

2014

Cyberbullying and the 1st Amendment: The Need for Supreme Court Guidance in the Digital Age

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Recommended Citation

Gavin, Bryan R., "Cyberbullying and the 1st Amendment: The Need for Supreme Court Guidance in the Digital Age" (2014). *Law School Student Scholarship*. 615.
https://scholarship.shu.edu/student_scholarship/615

Introduction

“Why are you still alive?” “You’re ugly” “Can u die please?”—Text message received by 12-year-old Rebecca Sedwick from her classmate before jumping from a tower at an abandoned cement factory near her home.

Since *Tinker v. Des Moines Independent Community School District*, courts and administrators have struggled to strike the appropriate balance between public school students’ First Amendment rights and schools’ interests in education, order, and discipline.¹ The advent of electronic communication, such as instant messaging, text messaging, MySpace, Facebook, blogs, YouTube, and Twitter has only confounded this confusion, adding another dimension to student speech – cruel speech that occurs outside school hours and off-campus. Schools now need an answer to questions that rarely surfaced in the past; under what circumstances can schools punish students for cruel off-campus speech?²

Electronic communication has given rise to cyberbullying, a new way students can bully, harass, taunt, and slander each other. Cyberbullying is willful and repeated harm from one student to another inflicted through the use of computers, cell phones, and

¹Recent Case, *First Amendment- Student Speech- Third Circuit Applies Tinker to Off-Campus Student Speech*, 125 Harv. L. Rev. 1064 (2011).

² Emily Bazelon, *Stick and Stones, Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy* 274 (Andy Ward, 2013)

other electronic devices.³ The ubiquitous nature of cyberbullying leaves the victim incapable of escaping the torment and ridicule at the end of the school day. The increase in school violence and highly publicized student suicides have brought cyberbullying to the forefront, leaving legislatures and school officials searching for ways to enact tougher laws and impose stricter disciplinary measures and policies to prevent and remedy cyberbullying.⁴

The divergent opinions in lower courts have left many school administrators unable to confidently discipline cyberbullying because administrators are forced to conduct a delicate balancing test between students' constitutional rights and the administrators' power to police off-campus student-on-student harassment. Courts must not allow cyberbullies to hide behind the cloak of the First Amendment and must give schools deference to curb the harmful effects of cyberbullying.

The Realities of Cyberbullying

Boys will be boys. Just Walk Away. Ignore It. Sticks and stones may break my bones but words will never hurt me. This basic stance remained largely unchanged in America for the next hundred years: bullying was an inexorable part of life, a force of nature, and the best thing to do was to shrug it off. And then on April 20, 1999, that bedrock principle of child rearing collapsed in this country. That morning... two [students] walked into Columbine High School and opened fire on their classmates.⁵

In the wake of Columbine, American schools made a concerted effort to curb bullying through instituting prevention programs with weekly announcements,

³ Hilary Schronce Blackwood, *Regulating Student Cyberbullying*, 40 Rutgers L. Rec. 153, 169 (2013).

⁴ Scott Farbish, *Sending the Principal to the Warden's Office: Holding School Officials Criminally Liable for Failing to Report Cyberbullying*, 18 Cardozo J.L. & Gender 109, 110 (2011).

⁵ Bazelon, *supra* note 2, at 8.

assemblies, and posters in hallways.⁶ Despite this initial “burst of energy,” the anti-bullying sentiment failed to blossom into a national campaign.⁷

However, the introduction of social networking has catapulted bullying into the conscience of our nation. With constant connectivity of cell phones and laptops, bullying for some students has become “inescapable.”⁸ It used to be a parent could be relatively assured that their kids were safe in their room, but that's no longer the case.⁹

America has witnessed the rise of the cyberbully. Cyberbullying is defined as the “willful and repeated harm inflicted through the medium of electronic text.”¹⁰

Cyberbullying differs from traditional bullying in several ways.

Cyberbullying has no distinct boundaries and can reach a victim anytime and anywhere.¹¹ Electronic devices are lifelines to everything, because of this, most cyberbullying is not reported, because students do not want to risk their parents confiscating their cellphones or shutting down their Facebook and Twitter accounts.¹² As a result, a cyberbullying victim may experience more damaging effects than a traditional

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 9.

