

## Louisiana Law Review

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Volume 78  
Number 3 *Spring 2018*

Article 13

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4-9-2018

### Criminalization of Cyberbullying: The Constitutionality of Creating an Online Neverland for Children Under a Tinker-Bell Analysis

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# **Criminalization of Cyberbullying: The Constitutionality of Creating an Online Neverland for Children Under a *Tinker-Bell* Analysis**

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#### INTRODUCTION

Megan Meier, Phoebe Connop, Ryan Halligan, Jesse Logan, Hope Sitwell, Jamey Rodemeyer, Amanda, Todd, and Katlin Loux all died before their 19th birthdays.<sup>1</sup>

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1. See *Megan’s Story*, MEGAN MEIER FOUND., <http://www.meganmeierfoundation.org/megans-story.html> (last visited Oct. 29, 2017) [<https://perma.cc/RN7V-GV4K>]; Mark Hodge & Ian Murphy, ‘AN ABSOLUTE TRAGEDY’ *Schoolgirl hanged herself over fears of online backlash over racially offensive Instagram snap*, SUN (Aug. 28, 2016), <https://www.thesun.co.uk/news/1687224/schoolgirl-hanged-herself-over-fears-of-online-backlash-over-racially-offensive-instagram-snap/> [<https://perma.cc/499E-UB2B>]; John Halligan & Kelly Halligan, *Ryan’s Story*, <http://www.ryanpatrickhalligan.org> (last visited Nov. 2, 2017) [<https://perma.cc/9V53-BUEG>]; Mike Celizic, *Her teen committed suicide over ‘sexting’*, TODAY PARENTS (Mar. 6, 2009, 8:26 AM), <http://www.today.com/parents/her-teen-committed-suicide-over-sexting-2D80555048> [<https://perma.cc/HJV4-DV9H>]; Patience Ley, *Cyber Bullying*, PREZI (Mar. 18, 2014), <https://prezi.com/mxhrody4tlkx/cyber-bullying/> [<https://perma.cc/8NYW-DNU8>]; Michelle Dean, *The Story Of Amanda Todd*, NEW YORKER (Oct. 18, 2012), <http://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd> [<https://perma.cc/HRV4-CY59>]; Susan Donaldson James, *Jamey Rodemeyer Suicide: Police Consider Criminal Bullying Charges*, ABC NEWS (Sept. 22, 2011), <http://abcnews.go.com/Health/jamey-rodemeyer-suicide-ny-police-open-criminal-in>

Jesse lost her life at age 18.<sup>2</sup> Phoebe was 16 years old.<sup>3</sup> Amanda was 15.<sup>4</sup> Jamey was 14.<sup>5</sup> Ryan,<sup>6</sup> Hope,<sup>7</sup> and Megan<sup>8</sup> were 13. Katlin, who lived a few miles south of Shreveport, Louisiana, had just graduated from high school.<sup>9</sup> She was 17.<sup>10</sup> What was the cause of these young peoples' premature deaths? They were victims of suicide provoked by cyberbullying.<sup>11</sup>

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vestigation/story?id=14580832 [https://perma.cc/6AKG-HTUS]; Loresha Wilson, *Louisiana teen deaths highlight dangers of bullying*, USA TODAY (Sept. 26, 2013, 5:50 PM), <http://www.usatoday.com/story/news/nation/2013/09/25/student-bullying-suicides/2867781/> [https://perma.cc/4P5H-4ZYZ].

2. Celizic, *supra* note 1 (recounting Jesse Logan's suicide after her ex-boyfriend shared nude photographs of her with their classmates).

3. Hodge & Murphy, *supra* note 1 (explaining 16-year-old Phoebe Connop's suicide after her peers cyberbullied her for making racially insensitive remarks).

4. Dean, *supra* note 1 (recounting Amanda Todd's suicide after a man took nude photographs of her during an online chat session and sent them to her classmates).

5. James, *supra* note 1 (recounting Jamey Rodemeyer's suicide after he was bullied online with homophobic slurs).

6. Halligan & Halligan, *supra* note 1 (detailing Ryan Halligan's suicide after experiencing pervasive bullying during face-to-face confrontations and online communication).

7. Ley, *supra* note 1 (detailing Hope Sidwell's suicide after her ex-boyfriend shared nude photos of her with their classmates).

8. *Megan's Story*, *supra* note 1 (detailing 13-year-old Megan Meier's suicide after she was catfished and cyberbullied, via social media, by an adult in her neighborhood).

9. Wilson, *supra* note 1.

10. *Id.* (explaining the story of Katlin Loux's tragic suicide one week after her high school graduation because of pervasive bullying).

11. There is no uniform definition of cyberbullying. *See, e.g.*, NANCY WILLARD, EDUCATOR'S GUIDE TO CYBERBULLYING AND CYBERTHREATS 1 (Apr. 2007), <https://education.ohio.gov/getattachment/Topics/Other-Resources/School-Safety/Safe-and-Supportive-Learning/Anti-Harassment-Intimidation-and-Bullying-Resource/Educator-s-Guide-Cyber-Safety.pdf.aspx> (defining cyberbullying as "cruel[ty] to others by sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies") [https://perma.cc/ZSJ5-T5ZY]; MARCI FELDMAN HERTZ & CORINNE DAVID-FERDON, CTRS. FOR DISEASE CONTROL & PREVENTION, ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS 3 (Jan. 2009), <http://www.cdc.gov/violenceprevention/pdf/EA-brief-a.pdf> (defining cyberbullying as "any kind of aggression perpetrated through technology—any type of harassment or bullying (teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through email, a chat room, instant messaging, a website (including blogs), or text messaging") [https://perma.cc/9GUX-NVAG]. Louisiana defines cyberbullying as the "transmission of any electronic textual, visual, written, or

Each of these tragic suicides is sufficient to provoke an emotional response that, in turn, spurs corrective or preventative legislative action.<sup>12</sup> Beyond simple emotionalism, a recurring problem that has created an observable and detrimental harm to society, such as cyberbullying, justifies legislative response.<sup>13</sup> Pervasive cyberbullying frequently impacts academic decisions,<sup>14</sup> leads to real-world confrontations,<sup>15</sup> and too often culminates in tragic suicides.<sup>16</sup>

In 2015, 34% of middle school students surveyed reported experiencing cyberbullying.<sup>17</sup> Children are particularly vulnerable to the damaging effects of cyberbullying because their brains are still developing.<sup>18</sup> Cyberbullying

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oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.” LA. REV. STAT. § 14:40.7 (2017).

12. See, e.g., MO. REV. STAT. § 565.090 (2017) (“A person commits the crime of harassment if he or she . . . [k]nowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication.”).

13. See, e.g., Wilson, *supra* note 1. Cyberbullying has become so pervasive that it has appeared on prominent societal icons, such as South Park. See Peter Anthony, ‘South Park’ Season 19 Episode 5: Top 5 Moments From ‘Safe Space’ [RECAP], DESIGN & TREND (Oct. 22, 2015, 12:14 PM) (on file with author).

14. Christina Warren, *Rebecca Black Quits Middle School After Bullying*, MASHABLE (Aug. 12, 2011), <http://mashable.com/2011/08/12/rebecca-black-quits-school-bullying-poll/#38sqn.dJnOq1> (explaining how Rebecca Black was bullied after becoming a viral sensation for her hit song “Friday”) [<https://perma.cc/8SAE-9PZW>].

15. Damon Sims, *Cleveland shooting shows how cyberbullying is spreading and leading to real-world confrontations*, CLEVELAND (Apr. 5, 2009), [http://blog.cleveland.com/metro/2009/04/cleveland\\_shooting\\_shows\\_how\\_c.html](http://blog.cleveland.com/metro/2009/04/cleveland_shooting_shows_how_c.html) (detailing how a social media feud between two teens led to a non-lethal shooting) [<https://perma.cc/3Q6J-7489>].

16. See *Megan’s Story*, *supra* note 1 (explaining that 13-year-old Megan Meier committed suicide after being catfished and cyberbullied via social media by an adult in her neighborhood); Hodge & Murphy, *supra* note 1 (explaining how 16-year-old Phoebe Connop committed suicide after being cyberbullied by her peers for making racially insensitive remarks).

17. Samir Hinduja & Justin W. Patchin, *2015 Cyberbullying Data*, CYBERBULLYING RES. CTR. (May 1, 2015), <http://cyberbullying.org/2015-data> [<https://perma.cc/7WP2-9AP6>].

18. Linda Spear, *Adolescent Brain Development*, 8 T.M. COOLEY J. PRAC. & CLINICAL L. 11, 19 (2006) (asserting that emotional environments make it difficult for adolescents to focus vis-a-vis executive functions).

often leads to adolescent suicide<sup>19</sup> and contributes to the fact that suicide is the second leading cause of death in the United States for people between ages 15 and 24.<sup>20</sup>

Cyberbullying poses a significant danger because people can access forms of electronic communication almost anywhere at any time.<sup>21</sup> Cyberbullying adversely affects victims in numerous observable ways, including “lowering self-esteem, increasing depression, and producing feelings of powerlessness.”<sup>22</sup> Accordingly, cyberbullying contributes to school problems, anti-social behavior, substance use, and delinquency.<sup>23</sup> These issues are just some of the reasons that individual states have adopted cyberbullying legislation.<sup>24</sup> This legislation, however, must not infringe First Amendment rights.<sup>25</sup>

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19. See, e.g., *Megan’s Story*, *supra* note 1 (detailing 13-year-old Megan Meier’s suicide after she was catfished and cyberbullied via social media by an adult in her neighborhood).

20. See CHRISTOPHER W. DRAPEAU & JOHN L. MCINTOSH, AM. ASS’N OF SUICIDOLOGY, U.S.A. SUICIDE: 2013 OFFICIAL FINAL DATA (Apr. 24, 2015), <http://www.suicidology.org/Portals/14/docs/Resources/FactSheets/2013datapgsv3.pdf> [<https://perma.cc/YVN3-UBZ4>].

21. Jenn Anderson, Mary Bresnahan & Catherine Musatics, *Combating Weight-Based Cyberbullying on Facebook with the Dissenter Effect*, 17 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 281, 281 (2014) (arguing that online bullying is more dangerous than traditional bullying for several reasons. First, online bullying is easier to engage in because of increased anonymity and decreased internal censorship. Second, online bullying is more pervasive than traditional bullying, partly because perpetrators can use a broad range of platforms, including web sites, cell phones, e-mail, and instant messaging. Third, online bullying comments are often permanently, and repeatedly, visible by victims and their peers).

