WHERE THE SCHOOLHOUSE GATES END: AN ANALYSIS OF STATE CYBERBULLYING LAWS

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Andrew D. Postal, B.A. and B.S.

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Andrew D. Postal, B.A. and B.S.

Thesis Advisor: Mark MacCarthy, Ph.D.

ABSTRACT

American policy makers, from school board members to elected lawmakers, must constantly strike a delicate balance between disciplining students for misconduct and protecting student speech rights. These decisions are often controversial and must adapt to rapidly changing technologies. Nowhere are these tensions more apparent than in laws aiming to address the problems caused by cyberbullying in American K-12 public schools. This paper employs a functional approach to sociotechnical analysis, which identifies a new sociotechnical harm of cyberbullying, the relevant technologies involved, shortcomings in existing laws, and changes that must be made in laws to rectify the shortcomings. This work updates previous research on student speech and the First Amendment by including recently passed state laws aimed at addressing cyberbullying specifically. Additionally, it looks more broadly at how to balance student speech and general bullying laws and creates a unique policy framework for evaluating existing cyberbullying laws.

This research accomplishes three main goals. First, it will outline existing legal jurisprudence shaping First Amendment protections to student speech. Second, it will detail how online social media sites and electronic communication methods create and contribute to new sociotechnical problems associated with cyberbullying, which while similar to bullying, are distinctly different. Third, it will analyze the text of state cyberbullying laws from Illinois, Michigan, North Carolina, and California, arguing that broad language giving schools the
authority to step beyond their physical and electronic boundaries to punish students for online content created on off-campus, non-school sanctioned computers, runs against the constitutional limits placed on schools by the U.S. Supreme Court decision in *Tinker v. Des Moines Independent Community School District* (1969), which states that schools must stay within their geographical boundaries when punishing student speech that administrators believe will cause a substantial disruption to the educational mission.

Overall, this paper argues that laws aimed at addressing cyberbullying must limit schools to a jurisdictional substantial disruption approach. By this, I mean schools should not discipline students for content produced outside of the physical boundaries of the school, including its computer network. While off-campus cyberbullying is still problematic, other entities, such as law enforcement and social media platform terms of service, should govern any content. Instead of focusing on legal solutions to the problems brought on by cyberbullying, lawmakers and schools should focus more on shifting societal norms and teaching youth how to properly conduct themselves on the Internet.
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CHAPTER 1

INTRODUCTION

On October 16, 2006, Megan Meier’s mother Tina found Megan hanging in her closet. She died a day later. Megan was a 13-year-old girl living in suburban St. Louis and heartbroken when Josh Evans, with whom she had had an online relationship on MySpace, broke up with her via the online platform. On October 15, 2006—the day before Megan hanged herself—Josh sent her a MySpace message saying that the world would be better off without her. What Megan and her family found out later was that Josh Evans was not a real person, but rather one of the Meier’s neighbors, Lori Drew, who was posing as Evans on a fake MySpace profile. Lori Drew was a 48-year-old mother who had convinced her daughter Sarah, and her business assistant Ashley Gilles, to set up the fake Josh Evans profile and harass Megan online. The federal government accused Drew in November 2008 of violating the federal Computer Fraud and Abuse Act (CFAA) by violating MySpace’s terms and services. The CFAA bans unauthorized access of computers. Drew was charged in Los Angeles, because that is where MySpace’s servers were located. In 2009, a Missouri federal judge dismissed the case against drew, claiming that if Drew was found guilty, then every person who had ever violated MySpace’s terms of service would be found guilty of a misdemeanor.

In March 2014, Riley Stratton, a 13-year-old sixth-grader from Minnewaska, Minnesota, was awarded $70,000 by the school district where she attended school. Two years prior, Stratton had posted on her Facebook page her dislike for a hall monitor, saying that she thought she was

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1 “Parents Want Jail Time for MySpace Hoax Mom.” ABC News. 29 Nov. 2007.
mean. Upon learning of this, her school officials gave her an in-school suspension for her actions. In a subsequent incident, a parent complained that Stratton was sending sexually explicit Facebook messages to her son. In response, school officials called Stratton into their office and demand her Facebook password, with a deputy police officer present. Stratton became so embarrassed she dropped out of school and started homeschooling. The American Civil Liberties Union took the school to court, stating that Stratton’s First Amendment rights were violated. They won the case and the school was found in violation of Stratton’s First Amendment rights. The school defended the actions. Minnewaska Superintendent Greg Schmidt, who started his job after these incidents, stated that, “Some people think schools go too far and I get that. But we want to make kids aware that their actions outside school can be detrimental.”

These two cases illustrate the challenges that cyberbullying poses to schools and student First Amendment rights. Schools must walk a delicately fine line between protecting students from harm and preserving the state-sanctioned educational mission, as well as ensuring that they protect student First Amendment free speech and expression rights. In this thesis, I will examine how state cyberbullying statutes adhere to the boundaries of school disciplinary jurisdiction established by the courts, and what that means for the state of student First Amendment free speech rights more broadly. I am analyzing laws that are tied to American K-12 public schools and students. I am not, however, looking at laws as they pertain to adult cyberbullying or Internet trolls.

**Why Cyberbullying is a Problem**

Cyberbullying is a major issue in the United States. The U.S. Department of Health and Human Services (HHS) defines cyberbullying as “bullying that takes place using electronic

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technology.” Additionally, HHS states that cyberbullying can happen over a variety of electronic platforms, including, “mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.”

Finally, HHS says that cyberbullying is different than other types of bullying for three reasons:

- Cyberbullying can happen 24 hours a day, 7 days a week.
- Cyberbullying can be posted anonymously, distributed quickly, and it can be difficult to trace its origins.
- Deleting messages after they have been posted is extremely difficult and often impossible.

HHS also outlines the detrimental effects of cyberbullying on minors, which includes:

- Drug and alcohol use
- Skipping school
- Receiving poor grades
- Having lower self esteem
- Having more health problems

According to the Cyberbullying Research Center, which has been collecting data on middle school and high school cyberbullying since 2002, over 25 percent of the 15,000 students surveyed over the eight studies (May 2007 - January 2014) on average stated that they have been cyberbullied at some point in their lifetime. Additionally, the problem is only getting worse. January 2014 had the highest rate of students—34.6 percent—saying that they were

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Clearly, this problem must be addressed. Having stated this problem, this thesis will not attempt to find a solution to cyberbullying. Rather, it will examine the constitutionality of existing state cyberbullying laws in terms of school disciplinary jurisdiction, as well as analyze what those laws mean for the First Amendment rights of students.

**How Youth Engage with Social Networking Sites**

Social media, and the Internet in general, serves as an important avenue for young people to socialize with their peers and develop their own personal identities and interests in ways never before possible. A 2011 Pew Research Center study notes that 95 percent of teens 12-17 are online, and 80 percent of those teens are on social media. “Living and Learning with New Media: Summary of Findings from the Digital Youth Project,” a 2008 ethnographic study on how young people use digital media, makes important findings about the importance of the Internet and social networking websites to helping youth grow, both personally and professionally. First, the study finds that young people “geek out” and participate in highly engaged social discussions with other teens and adults on specialized topics, with the goal of improving their craft or gaining a reputation for being an expert in a topic. As the study finds, “[o]nline groups enable youth to connect to peers who share specialized and niche interests of various kinds, whether that is online gaming, creative writing, video editing, or other artistic endeavors.” This is a function of social media that must be protected. Social media provides

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10 Ito, Mizuko et. al., 1
support groups and outlets for young people to foster their hobbies and interests and engage with one another when they cannot be physically present in the same space at the same time.

The study also finds that young people “can also find opportunities to publicize and distribute their work to online audiences and to gain new forms of visibility and reputation.”\textsuperscript{11} By having a social media presence, young people are also able to share their talents with the entire world for an extremely low cost, which before was not possible. For example, if a young artist or musician is able to post his or her work in a Facebook group comprised of fellow artists, that work could be discovered by an art curator or music producer on the other side of the world, which would yield new opportunities.

Finally, a significant amount of peer-to-peer learning takes place online, often beyond the scope of what a young person can learn in the classroom. As the study notes, “[u]nlike what young people experience in school, where they are graded by a teacher in a position of authority, feedback in interest driven groups is from peers and audiences who have a personal interest in their work and opinions. Among fellow creators and community members, the context is one of peer-based reciprocity, where participants can gain status and reputation but do not hold evaluative authority over one another.”\textsuperscript{12} Here, it is shown that online communities help students learn from one another and foster the development of a young person, both mentally and professionally.

Ultimately, social networking sites lower barriers to entry for young people to become more engaged with their interests, their peers, and the world. Social media sites lower the economic barriers to entry for a young person to a thriving conversation on art or current affairs, as well as lowering the social barriers to enter a group discussion about an interest of theirs.

\textsuperscript{11} Ito, Mizuko et. al., 1
\textsuperscript{12} Ito, Mizuko et. al., 31
Furthermore, by providing valuable forums for peer-to-peer learning and self-expression, young people learn in ways that might not be possible in a face-to-face conversation, especially one with a teacher. Overall, restricting youth access to social networking websites and the Internet would greatly silence the fresh voices of students who use the Internet to advance their own personal and professional development.

**Thesis Roadmap**

This thesis will consist of the following parts: a literature review, methods discussion, case study analysis, policy recommendations, and conclusion. The literature review will be comprised of a survey of relevant literature and previous studies. In that section, I will extract four main schools of thought by which scholars analyze laws pertaining to student speech. These schools of thought are a geographical standard, a true threats and substantial disruption standard, use of the civilian legal system, and an examining the relationship between the school and student. The methods section will outline my method for analyzing state statutes relating to school cyberbullying. My method is a functional approach to sociotechnical analysis, which identifies a new societal problem, a technology that gives rise to that problem, an analysis of where existing law falls short in mediating that societal problem, and a discussion of where improvements to statutes can be made. The case study analysis will focus on state laws from Illinois, Michigan, North Carolina, and California that aim to address the problems of cyberbullying in schools. I argue that these laws broadly expand the ability of schools to punish online student speech, which goes beyond what is constitutional under the First Amendment at the expense of student speech. The policy recommendation chapter will focus on my own recommendation to follow when state lawmakers craft cyberbullying statutes. I argue a jurisdictional substantial disruption approach should be taken, which allows schools to punish a
student for actions originating when he or she is physically on campus or on school-owned computers or computer networks. Lastly, the conclusion will tie up my argument and provide take-aways, as well as avenues for future research.
CHAPTER 2

LITERATURE REVIEW

In response to instances of student speech, both the U.S. Supreme Court and lower-level courts agree that student speech in K-12 public schools deserves some level of legal protection under the First Amendment. However, courts have been unclear in delineating boundaries for when speech no longer becomes protected free expression and crosses over into a space where school administrators must act to protect the educational mission of the school and the safety of the school community. This creates tension between competing school interests to both foster democratic principles amongst its students, as well as to ensure its educational mission is carried out, setting up an on-campus-off-campus dichotomy. In particular, the lack of clarity on this issue from the Supreme Court has left lower courts to craft a patchwork of standards for determining where school disciplinary jurisdiction ends over its students. This creates an uncertain legal landscape for school administrators to tread lightly upon. A further complication to this legal question is the advent of the Internet and electronic communication technologies. Now, as students across the United States log into social media accounts and online chat rooms, the schoolhouse gates potentially expand indefinitely, with the legal question becoming what role schools should play in reprimanding students for what is said, posted, or disseminated via the Internet about their teachers, administrators, principals, and fellow students on non-school sanctioned computers or computer networks.

While courts have provided a variety of tests and standards, legal scholars and courts remain divided on which is the most effective to determining the level of school involvement in the online sphere and have developed a few schools of thought on how best to make that determination. The first standard is a geographical standard based on where the student is when
he or she is speaking; the second evaluates the true impact or threat of the speech; the third is a relational standard that examines in what capacity the student was speaking (private citizen vs. student); and the fourth proposes using the civilian legal system to address online student speech occurring on off-campus computers, rather than craft laws that specifically target new technologies.

A. Legal Precedent for Student Speech

First Amendment protections for student speech have historically been unclear and create a tension between competing interests of a school. As David Hudson, Jr. writes in his book, Let the Students Speak!: A History of the Fight for Free Expression in American Schools (2011), schools have the unique task of having to ensure that students have the ability to express their opinions, while also balancing the school’s interest to carry out its educational mission, as schools are responsible for students while on campus. Complicating this mission is advent of social media websites, which blur the lines between when a student’s off-campus actions have on-campus consequences. In his work, When The Schoolhouse Gate Extends Online: Student Free Speech in the Internet Age (2008), David Fraymar notes the widespread use of social media amongst students. According to Fraymar, “eighty-seven percent of young adults between ages twelve and seventeen use the Internet regularly. Ninety-three percent have used it at some point. Of middle- and high-school aged adolescents who use the Internet, more than half use online social networking websites, such as MySpace and Facebook.” This demonstrates how difficult it is for school administrators to determine where their disciplinary jurisdiction ends in regards to student speech.

