FAKING OUT THE FIRST AMENDMENT?
THE LEGISLATIVE ASSAULT ON PHONY FACEBOOK PROFILES, ALTERED IMAGES AND STUDENT SPEECH

By

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To my parents that taught me to always follow my dreams and to Ron for his immeasurable support and patience

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TABLE OF CONTENTS

page

Abstract of Thesis Presented to the Graduate School
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Requirements for the Degree of Master of Arts in Mass Communication

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This study provides a First Amendment legal analysis of § 14-458.2 of the General Statutes of North Carolina, which was signed into law in July 2012. Aimed to protect public school employees from cyberbullying by their students, the law makes it a crime for students to create fake Internet profiles of their school officials, among other provisions. The law raises concerns about students' First Amendment rights and the scope of protection for their off-campus cyberspeech. This study analyzes the constitutionality of the statute through the lens of established First Amendment doctrines and examines possible precedent and alternative measures.

CHAPTER 1
INTRODUCTION

In 2013, Indiana lawmakers considered a bill that would have prohibited public school students in the Hoosier state from building "a fake profile of a school employee on an Internet web site, including a social networking web site" and doctoring an "image of a school employee on an Internet web site."[1] In addition, the measure would have banned students from encouraging others "to post on an Internet web site . . . private, personal, or sexual information pertaining to a school employee."[2]

The Indiana bill followed closely on the heels of a law adopted in North Carolina in 2012 that prohibits students from making fake online profiles with the intent to

[1] H.B. 1364, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013).

[2] *Id*.

"intimidate" or "torment" school officials.[3] The North Carolina statute also makes it illegal for students to post real or doctored photos of school employees.[4]

The North Carolina law, which took effect December 1, 2012, is the first of its kind to impose criminal sanctions "aimed at preventing students from 'cyberbullying' school employees."[5] Students who violate the law face misdemeanor charges that entail a fine of up to $1000 and thirty days of probation for first-time offenders.[6]

Sarah Preston, policy director of the American Civil Liberties Union of North Carolina (hereinafter ACLU), expressed her organization's opposition to the law in a newspaper column.[7] The ACLU claims the words "torment" or "intimidate" lack a clear

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[3] The North Carolina statute preventing "[c]yber-bullying of school employee by student" provides:

> [I]t shall be unlawful for any student to use a computer or computer network to do any of the following: [] With the intent to intimidate or torment a school employee, do any of the following: [] Build a fake profile or Web site . . . Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a school employee . . . Post a real or doctored image of the school employee on the Internet . . . Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a school employee . . . Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee . . . Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a school employee for the purpose of intimidating or tormenting that school employee (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network) . . . Sign up a school employee for a pornographic Internet site with the intent to intimidate or torment the employee . . . Without authorization of the school employee, sign up a school employee for electronic mailing lists or to receive junk electronic messages and instant messages, with the intent to intimidate or torment the school employee.

N.C. GEN. STAT. § 14-458.2 (2012).

[4] *Id.*

[5] Sarah Preston, *A Bad New Law Targets N.C. Students*, NEWS & OBSERVER, Dec. 4, 2012, *available at* http://www.newsobserver.com/2012/12/03/2522814/a-bad-new-law-targets-nc-students.html.

[6] N.C. GEN. STAT. § 14-458.2 (2012).

[7] Preston, *supra* note 5.

definition and thus chill minors' rights to engage in free expression.[8] Preston asserted that:

> the language in this law is so vague, and its punishments so severe, that it not only attacks students' basic constitutional right to free speech but also could lead to a student being arrested simply for posting comments online that a school official finds offensive – even if those comments are factually true statements.[9]

This study analyzes the First Amendment[10] speech issues raised by North Carolina and Indiana's legislative efforts to restrict online student speech about school officials. Initially, Chapter 2 describes the legislative history behind the bills and provides further details on their terms, as well as the phenomenon of "cyberbaiting" that helped to spark the North Carolina law.

Chapter 3 is divided into three sections that examine the ongoing battle over the off-campus speech rights of students when they engage in online expression targeting other students or school officials.[11] First, Section A provides an overview of the four U.S. Supreme Court decisions involving public school student speech rights. Section B then concentrates on four recent federal appellate court rulings, involving online student expression, each of which the U.S. Supreme Court declined to hear: *Doninger v. Niehoff*,[12] *Layshock v. Hermitage School District*,[13] *J.S. v. Blue Mountain School*

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[8] *Id.*

[9] *Id.*

[10] The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[11] *See generally* David Hudson, *First Amendment Essay: Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621 (2012).

[12] 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2012).

District[14] and *Kowalski v. Berkeley County Schools*.[15] The cases illustrate the difficulty faced by students, schools and courts alike when attempting to define the appropriate extent of governmental authority over students' off-campus expression. Finally, Section C explores how the North Carolina law is distinguishable from other similar anti-cyberbullying laws.[16]

Next, Chapter 4 is also divided into three sections and examines the possible relevance of other precedential cases. Specifically, Section A addresses the U.S. Supreme Court's 2012 decision in *U.S. v. Alvarez.*[17] *Alvarez* involved the constitutionality of part of the Stolen Valor Act[18] that made it a crime to lie about earning military medals of honor. The Court's plurality opinion[19] struck down the law, holding that falsity alone does not remove speech from the cloak of First Amendment protection.[20] *Alvarez* thus arguably calls into question the idea that states can ban false

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[13] 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

[14] 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

[15] 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

[16] *Infra* notes 127-51 and accompanying text.

[17] 132 S. Ct. 2537 (2012).

[18] The section of the Stolen Valor Act at issue in *Alvarez* provided that:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b) (2011).

[19] *See Alvarez*, 132 S. Ct. at 2542 (noting that Justice Anthony Kennedy authored the plurality opinion, joined by Justices John Roberts, Ruth Bader Ginsburg and Sonia Sotomayor).

[20] *See id*. at 2545 (stating that "falsity alone may not suffice to bring the speech outside the First Amendment").

speech about teachers and school officials without also proving some direct and legally redressable injury, such as reputational harm, caused by that speech.

Section B then explores the Supreme Court's 1988 decision in *Hustler Magazine v. Falwell.*[21] Jerry Falwell, "a nationally known minister and commentator on politics and public affairs,"[22] filed suit against *Hustler* and its founder, Larry Flynt, for, among other torts, intentional infliction of emotional distress (IIED) "arising from the publication of an advertisement parody."[23] The Court held that the First Amendment prohibited public figures and public officials from recovering from IIED "unless it is shown that the publication contains a false statement of fact which was made with actual malice."[24] Public school teachers, as state employees, arguably are limited-purpose public figures and thus laws protecting them from parodic profiles may be subject to similar First Amendment scrutiny.

Finally, Section C examines a new string of statutes arising throughout the country targeting online impersonation. For instance, California recently adopted a statute banning the impersonation of "another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, or threatening, or defrauding another person."[25] These statutes may be relevant to the analysis of fake-profile statutes like North Carolina's law that is the centerpiece of this study.

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[21] 485 U.S. 46 (1988).

[22] *Id.* at 46.

[23] *Id.*

[24] *Id.*

[25] CAL. PENAL CODE § 528.5 (2013).

Chapter 5 then analyzes the constitutionality of the North Carolina and Indiana legislation through the lens of three well-established First Amendment doctrines: 1) strict scrutiny;[26] 2) vagueness;[27] and 3) overbreadth.[28] Additionally, Chapter 5 questions why laws like North Carolina's statute carve out a unique class of citizens – teachers and school officials – for protection against the slings and arrows of outrageous expression. What, in other words, makes this particular group of people somehow more sensitive to, and deserving of, enhanced protection from the online comments and criticisms authored by a digital-native generation? Furthermore, Chapter 5 briefly describes the legal remedies already available to teachers and school employees when dealing with outrageous student expression, including the torts of defamation[29] and intentional infliction of emotional distress.[30]

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[26] *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2738 (2011) (observing that "a restriction on the content of protected speech" requires a governmental entity to "demonstrate that it passes strict scrutiny" such that the regulation "is justified by a compelling government interest and is narrowly drawn to serve that interest"); United States v. Caronia, 703 F.3d 149, 163 (2d Cir. 2012) (observing that "[c]ontent-based speech restrictions are subject to 'strict scrutiny' – that is, the government must show that the regulation at issue is narrowly tailored to serve or promote a compelling government interest").

[27] *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (observing that "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); s*ee also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 941 (3d ed. 2006) (observing that "a law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated").

[28] *See* United States v. Williams, 553 U.S. 285, 292 (2008) (providing that under "our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech"); *see also* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (providing an excellent analysis of overbreadth within the context of criminal statutes).

[29] *See generally* Hawran v. Hixson, 209 Cal. App. 4th 256, 277 (Cal Ct. App. 2012) (noting that "[d]efamation requires a publication that is false, defamatory, unprivileged, and has a tendency to injure or cause special damage").

[30] Intentional infliction of emotional distress typically "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

Finally, Chapter 6 concludes by suggesting that the North Carolina law should be struck down as unconstitutional. This chapter also proposes alternative solutions that may curb the harms caused to school employees by student cyberspeech, without infringing on students' First Amendment rights.

CHAPTER 2
ANALYSIS OF LEGISLATIVE HISORY: CYBERBAITING OF TEACHERS PROMPTS LEGAL ACTION

According to the 2011 Norton[31] Online Family Report,[32] slightly more than 20% of elementary and secondary school teachers[33] surveyed in twenty-four countries[34] have either experienced or know someone who has experienced cyberbaiting. Cyberbaiting is "a growing phenomenon" in which "students first irritate or bait a teacher until he or she cracks, filming the incident on their mobile device so they can post the footage online, embarrassing the teacher and the school."[35] In extreme cases, the posted videos can lead to "the loss of a career."[36]

The experience of an upstate New York bus monitor named Karen Klein on a ride home from school illustrates the severity of cyberbaiting.[37] Specifically, Klein was provoked by her students who "poked [her] with a textbook, called her a barrage of

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[31] *See* Press Release, Symantic, Norton Online Family Report Identifies Issues of "Cyberbaiting" and Overspending (Nov. 17, 2011) [hereinafter Press Release, Symantic], *available at* http://www.symantec.com/about/news/release/article.jsp?prid=20111117_01 (explaining "Symantec's Norton products protect consumers from cybercrime with technologies like antivirus, anti-spyware and phishing protection – while also being light on system resources. The company also provides services such as online backup and PC tuneup, and family online safety").

[32] Norton by Symantic, *Norton Online Family Report*, CYBERCRIME REPORT (2011), http://www.symantec.com/content/en/us/home_homeoffice/html/cybercrimereport/.

[33] *See id.* (providing the methodology of the online survey, which questioned a total of 2,379 teachers of students ages eight to seventeen years).

[34] *See id.* (listing the countries surveyed, including "14 tracking countries: Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, New Zealand, Spain, Sweden, United Kingdom, United States," and "10 new countries: Belgium, Denmark, Holland, Hong Kong, Mexico, South Africa, Singapore, Poland, Switzerland and UAE").

[35] Press Release, Semantic, *supra* note 31.

[36] Gregory Branch, *Cyberbaiting – A New Concern for Teachers?*, SANTA ANA EXAMINER, Mar. 3, 2012, available on NewsBank database.

[37] Christine Armario, *Technology Adds Cruel Edge to Bullying*, SAN JOSE MERCURY NEWS, June 24, 2012, at 7A.

obscenities and threated to urinate on her front door, among other callous insults."[38] The worst of the harassment came from a student who taunted: "You don't have a family because they all killed themselves because they don't want to be near you."[39] In fact, Klein's son committed suicide ten years prior, and the accusation eventually forced the bus monitor into tears.[40] A student standing by took video of the incident on a cellphone, posted it to YouTube, and the video "went viral."[41]

Cyberbaiting is one reason the Classroom Teachers Association of North Carolina[42] lobbied for a law that would protect teachers from their students and online harassment.[43] Judy Kidd, president of the CTANC, told Education Week that her organization had received complaints about students cyberbullying teachers and that "[i]t became apparent that we had to get some kind of protection."[44] The new North Carolina law targeting the online harassment of teachers via fake profiles, which is

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See* Classroom Teachers Association of North Carolina, *Accomplishments/Involvements*, CTA (Jun. 7, 2013), http://www.ctanc.org/accomplishments-involvements (characterizing the organization as "a proactive alternative to union affiliation, working statewide for all licensed teachers in North Carolina" and "one of the fastest-growing teacher organizations in the state, run primarily by volunteers who are currently in the classroom. CTANC provides effective representation both locally and in the legislature. [Their] liability coverage includes legal representation and consultation").

