COMMENT

Logging Out: The Inadequacies of Current Cyberbullying Remedies and Their Impact on LGBTQ+ Youth

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I. INTRODUCTION—A TALE OF TRAGEDY

On September 22, 2010, Tyler Clementi, a freshman at Rutgers University in New Brunswick, New Jersey, jumped off the George Washington Bridge, tragically ending his own life.[1] A few days earlier, on

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1. State v. Ravi, 147 A.3d 455, 468 (N.J. Super. Ct. App. Div. 2016); Kyle McGovern, *Dharun Ravi and Tyler Clementi Timeline: Former Rutgers Roommate in Dorm Room Spying Trial*, HUFF POST (May 22, 2012), https://www.huffpost.com/entry/dharun-ravi-tyler-clementi-

September 19, Tyler had asked his roommate, Dharun Ravi, to have private use of their dorm room for a date with another man, M.B. The night of Tyler's date, Dharun and another student, Molly Wei, used a webcam to watch Tyler and M.B. kiss and engage in "sexual relations" in the room.[2] While watching Tyler and M.B. through the webcam, Dharun started posting on social media about Tyler, live-tweeting, "I saw [Tyler] making out with a dude. Yay."[3] Dharun and Molly also talked about the webcam-viewing and Tyler's sexual encounters with M.B. with their friends, including some Rutgers students.[4]

After seeing Dharun's tweets, Tyler requested the university for a single dormitory room.[5] On September 21, two days after Dharun first used the webcam to intrude on Tyler's privacy, Tyler asked to have the room for another date with M.B.[6] Again, Dharun arranged to use the webcam to spy on Tyler and M.B., tweeting instructions for his followers to video-call him to watch Tyler and M.B.[7] After seeing that tweet, Tyler arranged a meeting with his dormitory's resident assistant and proceeded to unplug Dharun's computer to prevent Dharun from spying on him and M.B. again.[8] Tyler reported Dharun to the resident assistant who informed the Senior Management of the Residence Life Assignments Office, characterizing Dharun's activities as a "roommate conflict."[9]

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timeline_n_1297056; Ian Parker, *The Story of a Suicide: Two College Roommates, a Webcam, and a Tragedy*, NEW YORKER (Feb. 6, 2012), https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide; *see also Tyler Clementi's Story*, TYLER CLEMENTI FOUND., https://tylerclementi.org/tylers-story/ (last visited Mar. 28, 2020). The initials "T.C." in the New Jersey Superior Court, Appellate Division's opinion refer to Tyler Clementi. *Ravi*, 147 A.3d at 466.

2. *Ravi*, 147 A.3d at 460-61, 466; McGovern, *supra* note 1; Parker, *supra* note 1. M.B. testified that the "sexual relations" involved "sexual contact and sexual penetration." *Ravi*, 147 A.3d at 466. At trial, Molly (M.W.) testified that Dharun first went to her room after letting Tyler and M.B. have the room to themselves and then turned on his webcam from her room. *Id.* at 460-61.

3. *Ravi*, 147 A.3d. at 461. It is important to note that Dharun looked up Tyler online before they moved in together as roommates, and upon discovering that someone with Tyler's email posted on a "gay forum," Dharun texted a friend, "F*CK MY LIFE. He's gay." *Id.* at 459.

4. *Id.* at 461-62, 464; Parker, *supra* note 1.

5. Tyler submitted a room change application on September 21, 2010, via Rutgers University's Resident Life Assignments Office, and he wrote, "[R]oommate used webcam to spy on me/want a single room." *Ravi*, 147 A.3d at 467; *see also* Parker, *supra* note 1.

6. *Id*. at 463, 466.

7. Dharun posted a tweet that said, "Anyone with iChat I dare you to video chat me between the hours of 9:30 and 12. Yes, it's happening again." *Id.*

8. *Ravi*, 147 A.3d at 467; McGovern, *supra* note 1.

9. *Ravi*, 147 A.3d at 467. Tyler also sent a formal email to the same resident assistant saying, "I feel that my privacy has been violated and I am extremely uncomfortable sharing a room with someone who would act in this wildly inappropriate manner." McGovern, *supra* note 1.

Just a few days after Dharun live-streamed and posted Tyler's private, consensual, sexual encounter with another man online, Tyler committed suicide.[10] Had the university fulfilled Tyler's first request for a single dorm room promptly, and had stronger legal mechanisms been in place to discourage and prevent Dharun from bullying Tyler online, perhaps Tyler's suicide could have been prevented.

Even though Tyler's story is neither a new nor a rare occurrence,[11] his death gained nationwide attention, highlighting a common, extensive problem facing the LGBTQ+ community: cyberbullying.[12] While the issue of cyberbullying has been prevalent since the advent of widespread Internet usage,[13] it became more noticeable after multiple, highly publicized incidents like Tyler's suicide.[14] Since then, the public has continuously demanded lawmakers to do something about cyberbullying.[15]

This Comment discusses the legality of regulating youth-on-youth cyberbullying, focusing on the primary obstacle that schools face in disciplining students for speech online or through electronic communication—the First Amendment. Part II discusses the effects of cyberbullying on school-age youth, and in particular, on school-age LGBTQ+ youth. Part III discusses several remedies that are currently available for students in secondary schools and colleges. Part IV discusses the difficulties that schools face in regulating and disciplining students for cyberbullying without infringing upon their First Amendment fundamental rights to freedom of speech. Part V explains why the standard

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10. *Ravi*, 147 A.3d at 468; McGovern, *supra* note 1; Parker, *supra* note 1.

11. LGBTQ+ youth seriously contemplate suicide at nearly three times the rate of heterosexual youth and are almost five times as likely to attempt suicide as heterosexual youth. Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9-12—United States and Selected Sites, 2015*, 65 MMWR SURVEILLANCE SUMMARIES 1, 20 (Aug. 12, 2016).

12. *See Tyler Clementi's Story*, *supra* note 1.

13. Richard Donegan, *Bullying and Cyberbullying: History, Statistics, Law, Prevention and Analysis*, 3 ELON J. UNDERGRADUATE RES. COMM. 33, 34 (2012).

14. *See*, *e.g.*, *Tim Fitzsimons, Tennessee Teen's Suicide Highlights Dangers of Anti-LGBTQ Bullying*, NBC NEWS (Oct. 1, 2019, 6:15 PM), https://www.nbcnews.com/feature/nbc-out/tennessee-teen-s-suicide-highlights-dangers-anti-lgbtq-bullying-n1060976; Pauls Toutonghi, *"They Ripped Him Apart": Searching for Answers in the Suicide of Bullied Teen Jadin Bell*, SALON (Sept. 8, 2013, 3:00 PM), https://salon.com/test/2013/09/08/"they_ripped_him_apart"_searching_for_answers_in_the_suicide_of_bullied_teen_jadin_bell/.

15. *See* Fitzsimons, *supra* note 14; Dewey C. Gornell & Susan P. Limber, *Do U.S. Laws Go Far Enough to Prevent Bullying at School?*, AM. PSYCHOL. ASS'N (Feb. 2016), https://www.apa.org/monitor/2016/02/ce-corner (last visited Oct. 27, 2019); Liyanga de Silva, *We Must Take Cyberbullying More Seriously. Legal Action Is the Right Move.*, DIAMONDBACK (Mar. 11, 2018), https://dbknews.com/2018/03/11/maryland-cyberbullying-jail-fines-bill/.

that courts currently use—*Tinker v. Des Moines Independent Community School District* and its progeny—is inapplicable and dated in light of the pervasive nature and widespread usage of electronic and online communication. Finally, Part VI discusses how LGBTQ+ students are impacted, as well as the difficulties in creating a valid anti-cyberbullying law compatible with the First Amendment. This Comment concludes, in Part VII, that the Supreme Court needs to modernize its interpretation of *Tinker* or devise a new legal standard altogether in light of this new electronic-dependent world.