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Complicating matters is that student off-campus online speech has on-campus real consequences. As Todd D. Erb writes, “[j]ust as the September 11th attacks shifted the nation’s paradigm concerning issues of national security, the 1999 shootings at Columbine High School changed the way school administrators handle threats from students against faculty or other students on campus.”\(^{15}\) From such incidents as the 1999 Columbine School Shootings, teachers and administrators must now take seriously any violent threats from students. Additionally, “[a]ccording to a 2007 study by the Federal Probation Juvenile Department, ‘90 percent of middle-school students have had their feelings hurt online,’ while seventy-five percent had visited a website that bashed another student.”\(^{16}\) Clearly, the problem of online cyberbullying has impacts on students’ lives, and schools must protect students from harm to ensure they carry out their educational mission.

In addition to the real challenges schools face from online student speech and how to apply disciplinary action around off-campus online speech, schools must navigate complex legal standards to determine where their legal ability to mitigate negative on-campus impacts of off-campus speech ends, specifically in the online content.

1. **U.S. Supreme Court Decisions: From Tinker to Morse**


\(^{16}\) Erb, 259
the general public. However, the extent of that protection is not obvious from these decisions.  

Each case added a layer of complication onto the already complicated legal standards determining how schools can regulate online student speech to prevent cyberbullying.

The U.S. Supreme Court Case Tinker v. Des Moines Independent Community School District (1969) is the most important court case on school speech, laying the legal foundation for student speech protections. Anne Dupre (2009) calls this case “the cornerstone on which the student speech right was built.” This case involved public junior high school students wearing armbands to protest the Vietnam War, which resulted in their suspension. The Court ruled that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” which establishes the geographic dichotomy that punishes on-campus speech, while allowing off-campus speech to persist. The case also established the “Tinker Test,” which allowed for student speech on campus also long as it was not disruptive to the learning environment. This is called the substantial disruption test. As Nancy Williams (2007) writes, “Tinker does not require a demonstration of actual disruption. It requires a reasonable, factual basis to anticipate disruption at school.” However, it is important to note that the Court did recognize that the Constitutional rights of students are not the same as adults. While this standard seems straight forward, it has become increasingly muddled with the advent of the Internet and has been complicated by subsequent cases limiting broad applicability of the Tinker Test.

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17 Heidlage, Benjamin F. "Relational Approach to Schools' Regulation of Youth Online Speech, A." NYUL Rev. 84 (2009), 576.
Throughout my project, I rely on an interpretation of *Tinker* that states that schools cannot extend disciplinary action beyond their campus boundaries. There are different interpretations of this case. Some scholars believe that schools can get involved as long as there is the potential for a substantial threat or disruption on campus, even if the action originates off-campus. However, I believe that the fact that the majority opinion stated, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” makes it clear that there should be a geographical boundary limiting school disciplinary actions.

The next Supreme Court case shaping the legal landscape of student speech is *Bethel School District No. 403 v. Fraser* (1986). In the case, Matthew Fraser, a high school student, used sexual innuendos in a speech during a school-sanctioned rally. The school suspended Fraser for seven days; however, Fraser argued that his speech was constitutionally protected, just like the armbands that Tinker wore. The Court sided with the school in this case. Chief Justice Burger wrote, “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” This case limited the scope of protected student speech—and thus the *Tinker* decision—by giving schools the ability to determine what constituted vulgar and offensive discourse, and is overall much more restrictive than the substantial disruption standard from *Tinker*. The terms open for interpretation and could lead to schools describing more types of speech as “offensive” or “vulgar” as a way to limit student speech and expression.

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The third case dealing with student speech is *Hazelwood School District v. Kuhlmeier* (1988). In this case, students challenged school censorship of student-produced school newspaper articles about teen pregnancy and divorce (*Hazelwood*). In this case, as Erb writes, “[t]he court suggested that, although Tinker requires schools to tolerate particular student speech, the First Amendment does not require a school to affirmatively promote particular student speech.” The Court ruled that while legal protections of student speech, educators do not have to actively promote content that they deem to be “legitimate pedagogical concerns.” Additionally, it greatly expands the school’s jurisdiction by allowing administrators to censor content that is “inconsistent with ‘the shared values of a civilized social order.’” However, since this case involves a school newspaper, which is different in function and scope of a social media site, Erb argues that “Kuhlmeier generally is not instructive in off-campus cyberbullying cases, but it strengthens school authority to punish students when web sites are created or accessed on school computers.” While Kuhlmeier offers some direction in terms of content, it does nothing to help settle the question of where school authority and jurisdiction over off-campus students speech stops.

The fourth—and the most recent—Supreme Court case addressing the issue of school boundaries in terms of student speech was *Morse v. Frederick* (2007). In this case, high school student Joseph Frederick at Juneau-Douglas High School unfurled a banner at an off-campus field trip reading, “BONG HiTS 4 JESUS.” The high school principal, Deborah Morse, suspended Frederick for his behavior, but Fredrick argued that his First Amendment rights had been violated. The Court’s majority determined that the principal was acting within her authority.

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25 Erb, 262
26 Erb, 262
to regulate Frederick’s speech for three main reasons. First, the event, although off-campus, was school sanctioned. Second, the banner appeared to promote illegal drug use. Thirdly, and related to the second reason, schools have a responsibility to prevent illegal drug use. Frayman notes that while Morse dictated that school custodial duties were important, it failed to address the off-campus nature of the event in a substantial way.28

As the major Supreme Court cases addressing student speech demonstrate, the Court does not provide clear directions for school administrators as to when they can legally punish student speech. While there is general direction that gives on-campus speech the least amount of protection, the school must also prove that the speech poses a true threat to the school’s educational mission. Student speech and cyberbullying via the Internet and social media does not fit neatly into those vague standards. While, it can be argued that such speech should not be protected, it often takes place on computers off-campus, which complicates school efforts to discipline students for cyberbullying. The Supreme Court offers a geographical framework to aid lower-level courts to address this question. However, without a case directly involving online content, lower-level courts must grapple with more direct questions, such as if schools can legally discipline students under the First Amendment for creating websites lampooning school teachers and officials.

2. Lower-Level Courts Grapple with Student Speech Protections

While these four Supreme Court decisions largely define, and will continue to define, constitutional protections for student free speech and expression, there are a few lower-level court decisions that have potential to have a more targeted impact specifically on student online generated content. The most important lower-level court cases impacting student speech are:

28 Fraymar, 4.
Thomas v. Board of Education (1979), Klein v. Smith (1986), Beussink v. Woodland R-IV School District (1998), and J.S. v. Bethlehem Area School District (2002). If the Supreme Court were to examine these cases, the Court would have to grapple further with the issue of how far the schoolhouse gates extend onto the Internet.

The first case, Thomas v. Board of Education, is a case involving an off-campus satirical newspaper. In this case, students wrote a satirical newspaper, Hard Times. This newspaper contained vulgar sexual content, which upset parents. The school administration attempted to suspend the students who created the paper for five days, which the students argued violated their First Amendment rights. The Second Circuit Court of Appeals ruled that the suspensions were not outside of the administrator’s bounds. The court writes, “My judgment would remain firm that the decisions of the school authorities were properly within their supervisory power to control the conduct of the students and did not violate First Amendment rights and privileges.” While this does have parallels to online speech, in that the newspaper was created off-campus but accessed on-campus, much like a website, the parallel breaks down in that speech on the Internet arguably has a wider potential reach than a small satirical newspaper.

The second case pertaining to student speech is Klein v. Smith. In this case, a high school student made an obscene gesture towards a teacher after school hours off-campus. The school suspended the student, but the student claimed that his First Amendment rights had been violated. In their opinion, the Maine District Court, “reasoned that Klein's speech was sufficiently off-campus for purposes of Tinker and that his suspension violated his First


Amendment rights. This action by the school appears to be much in line with Fraser (decided that same year). However, the federal district court in Maine ruled that the student was “far removed from any school premises or facilities.” This ruling sets the stage for student online content cases because the court recognized the constitutional right of students to express themselves freely off-campus and outside school hours, without any fear of school discipline.

The third case that has potential to impact the constitutionality of student-generated online content is Beussink v. Woodland R-IV School District. In this case, a student who created a web page that was critical of the school and administrators, and contained vulgarity, faced a ten-day suspension. A Missouri federal district court ruled that since the student did not use school resources to make the website, his suspension impeded on his constitutional rights to free expression. In addition, as the judge wrote, “[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under Tinker.” Here the Tinker standard receives some clarification in terms of online content. The judge makes clear that schools cannot censor content because they do not agree with it, thus limiting the disciplinary purview of the school. It further falls within the Tinker standard by asserting that there limitation for student-generated online content produced using school resources.

While the previous two cases appear to advance student expression rights, the fourth case, J.S. v. Bethlehem Area School District, restricts them. The facts of the case involved an eighth-grader who created a website with threats against a math teacher and principal. The website contained violent language and images directed towards both school administrators. The

32 Fryman, 4.
34 Hudson, 14.
35 Hudson, 14
school expelled the student, but the student argued that the website was a form of protected free speech.\textsuperscript{37} In a Pennsylvania Supreme Court decision, the justices decided that while the threats were not very credible (despite being offensive and vulgar), since the student did access the website on school computers, they ruled the speech to be on-campus, to have disrupted the school community, and thus upheld his expulsion.\textsuperscript{38} One important clarification to the Tinker requirement was, “that the speech must pose a foreseeable risk of a substantial disruption, but it does not need to be absolutely certain that disruption will occur.”\textsuperscript{39} This case has large potential to limit what constitutes “off-campus.” While the student created the website off-campus, accessing it at school qualified as a strong enough substantial threat to the school that the speech fell into the school’s jurisdiction. The fact that a substantial disruption can include a potential, but not certain, threat greatly expands what a school can deem a substantial threat under the Tinker standard.

**B. Competing Interests: Why Schools Would Want to Regulate Student Speech**

While student speech has been awarded legal protection, there are rational reasons why schools would want to restrict certain forms of student speech, both online and offline. One reason is potential violent threats to schools, especially in context of recent events, such as the Columbine Shooting. Based on the outcomes of these events, it can be reasonably understood why schools would want to take down threatening online content, fearing that it could lead to violent actions on-campus against students or faculty. Some scholars believe that the historical place of schools as mediators in society. “Treating schools as purely governmental institutions under the law misconstrues the true character of schools as mediating institutions, but the judicial
branch has done just that.”

By mediating institutions, Erb notes how schools function as a mediator between the needs of parents, students, and the state. As Nancy Willard writes, “[u]nder Tinker, a school official has the authority to take corrective action to address harmful speech occurring on-campus or off-campus that has or could cause substantial disruption at school or interference with the rights of students to be secure” This is not my preferred interpretation of Tinker, as it appears to run contrary to the geographical limitations standard.

Another reason schools would want to restrict certain online student speech is because of the widespread problem of cyberbullying. As Mary-Rose Papandrea notes, “[r]ather than harass their classmates in the locker room, hallways, and bathrooms, students engage in ‘electronic aggression,’ often in the form of malicious rumors or humiliating or threatening speech spread on social networking sites, e-mails, instant messages, chat rooms, text messages, and blogs.”

Additionally, “a 2007 study by the Federal Probation Juvenile Department, [showing] ‘90 percent of middle-school students have had their feelings hurt online,’ while seventy-five percent had visited a website that bashed another student.” This is a high number of students to be impacted by online student content. However, in its Tinker decision, the Supreme Court has made it clear that speech can only be restricted if it poses a threat to disrupting the educational mission of a school. Additionally, as Shariff notes, “[w]hile the court acknowledged that it is crucial to allow unpopular speech, it emphasized that schools have a vital role in preparing students to participate in democratic society, by teaching students the ‘appropriate form of civil

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40 Erb, 21.
41 Willard, S65.
42 Papandrea, 1037.
43 Erb, 259.
discourse’ necessary in civil society.” The Supreme Court has protected student speech, but schools must grapple with determining when that speech becomes a threat.

A third reason schools might want to restrict certain student content is due to the nature of K-12 public school students: they are almost all minors in the eyes of the law. School administrators argue children must be protected from violent, sexually explicit, or inappropriate content. As Mary-Rose Papandrea writes, “[t]ypically the Court assumes, with little analysis, that the speech restriction at issue—which almost always involves sexually explicit or indecent speech—is necessary to protect the emotional and moral development of children.” While this school officials may seek to restrict speech for this reason, the Supreme Court has given indication that it is not enough evidence under the substantial disruption standard to limit student speech online. In the 1997 case, Reno v. ACLU, the Court found provisions preventing the transmission of “patently offensive” and “indecent” speech provisions of the 1996 Communications Decency Act (CDA) unconstitutional. Furthermore, the Court overturned the 1998 Child Online Protection Act, which while similar to the CDA, specifically prevents the transmission of material “harmful to minors.” These cases demonstrate the Supreme Court’s refusal to subject the Internet to a lower First Amendment standard than print, or other forms of media. However, in United States v. American Library Association (2003), it did uphold the Children’s Internet Protection Act, which required public schools and libraries that receive federal dollars for Internet connections to install blocking software to protect minors, which was

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45 Papandrea, 1071.
47 Hudson, Let the Students Speak!: A History of the Fight for Free Expression in American Schools, 161.
seen as a more targeted law. Based on this most recent case, the goal of protecting minors from inappropriate material could give schools legal authorities to limit online student content.