[43] Joann Pan, *North Carolina Criminalizes Cyberbullying of Teachers*, MASHABLE.COM, Sept. 21, 2012, http://mashable.com/2012/09/21/cyberbullying-of-teachers.

[44] Francesca Duffy, *N.C. Law Protects Teachers Against Cyberbullying*, EDUC. WK. BLOGS, Sept. 20, 2012, http://blogs.edweek.org/teachers/teaching_now/2012/09/north_carolina_law_protects_teachers_against_cyberbullying.html.

codified at § 14-458.2 of the General Statutes of North Carolina, was part of the larger School Violence Prevention Act of 2012.[45]

Sponsored by Republican Senator Tommy Tucker, Senate Bill 707 was introduced in April of 2011.[46] In explaining the rationale behind the fake-profile portion of the bill, Rep. Rick Glazier told the Student Press Law Center that for teachers, social media bullying "created an intimidating atmosphere that made it impossible for them to do their jobs."[47]

The North Carolina legislature apparently was eager to adopt the new law, as the bill passed unanimously in the Senate and encountered only one vote against it in the House.[48] It was signed into law on July 12, 2012 by Governor Beverly Perdue.[49]

Among those most thankful for the new law are teachers who have experienced the worst of their students' online wrath firsthand. Chip Douglas, a tenth-grade English teacher, for instance, explains that "it was awful" to have one of his students create a fake Twitter account using his name.[50] "It had this image of me as this drug addict,

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[45] S. 707, 2011 Sess. (N.C. 2011); 2012 N.C. Sess. Laws 149.

[46] *Id.*

[47] Nikki McGee, *N.C Outlaws Fake Social Media Profiles of School Officials*, STUDENT PRESS LAW CENTER, Aug. 1, 2012, *available at* http://www.splc.org/news/newsflash.asp?id=2418.

[48] *See* Senate Bill 707 / S.L. 2012-149, North Carolina General Assembly website, http://www.ncleg.net/gascripts/billlookup/billlookup.pl?Session=2011&BillID=S707 (providing the legislative history behind the bill).

[49] *Id.*

[50] *Morning Edition: Cyberbullying Law Shields Teachers From Student Tormentors* (National Public Radio broadcast Feb. 19, 2013) (transcript available at http://www.npr.org/templates/transcript/transcript.php?storyId=172329526).

violent person, supersexual, that I wouldn't want to portray," Douglas stated.[51] The new measure provides teachers like Douglas a direct line for legal redress.

On the other end of the spectrum, the law received its share of criticism, particularly by those concerned with students' First Amendment rights. The law inclusively criminalizes statements, "whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee."[52] The controversy against this type of legislation begins with a slippery-slope argument, such as that articulated below by ACLU of North Carolina Policy Director Sarah Preston:

> Consider this scenario: A student posts a factually accurate comment on Facebook complaining about offensive comments a teacher made in front of several students. Would that original Facebook comment be considered "intimidating" or tormenting"? Does the student who simply reported what the teacher said deserve to be arrested? What if students post on a message board that they are 'tired' of a particular teacher? Or if they use Twitter to voice their disagreement with a decision made by a certain school official? Are those now criminal acts? The law is not clear.[53]

Additionally, since older teens in the Tar Heel State can be criminally charged as adults and possibly face incarceration for violations of the law, a criminal charge could potentially damage a student's future, "affect[ing] college admission and job opportunities."[54] The ACLU claims that these types of laws particularly expose "15, 16, 17 year olds to potential criminal sanctions for a dumb mistake that they make, for

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[51] *Id.*

[52] N.C. GEN. STAT. § 14-458.2 (2013).

[53] Preston, *supra* note 5.

[54] Ann Helms, *N.C. Law Protects Educators From Online Harassment – Students now face criminal charges*, EDUC. WK., Dec. 12, 2012, at 16.

something stupid they say."[55] Spokesperson Chris Brook posits that this "is a terrible message to send to students, that accurate critiques of government employees could land you in criminal hot water. I think no one should be comfortable with that."[56]

This ambiguity and objection to the law, however, did not stop another state from following in North Carolina's footsteps. Although the similarly proposed Indiana bill, sponsored by Representatives Eric Turner and Todd Huston, would not have criminalized "harassment," as does the North Carolina law, violations would have landed students with similar punishments, including fines up to $1000.[57] Huston explained that when they drafted the bill, which was introduced in January 2013, they "'used [North Carolina's law] as kind of the baseline,'"[58] but they added a new measure: "it's not only students who would be subject to this law, but former students and parents as well."[59]

The Indiana school board association opposed the proposed legislation because "the language in the bill could be problematic," and it could potentially lead to "defamation suits against schools."[60] It appears as though the Indiana House agrees.

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[55] Miller, *supra* note 31.

[56] *Id.*

[57] H.B. 1364, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013).

[58] Kaitlin Tipsword, *Proposed Indiana Law Would Fine Students for Making Fake Social Media Profiles of Teachers: Bill is Modeled After Newly Passed Law in North Carolina,* STUDENT PRESS LAW CENTER, Feb. 1, 2013, *available at* http://www.splc.org/news/newsflash.asp?id=2520.

[59] *Id.*

[60] *Id.*

In February 2013, the bill was defeated on a roll call vote in the House, with only thirty representatives voting in its favor and sixty-eight voting against it.[61]

Although the Indiana bill failed to become law, it is possible that similar legislative efforts will continue. While cyberbullying and cyberbaiting remain hot topics, other states will likely consider comparable measures regarding the legality of online student speech. The question on the constitutionality of these laws, however, may remain unanswered until the U.S. Supreme Court agrees to hear one of the many cases regarding the off-campus, online speech rights of public school students.

[61] *See* Indiana HB 1364, Open States website, http://openstates.org/in/bills/2013/HB1364/#votes (providing the voting history behind the bill).

CHAPTER 3
CONTEXTUALIZING THE BATTLE OVER NOTH CAROLINA'S LAW: OFF-CAMPUS STUDENT CYBERSPEECH AND CYBERBULLYING

This chapter addresses precedential student speech cases along with recent judicial rulings affecting students' online, off-campus speech. It then provides a brief primer on cyberbullying. First, Section A provides an overview of U.S. Supreme Court cases, which have loosely defined the state of the First Amendment in public schools. Next, Section B delves into a quartet of federal appellate court decisions from the past three years, each of which the Supreme Court declined to disturb. Lastly, Section C distinguishes North Carolina's statute targeting the mocking of school officials from extant cyberbullying laws.

A. From *Tinker* to *Morse*: The Supreme Court's Treatment of Free Speech and Public School Students

Beginning more than forty years ago, the U.S. Supreme Court has attempted to define the powers and limits of First Amendment protections in public schools. Specifically, it has ruled on four cases that now provide a framework for subsequent student speech jurisprudence.[62] The concern, as Professor Lee Goldman has observed, is that "lower courts . . . have had great difficulty applying these precedents, particularly when the speech involves the Internet or other new media."[63] It is important to understand—particularly when analyzing laws like that of North Carolina that involve cyberbullying—that the Supreme Court has left this area of First Amendment jurisprudence ambiguously open to interpretation.

[62] Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

[63] Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011).

The interest in students' First Amendment rights was initially considered by the high court in the 1969 case of *Tinker v. Des Moines*.[64] In protest to the Vietnam War, the students wore black armbands to school during the holiday season.[65] School officials demanded the armbands be removed, and those who did not comply were suspended.[66] The Court ruled in favor of the students and set a standard for restrictions on student speech, referred to as the *Tinker* test.[67] The test states that student speech can only be restricted if it is likely to cause a "substantial disruption or material interference with school activities"[68] or an "invasion of the rights of others."[69] The Court added that speech restrictions could not be justified based upon an "undifferentiated fear or apprehension of disturbance"[70] or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[71]

Today, *Tinker* "stands as the high water mark for student First Amendment rights."[72] In contrast, the three Supreme Court cases that followed broadened the basis

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[64] 393 U.S. 503 (1969).

[65] *Id.* at 504.

[66] *Id.*

[67] *E.g.*, B.H. v. Easton Area Sch. Dist. 725 F.3d 293, 331 (2013); *e.g.* K.A. v. Pocono Mountain Sch. Dist., 710 F.3d 99, 109 (2013); *e.g.* T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 784 (2011).

[68] *Tinker*, 393 U.S. at 514.

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

[70] *Id.* at 508.

[71] *Id.* at 509.

[72] David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of Bethel v. Fraser and The Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 186 (2002-2003).

on which schools can censor student speech. As the First Amendment Center's[73] David Hudson and John Ferguson observe, the Court granted more deference to school officials—a decision based on the notion that "[m]any general First Amendment principles do not apply, or apply with reduced force, to public school students."[74]

The Court waited seventeen years after *Tinker* before addressing another case that questioned student speech rights at public schools, *Bethel School District v. Fraser*.[75] In nominating a friend for a student body office, Matthew Fraser used sexually explicit metaphors during an assembly.[76] The school suspended him for three days for his lewd remarks,[77] and Fraser then sued the school for violating his First Amendment rights.[78] The Supreme Court, however, distinguished this case from *Tinker* based on the message's sexual nature. It determined that schools can regulate student speech that is "sexually explicit, indecent or lewd,"[79] especially if it is devoid of any political viewpoint like that in *Tinker.*[80] The Court reasoned that "[t]he undoubted freedom to advocate unpopular and controversial issues in schools and classrooms must be

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[73] *See About Us*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/#tab-section (last visited July 24, 2013) (noting the purpose of the Center is to "support the First Amendment and build understanding of its core freedoms through education, information and entertainment," and also "serves as a forum for the study and exploration of free-expression issues, including freedom of speech, of the press and of religion, and the rights to assemble and to petition the government").

[74] Hudson & Ferguson, *supra* note 72 at 182.

[75] 478 U.S. 675 (1986).

[76] *Id.* at 677.

[77] *Id.* at 678.

[78] *Id.* at 679.

[79] *Id.* at 684.

[80] *Id.* at 680.

balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[81]

Just two years later, the U.S. Supreme Court further broadened the authority of public schools and their ability to censor student speech in *Hazelwood School District v. Kuhlmeier.*[82] Here, the school muzzled students in a journalism class, prohibiting them from publishing two articles; one involved teenage pregnancy, and the other discussed the impact of divorce on students.[83] The Court sided with the school and upheld the censorship, while distinguishing it from *Tinker*.[84] The Court in *Kuhlmeier* held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[85]

Up to this point, however, all student speech cases that reached the U.S. Supreme Court involved expression that physically manifested on school campus. It was not until 2007 that the high court heard a case regarding censorship of off-campus speech. *Morse v. Frederick*[86] explored a high school's decision to suspend a student for ten days[87] after forcing him to take down a banner, emblazoned with the words "Bong Hits 4 Jesus," which he proudly displayed at a school-sponsored televised

[81] *Id.* at 681.

[82] 484 U.S. 260 (1988).

[83] *Id.* at 263.

[84] *Id.* at 270-273.

[85] *Id.* at 273.

[86] 551 U.S. 393 (2007).

[87] *Id.* at 398.

parade.[88] Here, the Court once again ruled in favor of the school, stating that even though the speech transpired off-campus, it occurred at a school-chaperoned event, rendering the message a violation of school policies. Furthermore, the Court concluded that schools may regulate "speech that can reasonably be regarded as encouraging illegal drug use."[89]

Tinker, *Fraser*, *Kuhlmeier* and *Morse* collectively provide public schools with some guidelines for constitutionally punishable student speech. However, none of these cases pertain specifically to online or purely off-campus, non-school-sponsored speech, leaving cases in this particular area of the law open to judicial biases. Section B further illustrates how this gap in jurisprudence has proven to be problematic as lower courts attempt to define the boundaries of school authority.

B. A Missed Opportunity for Clarity: Four Student Speech Cases Denied Review by the U.S. Supreme Court

The Introduction identified four cases the nation's high court passed on hearing that might have clarified some very murky water in First Amendment student-speech jurisprudence. Although numerous other recent cases involve student cyberspeech,[90] these four are indicative of why a common legal standard is desperately needed for dealing with such off-campus, online cases. As David Hudson points out, "[s]o far, the

[88] *Id.* at 397.

