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REGULATING STUDENT CYBERBULLYING

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INTRODUCTION

Cyberbullying is at the forefront of the public conscience.[1] Americans read about it, blog about it, and mourn about it.[2] It is bad for the cyberbullies and those being victimized; it is bad for the families and friends of the bully and the victim; and it is bad for K-12 schools, that as of now are left with little to no recourse against cyberbullies.[3] Until the Supreme Court of the United States hears a student cyberbullying case and differentiates cyberbullying from forms of protected expression, as it did with traditional bullying[4] and hate speech,[5] cyberbullied students will remain defenseless.[6] Thus, cyberbullying is a problem that prompts an important question: to what extent does the constitutional framework allow schools to address cyberbullying through censorship?

Answering this question requires an understanding of current student speech jurisprudence.[7] As a general rule, student speech is protected. However, there are exceptions to this rule. The first exceptions were laid out in *Tinker v. Des Moines Independent Community School District*.[8] The *Tinker* Court held that schools may censor student speech that "materially and substantially" disrupts school

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[1] Janice D'Arcy, *Combating Cyber Bullying and Technology's Downside*, WASH. POST (Sept. 21, 2011, 1:17 PM), http://www.washingtonpost.com/blogs/on-parenting/post/combatting-cyber-bullying-and-technologys-downside/2011/09/18/gIQAYnUNlK_blog.html; Gregg MacDonald, *Cyber-bullying Defies Traditional School Bully Stereotype*, WASH. POST (Sept. 2, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/01/AR2010090102648.html; Donna St. George, *Cyber-bullying Linked to Spike in Depression*, WASH. POST (Sept. 21, 2012), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/20/AR2010092006150.html.

[2] Emily Friedman, *Tyler Clementi's Family Hopes Son's Death Will Serve As Call for Compassion*, ABC NEWS (Oct. 2, 2010), http://abcnews.go.com/US/rutgers-campus-mourns-loss-18-year-tyler-tyler/story?id=11782324#.UFjTbo7fawo; Sameer Hinduja, *Teens and Techology, School District Policy Issues, 2012-2013*, CYBERBULLYING RES. CENTER BLOG (Sept. 7, 2012, 9:34 PM), http://cyberbullying.us/blog/; Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES (June 27, 2010), http://www.nytimes.com/2010/06/28/style/28bully.html?pagewanted=all.

[3] Sameer Hinduja, *Cyberbullying Laws and School Policy: A Blessing or Curse?*, CYBERBULLYING RES. CENTER BLOG (Sept. 28, 2010, 4:23 PM), http://cyberbullying.us/blog/ (discussing the need for a prescriptive solution for "how" and "when" schools can deal with incidents of cyberbullying).

[4] Traditional bullying remains under the protective umbrella of the First Amendment so long as it does not constitute low value, unprotected speech, such as fighting words and obscenity. *See infra* Part III.

[5] The first hate crime case to reach the Supreme court was *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Here, a group of teenagers burned a makeshift cross in an African American family's yard. *Id.* at 379. One of the teenagers was prosecuted under a city hate crime ordinance. *Id.* at 380–81. The court struck down the restriction as constitutionally impermissible content discrimination in violation of the First Amendment. *Id.* at 391.

[6] This Article does not concede that cyberbullying is a form of expression. Rather, the word "expression" is used for consistency with language found in case law.

[7] *See infra* Part I.A–B.

[8] 393 U.S. 503 (1969).

activities[9] and speech that "impinge[s] upon the rights of other students."[10] Cases following *Tinker* carved out additional exceptions for offensive sexual innuendo,[11] school-sponsored speech,[12] and speech that promotes drug use.[13] These existing exceptions are, however, under-inclusive. Although some cyberbullying falls within these categories, most cyberbullying does not.[14] These limited categories fail to create an exception for another type of low value speech: cyberbullying. Accordingly, this Article argues that the Supreme Court, to protect students and schools, should create a categorical exception for cyberbullying as it has done in the past for other categories of low value speech.[15]

At opposite ends of the speech spectrum are high and low value speech.[16] High value speech receives First Amendment protection, while low value speech does not.[17] Determining whether speech is high or low value is not an easy task.[18] However, First Amendment theory provides various justifications for categorizing speech as high value as opposed to low value. High value speech typically comports with at least one of four major theoretical bases used to identify speech deserving

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[9] *Id.* at 509.
[10] *Id.*
[11] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[12] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).
[13] Morse v. Frederick, 551 U.S. 393, 410 (2007).
[14] The failure of cyberbullying to to manifest into a substantial disruption will be discussed in Part I.C.
[15] The Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), mentioned such categories:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571–72.
[16] Jeffrey M. Shaman, *The Theory of Low-Value Speech,* 48 SMU L. REV. 297, 301–17 (1995) (discussing various categories under the low value speech theory, including obscenity, child pornography, and libel). There are some forms of speech, such as commercial speech, that fall in the middle of this speech spectrum and receive lesser First Amendment protection, *id.* at 317–18, but that is beyond the scope of this Article.
[17] There are certain limited classes of speech that do not receive First Amendment protection: low value speech. *See supra* note 15 and accompanying text.
[18] *See* discussion *infra* Part III.B.

of First Amendment protection. These four bases are (1) the promotion of democratic self-government,[19] (2) the search for truth in the marketplace of ideas,[20] (3) the promotion of autonomy and self-fulfillment, and (4) the so-called "safety valve" for social pressure.[21] This Article argues that cyberbullying should be a category of low value speech subject to no First Amendment protection because it cannot be justified by any of the four theoretical bases; even if it could be justified, any social value added by cyberbullying would be negated by the harm it causes.

This Article proceeds in four Parts. Part I provides an overview of Supreme Court student speech jurisprudence. Part I also discusses the more recent, and presently sparse, set of lower court cases regarding student cyberspeech originating off campus that has been directed at another student. Part II defines and provides a social context for the cyberbullying phenomenon and explains the dynamics of cyberbullying. Part III explains what constitutes low value speech and then explores how various theoretical frameworks all support the idea that cyberbullying is low value speech. Part III also contends that even if cyberbullying has some value, the severe harm caused by cyberbullying outweighs the benefit of protecting such expression under the First Amendment. Therefore, the Supreme Court should recognize cyberbullying as the newest category of low value

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[19] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT ch. IV (Harper & Brothers 1948); KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 21 (NYU Press 2003). Alexander Meiklejohn's view that freedom of speech and press enables us to live in a democratic system of self-government has been essential in determining the value of various categories of speech. *See* Shaman, *supra* note 16, at 333 (citing Meiklejohn, *supra*).

[20] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881–82 (1963). Justice Holmes articulated this theory in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), when he wrote:

> [T]he ultimate good desired is better reached by free trade in ideas[,] . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which [men's] wishes safely can be carried out.

Id. at 630 (Holmes, J., dissenting).

[21] "The individual-self-fulfillment theory grounds freedom of expression in the 'widely accepted premise of Western thought that the proper end of man is the realization of his character and his potentialities as a human being.' " Julia K. Wood, Note, *Truth, Lies, and Stolen Valor: A Case for Protecting False Statements of Fact Under the First Amendment*, 61 DUKE L.J. 469, 476; *see* RODNEY A. SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 1:1–:2, :7, :11 (2010) ("There is precious little record of what freedom of speech and the press really meant to the framers.").

speech. Lastly, Part IV provides a proposed legal test for cyberbullying and hypotheticals illustrating examples of when expression does and does not rise to the level of cyberbullying under this test.

I. THE CURRENT STATE OF THE LAW

For the purpose of this Article, student speech comes in two forms: speech on campus and off campus. Four Supreme Court opinions lay the framework for regulating student speech originating on campus.[22] These cases allow schools to regulate speech that "materially and substantially" disrupts school activities or speech that "impinge[s] upon the rights of other students;"[23] speech that is vulgar or plainly offensive;[24] speech that is related to the school's pedagogical goal;[25] and speech that promotes illegal drug use.[26] The other, newer aspect of student speech jurisprudence consists of student cyberspeech cases from lower courts where student speech originates off campus, yet impacts students on campus.[27] The disparate holdings from lower courts leave this aspect of student speech jurisprudence unclear and difficult for schools to apply, particularly as lower courts continue trying to use tests created for on-campus speech to regulate off-campus speech.