1. Schools of Thought: How Schools Can Address Cyberbullying within Current Legal Frameworks

Geographical Standard

Per my interpretation of Tinker, using a geographical standard allows laws to be constitutionally sound when they seek to expand school disciplinary jurisdiction over student online content. While this standard may seem to be simplistic enough, the advent of the Internet has greatly complicated this distinction. If a student publishes content online on a home computer, the Internet allows that speech to transcend and permeate onto the school’s physical campus, potentially having negative impacts, leading to “Off-campus justice v. on-campus justice.” As U.S. District Judge Mark Kravitz writes, “Off-campus speech can become on-campus speech with the click of a mouse.” Ultimately, this standard leads courts have become more restrictive on student speech. As Heidlage writes, “[e]arly attempts seem to focus on the geographical boundaries of the school yard. Speech taking place away from the physical campus was afforded full constitutional protection, but speech taking place on school property could be restricted if it could foreseeably cause a substantial disruption at the school. However, this seemingly simple distinction has been complicated by the emergence of the Internet, leading courts to apply the more speech-restrictive standard more broadly” Using a strict geographical standard
standard will help separate off-campus and on-campus speech, both of which are governed by different laws and regulations.

In response to this complication, some scholars argue that cyberspace and the Internet should be given their own geographic location and standard. Allison Martin in her work “Tinkering with the Parameters of Student Free Speech Rights for Online Expression: When Social Networking Sites Knock on the Schoolhouse Gate” (2013) argues that online speech does not fit neatly into a on- or off-campus dichotomy, but rather, “…cyberspace is best viewed as a unique jurisdictional ‘location’ for purposes of First Amendment analysis, and therefore online speech should not be subject to the traditional ‘on school grounds’ legal framework.” She argues that cyberbullying is a real problem, and that students cannot speak in the classroom as they do on the sidewalk, a belief upheld by the courts. Giving the Internet its own geographical location allows students and schools to remove uncertainty and “[t]he creation of cyberspace as an independent location would allow traditional free speech precedent to peacefully co-exist with a new framework for online speech.” This should not to happen because it would bring the on-campus standards of higher scrutiny to speech on the Internet as a whole, which could have the impact of chilling student speech online. Specifically, this brings the Tinker test into purely online speech, as it allows schools to apply their codes to Internet content more broadly. It is important to both preserve the Tinker test, as well as the on-campus and off-campus distinctions.

**True Threats and Substantial Disruption Standard**

Many scholars often look to the substantial disruption standard as a test to determine where the schoolhouse gates end rather than relying on a geographic determination of where the student was at the time of the speech. In the second part of the Tinker Test, the Supreme Court

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52 Martin, 787.
53 Martin, 788.
develops the “substantial threat” standard in determining whether student speech is constitutionally protected under the First Amendment. The Pennsylvania Supreme Court also grappled with this issue in *J.S. v. Bethlehem Area School District*, where they ruled that a substantial threat must be present; “some remote apprehension of disturbance” did not constitute enough of a threat. Additionally, as Erb writes, “In the post-Columbine era, it is the threatening nature of cyber-speech that often captures the attention of school administrators” (Erb 267). The changing nature of student threats is exacerbated when online due to its ability to have a widespread viewership and potential to have real-life harmful effects on the campus community.

One method of applying a test based on true and substantial threat is the Erb test, or the “impact analysis test.” In this test, the school evaluates the impact of the speech on campus and assumes a mediating role. Tracy L. Adamovich suggests that schools should look at a number of factors in determining whether they are justified in disciplining students. The most prominent of these factors are the intent of the speech and its level of disruption of school operations. This model could offer insight over a purely geographical one in that as long as the speech has negative consequences (no matter where it originates), a school could arguably be required to do whatever is in its power to stop those consequences. This also would seemingly fit within the Tinker Test of a substantial threat. However, the legal problem to this approach is that it effectively extends the school’s jurisdiction over its students to the entire Internet and leave the school large discretion in determining what is a true and substantial threat.

*Using the Civilian Legal System*

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54 Martin, 792.
55 Erb, 286.
56 Adamovich, Tracy L. "Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student." John's L. Rev. 82 (2008), 1108.
Another school of thought in terms of how to discipline student speech and prevent negative impacts on campus (all while protecting student speech under the First Amendment) is to rely on the legal system to discipline online student speech off-campus rather than have the school step in to discipline the student. Clay Calvert (2001) argues in his work “Off-Campus Speech, On-Campus Punishment: Censorship Of The Emerging Internet Underground,” that school codes should not allow teachers and school administrators to “double dip” in terms of being able to punish students. He poses the question, “...if traditional and generally applicable off-campus civil law remedies such as libel are available for teachers and principals who feel defamed by student speech that originates off campus, then why should school administrators be able to mete out a second, in-school punishment against those students?"57 Calvert points to the Pennsylvania court decision in Bethlehem, which asserts, “[i]n a two-to-one decision, a Pennsylvania appellate court upheld this action over Swidler’s assertion that his First Amendment right of freedom of expression was violated."58 If teachers are able to pursue punishment for students in dual routes, then perhaps leaving the issues to the civilian legal system rather than schools could be appealing for the sake of ensuring that there is no legally questionable nature of the student’s punishment.

Yet despite this view, other scholars believe that schools, due to their unique mission and place in society of educating children, should be given more deference in the way of disciplining student speech. Renee L. Servance (2003) in her piece “Cyberbullying, Cyber-Harassment, And The Conflict Between Schools,” argues that “…courts should defer to school decisions, provided there has been a thorough analysis of the true impact of the speech and disruption to the school

57 Calvert, 245.  
58 Calvert, 249.
community. In doing so, the schools are free to accomplish their primary mission—to teach."\textsuperscript{59}

This is also a compelling argument. Schools have the primary function of education and socialization in American society. Thus, substantial disruptions in this mission would have negative impacts on the American public. Additionally, as previously mentioned, the Supreme Court recognizes that minors do not have the same level of constitutional protections as adults. In examining the question of where the schoolhouse gates end in terms of discipline for online student cyberbullying, this tension between the level of rights afforded to minor students and the state-sanctioned educational mission of the school will be central.

\textit{Relationship Between the School and Student}

The final school of thought looks to the relationship between the school and student to determine the context of the speech and its contextual impacts on the school community. This approach is based on the writing of Benjamin Heidlage (2009). In his article, “A Relational Approach To Schools’ Regulation Of Youth Online Speech,” Heidlage writes, “\textit{[t]he relational approach forces judges to examine the context in which the speech takes place and determine whether society expects such context to be governed by institutional educational authority.}”\textsuperscript{60}

Heidlage argues that students act in two different capacities: as students and as private citizens.\textsuperscript{61} He believes that when a student is acting in their role as a student, then the speech should receive lesser First Amendment protections. However, when a student is acting in their role of a citizen, then the student’s speech should be fully protected under the First Amendment. Ultimately, Heidlage’s concern is over significant and worrying creep of school authority into the private lives and words of students in response to violent events, such as the Columbine shooting. The

\textsuperscript{59} Servance, Renee L. “Cyberbullying, cyber-harassment, and the conflict between schools and the first amendment.” Wis. L. Rev. (2003), 1244.
\textsuperscript{60} Heidlage, 572.
\textsuperscript{61} Heidlage, 575.
Supreme Court has ruled that overreach of school authorities into the private lives of students is unacceptable.

While Heidlage struggles to separate the different roles students assume, the relational approach model still leaves gray areas. For example, if two students are cyberbullying one another on social media, how do schools and courts determine in what capacity the students are acting? Additionally, this confusing boundary could lead to chilling effects on student speech, which is also suboptimal. In summary, the entire standard is very subjective that seems unlikely to yield any significant protections for student speech.

**Alternative Approaches**

While these are the main schools of thought for how to assess state laws for compliance with standing legal jurisprudence for where the school jurisdiction must end when regulating student speech, there are other frameworks worth outlining. In her work “Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech,” Alison Virginia King (2010) outlines four main recommendations for crafting effective cyberbullying legislation at both the state and federal level.

Her first recommendation is that the U.S. Supreme Court should make a ruling in a case addressing online speech to give legislators and schools clarity. This would be an important step forward in the law. However, waiting for the Supreme Court to rule on this issue would not be a reasonable solution in the short term. Yet, recognizing this fact, she argues that “[u]ntil the Supreme Court provides clarity on the ability of schools to regulate online speech, legislators should tailor cyberbullying laws carefully to avoid running afoul of the First Amendment.”62

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62 King, Alison Virginia. “Constitutionality of cyberbullying laws: Keeping the online playground safe for both teens and free speech.” Vand. L. Rev. 63 (2010), 877.
This leads into her second recommendation, which is to ensure that state laws are narrowly defined, noting that states vary in whether or not they specifically define cyberbullying (King 858). She also asserts that providing schools the ability to set their own definitions of cyberbullying improves the ability of schools to act, arguing, “[a]llowing school boards to set cyberbullying policies puts the issue in the hands of the institution most directly affected by the issue and best positioned to develop a solution.” Additionally, she notes how some states have included language in their cyberbullying laws that includes First Amendment constitutional limitations, such as an Arkansas law that stipulates a “clear and present danger.” While King notes the limits of this approach and realizes that having a school-specific approach leaves off-campus cyberbullying untouched by the law, she also realizes that broad laws allow school boards to have “wide latitude to promulgate cyberbullying policies, which presents the danger of eroding First Amendment rights if the policies adopted are overly restrictive of student speech.” This example demonstrates the importance of narrow and specific intention and definition of cyberbullying and the purview of the law run less of a chance of being challenged on First Amendment grounds. Ultimately, she combines all of these points to make one neat argument, asserting that “[t]o keep cyberbullying laws within constitutional bounds, lawmakers should also better define the scope of public-school authority to proscribe speech, including limitations on this power that reflect the Tinker ‘material and substantial disruption’ standard.”

This approach takes a jurisdictional and geographic approach by limiting schools to apply the disruption standard only on school grounds.

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63 King, 859.
64 King, 860.
65 King, 861.
66 King, 877.
Her third argument in her paper involves adjusting federal legislation, specifically the 1996 Communications Decency Act (CDA). As previously mentioned, the Supreme Court ruled the law to be unconstitutional in the case *Reno v. ACLU* (1997). King argues that Congress should revise the CDA to create notice-based liability for Internet service providers (ISPs), requiring them to remove defamatory content upon request, arguing that the Federal Communications Commission (FCC) should establish guidelines. She asserts that the Digital Millennium Copyright Act (DMCA), which protects platforms from copyright liabilities, but removes the content, could offer a guide. While she recognizes that this could create an Internet police, King believes that FCC guidelines could offer clarity.

In my paper, I will stay away from discussing the CDA for a number of reasons. First, a discussion of amending the CDA would be too broad, given my time and space restraints. Furthermore, amending the CDA would be under the purview of the U.S. Congress, and my research focuses on state laws. While amending the CDA would have an impact on state cyberbullying legislation, my primary focus is on developing a policy framework for states to employ when crafting laws, so that that legislation will help curb cyberbullying, while also keeping schools within their legal disciplinary jurisdiction.

King’s main recommendations for addressing cyberbullying come from non-legal measures. Recognizing that cyberbullying is also a societal problem, she writes, “non-legal tactics, such as educational programming, counseling, and legislative action, contribute to a more complete solution to this complex social problem.”67 Education on responsible Internet usage both at home and school are an important part of curbing cyberbullying that can get lost in the discussion of legal solutions to cyberbullying. These programs are successful in their goals. King

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67 King, 880.
notes a Virginia program that empirically saw improvement in students’ attitudes towards Internet usage. Overall, changing societal norms at a young age is equally as important as legislation to legally reducing cyberbullying on school campuses.

**Concluding Remarks**

Since the landmark Supreme Court decision of *Tinker*, the legal landscape of student speech protections has been shaped and reshaped by a series of subsequent Supreme Court decisions, as well as a number of lower-level court decisions. Throughout these cases, the same questions remain: how to determine off-campus versus on-campus speech, what level of constitutional protections should minors and students receive, and how do courts and schools balance the educational mission of schools with the rights of students to express themselves, especially online? Various scholars have developed four schools of thought to answer this question and determine where the schoolhouse gates end.

This project fills an important hole in the research in the research on this topic. My research updates previous research on student speech and the First Amendment by including recently passed state laws aimed at addressing cyberbullying specifically. Previous research looks more broadly at how to balance student speech and general bullying laws. My research also creates a unique policy framework for evaluating existing cyberbullying laws that state lawmakers can reference as they craft future cyberbullying laws.

In the following sections of my paper, I will closely analyze state laws from Illinois, Michigan, North Carolina, and California that are aimed at curbing cyberbullying. Following a close analysis of state laws, I will then discuss my policy recommendations in Chapter 5, which will grow out of my literature review and analysis of my case studies. These recommendations

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68 King, 882.
will shine a light on how the constitutionality of these laws in terms of student speech, and how they can be improved to better protect both the rights of schools to educate and the rights of students to speak.
CHAPTER 3

METHODS DISCUSSION

In order to answer my research question of what policy frameworks should be used to both address the problem of cyberbullying, while also adhering to the legal jurisdictions that the courts have given to schools when taking disciplinary action against student speech, I will employ a functional approach to sociotechnical analysis, which is defined by Meg Leta Jones (2015) in her work, “The Ironies of Automation Law: Tying Policy Knots with Fair Automation Practice Principles.” Through this method, I am able to identify relevant technologies, themes in legal scholarship, shortcomings of existing law, and changes that must be made to reconcile the inherent tension between school jurisdiction, student speech, and school safety, which have been exacerbated by new communication technologies.

