted in the first place).

166. See generally WILLARD, CYBERBULLYING LEGISLATION AND SCHOOL POLICIES, *supra* note 61.

167. See generally *id.*

168. See U.S. CONST. amend. I.

169. See generally WILLARD, CYBERBULLYING LEGISLATION AND SCHOOL POLICIES, *supra* note 61.

A. *Student Free Speech Standard and Potential First Amendment Challenges to Cyberbullying Laws*

The protection of free speech under the First Amendment of the United States Constitution is a major concern when drafting policies aimed at combating cyberbullying.¹⁷⁰ The Supreme Court has yet to hear a case involving the treatment of student free speech as it relates to off-campus cyberbullying. Since most of the legislation aimed at curbing cyberbullying has targeted public school action, it is appropriate to examine the Supreme Court's jurisprudence involving student speech.¹⁷¹

Most speech is considered protected under the First Amendment to the United States Constitution.¹⁷² However, the court has taken occasion to impose limits on First Amendment speech on students. Most of the limitations on student speech have been articulated in the progeny of cases following *Tinker v. Des Moines Independent Community School District*.¹⁷³ The four seminal student free speech Supreme Court decisions are discussed below.

In *Tinker*, the first student free speech case considered by the Supreme Court, the Court asserted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁷⁴ Under the *Tinker* standard, school officials may only respond with formal discipline in cases where the off-campus speech causes, or threatens to cause, a substantial and material disruption at school or interference with the rights of students to be secure.¹⁷⁵ The liberties and constraints afforded to school districts under the student free speech cases must be considered when crafting legislation.¹⁷⁶

170. See generally Beckstrom, *supra* note 7 (discussing constitutional concerns with cyberbullying legislation).

171. See generally Emrick, *supra* note 28 (discussing Supreme Court jurisprudence with regard to students' freedom of speech in schools).

172. See U.S. CONST. amend. I.

173. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

174. *Id.* at 506.

175. *Id.* at 514. In *Tinker*, respondent school officials suspended petitioner students from public high school because they wore black armbands to school in protest of the Vietnam War. *Id.* at 504. Petitioners brought an action against the respondents under 42 U.S.C. § 1983, seeking nominal damages and an injunction restraining the school from disciplining the students for violating their civil rights. *Id.* at 504-05. The trial court dismissed the complaint, upholding the constitutionality of respondents' action on the ground that it was reasonable in order to prevent the disturbance of school discipline. *Id.* The circuit court affirmed. *Id.* at 505. The Supreme Court reversed because the wearing of armbands was entirely divorced from actually or potentially disruptive conduct by those that participated in it. *Id.* Petitioners' conduct was closely akin to pure speech that was entitled to comprehensive protection under the First Amendment, absent facts that might reasonably have led school officials to forecast substantial disruption of, or material interference with, school activities. *Id.* In *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874 (7th Cir. 2011), the court applied the *Tinker* "substantial disruption test" to a case involving defendant school district seeking a preliminary court injunction to ban plaintiff students from wearing a shirt displaying the phrase "be happy not gay." *Id.* at 876. The court determined that it was speculative to conclude that allowing the students to wear T-shirts that said "be happy not gay" would have even a slight tendency to provoke a substantial disruption, or to

In the second case, *Bethel School District No. 403 v. Fraser*, the Supreme Court deviated from the broad ruling in *Tinker* when upholding a student's suspension.¹⁷⁷ The Court ruled in *Fraser* that students are not entitled to the same latitude of First Amendment protections as adults, and that under the First Amendment school officials may properly punish student speech with suspension if they determine that speech to be lewd, offensive, or disruptive to the school's basic educational mission.¹⁷⁸

The third case, *Hazelwood School District v. Kuhlmeier*, determined that public school officials may impose some limits on what appears in school-sponsored student publications.¹⁷⁹ The Supreme Court reasoned that although *Tinker* requires schools to tolerate particular student speech, the First Amendment does not require a school to affirmatively promote particular student speech when a student is using a school-sponsored medium, such as a newspaper.¹⁸⁰ The *Hazelwood* standard thus allows schools to impose restrictions on student speech that could reasonably be perceived as bearing the imprimatur of the school.¹⁸¹

Finally, in the fourth and most recent Supreme Court student free speech case, *Morse v. Frederick*, the Court further eroded the rights of students under First Amendment.¹⁸² In *Morse*, the Supreme Court ruled that school officials

poison the educational atmosphere. *Id.* at 877. Such speculation was "too thin a reed" on which to hang a prohibition of the exercise of the students' free speech. *Id.*

176. *See* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

177. *Id.* Matthew Fraser delivered a speech nominating a fellow student for student elective office. *Id.* at 677. The speech was delivered at a school assembly. *Id.* During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. *Id.* at 677-78. Prior to the assembly, two of Fraser's teachers told him that he should not deliver the speech because it was inappropriate. *Id.* After delivering the speech, Fraser was informed that he would be suspended and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises. *Id.* at 678. Fraser consequently brought suit against the school for violating his first amendment rights. *Id.* at 678-79.

178. *See* *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007).

179. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The students brought an action against their school district for allegedly violating their rights under the First Amendment. *Id.* at 262. The principal did not believe the students' articles, which were about teen pregnancy and divorce, were appropriate for publication because the identity of the students in the articles would be easily ascertained. *Id.* at 263. The principal made the decision to eliminate two pages from the newspaper, which removed the articles from publication. *Id.* at 264. The district court found in favor of the school district, but the appellate court reversed. *Id.* at 264-66. The Supreme Court reversed, finding that the principal's actions were not unreasonable. *Id.* at 275. The Court found that public schools did not possess all of the attributes of streets and other traditional public forums. *Id.* at 267. The school had an interest in protecting the identity of the students in a pregnancy article as well as maintaining the integrity of student speech allowed in the school newspaper. *Id.* at 276. Therefore, no First Amendment violation occurred. *Id.*

180. *Id.*

181. *See id.*

182. *Morse*, 551 U.S. at 397-98. A student was suspended from school after he refused the principal's direction to take down a banner that said "bong-hits 4 Jesus" that he unfurled

may prohibit student speech that can reasonably be interpreted as promoting illegal drug use, because it was contrary to the school's mission to curb student drug use.¹⁸³ Despite the fact that the speech in *Morse* technically occurred off-campus, the plurality deemed that there was a sufficient relationship between the school and the activity to justify the school's punishment.¹⁸⁴

While the four cases above have articulated the main boundaries to on-campus student speech, restrictions for off-campus student speech are less certain.¹⁸⁵ Some courts have refused to use less stringent standards for student speech that occurs off-campus.¹⁸⁶ Other courts have extended *Tinker* to cases that cause a "substantial disruption" on the operation of the school even if the speech occurred off-campus.¹⁸⁷ Still other courts have looked to whether off-campus student speech rose to the level determined to be a "true threat."¹⁸⁸

The Supreme Court's views on the issue of student free speech involving electronic communications are unclear, especially when an off-campus incident was involved.¹⁸⁹ Given the void in Supreme Court precedent and federal law on the issue of cyberbullying and more specifically cyberbullying that occurs off-campus, schools will remain in a precarious position when enforcing state mandates to implement cyberbullying policies until clearer guidelines regarding the regulation of student online speech are settled by Congress or the high court.¹⁹⁰

at a school-sponsored and school-supervised event. *Id.* at 397-98. The principal directed the student to take the banner down because the banner appeared to advocate illegal drug use in violation of school policy. *Id.* The school board upheld the student's suspension. *Id.* at 398. The Court concluded that the "substantial disruption" rule of *Tinker* was not the only basis for restricting student speech. *Id.* at 396-97. Considering the special characteristics of the school environment and the governmental interest in stopping student drug abuse, the Court held that schools were entitled to take steps to safeguard those entrusted to their care from speech that could reasonably be regarded as encouraging illegal drug use. *Id.* at 397.

183. *Id.* at 410.

184. *Id.* at 400-01.

185. Zande, *supra* note 18, at 121.

186. *See, e.g.,* Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (1979); *see also* Harriet Hader, Note, *Supervising Cyberspace: A Simple Threshold For Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV 1563, 1576-78 (2009).

187. *See, e.g.,* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180-82 (E.D. Mo. 1998) (finding a student entitled to injunctive relief when his homepage posted from his home computer did not cause substantial interference with the school's operation).

188. *See, e.g.,* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622-23, 626-27 (8th Cir. 2002) (finding that a letter drafted by a student describing how he would severely injure and kill his former girlfriend amounted to a "true threat" and holding that the test for differentiating protected speech from a "true threat" is "whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm"); *see also* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371 (9th Cir. 1996).

189. *See* Zande, *supra* note 18, at 120.

190. Kara Canley Murrhee, Note, *Squelching Student Speech in Florida: Cyberbullying and the First Amendment*, 21 U. FLA. J.L. & PUB. POL'Y 307, 311 (2010).

B. Jurisdiction to Investigate Cyberbullying

Jurisdiction to investigate instances of alleged cyberbullying is another concern that lawmakers need to address when crafting enforceable cyberbullying laws.¹⁹¹ States often delegate the authority to control and punish bullying to individual school districts.¹⁹² The question of whether a school has jurisdiction is more complicated for cyberbullying than it is for traditional bullying because cyberbullies impact their victims through the use of a telecommunication device, and thus do not have to be proximate to their victims in order to harm their victims.¹⁹³

Like the First Amendment issues discussed above, the issue of whether a school possesses jurisdiction to investigate and potentially punish student speech often involves first characterizing whether the speech occurred on-campus or off-campus.¹⁹⁴ In the absence of clear court precedent or federal law, it will remain unclear how far the school district's jurisdiction extends to investigate cyberbullying incidents that occur outside of school or at a school function outside of the school's premises.¹⁹⁵ Even if acting with the authority of state law, if the communication takes place off-campus, school officials may not have the constitutional authority to exercise jurisdiction to control the student's speech.¹⁹⁶

It is also ambiguous whether school officials can be held responsible for cyberbullying between students, especially if the act is committed on a student's personal device.¹⁹⁷ A school may still be found liable for its failure to

191. See Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 259 (2008); see generally *J.C. v. Beverly Hill Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (summarizing the Supreme Court's acceptable limitations on free speech and applying the *Tinker* test to determine an online video of derogatory comments toward a student did not substantially disrupt normal school activities and therefore was protected speech).

