OFF-CAMPUS CYBERBULLYING IN MISSISSIPPI: STATUTORY UPDATES TO PROTECT BOTH STUDENT SPEECH AND EDUCATION RIGHTS

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INTRODUCTION

The students were crowded into the bleachers as they waited for the bell to ring just like every other day. While I, the naïve first-year teacher, leaned on the rail talking to some students, a girl from the first row leapt up six rows of the bleachers and across the aisle to pull another girl down onto the stairs. Before I could wrap my head around the feat of physics I had just witnessed, I realized it was my responsibility to do something. As they rolled down the bleachers hitting, kicking, biting, and pulling hair, I jumped in to stop them. Later that day while I sat with my class at lunch, I asked what happened that morning. The girl who knew all the gossip was thrilled to educate me. Apparently, the attacker was being bullied on Snapchat and Instagram by the girl she attacked. The bullying went on for weeks unbeknownst to the teachers and administrators. That was the first of several fights I witnessed during my three-year stint in education that were directly caused by off-campus cyberbullying.

Nancy Willard, the director of the Center for Safe and Responsible Internet Use defines cyberbullying as "being cruel to others by sending or posting harmful material or engaging in other forms of social cruelty using the Internet or other digital technologies."[1] Examples include posting harmful, threatening, or embarrassing posts on social media about a target, texting threatening messages to a target from an unknown number, creating a fake identity to trick a target into a relationship, and sending a target's sensitive photos to friends over Snapchat.[2] The ways to cyberbully are nearly infinite.[3]

The Mississippi Legislature includes cyberbullying in its general bullying definition.[4] According to the Mississippi Code, bullying is "any pattern of gestures or written, *electronic* or verbal communications, or any physical act or any threatening communication, or any act reasonably perceived as being motivated

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[1] Berin Szoka & Adam Thierer, *Cyberbullying Legislation: Why Education Is Preferable to Regulation*, 16 PROGRESS ON POINT, June 2009, at 1, 5.

[2] *Id.*

[3] *See id.*

[4] MISS. CODE ANN. § 37-11-67(1) (West, Westlaw through 2023 Reg. Sess.).

by any actual or perceived differentiating characteristic."[5] The statutory definition is limited to bullying of students or school employees that occurs "on school property, at any school-sponsored function, or on a school bus."[6] Additionally, the bullying must cause an "actual and reasonable fear of harm" to a person or property, create a "hostile environment" in which a target's rights to attend school are "substantially interfer[ed] with or impair[ed]," or "substantially disrupt[] the operation of a school."[7]

The harms associated with bullying are well known, and rates of bullying have decreased since 2000.[8] In its place, cyberbullying has risen to become a predominant health crisis among students.[9] The U.S. Department of Education's Institute of Education Sciences reported a 7.5% increase in reported weekly cyberbullying incidents at the middle school level and a 4.3% increase at the high school level in just two years.[10] These statistics correlate with the weekly rise in cyberbullying incidents that affect the school environment reported by schools.[11]

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[5] *Id.* (emphasis added).

[6] *Id.*

[7] *Id.* § 37-11-67(1)(a)-(b), (6).

[8] INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2019 48 (2020) (citation omitted) ("The percentage of public schools that reported student bullying occurred at least once a week decreased from 29 percent in 1999-2000 to 14 percent in 2017-18.").

[9] *See* Justin W. Patchin, *Summary of Our Cyberbullying Research (2007-2021)*, CYBERBULLYING RSCH. CTR. (June 22, 2022), https://cyberbullying.org/summary-of-our-cyberbullying-research [https://perma.cc/FBX6-9WB4] (demonstrating since 2007, cyberbullying victimization rates increased from 18.8% in May 2007 to 45.5% in April 2021).

[10] The Institute of Education Sciences reported that for the 2017-2018 school year, 33.1% of middle schools and 30.2% of high schools in the United States reported at least weekly incidents of cyberbullying at their school. INST. OF EDUC. SCIS., *supra* note 8, at 51 fig.7.3. Yet, the Institute of Education Sciences reported for the 2015-2016 school year that 25.6% of middle schools and 25.9% of high schools reported weekly incidents of cyberbullying. INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2017 63 fig.7.3 (2018).

[11] For the 2015-2016 school year, 14.5% of middle school administrators and 15.0% of high school administrators said the school environment was affected by cyberbullying. INST. OF EDUC. SCIS., *supra* note 10, at 63 fig.7.3. These numbers increased to 21.2% in middle schools and 18.0% in high schools for the 2017-2018 school year, an increase of 6.7% and 3.0% respectively. INST. OF EDUC. SCIS., *supra* note 8, at 51 fig.7.3.

The rise of cyberbullying is directly tied to students' increasing access to unsupervised technology.[12] Psychiatrists write, "With increased access to and use of information and communication technologies comes an increased risk of being cyberbullied."[13] The more time a child spends using electronic devices like computers, smartphones, or tablets, the more likely they are to become a victim of cyberbullying.[14] Since more children have access to technology than ever before, it is unsurprising that cyberbullying has increased so rapidly.[15]

Mississippi is not immune from the cyberbullying crisis. U.S. Department of Education statistics from 2015, the most recent data available, showed that 15.5% of public high school students in Mississippi reported being bullied online in the past year, consistent with the national average of 15.6% that year.[16] Because Mississippi lacks statistics related specifically to cyberbullying, I reached out to my contacts in the teaching profession to get some insight into the problem. I sent out a survey and received responses from twenty-three different teachers in seventeen different middle and high schools throughout the state. Their responses were disheartening. Of the twenty-three respondents, fifteen, or 65.2%, said that cyberbullying problems occur at or away from school at least once a week. Seventeen respondents, or 73.9%, said cyberbullying affects the school environment. Even though such a high percentage noted that cyberbullying affects the school environment, only eight respondents, or 34.8%, said school

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[12] Tracy Vaillancourt et al., *Cyberbullying in Children and Youth: Implications for Health and Clinical Practice*, 62 CAN. J. PSYCHIATRY 368, 369 (2017).

[13] *Id.*

[14] Allison Ann Payne & Kirsten L. Hutzell, *Old Wine, New Bottle? Comparing Interpersonal Bullying and Cyberbullying Victimization*, 49 YOUTH & SOC'Y 1149, 1154 (2017).

[15] By age eleven, 53% of children have their own smartphone, and by age twelve, the number increases to 69%. VICTORIA RIDEOUT & MICHAEL B. ROBB, THE COMMON SENSE CENSUS: MEDIA USE BY TEENS AND TWEENS, 2019 5 (2019). Just eight years ago, in 2015, only 32% of eleven-year-olds and 41% of twelve-year-olds had smartphones. *Id.* at 5 fig.D. Meanwhile, smartphone ownership among both teens and tweens from 2015 to 2019 increased by 17%. *Id.* at 5 fig.E.

[16] INST. OF EDUC. SCIS., *supra* note 10, at 186 tbl.11.7. For the 2017-2018 school year, 14.9% of all public schools across the United States reported weekly incidents of cyberbullying. INST. OF EDUC. SCIS., *supra* note 8, at 51 fig.7.3.

resources are used to deal with cyberbullying.[17] Even though teachers are aware of cyberbullying, schools do not appear to be taking proportional action to intervene.

The prevalence and rise of cyberbullying, especially in Mississippi, is disturbing in light of research that suggests cyberbullying is more harmful to children than traditional bullying. The CDC notes traditional bullying increases students' risk for mental health issues, insomnia, dropping out of school, and lower overall academic performance.[18] All the same are true of cyberbullying but at even higher rates.[19] Cyberbullying may be more damaging to students because the potential harm of bullying is magnified in cyberbullying.[20] While traditional bullying generally happens as isolated events witnessed by small groups of people, cyberbullying allows harmful content to spread widely, instantaneously, and anonymously.[21] Unlike traditional "schoolyard" bullies, the ubiquitous nature of the Internet enables cyberbullies to intrude into victims' private spaces, which makes the bullying inescapable.[22] Some cyberbullying is done by close friends of the victim who have more intimate and harmful knowledge to share.[23] The pervasive nature of the Internet gives every bully a global stage to abuse their victim in perpetuity while the victims are left powerless with no place to seek refuge.[24]

The constant bombardment victims suffer from cyberbullying causes them to suffer increased rates of psychological problems including anxiety, depression, and self-harming behavior along with the associated physical side effects.[25] The National Academies of Sciences, Engineering, and Medicine reported that victims of

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[17] The survey responses collected regarding cyberbullying trends in Mississippi are on file with the author.

[18] *Preventing Bullying*, CTRS. FOR DISEASE CONTROL & PREVENTION (2021), https://www.cdc.gov/violenceprevention/pdf/yv/Bullying-factsheet_508_1.pdf [https://perma.cc/FX42-8U76].

[19] *See* Vaillancourt et al., *supra* note 12, at 369-70.

[20] *Id.* at 370.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] THE NAT'L ACADS. OF SCIS., ENG'G, & MED., PREVENTING BULLYING THROUGH SCIENCE, POLICY, AND PRACTICE 114-15, 125-26 (Frederick Rivara & Suzanne Le Menestrel eds., 2016).

cyberbullying deal with the psychological difficulties associated with cyberbullying in different ways.[26] Some individuals internalize their problems, which leads to increased depression, anxiety, and self-harming behaviors.[27] Others, like my student, externalize their problems and react with violence.[28] Students who are cyberbullied are two times more likely to have difficulty sleeping or other psychosomatic disturbances like headaches, stomachaches, dizziness, and bedwetting.[29] Regardless of how the victims react, they are 1.9 times more likely to attempt suicide.[30]

The harm inflicted by cyberbullies bleeds into the school environment. In order for students to achieve academically, they need to feel safe at school.[31] Students who do not feel safe in school are more likely to have increased absenteeism, poor academic performance, and substance abuse issues, and they are more likely to carry weapons.[32] It is not surprising then that students who face the unceasing abuse of cyberbullying are more likely to perform poorly academically, miss school, abuse substances, and carry weapons.[33] Further, researchers found that cyberbullying is a better indicator for academic problems like absenteeism and poor grades than traditional "schoolyard" bullying.[34]

Victims are not the only ones who suffer negatively from cyberbullying. Bullies experience similar physical and psychological problems.[35] In fact, bullies are 1.5 times more likely

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[26] *Id.* at 125.

