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Cyberbullying: Adaptation from the Old School Sandlot to the 21st Century World Wide Web—The Court System and Technology Law's Race to Keep Pace

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CYBERBULLYING: ADAPTATION FROM THE OLD SCHOOL SANDLOT TO THE 21ST CENTURY WORLD WIDE WEB— THE COURT SYSTEM AND TECHNOLOGY LAW'S RACE TO KEEP PACE

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I. INTRODUCTION

No longer are just consumers, retailers, and marketers involved in the chain of commerce affected on a daily basis by the technological advances making our world a much smaller place. Today, educators are confronted, on a daily basis, by high-tech communication devices in the hands of their students. It had been assumed that such technology in the hands of our young people would help them remain competitive in an increasingly technological world. However, such technology may be causing more trouble than good for the children of America. While computers, PDAs, smartphones, and MP3 players are utilized by teachers as an effective medium to teach students, such devices are also being used by students to cheat in order to get ahead. Other apparent problems are cell phones ringing in class and students communicating to each other via text message during class.[1] While these may be some initial concerns leading to hesitance by school administrators to allow such devices to enter schools, a more growing concern that directly

1. Jennifer Dobson, *Cell Phones: How to Deal with this New Classroom Problem*, A1 ARTICLES, Aug. 9, 2010, http://www.a1articles.com/article_1687910_22.html.

affects academia and personal lives is raising attention across the country.[2]

The use of modern communications devices to mock, tease, imitate, and coerce others (students, teachers, and/or administrators) is proving to have an effect inside the schoolhouse gates, regardless of where the communication originates. However, in contention with a school's interest in properly teaching its students is the student's freedom of speech under the U.S. Constitution, First Amendment. A student's freedom of speech rights on school grounds are not the same as those of the everyday American citizen.[3] Similar to the abbreviated rights students have in regard to search and seizure on school property,[4] students' speech rights are more restricted than those of protestors on public streets or people writing editorial in public newspapers.

The overarching question facing the courts today is to what extent may schools limit off-campus speech, emanating from off-campus online social media outlets such as Facebook but which has an on-campus effect. Prior to the digital age, almost all speech that affected the classroom originated in school or from a school related activity. Technological advances have required the passage of new legislation to combat cyberbullying. The freedom of speech issue is at the forefront of new legislation being proposed, or already enacted, with the purpose of curtailing destructive or hurtful communications by students.[5]

Part II of this Article will explain the jurisdiction of public schools as it applies to students' freedom of speech rights. Part II will start with standard student free speech issues and analyze the four seminal Supreme Court cases that lay out the current judicial posture regarding freedom of speech rights in schools while also illustrating a school's jurisdiction. Next, Part III will discuss the split in the Third Circuit

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2. *See* Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES, June 27, 2010, *available at* http://www.nytimes.com/2010/06/28/style/28bully.html.

3. *See generally* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that the school district acted within its authority in imposing sanctions on students who used lewd language in a school speech).

4. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). The Court concluded, along with the majority of courts,

> that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

Id.

5. *See* Stephen Balkam, *Protecting Kids While Protecting Free Speech*, FIRST AMENDMENT CENTER, Mar. 31, 2009.

Court of Appeals, involving two similar cases, and then finally address potential approaches the Supreme Court may take to tackle the issue of technology affecting behavior in the classroom.

Part IV of this Article will address cyberbullying as it applies to free speech issues and the criminal law landscape. As will be shown, cyberbullying is becoming more and more prevalent in today's increasingly interconnected online world, particularly among kindergarten through twelfth grade students in public schools.[6] Incidents of cyberbullying are occurring at such an accelerated rate on social networking sites, such as Facebook and MySpace, that state legislatures across the country are rapidly adopting measures to combat the problem.[7] Next, Part IV will discuss the different approaches to cyberbullying in the school system and the criminal law system. Part IV will then discuss how the criminal law establishment currently combats cyberbullying and explain why the criminal law institution should take further jurisdiction and discipline over cyberbullying incidents. Starting with an analysis of the inadequacy of former and current cyberbullying laws, Part IV will address and analyze what states have done across the country to combat these innovative cyber victimization incidents. Additionally, Part IV will take an in-depth look at the Florida Jeffrey Johnston Act (Johnston Act) and in Part V, Federal Megan Meier Laws (Meier Law) recently enacted to combat cyberbullying. Lastly, Part V will close with a projection of what the future landscape of anti-cyberbullying laws may look like, while proposing solutions regarding the criminal justice system in Florida, and at the federal level.

II. THE FOUR SEMINAL SUPREME COURT CASES DEFINING SCHOOL SPEECH

A. Tinker v. Des Moines School District; *The Formal Balancing Test*

The usual starting point involving a student's free speech rights begins with *Tinker v. Des Moines Independent Community School District*.[8] In *Tinker*, in December 1965, two teenage boys and a teenage girl wore black armbands to their public schools in Des Moines, Iowa as sign of protest against the Vietnam War.[9] The principals at the Des Moines schools became aware of the students' plan prior to them

6. *See* Cyberbullying Among Youngsters: Profiles of Bullies and Victims, http://sageinsight.wordpress.com/2011/04/28/cyberbullying-among-youngsters-profiles-of-bullies-and-victims/ (last visited June 30, 2011).

7. *See* Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 848-49 (2010).

8. Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503 (1969).

9. *Id.* at 504.

executing it and adopted a last minute policy that stated: "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[10] The three students were aware of this policy and still wore the armbands on December 16th and 17th, after the policy had taken effect.[11] As a result of wearing the armbands, all three students were sent home and suspended from school until they would agree to return not wearing the armbands.[12] The students did not return to school until after New Year's Day.[13]

Prior to the case reaching the Supreme Court, the District Court dismissed the complaint brought forth by the three students.[14] This dismissal was affirmed without opinion by a divided Eighth Circuit Court of Appeals that sat *en banc*.[15]

At the Supreme Court, Justice Fortas' opinion emphasized the following: "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16] He went on to say that freedom of speech rights must be balanced against the safeguards that educators must impose to control conduct in schools.[17] The Court concluded that a balancing act must be performed when weighing a student's First Amendment rights with the policies invoked by school officials.[18]

The Fortas opinion focused on the substantiality of the disruption within the school, grounding its decision from *Burnside v. Byars*[19] which held conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" may be proscribed.[20] The Court went on to state that if the speech does not interfere with the day-to-day operations of the school or with the individual rights of the students in the school, then no restriction may be placed on the speech.[21] The Court further noted that

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* This is when the planned protest was scheduled to be over. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 506.
17. *Id.* at 507; *see* Epperson v. Arkansas, 393 U.S. 97, 109, (1968) (invalidating an Arkansas statute that prohibited the teaching of evolution in the classroom of public schools).
18. *See Tinker*, 393 U.S. at 507.
19. *See* 363 F.2d 744, 749 (1966).
20. *Tinker*, 393 U.S. at 505. In *Burnside,* a group of students wore "freedom buttons" to protest racial segregation in their state. 363 F.2d at 747. The school principal ordered the students to remove the buttons because he thought it would lead to a commotion. *Id.* at 746-47. The Fifth Circuit of Appeals held that school officials could not prohibit the students from wearing the buttons because no evidence was shown that the wearing of the buttons would cause a disruption. *Id.* at 747.
21. *See Burnside*, 363 F.2d at 749.

the school in the instant case produced no evidence pointing to classes being disrupted or any threats or acts of violence due to the students wearing the armbands.[22] The Court then rejected the argument posed by the School District (the same argument the District Court relied on in its opinion) that the School District acted "based upon their fear of a disturbance from the wearing of the armbands."[23] The Court went on to state that such apprehension of a disturbance is not enough to supersede the right to one's freedom of speech, on or off of school grounds.[24] The Court supported its argument by referring to the country's history, its national strength, and the independence of Americans to be allowed to think and express themselves freely.[25] Additionally, the Court stated that when a school official is justified in prohibiting a particular kind of speech, the school official "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[26] Thus, if the school official is not able to show a valid school interest in preventing a potential and actual disturbance at school while imposing a valid restriction upon a student's First Amendment rights, the student is entitled to express their views and opinions.[27]

In sum, the *Tinker* standard is the "formal balancing test" used to determine if a school official has infringed on a student's right to free speech, but as the cases below will demonstrate, limits are set as to how far students can push the limits of their free speech.

