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I. INTRODUCTION

Tyler Clementi is a name that rings familiar in the ears of New Jersey citizens.[1] His was a tragic story of the results of bullying, and legislators throughout the country have considered the events, which were followed by public outcry, and have sought to solve the bullying problem once and for all. Clementi was a freshman student and an accomplished violinist at Rutgers University who was reported to have jumped off the George Washington Bridge following a cyberattack by his roommate.[2] A few nights before the suicide, his roommate had posted on Twitter: "Roommate asked for the room till midnight. I went into molly's room and turned on my webcam. I saw him making out with a dude. Yay."[3] Similar stories of victimization and bullying scatter the media,[4] and states are quickly amending current statutes and enacting new statutes to make anti-bullying laws in their education systems more severe.[5] Following suit, the state of New Jersey enacted what commentators have called the "toughest legislation against bullying in

1. *See* Lisa W. 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/30 suicide.html.

2. Although the majority of anti-bullying legislation is geared toward schools ages K–12, bullying incidents in universities have also helped spark legislative action.

3. Foderaro, *supra* note 1.

4. *See* John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 86 (2011) (Megan Meier, a thirteen-year-old girl in Missouri, committed suicide because of MySpace postings which said "she was a bad person whom everyone hated and the world would be better off without."); Jason A. Wallace, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 735 (2011) (Eric Mohat, a seventeen-year-old Ohio student, shot himself after "a bully said . . . in front of other students, 'Why don't you go home and shoot yourself? No one would miss you.'"); Emily Bazelon, *What Really Happened to Phoebe Prince*, SLATE (July 20, 2010), http://www.slate.com/articles/life/bulle/features/2011/what_really_happened_to_phoebe_prince/the_untold_story_of_her_suicide_and_the_role_of_the_kids_who_have_been_criminally_charged_for_it.html (explaining the complications surrounding the bully-related suicide of Phoebe Prince, a fifteen-year-old ninth grader who came to Massachusetts from Ireland and killed herself following the supposed bullying from six students); Kevin & Marilyn Ryan, *Phoebe's Legacy*, THE PILOT (Bos.), June 4, 2010, at 13.

5. *See* Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws*, CYBERBULLYING RESEARCH CTR. (Feb. 2012), www.cyberbullying.us/Bullying_and_ Cyberbullying_Laws.pdf (last updated July 2012); BULLY POLICE USA, http://www.bullypolice.org/.

the nation."[6]

Enacted September 1, 2011, New Jersey legislators have titled the legislation the Anti-Bullying Bill of Rights.[7] Included in this legislation is the requirement that schools adopt "comprehensive anti-bullying policies," which include significantly increased staff training on how to deal with and educate against suicide and bullying, heightened deadlines for when and how to report bullying incidents to appointed school- and district-wide anti-bullying specialists, and even mandatory grade postings on every school and district website that gives the bully-ranking of that school or district.[8] According to the statute, New Jersey legislators wished to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur *in school and off school premises*."[9] Ergo, this legislation not only allows, but also encourages students, staff, and teachers to monitor and report incidents of all bullying or victimization—even incidents that occur off campus. Accordingly, the statute's definition of "harassment, intimidation or bullying," includes behavior that takes place "on school property, at any school-sponsored function, on a school bus, or off school grounds."[10]

While many have applauded the law's strict requirements as a model for all other states to follow in cracking down on bullies,[11] not everyone believes that it is a change for the better, and some critics consider the statute to be too sweeping and broad.[12] For example, Richard G. Bozza,

6. Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, N.Y. TIMES (Aug. 30, 2011), http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html?pagewanted=all; *see also New Jersey's Anti-Bullying Law Takes Effect As Students Return to School*, CBS N.Y. (Sep. 6, 2011), http://newyork.cbslocal.com/2011/09 /06/new-jerseys-anti-bullying-law-takes-effect-as-students-return-to-school/.

7. Anti-Bullying Bill of Rights, Ch. 122, 2010 N.J. Sess. Law Serv. (Jan. 5, 2011 West) (codified as amended at N.J. STAT. ANN. § 18A:37-13.1 to :37-30 (West 2011)).

8. Hu, *supra* note 6.

9. Anti-Bullying Bill of Rights, Ch. 122 (2)(f) (emphasis added).

10. *Id.* 122(11)(2).

11. Adam Cohen, *Why New Jersey's Antibullying Law Should Be a Model for Other States*, TIME (Sept. 6, 2011) http://ideas.time.com/2011/09/06/why-new-jerseys-antibullying-law-should-be-a-model-for-other-states/ (explaining that the New Jersey law is an "important step forward in combating the bullying of young people"). *See, e.g.*, Matt Friedman, *Gov. Christie Signs 'Anti-Bullying Bill of Rights'*, NJ.COM (Jan. 6, 2011), http://www.nj.com/news/index.ssf/2011/01/gov_christie_signs_anti-bullyi.html ("The bill sailed through the Assembly and Senate in November. It passed 73-1, with 5 abstentions, in the Assembly. It passed the Senate 30-0.").

12. *See* Emily Bazelon, *Anti-Bullying Laws Get Tough with Schools* (NPR radio broadcast Sept. 17, 2011), *available at* http://www.npr.org/2011/09/17/140557573/anti-bullying-laws-get-

the executive director of the New Jersey Association of School Administrators, expressed concern with the statute, stating, "I think this has gone well overboard. . . . Now we have to police the community 24 hours a day. Where are the people and the resources to do this?"[13]

Is New Jersey's law the future of our country's anti-bully reform? Is this truly a model statute for all states to follow, as critics have suggested, or would it be better to invalidate this law while it is still new? This Comment analyzes New Jersey's Anti-Bullying Bill of Rights under the First Amendment and argues that the biggest problem with the new law is not just its costs or heightened liability for New Jersey schools, but rather the statute's increased regulation of off-campus speech. Although many states have made a push to extend anti-bullying legislation into the realm of cyber-space,[14] New Jersey should not have joined the bandwagon so heartily and enacted legislation that has gone so far in chilling significant amounts of student speech on and off campus. Part II of this Comment will address the problem and the effects of bullying and suggest why the media's reports on bullying may have a greater role than we realize in the bullying problem. Part III will give an overview of the relevant case law that governs student speech today and explain why lower courts across the country have been unable to find a clear standard to follow in this area. It will also discuss how the lack of clear direction from these cases creates the potentially statute-invalidating issues of vagueness and overbreadth. Part IV will compare other states' approaches to the bullying and cyberbullying problem with New Jersey's approach in its new law, and discuss which, if any, is the best strategy. Finally, Part V will propose how New Jersey and other states can tailor their laws to avoid constitutional concerns and still effectively combat the problem of bullying by taking an ex-ante rather than an ex-post approach.

tough-with-schools. *But see* Alexandra Rice, *N.J. Schools Brace for Anti-Bullying Rules' Impact*, EDUC. WK. (Oct. 17, 2011), http://www.edweek.org/ew/articles/2011 /09/14/ 03bully.h31.html (stating that some administrators are concerned about the costs of the new legislation and the possibility of over-policing students); Hu, *supra* note 6 (stating that administrators are worried about the schools' increased liability with the new law).

13. Hu, *supra* note 6.

14. *See* FLA. STAT. § 1006.147(2)(c) (2010); GA. CODE ANN. § 20-2-751.4(a) (2010); IDAHO CODE ANN. § 18-917A(2) (2010); KAN. STAT. ANN. § 72-8256(a)(2) (2010); KY. REV. STAT. ANN. § 525.080(1)(C) (West 2010); MASS. GEN. LAWS ch. 71, § 370 (2010); MINN. STAT. ANN. § 121A.0695 (West 2010); OR. REV. STAT. § 339.356(2)(b) (2010); VA. CODE ANN. § 22.1-279.6(A) (2010); WASH. REV. CODE § 28A.300.285(2) (2010).