[27] *Id.*

[28] Payne & Hutzell, *supra* note 14, at 1155.

[29] THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25, at 115-16.

[30] Charisse L. Nixon, *Current Perspectives: The Impact of Cyberbullying on Adolescent Health*, 5 ADOLESCENT HEALTH, MED. & THERAPEUTICS 143, 145 (2014).

[31] *Spotlight on: School Safety*, YOUTHTRUTH SURVEY (Mar. 29, 2018), http://youthtruthsurvey.org/wp-content/uploads/2018/04/YouthTruth-Spotlight-On-School-Safety.pdf [https://perma.cc/2RPJ-SHJX].

[32] *Id.*

[33] Victims of cyberbullying are 2.5 times more likely to abuse substances than their peers and eight times more likely to carry a weapon to school. Nixon, *supra* note 30, at 146-47. The National Academies of Sciences, Engineering, and Medicine reported that "for every 1-point increase in grade point average (GPA), the odds of being a child who was bullied (versus a bystander) decreased by 10 percent." THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25, at 131.

[34] Vaillancourt et al., *supra* note 12, at 370.

[35] Nixon, *supra* note 30, at 149.

to have attempted suicide than their peers.[36] Physically, bullies suffer psychosomatic symptoms similar to those of their victims and are also more likely to show aggression and abuse substances.[37] The limited research available also suggests that mere bystanders who are not directly involved in bullying also suffer adverse side effects like increased anxiety and insecurity.[38]

When students have contact with cyberbullying as victims, bullies, or bystanders, they suffer physically and psychologically. The rates of cyberbullying in Mississippi indicate that what we are doing to help our children is not working. Teachers in Mississippi know about the problems caused by cyberbullying, but many feel helpless to address the problem. Mr. Hart, an eighth grade teacher in Marshall County, Mississippi, expressed sadness and a level of hopelessness with cyberbullying. He said:

> As teachers and administrators, we give our best attempts at creating a safe, comforting, and warm environment for learning for all students. However, when students have been saying mean things about each other on their various devices all the night before or on the bus that morning, this typically shatters the safety we attempt to create. . . . I can help students navigate respectful, positive interactions with each other in my classroom—but I can't erase the memory of a hurtful comment a student saw about themselves on Instagram or in a group chat the night before.

The pain cyberbullying causes adolescents is undeniable. The disruption in school is undeniable. What can be done about this problem? Who is supposed to protect our children from each other? Leadership must start somewhere. Schools and teachers are able and willing to confront the crisis if they are given guidance on how to deal with cyberbullying that occurs off of school property.

This Comment will propose an amendment to Mississippi's bullying statute to achieve a comprehensive and more effective anti-bullying policy, which will protect students from off-campus cyberbullying that negatively affects the school environment. Part I outlines current legal avenues to address cyberbullying that exist

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[36] *Id.* at 145.

[37] *Id.* at 146, 149.

[38] THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25, at 137-38.

in Mississippi, both civil and criminal, and why those legal avenues are inadequate. Part II examines the effective ways to successfully combat cyberbullying. Part III discusses various legal challenges to off-campus cyberbullying statutes and determines which versions of various state cyberbullying statutes around the United States are constitutional. Part IV lays out a constitutional reformation to the current Mississippi cyberbullying statute to give guidance to teachers and administrators so that they can confidently and legally combat cyberbullying that impacts the school environment.

I. LEGAL AVENUES TO ADDRESS CYBERBULLYING IN MISSISSIPPI

Cyberbullying victims have several legal avenues to address cyberbullying. In addition to remedies parents can take outside the legal system, the law provides both civil and criminal penalties to deter bullies and encourage parents to actively supervise their children's online activities.

A. Civil Liability

Though it is possible that a cyberbullying tort could pass constitutional scrutiny if it is narrowly tailored, so far in the United States, no state recognizes cyberbullying as an independent tort action.[39] Since there are no cyberbullying torts, in order to hold cyberbullies accountable, victims must resort to traditional tort law, so causes of action available for cyberbullying in Mississippi include intentional infliction of emotional distress, defamation, invasion of privacy, and negligent entrustment.[40] Victims of cyberbullying in Mississippi can also bring actions against school districts under anti-discrimination statutes including Title IX and Title VI.[41]

The most obvious tortfeasor a victim can sue is the bully through an intentional infliction of emotional distress claim, a defamation claim, or an invasion of privacy claim, depending on the type of cyberbullying. Since bullies are often minor students with

[39] Ronen Perry, *Civil Liability for Cyberbullying*, 10 U.C. IRVINE L. REV. 1219, 1226 (2020).

[40] *See id.* at 1226-30.

[41] *See id.* at 1242.

no resources, courts can also hold the bully's guardians liable through a negligent entrustment claim. Finally, courts can hold school districts liable for discrimination in extraordinary circumstances. Unfortunately for victims seeking a remedy, the difficulty proving allegations against tortfeasors (bullies, parents, or school districts) makes recovery through civil court incredibly difficult.

1. Intentional Infliction of Emotional Distress

Because the negative side effects associated with cyberbullying stem from severe emotional distress, intentional infliction of emotional distress is the most obvious tort.[42] The severe emotional distress may be for "mental pain and anguish," which includes "anxiety, distress, fear, aggravation, and inconvenience."[43] Though cyberbullying can cause victims to exhibit all of these symptoms, intentional infliction of emotional distress is still almost unwinnable.

In Mississippi, recovery for intentional infliction of emotional distress requires a plaintiff to prove five elements: (1) the defendant's actions were willful or wanton; (2) the defendant's actions would "evoke outrage or revulsion in civilized society"; (3) the defendant's actions were directed towards or meant to harm the plaintiff; (4) the defendant's actions caused the plaintiff severe emotional distress; and (5) the resulting distress was foreseeable.[44] A plaintiff will most likely have difficulty proving all of these elements.

First, the victim of cyberbullying must experience severe mental and emotional distress.[45] If the plaintiff's reaction to the defendant's conduct is exaggerated or not justifiable, then a court will not hold the defendant liable.[46] Adolescents, who are in a heightened state of sensitivity because of their emotional immaturity, often react to rejection from their peers in ways the objectively reasonable person would not. As such, their reactions

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[42] *See* Jones v. City of Hattiesburg, 228 So. 3d 816, 819 (Miss. Ct. App. 2017).

[43] Donald v. Amoco Prod. Co., 735 So. 2d 161, 179 (Miss. 1999).

[44] *Jones*, 228 So. 3d at 819.

[45] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. j (AM. L. INST. 2012).

[46] *Id.*

could be considered exaggerated and unjustifiable and would not meet the severe emotional distress standard.

Second, in order for bullying to meet the second prong of the standard, the defendant's conduct must be so extreme and outrageous "to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[47] In order to win an intentional infliction of emotional distress claim according to the *Third Restatement of Torts*, "[o]rdinary insults and indignities are not enough . . . , even if the actor desires to cause emotional harm."[48] To the observer, most bullying falls into the category of annoyances, insults, pettiness, and other trivial matters rather than extreme and outrageous conduct. The harmful nature of cyberbullying is the repetitive nature of the behavior, not how extreme and outrageous each particular act is.

2. Defamation

If the cyberbully makes offensive statements about the victim, then the victim may file a defamation suit. Defamation, as a matter of free speech, is governed by the First Amendment. If the defamation happens to a public figure or on a matter of public concern, then the U.S. Supreme Court's "actual malice test" applies.[49] However, the Supreme Court decided that when defamation is between private parties on matters of private concern, states are free to make their own standards.[50] The Mississippi standard requires:

> (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of

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[47] Brent v. Mathis, 154 So. 3d 842, 851 (Miss. 2014) (quoting Speed v. Scott, 787 So. 2d 626, 630 (Miss. 2001)).

[48] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. d (AM. L. INST. 2012).

[49] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 327-28 (1974).

[50] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-61 (1985).

> special harm or the existence of special harm caused by the publication.[51]

Prongs one, two, and four set high standards of proof. Even without the actual malice standard, victims of cyberbullying are unlikely to prevail on a defamation claim.

First, a victim of cyberbullying may not be able to prove the statement which harmed them is false. Sometimes, students are bullied based on true characteristics like size, skin color, or sexual orientation.[52] Even if a statement is not explicitly true, statements are only actionable in a defamation claim if they are provably false.[53] Opinions or hyperbole, though not objectively true, are not provably false. In a Texas case, an assistant principal sued students after they made a Myspace page which contained graphic sexual references using her name, photograph, and place of employment.[54] The court dismissed her suit for defamation.[55] Since the comments on the Myspace page were "not assertions of fact that could be objectively verified, they were not defamatory as a matter of law."[56] In another case out of New York, student defendants created a private Facebook group in which they discussed the plaintiff, a fellow classmate.[57] Among other things, the defendants posted that the plaintiff contracted AIDS on an African cruise, contracted AIDS after "screw[ing] a baboon," contracted AIDS, crabs, and syphilis after entertaining the company of a male prostitute, and then morphed into the devil.[58] The court determined the statements made against the plaintiff were "rhetorical hyperbole" and "vigorous epithet[s]" no reasonable observer would take as truthful statements.[59] The court acknowledged that the statements were vulgar, juvenile, and reprehensible, but they were not statements of fact.[60] Since the court could not find a statement of fact to declare

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[51] Inland Fam. Prac. Ctr., LLC v. Amerson, 256 So. 3d 586, 590 (Miss. 2018).
[52] Perry, *supra* note 39, at 1228.
[53] *Amerson*, 256 So. 3d at 590.
[54] Draker v. Schreiber, 271 S.W.3d 318, 320-21 (Tex. Ct. App. 2008).
[55] *Id.* at 321.
[56] *Id.*
[57] Finkel v. Dauber, 906 N.Y.S.2d 697, 700-01 (N.Y. Sup. Ct. 2010).
[58] *Id.* at 700.
[59] *Id.* at 701-02.
[60] *Id.* at 702.

defamatory, it dismissed the plaintiff's defamation claims.[61] Similar to the laws applied in New York and Texas, the Mississippi standard requires a false statement.[62] If the statements are true or at least not provably false, the statement is not defamatory as a matter of law, and the victim of cyberbullying cannot recover under a theory of defamation.[63]

Prong two of the Mississippi defamation standard requires the defendant to send the defamatory statement to a third party.[64] This requirement takes all cyberbullying that happens between two individuals outside the scope of defamation.[65] In 2017, a sixth grader from New Jersey, Mallory, experienced cyberbullying via direct messages that came to her phone.[66] The messages told her that no one liked her and that she was "a loser." [67] One of the messages even said, "why don't you kill yourself."[68] Since the bullies sent these statements directly to Mallory, a defamation action could not hold them liable.[69]

Finally, prong four requires an actionable statement.[70] Defamation has two types of actionable statements. A statement is actionable per se when the statement is "so clearly defamatory that no resort to other facts or circumstances is necessary for the ordinary person to understand injury to the victim's good name."[71] For example, an accusation that a plaintiff stole meat[72] or cash[73] is actionable per se as long as the defamation is not "the product of any innuendo, speculation or conjecture."[74] If the accusation is not actionable per se, then the plaintiff needs to prove the statement

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[61] *Id.* at 702-03.

