

DISARMING DIGITAL BULLIES: AN ARGUMENT TO EXPAND SCHOOL JURISDICTION IN FLORIDA TO PUNISH ACTS OF CYBERBULLYING THAT OCCUR AWAY FROM SCHOOL GROUNDS

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With the keyboard as his weapon, the bully violated the sanctity of my home and murdered my child just as surely as if he had crawled through a broken window and choked the life from Jeff with his bare hands. It was not a death that was quick and merciful. It was carried out with lies, rumors[,] and calculated cruelty portioned out day by day.¹

I. INTRODUCTION

In 2005, fifteen-year-old Jeffrey Johnston committed suicide after enduring three years of brutal and relentless online bullying.² Jeff was tormented, almost daily, by one of his peers through a website where the teen demoralized Jeff and called him demeaning names.³ Eventually the torment became too much for Jeff to bear, and he took his own life.⁴ Unfortunately, Jeff's story

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1. Debra Johnston, *Computers and the Media*, in Brenda High, *Bullycide in America: Moms Speak Out about the Bullying/Suicide Connection* 119, 124 (JBS Publ'g, Inc. 2007). Debra Johnston, Jeffrey Johnston's mother, was the driving force behind the adoption of Florida's anti-bullying statute. Bullycide in Am., *Meet Debbie Johnston*, <http://www.bullycide.org/debbie.html> (accessed Mar. 4, 2012). Mrs. Johnston now speaks at schools, using her son's story to educate adolescents about the harmful effects of cyberbullying. *Id.*

2. Johnston, *supra* n. 1, at 123–124.

3. *Id.* at 124. Jeff was also bullied through anonymous phone calls and while at school. *Id.*

4. *Id.* at 123–124.

is not unique. Over the last five years, there have been countless stories similar to Jeff's—all with tragic endings.⁵ But it took Jeff's suicide and his mother's unyielding campaign for change to bring the Florida Legislature's attention to the serious problem of online bullying.

While traditional bullying is not a new issue plaguing Florida's youth, the exponential growth in technology,⁶ and its widespread use among adolescents,⁷ has mutated traditional bullying into a sinister and troubling problem. Today, schoolyard bullies "have exchanged their brute-force tactics for electronic weapons;"⁸ these bullies taunt children by posts on social-networking websites (such as Facebook and MySpace), threaten children through text messages, and demean children by instant messages.⁹ Bullying accomplished through the Internet and other

5. There have been numerous stories of teens committing suicide after being bullied online that have made headlines across the nation in the last five years. *See e.g.* Brent Dean, *The Tragedy of Megan Meier: A Look at a Notorious Social Networking Crime*, 5 *Computer Crime & Tech. L. Enforcement* 2, 3 (2009) (detailing the infamous cyberbullying on MySpace that led to thirteen-year-old Megan Meier's suicide in 2006); Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to His Death*, <http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716> (Sept. 29, 2010) (discussing the suicide of eighteen-year-old Tyler Clementi, a Rutgers University freshman. Clementi committed suicide after two Rutgers students secretly filmed him with a Web camera and posted videos online of Clementi participating in sexual acts.); Russell Goldman, *Teens Indicted after Allegedly Taunting Girl Who Hanged Herself*, <http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357> (Mar. 29, 2010) (reporting the suicide of fifteen-year-old Phoebe Prince who killed herself after three months of being routinely tormented by harassing messages sent through text messages and the social-networking website, Facebook).

6. Between 2000 and 2007, the number of individuals worldwide with access to the Internet has increased by 249.6 percent. Sameer Hinduja & Justin W. Patchin, *Bullying Beyond the Schoolyard: Preventing and Responding to Cyberbullying* 7 (Corwin Press 2009).

7. In 2009, research from the Pew Internet and American Life Project reported that ninety-three percent of adolescents in the United States between the ages of twelve and seventeen use the Internet. Pew Internet & Am. Life Project, *Updated: Change in Internet Access by Age Group, 2000–2010*, <http://www.pewinternet.org/Infographics/2010/Internet-access-by-age-group-over-time-Update.aspx> (Sept. 10, 2010).

8. Kevin Turbert, Student Author, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 *Seton Hall Legis. J.* 651, 652 (2009).

9. *Id.* Recently, two teens in Florida created a fake Facebook page about another teenage girl and posted nude photographs with the victim's head superimposed on the pictures. ABC Action News, *FL Teens Won't be Prosecuted in Cyberbullying Case*, http://abclocal.go.com/wpvi/story?section=news/national_world&id=7974809 (Feb. 23, 2011).

technological means has become so prevalent that it has earned its own term—cyberbullying.¹⁰

Researchers have conducted various studies across the United States surveying the percentage of adolescents who have been cyberbullying victims. According to a study published by Dr. Sameer Hinduja and Dr. Justin W. Patchin, founders of the Cyberbullying Research Center,¹¹ approximately thirty percent of adolescents age seventeen and younger have reported being cyberbullying victims.¹² In Florida, a statewide survey conducted by the Department of Children and Families (DCF) also found that cyberbullying is on the rise among adolescents.¹³ The survey asked adolescents between the ages of eleven and eighteen whether they had been cyberbullying victims within the last thirty days.¹⁴ In 2008, the survey reported that approximately eight percent of adolescents questioned had been cyberbullying victims.¹⁵ In 2010, the same survey found that approximately eighteen percent of the same age group reported being cyberbullying victims.¹⁶

After Jeff Johnston's suicide, the issue of cyberbullying, as well as bullying in general, was brought to the Florida Legislature's attention. In 2008, Florida passed the "Jeffrey Johnston Stand Up for All Students Act" (commonly referred to as "Jeff's

10. Cyberbullying is the popular term for bullying that is perpetrated through technological means, but there are several other terms used in reference to cyberbullying, including: electronic bullying, e-bullying, cyber harassment, Internet bullying, and online social cruelty. Hinduja & Patchin, *supra* n. 6, at 4–5.

11. Dr. Hinduja and Dr. Patchin started researching cyberbullying in 2002 and established the Cyberbullying Research Center in 2005. Cyberbullying Research Ctr., *About Us*, <http://www.cyberbullying.us/aboutus.php> (accessed Mar. 4, 2012). The Center is an online resource that provides "information concerning the ways adolescents use and misuse technology." *Id.*

12. Hinduja & Patchin, *supra* n. 6, at 47. This study was conducted in 2004. *Id.*

13. Donna Winchester, *Cyberbullying on the Rise*, <http://www.tampabay.com/news/education/k12/article980638.ece> (Mar. 3, 2009) (reporting an increase in cyberbullying among adolescents in Pinellas and Hillsborough Counties, Florida).

14. Fla. Dep't of Children & Fams., *2008 Florida Youth Substance Abuse Survey* 119 (2008) (available at <http://www.dcf.state.fl.us/programs/samh/publications/fysas/08Survey/2008FYSASStatewideTablesFinal.pdf>).

15. *Id.* at 48.

16. Fla. Dep't of Children & Fams., *2010 Florida Youth Substance Abuse Survey ATOD Prevalence Tables* 42 (2010) (available at [http://www.dcf.state.fl.us/programs/samh/publications/fysas/10Survey/2010_FYSAS_Statewide_Tables_\(Final\).pdf](http://www.dcf.state.fl.us/programs/samh/publications/fysas/10Survey/2010_FYSAS_Statewide_Tables_(Final).pdf)). This survey was administered to over 72,000 adolescents between ages ten and nineteen. *Id.* at 2.

Law”).¹⁷ Jeff’s Law mandates that each school district adopt a comprehensive policy to address bullying and harassment, which includes cyberbullying, although the term “cyberbullying” is not specifically used in the statute.¹⁸ The law also requires each school district’s policy to be in “substantial conformity” with the Florida Department of Education’s (DOE) model policy.¹⁹

Jeff’s Law indirectly addresses cyberbullying by requiring that each school district’s anti-bullying policy prohibit bullying or harassment “[t]hrough the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K–12 educational institution.”²⁰ While Jeff’s Law is a step in the right direction in tackling some of the problems cyberbullying presents, it is unclear whether the law has been successful in reducing cyberbullying incidents.²¹ In fact, recent statistics indicate that cyberbullying in Florida has increased since Jeff’s Law was passed.²² As currently written, Jeff’s Law is limited to addressing cyberbullying that occurs through the use of a school’s technology or on school grounds;²³ this limitation leaves a gaping hole for most cyberbullying, which

17. Jeffrey Johnston Stand Up for All Students Act, Fla. Stat. § 1006.147 (2011).

18. *Id.* at § 1006.147(2)(c), (4).

19. *Id.* at § 1006.147(4); see also Fla. Dep’t of Educ., *Model Policy Against Bullying and Harassment*, http://www.fldoe.org/safeschools/bullying_prevention.asp (accessed Mar. 4, 2012) (providing Florida school districts with the model policy mandated under Jeff’s Law to use as a guide in establishing a policy against bullying and harassment). The school districts also have the option to adopt the model policy as their own rather than developing a policy themselves. Fla. Stat. § 1006.147(4).

20. *Id.* at § 1006.147(2)(c).

21. According to attorney David T. Tirella, who worked on the campaign to have Jeff’s Law passed, it is unclear at this point whether the law has been successful because there are not many statistics available to suggest whether the law has reduced cyberbullying incidents. Telephone Interview with David T. Tirella, Esq., Partner, Eaton & Tirella, Adjunct Prof., Stetson U. College of L. (Jan. 4, 2011). Furthermore, Mr. Tirella noted that before the law was passed, he received phone calls regarding cyberbullying cases on a weekly basis, and afterwards he continued to receive numerous phone calls, although recently the frequency has decreased slightly. *Id.*

22. See *supra* nn. 14–16 and accompanying text (establishing that the percentage of adolescents who reported having been a cyberbullying victim increased from eight percent in 2008 to eighteen percent in 2010).

23. Fla. Stat. § 1006.147(2)(c). Some have interpreted Section (2)(c) of Jeff’s Law to permit schools to punish cyberbullying that occurs away from school grounds on personal computers so long as the information can be accessed through school-owned computers. Telephone Interview with Aaron Nevins, Florida Senator Elyn Bogdanoff’s Legislative Assistant (Feb. 2, 2011). Regardless, many teachers and school administrators have claimed that such information could not be accessed because of web-filtering software installed on school computers. *Id.*

occurs away from school on personal computers, home networks, and personal cell phones.²⁴ There is also evidence that Jeff's Law is not being enforced at the administrative level because most school districts are not implementing the anti-bullying policies mandated under the statute.²⁵

Jeff's Law is not the only recourse available to protect students from cyberbullying. Florida also provides civil and criminal remedies that could potentially redress the harms of cyberbullying. But these courses of action are difficult to pursue and often fail to provide cyberbullying victims with adequate remedies.²⁶ Moreover, these solutions focus too much on providing post-harm cures, and fail to act as preventative measures.

Because cyberbullying is on the rise among adolescents and current Florida law fails to provide adequate recourse, this Article advocates that the Florida Legislature needs to do more to protect its youth from this growing problem. This Article focuses on adolescent peer-to-peer cyberbullying²⁷ and explores the potential solutions available to fill the gap left by the inadequacies of Flori-

24. *But see* Kara Carnley Murrhee, Student Author, *Squelching Student Speech in Florida?: Cyberbullying and the First Amendment*, 21 U. Fla. J.L. & Pub. Policy 307, 322 (2010) (arguing that Jeff's Law is actually too broad in its application to off-campus speech because the statute contains a provision that states that the physical location where the speech occurs or the time of access of the computer-related incident will not be considered). While Jeff's Law does contain a provision that states that the location and time of the incident do not matter, arguably, it is still restrained by the clause that requires that the incident be conducted "[t]hrough the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 educational institution." Fla. Stat. § 1006.147(2)(c), (7)(a).