B. Bethel School District No. 403 v. Fraser; *Restrictions Imposed Upon Content of Free Speech*

In *Bethel School District No. 403 v. Fraser*,[28] Matthew Fraser, a student at Bethel High School, gave a speech at a school-sponsored student assembly, attended by approximately six hundred students, nominating a fellow classmate for student office.[29] The content of Fraser's speech contained an "elaborate, graphic, and explicit sexual metaphor."[30] As a result of his speech, Fraser was suspended for three days because his conduct violated the school's student discipline code.[31]

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22. *Tinker*, 393 U.S. at 508.
23. *Id.*
24. *Id.*
25. *Id.* at 508-09.
26. *Id.* at 509.
27. *Id.* at 511.
28. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
29. *Id.* at 677.
30. *Id.* at 678.
31. *Id.* The disciplinary rule is stated as "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.*

In *Fraser*, the Supreme Court reversed the Ninth Circuit's decision and held in favor of the School District by stating the school district was well within in their "permissible authority" to impose sanctions on Fraser due to the content of his speech.[32] The Court utilized the *Tinker* standard to some degree but went beyond it by addressing the issue of a "material disruption" of the classroom, stating that such behavior conflicts with rights of other students.[33] The Court further implied that more deference should be given to school officials when they are stepping in to regulate speech that is unrelated to any political viewpoint, thus possibly differentiating the levels of interference for non-political speech as opposed to political speech on school grounds.[34] The First Amendment rights of students in public school "are not automatically coextensive with the rights of adults in other settings."[35] The Court supported its decision by stating that vulgar and lewd speech in schools is not within the purview of the First Amendment protection because such speech would "undermine the school's basic educational mission."[36] By punishing the student, the school is disassociating itself from such offensive speech that would directly conflict with the core values and beliefs of public school education.

Differing from *Tinker*, the holding in *Fraser* distinguished the punishing of a student for his non-politically motivated message at a school sanctioned event from the protection of politically-motivated speech at school. Additionally, the Court began to build its "sponsor vs. tolerate" perspective,[37] which is evinced and utilized more clearly in *Hazelwood School District v. Kuhlmeier*.[38]

C. Hazelwood School District v. Kuhlmeier; *Tolerating or Promoting Student Speech?*

In *Hazelwood*, three student members of the school newspaper claimed their First Amendment rights were violated when school officials chose to delete two pages of articles from the May 13, 1983 issue.[39] The newspaper was a school-sponsored extracurricular activity that received money from the school and was overseen by school board

32. *Id.* at 685.
33. *See id.* at 680-81, 694.
34. *See id.* at 681.
35. *Id.* at 682.
36. *Id.* at 685.
37. The Court begins to lay the groundwork for their argument of when a school should tolerate speech (*Tinker*) and when it will not (*Fraser* and *Hazelwood*). In this connotation, the court sponsors the speech if they allow it on school grounds; hence, by not acting, they are sponsoring the speech. In the cases mentioned above, the court talks about differentiating between "sponsoring vs. tolerating" the speech.
38. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
39. *Id.* at 262.

officials.[40] The Court of Appeals for the Eighth Circuit reversed the District Court's ruling, which held that the school newspaper was not a part of the basic student curriculum and its main focus was to express students' viewpoints.[41] Furthermore, the Appeals Court classified the newspaper as a public forum, thus prohibiting school officials from interfering with student speech except when necessary to avoid material and substantial interference with classroom.[42] Additionally, the Appeals Court stated school officials may censor school newspaper articles only if an invasion of the rights of others is found to rise to the level of tort liability; however, the Appeals Court found no such level of culpability in this case.[43]

When the case made its way to the Supreme Court, the Court focused on the difference between tolerating student speech and promoting student speech.[44] When a student's speech is conveyed through a school-sponsored medium or publication, such as the school newspaper, schools officials are "entitled to exercise greater control" than in instances in which students convey a message though their own medium "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[45] The Court further explained that the same standard need not be applied when determining when a school chooses not to lend its name to endorse student expression.[46] The Court went on to hold that a student's First Amendment rights are not infringed upon when school officials choose to censor certain articles as "long as their actions are reasonably related to legitimate pedagogical concerns."[47]

With *Tinker* setting the threshold as to why and to what degree a school must tolerate student speech; *Fraser* goes beyond the *Tinker* standard by granting school officials more deference over non-political speech. *Hazelwood* then created the tolerate versus sponsor viewpoint involving on-campus speech in a school-sponsored activity. Lastly,

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40. *Id.* at 262-63.

41. *Id. at 265.*

42. *Id.* The Court of Appeals applies basic First Amendment rights in a public forum while using the *Tinker* standard as an exception to punish the students if the facts warrant such punishment. *Id.*

43. *Id.* at 265-66. (noting that the Court of Appeals created another exception where the arm of the school can limit student speech).

44. *Id.* at 271-72.

45. *Id.* at 271 (differentiating between the *Tinker* students who expressed their opposition to the war through personal expression by wearing armbands and the students in *Hazelwood* who expressed their view in a school-sponsored medium or publication).

46. *Id.* at 272.

47. *Id.* at 273.

Morse v. Frederick[48] attempted to answer the question of if speech occurring off-campus can result in punishment by a public school.

D. Morse v. Frederick*; May Off-campus Speech Be Punished On-campus?*

Morse was the first case to deal with student speech originating off-campus. In *Morse*, a high school principal witnessed some of her students displaying a banner containing a message which appeared to endorse the use of illegal drugs, at a school-sponsored event, off of school property.[49] Instructing the students to take down the banner and confiscating the banner, the principal suspended the one student who refused to comply.[50] The Ninth Circuit Court of Appeals reversed the lower court's holding that a violation of the student's First Amendment rights occurred.[51] The Appeals Court chose to apply a strict application of the *Tinker* standard and held, even though the action took place at a school-sponsored event, there was no evidence of a substantial and material disruption of a school activity.[52]

On appeal, the Supreme Court held that a principal may restrict student speech at a school-sponsored event when such speech may be reasonably related to promoting illegal drug use.[53] The Court focused on the severity of the drug use problem in this country and stated the promotion of illegal drugs was reasonably related to this problem.[54] Continuing its argument, the Court noted it is inherent that public schools play an important role in the education of students to prevent drug use.[55] Consistent with the principles of the past cases—*Tinker*, *Fraser*, and *Hazelwood*—the *Morse* Court focused on a "reasonableness test."[56]

Once again the Supreme Court chose to go down a line of reasoning different from the *Tinker* standard set forth decades before. Even though *Morse* expands the range of when schools may regulate student speech, by including student speech which occurs outside the school walls at a school-sponsored event, it does not provide clarity or answers to how the broad *Tinker* standard should be applied because the Court chose to utilize a reasonableness standard instead. In sum, depending on the facts of the case, the Court may choose to utilize the *Tinker* standard or the

48. 551 U.S. 393 (2007).
49. *Id.* at 396.
50. *Id.*
51. *Id.* at 399.
52. *Id.*
53. *Id.* at 410.
54. *Id.* at 407-08.
55. *Id.* at 408.
56. *Id.* at 397.