The first step of the fundamental approach is to identify new sociotechnical harm. In this case, the new sociotechnical harm would be the advent of cyberbullying, or bullying through new methods of communication, particularly online social networking platforms such as Facebook and Twitter. These new tools pose new sociotechnical harms for a few reasons. The Internet and mobile technology allow people—and in this case, students—to communicate with one another beyond the schoolhouse gates. This allows students to cause disruptions to the safety of students and the school community, by the click of a mouse, with greater scope and speed than ever before. Finally, the legal system struggles to grapple with how to view these new technologies in light of preexisting legal jurisprudence on student speech protections, as well as school disciplinary jurisdiction.

This leads to the second part of my method, identifying the breakdown posed by the new technology. With the Internet expanding the ability of students to communicate with one another, as well as the entire world, within milliseconds, breakdowns in how to apply existing legal
standards for determining school jurisdiction began to appear. When students post content on non school-sanctioned computers and networks, it raises tough questions for schools about whether or how to legally discipline students for harmful and potentially harmful speech. Administrators and teachers are now faced with the legal question of whether or not they can punish students for the potentially disruptive and harmful content posted online. Some state laws test the legal boundaries of school jurisdiction, as is outlined later in my thesis. Through a close reading of preexisting literature in the field of student speech, frameworks began to emerge on how to apply court rulings to current school jurisdiction questions. These themes are a geographical approach, a substantial threat or disruption approach, relying on the civilian legal system in the case of off-campus speech, and looking to the relationships between a student and his school and teachers to decide whether it is appropriate for schools to expand their disciplinary jurisdiction. I decided that these themes were the most important by which to conduct my analysis of state cyberbullying laws because they also corresponded with the legal standards outlined by the Supreme Court and other lower-level courts.

The third part of functional sociotechnical analysis describes the relevant technologies in my analysis. While it is difficult for me to identify just one technology involved in the issue of cyberbullying and school speech, several technologies are important to the development of my analysis. None is more important than the advent of online social media platforms. These technologies are particularly important because they facilitate student speech beyond the schoolhouse gates. Unlike an underground newspaper, online content has the potential to spread rapidly and globally in a matter of milliseconds. In the case of harmful off-campus student speech, most court decisions have revolved around physical school-sanctioned events or physical media forms. These new electronic communication capabilities in the hands of everyday
Americans pose a great challenge to determining when schools go beyond their legal authority to discipline a student. I view these technologies to be the most important because by definition, cyberbullying takes place on cyberspace and the Internet.

The fourth part of my method examines existing laws and their shortcomings. According to the Cyberbullying Research Center, there are bullying laws on the books in 49 out of 50 states as of January 2015, with Montana being the only state where there are no laws whatsoever about bullying or cyberbullying. Out of the 49 states that have bullying laws, 21 have laws that specifically mention cyberbullying.  

I will use the four legal lenses from my review of previous literature to evaluate four state laws that address cyberbullying. I arrived at these lenses by aggregating the standing legal standards set by the courts. Next, I will see how the language of the laws include, ignore, or adhere to pre-established legal standards. This will help paint a picture of what current laws say and their shortcomings when evaluated against legal jurisprudence.

The fifth and final part of my method will include a discussion of changes that must be made to current cyberbullying laws and ways to improve future cyberbullying legislation. Based on the standing legal jurisprudence and language of current cyberbullying laws, I developed a framework by which to assess future cyberbullying legislation for its adherence to legal standards. My assessments and framework come from what legal standards the courts have laid out in terms of where school jurisdiction over student disciplinary action can extend.

Overall, my method, the functional approach to sociotechnical analysis, will allow me to effectively answer my research question of where school jurisdiction over student online speech.

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legally must end in the context of state cyberbullying laws. Then, by building off of the standing jurisprudence, I will be able to develop my framework and assess both shortcomings in current state law, as well as be able to make recommendations for how to craft future pieces of legislation aimed at curbing cyberbullying. I chose this method because it provides the most straightforward and logical way to apply legal standards and evaluate new laws that have yet to be tested in court, which applies to most state cyberbullying laws.

**Cyberbullying Outside of the School Context**

Now that I have outlined my methods to examine my research question, it is important to comment on the issue of cyberbullying more generally, specifically separate from the school context. Cyberbullying is a problem within modern society, one that has been made possible by new technologies, specifically social media websites and mobile platforms. With traditional media sources, such as print, television, and radio, an editor curated content to be aired, preventing any sort of personal attack against another person from gaining a widespread audience. However, with the advent of social media sites and other Internet platforms, there is no editor to prevent or remove content, and sites are not required to edit content. Furthermore, section 230 of the federal Communication Decency Act prevents online platforms from being liable for content posted by third parties on their websites.\(^{70}\) They are free, however, to take action against cyberbullying on their own. For example, in Facebook’s terms of service,\(^ {71}\) it specifically forbids users to “bully, intimidate, or harass any user.” Additionally, Facebook has a resource geared towards teen users experiencing bullying, allowing them to send messages

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\(^{70}\) 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material. [https://www.law.cornell.edu/uscode/text/47/230](https://www.law.cornell.edu/uscode/text/47/230)

asking for content to be taken down. It is clear that changing technological capabilities are substantially changing the nature of bullying.

While most would agree that cyberbullying is a growing problem, there are many different approaches on how to address it. Some would argue for new laws, and others would assert that this is a difficult to legislate. I argue that no new legislation is needed to curb cyberbullying, but rather existing bullying laws, as well as defamation laws, should apply to cyberbullying cases that occur removed from the school cases. Schools fit into this same framework, in that they should retain jurisdiction and responsibility only over their own computers and computer networks. If legislation is needed, it should narrowly define cyberbullying. When drafting new legislation, state lawmakers run the risk of crafting laws that too broadly define both cyberbullying and the authority of schools to regulate speech. Furthermore, new cyberbullying laws would likely have a chilling effect on student speech, as students will err on the side of not posting content rather than run the risk of receiving school discipline, or worse, a criminal charge.

Thus far, I have outlined the schools of thought on how to best legislate student speech within established legal jurisprudence and standards. Based on my interpretation of *Tinker*, I believe that state cyberbullying laws should limit their purview to addressing substantial school disruptions occurring on school sanctioned computers and computer networks, or more of a geographical approach. While cyberbullying outside school campuses is problematic, it is not the school’s place to monitor such content, as it risks schools becoming too much of a censor of student speech.

In his work “The Constitution Of Code: Limitations On Choice-Based Critiques Of Cyberspace Regulation,” Lawrence Lessig (1997) outlines three ways that society, including cyberspace is constrained. The first is through laws. Laws tell individuals what they are permitted to do and what they are forbidden to do in a society and what sanctions from government they will experience if they act in a contrary way. For example, laws tell people that it is illegal to run red traffic lights and they face a monetary fine or driver’s license suspension if they break this law. The second is through norms. These, like laws, regulate behavior. However, unlike laws, norms are informal codes of conduct that people adhere to. For example, a norm tells people that racist jokes are unacceptable. The third is nature. Nature is what biologically and physically bounds people’s actions. For example, nature would tell people that they could not see through walls. Together, all three of these constraints shape societal actions.

Lessig explains that each constraint, however, functions in a different way. Laws and norms are “ex-post punishments.” This means that breaking a law or norm results in a punishment of sorts, whether it is jail time or being ostracized from a social group. He argues
that laws are centralized punishment, through police and courts, whereas norms are decentralized and only enforced by peers. Nature, he asserts, is more direct in that we cannot choose to disobey it, as we can with laws and norms. He asserts norms will become the most effective way to regulate cyberspace.

However, it is clear that many lawmakers think that norms alone have not been effective in stopping cyberbullying. Many state governments are passing laws to address cyberbullying, specifically in the school context. In this section, I will analyze four existing state laws to determine how well they adhere to my framework, as well as the legal standards outlined by the courts. These case studies are real-world examples of how state lawmakers interpret and apply legal standards on bullying and cyberbullying, which will have significant impacts on implementation.

**Case Selection**

In my analysis, I will look at state cyberbullying laws from four states: Illinois laws, House Bills (HB) 64 and 4207 (2014); Michigan law, Senate Bill (SB) 74 (2014); North Carolina laws Senate Bill (SB) 526 (2009) and 707 (2012); and California law, Assembly Bill (AB) 746 (2011). I chose these four laws because they all attempt to legislate the problem of off-campus cyberbullying, but approach the law in different ways. The Illinois and North Carolina laws are broadly written and significantly expand the ability of schools to reach beyond their jurisdictions to punish students for their potentially harmful speech, even when originating on off-campus computers and networks. The Michigan and California laws are slightly narrower, allowing school districts and local education officials to develop plans to address cyberbullying, but still include vague terminology.
I chose these four specific laws due to the fact that they were all passed within the past five years. With the ever-increasing prevalence of social media sites, mobile phone applications, and Internet access, it is important that the state laws I look at for my case studies were recently passed to address the current landscape of cyberbullying. Had I examined bullying laws, I would have been unable to assess how state lawmakers have responded to cyberbullying, which often extends beyond school campuses, within the legal frameworks provided by the courts.

In addition, by looking at laws from these specific states, I am able to gain geographic diversity among my case studies. Each of my four case studies examines how a different region of the United States addressed the problem of cyberbullying. Finally, analyzing the shortcomings of my case studies will allow me to develop my policy recommendations.

**Analysis of Cases**

**Illinois**

**HB 4207**

The first case study I will examine is two recent state cyberbullying laws from the state of Illinois, HB 4207[^73] and HB64[^74]. Passed by the Illinois State Legislature and signed into law by Governor Pat Quinn in 2014, both laws attempt to address the issue of cyberbullying, particularly off-campus. HB 4207 defines cyberbullying and explains the role of school personnel in addressing cyberbullying. HB 64 addresses the specific technology of social networking sites by defining these sites and disciplinary measures schools might take in light of perceived cyberbullying. However, it is Section 15 of that law that has the most wide-reaching implications for where school jurisdiction legally ends. Through a careful analysis of the text of the laws, it becomes clear that both of these new laws tread on legal thin ice given their broad cyberbullying

definitions and expanded role of the schools to punish students for off-campus cyberbullying, which overextends their legal disciplinary jurisdiction.

The first piece of legislation, HB 4207, establishes the reason for the legislation, as well as how the state of Illinois legally defines cyberbullying. The law first begins with recognition that “bullying causes physical, psychological, and emotional harm to students and interferes with students' ability to learn and participate in school activities.” It next states that bullying has been shown to directly lead to “other forms of antisocial behavior, such as vandalism, shoplifting, skipping and dropping out of school, fighting, using drugs and alcohol, sexual harassment, and sexual violence, [and that] bullying on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic is prohibited in all school districts and non-public, non-sectarian elementary and secondary schools.” Then, the law extends these previous points on bullying to apply to prohibit bullying on school sanctioned activities and events, buses, property, as well as the transmission of information through both school computers and non-school computers. This latter point, is defined as “cyberbullying,” and requires schools to have a policy in place to address it, which must be updated every two years. It prohibits students from being subjected to cyberbullying and requires schools to investigate reports of cyberbullying to determine if the action constitutes a substantial disruption of the educational mission.
Additionally, the law aims to address the question of school jurisdiction in terms where it can take actions against traditional bullying. In this section of the law, the legislature explains that no student should be subjected to bullying in the following cases:

- “During school-sponsored educational programs;
- While in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
- Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment;
- Or through the transmission of information from a computer that is accessed at a non-school related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school” (Page 2, lines 10-25).

This last line establishes the trigger for schools. Under the Supreme Court decision in *Tinker*, schools cannot take action unless cyberbullying causes a substantial disruption to the educational process or school order. The substantial disruption language in the law is designed to meet this test. The problem with this law is that it allows schools to reach out beyond their campus to prevent a disruption. It expands cyberbullying to include electronic devices that originate “from a computer that is accessed at a non-school related location.” As this provision shows, the law greatly expands jurisdiction of schools beyond their geographical boundaries, both physically and in terms of computer networks. This is inconsistent with legal standards established by the courts and might run afoul of the *Tinker* decision’s geographical limitations.
The law also broadly defines school personnel, who under the law have the ability to report suspected instances of cyberbullying to school administration. The text of the law defines “school personnel” as “persons employed by, on contract with, or who volunteer in a school district or nonpublic, nonsectarian elementary or secondary school...” (Page 4, lines 20 - 22). The role of school personnel is to help “[implement] a procedure [to] include a process to investigate whether a reported act of bullying is within the permissible scope of the district's or school's jurisdiction and shall require that the district or school provide the victim with information regarding services that are available within the district and community, such as counseling, support services, and other programs.” The problem with including “volunteer” as school personnel is that it is a broad term, as the law does not clarify who counts as volunteers.

Theoretically, any person who has spent time at the school could be seen as a volunteer, giving them the ability to report students for potential cyberbullying. The problem with allowing volunteers to report cyberbullying is that it provides a legal avenue for a group of self-appointed people to censor student content on the Internet that they disapprove of. The law requires that schools look into each of these claims, which gives a lot of power to nearly anyone who has stepped foot on the school, as well as chills student speech.