[62] *See* Inland Fam. Prac. Ctr., LLC v. Amerson, 256 So. 3d 586, 590 (Miss. 2018).

[63] *See id.*

[64] *Id.*

[65] *See id.*

[66] Kalhan Rosenblatt, *Cyberbullying Tragedy: New Jersey Family to Sue After 12-Year-Old Daughter's Suicide*, NBC NEWS (Aug. 1, 2017, 12:09 PM), https://www.nbcnews.com/news/us-news/new-jersey-family-sue-school-district-after-12-year-old-n788506 [https://perma.cc/5VLP-GK4V].

[67] *Id.*

[68] *Id.*

[69] *See* Perry, *supra* note 39, at 1228.

[70] *Amerson*, 256 So. 3d at 590.

[71] Baugh v. Baugh, 512 So. 2d 1283, 1285 (Miss. 1987).

[72] *See* Boler v. Mosby, 352 So. 2d 1320, 1322-23 (Miss. 1977).

[73] *See* Lemonis v. Hogue, 57 So. 2d 865, 866 (Miss. 1952).

[74] *Baugh*, 512 So. 2d at 1285.

caused them "special harm."[75] Mississippi courts define special harm as "the loss of something having economic or pecuniary value."[76] Mississippi courts find special harm when emotional distress, like embarrassment, shame, and humiliation, leads to monetary loss.[77] If plaintiffs can prove they spent money seeking psychiatric help because of the defamatory statements, then they can possibly recover damages.[78] However, if plaintiffs can only prove they suffered emotional distress but did not incur monetary loss, then the defamatory statements are not actionable.[79] Cyberbullying takes its toll on the target, but that toll is generally felt mentally and emotionally, not financially. Without suffering provable financial damages or unmistakable accusations of criminal conduct, victims of cyberbullying in Mississippi cannot recover damages in a defamation claim.

3. Invasion of Privacy

Strictly speaking, invasion of privacy is four different torts: "1. The intentional intrusion upon the solitude or seclusion of another; 2. The appropriation of another's identity for an unpermitted use; 3. The public disclosure of private facts; and 4. Holding another to the public eye in a false light."[80] For a Mississippi court to find a defendant liable under an invasion of privacy theory, at least under the first, third, and fourth types, the plaintiff must prove the invasion of privacy would be "highly offensive" to an objectively reasonable person.[81] The only one of the four types that could not apply in a school cyberbullying case is the second one. For invasion of privacy to apply in the context of appropriating another's identity, the defendant must use the appropriation in a commercial enterprise.[82] Even though cyberbullies can appropriate the

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[75] Speed v. Scott, 787 So. 2d 626, 632 (Miss. 2001).

[76] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (AM. L. INST. 1977)).

[77] *See id.*

[78] *Cf.* Barton v. Barnett, 226 F. Supp. 375, 378 (N.D. Miss. 1964).

[79] *See id.*

[80] Candebat v. Flanagan, 487 So. 2d 207, 209 (Miss. 1986).

[81] *Id.* (discussing the first category); Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990) (discussing the third category); Cook v. Mardi Gras Casino Corp., 697 So. 2d 378, 382 (Miss. 1997) (discussing the fourth category).

[82] Brasel v. Hair Co., 976 So. 2d 390, 392 (Miss. Ct. App. 2008); Harbin v. Jennings, 734 So. 2d 269, 272 (Miss. Ct. App. 1999).

likenesses of others for nefarious purposes, cyberbullies do not make money off bullying. Therefore, any appropriation of a victim's likeness would not rise to the level of an invasion of privacy tort under the second type. However, the first, third, and fourth types of invasions of privacy are available for claims against cyberbullies.

One difficulty plaintiffs encounter when proving an invasion of privacy claim is the "highly offensive to an objectively reasonable person" requirement. The barrier may prove too much for emotionally immature grade-school students to overcome. For a middle schooler, it may be a "highly offensive" invasion of privacy to tell others who their crush is, but to the objectively reasonable person, that is most certainly not highly offensive.

On the other hand, the invasion of privacy torts may not even cover the most extreme examples of cyberbullying. Presumably, live-streaming a roommate's same-sex sexual encounter without the roommate's consent, like what happened to Tyler in New Jersey,[83] should qualify as an invasion of privacy that is highly offensive to an objectively reasonable person.[84] However, even this is not a certainty in Mississippi. In the 1999 case, *Plaxico v. Michael*, the Supreme Court of Mississippi held that a defendant's conduct that included taking nude pictures of his ex-wife's lover in her own home for use in his child custody case was not an invasion of privacy.[85] The court stated, "Although these actions were done without [Plaintiff's] consent, this conduct is not highly offensive to the ordinary person which would cause the reasonable person to object."[86] Though it seems self-evident to some that to "spy on a person's bedroom, take photographs of her in a semi-nude state and have those photographs developed by third parties and delivered to his attorney thereby exposing them to others"[87] qualifies as

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[83] Patrick McGeehan, *Conviction Thrown Out for Ex-Rutgers Student in Tyler Clementi Case*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/nyregion/conviction-thrown-out-for-rutgers-student-in-tyler-clementi-case.html [Perma.cc link unavailable].

[84] *See* Plaxico v. Michael, 735 So. 2d 1036, 1040 (Miss. 1999) (Banks, J., dissenting) (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 2 (AM. L. INST. 1977)) ("[I]nvasion of privacy would occur if private investigator, seeking evidence for use in a lawsuit, looks into plaintiff's bedroom window with telescope for two weeks and takes intimate photographs.").

[85] *See id.* at 1037-40.

[86] *Id.* at 1040.

[87] *Id.* (Banks, J., dissenting).

invasion of privacy, case law in Mississippi does not support that conclusion. At least not when child custody is at stake and the mother is in a homosexual relationship.[88] Perhaps, in 2023, the Supreme Court of Mississippi would decide differently, or at least give a better explanation for why the plaintiff's voyeuristic photos would not be highly offensive to a reasonable person, but there is no guarantee because *Plaxico v. Michael* is the current law of the state. Victims of cyberbullying like Tyler cannot rely on Mississippi case law to achieve justice through an invasion of privacy claim when precedent like *Plaxico v. Michael* exists. Holistically, invasion of privacy fails to address a large portion of relatively minor invasions of privacy and, in light of the law of the state, may not even address the most extreme examples.

4. Negligent Entrustment

Intentional infliction of emotional distress, defamation, and invasion of privacy are all actions a victim can bring against their bully. However, many cyberbullies are children with no assets. Through negligent entrustment, a court may hold the bully's parents accountable for the conduct of their child. In order for a parent to be held liable for negligent entrustment in Mississippi, a plaintiff must prove that: (1) the defendant parents gave the instrument to their child to use; (2) the defendant parents knew or should have known their child would use the instrument "in a manner involving an unreasonable risk of harm"; and (3) harm resulted from the child's use of the instrument.[89] In the context of cyberbullying, this is nearly impossible to prove. While a plaintiff can easily meet the first prong, as most children get technology from their parents or access their technology using their parents' Wi-Fi, electricity, or data, liability for the second and third prongs hinge on the definition of "harm" used by the courts and the foreseeability that the child would use the instrument to harm others.

Harm means different things in different contexts. The Supreme Court of Mississippi has held that in cases of negligence, a plaintiff cannot recover "without proving some sort of physical

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[88] *Id.* at 1039-40 (majority opinion).

[89] *See* Kitchens v. Dirtworks, Inc., 50 So. 3d 388, 392 (Miss. Ct. App. 2010).

manifestation of injury or demonstrable physical harm."[90] In order to prove prongs two and three of negligent entrustment, the victim would have to prove a physical harm associated with the cyberbullying and that the parent knew or should have known that their child would use technology to physically harm another.[91] The New York case *Finkel v. Dauber* demonstrates this difficulty.[92] Though the standard in New York is different and requires the parent to entrust their child with a *dangerous* instrument, the court pointed out, "To declare a computer a dangerous instrument in the hands of teenagers in an age of ubiquitous computer ownership would create an exception that would engulf the rule against parental liability."[93] Since students use computers for so many different things, especially since the beginning of the COVID-19 pandemic, proving that a parent knew or should have known that their child would use the computer or other technology to physically harm other children is preposterous. As a result, relying on negligent entrustment to seek recovery for cyberbullying would yield little to no results.

5. Discrimination Claims

Since recovering from students and parents is difficult, victims of cyberbullying can turn to schools and school administrators for recovery under § 1983, Title VI, or Title IX.[94] However, the standard to hold a school district or employee of the school district acting within the scope of their employment liable is incredibly high and rarely met. Since discrimination is always intentional, the plaintiff must prove the school acted so indifferently to the bullying that a court can interpret the school's inaction as intent.[95]

In the landmark 1999 case, *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the U.S. Supreme Court decided a school district can be held liable for the conduct of a student sexually harassing another student if they are "deliberately

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[90] Am. Bankers' Ins. Co. of Fla. v. Wells, 819 So. 2d 1196, 1209 (Miss. 2001).

[91] *See Kitchens*, 50 So. 3d at 392.

[92] 906 N.Y.S.2d 697 (N.Y. Sup. Ct. 2010).

[93] *Id.* at 702.

[94] Perry, *supra* note 39, at 1241-43.