⁹ Kevin P. Connolly, Rebecca Sedwick’s Mom Hires Morgan & Morgan in Cyber bullying-Suicide Case, Orlando Sentinel (October 22, 2013), http://articles.orlandosentinel.com/2013-10-22/news/os-rebecca-sedwick-mom-hires-morgan-20131022_1_12-year-old-lakeland-girl-rebecca-ann-sedwick-tricia-norman

¹⁰ Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 Seton Hall Legis. J. 651, 652 (2009).

¹¹ Shaheen Shariff, Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace, 1 International Journal of Cyber Criminology (January 2007).

¹² Daniel B. Wood, Cyberbullying: Should schools police students' social media accounts?, The Christian Science Monitor (September 17, 2013), [http://www.csmonitor.com/USA/Education/2013/0917/Cyberbullying-Should-schools-police-students-social-media-accounts-video/\(page\)/2](http://www.csmonitor.com/USA/Education/2013/0917/Cyberbullying-Should-schools-police-students-social-media-accounts-video/(page)/2)

bullying victim because home is no longer a sanctuary to escape the torment. Much of the cruelty of traditional bullying was in the form of the spoken word-“there and then gone, ephemeral and untraceable.”¹³ On the other hand, on social networking sites and in text messages, the cruel messages are on display via printouts and screen shots.¹⁴ This makes bullying “more lasting, more visible, more viral.”¹⁵

The omnipresent nature of cyberbullying has compounded the consequences. No longer is the audience limited to the playground, it is any of hundreds or even thousands of Facebook friends or Twitter followers.¹⁶ This instantaneous dissemination can do considerable harm to a student's psyche and self-esteem. Further, deleting the harassing messages, texts, and pictures is extremely difficult after they have been posted or sent. Additionally, the Internet has emboldened bullies by allowing them to hide behind a computer screen. Bullies are no longer forced to view the pain he or she has caused the victim.

An U.S. Department of Education report found that about 19% of middle school administrators reported that they had to deal with cyberbullying daily or at least once per week.¹⁷ Research indicates approximately 20 percent of the youth ages 10-18 in a sample of 4441 reported experiencing cyberbullying.¹⁸

¹³ Bazelon, *supra* note 2, at 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.S. Department of Education, *Crime, Violence, Discipline, and Safety in U.S. Public Schools* at 12 (May 2011), <http://nces.ed.gov/pubs2011/2011320.pdf>. See also Michelle Davis, *Schools Tackle Legal Twists and Turns of Cyberbullying*, Education Week, Feb. 4, 2011, <http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html>; Nirvi Shah, *Anonymous Bullying on Social Networking Seeps Into Schools; Educators say*

The current split in the courts addressing off-campus student speech impedes school administrators from disciplining student's online speech, thus significantly undermining their authority.¹⁹ It seems inconsistent that school administrators may discipline students for minor infractions such as tardiness, but may be prevented from disciplining off-campus cyberbullying that inflicts severe emotional trauma, or even contributes to the suicide of their victim.²⁰ To prevent these serious consequences, school administrators have to make decisions quickly.²¹ However, without guidance from the courts, a wrong decision to discipline a student may infringe upon First Amendment rights and lead to a highly publicized lawsuit and loss of administrator's professional credibility.²²

Asher Brown, Billy Lucas, Ryan Halligan, Megan Meier, Phoebe Prince, Seth Walsh, Tyler Clementi, and most recently in October of 2013, Rebecca Sedwick. The all-too-soon ending of these lives was at least in part caused by cyberbullying. Many state legislatures have realized the compelling dangers of cyberbullying and have enacted laws requiring school districts to adopt anti-cyberbullying measures. These required policies allow schools to combat and respond to cyberbullying. Courts must not

Formspring has Become a Battlefield in Cyberbullying Wars, Education Week, March 30, 2011, at 12. Donna St. George & Daniel deVise, *Slur-Filled Web Site Harmful but Not Illegal; Some Call Teen Forum "Toxic" Free Speech*, Washington Post, May 17, 2009, at C01, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/16/AR2009051602191.html?sid=ST2009051700575>.