Morse standard in its application of the law.

The chart below summarizes the key information from the four seminal cases.[57]

Case	Type of Speech	Location of Speech	School Event	Evidence of Interference with School Acknowledged	Apply Tinker	Holding	Prevailing Party
Tinker	Symbolic Political Speech	On Campus	No	No	N/A	Student speech may be regulated when it will lead to a material and substantial disruption of work and discipline of school	Student
Fraser	Non-Political Speech	On Campus	Yes	Yes	Slight	Constitutional rights of students are not coextensive of adults Tinker Standard is not absolute	School
Hazel wood	Non-Political Speech	On Campus	Yes	No	No	School officials may exercise control over student speech so long as their actions are reasonably related to pedagogical concerns. Establishes tolerate vs. sponsor viewpoint	School

57. This chart is a compilation of the four Supreme Court cases dealing with student speech in public schools. It is meant as an illustrative guide to categorize the important facets of each case.

Case	Type of Speech	Location of Speech	School Event	Evidence of Interference with School Acknowledged	Apply Tinker	Holding	Prevailing Party
Morse	Non-Political Speech	Off Campus	Yes	No	No	Student speech may be regulated at a school sponsored event when such speech may be reasonably related to promoting illegal drug use.	School

III. THE THIRD CIRCUIT SPLIT

A. *(Cyber)Bullying Turns to Electronic Communications and the Internet*

With the backdrop of student free speech laid out, this Article now turns to a new wave of cases involving electronic speech by students which occur off-campus and are, arguably, not related to any school activity. Recently, the Third Circuit Court of Appeals rendered two decisions in two seemingly similar cases, with different results, on the same day.

1. *J.S. v. Blue Mountain School Dist.*; Disciplining Off-campus Speech

In *J.S. ex rel. Snyder v. Blue Mountain School District*,[58] two eighth graders created a fictitious Myspace.com[59] profile of their school's principal, from a computer at home.[60] The fictitious profile painted the principal, James McGonigle, as a bisexual, sex addict pedophile.[61] After discovering the profile, McGonigle met with the Superintendent and Director of Technology for the school district with a printed copy of the

58. J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010), *Rehearing en Banc Granted, Opinion Vacated* (Apr. 9, 2010).

59. A social networking website.

60. 593 F.3d at 290-91.

61. *See id.* at 291.

profile.[62] Subsequently, it was determined the two eighth graders committed a serious infraction of the school's disciplinary code and McGonigle informed the students that they would receive a ten-day suspension from school.[63]

As a result of the suspension, one of the eighth graders, through her parents, filed suit against the Blue Mountain School District claiming a violation of her free speech rights, Due Process rights, rights under Pennsylvania State Law, and her parents' Fourteenth Amendment substantive due process rights.[64] In the interest of brevity, this Article will solely focus on the part of the decision regarding the student's free speech rights. The District Court noted that the profile did not "substantially and materially" disrupt school, but it did cause some disruption.[65] Ultimately, the case turned on the fact that the "lewd and vulgar off-campus speech had an effect on-campus," and the District Court ruled in favor of the School District.[66]

On appeal, the Third Circuit held "off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."[67] By focusing its legal analysis on the interaction between the creation of the fictitious MySpace profile and the Middle School,[68] the Appeals Court pointed to numerous disruptions including: disruptions inside the classroom, canceling of student counseling sessions due to restructuring of schedules, disturbances on-campus when the two eighth graders returned to campus, and an overall deterioration of discipline in the Middle School among the eighth grade student body.[69] The court then went on to state that such minor disruptions could compound into a much larger issue if not acted upon early enough.[70] Thus, it seems clear that school officials are endowed with the inherent power to deter and prevent potential disruption from occurring on-campus.[71]

2. *Layshock v. Hermitage School District*

Similar to the case above, and decided on the same day, *Layshock ex*

62. *Id.* at 292.
63. *Id.* at 293.
64. *Id.* at 294-95.
65. *Id.* at 295.
66. *Id.*
67. *Id.* at 301. *See also* New Jersey v. T.L.O., 469 U.S. 325 (1985).
68. *Blue Mountain Sch. Dist.*, 593 F.3d at 293.
69. *See id.* at 294.
70. *See id.* at 301-02.
71. *See id.* at 302.

rel. Layshock v. Hermitage School District,[72] involved a student using a computer off-campus to create a fake MySpace profile of his high school principal, Eric Trosch.[73] As a result of creating the fake profile, Layshock was in violation of the school discipline code and was punished with a suspension from school.[74]

Layshock filed a suit in District Court that included a claim asserting a violation of his First Amendment rights.[75] The District Court entered summary judgment in favor of Layshock on the First Amendment claim because the school district "could not 'establish[] a sufficient nexus between [Layshock]'s speech and a substantial disruption of the school environment[].'"[76] Instead of making an argument regarding the relationship between the speech and the disruptions it caused or would have caused on school grounds (the *Tinker* standard), the School District attempted to show a nexus between the creation and distribution of the speech and the School District permitting itself to regulate its conduct, resting its analysis akin to *Fraser*.[77] However, the conduct in *Fraser* occurred on-campus, thus according to *Fraser*, no material disruption need be shown.[78] Here, because there was no finding of any material or substantial disruption occurring or likely to occur as a result of Layshock's speech, a school official's administrative arm can only stretch as far as the schoolhouse gates and may not extend outside the gates unless evidence of a disruption or potential disruption is shown.[79]

3. Why the Split?

The difference in rulings between these two factually similar cases rested solely on the argument the School District chose to present in *Layshock*. In *Blue Mountain*, the court overlooked the fact that the speech occurred off-campus and implemented a straight forward *Tinker* application based on the School District's argument of the multiple disruptions occurring on-campus with the potential for further substantial disruption to occur.[80] Furthermore, by choosing to overlook the fact the speech occurred off-campus, the Appellate Court gave

72. Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), *Rehearing en Banc Granted, Opinion Vacated* (Apr. 9, 2010).

73. *Id.* at 252.

74. *Id.* at 254.

75. *Id.* at 254-55.

76. *Id.* at 258, 264.

77. *Id.* at 259.

78. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599-600 (D. Pa. 2007) (stating "[t]here is no evidence that Justin engaged in any lewd or profane speech while in school."). *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

79. *See Layshock*, 593 F.3d at 263; *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1044-45 (2d Cir. 1979).

80. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 298 (3d Cir. 2010).

greater weight to the disruptions or potential disruption occurring or that could occur on-campus.[81]

While in *Layshock*, however, the School District focused its argument on the vulgarity of the off-campus speech to be sufficient enough to warrant punishment without citing to any disruption occurring (or that could occur) on-campus.[82] It appears the Third Circuit's approach to regulating off-campus speech rested solely on its effect, or potential effect, on-campus, a straight forward *Tinker* application.[83]

In sum, it is plausible that the Appellate Court understood the nuance it was creating, which is why it issued both of these decisions on the same day. Accordingly, the court used these two cases to highlight the importance of the level of on-campus disturbance created by the off-campus speech.

B. *Analyzing Off-Campus Speech's Effects in the Classroom*

The inevitable question before us now is whether there is a standard of analyzing speech occurring off-campus that effects work inside the classroom, and if so, what is that standard? Prior to the modern ubiquitous use of the Internet, courts were confronted solely with regulating speech occurring on-campus or at a school-sponsored event. The standard set forth in *Tinker* or the exceptions laid out in *Fraser*, *Hazelwood,* and *Morse* all entailed speech occurring under the purview of public schools. Today, however, public schools must grapple with how to confront online speech originating off-campus that may cause disruption inside school walls, especially speech that originates on the Internet. There are a plethora of cases[84] that offer examples of rulings in favor of school districts where the school district was able to show a sufficient nexus between the speech and a material and substantial disruption in the classroom.[85] If courts are going to shift their ideology towards a pure *Tinker* standard when evaluating off-campus speech, parameters must be meted as to what qualifies as a substantial disruption to classroom activity. This approach will give school officials greater latitude in administering punishment as the threshold school

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81. *Id.*; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (stating if school officials are able to "demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities").