The law states that bullying, which includes cyberbullying, is defined as “any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students” (Page 3, lines 6-9). The law then goes on to explain that the bullying also comes from the impact that the previously stated actions have on students, which include:

- Placing students in “reasonable fear” of harm to person or property.
- Causing a “substantially detrimental” effect on a student's’ mental or physical health.
• “Substantially interfering” with a student’s academic performance.
• “Substantially interfering” with the student's ability to “participate in or benefit from” school services, activities, or privileges. (Page 3, 6-19).

After describing the items, the law states, “[t]his list is meant to be illustrative and non-exhaustive.” One could imagine instances where speech that might be beneficial to society can no longer be heard due to its labeling as “bullying” under the law. For example, forms of satirical or ironic posts could be lost in the definition of cyberbullying, leading to such content never being posted at all. This is because they might not translate well via a social media post and conceivably met the criteria of emotional distress under the law, for example.

Lastly, the law attempts to define what cyberbullying includes specifically. According to the law, cyberbullying includes:

• “Bullying through the use of technology or any electronic communication, including:
  • Signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectric system.
  • Photooptical system, including without limitation electronic mail, Internet communications, instant messages, or facsimile communications.
  • The creation of a webpage or weblog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages if the creation or impersonation creates any of the effects enumerated in the definition of bullying in this Section.
  • The distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more
persons if the distribution or posting creates any of the effects enumerated in the definition of bullying in this Section.” (Page 4, lines 1-19).

Again, as previously mentioned, just the act of creating a website or an electronic message about school does not imply that it triggers substantial disruption to the school’s educational mission. The main problem with this provision is that it applies to content generated on non-school owned computers. Additionally, the language in the law could deter some desired sites. For example, a student writing provocative material about sex, gender, and race under a pen name could be seen as violating the ban on the creation of content under the provision preventing postings under another’s identity. Overall, HB 4207 demonstrates precisely why new laws should not give schools more authority to regulate off-campus cyberbullying. They lead the school to follow a vague set of criteria and act as a censor of student speech outside of the school.

**Right to Privacy in the School Setting Act (HB 64)**

In addition to HB 4207, the Illinois Legislature also passed HB 64, which was signed into law in 2014, with a sort title, the “Right to Privacy in the School Setting Act.” In summary, this law aims to better define cyberbullying technology (in this case, social networking websites), as well as establish school jurisdiction around social networking sites.

First, the law starts by defining both an elementary/secondary school and postsecondary schools. The former is “a public elementary or secondary school or school district or a nonpublic school recognized by the State Board of Education,” and the latter is, “an institution of higher learning as defined in the Higher Education Student Assistance Act.” This law applies to college campuses. While colleges and universities are outside the scope of my paper and I will not
discuss them, they would provide for interesting areas of future research to determine how these laws impact university students. The law defines a “social media network” as:

- “‘Social networking website’ means an Internet-based service that allows individuals to do the following: (1) construct a public or semi-public profile within a bounded system created by the service; (2) create a list of other users with whom they share a connection within the system; and (3) view and navigate their list of connections and those made by others within the system. ‘Social networking website; does not include electronic mail.”

Then, the law outlines provisions on how school administrators can go about obtaining student social networking passwords for elementary or secondary schools. The law states, “[a]n elementary or secondary school must provide notification to the student and his or her parent or guardian that the elementary or secondary school may request or require a student to provide a password or other related account information in order to gain access to the student's account or profile on a social networking website if the elementary or secondary school has reasonable cause to believe that the student's account on a social networking website contains evidence that the student has violated a school disciplinary rule or policy. The notification must be published in the elementary or secondary school's disciplinary rules, policies, or handbook or communicated by similar means.” This section provides the bulk of the law and demonstrates a very large creep of the school into the private postings of students. The fact that a school can obtain the passwords of a student’s Facebook account, for example, is akin to a student giving over the keys to his or her diary for the school to read. This could conceivably lead to school officials trying to obtain a student’s passwords for their social media accounts simply because they do not like the student’s opinions. Additionally, the school just has to see a reasonable cause, but does not necessarily need proof of wrongdoing. Ultimately, it should not be within the
school’s jurisdiction to discipline perceived cyberbullying off-campus. While potentially harmful actions arising from social media should be addressed, it should be the responsibility of Facebook or local law enforcement, not schools, to respond to this off-campus threat.

The definition of a social networking website does largely encapsulate the essence of a social networking website, it is still too restrictive in this instance, rather than too broad. When lawmakers attempt to define a technology, there are often cases that do not fit within the set definitions and technology outpaces the definitions. For example, where would a text message fit within this definition? On the one hand, it is bound by a list of users and shared contacts, but it is also could be arguably a type of electronic mail where cyberbullying can take place.

Additionally, the fact that this law places social media within the realm of the school makes this law legally questionable. First, according to the text of the law, there must be a substantial disruption in order for the school to get involved with off-campus social networking sites, stating “in order to gain access to the student's account or profile on a social networking website if the elementary or secondary school has reasonable cause to believe that the student's account on a social networking website contains evidence that the student has violated a school disciplinary rule or policy.” A school demanding a password for activity off-campus and on personal computers requires the school to get into the minds of the student for intent, which is difficult to ascertain for certain.

Furthermore, this language could potentially lead to schools demanding changes to a social media site’s terms of service. A school could threaten to discipline students who have Facebook accounts at all, due to their potential for causing substantial school disruptions, which would require Facebook to retool their terms of service to try and retain these users. Finally, if schools can gain access to a student’s social media account, than students lose an avenue for
having a constructive conversation about how their schools and teachers can improve, as well as the ability to bring to light a negative incident that the school might want to minimize. Instead, the social networking site should be responsible for implementing policies to limit cyberbullying, as evidenced by Facebook’s anti-bullying initiatives previously mentioned.

Overall, allowing schools to gain access to a student’s password for their social networking sites functionally expands the role of schools to police social networks. This is not the job of the school and would have a severe chilling effect on Internet speech. The reasonable cause to believe standard is too low a standard to set for obtaining personal information, such as passwords. One student alleging that another student said something on Facebook that violated a school rule might count as a reasonable cause to believe that a rule had been broken, even if the student was motivated by malice and spite and a desire to get another student into trouble. More would be needed than mere allegation. This also greatly expands the role of the school well beyond the Tinker ruling and subsequent court cases. A statement on a social network that violates a minor school rule might or might not have a connection to potential school disruptions. But the bill would authorize the school to demand a student password even when it has no indication that there was any disruption. Therefore, allowing schools to determine when they need a password likely violates the standing legal precedent. Instead of crafting new laws that allow schools to police social networking websites, the school should focus on conducting educational trainings that teach students and young people about responsible Internet usage and create social norms where dangerous Internet usage becomes rarer.

One example that might give Illinois an idea of the legal challenges ahead comes from an example at a Minnesota school.75 In this case, Riley Stratton, a sixth-grader in Minnewaska

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School District, wrote a Facebook post criticizing a teaching aide. She did not use a school computer, but was given detention and the school forced her to apologize. Following this incident, school officials received a complaint that Stratton and a male student were engaging in explicit private Facebook conversations, none of which occurred on school computers. School officials then interrogated Stratton and forced her to give them her Facebook password. Following the incident, the American Civil Liberties Union brought a case claiming that Stratton’s right to free speech and privacy were violated. Ultimately, the school district paid $70,000 to settle the case.

This incident demonstrates how the new Illinois laws create chilling effect online, leading students to not post content online in fear of repercussions. Furthermore, the broad authorities given to schools to discipline students for content posted on their social media sites on non-school computers is an example of school jurisdiction gone too far. While cyberbullying is a problem when occurring on non-school sanctioned computers, it is not the jurisdiction of schools to get involved.

**Michigan**

**SB 74**

In the same year the Illinois legislature passed a cyberbullying law, Michigan also passed a cyberbullying law, which Michigan Governor Rick Snyder signed into law in January 2015. In contrast to the Illinois statutes, the Michigan law requires school boards and schools to update and clarify school bullying policy to include cyberbullying, which works at achieving a better balance between the role of schools in punishing students for cyberbullying content off-campus and the need to address substantial disruptions that trigger school actions.

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This law has more of a clarifying purpose, ensuring that school boards have policies in place to address cyberbullying. In summary, this law is, “[a]n act to provide a system of public instruction and elementary and secondary schools; to revise, consolidate, and clarify the laws relating to elementary and secondary education.” It goes on to state, “The board of a school district or intermediate school district or board of directors of a public school academy shall adopt and implement a policy prohibiting bullying at school, as defined in this section.”

What makes this law preferable over others is that it limits the role and reach of schools to within the school boundaries and allows other agents (such as Facebook or local law enforcement) to get involved in cases of cyberbullying on non school sanctioned computers, which addresses the issue in the most constitutionally allowable manner. It limits the school’s role to implementing a policy prohibiting bullying “at school.” The law defines “at school”:

- “At school’ means in a classroom, elsewhere on school premises, on a school bus or other school-related vehicle, or at a school-sponsored activity or event whether or not it is held on school premises. ‘At school’ includes conduct using a telecommunications access device or telecommunications service provider that occurs off school premises if the telecommunications access device or the telecommunications service provider is owned by or under the control of the school district or public school academy.

With this language, Michigan stops schools from becoming censors of student content produced off-campus that they do not like or agree with. Moreover, this definition closely resembles my own policy framework by limiting a school’s jurisdiction to student speech taken place on campus, at school-sponsored events, and on a school-owned computers and computer networks.

This stands in sharp contrast to Illinois’ HB 64, which states that schools can request access to content posted on off-campus networks. To put the differences into perspective, under
the Michigan law, the student in Minnesota who had a complaint about her teacher aide would not have been suspended, her First Amendment right to express her views on her social media would have been protected, and her school district would not have been forced to pay her $70,000 in a settlement. In this way, overreaching school cyberbullying laws could end up costing school districts tens of thousands, and possibly millions, of dollars in legal fees and settlements. This language should be a model followed by other states looking to craft cyberbullying legislation.

The law then states that school districts must adopt policies that prohibit bullying, which due to this law must also include cyberbullying. In order to be compliant, the code must include:

• “A statement prohibiting bullying of a pupil. Not later than 6 months after the effective date of the 2014 amendments to this section, this statement shall be modified as necessary to comply with the 2014 amendments to this section including, but not limited to, the inclusion of cyberbullying as a form of bullying.
• A statement prohibiting retaliation or false accusation against a target of bullying, a witness, or another person with reliable information about an act of bullying.
• A provision indicating that all pupils are protected under the policy and that bullying is equally prohibited without regard to its subject matter or motivating animus.
• The identification by job title of school officials responsible for ensuring that the policy is implemented.
• A statement describing how the policy is to be publicized.
• A procedure for providing notification to the parent or legal guardian of a victim of bullying and the parent or legal guardian of a perpetrator of the bullying.
• A procedure for reporting an act of bullying.
• A procedure for prompt investigation of a report of violation of the policy or a related complaint, identifying either the principal or the principal’s designee as the person responsible for the investigation.

• A procedure for each public school to document any prohibited incident that is reported and a procedure to report all verified incidents of bullying and the resulting consequences, including discipline and referrals, to the board of the school district or intermediate school district or board of directors of the public school academy on an annual basis.

• An assurance of confidentiality for an individual who reports an act of bullying and procedures to safeguard that confidentiality.”

Through this language, this law narrowly defines the steps that schools must have in their bullying policies. Unlike the Illinois law, this provides a clear framework from which schools can model their policies. Additionally, while the law requires schools to report cases of bullying to the state department of education, it also states that, “The department shall ensure that the information collected and made available under this subsection does not include personally identifiable information about any individual who reports or is involved in a specific incident of bullying.” This has the effect of keeping a level of anonymity for students suspected of cyberbullying, which prevents public humiliation or pressure a student might face if that information was made publicly available, whether or not they are actually guilty of cyberbullying. A level of guaranteed anonymity helps to reduce the potential of a chilling effect from these laws. It also states: “[a] school employee, school volunteer, pupil, or parent or guardian who promptly reports in good faith an act of bullying to the appropriate school official designated in the school district’s or public school academy’s policy and who makes this report
in compliance with the procedures set forth in the policy is immune from a cause of action for damages arising out of the reporting itself or any failure to remedy the reported incident.” This allows students, parents, and administrators to report instances of cyberbullying without fear of repercussions, which likely increases the likelihood that a student will report cyberbullying.

Furthermore, an important provision of the law also requires more public input, requiring that “the board or board of directors shall hold at least 1 public hearing on the proposed policy or modification” (Sec. 1310b (2)). By requiring a public comment period, the schools must take public opinion into account when deciding how to address cyberbullying, which offers transparency. The law also identifies the legal trigger for the school to get involved with punishing bullying, stating that bullying, “[s]ubstantially interfer[es] with educational opportunities, benefits, or programs of 1 or more pupils” (Sec. 1310b.(9)(B)i)). Including this language is an inclusion of a trigger of a substantial disruption into the law.

SB 74 also defines cyberbullying for Michigan schools. Bullying is defined as, “any written, verbal, or physical act, or any electronic communication, including, but not limited to, cyberbullying, that is intended or that a reasonable person would know is likely to harm 1 or more pupils either directly or indirectly by doing any of the following:

- “Substantially interfering with educational opportunities, benefits, or programs of 1 or more pupils.
- Adversely affecting the ability of a pupil to participate in or benefit from the school district’s or public school’s educational programs or activities by placing the pupil in reasonable fear of physical harm or by causing substantial emotional distress.
- Having an actual and substantial detrimental effect on a pupil’s physical or mental health.
• Causing substantial disruption in, or substantial interference with, the orderly operation of the school.”