II. BULLYING: AN INCREASING PROBLEM?

Bullying is an age-old problem, which seems so common that it does not even need to be defined. It occurs in every classic tale, from Shakespeare to Golding. The saying "kids will be kids" commonly accompanies stories of bullying and harassment in school; but this view of bullying is much too oversimplified, considering many of today's sobering statistics. According to recent studies, one in five students are bullied each year, and those numbers increase to nine in ten for gay and lesbian students.[15] Bullied students are five times more likely to be depressed than those who go to school unscathed, and 160,000 bullied students skip school every day out of fear of their oppressors.[16] Further, in another dimension to the problem, recent studies reveal a strong link between school safety and academic success.[17] These statistics show that millions of students suffer from bullying victimization, which creates an unsafe school environment and leads them to "perform poorly, skip classes, or drop out entirely."[18]

The Internet has exacerbated the bullying problem; statistics show that forty-three percent of ten- to eighteen-year-olds report being victims of cyberbullying.[19] But many kids in this group fail to report or take action against these incidents[20] because they are afraid to have their Internet privileges revoked or they feel their parents or adults at school

15. Jessica Bennett, *From Lockers to Lockup*, NEWSWEEK, Oct. 4, 2010, http://www.thedailybeast.com/newsweek/2010/10/04/phoebe-prince-should-bullying-be-a-crime.html.

16. *Id. See also* Joel Baum, *Gender, Safety and Schools: Taking the Road Less Traveled*, 15 U.C. DAVIS J. JUV. L. & POL'Y 167, 168–69 (2011) (stating that twenty-three percent of California students reported being harassed because they were not "as masculine as other guys" or "as feminine as other girls," and almost half of all transgender students reported skipping a class at least once in the past month and missing school because they felt uncomfortable or unsafe); OLWEUS BULLYING PREVENTION PROGRAM, http:// www.violencepreventionworks.org/public/bullying_effects.page (last visited Sept. 22, 2012) (stating that students who are bullied are more likely to experience depression, low self-esteem, health problems, poor grades, and suicidal thoughts; and students who bully others are more likely to get into frequent fights, steal and vandalize property, drink alcohol and smoke, report poor grades, perceive a negative climate at school, and carry a weapon).

17. Wallace, *supra* note 4, at 736.

18. *Id.*

19. Bethan Noonan, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. CONTEMP. HEALTH L. & POL'Y 330, 335 (2011) (stating also that four to twenty-one percent of ten- to eighteen-year-olds are perpetrators of cyberbullying).

20. *Id.* at 336. Cyberbullying includes e-mail, instant messaging text or pictures, and posts on social networking sites, web pages, and blogs. The most common forms of cyberbullying are cyberstalking, harassment, denigration, flaming, impersonation, and outing. *Id.* at 333.

cannot help them.[21] Cyberbullying victims suffer socially and emotionally, as they are less able to make and keep friends and usually exhibit signs of distress, depression, anxiety, and increased thoughts of suicide.[22]

Dr. Dan Olweus, a leading research professor of psychology who is considered the pioneer of bullying research, defines bullying as including three important components: (1) "[b]ullying is aggressive behavior that involves unwanted, negative actions"; (2) "[b]ullying involves a pattern of behavior repeated over time"; and (3) "[b]ullying involves an imbalance of power or strength."[23] Dr. Olweus explains that bullying can take on many forms: verbal bullying, bullying through social exclusion or isolation, physical bullying, bullying through lies and false rumors, having money or other things taken or damaged by other students, being threatened or being forced to do things by students who bully, racial bullying, sexual bullying, and cyberbullying.[24] Bullying can also negatively affect more than just those directly involved. Those who observe bullying may feel they are in an unsafe environment and may feel fearful, powerless to act, guilty for not acting, or tempted to participate.[25] Similarly, schools with bullying issues may develop an environment of fear and disrespect, and may see increases in the number of students who have difficulty learning, who feel insecure, who dislike school, or who perceive that teachers and staff have little control and do not care about them.[26]

The current bullying statistics are frightening, and bullying can have devastating results. But social scientists report that the bullying problem is "not more extreme, nor more prevalent, than it was a half-century ago."[27] Experts even suggest that the bullying problem has improved over the past decade.[28] Further, although cyberbullying presents new kinds of challenges, this type of bullying still occurs a third less than traditional bullying.[29] But with every reported suicide or bullying

21. *Id.* at 336.

22. *Id.* at 337.

23. OLWEUS, *Resisting Bullying*, *supra* note 16 ("A person is bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself.").

24. *Id.*

25. OLWEUS, *Bullying Effects*, *supra* note 16.

26. *Id.*

27. Bennett, *supra* note 15.

28. *Id.*

29. *Id.*

statistic, society becomes more aware of the bullying problem and more inclined to want a drastic change. It is clear that something must be done, and state legislatures have been answering the call by enacting anti-bullying statutes and increasingly intensifying those statutes' severity and breadth.[30]

By contrast, however, some critics argue that the intensity of today's legislation, specifically New Jersey's Anti-Bullying Bill of Rights, is not a necessary solution because it aims to solve a bullying problem that is bigger than what actually exists. Society's reaction to bullying is what has changed over time, and such a change is not necessarily a positive thing as illustrated by "the helicopter parents who want to protect their kids from every stick and stone, the cable-news commentators who whip them into a frenzy, the insta-vigilantism of the Internet."[31] In fact, the media may have skewed our perception of this problem:

> [B]ullying is not just a social ill; it's a "cottage industry" . . . complete with commentators and prevention experts and a new breed of legal scholars, all preparing to take on an enemy that's always been there. None of this is to say that bullying is not a serious problem (it is), or that tackling it is not important. But like a stereo with the volume turned too high, all the noise distorts the facts, making it nearly impossible to judge when a case is somehow criminal, or merely cruel.[32]

As Yamada suggests, bullying is a problem worth fighting; but fighting the problem is not something that should be taken to the extreme. Legislation is an important step in curtailing bullying in schools. But in deciding which legislation has gone too far, it is important to understand the truth of the statistics, the impact of the media, and the solutions that are already in place.[33]

III. CASE LAW AND ITS IMPLICATIONS FOR NEW JERSEY'S LAW

One particularly problematic aspect of anti-bullying legislation is its infringement upon students' constitutionally protected First Amendment freedoms of speech. Under the First Amendment there are only a few

30. *See supra* note 14.

31. Bennett, *supra* note 15.

32. *Id.*

33. *See infra* Part IV (detailing different approaches that states can take, and already have taken, to avoid over-legislation in the anti-bullying arena).

exceptions to the large body of protected speech[34]: obscenity,[35] defamation,[36] public safety,[37] incitement to riot,[38] and the so-called "fighting words,"[39] to name a few. "The rationale usually given for unprotected speech is that it contains no ideas or viewpoints and does not advance any socially worthwhile goal."[40] But there is another established category of speech—speech that is within the school setting—that is unprotected in some circumstances, not because the speech does not advance any socially worthwhile goals, but because it is imperative for schools to be able to regulate speech on their campuses. The four Supreme Court cases that address students' First Amendment rights are considered rather canonical: *Tinker v. Des Moines Independent Community School District*,[41] *Bethel School District No. 403 v. Fraser*,[42] *Hazelwood School District v. Kuhlmeier*,[43] and *Morse v. Frederick*.[44]

Although these four cases are continually regarded as binding precedent and are cited by most lower courts in free-speech cases within a school setting, the cases do not decipher many of the complexities of student speech within the First Amendment context. Rather, these cases are at most a good framework for First Amendment analysis, as they fail to clearly define exactly when and how to apply their rules. The deficiencies in these cases, which mainly come from a lack of clear direction, have been the basis for much confusion in the lower courts, "particularly when the speech involves the Internet or other new media,"[45] or when it extends off campus. This section will discuss each of the four cases and explain why each fails to provide appropriate direction for legislators wanting to make anti-bullying laws that are consistent with judicial precedent.

34. Hayward, *supra* note 4, at 102.

35. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

36. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

37. Gitlow v. New York, 268 U.S. 652 (1925).

38. Schenck v. Pro-Choice Network, 519 U.S. 357 (1997).

39. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

40. Hayward, *supra* note 4, at 102.

41. 393 U.S. 503, 504 (1969).

42. 478 U.S. 675 (1986).

43. 484 U.S. 260 (1988).

44. 551 U.S. 393 (2007).

45. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011) (citing several different lower court cases that have had very similar facts but different outcomes).