25. Telephone Interview with Nevins, *supra* n. 23; Telephone Interview with Debra Johnston, Founder of Students for Safer Schs. and Jeffrey Johnston's Mother (Feb. 2, 2011).

26. *See infra* Part III for a discussion of the applicable Florida laws and the inadequacies of these laws to address cyberbullying.

27. "Peer-to-peer cyberbullying" refers to cyberbullying that occurs between adolescents of the same age group. Cyberbullying can also occur among adults, or between adults and children, as is the case when children use electronic communications to demean teachers or other authority figures. *See* Susan W. Brenner & Megan Rehberg, "Kiddie Crime"? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 First Amend. L. Rev. 1, 5-13 (2009) (providing examples of student-on-student, student-on-teacher, teacher-on-student, and teacher-on-teacher cyberbullying). The most well-known incident of cyberbullying between an adult and a child is the case of Megan Meier. Megan was the victim of an online hoax, perpetrated by a neighbor, Lori Drew, who was the mother of a girl Megan's age. Dean, *supra* n. 5, at 2-3. Drew posed as a thirteen-year-old boy, Josh Evans, and befriended Megan through the social-networking website, MySpace. *Id.* Drew, under the guise of this young boy, started sending Megan nasty messages, which eventually instigated Megan's suicide. *Id.*

da's current laws. Part II defines cyberbullying and identifies cyberbullying's unique characteristics, which make this type of bullying more problematic and devastating than traditional bullying. Part III explains Jeff's Law and the civil and criminal solutions currently available to address cyberbullying in Florida. This Part also highlights the inadequacies of these laws and their failure to provide cyberbullying victims with sufficient remedies. Part IV proposes several solutions that can be initiated to reduce cyberbullying's prevalence in Florida, including amendments to Jeff's Law, education-based initiatives, and amendments to the Communications Decency Act. This Part also highlights some of the issues that may arise if each solution is implemented. Finally, Part V offers some concluding remarks regarding the state of cyberbullying in Florida and suggests that Florida continue applying a community approach that involves parents, educators, and lawmakers to craft a holistic solution to the cyberbullying dilemma.

II. THE NATURE OF THE BEAST: WHAT EXACTLY IS CYBERBULLYING?

In the *Art of War*, Sun Tzu proclaimed that to win a war, one must "[k]now the enemy."²⁸ The same holds true on the battlefield of the law. To solve a legal problem, it is vital to understand the problem itself. Cyberbullying is waging a gruesome war among Florida's youth and is a nebulous and difficult problem for parents, educators, and lawmakers to tackle. The response to this growing problem must be multifaceted to account for the unique aspects of cyberbullying that make this problem especially difficult.

A. How Should Cyberbullying Be Defined?

Cyberbullying is the popular term used to describe bullying perpetrated through technological means and is used extensively in legal and scholarly literature on the topic. While the term "cyberbullying" is used frequently, scholarly and legal definitions of cyberbullying vary dramatically.²⁹ As of February 2011, thirty-

28. Sun Tzu, *The Art of War* 84 (Samuel B. Griffith trans., Oxford U. Press 1963).

29. See Robin M. Kowalski, *Cyber Bullying: Recognizing and Treating Victim and*

four states have enacted some type of legislation regarding cyberbullying,³⁰ but each state has crafted its own definition of cyberbullying and a consistent definition has yet to emerge.³¹

The variation in definitions used by cyberbullying experts depends on the degree of complexity that experts believe the definition should be given. For example, Dr. Hinduja and Dr. Patchin favor a simplistic and concise definition of cyberbullying, describing it as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”³² This simplistic definition is made up of four main components: (1) willful behavior, (2) repeated behavior, (3) harm, and (4) a technological medium.³³

Shaheen Shariff, an associate professor of Education at McGill University, and a leading authority in addressing cyberbullying in schools, favors a more complex definition of cyberbullying.³⁴ According to Shariff, an adequate definition of cyberbullying would contain the following elements: the form cyberbullying takes, the tools that are used to engage in it, and the ways in which it is understood to differ from traditional bullying.³⁵ Shariff defines cyberbullying as:

[C]omprising covert, psychological bullying, conveyed through the electronic mediums such as cell phones, blogs and [websites], online chat rooms, MUD rooms (multiuser domains where individuals take on different characters), . . . Xangas (online personal profiles where some adolescents create lists of people they do not like)[,] . . . [and] social communications networks such as Facebook, YouTube,

Aggressor, 25 *Psychiatric Times* 1 (Oct. 2008) (explaining that the recent research performed on cyberbullying and its evolving nature make it difficult to come to a consensus regarding how cyberbullying should be defined).

30. States that have enacted some form of cyberbullying legislation include: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington, and Wyoming. Nat'l Conf. of St. Legis., *Cyberbullying Enacted Legislation: 2006–2010*, <http://www.ncsl.org/Default.aspx?TabId=12903> (accessed Mar. 4, 2012).

31. *Id.*

32. Hinduja & Patchin, *supra* n. 6, at 5.

33. *Id.*

34. Shaheen Shariff, *Confronting Cyber-Bullying: What Schools Need to Know to Control Misconduct and Avoid Legal Consequences* 39–40 (Cambridge U. Press 2009).

35. *Id.* at 40.

Orkut, LinkedIn, MySpace, and countless others that are surfacing on the Internet.³⁶

Regardless of whether the definition is simplistic or complex, the various definitions³⁷ tend to have a few common elements: the definitions indicate that “communications technology tools and media are being used to engage in online bullying and that the communication is . . . deliberate and willful, repeated[,] and exclusionary.”³⁸ Most importantly, each definition of cyberbullying recognizes that some kind of harm, usually emotional or psychological, has been inflicted on the victim.³⁹ Although experts define cyberbullying differently, it has become clear that this new kind of bullying is inflicting severe harm on children.⁴⁰

B. “Oh My! What Big Teeth You Have!”⁴¹ Unique Aspects of Cyberbullying

Schoolyard bullying is not a new phenomenon plaguing Florida’s youth.⁴² But the unique aspects associated with the Internet

36. *Id.* at 41.

37. For another definition of cyberbullying, see Nancy Willard, *Educator’s Guide to Cyberbullying and Cyberthreats* 1–2 (April 2007) (available at <http://csriu.org/cyberbully/docs/cbcteducator.pdf>) (defining cyberbullying as, “being cruel to others by sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies”); see also Darby Dickerson, *What Is Cyberbullying*, 29 NASPA Leadership Exch. (2009) (discussing the factors that need to be considered when crafting a definition of cyberbullying: (1) the conduct to be addressed as cyberbullying, (2) the type of harm to be prevented, (3) the purpose of the definition, and (4) in the context of schools, whether off-campus conduct will be addressed); Olweus Bullying Prevention Program, *What Is Cyber Bullying?* http://www.olweus.org/public/cyber_bullying.page?menuheader=1 (accessed Mar. 4, 2012) (providing a comprehensive overview of cyberbullying, including a definition of cyberbullying, the forms that cyberbullying can take, and the warning signs of cyberbullying).

38. Shariff, *supra* n. 34, at 42.

39. See *id.* at 34 (describing that cyberbullying results in psychological harm, such as “fear for . . . physical safety, or breaking down [of] self-esteem and confidence”).

40. “Cyberbullying can cause psychological harm, including depression; negatively impact academic performance, safety, and the well-being of children in school; force children to change schools; and in some cases lead to extreme violent behavior, including murder and suicide.” Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 2(5) (Apr. 2, 2009).

41. Adapted from Grimm’s Fairy Tales, specifically *Little Red Riding-Hood*. Jacob Grimm & Wilhelm Grimm, *Little Red Riding-Hood*, in *The Blue Fairy Book* 51, 53 (Andrew Lang ed., May Sellar trans., 5th ed., Longmans, Green, & Co. 1891).

42. Shariff, *supra* n. 34, at 22. While there have been numerous accounts of bullying behavior for hundreds of years, the first recorded study on schoolyard bullying was conducted in the early 1970s by Dr. Dan Olweus. Olweus Bullying Prevention Program,

and its corresponding technology make cyberbullying a crueler and more difficult problem to address.⁴³ These aspects include the ability to hide one's identity, the permanence of expression, the speed with which information travels, and the huge audience cyberbullying communications are capable of reaching.⁴⁴ Compounding these issues is the fact that the technological world consists of infinite spaces with fluid boundaries, making it particularly difficult for parents, educators, and law enforcement to monitor online behavior.⁴⁵ These unique aspects have facilitated the escalation of traditional bullying, allowing it to reach a new level of cruelty that can often become so severe that it is life-threatening.⁴⁶

"[B]ullies at school usually can be identified easily by [the] mistreated individuals, [but] cyberbullies typically are difficult to trace."⁴⁷ One of the most basic aspects of the Internet is the ability to remain anonymous. Perpetrators can attack their victims and remain virtually unknown.⁴⁸ Cyberbullies cloak themselves in anonymity by utilizing screen names, a type of pseudonym that protects their identities.⁴⁹ Anonymity of cyberbullies can be a par-

Research and History, http://www.olweus.org/public/bullying_research.page (accessed Mar. 4, 2012).

43. Kowalski, *supra* n. 29, at 1.

44. Shariff, *supra* n. 34, at 44–45.

45. Hinduja & Patchin, *supra* n. 6, at 22.

46. For examples of cyberbullying that reached life threatening levels, see *supra* n. 5; see also wiseGEEK, *What Is the Connection between Cyber Bullying and Suicide?* <http://www.wisegeek.com/what-is-the-connection-between-cyber-bullying-and-suicide.htm> (accessed Mar. 4, 2012) (describing studies that have revealed a connection between cyberbullying and suicide).

47. Paris S. Strom & Robert D. Strom, *When Teens Turn Cyberbullies*, in *The Reference Shelf: Internet Safety* 89, 89 (Richard Joseph Stein ed., H.W. Wilson Co. 2009).

48. Hinduja & Patchin, *supra* n. 6, at 20.

49. In some instances, anonymity is not absolute. Each computer and most other technological devices that can access the Internet have an Internet Protocol (IP) address. With the correct knowledge one can trace online communications back to the IP address that created it. *Id.* at 21. While tracking an IP address can be a successful tool to identify online bullies, it is not a simple process and requires some technical knowledge. It can also be problematic if the communication originated from a computer or other device used by multiple individuals, such as a library computer, which makes it more difficult to definitively establish the originator of the communication. Courts have decided several cases in which Internet Service Providers (ISPs) were ordered by the court to reveal the true identities of individuals that used pseudonyms. See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 251–252, 257 (D. Conn. 2008) (deciding a case in which several students brought federal copyright claims and state law claims for libel, invasion of privacy, and emotional distress against thirty-nine unknown individuals for posting derogatory comments on a website called AutoAdmit. One of the anonymous posters moved to quash the subpoena requesting

ticular challenge for public schools because they may not have the power or expertise to discover who is behind the pseudonym.⁵⁰ The cyberbully anonymity has a profound impact on the psychological wellbeing of the children who are victimized. The fear created by the uncertainty of who is attacking them online can interfere with children's performance in school by making them feel afraid and anxious.⁵¹ Anonymity also heightens the level of cruelty that cyberbullying is capable of reaching. "As technology allows its users to inflict pain without seeing its effect, it also seems to incite a deeper level of malevolence."⁵² When adolescents believe that the communication cannot be traced to them, they feel free from societal constraints and their conscience.⁵³ This uninhibited feeling incites adolescents to say cruel things that they probably would not have the audacity to say if the speech could be traced to their personal identities or if they had to look their victim in the eye and see their behavior's immediate effects.⁵⁴

Another unique aspect of cyberbullying that makes it more severe than traditional bullying is the permanent life of online communications. Once information makes its way onto the Internet, it becomes increasingly difficult to remove.⁵⁵ Moreover, the information is easily forwarded to others, who can then save the

the ISP to reveal his identity, but the court held that the students were entitled to disclosure of the poster's identity.); see also Ryan Singel, *Yale Students' Lawsuit Unmasks Anonymous Trolls, Opens Pandora's Box*, <http://www.wired.com/politics/law/news/2008/07/autoadmit> (July 30, 2008) (summarizing the facts that led to the decision in *Doe I v. Individuals*).

