Cyber Bullying:  
A Multifaceted Approach to a Complex Legal Problem

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In 2006, 13-year-old Megan Meier struck up an online flirtation with a 16-year-old boy named Josh Evans. They messaged over the social networking site MySpace for about a month before Josh Evans suddenly turned on her, making nasty comments to Meier; in his final message to her, he said that “the world would be a better place without you.”¹ On that same day Meier hanged herself.

Six weeks later, Meier’s parents learned that Josh Evans didn’t exist.² His MySpace profile had been created by 47-year-old Lori Drew, in concert with her daughter (a former friend of Meier’s) and her employee, to “learn what [Meier] was saying about Drew’s daughter online.”³ Despite the ensuing outrage and pressure the St. Charles County officials received to charge Drew with a crime, there was little legal recourse; at the time there were no statutes in Missouri or federally with which to charge Drew.⁴ Ultimately, federal prosecutors charged Drew under the Computer Fraud and Abuse Act for violating MySpace’s terms and services agreement,⁵ in an attempt to charge her with something.

The Meier case is an extreme example of cyber bullying’s consequences, and not a very accurate one; Meier had suffered from depression, and so was already particularly

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2. Ibid.


4. Ibid.

5. Ibid.
vulnerable. Nevertheless, the case did raise awareness about cyber bullying, and in 2009 Rep. Linda Sanchez (D-California) proposed the “Megan Meier Cyber Bullying Prevention Act,” legislation that was intended to target the online nature of the harassment that allegedly prompted Meier’s suicide. Introduced to the House Judiciary’s Subcommittee on Crime, Terrorism, and Homeland Security, Sanchez’s proposal was met by skepticism by other committee members, whose concerns included infringement on free speech and that the legislation’s overly broad language could lead to over-criminalization.

Sanchez’s proposal never made it beyond the subcommittee hearings, and the subcommittee’s apprehension of the legislation’s potential consequences underscores the difficulty in regulating a nebulous concept like cyber bullying: in what way should cyber bullying be defined, and what is the balance between protecting cyber bullying victims while protecting the free speech rights of the perpetrators?

**Online Harassment and Cyber Bullying: A brief review**

Online harassment is an umbrella term for various kinds of cyber harassment, including cyber stalking and cyber bullying, and can include “threats of violence, privacy


8. Ibid.

invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks.”

Sometimes also termed “cyber victimization,” online harassment generally refers to “the intentional infliction of substantial emotional distress” through online speech and a series of incidents, not an isolated event, such that the actions can be considered a “course of conduct.” This paper distinguishes cyber bullying as online harassment among underage peers and usually involves schools, which will be discussed in greater detail below.

Bullying is not a new concept, and has been considered a fairly typical, though unfortunate, part of growing up for some people. The additional technological components of cyber bullying, however, make the problem of peer harassment more acute. Whereas pre-Internet bullied students could find refuge away from school, today’s bullying is more pervasive, following students wherever they go through the myriad-networked devices that are becoming more central in teenagers’ lives. An abusive message may be shouted in the school cafeteria, then repeated through a Facebook post,


12. Citron, Hate Crimes in Cyberspace, 3.

13. Ibid.


and circulated online through re-postings and comments. When a student is beaten up, the beating may be recorded by someone’s smartphone, and that video could be posted online and sent to friends, who share the video with their friends. In these hypothetical scenarios, the audience of the abuse can potentially become much larger, intensifying the bullied student’s feelings of humiliation and isolation, and expanding the opportunities for re-victimization.\(^\text{16}\) In sum, technology enables wider, more permanent dissemination of abuse. Furthermore, the Internet allows bullies to remain anonymous should they so choose, which makes it more difficult to identify the perpetrators.