A. Tinker *and the Birth of the "Substantial Disruption" Doctrine*

In *Tinker*, students sued their school district seeking an injunction and nominal damages after school officials suspended them for wearing black armbands to school in protest of the Vietnam War.[46] The Eighth Circuit affirmed the district court's dismissal of the complaint, which upheld the school authorities' actions on the ground that the armband prohibition was reasonable to prevent the disturbance of school discipline.[47] But the Supreme Court reversed and held that the students' conduct was not disruptive and therefore was considered "pure speech," entitled to full First Amendment protection.[48] The Court articulated that it would be absurd to assume that students or teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[49] and held that the state's interest in eliminating disturbances in schools is "not enough to overcome the right to freedom of expression."[50] The Court emphasized that schools could not justify restricting otherwise protected student speech for only an "undifferentiated fear or apprehension of disturbance"[51] or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[52]

The Court did recognize, however, the necessity of some limitations on student speech and held that student speech may be prohibited when it "materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school,"[53] or if it "collid[es] with the rights of others."[54] Accordingly, the Court protected the student's speech in this case because there was no substantial disruption from a student passively wearing a symbolic armband.

Although the Court's failure to define substantial disruption or interference here did not alter the outcome of this particular case, because the conduct involved was clearly not a substantial disruption,[55]

46. *Tinker*, 393 U.S. at 504.

47. *Id.* at 505.

48. *Id.* at 505–06.

49. *Id.* at 506.

50. *Id.* at 508.

51. *Id.*

52. *Id.* at 509.

53. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

54. *Id.* (citing Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966)).

55. Hayward, *supra* note 4, at 103 ("[W]hen wearing armbands the petitioners were quiet and

the absence of a definition of the commonly quoted phrase "substantial disruption" causes significant problems in many student speech cases today. This substantial-disruption doctrine is the "most widely used standard applied at the lower-court level to online student speech"[56] and is the most commonly used phrase in state anti-bullying statutes; but the phrase has never been defined in a way to avoid discretionary legislation and court rulings. Moreover, without clear parameters, the popularly cited doctrine is potentially facially overbroad and void for vagueness, which is seen even more easily when applied to off-campus student speech.[57]

B. Fraser*'s Classification of the Lewd and Obscene*

Tinker's substantial-disruption test has become the "hallmark of student speech cases because of its application to student speech inside and outside of school";[58] but the Court has also established three separate rules, which further articulate the parameters of student speech. In *Fraser*, a student gave a speech at a school election assembly, which all the students of the school were required to attend. During his speech, the student used "elaborate, graphic, and explicit sexual" language[59] and, as a result, was suspended for violating a school disciplinary rule that prohibited "conduct which materially and substantially interfere[d] with the educational process . . . including the use of obscene, profane language or gestures."[60] Although both the district court and the court of appeals found the student's speech constitutionally protected according to the *Tinker* precedent, the Supreme Court reversed. The Court acknowledged *Tinker* in its decision by affirming that students retain their constitutional rights to freedom of speech or expression even in a school setting; but the Court expressed the need to balance this freedom to advocate unpopular and controversial views in school with "the

passive. They were not disruptive, and did not impinge upon the rights of others.").

56. Noonan, *supra* note 19, at 339.

57. *See* Goldman, *supra* note 45, at 405 (stating that while most lower courts have "applied the 'substantial disruption' standard to off-campus speech and find such speech unprotected when it reasonably may cause substantial disruption at the school," these lower court decisions fail to identify how a court should determine what constitutes a "'substantial disruption' beyond almost meaningless general statements").

58. Noonan, *supra* note 19, at 341.

59. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986).

60. *Id.* at 678.

boundaries of socially appropriate behavior."[61] The Court did not overturn *Tinker*, but established a new rule that identified lewd and offensive student speech as constitutionally unprotected. Thus, this rule demonstrated that "the constitutional rights of students in public schools are not co-extensive with those of non-students in other settings, and [that] *Tinker*'s mode of analysis was not the sole analytical approach in school speech cases."[62]

The *Fraser* rule gives even less insight than does the *Tinker* rule in suggesting how courts should approach student speech cases, especially those dealing with off-campus speech. Even so, a comparison of the two cases demonstrates that pure political speech (like that in *Tinker*) is more likely to be protected than other types of speech, and that vulgar and obscene speech (like that in *Fraser*) will be unprotected. Although bullying does not completely fit within either of these categories, the significantly low value of speech and expression of bullying seems to make it more akin to the low-level of speech in *Fraser*. There is no indicator that the rule in *Fraser* permeates, in any way, the realm of off-campus speech. However, the speech in *Fraser* is similar enough or akin to the constitutionally unprotected category of obscenity, which can be prohibited off campus in ways other than school regulations. Therefore, because the speech in *Fraser* can be regulated by other means, there is no real need for the *Fraser* rule to extend off campus. By contrast, however, bullying in the majority of cases does not fit within a category of unprotected speech, like obscenity,[63] so the Supreme Court should give more specific direction on how to apply its rules to the difficult cyberbullying contexts, while still maintaining students' First Amendment rights.

C. Hazelwood

In *Hazelwood*, students brought suit in federal district court alleging that their First Amendment rights were violated when the school deleted two pages from a student newspaper, which included one article about students' experiences dealing with pregnancy and another article about the impact of divorce on students.[64] The newspaper had been written and

61. *Id.* at 681.

62. Goldman, *supra* note 45, at 402.

63. *See infra* Part V (suggesting that perhaps bullying could fit within the categories of fighting words or true threats).

64. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988).

edited as part of a class, but the principal was worried because the content indirectly identified several students and directly identified a student's father.[65] At the time the supervising teacher submitted page proofs of the newspaper, the principal believed that there was not enough time for the students to make necessary changes before printing, so he deleted the pages.[66] The Supreme Court reversed the Eighth Circuit's decision that a First Amendment violation had occurred, finding that the school had acted within its authority in regulating the newspaper's content.[67]

In its decision, the Court articulated three major points. First, the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings,"[68] and those rights must be "applied in light of the special characteristics of the school environment."[69] Therefore, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[70] Second, the school newspaper at issue could not be characterized as a forum for public expression; therefore, the school could impose reasonable restrictions on the speech of students, teachers, and other members of the school community.[71] And third, the standard for determining when a school may punish student expression that happens to occur on school premises is not "the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[72]

The *Hazelwood* rules, as articulated by the Court, discuss another layer of analysis, beyond the two prior cases, for understanding students' First Amendment rights. However, these rules do not provide complete direction for anti-bullying legislation specifically. Schools can apply the first *Hazelwood* rule and prohibit bullying on campus on the basis that bullying is not consistent with "the special characteristics of the school

65. *Id.* at 262–63.

66. *Id.* at 263–64.

67. *Id.* at 276.

68. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)) (internal quotation marks omitted).

69. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (internal quotation marks omitted).

70. *Id.* (citation omitted) (quoting *Tinker*, 393 U.S. at 506).

71. *Id.* at 267–69 (explaining that the only way to create a public forum is by intentionally opening a nontraditional forum for public discourse).

72. *Id.* at 272–73.

environment"; but this rule does not provide specific guidance for off-campus regulation. Schools can also apply the second and third *Hazelwood* rules to prohibit bullying that may occur in any school medium (e.g., a school newspaper or a school website); but neither rule offers direction for private mediums. By contrast, the Court's holding suggests that public forums (e.g., email, Facebook, Twitter, etc.) should be open for all student speech regardless of harmful content; therefore, the second and third *Hazelwood* rules are not intended to apply to off-campus speech.

D. Morse

Finally, in *Morse*, the most recent case dealing with the First Amendment rights of student speech, the Court followed its trend of giving schools even more regulatory power.[73] Here, the Court rejected a student's claim that his conduct, unfurling a banner that stated "BONG HiTS 4 JESUS," was protected under the First Amendment.[74] The student had displayed the banner off campus at a school-sanctioned and school-supervised event, and the principal—who considered the banner as promoting illegal drug use in violation of school policy—had confiscated the banner and suspended the student when he refused to take it down.[75] While the district court held that there was no First Amendment infringement, the Ninth Circuit held that even though the banner promoted drug use and occurred during a school-authorized event, the student's speech was protected because his speech did not constitute a substantial disruption.[76]

However, the Supreme Court in this case reversed the appellate court's decision and held that the prohibition did not violate the First Amendment because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use,[77] and because the speech was considered on-campus.[78] To support this holding, the Court stated that the nature of students' rights depends on "what is appropriate for children in school,"[79] a

73. Morse v. Frederick, 551 U.S. 393, 393 (2007).

74. *Id.*

75. *Id.* at 397–98.