¹⁸ Sameer Hinduja and Justin W. Patchin, *Cyberbullying Victimization* (2010), <http://www.cyberbullying.us/research.php>.

¹⁹ Amici Curiae Brief of Nat'l Sch. Bds. Ass'n, et al. in Support of Petitioners at 13, *Blue Mountain Sch. Dist. v. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502), 2011 WL 5254664; *see also* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 942 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 14.

invalidate these measures as conflicting with the First Amendment as courts should “rarely intervene in the resolution of conflicts that arise in the daily operation of school systems.”²³ More importantly, the education of the nation’s youth is the responsibility of parents, teachers, and school officials, not federal judges.²⁴

Both schools and the law are capable of distinguishing between off-campus speech that must be protected under the First Amendment and cyberbullying that is so severe, persistent, and pervasive that it substantially interferes with a student’s educational opportunities. Thus, courts must defer to the school’s basic educational mission and responsibility to teach students the boundaries of socially appropriate behavior.

Supreme Court Student Speech Cases

In the seminal Supreme Court case, *Tinker*, the school authorities ban preventing students from wearing armbands was deemed unconstitutional because it was an arbitrary restriction on a student’s right to freedom of expression.²⁵ Specifically, the high school principal became aware of students’ plan to wear black armbands on their sleeves to show disapproval of the Vietnam War.²⁶ Shortly thereafter, the school adopted a policy that any student wearing an armband in school would be told to remove it.²⁷ If the student refused, he or she would be suspended.²⁸ Two days after the policy was adopted,

²³ J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915(3d Cir. 2011) (en banc), 132 S. Ct. 1097 (2012).

²⁴ *Id.*

²⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁶ *Id.*

²⁷ *Id.* at 504.

²⁸ *Id.*

three students wore black armbands to school and refused to remove them.²⁹ As a result, the students were suspended.³⁰ In holding that the administrator's actions were unconstitutional, the Court reasoned that the students' speech was not marked by "aggressive, disruptive action."³¹ In contrast, the speech was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" ³² The Court reasoned that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and that student speech may not be restricted unless it is reasonably foreseeable that this speech could cause a material and substantial disruption at school.³³

Since *Tinker*, the Supreme Court has further limited student speech in the school environment. See, e.g., *Fraser*, *Hazelwood Sch. Dist. v. Kuhlmeier*; *Morse v. Frederick*, *infra*.

For example, *Fraser* allows schools to punish student speech that is lewd, vulgar, and plainly offensive.³⁴ In *Fraser* a high school student delivered a speech nominating a peer for student government in which he used an "elaborate, graphic, and explicit sexual metaphor."³⁵ The Court explained that the constitutional rights of students in schools are not "coextensive" with those of adults elsewhere.³⁶ It concluded by

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 508.

³² *Id.*

³³ *Id.*

³⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

³⁵ *Id.* at 678.

³⁶ *Id.*

holding that the First Amendment does not prevent school officials from restricting vulgar and lewd speech in school that would undermine a school's educational mission.³⁷

Two years following *Fraser*, the Court held in *Hazelwood* that school-sponsored speech can be restricted when it is reasonably related to a legitimate pedagogical concern.³⁸ In *Hazelwood*, a school newspaper was primarily funded by the school board and the principal thought two stories should not be published--one detailed the experiences of three students who were pregnant, and one was about being a child of divorced parents and contained personal quotes from students.³⁹ The principal informed the editor that either the school would print the issue without the pages on which the stories appeared or there would be no issue at all.⁴⁰ The Court held that educators do not violate the First Amendment by exercising editorial control over school-sponsored speech so long as the editing is reasonably related to pedagogical concerns.⁴¹

Most recently, the Court held that schools may discipline student speech that occurred at an off-campus school-sanctioned event.⁴² In *Morse* a high school student arrived at a school-sponsored event to watch the Olympic torch parade and displayed a large banner that read, "BONG HiTS 4 JESUS."⁴³ The principal instructed the student to take it down, but Frederick refused.⁴⁴ The principal suspended him for ten days for advocating drug use.⁴⁵ The Court held that the principal did not violate the First

³⁷ *Id.* at 675.