II. THE EFFECTS OF CYBERBULLYING ON LGBTQ+ YOUTH

Because cyberbullying disproportionately affects LGBTQ+ persons, specifically LGBTQ+ youth, it is important to define the term.[16] The American Psychological Association defines cyberbullying as "using an electronic device for aggressive, repeated and intentional acts of bullying such as name-calling, sending threatening emails, placing photos of persons on the Internet without permission and sending viruses."[17] Some more specific and more common examples of cyberbullying include:

> **Harassment**. Repeatedly sending nasty, mean, and insulting messages; **Denigration**. "Dissing" someone online. Sending or posting gossip or rumors about a person to damage his or her reputation or friendships; **Outing.** Sharing someone's secrets or embarrassing information or images online; . . . **Trickery**. Talking someone into revealing secrets or embarrassing information, then sharing it online; . . . **Cyberstalking**. Repeated, intense harassment and denigration that includes threats or creates significant fear.[18]

16. Warren J. Blumenfeld & R.M. Cooper, *LGBT and Allied Youth Responses to Cyberbullying: Policy Implications*, 3 INT'L J. CRITICAL PEDAGOGY 114, 119 (2010); Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2017*, 67 MMWR SURVEILLANCE SUMMARIES 1, 18 (2018). Almost twice as many LGBTQ+ students reported experiencing cyberbullying than their heterosexual peers in a survey conducted by the Cyberbullying Research Center, which polled over 4400 secondary school-aged children (from eleven to eighteen years old), all randomly selected from a public school district. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RES. CTR., CYBERBULLYING RESEARCH SUMMARY 2 (2011).

17. Practice Research & Policy Staff, *Research Roundup: Cyberbullying*, APA SERVICES, INC. (Mar. 31, 2010), http://www.apaservices.org/update/2010/03-31/cyberbullying. Congress has defined "electronic technology" to include "cell phones, computers, and tablets as well as communication tools including social media sites, text messages, chat, and website." GAIL MCCALLION & JODY FEDER, CONG. RESEARCH SERV., STUDENT BULLYING: OVERVIEW OF RESEARCH, FEDERAL INITIATIVES, AND LEGAL ISSUES 2 (2013).

18. Practice Research & Policy Staff, *supra* note 17.

LGBTQ+ youth, specifically, can experience "outing,"[19] which, for LGBTQ+ youth, can mean the act of exposing "a person's sexual identity to classmates and sometimes to the targets' parents or guardians."[20]

Social media platforms are regarded as the "primary mode of socializing" for the LGBTQ+ community,[21] making cyberbullying much more pervasive in day-to-day life than "traditional" in-person bullying.[22] A 2010 analysis conducted by Warren Blumenfeld and R.M. Cooper observed that since communication technology has become so advanced, cyberbullying can now seemingly reach every part of one's life—every activity and every place.[23]

While cyberbullying affects LGBTQ+ persons of all ages, LGBTQ+ youth are especially vulnerable.[24] The Gay, Lesbian & Straight Education Network (GLSEN), in a comprehensive report detailing the experiences of LGBTQ+ youth online, found that LGBTQ+ youth "most commonly reported" that they feel unsafe and are bullied online and/or by text messaging.[25] About one in four LGBTQ+ youth reported experiencing cyberbullying specifically because of "sexual orientation or gender expression," and one in four LGBTQ+ youth also reported experiencing bullying via text messages for these reasons.[26] LGBTQ+ youth are also about "four times as likely as non-LGBTQ+ youth" to report experiencing sexual harassment online and "three times as likely" by text messaging.[27]

The Centers for Disease Control and Prevention's (CDC) Youth Risk Behavior Surveillance in 2017 found that on average, in the United States, LGBTQ+ youth feel "sad or hopeless" at nearly twice the rate as heterosexual youth and "seriously considered contemplating suicide"

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19. *Id.*

20. Blumenfeld & Cooper, *supra* note 16, at 119.

21. César G. Escobar-Viera et al., *For Better or for Worse? A Systematic Review of the Evidence on Social Media Use and Depression Among Lesbian, Gay, and Bisexual Minorities,* 5 JMIR MENTAL HEALTH 1, 2 (2018).

22. Donegan, *supra* note 13, at 34.

23. See Blumenfeld & Cooper, *supra* note 16, at 118 ("[T]he advent of advanced information and communication technologies has now allowed this abusive and destructive practice to extend to virtually all aspects of a young person's life.").

24. *See* HINDUJA & PATCHIN, *supra* note 16, at 1.

25. GLSEN, OUT ONLINE: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH ON THE INTERNET 6-7 (2017), http://unh.edu/ccrc/pdf/Out%20Online.pdf.

26. *Id.* at 8-9.

27. *Id.* at 10. Additionally, the Centers for Disease Control and Prevention (CDC) surveyed public, charter, Catholic, and nonpublic school students between ninth and twelfth grades in the United States and found that LGBTQ+ students had a higher prevalence of not going to school due to concerns of safety, feelings of hopelessness, and even suicidal thoughts, than their heterosexual peers. Kann et. al., *supra* note 16, at 3, 19, 24-25.

approximately three times as much as heterosexual youth.[28] After analyzing eleven studies between 2003 and 2017, a review conducted by Dr. César Escobar-Viera from the University of Pittsburgh's Center for Research on Media, Technology, and Health found that cyberbullying was "directly and independently associated with psychological distress, depression, engaging in physical fights, and suicidal thoughts or suicide attempts."[29] Additionally, the GLSEN report found that cyberbullying can cause "lower self-esteem" and "higher levels of depression" in LGBTQ+ youth.[30]

III. HOW CURRENT LEGAL REMEDIES FALL SHORT

It is clear that LGBTQ+ youth are disproportionately cyberbullied as compared to their heterosexual peers; cyberbullying of LGBTQ+ youth largely comes from their peers in online spaces.[31] Punishing and preventing cyberbullying are issues that both Congress and state legislatures have attempted to solve.[32] If an individual experiences cyberbullying on social media platforms or websites, the individual may block the cyberbully or report that the cyberbully violated the platform or the website's terms of use;[33] however, that is only a temporary solution at best and often ineffective.[34] Unfortunately, the current state and federal remedies discussed below are inadequate in addressing the prevention of such cyberbullying conduct in the first place, as well as the reach and lack of uniformity in punishing cyberbullies.[35]

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28. Kann et al., *supra* note 16, at 23-24.

29. Escobar-Viera et al., *supra* note 21, at 6.

30. GLSEN, *supra* note 25, at 10.

31. *See id.* at 6; MCCALLION & FEDER, *supra* note 17, at 2, 8; *see*, *e.g.*, Blumenfeld & Cooper, *supra* note 16, at 117.

32. *See* MCCALLION & FEDER, *supra* note 17, at 7, 11.

33. *Tackling Cyberbullying*, DIGITAL DURHAM, http://www.digitaldurham.org/tackling-cyber-bullying (last visited Oct. 27, 2019).

34. *See* Charlie Warzel, *Twitter Touts Progress Combating Abuse, but Repeat Victims Remain Frustrated*, BUZZFEED NEWS (July 20, 2017, 9:01 AM), https://www.buzzfeednews.com/article/charliewarzel/twitter-touts-progress-combatting-abuse-but-repeat-victims; James Wellemeyer, *Instagram, Facebook, and Twitter Struggle to Contain the Epidemic in Online Bullying* (July 17, 2019, 6:29 AM), https://marketwatch.com/story/why-it-may-be-too-late-for-instagram-facebook-and-twitter-to-contain-the-epidemic-in-online-bullying-2019-07-15.