A. Exceptions to Student Freedom of Speech

The cases discussed in this section represent the framework established by the Supreme Court to decide whether a school may regulate student expression that originates on campus.[28]

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[22] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (establishing the "substantial disruption" test); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (establishing that speech on campus ridden with sexual innuendo does not receive First Amendment protection); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (establishing that schools may censor school-sponsored speech); Morse v. Frederick, 551 U.S. 393, 410 (2007) (establishing that schools may censor speech promoting illegal drug use).
[23] *Tinker*, 393 U.S. at 509.
[24] *Fraser*, 478 U.S. at 683–84.
[25] *Hazelwood*, 484 U.S. at 273.
[26] *Morse*, 551 U.S. at 410.
[27] *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010).
[28] This line of cases emphasizes the important principle that "students in public schools simply do not enjoy the same level of constitutional rights as adults due to the special characteristics of the school environment." Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1050–51 (2008) (internal quotation marks omitted).

Tinker,[29] the Supreme Court's first decision concerning student expression, stands for the proposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[30] However, *Tinker* also created two exceptions to this general rule.

In 1969, three public school students in Des Moines, Iowa, wore black armbands to school as a silent protest against the Vietnam War.[31] Students sued the school after being suspended.[32] In this seminal case on student expression, the *Tinker* Court set out a test for when schools may constitutionally censor student expression. The *Tinker* test creates two exceptions to the general rule that student speech receives First Amendment protection. The Court held that student speech may not be suppressed unless the school reasonably determines that the expression will (1) "materially and substantially" disrupt school activities[33] or that the speech (2) "impinge[s] upon the rights of other students."[34] Cases following *Tinker* have created additional exceptions to the general rule of speech protection.

Seventeen years after *Tinker*, in *Bethel School District No. 403 v. Fraser*,[35] the Court created the next exception to protection of student speech. Student Matthew Fraser made a campaign speech ridden with sexual innuendo.[36] The school suspended Fraser.[37] He then sued the school, alleging that his suspension and subsequent removal from the list of commencement speakers infringed upon his First Amendment right to free speech.[38] The Court held that schools may regulate the manner of

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[29] 393 U.S. 503 (1969).
[30] *Id.* at 506.
[31] *Id.* at 504.
[32] *Id.*
[33] *Id.* at 513. For the purposes of the Article, the first *Tinker* exception will be referred to as the substantial disruption exception.
[34] *Id.* at 509. For the purposes of the Article, the second *Tinker* exception will be referred to as the rights of others exception.
[35] 478 U.S. 675 (1986).
[36] *Id.* at 678.
[37] *Id.*
[38] *Id.* at 679.

student communication,[39] particularly where speech is vulgar or plainly offensive.[40] *Fraser* created an exception to speech protection that goes beyond the exceptions developed in *Tinker* as the Court here articulated a different set of circumstances determining when student speech is given less protection.

Two years later in *Hazelwood School District v. Kuhlmeier*,[41] the school principal censored portions of the school newspaper discussing divorces and teenage pregnancy. Student newspaper staff members sued the school for infringement of their First Amendment right to free speech. With *Hazelwood*, the Court created an exception for school-sponsored speech. The Court held that because schools are entitled to exercise control over school-sponsored speech, schools may censor speech so long as their actions are reasonably related to pedagogical goals.[42] Again, *Hazelwood* created an additional exception to protection of student speech because the Court articulated additional circumstances when schools may constitutionally censor student expression.

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[39] *Id.* at 683. Chief Justice Burger provided the following rationale:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

Id. at 683 (internal citation marks and footnotes omitted).
[40] *Id.* at 683–85; *see also* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469–70 (6th Cir. 2000) (noting that the Marilyn Manson T-shirt worn by Boroff was offensive).
[41] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[42] *Id.* at 272–73 (1988). The Court explained:

> [W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id.

Most recently, in 2007, the Court dealt with the infamous "BONG HiTS 4 JESUS" case,[43] where high school senior Joseph Frederick unfurled a banner with such language during the Olympic Torch Relay as it passed by his school.[44] Although this form of student speech occurred across the street from the school, the Court held that a school may restrict student speech that is reasonably regarded as promoting illegal drug use.[45] The Court articulated a difference between this case and *Fraser*, providing yet another exception to student speech protection by noting that "the concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."[46]

Tinker and its progeny—*Fraser*, *Hazelwood*, and *Morse*—address speech originating on or near school grounds. Each case following *Tinker* added an additional set of circumstances where student speech is given less protection, allowing for school regulation of said speech. This jurisprudence is both robust and informative for school administrators and courts. However, avenues for student expression are evolving as a result of the Internet, cell phones, and an overall increase in social media capability. With the increase in technology, lower courts are facing new student expression issues and challenges.

B. Student Cyberspeech Cases

There are two lines of student speech cases: student speech directed at other students and student speech directed at teachers and administrators. This Article focuses solely on cases where student cyberspeech[47] is directed at other students[48] because students suffer unique harms,[49] making

[43] Morse v. Frederick, 551 U.S. 393 (2007).
[44] *Id.* at 397.
[45] *Id.* at 409–10.
[46] *Id.* at 409.
[47] For the purpose of this Article, "cyberspeech" is speech originating off campus through use of the Internet, cell phones, or other social media devices.
[48] Lower courts have decided two different categories of student cyberspeech cases: (1) student cyberspeech directed at school administrators and teachers, *see, e.g.*, Wisniewski v. Bd. of Educ., 494 F.3d 34, 35 (2d Cir. 2007); Doninger v. Niehoff, 514 F. Supp. 2d 199, 220 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008); Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 504–05 (W.D. Pa. 2006); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850–51 (Pa. 2002), and

them particularly vulnerable to cyberspeech attacks. As such, the phrase "student cyberspeech" will be used as shorthand for student cyberspeech directed at other students. As a general matter, there is a difference between student speech originating on campus that creates a substantial disruption and student speech originating off campus that constitutes cyberbullying.[50] However, the same legal test—the *Tinker* substantial disruption exception—is currently applied to each of these different situations. Courts analyze student speech, whether created on or off campus, in accordance with *Tinker*.[51] This is problematic for reasons explored in this section.

In 2010, a California District Court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,[52] heard a case where the student speech originated off campus. A student videotaped an off-campus conversation between classmates who made derogatory comments about another classmate.[53] This student then posted the video on YouTube.[54] After the student was suspended for her activity, she filed suit claiming that the school had no authority to discipline her for conduct occurring entirely outside of school.[55] Applying *Tinker's* substantial disruption exception,[56] the court held that the school administration had authority to discipline students for off-campus speech if such speech caused a substantial disruption at school.[57] Because the school district could not show that the video

(2) student cyberspeech directed at other students, *see, e.g.*, Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567–69 (4th Cir. 2011); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098–99 (C.D. Cal. 2010).

[49] *See infra* Part II.

[50] *See infra* Part I.C.

[51] *See, e.g.*, Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075–76 (5th Cir. 1973); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1392 (D. Minn. 1987); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 521–22 (C.D. Cal. 1969); Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 283–88 (Or. Ct. App. 2000). More recent cases have continued this trend. *See, e.g.*, *Kowalski*, 652 F.3d at 571–74; *Beverly Hills Unified*, 711 F. Supp. 2d at 1100–23.

[52] 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

[53] *Id.* at 1108.

[54] *Id.* at 1098.

[55] *Id.* at 1100.

[56] *Id.* at 1117–22.