76. *Id.* at 399.

77. *Id.* at 408.

78. *Id.* at 400–01.

79. *Id.* at 394 (quoting Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–656 (1995)) (internal quotation marks omitted).

standard that in this case includes the "important—indeed, perhaps compelling" interest in deterring drug use by school children.[80] Because drug abuse is a serious national problem and because Congress has declared that it is part of a school's job to educate against such abuse, both "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse allows schools to restrict student expression" that encourages such use.[81] The Court also articulated that the speech could be regulated because it was "school speech": the event had occurred during normal school hours and had been sanctioned by the principal as an approved social event where school rules would apply.[82]

Although factually different from bullying, this case provides a bit more direction for anti-bullying legislation than earlier Supreme Court precedent. First, *Morse* defines, though in a limited way, what can be regulated in schools. The Court articulated that if there is a "compelling" governmental interest in prohibiting a certain type of behavior or speech for children in school, then it is reasonable and acceptable for schools to prohibit that speech or conduct. Bullying surely fits into a category of speech or conduct that the government has a strong interest in regulating.[83] Second, *Morse* broadened the classification of on-campus speech. Although the Court did not specify exclusively what is and is not considered on-campus regulation, it did say that a school-sanctioned event that takes place during school hours fits within this category. Thus, the language of *Morse* gives further justification and direction for anti-bullying legislation *on campus*. At the same time, however, it—like the other Supreme Court cases in this area—fails to give any specific direction for *off-campus* regulation.

E. Vagueness and Overbreadth

One enduring rule in Supreme Court jurisprudence is the requirement that legislation be appropriately tailored (not overbroad), and sufficiently clear (not vague). In light of this, it is ironic that the holdings in these four cases provide language that, when adopted by legislators, inspires

80. *Id.* at 407 (quoting *Veronica*, 515 U.S. at 661) (internal quotation marks omitted).

81. *Id.* at 395 (citation omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969))

82. *Id.* at 400–01.

83. *See* Safe Schools Improvement Act of 2010, S. 3739, 111th Cong. (2010).

state legislation that is both overbroad and vague.[84] Lower courts are also left to their own discretion in determining what the language from these cases means. The discretionary nature of the language has created a large discrepancy among courts as to what constitutes permissible speech regulation and what does not. In addition, the large majority of state legislators have relied on these cases to create student-rights legislation, specifically anti-bullying legislation. As would be expected, these states use the Supreme Court's exact language—language which has not been defined or qualified—thereby creating the potential for constitutional problems under the overbreadth and vagueness doctrines. Although, admittedly, state legislators must engage in some degree of guesswork because the Supreme Court has not ruled specifically on off-campus bullying, nor more specifically on cyberbullying, the language from these four cases is still too overbroad and vague because it does not provide specific parameters for states to accurately use the Court's rulings.

The definitions of the overbreadth and vagueness doctrines are fairly straightforward; but it is helpful to articulate the doctrines before continuing with this analysis. In *United States v. Williams*, the Supreme Court stated that a statute is unconstitutionally overbroad if it chills "a substantial amount of protected speech" relative to the statute's plainly legitimate sweep.[85] Also, in *Grayned v. City of Rockford*, the Court held that a statute may be impermissibly vague for two independent reasons. First, if the statute does not give a "person of ordinary intelligence" a fair notice of what is prohibited, and second, if the statute does not "provide explicit standards" for those who apply the law to prevent arbitrary and discriminatory enforcement.[86]

The language from *Tinker*, which has been adopted in a great majority of state cyberbullying statutes,[87] presents the biggest

84. *See* Hayward, *supra* note 4, at 92 (stating that cyberbullying statutes are often so vague that they offer no guidance to distinguish permissible from impermissible speech: "[T]hese laws do not simply 'chill' student free speech, they plunge it into deep freeze."); *see also* Goldman, *supra* note 45, at 405 (explaining that most lower courts have applied the "substantial disruption" standard to off-campus speech and find such speech unprotected when it reasonably may cause substantial disruption at the school, though most lower courts still fail to identify how a court should determine whether there is a "substantial disruption").

85. United States v. Williams, 553 U.S. 285, 292 (2008).

86. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

87. For example, see ALA. CODE §§ 16-28B-1 to -9 (2010); ALASKA STAT. 14 §§ 33.200 to .250 (2010); ARK. CODE ANN. § 6-18-514 (2010); CAL. EDUC. CODE §§ 32260, 48900.4 (West 2010); MASS. GEN. LAWS ch. 71, § 370 (2010); N.H. REV. STAT. ANN. §§ 193-F:2 to -F:10 (2010); N.D.

overbreadth and vagueness problems with its oft-quoted "substantial disruption" phrase. This is because the Court fails to define the phrase or give any guidance toward its use. Although the standard is not *as* substantially overbroad in an on-campus setting, and although the Court did not necessarily intend the standard to be used in off-campus situations, many laws have adopted the language and used it to encompass any bullying which occurs on or off campus—effectively regulating speech and expression that is First-Amendment protected. Furthermore, the standard proves extremely vague when subjected to the *Grayned* test: no person of ordinary intelligence would have fair notice of what constitutes "substantial disruption," and as was articulated in *Tinker*, the standard fails to provide any sub-standards to direct law enforcement officials on how to apply the law. Thus, the "substantial disruption" test as it stands today covers far too much protected speech and expression. Consider, for example, the following scenarios where prohibiting language causing substantial disruption could seriously inhibit free speech:

> A letter to the editor of the *New York Times* criticizing a school's choice of curriculum can create a substantial disturbance on campus. Such a letter may result in a flood of calls to administrators or even make adoption of the school's curriculum choice impossible. Similarly, the "substantial disruption" test could allow the government to punish students for watching popular television shows or reading particular magazines, newspaper articles, or books for fear that discussion at school of such normally protected speech will disrupt classes or interfere with the fundamental values that the school seeks to teach.[88]

Therefore, for on-campus speech and especially for off-campus speech, *Tinker*'s "substantial disruption" standard must be qualified to avoid laws which will surely be facially void for vagueness and overbreadth.

Although the three other Supreme Court cases—*Fraser*, *Hazelwood*, and *Morse*—articulate different rules, they still rely on the *Tinker* decision and thus still fail to describe the meaning of the phrase "substantial disruption" themselves. However, for the most part, the rules from these cases have the same likelihood to produce legislation that is

CENT. CODE § 15.1-19-17 to -22 (2011); OR. REV. STAT. § 339.356 (2010); 24 PA. CONS. STAT. § 13-1303.1-A (2010); TENN. CODE ANN. §§ 49-6-1014 to -19 (2010); WASH. REV. CODE § 28A.300.285 (2010).

88. Goldman, *supra* note 45, at 408.

on its face vague and overbroad. Constitutional problems arise when state statutes extend those case rulings to off-campus cases because they have no other rulings on which to rely. Overall, the problem in the realm of student speech cases is the lack of clarity. Without much clarity in these cases, lower courts and legislators are forced to use their own discretion to apply case rulings to varieties of situations.

Within the bullying context, statistics show that bullying in schools must be prohibited and that school anti-bullying laws must target off-campus cyberbullying in some way or another; but these laws must still be written in a clear and concise way. Clear rules provide "predictability and reduce the need for litigation. . . . [Moreover,] the value of clarity in this area is particularly acute. Unclear rules risk chilling speech."[89] Although bullying is a problem that must be addressed, the Court and state legislators must consider how to delicately balance that concern with students' First Amendment rights.

IV. STATES TO THE RESCUE: AN OVERVIEW OF ANTI-BULLYING LEGISLATION THROUGHOUT THE COUNTRY

In response to recent events and the growing societal concerns of bullying in our education system, forty-eight states[90] have enacted anti-bullying laws.[91] However, the breadth and depth of these statutes vary

89. *Id.* at 407.