192. See Michelle R. Davis, *State Cyberbullying Laws Range from Guidance to Mandate*, DIGITAL DIRECTIONS, Feb. 4, 2011, <http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying-laws.h04.html>.

193. A school's ability to intervene in a cyberbullying incident would be further impaired if the incident occurred between students in different districts, or if the bully was not a student at all, as was true in the Megan Meier case. See Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, Jun. 28, 2010, at A1.

194. See DAVID HUDSON, JR., FIRST AMENDMENT CTR., *STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPACE MEAN FOR STUDENTS' FIRST AMENDMENT RIGHTS?* 12 (2006), available at <http://www.firstamendmentcenter.org/PDF/student.internet.speech.pdf>; see also Erb, *supra* note 191, at 259 (discussing state and court struggles to address off-campus incidents of cyberbullying, describing it as "no man's land").

195. See David Hudson, Jr. *Cyberspeech*, FIRST AMENDMENT CENTER, Apr. 9, 2002 available at <http://www.firstamendmentcenter.org/cyberspeech> (discussing arguments over whether schools have jurisdiction over off-campus speech).

196. *Id.*

197. IOWA POL'Y RESEARCH ORG., *supra* note 6.

sufficiently prevent instances of cyberbullying under the regular tort regime.¹⁹⁸ As examined in the Tyler Clementi case discussed above, Rutgers University may face legal consequences for its failure to intervene in the cyberbullying, despite the fact that the transmission of material occurred on the cyberbully's personal computing device.¹⁹⁹

The ability of a school or law enforcement to investigate alleged instances of cyberbullying also differs from their ability to investigate traditional bullying. Unlike in traditional forms of bullying, cyberbullies have an easier time remaining anonymous and may also not comply with school demands to provide evidence necessary to prove an accusation, especially if evidence is contained on a personal device.²⁰⁰ Additionally, traditional bullying involves a face-to-face confrontation and may also involve physical contact that leaves visible scars, whereas most instances of cyberbullying will leave no direct physical scars. However, victims of cyberbullying can be psychologically scarred because the bullying can go beyond public interactions, infiltrating the victim's home life.²⁰¹ Further, the cyberbullying may be accessible to a virtually unlimited audience.²⁰²

Therefore, the extent to which jurisdiction is conferred on a school, within constitutional constraints, to investigate a reported instance of cyberbullying is an important topic to address in any cyberbullying legislation and legislatures and schools must be aware of this concern when crafting effective legislation. However, policies adopted by states and schools must remain within the boundaries of regulating speech set forth by established case law.

C. *Lack of Sufficient Guidance for Schools*

Another concern with crafting cyberbullying laws is that too many bullying laws are created without providing schools guidance on what policies are necessary and what type of liability a school may incur.²⁰³ In addition to a lack of guidance regarding constitutional limitations imposed on a school's ability to regulate speech and jurisdiction to investigate an alleged incident, unclear legislative mandates intended to support school efforts to combat

198. See NANCY WILLARD, *EDUCATOR'S GUIDE TO CYBERBULLYING AND CYBERTHREATS* 9-10 (2007), <http://csriu.org/cyberbully/docs/cbcteducator.pdf> [hereinafter WILLARD, *EDUCATOR'S GUIDE*] (noting a school's added potential liability if the victim were a member of a "protected class" or if the incident involved the use of a personal device used while on school property).

199. See Caroline Black, *Tyler Clementi Suicide: Parents Consider Lawsuit Against Rutgers University*, CBSNEWS, Dec. 22, 2010, http://www.cbsnews.com/8301-504083_162-20026433-504083.html.

200. Fukuchi, *supra* note 26, at 317-18.

201. See BROWN & DEMARAY, *supra* note 20, at 2 (explaining that it is difficult to escape cyberbullying, because most students have access to computers and cell phones at home).

202. See *The National, InDepth: Cyber-bullying* (CBCNews radio broadcast Oct. 10, 2002), available at http://www.cbc.ca/news/background/bullying/cyber_bullying.html.

203. See Davis, *supra* note 192.

cyberbullying may unintentionally impose liability for schools on both the prevention and enforcement ends.²⁰⁴

For example, the school in the Witsell case may be vulnerable to legal liability due to the fact that the bullied student met with her guidance counselor, who failed to contact Witsell's family about their distressed daughter before she took her life.²⁰⁵ From one perspective, the school's social worker may be seen as having taken a proactive measure to prevent Witsell from hurting herself by having Witsell sign a "no harm" contract.²⁰⁶ Alternatively, the school's social worker's failure to effectively intervene or inform the student's parents may establish a basis for liability against the school.²⁰⁷

Schools could also be vulnerable to constitutional challenges if they stifle free speech in their enforcement of policies.²⁰⁸ Although cyberbullying poses a real threat to students' ability to receive an education, aggressive policies extending schools' authority beyond the school's premises run the risk of treading on protected speech.²⁰⁹ Since school administrators may not know the extent to which they are legally liable or able to limit free speech in the classroom, lawmakers must take proactive steps to provide them with resources, clear laws, and guidance on these issues.²¹⁰