35. For a description of some of the state and federal efforts in preventing and punishing cyberbullying conduct, see MCCALLION & FEDER, *supra* note 17, at 7-9, 11-14.

A. State Laws Lacking in Uniformity

State laws lack uniformity in terms of what sort of conduct is punished or prohibited, how far schools can go in disciplining students for cyberbullying conduct, and in the protections given to students.[36]

The most current analysis on data compiled by researchers at the Cyberbullying Research Center shows that all but two states (Alaska and Wisconsin) include the term "[c]yberbullying" or "[o]nline [h]arassment" in their laws against bullying, and almost all states impose criminal sanctions for "'cyberbullying' or [e]lectronic [h]arassment."[37] Furthermore, nearly every state has school sanctions for cyberbullying, and every state has a school policy against cyberbullying.[38] However, only about one-third of the states include off-campus behaviors in those policies.[39]

Further, some states have enacted laws specific to cyberstalking, which encompass some aspects of cyberbullying, but not all, as the definition of cyberstalking is geared more specificically to stalking.[40] Additionally, because of the anonymous nature of the Internet and "lack of direct contact," identifying and prosecuting cyberstalkers is difficult.[41] Limitations on jurisdiction are another obstacle for law enforcement, as cyberstalkers may live in a different jurisdiction than their victims.[42]

This Section will address state anti-bullying laws as they pertain to their schools in three categories: (1) those that offer relatively minimal protections against cyberbullying; (2) those that offer more protections,

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36. *See Bullying Laws Across America*, CYBERBULLYING RES. CTR. (Nov. 2018), https://cyberbullying.org/bullying-laws (last visited Oct. 27, 2019); *Laws, Policies, & Regulations*, STOPBULLYING (Jan. 7, 2018), https://www.stopbullying.gov/laws/index.html#common (last visited Mar. 28, 2020).

37. *See Bullying Laws Across America*, *supra* note 36.

38. *Id.*

39. These states include Arkansas, California, Connecticut, Florida, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, South Dakota, Tennessee, Texas, and Vermont. *Id*.

40. CONG. RESEARCH SERV., RL34651, PROTECTION OF CHILDREN ONLINE: FEDERAL AND STATE LAWS ADDRESSING CYBERSTALKING, CYBERHARASSMENT, AND CYBERBULLYING 4-5 (2009). States that have enacted such laws include Alabama, Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Maine, Massachusetts, Michigan, New Hampshire, New York, Oklahoma, and Wyoming. *Id.* at 5. Cyberstalking is defined as "the use of Internet, e-mail, or other electronic communications to stalk another person." *Id.* at 4. "A cyberstalker may send repeated, threatening, or harassing messages" and "can urge other Internet users into harassing or threatening a victim by utilizing Internet bulletin boards or chat rooms." *Id.*

41. *Id.* at 4-5.

42. *Id.* at 5.

but in limited circumstances; and (3) those that offer a high level of protection.

1. State Laws That Offer Minimal Protections

One example of a state law that offers minimal protections against cyberbullying in schools is Alaska.[43] Alaska's school anti-bullying laws do not explicitly include cyberbullying or any off-campus conduct. While Alaska requires its school districts to adopt anti-harassment and anti-bullying policies that must include certain procedural requirements and prohibit "harassment, intimidation or bullying,"[44] it does not acknowledge cyberbullying, cyber-harassment, off-campus bullying conduct, or whether such conduct is covered during non-school hours.[45] Although Alaska has a general anti-harassment statute with a provision for the harassment of minors, it is not specific to schools; further, that provision is limited to conduct that "places the person in reasonable fear of physical injury," which only covers a fraction of cyberbullying conduct.[46]

Another example of a minimal statute is Kentucky's school anti-bullying law.[47] In Kentucky's statute that specifies the types of conduct that schools are required to discipline, bullying is defined as "unwanted verbal, physical, or social behavior" that is "repeated or has the potential to be repeated."[48] "Behavior" is not defined in that statute, and the statute

43. ALASKA STAT. § 14.33.250 (2006) ("(2) '[H]arassment, intimidating, or bullying' means an intentional written, oral, or physical act, when the act is undertaken with the intent of threatening, intimidating, harassing, or frightening the student, and (A) physically harms the student or damages the student's property; (B) has the effect of substantially interfering with the student's education; (C) is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or (D) has the effect of substantially disrupting the orderly operation of the school . . . ."); *see Alaska Anti-Bullying Laws & Policies*, STOPBULLYING (Sept. 8, 2017), https://www.stopbullying.gov/laws/alaska/index.html.

44. *Id.*

45. *Id.*; *see* Blumenfeld & Cooper, *supra* note 16, at 118.

46. ALASKA STAT. § 11.61.120 (2019) ("(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person . . . (7) repeatedly sends or publishes an electronic communication that insults, taunts, challenges, or intimidates a person under 18 years of age in a manner that places the person in reasonable fear of physical injury . . . ."); *see* Blumenfeld & Cooper, *supra* note 16, at 119; Practice Research & Policy Staff, *supra* note 17.

47. KY. REV. STAT. ANN. § 158.148(1)(a) (West 2016) ("As used in this section, 'bullying' means any unwanted verbal, physical, or social behavior among students that involves a real or perceived power imbalance and is repeated or has the potential to be repeated: 1. That occurs on school premises, on school-sponsored transportation, or at a school-sponsored event; or 2. That disrupts the education process."); *see Kentucky Anti-Bullying Laws & Policies*, STOPBULLYING (Sept. 26, 2017), https://www.stopbullying.gov/laws/kentucky/index.html.

48. KY. REV. STAT. ANN. § 158.148(1)(a).

also does not contain any mention of bullying conduct electronically and does not include off-campus conduct.[49] Local boards of education are simply required to "prohibit bullying" and are left to formulate their own guidelines for identifying and disciplining bullying conduct.[50]

2. States That Offer Protection in Limited Circumstances

Other states, such as Colorado and Missouri, have laws that offer more protection, but they have their limits.[51] The Colorado school anti-bullying law's definition of "bullying" explicitly includes conduct perpetrated via electronic means that "cause physical, mental or emotional harm to any student."[52] However, the statute only has disciplinary actions for bullying conduct that occurs on campus, not off campus. For such activity occurring electronically, Colorado simply encourages (not requires) their schools to develop Internet safety plans.[53] It is noteworthy that the statute contains an explicit disclaimer that it is not meant to infringe on a student's freedom of speech or expression.[54] Missouri's law explicitly includes cyberbullying as well, but it, like Colorado's law, does not explicitly cover off-campus bullying or cyberbullying conduct.[55]

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49. *Id.* Kentucky does have a criminal statute that encompasses electronic harassment between students; however, that provision is not included under the guidelines that schools are required to adopt under the education laws. KY. REV. STAT. ANN. § 525.800. The education laws, which specify the discipline guidelines for bullying in sschools, do not explicitly address or cover electronic communication or harassment. *Id.* § 158.148.

50. KY. REV. STAT. ANN. § 158.148(5)(a)-(e) ("Each local board of education shall be responsible for formulating a code of acceptable behavior and discipline to apply to the students in each school operated by the board. . . . (c) The code shall prohibit bullying . . . .")

51. COLO. REV. STAT. § 22-32-109.1 (2020), *amended by* H.B. 20-1048 (Colo. 2020); MO. REV. STAT. § 160.775 (2016).

52. COLO. REV. STAT. § 22-32-109.1(1)(b) ("'Bullying' means any written or oral expression, or physical or electronic act . . . or pattern thereof, that is intended to coerce, intimidate, or cause any physical, mental or emotional harm to any student. Bullying is prohibited against any student for any reason, including but not limited to any such behavior that is directed toward a student on the basis of the student's academic performance or against whom federal and state laws prohibit discrimination upon any of the bases . . . . This definition is not intended to infringe upon any right guaranteed to any person by the first amendment to the United States constitution or to prevent expression of any religious, political, or philosophical views."); *see Colorado Anti-Bullying Laws & Policies*, STOPBULLYING (June 20, 2017), https://www.stopbullying.gov/laws/colorado/index.html.