[89] *Id.*

[90] *See, e.g.,* R.S. v. Minnewaska Sch. Dist., 894 F. Supp. 2d 1128 (2012) (involving a twelve-year-old student who was reprimanded by school officials for a Facebook post. The student was subsequently forced to turnover private information, including her Facebook username and password); *see e.g.,* T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (2011) (concerning two teenage girls that were suspended from extra-curricular activities at school after posting raunchy sleepover photos online); *see e.g.* D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754 (8th Cir. 2011) (relating to a high school student that was placed in juvenile detention, as well as suspended from school after sharing threatening instant messages on the Internet).

U.S. Supreme Court has assiduously avoided several questions regarding student online speech, denying review in numerous cases,"[91] despite the fact that "lower courts have reached very different results in these cases and applied differing legal standards."[92] Each section below briefly identifies the issues and outcomes of the four cases in order to illustrate the need for uniform guidance regarding when public school officials can punish students for off-campus-created digital expression without violating the First Amendment right of free speech.

Doninger v. Niehoff

Avery Doninger was student-council secretary of the junior class at Lewis S. Mills High School in Burlington, Connecticut in 2007 when she was punished for criticizing her principal and other school administrators.[93] The dispute pivoted on the "scheduling of an event called 'Jamfest,' an annual battle-of-the bands concert that Doninger and other student council members had helped to plan."[94] Due to administrative reasons, the student council faced the choice of either changing the venue or the date of the event—two options that were disappointing to Doninger and her peers.[95] This prompted

[91] David Hudson, *First Amendment Essay: Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621, 621 (2012).

[92] *Id.* at 622.

[93] Doninger v. Niehoff, 642 F.3d 334, 339-43 (2d Cir. 2011).

[94] *Id.* at 339.

[95] *Id.*

Doninger to send a mass-email from a school computer lab,[96] in which she urged other students and parents to complain to the school for the cancellation of Jamfest.[97]

Principal Karissa Niehoff asserted "that she . . . told Doninger that her conduct—sending a mass email . . . that contained inaccurate information, rather than working with the administration to resolve the problem—was unbecoming of a class officer."[98] During the evening following this discussion, Doninger posted a message from her home computer on her blog hosted by Livejournal.com.[99] The posting began by stating "[J]amfest is cancelled due to douchebags in central office" and then it reproduced the mass email for which Doninger was earlier reprimanded.[100]

Doninger was subsequently prohibited from running for council office her senior year. She claimed "her rights were [also] violated when Niehoff prohibited her from displaying in a school assembly a homemade t-shirt emblazoned with 'Team Avery' on the front and 'Support LSM Freedom of Speech' on the back."[101]

The case moved up from federal district court in Connecticut to the U.S. Court of Appeals for the Second Circuit, which held that "the asserted First Amendment right at

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[96] *Id.*

[97] *See id.* at 339-40 (noting that the email alerted the recipients that 'the Central Office [had] decided that the Student Council could not hold its annual Jamfest/battle of the bands in the auditorium' and urging them to 'contact [the central office and ask that we be let [sic] to use our auditorium'").

[98] *Id.* at 340.

[99] *See What is Live Journal?*, LIVE JOURNAL (last visited July 22, 2013), http://www.livejournal.com/support/faq/56.html (defining the website as "an online journal service with an emphasis on user interaction").

[100] *Doninger*, 642 F.3d at 340-41.

[101] *Id.* at 339.

issue was not clearly established"[102] and affirmed the trial court's ruling that the school officials "were entitled to qualified immunity."[103]

Frank LoMonte, director of the Student Press Law Center,[104] expressed concern with the appellate court's ruling, positing that "what Avery Doninger was doing was not terribly different from what an editorial commentator might do—trying to arouse the public to call and email the school to express an opinion about a disputed policy decision."[105] The ruling was "worrisome," he asserted, because "[t]he circuit has indicated, in essence, that it's safe for students to engage in discussion about issues that nobody cares about, but if the issues raise strong emotions, then the students' involvement might be considered 'disruptive.'"[106]

Professor Susan Bendlin of Barry University School of Law also points out that "[o]ffering qualified immunity in these situations does not . . . resolve the dilemma faced by school officials."[107] The *Doninger* decision "underscores the point that a school official can reach an incorrect conclusion"[108] and can "still be protected from suit if his or

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[102] *Id.* at 338.

[103] *Id.*

[104] *See About Us,* STUDENT PRESS LAW CENTER (last visited July 22, 2013), http://www.splc.org/aboutus/about.asp (describing the organization as a "legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in their struggle to cover important issues free from censorship").

[105] Press Release, Student Press Law Center, SPLC Statement on Today's Decision in Doninger v. Niehoff (Apr. 25, 2011), *available at* http://www.splc.org/news/newsflash.asp?id=2217.

[106] *Id.*

[107] Susan Bendlin, *Cyberbullying: When is It 'School Speech' and When is It Beyond the School's Reach?* Working Papers Series 1, 31 (2012), *available at* SSRN: http://ssrn.com/abstract=2079175 or http://dx.doi.org/10.2139/ssrn.2079175.

[108] *Id.* at 30.

her decision or action was reasonable."[109] Bendlin contends, however, that "[c]ompassionate and competent administrators struggle to make the correct choices in tough situations, and the mere notion that they may be absolved from having to pay money damages is small comfort."[110]

Doninger's petition to the U.S. Supreme Court alleged that "[t]he lack of guidance by this Court to address students' internet speech, or indeed any kind of off-campus speech, combined with school officials' inflated fears of school violence, have resulted in improper punishment of many students for otherwise protected off-campus speech."[111] However, her petition was denied by the Court in October 2011,[112] and her First Amendment concerns were never directly addressed.

Layshock v. Hermitage School District

Justin Layshock's case, had it been accepted by the Supreme Court, might have resolved the constitutional questions raised by the North Carolina statute and proposed Indiana law at the center of this study. Layshock was a senior at Hickory High School in Hermitage, Pa., when he created a "fake Internet 'profile' of his Hickory High School Principal"[113]—precisely the type of behavior criminalized by the North Carolina law.[114]

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[109] *Id.* at 30-31.

[110] *Id.* at 31.

[111] Brief for Petitioner at 19, Doninger v. Niehoff, 132 S. Ct. 499 (2011) (No. 11-113).

[112] Doninger v. Niehoff, 132 S. Ct. 499 (2011).

[113] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011).

[114] N.C. GEN. STAT. § 14-458.2 (2012).

He produced the MySpace page from his grandmother's house during non-school hours and referred to it as a "parody profile"[115] poking fun at his principal, Eric Trosch.[116]

Several other students followed suit, creating their own "unflattering profiles of Trosch on MySpace,"[117] all of which were "more vulgar and more offensive than Justin's."[118] After the school district learned of Layshock's involvement in creating one of the profiles, it held a hearing in which Layshock was found guilty of violating the Hermitage School District Code.[119] He then faced harsh discipline, including a ten-day, out-of-school suspension. In addition, Layshock's "punishment consisted of (1) being placed in the Alternative Education Program," "(2) being banned from all extracurricular activities, including Academic Games and foreign-language tutoring," and "(3) not being allowed to participate in his graduation ceremony."[120]

Among Layshock's legal theories, one count "alleged that the District's punishment of Justin violated his rights under the First Amendment."[121] In June 2011, an *en banc* panel of the U.S. Court of Appeals for the Third Circuit ruled in favor of the student, affirming the district court's grant of summary judgment on his First Amendment claims. The appellate court reasoned that "the First Amendment prohibits

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[115] *Layshock*, 650 F.3d at 207.

[116] *Id.*

[117] *Id.* at 208.

[118] *Id.*

[119] The Hermitage School District Discipline code includes, in pertinent part, "[d]isruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violations (use of school pictures without authorization)." *Id.* at 209-10.

[120] *Id.* at 210.

[121] *Id.*

the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline."[122] It reached this conclusion after considering the facts that Layshock's speech: a) originated off-school premises; b) did not disrupt the educational environment; and c) was not part of any school-sponsored event.[123] The court further opined:

> It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.[124]

The Court's rationale seemingly conflicts with the provisions of the new North Carolina statute targeting the fabrication of school officials' online profiles by students.

J.S. v. Blue Mountain School District

Also decided *en banc* by the Third Circuit on the same day as *Layshock* was *J.S. v. Blue Mountain School District*.[125] It involved similar facts about a student who fabricated an Internet profile of a school administrator. In *J.S.*, the Blue Mountain Middle School student claimed she originally intended the fake MySpace profile of principal James McGonigle to be a "joke between herself and her friends"[126] when she

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[122] *Id.* at 207.

[123] *Id.* at 212-19.

[124] *Id.* at 216.

[125] 650 F.3d 915 (3d Cir. 2011).

[126] *Id.* at 921.

and a girlfriend created it.[127] The page did not identify McGonigle by name or school, but contained his photograph.[128] Although the profile "contained adult language and sexually explicit content,"[129] the court record indicates that it was "so outrageous that no one took its content seriously."[130] Additionally, J.S. set the security settings on the profile to private, thus limiting access to it to a select group of friends.[131]

The Third Circuit reversed the district court's denial of the student's motion for summary judgment on her free speech claim. Perhaps unsurprisingly, it once again found the school had violated the student's First Amendment rights when it disciplined her with a ten-day school suspension "for speech that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school."[132] The appellate court pointed out that "[n]either the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption in school."[133] It further explained that an "opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship."[134]

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[127] *Id.* at 920.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 921.

[131] *Id.*

[132] *Id.* at 925.

[133] *Id.* at 933.

[134] *Id.*

While the Third Circuit's opinions in both *Layshock* and *J.S.* appear to put off-campus-created online student expression beyond the reach of the educational system, some believe that the appellate court was too quick to submit to the students' claims. Educator Allan Osborne, for instance, contends that the "Third Circuit appears to have played down the potential damage the fake profiles may have caused to the principals' reputations and their abilities to continue to maintain order in their school."[135] He mockingly considers that "one can only wonder whether the judges would have been as magnanimous had they been the subject of similar postings."[136] Different federal circuits, however, have reached divergent conclusions to this effect, as is evident in the case described below.

Kowalski v. Berkeley County Schools

Unlike the three previous cases, *Kowalski* involved Internet-based speech targeting a student, not a school official. Specifically, Kara Kowalski was a senior at Musselman High School in Berkeley County, W. Va. in 2005, when she "used her home computer to create a webpage that was largely dedicated to ridiculing a classmate."[137] Kowalski claimed that the MySpace discussion group webpage's title "S.A.S.H." was an acronym for "Students Against Sluts Herpes."[138] Another student who posted several comments and photos on the group's message board, however, alleged that it really

[135] Allan Osborne & Charles Russo, *Can Students be Disciplined for Off-Campus Cyberspeech?*, 2012 BYU EDUC. & L. J. 331, 360 (2012).

[136] *Id.* at 361.

[137] Kowalski v. Berkeley County Schs., 652 F.3d 565, 565 (4th Cir. 2011).

[138] *Id.* at 567.

stood for "Students Against Shay's Herpes."[139] This was a reference to one of their classmates, Shay N., "who was the main subject of discussion on the webpage."[140]

After school administrators "concluded that Kowalski had created a 'hate website,' in violation of the school policy against 'harassment, bullying, and intimidation,'"[141] Kowalski was: a) suspended for ten days; b) given a three-month "social suspension" from school events; and c) forced off the cheerleading squad.[142]

Kowalski claimed her First Amendment rights were violated because her speech occurred outside of school.[143] The U.S. Court of Appeals for the Fourth Circuit, however, affirmed the district court's judgment against her. The appellate explained that while "[t]here is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issues originated outside the schoolhouse gate," it did not find the need to demarcate that limit in the instant case because "the nexus of Kowalski's speech to Musselman High School's pedagogical interest was sufficiently strong to justify" its actions.[144]

California Western School of Law Professor Ari Waldman supports the court's decision and agrees that Kowalski's "discipline was warranted."[145] Feeding off the court's decision, Waldman contends that "in cases where a school could punish an

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[139] *Id.*

[140] *Id.*

[141] *Id.* at 568-69.

[142] *Id.* at 569.

[143] *Id.* at 570.

[144] *Id.* at 573.

