

# PRESERVING THE SCHOOLHOUSE GATES: AN ANALYTICAL FRAMEWORK FOR CURTAILING CYBERBULLYING WITHOUT ERODING STUDENTS' CONSTITUTIONAL RIGHTS

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*“The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web.”*<sup>1</sup>

## INTRODUCTION

The advent of a dot-com world and the consequential birth of revolutionary social networking sites, such as Facebook and MySpace, have furnished youth across the globe with access to one another at their fingertips. However, with this unprecedented instant interaction has come a detrimental—and in some cases, a fatal—price of admission: cyberbullying. Adolescents<sup>2</sup> using the Internet today may experience cyberbullying through any one of modern-day technology’s communication avenues: websites, social networks, blogs, chat rooms, online videos, instant messages, message boards, or other areas of the Internet. The surfeit of benefits the Internet has introduced—increased efficiency, social networking, instantaneous news, enhanced research—are accompanied by a multitude of perils: cyberbullying, online harassment, identity theft, and hacking, to name a few.<sup>3</sup>

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1. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007) (holding that there was not a sufficient “nexus” between the off-campus speech and the “substantial disruption of the school environment,” and that it was a violation of the student’s speech rights for school officials to suspend the plaintiff-student for the off-campus creation of a parody profile that used lewd and offensive language to depict the school principal).

2. Cyberbullying generally has been associated with the victimization of minors; however, the term and associated issues include legal adults as well. This Note focuses on cyberbullying within the context of minors.

3. Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 846 (2010).

These associated dangers pose difficulties and new obstacles for policymakers, school officials, and parents striving to develop adequate protections for adolescents. Although policymakers have enacted legislation to combat cyberbullying, school officials have struggled with effective implementation—an understandable confusion in consideration of the disparate case precedent and grave jurisprudential confusion surrounding schools' authority with off-campus student speech.

In 2006, the horrifying effects of cyberbullying were palpable. The mother of thirteen-year-old Megan Meir returned home one day to find her daughter hanging in her closet from a belt tied around her neck.<sup>4</sup> Megan's mother would later discover that her daughter's suicide resulted from a barrage of cruel and degrading attacks launched through MySpace<sup>5</sup> by a purported fellow teen, Josh Evans.<sup>6</sup> Josh's once friendly and flirtatious exchanges with Megan quickly morphed into insulting and disparaging attacks against her. On the day of Megan's suicide, Josh's last message taunted: "The world would be a better place without you."<sup>7</sup> The heartrending events following Megan's death revealed that the professed "Josh Evans" was actually Lori Drew, the mother of one of Megan's female friends.<sup>8</sup>

Regrettably, Megan's story is far from rare. According to the National Crime Prevention Counsel, forty-three percent of teens have endured cyberbullying.<sup>9</sup> The United States Department of Education recently reported that about nineteen percent of school administrators said they had to deal with cyberbullying daily or at least once per week.<sup>10</sup> The breadth and severity of cyberbullying demands a response from communities, parents, schools, and legislatures. However, regulation of online speech treads on delicate constitutional territory. Thus, in our efforts to garnish children with adequate protection from cyberbullying, we must proceed cautiously so as not to erode the freedom of speech guaranteed by the First Amendment of the United States Constitution.

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4. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, <http://www.nytimes.com/2007/11/28/us/28hoax.html#>.

5. MySpace is an online forum for social networking through which members can communicate, both privately and publicly. Subscribers create profile pages whereby they are able to share and send pictures, videos, and messages. *Myspace.com Terms of Use Agreement*, MYSPACE (May 9, 2012), <http://www.myspace.com/help/terms>.

6. Maag, *supra* note 4.

7. *Id.*

8. *Id.*

9. NAT'L CRIME PREVENTION COUNCIL, PROTECTING WHAT MATTERS TO YOU 16 (2008).

10. SAMANTHA NEIMAN & MONICA R. HILL, U.S. DEP'T OF EDUC., CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS 12 (2011).

This Note examines the anomaly of cyberbullying and explores the exploding role of technology in the lives of students today. Part I expounds the distinction between cyberbullying and its traditional counterpart and, ultimately, reveals that the insidious nature of cyberbullying—in comparison to traditional bullying—exponentially amplifies the detrimental psychological effects experienced by victims. Given that the Internet has become so omnipresent in youth culture today, coupled with the more vicious effects cybervictims endure, Part I concludes that the cyberbullying phenomenon demands a comprehensive response from parents, school officials, and policymakers.

Part II denotes that constitutional challenges frequently confront school authorities in disciplinary instances of cyberbullying. Part II then enumerates the limited circumstances, as determined by the Supreme Court, in which school officials may proscribe student speech without offending the First Amendment. The following five cases comprise the seminal Supreme Court decisions regarding student speech: (1) *Tinker v. Des Moines*, (2) *Bethel v. Fraser*, (3) *Hazelwood v. Kuhlmeier*, (4) *Morse v. Frederick*, and (5) *Virginia v. Black*. Part II then discusses the Third Circuit split to elucidate that the state of the law concerning cyberbullying is constantly in flux, and at best, confused.

Part III, after examining the flaws with proposed and current cyberbullying legislation, argues that many existing cyberbullying laws are subject to invalidation under the argument that the policies are overly-inclusive and vague. Part III ultimately concludes that many cyberbullying laws are patent violations of students' First Amendment rights and, therefore, fail to garnish today's youth with adequate protection from cyberbullying.

Finally, Part IV discusses the complexities and ambiguities saddling school officials and, accordingly, proffers a non-legal preventative measure to curtail cyberbullying. Part IV proposes the "Positive Action" program as a comprehensive framework for families and community leaders to implement prevention or intervention efforts against cyberbullying. The "Positive Action" program, developed by Dr. Carol G. Allred, is a proven evidence-based program for improving adolescent behavior and already has enjoyed success in traditional and cyberbullying prevention, reducing as much as forty percent of bullying behaviors.

As this Note will demonstrate, constructing effective legislation—that both furnishes students with adequate protection against cyberbullying without simultaneously eroding their First Amendment rights—has proven to be an exigent, and arguably unsuccessful, task. Accordingly, the solution

lies, not within the confines of the legislature, but within the hands of those closest to our students—their parents.

### I. CYBERBULLYING

Decades ago, if we had asked parents, teachers, and school officials the forum in which bullying occurred, we would have heard one resounding yet simple answer—“the schoolyard.” Today, however, the proverbial schoolyard has expanded, compounded, and undergone a technological face-lift.

Traditional “bullying” has been defined as repeated intimidation, over time, of a physical, verbal, and psychological nature of a less powerful person by a more powerful person or group of persons.<sup>11</sup> It can be physical (e.g., punching), verbal (e.g., name-calling), and/or social (e.g., circulating rumors).<sup>12</sup> In short, traditional “bullying” is repetitive and encompasses an intrinsic power imbalance between the bully and the victim, one who is typically feeble or incapable of self-defense.<sup>13</sup>

Though often compared to traditional schoolyard bullying, a key component that differentiates cyberbullying from traditional schoolyard bullying is the use of technology to harass the victim. “Cyberbullying” is commonly defined as the “willful and repeated harm inflicted through use of computers, cell phones, and other electronic [communication] devices,”<sup>14</sup> which is done to harass, intimidate, and threaten others. Cyberbullying has been further defined as involving “the use of information and communication technologies such as email, cell phone and pager text messages, instant messaging, defamatory personal websites, and defamatory online personal polling websites, to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm others.”<sup>15</sup> From the

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11. Kevin Ryan & Marilyn Ryan, Opinion, *Phoebe's Legacy*, PILOTCATHOLICNEWS.COM (June 4, 2010), <http://www.thebostonpilot.com/article.asp?ID=11894> (arguing that the cause of bullying is a natural consequence of an environment where children lack both a strong program of moral education and strong consequences of preying upon one another).

12. Christina Salmivalli et al., *Aggression and Sociometric Status Among Peers: Do Gender and Type of Aggression Matter?*, 41 SCANDINAVIAN J. OF PSYCHOL. 17, 18 (2000).

13. Dan Olweus, *Bully/Victim Problems in School: Facts and Intervention*, 12 EUR. J. OF PSYCHOL. OF EDUC. 495, 496 (1997); see generally SHAHEEN SHARIFF, CYBERBULLYING: ISSUES AND SOLUTIONS FOR THE SCHOOL, THE CLASSROOM, AND THE HOME 19–24 (2008) (illustrating physical and psychological bullying).

14. SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD 5 (2009). Cyberbullying has also been defined as the willful and repeated use of computers, cell phones, and other electronic communication devices to harm others. *Id.*

15. CYBERBULLYING IN THE GLOBAL PLAYGROUND: RESEARCH FROM INTERNATIONAL PERSPECTIVES 6 (Qing Li et al. eds., 2012).

aforementioned definitions, we can extract the following elements: (1) *willful*, (2) *repeated*, (3) *harm*, and (4) *through the use of computers, cell phones, or other electronic devices*.<sup>16</sup>

Cyberbullying victimization may share with its traditional counterpart similar developmental trajectories—both suggest victims wrestle with substance use, depression, suicidal ideation, and psychosomatic symptoms, to name a few.<sup>17</sup> The insidious nature of cyberbullying—which invites anonymity, instantaneity, and potential for perpetuity—may also augment the intensity of the psychological effects endured by victims.<sup>18</sup> For example, cell phones may seem like innocuous tools for making social plans, but at the same time, they serve as convenient vehicles through which bullies can launch an onslaught of verbal taunts at their victims. Or consider, for instance, a fictitious screen name or e-mail address as the chosen medium through which an unidentified bully disseminates his attacks; such anonymity creates a potential safe-haven for bullies. Moreover, the viral nature of cyberbullying enables a bully to spout vile vituperations that can reach a victim instantaneously, spread to mass audiences, and perpetuate in existence.

Simply put, the widespread use of the Internet and social networking sites have invited, indeed provoked, bullying to occur well beyond the schoolyard. According to the Pew Research Center's Internet & American Life Project, "[s]ocial media use has become so pervasive in the lives of American teens that having a presence on a social networking site is almost synonymous with being online."<sup>19</sup> The Pew Research Center's 2011 Report further indicates that ninety-five percent of all teens ages twelve to seventeen are online, and eighty percent of those online teens use social media websites.<sup>20</sup> In addition to computers and the Internet, seventy-five percent of teens ages twelve to seventeen as of September 2009 owned a cell phone

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16. HINDUJA & PATCHIN, *supra* note 14, at 5. *Willful* essentially means that "[t]he behavior has to be deliberate, not accidental"; *repeated* denotes that the "[b]ullying reflects a pattern of behavior, not just one isolated incident"; *harm* means "[t]he target must perceive that harm was inflicted"; and "[c]omputers, cell phones, or other electronic devices" is "what [, in short,] differentiates cyberbullying from traditional bullying." *Id.*

17. *See, e.g.*, Sameer Hinduja & Justin W. Patchin, *Cyberbullying: An Exploratory Analysis of Factors Related to Offending and Victimization*, 29 *DEVIAN'T BEHAV.* 129, 136–37 (2008).

18. *See, e.g.*, Jason Koebler, *Cyber Bullying Growing More Malicious, Experts Say*, U.S. NEWS & WORLD REP. (June 3, 2011), <http://www.usnews.com/education/blogs/high-school-notes/2011/06/03/cyber-bullying-growing-more-malicious-experts-say>.

19. AMANDA LENHART ET AL., THE PEW RESEARCH CTR., TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES: HOW AMERICAN TEENS NAVIGATE THE NEW WORLD OF "DIGITAL CITIZENSHIP" 2 (2011).

20. *Id.*

through which they communicated both verbally and textually.<sup>21</sup> As evidenced by that data, the majority of today's American youth are embedded in an online culture that is largely inseparable and indistinct from their offline world.

With this ubiquitous use of the Internet and technological mediums, online harassment and cyberbullying have become more prevalent. For instance, eighty-eight percent of social-media-using teens reported to have witnessed other people act cruel on social networking sites.<sup>22</sup> These statistics are significantly high, even in light of the difficulty school officials experience in discerning the true predominance of cyberbullying since victims rarely report incidents to adults.<sup>23</sup> Further, even the reported instances of bullying may not capture the entire picture due to the distinct rhetoric used by adults to describe bullying, language that has diverged from the characterizations given by many teens.<sup>24</sup>

One recent study probed to uncover the true experiences that adolescents have on social networking sites and, ultimately, revealed that teens using social media websites not only have witnessed, but have personally experienced, the negative outcomes from interactions on such sites. The statistical data collected unveiled the following:

- 25% of social media teens have had an experience on a social networking site that resulted in a face-to-face argument or confrontation with someone.
- 22% have had an experience that ended their friendship with someone.
- 13% have had an experience that caused a problem with their parents.
- 13% have felt nervous about going to school the next day.
- 8% have gotten into a physical fight with someone else because of something that happened on a social network site.
- 6% have gotten in trouble at school because of an experience on a social network site.<sup>25</sup>

That same study indicated that nineteen percent of teens had been bullied in the past year through at least one of the four scenarios queried in the

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21. AMANDA LENHART ET AL., THE PEW RESEARCH CTR., TEENS AND MOBILE PHONES 2 (2010).

22. LENHART ET AL., *supra* note 19, at 3.

23. See Jaana Juvonen & Elisha F. Gross, *Extending the School Grounds?—Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 496 (2008).

24. LENHART ET AL., *supra* note 19, at 37.

25. *Id.* at 4.

survey (in person, online, by text, or by phone).<sup>26</sup> The teen participants in that study reported the following:

- 12% of all teens report being bullied in person in the last 12 months.
- 9% of all teens have been bullied via text message in the last 12 months.
- 8% say they have experienced some form of online bullying, such as through e-mail, a social network site or instant messaging.
- 7% say they have been bullied by voice calls over the phone.<sup>27</sup>

It should also be noted that half of the above-mentioned victims reported that they were bullied in multiple ways (i.e., in person *and* online).<sup>28</sup>

Research also suggests that devastating emotional and behavioral consequences result from cyberbullying victimization. Suicide, or what some aptly have named “cyberbullicide,”<sup>29</sup> is the most devastating consequence of cyberbullying victimization. However, there are also a host of less grave effects that are nonetheless emotionally and developmentally damaging to teens. Research has indicated that cyberbullying victims felt angry, frustrated, sad, embarrassed, or scared.<sup>30</sup> Data has also unveiled that cyberbullying victims have been found to possess significantly lower levels of self-esteem, which correlates with a number of other dysfunctional responses.<sup>31</sup> Additionally, researchers have determined that delinquency and interpersonal violence can result when victims fail to process their negative emotions in a proper manner.<sup>32</sup> For example, a victim of cyberbullying may have experienced the above-mentioned feelings of anger, sadness, embarrassment, or the like, and may then bring a weapon to school; this student may feel as though he needs to protect himself against the next potential episode and, ultimately, may end up inflicting harm on the bully or an innocent bystander. Research supports this assertion, as experts have concluded that online victims were eight times as likely than non-victims to report carrying a weapon at school in the last thirty days.<sup>33</sup> In short, this

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26. *Id.* at 38.

27. *Id.* at 5.

28. *Id.*

29. HINDUJA & PATCHIN, *supra* note 14, at 185 (defining “[c]yberbullicide” as a “[s]uicide stemming directly or indirectly from cyberbullying victimization”).

30. *Id.* at 63.

31. Mark R. Leary, *Making Sense of Self-Esteem*, 8 CURRENT DIRECTIONS PSYCHOL. SCI. 32, 34 (1999).

32. See Robert H. Aseltine, Jr. et al., *Life Stress, Anger and Anxiety, and Delinquency: An Empirical Test of General Strain Theory*, 41 J. HEALTH & SOC. BEHAV. 256, 256 (2000).

33. Michele L. Ybarra et al., *Examining the Overlap in Internet Harassment and School Bullying: Implications for School Intervention*, 41 J. ADOLESCENT HEALTH S42, S42 (2007).

potential infliction of harm by the victim acting in self-defense only perpetuates the vicious cycle of cyberbullying.

Accompanying the above-mentioned emotional consequences are behavioral effects, which research indicates also stem from cyberbullying victimization. Experts have concluded that, with increasing perpetration of online harassment, comes increased rule-breaking and aggressive behavior.<sup>34</sup> For instance, some student victims have removed themselves from the online venue in which the cyberbullying occurred or even stayed offline completely for a period of time after the incident.<sup>35</sup> Many victims also remained apprehensive to attend school and, in some cases, even feigned illness to circumvent the possibility of another confrontation by the bully.<sup>36</sup>

Undisputedly, cyberbullying is a prevalent and growing concern in youth culture today, the effects of which are only multiplied and compounded by technology and the popularity of the Internet. At the same time, the policies enacted by state legislatures and the course of action pursued by school officials must steer clear of trampling students' First Amendment rights. As the next Part unveils, there are limited circumstances in which the Supreme Court has permitted school officials to restrict student speech without offending the First Amendment.

## II. THE FIVE SEMINAL SUPREME COURT CASES

Prior to the advent of technology, student speech cases were relatively straightforward and required the courts to determine whether a school district could constitutionally regulate on-campus student speech. Technology, however, has transformed student speech cases into a whole new kind of animal. With much student speech now originating off-campus, the issue has become whether school officials may constitutionally reach outside of the proverbial schoolhouse gates in order to discipline a student—an unclear and undetermined scope of authority abound with potential First Amendment violations.

““The problem is that the U.S. Supreme Court has never addressed a case pitting the First Amendment speech rights of minors in cyberspace against

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34. Michele L. Ybarra & Kimberly J. Mitchell, *Prevalence and Frequency of Internet Harassment Instigation: Implications for Adolescent Health*, 41 J. ADOLESCENT HEALTH 189, 189 (2007).

35. Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148, 161 (2006).