[95] *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642-43 (1999).

indifferent" to the harassment.[96] A court can only hold a school liable if the school's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[97] However, this case provides a significant hurdle for cyberbullying victims to jump through because schools are only liable if the harassment takes place "in a context subject to the school district's control."[98] A student who is bullied off-campus will not be able to get relief from the school because the school does not have control over what happens off of school grounds.

Despite the difficulties imposed by *Davis*, lower courts have applied *Davis*'s deliberate indifference test to the context of cyberbullying. In 2019, the Fifth Circuit examined a case in which a student, who was sexually harassed on campus and cyberbullied off-campus after two students allegedly sexually assaulted her at a party, brought a Title IX claim against the school claiming it was "deliberately indifferent" to the sexual harassment.[99] The Fifth Circuit set forth five elements plaintiffs must prove in order to recover against a school district for a Title IX discrimination claim:

> (1) [The district] had actual knowledge of the harassment, (2) the harasser was under the district's control, (3) the harassment was based on the victim's sex, (4) the harassment was so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit, and (5) the district was deliberately indifferent to the harassment.[100]

Though the plaintiff met prongs one through four, she fell short on the final prong.[101] Ultimately, the Fifth Circuit found the school was not "deliberately indifferent" to the harassment because, though almost nothing was done to punish the cyberbullies, the school investigated and punished one student, which was enough to prove they were not deliberately indifferent.[102] While discussing the

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[96] *Id.* at 643.

[97] *Id.* at 648.

[98] *Id.* at 645.

[99] *See* I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360, 364-68 (5th Cir. 2019).

[100] *Id.* at 368 (alteration in original) (quoting Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165 (5th Cir. 2011)).

[101] *See id.* at 374-78.

[102] *Id.* at 377-78.

standard of "deliberate indifference," the court noted that "negligent delays, botched investigations of complaints due to the ineptitude of investigators, or responses that most reasonable persons could have improved upon do not equate to deliberate indifference."[103] It appears that according to the Fifth Circuit, in order to hold a school district liable for Title IX discrimination, a plaintiff must prove, not that the school's response was inept, but that the school did nothing.[104] Since "deliberate indifference" is such a high standard for the plaintiff to prove, holding a school district accountable for cyberbullying perpetuated by students against other students is reserved for only the most exceptional circumstances and is ineffective at regulating cyberbullying.

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Individual torts that could hold cyberbullies, their parents, or schools liable for harming victims each have their individual hurdles. If victims bring claims for damages under tort theories or anti-discrimination statutes, then victims can recover damages for only the most extreme cases of cyberbullying, which does not protect most victims.

B. Criminal Liability

Criminal liability to punish cyberbullies is a popular idea to curb the epidemic.[105] State and local governments throughout the United States have passed cyberbullying laws that criminalize cyberbullying in some way.[106] Some states impose fines, others impose imprisonment, and others impose both.[107] Laws that criminalize cyberbullying often raise and result in First Amendment issues by substantially limiting free speech.[108] Though there are several laws in Mississippi that could hold cyberbullies

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[103] *Id.* at 369.

[104] *See id.*

[105] *See* Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 695 (2012).

[106] *Id.* at 695-96.

[107] *See* Liat Franco & Khalid Ghanayim, *The Criminalization of Cyberbullying Among Children and Youth*, 17 SANTA CLARA J. INT'L L., no. II, 2019, at i, 25.

[108] Lidsky & Garcia, *supra* note 105, at 698-99.

accountable, Mississippi laws are not immune to the free speech concerns created by anti-cyberbullying legislation.

1. Prohibition of Posting Injurious Messages to Others Online

Until 2020, Mississippi's law prohibiting the posting of injurious messages to others online, Mississippi Code section 97-45-17, could have been used to hold cyberbullies accountable.[109] The law prohibited individuals from posting or sending messages online "for the purpose of causing injury to any person."[110] Unfortunately for those seeking to criminalize cyberbullying, the same broad language meant to punish a wide variety of harmful cyberbullying made the law unconstitutional.[111]

The Court of Appeals of Mississippi declared the law unconstitutionally overbroad in *Edwards v. State*.[112] William Edwards appealed after he was convicted of violating Mississippi Code section 97-45-17 for posting Facebook Live videos accusing a pastor of sexual misconduct.[113] Edwards argued on appeal that the statute was unconstitutionally overbroad and, therefore, invalid.[114] The court agreed.[115] It determined the definition of "injury" in the statute included physical, pecuniary, reputational, and emotional injuries.[116] As a result, the statute criminalized false accusations as well as true accusations, both of which could include political "attack ads" and other protected speech.[117] As a result, the statute criminalized "a substantial amount of protected speech, including core political speech."[118] Though a substantial interest in protecting individuals from harm exists, the statute's overbroad language burdened too much speech, making the law unconstitutional.[119]

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[109] MISS. CODE ANN. § 97-45-17 (West, Westlaw through 2023 Reg. Sess.), *invalidated by* Edwards v. State, 294 So. 3d 671 (Miss. Ct. App. 2020).

[110] *Id.*

[111] *See generally Edwards*, 294 So. 3d 671.

[112] *Id.* at 677-78.

[113] *Id.* at 672-74.

[114] *Id.* at 674.

[115] *Id.* at 675.

[116] *Id.* at 676 (citing Wilcher v. State, 227 So. 3d 890, 896-97 (Miss. 2017)).

[117] *Id.* (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 260 (2003) (Scalia, J., concurring in part and dissenting in part)).

[118] *Id.*

[119] *Id.* at 677-78.

Because of the nearly infinite forms of cyberbullying, an effective statute to hold bullies accountable would need to use broad language. Unfortunately, it is that very broad language a cyberbullying statute needs that burdens a substantial amount of free speech. The court's decision in *Edwards* took away the most effective way to hold cyberbullies criminally liable. Additionally, it called into question the constitutionality of similar statutes which target online speech, like cyberstalking and cyber-impersonation laws.

2. Cyberstalking

Similar to the statute prohibiting the posting of injurious messages online, the cyberstalking statute could be used to punish cyberbullies who intentionally and repeatedly use electronic communication to harass, threaten, or terrify others.[120] Also like the statutory prohibition of posting injurious messages online, the cyberstalking statute may be unconstitutionally overbroad. Even if the cyberstalking statute is constitutional, the statute is insufficient to address cyberbullying because it is too complicated to get a conviction.

Before the Mississippi Court of Appeals' declaration that Mississippi's statute prohibiting the posting of injurious messages online was unconstitutional, Judge Biggers for the U.S. District Court for the Northern District of Mississippi called the cyberstalking statute's constitutionality into question.[121] In the 2016 case, *Moody v. Lowndes County*, the plaintiff—a woman who had emailed her ex-husband incessantly regarding the child they shared together—brought First and Fourth Amendment claims against the county and one of its officers after the judge in the prior criminal case had ruled that she was not guilty of violating the cyberstalking statute.[122] Judge Biggers noted that it was possible her conduct was not the kind of conduct the statute was meant to regulate.[123] In his opinion, he questioned the constitutionality of the

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[120] *See* MISS. CODE ANN. § 97-45-15 (West, Westlaw through 2023 Reg. Sess.).

[121] *See* Moody v. Lowndes County, No. 1:14CV197-NBB-DAS, 2016 WL 5363461, at *5 (N.D. Miss. Sept. 23, 2016).

[122] *Id.* at *1-2.

[123] *Id.* at *5.

law.[124] He "question[ed] whether the statute itself would pass constitutional muster if for no other reason than the fact that it may be unconstitutionally overbroad."[125] Since the constitutionality of the law was not before the court, the judge did not decide the question,[126] but if the statute finds its way before the court to prosecute cyberbullies, the question of constitutionality will come before the court sooner or later. The court may not uphold the statute.

That the statute is unconstitutional is not a foregone conclusion. The Mississippi Court of Appeals defended and distinguished the cyberstalking statute from the statutory prohibition of posting injurious messages, noting the "safe harbor[s]" included in the cyberstalking statute were missing from the posting injurious messages statute.[127] The cyberstalking statute expressly states it "does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others."[128] The cyberstalking statute also does not apply to "any constitutionally protected activity, including speech, protest or assembly."[129] Though Judge Biggers may disagree, the Mississippi Court of Appeals believes that the cyberstalking statute is narrowly tailored to protect speech.[130]

Even if the statute is constitutional under the First Amendment, the cyberstalking law has numerous elements which are difficult to prove. Since the Mississippi Legislature passed the law in 2003, few people have been charged or convicted under the statute because of how difficult the crime is to prosecute.[131] In order to prove cyberstalking, the prosecuting attorney must prove seven different elements, the most difficult being knowledge and intent.[132]

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[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Edwards v. State, 294 So. 3d 671, 677 n.7 (Miss. Ct. App. 2020).

[128] *Id.* at 678 n.7 (quoting MISS. CODE ANN. § 97-45-15(3)).

[129] *Id.*

[130] *See id.*

[131] Laura Cummings, Off. of Legis. Rsch., *Charges and Convictions Under Cyberstalking Laws*, CONN. GEN. ASSEMBLY (Feb. 26, 2009), https://www.cga.ct.gov/2009/rpt/2009-R-0121.htm [https://perma.cc/H4MT-HRGN].

[132] *Id.*

The difficulty prosecutors face enforcing the statute in addition to constitutional concerns makes the cyberstalking statute insufficient to address adolescent cyberbullying.

3. Cyber-Impersonation

Unlike Mississippi's cyberstalking statute and the statute prohibiting the posting of injurious messages online, Mississippi's cyber-impersonation law would most likely pass First Amendment scrutiny because it is not unconstitutionally overbroad.[133] However, the law is still insufficient to address cyberbullying because it only covers cyberbullying which involves impersonation of others, a small subset of the various forms of cyberbullying.[134]

The cyberstalking statute and the statutory prohibition on posting injurious messages to others online may be unconstitutional, but the cyber-impersonation statute would probably withstand First Amendment scrutiny based on a Texas Court of Appeals decision in response to a constitutional challenge of a similar law.[135] The court found that the government had a significant interest in mitigating cyber-impersonation and that the statute did not substantially interfere with protected speech, so the court ruled the statute was not facially overbroad.[136] Similar to the Texas statute, the Mississippi statute prohibits the intentional and nonconsensual impersonation of another person online in only four instances—when the intent is to harm, intimidate, threaten, or defraud.[137] Since the Mississippi statute is limited to only four instances of impersonation and focuses on the intention of the speaker, it is not unconstitutionally overbroad. The similarities between the statutes suggest a similar outcome if someone challenged the constitutionality of Mississippi's cyber-impersonation statute.