82. *See generally* 593 F.3d 249 (3d Cir. 2010), *Rehearing en Banc Granted, Opinion Vacated* (Apr. 9, 2010).

83. *See generally Tinker*, 393 U.S. 503.

84. *See generally* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of. Educ., 494 F.3d 34 (2d Cir. 2007); J.S. *ex rel.* Snyder v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).

85. *See Layshock*, 593 F.3d at 261-63.

officials must meet is lowered substantially.

Furthermore, if no substantial disruption occurs because of the quick action by school officials to address the problem early, what will actually be deemed a potential substantial disruption within the school? The standard set by *Tinker* gives school officials broad discretion in determining when an actual disruption has occurred and if one is foreseeable.[86] Such power lends itself to a slippery slope because focus is given to the effect of the speech without contemplating if the school is empowered to punish the speaker.[87] However, school officials may not infringe on a student's freedom of expression if the school's action is solely based on fear or apprehension.[88] Expanding the school's authority grants schools the power to oversee and discipline all aspects of a student's life.[89] So where will the line be drawn?

As we look forward from the analysis of the aforementioned cases in mind, it may be said that courts grant great deference to school officials in disciplining students whose non-political speech violates a well established code of conduct rule, originating on or off-campus, where a substantial nexus can be illustrated between a material substantial disruption that has occurred or is likely foreseeable with the educational mission or safety of other students in public schools. With a majority of new Internet cases emanating under these circumstances, and the Supreme Court yet to take a case involving online speech in public schools, the courts will most likely take a step back and allow the schools to continue to play judge, unless state legislatures step in to regulate online speech, and ultimately cyberbullying.[90] Such an approach allows schools to "balance the needs of a student's right to self-expression and the school's need to maintain an orderly and safe educational environment."[91] With more attention being drawn to the issue of cyberbullying by lawsuits and media outlets, legislatures across the country are trying to keep up with the consequences of these emerging technological advances through legislative acts.

86. *See* Benjamin Heidlage, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 583-84 (2009).

87. *Id.* at 584.

88. *Tinker*, 393 U.S. at 508.

89. Heidlage, *supra* note 86, at 586.

90. *See* T.L.O., 469 U.S. 325, 340 (1985).

91. Sandy S. Li, Notes & Comments, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 102 (2005).

IV. CRIMINAL LAW LIABILITY AMONG THE STATES

A. *Cyberbullying Takes Legislative Form*

Moving from traditional free speech issues such as those addressed by *Tinker*, schools, states, and courts are presented with a new phenomenon—namely online free speech issues when that online speech is directed at hurting another. Cyberbullying is a recent phenomenon accompanying the age of the Internet and virtual world. According to the Department of Justice, 77% of middle school students say they have been bullied or threatened by other kids on and offline.[92] To combat this new wave of bullying and ease the burden of prosecution, many states have now altered their existing harassment laws, or enacted "cyberstalking" or "cyberharassment" laws that explicitly prohibit electronic forms of communication which is done with an attempt to bully, harass, or demean another in the online world.[93] During the early years of the Internet, states would prosecute cyberbullying culprits under traditional harassment laws.[94] These traditional harassment laws, however, did not easily apply to harassment which occurred via an electronic medium.[95] In turn, this made the prosecution of cyberbullies extremely difficult. Furthermore, these traditional harassment laws which states and the federal government used were garden-variety harassment laws that did not cover electronic communications until the passage of the Federal Computer Fraud and Abuse Act (CFAA).[96] The CFAA was one of the first laws which prosecuted individuals who used a computer in a fraudulent means.[97] Other examples of early laws controlling electronic communication were 18 U.S.C. § 875(c) which criminalized interstate threats and 47 U.S.C. § 223 which prohibited obscene or harassing phone calls through interstate communications.[98] While helpful, these laws were not specifically designed to combat Internet cyberbullying in the virtual age

92. Juju Chang et al., *Mom's Campaign for Florida Anti-Bully Law Finally Pays Off*, ABCNEWS, May 2, 2008 http://abcnews.go.com/GMA/story?id=4774894&page=1 [hereinafter ABC].

93. ALISON M. SMITH, CONG. RESEARCH SERV., RL 34651, PROTECTION OF CHILDREN ONLINE: FEDERAL AND STATE LAWS ADDRESSING CYBERSTALKING, CYBERHARASSMENT, AND CYBERBULLYING 6 (2008), http://assets.opencrs.com/rpts/RL34651_20080905.pdf.

94. *Id.* at 1.

95. *Id.; see also* Shire Auerbach, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641 (2009).

96. 18 U.S.C. § 1030. This is the federal code in which the government prosecuted Lori Drew in the MySpace death of Megan Meier. *See* United States v. Drew, 259 F.R.D. 449, 452 (2009).

97. SMITH, *supra* note 93, at 11 n.60.

98. Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 331-32 (2008).

of anonymous online bullies who violated the constitutional liberties of others to be free from torment and bullying on the Internet. Because existing laws did not satisfactorily address cyberbullying, 34 states have now enacted "cyberbullying" laws in order to better protect minors from online bullying or harassment.[99]

As cyberbullying has become a widespread and pervasive issue across the United States, states have in turn enacted legislation to combat these virtual crimes.[100] The majority of these state laws effectuate sanctions for all forms of cyberbullying which occur on school property, as well as at school-sanctioned events and activities.[101] Additionally, some of these state laws also extend the reach of sanctions to cyberbullying activities that originate off-campus.[102] This is done with the realization and understanding that off-campus activities can have a chilling and disruptive effect on a child's learning environment within the school walls. Currently, the penalties for cyberbullying range from parent interventions to school suspensions to criminal prosecution of misdemeanors and felonies.[103]

Before addressing the specific details of newly enacted state anti-cyberbullying legislation, it is important to have an overview of the spectrum of state laws and wide variety among them. As of this writing, all fifty states now have some form of "cyber" laws on the books, but the statutes vary greatly, and some do not even refer to electronic communications.[104] Nebraska's cyberstalking and cyberharassment statutes, for example, only refer to communications, and do not directly refer to communications over the Internet or communications in the electronic medium.[105] As a result of omitting any reference to the Internet or electronic medium, it is plausible that an Internet aggressor may avoid prosecution under this statute by stating the statute is too narrow and, while being strictly construed as a criminal law, does not cover the culprit's cyberbullying behavior on the Internet through an

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99. Nat'l Conference of State Legislatures, *State Cyberstalking, Cyberharassment, and Cyberbullying Laws*, Dec, 13, 2010, http://www.ncsl.org/default.aspx?tabid=13495 [hereinafter NCSL].

100. *See id.* While outside the purview of this Article, it is important to note the differences between cyberbullying, cyberstalking, and cyberharassment. Cyberstalking is the use of the Internet, e-mail or other electronic communications to stalk, and generally refers to a pattern of threatening or malicious behaviors. Cyberharassment differs from cyberstalking in that it is generally defined as not involving a credible threat. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id. See generally* Todd B. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257 (2008).