90. The two states without anti-bullying legislation are Montana and South Dakota. *See supra* note 5.

91. *See* ALA. CODE §§ 16-28B-1 to -9 (2010); ALASKA STAT. 14 §§ 33.200 to .250 (2010); ARIZ. REV. STAT. ANN. § 15-341(37) (2010); ARK. CODE ANN. § 6-18-514 (2010); CAL. EDUC. CODE §§ 32260, 48900.4 (West 2010); COLO. REV. STAT. § 22-32-109.1 (2010); CONN. GEN. STAT. § 10-222d (2010); DEL. CODE ANN. tit. 14, § 4112D (2010); FLA. STAT. § 1006.147 (2010); GA. CODE ANN. § 20-2-751.4 (2010); HAW. S.B. NO. 2094 (2010); IDAHO CODE ANN. § 18-917A (2010); 105 ILL. COMP. STAT. § 5/27-23.7 (2010); IND. CODE §§ 20-33-8-0.2, 20-33-8-13.5 (2010); IOWA CODE § 280.28 (2010); KAN. STAT. ANN. § 72-8256 (2010); KY. REV. STAT. ANN. § 525.080(l)(C) (West 2010); LA. REV. STAT. ANN. § 17:416.13 (2010); ME. REV. STAT. tit. 20A, § 1001(15)(H) (2010); MD. CODE ANN. EDUC. §§ 7-424 to -424.3 (West 2010); MASS. GEN. LAWS ch. 71, § 370 (2010); MICH. COMP. LAWS § 380.1310b (2010); MINN. STAT. § 121A.0695 (2010); MISS. CODE ANN. §§ 37-11-67 to -69 (2010); MO. REV. STAT. § 160.775 (2010); NEB. REV. STAT. § 79-267 (2010); NEV. REV. STAT. § 388.135 (2010); N.H. REV. STAT. ANN. §§ 193-F:2 to -F:10 (2010); N.J. STAT. ANN. §§ 18A:37-15 to -21 (West 2010); 2010 N.J. Sess. Law. Serv. ch. 122 (West); N.M. ADMIN. CODE § 6.12.7 (2010); N.Y. EDUCATION LAW §§ 10, 2801 (McKinney 2010); N.C. GEN. STAT. §§ 115C-407.15 to 407.18 (2010); N.D. CENT. CODE § 15.1-19-17 to -22 (2011); OHIO REV. CODE ANN. §§ 3313.666 to .667 (West 2010); OKLA. ST. tit. 70, § 24-100.4 (2010); OR. REV. STAT. § 339.356 (2010); 24 PA. CONS. STAT. § 13-1303.1-A (2010); R.I. GEN. LAWS § 16-21-34 (2010); S.C. CODE ANN. § 59-63-140 (2010); TENN. CODE ANN. §§ 49-6-1014 to -19 (2010); TEX. EDUC. CODE ANN. §§ 25.0342, 37.001 (West 2010); UTAH CODE ANN. §§ 53A-11a-101 to -401 (West 2010); VT.

quite significantly from state to state, as would be expected. Although it is unnecessary for this Comment to substantially examine each state's statute, a categorical analysis that surveys the statutes more collectively is appropriate and helpful for further discussion and analysis of effective statutory regulation. To discuss the different statutes, this Comment groups the several states' regulations into a gradient scale of three categories—light, medium, and harsh—depending on the amount and type of restrictions in the statutes.[92] Because certain states have a combination of elements from two or more distinct categories, this categorization of states is somewhat generalized and fluctuant, and may not include every state. However, for the purposes of this Comment, these broad generalizations aid in an analysis of the trends in state statutes.

A. Light Regulations: Not Light Problems

In the first category, which is composed of statutes with regulations that are too light, the statutes are much too sparse to effectively define the type of speech they regulate. As a result, these laws could cause serious constitutional issues.[93] The states in this category have created anti-bullying laws, and some have even included electronic communication in those laws; but overall, the laws fall very short of either comprehensively defining bullying or providing schools with effective solutions to regulate the bullying problem. Thus, the statutes in this category are ineffective because they fail to provide a clear description of bullying, and, more importantly, fail to articulate when and where bullying can be regulated. Another concern with this category's sparse restrictions is the absence of any anti-bullying training programs. Many statutes require school-wide training policies, but most fail to require educational training programs[94] for teachers or students,

STAT. ANN. tit. 16, §§ 11, 565 (2010); VA. CODE ANN. § 22.1-279.6 (2010); WASH. REV. CODE § 28A.300.285 (2010); W. VA. CODE ANN. §§ 18-2C-1 to -5 (2010); WIS. STAT. § 118.46 (2010); WYO. STAT. ANN. §§ 21-4-311 to -314 (2010). *See also supra* note 5 (giving an overview of which states have anti-bullying laws, which states have included cyberbullying, electronic harassment, criminal sanctions, or school sanctions in their laws, and which states require additional school policies).

93. This light category includes Florida, Iowa, Idaho, Louisiana, New Mexico, Texas, Virginia, Washington, West Virginia, and Wisconsin. *See supra* note 91.

94. *See* LA. REV. STAT. ANN. § 17:416.13 (2010) (failing to include a training program requirement, an indication of when and where bullying can be regulated, and a regulation of electronic communication or cyberbullying); N.M. ADMIN. CODE § 6.12.7 (2010); TEX. EDUC. CODE

which would ensure that schools take an active and preemptive stance against bullying.

Virginia's anti-bullying statute, for example, requires each school board to "include in its code of student conduct, prohibitions against bullying, hazing, and profane or obscene language or conduct." Instead of providing definitions of "bullying," "hazing," etc., or clarifying any other details of the required prohibitions, the statute leaves each Virginia school district to its own judgment. The statute does not explain how harsh to make school prohibitions, nor does it mention how far the prohibitions can extend.[95] Thus, without any language to determine the boundaries of when and where to regulate, school districts are left to their own discretion to determine when they can and cannot regulate bullying. This grant of discretion is problematic on two extremes: school officials may not know when they can regulate, thereby choosing either not to regulate at all, or choosing to regulate anything within the definition of bullying, regardless of when and where it takes place—very easily unconstitutionally regulating the First Amendment rights of students based on the vagueness and over-breadth doctrines.[96]

B. Medium Regulations: Almost Just Right

The second category of statutes, the medium group, comprises the vast majority of states' statutes. These statutes have language that, for the most part, addresses most of the bullying concerns and also provides students constitutional First Amendment protection. As a general rule, these statutes require school districts to implement anti-bullying policies *and* relevant training programs for both students and teachers. However, what makes these statutes significantly more successful in targeting the bullying problem within acceptable First Amendment limits than those in the light category is the definition of exactly where and when schools can regulate bullying.

ANN. § 37.001 (2010); VA. CODE ANN. § 22.1-279.6 (2010); W. VA. CODE ANN. §§ 18-2C-1 to -5 (2010) (encouraging, but not *requiring* the implementation of a bullying task force).

95. VA. CODE ANN. § 22.1-279.6 (2010); *see also* WIS. STAT. § 118.46 (2010) (failing to give any directions to school districts of how to design an anti-bullying statute and what to include in such a statute).

96. *See* Noonan, *supra* note 19, at 332 ("The majority of cyberbullying legislation gives schools wide discretion in determining when, if at all, administrators can intervene. The methods that each state uses to deal with cyberbullying, coupled with the wide discretion given to schools to handle the problem, leave many children free to cyberbully and their victims unable to escape.").

1. The "true medium" group

This category of statutes can be divided further into two subcategories. The first group, labeled the "true medium" group for the purposes of this Comment, does not mention cyberbullying or electronic communication regulations at all, and includes no language that expressly allows the regulation of off-campus speech.[97] Therefore, this group of statutes provides students the most First Amendment protection of any other category because students' off-campus speech and expression cannot be regulated at all. However, these statutes are weak in regulating bullying because they fail to even acknowledge the growing problem of cyberbullying, which, as noted earlier, occurs almost exclusively off campus. Thus, although these statutes do not mention any off-campus regulations, it is inevitable that the school districts in these states will encounter off-campus bullying and will be unable to act. It can be argued, however, that in a few of these statutes there may be an implied ability to regulate off-campus bullying. This implied right stems from the "substantial disruption" language adopted from *Tinker*. However, the few statutes that do include this "substantial disruption" language are still weak, because they fail, as did the Supreme Court, to define what constitutes a "substantial disruption."