36. HINDUJA & PATCHIN, *supra* note 14, at 65. One student recalled, “This one time this girl that was a lot bigger than me made me cry when I talked to her online because she told me if she saw me in school she was going to stuff me in a locker and that no one was going to find me for a very long time. I faked sick for a week and a half until I found the courage deep inside me to go to school. Nothing bad even happened. I was really relieved.” *Id.* (emphasis omitted).

the authority of public schools to punish them for online speech,” explained one commentator.<sup>37</sup> He continued, ““When off-campus speech negatively targets, harasses or otherwise detrimentally affects other students or teachers and school administrators, we’re seeing schools *reaching beyond the proverbial schoolhouse gates to punish students for their off-campus expression.*””<sup>38</sup> This inherent conflict has placed school administrators between a rock and a hard place: face litigation brought by a disciplined student for an alleged violation of her First Amendment rights or face litigation brought on behalf of a student victim who suffered when school authorities failed to act.

The Supreme Court has long held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>39</sup> However, while “[t]he First Amendment guarantees wide freedom in matters of adult public discourse . . . [i]t does not follow [that] . . . the same latitude must be permitted to children in public schools.”<sup>40</sup> Therefore, the Supreme Court has enumerated five main circumstances in which school officials may constitutionally regulate student speech: (1) substantially disruptive;<sup>41</sup> (2) plainly offensive;<sup>42</sup> (3) school-sponsored;<sup>43</sup> (4) pertains to illegal drug use;<sup>44</sup> or (5) amounts to a true threat.<sup>45</sup> These five exceptions indicate the only circumstances in which student speech does not enjoy First Amendment<sup>46</sup> protection and thus may be constitutionally regulated by school officials.

#### A. *Tinker v. Des Moines*

In *Tinker v. Des Moines*, two high school students and a junior high school student protested American involvement in the Vietnam War by

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37. Kara Carnley-Murrhee, *Cyberbullying: Hot Air or Harmful Speech?*, UF LAW MAG., Winter 2010, at 17, 18.

38. *Id.* (emphasis added).

39. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

40. *Id.*

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

42. *See Bethel*, 478 U.S. at 685.

43. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

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

45. *See Virginia v. Black*, 538 U.S. 343, 344 (2003).

46. U.S. CONST. amend. I (providing in pertinent part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”).

donning black armbands to their Des Moines, Iowa schools.<sup>47</sup> Upon learning the students' intentions, principals of the school feared the armbands would incite disruption within the school environment and, consequently, asked students wearing the armbands to remove them or face suspension.<sup>48</sup> Despite the looming threat of discipline, John Tinker and his sister, Mary Beth Tinker, wore the armbands as planned and were ultimately suspended.<sup>49</sup> The Supreme Court held that the students wearing the armbands in protest did not disrupt school activities and did not impinge upon the rights of others.<sup>50</sup> In short, the Court determined that their conduct fell within the purview of protection afforded by the Free Speech Clause of the First Amendment and also the Due Process Clause of the Fourteenth Amendment.<sup>51</sup>

In response to the school board's fear of potential interference with the school environment, the Court denoted:

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . .

. . . Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.<sup>52</sup>

*Tinker* provides the applicable standard for evaluating the constitutionality of disciplinary actions taken by school officials in regulating student speech.<sup>53</sup> Authorities can place restrictions on speech if the student's expression "'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school' . . . [or] collid[es] with the rights of others."<sup>54</sup> It must be demonstrated that the disciplinary

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47. 393 U.S. 503, 504 (1969).

48. *Id.*

49. *Id.*

50. *Id.* at 514.

51. *Id.*

52. *Id.* at 508–09.

53. *Id.* at 509.

54. *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

action taken by school officials is “caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>55</sup> In sum, where the speech materially and substantially disrupts the school environment, or at least creates a foreseeable risk of such disruption, school authorities may restrict the student speech.<sup>56</sup>

The next case discussed below, *Bethel v. Fraser*, clarifies that even if disruption is not immediately likely, school officials are charged with the duty to “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government.”<sup>57</sup>

#### B. *Bethel v. Fraser*

The *Bethel* case concerned Matthew Fraser who, during a speech nominating a fellow student for elective office, used what some observers believed to be a graphic sexual metaphor.<sup>58</sup> Pursuant to Bethel High School’s disciplinary code of conduct, the administration determined that Fraser acted in violation of the regulation and suspended him from school for three days.<sup>59</sup> The Court, considering the 600-student audience (many of whom were only fourteen years old), held that school officials appropriately disciplined the student because the school had the right to proscribe the use of vulgar and offensive language.<sup>60</sup> The Court reasoned that there was a particularly heightened interest in protecting children from exposure to vulgar and offensive language.<sup>61</sup> Moreover, the Court opined that the First Amendment did not preclude school officials from restricting lewd speech because such discourse was “inconsistent with the ‘fundamental values’ of the public school education.”<sup>62</sup>

Even more restrictive than *Bethel* was *Hazelwood v. Kuhlmeier*, a case which presented the Court with the question of whether a school may constitutionally preclude students from publishing controversial topics in the school newspaper. The Supreme Court answered in the affirmative.

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55. *Id.* at 509.

56. *Id.* at 513.

57. 478 U.S. 675, 681 (1986) (citation omitted).

58. *Id.* at 677–78.

59. *Id.* at 678.

60. *Id.* at 677, 685.

61. *Id.* at 684.

62. *Id.* at 685–86.

### C. *Hazelwood v. Kuhlmeier*

The *Hazelwood* case concerned the deletion of pages from a school newspaper that was part of a journalism course.<sup>63</sup> Student staff members of the school's newspaper brought an action against the school district and school officials claiming that their First Amendment rights were violated when two pages of the school's publication regarding controversial topics, including students' experiences with divorce and pregnancy, were omitted from the final publication.<sup>64</sup> The Justices reasoned that the school newspaper did not constitute a "public forum," and therefore, the school had the right wholly within their discretion to determine the material and content within the publication.<sup>65</sup>

The Court further explicated its decision:

[P]ublic schools do not possess all of the attributes of streets, parks, and other traditional public forums that . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," . . . or by some segment of the public, such as student organizations. . . . If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.<sup>66</sup>

In concluding its opinion, the Court denoted that discretion to determine the threshold for inappropriate speech within the classroom properly rests with the school board rather than the federal courts.<sup>67</sup> In short, the Court in *Hazelwood* concluded that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are "reasonably related to legitimate pedagogical concerns."<sup>68</sup>

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63. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

64. *Id.* at 264.

65. *Id.* at 265.

66. *Id.* at 267 (citations omitted).

67. *Id.* at 273.

68. *Id.*

#### D. Morse v. Frederick

The Supreme Court has recently approved regulation of non-vulgar, non-disruptive student speech that is antithetical to an important mission of a public school.<sup>69</sup> In *Morse v. Frederick*, the principal directed students to take down a banner that appeared to advocate illegal drug use in violation of school policy.<sup>70</sup> At a school-sponsored event, Joseph Frederick unfurled a banner with the message, “Bong Hits 4 Jesus,” in reference to the use of marijuana.<sup>71</sup> The school demanded that the student take down the banner; however, the student refused.<sup>72</sup> The principal, Deborah Morse, suspended Frederick for ten days, citing Frederick’s violation of the school’s policy (which prohibited any assembly or public expression that promoted illegal drug use), as the reason for discipline.<sup>73</sup>

Frederick then sued alleging that the school violated his First Amendment rights.<sup>74</sup> The Supreme Court ultimately concluded that the school officials did not violate the First Amendment by suspending the student.<sup>75</sup> The Court in *Morse* emphasized that United States public schools and the government have a fervent interest in protecting students from the dangers of illegal drug use and establishing effective policies that discourage illegal drug use.<sup>76</sup>

In addition to the aforementioned specific instances in which speech is not protected under the First Amendment, the Supreme Court has also found an exception to free speech where the speech amounts to a “true threat.”<sup>77</sup> The next case, *Virginia v. Black*, discusses those circumstances.

#### E. Virginia v. Black

*Virginia v. Black*’s “true threat” can also serve as an underlying basis for school officials to exercise appropriate authority in disciplining a student for cyberbullying. As a result of *Virginia*, where cyberbullying instances amount to “true threats,” school officials have the requisite authority to take

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69. See *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

70. *Id.* at 398.

71. *Id.* at 397.

72. *Id.* at 398.

73. *Id.*

74. *Id.* at 399.

75. *Id.* at 400.

76. *Id.* at 408.

77. *Virginia v. Black*, 538 U.S. 343, 344 (2003).

action—irrespective of whether the incident occurs on or off school grounds.<sup>78</sup> The United States Supreme Court has consistently upheld that “true threats” are not protected speech under the First Amendment.<sup>79</sup> By definition, true threats are communications of “serious expression[s] of an intent to commit an act of unlawful violence to a particular individual.”<sup>80</sup> Specifically, “intimidation” is a type of true threat “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>81</sup> Speech will still constitute a true threat even in factual circumstances where the speaker does not actually intend to carry out the threat.<sup>82</sup> Thus, the First Amendment clearly permits school officials to regulate student speech that constitutes a true threat.<sup>83</sup>

However, lines remain blurred with respect to the true threat exception for want of the Supreme Court to decipher an applicable, bright-line test for true threat cases. As a result of the Supreme Court’s failure to provide a concrete test for true threats, the lower courts have rendered incongruent decisions when interpreting *Virginia*, consequently effectuating a muddled and inconsistent application of the true threat exception. Thus, *Virginia* serves as a fifth exception to the general rule that student speech enjoys First Amendment protection. Nevertheless, the disadvantages and inconsistencies inherent in that case accompany this fifth exception.