53. COLO. REV. STAT. § 22-32-109.1(2)(c).

54. *Id.* § 22-32-109.1(b).

55. MO. REV. STAT. § 160.775(2) (2016) ("'Bullying' means intimidation, unwanted aggressive behavior, or harassment that is repetitive or is substantially likely to be repeated and causes a reasonable student to fear for his or her physical safety or property; substantially interferes with the educational performance, opportunities, or benefits of any student . . . ; or substantially disrupts the orderly operation of the school. Bullying may consist of . . . cyberbullying, electronic, or written communication, and any threat of retaliation for reporting of such acts. Bullying . . . is

However, schools can discipline their students if the cyberbullying occurs or originates on school property or at a "district activity" using the school's technology.[56] Hence, a sufficient nexus needs to exist between the cyberbullying to the educational environment; otherwise, if the cyberbullying was done off school property or at a "district activity" using the student's personal technology, it may not be protected.[57]

3. States That Offer a High Level of Protection

Many states, such as California and Texas, implement a high level of protection against cyberbullying—they have anti-bullying laws that cover cyberbullying in some off-campus situations, regardless of the use of school property or technology.[58]

California's anti-bullying law is detailed and encompasses more conduct compared to that of other states' anti-bullying laws, and it explicitly prohibits cyberbullying.[59] Students may be punished for cyberbullying even if the conduct did not originate on school property—the conduct just has to have *some* connection to a school activity, i.e., "[w]hile going to or coming from school."[60] Likewise, Texas's anti-bullying law covers on- and off-campus bullying and cyberbullying

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prohibited on school property, at any school function, or on a school bus. 'Cyberbullying' means bullying . . . through the transmission of a communication including, but not limited to, a message, text, sound, or image by means of an electronic device including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager."); *see Missouri Anti-Bullying Laws & Policies*, STOPBULLYING (Sept. 26, 2017), https://www.stopbullying.gov/laws/missouri/index.html.

56. MO. REV. STAT. § 160.775(5).

57. *Id.*

58. CAL. EDUC. CODE § 48900 (West 2016); TEX. EDUC. CODE ANN. § 37.0832 (West 2017); *see Bullying Laws Across America*, *supra* note 36.

59. CAL. EDUC. CODE § 48900(r) ("(1) 'Bullying' means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act . . . (2)(A) 'Electronic act' means the creation or transmission originated on or off the school site, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including . . . (i) A message, text, sound, video or image; (ii) A post on a social network internet Web site, including, but not limited to: (I) Posting to or creating a burn page . . . (II) Creating a credible impersonation of another actual pupil . . . (III) Creating a false profile . . . (iii)(I) An act of cyber sexual bullying."); *see California Anti-Bullying Laws & Policies*, STOPBULLYING (June 20, 2017), https://www.stopbullying.gov/laws/california/index.html.

60. CAL. EDUC. CODE § 48900(r) ("A pupil . . . may be suspended or expelled for acts enumerated in this section and related to a school activity . . . that occur at any time, including . . . (1) While on school grounds. (2) While going to or coming from school. (3) During the lunch period whether on or off the campus. (4) During, or while going to or coming from, a school sponsored activity.").

conduct.[61] Texas' law is broader than California's regarding off-campus conduct, as its law can apply to any off-campus situation.[62] The anti-bullying law from New Jersey, where Tyler Clementi attended college, is also included within this category; as of 2011, the year after Tyler's suicide, New Jersey law prohibits off-campus cyberbullying conduct.[63]

B. Absence of an Anti-Cyberbullying Federal Statute

Although no federal law directly addressing cyberbullying or electronic harassment exists, some cyberbullying conduct *may* fall within the purview of some federal laws aimed at stalking and harassment, but only in particular circumstances.[64] Over the years, traditional stalking and harassment laws have been amended to include Internet activity; however, they still have limited application in the age of global Internet use and modern-day social media.[65] Such conduct is now more difficult to regulate and prevent due to the anonymous nature and widespread usage of the Internet.[66]

Laws pertaining to discriminatory harassment in schools, such as the Equal Educational Opportunities Act (EEOA) and Title IX of the Education Amendments of 1972 (Title IX), are relevant but are still

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61. TEX. EDUC. CODE ANN. § 37.0832(a)(1) ("'Bullying': (A) means a single significant act or pattern of acts by one or more students directed at another student that exploits an imbalance of power and involves engaging in . . . expression through electronic means . . . and that: (i) has the effect or will have the effect of physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property; (ii) is sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student; (iii) materially and substantially disrupts the educational process or the orderly operation of a classroom or school; or (iv) infringes on the rights of the victim at school; and (B) includes cyberbullying. (2) 'Cyberbullying' means bullying that is done through the use of any electronic communication device . . . ."); *see Texas Anti-Bullying Laws & Policies*, STOPBULLYING (June 20, 2017), https://www.stopbullying.gov/laws/texas/index.html.

62. TEX. EDUC. CODE ANN. § 37.0832(a)(a-1)(3) ("[C]yberbullying that occurs off school property or outside of a school-sponsored or school-related activity if the cyberbullying: (A) interferes with a student's educational opportunities; or (B) substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school related activity.").

63. N.J. STAT. ANN. § 18A:37-14 (West 2011) ("'Harassment, intimidation, or bullying' means any . . . electronic communication, whether it be a single incident or a series of incidents . . . that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . . .").

64. MCCALLION & FEDER, *supra* note 17, at 13; *Laws, Policies & Regulations*, *supra* note 36.

65. CONG. RESEARCH SERV., *supra* note 40, at 4-6.

66. *See id.* at 5.

ineffective in preventing and redressing LGBTQ+ cyberbullying.[67] Student-on-student harassment is covered under these statutes "if such harassment is sufficiently serious that it creates a hostile environment," and if a school fails to address such harassment and does not provide a remedy.[68] While these statutes have been applied to in-person bullying among youth in schools, their effectiveness in remedying cyberbullying, especially towards LGBTQ+ youth, is still unclear.[69]

The EEOA, a school desegregation statute, prohibits states from denying educational opportunities to students on account of their "race, color, sex, or national origin."[70]

However, the EEOA does not clearly define the term "sex" and does not explicitly include discrimination on the basis of sexual orientation, gender identity, or gender nonconformity.[71] Title IX bars discrimination in "federally funded education programs or activities" on the basis of sex[72] but does not explicitly include sexual orientation or gender identity; nevertheless, some of the discrimination LGBTQ+ students face could potentially still be included under the term "sex." [73] However, researchers have noted that Title IX "prohibits sexual orientation or gender identity discrimination *only* when it constitutes a form of sex discrimination."[74]

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67. MCCALLION & FEDER, *supra* note 17, at 13.

68. *Id.*

69. Discrimination solely on the basis of one's sexual orientation and/or gender identity is not explicitly included in either of the statutes, and while Title IX and the EEOA bar discrimination on the basis of "sex," the statutes do not not explicitly include sexual orientation and/or gender identity within the meaning of that term. 20 U.S.C. §§ 1681, 1703 (2018); MCCALLION & FEDER, *supra* note 17, 13-14.

70. § 1703; *see The Equal Educational Opportunities Act Is Signed into Law*, HISTORY.COM (Sept. 23, 2019), https://www.history.com/this-day-in-history/equal-educational-opportunities-act-1974-signed-into-law-nixon.