Even though the Mississippi cyber-impersonation statute would probably pass constitutional scrutiny, it covers only a small subset of cyberbullying. The only cyberbullying covered in the

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[133] *See* MISS. CODE ANN. § 97-45-33 (West, Westlaw through 2023 Reg. Sess.).

[134] *See id.*

[135] State v. Stubbs, 502 S.W.3d 218 (Tex. App. 2016).

[136] *Id.* at 225-29, 232-35.

[137] *Id.* at 223, 232 n.18 (discussing Texas Penal Code section 33.07(a) and Mississippi Code section 97-45-33).

statute is cyberbullying in which a student *impersonates* another over the Internet "for purposes of harming, intimidating, threatening or defrauding another person."[138] Implementing the cyber-impersonation statute to address cyberbullying in schools would fail to address all kinds of cyberbullying where the bullies either hide their identities or act as themselves. As a result, punishing cyberbullies who impersonate others covers so few incidents of cyberbullying that it cannot effectively address the crisis.

II. STRATEGIES TO COMBAT OFF-CAMPUS CYBERBULLYING

Utilizing courts to punish cyberbullies is ineffective. Court systems were not designed to protect children from the harmful words they speak to one another, nor should they carry that burden.[139] To protect due process, courts necessarily move at a glacial pace. Filing a single complaint takes months, and it often takes years for courts to resolve disputes. Schools can investigate a cyberbullying incident, quickly mediate, inform guardians, and mete out any punishments in a fraction of the time it takes for a plaintiff to file a single complaint in court.[140]

Using the courts to address the cyberbullying crisis is not just ineffective, it is unjust. First, children are not fully developed and lack the ability to understand serious long-term consequences.[141] For adolescents, understanding the consequences of cyberbullying is more difficult than understanding the consequences of traditional "schoolyard" bullying. Unlike traditional "schoolyard" bullying, cyberbullying allows bullies to avoid direct contact with their victims.[142] Cyberbullies may not know the effect their words have because they cannot see the real-time reaction of others.[143]

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[138] MISS. CODE ANN. § 97-45-33(1).

[139] *See* Susan W. Brenner & Megan Rehberg, *"Kiddie Crime"? The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 83-85 (2009) ("The rough edges of our society are still in need of a good deal of filing down, and . . . [we] must . . . be hardened to . . . acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.") (alterations in original) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. L. INST. 1965)).

[140] *See id.* at 84.

[141] *See id.* at 83; Franco & Ghanayim, *supra* note 107, at 41-44.

[142] *See* Payne & Hutzell, *supra* note 14, at 1155-56.

[143] Nixon, *supra* note 30, at 143.

Empathetic awareness comes with the age and maturity adolescents lack, so criminalizing them for such conduct is unjust.[144] To criminalize and punish cyberbullies while not extending the same punishment to traditional "schoolyard" bullies is equally unjust. It is unfair to send children to court when similar conduct at school would result in punishment at school. It is also unjust to treat cyberbullies as criminals because bullies, like their victims, are at a higher risk of mental illness, acting out, and suicide than students who are not involved in bullying.[145] Instead of sending cyberbullies into the criminal justice system or court, parents and schools should help them. Students who bully need compassion, not fees and criminalization.

Schools, rather than courts, should confront the cyberbullying crisis because it is within their mission to do so. The mission of the school is to "educat[e] the young for citizenship."[146] Since the bullied and bullies are less likely to attend school and more likely to have lower grades, cyberbullying has a direct, detrimental effect on a school's ability to educate children.[147] In order to fulfill their mission to educate students, schools need to limit occurrences of bullying and cyberbullying.

Courts of law cannot effectively confront the cyberbullying crisis, but schools can. The most effective strategy for combatting cyberbullying according to students, both bullies and non-bullies, is limiting bullies' access to technology, while the most ineffective ways to combat cyberbullying are punishments that take up students' time and money.[148] This data suggest that criminalization of and civil penalties for cyberbullying are not the best ways to prevent it.[149] Since access to technology at home is something only a child's parents can control, parents play a key role in preventing

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[144] *See* Brenner & Rehberg, *supra* note 139, at 83.

[145] *See generally* Vaillancourt et al., *supra* note 12; Nixon, *supra* note 30; THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25.

[146] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[147] *See* Brenner & Rehberg, *supra* note 139, at 84.

[148] Ellen M. Kraft & Jinchang Wang, *Effectiveness of Cyber Bullying Prevention Strategies: A Study on Students' Perspectives*, 3 INT'L J. CYBER CRIMINOLOGY 513, 529-30 (2009).

[149] *See id.* at 530.

cyberbullying.[150] Schools can also play an important role in implementing "clear rules with enforced penalties and ongoing prevention programs" because such programs were generally viewed as effective by bullies.[151]

Legislatures can adopt legislative guidance to help schools craft and implement effective anti-cyberbullying programs. Evidence about whether laws are effective is very limited, but "[e]merging evidence exists to suggest that anti-bullying laws and policies can have a positive impact on reducing bullying and on protecting groups that are disproportionately vulnerable to bullying."[152] As with any law, anti-bullying legislation is only effective if it is implemented well.[153] The most effective way to implement anti-bullying policies is to ensure school administrators and teachers know the parts and scope of the law.[154] Teachers and administrators cannot be expected to implement the law appropriately if they do not know what the law says. Second, schools need to have resources available to implement the laws.[155] Either the law needs to be written in a way that implementation would not take up existing resources or written to include new resources for implementation.

In addition to laws, teaching students empathy for others in the realm of cyberspace is an effective way to combat cyberbullying. One of the reasons cyberbullying is so widespread is because bullies cannot see the facial expressions of their targets, which leads them to experience less empathy.[156] Developing awareness around the hurt associated with cyberbullying can help students develop empathy in cyberspace, where empathy is more difficult to summon.

It is also useful to integrate a comprehensive plan to combat cyberbullying into an existing plan.[157] This comprehensive plan should target anti-bullying as a whole, as well as both the bullies

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150 *Id.*
151 *Id.*
152 THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25, at 283.
153 *See id.* at 283-84.
154 *See id.*
155 *See id.*
156 Nixon, *supra* note 30, at 143.
157 THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25, at 220.

and the bullied for individual intervention.[158] This comprehensive plan should address skills to prevent bullying, cope with bullying, and respond appropriately to bullying.[159] It is not enough just to have a plan; people need to be taught the plan. A good plan should implement "evidence-informed bullying prevention training for individuals . . . who work directly with children and adolescents on a regular basis."[160]

Relying on the courts to halt the spread of cyberbullying is unfair and unrealistic. A civil suit would not have saved Mallory, the sixth grader from New Jersey who took her life in 2017 after various classmates bullied her via text message, Snapchat, and Instagram.[161] Criminal charges did not protect Tyler in New Jersey from his roommate live-streaming his sexual encounter.[162] Nor could a court of law protect Channing, a sixteen year old student from Tennessee who took his own life in 2019 after an ex-girlfriend posted messages that outed him as gay on Snapchat and Instagram.[163] Courts are not equipped and do not have the legal authority to stop cyberbullying because without some kind of injury, there can be no tort or crime.[164] As a matter of law, courts cannot stop bullying before it happens, but schools can. With guidance, schools can take a more active role in preventing cyberbullying tragedies like Mallory's suicide, Tyler's suicide, and Channing's suicide. Parents and schools should work together to restrict bullies' access to technology and establish clear rules and procedures for punishing cyberbullies at school,[165] while legislatures need to provide schools with guidance on how to legally deal with cyberbullying that occurs both on and off of campus.[166]

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158 *Id.* at 234.

159 *Id.* at 220.

160 *Id.* at 298.

161 *See* Rosenblatt, *supra* note 66.

162 *See* McGeehan, *supra* note 83.

163 Tim Fitzsimons et al., *Tennessee Teen Dies by Suicide After Being Outed Online*, NBC NEWS (Sept. 30, 2019, 2:26 PM), https://www.nbcnews.com/feature/nbc-out/tennessee-teen-dies-suicide-after-being-outed-online-n1060436 [https://perma.cc/9FRL-EXXF].

164 *See* discussion *supra* Part I.

165 Kraft & Wang, *supra* note 148, at 530.

166 *See* THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 25, at 283-84.

III. CONSTITUTIONAL WAYS TO PROTECT THE RIGHTS OF STUDENTS, PARENTS, AND SCHOOLS

Like with anti-bullying legislation, free speech problems arise when schools try to regulate the off-campus speech of students. The U.S. Supreme Court only just addressed the issue of off-campus school speech in June of 2021, and its guidance to schools is limited and unclear.[167] Since the Supreme Court has not adequately addressed the issue of how and when schools can regulate the off-campus expressive conduct of students, schools are left to apply old jurisprudence to the rapidly evolving cyberbullying problem.[168] When determining the constitutionality of an off-campus cyberbullying statute, three competing interests must be analyzed: the free speech interest of the child, the interest of the parent to direct the upbringing of their child, and the interest of the school to fulfill its educational mission.

The Supreme Court in *Tinker v. Des Moines Independent Community School District* made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[169] In fact, the Supreme Court has called for "scrupulous protection of Constitutional freedoms of the individual" so as not to "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[170] However, freedom of speech must be "applied in light of the special characteristics of the school environment."[171] Years later in *Bethel School District No. 403 v. Fraser*, the Supreme Court said, "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other

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[167] *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2059 (2021) (Alito, J., concurring). *See generally* David L. Hudson Jr., Mahanoy Area School District v. B.L.*: The Court Protects Student Social Media but Leaves Unanswered Questions*, 2021 CATO SUP. CT. REV. 93; Jenny Diamond Cheng, *Deciding Not to Decide:* Mahanoy Area School District v. B.L. *and the Supreme Court's Ambivalence Towards Student Speech Rights*, 74 VAND. L. REV. EN BANC 511 (2021).