Danielle Citron, who has written extensively on cyber stalking and online harassment more broadly, coined the term “Hate 3.0” to reflect the current technological development and capacities of the Internet and thus the “personalized,” individually-directed nature of online hate.\(^\text{17}\) Compounding this, technology enables users to “disaggregate” their ideas from their physical presence, which also removes social context from their online actions and can make it more difficult to discern the off-line intent and severity of the abuse.\(^\text{18}\) The Internet also eliminates geographical restrictions; this “aggregate” quality enables “cyber mobs” to form and attack less powerful individuals or groups.\(^\text{19}\)

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In a review of studies examining the psychological impacts of cyber bullying, Cassidy found that while a majority of cyber bullying occurs outside of school, it is connected to school-related incidents. Research has also shown that the online-specific aspects of cyber bullying – anonymity and wider dissemination of abuse – can intensify the deleterious effects of bullying. Cyber bullying research, as well as high-profile cases like that of Meier and Phoebe Prince, whose suicides have been connected to bullying, have garnered national attention and prompted calls for legal solutions to the problem.

However, a legal solution is not as simple as enacting sweeping federal legislation to ban cyber bullying. As mentioned above, Rep. Linda Sanchez already tried to propose such legislation, and it failed to go anywhere. Academics and legal scholars have identified two general areas of recourse to combat cyber bullying: school sanctions and legal remedies, either through criminal charges or civil suits. This paper will address both areas, through an examination of the two main obstacles and concerns in any cyber bullying case: the first amendment and defining the key terms of cyber bullying cases. A larger focus is given to schools’ actions around cyber bullying, as most cases of cyber bullying exist somewhere between students’ lives inside and outside of school.

**Cyber Bullying and Free Speech Concerns**


21. Ibid.


The Supreme Court established the country’s commitment to an unfettered public discourse in New York Times v. Sullivan. Courts have followed this precedent and “consistently held that the First Amendment generally forbids restrictions of speech in public discourse on the ground that it is offensive, unsettling, insulting, demeaning, annoying, snarling, bilious, rude, abusive, or nasty.” In other words, most speech is constitutionally protected regardless of how unsavory it might be. Unprotected speech, which the government can regulate, falls into a narrower category that includes “fighting words, true threats, incitement, and obscenity.”

Federal legislation aimed at protecting minors through widespread regulation of Internet content has yet to pass, though not for lack of trying. Specifically, Congress tried twice to pass legislation protecting children from sexually explicit content on the Internet: the Communications Decency Act (CDA) in 1996, and the Children’s Online Protection Act (COPA) soon after the CDA’s failure. Both pieces of legislation were struck down as unconstitutional for infringing on First Amendment rights. While the


25. Ibid.


29. Ibid, 121-122.
Court agreed that both served a compelling government interest – the first test of strict scrutiny – it found that neither was narrowly tailored enough.\(^{30}\)

Two items from the legal history of CDA and COPA are important to consider. First, both acts addressed a fairly specific concern: exposing children to sexually explicit content over the Internet. This is not only much more targeted than the broad swath of actions and content encompassed by cyber bullying, but also arguably a more critically compelling governmental interest. Second, COPA was drafted by Congress to address the deficiencies identified in CDA, which the Court recognized, but it still determined that COPA was too broad and therefore infringed too substantially on free speech to be constitutional.\(^{31}\)

The history of CDA and COPA indicates that the Court is highly skeptical of Internet regulation and its potential chilling effect on speech. Given this precedent, Merlis asserts that “society should look at other options to find a way to protect children while maintaining the integrity of the First Amendment.”\(^{32}\) After the public outcry over Meier’s suicide, states began passing legislation to address bullying.\(^{33}\) Currently, 49 states have

\(^{30}\) Ibid, 123.

\(^{31}\) Ibid.

\(^{32}\) Ibid, 125.

enacted anti-bullying laws and 48 include mention of electronic harassment; only 20 statutes explicitly include the term “cyber bullying.”

Additionally, 44 of the 49 anti-bullying statutes include school sanctions, which grant schools the authority to discipline students for bullying behavior. It stands to reason that cyber bullying, which occurs between peers, would largely revolve around school life. The following section evaluates how schools and the courts have handled student speech issues broadly, which has established a precedent for approaching students’ speech in cases of cyber bullying.