The law defines cyberbullying as, “any electronic communication that is intended or that a reasonable person would know is likely to harm 1 or more pupils either directly or indirectly by doing any of the following:

• Substantially interfering with educational opportunities, benefits, or programs of 1 or more pupils.

• Adversely affecting the ability of a pupil to participate in or benefit from the school district’s or public school’s educational programs or activities by placing the pupil in reasonable fear of physical harm or by causing substantial emotional distress.

• Having an actual and substantial detrimental effect on a pupil’s physical or mental health.

• Causing substantial disruption in, or substantial interference with, the orderly operation of the school.”

Again, the trigger for any level of school involvement is included in the language of the law, highlighting the need for a substantial disruption to the school educational mission school safety to be present before a school takes action against student speech. This complies with the *Tinker* case and legal precedent.

Another benefit about SB 74 is that it gives schools the ability to develop non-legal solutions to cyberbullying. These include:

• “Provisions to form bullying prevention task forces, programs, teen courts, and other initiatives involving school staff, pupils, school clubs or other student groups, administrators, volunteers, parents, law enforcement, community members, and other stakeholders.
• A requirement for annual training for administrators, school employees, and volunteers who have significant contact with pupils on preventing, identifying, responding to, and reporting incidents of bullying.

• A requirement for educational programs for pupils and parents on preventing, identifying, responding to, and reporting incidents of bullying and cyberbullying."

These non-legal solutions to the problem are an essential piece to the fight against cyberbullying. By working to change norms around youth Internet usage, the problem of cyberbullying declines over the years. These trainings will help teachers, administrators, and students to better identify cyberbullying when it occurs.

Overall, the clarifying mission and narrow definition of jurisdiction make Michigan's SB 74 a good example of how state laws do not have to expand the role of schools beyond those established by the courts. Additionally, by limiting the scope of schools to be only to school-owned computers and computer networks, lawmakers limit the chance that the school will create a chilling effect for student speech. Finally, by including non-legal solutions to cyberbullying, this law nicely balances the need for a school response to cyberbullying and the First Amendment rights of their students.

North Carolina

SB 707

Thus far, I have analyzed state laws from Illinois and Michigan, which attempt to address the problem of student cyberbullying on school campuses. Each law takes a different approach. The Illinois laws broadly empower schools to report suspected cyberbullying to school officials, even going so far as to require a student to turn over their social media passwords to the school. In contrast, the Michigan law achieves a better balance by allowing each school district to
determine how to best include anti-cyberbullying language in their school codes, but does not allow schools to redefine bullying or cyberbullying. The Michigan law also limits the school’s disciplinary jurisdiction to school owned computers and networks, which stops short of expanding the school’s ability to discipline student cyberbullying originating on non-school computers. Again, my argument is not that off-campus cyberbullying is not a problem; it is that schools lack the legal authority to discipline students for content produced off-campus on non-school sanctioned computers. Instead, it is local law enforcement and terms of service on social media sites that should be responsible for addressing this.

The next state law I will analyze is SB 707, a 2012 law from North Carolina. First, it is useful to give SB 707 a bit of context. This law is an expansion of a 2009 statue, SB 526. The 2009 law creates a standardized definition of bullying, but makes no mention of cyberbullying. SB 526 defines bullying as: “any pattern of gestures or written, electronic, or verbal communications, or any physical act or any threatening communication, that takes place on school property, at any school-sponsored function, or on a school bus, and that:

- Places a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or her property; or
- Creates or is certain to create a hostile environment by substantially interfering with or impairing a student's educational performance, opportunities, or benefits. For purposes of this section, ‘hostile environment’ means that the victim subjectively views the conduct as bullying or harassing behavior and the conduct is objectively severe or pervasive enough that a reasonable person would agree that it is bullying or harassing behavior.”

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In this law, the trigger of school disruption is present, but it includes vague definitions, which could chill student speech. For example, the definition of hostile environment states that the victim must only “subjectively” view the conduct as bullying or harassing. As is the case with Illinois HB 4207, a student offended by a satirical post, an artistic work, or opposing political view could deem a student’s online content as falling within this bullying definition. This law also creates the foundation for legally protecting school employees from student content, a main purpose that SB 707 builds upon. Lastly, SB 526 includes a provision, which says, “This Article shall not be construed to permit school officials to punish student expression or speech based on an undifferentiated fear or apprehension of disturbance or out of a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” While this is nice language to include in the law, the vague language of the law appears as if it will limit student expression when implemented. SB 707 allows this to be taken a step further by building upon SB 526 in the online context.

SB 707 has dueling purposes. Overall, this law overextends the legal role of schools by protecting schoolteachers and employees from cyberbullying more than the students. This goes against the legal precedent established by the courts in that laws aimed at protecting the educational environment of schools should focus more on its students (who are mostly minors) than on protecting the adults teaching at the school.

Despite this reality of the law, the first stated purpose of the law is to protect children from cyberbullying. The law states, “the General Assembly of North Carolina finds that a safe and civil environment in school is necessary in order for students to learn and achieve high academic standards; and Whereas, bullying and harassment, like other disruptive or violent behaviors, disrupt both a student's ability to learn and a school's ability to educate its students in
a safe environment; and Whereas, [the] sole purpose of this law is to protect all children from bullying and harassment, and no other legislative purpose is intended nor should any other intent be construed from passage of this law.” Here, the lawmakers include language of substantial disruption and school safety, which are triggers for school action in the first place.

The second part of the law defines an online profile as:

• “a configuration of user data required by a computer so that the user may access programs or services and have the desired functionality on that computer or a Web site user's personal page or section of a page made up of data, in text or graphical form, which displays significant, unique, or identifying information, including, but not limited to, listing acquaintances, interests, associations, activities, or personal statements.”

It is interesting that in this law defines online profiles, but does not define cyberbullying. While bullying is defined in SB 526, without a narrow definition of cyberbullying, a teacher or school employee could claim that a student is cyberbullying them for any online action they do not like or agree with.

Section three of the law outlines unlawful actions on a computer that are taken to negatively target children, stating:

“Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following:

• Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor.

• Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer
programs, or computer software residing in, communicated by, or produced by a computer or computer network).

- Sign up a minor for a pornographic Internet site with the intent to intimidate or torment the minor.
- Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages, with the intent to intimidate the minor.”

Despite focusing on protecting children, this provision still causes legal problems. The language of this law only states that it applies to “any person,” which is unnecessarily vague and does not limit the legislation to students. There are serious flaws in how this law would be implemented. This section of the law is also legally dubious because it applies to “a computer or computer network.” In order to ensure that school disciplinary roles do not overstep legal boundaries established in Tinker, the law should only apply to school owned and sanctioned computers, as the Michigan law does. Lastly, the lack of definitions for words such as “provoke” and “intimidate” mean that even a student airing an opinion that might not be popular, such as stating their support for legalized same-sex marriage in the United States, could be seen as provoking someone who disagrees with this position to stalk students who do support marriage equality. Another example would be a student who posted a true statement of how another student harassed them on Facebook being found guilty of cyberbullying because even though it is a true statement, it could potentially provoke another student. This is speech that society would not want to silence. Again, while the underlying law in SB 526 may state that these actions are not meant to take away speech rights of students, how they are implemented is another matter entirely.
Section four of the law is where the real core of the law lies, and provides the most legal problems. First, the section begins by defining who counts as a school employee and a student. A school employee is “[a]n employee of a local board of education, a charter school... a regional school...or a nonpublic school which has filed intent to operate.” A student is, “[a] person who has been assigned to a school by a local board of education...or has enrolled in a charter school...a regional school...or a nonpublic school which has filed intent to operate...or a person who has been suspended or expelled from any of those schools within the last year.” It is important that the law makes clear who this law applies to. However, it is a very broad definition, as it includes nearly all students and school employees in the state. Under this law, it would remain questionable what one must do to constitute being “employed” by the school. This could make it confusing to determine who has the authority to discipline students under the SB 707. This broad definition of school employees would increase the amount of school employees who could potentially discipline students, which increases the likelihood of a student being punished. Therefore, students will likely err on the side of not speaking.

Section four then goes on to identify actions that are prohibited by this article of the law. It states that:

“Except as otherwise made unlawful by this Article, it shall be unlawful for any student to use a computer or computer network to do any of the following:

(1) With the intent to intimidate or torment a school employee, do any of the following:

a. Build a fake profile or Web site.

b. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a school employee.

c. Post a real or doctored image of the school employee on the Internet.
d. Access, alter, or erase any computer network, computer data, computer program, or computer software, including breaking into a password-protected account or stealing or otherwise accessing passwords.

e. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a school employee.

(2) Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee.

(3) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a school employee for the purpose of intimidating or tormenting that school employee (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network).

(4) Sign up a school employee for a pornographic Internet site with the intent to intimidate or torment the employee.

(5) Without authorization of the school employee, sign up a school employee for electronic mailing lists or to receive junk electronic messages and instant messages, with the intent to intimidate or torment the school employee.”

This section of the law increases school authority over students without a real trigger for it under the substantial disruption standard. SB 707 protects teachers over students, but based on this law, signing a student up for a pornographic site would be permissible, but signing up a teacher would be illegal. Due to the fact that school employees are adults and students are generally minors, teachers do not need special protections from students. For example, if embarrassing a teacher on the Internet has no real impact on the educational mission, the school
legally should have no reason to get involved in the case. This is outlined in the *Tinker* case. However, this law would legally permit schools to get involved.

Second, this section, like section two, contains vague terms that could allow teachers to pursue student online actions that they do not like or personally approve of, and punish the student for it. For example, a student writing a post about the political positions stated by their teacher or a school employee could lead to harassment or stalking of that employee. Thus, the student could conceivably be subject to punishment under the law. Additionally, the fact that the statement could be punishable even if it is true greatly expands the role of schools to include Internet censorship. The law’s language prohibiting the creation of fake websites or doctored images could prevent artistic remix projects or satire from happening. In this way, this law has a large and real chilling effect. This is compounded by the fact that the law leaves vague the computer networks covered by this law, which will likely default to allow schools to punish students for actions taken on personal, non-school owned or sanctioned computers.

Section four of the law also outlines harsh punishments for students who are deemed to violate this law. The law states that, “Any student who violates this section is guilty of cyber-bullying a school employee, which offense is punishable as a Class 2 misdemeanor. (d) Whenever any student pleads guilty to or is guilty of an offense under this section, the court may, without entering a judgment of guilt and with the consent of the student, defer further proceedings and place the student on probation upon such reasonable terms and conditions as the court may require.” Having a class 2 misdemeanor on his or her record is a serious offense that most students will want to avoid. By including such harsh punishments, this law virtually guarantees that students will not dare post anything about a teacher on their personal online accounts that a teacher would not like. Furthermore there is no due process for students under
this provision, which states, “whenever any student pleads guilty to or is guilty of an offense under this section, the court may, without entering a judgment of guilt and with the consent of the student, defer further proceedings and place the student on probation upon such reasonable terms and conditions as the court may require.” Based on this law, students can be placed on probation even without pleading or being guilty of an offense. As previously stated, this wanders far from the substantial threat trigger. This would prevent provocative art projects, satire, or political discussions from happening, which would be detrimental to societal discourse as a whole.

The last provision of note in this law is from section nine, which reads, “A student who is convicted under G.S. 14-458.2 of cyber-bullying a school employee shall be transferred to another school within the local school administrative unit. If there is no other appropriate school within the local school administrative unit, the student shall be transferred to a different class or assigned to a teacher who was not involved as a victim of the cyber-bullying. Notwithstanding the provisions in this section, the superintendent may modify, in writing, the required transfer of an individual student on a case-by-case basis.” This again protects school employees more than students. By simply shuffling around students from class to class, this law could actually cause more of a disruption to school and the educational mission than the original “provoking” or “intimidating” post would. While schools can obtain waivers for the provision if it becomes a disruption, it establishes a default of transferring students, which would be more likely, even if rarely need. Instead, schools should be able to determine and show on a case-by-case basis that a student’s continued presence at the school would be detrimental.

Overall, North Carolina’s cyberbullying law requires intent to intimidate school employees, requiring school employees to go inside the minds of students to determine intent,
which makes it more difficult for the school to prove that the student did something wrong. Instead of letting the landscape of slander and libel laws, as well as online terms of service, provide the protection for teachers facing cyberbullying, this law vastly expands the school’s authority to censor the Internet, which goes beyond the *Tinker* decision. *Tinker* requires that a substantial disruption be present before school action can be taken against students. If embarrassing a teacher does not cause a substantial disruption, than the school has no legal authority to get involved, but this law demands it does. Additionally, it appears that embarrassing a teacher receives more legal protection than a student does who finds him or herself a similar situation. Ultimately, this leads to an expansion of school authority beyond school-sanctioned computers and computer networks, leading to chilling of speech, especially with such a high-stakes class 2 misdemeanor attached.

**California**

**AB 746**

The final state law I will analyze is California’s AB 746. In summary, this law redefines the definition of an “electronic act” to include social networking Internet websites as a means by which students can be bullied and bully other students. It also allows schools to address issues arising from posts on these sites.