Tennessee's anti-bullying law, for example, confines the regulation of bullying solely to on-campus acts. In its statute, it says that harassment, intimidation, or bullying means "any act that substantially interferes with a student's educational benefits, opportunities or performance, that *takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation, or at any official school bus stop*."[98] Here, Tennessee uses the "substantial" language, but uses it to qualify only on-campus speech. While this approach does effectively protect students' First Amendment rights off campus, it seems to avoid the concerning complexity of the cyber-world. Similarly, Indiana's statute provides details which confine regulations to

> school grounds immediately before or during school hours, immediately after school hours, or at any other time when the school is being used by a school group; off school grounds at a school activity,

97. This true medium group includes Alaska, Wyoming, Indiana, Maryland, Massachusetts, North Dakota, Ohio, and Tennessee. *See supra* note 91.

98. TENN. CODE ANN. § 49-6-1015 (2010) (emphasis added).

> function, or event; traveling to or from school or a school activity, function, or event; or using property or equipment provided by the school.[99]

Yet, even this law could be more effective by mentioning home electronic equipment and the regulation of cyberbullying. Consequently, because the statutes in this category do not give any clear directions regarding regulating off-campus bullying or interpreting behavior that "substantially disrupts" school functions, school districts are left without the tools to effectively solve the bullying problem—especially off campus—and are forced to take their own discretionary measures.

2. The "medium plus" group

The second subcategory in this group, or the "medium plus" group for purposes of this section, includes the regulation of cyberbullying or electronic communication.[100] Like the "true medium" group, however, these statutes do not expressly allow the regulation of off-campus speech in their descriptions of where bullying can be regulated.[101] Although this group technically provides less First Amendment protection than does the true medium group (because the statutes regulate cyberbullying and electronic communication), these statutes are more comprehensive and therefore more effectively alleviate the complexity of the multi-realm bullying problem.

Although each statute in this medium plus group has slightly different characteristics and nuances, as a general rule, these statutes should be considered model anti-bullying statutes for the states. This is because these statutes do not expressly allow any off-campus regulation, but do recognize and mention electronic communication and cyberbullying in their laws. To reconcile this obvious discrepancy between recognizing cyberbullying in their laws, but not expressly allowing off-campus regulation, these statutes either allow the regulation of cyberbullying *only* on-campus, or allow the regulation of cyberbullying on or off campus if the conduct is "substantially disruptive

99. IND. CODE § 20-33-8-13.5 (2010).

100. Although there are only a few states that mention "cyberbullying" in their laws, *see supra* note 5, the vast majority of the states' statutes encompass cyberbullying through synonymous terms.

101. This medium-plus group includes Alabama, Arkansas, Arizona, California, Connecticut, Delaware, Georgia, Kansas, Maryland, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, and Wyoming. *Supra* note 91.

to schools." Furthermore, the best statutes in this group solve the problems of vagueness and overbreadth by explaining what "substantial disruption" actually means[102]—limiting its applications, and thereby eliminating the constitutional problems that have clouded the "substantial disruption" standard for years. Because these laws are organized to specifically allow *only* on-campus regulation and will make exceptions to this rule *only* if the off-campus bullying substantially disturbs school procedures, there is a presumption against regulating off-campus speech. Thus, while this presumption clearly allows school districts to regulate on-campus behavior, it also gives schools the tools they need to regulate off-campus if such regulation is imperative—according to the articulated criteria of "substantial disruption."

For example, Arkansas' statute includes electronic bullying,[103] but does not expressly allow off-campus regulation. This statute defines bullying as conduct that physically harms a student, teacher, or property; substantially interferes with a student's education; creates a hostile educational environment due to the severity, persistence, or pervasiveness of the act; and substantially disrupts the orderly operation of the school or educational environment.[104] Here, Arkansas does not expressly direct school districts to regulate off-campus speech, but indirectly allows regulation if the conduct substantially interferes with a student's education. Also, Arkansas' statute is more successful than others in this category because it defines what "substantial disruption" means:

> "Substantial disruption" means without limitation that any one (1) or more of the following occur as a result of the bullying:

102. For example, Alabama's definition of harassment includes the "substantial disturbance" language, and although it does not provide a definition as clear as Arkansas' statute, it provides parameters for the phrase by its specific definition and its context as part of a list: "To constitute harassment, a pattern of behavior may do any of the following: (a) Place a student in reasonable fear of harm to his or her person or damage to his or her property. (b) Have the effect of substantially interfering with the educational performance, opportunities, or benefits of a student. (c) Have the effect of substantially disrupting or interfering with the orderly operation of the school. (d) Have the effect of creating a hostile environment in the school, on school property, on a school bus, or at a school-sponsored function. (e) Have the effect of being sufficiently severe, persistent, or pervasive enough to create an intimidating, threatening, or abusive educational environment for a student." ALA. CODE §§ 16-28B-3(2) (2010).

103. ARK. CODE ANN. § 6-18-514(3) (2010) ("'Electronic act' means without limitation a communication or image transmitted by means of an electronic device, including without limitation a telephone, wireless phone or other wireless communications device, computer, or pager.").

104. *Id.* § 6-18-514(2).

> (A) Necessary cessation of instruction or educational activities;
>
> (B) Inability of students of educational staff to focus on learning or function as an educational unit because of a hostile environment;
>
> (C) Severe or repetitive disciplinary measures are needed in the classroom or during educational activities; or
>
> (D) Exhibition of other behaviors by students or educational staff that substantially interfere with the learning environment.[105]

Like the other statutes in this category, Arkansas' statute has a presumption against regulating off-campus speech. However, it recognizes the need for some off-campus regulation in extreme circumstances and successfully defines a clear and easy-to-follow criterion for school districts. Therefore, these medium plus statutes are ideal because school districts can regulate only on-campus bullying, but have the tools necessary to solve off-campus problems should they arise. Additionally, schools are no longer left to their own discretion to decide when they can regulate off-campus speech.

C. Harsh Regulations: States Have Gone Too Far

The final category of regulations, those in the harsh category, comprises the fewest statutes, but has the most extreme and pervasive regulations.[106] These statutes are similar to those in the medium group because most include the "substantial disruption" language and require school districts to implement anti-bullying training programs. But these statutes give students the least First Amendment protection because the statutes *expressly* direct school districts to regulate off-campus bullying. By contrast, the medium category of statutes maintains a presumption against off-campus regulation; here, the statutes favor regulating off-campus speech, which arguably violates the First Amendment.

For example, in addition to regulating on-campus behavior, Massachusetts' statute prohibits bullying at "location[s], activit[ies], function[s] or program[s] that [are] *not school-related*, or through the use of technology or an electronic device that [are] *not* owned, leased or used by a school district or school."[107] Although Massachusetts qualifies this

105. *Id.* § 6-18-514(5). *But see* CONN. GEN. STAT. § 10-222d (2010) (failing to define "substantially disrupt"); KAN. STAT. ANN. § 72-8256 (2010).

106. This harsh group includes Colorado, Hawaii, New Jersey, Massachusetts, and Vermont. *Supra* note 91.

107. MASS. GEN. LAWS ch. 71, § 37O (b) (2010) (emphasis added).

regulation by suggesting that the off-campus conduct must "[create] a hostile environment at school for the victim, [infringe] on the rights of the victim at school or materially and substantially [disrupt] the education process or the orderly operation of a school,"[108] the language of the statute has already created an unconstitutional presumption by specifically directing school officials to regulate off campus in the first place. Instead of keeping bullying regulation on campus and extending off campus *only* in attenuating circumstances—as does the medium category of statutes, this statute starts by regulating off campus and limits the school's ability to regulate *only* if the conduct does not meet a certain criteria. Therefore, the statute is too harsh because schools can use their discretion to presume they can regulate off campus First-Amendment protected speech.[109]

Finally, it is appropriate to consider New Jersey's statute last. Just as many critics have stated, New Jersey's anti-bullying statute is indeed one of the toughest anti-bullying statutes, and accordingly falls within this harsh category.[110] In its definition of "harassment, intimidation, or bullying," New Jersey's statute includes acts which take place "on school property, at any school-sponsored function, on a school bus, *or off school grounds* as provided for in section 16 of P.L.2010 . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . . ."[111] Although New Jersey's statute, like Massachusetts', also has language that qualifies the school's ability to regulate off-campus bullying, this language is not readily apparent. The major qualifications of the off-campus regulation can be found in section 16 of P.L.2010. This section, however, is nearly impossible to find, and other than the qualifications found in that hidden section, the statute contains no other limitations on how far school's can regulate off-campus speech. The New Jersey statute, like many statutes in both the medium and harsh categories, includes the "substantial disruption" language; but it fails to define how to determine when conduct becomes substantially disruptive. Consequently, the language in New Jersey's statute is on its face overbroad because it extends into the realm of constitutionally protected off-campus student speech, and does not

108. *Id.*

109. *See also* Bennett, *supra* note 15 ("[I]n Massachusetts, which has one of the strictest [anti-bullying laws], anti-bullying programs are mandated in schools, and criminal punishment is outlined in the text for even the youngest offenders.").