105. Kate E. Schwartz, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 416 (2009).

electronic medium. Arizona is another example of a state that has potentially limited itself in its legislation construction. In Arizona, under their cyber victimization law, a person who "contacts . . . or causes a communication with another person by verbal, electronic . . . or written means in a manner that harasses" may be punished.[106] As may be deduced from this statute, there is no requirement of reasonable fear on the part of the victim, and hence, no felony punishment.[107] Therefore, a stalker may tow the fine line of stalking while not causing reasonable apprehension in the victim and therefore avoid a severe felony charging if there is no reasonable fear induced by the victim.

While states such as Nebraska and Arizona may have enacted specific express language in their cyberbullying laws, other states have arguably enacted overbroad cyberbullying laws which group many types of behavior into a single act and punishment.[108] Kentucky's cyberbullying law, for example, convolutes cyberbullying, and cyberharassment actions by incorporating them into a single act and single punishment.[109] Kentucky's law criminalizes any action through electronic communication that intends to intimidate, harass, bully, annoy, or alarm another person.[110] In contrast, Florida maintains distinct statutes for cyberstalking and cyberbullying with the former carrying a higher mens rea and a stiffer criminal penalty when compared to cyberbullying.[111] As may be seen in the chart below, Kentucky has only one cyber victimization law on the books but attempts to use this overbroad and over-inclusive law as a criminal determent to prohibit many kinds of electronic communications beyond mere cyberbullying. Accordingly, there is a risk of over-criminalization when no law on point exists for the specific conduct that is attempted to be proscribed.

The table below illustrates the 50 states and their recent actions to combat cyber victimization, including cyberbullying.[112]

State/Territory	Cyberstalking	Cyberharassment	Cyberbullying
Alabama		Ala. Code § 13A-11-8	Ala. Code § 16-28B-3(2)

106. *Id.* at 418.

107. *See id.*

108. *Id.*

109. *Id.* at 419.

110. *Id.*; *see also* Charlotte Chang, *Internet Safety Survey: Who Will Protect the Children?*, 25 BERKELEY TECH. L.J. 501 (2010) (noting Texas law).

111. *Compare* FLA. STAT. § 784.048 (2009), *with* FLA. STAT. § 1006.147 (2009).

112. Cyberbullying and cyberharassment are sometimes used interchangeably, but for the purposes of this chart, cyberbullying is used to mean electronic harassment or bullying between minors within the school context. NCSL, *supra* note 99. This chart identifies only state laws that include specific references to electronic communication.

State/Territory	Cyberstalking	Cyberharassment	Cyberbullying
Alaska	Alaska Stat. §§ 11.41.260, 11.41.270		
Arizona		Ariz. Rev. Stat. § 13-2921	
Arkansas	Ark. Code § 5-41-108	Ark. Code § 5-41-108	Ark. Code § 6-18-514
California	Cal. Civil Code § 1708.7, Cal Penal Code § 646.9	Cal. Penal Code §§ 422, 653.2, 653m	Cal. Ed. Code §§ 32261, 32265, 32270, 48900
Colorado	Colo. Rev. Stat. §§ 18-602, 18-9-111	Colo. Rev. Stat. § 18-9-111	Colo. Rev. Stat. § 22-32-109.1 (2)(a)(X)
Connecticut		Conn. Gen. Stat. § 53a-182b, 53a-183	
Delaware		Del. Code tit. 11 § 1311	Del. Code tit. 14 § 4112D
Florida	Fla. Stat. § 784.048	Fla. Stat. § 784.048	Fla. Stat. § 1006.147
Georgia	Georgia Code § 16-5-90		Georgia Code § 20-2-751.4
Hawaii		Hawaii Rev. Stat. § 711-1106	
Idaho	Idaho Stat. §§ 18-7905, 18-7906		Idaho Stat. § 18-917A
Illinois	720 ILCS §§ 5/12-7.5, 740 ILCS 21/10	720 ILCS §§ 135/1-2, 135/1-3, 135/2	105 ILCS §§ 5/27-13.3, 5/27-23.9
Indiana		Ind. Code § 35-45-2-2	
Iowa		Iowa Code § 708.7	Iowa Code § 208.28
Kansas	Kan. Stat. § 21-3438		Kan. Stat. § 72-8256
Kentucky			Ky. Rev. Stat. § 525.080(1)(c)
Louisiana	La. Rev. Stat. §§ 14:40.2, 14:40.3		La. Rev. Stat. §§ 14:40.2, 14:40.7, Children's Code Art. 730(11)
Maine	Me. Rev. Stat. tit 17A § 210A (see 2007 Me. Laws, Ch. 685, sec. 3)		

State/Territory	Cyberstalking	Cyberharassment	Cyberbullying
Maryland		Md. Code tit. 3 § 3-805	Md. Code, Ed. Law § 7-424, 7-424.1
Massachusetts	Mass. Gen. Laws ch. 265 § 43	Mass. Gen. Laws ch. 265 § 43A	Mass. Gen. Laws ch. 71 § 370
Michigan	Mich. Comp. Laws §§ 750.411h, 750.411i	Mich. Comp. Laws § 750.411s	
Minnesota	Minn. Stat. § 609.749	Minn. Stat. § 609.795	Minn. Stat. § 121A.0695
Mississippi	Miss. Code §§ 97-45-15, 97-45-17, 97-3-107	Miss. Code § 97-29-45	Miss. Code §§ 37-11-67, 37-11-69
Missouri	Mo. Rev. Stat. § 565.225	Mo. Rev. Stat. § 565.090	Mo. Rev. Stat. § 160.775
Montana	Mont. Code Ann. § 45-5-220	Mont. Code Ann. § 45-8-213	
Nebraska			Neb. Rev. Stat. § 79-2,137
Nevada	Nev. Rev. Stat. § 200.575		Nev. Rev. Stat. § 392.915
New Hampshire		N.H. Rev. Stat. § 644:4	N.H. Rev. Stat. §§ 193-F:2 et seq.
New Jersey	N.J. Stat. § 2C:12-10, 2C:12-10.1		N.J. Stat. §§ 18A:37-14, 18A:37-15.1
New York		New York Penal Law § 240.30	
North Carolina	N.C. Gen. Stat. §§ 14-196.3	N.C. Gen. Stat. § 14-196(b)	N.C. Gen. Stat. §§ 14-458.1, 115C-407.15-17
North Dakota		N.D. Cent. Code § 12.1-17-07	
Ohio	Ohio Rev. Code § 2903.211	Ohio Rev. Code §§ 2917.21(A), 2913.01(Y)	
Oklahoma	Okla. Stat. tit. 21 § 1173	Okla. Stat. tit. 21 § 1172	Okla. Stat. tit. 70 § 24-100.4
Oregon	Or. Rev. Stat. §§ 163.730 to 163.732	Or. Rev. Stat. § 166.065	Or. Rev. Stat. § 339.351 et seq.
Pennsylvania	Pa. Cons. Stat. tit. § 18	Pa. Cons. Stat. tit. 18 §	24 P.S. § 13-1303.1-A