³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

³⁹ *Id.* at 270.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Morse v. Frederick*, 551 U.S. 393 (2007).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 394.

Amendment by restricting speech that is reasonably viewed as promoting illegal drug use.⁴⁶

These cases establish that a student's constitutional right to freedom of expression will give way to the school's interests in education, order, and discipline if the expression is substantially disruptive, plainly offensive, perceived to be school sponsored expression, or advocates illegal drug use.⁴⁷

The Supreme Court only addresses student speech that occurs within the school environment, and has not directly addressed the question of what protections the Constitution affords student speech that is generated from a student's home computer or cell phone while off-campus. Thus, the question remains; under what circumstances can schools punish students for cyberbullying?

Student Cyberspeech Cases⁴⁸

In 2010, a California District Court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, heard a case where the student speech originated off campus.⁴⁹ A student videotaped an off-campus conversation between classmates who made derogatory comments about another classmate, calling her “spoiled,” a “slut,” and the “ugliest piece of sh—I’ve ever seen in my whole life.”⁵⁰ From her home, the student posted the video

⁴⁶ *Id.*

⁴⁷ Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in A Sticky Situation?*, 81 Fordham L. Rev. 2729, 2750 (2013).

⁴⁸ There are two types of student speech cases: student speech directed towards other students and student speech directed towards teachers and administrators. For the purposes of this paper, the focus will be student speech directed at other students.

⁴⁹ *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C. D. Cal. 2010).

⁵⁰ *Id.* at 1098.

on YouTube.⁵¹ It received approximately 90 hits that night.⁵² The student about whom the video was made was very distraught and she and her mother contacted school officials.⁵³ The student was suspended for two days and subsequently filed suit against the school, asserting that the school had no authority to discipline her for conduct occurring off-campus.⁵⁴ Applying *Tinker's* substantial disruption exception, the court held that the school administration had authority to discipline students for off-campus speech if such speech caused a substantial disruption at school.⁵⁵ Because the school could not prove the video caused a substantial disruption, the court held that the school violated the student's First Amendment rights by suspending her for posting the video.⁵⁶ The court further posited that it did not wish to see school administrators become censors of students' speech "at all times, in all places, and under all circumstances."⁵⁷

On the other hand, the 4th Circuit in *Kowalski v. Berkeley County Schools* held that a student's abusive language on MySpace.com would disrupt the school's work and discipline because it hindered the school's interest in maintaining order and protecting its students.⁵⁸ In *Kowalski*, a high school student, from her home computer, created a discussion group on MySpace.com entitled "S.A.S.H."⁵⁹ The acronym for "Students Against Shay's Herpes," referred to a classmate named Shay N.⁶⁰ The page included

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1094.

⁵⁵ *Id.* at 1125.

⁵⁶ *Id.* at 712

⁵⁷ *Id.*

⁵⁸ *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011) *cert. denied*, 132 S. Ct. 1095 (2012).

⁵⁹ *Id.* at 567.

⁶⁰ *Id.* at 567.

pictures of Shay, including one in which the student drew red dots on Shay's face and added a sign in front of her pelvis that read, "Warning: Enter at your own risk."⁶¹ The student did not dispute that her speech was inappropriate, but she claimed immunity because the message was posted from home and it was intended to be private.⁶² The principal only learned of the Internet posting because he was provided a printed copy.⁶³ The court reasoned that even though the student created the posting at home and after school hours, it was foreseeable that the speech would reach school and negatively impact the environment.⁶⁴ "Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment."⁶⁵ Moreover, the court held that had the school not intervened, there was a potential for continuing harassment of both Shay N. and other students.⁶⁶ Experience suggested that unpunished misbehavior could have snowballed and resulted in "copycat[s]."⁶⁷ Likewise, the court posited that such conduct and speech must not be tolerated by the educational system because the purpose of schools is to educate students about the "habits and manners of civility."⁶⁸ Thus, the court held that it was reasonably foreseeable that the offensive language used in the student's post would disrupt the

⁶¹ Bazelon, *supra* note 2, at 275.