71. § 1703.

72. MCCALLION & FEDER, *supra* note 17, at 13; *see* § 1681.

73. § 1681; *see* Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues Regarding Harassment and Bullying 7-8 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

74. MCCALLION & FEDER, *supra* note 17, at 14. Under Title IX, each public school and any other school receiving federal funding is required to comply with Title IX and its procedural requirements and have their own Title IX offices and coordinators, but some schools fail to follow such requirements in responding to Title IX complaints. *See* U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 1, 3-5, 25 (2015), https://www2.ed.gov/about/offices/list/ocr/docs/dci-title-ix-coordinators-guide-201504.pdf; Priya Dieterich, *These Students Challenged Their Campus's Flawed Title IX Policy—and They're Winning*, NATION (July 11, 2018), https://www.thenation.com/article/archive/students-challenged-campuss-flawed-title-ix-policy-won/; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/. Although most of the press surrounding Title IX failures involves schools' mishandlings of

In a 2010 "Dear Colleague"[75] letter, the Office of Civil Rights (OCR), under the Department of Education, issued guidance that explicitly stated that Title IX protects LGBTQ+ students from discrimination on the basis of sex stereotypes.[76] Although Title IX does not explicitly prohibit sexual orientation discrimination, anti-LGBTQ+ conduct may fall into the category of gender-based harassment and is thus covered under Title IX.[77] Therefore, schools are not excused from their Title IX responsibilities when students are harassed solely on the basis of their actual or perceived sexual orientation.[78]

The "Dear Colleague" provides an illuminating example: if a male student were to be subjected to anti-gay name-calling, harassment, and threats for having "effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices," that constitutes discrimination prohibited by Title IX even though the student identified as gay and the harassment was seemingly based solely on his sexual orientation.[79] Such conduct is under Title IX's purview because the student experienced gender-based harassment, discrimination on the basis of his sex for "failing to conform to stereotypical notions of masculinity and feminity," for not acting how a boy should act.[80] While these guidelines are still in effect, discrimination on the basis of sexual orientation, gender identity, or gender nonconformity is protected under Title IX "*only* when it constitutes a form of sex discrimination[;] . . . the statute does not prohibit all forms of sexual orientation or gender identity discrimination or harassment of students."[81]

In 2016, the Department of Justice and Department of Education issued another "Dear Colleague" letter, which extended Title IX protections to transgender students "even in circumstances in which other

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sexual assault allegations, they are illustrative of the bigger problem surrounding schools' differing Title IX practices or lack thereof. *See* Dieterich, *supra*; Keierleber, *supra*.

75. "Dear Colleague" letters are official correspondences signed and sent by members of Congress and distributed to congressional offices in order to "encourage others to cosponsor, support, or oppose legislation; collect signatures of letters; invite [m]embers to events; update congressional offices or administrative rules; and provide general information." JACOB R. STRAUSS, CONG. RESEARCH SERV., "DEAR COLLEAGUE" LETTERS IN THE HOUSE OF REPRESENTATIVES: PAST PRACTICES AND ISSUES FOR CONGRESS 1 (2017).

76. Letter from Russlynn Ali, *supra* note 73, at 7-8.

77. *Id.* at 8.

78. *Id.*

79. *Id.* at 7.

80. *Id.* at 7-8

81. MCCALLION & FEDER, *supra* note 17, at 14.

students, parents, or community members raise objections or concerns."[82] However, in 2017, the OCR issued another "Dear Colleague" letter that rescinded the Title IX protections given to transgender students in the 2016 letter.[83] An important aspect of the "Dear Colleague" guidance letters is that they reflect only how the OCR and the Department of Education would treat Title IX claims, *not* the courts.[84]

With Internet use skyrocketing within the last twenty years, Congress has enacted laws specifically aimed at protecting children from sexual predators online, using its authority under the Commerce Clause to regulate Internet activites.[85] These statutes have successfully withstood constitutional challenges; however, with cyberbullying, there are multiple constitutional considerations to address when enacting such a law because it would affect one's right to free speech and expression online.[86]

IV. THE DEVELOPMENT OF FIRST AMENDMENT FREEDOM OF SPEECH

The First Amendment of the United States Constitution reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[87] Legal scholars acknowledge that school and university rules restricting or prohibiting cyberbullying cause concern for constitutional violations, as that would mean effectively restricting or prohibiting one's speech online.[88] For LGBTQ+ students, who are more likely to be cyberbullied by their own peers than heterosexual students,[89] finding a solution to cyberbullying, despite this obstacle, is of the utmost importance.

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82. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, to Colleagues Regarding Transgender Students 2 (May 13, 2016), https://www.www2.ed.gov/about/offices/list/ocr/lettesr/colleague-201605-title-ix-transgender.pdf.

83. Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, & T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, to Colleagues Regarding Title IX, at 1 (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

84. Letter from Russlynn Ali, *supra* note 73, at 1-2.

85. CONG. RESEARCH SERV., *supra* note 40, at 2-3 (discussing the Child Online Privacy Protection Act (COPPA), Child Online Protection Act (COPA) and the Children's Internet Protection Act (CIPA)).

86. *Id.* at 2-3, 11.

87. U.S. CONST. amend. I.

88. MCCALLION & FEDER, *supra* note 17, at 17; Raul R. Calvoz, Bradley W. Davis & Mark A. Gooden, *Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 360-62 (2013).

89. HINDUJA & PATCHIN, *supra* note 16, at 2; Kann et al., *supra* note 16, at 18.

In *Watts v. United States*, the U.S. Supreme Court held that "true 'threats'" are not protected by the First Amendment.[90] In that case, the defendant, in a tongue-in-cheek manner, threatened to shoot President Johnson at a rally because he did not want to be drafted.[91] The Court ultimately deemed Watt's statement as protected since it was not a "true 'threat,'" but "political hyperbole" given the context of the speech.[92] While the Court stated that a "true 'threat'" needs to "be distinguished from what is constitutionally protected speech," it did not establish a bright-line rule for defining speech and conduct that constitutes a "true 'threat.'"[93]

Two years after *Watts*, the Supreme Court protected offensive speech in *Cohen v. California*, where the defendant wore a jacket with visible, expletive language on it denouncing the Vietnam War.[94] The *Cohen* Court reasoned that because there were no "fighting words" (words that would incite violent conduct) on the jacket, the restraints that the State of California placed on the offensive content of the message were unjustified.[95]

By the Court's decisions in these landmark cases, if a speech does not rise to a level of a "true threat," a realistic threat of physical violence, or contain "fighting words," words that incite violent conduct, it is protected under the First Amendment.[96] Furthermore, without a bright-line test to define a "true threat," putting offensive speech or even hate speech[97] within the scope of First Amendment protection potentially makes preventing and regulating cyberbullying conduct all the more difficult.[98] Because of these issues, the *Watts* and *Cohen* decisions have inadvertently contributed to the existence and pervasiveness of cyberbullying today.

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90. Watts v. United States, 394 U.S. 705, 707-08 (1969); *see also* MCCALLION & FEDER, *supra* note 17, at 16.

91. *Watts*, 394 U.S. at 706.

92. *Id.* at 708.

93. *Id.* at 707-08; MCCALLION & FEDER, *supra* note 17, at 16-17.

94. Cohen v. California, 403 U.S. 15, 16, 26 (1971).

95. *Id.* at 20, 26. The Court reasoned that "[n]o individual actually or likely to be present could reasonably have regarded the words on [the defendant's] jacket as a direct personal insult" and that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.*

96. *Id.* at 20; *Watts*, 394 U.S. at 707-08.