22. *Id.*

23. *Cyberbullying Facts*, CYBERBULLYING RES. CTR., <http://cyberbullying.org/facts> (last visited Oct. 29, 2017) [<https://perma.cc/W9Y9-QT9F>].

24. See, e.g., Phil Prazan, *After teen’s suicide David’s Law hopes to prevent cyber-bullying*, KXAN (Nov. 13, 2016, 11:32 PM), <http://kxan.com/2016/11/13/davids-law-hopes-to-stem-cyber-bullying-in-texas/> [<https://perma.cc/Y88B-SMPF>]; see also Samir Hinduja & Justin W. Patchin, *A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CTR. (Jan. 2016), <https://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf> (listing Arkansas, Louisiana, Missouri, Nevada, North Carolina, Tennessee, and Washington as states that criminalize cyberbullying at the time of the last update).

25. See, e.g., *State v. Bishop*, 787 S.E.2d 814, 820 (N.C. 2016).

The First Amendment guarantees freedom of speech and protects that right from arbitrary government intrusion.<sup>26</sup> Although the First Amendment does not protect all speech, it does protect offensive or disagreeable speech.<sup>27</sup> For speech to be restricted by the government, the Constitution requires that the speech be more than merely offensive or undesirable.<sup>28</sup> The United States Supreme Court has declined to address how First Amendment protections apply to cyberbullying prohibitions.<sup>29</sup> In the Supreme Court's silence, state legislatures, including Louisiana's, have passed criminal cyberbullying statutes.<sup>30</sup>

This Comment asserts that Louisiana's criminal cyberbullying statute is unconstitutional because it extends beyond the exceptions to First Amendment protections recognized by the Supreme Court and the United States Fifth Circuit Court of Appeals and thus criminalizes constitutionally

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26. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“The First Amendment . . . prohibits the enactment of laws ‘abridging the freedom of speech.’” (quoting U.S. CONST. amend I)). In a 2017 decision, the Supreme Court recognized that the First Amendment protects the right to engage in free speech on social media. The Court likened social media to the traditional town square. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (“[P]rohibiting sex offenders from using [social media], . . . bars access to . . . speaking and listening in the modern public square . . . . [Social media] can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”).

27. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (finding that a federal law prohibiting disparaging trademarks “violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”); *id.* at 1764 (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

28. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 408 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

29. See *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016) (denying certiorari where discipline of a student was upheld for posting a rap to Facebook and YouTube that threatened violence on school teachers); *Kowalski v. Berkeley Cty. Schs.*, 565 U.S. 1173 (2012) (denying writ when the student's creation of an online chat room to ridicule a fellow student was upheld); *Blue Mt. Sch. Dist. v. J.S. ex rel. Snyder*, 565 U.S. 1156 (2012) (denying writ when a student was protected by the First Amendment when she created a false online profile of her principal).

30. See, e.g., ARK. CODE ANN. § 5-71-217 (2017); LA. REV. STAT. § 14:40.7 (2017).

protected speech.<sup>31</sup> Louisiana should amend its statute to provide the greatest possible protection for children while conforming to the requirements of both the First Amendment and the Louisiana Constitution.

Part I of this Comment discusses the history and significance of the fundamental right of free speech in the United States and exceptions to First Amendment protections recognized by the Supreme Court. Part II explores Supreme Court jurisprudence and subsequent lower court decisions regarding speech relevant to criminalizing cyberbullying. Part III analyzes the constitutionality of Louisiana's cyberbullying statute under the First Amendment of the United States Constitution and the Louisiana Constitution. Part IV proposes changes to the statute to provide the greatest constitutional protection for children.

#### I. EXPLORING THE HISTORY OF THE RIGHT OF FREE SPEECH IN THE UNITED STATES

The United States' founders believed certain fundamental rights were granted by Nature and its Creator.<sup>32</sup> The government could not abridge these fundamental rights because they did not flow from government and were not surrendered by the people.<sup>33</sup> The United States Constitution expressly

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31. See U.S. CONST. amend. I.

32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . ."). This understanding of natural rights can be traced throughout history to earlier thinkers, such as England's John Locke. See generally MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 187–215 (2011) (explaining Locke's insistence that natural law comes from a Creator).

33. See VIRGINIA DECLARATION OF RIGHTS § 1 (1776) ("That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity."); 1 WILLIAM BLACKSTONE, COMMENTARIES \*124 ("For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."); see also U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").



recognized freedom of speech as one of these fundamental rights<sup>34</sup> in 1791.<sup>35</sup> Nevertheless, these rights were never considered absolute.<sup>36</sup>

### A. *Government as the Protector of Individual Rights*

The Declaration of Independence declares that governments are formed to protect fundamental rights.<sup>37</sup> Historically, commentators have recognized protecting fundamental rights as one of government's most significant functions.<sup>38</sup> When giving the government the power necessary to protect individual rights, it is necessary to ensure that government itself does not impermissibly infringe upon individual's exercise of these fundamental rights.<sup>39</sup> Consequently, the American people adopted the first

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34. *Fundamental Right*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“(1) A right derived from natural or fundamental law. (2) *Constitutional law*. A significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications.”).

35. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (“The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.”).

36. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[T]he right of free speech is not absolute at all times and under all circumstances.”); *see also* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919) (“‘Your right to swing your arms ends just where the other man’s nose begins.’ To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.”).

37. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”).

38. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES \*124 (“Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.”).

39. THE FEDERALIST NO. 51 (James Madison) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

ten amendments to the Constitution, commonly known as the Bill of Rights,<sup>40</sup> as checks on the federal government's power.<sup>41</sup>

The Constitution's First Amendment guarantees American citizens' fundamental right to freedom of speech with a clear and resounding declaration: "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>42</sup> Although the plain text limits only Congress's

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40. U.S. CONST. amends. I-X. *See Bill Of Rights Of The United States Of America (1791)*, BILL OF RIGHTS INST., <https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> (last visited Oct. 29, 2017) [<https://perma.cc/WLV9-97QN>]. Historical precursors to the Bill of Rights include the Magna Carta that restricted the power of the King. *See Magna Carta: Muse and Mentor: Executive Power*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/executive-power.html> (last visited Nov. 2, 2017) [<https://perma.cc/7945-2EAJ>]. The Library of Congress explains the Magna Carta's historical importance because

[f]or centuries Magna Carta has stood for the principle that no man is above the law, not even a king. Although King John's Magna Carta does not explicitly articulate this idea, it did create checks designed to restrain the king whenever he failed to uphold the terms of the charter. . . . the understanding that any act by the king or one of his agents that violated the terms of the charter was void, and, in the language of Edward I's 1297 Confirmation of the Charters, "should be undone and holden for naught."

LIBRARY OF CONGRESS, *supra*.

41. *See* BILL OF RIGHTS INST., *supra* note 40. The Bill of Rights was adopted as part of a compromise between federalist and anti-federalist factions to ratify the Constitution. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 389–90 (2009).

42. U.S. CONST. amend I. As the first individual right expressly protected from governmental intrusion, the freedom of speech holds a venerated position in American society. *See From George Washington to Officers of the Army, 15 March 1783*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-10840> (last updated June 29, 2017) [<https://perma.cc/4PHA-TPPG>]. George Washington wrote a letter to his army officers explaining free speech's importance:

[I]f Men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of Mankind; reason is of no use to us—the freedom of Speech may be taken away—and, dumb & silent we may be led, like sheep, to the Slaughter.

FOUNDERS ONLINE, *supra*; *see also* *Extract Thomas Jefferson to Archibald Stuart*, JEFFERSON QUOTES AND FAMILY LETTERS, <http://tjrs.monticello.org/letter/139> (last visited Oct. 29, 2017) ("I would rather be exposed to the inconveniencies attending too much liberty than those attending too small a degree of it.") [<https://perma.cc/5KXV-698N>].

power, the First Amendment, through the Fourteenth Amendment<sup>43</sup> and the doctrine of incorporation,<sup>44</sup> precludes each state from violating the rights the Amendment protects.<sup>45</sup> Each state, therefore, is prohibited from restricting speech protected by the First Amendment.<sup>46</sup>

*B. The Supreme Court's Recognition of Permissible Restrictions on Speech*

The First Amendment prohibits the government from “restrict[ing] expression because of its message, its ideas, its subject matter, or its

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43. U.S. CONST. amend XIV (providing that no state may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

44. The doctrine of incorporation provides that certain Bill of Rights protections are enforced against the states through the Fourteenth Amendment. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws abridging the freedom of speech.”); *see also McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (“[I]ncorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’” (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964))).

45. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (finding that the Fourteenth Amendment precluded state legislatures from passing laws violating the free exercise of religion enshrined in the First Amendment). Before the Fourteenth Amendment and the incorporation doctrine, the Supreme Court held that the Bill of Rights did not apply to the states. In *Barron v. City of Baltimore*, the Supreme Court stated that

[i]n almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments. . . . These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. We are of opinion, that the provision in the fifth amendment to the constitution . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.

*Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833).

46. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.”).

content.”<sup>47</sup> Speech does not have to be beneficial or useful to enjoy First Amendment protections.<sup>48</sup> As a general rule, a law restricting speech because of the content of its message, such as an cyberbullying statute, must survive strict scrutiny to be constitutional.<sup>49</sup>

When analyzing cyberbullying laws, there are two notable potential exceptions to applying strict scrutiny. First, a state actor may prohibit speech when its content concerns a traditionally limited genre of speech.<sup>50</sup> Second, speech may be limited in cases related to schools if the restriction complies with *Tinker v. Des Moines Independent Community School District*<sup>51</sup> and its progeny.<sup>52</sup>

### 1. Applying Strict Scrutiny to Content-Based Laws

A law is content-based if it restricts speech because of the “topic discussed or the idea or message expressed.”<sup>53</sup> Further, a law is content-based if it cannot be justified “without reference to the content of the regulated speech” or if the law was passed “because of disagreement with the message.”<sup>54</sup> Conversely, a content-neutral speech restriction “serves

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47. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation mark omitted) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983)).

48. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 576 (2011) (“Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain.”) (internal quotation mark omitted).

49. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (stating that to survive strict scrutiny, there must be both a compelling state interest, and the state must choose the least restrictive means in achieving that interest).

50. True threats, incitement, obscenity, and fighting words have traditionally been restricted without raising First Amendment concerns. *See id.* at 791.

51. *Tinker*, 393 U.S. 503 (holding that conduct by a student on campus—conduct that materially disrupts classwork or involves substantial disorder or invasion of the rights of others—is not immunized by the First Amendment right to free speech).

52. *See, e.g., Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016) (extending *Tinker* to reach speech made online off-campus).

53. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Cyberbullying laws are usually content-based restrictions because they criminalize or restrict speech based upon its bullying message. *See, e.g., State v. Bishop*, 787 S.E.2d 814, 820 (N.C. 2016).

54. *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791(1989)) (internal quotation marks omitted).

purposes unrelated to the content of expression.”<sup>55</sup> A court is required to determine if a challenged regulation “on its face” distinguishes protected and criminalized speech “based on the message a speaker conveys.”<sup>56</sup> Suppressing speech because of its content generally is presumed unconstitutional.<sup>57</sup>

Strict scrutiny is a heightened form of review used by courts to determine a law’s constitutionality.<sup>58</sup> To withstand strict scrutiny, a content-based speech regulation must promote a compelling state interest and embody the least restrictive means to further that interest so that the regulation does not “unnecessarily interfer[e]” with freedoms protected by the First Amendment.<sup>59</sup> Strict scrutiny sometimes has been called “‘strict’ in theory and fatal in fact.”<sup>60</sup> One scholar’s research shows that only 22% of statutes analyzed in free speech cases survived strict scrutiny.<sup>61</sup>

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55. *Ward*, 491 U.S. at 791. The Supreme Court stated how a speech restriction is content-neutral:

The principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. . . . Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.

*Id.* (internal quotation marks omitted) (internal citations omitted).

56. *Reed*, 135 S. Ct. at 2227 (quoting *Sorrel v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011)).

57. *Id.* at 2226 (“Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

58. See *Strict scrutiny*, EXPLORING CONSTITUTIONAL LAW, [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (last visited Oct. 29, 2017) [<https://perma.cc/8E3M-KW78>].

59. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

60. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (defining “conventional ‘strict scrutiny’” as “scrutiny that is strict in theory, but fatal in fact” because strict scrutiny is difficult to survive); see also Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Bernal v. Fainter, 467 U.S. 216, 220 n.6 (1984) (“Only rarely are statutes sustained in the face of strict scrutiny.”).

61. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 851 (2006). The same study found that although “the Supreme Court (25%) and the district courts

Content-based speech restrictions rarely survive strict scrutiny.<sup>62</sup> The Supreme Court decided such a rare case when it upheld a state statute prohibiting electioneering within 100 feet of polling places because the law furthered a compelling state interest—having free and effective elections<sup>63</sup>—by the least restrictive means.<sup>64</sup> On the other hand, a statute purporting to protect children from obscene messages did not survive strict scrutiny because the statute went beyond what was necessary to further the state’s compelling interest by also denying “adult access to telephone messages which were indecent.”<sup>65</sup> Additionally, a law prohibiting a church and its pastor from displaying temporary directional signs announcing service times and locations failed to survive strict scrutiny because the statute was not narrowly tailored to achieve a compelling state interest.<sup>66</sup> Nevertheless, a content-based speech restriction that otherwise would fail to survive strict scrutiny is constitutional if the law restrains a traditionally restricted genre of speech.<sup>67</sup>

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(23%) uphold laws at similar rates, the circuit courts of appeal are much more likely to uphold a law (39%)” under strict scrutiny. *Id.* at 826. Winkler concludes that his study conclusively shows that “strict scrutiny is survivable in practice and not fatal in fact.” *Id.* at 871.

62. *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (“It is rare that a regulation restricting speech because of its content will ever be permissible.” (quoting *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 818 (2000))).

63. *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality opinion).

64. *Id.* at 211 (“Accordingly, it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.”).

65. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

66. *Reed*, 135 S. Ct. at 2232. The Supreme Court held that the sign restriction failed strict scrutiny because

[t]he Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting. In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest.

*Id.*

67. *See United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (reciting content-based restrictions on speech that have been permitted in a few historical categories, including incitement, fighting words, and true threats).

## 2. *Speech Traditionally Limited Due to the Content of its Message*

Certain genres of speech traditionally have been limited because the message conveyed does not violate the First Amendment.<sup>68</sup> The Supreme Court has observed that limiting these “well-defined and narrowly limited classes of speech” does not impermissibly infringe upon constitutional rights.<sup>69</sup> These traditionally restricted classes or genres include fighting words,<sup>70</sup> obscenity,<sup>71</sup> incitement,<sup>72</sup> and true threats.<sup>73</sup> Because the First Amendment does not protect these types of speech, they can be restricted without violating the Constitution.<sup>74</sup>

### a. *The “Fighting Words” Exception*

“Fighting words” are words “[that] by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>75</sup> Fighting words provide no benefit to social discourse; any value derived from fighting words is outweighed by the damage caused to societal interests.<sup>76</sup> As such, fighting words do not convey any information or opinion protected by the Constitution and may be restricted.<sup>77</sup>

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68. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“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.”).

69. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790–91 (2011) (explaining that obscenity, incitement, and fighting words “represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” (quoting *Chaplinsky*, 315 U.S. at 571–72)).

70. *Chaplinsky*, 315 U.S. at 572.

71. *Roth v. United States*, 354 U.S. 476, 483 (1957).

72. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam).

73. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“[T]he First Amendment also permits a State to ban a true threat.”) (internal citation omitted).

74. *281 Care Comm. v. Arneson*, 638 F.3d 621, 633 (8th Cir. 2011) (“The categories of speech that the Supreme Court has found fall outside the First Amendment include fighting words, obscenity, child pornography, and defamation; statutes restricting speech from one of these categories are not subject to strict scrutiny as long as they are viewpoint-neutral.” (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–88 (2000))).

75. *Chaplinsky*, 315 U.S. at 572.

76. *Id.* (“[Fighting words] 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.”).

77. *Id.*

In *Chaplinsky v. State of New Hampshire*, the Supreme Court upheld a statute prohibiting anyone from addressing offensive, derisive, or annoying words that had a “direct tendency to cause acts of violence” to another person lawfully in a public place.<sup>78</sup> Walter Chaplinsky was convicted under the statute for accusing another man and the government of Rochester, New Hampshire of being, among other things, fascist.<sup>79</sup> The Court held that this law did not violate the First Amendment because the statute was “narrowly drawn and limited to define and punish specific conduct lying within the domain of state power.”<sup>80</sup> Thus, the Court held that Chaplinsky’s conviction under the statute was constitutionally permissible because his “fighting words” were likely to cause an immediate breach of the peace.<sup>81</sup>

Courts have greatly limited the fighting words doctrine since *Chaplinsky*.<sup>82</sup> One scholar notes the existence of a “strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence.”<sup>83</sup> Further, the Supreme Court has not upheld a “fighting words” conviction since *Chaplinsky* in 1942.<sup>84</sup>

*b. The “Obscene Material” Exception*

In addition to the fighting words doctrine, the Supreme Court has upheld restrictions on speech that contains obscene material.<sup>85</sup> Obscene

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78. *Id.* at 573.

79. *Id.* at 569. Chaplinsky’s complaint alleged 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.*

80. *Id.* at 573.

81. *Id.* at 574.

82. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1034 (4th ed. 2011).

83. Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009).

84. Burton Caine, *The Trouble with “Fighting Words”*: *Chaplinsky v. New Hampshire Is A Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 444 (2004).

85. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957).



material “deals with sex in a manner appealing to prurient<sup>86</sup> interest” and is not protected by the First Amendment.<sup>87</sup> To determine whether material appeals to a prurient interest, the court asks whether the material “offend[s] the common conscience of the community by present-day standards.”<sup>88</sup> A statute regulating obscene material must regulate speech that depicts or describes sexual conduct and specifically define the prohibited speech.<sup>89</sup> Further, the obscenity statute must concern works appealing to that prurient interest, “which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value.”<sup>90</sup>

In *Roth v. United States*, Samuel Roth was charged with “mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.”<sup>91</sup> Federal law provided that “[e]very obscene, lewd, lascivious, or filthy book . . . or other publication of an indecent character; . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails . . . .”<sup>92</sup> The Supreme Court found that the statute was constitutional because the First Amendment does not protect obscenity; thus, the Court upheld Roth’s conviction.<sup>93</sup>

### *c. The “Incitement” Exception*

In addition to obscenity, the Supreme Court has upheld restrictions on inciting speech. The First Amendment does not protect speech that is “directed to inciting or producing imminent lawless action and is likely to

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86. *Prurient*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/prurient> (last visited Nov. 2, 2017) (defining “prurient” as “marked by or arousing an immoderate or unwholesome interest or desire; *especially*: marked by, arousing, or appealing to sexual desire”) [<https://perma.cc/QE2P-PSFG>].

87. *Roth*, 354 U.S. at 487 (footnote omitted).

88. *Id.* at 490.

89. *Miller v. California*, 413 U.S. 15, 23–24 (1973) (internal citation omitted).

90. *Id.*

91. *Roth*, 354 U.S. at 480.

92. *Id.* at 479 n.1.

93. *Id.* at 484–85 (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. We hold that obscenity is not within the area of constitutionally protected speech or press.”) (internal footnotes omitted).

incite or produce such action.”<sup>94</sup> Speech is protected, however, if it fails either to “incite lawless action” or if the speech is unlikely to induce the lawless action that the government seeks to avoid.<sup>95</sup> For example, organizing, equipping, and urging people to participate in “virtual sit-ins” that caused website servers to slow down was incitement because virtual sit-ins are unlawful and the lawless conduct actually occurred.<sup>96</sup> But religious protestors making vulgar and disparaging comments towards another religion was not inciting speech because the protestors did not advocate for imminent lawlessness.<sup>97</sup>

In *NAACP v. Claiborne Hardware Co.*, the Claiborne County, Mississippi chapter of the National Association for the Advancement of Colored People (“NAACP”) boycotted white merchants after the chapter’s petition for racial equality and integration was not satisfactorily answered.<sup>98</sup> The boycott organizer, Charles Evers, said that “boycott violators would be ‘disciplined’ by their own people and warned that the Sheriff could not sleep with boycott violators at night.”<sup>99</sup> Further, Evers threatened, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”<sup>100</sup> Even though Evers expressed himself through “emotionally charged rhetoric,” his speech was protected by the First Amendment because it did not actually incite lawless action.<sup>101</sup> Advocating the use of force or violence does not strip speech of First Amendment protections if the speech is unlikely to induce violent action.<sup>102</sup>

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94. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

95. *Id.*

96. *United States v. Fullmer*, 584 F.3d 132, 155 (3d Cir. 2009) (“[A]n . . . e-mail titled ‘Electronic Civil Disobedience,’ . . . encouraged and compelled an imminent, unlawful act that was not only likely to occur, but provided the schedule by which the unlawful act was to occur. This type of communication is not protected speech under [*Brandenburg*] . . .”).