50. Most public schools do not have the resources, or the funds, to petition a court for an injunction against an ISP to require that the ISP divulge the true identity of anonymous individuals. Strom & Strom, *supra* n. 47, at 89–90. While some courts may have ruled that ISPs are required in certain circumstances to reveal anonymous users' identities, other courts have upheld anonymity on the Internet. See The Huffington Post, *Court Upholds Anonymity on the Internet*, http://www.huffingtonpost.com/2009/02/28/court-upholds-anonymity-o_n_170808.html (Feb. 28, 2009).

51. Shariff, *supra* n. 34, at 44. "Fear of unknown cyber perpetrators among classmates . . . distracts all students . . . [and] creates a hostile physical school environment in which students feel unwelcome and unsafe." *Id.*

52. Colleen Barnett, Student Author, *Cyberbullying: A New Frontier and a New Standard a Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 *Quinnipiac L. Rev.* 579, 583 (2009).

53. Hinduja & Patchin, *supra* n. 6, at 20.

54. *Id.* ("Malicious words and statements that an individual might be ashamed or embarrassed to use in a face-to-face setting are no longer off-limits or even tempered when that person is physically distant from the target.")

55. Shariff, *supra* n. 34, at 45.

information in emails or other online storage devices. The communication can also be saved on computer hard drives or removable storage devices, such as external hard drives.⁵⁶ Once information is released into cyberspace, it becomes difficult, if not impossible, to ensure that all copies of that information are removed.

Information can travel quickly through the digital world. Communications can be sent over the Internet or other technological devices, such as cell phones, in a matter of seconds.⁵⁷ The speed that information can travel over technological devices combined with the sheer number of viewers it is capable of reaching⁵⁸ can make communications over the Internet take on a “viral nature.”⁵⁹ The communication can spread from one child to another, and then another, and so on *ad infinitum*, so quickly that it cannot be stopped.⁶⁰ Information that is hurtful or demeaning is more likely to be transferred among children, and as more children join in on the cyberbullying, the greater the negative impact on the victim.⁶¹ “[Cyberbullying] can be so dangerous because it can lead to cyber-mobbing, which means kids can come together to attack another kid, 24 hours a day, seven days a week.”⁶²

One might ask why a child who is being bullied over the Internet does not just ignore the behavior or remove himself or herself from the technology altogether. The use of technology and the Internet has become so ingrained in the daily activities of the younger generation, however, that it becomes difficult for the

56. *Id.*

57. In Osaka, Japan, a classmate secretly photographed a high school freshman with a cell phone camera while the freshman was changing in the locker room, and the picture was forwarded to other students via instant messaging. Strom & Strom, *supra* n. 47, at 90. By the time the photographed boy had finished changing, the photo had been forwarded to so many people in the school that he had become the “laughing stock of the school.” *Id.*

58. Ninety-three percent of twelve to seventeen-year-olds use the Internet. Pew Internet & Am. Life Project, *supra* n. 7.

59. Hinduja & Patchin, *supra* n. 6, at 23.

60. *Id.* One study has shown that children are thirty percent more likely to side with the perpetrator rather than the victim and participate in cyberbullying. Shariff, *supra* n. 34, at 44.

61. *Id.*

62. CBS News, *Officials: Suicidal Teen Was Cyber-Bullied*, <http://www.cbsnews.com/stories/2010/01/27/earlyshow/leisure/gamesgadgets/gizmos/main6146385.shtml> (Jan. 27, 2011) (quoting Meline Kevorkian).

child to separate himself or herself from the technology.⁶³ Most children use the Internet and other technological devices to communicate, complete homework, and for leisurely activities.⁶⁴ It would be difficult for cyberbullying victims to separate themselves from technology; thus, they are unable to distance themselves from the cyberbullying.⁶⁵ Unlike traditional bullying that ends when the victims are able to remove themselves from the bullies' physical presence, cyberbullying constantly plagues the victim, and follows him or her home from school, leaving the victim with no respite from the torment.⁶⁶

Cyberbullying is also capable of reaching a more severe level than traditional bullying because it is difficult for adults to supervise online behavior. The Internet is a vast space and there are no real boundaries within this world, so information is constantly in motion. It can be difficult for parents or other supervisory adults to monitor a space of this magnitude. Many adolescents also have private cell phones,⁶⁷ and in some cases adolescents may have personal computers.⁶⁸ Children are generally more technologically savvy than the adults who supervise them,⁶⁹ which makes it easier for children to hide cyberbullying behavior.⁷⁰

63. Some have referred to this generation as "digital natives." Marc Prensky, *Digital Natives, Digital Immigrants*, 9 *On the Horizon* 1, 1 (Oct. 2001).

Today's students—K through college—represent the first generations to grow up with this [digital] technology. They have spent their entire lives surrounded by and using computers, videogames, digital music players, video cam[eras], cell phones, and all the other toys and tools of the digital age. . . . Computer games, email, the Internet, cell phones[,] and instant messaging are integral parts of their lives.

64. *Id.*

65. Kimberly L. Mason, *Cyberbullying: A Preliminary Assessment for School Personnel*, 45 *Psychol. in the Schs.* 323, 324 (2008).

66. *Id.*; see also Darby Dickerson, *Cyberbullies on Campus*, 37 *U. Toledo L. Rev.* 51, 56 (2005) (discussing how "[t]echnology affords bullies 24/7 access to potential victims, and opens the opportunity for persistent, unending harassment from which victims are hard-pressed to escape").

67. According to a 2010 study conducted by the Pew Internet and American Life Project about teens and mobile phone use, seventy-five percent of children ages twelve through seventeen own a cell phone. Amanda Lenhart, Rich Ling, Scott Campbell & Kristen Purcell, *Teens and Mobile Phones 2*, <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf> (Apr. 20, 2010).

68. Hinduja & Patchin, *supra* n. 6, at 22.

69. See generally Prensky, *supra* n. 63 (explaining how today's students have grown up with technology and how it is an integral part of their lives).

70. Also, some websites attempt to monitor chat rooms and message boards, but messages sent privately between individuals are outside the monitor's realm of supervision.

Cyberbullying differs from traditional bullying because of the challenges created by the digital world in which most adolescents participate. In order to effectively curb this problem, parents, educators, and lawmakers must understand the unique aspects associated with cyberbullying, including anonymity, permanence of expression, the viral nature of online communications, and the difficulty of online supervision.⁷¹

C. Emotional and Behavioral Consequences of Cyberbullying

Cyberbullying, like traditional bullying, has a significant emotional and psychological impact on its victims, and this negative influence on the victim's life should not be disregarded. The negative consequences of cyberbullying affect both victims and perpetrators and can include sadness, anxiety, depression, low self-esteem, and an overall decline in mental and physical health.⁷² The "[m]ental anguish from the social exclusion caused by [cyberbullying] is sufficient to destroy the confidence of any adult, let alone a child on whom it can have lifelong effects."⁷³ Dr. Hinduja and Dr. Patchin conducted a study in which they found that cyberbullying victims felt "angry, frustrated, sad, embar-

Hinduja & Patchin, *supra* n. 6, at 22.

71. Recently, research has also revealed that sexual and homophobic harassment are becoming a prevalent aspect of cyberbullying. Shariff, *supra* n. 34, at 45; see CBS News, *Tyler Clementi Suicide Sparks Outrage, Remorse*, <http://www.cbsnews.com/stories/2010/09/30/national/main6914293.shtml> (Oct. 29, 2010) (reporting the suicide of Rutgers University freshman, Tyler Clementi, who killed himself after his roommate circulated online videos of him participating in homosexual acts, and discussing the tendency of bullies to target gay, lesbian, and bisexual individuals). Another example of the rising prevalence of sexual harassment through cyberbullying is an issue dubbed "sexting." Sexting is the practice of sending nude pictures via text messages. Suzanne Choney, *Nearly 1 in 3 Older Teens Gets 'Sexting' Messages*, http://www.msnbc.msn.com/id/34422197/ns/technology_and_science-tech_and_gadgets# (Dec. 15, 2009). Among children ages twelve to seventeen, fifteen percent report that they have received nude or partially nude photos via text of someone they know, and four percent admit to sending nude or semi-nude photos. *Id.* Such photos can be used as the basis for cyberbullying. In 2009, Hope Witsell, a thirteen-year-old girl from Florida, committed suicide after she sent a semi-nude photo of herself to a boy she admired, who then sent the photo to students at her school and a nearby high school. *Id.*; see also Stacy M. Chaffin, Student Author, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 *How. L.J.* 773, 776-777 (2008) (detailing the prevalence of sexual harassment in cyberbullying and highlighting the need for parents, teachers, and the government to play a role in alleviating cyberbullying).

72. Hinduja & Patchin, *supra* n. 6, at 63. The stress and anxiety created by bullying can manifest in physical symptoms such as headaches, stomachaches, fatigue, and illness. Shariff, *supra* n. 34, at 38.

73. Shariff, *supra* n. 34, at 37.

ressed, or scared.”⁷⁴ If not treated, these feelings can result in delinquency, interpersonal violence, and depression.⁷⁵ Cyberbullying victimization can also lead to adolescent problem behaviors, such as difficulties performing in school, assaultive conduct, substance abuse, and participation in traditional bullying.⁷⁶

Perhaps the most devastating consequence of cyberbullying is the increasing rate at which young cyberbullying victims are committing suicide, termed “cyberbullicide.”⁷⁷ Recent research has uncovered a link between cyberbullying victimization and suicidal thoughts.⁷⁸ In fact, children who are cyberbullying victims are twice as likely to commit suicide as children who are not cyberbullying victims.⁷⁹ In one study conducted on middle-school-aged students, researchers found that the children who had been victimized by cyberbullying scored higher on a suicidal-ideation scale than those who had not experienced cyberbullying, and, thus, were at a higher risk for committing suicide.⁸⁰

74. Hinduja & Patchin, *supra* n. 6, at 63.

75. *Id.*; see also Mitali R. Vyas, *School Shooters: Perpetrators or Victims? The Need for Expanding Battered Child Syndrome to Include Peer Harassment in School-Violence Prosecutions*, 41 Stetson L. Rev. 215, 220–222 (2012) (suggesting that bullying, including cyberbullying, can lead victims to perpetrate acts of violence).

76. Marci Feldman Hertz & Corinne David-Ferdon, *Electronic Media and Youth Violence: A CDC Issue Brief for Educators and Caregivers* 8 (2008) (available at <http://www.cdc.gov/violenceprevention/pdf/EA-brief-a.pdf>).

77. Cyberbullicide is defined as “suicide indirectly or directly influenced by experiences with online aggression.” Sameer Hinduja, *Cyberbullicide—The Relationship between Cyberbullying and Suicide among Youth*, <http://cyberbullying.us/blog/cyberbullicide-the-relationship-between-cyberbullying-and-suicide-among-youth.html> (accessed Mar. 4, 2012).