97. The Court has recently declined to regulate hate speech and even extended First Amendment protections to hate speech. Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("[B]ut the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting United States v. Schwimmer, 279 U.S. 644 (1929) (Holmes, J., dissenting))).

98. *See id.*

V. A STUDENT'S RIGHT TO FREE SPEECH IN SCHOOLS—THE *TINKER* TEST

Public schools and universities are within the scope of the First Amendment.[99] First Amendment concerns focus on whether schools can discipline or make rules regulating students' speech or expression.[100]

The Supreme Court decision in *Tinker v. Des Moines Independent Community School District* from 1969 still dictates how the First Amendment is applied to student speech and conduct to this day.[101] In *Tinker*, a group of high school students wore black armbands that publicized their protests against the Vietnam War to school. A few days before, their school had learned of their plans to wear the armbands and had adopted a policy against it, threatening suspension. As such, the students were subsequently suspended until they came back without the armbands. The Supreme Court held that the students were protected by the First Amendment in their wearing of the armbands, as they are "persons" under the Constitution and possess fundamental rights that States must respect.[102]

With *Tinker*, the Court declared that students and teachers have a constitutional right to "freedom of expression of their views" in their schools.[103] To determine whether a school may regulate this freedom, the Court created a "substantial disruption" test (the "*Tinker* test"), still used today.[104] The Court stated that student speech and expression is "not immunized by" the First Amendment freedom of speech if it "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[105]

While offensive speech is protected speech under *Cohen*, if such speech or expression substantially disrupts school operations and the rights of others, schools are justified in regulating and stopping such conduct and disciplining their students.[106] However, schools cannot

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99. U.S. CONST. amend. XIV; Gitlow v. New York, 268 U.S. 652, 666 (1925) (applying the First Amendment to the states via the Fourteenth Amendment).

100. *See* MCCALLION & FEDER, *supra* note 17, at 16-18; Calvoz, Davis & Gooden, *supra* note 88, at 362.

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

102. *Id.* at 511.

103. *Id.*

104. The Court looked to whether the students' conduct "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 514; *see* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (a 2015 case that still uses the *Tinker* test).

105. *Tinker*, 393 U.S. at 514.

106. *Id.* at 513; *see* Cohen v. California, 403 U.S. 15, 26 (1971).

prohibit student speech solely for "undifferentiated fear or apprehension of disturbance"[107] or simply because the students' views were unpopular.[108] Nearly twenty years after *Tinker*, the Court refined the *Tinker* test by adding an exception to it in *Bethel School District No. 403 v. Fraser*.[109]

In *Fraser*, a student delivered a speech at his school's assembly that was filled with sexual innuendos and graphic sexual metaphors, and as a result, he was disciplined.[110] The Court in *Fraser*, distinguishing from *Tinker*, found no First Amendment protections since the speech was "vulgar and lewd" [111] and had no place at a high school assembly or classroom. The Court's reasoning focused on the social ramifications of the students' conduct, citing the general duty of schools to "prohibit the use of vulgar and offensive terms in public discourse" and schools' interests in "protecting minors from exposure to vulgar and offensive spoken language."[112] The Court also noted that the "fundamental values necessary to the maintenance of a democratic political system," which are instilled by schools, do not condone usage of terms that are "highly offensive or highly threatening to others."[113] School officials thus had the power to discipline and sanction speech they deem to be vulgar, lewd, or offensive when made on-campus. The Court's holding in *Fraser* gave schools the authority to punish students for vulgar or offensive speech originating *on-campus*, but it did not explicitly address whether the exception also applies to speech off-campus.[114] Presumably, schools could not punish students for speech originating *off-campus* unless the *Tinker* test is satisfied.[115]

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

108. *Id.* at 509.

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

110. The student was suspended for three days and had his name removed from consideration for the school's graduation speaker. *Id.* at 677-78.

111. *Id*. at 685.

112. *Id.* at 683-84.

113. *Id.* at 683.

114. *Id.* at 685-86; *see* Calvoz, Davis & Gooden, *supra* note 88, at 384-85 (discussing the *Fraser* exception as applicable to on-campus speech for "maintaining an appropriate school climate" and acknowledging that some lower courts have later applied *Fraser* beyond on-campus events years after the Court's holding).

115. By the way the Court worded the *Tinker* test, it has arguably had a broad application that could be construed to apply to off-campus conduct, as it simply states that conduct that "might reasonably have led school authorities to forecast substantial disruption or material interference with school activities" is not subject to First Amendment protections. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

The two other exceptions to the *Tinker* test were created from *Hazelwood School District v. Kuhlmeier* and *Morse v. Frederick*.[116] *Kuhlmeier* involved students who wrote articles on teen pregnancy for a school newspaper, which their school then withheld from publishing.[117] The Court found that the students' First Amendment rights were not violated because the newspaper was school-sponsored and the school's actions were "reasonably related to legitimate pedagogical concerns."[118] The Court reasoned that "[a] school must be able to set high standards for the student speech that is disseminated under its auspices . . . and refuse to disseminate student speech that does not meet those standards."[119] Essentially, a student's First Amendment rights regarding content on a school-sponsored, on-campus medium are subject to less protection.[120]

In *Morse*, the most recent of the *Tinker* test exceptions, a student displayed a banner that said "BONG HiTS 4 JESUS" at a school-supervised event and was subsequently suspended.[121] The Court held that the school did not violate the student's right to free speech because it had the authority to restrict the student's speech at the school event when it "reasonably viewed [the speech] as promoting illegal drug use."[122] The Court differentiated the school's action from that of a "mere desire to avoid the discomfort" from an unpopular viewpoint discussed in *Tinker*, stating that the banner reflected a "more serious and palpable" danger of drug use.[123] With *Morse*, the Court created an exception to the *Tinker* test for on-campus speech that promotes serious and palpable danger to the students.

The *Tinker* test and the subsequent *Fraser*, *Kuhlmeier*, and *Morse* exceptions are still used today, but all of the cases dealt with facts involving student speech and verbal expression that was all in-person conduct, physically on school grounds.[124] In the age of such widespread

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116. Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

117. *Kuhlmeier*, 484 U.S. at 263-64.

118. *Id.* at 272-73.

119. *Id.* at 271-72.

120. *Id.* at 272-73.

121. *Morse*, 551 U.S. at 397-98.

122. *Id.* at 409-10.

123. *Id.* at 408 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

124. *Id.* at 410 (holding that schools have an overriding interest in preventing on-campus speech that encourages dangerous and illegal activities); *Kuhlmeier*, 484 U.S. at 273 (holding that school-sponsored forums and mediums of speech (a school newspaper published by the school) are subject to less First Amendment protections); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (holding that schools can punish for vulgar or offensive speech physically

usage of electronic communication among the youth, coupled with the ability to access the Internet everywhere they go at ease, a lot of cyberbullying today occurs outside of school property.[125] Nevertheless, courts still use and try to fit the *Tinker* test and its exceptions into situations of cyberbullying, which leads to uneven and ununiform results throughout different jurisdictions.[126]

For example, in 2011, *Layshock v. Hermitage School District*, from the Third Circuit, had a student who used his grandmother's computer during non-school hours to create a fake, derogatory MySpace profile of his principal using a photograph from the school website.[127] His friends had access to the profile, and he twice used a school computer to access the profile. Knowledge of the profile quickly reached the entire student body, resulting in the student's suspension. Because the school district did not challenge that the profile did not cause a substantial disruption at the school, the court did not extensively analyze *Tinker*. However, the school district argued for the application of the *Fraser* exception. The school district viewed the profile as on-campus speech because it purportedly intended to reach the school community, and the student accessed it through the school's technology, but the court disagreed. The court held that neither the student's access of the profile twice at school nor its popularity around the student body constituted "entering the school."[128] Because there was not a sufficient nexus, the court held that the school district could not punish the student.