[57] *Id.*

the student posted caused a substantial disruption at school, the school district violated the student's First Amendment rights by suspending her after she posted the video on YouTube.[58]

One year later, the Fourth Circuit held just the opposite in *Kowalski v. Berkeley County Schools*.[59] High school senior Kara Kowalski was suspended for five days after creating and posting to MySpace.com a webpage called "S.A.S.H." ("Students Against Shay's Herpes").[60] Shay N. was another student at the high school.[61] The Fourth Circuit held that the school was authorized to discipline Kowalski because (1) "the nexus of . . . [her] speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being,"[62] (2) "the speech was materially and substantially disruptive in that it interfer[ed] . . . with the school's work [and] colli[ded] with the rights of other students to be secure and to be let alone,"[63] and (3) it was foreseeable that her conduct would reach the school.[64] Prongs one and three serve as a threshold question: whether the school can regulate the speech originating off campus in the first place. Once the threshold question is answered in the affirmative, the next question is whether the school regulated the speech in a manner consistent with the First Amendment. As it stands, when speech is the type of speech that schools may regulate, schools may constitutionally regulate in accordance with the exceptions laid out in *Tinker* and its progeny. Here, the court explained that "schools have a duty to protect their

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[58] *Id.*
[59] 652 F.3d 565 (4th Cir. 2011).
[60] *Id.* at 567.
[61] *Id.*
[62] *Id.* at 573. "[T]he language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying." *Id.* at 572 (citing DeJohn v. Temple Univ., 537 F.3d 301, 319–20 (3d Cir. 2008)).
[63] *Id.* at 573–74 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969) (internal quotation marks omitted)).
[64] *Id.* at 574. The *Kowalski* court explained that "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this CONDUCT would foreseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus." *Id.* at 574 (quoting Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) (interal citations omitted)).

students from harassment and bullying in the school environment"[65] and "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."[66]

As the cases illustrate, student cyberspeech jurisprudence is both limited and lacking in uniformity, providing little direction to lower courts and school administrators in the absence of a Supreme Court ruling. When lower courts are tasked with deciding whether schools constitutionally regulated student speech originating off campus, it appears that lower courts take either a one-step or two-step approach.[67] Courts utilizing the one-step approach address only the substantive question: whether the school's regulation of student expression is constitutional.[68] Here, courts apply *Tinker* and its progeny to decide if the manner of regulation is constitutional.[69] The two-step

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[65] *Kowalski*, 652 F.3d at 572 ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." (citing Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007))).

[66] *Id.* at 572.

[67] The court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District,* 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010), explained the various approaches lower courts have taken when tasked with deciding whether schools constitutinally regulated student cyberspeech:

> First, the majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means. The end result established by these cases is that any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school. Second, some courts will apply the Supreme Court's student speech precedents, including *Tinker*, only where there is a sufficient nexus between the off-campus speech and the school. It is unclear, however, when such a nexus exists. The Second Circuit has held that a sufficient nexus exists where it is "reasonably foreseeable" that the speech would reach campus. The mere fact that the speech was brought on campus may or may not be sufficient. Third, in unique cases where the speaker took specific efforts to keep the speech off campus . . . , or clearly did not intend the speech to reach campus and publicized it in such a manner that it was unlikely to do so . . . , the student speech precedents likely should not apply. In these latter scenarios, school officials have no authority, beyond the general principles governing speech in a public arena, to regulate such speech.

Id. at 1107.

[68] *Id.* at 1115 ("[T]he Court must consider whether the school's decision to discipline is based on *evidence* or *facts* indicating a foreseeable risk of disruption, rather than undifferentiated fears or mere disapproval of the speech."). In *Beussink v. Woodland R-IV School District*, 30 F. Supp. 2d 1175, 1180–82 (E.D. Mo. 1998), the court granted a preliminary injunction for the student because the principal disciplined based on his emotions rather than any actual disruption caused by the speech.

[69] Determining whether the speech is linked to the school for the purposes of regulating such speech depends on whether there are specific facts that could reasonably lead school officials to forecast disruption. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

approach begins with a threshold question: is the speech specifically linked to the school? If answered in the affirmative, the two-step courts apply *Tinker* and its progeny to determine the substantive question of whether the regulation was constitutional.[70] The one-step and two-step approaches taken by courts are important only for purposes of clarity and by way of background. Accordingly, this Article is not concerned with the route courts take to ultimately apply *Tinker* and its progeny. Rather, this Article is only concerned that courts are applying *Tinker* and its progeny to determine whether a school's regulation of off-campus speech was done in a constitutional manner. And, perhaps most importantly, this Article seeks to illustrate how the *Tinker* line of cases falters when courts apply it to cases involving cyberbullying because cyberbullying is not correctly subject to school regulation under this framework.

C. Tinker's *Poor Fit in the Cyberbullying Context*

Courts were presented with harms associated with student speech originating on campus before they were presented with harms associated with student speech originating off campus.[71] In response to speech originating on campus, the Court in *Tinker* and in cases thereafter created exceptions to the general rule that student speech is protected under the First Amendment. These exceptions suggest that some student speech does not warrant First Amendment protection. Although these exceptions have proven useful in allowing schools to regulate certain student speech originating on campus, these exceptions do little to aid against harmful student speech that originates off campus but nonetheless affects other students at school.

Tinker and its progeny lack utility when applied in cases where student speech originates off campus because this speech is different than student speech that originates on campus. Student

[70] Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 721 (2012) ("In its student speech cases, the Supreme Court has created one governing standard (Tinker) and carved out three limited exceptions, none of which requires a campus presence for school disciplinary authority.").
[71] *Tinker*, along with the cases that carved out further exceptions to First Amendment protection, dealt with student expression and actions on or near campus. *See supra* note 22 and accompanying text.

speech on campus is immediate and within the control of school administrators at inception. By contrast, student cyberspeech is created, or at least disseminated, through use of the Internet and has the ability to reach far larger audiences for longer, potentially infinite, periods of time.[72] Teachers and other school administrators may not be able to see this harm in the same way that they see a fight break out in the hallway or a banner unfurl with language promoting the use of drugs.

More specifically, *Tinker's* substantial disruption exception was created to allow schools to regulate student expression originating on campus that caused a substantial disruption.[73] The substantial disruption exception allowed schools to regulate student speech that was otherwise protected by the First Amendment. As courts have interpreted *Tinker* over time and expanded a school's right to regulate student expression, geographic boundaries generally carry little weight in the student-speech analysis where there exists a foreseeable risk of substantial disruption.[74] Accordingly, when student speech originates off campus and there exists a foreseeable risk of a substantial disruption, discipline for such speech is permissible under *Tinker*.

Assuming that geographic boundaries carry little weight in the student-speech analysis and that the *Tinker* substantial disruption exception does reach some speech originating off campus, the *Tinker* exception still fails to address cyberbullying because cyberbullying is a form of bullying that does not fit into the existing substantial disruption framework. According to the *Tinker* Court, a school can regulate student speech if such speech "materially and substantially disrupt[s] the work and discipline of the school."[75] Moreover, under *Tinker*, school authorities are not required to wait until an actual disruption occurs. Rather, if school authorities can "reasonably portend disruption" in

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[72] *See infra* Part II.

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

[74] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010) ("[W]e hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption . . . need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*." (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010))); *see* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (explaining that "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*").

[75] *Tinker*, 393 U.S. at 513.

light of the situation, regulation of student expression is permissible.[76] However, because the substantial disruption inquiry is highly fact-intensive, the law has yet to provide clear guidelines as to what constitutes a substantial disruption.[77] The court in *J.S. v. Bethlehem Area School District*[78] articulated the vagueness of this concept when it described substantial disruption as requiring "more than some mild distraction or curiosity created by the speech" but less than "complete chaos."[79]

As courts continue to apply *Tinker* to speech that originates off campus, the victims of cyberbullying will continue to be harmed. *Tinker's* substantial disruption protection is under-protective because most cyberbullying does not rise to the level of a substantial disruption. Often the effects of cyberbullying on victims do not manifest in a school-wide or even small-classroom disruption or fight. Rather, cyberbullying often produces a more quiet, internal struggle on the part of the victim, sometimes manifested by the victim's low self-esteem, isolation, and suicide.[80] In addition to being generally detrimental to the victim, cyberbullying, more specifically, is an insidious obstruction to the victim's education. The pervasive and invasive nature of cyberbullying leaves the victim forever tormented, distracted, and feeling unsafe:[81] an experience distinct from a single, isolated event at school falling under the *Tinker* substantial disruption exception. Because it is highly