**Cyber Bullying and School Sanctions**

Scholars point to three cases that define the legal standards for student speech at school: *Tinker v. Des Moines Independent School District; Bethel School District No. 43 v. Fraser;* and *Hazelwood School District v. Kuhlmeier.* In *Tinker*, students were suspended for wearing black armbands to school to protest the Vietnam War. The Supreme Court affirmed the students’ rights to political speech in school, noting that students do not “shed their constitutional rights to freedom of speech or expression at the


35. Ibid.


schoolhouse gate.” 38 The Court affirmed that students had a right to free speech provided it did not cause or “forecast a substantial disruption of or material interference with school activities” 39 or “collid[e] with the rights of others.” 40 The Court established in Bethel that schools could restrict speech that “would undermine the school’s basic educational mission.” 41 In this case, a student (Fraser) gave a lewd and vulgar school-wide speech; although the speech did not “substantially or materially interfere” with school activities, as laid out in Tinker, 42 the Court reasoned that schools could censor speech in the interest of “promoting civility and citizenship.” 43 In the third case, Hazelwood, the Court determined that schools had greater control of student speech expressed through school-sponsored activities using school resources. 44

This “legal triumvirate” 45 establishes a few important standards that affect schools’ authority to sanction cyber bullies: in order for schools to restrict speech, it


39. Ibid, 514.


45. Ibid, 1224.
should occur within school grounds, be either lewd and/or vulgar or substantially disrupt school activities, or be expressed using school resources, such that the school is implicated in the expression.

Although Tinker, Bethel, and Hazelwood are all analog cases, occurring before the Internet, the established standards have been applied to cases involving students’ online speech with mixed results. In a synthesis of the first 11 cases that have addressed students’ “cyber expression,” Lorillard notes that in each the speech is directed towards the schools, teachers, or administrators; it is worthwhile to consider whether the inherent power imbalance between bully (student) and victim (adult) reduces the impact and seriousness of the offending speech. In six of these cases the courts found that the schools had violated students’ free speech rights based on a variety of factors including the content of the speech, how targeted it was, and whether it had or was intended to reach school.

The first case involving student-on-student bullying occurred in 2009. J. C. ex rel. R. C. v. Beverly Hills Unified School District dealt with a student (J.C.) who recorded herself and her friends “maligning” another classmate (C.C.). J.C. posted the video on YouTube and shared it with a few friends and by the evening the video had been viewed

47. Ibid, 245.
49. Ibid.
90 times. The subject of the video, C.C., brought the school’s attention to the video and spent 20-25 minutes talking to a school counselor because she “felt humiliated”; ultimately she missed part of one class.

The Court determined that it could apply *Tinker* to the case because even though the speech originated outside of school grounds, the video’s content “increase[d] the likelihood that the expression [would] reach campus,” and so there was a sufficient connection between the “off-campus” speech and the school environment. However, in applying *Tinker*, the Court ultimately rejected the contention that J.C.’s video had caused a “substantial disruption.”

The problem of defining what constitutes a “substantial disruption” will be discussed in greater detail below, but the *J.C.* case also raises the important question of how students’ free speech rights should be considered in balance to other students’ rights to privacy and a peaceful learning environment. When *Tinker* is invoked in most of the cyber bullying cases mentioned above, attention is primarily paid to the “substantial disruption” part of the decision. In the excerpted quotation from *Tinker* that follows, though, “invasion of the rights of other” appears equally prominently:

> 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 disrupts classwork or

50. Ibid.
51. Ibid, 248.
52. Ibid.
53. Ibid, 250.
54 Ibid, 248.
involves substantial disorder or invasion of the rights of others is, of course, not
immunized by the constitutional guarantee of freedom of speech.55

As mentioned earlier, the six decisions reviewed by Lorillard that upheld the students’
speech rights could not find a substantial enough disruption to merit restricting the
students’ speech.56 It seems possible, however, that a court could use the second half of
the Tinker standard, speech that is an “invasion of the rights of others,” along with the
Bethel standard – that schools have the right to restrict speech that is “contrary to the
school’s educational objectives”57 – to give schools more latitude to address cyber
bullying.