In sum, lower courts employ variations of the five aforementioned cases to cyberbullying cases, leading to disparate decisions about whether school officials have the authority to regulate off-campus student speech—only further aggravating existing jurisprudential confusion. Moreover, the Supreme Court has not revisited a student speech case for fifteen years and, in particular, has never rendered a decision concerning the unique interplay between student speech and today’s complex technologies. Indeed, today’s complex and interactive multimedia websites—accessible to the world—has replaced *Tinker*’s simple black armband, worn silently within the confines of one Iowa classroom.

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78. *Id.*

79. *Id.* at 359.

80. *Id.*

81. *Id.* at 360.

82. *Id.*

83. *Id.* at 359.

F. *The Third Circuit Split*

The Third Circuit's recent decisions further obviate the confused state of the law concerning cyberbullying. In two cases with nearly identical facts, the Third Circuit Court of Appeals rendered decisions in stark opposition to one another—on the same day.<sup>84</sup> First, in *J.S. ex. rel. Snyder v. Blue Mountain School District*, two students created from their home computer a fictitious MySpace profile of their school's principal.<sup>85</sup> The profile's content and images depicted the principal as a bisexual sex addict and pedophile.<sup>86</sup> The school determined that the students' conduct violated the educational institution's disciplinary code and then suspended the students for ten days.<sup>87</sup> An action against Blue Mountain School District soon ensued.<sup>88</sup> One of the suspended students, through her parents, alleged that the school board's disciplinary action constituted, inter alia, a violation of her First Amendment rights.<sup>89</sup> The court granted summary judgment to the school district, ruling that the school could discipline "lewd and vulgar off-campus speech" that had an effect on campus, even if such effect did not amount to a "substantial disruption."<sup>90</sup> School District -1, Students -0.

That same day, in *Layshock v. Hermitage School District*, the Third Circuit rendered an opinion in stark opposition to the *Snyder* decision—despite the two cases' nearly identical facts.<sup>91</sup> In *Layshock*, student Justin Layshock, created a fictitious MySpace profile of his principal from an off-campus computer during non-school hours.<sup>92</sup> In particular, the profile contained vulgar and offensive statements and used crude language to paint the principal as, among other descriptions, a homosexual who engages in marijuana and alcohol use.<sup>93</sup> The School District argued its position akin to *Fraser*, attempting to demonstrate a nexus between the creation and

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84. Compare *J.S. ex. rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rev'd en banc*, 650 F.3d 915 (3d Cir. 2011) (holding that school did not violate student's First Amendment rights by suspending her for creating a false internet profile of her principal), with *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *vacated*, 650 F.3d 205 (3d Cir. 2011) (holding that the school violated student's First Amendment rights by suspending him for creating a false internet profile of his principal).

85. 593 F.3d 286 at 290.

86. *Id.*

87. *Id.* at 293.

88. *Id.* at 290.

89. *Id.*

90. *Id.* at 295, 307.

91. Compare *id.* at 286, with *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *vacated*, 650 F.3d 205 (3d Cir. 2011).

92. *Layshock*, 593 F.3d at 252.

93. *Id.*

distribution of the speech and the educational institution sufficient enough to permit the School District to regulate the student's off-campus speech.<sup>94</sup> The court determined the School District "could not establish a sufficient nexus between [Layshock]'s speech and a substantial disruption of the school environment."<sup>95</sup> The conduct in *Fraser*, however, occurred on-campus and, accordingly, would not trigger the requisite substantial disruption standard as intimated by the court.<sup>96</sup> The court ultimately held that the School District violated Layshock's First Amendment rights and entered summary judgment in favor of the student.<sup>97</sup> School District -1, Students -1.

In sum, the Third Circuit essentially rendered two opinions in stark opposition to one another despite the two cases' nearly identical factual circumstances: (1) School officials have seemingly unbridled power to chill off-campus student speech in an effort to prevent or deter potential disruption from occurring on-campus; yet (2) School officials may not constitutionally extend their reach outside of the proverbial schoolhouse gates to regulate off-campus student speech. School District -?, Students -?.

Perhaps realizing the egregious irony of these opinions, the Third Circuit revisited en banc these two cases this past June.<sup>98</sup> The Third Circuit reheard the *Snyder* case and ultimately reversed its initial decision, ruling instead in favor of the student.<sup>99</sup> In the Third Circuit's en banc ruling of *Layshock*, the court held that the school district violated the students First Amendment rights in disciplining the student for speech that occurred off-campus after school hours.<sup>100</sup> Unlike the decision in *Snyder*, however, this ruling was unanimous, with one concurring opinion.<sup>101</sup>

The law concerning cyberbullying is, therefore, undoubtedly in flux and desperately in need of clarification. The following Part argues that some

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94. *Id.* at 259, 261.

95. *Id.* at 258 (internal quotation marks omitted).

96. *Id.* at 257.

97. *Id.* at 263–65.

98. Seth Zweifler, *Third Circuit Sides with Students in Online Speech Fight: Landmark Rulings Leave Some Questions Unanswered*, STUDENT PRESS L. CENTER (June 13, 2011), <http://www.splc.org/news/newsflash.asp?id=2238>.

99. *See generally* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc).

100. *See generally* *Layshock ex rel. v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc).

101. *Id.* at 219. In his concurring opinion, Judge Jordan (with whom Judge Vanaskie joined), commented: "Unlike the fractured decision in *J.S.*, we have reached a united resolution in this case, *but there remains an issue of high importance on which we are evidently not agreed and which I note now*. . . . The issue is whether the Supreme Court's decision in *Tinker v. Des Moines* . . . can be applicable to off-campus speech." *Id.* at 219–20 (Jordan, J., concurring) (emphasis added) (citations omitted).

cyberbullying laws—which grant school officials authority that extends beyond the few allowable exceptions—remain ineffective because they patently violate students’ First Amendment freedoms.

### III. ANTI-CYBERBULLYING LAWS CHILL STUDENT SPEECH

While the Supreme Court’s silence has been audible,<sup>102</sup> and the legislature has yet to cure statutory ambiguities, many states have enacted anti-cyberbullying laws. Forty-nine states now have anti-bullying statutes, but only twenty-one states specifically prohibit cyberbullying.<sup>103</sup> Amendments to preexisting anti-bullying policies and statutes have typically included the addition of language to define and encompass technology.<sup>104</sup> For example, states have modified provisions of their statutes to include terms such as “sexting” and “blogging”; if an applicable statute exists in that state or, in the alternative, as a matter of policy on a local level.<sup>105</sup> One state does not have any laws at all with respect to anti-bullying, either in the traditional sense or the cyberbullying context.<sup>106</sup>

Although cyberbullying legislation enjoys many avid supporters, the policies are also subject to criticism and contestation for vagueness and overbreadth. Policymakers sprinkle anti-cyberbullying legislation with ambiguous terms such as “disruptive” or “hostile environment at school,” which are so vague that many people—including school officials who shoulder the burden of enforcement—struggle to distinguish between permissible and impermissible speech.<sup>107</sup> Current and proposed cyberbullying laws grant school officials seemingly unbridled power to restrict student speech; or, where legislation does not grant unbridled power to school officials, the laws authorize school officials to proscribe student speech that cannot be characterized within one of the few allowable exceptions enumerated by the Supreme Court. Nevertheless, in both circumstances, such cyberbullying

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102. Warren Richey, *Does First Amendment Protect Students’ Online Speech Off-Campus?*, THE CHRISTIAN SCI. MONITOR (Jan. 17, 2012), <http://www.csmonitor.com/USA/Justice/2012/0117/Does-First-Amendment-protect-students-online-speech-off-campus> (discussing the United States Supreme Court’s denial of certiorari for three cases presenting the Court with an opportunity to clarify conflicting lower court rulings on whether school officials may discipline students for offensive comments made at home and posted on the Internet about fellow students or school officials).

103. BULLY POLICE USA, <http://www.bullypolice.org> (last visited Mar. 24, 2012); *see also* John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 90 (2011).

104. BULLY POLICE USA, *supra* note 103.

105. *See generally id.*

106. *See id.*

107. Hayward, *supra* note 103, at 91–92.

laws are patent violations of the First Amendment and should therefore be held unconstitutional. While policymakers have attempted to furnish adolescents with adequate protections by enacting these knee-jerk legislative policies, school districts—who are strapped with implementing these new laws—have been left confused and unapprised. In effect, many school officials remain uncertain as to where the boundaries of their authority begin and where they end.