110. *See supra* note 5.

111. 2010 N.J. SESS. LAW SERV. ch. 122 (West).

provide any language, which limits the regulation's scope.

V. THE BIG FIX: HOW NEW JERSEY AND OTHER STATES CAN TAILOR THEIR LAWS

In considering the Supreme Court's First Amendment case law in conjunction with existing anti-bullying statutes, the question remains how to reconcile the two: what is the delicate balance between protecting students' free speech rights and sufficiently regulating bullying in and out of schools? While the solution must come, to some extent, from legislation, the reality is that legislation cannot and should not be the complete answer. Instead the states should take an ex-ante approach and focus on education. Such an approach would not only avoid the constitutional ramifications that result from over-legislation, but would also take a preventative approach and eliminate bullying from the beginning instead of trying to solve the problems ex-post.

A. Education Not Legislation

Although students surely know about bullying, many are most likely unaware of its many different forms and the drastic ramifications it may have. Bullying is a serious issue, but the best way to eliminate the problem is through anti-bullying education, not legislation. Bullying and cyberbullying education is especially relevant to the concerns of this Comment because education eliminates the need to over-regulate in the realm of off-campus First Amendment protected speech, and additionally provides a more effective solution to the problems associated with bullying.

Scholars have already shown the effectiveness of education in solving bullying-related issues. For example, Patricia W. Agatston, Robin Kowalski, and Susan Limber conducted research on students' perspectives and responses to bullying, and their findings suggest that preventative messages targeting students, educators, and parents is the best way to fight against this seemingly unending battle.[112] Surprisingly, this research revealed that students viewed bullying, specifically cyberbullying, as a problem, "but one rarely discussed at school," and that students did not view "school district personnel as helpful resources" when combating the bullying challenges they faced.[113] Although several

112. Patricia W. Agatston, Robin Kawalski & Susan Limber, *Students' Perspectives on Cyber Bullying*, J. OF ADOLESCENT HEALTH S59, S59 (2007).

113. *Id.*

state statutes have required schools to adopt an already established anti-bullying policy or create their own, the emphasis on these programs has not been strong enough and schools need to take an even more increased role in educating about bullying.[114] "If we can change this culture in K-12, hopefully we won't have incidents by the time [students] are in college or in the workplace . . . that is what education is about, to teach our kids courtesy and respect as well."[115]

Yet another, equally compelling reason to focus on education and not legislation is the fact that making bullying or cyberbullying a crime "is a scare tactic that has proven to be ineffective,"[116] and could actually have devastating results on students found guilty of cyberbullying. Most research and statistics fail to consider the negative consequences that stem from labeling students as bullies, whether or not those students were actually in the wrong. Although students must learn to take responsibility for their actions, labeling them as bullies, or even as criminals in the most extreme cases, "can have lasting effects not only on how they will later be able to fit into social order and re-establish themselves in the community, but also on their future educational endeavors."[117] Focusing more on educational programs will shift schools' attention to informing students about bullying and its consequences, rather than pointing fingers and assessing blame, and will therefore ultimately protect more students by creating safer, more constructive school environments.[118]

As would be expected, an educational approach to the overall bullying problem is also a necessary step in reducing the cyberbullying

114. It is important to note, that there are many states, including New Jersey, which do have extremely stringent anti-bullying training and education programs; however, for the most part, these states have also over-legislated in an unacceptable way. The important thing for states to do is to find the balance between education and legislation.

115. Monsy Alvarado, *Halting Bullies is New Priority*, NORTHJERSEY.COM (Sept. 5, 2011), http://www.northjersey.com/news/129283053_Halting_bullies_is_new_priority. html (quoting Frank Belluscio of the New Jersey School Boards Association, explaining what New Jersey's new legislation aims to accomplish) (internal quotation marks omitted).

116. Noonan, *supra* note 19, at 358.

117. *Id. See also* Bennett, *supra* note 15 (explaining that the "bullies" responsible for Tyler Clementi's death face up to five years in prison, with potentially more charges, and asking where is the line between behavior that is bad and behavior that is criminal).

118. Bazelon, *supra* note 4, at 1–2 (describing how those charged with bullying Phoebe Prince have suffered as a result of their charges: "The charges turned the six students into international symbols of callow teenage evil. . . . They were kicked out of school. Sean lost a football scholarship to college. They are all facing pretrial proceedings in September, with the possibility of prison time if they're convicted.").

problem that has become rampant in schools over the past decade. Although they are experts with various technological devices, from cell phones to Facebook, students—especially those who are younger—are unaware of the "social and moral ramifications"[119] that can result from these devices. So much harm can occur simply by clicking a mouse or sending a text, and students need to be aware of these potential consequences. Specifically, schools should encourage the safe and considerate use of computers and other equipment by educating their staff and students about the do's and don'ts of online and computer communication, and encouraging parents to go online with their children and monitor their activities.[120]

Although schools seem to be the most obvious arena to target the bullying problem, one important consideration is to educate community-wide, by getting parents and community members involved in the anti-bullying education process. Richard Bozza, the executive director of the New Jersey Association of School Administrators, critiqued New Jersey's law by explaining that bullying "is not a school issue," but is a "community issue" that should be addressed as a community.[121] Indeed, schools that are successful in combating the bullying problem share several features: "strong leadership, clearly articulated and enumerated anti-discrimination policies, a commitment to training for all parts of the community, consistent reinforcement of positive school culture and nimble systems of communication."[122] Thus, critical to these stable, successful schools is both a specific anti-bullying policy—which is where legislation is necessary—and the involvement of school and community leaders. Once students, their parents, and community members become aware of the bullying problem and the steps they can take to avoid and address the problems, bullying will finally become a solvable problem. Instead of attempting to legislate bullying and cyberbullying "out of existence (a quixotic dream)," schools and legislatures should choose a "more productive approach . . . that is proactive and educational."[123]

119. Hayward, *supra* note 4, at 90.

120. *Id.* at 89 n.12.

121. Alvarado, *supra* note 115.

122. Joel Baum, *Gender, Safety and Schools: Taking the Road Less Traveled*, 15 U.C. DAVIS J. JUV. L. & POL'Y 167, 170 (2011).

123. Hayward, *supra* note 4, at 89–90 (providing a list of nine proposals to prevent cyberbullying from recurring: (1) not engaging the person by replying; (2) printing all online communications so that cyberbullying is documented; (3) changing screen names and sharing them

B. How Tailored Legislation Can Help

Although education is the most effective way to solve the bullying problem, schools may still need some prodding and funding from legislation to actually get results. However, aside from establishing clear and specific anti-bullying policies, legislation should be viewed more as a safety valve, if and when problems occur, rather than the actual solution to bullying. The problem with current legislation is that it has become increasingly harsh, prohibiting—and at times—criminalizing more speech and expression, and ultimately creating even more problems.[124] Therefore, instead of eliminating anti-bullying legislation altogether—which would surely wreak political havoc—and relying solely on educational measures, the most efficient and logical solution is to tailor existing legislation so that it works in conjunction with educational programs.