[145] Ari Waldman, *Cyberlaw: Hostile Education Environments,* 71 MD. L. REV. 705, 748 (2012).

online aggressor and even in cases where schools could not, the geographic origin and geographic reach of the speech is irrelevant."[146] Waldman reasons that "when a culture of fear pervades a school that sits idly by when attacks go on in person or online, no one can teach anyone anything, and the school turns into a prison."[147]

The outcome of *Kowalski*, when considered alongside the decisions in *Doninger*, *Layshock* and *J.S.*, makes it evident that there is no bright-line, agreed-upon rule for deciding when public school administrators can lawfully extend their disciplinary authority over to off-campus cyberspeech. The Fourth Circuit in *Kowalski* provided another exception to students' freedom of expression, mirroring the U.S. Supreme Court's 2007 decision in *Morse v. Frederick*.[148] In *Morse*, the Court noted "that our jurisprudence now says that students have a right to speak in schools except when they do not – a standard continuously developed through litigation against local schools and their administrators."[149]

"[W]e have differing standards . . . developing now around the country in the various circuits, maybe something the Supreme Court should look at,"[150] posits Professor Robert Richards from Pennsylvania State University. "And we have a Supreme Court that has historically demonstrated very little interest in this area, but

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[146] *Id.* at 730.

[147] *Id.* at 742.

[148] 551 U.S. 393 (2007).

[149] *Id.* at 418.

[150] Alan B. Morrison et al., *Panel Discussion on Recent U.S. Supreme Court Free Speech Decisions & the Implications of these Cases for American Society*, 76 ALB. L. REV. 781, 819 (2013).

maybe they ought to address this issue."[151] Richards, however, digresses and asks, "do we really want them addressing this issue, when you have somebody like Justice Thomas saying that there are no First Amendment rights for anybody in the public schools[?]"[152]

Nonetheless, because the U.S. Supreme Court has refused to address any of these cases, it is evident that "courts are struggling to define the proper place of so-called 'student internet speech.'"[153] However, despite this lack of clarity, it is apparent that those in favor of preserving students' First Amendment rights believe "extending school districts' intentionally limited authority to off-campus speech—whether online or otherwise—would set a dangerous precedent."[154]

But even without a standard established by the Supreme Court, much legislation has already been passed, extending the reach of school authority to off-campus speech. Particularly, as discussed below in Section B, there has been a growing trend in the implementation of anti-cyberbullying laws—also presenting disturbing consequences to students' freedom of expression.

C. Cyberbullying Legislation: The Uniqueness of North Carolina's New Law

Megan Meier, a thirteen-year-old girl from Missouri, "hanged herself with a belt in her bedroom closet"[155] after experiencing severe cyberbullying in October 2006.[156] The

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[151] *Id.*

[152] *Id.*

[153] Michael Kasdan, *Student Speech in Online Social Networking Sites: Where to Draw the Line*, 2 N.Y.U. INTELL. PROP. & ENT. LAW LEDGER 16, 16 (2010).

[154] *Id.* at 23.

[155] Betsy Taylor, *Mom: Verdict Shows Cyberbullies Will be Punished*, ASSOC. PRESS, Nov. 28, 2008, available on NewsBank database.

cyberbullying began when a forty-nine-year-old neighbor, Lori Drew, created a fake MySpace profile posing as a teenage boy. According to University of Florida Law Professor Lyrissa Lidsky, "Drew believed Megan may have been spreading rumors about her daughter, and she enlisted the help of an eighteen-year-old employee in exacting retribution."[157] The two "sent flirtatious messages"[158] addressed from the make-believe boy to Meier, which led to the development of an online relationship. Meier committed suicide when the "boy" dumped her by telling her "[t]he world would be a better place without you."[159] "There was no reporting about the case" during the initial police investigation, but a "press frenzy" was initiated one year later, "[a]fter Megan's aunt told the story to the *St. Louis Dispatch.*"[160]

Although "public outrage"[161] ensued after the delayed coverage of Meier's tragic death, St. Charles County prosecutor Jack Banas claimed "he could not find statutes allowing him to charge anyone in the case,"[162] after reviewing "laws related to stalking, harassment and child endangerment."[163] Unsurprisingly, this event brought national

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[156] *Id.*

[157] Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying,* 2012 MO. L. REV. 1, 9 (2012).

[158] Betsy Taylor, *Mom: Verdict Shows Cyberbullies Will be Punished*, ASSOC. PRESS, Nov. 28, 2008, available on NewsBank database.

[159] *Id.*

[160] Lauren Gelman, *Privacy, Free Speech, and 'Blurry-Edged' Social Networks,* 50 B.C. L. REV. 1315, 1338 (2009).

[161] Betsy Taylor, *Prosecutor: Law Doesn't Allow for Charges in MySpace Suicide Case,* ASSOC. PRESS, Dec. 3, 2007, available on NewsBank database.

[162] *Id.*

[163] *Id.*

attention to the issue of cyberbullying and "led to calls for legal reforms."[164] Professor Lidsky notes that "[m]uch of this important new legislation places schools at the vanguard of the anti-bullying campaign, requiring them to formulate policies and discipline perpetrators."[165]

According to the National Conference of State Legislatures (hereinafter NCSL), more than thirty states now have statutes aimed at controlling cyberbullying and online harassment.[166] The NCSL broadly defines cyberbullying as "the willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others."[167]

Cyberbullying, however, "has gained a variety of definitions as it has gained notoriety,"[168] avoiding a universal agreement on its meaning. Professor Susan Brenner of the University of Dayton School of Law, for instance, defines cyberbullying as the "repeated use of computer or other modern communications technology to engage in non-physical abuse of one or more individuals when the actors are all constituents of a common educational context."[169] In contrast, Bentley University Professor John Hayward provides a more convoluted definition of cyberbullying as "involving the use of information and communication technologies such as e-mail, cell phone and pager text

[164] Lidsky & Pinzon, *supra* note 130, at 8.

[165] *Id.* at 3.

[166] *See Cyberbullying,* National Conference of State Legislatures, http://www.ncsl.org/issues-research/educ/cyberbullying.aspx (last visited Sep. 30, 2013) (summarizing the contents of every state's cyberbullying legislation passed between 2006 and 2010).

[167] *Id.*

[168] Susan Brenner & Megan Rehberg, *Cyberspeech Article: 'Kiddie Crime'? The Utility of Criminal Law in Controlling Cyberbullying,* 8 FIRST AMEND. L. REV. 1, 2 (2009).

[169] *Id.* at 2-3.

messages, instant messaging, defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behavior by an individual or group, that is intended to harm others."[170] This absence of a unified definition of cyberbullying undoubtedly introduces difficulties of vagueness and overbreadth when drafting laws to prevent it.

However, one advocate for the suppression of cyberbullying, Stopbullying.gov,[171] notes that this bullying trend most negatively affects "kids," who are unable to escape this type of behavior.[172] It is likely for this reason that most state laws aimed at curbing cyberbullying define it as a crime of student against student or against a minor.[173]

Alabama, for instance, enacted the Student Harassment Prevention Act[174] in 2009. The bill that gave rise to it clearly states that the "intent of the Legislature" was for the act to "apply only to student against student harassment, intimidation, violence, and threats of violence in the public schools."[175]

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[170] John Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 88 (2011).

[171] *See About Us,* StopBullying.gov, http://www.stopbullying.gov/about-us/index.html (last visited Sep. 30, 2013) (describing the website as a provider of "information from various government agencies on what bullying is, what cyberbullying is, who is at risk, and how you can prevent and respond to bullying").

[172] *See What is Cyberbullying,* StopBullying.gov, http://www.stopbullying.gov/cyberbullying/what-is-it/index.html (last visited Sep 30, 2013) (providing that "kids who are cyberbullied" are prone to experiencing negative behaviors, such as using alcohol and drugs, skipping school, experiencing in-person bullying, and receiving poor grades).

[173] *Infra notes* 147-49 and accompanying text.

[174] ALA. CODE § 16-28B-1 (2013).

[175] 2009 Ala. Acts 571.

The NCSL's data reveal that other states also have focused their attention on children. This includes Florida, which "defines bullying as systematically and chronically inflicting physical hurt or psychological distress on one or more *students*."[176]

It is apparent that the existing legislation regarding cyberbullying did not originally aim at protecting school employees and administrators – at least not until the introduction of the North Carolina law analyzed in this study. Although this law differs from other cyberbullying statutes, they collectively draw similar scrutiny from those concerned with students' First Amendment rights. Professor Lidsky, for instance, posits:

> Viewed from a First Amendment perspective, criminal cyberbullying laws seem especially prone to overreach in ways that offend the First Amendment, resulting in suppression of protected speech, misdirection of prosecutorial resources, misallocation of taxpayer funds to pass and defend such laws, and the blocking of more effective and constitutionally permissible reforms.[177]

Taking into account both the four appellate case rulings discussed in Section A and this trending cyberbullying legislation, it is evident that the struggle to strike a balance between students' First Amendment rights and school's authority has continued to escalate. The ubiquity of the Internet—particularly social networking sites—has made it difficult for legislatures and courts to draw a clear line on when it is acceptable to discipline off-campus speech that has the potential to reach school campus.

The next chapter of this study examines two U.S. Supreme Court cases, which may be relevant to the constitutionality of North Carolina's new law restricting students'

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[176] FLA. STAT. § 1006.147 (2013) (emphasis added).

[177] Lidsky & Pinzon, *supra* note 130, at 6.

online speech. *U.S. v. Alvarez*[178]—identifying false speech as protected speech—and *Hustler Magazine v. Falwell*[179]—shielding parodical speech—may have already set precedential standards on which to review North Carolina's law. This chapter will also explore a new trend of statutes arising throughout the country, which prohibit online impersonation, and how these legislative efforts may be pertinent to the law analyzed in this study.

[178] 132 S. Ct. 2537, 2542 (2012).

[179] 485 U.S. 46, 48 (1988).

CHAPTER 4
IDENTIFYING POSSIBLE PRECEDENT: SUPREME COURT PROTECTION FOR FALSE AND PARODIC SPEECH, STATE PUNISHMENT OF ONLINE IMPERSONATION

This chapter initially explores two U.S. Supreme Court opinions that establish a backdrop against which the North Carolina statute central to this study can be reviewed. Section A first delves into *United States v. Alvarez*,[180] in which the Court addressed the constitutionality of a federal statute that proscribed a category of false speech. The *Alvarez* plurality held that lies, in and of themselves, do not automatically fall beyond the scope of First Amendment protection.[181] Section B then examines *Hustler Magazine v. Falwell*,[182] an opinion protecting producers of parodic and satirical speech from tort liability when the individual ridiculed is a public figure.[183] Viewed collectively, sections A and B attempt to connect the sometimes-protected categories of false and parodic speech to the expression restricted by North Carolina, which bars students from creating false—and in many instances, parodic—online profiles of school officials. Finally, this chapter addresses in Section C the growing legislative movement to illegalize impersonation on the Internet. This section considers the implications of such statutes on North Carolina's law that may weaken its claim for necessity.

[180] 132 S. Ct. 2537 (2012).

[181] *Id.*

[182] 485 U.S. 46 (1988).

[183] *Id.*

A. United States v. Alvarez: False Speech and the First Amendment

In *United States v. Alvarez*,[184] the Supreme Court in 2012 considered the constitutionality of a section of the Stolen Valor Act[185] [hereinafter "SVA"] that made it illegal to lie about receiving the Congressional Medal of Honor and other military honors.

The case arose after Xavier Alvarez attended "his first public meeting as a board member of the Three Valley Water District Board"[186] in California in 2007 and "lied in announcing he held the Congressional Medal of Honor."[187] Alvarez fabricated details of his make-believe persona, falsely introducing himself as "a retired marine of 25 years"[188] who was "wounded many times by the same guy."[189]

Referring to Alvarez's poor character, Justice Anthony Kennedy wrote:

> Lying was his habit . . . [Alvarez] lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico . . . . None of this was true. For all the record shows, respondent's statements were but a pathetic attempt to gain respect that eluded him.[190]

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[184] 132 S. Ct. 2537 (2012).

[185] The section of the Stolen Valor Act at issue in *Alvarez* provided that:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b) (2011).

[186] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.*

Although it is obvious that the Court did not endorse or approve of Alvarez's deceitfulness, Justice Kennedy authored the plurality opinion in favor of Alvarez and was joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor. After deeming the SVA to constitute "a content-based suppression of pure speech,"[191] the Court struck it down. Justice Kennedy observed that "falsity alone may not suffice to bring the speech outside of the First Amendment,"[192] and he "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected."[193]

Justice Stephen Breyer carved out a concurring opinion joined by Justice Elena Kagan, in which they agreed that the SVA violated the First Amendment, but on different grounds.[194] Rather than employing the plurality's strict scrutiny review, which implies a "near-automatic condemnation"[195] of the statute, Justice Breyer used an intermediate scrutiny or "'proportionality' review"[196] approach as an "examination of 'fit.'"[197] Proposing that a more tailored statute was permissible, he also suggested as a less restrictive alternative "an accurate, publicly available register of military awards . . .