On-campus student speech is clearly governed by *Tinker* and its tetralogy. The overarching and unanswered question asks, however: to what extent may school officials regulate off-campus speech? Put another way, this digital era calls for a recalibration of *Tinker*'s schoolhouse gates so as to clarify the student speech that can constitutionally be regulated by school authorities. Many schools want to assist in curtailing cyberbullying, but do not know where the scope of their authority to discipline students begins or ends. “‘Schools are finding themselves at a loss, particularly because of vague laws’ . . . to instruct them on how to address cyberbullying.”<sup>108</sup>

The Supreme Court has had, and subsequently denied, multiple opportunities to draw a line of demarcation and answer whether school officials have carte blanche authority to punish students when the speech at issue originates outside the schoolhouse gates.<sup>109</sup> Even as recently as January 17, 2012, the Supreme Court declined to take up three vital cases involving controversial student speech on the Internet.<sup>110</sup> One commentator writing an *Amici Curiae* Brief for the National School Boards Association and others urged: “Given the exploding role of technology in the lives of students, clear guidance from this Court on how schools may regulate student speech that originates away from the traditional school campus but dramatically affects the learning environment is imperative.”<sup>111</sup> Meanwhile, lower courts are all over the board—leaving school administrators more confused than ever as to what standard applies with respect to off-campus online student speech.

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108. Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying*, 46 WAKE FOREST L. REV. 641, 648 (2011). The commentator also notes: “It is time to address cyber bullying in detail, so that educational institutions can be well aware of their legal rights and responsibilities. This requires clearly defining the scope of cyber bullying and early detection of activities. From these, schools should be able to better assess and decrease the number of cases through prevention strategies.” *Id.* at 648 n.34.

109. See Richey, *supra* note 102.

110. *Id.*

111. *Amici Curiae* Brief of Nat'l Sch. Bds. Ass'n et al. in Support of Petitioners at 2, *Blue Mountain Sch. Dist. v. Snyder*, 650 F.3d 915 (3d Cir. 2011) (No. 11 - 502).

### A. *Cyberbullying at the State Level*

Although surveying all existing and proposed legislation exceeds the scope of this Note, this Part examines several cyberbullying laws at both the state and federal level. “A statute will be considered void for vagueness if it does not allow a person of ordinary intelligence to determine what conduct it prohibits, or if it authorizes arbitrary enforcement.”<sup>112</sup> Such an inquiry—under the void for vagueness doctrine—is “grounded in the notice requirement of the Fourteenth Amendment’s due process clause.”<sup>113</sup>

By contrast, a regulation is unconstitutional on its face under the overbreadth doctrine where there is a likelihood that the statute’s very existence will restrict free expression by inhibiting the speech of third parties who are not before the court.<sup>114</sup> In order to invalidate a law for overbreadth, the challenging party must demonstrate the overbreadth is “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”<sup>115</sup> A statute striving to regulate speech protected by the First Amendment is overly-inclusive (i.e., suffers from overbreadth) if, in proscribing *unprotected* speech, it also proscribes *protected* speech.<sup>116</sup> Because an overbroad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied, to challenge the statute on the ground that it violates the First Amendment rights of others.<sup>117</sup>

North Carolina, for example, passed a law banning students from bullying school workers online.<sup>118</sup> This law, an extension of North Carolina’s extant anti-bullying law, marks the first in the nation to criminalize cyberbullying of school employees. As a result, North Carolina’s law is subject to attacks grounded in the overbreadth and vagueness doctrines. The statute imposes criminal liability on public school students who use computers with the “intent to intimidate or torment” school employees by: (1) building a fake profile or website; (2) posting or encouraging others to post on the Internet private, personal, or sexual

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112. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 935 (3d Cir. 2011).

113. *Id.*

114. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

115. *Id.* at 615.

116. *Id.* at 612, 615.

117. *Id.* at 612.

118. Elijah Yip, *New North Carolina Law Criminalizes Cyberbullying of School Workers*, LEGALTXTS (Dec. 4, 2012), <http://www.legaltxts.com/new-north-carolina-law-criminalizes-cyberbullying-of-school-workers/>.

information about a school employee; (3) tampering with a school employee's online network, data, or accounts; (4) using a computer system for repeated, continuing, or sustained electronic communications (including email) to a school employee.<sup>119</sup>

The law even goes so far as to criminalize true statements, by proscribing online statements "whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee."<sup>120</sup> Although the statute defines a profile and personal Web page, the law fails to describe or provide instances as to words such as "intimidate" or "torment."<sup>121</sup> Therefore, this law runs the risk of chilling free speech because people will not know what speech or online activity amounts to a violation.

Thus, as evidenced by North Carolina's law, some state cyberbullying laws may be invalidated due to overbreadth or vagueness. One case, *Coy ex rel. Coy v. Board of Education*,<sup>122</sup> serves to further exemplify the ease with which cyberbullying laws may be found unconstitutionally overbroad or vague. While the *Coy* case does not concern a cyberbullying statute, the case deals with school code of conduct provisions,<sup>123</sup> which can be easily analogized to cyberbullying laws. It is prudent to note the arguments with respect to the overbreadth and void for vagueness doctrines in *Coy* because such positions can similarly be taken in the context of current cyberbullying laws.

In *Coy*, plaintiff-student, Jon Coy, brought an action through his parents, alleging that the Board of Education violated his First Amendment rights when he was disciplined for accessing an unauthorized website while on school property and from a school computer.<sup>124</sup> The website's content contained lewd and obscene material, including arguably the most objectionable sentence, which depicted a fellow classmate as being sexually aroused by his mother.<sup>125</sup> The Board of Education justified its disciplinary action taken against Jon Coy under the argument that the student violated the school's Internet use policy.<sup>126</sup> In pertinent part, the Internet policy forbade students from "[h]acking into unauthorized computers, sites, or information databases' and '[d]isplaying offensive messages or pictures.'"<sup>127</sup> The crux of

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119. N.C. GEN. STAT. § 14-458.2(b)(1) (2012).

120. *Id.* § 14-458.2(b)(2) (2012).

121. *Id.* § 14-453(7c) (2012).

122. 205 F. Supp. 2d. 791 (N.D. Ohio 2002).

123. *See id.* at 801.

124. *Id.* at 794.

125. *Id.* at 794-95.

126. *Id.* at 795.

127. *Id.*

the case, at least for purposes of this discussion, rested on the plaintiffs' assertion that the code of conduct provisions used to suspend Jon Coy were unconstitutionally vague and overbroad because the provisions proscribed protected speech, with no justification, and gave a speaker no indication what speech might violate the student conduct code.<sup>128</sup>

The first step in analyzing an overbreadth claim is to ascertain whether the school conduct code at issue "reaches a substantial amount of constitutionally protected speech."<sup>129</sup> In *Coy*, the court reviewed Section 8 of the student conduct code, along with two other sections, which provided: "A student shall not use obscenity, profanity, any form of racial or ethnic slurs, or other patently offensive language or gesture, nor shall a student be in possession of patently offensive material on school property, at school-sponsored events off school grounds, or during travel to and from school."<sup>130</sup> At its core, this student conduct code section constitutionally regulates the speech discussed in the *Fraser* decision. However, little doubt remains that the aforementioned provision appears to proscribe language, unpleasant as it may be, that is nonetheless protected under the First Amendment.<sup>131</sup> The court then reviewed two similar provisions and found that those sections similarly swept up constitutionally protected speech.<sup>132</sup>

After concluding that all three sections included language that chilled constitutionally protected speech, the court next looked to determine whether the provisions were invalid under the void for vagueness doctrine.<sup>133</sup> The vagueness doctrine maintains that "[v]agueness may take two forms, both of which result in a denial of due process [rights]."<sup>134</sup> In other words, "[a] vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable."<sup>135</sup> At the same time, a court will render an ordinance vague "if it is an unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement."<sup>136</sup>

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128. *See id.* at 794.

129. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (internal quotation marks omitted).

130. *Coy*, 205 F. Supp. 2d. at 802 (internal quotation marks omitted).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Leonardson v. City of East Lansing*, 896 F.2d 190, 195–96 (6th Cir. 1990)).

136. *Id.*

Furthermore, the moving party must demonstrate that “no standard of conduct is specified at all.”<sup>137</sup>

In *Coy*, Section 21 of the student conduct code, for instance, permits a school to discipline a student for “[a]ny action or behavior judged by school officials to be *inappropriate*” in the school setting.<sup>138</sup> While the school district need not expound the forbidden conduct with mathematical precision, Section 21 is impermissibly vague because the provision does not indicate to students what actions or behavior would subject them to disciplinary action.<sup>139</sup> Section 21 falls short in that this “catch-all” provision’s only limitation is that school authorities must deem a student’s action to be “inappropriate,” language that the section fails to illustrate or even define.<sup>140</sup> The language and construction of Section 21 is, at best, an invitation for discriminatory, capricious, and overzealous implementation.<sup>141</sup> Accordingly, the court in *Coy* held that Section 21 was “constitutionally invalid on its face.”<sup>142</sup>

In sum, current and proposed state cyberbullying laws are analogous to the above-mentioned code of conduct sections and, as a result, potentially will suffer from the same fate as the provisions in *Coy* suffered. Therefore, when constructing cyberbullying laws at the state (or even at the federal) level, policymakers should exercise prudence so as not to enact legislation that sweeps up constitutionally protected speech or invites prejudicial, capricious, and overzealous enforcement.