State/Territory	Cyberstalking	Cyberharassment	Cyberbullying
	2709.1	2709(a), 2709(f)	
Rhode Island	R.I. Gen. Laws § 11-52-4.2	R.I. Gen. Laws § 11-52-4.2	R.I. Gen. Laws § 16-21-26
South Carolina	S.C. Code §§ 16-3-1700(C), 16-3-1700(F)	S.C. Code §§ 16-3-1700(B), 16-3-1700(C), 16-17-430	S.C. Code §§ 59-63-110 to 59-63-150
South Dakota	S.D. Cod. Laws § 22-19A-1	S.D. Cod. Laws § 49-31-31	
Tennessee	Tenn. Code § 39-17-315	Tenn. Code § 39-17-308	
Texas		Tx. Penal Code § 33.07	
Utah	Utah Code § 76-5-106.5	Utah Code § 76-9-201	
Vermont	Vt. Stat. tit. 13 §§ 1061, 1062, 1063	Vt. Stat. tit. 13 § 1027	
Virginia	Va. Code § 18.2-60	Va. Code § 18.2-152.7:1	Va. Code § 22.1-279.6
Washington	Wash. Rev. Code §§ 9A.46.110, 9.61.260	Wash. Rev. Code §§ 9A.46.020, 10.14.020	Wash. Rev. Code § 28A.300.285
West Virginia		W. Va. Code § 61-3C-14a	
Wisconsin		Wis. Stat. § 947.0125	
Wyoming	Wyo. Stat. § 6-2-506		Wyo. Stat. §§ 21-4-311 to 21-4-315
Territories:			
Guam	X.G.C.A. tit. 9 §§ 19.69, 19.70	X.G.C.A. tit. 9 §§ 19.69, 19.70	

B. *Florida Takes Action; "The Jeffrey Johnston Stand Up for All Students Act"*

Jeffrey Johnston was a student who attended public schools in the State of Florida.[113] While attending school, Jeffrey was constantly bullied in person and through Internet communications for three years.[114] Eventually, the bullying became to be too much, and at the age

113. JeffreyJohnston.org, http://www.jeffreyjohnston.org (last visited Mar. 14, 2011).
114. *See id.*

of fifteen Jeffrey took his own life.[115]

In April 2008, Florida Governor Crist signed into law Florida Statute § 1006.147, also called the "Jeffrey Johnston Stand Up for All Students Act" (Johnston Act).[116] The Johnston Act prohibits bullying and harassment in Florida public schools for the grades of kindergarten through twelfth grade.[117] Additionally, this law protects public school students and employees and requires public schools to adopt and implement measures and policies to protect and safeguard students and employees from physical and emotional harm from cyberbullying.[118] If a state school fails to comply with the Johnston Act, the school risks losing state educational funding.[119] The Florida Senate has stated in formal session that spreading false rumors or online attacks that puts a student in reasonable fear or harm, or which is sufficient to interfere with the student's school performance is enough to qualify as cyberbullying in Florida.[120] The law also has a good faith immunity clause. Students, parents, volunteers, or employees who in good faith report cyberbullying will be exempted and immune from civil causes of action against them.[121] The Johnston Act mandates that each school district in the State of Florida adopt and implement the Johnston Act requirements by December 1, 2008.[122]

The Johnston Act seeks to address and prevent actual bodily harm, reasonable fear of bodily harm, actual property damage, reasonable fear of property damage, substantial disruption of orderly operation of the school, and substantial interference with a student's access to educational benefit, of a public school student within the State of Florida.[123] Furthermore, the Johnston Act seeks to reach cyberbullying which occurs while the culprit is in school, on school property and at school-sponsored activities and events whether or not on school property.[124] It also addresses cyberbullying that occurs through computer, computer system, network, or electronic technology of a

115. *Id.*; Martha L. Arias, *Internet Law—Bullying and Cyberbullying Prohibited Under Florida Law*, INTERNET BUS. L. SERVICES, Mar. 29, 2010, http://www.ibls.com/internet_law_news_portal_view.aspx?id=2109&s=latestnews [hereinafter IBLS].

116. IBLS, *supra* note 115.

117. *Id.*

118. *Id. See also* Andrew M. Henderson, *High-Tech Words Do Hurt: A Modern Makeover Expands Missouri's Harassment Laws to Include Electronic Communications*, 74 MO. L. REV. 379, 389 (2009).

119. ABC, *supra* note 92.

120. FLA. STAT. § 1006.147 (2009).

121. IBLS, *supra* note 115.

122. *Id.*

123. Colleen Barnett, Note, *Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPIAC. L. REV. 579, 623 (2009).

124. *Id.* at 624.

schools district, and off-campus speech if it substantially disrupts orderly operation of the school.[125] Additionally, under the Johnston Act, Florida public schools must follow up on reports of cyberbullying by, *inter alia*, contacting the parents of all students involved and documenting the incident.[126] The Johnston Act, however, does not prohibit cyberbullying in school vehicles, designated bus stops, or grounds immediately adjacent to school grounds.[127] As of this writing, thirty-four states currently have anti-cyberbullying statutes on the books, but Florida is only one of two states to penalize schools that do not comply with statutes.[128]

1. The Exception: Private Schools

It is important to take note the Johnston Act only applies to public schools. Section 1006.147(2), Florida Statute, states "[b]ullying or harassment of any student or employee of a *public* K-12 educational institution is prohibited."[129] Furthermore, it is important to highlight some of the fundamental differences between private and public school in the State of Florida. Private schools on the elementary and secondary levels are not licensed or regulated by the Department of Education.[130] Furthermore, Florida private schools institute their own systems of school accountability and discipline.[131] Most importantly, however, private schools are not subject to school requirements specified in educational state statutes and are not under the jurisdiction of the Department of Education of the State of Florida because the Johnston Act is controlled and tied to public funding.[132]

As of the writing of this Article, there are 2,587,554 public school students within 3,629 public schools in the State of Florida.[133] There are approximately 339,582 private school students within 1,713 private schools in the State as well.[134] While the ratio is approximately every 7.62 public school students to 1 private school student, there are still a total of 2,927,136 Florida students in kindergarten through twelfth grade, with 11.6% of these Florida students attending private schools

125. *Id.*
126. ABC, *supra* note 92.
127. *Id.*; Barnett, *supra* note 123.
128. ABC, *supra* note 92; *see* NCSL, *supra* note 99.
129. FLA. STAT. § 1006.147 (2009) (emphasis added).
130. Fla. Dep't of Educ., *Choosing a Private School in Florida*, http://www.floridaschool choice.org/Information/Private_Schools/choosing_a_private_school.asp (last visited Mar. 15, 2011).
131. *Id.*
132. *Id.*
133. Education Bug, Welcome to the Florida Public School Directory, http://florida. educationbug.org/public-schools/?subdomain=florida (last visited Mar. 15, 2011).
134. *Id.*

and arguably out of the purview of the Johnston Act. Other ambiguous limitations within the Johnston Act are Sections 1006.147(2)(a), (b), and (c) which state the following: that the cyberbullying or harassment must be "[d]uring any education program or activity . . . during any . . . school-sponsored program on a school bus of a K-12 educational institution; or . . . [t]hrough the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 educational institution."[135] These are very limiting sections of the Johnston Act. Are the actions of a cyberbully who sits at home accessing Facebook or MySpace and insults other youths covered under the Johnston Act? The answer seems to be no, unless the cyberbully is doing so at a school-sponsored event or accesses a computer network of a K-12 educational institution—which is very unlikely.

2. The Unknown: What are the Penalties?

One of the founding principles of criminal law is to deter future unlawful conduct. The Johnston Act also goes into intricate detail over the reporting system school districts must implement to account for and report cyberbullying. Overall, the Johnston Act has over nineteen requirements.[136] However, it contains no proscription or express language for penalties if the Johnston Act is violated.[137]

In reality, and in practical use, what is the purpose of the Johnston Act? While the Johnston Act is a well-intentioned step in the right direction to combat cyberbullying, the authors feel the Johnston Act lacks the teeth it needs, and deserves, to truly be effective within and outside the educational landscape. In stark contrast to other state cyberbullying laws across the country, the Johnston Act does not impose any criminal penalties or any other express discipline for violation of the Act.[138] Because the Johnston Act contains no penalties, questions arise as to the proper consequences that will need to be imposed upon a student who violates the Act. Should a violation of the Act merely include school punishment, such as a detention? Or does a violation of the act require that further and subsequent criminal action must be sought by the state beyond merely school discipline?[139] As the Johnston Act is used, challenged, and applied, court sanctions for violation of this Act will most likely be determined on a case-by-case

135. FLA. STAT. § 1006.147(2)(a)-(c) (2009).
136. *See* FLA. STAT. § 1006.147 (2009).
137. *See id.*
138. *See id.*
139. *See* Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U.L. REV. 1285, 1293 (2007).

basis.