⁶² *Id.* at 573.

⁶³ *Id.* at 568.

⁶⁴ *Id.* at 571.

⁶⁵ *Id.* at 574.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 573.

school's work and discipline because it hindered the school's interest in maintaining order and protecting the educational rights of its students.⁶⁹

Both *J.C.* and *Kowalski*, while arriving at different conclusions, agree that student's can be punished for off-campus speech. The holding in *J.C.* was a partial victory for First amendment advocates as it limited the scope of the school's authority over off-campus student speech, but did not hold that students cannot be punished for off-campus speech. What remains unclear is to what degree the First Amendment allows school districts to regulate student cyberspeech.⁷⁰ This is a legal gray area as the Supreme Court has only addressed student speech that occurs within the school environment.

Legislative response to Cyberbullying

A number of highly publicized cyberbullying incidents have led to legislation expanding the scope of schools' regulatory authority beyond the schoolyard.⁷¹ Despite the conflict of opinion within the judiciary over the appropriate reach of school authority, several states have enacted aggressive cyberbullying legislation.⁷²

Extend Authority to Off-Campus Cyberbullying

⁶⁹ *Id.* at 572.

⁷⁰ Karla Schultz, *Free to Be Mean? What Are the First Amendment Rights of Bullies?*, August 2011 Practical Perspectives on School Law and Policy August 2011 at 3.

⁷¹ Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 Fordham L. Rev. 2729 (2013).

Available at <http://ir.lawnet.fordham.edu/flr/vol81/iss5/17>

⁷² *Id.* at 2753

Arkansas, California, Connecticut, Florida, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, South Dakota, Tennessee, and Vermont are all examples of states that have anti-cyberbullying statutes that explicitly allow students to be punished for off-campus cyberbullying.⁷³

New Jersey and California are examples of states at the forefront of cyberbullying legislation. Specifically the New Jersey Legislature passed the “Anti-Bullying Bill of Rights Act” which went into effect in the 2011-2012 school year.⁷⁴ The intent behind this legislation was to strengthen the standards and procedures for “preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises.”⁷⁵

N.J. Stat. Ann. § 2c:33-4 is an amendment to the existing law that bolstered existing anti-bullying legislation by addressing bullying occurring through electronic communication.⁷⁶ This amendment allows school officials to punish students for events that occurred off school property as long as there is a connection to school.⁷⁷

Additionally, N.J. Stat. Ann. § c. 18A:37-15.1 was amended to include “Electric communication” in school districts’ harassment and bullying prevention policy.⁷⁸ Notice of this amended policy must appear in any publication of the school district that sets forth

⁷³ Sameer Hinduja, Ph.D., *State Cyberbullying Law: A Brief Review of State Cyberbullying Laws and Policies* (July 2013).

Available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf

⁷⁴ National Conference of State Legislatures, *Cyberbullying and the States* (July 9, 2010). Available at <http://www.ncsl.org/research/civil-and-criminal-justice/cyberbullying-and-the-states.aspx>

⁷⁵ Anti-Bullying Bill of Rights Act, (Supp. P.L.2002, c.83 (C.18A:37-13 et seq.) and chapter 3B of Title 18A of the New Jersey Statutes))

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

the comprehensive rules, procedures and standards of conduct for schools within the school district, and in any student handbook.⁷⁹ This amendment gives school officials the ability to punish students for events that occurred off school property.⁸⁰ There has to be a connection to school for the communication to be evaluated under the authority of school officials.⁸¹

The law defines harassment, intimidation or bullying as:

any gesture, any written, verbal or physical act, or any **electronic communication**, whether it be a single incident or series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic... that takes place on school property, at any school-sponsored function, on a school bus, **or off school grounds** ... that substantially disrupts or interferes with the orderly operation of the school or the rights of other students, and that a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage his property. (emphasis added)⁸²