78. See *supra* Part I (discussing Jeffrey Johnston’s suicide after he was relentlessly cyberbullied by his peers); see also *supra* n. 5 (providing numerous examples of adolescents who have committed suicide after being cyberbullying victims).

79. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide* (Cyberbullying Research Ctr. 2010) (available at http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf).

80. Hinduja & Patchin, *supra* n. 6, at 69. The researchers point out, however, that in most of the cases where a child committed suicide because of being victimized by cyberbullying he or she was suffering from other physical or mental issues, such as depression, and cyberbullying may have exacerbated issues these adolescents were already trying to cope with. *Id.* at 70; see e.g. Fox News, *Mom: MySpace Hoax Led to Daughter’s Suicide*, <http://www.foxnews.com/story/0,2933,312018,00.html> (Nov. 16, 2007) (describing how thirteen-year-old Megan Meier suffered from depression and attention-deficit disorder when she committed suicide after being the victim of a cyberbullying); Jane Walsh, *Defense Seek Medical Records on Phoebe Prince*, <http://www.irishcentral.com/news/Defense-seek-medical-records-on-Phoebe-Prince-100333074.html> (Aug. 10, 2010) (reporting that Phoebe Prince, who committed suicide after being cyberbullied, had a history of depression and had attempted to commit suicide before being a cyberbullying victim).

*III. FLORIDA'S CURRENT LEGAL SOLUTIONS TO
CYBERBULLYING AND WHY THESE SOLUTIONS
ARE NOT ENOUGH*

Currently, there are several legal recourses available in Florida that purport to protect adolescents from cyberbullying, but these recourses fail to provide adequate remedies for those children who have been cyberbullying victims. First, the Florida Legislature passed Jeff's Law in 2008, which prohibits bullying, including cyberbullying and mandates that each school district in Florida develop a comprehensive anti-bullying policy.⁸¹ Jeff's Law was intended to protect Florida's students from bullying, and provides schools with the authority to discipline students for some instances of cyberbullying behavior.⁸² Second, once an adolescent has been a cyberbullying victim, Florida civil law provides several actions that the victim can pursue, including defamation, intentional infliction of emotional distress, and negligent supervision.⁸³ Finally, Florida has a criminal statute that prohibits "cyberstalking," a term which encompasses some of the more severe behaviors associated with cyberbullying.⁸⁴

A. Legislative Solutions: Jeff's Law

After Jeffrey Johnston's suicide in 2005, his mother, Debra Johnston, campaigned to have a law passed that would provide some protection for Florida's students against bullies.⁸⁵ Jeff's law failed to pass the first two times it was introduced into the Florida Legislature.⁸⁶ In 2008, the law was introduced into the Florida Legislature for the third and final time and was approved.⁸⁷ Jeff's

81. Fla. Stat. § 1006.147.

82. *Id.*

83. See *infra* Part III(B) (discussing civil actions of defamation, intentional infliction of emotional distress, and negligent supervision).

84. Fla. Stat. § 784.048 (2007). The statute defines "cyberstalking" as engaging "in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose." *Id.* at § 784.048(1)(d).

85. Juju Chang, Linda Owens & Jonann Brady, *Mom's Campaign for Florida Anti-Bully Law Finally Pays Off*, <http://abcnews.go.com/print?id=4774894> (May 2, 2008).

86. Telephone Interview, *supra* n. 21.

87. *Id.* According to Mr. Tirella, the law had failed in the legislature previously because it did not have any teeth. *Id.* The addition to the law of a provision withholding

Law is intended to: (1) safeguard individual liberty by preventing “substantial interference with a student’s educational performance”; (2) empower families; and (3) maintain public security.⁸⁸

Jeff’s Law defines bullying as “systematically and chronically inflicting physical hurt or psychological distress,”⁸⁹ and defines harassment as

any threatening, insulting, or dehumanizing gesture, [or the] use of data or computer software, or written, verbal, or physical conduct directed against a student or school employee that: [(1)] [p]laces a student or school employee in reasonable fear of harm to his or her person or damage to his or her property; [(2)] [h]as the effect of substantially interfering with a student’s educational performance, opportunities, or benefits; or [(3)] [h]as the effect of substantially disrupting the orderly operation of a school.⁹⁰

Jeff’s Law does not actually use the term “cyberbullying.”⁹¹ Instead, the law addresses cyberbullying by prohibiting bullying or harassment of any student “[t]hrough the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K–12 educational institution.”⁹²

Jeff’s Law also mandates that each school district develop a policy prohibiting bullying and harassment, which must be in substantial conformity with the anti-bullying policy developed by the DOE.⁹³ School districts that failed to develop an anti-bullying

funds from schools, however, added the “teeth” necessary to push the law through the senate. Mr. Tirella stated to ABC News, “We tried reason, we [tried] logic, we tried morality, we tried legality to take care of these students and it didn’t work. . . . So you know what we’re trying now? The pocketbook.” Chang, Owens & Brady, *supra* n. 85.

88. Fla. H., *Staff Analysis*, HB 669 (Apr. 10, 2008) (available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0669e.PBC.doc&DocumentType=Analysis&BillNumber=0669&Session=2008>).

89. Fla. Stat. § 1006.147(3)(a).

90. *Id.* at § 1006.147(3)(b).

91. *Id.* at § 1006.147.

92. *Id.* at § 1006.147(2)(c).

93. For a copy of the DOE’s model policy, see *supra* n. 19. For examples of policies developed as a result of this legislation, see generally Sch. Bd. of Hillsborough Co., *Bullying and Harassment*, <http://www.sdhc.k12.fl.us/bullyingprevention/PDFs/Policy5517.01English.pdf> (accessed Mar. 4, 2012); Pinellas Co. Sch. Bd., *The Policy Manual of the School Board of Pinellas County, Florida* 1–8 (June 2009) (available at <http://web.pcsb.org/Planning/>).

policy in substantial conformity with the policy developed by the DOE by December 1, 2008, would not receive their allotment of Florida's Safe School Funds,⁹⁴ totaling almost seventy-six million dollars for the 2009–2010 school year.⁹⁵ Under the law, distribution of the Safe School Funds in the following school years is contingent upon compliance with the reporting procedures mandated under the statute.⁹⁶

Compared to the cyberbullying laws adopted in other states to address cyberbullying, Jeff's Law is "the best of its kind."⁹⁷ While Jeff's Law has been successful in requiring school districts to develop policies preventing bullying and cyberbullying, the law has not been as successful in reducing the prevalence of cyberbullying among school-aged children in Florida. A survey conducted by the DCF found that between 2008, when the law was first passed, and 2010, there had been a ten-percent increase in the number of high school adolescents who have reported being a cyberbullying victim.⁹⁸ Moreover, a study involving middle-school principals in Florida found that the principals believed the policies developed by the school districts were comprehensive in addressing different types of cyberbullying behavior, but improvements still needed to be made regarding periodic review and updating of the bullying policies.⁹⁹ The research further found that the principals were still confused regarding whether schools were permitted to punish off-campus cyberbullying incidents and suggested that a more clearly defined protocol needed to be devel-

CHAPTERS/pdfmanual_061609.pdf). The policies developed by each school district may be more substantial than the policy developed by the Florida DOE. *See* Broward Co. Sch. Bd., *Policy 5.9: Anti-Bullying* (July 22, 2008) (available at <http://www.fldoe.org/safeschools/pdf/Broward.pdf>) (providing a much more comprehensive and detailed anti-bullying policy than the DOE).

94. Fla. Stat. § 1006.147(8).

95. Telephone Interview, *supra* n. 21. According to Tirella, the distribution of Safe School Funding could have been substantial, and schools that were not in compliance with the statute stood to lose a significant amount of money, making this statute one of the financially toughest anti-bullying statutes in the country. *Id.*

96. Fla. Stat. § 1006.147(8).

97. Telephone Interview, *supra* n. 25; *see also* Bully Police USA, *Florida*, http://www.bullypolice.org/fl_law.html (accessed Mar. 4, 2012) (commenting on the quality of anti-bullying laws in the United States and grading Jeff's Law as "A++").

98. *2008 Survey*, *supra* n. 14, at 119; *2010 Survey*, *supra* n. 16, at 42.

99. Margaret C. Gardner, *Principals' Perceptions of Cyberbullying Policies in Selected Florida Middle Schools* 153 (unpublished Ph.D. dissertation, U.C. Fla., 2010) (available at http://etd.fcla.edu/CF/CFE0003174/Gardner_Margaret_C_201008_Ed.D.pdf).

oped under the statute for dealing with off-campus cyberbullying incidents.¹⁰⁰

Despite the efforts of Jeff's Law to quell cyberbullying, it is still a problem among Florida's youth.¹⁰¹ Because the statute, on its face, only seems to give schools authority to punish cyberbullying acts that occur on school grounds or through the use of school computers or networks, the law is limited in its application.¹⁰² Such a restriction leaves a vast majority of cyberbullying unpunished because cyberbullying incidents primarily occur away from school grounds.¹⁰³

Discussions with middle[-] and high[-]school students suggest that most [cyberbullying] occurs away from school property and during off-school hours, with the exception of [cyberbullying] perpetrated by text messaging using cell phones. Schools appear to be a less common setting because of the amount of structured activities during the school day and because of the limited access to technology during the school day for activities other than schoolwork. Additionally, because other teens are less likely to be, for instance, on social-networking websites during school hours, the draw to such websites during the day is limited.¹⁰⁴

This restriction in Jeff's Law severely limits the school's jurisdiction to punish cyberbullying acts that occur away from school grounds on personal computers or other personal technological devices, regardless of whether the incidents have a profound impact on the school environment. Furthermore, evidence suggests that while school districts have been in compliance with Jeff's Law by developing anti-bullying policies, these policies are not being implemented within the school districts.¹⁰⁵ The reporting procedures required under the statute are not sufficient

100. *Id.* at 150–151.

101. *See supra* nn. 14–16 and accompanying text (providing surveys conducted by the DCF showing that cyberbullying victimization has increased by approximately ten percent in the two years since Jeff's Law was passed).

102. Fla. Stat. § 1006.147(2).

103. Darryn Cathryn Beckstrom, Student Author, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 Vt. L. Rev. 283, 290 (2008).

104. Barnett, *supra* n. 52, at 588 (quoting Hertz & David-Ferdon, *supra* n. 76, at 103).

105. Telephone Interview, *supra* n. 25.

to ensure that the anti-bullying policies are actually being utilized by school districts because the statute does not provide a mechanism by which schools' use of the policies will be monitored. There is also evidence that school districts that have received their allotted portion of the Safe School Funding elected to spend the money on trivial materials, such as hand sanitizer, as opposed to spending the funds on preventing bullying and cyberbullying.¹⁰⁶

B. Civil Solutions

In Florida, there are few civil actions that cyberbullying victims and their parents or guardians can pursue to redress the harms cyberbullying causes. These civil actions developed before the proliferation of the Internet and are not tailored to cyberbullying's unique aspects. In some circumstances a cyberbullying victim may successfully establish a civil claim against the perpetrator for defamation or intentional infliction of emotional distress (IIED) and, in some instances, may establish a claim against school teachers, principals, or other supervisory personnel under a theory of negligent supervision.