#### B. *Cyberbullying at the Federal Level*

The devastating suicide of teenager Megan Meier was previously discussed to shed light on the horrifying effects that can result from cyberbullying. In a tragic twist of events, the person purporting to be Josh Evans on MySpace was actually Lori Drew, the mother of another teen with whom Megan had an on-again, off-again friendship.<sup>143</sup> As a result of her conduct, Lori Drew was ultimately charged and convicted under the Computer Fraud and Abuse Act (CFAA).<sup>144</sup> At the time, Lori Drew was

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137. *Id.* (internal quotation marks omitted) (citation omitted).

138. *Id.* at 796 (emphasis added).

139. *Id.* at 802.

140. *Id.*

141. *Id.*

142. *Id.*

143. Maag, *supra* note 4.

144. Sam Bayard, *Judge Issues Opinion Overturning Lori Drew’s Conviction*, DIGITAL MEDIA LAW PROJECT (Aug. 31, 2009), <http://www.dmlp.org/blog/2009/judge-issues-opinion-overturning-lori-drews-conviction>. See also 18 U.S.C. § 1030(a)(2)(C) (2010).

convicted pursuant to the CFAA because there was no appropriate federal statute on point for cyberbullying acts.<sup>145</sup> Her conviction, however, was later dismissed because the government failed to prove that Lori Drew's actions directly caused Megan's suicide.<sup>146</sup> Ultimately, Lori Drew was convicted of arguably the most minimal infraction: violation of MySpace's terms agreement.<sup>147</sup>

In response to Megan Meier's tragic story, the Federal Megan Meier Cyberbullying Prevention Act (Meier's Law) was introduced to Congress on April 2, 2009.<sup>148</sup> In pertinent part, Meier's Law stipulates:

(a) Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, 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.<sup>149</sup>

Thus, in order to successfully establish a claim under Meier's Law, there are three core elements: (1) the requisite mens rea of the cyberbully; (2) the mandatory use of electronic means of communication; and (3) that the communications were severe, hostile, and repeated.<sup>150</sup>

Similar to state cyberbullying laws, Meier's Law is both vague and overly-inclusive. As previously stated, an ordinance will be deemed void for vagueness when a law invites arbitrary and capricious implementation or prejudicial and overzealous enforcement.<sup>151</sup> In addition, a statute suffers from overbreadth if, in proscribing unprotected speech, the provision also proscribes protected speech.<sup>152</sup> First, proponents and creators of Meier's

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145. See Bayard, *supra* note 144.

146. See *id.*

147. *Id.*

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

149. *Id.* § 3(a).

150. See *id.*

151. See *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d. 791, 802 (N.D. Ohio 2002).

152. See *id.* at 801.

Law intended for the act to protect minor-on-minor cyberbullying, but the law fails to stipulate such a distinction and therefore presumably applies to adults as well. Second, Meier's Law arguably proscribes *any* electronic communication done "with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person,"<sup>153</sup> language which could easily implicate criminalizing acts—such as "outing and trickery" or "flaming"—that the statute's stated purpose never intended to proscribe.<sup>154</sup>

In short, Meier's Law provides at least a framework for a future federal cyberbullying law. However, the proposed law, as of this writing, simply misses the mark. Therefore, policymakers must draft cyberbullying laws that are narrowly tailored and strive to effectuate adequate protection of today's adolescent, digital citizens without contemporaneously sweeping up constitutionally protected speech—a task yet to be accomplished at the federal level.

#### IV. A CONSTITUTIONAL COMBATANT TO CYBERBULLYING: THE "POSITIVE ACTION" PROGRAM

As previous Parts have demonstrated, constructing cyberbullying laws that furnish today's youth with adequate protection from cyberbullying without simultaneously chilling students' free speech rights has proven to be an exigent, and many times unsuccessful, task. Further, this task will continue to pose difficulties for policymakers because the technology that underpins cyberbullying is ever-changing. As a result, this Note proffers an alternative solution to cyberbullying—one that is outside of legislative hands—which prompts parents to exercise their constitutional and divine right to educate their children and initiate behavior reform first in the home. Recognizing, though, that parents cannot effectuate change alone, the solution proposed by this Note encourages parents to work alongside community leaders and school educators in initiating this constitutional combatant to cyberbullying.

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153. Megan Meier Cyberbullying Prevention Act, H.R. 1966, § 3(a).

154. NANCY WILLARD, CTR. FOR SAFE & RESPONSIBLE INTERNET USE, EDUCATOR'S GUIDE TO CYBERBULLYING: ADDRESSING THE HARM CAUSED BY ONLINE SOCIAL CRUELTY 2 (2005). Note that "outing and trickery" has been defined as follows: "Sending or posting material about a person that contains sensitive, private, or embarrassing information, including forwarding private messages or images. Engage in tricks to solicit embarrassing information that is then made public." *Id.* In addition, the act of "flaming" has been defined as "[s]ending angry, rude, vulgar messages directed at a person or persons privately or to an online group." *Id.*

Derived from the United States Constitution is the bedrock principle that parents possess the fundamental right to educate their children.<sup>155</sup> The Fourteenth Amendment to our nation's Constitution in pertinent part provides that no State shall "deprive any person of life, liberty, or property, without due process of law."<sup>156</sup> In the landmark decision, *Meyer v. Nebraska*, the Supreme Court interpreted the Fourteenth Amendment to guarantee parents the substantive due process right to "bring up children."<sup>157</sup> The Court held that the right of parents to raise their children, free from unreasonable state interference, is an unwritten liberty protected by the Fourteenth Amendment.<sup>158</sup>

The Court, in *Prince v. Massachusetts*, further illustrated this constitutional guarantee:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.<sup>159</sup>

The precedents then generated by *Meyer* and *Prince* further solidified the fundamental tenet that parents possess the chief prerogative to educate and raise their children.<sup>160</sup>

Catholic social teaching, too, supports the conclusion that parents, as the first and foremost educators, stand in the best position to guide the futures of their children and combat complex social concerns. This theory, called "subsidiarity," posits that "when a decentralized entity—such as the family or a private institution—can effectively address a social concern, the sovereign State should allow it to proceed."<sup>161</sup> Pope John Paul II, in his *Letter to Families*, has expounded the notion of subsidiarity:

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155. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

156. U.S. CONST. amend. XIV, § 1.

157. 262 U.S. at 399.

158. See *id.* at 399–400.

159. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citation omitted).

160. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Washington v. Glucksburg*, 521 U.S. 702, 761 (1997).

161. Joseph Paravecchia, Note, *Sexting and Subsidiarity: How Increased Participation and Education from Private Entities May Deter the Production, Distribution, and Possession of Child Pornography Among Minors*, 10 AVE MARIA L. REV. 235, 238 (2011).

Parents are the first and most important educators of their own children, and they also possess a fundamental competence in this area: they are educators because they are parents. They share their educational mission with other individuals or institutions, such as the Church and the State. . . . This implies the legitimacy and indeed the need of giving assistance to the parents, but finds its intrinsic and absolute limit in their prevailing right and their actual capabilities.<sup>162</sup>

In short, parents bestow life upon their children and, therefore, “have the original, primary and inalienable right to educate them.”<sup>163</sup> Accordingly, parents are “the first and foremost educators of their children.”<sup>164</sup>

Subsidiarity and its underlying principles have recently been proposed in efforts to prevent another adolescent-driven multimedia phenomenon, “sexting.”<sup>165</sup> In proffering his solution to address the recent “sexting” anomaly, the author asserts that applying the subsidiarity theory to sexting may serve as the most efficacious deterrence of the production, distribution, and possession of child pornography among minors.<sup>166</sup> The author opines: “[N]on-governmental agencies may have a better opportunity to combat sexting because they can go where the government cannot, particularly, inside the home.”<sup>167</sup> The same remains true in the context of cyberbullying; that is, parents stand in the best position to combat cyberbullying because they

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162. Pope John Paul II, *Gratissimam Sane* [Letter to Families] ¶ 16 (1994) (emphasis omitted).

163. Pontifical Council on the Family, *Charter of the Rights of the Family* Art. 5 (1983), in CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 335 (1999) (emphasis omitted).

164. *Id.* (emphasis omitted).