[191] *Id.* at 2543.

[192] *Id.* at 2539.

[193] *Id.* at 2546 – 47.

[194] *Id.* at 2551.

[195] *Id.* at 2552.

[196] *Id.* at 2551.

[197] *Id.*

[that] may well adequately protect the integrity of an award against those who would falsely claim to have earned it."[198]

Although Justice Samuel Alito was joined by Justices Antonin Scalia and Clarence Thomas in the dissent,[199] and the Court's 4—2—3 decision in *Alvarez* is "badly fractured,"[200] Professor Richard Hasen asserts that all justices share a common concern. "[T]here seems unanimous skepticism of laws targeting false speech about issues of public concern. . . . Especially dangerous are criminal laws punishing false speech that could lead to selective criminal prosecution."[201]

Hasen identifies one of the difficulties posed by this sort of speech-restricting measure. The North Carolina law, for instance, which aims at silencing students for the purpose of protecting school employees from cyberbullying, nonetheless threatens student speech that might address important matters of "public concern." Subjecting students to possible criminal sanctions is likely to chill some expression that legitimately criticizes school authorities' actions. It is foreseeable that only unfavorable and unflattering statements about school officials—even those that merit presentation in public fora to expose shortcomings of the public education system—would be prosecuted under the law.

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[198] *Id.* at 2556.

[199] *Id.* at 2542.

[200] Richard Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 69 (2013).

[201] *Id.*

The Supreme Court traditionally protects against content-based restrictions, with the exception of certain "historically unprotected"[202] categories of speech. As outlined in *Alvarez*, these categorical carve-outs from First Amendment protection include "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent."[203] Noticeably missing from this list of unprotected categories of expression are false speech and any specific brand of student speech.

The *Alvarez* plurality held that the Government failed to demonstrate "that false statements should constitute a new category."[204] Kennedy stressed that for the Court to exempt a new category of speech from First Amendment protection, there must be "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[205] In the case of the SVA, there simply was no historical precedent for banning false speech about earning military medals of honors. Although the same may not be said about restrictions on student speech occurring on public school grounds,[206] a uniform legal standard does not exist defining the scope of false student speech originating off-campus and at non-school-sponsored events.

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[202] *Alvarez*, 132 S. Ct. at 2540.

[203] *Id.* at 2544.

[204] *Id.* at 2547.

[205] *Id.*

[206] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) (indicating that a "principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use); *see, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *see, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S.

On its face, *Alvarez* seems to safeguard some speech now restricted by the North Carolina law. Specifically, it seems unlikely that the provision prohibiting students from using a computer to "[b]uild a fake profile or Website"[207] would withstand the same level of judicial scrutiny employed by the Court in its analysis of the SVA. In other words, a fake profile is, by definition, false speech, and *Alvarez* protects false speech in and of itself.

The caveat carved out by Justice Kennedy in *Alvarez,* which may be argued in support of North Carolina's statute, is that false speech can be regulated if there is "a direct causal link between the restriction imposed and injury to be prevented."[208] Simply put, there must be some kind of direct harm caused by false speech before it can be lawfully punished. As First Amendment scholar Rodney Smolla observes:

> [Some] restrictions on false speech are permissible . . . Most pointed, for example, perjured statements are not simply unprotected because they are false, but because they are 'at war with justice' . . . Similarly, . . . laws prohibiting the impersonation of government officials serve to preserve 'the integrity of governmental processes.'[209]

In the case of North Carolina, the statute's restriction on speech is designed to protect school administrators from injury caused specifically by student cyberspeech intended to "intimidate or torment." But is there a "direct causal link," as defined by Justice Kennedy, between the punishable student speech and the potential harm it

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675, 685-86 (1986) (providing that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission").

[207] N.C. GEN. STAT. § 14-458.2 (2012).

[208] United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012).

[209] Rodney Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez,* 76 ALB. L. REV. 499, 517 (2012).

causes? It appears doubtful. As addressed later in Chapter 5 of this study, school officials directly harmed by fake profiles do possess other remedies.

Taking into consideration Smolla's observation that some extant laws prohibiting impersonation of government officials pass constitutional scrutiny, the North Carolina law may simply be pinpointing a subset of "government officials"—public school employees—and protecting them from impersonation in the form of fake online profiles. Nonetheless, this protection, as addressed in the section below, may also have a latent effect on another constitutionally protected form of speech: parody.

B. Hustler Magazine v. Falwell: Protecting Parodies Pertaining to Public Figures

Hustler Magazine v. Falwell, according to First Amendment scholar and Yale Law School Dean Robert Post, "is a classic First Amendment case."[210] It began in response to the publication of *Hustler's* November 1983 issue,[211] which featured an ad parody mocking the Reverend Jerry Falwell.[212]

Falwell was then "a nationally known minister" who was "active as a commentator on politics and public affairs."[213] The parody copied the style of a real-life Campari Liqueur ad campaign that centered on interviews of celebrities talking about their "first time"[214] with Campari but was laden in innuendoes about their first time

[210] Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 603, 604 (1990).

[211] *Falwell*, 485 U.S. 46, at 48.

[212] *Id.*

[213] *Id.* at 47.

[214] *Id.* at 48.

having sex.[215] In *Hustler's* version, Falwell was depicted as a hypocritical preacher whose "'first time' was during a drunken incestuous rendezvous with his mother in an outhouse."[216]

Despite the inclusion of a disclaimer at the bottom of the parody's page, which read "ad parody – not to be taken seriously,"[217] Falwell sued *Hustler* and its publisher, Larry Flynt, for invasion of privacy, libel and intentional infliction of emotional distress [hereinafter IIED].[218] Initially, the U.S. District Court of the Western District of Virginia denied Falwell recovery on the libel and invasion of privacy causes of action.[219] However, the jury fell in line with Falwell on the IIED claim, awarding him $100,000 in compensatory damages and $100,000 in punitive damages for which Larry Flynt and Hustler Magazine were jointly liable.[220] The U.S. Court of Appeals for the Fourth Circuit upheld the IIED verdict in Falwell's favor,[221] and thus the U.S. Supreme Court focused only on the IIED claim and the question of "whether a public figure may recover

[215] *See id.* (describing the original Campari ads, which made evident the interviews concerned the celebrities' "first time sampling Campari," but were also "clearly played on the sexual double entendre of the general subject of 'first times'").

[216] *Id.*

[217] *Id.*

[218] *Id.* at 47-48; *see* Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media,* 5 COMM. L. & POL'Y 469, 476 (2000) (identifying the four IIED elements: "(1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe").

[219] Falwell v. Flynt, No. 83-0155-L-R, 1985 U.S. Dist. LEXIS 20586, at *1-2 (W.D. Va. 1985).

[220] *Id.* at *2.

[221] Falwell v. Flynt, 797 F.2d 1270, 1278 (1986).

damages for emotional harms caused by the publication of an ad parody offensive to him."[222]

Chief Justice William Rehnquist delivered the opinion of the Court,[223] concluding that:

> public figures and public officials may not recover for the tort of [IIED] by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. . . [This] reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment.[224]

Put more bluntly, the Court in *Hustler* protected parody and satire from IIED liability if the plaintiff is a public figure or public official, unless the plaintiff can also prove actual malice—a standard borrowed from laws defining the tort of defamation.[225]

In 2011, the high court added that even a private plaintiff could not recover for the tort of IIED when the speech at issue "deals with a matter of public concern."[226] Such speech, which "can be fairly considered as relating to any matter of political,

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[222] Hustler Mag. v. Falwell, 485 U.S. 46, 50 (1988).

[223] *See id.* at 46 (noting that Rehnquist was joined by Associate Justices William Brennan, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor and Antonin Scalia).

[224] *Id.* at 56.

[225] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (noting that "[t]he constitutional guarantees" offered by the First Amendment, require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'").

[226] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215-1219 (2011) (providing the Court's reasoning that the plaintiff—a private figure who clearly suffered emotional harm from defendants picketing at his son's funeral—did not have a successful IIED claim because the defendants' speech involved matters of public concern).

social, or other concern to the community,"[227] or is a "subject of general interest and of value and concern to the public,"[228] has heightened protections under the First Amendment.[229]

In *Hustler*, the Court opined that it would be a difficult task to separate even seemingly valueless speech, such as the parody of Falwell, from other "graphic depictions and satirical cartoons [which] have played a prominent role in the public and political debate."[230] In response to this position, Professor David Goldberg observes that the Court presented persuasive reasons for this "speech-protective approach"[231]—namely "the inability to draw lines distinguishing harmful speech from valuable speech and the inherent benefits of free speech."[232] Dean Post further notes that the Court in *Hustler* "justified the rule with the familiar theory that constitutionally valueless expression must sometimes be protected so that speakers will not engage in self-censorship and hence diminish 'speech relating to public figures that does have constitutional value.'"[233]

In relation to Goldberg and Post's observations, the North Carolina statute at issue in this study precisely serves the purpose of diminishing students' right to participate in meaningful public discourse. By prohibiting students from posting "or

[227] *Id.* at 1216 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

[228] *Id.* (quoting San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

[229] *Id.* at 1219.

[230] *Hustler*, 485 U.S. 46, 54 (1988).

[231] David Goldberg, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist, and Ethnically Offensive Speech*, 56 BROOKLYN L. REV. 1165, 1190 (1991).

[232] *Id.*

[233] Post, *supra* note 178, at 614.

encourage[ing] others to post on the Internet [any] private, personal, or sexual information pertaining to a school employee,"[234] the law strips students of the ability to expound on, in any satirical or parodical format, matters of public concern[235] regarding public school authorities.

Thus, the important remaining question regarding *Hustler* and its potential relevance to the North Carolina law at hand can be divided into three parts:

(1) Can government-employed public school personnel, like those the North Carolina law claims to protect, be considered public figures or officials? If so,

(2) By prohibiting students from engaging in satirical online speech, does the North Carolina law chill protected speech that is reasonably believed to possess "constitutional value," such as commentary on public officials? And finally,

(3) Does it make the law unconstitutional if it abridges students' freedom of speech that has otherwise been protected by First Amendment jurisprudence, including that covered by *Hustler*?

In response to the first part of the question, it perhaps would be difficult to claim that a teacher who holds no administrative leadership position is anything more than a private individual,[236] unless she has thrust herself into matters of public concern and the

[234] N.C. GEN. STAT. § 14-458.2 (2012).

[235] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (defining speech dealing with matters of public concern as that which "can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,'" and adding that "[t]he arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern'").

[236] *See* DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 5:24 (2003) (providing that "[p]ublic school teachers and lower level school administrators . . . are not, under the majority rule, public officials").

public eye.[237] David Elder, author of *Defamation: A Lawyer's Guide*,[238] points out, however, that the courts have, in some instances, "appended the 'public official' status"[239] to school teachers. However, principals and other school district leaders have historically been treated as public officials,[240] as they provide the face of the tax-funded public school system, and therefore could legally be subject to the satirical criticisms protected by *Hustler*.[241]

The second part calls into question whether the North Carolina law sweeps up students' freedom to criticize public school officials by using parody and satire, in direct opposition to the holding in *Hustler.* Despite the fact that the law aims to protect school officials from students' online harassment, in a more simplistic sense, the statute shelters them from being the butt of embarrassing and juvenile jokes, analogous to Larry Flynt's portrayal of Jerry Falwell. As evident in cases like *Layshock* and *J.S.*, many students who use social networking websites to create parody profiles of their school principals regard these jokes as harmless and commonplace. Although *Hustler* involved a legacy medium – a print magazine – it appears as if the North Carolina law

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[237] *Id.* at § 5:24; *See* Gertz v. Welch, 418 U.S. 323, 345 (1974) (explaining that "[f]or the most part those who attain" a public figure status have assumed roles of special prominence in the affairs of society . . . More commonly," however, generally private figures who are subsequently "classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and they "invite attention and comment").

[238] ELDER, *supra* note 236.

[239] *Id.* at § 5:1.

[240] *See id.* (identifying "high-level school administrators" as public figures, who are required to comply with the *New York Times* actual malice standard).