[168] Patrick E. McDonough, Note, *Where Good Intentions Go Bad: Redrafting the Massachusetts Cyberbullying Statute to Protect Student Speech*, 46 SUFFOLK U. L. REV. 627, 633 (2013).

[169] 393 U.S. 503, 506 (1969).

[170] *Id.* at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[171] *Id.* at 506.

settings."[172] Students in public schools must have their rights respected, but their rights are not absolute and can be restricted in the school environment under limited circumstances.

Supreme Court jurisprudence since *Tinker* clearly allows schools to punish students for speech that occurs at school, but it was not until *Mahanoy Area School District v. B.L. ex rel. Levy* in 2021 that the Supreme Court finally addressed whether or not schools have authority to punish students for speech that occurs off campus.[173] Ultimately, the court determined that under certain circumstances, schools can punish students for off-campus speech.[174] The majority, speaking through Justice Breyer, declined to state a "broad, highly general First Amendment rule" to define off-campus speech or how to regulate schools' responses to such off-campus speech, but they did list a number of examples that would allow regulation, including "serious or severe bullying or harassment targeting particular individuals" and "threats aimed at teachers or other students."[175] However, schools' interests in punishing off-campus speech are severely limited due to three important distinctions between school regulation of off-campus speech and school regulation of on-campus speech.[176] First, the school does not usually stand *in loco parentis* when students are off campus like it does when students are on campus.[177] Rather, off campus, the child's parents have the right and responsibility to "protect, guide, and discipline them."[178] Second, because schools can punish the activity of students both on and off campus, *all* expressive conduct a student engages in is subject to school regulation.[179] Since student speech is so heavily regulated, Justice Breyer wrote, "When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."[180] Finally, schools, as training grounds for future American citizens, have a responsibility

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[172] 478 U.S. 675, 682 (1986).
[173] 141 S. Ct. 2038 (2021).
[174] *See id.* at 2045.
[175] *Id.*
[176] *Id.* at 2046.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*

to "protect the 'marketplace of ideas.'"[181] Ultimately, the court decided that students have more free speech rights outside of school, but that schools still have an amount of authority to regulate off-campus speech that the court has yet to disclose.[182]

Parents, like students, have their rights limited when the school is given power to punish children for off-campus speech. Parents have a Fourteenth Amendment right to bring up their children as they see fit.[183] However, like students, parents' rights are not limitless. The government has authority to regulate parental actions for the well-being of the child.[184] In the school context, school officials have power to punish students because the school acts *in loco parentis*.[185] Conversely, the punishment school officials can mete out when students speak outside of school is limited because the school no longer acts *in loco parentis*.[186] To allow otherwise would infringe on the rights of the parent to raise their children.

Finally, the mission of the school is to prepare students for citizenship through education.[187] To protect the learning environment, schools have a substantial interest "in maintaining discipline in the classroom and on school grounds."[188] The special characteristics of the school environment allow schools to enact and enforce "rules against conduct that would be perfectly permissible if undertaken by an adult."[189] Schools have a responsibility to carry out their mission for all students, both individually and collectively. One of the burdens school officials face, especially in the context of off-campus school speech, is how to protect the individual rights of

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[181] *Id.*

[182] *See id.* Instead of giving schools a workable test to implement, the court "le[ft] for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference." *Id.* Such vague commentary does little to help principals discipline students daily.

[183] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 518 (1925).

[184] Prince v. Massachusetts, 321 U.S. 158, 167 (1944).

[185] *Mahanoy*, 141 S. Ct. at 2044-45.

[186] *Id.* at 2046.

[187] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[188] New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

[189] *Id.*

each student while achieving their mission to collectively educate all students.[190]

Any action schools take against the off-campus speech of students must balance the oft-competing interests of students, parents, and schools. In *Mahanoy*, Justice Alito issued a warning to school administrators who try to regulate off-campus speech.[191] With the acknowledgement that most school officials genuinely believe they are acting in the best interest of the students, "school officials should proceed cautiously" to regulate off-campus speech.[192] Without clear instructions from the U.S. Supreme Court, school officials in Mississippi would benefit from guidance from the Mississippi Legislature to protect student speech, parental rights, and education rights.

A. Off-Campus Cyberbullying Laws from Other States

Twenty-eight states and Washington, D.C., have adopted statutes to include some regulation of off-campus Internet speech, including other southern states like Tennessee, Texas, Georgia, and Florida.[193] There are a few major trends most statutes follow, while other ideas are less common. The most common phrase in off-campus anti-bullying statutes is the "materially and substantially disrupt[ive]" language from *Tinker*.[194] The second most common phrase is *Tinker*'s "rights of others" language.[195] Some states focus

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[190] Unfortunately, conflicts between individual rights and collective rights occur daily in public schools. For example, when a student yells out in class without raising their hand to speak their opinion on a topic protected by the First Amendment, the teacher may punish that student for disrupting the learning environment. The student, individually, has every right to speak about that topic. However, when their individual right infringes on the rights their classmates have to an education, school officials have discretion to punish the individual for their speech.

[191] *See Mahanoy*, 141 S. Ct. at 2058-59 (Alito, J., concurring).

[192] *Id.*

[193] *Bullying Laws Across America*, CYBERBULLYING RSCH. CTR., https://cyberbullying.org/bullying-laws [https://perma.cc/EPR3-SKQQ] (last visited June 19, 2023).

[194] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969); *see* FLA. STAT. ANN. § 1006.147(2)(d) (West, Westlaw through 2023 Spec. Sess. B and 2023 First Reg. Sess.); TENN. CODE ANN. § 49-6-4502(3)(B) (West, Westlaw through 2023 Reg. Sess.); CONN. GEN. STAT. ANN. § 10-222d(b)(16)(B)(iii) (West, Westlaw through 2023 Reg. Sess.).

[195] *Tinker*, 393 U.S. at 513; *see* FLA. STAT. ANN. § 1006.147(9); CONN. GEN. STAT. ANN. § 10-222d(b)(16)(B)(ii).

on targeting, which implicates the "reasonable foreseeability" test used by most circuit courts.[196] Finally, a couple of states use the term "hostile educational environment,"[197] similar to the "hostile work environment" language used in Title VII litigation.[198]

Other states struck out on their own to develop off-campus anti-bullying legislation. For example, South Dakota broadly allows schools to punish any bullying anywhere.[199] Some provisions have constitutional merit found in circuit court opinions, while others have no basis in either U.S. Supreme Court or circuit court opinions.

B. True Threats

The First Amendment does not protect "true threats" for adults or children, so statutes can constitutionally regulate "true threats" in the school setting. Less clear, though, is what kind of threats schools can regulate as off-campus speech.

The U.S. Supreme Court defined "true threats" in *Virginia v. Black* as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence."[200] The Fifth Circuit applies an objectively reasonable person standard to determine a "true threat" and allows the threat to indicate a future harm, not just an immediate one.[201] As long as the threat is in some way communicated to the threatened individual or to a third party and a reasonable person would believe the speaker intends to harm someone, then the speech is not protected by the First Amendment.[202] Intent to follow through with the threat is not relevant to the analysis.[203]

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[196] *See* GA. CODE ANN. § 20-2-751.4(c)(2) (West, Westlaw current through Act 3 of 2023 Reg. Sess.); TENN. CODE ANN. § 49-6-4502(3)(B); *see also* discussion *infra* notes 228-31.

[197] CONN. GEN. STAT. ANN. § 10-222d(b)(16)(B)(i); TENN. CODE ANN. § 49-6-4502(3)(B). *See generally* Carla DiBlasio, Note, *"Hostile Learning Environment:" Developing Student Speech Regulation by Applying the Hostile Work Environment Analysis to Cyberbullying*, 3 CASE W. RSRV. J.L. TECH. & INTERNET 263 (2012).

[198] Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 651 (5th Cir. 2012).

[199] *See* S.D. CODIFIED LAWS § 13-32-18 (Westlaw through 2023 Reg. Sess.).

[200] 538 U.S. 343, 359 (2003).

[201] Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004).

[202] *Id.*

[203] *Id.*

However, when Justice Breyer wrote in *Mahanoy* that "threats" against either students or teachers are included in instances where schools can regulate off-campus speech, it is unclear if "threats" must rise to the level of "true threats" to be punishable.[204] Recently, the U.S. District Court for the Western District of Pennsylvania decided to apply the "true threat" analysis when it examined the probability of success of a case for a preliminary injunction.[205] In a Snapchat group with the football team, the football coaches and other players confronted A.F., the plaintiff, for his failure to attend conditioning practices.[206] A.F. and R.G., another student athlete, engaged in a back-and-forth in which A.F. threatened to hurt and kill R.G. multiple times before finally posting a picture of himself with a rifle that school officials later determined to be a BB gun.[207] The school ruled that A.F.'s speech amounted to "terrorist threats" and removed A.F. from the football team.[208] In holding that A.F.'s First Amendment claim did not have a reasonable probability of success sufficient to win a preliminary injunction, the court determined A.F.'s threats to be "true threats" and not protected by the First Amendment.[209]

It is clear that schools can use the "true threat" analysis to police off-campus student speech, but it is not clear how "true" a threat must be to allow school officials to regulate such speech, a question the Supreme Court of Pennsylvania grappled with in *J.S. ex rel. M.S. v. Manheim Township School District*.[210] The Pennsylvania court was confronted with a student who made what objectively looked like a threat, but was, to the student, a joke.[211] J.S., the plaintiff, sent jokes to one friend via private message on Snapchat off school grounds suggesting that one of their classmates was a school shooter.[212] The friend leaked one of the memes threatening to shoot up the school on social media where

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[204] Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

[205] *See* A.F. v. Ambridge Area Sch. Dist., No. 2:21-cv-1051, 2021 WL 3855900, at *4-6 (W.D. Pa. Aug. 27, 2021).

[206] *Id.* at *2.

[207] *Id.*

[208] *Id.* at *3.

[209] *Id.* at *6.

[210] 263 A.3d 295 (Pa. 2021).

[211] *Id.* at 298-300.