Further, The Anti-Bullying Bill of Rights provides detailed procedures for timely reporting of incidents of bullying.⁸³ All incidences of harassment, intimidation, or bullying must be reported verbally to the school principal on the same day when the school employee or contracted service provider witnesses or receives reliable information regarding any such incident.⁸⁴ The school employee or service provider must submit a

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² New Jersey Education Association: *Anti-Bullying* (November 12, 2013). Available at <http://www.njea.org/issues-and-political-action/anti-bullying>

⁸³ *Id.*

⁸⁴ *Id.*

written report of the incident to the principal within two days.⁸⁵ The principal is required to inform the parents or guardians of all students involved in the alleged incident and may discuss the availability of counseling and other intervention services.⁸⁶ The principal or principal's designee must initiate an investigation of the incident within one school day of receiving the report and refer the incident to an anti-bullying specialist who conducts the investigation.⁸⁷ The investigation must be completed no later than 10 days after the principal receives the initial written report of the incident.⁸⁸

Upon completion of the investigation, the report is forwarded to the school's superintendent who may provide intervention services, establish training programs, impose discipline, order counseling, or take other appropriate actions.⁸⁹ In addition, the school board must receive the report at its first meeting immediately following the investigation along with information on actions taken to address the incident.⁹⁰ After considering all the information provided, the board must issue a timely written decision affirming, rejecting, or modifying the superintendent's decision.⁹¹ Finally, the board's decision may be appealed to the commissioner of education.⁹²

Most recently, the Governor of California signed AB 256 amending California's pupil discipline law, Education Code section 48900, which details grounds for suspension

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

and expulsion, including bullying.⁹³ The amendment, effective January 1, 2014, leaves the basic definition of bullying unchanged.⁹⁴ Education Code section 48900(r) provides that a pupil engaged in an act of “bullying” could be suspended from school or recommended for expulsion.⁹⁵ Under subsection (r)(1), bullying is defined as “any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act. . . .”⁹⁶ The statute also specifies that, in order to qualify for suspension or expulsion, the bullying must be “directed toward one or more pupils” and it must have or “be reasonably predicted to have” certain effects specified in §48900(r)(1)(A)-(D).⁹⁷

The primary change to the Education Code is to §48900(r)(2)(A), which previously defined an electronic act as the “means of transmission, by means of an electronic device including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication. . . .” As of January 1, 2014, Electronic act will be defined as the “the creation and transmission *originated on or off the schoolsite*, by means of an electronic device, including, but not

⁹³ Penelope Glover, *Does California’s Anti-Bullying Legislation (AB 256) Encourage Schools to Go Too Far in Disciplining for Off-Campus Electronic Acts* (November 25, 2013, 1:00 AM),

<http://www.aalrreducationlaw.com/does-californias-anti-bullying-legislation-ab-256-encourage-schools-to-go-too-far-in-disciplining-for-off-campus-electronic-acts/>

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ §48900(r)(1)(A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property. (B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health. (C) Causing a reasonable pupil to experience substantial interference with his or her academic performance (D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication . . .”⁹⁸

The plain language of amended 48900(r) does not address free speech concerns. However, a legislative analysis prepared by Sophia Kwong Kim, ED, for the Assembly Third Reading⁹⁹, discussed the purpose behind the amendment as follows:

[I]t is not the intent of this bill to add new responsibilities by requiring superintendents and principals to monitor students’ off-campus activities, or to increase suspensions and expulsions. This bill is not inconsistent with how school administrators or the courts have interpreted state law. Students will not be suspended or expelled solely because of activities conducted away from the schoolsite; there must be some type of impact on students, as specified under the definition of bullying. The courts have ruled that disciplinary action as a result of bullying via a social network site is contingent on whether the action causes a substantial disruption to school activities or work of a school, regardless of where the action took place. If a student is suspended or expelled and the activity is not found to have caused substantial disruption, it can then constitute a violation of freedom of speech. This is based on the 1969 case of *Tinker v. Des Moines Independent Community School District* (393 U.S. 503, 506; 1969).¹⁰⁰

It is evident from New Jersey’s Anti-Bullying Bill of Rights and California’s AB 256 amending its Education Code that both legislatures believe that protecting students from bullying, wherever it may arise, is a foremost concern of the states and its constituents. Particularly compelling is the legislative analysis of AB 256 wherein Ms.