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[76] *Id.*; LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).
[77] *Beverly Hills Unified*, 711 F. Supp. 2d at 1111. "A substantial disruption requires something more than a 'mild distraction or curiosity created by the speech' but need not rise to the level of 'complete chaos.' " *Id.* (quoting J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002)).
[78] 807 A.2d 847 (Pa. 2002).
[79] *Id.* at 868.
[80] *See Cyberbullying, Human Rights and Bystanders*, AUSTRALIAN HUM. RTS. COMM'N, http://www.hreoc.gov.au/bullying/cyberbullying/impacts.html (last visited Sept. 19, 2012). In the United States, teenagers like Kylie Kenney, Phoebe Prince, and Ryan Halligan were cyberbullied—in some cases, to death. *See* Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law*, SLATE (Apr. 30, 2010, 4:13 PM), http://www.slate.com/id/2252543/; Suzanne Struglinski, *Schoolyard Bullying Has Gone High-Tech*, DESERET NEWS (Aug.18, 2006), http://www.deseretnews.com/article/645194065/Schoolyard-bullying-has-gone high-tech.html; *If We Only Knew, If He Only Told Us,* RYAN'S STORY, www.ryanpatrickhalligan.org (last visited Sept. 19, 2012).
[81] *See Cyberbullying, Human Rights and Bystanders*, *supra* note 80 (noting that among the many detrimental effects of cyberbullying, victims may feel unsafe and experience a lack of concentration and learning difficulties); *see also Cyberbullying: Understanding and Addressing Online Cruelty*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/education/curriculum_connections/cyberbullying/ (last visited Sept. 19, 2012) ("[C]yberbullying messages can be circulated far and wide in an instant and are usually irrevocable; cyberbullying is ubiquitous—there is no refuge and victimization can be relentless; and cyberbullying is often anonymous and can rapidly swell as countless and unknown others join in on 'the fun.' ").

unlikely that cyberbullying would ever rise to the *Tinker* level of a substantial disruption, schools remain incapable of constitutionally regulating this form of bullying so long as *Tinker* is applied in the cyberbullying context.

Critics of this Article may argue that *Tinker* does adequately aid against cyberbullying based on the extended application of *Tinker* to student expression originating off campus. When courts have been tasked with deciding whether schools may regulate student speech originating off campus, it has been held that *Tinker* allows schools to regulate such expression before it rises to a substantial disruption at school so long as the forecast of substantial disruption is reasonable.[82] But, even an extended application of *Tinker* cannot aid against cyberbullying because of the inherent difference in how cyberbullying is manifested and what constitutes a substantial disruption. Cyberbullying is not merely a foreseeable reality; it is a current reality for many students,[83] which infringes upon their right to feel safe at school.[84] If a court were to use the extended application of *Tinker* to reach a holding that the school could regulate cyberbullying, this would hardly constitute a win for victims of cyberbullying, as the court would be missing the point that cyberbulling is very much a reality at

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[82] Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding that Tinker does not require "actual disruption to justify a restraint on student speech"); Lowery v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007) ("Tinker does not require school officials to wait until the horse has left the barn before closing the door . . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable."); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("Tinker does not require school officials to wait until disruption actually occurs before they may act.").

[83] Nearly twenty percent of young people have reported experiencing cyberbullying in their lifetimes. *Cyberbullying: Understanding and Addressing Online Cruelty*, *supra* note 81.

[84] *See* Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: Identification, Prevention, and Response,* CYBERBULLYING RES. CENTER (2012), *available at* http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf. Sameer Hinduja, Ph.D., is an Associate Professor at Florida Atlantic University and Justin W. Patchin, Ph.D., is an Associate Professor at the University of Wisconsin-Eau Claire. In a recent study, Hinduja and Patchin found that cyberbullying impacts a student's educational experience:

> One of our recent studies found that students who experienced cyberbullying (both those who were victims and those who admitted to cyberbullying others) perceived a poorer climate at their school than those who had not experienced cyberbullying. Youth were asked whether they "enjoy going to school," "feel safe at school," "feel that teachers at their school really try to help them succeed," and "feel that teachers at their school care about them." Those who admitted to cyberbullying others or who were the target of cyberbullying were less likely to agree with those statements.

Id. at 4.

school causing student victims great distress. The inapplicability of *Tinker* and its extended application in the cyberbullying context begs the question: to what extent does our constitutional framework allow schools to address cyberbullying by censoring this form of bullying? The *Tinker* line of cases provides several answers: it limits how school teachers and school boards may regulate student speech and it limits what legislatures can do in passing cyberbullying laws. Because *Tinker* is the law, *Tinker* restricts any attempt to mitigate the cyberbullying problem. Hence, in order to provide cyberbullied victims with constitutional protection, the Court must move beyond *Tinker* and its progeny and apply a new test.

Just as schools may regulate certain on-campus student speech to aid against substantial disruptions,[85] sexual innuendo during school assemblies,[86] and banners promoting illegal drug use,[87] schools should be allowed to regulate certain off-campus student speech—cyberbullying—without running afoul of the First Amendment. This Article seeks to articulate and convey the necessity of a new test that allows schools to censor harmful cyberspeech even when such cyberspeech would be permissible under *Tinker* and its progeny.

II. CYBERBULLYING: A UNIQUE FORM OF BULLYING

Child bullies are hardly unique to the twenty-first century. However, with advanced technological capabilities available to nearly everyone, including children, child bullies are now capable of bullying their peers more intensely. The Internet, now available not only on home computers but also on phones and other digital devices, has become the modern bully's new playground. Advanced bullying capabilities have created new bullies—cyberbullies. Before determining when schools may regulate cyberbullying, it is important to understand what constitutes cyberbullying and the differences between this type of bullying and traditional bullying.

[85] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
[86] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[87] Morse v. Frederick, 551 U.S. 393, 410 (2007).

Although the definition of cyberbullying is not completely settled,[88] cyberbullying is generally understood socially as willful and repeated harm from one student to another inflicted through the use of computers, cell phones, and other electronic devices.[89] Although cyberbullying includes the word "bullying," the acts and effects of cyberbullying are quite different from traditional bullying. Cyberbullying differs from traditional bullying in at least three ways.[90]

First, cyberbullies can attack anonymously.[91] Before advances in technology, bullies could not hide behind a cloak of anonymity: bullying required a face-to-face interaction. But, not anymore. Today, bullies can hide behind virtual identities as they bully their victims at any time of day or night.[92] Because the cyberbully is not physically present with the victim, he cannot see the impact of his bullying. Whereas an in-person bullying session may end once the bully has inflicted enough pain, the cyberbully's inability to perceive the victim's distress may allow the bully to push further than he may otherwise have in person.[93] The lack of face-to-face contact also makes the cyberbully less aware of the consequences of his actions and, therefore, less likely to stop cyberbullying.[94]

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[88] *See, e.g.*, *What Is Cyberbullying*, STOPBULLYING.GOV, http://www.stopbullying.gov/cyberbullying/what-is-it/index.html (last visited Sept. 19, 2012) ("Cyberbullying is bullying that takes place using electronic technology. Electronic technology includes devices and equipment such as cell phones, computers, and tablets as well as communication tools including social media sites, text messages, chat, and websites."); *What Is Cyberbullying*, VIOLENCE PREVENTION WORKS!, http://www.violencepreventionworks.org/public/cyber_bullying.page (last visited Sept. 19, 2012) ("Cyber bullying is bullying through email, instant messaging (IMing), chat room exchanges, Web site posts, or digital messages or images sent to a cellular phone or personal digital assistant (PDA).").

[89] Hinduja & Patchin, *supra* note 84, at 1; *see also* Karly Zande, Note, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 106 (2009) (defining cyberbullying as "the use of technology to humilate, embarrass, or otherwise bully another"); *What Is Cyberbullying, Exactly?*, STOPCYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Sept. 19, 2012) (" 'Cyberbullying' is when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies or mobile phones. It has to have a minor on both sides, or at least have been instigated by a minor against another minor.").

[90] *See* Hinduja & Patchin, *supra* note 84.