[241] *See, e.g.*, Jee v. N.Y. Post, 176 Misc. 2d 253, 259 (1998) (noting that "a person who subjects himself or herself to the appointment process for public school principal, and who temporarily acts as principal during that process, is a public official for the purpose of the appointment process" and adding that "one who is a public official during the process of appointment, remains such after appointment, while serving as principal").

contradicts the Supreme Court's position that parody "is not governed by any exception to [] general First Amendment principles."[242] That is, if one assumes that *Hustler*'s holding also applies to the Internet and new media, then North Carolina's law directly conflicts with it.

This paves the road for the answer to the third part of the unpacked question above. Although complicated, it is seemingly obvious that the North Carolina law is likely unconstitutional when considered against the First Amendment principles echoed in *Alvarez* and *Hustler*. However, this constitutional analysis is more closely scrutinized in Chapter 5 of this study.

C. Online Impersonation: States Move to Criminalize Internet Imposters

In January 2013, Notre Dame football star Manti Te'o claimed to be the victim of an "elaborate hoax,"[243] after facing utter humiliation caused by an Internet prank "that involved a fake online girlfriend."[244] The athlete had earlier received sympathy and respect from fans when he revealed that his "girlfriend," Lennay Kekua, died in September 2012.[245] The press later exposed, however, that Kekua did not really exist, and the compassion for the football star turned into ridicule.[246] Te'o claimed his relationship with the woman "took place mostly online,"[247] making it possible for her persona to have been fabricated by an imposter. The question that arose from the

[242] *Hustler*, 485 U.S. 46, 56 (1988).

[243] Victor Luckerson, *Can You Go to Jail for Impersonating Someone Online?*, TIME (Jan. 29, 2013), http://business.time.com/2013/01/22/can-you-go-to-jail-for-impersonating-someone-online/.

[244] *Id*.

[245] *Id.*

[246] *Id.*

[247] *Id.*

scandal was whether or not Te'o could seek legal remedy for the harm he suffered with this type of online harassment.[248]

This same question has been addressed by many states in the past several years.[249] While online impersonation can take on many forms—ranging from harmless juvenile pranks to more severe identity theft—states that have criminalized it have specifically aimed to prevent "e-personation" that is used to "humiliate or torment people and even put them in danger."[250]

California State Senator Joe Simitian, for instance, authored the anti-online impersonation bill that was signed into law by then-Governor Arnold Schwarzenegger in December 2010.[251] Simitian asserted that the law targets what he called the "dark side of the social networking revolution."[252] He stressed that "[t]echnology has changed the nature of impersonation and made it easy for anyone with a grudge or a twisted sense of humor,"[253] and victims consequently need "a law they can turn to."[254] Similar to the North Carolina law central to this study, the penalties for violators of the California

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[248] *Id.*

[249] *E.g.*, N.Y. PENAL LAW § 190.25 (2008); *e.g.*, H.R. 2004, 51 Leg., 1st Sess. (Ariz. 2013).

[250] Press Release, Joe Simitian, Malicious E-Personation Protection Effective January 1 (Dec. 22, 2010) [hereinafter Press Release, Simitian], *available at* http://www.senatorsimitian.com/entry/malicious_e-personation_protection_effective_january_1/.

[251] CAL. PENAL CODE §528.5 (2011).

[252] Press Release, Simitian, *supra* note 210.

[253] *Id.*

[254] *Id.*

online impersonation statute could face a fine of up to $1,000 and up to one year in prison.[255]

Other states, such as Texas, have introduced even more severe punishment for those who use someone else's identity to "harm, defraud, intimidate or threaten any person"[256] online. Charges under the Texas statute could result in a third-degree felony,[257] punishable by a fine up to $10,000 and from two to ten years in prison.[258]

At least nine states,[259] not including North Carolina, have or are considering similar laws that prohibit online impersonation[260]—a legislative movement unlikely to cease in the near future. But what does this mean for laws like North Carolina's that targets cyberbullying against school administrators, and which focuses specifically on student speech?

First, it presents redundancy in the legal system in the event North Carolina adopts a general online-impersonation statute. Hypothetically, if a school official lives in a state with two sets of legislation: (1) against general online impersonation, like those adopted in Texas and California; and (2) prohibiting students from creating fake online profiles, the consequences for students could increase exponentially. If students were to face a double-dose of legal implications—violating two separate statutes by

[255] CAL. PENAL CODE §528.5 (2011).

[256] TEX. PENAL CODE §33.07 (2009).

[257] *Id.*

[258] TEX. PENAL CODE §12.34 (2009).

[259] CAL. PENAL CODE §528.5 (2011); HAW. REV. STAT. § 711-1106.6 (2013); LA. REV. STAT. ANN. § 14:73.10 (2013); MISS. CODE ANN. § 97-45-33 (2013); N.Y. PENAL LAW § 190.25 (2008); TEX. PENAL CODE §33.07 (2009); H.R. 2004, WASH. REV. CODE § 4.24.790 (2013); 51 Leg., 1st Sess. (Ariz. 2013); 764 Leg., 1st Sess. (PA. 2013).

[260] *Id.*

fabricating a perceptively harmful online profile that impersonates a school employee—this undoubtedly has the potential to threaten and chill protected speech.

Students can be equally liable as other citizens under these general online impersonation statutes, which have also been vulnerable to a fair share of criticism. Just as First Amendment enthusiasts spoke against the student-centered North Carolina law and other similar bills, they also have voiced concerns about measures preventing online impersonation. The Electronic Frontier Foundation [hereinafter "EFF"],[261] for instance, spoke out against California's version of the law, noting how "temporarily 'impersonating' corporations and public officials has become an important and powerful form of political activism, especially online."[262] The EFF stressed that by prohibiting the use of "spoof sites and identity correction,"[263] the legislation could thwart efforts to raise online awareness about community issues, environmental threats, and other political concerns.[264]

The Digital Media Law Project [hereinafter "DMLP"][265] also stood against a similar Arizona bill,[266] which was introduced in December 2012 and would make it a class five felony to impersonate someone online.[267] The DMLP stated:

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[261] *See About EFF,* ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/about (last visited Sep. 30, 2013) (noting the organization's primary focus in "defending free speech, privacy, innovation, and consumer rights").

[262] Corynne McSherry, *"E-Personation" Bill Could Be Used to Punish Online Critics, Undermine First Amendment Protections for Parody*, ELECTRONIC FRONTIER FOUNDATION (Aug. 22, 2010), https://www.eff.org/deeplinks/2010/08/e-personation-bill-could-be-used-punish-online.

[263] *Id.*

[264] *Id.*

[265] *See About the Digital Media Law Project,* DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/about/digital-media-law-project (last visited Sep. 30, 2013) (identifying the organization's mission to provide "individuals and organizations involved in online journalism and digital media . . . access to the legal resources, education, tools, and representation that they need to thrive").

> Indeed, cyberbullying is a rampant issue, and it may lead to serious physical and emotional harm (and even death, as in the sad case of Megan Meier). There is a legitimate state interest in preventing or limiting such harm. But people engage in online impersonation for a whole mix of reasons, and one could easily see a public figure threatening to use such a law against an account that was created for completely laudable ends, such as criticism and comment.[268]

Although it is clear that this string of anti-online impersonation laws has its own flaws, states' apparent acceptance of such legislation leads one to believe that more states are likely to follow. When matched up with a law like North Carolina's, the danger caused to students' freedom of expression is exacerbated.

Even standing alone, North Carolina's statute presents sufficient First Amendment concerns. The next chapter of this study more closely analyzes its constitutionality through the prism of three traditional legal doctrines – strict scrutiny, void for vagueness and overbreadth – and it further explores other legal remedies available to school employees who fall victim to students' online harassment.

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[266] H.R. 2004, 51 Leg., 1st Sess. (Ariz. 2013).

[267] *Id.*

[268] Marie-Andree Weiss, *@Parody or @Crime? AZ Bill May Blur the Line*, DIGITAL MEDIA LAW PROJECT (Feb. 5, 2013, 10:37 AM), http://www.dmlp.org/blog/2013/parody-or-crime-az-bill-may-blur-line.

CHAPTER 5
TESTING THE VALIDITY OF NORTH CAROLINA'S STATUTE: A CONSTITUTIONAL ANALYSIS

This chapter examines whether the law central to this study, § 14-458.2 of the General Statutes of North Carolina, is likely to pass constitutional muster. Initially, the statute is analyzed against three well-established First Amendment doctrines. Specifically, section A challenges whether the law stands up to strict scrutiny—the highest level of as-applied judicial review in determining the constitutionality of speech regulations. Section B then explores how the overbreadth doctrine could potentially render the law invalid on its face. Section C continues this constitutional analysis, applying the vagueness doctrine to challenge specific language used in North Carolina's statute.

The remaining sections in this chapter further question whether laws like North Carolina's are actually necessary to protect public school employees from significant harm. Section D suggests there is no justification for legislation carving out a unique group of citizens—in this case, public school employees—and awarding it special protection against exposure to otherwise constitutionally protected speech. Finally, section E explores alternative legal remedies already available to teachers and school administrators, protecting them from outrageous online attacks by their students. Specifically, possible solutions presented here include the civil torts of defamation and intentional infliction of emotional distress (IIED).

A. Strict Scrutiny

Courts historically have found that any law that "constitutes a content-based restriction on speech"[269] is "'presumptively invalid and is subject to strict scrutiny.'"[270] The North Carolina statute analyzed here unarguably restricts speech based on its content. Specifically, it targets online student speech that concerns school employees and is intended to "torment" or "intimidate."[271] Thus, strict scrutiny applies as the standard of review for this statute and similarly proposed laws like that in Indiana noted in the Introduction.

The Supreme Court subjects content-based regulations to this heightened level of scrutiny because, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[272] The Court therefore has determined that to test the constitutionality of speech-restricting laws like that of North Carolina, the government must satisfy a two-part strict test. As the Supreme Court wrote in 2011, a statute passes strict scrutiny only if "it is justified by a compelling government interest and is narrowly drawn to serve that interest."[273] The second part of this test requires the regulation to be "the least restrictive means among available, effective alternatives."[274] As the Court has opined, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature

[269] ACLU v. Reno, 217 F.3d 162, 171 (3d Cir. 2000).

[270] *Id.*

[271] N.C. GEN. STAT. § 14-458.2 (2012).

[272] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[273] Brown v. Entm't Merch. Ass'n, (2011) (emphasis added).

[274] Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

must use that alternative."[275] Put slightly differently by the Court in 2012, the "restriction on the speech at issue [must] be 'actually necessary' to achieve its interest."[276] As Professor George Wright recently summed it up, under strict scrutiny courts are "looking for a compelling governmental interest to justify the regulation, as well as narrow tailoring, or a precise fit, between the scope or burden of the regulation and the scope of the cited compelling governmental interest."[277]

Compelling Interest

The first prong in determining a statute's ability to pass strict scrutiny—the compelling state interest—is originally outlined by Associate Justice Wiley Blount Rutledge in Thomas v. Collins:[278]

> [A]ny attempt to restrict those liberties [secured by the First Amendment] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.[279]

In simpler terms, as Law Professor Howard Wasserman sums up, "government can punish [speech] only to serve an interest of the 'highest order.'"[280] One First Amendment scholar even suggests that "the compelling interest inquiry is

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[275] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

[276] United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012).

[277] R. George Wright, *Broadcast Regulation and the Irrelevant Logic of Strict Scrutiny*, 37 J. LEGIS. 179, 189 (2012).

[278] 323 U.S. 516 (1945).

[279] *Id.*

[280] Howard Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 445 (2006).

more than just an inquiry into whether the government interest is strong enough: It is also an inquiry into whether the benefit to the government interest is outweighed by the harm to the equally compelling interest in free speech itself."[281]

The Court has recently determined that a mere recitation of a compelling interest is insufficient.[282] The state, rather, must prove that there is a "direct causal link between the restriction imposed and the injury to be prevented."[283] Lacking any empirical data that the speech prohibited by North Carolina § 14-458.2 may cause any significant harm to school employees, the state has neglected to prove that the state interest rises to this standard.

Although North Carolina may have an *important* interest in trying to protect its public school employees from cyberbullying, by thwarting the free speech interests of its students, strict scrutiny requires more. As one scholar notes, "[a] significant or important interest is lesser than a compelling interest under strict scrutiny," and is only sufficient to meet the "more lenient" standard of intermediate scrutiny, mostly used to examine content-neutral laws. [284] The difference here is that, unlike most strict-scrutiny cases, the constitutional interest in intermediate scrutiny cases "is going to be relatively marginal [] because the regulation does not target communicative impact [or] because it

[281] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2438 (1997).