97. *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 244 (6th Cir. 2015) (“The only references to violence or lawlessness . . . were messages such as, ‘Islam is a Religion of Blood and Murder,’ ‘Turn or Burn,’ and ‘Your prophet is a pedophile.’ These messages, however offensive, do not advocate for, encourage, condone, or even embrace imminent violence or lawlessness.”).

98. *Claiborne Hardware Co.*, 458 U.S. at 898–900.

99. *Id.* at 902.

100. *Id.*

101. *Id.* at 928. (“An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.”).

102. *Id.* at 927.

*d. The “True Threats” Exception*

True threats, the fourth notable exception to First Amendment guarantees, are not protected by the First Amendment.<sup>103</sup> A true threat is the serious expression of intent to perform an illegal violent act that is directed toward a particular person or group.<sup>104</sup> The speaker does not actually have to intend to perform the act for the speech to constitute a true threat.<sup>105</sup>

In *Virginia v. Black*, the Supreme Court upheld prohibitions on burning a cross with the intent to intimidate someone because that expression constituted a true threat.<sup>106</sup> Cross burning in the United States is historically associated with the Ku Klux Klan.<sup>107</sup> Crosses often were burnt to “serve[] as a message of intimidation, designed to inspire in the victim a fear of bodily harm.”<sup>108</sup> Because cross burning often is intended to place recipients of the message in fear for their lives, the “First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate.”<sup>109</sup>

It is clear that strict scrutiny will not apply if the speech falls within a traditionally limited genre.<sup>110</sup> But strict scrutiny will not automatically apply if a content-based speech restriction is outside of a traditionally limited speech genre.<sup>111</sup> Strict scrutiny will also not apply if the restriction raises a pedagogical,<sup>112</sup> or education-related, concern, which is addressed in *Tinker* and its progeny.

## II. JURISPRUDENCE RELEVANT TO CRIMINALIZING CYBERBULLYING

States must respect federal constitutional speech protections when adopting cyberbullying statutes.<sup>113</sup> The Supreme Court has specifically addressed a student’s constitutional rights concerning speech made on

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103. See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

104. *Id.* at 359–60.

105. *Id.*

106. *Id.* at 360.

107. See, e.g., *id.* at 352.

108. *Id.* at 357 (“[T]he history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical.”).

109. *Id.* at 363.

110. See *supra* Part I.B.2.

111. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

112. *Pedagogical*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/pedagogical> (last visited Nov. 2, 2017) (defining “pedagogical” as “of or relating to teachers or education”) [<https://perma.cc/E36R-HGQD>].

113. See, e.g., *State v. Bishop*, 787 S.E.2d 814, 820 (N.C. 2016).

campus or at school-sponsored events.<sup>114</sup> The Supreme Court has remained silent, however, regarding the intersection of online bullying and the First Amendment.<sup>115</sup> Because of the Supreme Court's silence on this issue, lower courts have had to determine what, if any, federal constitutional protections apply to bullying occurring entirely online.<sup>116</sup>

*A. Speech Limitations Furthering Legitimate Pedagogical Concerns Are Constitutional*

Speech restrictions relating to a school's learning environment are not subject to strict scrutiny if the speech raises legitimate pedagogical concerns.<sup>117</sup> In 1969, the Supreme Court in *Tinker* recognized that students' speech enjoys First Amendment protections—but not without exception.<sup>118</sup> The Court held that schools can restrict students' speech made on the school's campus if the speech disrupts the learning environment.<sup>119</sup> In subsequent decisions, the Supreme Court has shown a willingness to deviate from *Tinker*'s stringent disruption standard to permit the content-based restriction of indecent speech made at a school

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114. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

115. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016) (denying certiorari when the discipline of a student was upheld for posting a rap song to Facebook and YouTube—a song that threatened violence on school teachers); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012) (denying certiorari when a student's creation of an online chat room to ridicule a fellow student was upheld); *Blue Mt. Sch. Dist. v. J.S. ex rel. Snyder*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012) (denying certiorari when a student creating a false online profile of her principal was held to be protected by the First Amendment).

116. See, e.g., *Bell*, 799 F.3d at 394.

117. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

118. *Tinker*, 393 U.S. at 506–07.

119. See *id.* at 513. The Supreme Court noted that 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 involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

*Id.*

assembly,<sup>120</sup> controversial speech in a student newspaper,<sup>121</sup> and off-campus speech made at a school-sponsored event by a student encouraging illegal drug use.<sup>122</sup>

### I. *Tinker v. Des Moines Independent Community School District*

In *Tinker*, the Supreme Court considered students' First Amendment right to engage in political speech on their high school campus by wearing armbands protesting the Vietnam War.<sup>123</sup> John Tinker, Mary Beth Tinker, and Christopher Eckhardt were high school students who decided to object publicly to the Vietnam War and to express support for a truce by wearing small black armbands to school.<sup>124</sup> Before the students wore the armbands to school, the Des Moines school system adopted a policy forbidding students from wearing the armbands to school.<sup>125</sup> Under the policy, students wearing the armband to school would be asked to remove it.<sup>126</sup> If the student refused to remove the armband he or she would be suspended.<sup>127</sup>

Knowing their school's policy, John Tinker, Mary Beth Tinker, and Christopher Eckhardt wore the armbands to school and were suspended.<sup>128</sup> There was no evidence that wearing the armbands caused any interference or disruption in the classroom.<sup>129</sup> Further, the Des Moines schools did not prohibit wearing all political or controversial symbols—instead, the schools singled out wearing this specific armband protesting the Vietnam

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120. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (digressing from the “substantial disruption” test, the Court held that the school district may prohibit lewd, indecent, or offensive speech and conduct when made at a school assembly).

121. *Kuhlmeier*, 484 U.S. at 273 (holding that a school may censor speech made in a student paper about controversial topics when the school's actions are “reasonably related to legitimate pedagogical concerns”).

122. *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding that a school may restrict speech made off-campus at a school sponsored event when the speech encourages illegal drug use).

123. *Tinker*, 393 U.S. at 504 (“On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands.”).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.* at 508.

War.<sup>130</sup> Analyzing these facts, the Court held that students possess First Amendment rights at school,<sup>131</sup> and expressing a point of view by wearing an armband is speech protected by the First Amendment.<sup>132</sup> Because there was no evidence that wearing the armbands “might reasonably have led school authorities to forecast [a] substantial disruption of or material interference with school activities,” the Constitution prohibits state officials from denying students right to speech.<sup>133</sup>

The Court further recognized that state and school officials can constitutionally regulate some speech in schools.<sup>134</sup> The Court stated that state legislatures and school boards may restrict speech if the “conduct by the student, in class or out of it . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>135</sup> The students in *Tinker* peacefully wearing armbands, however, were not a sufficient disruption to justify suppressing the students’ speech.<sup>136</sup>

## 2. Bethel School District No. 403 v. Fraser

In 1986, the Supreme Court announced its first deviation from the *Tinker* substantial disruption standard by expanding a school’s authority to restrain speech in *Bethel School District No. 403 v. Fraser*.<sup>137</sup> Matthew Fraser nominated a fellow high school classmate for student office in front of a mandatory school assembly.<sup>138</sup> During the speech, Fraser referred to his candidate “in terms of an elaborate, graphic, and explicit sexual

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130. *See id.* at 510–11.

131. *Id.* at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

132. *Id.* at 505.

133. *See id.* at 514.

134. *Id.* at 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”).

135. *Id.* at 513.

136. *Id.* at 514 (“They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others . . . . In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.”).

137. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (digressing from *Tinker*’s “substantial disruption” test, the Court held that the school district may prohibit lewd, indecent, or offensive speech and conduct when made at a school assembly).

138. *Id.* at 677–78.

metaphor.”<sup>139</sup> Consequently, the principal suspended Fraser for three days.<sup>140</sup> In upholding Fraser’s suspension, the Supreme Court broadened *Tinker*’s material disruption standard and held that a school district may restrict “offensively lewd and indecent speech” that would “undermine the school’s basic educational mission.”<sup>141</sup> By allowing the restriction of lewd or indecent speech at school, the Court broadened the school’s authority beyond *Tinker*, which required a material disruption of classwork or a substantial disorder before speech could be limited.<sup>142</sup>

### 3. Hazelwood School District v. Kuhlmeier

Two years later, in 1988, the Supreme Court again broadened schools’ authority to restrict student speech in *Hazelwood School District v. Kuhlmeier* by permitting schools to censor some speech before granting the speech the school’s imprimatur.<sup>143</sup> In *Hazelwood*, a principal prevented the student newspaper from publishing two articles.<sup>144</sup> The first article covered three students’ pregnancies.<sup>145</sup> The principal was concerned that the pregnant students in the article could be identified and that an article concerning sexual activity and birth control was inappropriate for the school’s younger students.<sup>146</sup> The second article discussed the impact of divorce on students.<sup>147</sup> In refusing to publish the divorce article, the principal worried that a father identified in the article, who was accused of not spending enough time with his family prior to the divorce, had not been granted “an opportunity to respond to these remarks or to consent to their publication.”<sup>148</sup>

Upholding the principal’s refusal to publish the students’ articles, the *Kuhlmeier* Court deviated from the *Tinker* standard.<sup>149</sup> The Court held that a school may refuse to “lend its name and resources” to the proliferation

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139. *Id.* at 678; *see also id.* at 687 (Brennan, J., concurring) (detailing some of Fraser’s speech: “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. . . .”) (internal quotation marks omitted).

140. *Id.* at 678 (majority opinion).

141. *Id.* at 685.

142. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

143. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 272–73.

of a student's speech provided its "actions are reasonably related to legitimate pedagogical concerns."<sup>150</sup> A school may exercise dominion over student speech made using school resources to ensure that participants learn what the activity is supposed to teach, protect consumers from being exposed to material inappropriate for their maturity, and prevent certain opinions from being erroneously attributed to the school.<sup>151</sup> Allowing schools to control certain student speech made using school resources is another expansion of school authority beyond *Tinker's* material disruption or substantial disorder requirement.<sup>152</sup>

#### 4. *Morse v. Frederick*

Most recently, in 2007, the Supreme Court once again deviated from *Tinker's* material disruption standard and broadened schools' authority to restrict speech based on its content in *Morse v. Frederick*.<sup>153</sup> In *Morse*, a high school principal confiscated a banner reading "BONG HiTS 4 JESUS," which a student, Joseph Frederick, displayed at an off-campus—but school-sponsored—event.<sup>154</sup> The school subsequently suspended Frederick.<sup>155</sup> In upholding the restriction, the Supreme Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."<sup>156</sup>

Further, the Court determined the principal reasonably "conclude[d] that the banner promoted illegal drug use . . . and that failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use."<sup>157</sup> The First Amendment does not require schools to allow expression that "contributes to those dangers" at off-campus, school-sponsored events.<sup>158</sup> Allowing a school to restrict speech promoting illegal drug use is an additional expansion of school authority beyond *Tinker's* material disruption or substantial disorder requirement.<sup>159</sup>

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150. *Id.*

151. *Id.* at 271.

152. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

153. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007).

154. *Id.* at 397.

155. *Id.* at 396.

156. *Id.* at 397.

157. *Id.* at 410.

158. *Id.*

159. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).



*B. Jurisprudence Analyzing Restrictions of Cyberbullying Under the First Amendment*

The Supreme Court has not decided a case concerning the criminalization of online, off-campus speech vis-à-vis the First Amendment.<sup>160</sup> In fact, the Supreme Court has denied certiorari in cases concerning a potential cyberbully's freedom of speech.<sup>161</sup> Because the Supreme Court has not ruled on a cyberbullying case, federal circuit courts and state courts have developed their own standards.<sup>162</sup> Accordingly, courts often apply *Tinker* to determine whether the bullying speech can be restricted because child cyberbullying cases frequently correlate with face-to-face confrontation at school.<sup>163</sup>

*1. Bell v. Itawamba County School Board: The Fifth Circuit Extending Tinker*

The United States Fifth Circuit Court of Appeals recently articulated a standard for determining whether purported cyberbullying is speech protected by the First Amendment in *Bell v. Itawamba County School Board*.<sup>164</sup> In *Bell*, Taylor Bell, a high school student, recorded and shared a rap song on his publicly accessible Facebook and YouTube pages when he was away from his school's campus.<sup>165</sup> In the song, Bell named two coaches and threatened to carry out violent acts against them.<sup>166</sup> Bell's rap also included threats to put a pistol in the coaches' mouths and "cap" them,

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160. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

161. *See Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016) (denying certiorari when the discipline of a student was upheld for posting a rap song to Facebook and YouTube which threatened violence on school teachers); *Kowalski v. Berkeley Cty. Schs.*, 565 U.S. 1173 (2012) (denying certiorari when a student's creation of an online chat room to ridicule a fellow student was upheld); *Blue Mt. Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012) (denying certiorari when a student creating a false online profile of her principal was held to be protected by the First Amendment).

162. Mitchell J. Waldman, *What Oral Statement of Student Is Sufficiently Disruptive so as to Fall Beyond Protection of First Amendment*, 76 A.L.R. FED. 599 (1986).

163. *See, e.g., Bell*, 799 F.3d at 394; *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

164. *Bell*, 799 F.3d 379.

165. *Id.* at 383.

166. *Id.*

described a particular weapon that he would use on the coaches as a “rueger [sic],”<sup>167</sup> encouraged other students to join these actions, and warned the coaches to “watch their backs” because they would receive no mercy.<sup>168</sup> The school suspended Bell because of the rap song.<sup>169</sup>

Sitting *en banc*, a divided Fifth Circuit extended the *Tinker* “substantial disruption” rule<sup>170</sup> to speech made completely online and away from the school’s campus when the speaker intended the speech to be seen by the scholastic community.<sup>171</sup> In upholding Bell’s suspension, the court found that it was reasonably foreseeable the rap would cause a “substantial disruption” on the school’s campus, particularly when Bell admitted<sup>172</sup> that he intentionally directed the rap song to be heard by the school’s student body.<sup>173</sup> Interestingly, the Fifth Circuit appears to have created a new standard that allows schools to regulate off-campus speech intentionally directed at a school’s student body—speech “constitut[ing] threats, harassment, and intimidation, as a layperson would understand the

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167. This reference apparently is a misspelling of the Ruger firearm brand. Ruger is a firearm producer that manufactures millions of firearms each year, including various models of handguns. *See Ruger History*, RUGER CORP., <http://www.ruger-firearms.com/corporate/> (last visited Nov. 2, 2017) [<https://perma.cc/4R66-ZTHR>].

168. *Bell*, 799 F.3d at 396–97.

169. *Id.* at 385.

170. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that conduct that materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the First Amendment).

171. *See Bell*, 799 F.3d at 383. For the purpose of this Comment, the correctness of the Fifth Circuit’s extension of the *Tinker* principle beyond the forum of the school house is assumed without analysis. But see, for example, Katherine E. Geddes, *First Amendment—Student Speech—Why Bell Tolls A Review of Tinker’s Application to Off-Campus Online Student Speech*, 69 SMU L. REV. 275 (2016), for a view critical of the Fifth Circuit’s extension of the *Tinker* principle to reach online speech.

172. *Bell*, 799 F.3d at 396. The Fifth Circuit found that Bell’s rap could reasonably substantially disrupt school because

[Bell] admitted during the disciplinary-committee hearing that one of the purposes for producing the recording was to “increase awareness of the alleged misconduct” and that, by posting the rap recording on Facebook and YouTube, he knew people were “gonna listen to it, somebody’s gonna listen to it”, remarking that “students all have Facebook”.

*Id.*

173. *Id.* at 393 (“Our holding concerns the paramount need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community.”).

terms.”<sup>174</sup> This extends *Tinker* to reach beyond speech occurring at school.<sup>175</sup>

Four judges dissented from the majority opinion.<sup>176</sup> Among their concerns, the dissenting judges contended that *Tinker*, a decision concerning armbands worn on school property, was ill-suited to address this question and that *Tinker* had been extended beyond what the Supreme Court intended by being applied to online and off-campus speech.<sup>177</sup> Additionally, the dissenters were concerned that by allowing a state actor to restrict speech a layperson understands to be threatening, harassing, or intimidating, “the majority opinion fail[ed] to apprehend that reasonable minds may differ about when speech qualifies as ‘threatening,’ ‘harassing,’ or ‘intimidating.’”<sup>178</sup>

The majority of the United States circuit courts that have considered the issue have extended *Tinker* and applied its substantial disruption standard to off-campus speech in cyberbullying cases.<sup>179</sup> Since *Tinker* was decided in 1969, six circuits have considered whether *Tinker* should apply to off-campus speech.<sup>180</sup> Five circuits, including the Fifth Circuit, have applied *Tinker* to off-campus speech.<sup>181</sup> The Third Circuit has an intra-

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174. *Id.* at 397 (“Accordingly, . . . there is no genuine dispute of material fact that Bell threatened, harassed, and intimidated the coaches by intentionally directing his rap recording at the school community, thereby subjecting his speech to *Tinker*.”).

175. *See Tinker*, 393 U.S. at 513.

176. *Id.* at 403–36.

177. *Id.* at 424 (Dennis, J., dissenting) (“*Tinker* does not authorize school officials to regulate student speech that occurs off campus and not at a school-sponsored event, where the potential ‘collision’ of interest upon which *Tinker*’s holding pivots simply is not present.”).

178. *Id.* at 418.

179. *See Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35 (2d Cir. 2007); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011); *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013); *Bell*, 799 F.3d 379.

180. *Bell*, 799 F.3d at 393.

181. *See Wisniewski*, 494 F.3d at 35 (applying *Tinker* to an eighth grader’s off-campus creation and Internet transmission of an icon that depicted and called for the killing of a teacher to 15 friends); *Kowalski*, 652 F.3d at 573–74 (finding that when a student created and posted on an online webpage, “the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it ‘interfer[ed] . . . with the schools’ work [and] colli[ded] with the rights of other students to be secure and to be let alone.” (quoting *Tinker*, 393 U.S. at 513)); *S.J.W. ex rel. Wilson*, 696 F.3d at 777 (“Thus, student speech that causes a

circuit split concerning *Tinker*'s application to off-campus speech.<sup>182</sup> The remaining circuits appear not to have addressed the issue.<sup>183</sup> Because *Bell* is the Fifth Circuit's most recent decision regarding state's authority to restrict online speech, *Bell*'s extension of *Tinker* to reach online speech informs any analysis of and potential amendments to Louisiana's cyberbullying statute.

## 2. State v. Bishop: North Carolina's Analysis of the State's Cyberbullying Law

Responding to cyberbullying related suicides, several states have imposed criminal sanctions.<sup>184</sup> North Carolina is one of these states.<sup>185</sup> In 2016, North Carolina's Supreme Court declared a portion of that state's cyberbullying statute unconstitutional in *State v. Bishop*.<sup>186</sup> The portion of the statute in question criminalized "[p]ost[ing] or encourage[ing] others to post on the Internet private, personal, or sexual information pertaining to a minor" with the "intent to intimidate or torment a minor."<sup>187</sup>

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substantial disruption is not protected. Based on the cases below and on the District Court's finding that NorthPress was 'targeted at' Lee's Summit North, we believe *Tinker* is likely to apply."); *Wynar*, 728 F.3d at 1069 ("[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."). The circuit courts disagree concerning the appropriate standard with which to apply *Tinker*. See Petra Ingerson Bergman, *Off-campus Freedom of Speech and Tinker: Political Protest to Bullying*, U. CIN. L. REV. (Feb. 15, 2017), [https://uclawreview.org/2017/02/15/off-campus-freedom-of-speech-and-tinker-political-protest-to-bullying/#\\_ftn47](https://uclawreview.org/2017/02/15/off-campus-freedom-of-speech-and-tinker-political-protest-to-bullying/#_ftn47) ("*Tinker* is integral to the three cases involved in the current circuit split concerning the application of *Tinker*, and its progeny, to the ability of schools to regulate off-campus speech and the appropriate standard under which to analyze off-campus speech. On one side, the Eighth Circuit held that the proper test to analyze the ability of schools to regulate or discipline off-campus speech is whether it was 'reasonably foreseeable' that the speech would reach the school and cause a 'substantial disruption.' On the other side, the Fourth Circuit held that the proper test was the 'nexus' test that holds that certain degree of intertwinement between the school and the speech will justify regulation by the school.") (internal footnotes omitted) [<https://perma.cc/RN5Z-BE3R>].

182. See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219–20 (3d Cir. 2011) (Jordan, J., concurring) (discussing that *Tinker*'s applicability to off-campus speech remains unresolved in the Third Circuit).

183. *Bell*, 799 F.3d at 394.

184. See Hinduja & Patchin, *supra* note 17.

185. See N.C. GEN. STAT. § 14-458.1 (2017).

186. *State v. Bishop*, 787 S.E.2d 814, 820 (N.C. 2016).

187. § 14-458.1(a)(1)(d).