[91] *See id.*

[92] Glenn Stutzky, *Cyberbullying Information* (2006), *available at* http://www.wsd1.org/stanleyknowles/documents/CYBER%20BULLYING%20INFORMATION.pdf. Stutzky, a clinical instructor at Michigan State School of Social Work, describes cyberbullying as more invasive in comparison to traditional bullying, because it is not bound by geography or time: "At the end of a bad day at school a child could find refuge at home, this technology allows the taunts, threats, insults, and rumors [to] follow the child home and have access around the clock." *Id.*

[93] Stuzky explains that cyberbullying lends itself to greater cruelty than traditional bullying: "If I'm bullying you face to face I can see the impact it's having on you, tears coming into your eyes, the lowering of your head, and I might back off

The second difference between cyberbullying and traditional bullying is that cyberbullies have the Internet to increase their audience and, thereby, increase their victims' torment.[95] Whereas a traditional playground bullying session may have included a bully or two, cyberbullies can work in much larger teams because of their bullying forum: the Internet. A large number of cyberbullies from across a school, a city, or even the world, can torment a single victim with the click of a mouse.[96] Also, once the bullying propaganda is uploaded onto the Internet, it is permanently published. Accordingly, a single instance of cyberbullying, including but not limited to online posts or videos, is immediately available for online sharing, liking,[97] and reposting. This makes cyberbullying a potentially endless experience for the victim.[98]

Third, although teachers and parents can readily monitor traditional bullies, they often lack the technological savvy to monitor cyberbullies. Traditional bullying victims can depend on teachers at school or parents at home to intervene and stop the bullying. However, teachers and parents may no longer be able to provide a safe refuge to those students who are cyberbullied. Teachers and parents may not be able to stop cyberbullies because of the complex and subtle nature of cyberbullying.[99] Cyberbullying typically occurs through the Internet or cell phones, so unless victims tell their teachers or parents, the act may go unnoticed.[100] Even if victims do tell teachers or parents,

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and end it . . . [, but] [t]his technology removes me from being able to see the impact of my actions and so lends itself to greater cruelty." *Id.*

94 *See Preventing Cyberbullying in Schools and in the Community*, NAT'L CTR. FOR MENTAL HEALTH PROMOTION AND YOUTH VIOLENCE PREVENTION (2009), http://www.promoteprevent.org/publications/prevention-briefs/preventing-cyberbullying-schools-and-community.

95 *See* Hinduja & Patchin, *supra* note 84.

96 *Id.*

97 Facebook designed the "like" feature as a way for users to give positive feedback to others on the website. By clicking "like" under a post, you can let someone know you enjoyed it without leaving a comment. *See Like*, FACEBOOK, https://www.facebook.com/help/?page=773 (last visited Mar. 9, 2013).

98 *See* Hinduja & Patchin, *supra* note 84.

99 "[M]any adults don't have the technological know-how to keep track of what teens are up to online. As a result, a victim's experience may be missed and a bully's actions may be left unchecked. Even if bullies are identified, many adults find themselves unprepared to adequately respond." Hinduja & Patchin, *supra* note 84.

100 *See supra* note 99.

they may be able to do little to stop the harm. As previously stated, once something is uploaded to the Internet, it is published forever.[101]

Cyberbullying is a distinct phenomenon from traditional bullying. Cyberbullies inflict new and unique harms on their victims. These victims are the impetus for a new legal test to determine when schools may constitutionally regulate cyberbullying.

III. NEW EXPRESSION CAPABILITIES NECESSITATE RECOGNIZING A NEW CATEGORY OF LOW VALUE SPEECH

Today, low value speech includes lewd and obscene speech,[102] libel,[103] and insulting and fighting words.[104] Bullying in the form of hate speech among adults is not in and of itself low value speech.[105] The limited categories of low value speech illustrate that despite the strength of the First Amendment, some speech is beyond protection. Cyberbullying should be deemed the newest category of low value speech. The following sections explain why cyberbullying is low value speech, as it not only fails to comport with any of the four major theoretical bases used to identify high value speech, but it also causes great social harm.

A. Background: Low Value Speech Does Not Receive First Amendment Protection

The Supreme Court has explained that "not all speech is of equal First Amendment importance."[106] In fact, there is a spectrum of speech with high value speech, which warrants First Amendment protection, at one end and low value speech, which warrants no protection, at the other

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[101] *See* Kristi Hagen & Stephen Mahaney, *A Teens Guide to Staying Safe and Being Smart*, WEBPRIVACY.COM (Apr. 29, 2010), http://webprivacy. com/articles/a_teens_guide_to_staying_safe_and_being_smart_online (explaining that once an image, video, or written content becomes popular on the Internet, such as being shared on Internet sites like Facebook and MySpace, there is no way to take the image, video, or written content back).
[102] Roth v. United States, 354 U.S. 476, 486 (1957).
[103] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280–81 (1964).
[104] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[105] The Supreme Court addressed the issue of hate speech in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). After a group of teenagers burned a makeshift cross in an African American family's yard, *id.* at 379, one of the teenagers was prosecuted under a city hate crime ordinance. *Id.* at 380–81. The ordinance prohibited symbols that "arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* The Court held that the ordinance was facially invalid under the First Amendment. *Id.* at 391–96.
[106] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

end. It has been well observed that categories of low value speech receive no First Amendment protection because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[107]

The Supreme Court case *Chaplinsky v. New Hampshire* formed the genesis of low value speech theory.[108] Chaplinsky was convicted for violating the law by denouncing other religions as a "racket"[109] while handing out Jehovah's Witness literature on a busy street in Rochester, New Hampshire.[110] The Supreme Court was tasked with deciding whether Section 2 of Chapter 378 of the Public Laws of New Hampshire[111] contravened the constitutional right of free expression. In reaching its holding that the law was constitutional, the Supreme Court explained that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[112] These "well-defined and narrowly

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[107] *Chaplinsky*, 315 U.S. at 571–72.

[108] *Id.*

[109] The Complaint stated in part that

> appellant, with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists," the same being offensive, derisive and annoying words and names.

Id. at 569 (internal quotation marks omitted).

[110] *Id.* at 569–70.

[111] Chaplinksy was convicted for violation of Section 2 of Chapter 378 of the Public Laws of New Hampshire, which state that

> [n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. at 569.

[112] *Chaplinsky*, 315 U.S. at 571–72.

limited classes of speech,"[113] including lewd and obscene speech,[114] libel,[115] and insulting and fighting words,[116] are now known as low value speech.[117] There are a limited number of categories of low value speech, which is a testament to the strength of First Amendment protection.[118] Accordingly, categorizing speech as "low value" has become one, if not the only, route to circumvent the First Amendment's strong protection of unsavory and harmful expression.[119]

B. Cyberbullying Should Be Deemed Low Value Speech

The implication of categorizing cyberbullying as low value speech is that if student cyberspeech directed at another student rises to the level of cyberbullying, the speech does not trigger First Amendment protection. As a result, schools could constitutionally censor student cyberbullying. Cyberbullying is low value speech that is undeserving of constitutional protection for two reasons. First, cyberbullying is not supported by any of the four leading theoretical bases created by judges and scholars to determine if speech is deserving of First Amendment protection.[120] Second, even if cyberbullying did fit within one of the four theoretical bases, this form of expression is still not deserving of First Amendment protection because of the individualized and concrete harm that such expression causes.[121] The harm of cyberbullying outweighs its value; there is no net value in cyberbullying.

1. Four Leading Theoretical Bases

Scholars and judges have articulated four well-accepted theoretical bases for the First

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[113] *Id.*
[114] Roth v. United States, 354 U.S. 476, 486 (1957).
[115] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280–81 (1964).
[116] *Chaplinsky*, 315 U.S. at 573.
[117] Low value speech simply means that such speech does not receive First Amendment protection.
[118] Unsavory speech protected by the First Amendment includes virtual child pornography. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239–40 (2002). Arguably harmful speech protected by the First Amendment includes hate speech. Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (per curiam).
[119] Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 5 (2008).
[120] For an overview of the lack of history preceding the creation of the First Amendment and lack of guidance provided by the Framers in determining what speech is deserving of First Amendment Protection, see generally LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1960).
[121] Gey, *supra* note 119, at 5.

Amendment's protection of certain forms of speech.[122] Simply put, these four bases are (1) the promotion of democratic self-government,[123] (2) the search for truth in the marketplace of ideas,[124] (3) the promotion of autonomy and self-fulfillment,[125] and (4) the safety-valve theory.[126] The democratic self-government theory suggests that if we the people are the government, then we the people need to exchange ideas as part of our right of citizenship. The First Amendment is important to democratic self-government because it allows citizens to explain their ideas and criticize their government without fear of censorship. However, cyberbullying does not promote democratic self-government because cyberbullying does not allow speakers to engage in decision-making "through a process of open discussion which is available to all members of the community."[127] Rather, cyberbullying stifles open discussion by creating a power differential between the cyberbully and the victim, leaving the victim feeling powerless and silenced.[128] A likely counterargument would be that the best way to stop the silence is to allow for more speech, rather than deeming cyberbullying low value speech, but this approach fails to acknowledge the difference between the cyberbullied victim and adults. Cyberbullied victims are children in school, not adults outside the schoolhouse gates. Accordingly, while expressions of hate speech, such as a Nazi march in Skokie, Illinois, are

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[122] Emerson, *supra* note 20, at 878–86 (explaining the four theories).
[123] *See* MEIKLEJOHN, *supra* note 19.
[124] Emerson, *supra* note 20, at 881. Justice Holmes articulated this theory in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), when he wrote,

> [T]he ultimate good desired is better reached by free trade in ideas[,] . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which [men's] wishes safely can be carried out.