[282] *Alvarez*, 132 S. Ct. 2537, 2549 (2012).

[283] *Id.*

[284] Matthew Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 358 (2011).

is targeted at 'low-value' speech."[285] High-value speech, on the other hand, including "political speech and religious speech most obviously, but also speech about other kinds of serious ideas," is at the "core of the First Amendment,"[286] and thus requires heightened scrutiny.

This is of particular importance in this analysis because there are probable instances in which a student sharing a "serious idea"—perhaps a valid criticism of school policies—may violate the North Carolina statute for merely expressing an unfavorable opinion online. The Supreme Court, however, has determined that simple avoidance of this sort of annoying or offensive speech is not a sufficiently compelling interest, consistently holding that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[287]

The North Carolina law, nonetheless, seems to do just that. If, for example, a student decides to post an offensive but factually true comment about a teacher's religious beliefs, the student may face legal repercussions,[288] even if the comment would otherwise be protected speech under the First Amendment. Considering that the law may simply serve as a prophylactic measure to deter this type of annoying or offensive speech, the state would fail to prove a compelling interest to satisfy strict scrutiny.

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[285] Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 821 (2007).

[286] Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 113 (2008).

[287] Morse v. Frederick, 551 U.S. 393, 437-38 (2007) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[288] *See* N.C. GEN. STAT. § 14-458.2 (2012) (prohibiting students from posting "on the Internet private, personal, or sexual information pertaining to a school employee").

Narrowly Tailored

Because content-based restrictions on speech must satisfy both elements of strict scrutiny, the state's likely inability to prove a compelling interest alone would deem North Carolina's law unconstitutional. However, assuming *arguendo* that the state could prove a compelling interest, it must still hold up to the second prong of the strict scrutiny test—it must be so narrowly tailored as to constitute the least restrictive means for achieving the interest.

Although the meaning of this prong "has rarely been explored with care,"[289] University of Chicago Law Professor Alan Sykes explains that it is relatively clear in certain cases: "[W]hen an alternative regulation unquestionably achieves a clearly stipulated regulatory objective at equal or lower cost to regulators while imposing a lesser burden on some other valued interest (free speech, free trade, or the like), the alternative is 'less restrictive.'"[290] In other words, a speech-regulating law cannot satisfy strict scrutiny if the state interest can be served by an alternative law restricting less speech.

The North Carolina law once again likely falls short from satisfying this element of strict scrutiny. Consider, for instance, the provision in the law that prohibits students from creating a "fake profile or Web site."[291] Presumably, the state's interest here is in protecting school employees from such evils as identity theft and defamation. While there may be a compelling interest in protecting school employees from these harms,

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[289] Alan Sykes, *Centennial Tribute Essay: The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003).

[290] *Id.*

[291] N.C. GEN. STAT. § 14-458.2 (2012).

most states, including North Carolina, already have laws that protect its citizens against these types of crime.[292] However, this particular provision of the North Carolina law criminalizes a student's creation of any fake profile or site, even if the speech would otherwise be protected by the First Amendment.

If, hypothetically, a North Carolina student were to create an arguably harmless, parodical Facebook account of a school principal, he would likely violate the statute under the "fake profile" provision, despite the fact that satire and parody generally constitute protected speech. [293] The less restrictive means standard serves as a significant challenge specifically to this provision of North Carolina's law because extant laws already achieve the objective of protecting school employees from the gravest of harms, without strictly abridging students' right to participate in protected parodical speech.

This implies, however, that only one provision of the law falls short of a narrow tailoring. Thus, to analyze the statute as a whole, one must consider the possibility of schools implementing an educational program, aimed at informing students of their First Amendment rights and the responsibilities that come with them. A mandated curriculum that teaches students how to express themselves online as responsible citizens—of particular importance for a generation surrounded by social technology—would certainly be far less restrictive than the imposition of a criminal statute. If such a program were to prove effective in preventing online student speech from causing the most severe of

[292] *See* N.C. GEN. STAT. § 75-66 (2013) (criminalizing identity theft in North Carolina); *see infra* notes 281-83 and accompanying text (identifying the tort of defamation as an alternative remedy).

[293] *Supra* notes 178-202 and accompanying text.

harms to public school employees, then this would be a valid, less-restrictive alternative to the North Carolina statute.

In the face of a legislative challenge, it is difficult to imagine, based on this analysis alone, that a court applying strict scrutiny could find the North Carolina law constitutional. The following sections, nonetheless, provide further analysis through the lens of other established First Amendment doctrines.

B. Overbreadth

The overbreadth doctrine is typically "invoked to strike down restrictions on speech that are worded in such a way that even protected expression is left vulnerable to punishment."[294] As Chief Justice John Roberts wrote for the Court in *United States v. Stevens*,[295] "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[296] The Court has made it clear that "the overbreadth of a statute must not only be real, but substantial as well,"[297] for a law to be unconstitutional under this doctrine.

The policy behind overbreadth doctrine, as Justice Antonin Scalia recently observed, is that "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas."[298] Scalia added that the Court has "vigorously enforced the requirement that a statute's

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[294] Kevin O'Neill, *Muzzling Death Row Inmates: Applying The First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 ARIZ. ST. L.J. 1159, 1203 (2001).

[295] 559 U.S. 460 (2010).

[296] *Id.* at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, n.6 (2008)).

[297] Broadrick v. Okla., 413 U.S. 601, 615 (1973).

[298] United States v. Williams, 553 U.S. 285, 292 (2008).

overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[299]

The question thus becomes whether North Carolina § 14-458.2 is substantially overbroad. Here, the Court must look "beyond the specific facts" of any one case and find the statute "invalid in all its applications."[300] This means that the statute could be challenged on overbreadth, even if it could be legitimately applied in some circumstances.

Consider, for example, the same hypothetical Facebook profile case discussed in the preceding section. If the profile had in fact included a clearly defamatory statement regarding the student's principal, the North Carolina statute might be applied to his specific case without abridging any protected speech. The law here may be constitutionally valid because the First Amendment, after all, generally does not protect libelous statements.[301] It is important to note, however, as further examined in section E below, that laws addressing defamation are already in place, making the student's speech punishable even in the absence of the new statute.

Nonetheless, this student may still legitimately challenge the law on overbreadth if he could provide evidence that the law inadvertently but substantially sweeps up protected speech. As established in the narrow tailoring analysis above, the statute imposes a palpable threat to parodic and satirical speech—speech which the Court has established can serve the important role of political and social commentary.[302] Because

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[299] *Id.*

[300] Richard Fallon, *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 952 (2011).

[301] *Alvarez*, 132 S. Ct. 2537, 2544 (2012).

[302] *Supra* notes 172-202 and accompanying text.

this challenge could be applied in every instance, it can be inferred that the statute is likely overbroad, and therefore unconstitutional.

C. Vagueness

The concern over North Carolina's new law, voiced by several First Amendment advocates, has centered on the ambiguous language used in the statue. Specifically, as noted in Chapter 2 by the ACLU of North Carolina Policy Director Sarah Preston, the words "intimidate" and "torment" are not well-defined and could ultimately chill protected speech.[303]

The void for vagueness doctrine aims specifically to strike down such problematic laws, which are not clearly established in their meaning. In analyzing content-based restrictions, the courts have held to the philosophy that any statute which regulates speech "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[304] The courts have further established that:

> [T]he void for vagueness doctrine addresses at least two . . . due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.[305]

Because the North Carolina statute does not define the terms "intimidate" and "torment," different individuals could arguably construe them in various ways. Students

[303] Preston, *supra* note 5.

[304] FCC v. Fox, 132 S. Ct. 2307, 2317 (2012) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

[305] *Id.*

could foreseeably be in violation of the statute for engaging in speech that they, in fact, thought to be protected. If the statute allows for *some* commentary on school employees, where to draw the line is unclear. This may also lead to arbitrary and subjective enforcement of the law, based on the feelings of the specific school employees targeted. Not knowing the law's exact applicability is likely to force students to question whether they should express certain ideas at all.

For instance, would an online comment stating that a teacher's wardrobe is "stupid" be a violation of the law? Could such a trivial opinion be considered intimidating or tormenting?

What if a teacher makes a derogatory comment toward a student? Could the student exposing the teacher's inappropriate behavior online also be criminally charged? The ambiguity surrounding these questions could ultimately lead students to self-censoring otherwise permissible speech, simply because they do not understand how far the law reaches.

Furthermore, the term "intent"[306] also raises some serious concerns when interpreting the meaning of the North Carolina law. Based on the statute's language, one is unable to discern whether the required proof of "intent" is subjective or objective. The question here is whether the law requires proof of (a) the actual intent of the speaker, or (b) the perceived intent by the listener. As one professor notes, in order for subjective intent to be established, "proof that the speaker wanted [his or] her comments to be construed"[307] a specific way "would be required."[308] In other words, as

[306] N.C. GEN. STAT. § 14-458.2 (2012).

[307] Mark Strasser, *Advocacy, True Threats, and the First Amendment,* 38 HASTINGS CONST. L.Q. 339, 348 (2011).

applied to the North Carolina law, a subjective intent test would necessitate proof that the student truly intended to intimidate or torment a school employee. On the other hand, an objective intent or a "'reasonable person' test"[309] would require "a reasonable listener"[310]—in this case, a reasonable school employee—to "interpret the statement as"[311] intimidating or tormenting. Without explicit direction on the meaning of intent, however, North Carolina courts may ultimately draw conflicting conclusions, which may lead to arbitrary and unfair application of the statute.

These uncertainties, by definition, illustrate the quintessential reasons for a law to be struck down as void for vagueness. Therefore, if the validity of the North Carolina law is to eventually be contested in court, it seems likely that vagueness would be on the forefront of the challenger's arguments.

D. Public School Employees—A Specially Protected Class of Citizens?

In analyzing the constitutionality of the North Carolina statute at issue here, it seems reasonable to raise the question as to why teachers, principals, and other school employees should be labeled as a unique class of citizens. Why, in other words, does the law carve out this small group of people as deserving of special protection from exposure to online speech?

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[308] *Id.*

[309] *Id.* at 380.

[310] *Id.*

[311] *Id.*

While the Supreme Court has noted that certain categories of speech are beyond the scope of First Amendment protections,[312] these categories have been established by identifying interests that "may transcend First Amendment concerns."[313] This suggests that the validity of a state's interest is integral in determining if a special group of citizens is warranted heightened protections from potentially harmful speech.

The prohibition against child pornography, for instance, silences a very specific category of speech with the sole objective of protecting one especially vulerable group of citizens—children. The Supreme Court in *New York v. Ferber*[314] set a precedential standard, "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment."[315] This decision carved out a special subset of citizens, namely minors,[316] and determined that the interest in protecting them from abuse in the form of pornography is more important than the interest in maintaining an uninhibited marketplace of ideas. Justice Byron White authored the opinion, explaining that the Court consistently "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[317] The Court in *Ferber* justified the

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[312] *See Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing the categories of expression not protected by the First Amendment, including "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent").

[313] New York v. Ferber, 458 U.S. 747, 752 (1982).

[314] *Id.*

[315] *Id.* at 763.

[316] *Id.* at 749.

[317] *Id.* at 757.

decision to place this category outside the scope of First Amendment protections by determining there is a compelling interest in protecting children from the devastating effects of sexual exploitation.[318] Justice White further noted that the "care of children is a sacred trust,"[319] which the Court would consistently seek to protect.

The interest of the state in protecting children from sexual abuse is very different from the interest asserted by North Carolina in protecting public school employees from speech that they may find merely offensive. As evident by the strict scrutiny analysis from section A, North Carolina's law likely fails to meet a *compelling* state interest. This is significant because the Court in *Ferber* suggests that, in the absence of a compelling interest, there is no justification for carving out a special group of people to protect from exposure to a particular category of expression.

Considering that the Court has generally been more permissive of content-based restrictions seeking to protect the sensibilities of minors,[320] a law aiming to minimize the effects of cyberbullying would more likely be supported if it specifically targets student-on-student speech. Despite other concerns raised by cyberbullying statutes, laws that aim to protect children from harmful speech stand a higher chance of passing judicial scrutiny over a law like North Carolina's, which affects speech regarding adult school employees.

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[318] *Id.* at 756-57.

[319] *Id.* at 757.