The first claim a cyberbullying victim may attempt to pursue against a perpetrator is defamation. In Florida, defamation is considered damage to an individual's personal reputation that "expose[s] a person to hatred, contempt[,] or ridicule[,] or cause[s] [a person] to be shunned or avoided, or injure[s] [a person] in [that person's] business or occupation."¹⁰⁷ Defamation can fall into one of two categories: slander or libel.¹⁰⁸ Slander occurs when the defamation is spoken out loud, and libel occurs when the defamation is written.¹⁰⁹ Electronic communications generally fall into the libel category.¹¹⁰ To succeed in a libel claim of defamation, the plaintiff must prove the defendant: (1) published to a third party;

106. *Id.* Mr. Nevins qualified that the school districts are not required to spend the Safe School Funds on preventing bullying and cyberbullying, but such behavior by the school districts shows a complete lack of regard for the seriousness of bullying and cyberbullying. *Id.*

107. *Perez v. City of Key West*, 823 F. Supp. 934, 938 (M.D. Fla. 1993) (explaining that defamation must injure the plaintiff's reputation in some manner).

108. *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1378 n. 11 (S.D. Fla. 2006).

109. *Id.* (explaining that a claim of libel is usually filed for defamatory written statements and a claim of slander is filed for defamatory spoken statements).

110. *Hinduja & Patchin*, *supra* n. 6, at 179.

(2) a false written statement about the plaintiff; (3) knowingly or with a reckless disregard as to its falsity; and (4) the falsity of the statement caused an injury to the plaintiff.¹¹¹ In a defamation case, the interest the law attempts to protect is the objective interest the plaintiff has in his or her reputation, whether that interest is economic, political, or personal.¹¹² This objective standard is a high burden to meet and can be especially difficult for adolescents to prove.¹¹³ Adolescents rarely succeed in defamation suits because juries often find that the adolescent is too young to have developed a sufficient reputation capable of being harmed.¹¹⁴ Also, the perpetrator can raise an affirmative defense that the statements are true, and if the statements are true, the victim, who has still suffered an injury, is left with no recourse.¹¹⁵

A cyberbullying victim may also attempt to pursue a civil claim against the perpetrator for intentional infliction of emotional distress. Some states do not permit a claim for IIED unless it is attached to some other civil claim, such as assault or battery;¹¹⁶ however, Florida courts recognize a claim for IIED as a separate cause of action that a plaintiff would not have to accompany with an independent tort.¹¹⁷ To pursue a cause of action for IIED in Florida, the plaintiff must show that: “(1) [t]he wrongdoer’s conduct was intentional or reckless . . . ; (2) the conduct was outrageous . . . ; (3) the conduct caused emotion[al] distress . . . ; and (4) the emotional distress was severe.”¹¹⁸ It is difficult for cyberbullying plaintiffs to pursue IIED claims because their injury is usually psychological or emotional and can be difficult to

111. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

112. *Id.* at 1109.

113. See Todd D. Erb, Student Author, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 *Ariz. St. L.J.* 257, 278–279 (2008) (explaining that students are afforded less protection than adults in a slander action because students have not yet developed a professional reputation that is capable of being slandered).

114. *Id.*

115. See *Fla. Publ’g. Co. v. Lee*, 80 So. 245, 246 (Fla. 1918) (holding that the truth of a libelous statement constitutes “a complete defense in a civil action”).

116. For example, the state of Kentucky does not allow a claim for IIED without physical damage. *Browning v. Browning*, 584 S.W.2d 406, 408 (Ky. App. 1979).

117. See *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278 (Fla. 1985) (holding that Florida courts should recognize a cause of action for IIED, even if no other physical tort accompanies the emotional injury).

118. *LeGrande v. Emmanuel*, 889 So. 2d 991, 994 (Fla. 3d Dist. App. 2004) (explaining the elements a plaintiff must prove to succeed in an IIED claim).

prove if not accompanied by a physical manifestation of the mental injury.¹¹⁹ Additionally, proving that the behavior was outrageous and the emotional distress was severe is a high burden for the plaintiff to meet.¹²⁰

The civil actions discussed above provide a remedy that cyberbullying victims can pursue against a perpetrator to redress the harms cyberbullying causes. In some instances, however, a cyberbullying victim may also be able to pursue a claim against a teacher, principal, or other supervisory school personnel under the theory of negligent supervision. A school official, who is responsible for supervising students, can be held liable for negligently failing to monitor the students in a reasonable fashion while the school is entrusted with the students' care.¹²¹ These individuals must use the degree of care that "a person of ordinary prudence, charged with the duties involved, would exercise under the same circumstances."¹²² "A breach of the supervisory duty exposes a school to liability for reasonably foreseeable injuries caused by the failure to use ordinary care."¹²³ For a cyberbullying victim to succeed on a theory of negligent supervision, the victim has the burden to prove that: (1) the school had a duty to supervise the plaintiff; (2) the plaintiff was injured; (3) the school breached its duty to supervise; and (4) the breach of the duty to supervise caused the injury.¹²⁴ While these elements seem

119. A physical manifestation of the emotional or psychological injury is not *necessary* to prove an IIED claim but can provide concrete evidence that some emotional or psychological injury has occurred. See *E. Airlines, Inc. v. King*, 557 So. 2d 574, 579 (1990) (Ehrlich, C.J., concurring) (reiterating that a physical manifestation of emotional distress is not required).

120. To counteract the potential wide application of IIED claims, the tort was purposefully restricted by these high burdens to apply to only the most severe claims and outrageous conduct. See Russell Fraker, Student Author, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 Vand. L. Rev. 983, 993 (2008) (discussing why the Restatement of Torts and courts have been reluctant to award plaintiffs damages for IIED claims and providing reasons why such high burdens are required to succeed on an IIED claim).

121. "A public school . . . undoubtedly owes a general duty of supervision to the students placed within its care[,] . . . [and] a negligent failure to act in carrying out this duty of the school is actionable." *Rupp v. Bryant*, 417 So. 2d 658, 666 (Fla. 1982). The Florida Supreme Court held that school officials could be held liable for injuries that occur either on or off school grounds, so long as the activity was school related. *Id.* at 667–668. Moreover, it is important to note that in regard to a duty to supervise, schools are not protected by sovereign immunity. *Wyke v. Polk Co. Sch. Bd.*, 129 F.3d 560, 571 (11th Cir. 1997).

122. *Benton v. Sch. Bd. of Broward Co.*, 386 So. 2d 831, 834 (Fla. 4th Dist. App. 1980).

123. *Wyke*, 129 F.3d at 571.

124. *Roberson v. Duval Co. Sch. Bd.*, 618 So. 2d 360, 362 (Fla. 1st Dist. App. 1993).

straightforward, when applied to cyberbullying that occurs away from campus, a plaintiff will most likely fail to establish the required elements.

Consider the following scenario: a student reported to a teacher on multiple occasions that another student had sent demeaning and hurtful instant messages to the student while at home, and the teacher failed to take any action to protect the student from further victimization. There may be an argument that in this scenario, the teacher breached the duty to supervise the students in a reasonable fashion.¹²⁵ However, it is unclear whether the student would succeed in a civil action against the teacher because Florida courts have yet to decide a case determining the scope of a school's duty to supervise online behavior.¹²⁶ If someone sent the instant messages from a computer belonging to the school, it is more likely under current Florida law that a teacher who failed to take action in this type of situation could be held liable under a theory of negligent supervision if the requisite elements could be established.¹²⁷

If someone had sent the instant messages from a home computer during non-school hours, then it is likely that the teacher would not be responsible for failing to take any action to correct the behavior. Florida caselaw has declared that schools are only responsible for supervising student behavior on school grounds and during school activities.¹²⁸ Applying the caselaw as it stands indicates that teachers and other supervisory school personnel could be held liable under a theory of negligent supervision for failing to catch and prohibit cyberbullying that occurs on school grounds or during school-sponsored activities. The current caselaw, however, would not support liability for teachers failing to catch or punish cyberbullying that occurs away from school grounds on personal computers or cell phones.¹²⁹ In most cases, cyberbullying occurs away from school grounds and outside of school-sponsored activities,¹³⁰ leaving students unable to pursue a

125. Shariff, *supra* n. 34, at 88.

126. *Id.* at 93.

127. A teacher could also potentially be liable for failing to take action if a student was reporting school-related issues that stemmed from off-campus cyberbullying because the behavior has a sufficient nexus to the school. *Id.* at 88.

128. Rupp, 417 So. 2d at 667-668.

129. *Id.*

130. See *supra* n. 104 and accompanying text (discussing that most cyberbullying inci-

cause of action against school personnel for failing to catch or punish the behavior.

The question then becomes whether in the future Florida courts will expand the duty of supervision to cover cyberbullying that occurs away from school grounds. Such an extension seems unlikely, however, because supervising the students' online behavior at all times would be time consuming and burdensome on teachers and other school administrators.¹³¹ Moreover, just as with a civil claim of IIED, most cyberbullying victims are emotionally injured, which, invariably, is more difficult to establish and recognize than physical injuries.¹³²

While the civil actions discussed above are available to cyberbullying victims, most of these actions are not tailored to account for the unique characteristics of cyberbullying; thus, perpetrators can easily defeat the civil actions. Pursuing civil claims can also become extremely costly and time consuming.¹³³ Most victims, or the victim's parents or guardians, will not be able to afford pursuing such a claim.¹³⁴ Additionally, the decision to bring the claim rests in the hands of the victim's parents or guardians because a minor does not have the power to bring a civil action on his or her own behalf.¹³⁵ If the parent or guardian does not want to bring the civil action on behalf of the minor, then the minor does not have another means to address the cyberbullying in a civil context.¹³⁶ There is also a strong possibility that the cyberbully, also a youth, or the cyberbully's parents, will be insolvent or judgment proof, leaving victims with little to no remedy even if they succeeded in

dents are perpetrated off school grounds and after school hours).

131. *See supra* nn. 67–71 and accompanying text (explaining the difficulty of monitoring online behavior).

132. Shariff, *supra* n. 34, at 93.

133. Such actions may also result in more harm to the victim because he or she will be forced to go through a lengthy and emotionally draining trial. *See* Shariff, *supra* n. 34, at 45 (explaining that schools often use delay tactics to draw out resolution of the case). Victims are especially vulnerable to harm in situations where the cyberbullies prevail because the victims may feel like they have not been vindicated.

134. *Id.* Also, there is “a general absence of [claims regarding] student-on-student cyberbullying . . . because students (and their parents) are reluctant to pursue litigation.” Brenner & Rehberg, *supra* n. 27, at 6.

135. *ACLU of Fla. v. Miami-Dade Co. Sch. Bd.*, 439 F. Supp. 2d 1242, 1261–1262 (S.D. Fla. 2006).

136. *See* Brenner & Rehberg, *supra* n. 27, at 6 (arguing that parents of children who have been cyberbullied may be reluctant to bring a civil action against the perpetrator).

a claim.¹³⁷ Anonymity is also an issue in pursuing a civil action because the Internet can shield cyberbullies from liability by protecting their identities.¹³⁸ Even if the plaintiff could afford to pursue a civil action, he or she cannot identify the proper defendant, and again, the victim is left with little or no remedy.

C. Criminal Solutions

Presently, Florida does not have a law criminalizing juvenile cyberbullying,¹³⁹ but Florida does have a statute that criminalizes “cyberstalking,” which is an offense encompassing some of the more severe behaviors that would be regarded as cyberbullying.¹⁴⁰ An individual commits the crime of cyberstalking when that person

engage[s] in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.¹⁴¹

An individual who “willfully, maliciously, and repeatedly”¹⁴² cyberstalks another individual can be charged with the criminal offense of stalking, a first degree misdemeanor, which is punishable by a prison term up to one year¹⁴³ or a fine of \$1,000.¹⁴⁴

137. Bradley A. Areheart, *Regulating Cyberbullies through Notice-Based Liability*, 117 Yale L.J. Pocket Pt. 41, 42 (2007) (noting that cyberbullies may be judgment proof).