Id. at 630 (Holmes, J., dissenting).
[125] *See supra* note 21.
[126] Emerson, *supra* note 20, at 880. This theory is premised on the idea that protecting expession is important because repressing speech creates negative consequences. *Id.*
[127] *Id.* at 882.
[128] *See generally* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (explaining that cyber assaults silence victims and serve as a form of discrimination).

constitutionally protected, student cyberbullying should not receive such protections.[129]

Under the marketplace of ideas theory, it is believed that the truth will emerge out of the competition of ideas. Cyberbullying does not allow for the search of truth in the marketplace of ideas because cyberbullying neither advances knowledge nor aids in the discovery of truth.[130] Cyberbullying is simply an intensified rumor mill.[131] Cyberbullied victims are silenced, meaning there is often a lack of counterspeech to the rumors created by cyberbullying. Accordingly, any hope for greater speech, or truth, rising to the surface is totally diminished in the cyberbullying context.

Under the autonomy and self-fulfillment theory, the quest for self-actualization is private and personal. This theory focuses on expression being an important aspect of the self.[132] Because different autonomy and self-fulfillment theorists place varying degrees of emphasis on the truth of expression in achieving self-actualization,[133] this theory initially seems as though it justifies protecting cyberbullying under the First Amendment. For example, in *Procunier v. Martinez*,[134] Justice Marshall wrote that "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression."[135] Under Marshall's interpretation of the autonomy and self-fulfillment theory, truth of expression is irrelevant and secondary to the legal capability of a person to express himself; therefore, it is the expression, regardless of its accuracy or impact, that should be protected. Under Marshall's view, cyberbullying should, arguably, be

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[129] In the 1970s, the Circuit Court of Cook County enjoined marchers at a National Socialist Party of America rally in Skokie, Illinois, from wearing Nazi uniforms or swastikas. A large part of Skokie's population consisted of Holocaust survivors. Although the Illinois Supreme Court refused to grant a stay, the Supreme Court of the United States heard the case and granted a stay, stating that "[i]f a State seeks to impose a restraint [on First Amendment rights], it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right." Nat'l Socialist Party v. Vill. of Skokie, 432 U.S. 43, 44 (1977) (internal citations omitted).

[130] Emerson, *supra* note 20, at 881.

[131] *See* Amanda Lenhart, *The Rumor Mill Speeds Up*, PEWINTERNET (June 27, 2007), http://www.pewinternet.org/Reports/2007/Cyberbullying/1-Findings/04-The-rumor-mill-speeds-up.aspx; Stephanie Sarkis, *Social Media, Psychotherapy, & Cyberbullying*, PSYCHOL. TODAY (May 12, 2011), http://www.psychologytoday.com/blog/here-there-and-everywhere/201105/social-media-psychotherapy-cyberbullying.

[132] As previously discussed, the search for truth under the marketplace of ideas is public.

[133] Wood, *supra* note 21, at 476.

[134] 416 U.S. 396 (1974).

[135] *Id.* at 427.

protected by the First Amendment. However, other autonomy and self-fulfillment theorists base self-fulfillment on a quest for truth.[136] Cyberbulling is by no means a quest for truth. Rather, as previously stated, cyberbullying is merely an intensified rumor mill,[137] stagnating both the cyberbully and his victim's self-actualization. Even if cyberbullying did bolster the cyberbully's quest for self-actualization at the expense of the victim's self-actualization, cyberbullying still fails under this interpretation of the theory. To the extent that self-actualization is a normative goal, First Amendment jurisprudence must approach self-actualization holistically. One person's development of sense of self should not undermine the ability of others to develop their sense of self.[138] For example, when one individual's process of self-actualization forecloses that of another, the principle of self-actualization does not support protecting that speaker's speech. Thus, one child's self-actualization through use of cyberbullying would not be protected speech if it inhibits another child from reaching her self-actualization.[139]

Lastly, the safety-valve theory seems to provide the strongest, although still imperfect, justification for protecting cyberbullying under the First Amendment. Under this theory, allowing people to express themselves—at all costs—is essential. Despite how offensive or untrue the expression may be, this theory holds that protecting speech is key because the act of repressing speech creates negative consequences; namely, it is better to allow individuals to express themselves through speech rather than using other forms of expression like fighting with one another.[140] Although it initially seems as though cyberbullying falls within this theory and, therefore, warrants

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136 Emerson, *supra* note 20, at 880.
137 *See supra* Part II.
138 *See* Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 344 ("Can the state, by protecting a child's identity interests, set back other children's identity interests? Indeed, in cases of hate speech, a child speaker might harm another child's identity development in the process of expressing her own identity. I argue that the state can legitimately impose assimilation demands in public schools when doing so prevents the harms caused by hate speech.").
139 *See id.*
140 Wood, *supra* note 21, at 477 (citing Gey, *supra* note 119, at 10 ("The notion [of the safety-valve justification] is that the First Amendment allows those who disagree strongly with the political status quo to vent their anger and therefore release pressure that could otherwise potentially build into a revolutionary conflagration.")).

First Amendment protection, a closer examination of the mundane underpinning of the safety-value theory makes cyberbullying an ill fit here as well. The justification for the safety-valve theory is limited to "containing the frustration of those who will never be victorious in a majoritarian political system."[141] Cyberbullying is a form of expression totally removed from politics. It is not the type of expression that the safety-valve theory was created to protect, as cyberbullying victims are not adults who could attempt to overthrow a political system. Rather, victims are silenced students who create no risk to society. Moreover, unlike minority political groups who were likely the impetus for creating the safety-value theory, cyberbullies do not need First Amendment protection "to vent their anger and therefore release pressure that could otherwise potentially build into a revolutionary conflagration."[142] In the school context, teachers, principals, and counselors can provide alternative forums for students to vent and discuss their differences, thereby creating a more even playing field for both the cyberbully and cyberbully victim to be heard. The safety-valve theory is not intended to protect expression in the form of cyberbullying. So long as alternative forums are available for would-be cyberbullies, the First Amendment should not protect cyberbullying either.

2. Accounting for Harm of Speech in Determining Its Value

As suggested by the Court in *Chaplinsky*, determining whether speech is low value involves weighing the harms against the benefits of the speech. With regard to low value speech categories and the lack of First Amendment protection thereof, the Court noted that "any benefit that may be derived from them is clearly outweighed . . . ."[143] The same is true for cyberbullying. Cyberbullies invade the rights of others, resulting in mental, emotional, and social harms. Professor Steven Gey explained that "[i]n the modern era, the basic First Amendment rule is that speech is constitutionally protected in the absence of proof that the speech creates a much more individualized and concrete

[141] Gey, *supra* note 119, at 11.
[142] Wood, *supra* note 21, at 477 (citing Gey, *supra* note 119, at 10).
[143] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

harm than simple offense."[144] Cyberbullies cause individualized and concrete harms exceeding simple offenses. In fact, cyberbullying creates individualized harms resulting in low self-esteem, isolation, and even suicide,[145] making it much more than a simple offense and ostensibly placing cyberbullying beyond the bounds of First Amendment protection. Critics may argue that cyberbullying should not be deemed low value speech because traditional bullying has not been deemed low value speech. As discussed in Part II, this argument is weak because traditional bullying and cyberbullying are distinct.

Unlike traditional bullying, cyberbullying spreads like wildfire as a result of its mode of dissemination, making cyberbullying more far-reaching and more difficult to monitor than its traditional counterpart. Teachers can monitor traditional bullying and respond with defensive speech and action. This could essentially turn a bullying moment into a teachable moment to explain why bullying is wrong. However, because monitoring cyberbullying is more difficult, these teachable moments do not arise in the cyberbullying context.[146] Accordingly, because cyberbullying creates more severe harms than traditional bullying that are unlikely to be monitored and alleviated through teachable moments and because cyberbullying, like other low value speech categories, lacks value,[147] cyberbullying should be deemed low value speech regardless of whether it is supported by one of the four theoretical bases.