[212] *Id.* at 298.

community members widely shared the post.[213] After investigation, the school and police determined J.S. was not a threat to the school community, but school officials expelled him nonetheless.[214] Since *Mahanoy* is unclear about what level of "threat" is punishable as off-campus speech,[215] the Pennsylvania court could either apply the "true threat" test from *Black*, or they could apply a much more lenient test based solely on the public perception of a threat.[216] In a previous "true threat" case in the school setting, Pennsylvania courts applied the "objective reasonable person" approach that the Fifth Circuit applies,[217] an approach the court reconsidered in *J.S.* when it determined that the First Amendment protects students from punishment unless their off-campus speech is a "true threat."[218] In determining that J.S.'s words were not a "true threat," the court strongly considered the subjective intent of J.S.'s words.[219] The court noted that in isolation, the words indicated a school shooting, but in context, the school shooting was a stupid joke between teenagers that did not constitute a "true threat."[220]

True, Justice Breyer and the Supreme Court were unclear about exactly the level of "threat" necessary to permit school officials to act on a threat, but the best way to craft a constitutional statute that protects students' First Amendment rights to free expression and still protects the school from threats is to take the lead of the Pennsylvania Supreme Court and only punish students for off-campus speech that rises to the level of "true threats."

C. Material and Substantial Disruption

The vital language present in almost all cyberbullying statutes throughout the United States is the "materially and substantially disrupt[ive]" language from *Tinker*.[221] The majority wrote, "But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially

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[213] *Id.* at 299.
[214] *Id.* at 299-301.
[215] *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).
[216] *See J.S.*, 263 A.3d at 305-06.
[217] *Id.* at 309-10.
[218] *Id.* at 316.
[219] *Id.* at 316, 318.
[220] *Id.* at 317-18.
[221] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

disrupts classwork or involves substantial disorder . . . is . . . not immunized by the constitutional guarantee of freedom of speech."[222] *Tinker* only expressly applied to speech that occurs in school, on school property.[223] Subsequent decisions expanded the scope of school regulation to events sponsored or monitored by the school,[224] publications by the school,[225] and, most recently in *Mahanoy*, certain off-campus speech.[226] Justice Breyer and the majority suggest that a material and substantial disruption may be grounds for punishing certain off-campus speech.[227]

Prior to *Mahanoy*, the various circuit courts dealt with school punishment of off-campus speech in different ways, and *Mahanoy*, as vague as it was, has done nothing to change the various tests the courts implemented to evaluate appropriate official action when freedom of expression interferes with the learning environment. The most accepted test is the "reasonable foreseeability" test. This test is employed by the Second, Third, Sixth, Seventh, Eighth, and Eleventh Circuits.[228] There are two variations of the reasonable foreseeability test. Some circuits, like the Second Circuit, require reasonable foreseeability that the speech will reach the school and the speech would cause a substantial disruption.[229] The other variation of the test, like the one employed by the Third Circuit,

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[222] *Id.*

[223] *See id.* at 513-14.

[224] *See* Morse v. Frederick, 551 U.S. 393, 403 (2007).

[225] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-73 (1988).

[226] *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

[227] *See id.* Immediately after Justice Breyer noted one of the "special characteristics" of schools is the "special interest" schools have in regulating student speech when there is a material and substantial disruption, he stated that the "special characteristics" do not necessarily go away when students are off school property. *Id.* Later, Justice Breyer addressed the school district's argument that B.L.'s speech caused a material and substantial disruption. *See id.* at 2047-48. Instead of invalidating the school district's argument that her off-campus speech was punishable by the school district, Justice Breyer discussed why B.L.'s conduct did not rise to the level of a material and substantial disruption. *See id.*

[228] *See* Doninger v. Niehoff, 642 F.3d 334, 348 (2d Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011); Barr v. Lafon, 538 F.3d 554, 565 (6th Cir. 2008); Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012); Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 983 (11th Cir. 2007).

[229] *See Doninger*, 642 F.3d at 348.

requires reasonable foreseeability only that the speech "create a substantial disruption or material interference in school."[230]

The reasonable foreseeability tests purport to focus on the school's ability to predict a disruption rather than reacting to an actual disruption. The Sixth Circuit stated that "[t]he rationale for this standard lies in the fact that requiring evidence of disruption caused by the banned speech would place 'school officials . . . between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation.'"[231] This test seeks to find a balance between the rights of students to exercise free speech with the interests of the school in protecting the learning environment.

The second, less common test employed by the Fourth Circuit is the "nexus" test. In *Kowalski v. Berkeley County Schools*, the Fourth Circuit wrote, "[W]here such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."[232] This test focuses on the student's awareness that their speech could cause a disruption at the school.[233] The student, therefore, would be on notice that their speech could be regulated by school officials.[234]

Both the Ninth Circuit and the Fifth Circuit declined to adopt either one of these tests outright. The Ninth Circuit chose to adopt both the reasonable foreseeability test and the nexus test to analyze cases,[235] while the Fifth Circuit made its own test. The Fifth Circuit wrote in the 2015 case *Bell v. Itawamba County School Board* that a student can be punished "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher."[236] The Fifth Circuit's test is based on the vital role teachers play in the learning process.[237] Limiting teachers through threats, harassment, or intimidation is enough, in the Fifth Circuit's view, to destroy

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[230] *J.S.*, 650 F.3d at 930.

[231] *Barr*, 538 F.3d at 565 (alterations in original) (quoting Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007)).

[232] 652 F.3d 565, 577 (4th Cir. 2011).

[233] *See id.* at 573-74.

[234] *See id.*

[235] *See* McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707-08 (9th Cir. 2019).

[236] 799 F.3d 379, 396 (5th Cir. 2015).

[237] *See id.* at 399-400.

education and effectively takes away the rights of each individual student in the community to receive their constitutionally protected, free, and appropriate public education.[238]

Currently, the Fifth Circuit's test is the easiest to satisfy, but none of the tests have been explicitly supported by the U.S. Supreme Court. To ensure constitutionality and protect the rights of students, the Mississippi Legislature should use the strictest language to narrowly tailor the statute. The strictest language is simply to stick with the "materially and substantially disrupt[ive]" language from *Tinker*.[239]

D. Rights of Others

So far, no clarity exists from the U.S. Supreme Court on whether or not the "rights of others" language from *Tinker* is a separate and distinct prong from the "materially and substantially disrupt[ive]" language, leaving courts to guess.[240] Though the Ninth Circuit tried, no court has upheld the "rights of others" language as the only reason to ban student speech.[241] The Ninth Circuit and other circuits that have addressed off-campus student speech have incorporated the "rights of others" analysis, not as a separate prong, but in the context of the "material and substantial disruption" test.[242] The Third Circuit is most skeptical of the "rights of others"

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[238] *Id.*

[239] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[240] Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 849 (2008).

[241] McDonough, *supra* note 168, at 661. In *Harper v. Poway Unified School District*, the Ninth Circuit examined the case of a student who had to sit in the office all day when he wore a shirt to school which condemned homosexuality on religious grounds. 445 F.3d 1166, 1171-72 (9th Cir. 2006). The student said nothing out loud, did not accost other students, and was pleasant and well-behaved the entire day he sat in the office. *See id.* at 1171-73. The Ninth Circuit held that the student was likely to lose his First Amendment claim based solely on *Tinker*'s "rights of others" prong. *Id.* at 1183. On appeal, the U.S. Supreme Court ordered the Ninth Circuit to dismiss Harper's appeal as moot after the district court entered a final judgment dismissing Harper's claims. *See* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262, 1262 (2007). The Supreme Court sought to make future re-litigation of the issue possible, leading some to believe the Supreme Court disagreed with the implementation of the "rights of others" language as a prong separate from the "materially and substantially disrupt[ive]" language. *Id.*; McDonough, *supra* note 168, at 661-63.

[242] *See Bell*, 799 F.3d at 390; Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 776 (9th Cir. 2014); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771,

as a distinct prong, writing, "[T]here is a danger in accepting the . . . argument: if [the "rights of others" language] of *Tinker* is broadly construed, an assertion of virtually any 'rights' could transcend and eviscerate the protections of the First Amendment."[243] Since utilizing the "rights of others" language as a separate and distinct prong could result in the abrogation of First Amendment rights, a statute cannot simultaneously protect students from off-campus cyberbullying and protect First Amendment rights while utilizing the language. A statute certain of constitutionality should not use the "rights of others" language from *Tinker*.

Instead, a statute should utilize language from *Mahanoy* to target only "severe bullying or harassment targeting particular individuals."[244] This language is much more focused and less susceptible to a constitutional overbreadth challenge. The First Circuit demonstrated the effectiveness of this approach when it held high school cyberbullies accountable for their relentless harassment of a fellow hockey player.[245] A group of eight hockey players engaged in a private Snapchat group, the purpose of which was to harass a freshman hockey player on their team.[246] The group conduct lasted for months, even after the freshman was made aware of the group and filed a bullying and harassment charge with the school.[247] The court, showing deference to the school's findings of fact, upheld the punishments as constitutional because the bullies' speech, unlike the speech at issue in *Mahanoy*, did not have First Amendment value as a criticism of the school community.[248] Rather, the speech rested solely on the impermissible grounds of harassing a fellow student.[249]

776-77 (8th Cir. 2012); Doninger v. Niehoff, 642 F.3d 334, 354 (2d Cir. 2011); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 571 (4th Cir. 2011); Barr v. Lafon, 538 F.3d 554, 563 (6th Cir. 2008); Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 983 (11th Cir. 2007); Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821, 825 (7th Cir. 1998).

[243] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 n.9 (3d Cir. 2011).

[244] Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

[245] *See* Doe v. Hopkinton Pub. Schs., 19 F.4th 493 (1st Cir. 2021).

[246] *Id.* at 498-502.

[247] *Id.* at 498, 500.

[248] *See id.* at 505-09; *see also Mahanoy*, 141 S. Ct. at 2046-48.

[249] *See Doe*, 19 F.4th at 505-09.

The First Circuit protected the rights of a student without using the ambiguous and broad "rights of others" language some statutes use. The best, most constitutional way to protect the rights of the bullied is to craft a statute that uses more specific language to protect the rights of students who are the targets of bullies to avoid an overbreadth challenge.