The events that led to Tyler's tragic suicide occurred in New Jersey in 2010.[129] Tyler's hypothetical case would most likely be analyzed similarly to *Layshock*, which was decided less than a year after Tyler's

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occurring on-campus); *Tinker*, 393 U.S. at 514 (holding that students protesting the Vietnam War have First Amendment rights for their speech that was conducted on-campus).

125. Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RES. CTR. (Sept. 27, 2018), https://www.pewinternet.org/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/.

126. *See*, *e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); N.Z. v. Madison Bd. of Educ., 94 N.E. 3d 1198 (Ohio Ct. App. 2017); J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000).

127. *Layshock*, 650 F.3d at 207-08.

128. *Id.* at 219.

129. State v. Ravi, 147 A.3d 455, 460-65 (N.J. Super. Ct. App. Div. 2016); McGovern, *supra* note 1.

death.[130] As with *Layshock*, a court would have to determine if Dharun's Twitter posts and two live-streaming sessions constituted on-campus speech—if it "[r]eached [i]nside" or entered[131] the school. Based on the Third Circuit's analysis in *Layshock*, this determination could go either way; however, Dharun's speech has an arguably stronger connection to a school than the student's in *Layshock*, as Dharun conducted his cyberbullying in on-campus housing.[132] Because the court did not undergo a *Tinker* analysis in *Layshock*, it is unclear how the Third Circuit would determine what constitutes conduct that would be reasonably foresseable as causing substantial disruption or material interference of school activities.

VI. CAN WE DO MORE TO PROTECT AGAINST CYBERBULLYING?

Numerous challenges exist in creating a law against cyberbullying that does not violate the First Amendment. The public response from the 2010 "Dear Colleague" letter was overwhelmingly composed of these concerns.[133] Multiple national organizations issued proposed guidelines[134] in response. The proposed guidelines focused on balancing First Amendment rights with safety and cautioned schools against using too much discretion in deciding whether or not to censor.[135] Additionally, the Anti-Defamation League submitted a response letter[136] to the OCR and the Department of Education expressing concern that their guidelines would not actually solve the problem of bullying and cyberbullying.

A. The Challenges of Creating an Anti-Cyberbullying Statute

Under the First Amendment, only "true 'threats,'" as discussed in *Watts*, are not protected; hate speech is still protected.[137] Because there is

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130. Layshock was decided in May 2011. Tyler passed away in September 2010. *Layshock*, 650 F.3d 205; *Ravi*, 147 A.3d at 468.

131. *Layshock*, 650 F.3d at 216, 219.

132. *Ravi*, 147 A.3d at 460, 463; Parker, *supra* note 1.

133. *See* MCCALLION & FEDER, *supra* note 17, at 11 (discussing the proposed guidelines issued by the American Jewish Committee and the Religious Freedom Education Project/First Amendment Center).

134. *Id.*

135. *Id.*

136. *Id.*

137. Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))); Watts v. United States, 394 U.S. 705, 708 (1969).

no federal statute directly prohibiting cyberbullying, states are left to create their own laws, a reality that leads to the previously discussed lack of uniformity as to how cyberbullying is treated and sanctioned.[138] The primary challenges to creating an anti-cyberbullying statute that is permissible under the First Amendment are (1) passing the strict scrutiny test, as the statute would naturally be content-based instead of content-neutral; (2) propensity for vagueness; and (3) the risk of overbreadth.[139]

State v. Bishop, from North Carolina, illustrates these issues.[140] North Carolina's anti-cyberbullying criminal statute made it "unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor . . . [w]ith the intent to intimidate or torment a minor."[141] The Supreme Court of North Carolina determined that the statute was "content based," which required strict scrutiny analysis, and subsequently concluded that the state had failed that test.[142] While the state had a compelling interest in protecting minors online, it failed to show that the statute was the least restrictive means of achieving that compelling interest.[143] The statute's language did not employ the least restrictive means of furthering the state's compelling interest, as "intimidate" and "torment" were not defined in the statute.[144] The statute was impermissibly overbroad, as the term, "torment," was construed so broadly that it encompassed annoyance, pestering, or harassment, which could criminalize conduct "that a robust contemporary society must tolerate."[145]

Another example can be found in *People v. Marquan M.*, in which the Court of Appeals of New York invalidated a local cyberbullying statute with the vagueness and overbreadth doctrines.[146] The statute stated that "any act of communicating or causing a communication to be sent by mechanical or electronic means . . . with the intent to harass, annoy,

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138. MCCALLION & FEDER, *supra* note 17, at 13; *Bullying Laws Across America*, *supra* note 36; *Laws, Policies & Regulations*, *supra* note 36.

139. *Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/modern-tests-and-standards-vagueness-overbreadth-strict-scrutiny-intermediate-scrutiny-and-effectiveness-of-speech-restrictions (last visited Mar. 30, 2020).

140. State v. Bishop, 787 S.E.2d 814, 816 (N.C. 2016).

141. N.C. GEN. STAT. § 14-458.1(a)(1)-(2) (2012), *invalidated by* State v. Bishop, 787 S.E.2d 814 (N.C. 2016); *Bishop*, 787 S.E.2d at 816.

142. *Bishop*, 787 S.E.2d at 818-20.

143. *Id.* at 820.

144. *Id.* at 820-21.

145. *Id.* at 821.

146. People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014).

threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person" was prohibited.[147] The statute was challenged for prohibiting a much larger range of conduct than its actual intended purpose. The court noted that the provision not only prohibited conduct relating to cyberbullying, but *any* conduct using electronic communication—it would inadvertently prohibit *any* telephone conversation or email communication that merely annoyed an adult-age person.[148]

B. Problems with the Currently Available Case Law

As courts apply *Tinker* and its exceptions with a lack of uniformity, a question arises—is *Tinker* sufficient enough to guide courts in resolving First Amendment issues with cyberbullying? The answer, simply put, is *no*. Courts, for the sake of modernity, need to stray from the *Tinker* test as it currently is. The Supreme Court must devise a new test that comports with modern First Amendment problems instead of relying on tests that were created decades before such problems even existed, or heavily modernize the *Tinker* test to be compatible with off-campus electronic and online communication.

Courts, both state and federal, seem to vary in their application of the *Tinker* test and its progeny to off-campus cyberbullying. In *J.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court established a sufficient nexus between the student's "Teacher Sux" website to the school, even though it was created on the student's home computer.[149] The *Bethlehem* court seemed to require a *substantial* connection and found one by focusing largely on the effect of the speech on the school community rather than the physical connection to the school, in order for *Tinker* and its progeny to be applicable.[150] If a student's off-campus cyberbullying conduct does not exhibit such a strong connection to the school—i.e., simply sending online or text messages to the victim that does not draw the attention of the entire school body—would the court still find that a strong enough nexus existed in order to apply *Tinker*? On the other hand, the Ohio Court of Appeals in *N.Z. v. Madison Board of Education* found a nexus between the student's off-campus speech and the school community purely from its physical location, focusing largely on

147. *Id.* at 484.

148. *Id.* at 486.