It is apparent that the Johnston Act reflects a trend toward school districts as the policy enforcers of cyberbullying misconduct within the state of Florida. However, it is also important to discuss Florida Statute 784.048, which proscribes cyberstalking and cyberharassment.[140] Perhaps because cyberbullying, by its definition in Florida, must include two minors, cyberstalking and cyberharassment may be seen as more serious crimes by the Florida legislature because of the adult conduct and nature of the crimes. Accordingly, unlike the Johnson Act, the cyberstalking and cyberharassment statute expressly provides penalties from a misdemeanor in the first degree through a felony in the third degree.[141] In contrast, the Johnston Act, which exclusively governs cyberbullying, has no such language in the statute to lay out criminal sanctions to guide future prosecuting attorneys and state courts.[142] As a result, what the Johnston Act does is establish a weak criminal law which ultimately redirects responsibility of policing the Act upon public schools without articulating penalties for violation of the Act. Thus, public schools are expected to prevent cyberbullying by their students without the support of any state criminal sanctions.

V. CYBERBULLYING AS A FEDERAL CRIME

A. *The Megan Meier Cyberbullying Prevention Act*

1. The MySpace Suicide

Megan Meier, of Dardenne Prairie, Missouri, was born November 6, 1992.[143] From the third grade on, Megan was under the care of a therapist and diagnosed with attention deficit disorder and depression.[144] In 2006, as the facts came to light, the daughter of a woman named Lori Drew and Megan had an on again and off again relationship which ultimately ended in turmoil.[145] As the two young girls separated, animosity rose between the two.[146] Through an online account on the

140. FLA. STAT. § 784.048 (2009).

141. *Id.*

142. FLA. STAT. § 1006.147 (2009).

143. Megan Meier Found., *Megan Meier's Story*, http://meganmeierfoundation.cwsit.org/megansStory.php (last visited Mar. 15, 2011); Megan Meier, http://www.mahalo.com/megan-meier/ (last visited Mar. 15, 2011).

144. *See* Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, *available at* http://www.nytimes.com/2007/12/16/fashion/16meangirls.html?ref=megan meier; *Megan Meier's Story*, *supra* note 143.

145. *Megan Meier's Story*, *supra* note 143.

146. *See* Ryanick Paige, *The Megan Meier Cyberbullying Prevention Act*, http://www.associatedcontent.com/article/1824371/the_megan_meier_cyberbullying_preventio

social networking site MySpace, Lori Drew (who lived four houses away from Megan Meier), created a fictitious MySpace profile of a boy named Josh Evans.[147] The façade account was created by Lori Drew for the purpose of retaliating against Megan for allegedly spreading gossip about Drew's daughter.[148] Among other messages, one of the e-mails from "Josh" stated, "You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you."[149] In response to the repeated distressing e-mails sent by Drew through MySpace, Megan committed suicide by hanging herself three weeks before her fourteenth birthday.[150] Lori Drew was ultimately charged and convicted under the Computer Fraud and Abuse Act (CFAA)[151] because of her cyberbullying acts against Megan, but her conviction was dismissed by the court because the State failed to prove Lori Drew's actions directly caused Megan's suicide (a crucial causation element in the statute).[152] It is pertinent to note that Lori Drew was prosecuted under the CFAA because no federal cyberbullying legislation on point had been created or enacted at that point in time.[153] In relevant part, the CFAA, 18 U.S.C. § 1030(a)(2)(C), the statute under which Lori Drew was prosecuted, states, "[w]hoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer" may be punished by fine or imprisonment, or both.[154] In sum, because there was no relevant cyberbullying statute on point, Lori Drew was only convicted of violation of MySpace terms agreement.[155]

In response to this episode, the Federal Megan Meier Cyberbullying Prevention Act (Meier's Law) was re-introduced to Congress on April 2, 2009, by U.S. Representative Linda Sánchez.[156]

In relevant part, Meier's Law states:

(a) Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or

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n.html?cat=17 (last visited Mar. 15, 2011).

147. *Id.*; *see also* United States v. Drew, 259 F.R.D. 449, 452 (2009).

148. Paige, *supra* note 146.

149. *Megan Meier's Story*, supra note 143.

150. *Id.*

151. 18 U.S.C. § 1030 (2008).

152. *See Drew*, 259 F.R.D. at 453.

153. The Megan Meier Cyberbullying Prevention Act was not introduced until May 22, 2008. OpenCongress, *H.R.6123: Megan Meier Cyberbullying Prevention Act*, http://www.opencongress.org/bill/110-h6123/show (last visited Mar. 15, 2011).

154. 18 U.S.C. §§ 1030(a)(2)(C), (c); *see Drew*, 259 F.R.D. at 451.

155. *Drew*, 259 F.R.D. at 451-53; Schwartz, *supra* note 105, at 424.

156. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (1st Sess. 2009).

> cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.
> (b) As used in this section—
> (1) the term "communication" means the electronic transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received; and
> (2) the term "electronic means" means any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text messages.[157]

Meier's Law was designed to set a standard federal definition for the term "cyberbullying" by defining that the cyberbullying behavior must be repeated, hostile, and severe in order to fall under the definition of cyberbullying within the Law.[158] According to the text of Meier's Law, and unlike Florida's Johnston Act, individuals who cyberbully others via any electronic means could face fines, two years in prison, or both.[159] At its core, Meier's Law looks at three elements of the cyberbullying act in order to fall under its jurisdiction: (1) the required mens rea of the cyberbully; (2) the mandatory use of electronic means of communication; and (3) that the communications were severe, hostile, and repeated.[160]

2. Walking the Fine Line—The First Amendment and Free Speech Rights

Was the Megan Meier occurrence an anomaly? Is federal legislation necessary for what usually amounts to local matters? In the case of *McIntyre v. Ohio Elections Commission*,[161] the Supreme Court demonstrated that the First Amendment protects the right to speak anonymously.[162] There is no doubt free speech is fundamental to our

157. *Id.*

158. *Id.* Along with prosecuting under the Megan Meier Law, other remedies of prosecution such as defamation, intentional infliction of emotional distress, and harassment are available.

159. Jacqui Cheng, *Trolling Someone Online? Bill Would Slap You With Jail Time*, ARS TECHNICA, May 10, 2009, http://arstechnica.com/tech-policy/news/2009/05/trolling-someone-online-bill-would-slap-you-with-jail-time.ars.

160. *Id. See also* Wes Finley-Price, *Bill Could Mean Jail Time for Internet Flamers*, CNN SCITECHBLOG, May 12, 2009, http://scitech.blogs.cnn.com/2009/05/12/bill-could-mean-jail-for-internet-flamers/.

161. 514 U.S. 334 (1995).

162. Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and*

way of life, but it also comes with responsibilities. However, due to the historic lack of government regulation over the Internet, an extremely broad reading of free speech has resulted.[163]

In light of these questions and the above mentioned case law, it is worth noting that Meier's Law has been met with resistance from free speech advocates. *Inter alia*, speech advocates note the language of Meier's Law is too broad and that it would act as a judge and jury to determine whether there is enough evidence to prove one person cyberbullied another.[164] Also noting the Law's vague language, opponents note the Law was created and intended to protect minor-on-minor cyberbullying, but the act does not contain such language and presumably applies to adults as well.[165] Furthermore, opponents argue cyberbullying is a state matter and cyberbullying prevention should not have become a federal mandate.[166]

Arguably Meier's Law could criminalize any online communication done "with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person" and potentially implicate those who enjoy engaging in "trolling" or "flaming"[167] on message boards.[168] However, when anonymity is used as an advantage to defame, libel, and emotionally distress a person in the virtual world, the First Amendment should step aside to common sense, decency, and justice. In cases of cyberbullying, law enforcement and the courts should retain the ability to pierce the veil of anonymity if and when the law and circumstances require.