E. Hostile Educational Environment

The "hostile educational environment" language, adopted from Title VII's "hostile work environment,"[250] first appeared in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.[251] Some argue that using the "hostile educational environment" language is a good way to combat cyberbullying,[252] and some states have included the language in their cyberbullying statutes.[253] This usage misappropriates the language of *Davis* because the "hostile educational environment" language is meant to protect students from sexual harassment that happens on school grounds, not to protect against bullying that occurs off-campus.[254] Including "hostile educational environment" in a statute to regulate off-campus cyberbullying opens up the statute to a constitutional challenge the state would most likely lose.[255] Like the "rights of others" language, the phrase "hostile educational environment" is simply too broad.

In the 2001 case, *Saxe v. State College Area School District*, then-Judge Alito authored an opinion for the Third Circuit which declared a policy that included the "hostile environment" language unconstitutionally overbroad.[256] Judge Alito wrote, "Because the [p]olicy's 'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics . . . [or] 'core' political and religious speech

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[250] Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 651 (5th Cir. 2012).

[251] 526 U.S. 629, 636 (1999).

[252] *See* DiBlasio, *supra* note 197, at 264.

[253] *See* TENN. CODE ANN. § 49-6-4502(3)(B) (West, Westlaw through 2023 Reg. Sess.); CONN. GEN. STAT. ANN. § 10-222d(a)(6) (West, Westlaw through 2023 Reg. Sess.).

[254] *See Davis*, 526 U.S. at 636.

[255] McDonough, *supra* note 168, at 667.

[256] 240 F.3d 200, 216 (3d Cir. 2001).

. . . ."[257] Certainly, if a policy that utilizes the "hostile environment" language to punish on-campus speech is unconstitutional, any policy which uses the same language to punish off-campus speech is unconstitutional and should be avoided in a constitutional statute.

IV. MODEL STATUTE FOR MISSISSIPPI TO PROTECT AGAINST OFF-CAMPUS CYBERBULLYING

A model statute that empowers schools to limit off-campus cyberbullying must strike a balance between students' First Amendment rights, the rights of all students to receive a free and appropriate public education, and the rights of parents to raise their children in the manner they see fit. But those are not the only factors to consider. As a result of the recent global pandemic, there is not much money to go around, especially for schools in Mississippi. Since the Mississippi Legislature passed the current funding formula for schools in 1996, Mississippi schools have been fully funded twice.[258] It's not that education is not a priority, but since Mississippi has the highest poverty rate of any state in the United States, money is in short supply.[259] The global pandemic only compounded that problem.[260] In addition to money, legislators need to consider the workload any new statute would place upon school staff. The last thing educators need is a lot of statutory changes to make teaching during a socially and emotionally

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[257] *Id.* at 217.

[258] Bracey Harris, *The MAEP Rewrite Is Dead, but the School Funding Fight Is Not. Here's Why*, CLARION-LEDGER, https://www.clarionledger.com/story/news/politics/2018/03/11/mississippi-legislature-kills-rewrite-public-education-funding-still-fight/412247002/ [https://perma.cc/7HFN-NYFD] (Mar. 13, 2018, 10:21 AM).

[259] *Poverty Rate by State 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/poverty-rate-by-state [https://perma.cc/999W-ZVSP] (last visited June 15, 2023). The rate of poverty in Mississippi is 19.26%, followed by Louisiana at 18.56% and New Mexico at 18.06%. *Id.* New Hampshire has the lowest poverty rate at 6.94%. *Id.*

[260] *See* Giacomo Bologna, *Mississippi Dire Outlook: Economist Predicts $1.2B Revenue Loss from Coronavirus Pandemic*, CLARION-LEDGER, https://www.clarionledger.com/story/news/politics/2020/05/26/mississippi-coronavirus-state-could-lose-1-2-billion-revenue/5258817002/ [https://perma.cc/QPZ5-SRXS] (May 26, 2020, 4:32 PM).

tumultuous time more difficult.[261] The statutory amendment suggested in this Comment is not the most ambitious, but it comes at little-to-no cost and requires little extra work on the part of teachers and administrators, which makes it the perfect change for this tumultuous time.

Effective anti-cyberbullying legislation should incorporate language that is narrowly tailored and is widely accepted as constitutional. Statutes from other states are not always the best indicators of constitutional legislation. For example, the South Dakota statute which allows schools to punish any kind of bullying, cyber or otherwise, anywhere it occurs is incredibly broad.[262] For that reason, it is not a statute Mississippi should emulate because the statute would not withstand constitutional scrutiny. Other statutes, like the Connecticut, Massachusetts, and Tennessee statutes, include some variation of the "hostile educational environment" language.[263] Since that language is incredibly broad and has no precedent in circuit courts or the U.S. Supreme Court as it relates to off-campus cyberbullying,[264] it is best to avoid. Finally, the Mississippi Legislature should not include *Tinker*'s "rights of others" language because it is not language that exists independently in case law.[265] However, federal courts, both the circuit courts and the Supreme Court, are clear that *Tinker*'s "materially and substantially disrupt[ive]" language,[266] "true threats" from *Black*,[267] and "serious or severe bullying or harassment targeting particular individuals" from *Mahanoy*[268] are constitutional and have been successfully applied in decisions about off-campus student speech.

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[261] *See* Madeline Will, *As Teacher Morale Hits a New Low, Schools Look for Ways to Give Breaks, Restoration*, EDUC. WEEK (Jan. 6, 2021), https://www.edweek.org/leadership/as-teacher-morale-hits-a-new-low-schools-look-for-ways-to-give-breaks-restoration/2021/01 [https://perma.cc/E7WA-UTNX].

[262] *See* S.D. CODIFIED LAWS § 13-32-18 (Westlaw through 2023 Reg. Sess.).

[263] CONN. GEN. STAT. ANN. § 10-222d(a)(6) (West, Westlaw through 2023 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 71, § 37O(a) (West, Westlaw through ch. 6 of 2023 First Ann. Sess.); TENN. CODE ANN. § 49-6-4502(3)(B) (West, Westlaw through 2023 Reg. Sess.).

[264] *See* discussion *supra* Section III.E.

[265] *See* discussion *supra* Section III.D.

[266] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[267] Virginia v. Black, 538 U.S. 343, 359 (2003).

[268] Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

As examined in Part II *supra*, there are many ways schools can effectively combat cyberbullying. Currently, legislation in Mississippi covers some, but not all, of those ways. Notably, section 37-11-69 of the Mississippi Code requires schools to implement a comprehensive plan directed to combat bullying.[269] The plan must include ways to notify parents of both the bullied and the bullies, requires school districts to hold students who are bullies accountable, and requires schools to offer counseling options to the bullies, the bullied, and the bystanders.[270] Additionally, the *2018 Mississippi College- and Career-Readiness Standards for Computer Science* requires computer education in "the fundamentals of digital citizenship and appropriate use of digital media," which teaches students empathy in the online universe.[271] All of these policies are excellent ways to deal with cyberbullying in schools. However, legislation in Mississippi is missing one thing to round out a truly comprehensive statutory scheme: policies to combat off-campus cyberbullying.

First, the statute should specify that off-campus cyberbullying can only be punished by the school when cyberbullying: (1) creates a material and substantial disruption; (2) is a true threat; or (3) constitutes "serious or severe bullying or harassment" targeted at particular individuals. These terms must be defined so that zealous school administrators do not use the language to infringe on the rights of students in the guise of protecting the rights of others. To include anything less in the statute would not provide schools adequate guidance to protect the First Amendment rights of students and would call the statute's constitutionality into question. This Comment proposes the Mississippi Legislature amend section 37-11-67 of the Mississippi Code to include two new subsections after subsection (1) that state:

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[269] MISS. CODE ANN. § 37-11-69 (West, Westlaw through 2023 Reg. Sess.).

[270] *See id.*

[271] Carey M. Wright et al., *2018 Mississippi College- and Career-Readiness Standards for Computer Science*, MISS. DEP'T OF EDUC. 15, https://www.mdek12.org/sites/default/files/Offices/MDE/OAE/SEC/2018_MCCRS_CS.pdf [https://perma.cc/7B5M-FV7D] (last visited June 15, 2023).

> (2) As used in this section, "bullying or harassing behavior" also means any form of electronic communication or electronic act that occurs off-campus and that:
>
> (a) Communicates any threat directed at a student or school employee so that a reasonable person would believe the speaker intends to harm someone;
>
> (b) Creates a material and substantial disruption in the orderly operation of the public school or educational environment as defined in this section; or
>
> (c) Constitutes serious or severe bullying or harassment targeted at particular individuals.
>
> (3) As used in this section, "material and substantial disruption" means without limitation that any one (1) or more of the following occur as a result of the cyberbullying:
>
> (a) Necessary cessation of instruction or educational activities for a considerable amount of time;
>
> (b) Severe or repetitive disciplinary measures are needed in the classroom or during educational activities; or
>
> (c) Exhibition of other behaviors by students or educational staff that substantially interfere with the learning environment.[272]

The proposed amendment covers and defines the legally allowable "materially and substantially disrupt[ive]" language from *Tinker*, the "true threat" standard from *Black*, and the "serious or severe bullying or harassment" language from *Mahanoy* while fitting seamlessly into the existing statute.

The addition of off-campus cyberbullying protections will empower school leaders to protect students, teachers, and the learning environment from bullies. The statute will also allow schools to hold cyberbullies accountable when their actions threaten the sanctity of the learning environment, even when those actions occur off-campus. Further, the simple additions come at no

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[272] This language was inspired by ARK. CODE ANN. § 6-18-514(b)(3), (b)(6) (West, Westlaw through 2023 Reg. Sess.).

cost to the taxpayer and with no extra regulations or stipulations to burden schools. It is a win for schools who are empowered to protect the learning environment without quashing the rights of students, a win for the taxpayers who bear no extra burden to implement the statute, and a win for the overworked teachers in the state.

CONCLUSION

At the moment, Mississippi's statutory scheme contains fairly comprehensive anti-bullying legislation that protects students at school from the conduct of bullies. Still, the existing statutes do little to protect students from the emotional and physical toll off-campus cyberbullying takes on them. In the absence of clear U.S. Supreme Court leadership on the issue, Mississippi needs to take a stand to protect its students by implementing a statute that empowers school officials to address off-campus cyberbullying in a legal way. The surefire legal way to address the problem is to carefully craft a narrowly tailored statute that encumbers no more speech than is necessary to protect the school learning environment. Working together, schools, parents, and students, led by the Mississippi Legislature, can prevent the spread of cyberbullying and protect the children of Mississippi.