When considering how to appropriately tailor legislation so as not to legislate past constitutional boundaries, we must look closely at what states are already doing successfully to determine what we really need to change. As established in the statutory analysis in Part IV, most states already require school districts to adopt an anti-bullying policy and several require schools to also train students, teachers, and staff about bullying.[125] However, few statutes specify what such policies and training programs ought to include. In addition, only a few states have programs that take specific measures to hold schools responsible for their progress in these training programs. Consequently, in order to maintain unity among state school districts and to ensure that schools are actually implementing the policies and training articulated in the statutes,

with selected friends and family only; (4) not sharing personal information in chat rooms; (5) contacting service providers to identify where negative emails originate; (6) thinking before sending a reply; (7) increasing parental awareness of online tools, applications, games, and other online materials used by their children; (8) involving teachers of children that are being cyber bullied; and (9) initiating comprehensive action by teachers, other school staff, students, parents, and community members).

124. *See id.* at 90.

125. *See* ALASKA STAT. §§ 14.33.200 to .250 (2010); ARIZ. REV. STAT. ANN. § 15-341(37) (2010); ARK. CODE ANN. 6-18-514 (2010); COLO. REV. STAT. § 22-32-109.1 (2010); CONN. GEN. STAT. § 10-222d (2010); GA. CODE ANN. § 20-2-751.4 (2010); IOWA CODE § 280.28; KAN. STAT. ANN. § 72-8256(c) (2010) (requiring only that "such plan shall include provisions for the training and education for staff members and students," but giving no specifics regarding that plan); MO. REV. STAT. § 160.775(4) (2010); N.C. GEN. STAT. §§ 115C-407.15 to -407.18 (2010); OHIO REV. CODE ANN. §§ 3313.666 to .667 (West 2010); R.I. GEN. LAWS § 16-21-34 (2010); S.C. CODE ANN. § 59-63-140 (2010); UTAH CODE ANN. §§ 53A-11a-101 to -401 (West 2010); VT. STAT. ANN. tit. 16, §§ 11, 565 (2010); WASH REV. CODE § 28A.300.285 (2010).

legislation must include detailed and specific requirements for school districts' policies; provide school districts with standardized training, materials for such training, or at least specific instructions to direct school districts in creating their own training; and require school districts to report back and remain accountable for their progress.

Equally important to tailoring statutes to include educational policies, training, and accountability to current legislation, is tailoring statutes to avoid over-legislation—especially to resolve the First Amendment issues many statutes pose. As articulated in Part IV, each state takes a slightly different approach to anti-bullying legislation, but as a general rule, those statutes in the medium category share characteristics that are most ideal for anti-bullying legislation nationwide. Following the characteristics in the medium category, states have two options: (1) choose to regulate *only* on campus and find other ways to take care of off-campus bullying and cyberbullying; or (2) choose to regulate primarily on campus, but allow regulation off campus only if absolutely necessary, only if a certain, clearly articulated criterion is satisfied.

Several scholars have argued that perhaps the first option is best because it offers full protection to students' off-campus First Amendment rights by not allowing any off-campus regulation. One benefit to this type of statute is that it strengthens and validates schools' on-campus regulations:

> Treating speech outside of school supervision as deserving of full First Amendment protection has the advantage of making restrictions on speech under school supervision more like a time, place, and manner regulation. By leaving other channels for student speech open, greater restrictions on student speech can be justified where they are truly needed.[126]

By excluding any off-campus regulation, schools do not face the vagueness and overbreadth problems that come from other unclear statutes; but at the same time, these schools are confronted with the inability to provide necessary protection to students who are victims to off-campus bullying and cyberbullying. Many states and scholars have presented viable options to resolve this problem.

For example, North Carolina's statute does not allow schools to regulate any bullying or cyberbullying off campus; but it has established a cyberbullying law that is completely separate from school

126. Goldman, *supra* note 45, at 408.

legislation.[127] Here, although schools in North Carolina can regulate *only* on campus, thereby maintaining students' First Amendment rights, the state legislature has established additional legislation outside the school sphere to target the growing problem of off-campus cyberbullying. These additional off-campus regulations could be justified under the First Amendment through the "fighting words" or "true threat" doctrines and would not only keep school regulations within the school sphere, but would also provide a community-wide solution to the bullying problem. Because the fighting words doctrine requires that speech has the likelihood to provoke an immediate violent reaction, it is, to say the least, difficult to analogize to bullying.[128] The true threat doctrine is more helpful. Under this doctrine, true threats, which are statements that communicate to a reasonable person a serious intent to cause a present *or future* harm,[129] are entirely unprotected by the First Amendment.[130] Therefore, such a doctrine could provide relief to some bullying victims who cannot turn to schools for relief because of statutory prohibitions.

But despite these out-of-school alternatives to regulating off-campus bullying, the second option—which instructs schools to regulate primarily on campus, but allows regulation off campus if a certain, clearly articulated criterion is satisfied—seems to be the most effective and the most accepted solution for tailoring anti-bullying legislation. This approach seems more effective than the first because many states already use it in some form, and this approach would require less tailoring to resolve the First Amendment problems that accompany much anti-bullying legislation.

If state legislatures choose to tailor their anti-bullying legislation according to this second approach, they must clearly define where and when regulation of on-campus bullying can take place, and they must

127. N.C. GEN. STAT. § 14-458.1 (2009).

128. Cohen, *supra* note 11. *See also* Clay Calvert, *Fighting Words in the Era of Texts, IMS, and E-mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART TECH. & INTEL. PROP. L. 1, 12 (2011). *But see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) (holding that the state can restrict words which by their very utterance inflict injury or tend to incite an immediate breach of the peace, which arguably could include bullying or cyberbullying).

129. Goldman, *supra* note 45, at 410 (explaining that the speaker need not actually intend to carry out the threat, but rather the doctrine is intended to protect individuals from the fear of violence and from the disruption that fear engenders); *see also U.S. v. White*, 670 F.3d 498, 524 (4th Cir. 2012) (The "true threat" doctrine requires "proof of a specific intent to threaten," but not proof of "intent to carry out the threat.").

130. Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 599 (2011).

clearly articulate *Tinker*'s "substantial disturbance" doctrine to establish a threshold for how and when schools can regulate off-campus bullying and cyberbullying.[131] "State-operated schools may not be enclaves of totalitarianism" and officials do not and should not have "absolute authority over their students";[132] therefore, it is imperative that anti-bullying legislation establishes clear parameters for school regulation.

The majority of states with statutes in the medium category already include language that clearly, and satisfactorily, defines their on-campus boundaries: on school grounds, in school vehicles, at designated school bus stops, at school-sponsored activities or events, etc. But only a few have defined the parameters of off-campus speech beyond a mere mention of the substantial-disturbance doctrine.[133] Therefore, states must tailor their legislation to define what this doctrine means and how it can be applied. Only then will states be able to address both on- and off-campus bullying concerns while, at the same time, eliminating the vagueness and overbreadth problems that currently exist in the majority of anti-bullying statutes.

VI. CONCLUSION

Bullying in schools is a difficult problem that calls for immediate attention. But because of its natural implications on the First Amendment rights of students, solving the problem requires a very delicate balance from schools and legislators nationwide.

So, is New Jersey's harsh, new anti-bullying statute a model statute for the states? Not quite. Although critics of the statute worry that it imposes too many responsibilities—which include inherent costs—on teachers and the community, the statute is actually successful in providing a strong focus on anti-bullying education. In this particular aspect of the statute, the increased regulation is actually a positive change. But New Jersey's legislation is not successful in other key aspects, namely its direct off-campus legislation, which infringes on students' First Amendment rights not only because it extends beyond the school grounds, but also because it does so according to schools officials' discretion. As the Supreme Court states in our leading case, *Tinker*:

131. *See* Noonan, *supra* note 19, at 34.

132. Waldman, *supra* note 130, at 592.

133. *See supra* note 90.

> 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discover truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'[134]

Because the First Amendment rights of students are vital rights, statutes, especially New Jersey's, must be tailored to eliminate the vagueness and overbreadth problems. Fortunately, even though most states' legislation have First Amendment complications at present, these states need only tailor a small part of their laws to make them First Amendment approved. Once states tailor their statutes and decide to take a more preventative approach, students across the United States will have two of their freedoms restored: safety from bullies and freedom of speech.

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134. Tinker v. Des Moines, 393 U.S. 503, 512 (1969) (citation omitted).

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