V. ADOPTING CYBERBULLYING LEGISLATION: A FEDERAL- AND STATE-BASED APPROACH AND A MODEL ACT

The MMCPA is the central piece of pending federal legislation addressing the issue of cyber-harassment.²¹¹ In addition to federal legislation, states have already utilized their legislatures to enact laws to combat cyber-harassment.²¹²

204. See *id.* (comparing state legislatures who provide schools with actual guidance to address cyberbullying with states that produce unfunded mandates or adopt vague "legislative declaration[s]"); see also Nate Schweber, *Parents of Student Who Committed Suicide Tell Rutgers University They May Sue*, N.Y. TIMES (Dec. 22, 2010), <http://www.nytimes.com/2010/12/23/nyregion/23rutgers.html> (providing an example of a family who may sue a public university for "failing to put in place and/or implement, and enforce, policies and practices that would have prevented or deterred such acts").

205. See Kaye, *supra* note 33; see also Schweber, *supra* note 204 (discussing the possibility of Tyler Clementi's parents suing Rutgers University for tort damages most likely under a wrongful death theory).

206. See Kaye, *supra* note 33.

207. See Nancy Willard, *The Authority and Responsibility of School Officials in Responding to Cyberbullying*, 41 J. ADOLESCENT HEALTH S64, S65 (2007) [hereinafter Willard, *Authority and Responsibility of School Officials*].

208. See WILLARD, EDUCATOR'S GUIDE, *supra* note 198, at 9.

209. See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (stating that "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech" and concluding the student would likely prevail in his claim against the school district).

210. HINDUJA & PATCHIN, IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 2, at 5.

211. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

212. See HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS, *supra* note 7, at 1.

An examination of legislation at the federal and state level as well as the model statute proposed by the Anti-Defamation League²¹³ are useful for developing future laws to confront cyberbullying.

A. *Federal Response and the MMCPA*

Despite its intention to protect individuals from the harms of cyberbullying, the MMCPA has been plagued by criticism from various groups. Many of these criticisms were addressed to the Congressional Subcommittee on Crime, Terrorism, and Homeland Security.²¹⁴ In a joint statement to the Subcommittee, various academics and experts in the field of cyberbullying and crime prevention voiced objections to the legislation on many different grounds, including the MMCPA's vagueness.²¹⁵ These experts specifically deemed the legislation to be "a faulty vehicle" for addressing a serious social problem.²¹⁶

While acknowledging the need for a response to cyberbullying, the experts articulated several concerns with the MMCPA.²¹⁷ Among these criticisms were concerns over free speech.²¹⁸ However, their chief concerns included that the legislation would be ineffective at addressing the "fundamental causes of cyberbullying" and could distract stakeholders from producing more effective intervention and prevention strategies.²¹⁹

Finally, the academics and experts provided the Subcommittee with guidance for what they believed would produce more effective legislation.²²⁰ The experts asserted that the Subcommittee's efforts should be focused on providing comprehensive funding for "safe schools and communities programs" in states, school districts, and local communities.²²¹ The experts also specified that schools and communities must mobilize to address the new risks presented to young people by new technologies.²²² The joint statement said that efforts to combat cyberbullying should not stem from the federal government but from local communities and schools, which actually have the capacity to support harassed students.²²³

213. ANTI-DEFAMATION LEAGUE, BULLYING/CYBERBULLYING PREVENTION LAW: MODEL STATUTE AND ADVOCACY TOOLKIT 11-17 (2009), available at http://www.adl.org/civil_rights/Anti-Bullying%20Law%20Toolkit_2009.pdf.

214. See JOINT STATEMENT ON THE MEGAN MEIER'S CYBERBULLYING PREVENTION ACT (2009), available at <http://www.cyberbully.org/documents/documents/cyberbullybill.pdf> [hereinafter JOINT STATEMENT].

215. *Id.*

216. *Id.*

217. *See id.*

218. *See id.*

219. *Id.* Further, Congressman Louie Gohmert notably remarked the bill "appears to be another chapter of over-criminalization." Kravets, *supra* note 122.

220. See JOINT STATEMENT, *supra* note 214.

221. *Id.*

222. *Id.*

223. *Id.*

Harvey Silvergate, speaking on behalf of the Cato Institute, focused his attack on the MMCPA on constitutional grounds by addressing the MMCPA's "vagueness."²²⁴ Silvergate primarily objected to the legislation on the grounds of First Amendment protected speech and Fifth Amendment due process issues.²²⁵ Due to the vagueness of the MMCPA, Silvergate's chief criticism was that the MMCPA would not be "comprehensible to the average citizen."²²⁶ Silvergate argued that use of terms such as "intimidate, harass, or cause substantial emotional distress" that are often prevalent in criminal statutes²²⁷ is inappropriate in the MMCPA because the sole behavior sought to be curtailed is speech.²²⁸ Silvergate reasoned that a typical citizen could not be expected to understand how to distinguish between free speech and conduct that equates to cyber-harassment based on the vague definitions associated with those terms and that such limitations would inevitably trample on the exercise of free speech under the First Amendment.²²⁹

The First Amendment issues also lead many critics to question its constitutionality.²³⁰ The vagueness of the MMCPA could make many political commentators and bloggers, who earn their living by being confrontational and inflammatory, prosecutable under the MMCPA.²³¹ However, although such language may be inflammatory or confrontational, it is for the most part protected under the First Amendment.²³²