165. *See generally* Paravecchia, *supra* note 161. The commentator proposes an unprecedented approach to combat “sexting,” the contemporary cultural phenomenon which refers to “the practice of sending sexual images or messages to someone’s mobile phone.” *Id.* at 236. The commentator concludes that, while criminalizing sexting remains of paramount importance, constructing legislation that steers clear of constitutional violations has proven to be an amorphous, and largely unsuccessful, task. *See id.* at 252. As a result, the commentator suggests the application of “subsidiarity,” a notion rooted in Catholic social teaching, which encourages the most decentralized entity to address a pressing social concern. *See id.* at 252–60. The commentator elucidates his proposal:

Private individuals and organizations can combat the dangerous effects associated with the transmission of sexually explicit material among minors. Parents embrace a God-given duty to be the first to educate their children as to matters of sexuality and morality. As suggested throughout this Note, when parents willingly use the resources of private institutions to prevent children from sexting, accompanied by their personal approach to familial education, they are effectively performing a task appropriately within their control, not one solely reserved for the government.

*Id.* at 260.

166. *See id.* at 252–53.

167. *Id.* at 255.

can go where the government cannot—inside the home. The aforementioned excerpts evidence that parents possess the divine right to educate their children and, therefore, are the most qualified candidates to effectuate behavioral change and cyberbullying prevention efforts in particular.

The proposition that parents stand in the most efficacious position to thwart their child's cruel behavior is consistent with recent research denoting that adolescents rely most heavily on parents, more than any other source, "for advice about online behavior and coping with challenging experiences."<sup>168</sup> In other words, parents are "the primary gatekeepers and managers of their teens' internet experience."<sup>169</sup> While "teens receive advice from a wide array of sources, [eighty-six percent] of online and cell-phone using teens say they have received general advice from their parents about how to use the internet responsibly and safely from their parents."<sup>170</sup> Parents are, therefore, the most qualified candidates to prevent cyberbullying because parents are the most often cited source of advice and the strongest influence on adolescents' understanding of appropriate digital behavior. That being said, however, parents cannot combat cyberbullying alone.

The multifaceted social problem presented by cyberbullying necessitates a multifaceted solution—one that requires the joint efforts of both parents and community organizations. That multifaceted solution must comprise a comprehensive framework to furnish families and community leaders with the requisite tools to initiate intervention and prevention efforts against cyberbullying. Thus, this Note proposes the "Positive Action" program<sup>171</sup> as the vehicle through which parents and community leaders effectuate their intervention or prevention efforts against cyberbullying.

#### A. *The Positive Action Program*

The "Positive Action" program, developed by Dr. Carol G. Allred, is "a proven evidence-based program for improving academics, behavior, and character."<sup>172</sup> The philosophy that underpins the Positive Action program stems from a simple, universal aphorism: "[Y]ou feel good about yourself

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168. LENHART ET AL., *supra* note 19, at 6.

169. *Id.* at 65.

170. *Id.* at 6.

171. See generally Brian R. Flay & Carol G. Allred, *The Positive Action Program: Improving Academics, Behavior, and Character by Teaching Comprehensive Skills for Successful Learning and Living*, in INTERNATIONAL RESEARCH HANDBOOK ON VALUES EDUCATION AND STUDENT WELLBEING 471 (Terence Lovat et al. eds., 2010).

172. *Program Overview*, POSITIVE ACTION, <http://www.positiveaction.net/programs/index.asp?ID1=1&ID2=14> (last visited Mar. 24, 2012).

when you do positive actions.”<sup>173</sup> This driving philosophy, illustrated through a diagram called the “Thoughts-Actions-Feelings Circle,” underlies the curriculum’s six units.<sup>174</sup> First, Unit 1 explicates the notion of “Self-Concept—What It Is, How It Is Formed, and Why It’s Important”—and introduces the Thoughts-Actions-Feelings Circle.<sup>175</sup> Second, Unit 2 teaches the physical and intellectual positive actions for a healthy body and mind.<sup>176</sup> Finally, Units 3 through 6 teach positive actions for the social and emotional areas.<sup>177</sup> The concepts within the program’s six units “help align student, teacher, family, and community.”<sup>178</sup>

Positive Action has been recognized by the United States Department of Education’s What Works Clearinghouse<sup>179</sup> as the only character education program in the nation to improve both academics and behavior.<sup>180</sup> In addition, the evidence-based program has been acknowledged by various other national and state organizations, including the Substance Abuse and Mental Health Services Administration (SAMHSA), the Office of Juvenile Justice and Delinquency Prevention (OJJDP), and Community Education Partners (CEP).<sup>181</sup> The Positive Action program has successfully reduced problematic behaviors among adolescent participants in areas such as

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173. *How it Works*, POSITIVE ACTION, <http://www.positiveaction.net> (last visited Mar. 24, 2012).

174. *Philosophy*, POSITIVE ACTION, <http://www.positiveaction.net/programs/index.asp?ID1=1&ID3=57> (last visited Mar. 24, 2012).

175. *Id.* See also Brian R. Flay et al., *Effects of the Positive Action Program on Achievement and Discipline: Two Matched-Control Comparisons*, 2 PREVENTION SCI. J. 71, 76–77 (2001).

176. *Philosophy*, *supra* note 174; see also Flay et al., *supra* note 175, at 77.

177. *Philosophy*, *supra* note 174; see also Flay et al., *supra* note 175, at 77. In Unit 3, students learn about managing themselves responsibly. Flay et al., *supra* note 175, at 77. Then, Unit 4 focuses on social skills and character so as to reinforce that students should treat others the same way in which they like to be treated. *Id.* Unit 5 addresses mental health and strives to instill in students that they should be honest individuals, both with themselves and others. *Id.* Finally, Unit 6 encourages tactics and approaches that emphasize to students that they must improve themselves continually, even after completing the program. *Id.*

178. Flay et al., *supra* note 175, at 76.

179. What Works Clearinghouse was established in 2002 as an initiative of the United States Department of Education’s Institute of Education Sciences. WHAT WORKS CLEARINGHOUSE, WHAT WORKS CLEARINGHOUSE: PROCEDURES AND STANDARDS HANDBOOK (VERSION 2.1) 1 (2011), available at [http://ies.ed.gov/ncee/wwc/pdf/reference\\_v2\\_1\\_standards\\_handbook.pdf](http://ies.ed.gov/ncee/wwc/pdf/reference_v2_1_standards_handbook.pdf). What Works Clearinghouse strives “to be a central and trusted source of scientific evidence for what works in education.” *Id.* In order to conclude “what works” for the public, the organization “conducts a thorough search for all relevant literature meeting the WWC evidence standards.” *Id.* The organization will also conduct “a thorough review of the identified research literature . . . and [conduct] a critical assessment. *Id.*

180. *Recognitions*, POSITIVE ACTION, <http://www.positiveaction.net/about/index.asp?ID1=7&ID2=706> (last visited Mar. 24, 2012).

181. *Id.*

violence as well as drug, alcohol, and tobacco use.<sup>182</sup> The program's notable statistics include the following:

- Up to 94% reduction in criminal bookings
- Up to 90% reduction in general discipline
- Up to 85% reduction in violence
- Up to 80% reduction in suspensions
- Up to 105% improvement in academic standardized achievement scores
- Up to 71% reduction in drug, alcohol, and tobacco use.<sup>183</sup>

As evidenced by the statistical data presented above, the Positive Action program has been utilized to improve problematic behavior among adolescents and already has been tailored to address cyberbullying in the program's "Bullying Prevention Kit."<sup>184</sup> Proponents of Positive Action's Bullying Prevention Kit depict the educational kit as "a response to the widespread demand for an effective tool that will prevent and reduce the increased incidents and severity of bullying behaviors in schools in all forms, including cyberbullying."<sup>185</sup> Specifically, the "Bullying Prevention Kit" includes twenty-one lesson plans targeted towards bullying behaviors, which has accomplished up to 40% reductions in bullying behavior.<sup>186</sup>

Unique to this Bullying Prevention curriculum is the program's attentiveness to the distinct roles students may emulate in cyberbullying situations—that is, the bully, the victim, or the bystander, or a combination of these roles.<sup>187</sup> The specific concentration on these varying roles increases the likelihood that more students will relate to the program's curriculum and, in turn, heightens the probability that the positive action messages will resonate with students and have a lasting effect.

"This one program achieves all these results in urban, suburban, and rural areas. It works for public, private, charter, and alternative schools, as well as before- and after-school programs, homes, and community service providers (including justice, social services, coalitions, mental health and

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182. *The Positive Action Program: Summary of Evaluation Results*, POSITIVE ACTION, [http://www.positiveaction.net/content/PDFs/2pg\\_Summary\\_Eval\\_Results.pdf](http://www.positiveaction.net/content/PDFs/2pg_Summary_Eval_Results.pdf) (last visited Mar. 24, 2012).

183. *Id.*

184. *Bullying Prevention*, POSITIVE ACTION, <http://www.positiveaction.net/programs/index.asp?ID1=1&ID2=22&ID3=300> (last visited Mar. 24, 2012).

185. *Id.*

186. *Id.*

187. *Id.*

welfare, and businesses).”<sup>188</sup> Moreover, Positive Action works for most “No Child Left Behind Programs,” including Titles I–V and Special Education.<sup>189</sup> Positive Action has developed curriculum that various individuals can implement (i.e., the parent, the counselor, the teacher, or the community leader).<sup>190</sup> These components can be used separately, in any combination, or together, providing a cohesive—yet flexible—approach and enabling schools, families, and communities to share a common vision and language in their efforts to achieve a positive future.