In sum, opponents state the federal government should not and cannot legislate against "meanness" in the form of violating free speech in open online forums.[169] This argument misses the mark.[170] Overall, Meier's Law creates a strong framework for states to work from, whereas many states are currently working in a vacuum.

Privacy, 17 COMMLAW CONSPECTUS 231, 239 (2008).

163. *Id.* at 264.

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

165. *Id.*

166. *Id.*

167. "Flaming" is a hostile and insulting interaction between Internet users. "Trolling" is the attempt to get others to flame. BBC-h2g2-Flaming and Trolling, http://www.bbc.co.uk/dna/h2g2/A1082512 (last visited Mar 15, 2011).

168. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (1st Sess. 2009).

169. Kotler, *supra* note 164.

170. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

B. *The Hypothetical; Application of the Johnston Act and Meier's Laws*

1. Facts

An afternoon three years ago, before the Johnston Act or Meier Law were enacted, a mother at her job received a telephone call from the middle school principal from her daughter's school in Palm Beach County, Florida. The principal stated her sixth grade daughter, Brianna, engaged in cyberbullying and requested the parent to come to the school immediately. Distraught, the mother immediately went to the middle school to confront her daughter. As it turns out, in fact, Brianna had created a fake Facebook page about another middle school student named Hali. The page repeatedly stated derogatory things regarding Hali such as she is a "whore" and she "should get beat up and go kill herself." Needless to say, Hali and her family were extremely distressed. Hali was constantly teased in and out of school, and before a few weeks passed, her self-esteem dropped, along with her grades, and the Facebook page had over one hundred posts and over one hundred "friends." A week later, Hali committed suicide.

2. Application Under Florida's Johnston Act and Meir's Law

Among other proscriptions, the Johnston Act states spreading rumors or attacks online that puts a student in reasonable fear or harm, or which are sufficient to interfere with the student's school performance, is enough to qualify as cyberbullying in Florida.[171] Under the facts mentioned above, using the default *mens rea* of knowledge, it is safe to assume that Brianna created the Facebook page with the requisite knowledge of what she was doing. Furthermore, stating that someone should get beat up or kill themselves is a viable threat which seems to rise to the standard of what the Act proscribes—the threat may be taken seriously. Furthermore, the Facebook page apparently wounded Hali's self-esteem and was a detriment to her school performance. While meeting the requirements to violate the Johnston Act, the school district will cite and report the act of cyberbullying to the parents, all parties involved, and file official records with the school district and the Department of Education. However, with the aforementioned being said, and with no imposition of penalties expressly worded in the Johnston Act, what is Brianna's proper punishment under the Act? What is the ultimate future deterrence for her and all cyberbullies? If other students see there are no severe consequences for these cyberbullying acts, the Johnston Act fails to deter cyberbullying and serve its legislative purpose. Under the Johnston Act, unless the victim

171. *See* FLA. STAT. § 1006.147 (2010).

sues civilly in Florida State Courts and is awarded a judgment, or requests the State Attorney's Office to prosecute and the State Attorney does so successfully, there is no precedence, or guideline, for what sanctions may be imposed by the courts upon Brianna.

Utilizing the same facts, there is a vastly different outcome under Meier's Law. Under the Meier Law, there must be: (1) the required mens rea of intent; (2) the mandatory use of electronic means of communication; and (3) the communications were severe, hostile, and repeated. In the hypothetical above, it may be inferred that such comments as labeling a young middle school student a "whore," or vehemently stating that she should go kill herself, are presumably made with the required *mens rea* of the intent to harm another. Furthermore, it was stated that Brianna had created the Facebook page, thereby satisfying the element of using an electronic means via a computer. Lastly, it is a question of fact if the comments were severe and hostile as they were repeated online; presumably leaving this question of fact to a jury.

Most importantly, and unlike the Johnston Act, sanctions are imposed in Meier's Law providing an outline for courts to follow.[172] Because Brianna engaged in repeated hostile harassment and cyberbullying which presumably caused Hali's suicide, Brianna shall face a fine of an undetermined amount or imprisoned not more than two years, or both. Directly in relation to the acts express language regarding the punishment proscribed, the courts, and Brianna, are now put on notice and given a guideline of what penalties will be incurred, something the Johnston Act fails to accomplish.

VI. CONCLUSION

Free speech issues among public school students have transferred from the school classroom to the World Wide Web. The Internet is dynamic, and as it continues to grow, there is a pressing need to discourage cyberbullying from the virtual world through a legal framework. The rate of cyberbullying is increasing and the conduct is unlikely to end any time soon. The anonymous nature of the Internet provides a safe haven for cyberbullies to take refuge from their harmful acts. There is no one technology that will ensure children will not be victims of cyberbullying. As cyberbullying takes refuge in a public forum for others to witness, and sometimes even encourage, it is important that this conduct is addressed and the real and substantial negative effects cyberbullying has upon its victims are acknowledged

172. *See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (1st Sess. 2009).

and properly addressed by legislative acts. In addition to the school district and criminal law recommendations this article proposes, parents need to get involved and educate their children in the nature of civil discourse and teach problem solving techniques. Perhaps telling a child to just turn the other cheek is not a remedy for this situation.

Technological advancements such as the Internet and social networking sites such as Facebook have enhanced the ease with which cyberbullies may operate with impunity in a faceless online world. Anonymity allows culprits to state opinions and information that they would not otherwise divulge, especially to another's face. In sum, if there is no responsibility for a cyberbully's actions under the Johnston Act in an anonymous online environment, it is easier for a faceless culprit to state harmful comments with malicious intentions and motives. The prevalent use of the Internet by minors, as well as adults, has rendered Internet victimization an expansive problem in a wide variety of situations and circumstances.

In light of this trend, school districts need to work with state and federal laws, and follow a scheme that holds culprits accountable while also helping victims. Additionally, legislative acts and courts need to recognize and distinguish degrees of punishment based upon the severity of the situation as presented by the facts. There is no way around it; cyberbullying poses a threat to public safety. A law that balances the needs of an open Internet and free speech needs to be regulated with a balance to protect Internet users.

In sum, Florida needs to update the Johnston Act and transcend the Act into a law that explicitly details punishments for those culprits who intentionally act in a foreseeably harmful way toward victims on the Internet; and deter such conduct in the future—an act that more closely mirrors Meier's Law. Florida has taken a substantial step in implementing cyberbullying laws, but the Johnston Act places too much responsibility on the school district, not enough on criminal law establishments, and needs to be updated to impose criminal and civil penalties when the act is violated—for at least the mere presence of deterrence. With such additions to the Johnston Act, school officials will have more confidence when acting to deter cyberbullying activities because they will know subsequent to their actions taken, punishment lies ahead for the perpetrators. As for Meier's Law, while the right to free speech should be upheld, allowing an online user to express his or her ideas and opinions, those ideas should not be aimed to intentionally inflict fear in another person.

In our new online world, victims have no safe haven to retreat from these public malicious acts of cyberbullying. In response to this, expect the Meier Law to soon be tested in our federal judiciary. The express

language of the Law will pose a challenge when balanced against the Constitutional muster of the First Amendment and free speech.