[320] *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (noting that the "government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression"); *see* Sable Commc'n of Cal. v. FCC, 492 U.S. 115, 126 (1989) (noting that government may "regulate the content of constitutionally protected speech in order to promote [the] compelling interest . . . in protecting the physical and psychological well-being of minors").

The validity of student-on-student cyberbullying statutes may rest heavily on these special considerations historically afforded to minors, even when balanced against other First Amendment interests. Public school employees, however, share no such history of special protections in First Amendment jurisprudence.

Other categories of unprotected speech, including true threats,[321] fighting words,[322] and incitement to violence,[323] fall beyond the scope of the First Amendment because the Court has determined that they may lead to physical harm or fear of such harm. These categories of speech, the Court opined in 2003, "are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[324] True threats, for instance, 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."[325] Here, the state's interest in providing protection from physical injury and the fear thereof is clearly compelling.

But this very real harm does not translate to an online platform. As Judge Lynn Adelman points out, it can be very "easy to exaggerate the harm that can come from a

[321] *See* Watts v. United States, 394 U.S. 705, 707 (1969) (noting that "a threat must be distinguished from what is constitutionally protected speech").

[322] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (indicating that fighting words falls into a category of speech, "the prevention and punishment of which have never been thought to raise any Constitutional problem").

[323] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (noting that "[t]he constitutional guaranties of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[324] Virginia v. Black, 538 U.S. 343, 358-59 (2003)

[325] *Id.* at 359.

new means of communication such as the internet,"[326] but is important to remember that laws like that of North Carolina are merely aiming to prevent emotional harm. School employees should likely develop thicker skin in the face of their students online speech, so as to not completely eradicate their First Amendment rights.

In the absence of a compelling state interest, it seems unjustifiable for North Carolina to categorize school employees as a unique group, deserving of heightened protections that may curb students' First Amendment interests. The statute is not targeted at protecting children from intrinsic harm nor does it aim to prevent imminent physical danger, and so the carving out of this special group is unprecedented, and arguably unwarranted.

E. Alternative Legal Remedies

If the North Carolina law was struck down as unconstitutional, this would not leave school employees completely vulnerable to cyber-attacks from their students. As one scholar notes, "sufficient remedies and redress in the civil, criminal, and juvenile justice systems already exist for off-campus expression that causes harm."[327] For instance, "traditional and generally applicable []civil law remedies such as libel are available for teachers and principals who feel defamed by student speech."[328]

Of course, in order for a school employee to have a successful defamation claim against a student, the tort requires five elements to be satisfied:

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[326] Lynn Adelmann & Jon Deitrich, *Extremest Speech and the Internet: Continuing Importance of Brandenburg*, 4 HARV. L. & POL'Y REV. 361, 362-63 (2010).

[327] Clay Calvert, *Off-Campus Speech, On Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 245-46 (2001).

[328] *Id.* at 245.

> (1) [T]he defendant must publish a defamatory statement; (2) that is false; (3) that is of and concerning the plaintiff; (4) the defendant must have some degree of fault; and (5) the statement must damage the plaintiff.[329]

If students can be held equally liable as adults for libelous statements, then a public school employee who can prove that a student's online speech satisfies these five elements has a valid and constitutional route to take against the libelous speech. Although the tort of defamation may not be the appropriate remedy for all instances in which student cyberspeech harms a school employee, it does protect against the most severe threats to reputation.

This proposed remedy, however, may not protect against all cases in which a student posts "private, personal, or sexual information pertaining to a school employee,"[330] for instance. Violations to this provision of the North Carolina law may be more appropriately addressed with a civil suit for infliction of emotional distress (IIED), the tort at issue in *Falwell* described earlier.[331] As noted by the Supreme Court of Nevada, "the elements of this cause of action are (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation."[332] If cyberspeech regarding a school employee can satisfy all IIED elements, and students could thus reasonably be punished through civil action, it

[329] Kraig Marton et al., *Protecting One's Reputation—How to Clear a Name in a World Where Name Calling is so Easy*, 4 PHX. L. REV. 53, 73 (2010).

[330] N.C. GEN. STAT. § 14-458.2 (2012).

[331] *Falwell*, 485 U.S. 46, at 48.

[332] Star v. Rabello, 97 Nev. 124, 125 (1981).

seems unnecessary and redundant to impose additional criminal penalties, as those prescribed by the North Carolina statute.

The bottom line is that these alternative remedies available to public school employees require the courts to analyze the allegedly harmful cyberspeech on a case-by-case basis. This allows the courts to distinguish truly harmful speech from that which is simply offensive. North Carolina, alternatively, now criminalizes any expression that may violate a provision of its statute, even if the speech is otherwise acceptable and protected speech.

This chapter has determined that North Carolina's new cyberbullying statute would likely face difficult doctrinal hurdles if challenged in court. The availability of alternative remedies simply serves to further invalidate its claimed necessity. Viewed collectively, analyses under strict scrutiny, overbreadth, and vagueness standards suggest that North Carolina's law is impermissibly unconstitutional. Since public school employees also do not warrant special protections, balanced against the First Amendment rights of students, there is no redeeming justification available for such overreaching legislation.

The next and final chapter of this study considers this constitutional analysis, alongside applicable precedent. It also provides recommendations for alternative measures, aimed to lessen the harm caused by the cyberbullying of school employees, but which would leave students' speech rights intact.

CHAPTER 6
CONCLUSION

Based on the analysis in Chapters 4 and 5, this study closes with the belief that North Carolina statute § 14-458.2, which regulates students' online speech about public school employees, should be struck down as unconstitutional.

Although "[t]he boundary between protected and unprotected student speech in public schools is," as one professor puts it, "unavoidably fuzzy, . . . this does not mean the courts are without guidance or principle."[333] Part of the collective understanding is the presumption that restrictions on otherwise protected speech originating *off* campus are unconstitutional, unless, as recent appellate court rulings such as *Doninger* and *Kowalski* indicate, the off-campus speech materially and substantially disrupts the school's educational mission on campus[334] or occurs at a school-sponsored event hosted off campus.[335]

The lower courts, however, lack explicit direction from the U.S. Supreme Court when dealing with students' Internet-posted speech like that implicated by North Carolina's statute.[336] Although the Supreme Court has not directly addressed the scope of First Amendment protection of students' off-campus-created online speech, it has reached decisions in *Alvarez* and *Falwell* that considerably challenge the provisions of

[333] Laycock*, supra* note 246 at 129.

[334] *See* Tinker v. Des Moines, 393 U.S. 503, 505 (1969) (opining that student speech "cannot be prohibited unless it 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school'").

[335] *See* Morse v. Frederick, 551 U.S. 393, 405 (2007) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)) (extending school authority to students' off-campus speech, "holding that 'educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

[336] *Supra* notes 62-127 and accompanying text.

the North Carolina law that may inhibit generally protected false, satiric and parodic speech. Additionally, the doctrinal analysis in Chapter 5 strongly suggests the law fails to satisfy the highest level of as-applied judicial scrutiny – namely, strict scrutiny – applicable to content-based regulations. The study further declines to find support for the law, especially in the face of other less restrictive options and problems of vagueness.

The paramount interest in protecting the freedom of speech afforded by the First Amendment, combined with a school's interest in educating its students on how to responsibly exercise that right as citizens, arguably outweigh the interest in shielding principals and teachers from speech they may merely find offensive. North Carolina's statute may serve a symbolic and educational function by deterring unfavorable student behavior. Specifically, parents who learn of the policy, perhaps by reading about it in school handbooks, may caution their children against creating mocking websites. Nonetheless, one must consider viable alternative solutions to prevent significant harm to school employees caused by cyberbullying. As the preceding Chapter addressed, existing laws already protect against the worst evils that the North Carolina law presumably aims to prevent such as defamation and identity theft. The adoption of the law and the drafting of similar bills in states like Indiana, however, imply that extant remedies have not adequately deterred students from engaging in offensive and inappropriate speech. Yet, before drafting laws that impose criminal sanctions on students' cyberspeech, lawmakers should first seriously consider these other remedies.

The Pew Research Center[337] reported in 2010 that 93% of teens go online,[338] and 73% of those use social networking websites.[339] Considering the total immersion in the medium by such an overwhelming majority of minors and the likelihood these numbers have increased in the past three years, it seems only logical that schools take a pedagogical step – one not to criminalize their speech, but to teach them acceptable and responsible online speech behavior. As Yale Law Professor Douglas Laycock notes:

> It is an essential part of a public school's mission to prepare students for a citizen's responsibility to participate in [] debates, or at least to listen to and evaluate them, and to do so vigorously as well as civilly. It can never be part of a school's basic educational mission to suppress student interest or participation in discussion [of important ideas].[340]

This suggests that schools should promote and teach about the basic rights provided by the First Amendment, instead of trying to thwart them.

In lieu of instilling fear of prohibitive fines or introducing the threat of incarceration, schools could develop educational modules for their students, aimed at informing them of their online speech rights, along with the many dangers the Internet presents. For instance, students and school employees, alike, would benefit from a curriculum that instructs about the permanence of online actions—how difficult it is to

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[337] *See About The Pew Research Center*, PEW RESEARCH CENTER, http://www.pewresearch.org/about/ (last visited Sep. 30, 2013) (identifying the organization as a "nonpartisan fact tank that informs the public about the issues, attitudes and trends shaping America and the world. It conducts public opinion polling, demographic research, media content analysis and other empirical social science research").

[338] Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, *Social Media & Mobile Internet Use Among Teens and Young Adults*, Pew Research Center, 4 (Feb. 3, 2010), http://pewinternet.org/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf.

[339] *Id.* at 2.

[340] Laycock, *supra* note 246 at 120.

remove all traces of a message once it is posted online. Schools should provide students with information that helps them to understand that the perceived anonymity (a false anonymity, in fact) that accompanies Internet use does not afford them a license to defame or otherwise injure other individuals.

Some may argue that this measure may enact the doctrine of *in loco parentis*, which grants schools the authority to act in place of the parents and "train up and qualify their children, for becoming useful and virtuous members of society."[341] The Court has held, however, that "moral judgments" are "not for the Government to decree."[342] Yet, before carving out laws that specifically restrict student speech regarding school authorities, it may serve a higher purpose to examine the deeper social issues tied to the diminished value of respecting one's elders. Scholastic programs could potentially help students appreciate the importance of showing one another respect, teaching them fair treatment of elders and peers, alike, and how these principles translate online. Perhaps the real answer rests in educating parents, stressing the importance of their role in speaking with their children and teaching them about proper online behavior.

It is also worth noting that social networking sites, such as Facebook, have played a dormant role in preventing cyberbullying and other inappropriate behavior on the Internet. Considering Facebook has a minimum age of thirteen for its subscribers[343]

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[341] Morse v. Frederick, 551 U.S. 393, 413 (2007) (quoting State v. Pendergrass, 19 N. C. 365, 365-366 (1837)).

[342] Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2733 (2011).

[343] *How Old Do You Have to be to Sign Up for Facebook?* FACEBOOK, https://www.facebook.com/help/210644045634222 (last visited Oct. 29, 2013).

and Twitter has no minimum age,[344] these sites are readily available to middle school and high school students. Therefore, perhaps some of the burden of teaching responsible use of the Internet falls on social networks. For instance, social networking sites could require new members to complete a tutorial or training regimen as part of their profile registration process. This mandatory procedure might enlighten new users about potential legal repercussions that may follow improper use of the website. Such an alternative could relieve schools of the responsibility to implement a new program, and yet it could be equally as effective.

Nonetheless, whether it's public schools, parents and/or the social networking websites who step up to this position of authority, any option would work better in the interests of students and their First Amendment rights than a criminal statute.

The analysis in this study, of course, is limited to an academic discussion of North Carolina's statute. The law, after all, has yet to be challenged in court. Because it implicates fundamental values set forth by the Bill of Rights—specifically, the right to comment on and to criticize governmental authority and officials, which is at the core of First Amendment protections—North Carolina indubitably faces a heavy burden and uphill battle to prove its constitutionality. Ultimately, if not in this instance but in another off-campus student speech controversy that surely will arise, the U.S. Supreme Court must finally weigh in to bring clarity to the scope of the off-campus speech rights of minors.

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[344] *See Previous Terms of Service (Version 1)*, Twitter, https://twitter.com/tos/previous/version_1 (last visited Oct. 29, 2013) (providing Twitter's previous terms of service, which included the provision that users "must be 13 years or older to use this site"); *see also Terms of Service*, Twitter https://twitter.com/tos (last visited Oct. 29, 2013) (providing current terms of service, which omit such a requirement).

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