As this Note has demonstrated, Cyberbullying is a comprehensive behavior-based problem that necessitates a comprehensive behavior-based solution. Concededly, today, cyberbullying prevention programs abound. This begs the obvious question: why *this* particular program? The short answer to the query: the Theory of Triadic Influence.<sup>191</sup>

#### B. *The Program’s Theoretical Underpinning: The Theory of Triadic Influence*

Tantamount to the efficacy of the Positive Action program is the curriculum’s theoretical underpinning, the Theory of Triadic Influence.<sup>192</sup> This Note argues that the Positive Action program will most effectively combat cyberbullying because the Theory of Triadic Influence does what no other extant health behavioral theory does today.<sup>193</sup> Some health behavioral theories focus on cognitive predicts of behavior, while others focus on expectancy-value formulations; some health behavioral theories focus on social support and bonding processes, while others focus on social learning processes.<sup>194</sup> These health behavioral theories focus solely on isolated streams of causation; in contrast, the Theory of Triadic Influence focuses on *all* streams of causation.<sup>195</sup>

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188. POSITIVE ACTION, EXCELLENCE BROCHURE 3 (2008), available at [http://www.positiveaction.net/content/PDFs/PA=excellence\\_brochure.pdf](http://www.positiveaction.net/content/PDFs/PA=excellence_brochure.pdf) (emphasis omitted).

189. *Id.*

190. *Id.* at 4.

191. See generally Brian R. Flay, *Positive Youth Development Requires Comprehensive Health Promotion Programs*, 26 AM. J. HEALTH BEHAV. 407 (2002).

192. For an explanation of the Theory of Triadic Influence, see generally Brian R. Flay & John Petraitis, *The Theory of Triadic Influence: A New Theory of Health Behavior with Implications for Preventive Interventions*, 4 ADVANCES MED. SOC. 19 (1994).

193. See Flay, *supra* note 191, at 407–11.

194. *Id.* at 410–11.

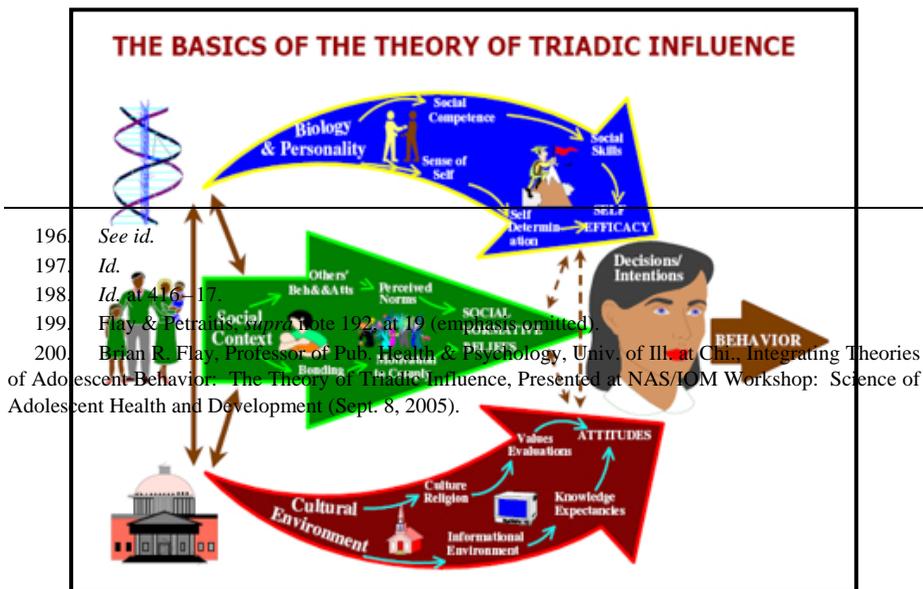
195. *Id.* at 411.

Technicalities aside, where other theories fall short, the Theory of Triadic Influence steps up.<sup>196</sup> For example, in the evaluation of other programs currently available to reform negative behaviors, many evaluators have criticized that those extant curriculums distract students from their academics, resulting in decreased academic performance.<sup>197</sup> However, the Positive Action program—because of its unique theoretical underpinning in the Theory of Triadic Influence—is the only program that thwarts behavioral problems while simultaneously *improving* academic performance.<sup>198</sup>

In its simplest form, the Theory of Triadic Influence includes three main “streams of influence” that flow through various “tiers”: “(1) cultural-environmental influences on knowledge and values, influencing attitudes, (2) social situation-context influences on social bonding and social learning, influencing social normative beliefs, and (3) intrapersonal influences on self-determination/control and social skills, leading to self-efficacy.”<sup>199</sup>

FIGURE 1.<sup>200</sup>

## THE BASICS OF THE THEORY OF TRIADIC INFLUENCE.



In addition to the three main streams of influence depicted above, there are several vital inter-stream effects and influences that flow between the streams of causation.<sup>201</sup> Those inter-stream influences—namely, proximal, distal, and ultimate influences—unveil implications instrumental to the construction of an individual’s prevention or intervention response plan.<sup>202</sup> For example, narrowly-construed “proximal” influences are the greatest indicators of behavior because proximal factors reveal the adolescent’s intentions to engage in the behavior within the next thirty days.<sup>203</sup> By contrast, “distal” influences concern the adolescent’s specific attitudes, self-efficacy, and normative beliefs toward a behavior (such as cyberbullying), and typically indicate indirect causes of that behavior.<sup>204</sup> Unlike both “proximal” and “distal” influences, “ultimate” influences are more broadly defined and not within the relative control of adolescents, but rather, are engrained in one’s biological construction, personality characteristics, and overall environment.<sup>205</sup>

Of particular importance are two distinguishing characteristics: the model’s incorporation of factors that have both direct and indirect effects on adolescents, as well as the theory’s consideration of both the adolescents’ new and regular or consistent behavior.<sup>206</sup> An adolescent’s experiences with related behaviors and early encounters with a new behavior lead to “feedback loops” through all three causation streams, in turn adding to the prior influence of these streams.<sup>207</sup>

Inherent to the model’s unique division of streams is the suggestion of higher-order descriptions, a characteristic facilitative to the identification of specific problem areas in the adolescent’s life.<sup>208</sup> Higher-order descriptions intimate that, within each stream of causation, a hierarchical structure exists—in other words, some causes have greater influence over an individual’s behavior.<sup>209</sup> Such a hierarchy makes important implications for the construction of prevention plans because “[t]he higher up the stream you make changes, the more people will change, and the more permanently they

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201. Flay & Petraitis, *supra* note 192, at 19.

202. *See id.* at 25.

203. *Id.* at 37.

204. *See id.* at 37.

205. *Id.* at 25, 37, 40.

206. *Id.* at 19–20.

207. *Id.* at 25, 38.

208. *Id.* at 25.

209. *Id.* *See also* Flay, *supra* note 201.

will stay changed.”<sup>210</sup> Identifying particular contributing causes to problematic behavior yields an obvious benefit: the ability to then address those particular contributing causes in order to eliminate, or at least mitigate, those negative influences.

In sum, the Theory of Triadic Influence proffers what other cognitive psychological models alone have been unable to achieve and, instead, unifies those prior theories into one comprehensive framework. By utilizing the Theory of Triadic Influence in cyberbullying deterrence efforts, we can tailor prevention methods to improve multiple offensive behaviors at once, and without compromising academic performance—a result no other cyberbullying prevention program has been able to achieve yet. Accordingly, this Note proffered the Positive Action program as the prevention curriculum that will most effectively—and constitutionally—curtail cyberbullying.

#### CONCLUSION

To see change in this world, we must become the change we wish to see.<sup>211</sup> To effectuate change in the cyberbullying world, we must support adolescents today in becoming the change we wish to see—and the most fervent catalyst to that change is improvement in youth behavior through education.

This Note has recounted the immeasurable and baneful effects that result from cyberbullying, a traditional playground problem that—through the Internet’s ubiquity—has transcended the schoolhouse gates and will only become more insidious as our amorphous digital realm expands. Cyberbullying is an age-old problem in a whole new vicious guise. While particularly terrifying incidents, such as Megan Meier’s suicide in 2006, have brought cyberbullying under closer scrutiny in recent years—by school officials, legislative bodies, and society in general—the policy responses and legal interventions to address this complex social problem remain largely ineffective. Meanwhile, the Supreme Court’s silence has been audible, leaving lower courts to mull over whether school officials may constitutionally regulate off-campus student speech—disparate decisions which have only further aggravated the jurisprudential confusion. Although criminalization remains a crucial approach to the curtailment of cyberbullying, the most effective preemptive efforts must begin at home—with parents. As evidenced by this Note, the Positive Action program and

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210. Flay, *supra* note 201.

211. Often attributed to Mahatma Gandhi (Oct. 2, 1869–Jan. 30, 1948).

the program's strong theoretical underpinning, the Theory of Triadic Influence, therefore represent the most effective—and constitutional—combatant against cyberbullying.