The law begins with quoting existing California bullying law. This states, “Existing law, the Interagency School Safety Demonstration Act of 1985, defines bullying as one or more acts of sexual harassment, hate violence, or intentional harassment, threats, or intimidation, directed against school district personnel or pupils, committed by a pupil or group of pupils. Under existing law, bullying, including bullying committed by means of an electronic act, as defined, is

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a ground on which suspension or expulsion may be based.” This shows that California already has laws requiring schools to address cyberbullying. However, AB 746’s purpose is to “specify that an electronic act for purposes of the act includes a post on a social network Internet Web site.” One criticism of this law would be that it is unnecessary, given that current law already includes provisions for bullying by means of an electronic act. However, the California Assembly Education Committee’s bill analysis report states, “[t]he author of this bill states that AB 746 ‘recognizes both the tremendous leap in popularity of social networking sites since the inception of our anti-bully law, and the potential that the resulting popularity has in increased ability for cyber bullies to spread their messages, by making clear that posting messages upon a social network site is covered under the Education Code anti-bullying provisions.’” A shortcoming in this argument is that by singling out specific technologies, new laws will be needed in the future to prioritize new ways that cyberbullying can occur.

Section one of the law begins with the trigger language for school involvement. It states, “[t]he Legislature hereby recognizes that all pupils enrolled in the state public schools have the inalienable right to attend classes on school campuses that are safe, secure, and peaceful. The Legislature also recognizes that pupils cannot fully benefit from an educational program unless they attend school on a regular basis.” This language, which has appeared in all four of my case study laws, is legally necessary per to the Tinker decision. Lawmakers also see their job as ensuring students stay in school, writing, “[t]he Legislature also recognizes that pupils cannot fully benefit from an educational program unless they attend school on a regular basis.” By including this into the law, the state makes an argument for the nexus between the law and how it impacts the educational mission of schools.
In the next part of the law, the text places emphasis on non-legal remedies to bullying and cyberbullying, while also defining the activities banned by the law on social network Internet websites. The law states, “[i]t is the intent of the Legislature in enacting this chapter to encourage school districts, county offices of education, law enforcement agencies, and agencies serving youth to develop and implement interagency strategies, in-service training programs, and activities that will improve school attendance and reduce school crime and violence, including vandalism, drug and alcohol abuse, gang membership, gang violence, hate crimes, bullying, including bullying committed personally or by means of an electronic act, which includes the posting of messages on a social network Internet Web site, teen relationship violence, and discrimination and harassment, including, but not necessarily limited to, sexual harassment.”

Finally, the last paragraph in the law defines an electronic act to mean, “the transmission of a communication, including, but not necessarily limited to, a message, text, sound, or image, or a post on a social network Internet Web site, by means of an electronic device, including, but not necessarily limited to, a telephone, wireless telephone or other wireless communication device, computer, or pager.” This definition of an electronic act and bullying is broad. For example, defining an electronic act as a including a “sound” gives great latitude to schools to discipline students for bullying and cyberbullying. Based on this law, a student playing a song that another student does not like could fall within the definition of an electronic act under the bullying definition.

The Assembly Education Committee Bill Analysis Report written during a May 2011 hearing on this bill makes two noteworthy points, demonstrating that lawmakers indeed considered the issues of definitions and protecting student speech.\textsuperscript{80} First, the law does not define

a social networking Internet website. However, the as the Bill Report brought to light, lawmakers used the 2007 definition from dannah boyd and Nicole B. Ellison while crafting the law in committee. The boyd and Ellison definition states, “a social network site is a web-based service that allows individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.” This definition parallels the definition of social network sites in Illinois HB 64. As in the Illinois law, the California law’s definition of a social network site leaves room for broad interpretation of what falls within the definition. For example, it is unclear if mobile applications count as web-based, despite the fact that bullying can occur on them. Expanding to mobile applications should only be permissible on a school-sanctioned device. However, by not putting the definition in the law, this definition becomes only a guideline for schools and law enforcement when dealing with social networking Internet websites. This leads to new online platforms that allow peer-to-peer communication to be labeled as social networking sites, even if they do not exactly fit the definition set by boyd and Ellison. Text messages would be a perfect example. They are not web-based or semi-public, but have a bounded system and lists of contacts.

The second point from the Bill Report is that lawmakers did take into consideration the potential for the law limiting student speech. The committee writes: “[e]xisting law states that a pupil may be suspended or expelled for any of the specified acts and related to school activity or attendance that occur at any time, including: while on school grounds, while going to or coming from school, during the lunch period whether on or off the campus, and during, or while going to or coming from, a school sponsored activity (Education Code Section 48900). Existing law also
states that a pupil may be suspended or expelled if the pupil has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel (which includes teachers) or pupils by creating an intimidating or hostile educational environment (Education Code Section 48900.4). The courts have ruled that disciplinary action as a result of bullying via a social network site is contingent on whether the action causes a substantial disruption to school activities or work of a school, regardless of where the action took place. If a student is suspended or expelled and the activity is not found to have caused substantial disruption, it could constitute a violation of freedom of speech. This is based on the 1969 case of Tinker v Des Moines Independent Community School District (393 U.S. 503, 506; 1969).”

Based on this definition, the current California law expands disciplinary jurisdiction beyond schools. The California Assembly appears to interpret the Tinker decision broadly, allowing schools to discipline students for speech off-campus. However, one of Tinker’s main takeaways is that students cannot be legally forced to leave their speech rights at the schoolhouse gate. This is important in light of cyberbullying on social media sites now being included in what schools can discipline students for. Ultimately, this interpretation will give schools a legal avenue to discipline student speech, “regardless” of where it took place. This is a misreading of the Tinker decision and will have a detrimental impact on student speech as the law is implemented.

**Concluding Remarks**
Throughout my analysis of state cyberbullying laws, it is apparent that there is much variation among state cyberbullying laws. Each one includes the trigger of a substantial threat must be present in order for schools to get involved and discipline students for online content. Yet each state took a different approach as state lawmakers attempted to address this real problem. However, not every state did so in a manner that protects student speech and the legal boundaries for school disciplinary action.

Illinois fails to respect student speech. Both state laws allowed schools to punish students for off-campus content, including go so far to demand that students hand over their personal social media passwords when the school requests them. Illinois lawmakers also gave volunteers a legal avenue for reporting student online posts they saw as offensive to school administration. The North Carolina law also appeared to lose sight of it’s original intent, which was to protect students from cyberbullying. Instead, the law goes on to offer protections for school employees from student cyberbullying, imposing a class 2 misdemeanor for those who are convicted. This law not only expands the role of schools, but significantly chills speech by attaching such a strong criminal punishment to those students convicted, whether or not the statement was true.

In contrast, Michigan and California take different approaches to the issue of cyberbullying, offering laws that are more clarifying in nature. The Michigan’s law allows school boards to make their own determination for how to best include cyberbullying into their school disciplinary codes. The law also makes clear the jurisdiction of schools to discipline students only applies to school-owned computers and networks, a big departure from the Illinois and North Carolina laws that allow schools to punish students for content produced on their personal computers. California also takes a more clarifying position by redefining existing law to
include social networking Internet websites in the definition of bullying, but also goes beyond school computers, as the law allows for discipline “regardless” of where the speech takes place.

Overall, the state of cyberbullying laws in these states demonstrates a need for narrow definitions and clear limits for where a school can and cannot discipline students for their action. While cyberbullying occurring on private computers is a problem at schools, these laws pose threats to student speech by not allowing actors outside of schools, such as law enforcement and social networking websites, to address the problem. It should not be a school’s duty to punish student online content that was not created or posted using a school-owned or school-sanctioned computer or computer network. As more states undertake the task of creating cyberbullying legislation, they should note the problems and successes of these four laws from a diverse range states, both geographically and demographically, and ensure that terms are narrowly defined and that the power of schools does not seep out of the schoolhouse gates.
CHAPTER 5

POLICY RECOMMENDATIONS

Legislating the prevention of cyberbullying is complicated. Lawmakers on a local, state, and federal level face difficult choices when it comes to crafting laws that simultaneously curb the negative impacts of cyberbullying, but also meet the legal standards set forth by the U.S. Supreme Court, as well as various lower-level courts. As mentioned in literature review chapter, four legal schools of thought became apparent when crafting legislation to be legally permissible under the First Amendment: geographical, substantial disruption, using the civilian legal system, and looking to the student-teacher relationship to provide legal guidance. These policy recommendations have grown out of the literature review chapter and the analysis of state cyberbullying laws. Schools should only be able to take action against student electronic speech when it has a likelihood of causing a substantial disruption of the educational mission and occurs on school-sanctioned or school-owned electronic devices or networks.

I suggest a policy that has more of a jurisdictional foundation, which I call a jurisdictional substantial disruption approach. Under this approach, when student online speech originates on off-campus computers and off-campus networks, the school has no legal authority to step in and regulate speech, but should work with other actors such as law enforcement or social media terms of service to address the problem.

It is important for me to make clear the nuance in my argument. I am not asserting that off-campus cyberbullying is not a real harm facing students, teachers, and administration. However, other vehicles should be used to punish and discourage this content. If state lawmakers believe that a legislative solution is necessary, then they should ensure that definitions of various terms in the law are articulated in a precise manner. Ultimately, I am arguing that there should
not be new laws requiring schools to respond to off-campus cyberbullying, and they should not voluntarily respond to off-campus cyberbullying, regardless of the law. Other actors, such as law enforcement, should act within their authority to protect against harassment, as well as respond to it.

**Why a Jurisdictional Substantial Disruption Approach**

When legislating cyberbullying, lawmakers should look to both the geographical and substantial disruption standards established by the courts in the *Tinker* case. I suggest that when crafting legislation, lawmakers should keep to the notion that actions taken on computers or networks physically off of the school’s campus should not be subject to disciplinary action by the school administration. In the same vein, if students are engaging in cyberbullying while on school-owned and school-sanctioned computers and networks, then that content could be subjected to discipline by the school.

This is the best standard to use when legislating cyberbullying for many reasons. First, based on the Supreme Court’s ruling in *Tinker*, the Court made clear that student’s free speech rights “do not end at the schoolhouse gate.” This is an important standard that recognizes the free speech rights of students. Using this standard will ensure that the law will be constitutional. Second, this standard provides some clarity when legislating. Schools have clear physical boundaries, as well as clearly identifiable school-owned electronic devices and networks. This easily allows schools to draw a connection between the cyberbullying, its abuse of school resources, and its negative impacts on the educational mission of the campus. With off-campus content, it is harder to draw those causal links. Furthermore, if schools were allowed to punish students for that content, school jurisdiction would theoretically extend to the entirety of the Internet. Thirdly, adhering to this legal standard allows schools to effectively allocate their
resources in ways that will lead to reduced cyberbullying rather than a policing of the Internet. If a school attempts to regulate activity beyond their school premises, then they spend money that could be used to take positive actions to stop cyberbullying. Furthermore, schools can reduce the amount of financial and time resources spent on policing off-campus Internet activity by allowing the civilian court system and affected parties parse out incidents through libel and slander law, leaving the school free of a costly lawsuit. Overall, the jurisdictional substantial disruption approach offers the best path for schools to address cyberbullying concerns, while ensuring the law does not violate students’ First Amendment speech rights.

While this standard appears to be the most effective legal standard to use in lawmaking, there are also some shortcomings to this approach. The most obvious one is, as I have mentioned, the advent of the Internet allows students to take bullying from the playground to the web via off-campus school networks and computers. This is a problem that various state legislatures have attempted to address. A jurisdictional substantial disruption approach would make it relatively easy to identify cases of cyberbullying and the school nexus, students can create threatening websites, social media posts, and emails off-campus. This content might be subject to other laws, but school officials should be allowed to review it.

If schools are allowed to punish students for content produced on home computers, then there could be substantial chilling effects among student speech. By chilling effects, I mean that if schools threaten disciplinary action for speech that could be perceived a cyberbullying, students will err on the side of not posting their content. This might be an acceptable result for speech that takes place on school computer networks, but it has the effect of forcing students to say only those things on their social networks that they would say on school computers. In addition to chilling effects, laws regulating speech on various technologies will never be able to
keep up with technological development. This is a position emphasized by Adam Thierer (2014) in his work “Privacy Law’s Precautionary Principle Problem.” He notes how with the rapid pace of technological advancement, laws will always be chasing technology (470). This is very much true in the context of regulating technologies where cyberbullying takes place. This can already be seen with the ever-available Internet connection via mobile cell phones, a technological advancement that is relatively new. Finally, a geographical approach is the one that is most likely to meet the legal standards established by the courts. Ultimately, the goal is to find a balance that allows schools to prevent harms from cyberbullying, while also not exceeding their constitutional authority. If a law fails to uphold student speech, then it may get tangled in a lawsuit and possibly struck down. Adhering to a narrowly tailored standard, such as a geographical one, allows the law to achieve its goals.

**Why Narrow Definitions are Important**

If a state deems a new law addressing cyberbullying to be necessary, then it is absolutely essential that lawmakers narrowly define the terms, intentions, and boundaries of the law. Alison V. King (2010) makes this same argument, which I outlined in my literature review chapter. To keep school intrusion into the lives of students to a minimum, new laws must narrowly define the speech that schools might legitimately target.