Indeed, Servance points to the school’s authority recognized by the Court in
Bethel to “decide what constitutes inappropriate conduct and expression within the
school” and balance “the right to free speech with the goal of protecting the rights of
others where speech causes harm.”58 McCarthy asserts that a fourth case addressing
student speech, Morse v. Frederick, supports the use of other standards “beyond Tinker’s
disruption prong … to assess the constitutionality of student expression.”59 In Morse, the
school sanctioned a student for speech that technically occurred outside school grounds.60


58. Servance, “Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and
the First Amendment,” 1229.

59. Martha McCarthy, “Curtailing Degrading Student Expression: Is a Link to a
Disruption Required?” Journal of Law & Education, no. 4 (2009), 611.

In this case, a student held up a large banner that espoused drug use; ultimately, the Court affirmed the school’s right to discipline the student because the student’s message supported illegal activity and was conveyed during a school-related activity.\(^\text{61}\) While this case technically affirmed a school’s authority to restrict speech off campus, the decision is narrowly interpreted to apply only to messages that promote illegal drug use,\(^\text{62}\) and therefore doesn’t apply in the majority of cyber bullying cases.\(^\text{63}\)

Lorillard describes Morse as the first decision that involves the “‘content-based regulation’ of student speech.”\(^\text{64}\) McCarthy argues further that the Morse standard obviates the Tinker disruption requirement and therefore, when combined with the second lesser-used standard in Tinker allowing for restriction of speech that invades others’ rights, could reasonably expand schools’ authority to sanction speech that harms individual students or groups.\(^\text{65}\)

The distinction between “on campus” versus “off campus” speech that arose in Morse is a more significant issue with cyber bullying. In both Bethel and Tinker, the speech being addressed clearly occurred on school grounds and is therefore more liable to restriction. As will be discussed further below, the Internet confounds the clear division


\(^{62}\) Ibid.


\(^{64}\) Lorillard, “When Children’s Rights ‘Collide,’” 240.

\(^{65}\) McCarthy, “Curtailing Degrading Student Expression,” 611.
between speech that technically occurs outside of school but makes its way inside the “schoolhouse gate.”

It should be noted, too, that the *Tinker* decision involved political speech. Citron and others have asserted that it’s not uncommon for online harassment to reach the level of “low value” speech, like defamation and true threats, which is not constitutionally protected and therefore should be more aggressively regulated.66,67 In these cases, schools more clearly have the authority to intervene and sanction students’ speech, including off-campus speech that is “clearly threatening to students or staff and therefore disruptive to the learning environment and educational process.”68

There is still, however, the issue of how to determine whether speech constitutes defamation or true threats. The Supreme Court is currently hearing a case, *Elonis v. United States*, which addresses threats expressed over the Internet. At issue is whether “true threats” made online should be determined by whether the speaker intends for the content to be threatening, or whether a “reasonable person” might interpret the content as truly threatening.69 This paper is not going to delve into the intricacies of the *Elonis* case and defining true threats, but the Supreme Court’s decision might have significant implications for addressing cyber bullying. Determining a true threat based on a

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reasonable person’s interpretation would give schools more latitude to identify speech that affects an individual student as a true threat and therefore is unprotected. In most cases, however, speech that might cause a substantial disruption or invade on others’ rights at school will not rise to the level of unprotected speech.

**Defining Cyber Bullying and its Components**

At first glance, the precedents established by *Tinker, Bethel,* and *Hazelwood* seem to provide clear-cut guidelines for when a school can sanction a student for cyber bullying: when the bullying occurs on school grounds; causes a substantial disruption or contains lewd or offensive language that it subverts the school’s educational mission; or is accomplished through use of a school’s resources. These standards become more problematic, however, when defining what constitutes the various components in the above standards, particularly as they apply to online technology. In her synthesis of 11 cyber bullying cases, Lorillard found that most decisions primarily turned on whether speech could be considered “on campus” or “off campus,” and if so, whether it caused a “substantial disruption.” The following section will explore these definitional components.