138. See *supra* Part II(B) and accompanying footnotes for a discussion of the issues associated with anonymity on the Internet and how some courts have started to require ISPs to reveal the identity of anonymous users. See also Richard G. Sanders & Robb S. Harvey, *Unmasking Anonymous and Pseudonymous Online Posters*, 21 Prac. Litig. 35, 35–36 (Mar. 2010) (explaining the difficulty of discovering the identity of anonymous online posters).

139. For a discussion of why criminalization of cyberbullying is not the answer, see Bethan Noonan, Student Author, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. Contemp. Health L. & Policy 330, 358 (2011).

140. Fla. Stat. § 784.048(1)(d).

141. *Id.*

142. *Id.* at § 784.048(2).

143. *Id.* at § 775.082(4)(a).

144. *Id.* at § 775.083(1)(d).

Prosecuting cyberbullying under the cyberstalking statute places a severe burden on prosecutors who face unique evidentiary challenges in prosecuting cybercrimes.¹⁴⁵ There is also evidence that prosecutors are unlikely to pursue charges against adolescents under this statute for cyberbullying.¹⁴⁶ To prosecute a charge of cyberstalking successfully, the prosecutor must prove beyond a reasonable doubt that the behavior was intentional and that the conduct caused substantial emotional distress—high burdens to meet.¹⁴⁷ Effectively, a cyberstalking charge would be likely to succeed only in instances where the cyberbullying conduct was extremely severe, again leaving most victims without a remedy for the cyberbullying conduct.¹⁴⁸ This statute fails to cover harmful cyberbullying behavior that does not rise to the level of stalking or harassment.¹⁴⁹ For example, the statute would not cover gossip and other forms of social banter not directed or targeted specifically at a child, as lawmakers designed it to deal only with the most severe forms of behavior.¹⁵⁰ Therefore, while the stalking statute may criminalize the most severe cyberbullying behavior, the law is not crafted to encompass the broad range of possible cyberbullying behavior and is inadequate as a remedy for cyberbullying.

Furthermore, criminalizing cyberbullying behavior has been opposed as ineffective against adolescents.¹⁵¹ Criminalization of

145. Jonathan B. Wolf, Student Author, *War Games Meets the Internet: Chasing 21st Century Cybercriminals with Old Laws and Little Money*, 28 Am. J. Crim. L. 95, 100–104 (2000). Cybercrimes need special laws because they are difficult for law enforcement to detect and it is difficult to gather sufficient evidence. *Id.* Individuals are also reluctant to report cybercrimes, and prosecuting these crimes is costly and time consuming. *Id.* at 102.

146. Telephone Interview, *supra* n. 23; *see also* ABC Action News, *supra* n. 9 (reporting that a Florida prosecutor declined to pursue charges against two teens that engaged in cyberbullying).

147. Brenner & Rehberg, *supra* n. 27, at 26. “Establishing the bully’s intent, and the causal nexus between that intent and the resultant harm to the victim, would be critical in a stalking or harassment prosecution predicated on . . . cyberbullying.” *Id.*

148. *Id.*

149. Fla. Stat. § 784.048(3). Note the requirement that a person’s behavior must amount to “stalking” before the statute will come into effect. *Id.*

150. *Id.* Stalking laws are created to handle conduct intentionally and repeatedly directed toward a specific individual but are not equipped to handle *indirect* cyberbullying behavior, such as gossip. Brenner & Rehberg, *supra* n. 27, at 40–41; *but see* Telephone Interview, *supra* n. 21 (asserting that the Florida cyberstalking law covers most, if not all, cyberbullying behavior but alleging that the real problem is enforcing the law and prosecuting under the law).

151. H.R. Subcomm. on Crime, Terrorism & Homeland Sec. of Comm. on the Jud., *Cyberbullying and Other Online Safety Issues for Children: Hearings on H.R. 1966 & H.R.*

adolescent behavior is ineffective because it fails to impress upon children the gravity of the behavior as many children fail to understand the implications of criminal acts.¹⁵² Additionally, most children are ignorant as to what types of behavior can lead to criminal sanction, thus, rendering criminal punishment unsuccessful as a preventative tool for cyberbullying.¹⁵³

IV. PROPOSED SOLUTIONS

Under Florida law, the legal solutions currently available to address cyberbullying are inadequate either because the laws fail to provide a workable remedy, such as the civil and criminal remedies discussed previously, or fail to address the issue in a comprehensive manner, such as Jeff's Law. Cyberbullying is an obscure and challenging problem to tackle; thus, Florida's solution to this problem must be multifaceted. To compensate for the inadequacies of current Florida law, there is a need for legislation that would expand school authority under Jeff's Law to punish cyberbullying incidents that occur away from school grounds. Jeff's Law should also be amended to provide a more effective mechanism for monitoring whether schools are actually implementing the anti-bullying policies as required under the statute.

While amended legislation adds to our cyberbullying arsenal, lawmaking is just one of the weapons available to begin to curtail the problem of cyberbullying. This difficult problem also calls for a more holistic solution. Schools do not have the time or the resources to devote to patrolling each student's online behavior,¹⁵⁴ so it can be difficult for schools to detect cyberbullying that occurs away from school grounds if students are not reporting such behavior.¹⁵⁵ For this type of legislation to be successful, education

3630, 111th Cong. 109 (Sept. 30, 2009).

152. *Id.* at 103 (explaining that making cyberbullying illegal is ineffective); *see also* Noonan, *supra* n. 139, at 358.

153. *See* H.R. Subcomm. on Crime, Terrorism & Homeland Sec., 111th Cong. at 109 (explaining that using criminalization as a scare tactic to prevent cyberbullying is ineffective); *see also* Nancy E. Willard, *The Authority and Responsibility of School Officials in Responding to Cyberbullying*, 41 *J. Adolescent Health* S64, S65 (2007) (discussing that formal discipline of children for cyberbullying behavior if the children cannot understand the implications of that behavior actually does more harm than good).

154. Shariff, *supra* n. 34, at 168. Budget restrictions and staff shortages can make it difficult for schools to monitor student behavior online. *Id.*

155. Beckstrom, *supra* n. 103, at 313. Adolescents are reluctant to report cyberbullying

of both students and parents will be necessary to reduce cyberbullying among adolescents. Jeff's Law already requires that each school district adopt procedures for educating students, teachers, and parents as part of the mandated anti-bullying policy.¹⁵⁶ However, this requirement applies to bullying in general and does not require any special emphasis on cyberbullying.¹⁵⁷ Therefore, it is unclear whether students and parents are being adequately educated regarding the unique aspects and dangers of cyberbullying. Educational programs about cyberbullying are needed to ensure that children and parents are aware of, and knowledgeable about, cyberbullying.

Lastly, Florida would be better equipped to address cyberbullying if the State could permit cyberbullying victims to hold ISPs and website providers, such as Facebook and MySpace, civilly liable for failing to take down cyberbullying speech if anyone provides the ISP with notice of the speech. Florida is prevented from such action under the federal Communications Decency Act (CDA),¹⁵⁸ which provides civil immunity to ISPs and website providers.¹⁵⁹ If Congress amended the CDA to abolish civil immunity for ISPs and website providers that fail to take down cyberbullying speech when notified of its presence, cyberbullying victims in Florida would have an additional remedy for cyberbullying harms.

A. Amendments to Jeff's Law

The Florida Legislature should amend Jeff's Law to expand school authority to punish off-campus cyberbullying incidents because such expansion would permit schools to punish more cyberbullying incidents and would help to decrease cyberbullying among Florida's youth. Some have interpreted Jeff's Law as permitting schools in Florida to punish cyberbullying that occurs

incidents to school personnel or parents because they may fear retaliation from the bully or from other students, or the adolescent may feel embarrassed to reveal the behavior, especially if the communications may be true, even if they are hurtful and damaging. *Id.*

156. Fla. Stat. § 1006.147(4).

157. *Id.* at § 1006.147(4)(a).

158. Communications Decency Act, 47 U.S.C. § 230 (2006).

159. *See Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1013 (Fla. 2001) (holding that even if a civil cause of action existed under Florida law, ISPs are immune from liability under the CDA because Florida's negligence cause of action is preempted by Section 230(c)(1)).

away from school so long as the cyberbullying can be accessed from a school computer.¹⁶⁰ Even if the broader interpretation of Jeff's Law is correct, there is a strong indication that schools have interpreted the statute more narrowly, believing that off-campus cyberbullying incidents are beyond their reach.¹⁶¹ If the statute already permits schools to reach off-campus cyberbullying incidents, at the very least the law should be amended to make such authority clear to schools and parents who are interpreting how the law applies.

Proponents of expanding school jurisdiction to combat cyberbullying argue that schools are better equipped than law enforcement or courts to handle cyberbullying because adolescents do not always understand the implications of their behavior.¹⁶² School administrators and teachers have a personal relationship with students that allows them to develop punishments better suited to address the unwanted behavior without resorting to serious criminal or civil charges, which could potentially cause substantial damage to the cyberbully's life.¹⁶³ This school-level response punishes the cyberbully appropriately while still providing the victim with a remedy and ensures that the victim will feel safe in the school environment.¹⁶⁴ This response will also have a greater impact on reducing cyberbullying incidents because the punishment is meted out when the behavior occurs, as opposed to some later date when the cyberbully is likely to be removed from the cyberbullying conduct and is less likely to realize that the behavior is inappropriate. This immediate punishment teaches students that such behavior will not be toler-

160. Telephone Interview, *supra* n. 23. Schools have also gotten around this interpretation of the law by alleging that they are unable to access most cyberbullying content because of web-filtering software that schools are required to have on all computers. *Id.*; *but see* Gardner, *supra* n. 99, at 150–151 (reporting that principals in Florida were still confused regarding when they were permitted to punish off-campus cyberbullying incidents and suggesting that Jeff's Law be amended to require the FDOE to provide guidelines to help educators determine when off-campus cyberbullying incidents are within their jurisdiction).

161. *See* Gardner, *supra* n. 99, at 150–151 (noting that school principals need continuing education so they can understand when they are allowed to intervene).

162. *See* Brenner & Rehberg, *supra* n. 27, at 83 (explaining that cyberbullying generally occurs among an immature population with “rough edges”).

163. *Id.* at 83–84.

164. Erb, *supra* n. 99, at 282. Schools are better equipped to dole out punishments for cyberbullying because they are more involved in the students' daily lives than law enforcement and in some cases, even parents. *Id.*

ated. Schools are also equipped with personnel, such as guidance counselors,¹⁶⁵ who can address the psychological issues facing both the cyberbully and the victim, which goes a long way in preventing cyberbullying and mitigating its effects.¹⁶⁶

Arguably, granting schools more authority to punish off-campus instances of cyberbullying would place a greater burden on schools, which already seem to be struggling for resources.¹⁶⁷ The Florida Legislature, under Jeff's Law, has already placed the onus on schools to regulate cyberbullying that occurs on school grounds or through school computers and networks.¹⁶⁸ Expanding school authority to punish cyberbullying incidents that occur off-campus would only slightly increase the burden that laws have already placed on schools.¹⁶⁹ Moreover, the Legislature could limit the schools' responsibility to monitor and punish every reported incident of cyberbullying by creating guidelines that would require schools to limit themselves to investigating and punishing cyberbullying incidents that create a "hostile educational environment for one or more students."¹⁷⁰ These guidelines would permit schools to punish and prevent more cyberbullying behavior than currently permitted under Jeff's Law, while at the same time limiting the burden the law would place on schools. Guidelines would also provide schools with clear boundaries that would alleviate the schools' confusion regarding what speech they are

165. See Fla. Sen. 1654 (Jan. 6, 2011) (available at <http://www.flsenate.gov/Session/Bill/2012/1654>) (requiring that each school district have a specified number of certified counselors per a specified number of students and that these guidance counselors provide counseling to students and work with teachers, parents, and administrators to develop programs for students).