As previously discussed, low value speech is not afforded First Amendment protection.[148] Traditional categories of low value speech include fighting words,[149] libel,[150] true threats,[151]

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144 Gey, *supra* note 119, at 5.
145 *See supra* Part II.
146 Taking advantage of these teachable moments helps to alleviate or at least mitigate the harm caused by traditional bullying.
147 *Cf. Chaplinsky*, 315 U.S. at 572 ("It has been well observed that . . . [low value speech has] no essential part of any exposition of ideas, and . . . [is] of such slight social value as a step to truth that any benefit that may be derived from . . . [it] is clearly outweighed by the social interest in order and morality.").
148 *See supra* Part III.B.1–2.
149 *Chaplinsky*, 315 U.S. at 572.
150 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280–81 (1964).

intimidation,[152] and obscene speech.[153] Cyberbullying finds company with these traditional categories of low value speech. Similar to other categories of low value speech, cyberbullying not only fails to encourage any reasoned deliberations about truth,[154] but it also denies the victim any benefit of speech as a result of its silencing effect.[155] However, because "[c]yberbullying does not fit squarely within any of the traditional categories of unprotected speech,"[156] cyberbullying should be its own category of low value speech.

Critics may question the likelihood of the Supreme Court creating yet another category of low value speech, as the Court seems hesitant to do so.[157] The Court's protection of free speech even where speech is unpopular, such as virtual child pornography,[158] and, arguably, causes great harm, such as hate speech,[159] illustrates the Court's deep commitment to preservation of the First Amendment. Although the Court's historical unwillingness to create new categories of low value speech is a valid concern, more recent movement by the Court suggests that cyberbullying as the newest category of low value speech is a possibility. For example, in 2003, the Court in *Virginia v. Black*[160] described certain instances of "intimidation" as a subset of the "true threat" low value speech category.[161] Although the Court was not dealing in the cyberbullying context and was not creating a new low value speech category, describing "intimidation" as a subset of an already existing

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[151] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); Watts v. United States, 394 U.S. 705, 705–07 (1969).
[152] *See* Virginia v. Black, 538 U.S. 343, 360 (2003). The court described "intimidation" as a subset of the unprotected category of "true threats," noting that this occurs "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.*
[153] Roth v. United States, 354 U.S. 476, 486 (1957).
[154] Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 802 (2008).
[155] *Id.* at 804.
[156] Jessica Moy, Note, *Beyond "The Schoolhouse Gates" and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After* Morse v. Frederick, 37 HASTINGS CONST. L.Q. 565, 586 (2010).
[157] There are a limited number of low value speech categories. *See supra* notes 149–53 and accompanying text.
[158] The Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239–40 (2002), held that the lack of a concrete connection between virtual child pornography and child abuse enabled virtual child pornography to be protected under the First Amendment.
[159] The Court in *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (per curiam), held that a Ku Klux Klan speech advocating violence toward minority groups was protected under the First Amendment.
[160] 538 U.S. 343 (2003).
[161] *Id.* at 360.

low value speech category expresses the Court's willingness to remove First Amendment protection where necessary. The implication is that the Court may consider creating a new category of low value speech or at least find a way to place cyberbulling within an existing category.

Cyberbullying, as defined in this Article,[162] should meet the Court's approval as the newest category of unprotected speech. The Court in *Chaplinsky* recognized certain "well-defined and narrowly limited" classes of speech that are not deserving of First Amendment protection, including obscenity, libel, and fighting words.[163] Because the proposed definition of cyberbullying is also well-defined and narrowly limited,[164] the Court would not be taking away student expression by deeming cyberbullying the newest category of unprotected speech.[165] As discussed in Part IV, by limiting the definition of cyberbullying as between multiple students,[166] cyberbullying is not an overly expansive form of expression. Also, cyberbullying is limited to a finite period: the time during which a person is a student. Cyberbullying is further limited by the requirement that a *student or students* must be causing *willful and repeated harm* to another *student*. The temporal and other limitations that cabin this Article's proposed definition of cyberbullying make it better suited as the newest category of low value speech than a form of expression that is not as narrowly limited, such as between *people*, that would result in certain expression being unprotected even by an adult speaker outside of the schoolhouse gate. By expanding the categories of low value speech to include cyberbullying, the Court will create a bright line rule, allowing for uniformity among the courts and clear direction to school administrators. Uniformity is necessary here. The current flexible approach created by *Tinker* and its progeny creates confusion for school administrators and courts alike. Most importantly, *Tinker* and its progeny provide a poor fit in the cyberbullying context because these exceptions were

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162 *See infra* Part IV.
163 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
164 *See infra* Part IV.
165 As previously mentioned, this Article does not concede that cyberbullying is a form of expression. Rather, the word "expression" is used for consistency with language found in case law.
166 *See infra* Part IV.

created to allow schools to regulate speech protected by the First Amendment, not low value speech, such as cyberbullying.

IV. EFFECTIVELY AIDING AGAINST CYBERBULLIES

Currently, any regulation of cyberbullying must conform to *Tinker*. However, if the Court deems cyberbullying the newest category of low value speech as proposed by this Article, the Court can create a new test that actually protects cyberbullying victims by allowing schools to constitutionally regulate this form of bullying. To be sure, if the Court deems cyberbullying low value speech, schools could constitutionally regulate cyberbullying because it would no longer be protected under the First Amendment. Creating a new legal test for cyberbullying is an important task. Courts and schools alike must be able to realize when student expression rises to the level of cyberbullying. Thus, it is essential to create a test that clearly explains what constitutes cyberbullying.

Cyberbullying may occur for a variety of reasons, including a student's race, gender identity, sexual orientation, or religion. These categorical reasons behind cyberbullying suggest that a test to aid against cyberbullying should be group based. But, a group-based test falls short, as it does not capture the entire cyberbullying landscape. Just as a victim may be cyberbullied based on a group characteristic, a victim may also be cyberbullied based on an aspect entirely unique to him. Because cyberbullying may occur based on a group characteristic or an individual characteristic, a test to protect all potential victims of cyberbullying must account for both scenarios. The proposed legal test for cyberbullying is as follows:

> Cyberbullying is willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices from one student or students to another student based on (1) expression demeaning group-based characteristics, including but not limited to race, gender identity, sexual orientation, and religion, or (2) expression intended to ridicule or attack an individual student.

To better understand the proposed cyberbullying test, examples of expression demeaning group-based characteristics, expression intended to ridicule or attack an individual student, and expression that does not rise to the level of cyberbullying under either prong of the proposed test are developed and discussed below.

A. Cyberbullying Under Prong One of the Proposed Test

Targeting the most vulnerable populations, particularly lesbian, gay, bisexual, and transgender ("LGBT") students, is not a new phenomenon.[167] Recently, Kenneth Weishuhn, a fourteen-year-old, openly gay high school freshman from Iowa, committed suicide.[168] Although no criminal charges have been filed due to a lack of probable cause, Weishuhn's victimization serves as an example of cyberbullying under prong one of the proposed test.

Details surrounding Weishuhn's death are scarce;[169] however, family and friends claim that he committed suicide after receiving death threats. If Weishuhn's family and friends are correct and fellow students created a Facebook hate group,[170] added all of his friends, and then sent him death threats via text messages, this action would rise to the level of cyberbullying under the proposed test.[171] In creating the webpage and sending death threats via text messages, students willfully and repeatedly inflicted harm on Weishuhn based on his sexual orientation through use of electronic devices.