149. J.S. *ex rel*. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851, 865, 867-69 (Pa. 2002).

150. The court looked to ability of the school community to access the website on-campus and the widespread knowledge of the website. *Id.* at 865.

the fact that a student had dropped a binder on the floor of the physical grounds of the school.[151]

The United States District Court for the Western District of Washington in *Emmett v. Kent School District* determined that a student's mock obituary website did not satisfy the *Tinker* test, with the key factor being the student's intent.[152] The court did not find a nexus between the website and the school, despite the intended audience being the school community.[153] In the Second Circuit's *Wisniewski v. Board of Education of Weedsport Central School District*, though the student's cyberbullying originated off-campus with his own technology, it did not shield him from punishment by the school.[154] The court simply applied the *Tinker* test and found the speech to be reasonably foreseeable to cause a substantial disruption at school, disregarding the fact that it originated off-campus and did not circle widely throughout the school community.[155] The Third Circuit came to nearly the opposite conclusion in *Layshock*, where the court declined to find a sufficient nexus between the speech and the school, even though the student's speech was circulated widely amongst the school, because it originated off-campus.[156] Further, because the school did not challenge the lower court's finding that the profile was not a substantial disruption or material interference, the court ruled in favor of the student; however, had the school challenged that finding, the court may have reached a very different conclusion.[157] The Fourth Circuit's holding in *Kowalski v. Berkeley County Schools* aligned with the Second Circuit's *Wisniewski*; however, unlike the Second Circuit, the Fourth Circuit analyzed whether a sufficient nexus existed between the speech and the school, factoring in the physical connection of the speech to the school.[158] The Fifth Circuit in *Bell v. Itawamba County School Board* involved a student's speech that originated off-campus by the student's own technology, and the court established a nexus between the speech and his

151. N.Z. v. Madison Bd. of Educ., 94 N.E. 3d. 1198, 1201, 1212-13 (Ohio Ct. App. 2017).

152. The student maintained that the website was a joke and inspired by a creative writing class project. Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089-90 (W.D. Wash. 2000).

153. *Id.* at 1090.

154. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35, 39-40 (2d Cir. 2007).

155. *Id.* at 39-40.

156. Layshock *ex rel*. Layshock v. Hermitage Sch.Dist., 650 F.3d 205, 207-08, 216 (3d Cir. 2011).

157. *Id.* at 214, 216, 219.

158. Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 574 (4th Cir. 2011); *see Layshock*, 650 F.3d at 214-16.

school and held that the school could punish the student simply because the speech was public and directly targeted to the school community.[159]

What exactly are the minimum conduct and nexus required in order to satisfy the *Tinker* test? Each court discussed above seems to have different standards and thresholds as to what constitutes a substantial disruption or material interference for the *Tinker* test and what constitutes a sufficient nexus between the off-campus speech and the school community. Some analyzed whether a sufficient nexus existed by focusing in part on a speech's physical connections to the school in addition to its reach into the school community.[160] Meanwhile, others more easily established a connection to the school community simply because the speech involved or mentioned the school, regardless of the use of a student's personal technology, low exposure to the actual school community, or the speech's lack of physical connection to the school.[161] A few did not find a nexus between a student's off-campus speech, despite the fact that such speech reached deep within the school community.[162] Furthermore, the speeches in each case involved differing levels of public access and exposure. They were also different in nature, ranging from vulgar comments and exposing private conduct to conduct that can be construed as violent threats.[163] With such a variety of factual situations, it is hard to discern exactly what is needed to allow a school to punish a student for off-campus cyberbullying. These cases illustrate the judicial system's vast ununiformity in delineating a threshold for what could be reasonably foreseeable as a "substantial disruption" or "material interference"[164] and if a nexus between the speech and the school community is even needed in the first place to use the *Tinker* test.

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159. The student's speech was a rap that was posted on Facebook and Youtube. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 384-85, 398-99 (5th Cir. 2015).

160. *See Kowalski*, 652 F.3d at 574; N.Z. v. Madison Bd. of Educ., 94 N.E.3d 1198, 1212-13 (Ohio Ct. App. 2017).

161. *Bell*, 799 F.3d at 388-99 (finding a nexus simply due to the fact that the student's rap recording was about school personnel, even though it originated off-campus with the student's personal technology); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35-36, 39 (finding a nexus even though the student's speech was created off-campus, without using technology, and only viewed by a few of his friends before the school was notified of it).

162. *See Layshock*, 650 F.3d at 208-09, 216; Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089-90 (W.D. Wash. 2000).

163. *Compare Layshock*, 650 F.3d at 207-08 (fake social media page created to make fun of a principal), *with Wisniewski*, 494 F.3d at 36 (an IM icon depicting a gun firing into the student's English teacher's head).

164. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

VII. CONCLUSION—WHAT DOES THIS MEAN FOR LGBTQ+ YOUTH?

For LGBTQ+ youth specifically, there are very little, if any, currently available ways to combat and remedy cyberbullying in schools because of the multitude of issues previously discussed. That will not change until Congress enacts a federal statute that directly addresses cyberbullying, or until the Supreme Court either completely revamps or retires *Tinker*. As previously discussed, cyberbullying is getting harder and harder to manage as communication technology advances and becomes an integral part of the daily lives of youths. The cases previously discussed all involved rather drastic and extreme forms of cyberbullying—creating websites to harass the victim, making a fake profile of the victim, and orchestrating a public social media group to smear the victim. As discussed before, the typical cyberbullying conduct does not rise to that kind of level. With such precedents, it is hard to tell how the various courts would treat cyberbullying conduct that is of lesser extreme, such as conduct consisting primarily of text or online messages exchanged only between the cyberbully and the victim.

Courts have already questioned the relevance and the stronghold that *Tinker* has in light of such vast advances to communication technology. The Fifth Circuit critized the continued use of *Tinker*; it raised an interesting discussion about keeping a standard that was created fifty years ago, at a time when no one could have imagined the capabilities and reach of electronic communication and the Internet as they are today.[165]

The Supreme Court has been reluctant to modernize the *Tinker* test or devise a new standard, as indicated by its continued use of the test,[166] but it is time. The Court certainly has the means to modernize the *Tinker* test, as it has periodically added exceptions to the test since its inception.[167] An alternative solution would be to categorize certain cyberbullying conduct aimed at LGBTQ+ youth, such as harassment on the basis of a student's sexual orientation, gender identity, or gender nonconformity, as

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165. *Bell*, 799 F.3d at 392.

166. The *Tinker* test, devised by the Court in 1969, has been used consistently by many federal appellate courts, such as the the Second Circuit in *Wisniewski*, the Fourth Circuit in *Kowalski*, and the Fifth Circuit in *Bell*, as well as state courts, such as *J.S.* in Pennsylvania and *N.Z.* in Ohio. *Tinker*, 393 U.S. at 514; *Bell*, 799 F.3d at 397-99; Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 572-75 (4th Cir. 2011); *Wisniewski*, 494 F. 3d at 38-40; N.Z. v. Madison Bd. of Educ., 94 N.E. 3d. 1198, 1213-14 (Ohio Ct. App. 2017); J.S. *ex rel*. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002).

167. *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (holding that on-campus speech that promotes serious and palpable danger, such as illegal drug use, to the students is not protected); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (holding that content on a school-sponsored medium has less First Amendment protections).

a "true threat" to one's safety in order to remove First Amendment protections.[168] However, that is a far stretch and a seemingly near-impossible feat to expect from the Supreme Court unless one's life is actually being validly threatened, given the outcome of *Watts*, and most recently, *Matal*.[169] The Supreme Court needs to modernize *Tinker* or devise a new legal standard with an actual bright-line test that fits better with the pervasive and widespread nature of cyberbullying.

Tyler Clementi is hardly the first LGBTQ+ individual to experience cyberbullying, and he will not be the last. To protect such a vulnerable population, stonger measures need to be in place to prevent and redress cyberbullying. LGBTQ+ youth should not have to suffer—or worse, die—in order to obtain some relief.

168. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (discussing the "true 'threat'" exception to First Amendment protections).

169. Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (finding that hate speech is protected by the First Amendment); *Watts*, 394 U.S. at 707-08 (finding that the defendant's speech did not constitute a "true 'threat'" to the President's life because he did not have the requisite "willfulness" to actually carry out his "threat," and the Court instead characterized it as a "hyperbole.").