Additionally, critics raise the issue that the case of Megan Meier is not an appropriate basis for a cyberbullying law because her case atypically involved adult-minor cyberbullying, whereas most cases of cyberbullying involve minor-on-minor cyberbullying.²³³ Critics assert that as it is currently written, the MMCPA would apply primarily to adults, and there is a paucity of evidence to suggest that cyberbullying is a problem propagated by adults.²³⁴

Furthermore, beyond the constitutional challenges to the MMCPA, it could also have the unintended consequences of making a behavior common among students felonious.²³⁵ Therefore, lawmakers may better serve the public by focusing their attention on prevention and on avoiding constitutional

224. *Hearings*, *supra* note 29.

225. *See id.*

226. *See id.* at 2.

227. *See, e.g.*, NEV. REV. STAT. § 388.133 (2011).

228. *Id.* at 3.

229. *Id.* at 8.

230. *See* Paige, *supra* note 28.

231. *See* Kotler, *supra* note 12.

232. *See* David Kravets, *Prison Awaits Hostile Bloggers*, WIRED, May 5 2009, available at <http://www.wired.com/threatlevel/2009/05/prison-awating-hostile-bloggers/> (stating that the MMCPA would never pass constitutional muster).

233. *See* Kotler, *supra* note 12.

234. *See id.*; *see also* Moyer, *supra* note 5 ("[C]yberbullying probably will remain most problematic for teenagers.").

235. *See* HINDUJA & PATCHIN, IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 2, at 1-3.

concerns, thereby helping to ensure that fewer individuals are impacted by cyberbullying.

B. State Models for Addressing Cyberbullying

As of March 2011, forty-four states passed laws calling for the adoption of anti-bullying policies in public schools.²³⁶ Of those states, thirty-one had laws addressing some form of electronic harassment, with six directly mentioning cyberbullying.²³⁷ The content of these laws vary greatly among the states.²³⁸ Some provide schools with considerable guidance and resources to development their policies while many others simply mandate school boards have a bullying and harassment policy, without addressing the actual content expected to be contained within the policies or providing resources to fund their efforts.²³⁹

Unfunded mandates place schools in tricky situations because legislatures demand school boards to take action without providing the schools appropriate guidance or resources to properly address the issue of cyberbullying.²⁴⁰ Many states simply pass laws saying, in effect, that “schools need to deal with this.”²⁴¹ Not only have legislatures stopped short in terms of providing specific instructions or a general framework within which schools can work, most have not even articulated a legal standard for schools to use when evaluating their role and the level of authority when confronting cyberbullying.²⁴²

School administrators find themselves in a precarious position when they see examples in the media where schools have been sued for taking action against a student when they should not have²⁴³ or for failing to take action when they should have.²⁴⁴ These administrators are ambivalent about what the

236. See HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS, *supra* note 7, at 1.

237. Davis, *supra* note 192.

238. See *id.*

239. See Christopher S. Burrichter, *Cyberbullying 2.0: A “Schoolhouse Problem” Grows Up*, 60 DEPAUL L. REV. 141, 148–50 (2010). Compare IND. CODE ANN. § 20-30-5.5-3 (LexisNexis 2007) (requiring the Indiana Board of Education to develop rules governing cyberbullying, yet failing to impose any limitation upon the Board’s actions of the scope of its control over student speech) with WASH. REV. CODE § 28A.300.285(3) (2011) (requiring school districts to collaboratively set harassment and cyberbullying policies “through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives”).

240. See Justin Patchin, *Cyberbullying Laws and School Policy: A Blessing or Curse?* CYBERBULLYING RESEARCH CTR., Sept. 28, 2010, <http://cyberbullying.us/blog/cyberbullying-laws-and-school-policy-a-blessing-or-curse.html>.

241. *Id.*

242. See *id.*

243. See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (finding that a school district likely overreached and violated a student’s First Amendment rights when it forced him to cleanup a personal homepage that made disparaging remarks about the school.).

244. See Denis Pelham, *Jury Orders Hudson Schools to Pay \$800K to Harassed Student*, DAILY TELEGRAM Mar. 6, 2010,

appropriate course of action is.²⁴⁵ Guidance for schools is needed to determine where the legal line of their authority is.²⁴⁶ Schools also need guidance so that they can implement a policy that will be effective at addressing the actual problem while remaining within constitutional boundaries.²⁴⁷

i. The Washington and New Hampshire Approach

Two states to examine when crafting cyberbullying legislation are Washington²⁴⁸ and New Hampshire.²⁴⁹ The Washington cyberbullying law calls on schools to adopt a model policy and also provides for a collaborative process to amend the policy to reflect the values and characteristics deemed important to the policy's stakeholders.²⁵⁰ Washington provides an example of a state that actually provides its schools with substantive minimum guidelines for what to contain in the policy, while also encouraging stakeholders to make improvements to better reflect the community's values.²⁵¹ However, a potential weakness of Washington's cyberbully law is that it restricts the scope of the policy to actions that take place "while on school grounds and during the school day,"²⁵² and is therefore ineffective when the cyberbullying occurs off-campus.