The need is not new. As the American Civil Liberties Union (ACLU) wrote in a July 2010 letter to the U.S. Senate Subcommittee on Consumer Protection, Product Safety, and Insurance regarding federal legislation to regulate youth online behavior,81 “[t]he Internet presents new ways for young people to communicate – but it does not inherently increase the dangers that have been present in human society for centuries.” This is an important point.

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81 American Civil Liberties Union. Letter to Chairmain Pryor and Rankinkg Member Wicker, Re: Subcommittee hearing on ‘Protecting Youths in an Online World’
https://www.aclu.org/files/assets/Statement_for_Hearing_re_Protecting_Youths_in_a_Online_World_2.pdf
Bullying is not a new problem, but as the number of online platforms increases, cyberbullying becomes more prevalent. Therefore, it is important that schools articulate narrow behavior and jurisdictions that any new anti-cyberbullying laws will impact, lest they risk running too broad and violating their legal jurisdiction as laid out by the courts.

The arguments against this position would be that since cyberbullying of students largely occurs online and often away on off-campus computers, lawmakers should write laws that give schools the authority to discipline students for their actions. Another argument in favor of laws allowing broad school authority to punish students for off-campus speech is that schools have a larger duty to protect the safety of students, especially in the post-Columbine era of school shootings and violence, much of which might begin as a social media or online forum post. Despite these arguments, neither justifies constructing laws with broad definitions. While protecting the safety of students is an important goal, the problem with criminalizing broad categories of off-campus online speech is twofold. First, the broader the definitions of cyberbullying, the broader the chilling effect by which students will err on the side of caution and not post content. This will prevent new and novel ideas from being heard due to fear of punishment. Additionally, laws such as these will push the real negative content further into the more “unreachable” parts of the Internet rather than eliminate the speech. Keeping potentially harmful content on a platform such as Facebook will make it easier to uncover than if it is buried deep under more Internet content. Finally, keeping terms broadly defined will lead laws to lawsuits and court challenges. This will cause further financial strain on schools and states. Instead of letting schools shoulder these costs, lawmakers can apply a jurisdictional substantial disruption approach and let actors other than schools address incidents outside of the schoolhouse gates.
Why a Substantial Disruption Standard Applied to Off-Campus Speech is Too Broad

A blanket substantial disruption standard is the wrong direction for lawmakers to go when crafting legislation giving schools the authority to discipline students for cyberbullying. This standard comes from the *Tinker* case, whereby the Justices recognized that student speech on-campus receives certain protections, as long as the speech does not disrupt the educational mission of the school. Despite being a prong of the *Tinker* test, using a broad version of this standard to craft law applying to off-campus computers and networks is too broad and potentially allows school to make decisions largely be based on what content administrators do not like or do not agree with. In essence, without a narrowly defined law, students will be under the jurisdiction of their schools the minute they log onto the Internet, wherever they are. Since the Internet was not around in 1969 when the Justices decided *Tinker*, this standard clearly only applied to speech on campus. Additionally, subsequent cases (i.e. *Fraser* and *Morse*) have expanded the discretion of schools to limit student speech, such as vulgarity. Therefore, laws that employ this substantial disruption claim to curb cyberbullying occurring on non school computers and networks will give schools far too much purview to limit online student speech.

Arguments in support of this view state that schools have a unique state-sanctioned educational mission that should be protected against substantial disruption. In the age of social media platforms, many students who are plotting a violent episode on school campus take to platforms such as Facebook and Twitter to make their initial warming. However, genuine threats should be resolved through more general law enforcement efforts and by terms of service; they should not be a matter of school discipline.

Steps Schools Can Take to Curb Cyberbullying Without Legislation
Overall, legislation allowing schools broader authority to regulate student speech run the risk of being too far-reaching and unconstitutional, running afoul of the legally defined school jurisdiction the courts have established for disciplining students. King also argues this in her paper, citing examples from Virginia schools that have demonstrated the effectiveness of such programs in promoting responsible Internet usage by young people.

While legislation is one option, what really is needed is a change of school and societal norms in relation to how students and young Americans use social media and the Internet. This would achieve the goals of legislation by deterring cyberbullying through social understanding and prevent the harmful content from being posted, while also allowing new and novel content to still thrive. While this would admittedly take time in the long run, restricting student speech in the short term is not beneficial to stopping cyberbullying. Educational campaigns on school campuses to teach students about Internet norms, responsible Internet use, and how to respectfully treat others offer the best way to bring schools into the discussion of how to stop off-campus cyberbullying. Additionally, teaching students that disruptive speech on campus will be answered by school discipline, and that off-campus speech is subject to the civilian justice system, could be a deterrent. However, laws that leave broad purview to schools to restrict speech does not strike the balance needed for protecting student speech and specifically addressing cyberbullying problems on school campus.
CHAPTER 6

CONCLUSION

Throughout the past fifty years, the delicate balance between protecting student speech and providing students with a safe learning environment has been a constant struggle for American K-12 public schools. Since the 1960s, the Supreme Court and other courts have provided a patchwork of rulings related to student speech protections, with each case providing a different set of standards and guidelines for schools to follow. The advent of social media has only further complicated the legal landscape of student speech by greatly expanding the scope and speed in which students can make their voices heard. While much of online student speech furthers the self-exploration and development of young people, some students use these new online communications tools to taunt or bully their peers. In response to these new challenges, states across the country have introduced and passed new laws giving schools new tools and ability to crack down on this negative cyberbullying. However, throughout my thesis, I argue that these new laws expand the disciplinary jurisdiction of schools beyond what is constitutionally acceptable, which greatly endangers student speech under the First Amendment to the United States Constitution.

Main Take-Aways from Project

My project has three main take-aways to emphasize. The first is that laws aiming to expand school disciplinary jurisdiction run afoul of the constitution by restricting student speech beyond what is constitutionally acceptable. In my case study analysis, I have shown how laws such as those in Illinois and North Carolina allow schools and school administrators to discipline students for actions taken on private computers, which are in no way associated with the school. In the case of the Illinois law, schools can request a student’s social media password if they feel
that a post has caused a substantial disruption. One does not even have to exist. The North Carolina law protects teachers from student cyberbullying, which is the opposite of what the law’s stated goal. These laws run against the *Tinker* decision, which states, in my judgment, that schools cannot infringe upon student speech rights beyond the schoolhouse gates.

The second take-away from my project is that key terms within cyberbullying laws must be narrowly defined in order to be compliant with existing jurisprudence on student speech. Narrow definitions are important to ensure that specific disciplinary actions are taken to address specific actions by students that cause a substantial threat on campus. If a law contains broad language, then upon implementation, school administrators could claim many actions are cyberbullying and impact the educational mission of the school. Furthermore, students will not know what can and cannot be posted and will err on the side of not posting, lest they be subjected to school discipline or a criminal charge. The Michigan law is effective at narrowly defining “at-school,” which keeps school disciplinary jurisdiction to physical space and computer networks owned by the school. In contrast, the California law contains vague terminology, citing that cyberbullying consists of “electronic acts” and “sounds.” Additionally, it states that schools can discipline students for online actions, “regardless of where they occur.” This difference is important in keeping school disciplinary action within its constitutional bounds.

The third take-away from my project is that if a state does deem it necessary to legislate cyberbullying, a jurisdictional substantial disruption approach is the most effective framework to use when crafting the legislation. This approach follows the *Tinker* decision and states that schools can constitutionally respond to substantial threats and harm within their geographic domain. By this, a school could punish a student for cyberbullying that originates on a school-
sanctioned computer, device, or network, as well as physically on campus. While I recognize that cyberbullying off-campus on private computers is a serious societal problem brought on by a new technology, the *Tinker* decision, in my judgment, prohibits schools from taking disciplinary actions off-campus. Instead, local law enforcement and social networking website terms of service should be responsible for addressing off-campus cyberbullying. When schools get involved, it only threatens student speech, which is important to youth self-discovery and artistic development.

**Non-Legal Ways of Changing Norms**

Cyberbullying laws, as I have demonstrated, face significant challenges in terms of compliance with First Amendment jurisprudence that governs student speech rights. In the face of these challenges, it is important that lawmakers and school officials give consideration to implementing programs at schools, and in society more generally, that shift and change cultural norms around how young people use the Internet, and in particular social media and social networking sites. As the organization Embrace Civility in the Digital Age states on its website, addressing youth cyberbullying requires “a multidisciplinary collaborative approach that involves educators, mental health professionals, and law enforcement”\(^82\). Per the constitution, shifting cultural norms should be the focus of proposed solutions to the problem of cyberbullying in schools.

Lawrence Lessig (1997) writes how in a world with ever-evolving technology, norms will become more important than laws in regulating cyberspace. He asserts that since law must constantly adapt to the technology, it will cease to be an efficient means of regulating cyberbullying and online behaviors in general. In a similar vein, Adam Thierer (2014) outlines

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\(^{82}\)Embrace Civility in the Digital Age. About. [http://www.embracecivility.org/about/](http://www.embracecivility.org/about/)
the “precautionary principle problem,” which states that top-down regulations constrain personal choice, economic efficiency, and long-term technical progress, as the regulations become paternalistic. Additionally, they are often based on perceived, rather than real, threats. Thus, there are some concrete non-legal actions that schools can take to mitigate the problems of cyberbullying on campus.

The first action is to institute educational programs on school campuses to inform students of proper ways to use social media and engage with their peers online civilly. Thierer calls this “digital citizenship” and “nettiquite.”83 As he states, educational programs (which are already included in state laws, such as Illinois HB 4207) provide teachers and students with the know-how to have civil online conversations, as well as “help us adapt to new technological changes by employing a variety of coping mechanisms or new social norms.”84 This sort of education reinforces in students and youth societal norms that it is unacceptable to bully or torment another student via social media. Over time, students who do cyberbully their peers will risk social isolation and shaming as punishment, allowing society to regulate itself. This solution has no First Amendment implications and will slowly, but surely, ingrain norms around cyberbullying into new generations of students.

The second way to address cyberbullying by shifting norms is to engage parents. As a 2011 Pew Research Center Study85 shows, parents have a strong role in “digital safekeeping” and ensuring that teens have civil discussions online. The Pew Research study also notes, “[p]arents in the United States are still the primary gatekeepers and managers of their teens’ internet experience.” There are a variety of actions parents can take at home to teach their contents.

children proper ways to use the Internet as a tool and resource. The Pew Center further outlines several steps parents can take to encourage and ensure that their children do not improperly use the Internet. These include, but are not limited to:

- Discuss how to be safe on the Internet and answer questions their children may have
- Talk with their children about ways to act towards other people on the Internet
- Talk with their children about what not to share online
- Monitor their children’s social media and Internet usage
- Use parental controls online

While these actions alone will not immediately solve the problems of cyberbullying, they are important to norm formation and inching us closer to a society that uses Lessig’s notion of norms to solve social problems related to youth cyberbullying, all without expanding school jurisdiction behind their constitutionally-acceptable limits.

Finally, it is important that social media websites enforce their terms of service, as well as integrate responses into their code, that deter and stop cyberbullying. This would fit within Lessig’s definition of nature. He argues that code is the new physical barrier that governs actions. Instead of requiring or allowing schools to get increasingly involved in policing student online content, lawmakers should ensure that social networking sites include technical measures and terms of service provisions that discourage cyberbullying. While Facebook does include cyberbullying help center and forbids it in their terms of service, it is important that the platform enforces these terms and require adherence to them in exchange for membership within its online community.

**Avenues for Future Research**

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86 Bullying Help Center. Facebook. [https://www.facebook.com/help/420576171311103/](https://www.facebook.com/help/420576171311103/)
One fruitful avenue for further research in this topic is to analyze how state cyberbullying laws impact student speech at the university level. Some laws make a point of mentioning post-secondary schools and universities, such as Illinois HB 64, which make distinctions between elementary and post-secondary schools. The recent incident involving a racist chant by the University of Oklahoma’s (OU’s) Sigma Alpha Epsilon (SAE) chapter highlights the saliency of this work. While on a bus far away from the school, several students engaged in a racist chant about the prospects of an African-American student becoming a member of OU’s SAE chapter. In response to the video, OU suspended the SAE chapter and expelled two students, with OU President David Boren reiterating his support for a zero-tolerance policy for racism on OU campuses.

In a piece on CNN.com, First Amendment attorney Marc J. Randazza explains how the prospect of a school official deciding the level of acceptability of the contents of a song sung on privately-funded buses far away from campus poses great risks to the strength and endurance of the First Amendment. He writes, “[y]ou should want to protect the SAE boys—not that they deserve it. You should do so because the day will come that your speech is unpopular.” This is exactly the reason why protecting the First Amendment from an “ends justify the means” approach at the school level is flawed. While the content of a fraternity’s racist song or a cyberbully’s message are deplorable and do not represent the values of our country and communities, allowing schools to institute laws and make decisions that punish students for off-

campus actions and speech greatly threatens the longevity of student speech. With state cyberbullying laws, it is students who carry the burden of limited avenues for speech, expression, and the ability to live in a society that respects and upholds their ability to be themselves. While racist speech is different and distinct from cyberbullying, a research project looking into cyberbullying at the university and post-secondary level would involve many of the issues raised by this example in terms of the role of the university in policing racist speech involving students.
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