During the 2011–2012 school year, Robert Bishop, the bully, and Dillion Price, the victim, were classmates.<sup>188</sup> Throughout the school year, Bishop and others bullied Price on Facebook.<sup>189</sup> In September, a classmate posted a screenshot<sup>190</sup> of a “sexually themed text message” Price mistakenly sent to him.<sup>191</sup> Price, Bishop, and several others commented on the post.<sup>192</sup> Subsequently, at least two similar Facebook posts involving “comments and accusations about each other’s sexual proclivities, along with name-calling and insults” followed, all involving Price, Bishop, and others.<sup>193</sup> That December, Price’s mother found him very upset, throwing things, and hitting himself in the head.<sup>194</sup> After learning about the comments and pictures that Price’s classmates had posted and fearing for his well-being, Price’s mother contacted the police.<sup>195</sup> On February 9, 2012, Robert Bishop was arrested and charged with violating North Carolina’s cyberbullying statute.<sup>196</sup>

The North Carolina Supreme Court found that the state’s statute did not fall within one of the narrow, traditional exception to First Amendment protections.<sup>197</sup> Likewise, the statute failed to raise the pedagogical concerns central to *Tinker*.<sup>198</sup> Because the statute criminalized certain speech purely because of its content, the statute was a content-based speech restriction subject to strict scrutiny.<sup>199</sup>

In its strict scrutiny analysis, the North Carolina Supreme Court observed that protecting children from cyberbullying is a compelling government interest.<sup>200</sup> In spite of furthering this compelling interest, the

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188. *Bishop*, 787 S.E.2d at 815.

189. *Id.*

190. *Screenshot*, DICTIONARY.COM, <http://www.dictionary.com/browse/screenshot> (last visited Nov. 2, 2017) (“Also called screen capture. a copy or image of what is seen on a computer screen at a given time.”) [<https://perma.cc/7FR5-HFR8>].

191. *Bishop*, 787 S.E.2d at 815.

192. *Id.*

193. *Id.* at 816.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.* at 821 n.3 (stating that the court need not consider a hypothetical statute which would criminalize a true threat although the court acknowledged this might present a “closer constitutional question”).

198. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that a student’s conduct that materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the First Amendment right to free speech).

199. *Bishop*, 787 S.E.2d at 819.

200. *Id.*

court held that the provision in question was not the least restrictive means of accomplishing that interest and was, therefore, unconstitutional.<sup>201</sup>

The Court expressed concern that “the statute contain[ed] no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting.”<sup>202</sup> Additionally, the Court was troubled by the overbreadth of the provision concerning criminal motive of the poster and content of the posting.<sup>203</sup> North Carolina’s cyberbullying statute forbade the motive to “intimidate or torment” and subsequently neglected to define either term that, absent a clear definition, included protected speech.<sup>204</sup>

The statute also failed to define exactly what it sought to prohibit when it broadly forbade publishing “private, personal, or sexual information pertaining to a minor.”<sup>205</sup> These broad, undefined terms criminalize protected speech “that a robust contemporary society must tolerate because of the First Amendment.”<sup>206</sup> For these reasons, the North Carolina Supreme Court held that the state’s cyberbullying statute was a content-based speech restriction that failed to survive strict scrutiny because the statute was “not narrowly tailored to the State’s asserted interest in protecting children from the harms of online bullying.”<sup>207</sup> Because the Louisiana and North Carolina cyberbullying statutes share the common interest of protecting children from harmful online speech and raise the corresponding overbreadth concerns,<sup>208</sup> *Bishop*’s strict scrutiny analysis of North Carolina’s cyberbullying statute can inform an analysis of the Louisiana statute’s constitutionality.

### III. ANALYZING THE CONSTITUTIONALITY OF LOUISIANA’S CYBERBULLYING STATUTE

Bells sound when one tinkers with the freedom of speech—even when one intends to protect children.<sup>209</sup> In attempting to protect minors from cyberbullying by criminalizing certain messages, Louisiana’s cyberbullying

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201. *Id.* at 820–21 (“The protection of minors’ mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.”).

202. *Id.* at 820.

203. *Id.* at 821.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 822.

208. Compare LA. REV. STAT. § 14:40.7 (2017), with *Bishop*, 787 S.E.2d at 819–21 (N.C. 2016).

209. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

statute raises First Amendment concerns.<sup>210</sup> To determine the constitutionality of Louisiana's cyberbullying statute under the United States Constitution, the court must analyze the statute through the jurisprudential doctrine of strict scrutiny and any applicable exceptions to strict scrutiny. Additionally, Louisiana's cyberbullying statute must be considered in light of Louisiana's own constitutional protections of the freedom of expression.

#### *A. Louisiana's Cyberbullying Statute*

In 2010, Louisiana enacted a statute that criminalizes "the transmission of any electronic . . . communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen" in an attempt to stop cyberbullying.<sup>211</sup> An offense under this statute "may be deemed to have been committed where the communication was originally sent, originally received, or originally viewed by any person."<sup>212</sup> Further, if the offender is under 17 years old, Title VII of the Louisiana Children's Code governs the matter exclusively.<sup>213</sup> The statute neither expressly raises the schoolhouse disruption concerns central to *Tinker* nor addresses any of the traditionally limited genres that would exempt the statute from the strict scrutiny's application.<sup>214</sup> For Louisiana's existing criminal cyberbullying statute to be constitutional, the statute must be one of the rare cases to survive strict scrutiny.

#### *B. Applying Federal First Amendment Jurisprudence to Louisiana's Cyberbullying Statute*

The First Amendment forbids interference with the inalienable and fundamental right to free speech unless a statute survives strict scrutiny or satisfies one of the jurisprudential exceptions.<sup>215</sup> As a general rule, the First Amendment establishes that the government cannot "restrict expression

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210. See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952))).

211. § 14:40.7(A).

212. § 14:40.7(C).

213. § 14:40.7(D)(2).

214. See § 14:40.7.

215. See *supra* Part I.B.2.; Part II.A.

because of its message, its ideas, its subject matter, or its content.”<sup>216</sup> Jurisprudential exceptions to this general rule exist for traditionally restricted speech genres and speech raising pedagogical concerns.<sup>217</sup> Any content-based speech restriction not falling under one of these jurisprudential exceptions is subject to strict scrutiny.<sup>218</sup>

*1. Louisiana’s Cyberbullying Statute Fails to Survive the Two-Pronged Test of Strict Scrutiny*

Louisiana’s cyberbullying statute forbids speech based on its content by criminalizing a communication “with the malicious and willful intent to coerce, abuse, torment, or intimidate.”<sup>219</sup> Because Louisiana’s cyberbullying statute restricts speech based on the message it expresses, the statute is a content-based restriction;<sup>220</sup> consequently, because it does not fall within one of the jurisprudential exceptions to First Amendment protections, the statute is subject to strict scrutiny.<sup>221</sup>

The United States Supreme Court has recognized that protecting children from certain kinds of speech is a legitimate interest.<sup>222</sup> Like North Carolina’s cyberbullying statute analyzed in *Bishop*, Louisiana has a compelling interest in protecting its children from the harmful effects of cyberbullying.<sup>223</sup> Louisiana expresses this concern by criminalizing cyberbullying only when it is directed at a “person under the age of eighteen.”<sup>224</sup> Like the North Carolina statute, however, Louisiana’s statute fails to use the least restrictive means to accomplish that goal.<sup>225</sup> In failing

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216. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983)).

217. *See supra* Part II.

218. *See supra* Part I.B.1.

219. § 14:40.7(A).

220. *See* § 14:40.7; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *State v. Bishop*, 787 S.E.2d 814, 820 (N.C. 2016).

221. *Reed*, 135 S. Ct. at 2227 (explaining that content-based restrictions on speech are subject to strict scrutiny).

222. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“[T]he District Court concluded that while the Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages . . . . We agree.”).

223. § 14:40.7. *See State v. Bishop*, 787 S.E.2d 814, 819 (N.C. 2016).

224. § 14:40.7(A) (“Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.”).

225. *See Bishop*, 787 S.E.2d at 820.



to specifically define several of the statute's key terms, the overly broad statute restricts speech that is protected by the First Amendment.<sup>226</sup>

The failure of Louisiana's criminal cyberbullying statute to define "transmission," "malicious," "willful," "coerce,"<sup>227</sup> "abuse,"<sup>228</sup> "torment," and "intimidate" raises serious constitutional concerns.<sup>229</sup> For example, Merriam-Webster defines "transmission" as "(1) the act or process of sending electrical signals to a radio, television, computer, etc; (2) something (such as a message or broadcast) that is transmitted to a radio, television, etc."<sup>230</sup> Using Merriam-Webster's definition, Louisiana's cyberbullying statute criminalizes "transmissions" that the legislature likely did not intend, such as a Facebook "share" or Twitter "retweet"<sup>231</sup> of a message originally conveyed by someone else.

Additionally, a transmission, under the lay definition, arguably covers the social media phenomenon in which large numbers of people submit demeaning or disparaging comments to run anonymously through accounts that then broadcast the message to a thousand or more of the account's followers.<sup>232</sup> Although criminalization of these transmissions may be constitutional if the speech falls under a traditionally limited genre or under *Tinker*, it is unclear whether the legislature intended to criminalize these kinds of speech.<sup>233</sup> Also, though the statute's requirement that an individual possess a "malicious and willful intent" narrows the scope of proscribed speech, failing to define the terms "coerce, abuse, intimidate, or

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226. See § 14:40.7(A).

227. For a common definition, see *Coerce*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "coerce" as "[t]o compel by force or threat <coerce a confession>").

228. For a common definition, see *Abuse*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "abuse" as "(1) To damage (a thing). (2) To depart from legal or reasonable use in dealing with (a person or thing); to misuse. (3) To injure (a person) physically or mentally").

229. § 14:40.7(A).

230. *Transmission*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/transmission> (last visited Nov. 2, 2017) [<https://perma.cc/GDF8-ST98>].

231. See *FAQs about Retweets (RT)*, TWITTER, <https://support.twitter.com/articles/77606> (last visited Nov. 2, 2017) ("A Retweet is a re-posting of a Tweet. Twitter's Retweet feature helps you and others quickly share that Tweet with all of your followers. You can Retweet your own Tweets or Tweets from someone else.") [<https://perma.cc/5P45-6U6D>].

232. See, e.g., LA HS confessions (@LAHighSchool898), TWITTER, <https://twitter.com/LAHSConfession> (last updated May 11, 2016) (containing a Twitter account that posts anonymous messages from Louisiana high school students—messages that often contain degrading and inflammatory messages) [<https://perma.cc/Q3G6-N5HR>].