New Hampshire's law is also distinctive because it enables schools to intervene in cyberbullying cases that occur off school property "if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event."²⁵³ New Hampshire's law has been applauded for providing schools with more clarity regarding their legal responsibility to intervene, especially in incidents that

<http://www.lenconnect.com/news/courts/x2102343874/Jury-orders-Hudson-schools-to-pay-800K-to-harassed-student> (finding a school district liable for showing "deliberate indifference").

245. See WILLARD, EDUCATOR'S GUIDE, *supra* note 198 (acknowledging the paucity of case law addressing a school's liability, but noting the need for schools to also take precautions).

246. See Patchin, *supra* note 240.

247. *Id.*

248. See WASH. REV. CODE § 28A.300.285 (2011).

249. See N.H. REV. STAT. ANN. § 193-F:4 (2011); see also Sameer Hinduja, *New Hampshire's Cyberbullying Law, Upcoming Cyberbullying Conference*, CYBERBULLYING RESEARCH CTR., Oct. 22, 2010, <http://cyberbullying.us/blog/new-hampshires-cyberbullying-law-upcoming-cyberbullying-conference.html> (praising the New Hampshire law for providing schools with legal guidance when they have an obligation to intervene in bullying cases, including those that occur off-campus).

250. WASH. REV. CODE § 28A.300.285(3).

251. See *id.* § 28A.300.285(5) (calling on an "advisory committee . . . to develop a model policy prohibiting acts of harassment, intimidation, or bullying that are conducted via electronic means"); see also Alison King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 859 (2010).

252. WASH. REV. CODE § 28A.300.285(5).

253. See N.H. REV. STAT. ANN. § 193-F:4 (2011).

occur off-campus.²⁵⁴ The New Hampshire cyberbullying law's articulation of a school's jurisdiction to involve itself with off-campus instances of bullying or cyberbullying is valuable because it provides school administrators with clearer guidance regarding the extent of their authority to handle the issue of cyberbullying.²⁵⁵

C. *Anti-Defamation League: Federal/State Hybrid Model Proposed*

The Anti-Defamation League (ADL) prepared a model statute for states to adopt.²⁵⁶ The ADL Model Statute would require school districts to adopt an anti-bullying policy that is comprehensive, practical, and effective.²⁵⁷ The policy gives schools the resources they need to combat and respond to bullying and cyberbullying.²⁵⁸ It asserts that a strong and comprehensive anti-bullying statute will include a strong definition of bullying; address bullying motivated by race, religion, ethnicity, sexual orientation and other personal characteristics; include notice requirements for students and parents; set out clear reporting procedures; and require regular training for teachers and students about how to recognize and respond to bullying and cyberbullying.²⁵⁹ The ADL Model Statute's structure would present schools with more guidance and clarity about their role and responsibility in combating cyberbullying.²⁶⁰

The ADL Model Statute's notice requirements and proposed language for intervening in off-campus incidents, however, threaten the policy's effectiveness. First, the ADL Model Statute's parental notice requirement²⁶¹ may constitute a barrier for its effectiveness by deterring students from reporting incidents if they fear embarrassing information will eventually be revealed to their parents.²⁶² For the reasons discussed in Part III, Section A, this reporting feature may have an especially harmful impact on LGBTQ students as well as victims of cyberbullying when sexual content is involved.²⁶³

Additionally, the ADL Model Statute's proposed language to address school intervention in incidents that occur off-campus, utilizing two standards to justify intervention,²⁶⁴ may be too complex and possibly unconstitutional when applied in certain circumstances.²⁶⁵ The ADL's Model Statute first uses a

254. See Patchin, *supra* note 240.

255. See *id.*

256. See ANTI-DEFAMATION LEAGUE, *supra* note 213, at 11-17.

257. See *id.*

258. See *id.*

259. See *id.*, at 4-7.

260. See *id.* at 4-7.

261. *Id.* at 13.

262. See Blumenfeld & Cooper, *supra* note 1, at 122-23.

263. See *id.*

264. See ANTI-DEFAMATION LEAGUE, *supra* note 213, at 13.

265. See *id.* at 13. The term "harm" in this context is not necessarily limited to physical harm. *Id.*

reasonableness inquiry for considering the intent of the student's act.²⁶⁶ Second, it uses a separate standard to determine whether the student's act was "directed specifically at students and intended for the purpose of disrupting school, and has a high likelihood of succeeding in that purpose."²⁶⁷ If a school determines that a student's act fits within either standard, school intervention is justified.²⁶⁸ The use of two standards to determine whether a school has authority to regulate off-campus acts is too convoluted for schools to apply, especially since one requires a reasonableness inquiry that may go too far in regulating a student's off-campus activities to survive constitutional scrutiny in certain cases.²⁶⁹

VI. PROPOSED HYBRID APPROACH TO SUPPORT REPORTING OCCURRENCES OF CYBERBULLYING AMONGST THE MOST VULNERABLE POPULATIONS

The ideal federal law to address cyberbullying must protect the First Amendment, emphasize prevention, provide for intervention by schools in off-campus incidents, and establish base guidelines for schools to pursue, while also affording stakeholders flexibility to implement amendments that emphasize the values and concerns held in their communities. The positive features of the Washington²⁷⁰ and New Hampshire²⁷¹ cyberbullying laws, along with the general framework and language of the ADL Model Statute,²⁷² should be incorporated to produce a federal model policy for dealing with cyberbullying for public schools within each state to implement. Each of the statutory schemes alone is insufficient to comprehensively address cyberbullying because none of the three legal models meet all of the above-mentioned objectives. However, a hybrid law incorporating the positive features of each of these statutory approaches would produce a strong federal model law for states to adopt to effectively address the issue of cyberbullying.