In the Weishuhn case, the combination of an anti-gay Facebook group, a text message referencing the page, and death threat text messages constitutes cyberbullying. However, an anti-gay Facebook page with no direct reference to a specific student would not rise to the level of

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167 *See* Friedman, *supra* note 2; Struglinski, *supra* note 80.
168 Kyle Munson, *No Criminal Charges to Be Filed in Death of Bullied Iowa Teen Kenneth Weishuhn*, DESMOINESREGISTER.COM (June 19, 2012, 4:21 PM), http://blogs.desmoinesregister.com/dmr/index.php/2012/06/19/no-criminal-charges-to-be-filed-in-death-of-bullied-iowa-teen-kenneth-weishuhn/.
169 *Id.*
170 A text message referred to an anti-gay Facebook page launched by fellow high school students. The page was eliminated or altered and, thus, could not be cited as evidence. *See* Munson, *supra* note 168.
171 *Kenneth Weishuhn, Gay Iowa Teen, Commits Suicide After Allegedly Receiving Death Threats*, HUFFINGTONPOST.COM (Apr. 17, 2012), http://www.huffingtonpost.com/2012/04/17/kenneth-weishuhn-gay-iowa-teen-suicide_n_1431442.html.

cyberbullying. A sole, indiscriminate anti-gay Facebook page or post would not constitute cyberbullying under the proposed test for two reasons: (1) there must be repeated harm and (2) the harm must be directed from one student or students to another identifiable student.

B. Cyberbullying Under Prong Two of the Proposed Test

In *Kowalski v. Berkeley County Schools*,[172] the court dealt with a fact pattern that would constitute cyberbullying under the proposed test. Senior Kara Kowalski created a MySpace webpage called "S.A.S.H," which stood for Students Against Shay's Herpes.[173] Shay N. was another high school student.[174] The webpage was created to ridicule Shay N. with comments, follow-up posts, and fictional pictures.[175] Kowalski created the page and then invited approximately 100 MySpace friends to join.[176] Fellow student Ray Parsons joined the group first.[177] He uploaded a photo suggesting that Shay N. smelled badly with a caption that read, "Shay Has Herpes."[178] Kowalski responded to the photo with various posts, one of which read, "the best picture [I]'ve seen on myspace so far! ! ! !"[179] Additional students posted similar replies, more mocking photographs were uploaded, and one student posted "Kara= My Hero." Another student said, "your so awesome kara...i never thought u would mastermind a group that hates [someone] tho, lol."[180]

Kowalski's creation and continued involvement with the S.A.S.H. webpage constitutes cyberbullying under prong two of the proposed test. Kowalski willfully created the webpage on her home computer to ridicule Shay N., despite her insistence that S.A.S.H. stood for "Students Against Sluts Herpes." The focus of the discussion, posts, and pictures was on an individual student: Shay N. Thus, Kowalski repeatedly harmed an identifiable student. By continuing to respond and

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[172] 652 F.3d 565 (4th Cir. 2011).
[173] *Id.* at 567.
[174] *Id.*
[175] *Id.* at 567–68.
[176] *Id.* at 567.
[177] *Id.* at 568.
[178] *Id.*
[179] *Id.*
[180] *Id.*

encouraging further posting, Kowalski, ultimately, harmed Shay N.'s reputation and caused her to miss class because she was uncomfortable at school following the creation of the S.A.S.H webpage.

Although the court in *Kowalski* reached the same conclusion as would be reached under the proposed test, that the school appropriately punished Kowalski for her expression,[181] the proposed test is a superior approach for courts in the future. Here, the court, using *Tinker*, focused on the foreseeability of a substantial disruption at school as justification for disciplining Kowalski. The court explained that Shay N.'s absence from school, as a result of the S.A.S.H. webpage, constituted a substantial disruption.[182] This appears to be a novel interpretation of the already ambiguous *Tinker* substantial disruption test. As previously discussed, this test was initially created to determine when schools could censor student speech originating on campus. Now, this test is being applied by courts, albeit in a slightly modified fashion, to student speech originating off campus. More specifically, the modified version of the *Tinker* substantial disruption test is whether the speech would create a "reasonably foreseeable substantial disruption" at school. By using the proposed cyberbullying test rather than the *Tinker* substantial disruption test, courts can create clear guidelines for schools and students for the type of expression that will not be tolerated. Most importantly, the proposed test shifts the focus primarily to the victim rather than the sort of disruption that may hypothetically manifest itself in some form. The shift in focus will enable courts and schools to work in conjunction with one another to effectively aid against cyberbullying.

C. Speech That Falls Short of Cyberbullying Under the Proposed Test

Consider the following hypothetical as an example of student expression that does not constitute cyberbullying.[183] Jessica and Sarah are high school sophomores. The two girls were friends

[181] *Id.* at 574–75.
[182] *Id.* at 574.
[183] This example is part fact and part fiction. The names have been changed to maintain anonymity, and the fact pattern has been manipulated to best serve its purpose within this Article. This hypothetical exemplifies how seemingly hurtful situations, which may intially appear as cyberbullying, are not, in fact, cyberbullying under the proposed test. The test for

in elementary and middle school, but the heated rivalry to graduate as valedictorian has created a rift in their friendship. Sarah is well aware that Jessica's mother is an alcoholic. She has seen Jessica's mother drunk when she has visited Jessica at home and she has seen Jessica's mother drive while under the influence of alcohol. Jessica has repeatedly told Sarah that her mother's drinking problem is embarrassing, and she has asked Sarah to never tell others at school about her mother's problem. Sarah agreed to keep it a secret.

In an effort to further bolster their resumes before applying to college, Sarah and Jessica both decided to run for the school's Students Against Driving Drunk ("SADD") student spokesperson position. The school allowed for each student running to campaign for two weeks to garner support before a school-wide vote. Sarah created a group on Facebook called "Sarah Against Driving Drunk" where she posted various things about herself and why she wanted the position. She asked students to "like" her group as a way for her to get a preliminary vote count. Jessica also created a similar group and asked students to "like" her group as a way to get a preliminary vote count. Sarah checked Jessica's group page and her "likes" daily. After three days of being behind Jessica in "likes," Sarah decided to improve her odds by posting on her own page why students wavering between voting for her and Jessica should vote for her. Sarah posted that "Jessica's mom was a drunk, who drove drunk, and Jessica knew about her mother's illegal actions, yet did nothing about it." Sarah then posted various links suggesting that because Jessica's mom was a drunk, Jessica had a genetic predisposition to be a drunk as well. Sarah ended her post with a question to her followers: "if Jessica can't keep her drunk mom off the road, can she really keep her drunk friends off the road?"

Within hours, Sarah's "likes" tripled, which placed her just ahead of Jessica. Fearing that the margin was too small for a comfortable win, Sarah decided to copy and paste her post onto Jessica's

cyberbullying does not aid against mere embarrassment and precarious teenage situations. This is a test to aid against willful and repeated harm, which cannot be tolerated under the the name of freedom of expression.

group wall. Hours later, a storm of commentary on Jessica's wall, ranging from "I withdraw my vote" to "I always knew Jessica's mom was drunk when I checked her out at the grocery store," resulted in Jessica shutting down her Facebook account and withdrawing from the SADD race. After taking two days off, Jessica returned to school. She hoped that students would have forgotten about Sarah's post, but she was wrong. Sarah had texted her earlier post to everyone in her phone and had printed and taped her Facebook post on the back of each stall in the girls' bathroom and locker room and on car windows in the junior and senior parking lots. The school was abuzz about Jessica's mom. After spending the week skipping class and then refusing to take end of course exams, Jessica was suspended.

Although Sarah intentionally posted and texted about Jessica's mother to garner votes, knowing that this may be hurtful to Jessica, her actions do not constitute cyberbullying. Sarah exposed the truth to student voters to explain why she was a better candidate for the position. The fact that Jessica was harmed as a result can best be explained as an unintended consequence or a secondary effect of Sarah's campaign, which is simply not enough to constitute cyberbullying under the proposed test.

CONCLUSION

Cyberbullying is a unique form of bullying. The effects are long lasting, detrimental, and potentially life-threatening. Unlike traditional bullying, cyberbullying is uncontrolled and infinite, beyond the control of parents and teachers. So long as schools remain constrained by *Tinker* and its progeny, victims of cyberbullying will continue to receive no relief. Although *Tinker* and its progeny effectively aid against certain problematic student speech, *Tinker* does not effectively aid against cyberbullying. Cyberbullying manifests itself in a manner different than a substantial disruption. But, this does not mean that cyberbullying warrants no regulation by schools. Rather, because of the harms cyberbullying causes, cyberbullying must be addressed by schools through regulation. The

time is ripe for the Court to forever change the cyberbullying landscape. By deeming cyberbullying the newest category of low value speech and adopting the test articulated in this Article, the Court can suppress cyberbullying. Our constitutional framework can aid against cyberbullies; the Court simply needs to allow it to do so.