233. See *supra* Part I.B.2; Part II.A.

torment” causes the statute to prohibit an impermissibly broad spectrum of speech.<sup>234</sup>

Black’s Law Dictionary defines “malicious” as “[s]ubstantially certain to cause injury” or “[w]ithout just cause or excuse” and “willful” as “[v]oluntary and intentional, but not necessarily malicious.”<sup>235</sup> Further, Black’s Law Dictionary defines “coerce” as “[t]o compel by force or threat.”<sup>236</sup> Without a clearly defined and proscribed intent standard and using Black’s Law Dictionary definitions, “coerce” may criminalize electronic transmissions of messages by a student seeking to compel another student to act by threatening to no longer be friends with her if she spoke to a particular person. Further, Merriam-Webster defines “intimidate” as “to make timid or fearful: frighten; *especially*: to compel or deter by or as if by threats.”<sup>237</sup> Using this definition, “intimidate” may include electronic messages traditionally known as “trash talking” before a big high school football game.<sup>238</sup>

There is no requirement that the bullying speech be seen or have any effect upon any victim.<sup>239</sup> Transmission of the ill-defined proscribed speech alone is sufficient to warrant criminal sanctions, regardless of whether the speech has any effect.<sup>240</sup> Louisiana’s cyberbullying statute fails to survive strict scrutiny because it does not embody the least

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234. See § 14:40.7(A).

235. *Malicious*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Willful*, BLACK’S LAW DICTIONARY (10th ed. 2014) Black’s Law Dictionary defines willful as Voluntary and intentional, but not necessarily malicious. . . . A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong. The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious*, *evil*, or *corrupt*.

*Id.*

236. See *Coerce*, BLACK’S LAW DICTIONARY, *supra* note 227.

237. For a common definition, see *Intimidate*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/intimidate> (defining “intimidate” as “to make timid or fearful: frighten; *especially*: to compel or deter by or as if by threats <tried to intimidate a witness>”) (last visited Nov. 2, 2017) [<https://perma.cc/CD6B-FJTG>].

238. “Trash talking” traditionally is a part of competitive athletics. For a list purporting to rank the top ten sports trash-talkers of all time, see Jim Haldem, *The 10 Greatest Trash Talkers in the History of Sports*, GOLIATH (Oct. 5, 2015), <http://www.goliath.com/sports/10-greatest-trash-talkers-in-the-history-of-sports/5/> [<https://perma.cc/78RN-U26V>].

239. See § 14:40.7(A).

240. See *id.*

restrictive means of achieving a compelling state interest.<sup>241</sup> The statute fails to specifically and narrowly define each type of speech it attempts to criminalize.<sup>242</sup>

### *2. Louisiana's Cyberbullying Statute Fails to Use the Traditional Genres or Tinker*

The Louisiana Legislature may prohibit speech constituting a true threat, incitement, fighting words, or obscenity because the First Amendment does not protect these traditionally restricted genres.<sup>243</sup> Additionally, the Supreme Court has held that state actors may restrict certain types of speech related to legitimate pedagogical concerns.<sup>244</sup> Louisiana's cyberbullying statute, however, does not track the language of either of these jurisprudential doctrines.<sup>245</sup> Therefore, Louisiana fails to provide minors with constitutionally permissible protection from certain types of cyberbullying.<sup>246</sup> Nevertheless, speech restrictions that satisfy the minimal constitutional standards under the United States Constitution may not satisfy Louisiana's constitutional safeguards of the freedom of expression.<sup>247</sup>

### *C. Applying Louisiana's Constitutional Protections to Louisiana's Cyberbullying Statute*

The Louisiana Constitution protects freedom of expression by providing that “[n]o law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.”<sup>248</sup> The Louisiana Supreme Court has yet to delineate the boundaries of the Louisiana

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241. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (holding that a city's content-based restriction on speech was unconstitutional when the law in question failed to satisfy strict scrutiny).

242. See § 14:40.7.

243. See *supra* Part I.B.2.; see, e.g., *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (reciting content-based speech restrictions that have been permitted in a few historical categories, including incitement, fighting words, and true threats).

244. See *supra* Part II.A.; see, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that conduct by a student which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the First Amendment right to free speech).

245. See § 14:40.7(A).

246. See *id.*

247. See LA. CONST. art. I, § 7.

248. *Id.*

Constitution's guarantee of the freedom of expression.<sup>249</sup> Each time the Louisiana Supreme Court has addressed a freedom of speech issue, it decided the issue by relying on the First Amendment of the United States Constitution.<sup>250</sup> True to the civilian tradition, however, Louisiana courts do not rely on *stare decisis*.<sup>251</sup> In future cases, Louisiana courts will have to determine the boundaries of Louisiana's freedom of expression by examining the Constitution's text.<sup>252</sup> Louisiana's Constitution clearly protects freedom of speech, but what qualifies as an impermissible "abuse" of that freedom is unclear.<sup>253</sup>

The theory of "new federalism," in which state constitutions are expansively interpreted to provide broader protections of individual rights than the limited boundaries set by the federal constitution,<sup>254</sup> has not yet

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249. See, e.g., *Brown v. State Through Dept. of Pub. Safety and Corrs., La. Gaming Control Bd.*, 680 So. 2d 1179, 1183 (La. 1996) (recognizing Louisiana's separate constitutional provisions but ruling the speech restriction at issue unconstitutional solely on First Amendment grounds) ("R.S. 27:13(C)(6) is clearly unconstitutional under the First Amendment to the U.S. Constitution insofar as it prohibits contributions to committees supporting or opposing ballot measures."); see also *Mashburn v. Collin*, 355 So. 2d 879, 891–92 (La. 1977) (holding that a restriction of expression to be unconstitutional solely under the United States Constitution because "[i]n the instant case it was not necessary for us to define such a standard for Louisiana because we found the expressions in question to be opinions fully protected by the minimum federal standards").

250. See *supra* note 249.

251. Judicial opinions may provide guidance or be persuasive but are not independent sources of law. Louisiana does not adhere to the common law doctrine of *stare decisis*. See *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000), *opinion corrected on reh'g*, 782 So. 2d 573 (La. 2001) ("Judicial decisions . . . are not intended to be an authoritative source of law in Louisiana."). The Louisiana Supreme Court has recognized that the civilian principle of *jurisprudence constante* can lead to a rule of law becoming part of Louisiana's custom. *Id.* at 128–29 ("Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,' *jurisprudence constante* applies and operates with 'considerable persuasive authority.'" (quoting James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993))).

252. LA. CONST. art. I, § 7.

253. See *id.*

254. See Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425–26 (1974); see also *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) ("Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held that Article II, Section 10 provides greater protection of free

been recognized by the Louisiana Supreme Court as a method of enlarging the scope of Louisianans' right of expression guaranteed by the Louisiana Constitution.<sup>255</sup> Louisianans' freedom of speech is protected, at a minimum, to the degree demanded by the First Amendment of the United States Constitution, but the Louisiana Constitution may provide greater speech protections than the First Amendment.<sup>256</sup>

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speech than does the First Amendment.”); *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 343 (Mich. 1985). The Michigan Supreme Court has endorsed new federalism for its constitution:

[That the Michigan] constitution may afford greater protections than the federal constitution is also well established and is based on fundamental constitutional doctrine and principles of federalism. The Michigan Constitution has been interpreted as affording broader protection of some individual rights also guaranteed by the federal constitution's Bill of Rights . . . . [I]t is clear that the Michigan Constitution may afford broader free expression and petition protections against government infringements.

*Woodland*, 378 N.W.2d at 343 (internal footnotes omitted); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (acknowledging that the state constitution may provide greater protections than those found in the United States Constitution when holding California's Constitution protects the freedom of speech and petition even when exercised in privately owned shopping centers).

255. See *State v. Schirmer*, 646 So. 2d 890, 904–05 (La. 1994) (Dennis, J., concurring). *But see* *State v. Moses*, 655 So. 2d 779, 784 (La. Ct. App. 1995) (finding that the Louisiana Constitution's article 1, §§ 5 and 7, read in concert, afford greater protections for anonymity than can be found in the United States Constitution).

256. See *State v. Moses*, 655 So. 2d 779, 784 (La. Ct. App. 1995) (finding that the Louisiana Constitution's article 1, §§ 5 and 7, read in concert, afford greater protections for anonymity than can be found in the U.S. Constitution). While on the Louisiana Supreme Court, former Justice Dennis voiced his concern over the court's refusal to decide a case on Louisiana constitutional grounds. See *Schirmer*, 646 So. 2d at 904–05 (Dennis, J., concurring) (“I disagree with the majority's pretermission of the state constitutional question. However, because Article I, § 7 of our state constitution grants as broad and arguably broader protection of rights of free speech than the minimum First Amendment safeguards and because I believe that the majority has applied those minimum safeguards correctly, I join in the judgment of the majority.”) (internal citation omitted). Justice Dennis believed that Louisiana should lead in the protections afforded to individual liberty rather than simply lag behind the United States' minimum constitutional standards. See *State v. Tucker*, 626 So. 2d 707, 719 (La. 1993) (Dennis, J., dissenting) (“In reality, my colleagues have sunk this court to the lowest pitch of abject followership. They no longer believe in our state constitution as an act of fundamental self-government by the people of Louisiana. They no longer perceive this court to be the final arbiter of the meaning of that constitution, bound by the intent of the drafters and ratifiers as

## IV. PROPOSED SOLUTIONS FOR LOUISIANA

Louisiana's criminal cyberbullying statute, a content-based restriction on speech, will be presumed by courts to be an unconstitutional infringement upon the inalienable right to free speech under the First Amendment.<sup>257</sup> Nevertheless, states are allowed to restrict speech in limited circumstances.<sup>258</sup> For Louisiana's cyberbullying statute to constitutionally achieve its goal of protecting children, the statute must be amended to include the language of the traditionally restricted speech genres.<sup>259</sup> Further, the statute should be amended to restrict speech likely to cause a material disruption or substantial disorder in accordance with *Tinker* and the Fifth Circuit's *Tinker-Bell* analysis.<sup>260</sup> Online speech often is as disruptive to the learning process as face-to-face confrontation; occasionally, it is more disruptive.<sup>261</sup> These changes will constitutionally restrain cyberbullying under First Amendment jurisprudence.<sup>262</sup> Any other cyberbullying restriction not falling within either of these exceptions must survive strict scrutiny.<sup>263</sup> Moreover, any speech restriction adopted by the Louisiana Legislature must comply with state constitutional protections.<sup>264</sup>

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reflected by the text, the drafting history, and this court's constitutional precedents. Instead, for them, our state constitution is a blank parchment fit only as a copybook in which to record the lessons on the history of the Common Law that flow from Justice Scalia's pen.”).