**“On-campus” and “Off-campus” Speech**

According to the standard set by *Tinker,* students’ speech can only be legitimately restricted if it occurs within the school grounds. The geographically limitless and ubiquitous nature of the Internet, however, blurs the lines between “on campus” and “off

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Online attacks that are created on someone’s home computer can easily reach the school through its impact on the targeted student(s), and therefore the question becomes whether the school has a prerogative to regulate that speech, and to what extent.

Lorillard refers to this phenomenon as an “on-campus ‘telepresence,’” and Dranoff proposes a three-part definition of on-campus speech to incorporate physically-present and tele-present speech: “(1) it actually takes place on campus; (2) it advocates on-campus action; or (3) a reasonable person would believe, given the circumstances, that the student intended for his speech to reach the school.” In this definition, Dranoff attempts to identify a “sufficient nexus” between on-campus and off-campus speech that would enable schools to address cyber bullying.

Courts have tried to navigate the geographical limitation of the “on campus” distinction as it relates to cyber bullying through a few methods. First, if the speaker brings the offensive material to school (e.g., accesses a harassing website through school computers), courts have established that the speech has been brought “on campus.”

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other more tenuous standards include whether a student has knowledge that the offending material will be distributed during school or could “reasonably foresee” that the material would be brought to school. While these latter two categories attempt to more comprehensively define “on campus” speech as it relates to online content, they are still considerably vague and thus open to subjective interpretation.

Servance proposes removing the “on-campus” versus “off-campus” consideration altogether, arguing that with the Internet, a geographical boundary is irrelevant:

Because the geographic distinction fails to account for the difference in the medium and impact of speech on targeted members of the school community, it is not a reliable rule for determining the boundary of school authority.

Servance argues that courts should give deference to schools, which “confront” daily the issue of “balanc[ing] the right to freedom of expression with the rights of others to be free from harassment.”

Other scholars have argued that giving schools the kind of carte-blanche disciplinary authority that Servance suggests, which could easily reach into students’ conduct at home, subverts parents’ “fundamental right to direct the upbringing of their children.” For this reason, Raatjes advocates that, while schools still have authority to

77. Ibid, 825-26.

78. Ibid.


80. Ibid, 1238.

sanction significantly disruptive student behavior, there should be a high threshold in how a “substantial disruption” is defined.\footnote{Ibid, 104.}

**Substantial Disruption**

Whether or not speech causes a “substantial disruption” is a subjective determination. In a Comment addressing current legal approaches to cyber bullying, Erb laments what he perceives as the “unreasonably high ‘substantial disruption’ benchmark the Supreme Court has set”\footnote{Erb, “A Case for Strengthening School District Jurisdiction,” 268.} in evaluating schools’ sanctions against cyber bullies. According to Erb and others, and as seen in the case of *J.C.*, an act of cyber bullying must disturb the school environment or affect “class activities,”\footnote{Lorillard, “When Children’s Rights ‘Collide,’” 209.} not just be a “distraction or curiosity”\footnote{Erb, “A Case for Strengthening School District Jurisdiction,” 266.} to an individual or small group of students, to be considered a “substantial disruption.”

Applying a more traditional, analog definition of “substantial disruption” risks ignoring the unique characteristics of cyber bullying. Given the “individualized,”\footnote{Ibid, 274.} targeted nature of cyber attacks, one student can be persistently and aggressively harassed over the Internet with barely a disruption to the school environment as a whole; the cyber victim’s learning environment, however, would be significantly disrupted.\footnote{Ibid.} Erb is
concerned that past cases ignore the individual effects of cyber bullying in their applications of Tinker.88

On the other hand, loosely interpreting “substantial disruption” so that it applies to any kind of hurtful speech – depending on the receiver’s interpretation – could give schools too much latitude. Hayward is alarmed that “substantial disruption” and the other terms in anti-bullying statutes are “so vague that they offer no guidance to distinguish permissible from impermissible speech.”89 Particularly if schools apply “substantial disruption” to an individual’s learning environment, as Erb suggests, schools may sanction speech merely on the basis of “the way people react to it at school.”90 Applying the standard so indiscriminately could “create a ‘heckler’s veto’ situation”91 in which schools over-discipline merely objectionable speech, and chill students’ speech overall.