266. *Id.* at 12-13 (“(3) The policy shall contain . . . (vii) A statement that this policy will apply to an electronic communication whether or not this conduct originated on school property or with school equipment so long as: (1) a reasonable person should know, under the circumstances, that the act will have the effect of harming a student or damaging the student's property, or placing a student in reasonable fear of harm to his or her person or damage to his or her property; and has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.”).

267. *Id.* (“(3) The policy shall contain . . . (vii) A statement that this policy will apply to an electronic communication whether or not this conduct originated on school property or with school equipment so long as: . . . (2) the act is directed specifically at students and intended for the purpose of disrupting school, and has a high likelihood of succeeding in that purpose.”).

268. *Id.*

269. *See id.* at 13.

270. WASH. REV. CODE § 28A.300.285 (2011).

271. N.H. REV. STAT. ANN. § 193-F:4 (2011).

272. ANTI-DEFAMATION LEAGUE, *supra* note 213, at 11-17.

A. *The Hybrid Proposal*

The federal government's role should be to create a model cyberbullying policy and incentivize its adoption by public schools nationwide. The model policy should use the positive attributes of the ADL Model Statute's framework, such as establishing a clear definition of cyberbullying, mandating clear reporting procedures, requiring regular training for teachers and administrators, and addressing bullying motivated by race, religion, ethnicity, sexual orientation, and other personal characteristics.²⁷³ The model policy should also include the collaborative process features of the Washington statute, which provides for community stakeholder representatives (including students) to meet in order to amend the model act to reflect the community's priorities, values, and concerns.²⁷⁴ Further, the policy should draw on the New Hampshire statute's language, which clearly empowers schools to get involved in cyberbullying instances outside school property if the conduct "interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event and requires the school to take action within forty-eight hours."²⁷⁵

Like the Washington statute,²⁷⁶ the model policy should also include minimum guidelines for school boards. While the model policy's structure and language should closely resemble the ADL Model Statute, it should remove the ADL Model Statute's reporting requirement and language pertaining to schools regulating off-campus speech, and instead adopt the clearer language from the New Hampshire Act, which empowers schools to address instances of cyberharassment that occur outside the classroom under certain circumstances.²⁷⁷ In addition to its clearer language, the New Hampshire law is also consistent with current Supreme Court jurisprudence relating to student speech. Because New Hampshire's law essentially extends the language from *Tinker*, the constitutional concerns of the federal law being ruled unconstitutional are limited.²⁷⁸ Finally, Washington's cyberbullying law's collaborative process feature²⁷⁹ should also be applied to the model policy. This would permit community stakeholders to amend the model policy to emphasize positive character traits and values of their community.²⁸⁰

273. *See id.*

274. *See* WASH. REV. CODE § 28A.300.285(3).

275. N.H. REV. STAT. ANN. § 193-F:4 (providing that bullying or cyberbullying occurs when an action or communication as defined "(b) [o]ccurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event").

276. *See* WASH. REV. CODE § 28A.300.285(1).

277. *See* N.H. REV. STAT. ANN. § 193-F:4.

278. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-14 (1969).

279. *See* WASH. REV. CODE § 28A.300.285(3).

280. *See id.*

B. Argument for Hybrid Approach to Combating Cyberbullying

The suggested approach outlined above for dealing with cyberbullying would be a more effective strategy to pursue than the MMCPA because it would first emphasize prevention through the integration of the ADL Model Statute's school-based approach into the federal model. By pursuing the creation of a federal "hybrid policy"²⁸¹ for states to adopt and amend, the federal government would transform its role of merely punishing free speech offenders to providing states and schools with a substantive cyberbullying prevention strategy. Additionally, the adoption of the proposed federal hybrid model would make schools, as opposed to courts, the central institution for combating cyberbullying.

i. The Hybrid Policy's School-Based Enforcement Model Is Superior to the MMCPA's Punitive Model

Schools are better institutions than courts to address the issue of cyberbullying. Since education is the mission of schools, they are better equipped to address cyberbullying before it occurs by educating students and faculty members about it. Schools are also often the link between the cyberbully and victim and are, therefore, better positioned to intervene, punish, and rehabilitate the cyberbully. Schools are also better able to provide support to a victim. The MMCPA's only stated remedy is to punish the offender through fine and/or imprisonment.²⁸²

Additionally, schools are superior to courts for handling this issue because they can be a more powerful deterrent mechanism, have more flexibility to protect victims, and can operate more efficiently. A school's response to the issue would be more visible to the cyberbully and victim, as well other students at the school, whereas the court system usually protects the privacy of minor offenders.²⁸³ Thus, empowering schools to handle these matters would be a more powerful deterrent mechanism because the repercussions of cyberbullying would be more transparent at a school and would therefore possibly deter other students from cyberbullying due to the visible consequences.