166. See Terry Diamanduros, Elizabeth Downs & Stephen J. Jenkins, *The Role of School Psychologists in the Assessment, Prevention, and Intervention of Cyberbullying*, 45 *Psychol. in the Schs.* 693, 694–703 (2008) (describing the important role school guidance counselors play in preventing and mitigating the effects of cyberbullying on both the victim and perpetrator).

167. See Amy Hetzner, *Education Department to Help Schools Manage Limited Resources*, <http://www.jsonline.com/blogs/news/117010128.html> (Feb. 27, 2011) (explaining that schools in states across the U.S. are trying to find ways to cope with deficits in school funding).

168. Fla. Stat. § 1006.147(2)(c).

169. If, as some have advocated, the statute already places the burden to punish off-campus cyberbullying incidents on schools, then such an argument would be greatly weakened.

170. Barnett, *supra* n. 52, at 611.

permitted to punish¹⁷¹ and would also prevent infringement of students' First Amendment right to free speech.¹⁷²

Critics of expanding school jurisdiction to reach off-campus regulation of cyberbullying argue that such an action would have a chilling effect on student speech protected under the First Amendment.¹⁷³ First Amendment protection of student speech extends to political or academic speech, such as the political speech involved in the Supreme Court decision in *Tinker v. Des Moines Independent Community School District*.¹⁷⁴ However, not all student speech is protected under the First Amendment; the First Amendment does not protect speech that intrudes upon the school's interest in pursuing an educational environment conducive to learning, or intrudes upon the other students' rights.¹⁷⁵ Furthermore, the Supreme Court specifically found that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."¹⁷⁶

171. See Nancy Willard, *Cyberbullying Legislation and School Policies: Where Are the Boundaries of the "Schoolhouse Gate" in the New Virtual World?* 2, <http://www.cyberbully.org/cyberbully/docs/cblegislation.pdf> (Mar. 2007) (explaining that punishment of off-campus student speech "raises questions about the ability and responsibility of school officials to address this concern, as well as issues related to the free speech rights of students").

172. Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 Neb. L. Rev. 630, 673 (2009) (arguing that First Amendment rights are not absolute and that school authorities should have jurisdiction to punish cyberbullying that "disrupts the school environment or has a reasonable probability of doing so").

173. See Murrhee, *supra* n. 24, at 322-323 (arguing that Florida's anti-bullying law gives schools too much jurisdiction over off-campus speech, which makes it likely unconstitutional); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027, 1089 (2008) (arguing that to allow schools to punish off-campus speech would give them too much authority and would censor "youth expression"); Matthew C. Ruedy, Student Author, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?* 9 N.C. J.L. & Tech. 323, 343 (2008) (warning that legislatures should use caution when drafting anti-cyberbullying laws because of the potential for a chilling effect on students' right to free speech).

174. 393 U.S. 503 (1969). The students sued the school for violating their First Amendment rights when the school suspended them for wearing black armbands in protest of the Vietnam War. *Id.* at 504. The Supreme Court held that the school could not punish students for merely political speech, but schools could punish student speech that disrupts the school environment. *Id.* at 512-513.

175. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-686 (1986).

176. *Id.* at 682.

Cyberbullying is speech that “threatens, demeans, [or] harasses”¹⁷⁷ and does not fall within a protected category of student speech. Additionally, such speech interferes with schools’ ability to create an environment conducive to education, and following the Supreme Court’s note in *Bethel School District v. Fraser*,¹⁷⁸ such student speech does not merit the same protection as other kinds of speech. While cyberbullying speech is not considered protected student speech, schools need to be cognizant that legislation granting authority to punish off-campus cyberbullying incidents does not give schools carte blanche authority to infringe students’ right to free speech.¹⁷⁹

At the beginning of 2011, a Florida senator introduced a bill in the Florida Senate to augment Jeff’s Law and clarify school authority to punish off-campus cyberbullying.¹⁸⁰ Among other minor changes, such as adding emotional hurt to the list of indicators that a child is being bullied, the Bill proposed adding a provision stating that a school may punish acts of cyberbullying that occur through electronic means “within the scope of [an] . . . educational institution.”¹⁸¹ The Bill defines the scope of an educational institution as “any computer, computer system, or computer network that is physically located on school property [regardless of ownership].”¹⁸² Moreover, the Bill suggests that Jeff’s Law should be amended to state, “[a]ny complaint of a computer-related incident must be investigated by a school district official using a computer on which web-filtering software is not installed.”¹⁸³ The Senator added this provision to address schools’ concerns that they were unable to investigate cyberbullying behavior that may occur off-campus because the web-filtering software required on most school computers blocks access to web-

177. Barnett, *supra* n. 52, at 611.

178. 478 U.S. at 682.

179. For a more in-depth discussion of the First Amendment issues as they relate to punishing acts of cyberbullying that occur away from school-grounds, see Douglas E. Abrams, *Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates*, 37 *New Eng. J. on Crim. & Civ. Confinement* 181 (2011).

180. Fla. Sen. 448 (Jan. 13, 2011) (available at <http://www.flsenate.gov/Session/Bill/2011/0448/BillText/Filed/PDF448>).

181. *Id.* at 2 (emphasis removed).

182. *Id.* at 3.

183. *Id.* at 5.

sites containing cyberbullying communications, such as the social-networking websites Facebook or MySpace.¹⁸⁴

These suggested provisions, while providing schools with more guidance on punishing off-campus cyberbullying, fall short of addressing all of the questions school districts have grappled with in attempting to punish cyberbullying. For example, can a teacher confiscate or examine a student's cell phone to investigate whether the student sent demeaning text messages to another student who reported the activity at school?

Because these suggested changes were inadequate, the Bill was not adopted.¹⁸⁵ The Bill should be reevaluated and revised to provide schools with clear guidelines that would help them establish when an off-campus cyberbullying incident falls within their purview.¹⁸⁶ Clearer guidelines would alleviate the hesitations schools have to punish off-campus cyberbullying incidents and would decrease the number of cyberbullying incidents that go unpunished. As written, the proposed changes to Jeff's Law fail to provide enough guidance to schools trying to alleviate cyberbullying behavior.

Additionally, the Bill should be amended to provide a mechanism for ensuring that schools are implementing the anti-bullying policies mandated under Jeff's Law. Jeff's Law has been successful in motivating schools to adopt anti-bullying policies,¹⁸⁷ but anecdotal evidence strongly suggests schools are not actually implementing the anti-bullying policies, especially when it comes to cyberbullying.¹⁸⁸ Essentially, it has become clear after the enactment of Jeff's Law that enforcement of the anti-bullying policies is a major issue with the statute and is the primary reason it is not functioning to its full potential.¹⁸⁹ Under Jeff's Law, school districts are required to provide data to the DOE regarding inci-

184. Telephone Interview, *supra* n. 23; *see also* 47 C.F.R. § 54.520(c) (2010) (requiring technology protection measures, such as Internet filters, on school computers as a prerequisite for receiving certain federal funds and discounts).

185. In May 2011, the Bill died in the Committee on Education Pre-K–12. Fla. Sen., *SR 448: Bullying of School Children*, <http://www.flsenate.gov/Session/Bill/2011/448> (July 1, 2011).

186. *See* Gardner, *supra* n. 99, at 150–151 (arguing that more guidelines and continuing education should be provided to schools so school administrators know when they can intervene in cyberbullying incidents).

187. Telephone Interview, *supra* n. 23.

188. *Id.*

189. *Id.*

dents of bullying and cyberbullying and the steps taken after reporting the incident.¹⁹⁰ However, the schools are not required to submit reports regarding the implementation of the anti-bullying policy, and there is no requirement in the statute mandating that school districts periodically review and update their policies.¹⁹¹

To enforce Jeff's Law better and ensure that the anti-bullying policies established by each district are being implemented, Jeff's Law should be amended to create a committee under the DOE that is responsible for ensuring the statute is being enforced. The committee's purpose would be to investigate whether each school district is enforcing its anti-bullying policy. The committee could accomplish this task by auditing each school district to determine whether the district is utilizing its anti-bullying policy and investigating reasonable complaints by parents, teachers, and other community members. Considering that Florida has sixty-seven counties,¹⁹² with as many school districts,¹⁹³ containing hundreds of schools, this could be an onerous task for such a committee. To balance the workload placed on the committee, it should randomly select schools from each district at each educational level to audit once per year.¹⁹⁴ This process would have the effect of better enforcing Jeff's Law, while balancing the size of the task required for such enforcement. The same provision of Jeff's Law that creates the committee should also give it the ability to sanction or penalize school districts that are not implementing their anti-bullying policies. Finally, the committee would be responsible for suggesting changes to each district's anti-bullying policy if it finds that the policy is not effective as written.

The greatest challenge faced in establishing this committee would be the cost of funding it.¹⁹⁵ The cost could be reduced, however, by assigning the committee responsibilities to current members of the DOE. These committee members would be

190. Fla. Stat. § 1006.147(4)(k).

191. *Id.* at § 1006.147 (failing to include provisions that require schools to review, update, or submit reports regarding the implementation of their anti-bullying policies).

192. U.S. Census Bureau, *Florida County Selection Map*, http://quickfacts.census.gov/qfd/maps/florida_map.html (accessed Mar. 3, 2012).

193. Florida Dept. of Educ., *Public Schools/Districts*, http://www.fldoe.org/schools/schoolmap/flash/schoolmap_text.asp (accessed Mar. 3, 2012).

194. The committee would be responsible for selecting the method through which the committee or other group of people will randomly select the schools.

195. Telephone Interview, *supra* n. 23.

responsible for performing committee duties in addition to their other duties in the DOE. Even with these reductions, establishing this committee would not be completely cost-free. The committee would need resources to perform the work that the law would require, and depending on the size of the workload created by the establishment of this committee, there may be a need to hire assistants or other personnel to accomplish the required objectives. These costs may be partially covered by the fines levied against districts not in compliance, but this may be an issue if schools are in compliance and no fines need to be charged. Thus, to ensure that the committee is able to function, the DOE should set aside a portion of its budget to fund the committee.

While this committee will be an extra cost to the DOE, any viable solution to implement Jeff's Law successfully would require some kind of monetary output. If the Florida Legislature is committed to reducing the prevalence of cyberbullying, it should be willing to back that commitment with the State's wallet. Moreover, such measures would not only reduce the prevalence of cyberbullying but may also have the effect of reducing bullying and violence in schools in general.

While these suggested amendments to Jeff's Law would decrease the casualties in the war against cyberbullying, cyberbullying is primarily a social problem, which must be addressed at its root. These types of social problems are best solved through educational initiatives.

B. A Community Approach: Education-Based Initiatives and Parental Awareness Are Needed to Combat Cyberbullying

In addition to amending Jeff's Law to ensure that schools are enforcing anti-bullying policies, the schools should develop educational programs dedicated to warning students and parents about the dangers of cyberbullying, to both a victim and perpetrator.¹⁹⁶ Educational programs can help children, especially young, impressionable children, develop online etiquette skills that will

196. See Berin Szoka & Adam Thierer, *Cyberbullying Legislation: Why Education Is Preferable to Regulation*, 16 *Progress on Point* 1, 17–18 (June 2009) (available at <http://www.pff.org/issues-pubs/pops/2009/pop16.12-cyberbullying-education-better-than-regulation.pdf>) (discussing the benefits of an education-based approach to cyberbullying).

prevent them from engaging in cyberbullying.¹⁹⁷ Implementing such programs can be practically costless to schools because there are a myriad of free online resources that schools can utilize to find materials to create educational programs.¹⁹⁸ Schools can also set aside a portion of their allotment of the Safe Schools Funds to purchase the resources needed to create an educational program on cyberbullying.