Concerns for students’ well-being and free speech rights are both legitimate, and striking an appropriate balance will likely have to be determined on a case-by-case basis. Servance’s idea of an impact analysis could be useful here. Even though she was writing in 2003, when the cyber bullying cases involved only students’ speech directed towards the teachers, administrators, or schools, her proposed impact analysis boils down to whether the bully and targeted individual(s) are members of the same school community, and whether the bullying had a substantial or material negative affect on the targeted

88. Ibid.
89. Hayward, “Anti-Cyber Bullying Statues Threat to Student Free Speech,” 92.
90. Ibid, 91.
individual. Servance defines this in practical terms as whether a teacher’s ability to teach or maintain classroom control was disrupted. Schools could apply this impact analysis to students to consider whether cyber bullying negatively affects their abilities to learn or participate fully in school life.

Other Legal Remedies for Cyber Bullying

Some legal scholars have argued that cyber bullies’ off-campus speech should be subject instead to civil and criminal laws rather than school sanctions, given the implications to students’ first amendment rights if schools are given jurisdictional free-rein to restrict speech whether it occurs inside or outside of school. Others have pointed to regulatory solutions that target the websites themselves that enable the expression.

Civil and Criminal law

Victims of cyber bullying have recourse outside of school sanctions through both civil and criminal law. There are several areas under tort law under which a victim could sue his or her cyber bully: 1) defamation; 2) invasion of privacy; 3) intentional infliction of emotional distress; and 4) negligence in providing reasonable levels of supervision of a child.


93. Ibid.


95. Ibid.

96. McQuade, Cyber Bullying: Protecting Kids and Adults from Online Bullies, 116.
Given the time and money usually required to sue someone, bringing a civil lawsuit against a cyber bully may not be the most realistic resolution. Citron also raises another concern, which is that some cyber victims may be reluctant to bring a lawsuit because they would be required to do so under their real names, thus potentially increasing attention and risking heightening the invective from their abusers.

There is a similar resource limitation in addressing cyber bullying through law enforcement. Other cyber crimes such as child pornography, hacking, and cyber terrorism are perhaps a more significant concern for law enforcement. Further, as Erb points out, cyber-bullying speech may be nasty and offensive, but it “will rarely rise to the level of criminal or civil liability.” It seems reasonable, given the practical constraints of both civil and criminal recourse, as well as the higher stakes students would face, that the majority of cyber bullying cases would be more appropriately and efficiently addressed through school actions.

Revising Section 230 of the Communications Decency Act

So far this paper has addressed remedies to cyber bullying through school sanctions and legal responses, in which the onus is placed on the school authorities or the

98. Ibid.
100. Ibid.
102. Ibid, 284.
victims themselves to discipline or sue the cyber bully. Another possible solution, however, lies with the websites themselves through which cyber bullies perpetrate their abuse. Scholars have proposed that websites’ liability to address and take down bullying speech should be greater than the near-blanket immunity currently provided to websites under Section 230 of the Communications Decency Act (CDA).\textsuperscript{103,104,105} Section 230 was enacted to ensure that a website would not be held legally responsible for third-party comments,\textsuperscript{106} which serves the worthwhile purpose of promoting free speech; otherwise, liability concerns might induce websites to overly-regulate users’ comments and postings.

However, website immunity introduces some challenges to the civil, criminal, and school-related remedies for cyber bullying discussed above. The Internet affords bullies anonymity, which can make it difficult to identify the source of the abuse beyond the webpage on which it’s posted. Levmore likens anonymous bullying on a webpage to an analog counterpart – an anonymous nasty comment written on a bathroom wall – with a few key differences: the audience of the bathroom wall is limited, the medium of the wall limits the scope and depth of the message, and “the greater the offense with respect to

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\item 103. Lipton, “Combating Cyber-Victimization,” 1132.
\item 106. Ibid.
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both content and audience, the more quickly the communication will be erased.” With immunity, websites cannot be compelled to reveal a cyber bully’s identity or take down the offending content.