257. See *supra* Part III.A.–B; see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (“It is rare that a regulation restricting speech because of its content will ever be permissible.” (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000))).

258. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (explaining that content-based restrictions on speech have traditionally been permitted in a few historical categories).

259. See, e.g., *Brown*, 564 U.S. at 791.

260. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

261. See *Anderson, Bresnahan & Musatics*, *supra* note 21, at 281 (arguing that online bullying is more dangerous than traditional bullying because cyberbullying is perpetrated using a broad range of platforms and online comments are often permanently, and repeatedly, visible to peers).

262. See *supra* Part I.B.2.; Part II.A.

263. See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

264. See *supra* Part III.C.

*A. Amending Louisiana's Cyberbullying Statute to Survive Strict Scrutiny*

To survive the two-pronged test of strict scrutiny, a state must show a compelling interest and use the least restrictive means of achieving that interest.<sup>265</sup> To survive the compelling interest prong of strict scrutiny, the importance of protecting children is vital to the survival of the statute. The United States Supreme Court has recognized the necessity of protecting children from certain kinds of speech as a compelling interest.<sup>266</sup>

In an effort to survive the second prong, the Louisiana Legislature attempted to narrowly tailor the statute by requiring a “malicious and willful intent” from the poster and criminalizing only speech that is targeted toward children under 18 years old.<sup>267</sup> Louisiana likely criminalized speech that a free society must tolerate when it purports to criminalize speech which is simply coercive, abusive, or intimidating, using the lay definitions of those words.<sup>268</sup> For the rare cases in which a content-based speech restriction is constitutional under the First Amendment, Louisiana must remove overly broad language from its cyberbullying statute and define with particularity the speech prohibited by the statute.<sup>269</sup> Louisiana should also amend its cyberbullying statute to track the language of traditionally limited genres of speech to prohibit cyberbullying speech that falls under either one of those exceptions.

*B. Amending Louisiana's Cyberbullying Statute to Include the Traditionally Restricted Genres*

Some cyberbullying may fall under the traditional speech limitations.<sup>270</sup> Louisiana should amend its cyberbullying statute to track the language of these jurisprudentially recognized exceptions.<sup>271</sup> First, to criminalize “fighting words,” the cyberbullying statute should prohibit cyberbullying that, by the very posting, “inflict[s] injury or tend[s] to incite

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265. See *supra* Part II.A.

266. See *Sable Commc'ns of Cal.*, 492 U.S. at 126 (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”).

267. LA. REV. STAT. § 14:40.7(A) (2017).

268. See *id.*

269. See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (“[A statute restricting speech for the purported reason of protecting minors] is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”).

270. See *id.* at 791 (listing traditionally permissible limitations on speech).

271. See *id.*

an immediate breach of the peace.”<sup>272</sup> Prohibiting “fighting words” expressed during online bullying may have a limited practical effect because a body of law “limit[s] the fighting words doctrine to face-to-face confrontations.”<sup>273</sup> Cyberbullying, by its nature, does not occur during face-to-face meetings. Therefore, although some cyberbullying may qualify as “fighting words,” this exception’s reach will be limited.

Second, Louisiana’s statute should be amended to prohibit cyberbullying that contains obscene material.<sup>274</sup> Cyberbullying by posting obscene materials happens frequently<sup>275</sup> and can have severe consequences.<sup>276</sup> To prohibit obscene cyberbullying, the statute should prohibit the use of materials that deal with sex in a manner appealing to prurient interests to bully another person online.<sup>277</sup> In *Bishop*, the purported cyberbully posted arguably obscene material; in dicta, the North Carolina Supreme Court recognized that the state’s cyberbullying statute may have been constitutional if it had tracked the language of the traditional obscenity exception.<sup>278</sup> By prohibiting cyberbullying using obscene materials, the statute will protect

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272. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (internal quotation marks omitted).

273. *Smolla*, *supra* note 83, at 350; *see also* *Cohen v. California*, 403 U.S. 15, 20 (1971) (finding that a provocative message containing a “four-letter word” on a jacket did not fall within the fighting words exception because “[n]o individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.”).

274. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (upholding the restriction of obscene dial-a-porn telephone calls for the purpose of protecting children).

275. *See State In Interest of T.R.*, 2015 WL 6835248 (La. Ct. App. 2015) (upholding the discipline imposed by the City Court vis-à-vis a minor child who posted obscene photographs that he claimed were taken of female classmates).

276. *See Celizic*, *supra* note 1 (telling the story of a young lady who committed suicide after being subjected to cyberbullying that included her ex-boyfriend sending nude photographs of her to other girls at her high school).

277. *See Miller v. California*, 413 U.S. 15, 24 (1973) (“A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

278. *See State v. Bishop*, 787 S.E.2d 814, 821 n.3 (N.C. 2016) (stating that the court need not consider a hypothetical statute that would criminalize a true threat although the court acknowledged this might present a “closer constitutional question”).



many minors who are victimized by bullies who post sexually explicit materials online—material that often pertains to the victim.<sup>279</sup>

Third, the Louisiana Legislature should amend its statute to prohibit cyberbullying containing “true threats” that are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>280</sup> Prohibiting “true threats” will protect minors from receiving messages that place them in reasonable fear for their safety or well-being. Lastly, the Louisiana Legislature should amend its statute to prohibit “incitement” by criminalizing cyberbullying that both advocates illegal conduct and is likely to produce imminent lawless action.<sup>281</sup> In addition to tracking the traditionally restricted genres, Louisiana should amend its cyberbullying statute to restrict speech that can be constitutionally curtailed within the *Tinker-Bell* analysis.

### C. Louisiana Should Amend the Statute to Track the Tinker-Bell Analysis

The Supreme Court upheld the right of a school district to restrict and punish certain types of speech that raise pedagogical concerns.<sup>282</sup> If a state school may restrict speech to further pedagogical concerns, reasoning *a fortiori*,<sup>283</sup> the state legislature may restrict speech if the speech poses a material disruption or substantial disturbance to pedagogical concerns central to *Tinker-Bell*.<sup>284</sup> The legislature, expressing the sovereign will of the people, is even more justified in prohibiting harmful speech that “would undermine the school’s basic educational mission.”<sup>285</sup>

Under the Fifth Circuit’s *Tinker-Bell* analysis, the Louisiana Legislature may and should prohibit cyberbullying that is intentionally directed at a

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279. See, e.g., Ley, *supra* note 1 (detailing Hope Sidwell’s suicide after her ex-boyfriend shared nude photos of her with their classmates); Dean, *supra* note 1 (recounting Amanda Todd’s suicide after a man took nude photographs of her during an online chat session and sent them to her classmates); Celizic, *supra* note 1 (recounting Jesse Logan’s suicide after a her ex-boyfriend shared nude photos of her with their classmates).

280. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

281. *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

282. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

283. *A fortiori*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“By even greater force of logic; even more so it follows”).

284. See, e.g., *Tinker*, 393 U.S. 503; *Bell*, 799 F.3d 379.

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

school community and reasonably foreseeable to cause material disruptions of classwork or cause a substantial disruption at school.<sup>286</sup> Additionally, the Louisiana Legislature may extend *Kuhlmeier* to prohibit cyberbullying made using state property, such as a school computer or a school's Internet connection.<sup>287</sup> Once Louisiana's cyberbullying statute complies fully with the United States Constitution, the statute must also comply with Louisiana's Constitution.<sup>288</sup>

*D. Louisiana Statutes Must Comply with Louisiana's Constitutional Protections*

To comply with the Louisiana Constitution's guarantee of the freedom of expression, the cyberbullying statute certainly must, at minimum, comply with the United States Constitution.<sup>289</sup> The Louisiana Constitution clearly states that no law may restrain the freedom of expression, but that prohibition is not absolute.<sup>290</sup> A person is responsible for abusing the freedom of expression.<sup>291</sup> In the absence of Louisiana Supreme Court jurisprudence delineating the extent of Louisiana's constitutional protections, the Louisiana Legislature should address the cyberbullying of children as an impermissible abuse of the freedom of expression.<sup>292</sup>

CONCLUSION

Despite embodying a compelling interest in protecting children, Louisiana's cyberbullying statute criminalizes speech that a robust free

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286. *Bell*, 799 F.3d 379; *see also* ARK. CODE ANN. § 6-18-514(b)(2)(D) (2017) (providing that a school principal or her designee has the authority to prohibit electronic bullying of a student—bullying that is an actual or reasonably foreseeable “[s]ubstantial disruption of the orderly operation of the school or educational environment”).

287. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that a school may censor speech in made in a school sponsored student paper when the school's actions are “reasonably related to legitimate pedagogical concerns”).

288. *See supra* Part III.C.

289. *Mashburn v. Collin*, 355 So. 2d 879, 891–92 (La. 1977) (holding that a restriction of expression was unconstitutional because it failed to meet the minimum federal requirements without addressing the state constitutional issue).

290. *See* LA. CONST. art. I, § 7.

291. *Id.*

292. *See id.*

society must tolerate.<sup>293</sup> The statute fails to survive strict scrutiny, does not fall within the traditional or *Tinker-Bell* exceptions, and impermissibly restricts the inalienable right of free speech enshrined in the First Amendment.<sup>294</sup> It is imperative for a compassionate society to act so that no family will have to senselessly lose another Megan, Phoebe, Ryan, Jesse, Hope, Jamey, Amanda, or Katlin.<sup>295</sup> But any protective action must be accomplished in a constitutional manner. To afford children maximum protection against cyberbullying, Louisiana's cyberbullying statute should be amended to track the jurisprudential language of the traditional and *Tinker-Bell* exceptions to First Amendment protections. Any criminal cyberbullying statute must embody the least restrictive means of protecting children from this online threat.

*Randall Morgan Briggs\**

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293. See *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016) (“Civility, whose definition is constantly changing, is a laudable goal but one not readily attained or enforced through criminal laws.”).

294. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (holding that a city's content-based restriction on speech unconstitutional when the law in question failed to satisfy strict scrutiny).

295. See *Megan's Story*, *supra* note 1; Hodge & Murphy, *supra* note 1; Halligan & Halligan, *supra* note 1; Celizic, *supra* note 1; Ley, *supra* note 1; James, *supra* note 1; Dean, *supra* note 1; Wilson, *supra* note 1.

\* J.D./D.C.L., 2018. Paul M. Hebert Law Center, Louisiana State University. A special thank you to my family, friends, and the *Louisiana Law Review* for investing their time, talents, and efforts in this Comment.