These educational programs should be able to relate and appeal to technologically savvy adolescents. Schools can use Facebook groups, blogs, or Twitter accounts to encourage healthy dialogue among students, facilitated and monitored by educators, that will make children feel involved in the educational process and can promote awareness of cyberbullying.¹⁹⁹ Additionally, the DOE could create a statewide advertising campaign that can be played in schools and on television to reach children on a more relatable level. “[R]esearch . . . has shown that media campaigns coupled with other kinds of interventions are the most successful” and that advertising campaigns designed to relate to adolescents can encourage proper behavior.²⁰⁰ The DOE can also turn to online resources for materials to create this advertising campaign. For example, the website YouTube provides videos created to encourage children to behave appropriately online and to warn them about the dangers of cyberbullying.²⁰¹ But educating chil-

197. Alison Virginia King, Student Author, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 Vand. L. Rev. 845, 880 (2010). One study conducted at a school in Virginia found that students who participated in an educational program about Internet safety were able to improve responses to a cyberbullying questionnaire. *Id.* at 881–882; see also *Bethel Sch. Dist.*, 478 U.S. at 681 (realizing the need for schools to teach children the proper behavior for interacting with others).

198. Dr. Hinduja and Dr. Patchin provide resources for schools and educators on their website. Cyberbullying Research Center, *Resources*, <http://www.cyberbullying.us/resources.php> (accessed Mar. 3, 2012); see also i-SAFE, *Educators*, <http://www.isafe.org/educators> (accessed Mar. 3, 2012) (providing educators with a curriculum to create a program for students about cyberbullying).

199. See *Stop Cyberbullying*, <https://www.facebook.com/stopcyberbullying> (accessed Mar. 8, 2012) (demonstrating a Facebook community page that is dedicated to discouraging cyberbullying on Facebook and to reporting individuals who participate in cyberbullying).

200. Philip Palmgreen et al., *Television Campaigns and Adolescent Marijuana Use: Tests of Sensation Seeking Targeting*, 91 Am. J. Pub. Health 292, 295 (2001) (available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446528/pdf/11211642.pdf>) (finding that public service announcements had the positive effect of reducing marijuana use among adolescents and could be used to prevent other adolescent social problems).

201. See Josh Gunderson, YouTube, *Josh Gunderson Presents: Cyber Bullying PSA*

dren and creating awareness in schools about cyberbullying will only go so far in preventing this problem; learning appropriate online etiquette skills cannot end when children leave school. Parental involvement and parental awareness of this problem must reinforce the lessons children are learning in schools.

Schools and parents need to work together to prevent and respond to cyberbullying. Schools play an important role in educating students and punishing cyberbullying behavior, but parents need to be aware of the problem and take a greater interest in supervising their children's online activities and fostering online etiquette. Parents should discuss appropriate online behavior with their children and determine what technological devices their children are mature enough to use and the level of supervision appropriate for that maturity level.²⁰² If necessary, parents should establish safeguards that would help prevent their children from becoming victims or perpetrators of cyberbullying. These safeguards may include prohibiting children from using the computer in a private space, using passwords to protect the computer, and limiting the time that their children can spend on the Internet.²⁰³ Parents can also utilize parental-control software and online security controls to monitor and restrict their child's online activities.²⁰⁴ Some cell phone companies offer similar features to monitor or restrict cell phone use, and some types of cell phones allow parents to download applications (commonly referred to as "apps"), that can restrict the child's use of the cell phone.²⁰⁵ Additionally, parents should require proper online behavior from their

(GUNDERSONproductions posted Apr. 19, 2010) (available at <http://www.youtube.com/watch?v=KhYNkQYed14>) (providing real examples of children who have become victims of cyberbullying); see also MTV Networks, *A Thin Line*, <http://www.athinline.org/> (accessed Mar. 3, 2012) (promoting MTV's anti-cyberbullying campaign, which features popular celebrities, such as Justin Bieber, that appeal to adolescents).

202. Margaret Hannah, *Cyberbullying Education for Parents: A Guide for Clinicians*, 6 J. Soc. Scis. 532, 533 (2010).

203. Mason, *supra* n. 65, at 330 (noting that "parents checking up on their children or surfing the Internet with them, having the computer out in the open, and the use of effective filtering software can all help reduce inappropriate online behaviors").

204. Some commentators argue such controls are inefficient because children can usually discover how to override these protections. Strom & Strom, *supra* n. 47, at 93. However, if parents educate themselves regarding the use of parental-controls and other web-filtering software, these protections can still be used effectively.

205. See Paul O'Reilly, *Parental Controls for Cell Phones*, <http://www.theonlinemom.com/secondary.asp?id=635> (accessed Mar. 3, 2012) (highlighting the various parental controls available for cell phones).

children and emphasize the consequences, such as a loss of privileges, if the child does not follow the proper behaviors.²⁰⁶ Parents should also attempt to become familiar with the Internet and other technological devices in order to understand the unique problems associated with cyberbullying better and to be able to address cyberbullying issues when they arise.

As part of the team approach, the school may need to step in and provide parents with education regarding cyberbullying. In some instances, parents may not understand what cyberbullying is or even realize it is a problem. Schools can provide parents with the appropriate education in many different ways, including sending pamphlets or newsletters home with the students, creating a website parents can visit for cyberbullying information, or holding educational seminars on cyberbullying for parents.²⁰⁷

While such parental awareness and supervision would be ideal and would significantly reduce cyberbullying, it would be naïve to imagine that all parents will play an active role in their child's online behavior.²⁰⁸ The State cannot require that parents take a more active role in communicating with their children about proper online behavior;²⁰⁹ therefore, the State must still look to schools to play a significant role in educating students about cyberbullying and punishing cyberbullying behavior.

C. The Communications Decency Act Should Be Amended to Provide for ISP Liability

Florida can only go so far in providing a civil remedy to those who have been harmed by cyberbullying because victims do not have the option to bring a civil suit against an ISP for failing to remove cyberbullying speech. The Communications Decency Act (CDA) was originally enacted to regulate pornographic material

206. Hannah, *supra* n. 202, at 534. Parents should create an open dialogue with their children regarding online issues so children will feel comfortable approaching their parents with these issues should they arise. Strom & Strom, *supra* n. 47, at 93.

207. Mason, *supra* n. 65, at 342.

208. *See id.* at 330, 341–342 (explaining that studies have shown that parental involvement in children's online behavior is low, and some parents are not going to be responsive to schools' efforts to increase parental involvement in monitoring children's online behavior).

209. *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (“It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

found on the Internet²¹⁰ but it provided that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²¹¹ The Fourth Circuit in *Zeran v. America Online, Inc.*,²¹² the leading case interpreting Section 230(c)(1) of the CDA, found that the section provided ISPs with immunity from civil liability for information posted on websites by users,²¹³ and the Florida Supreme Court found the reasoning of *Zeran* persuasive.²¹⁴ The Florida Supreme Court also held that Section 230(c)(1) of the CDA preempts Florida law.²¹⁵

Professor Bradley Areheart suggests that by slightly modifying Section 230(c)(1) of the CDA, cyberbullying victims will be granted a remedy that they could pursue against ISPs for failing to remove tortious cyberbullying content.²¹⁶ In this regard, ISPs would be subject to liability for cyberbullying material posted on websites they regulate if they are provided with notice of the material and fail to remove it.²¹⁷ This limited liability would serve two functions: (1) it would give cyberbullying victims a remedy to pursue, especially when the perpetrator is unknown; and (2) it would not place a burden on ISPs to monitor all speech posted because the take-down responsibility would only be triggered when there is notice.²¹⁸ Additionally, if ISPs were exposed to potential liability for this speech, it may encourage them to provide educational materials to their users and discourage users

210. Areheart, *supra* n. 137, at 42.

211. 47 U.S.C. § 230(c)(1).

212. 129 F.3d 327 (4th Cir. 1997).

213. *Id.* at 330. In *Zeran*, the court held that Section 230(c)(1) of the CDA provided absolute immunity to ISPs under any cause of action that would hold ISPs liable in the same way that a publisher is liable for the publication of third-party statements. *Id.*; see also Cara J. Ottenweller, Student Author, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 Val. U. L. Rev. 1285, 1310–1325, 1326–1329 (2007) (arguing that the majority’s opinion in *Zeran* was a misinterpretation of the CDA and suggesting that the CDA be amended to clarify its purpose).

214. *Am. Online*, 738 So. 2d at 1013–1015.

215. *Id.* at 1015–1018.

216. Areheart, *supra* n. 137, at 42.

217. *Id.* at 43–44. This amendment would be similar to the notice and take down provision of the Digital Millennium Copyright Act (DCMA), 17 U.S.C. § 512 (2006), which provides immunity to ISPs that take down material that would be considered a copyright infringement. *Id.*

218. *Id.* at 45.

from posting cyberbullying content, which may aid in preventing cyberbullying.²¹⁹

While this proposed amendment to the CDA would provide cyberbullying victims with another civil remedy to pursue, it would still pose problems similar to the problems presented by the other civil remedies discussed above in Part III. Such litigation would be time consuming and very costly, and ISPs are more likely to have greater resources than cyberbullying victims. Also, it may be difficult for ISPs to determine whether the communication rises to a tortious level and requires removal.²²⁰ Therefore, this solution alone would not be adequate to address cyberbullying but would be one more weapon that lawmakers could use in the war against cyberbullying.

V. CONCLUSION

While the growth of technology and the Internet has contributed greatly to society, the evolution of these advancements has also created a host of problems, including facilitating cyberbullying. Cyberbullying is a serious problem affecting Florida's youth, and its nebulous nature poses a unique challenge for parents, educators, and lawmakers. Today's adolescents are entrenched in the use of technology and the Internet, both of which have transformed traditional schoolyard bullying, a troubling issue in itself, into a more sinister and cruel problem. Currently, Florida has some solutions in place that attempt to curb cyberbullying and provide cyberbullying victims with a remedy for the harm they have suffered, but these solutions are not sufficient and are inadequate measures to prevent cyberbullying. This Article proposes that the Florida Legislature amend Jeff's Law to grant schools greater authority to punish off-campus cyberbullying incidents and that the law be amended to establish a mechanism for ensuring that school districts are implementing anti-bullying policies. Moreover, this Article suggests that parents should play a greater role in communicating with their children about proper

219. *See id.* at 47 (explaining that imposing "vicarious liability" on ISPs incentivizes them to devise solutions to limit liability).

220. *See King, supra* n. 197, at 878 (suggesting that a government agency, such as the Federal Communications Commission, could facilitate the problem of determining the type of content that ISPs should remove by developing advisory guidelines to assist ISPs).

online behavior and that they more closely monitor their children's use of technological devices and the Internet. Additionally, to provide cyberbullying victims with more adequate remedies, this Article suggests that Congress should amend the Communications Decency Act to permit limited liability for ISPs that are given notice of tortious, cyberbullying content and fail to remove that content. These solutions will not completely alleviate the problem of cyberbullying in Florida, but they represent a step in the right direction to reduce cyberbullying and protect Florida's youth from this evolving and challenging new problem.