Solove advocates a “notice-and-takedown” requirement similar to that found in the Digital Millennium Copyright Act (DMCA), which strips websites of their safe harbor protections once they’ve been notified of a copyright infringement. While he notes that the DMCA is “fraught with problems,” including significant abuse of the notice-and-takedown policy wherein wealthy, corporate entities intimidate non-copyright violators into removing content, Solove contends that requests for removal of defamatory or privacy-infringing content would come from individuals who lack similar litigation power. This distinction does not entirely address the concern that a notice-and-takedown requirement would result in “excessive” takedown and thus chill speech, and it would put websites in the position of determining whether content is actually “defamatory or otherwise tortious material.”

In an early test of Section 230, Kenneth M. Zeran v. American Online, Incorporated, the Court unequivocally affirmed website immunity from liability for third


109. Ibid.


111. Ibid.

party postings. Zeran brought action against AOL over defamatory content posted about him on one of AOL’s online bulletin boards by an unknown user. He claimed that AOL “unreasonably delayed in removing defamatory messages … refused to post retractions of those messages, and failed to screen for similar postings.” Ultimately the Court rejected Zeran’s argument that once AOL had been notified of the defamatory material, the interactive computer service was therefore liable for that content. In doing so it interpreted Congress’s intention in enacting Section 230 as follows:

Congress recognized the threat that tort-based lawsuits post to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on services providers to the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

The Court’s assertion of Internet independence with Zeran v. AOL back in 1997 is informative today when considering government regulatory interventions to address cyber bullying. The striking down of CDA and COPA, discussed earlier, as well as Section 230’s immunity provision, indicate that comprehensive federal regulations are not a viable solution in confronting cyber bullying.

**Conclusion**

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114. Ibid, 328.

115. Ibid, 330 (emphasis added).
Technology is a significant new complicating factor to an old problem: bullying. The Internet has enabled bullying to occur at all hours of the day and reach its targets anywhere. This new facet has complicated traditional pre-Internet boundaries between conduct that occurs in school and outside of school, and therefore it is less clear when schools have the authority to discipline students for bullying. Further, the mediated aspect of cyber bullying means that all bullying actions are speech-related, which thus requires greater caution in attempts to restrict or discipline cyber bullying, such that they don’t infringe on first amendment rights.

Merlis contends that in the advent and rapid rise of the Internet as “a vital part of Americans’ lives … legislators, parents, and the computer-technology industry failed to adequately prepare for the problems the Internet created.”116 Some have argued that the new Internet-related problem of cyber bullying should be addressed by federal legislation, while others are concerned that broad legislation would overreach and chill speech. So far the Courts have sided with the latter group, concerned with the breadth of the laws aimed at protecting children from Internet expression. States have enacted bullying laws, some of which include mention of electronic harassment specifically. As mentioned above, schools have also maintained varying levels of authority to discipline students who engage in cyber bullying. That authority, however, hinges on whether the speech occurs on- or off-campus and its impact on the school’s learning environment.

Even if there weren’t free speech concerns related to disciplining cyber bullying, some scholars have noted that taking punitive action against a bully does not necessarily

have the intended salubrious effect of protecting the victim or improving the situation. Instead, schools’ primary place might be in taking a proactive as well as remedial approach to cyber bullying. Raatjes lays out several non-disciplinary options, including: Internet safety training programs that would educate students on and promote responsible online behavior; diverting and/or productive after-school activities for students; and “parental training programs,” which might be done in partnership with local police departments.

For school policy, a combined approach that first utilizes proactive and remediation measures, and if those fail to address the problem, then escalates to disciplinary action, might be most reasonable. It seems it would be easier to prove a substantial disruption if pre-disciplinary measures are taken; a persistent bully who then requires discipline has already shown a course of conduct that would be more disruptive than a one-time incident.

This kind of mixed approach would also allow the kind of flexibility critical to issues around emerging media. As technology develops, the current methods for carrying out cyber bullying could very likely change, and so laws that are too prescriptive regarding what kinds of actions or expression are allowed might be not only too restrictive of speech, but also obsolete in a few years.


118. Ibid.
Bibliography