Schools are also more capable of protecting victims than courts. Instances of cyberbullying may involve private and sensitive information and the use of the court system may force victims to disclose potentially embarrassing information to the court in order to prosecute the cyberbully.²⁸⁴ On the other hand, a school's main interest would be preventing future incidents and

281. By "hybrid policy" I am referring to the federal model that would incorporate the Washington, New Hampshire, and ADL Model Statute's features into a single policy.

282. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

283. See David C. Howard et al., *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 204 (1977).

284. Regardless of whether a proceeding involving a juvenile defendant or victim is conducted publicly or privately, the basic rights and obligations of the parties to prove or defend claims would be preserved.

protecting the victim's right to have the opportunity to receive an education in a safe environment.²⁸⁵ Therefore, as a more flexible institution than the court, a school could protect a victim's privacy because it would not be as concerned with the rights of both parties.²⁸⁶

Finally, schools are more efficient vehicles to deal with cyberbullying than courts. It would be an inefficient use of resources to federally prosecute a potentially high percentage of the nation's youth for cyberbullying before addressing the problem at its root, which the MMCPA could theoretically do.²⁸⁷ A school can educate students and faculty about cyberbullying and prevention, as well as handle the instances that do occur more efficiently because there would be fewer litigation costs and likely fewer incidents because prevention would be emphasized.²⁸⁸

ii. Addressing Off-Campus Speech by Extending Current Supreme Court Precedent to Online Communication

Like the New Hampshire statute, the "hybrid approach" would clarify when a school can get involved with off-campus incidents of cyberbullying.²⁸⁹ As previously discussed, schools often suffer from a lack of state and federal guidance regarding their jurisdiction to investigate and punish students for cyberbullying that occurs off-campus.²⁹⁰ The incorporation of this language into the hybrid model would at least provide schools with clearer guidance on this matter.

iii. The Value of Engaging Stakeholders and Applying Washington's Scheme

Finally, this proposed hybrid model would be superior to the MMCPA because it would engage the stakeholders of the policy (including students, teachers, school administrators, parents, and law enforcement personnel) in a collaborative process to take into consideration many of the sensitive issues associated with cyberbullying.²⁹¹ Hopefully, issues such as implementing a

285. See Willard, *Authority and Responsibility of School Officials*, *supra* note 207, at S65.

286. However, a school may be forced to report certain instances such as the dissemination of sexual content if a minor is involved or if a student is thought to be a danger. See WILLARD, *EDUCATOR'S GUIDE*, *supra* note 198, at 5-6 (discussing instances when a school may be forced to contact law enforcement).

287. See HINDUJA & PATCHIN, *IDENTIFICATION, PREVENTION, AND RESPONSE*, *supra* note 2, at 2. Adults would also be subject to prosecution under the MMCPA. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009) (failing to limit prosecution to any age group).

288. Logically, a successful system focusing on prevention rather than punishment would result in fewer incidents of legally actionable cyberbullying.

289. N.H. REV. STAT. ANN. § 193-F:4(I) (2011).

290. See Willard, *Authority and Responsibility of School Officials*, *supra* at 207.

291. See WASH. REV. CODE § 28A.300.285(3) (2011).

considerate reporting system and student privacy concerns could be discussed and debated during this collaborative process.

The collaboration at the municipal level would also be more attentive to concerns over federalism. Although the basic guidelines and mandates for action would come from the federal government, the autonomy of municipalities would be preserved because the Washington law's feature providing for a collaborative process would give local stakeholders more of a role in actually constructing a policy.²⁹² This balance would, therefore, likely be more palatable to state's rights advocates than the MMCPA.

CONCLUSION

Cyberbullying will remain a commonplace issue in society with the potential to hurt the nation's youth until actions are taken either by schools or legislatures to address it. Laws need to be updated to address cyberbullying, but must also be sensitive to the concerns of especially vulnerable victims of cyberbullying, such as school-aged females, sexual minorities, and victims involved with the transmission of sexual content, all of whom are uniquely impacted by this form of harassment.

Legislators must also resist the temptation to tread on student speech by improvidently adopting vague statutory definitions and assigning overly broad authority to schools to rectify instances of cyberbullying. In most instances, schools should manage cyberbullying instead of courts, because schools are in a better position to both prevent cyberbullying on the front end through education and provide appropriate punishment to deter the harassment before it rises to criminal conduct.

Congress should avoid reactionary laws such as the MMCPA and should instead pass a law that requires states to adopt a federal model, such as the one proposed in Part VI, Section B. Congress should permit local stakeholders in the policy to amend it to better fit the concerns and values of their community. Finally, when amending these policies, stakeholders should be weary of adopting parental disclosure requirements. This is because such policy features may in fact deter some of the most vulnerable students, including victims of content-based cyberbullying and sexual minorities, from reporting instances.

Without redress, existing laws will continue to fail to protect the youth in this nation. The problems associated with cyberbullying will only grow as the influences of technology in our daily lives increase. The current patchwork of state laws is not an adequate solution to cyberbullying, an issue that deserves the attention of national lawmakers due to its potentially grave consequences, including death.

292. *See id.*