⁹⁸ Section 48900 of the Education Code, *amended by AB-256* (October 10, 2013) (*an act to amend Section 48900 of the Education Code, relating to pupils*).

⁹⁹ When a bill is read the third time it is explained by the author, discussed by the Members and voted on by a roll call vote. *See Overview of Legislative Process in California*.

¹⁰⁰ Glover, *supra* note 94.

Kim provided, “[s]tudents will not be suspended or expelled solely because of activities conducted away from the schoolsite; there must be some type of impact on students, as specified under the definition of bullying.” In other words, the California legislature is weighing student’s First Amendment rights against off-campus speech that requires reprimand. The California legislature believes that student’s First Amendment rights will not be violated if they are punished for off-campus “electronic speech” that: (1) places a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property; (2) causes a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health; (3) causes a reasonable pupil to experience substantial interference with his or her academic performance; or (4) causes a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

Off-campus cyberbullying fits squarely within the ambit of electronic speech that the New Jersey, Californian and other state legislatures are attempting to prevent and remedy. However, these state initiatives emphasizing school districts' responsibilities to address student bullying, regardless of its place of origin, will be of no moment unless there is guidance from the Supreme Court.¹⁰¹ The Court's guidance is critical to assisting school officials in understanding how they may regulate student expression that pervades social networking forums without infringing upon the First Amendment. Until a definitive answer exists, courts should defer to school officials because school officials are capable of distinguishing off-campus speech that must be protected under the First

¹⁰¹ Amici Curiae Brief of Nat'l Sch. Bds. Ass'n, et al. in Support of Petitioners at 4–5, *Blue Mountain Sch. Dist. v. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502), 2011 WL 5254664; *see also* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 942 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

Amendment and cyberbullying that is so severe, persistent, and pervasive that it substantially interferes with a student’s educational opportunities.

Policing and Deterring Online Speech

Public school officials are charged with the complex duty of educating our children.¹⁰² Very few would “voluntarily assume the additional burden of policing student online speech.”¹⁰³ If they were required to do so, they would have to monitor countless websites, and would reasonably fear legal liability for failing to detect cyberbullying, or for failing to act when discovering cyberbullying. Additionally, school administrators do not want to spend time disciplining students for speech that does not affect its students or school environment. If, however, particularly egregious speech that affects the school community is brought to their attention, they need to be able to act to preserve the learning environment and individual rights.⁷¹

School officials are well aware of the overlap of students' online and school lives and must be given deference to evaluate the situation, determine its impact on the school community and the individual, and take appropriate action.¹⁰⁴ However, the increased frequency of “cyberbullying” and other online speech has left school administrators, who devote hours of their time each week investigating such matters, asking for legal standards.¹⁰⁵ They need guidance from the Court on the limits of their authority, so that families and advocacy groups willing to bring a lawsuit will challenge fewer of their decisions.

¹⁰² *Id.* at 13

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Because some state laws now require schools to investigate incidents of cyberbullying, schools have turned to third parties for assistance for investigatory and liability purposes. For example, The Glendale, California school district hired a firm to monitor approximately 14,000 of its students' social media accounts to prevent and investigate incidences of cyberbullying.¹⁰⁶ The superintendent of the district instituted this program after two local teens committed suicide last year, including one in the Glendale district. The program is “designed around student safety and making sure kids are protected.”¹⁰⁷ The school district has paid an outside firm \$40,500 to track public postings, searching for such topics as possible truancy, drug use, suicide threats, bullying, and other violence.¹⁰⁸ Only the postings of students 13 years and older are monitored, because that is the legal age at which parental permission is not required.¹⁰⁹

Some cyberbullying experts opine that it is not prudent for schools to oversee the social media of its students. Besides the First Amendment implications of the program, schools may also be opening the floodgates for litigation for negligently monitoring a student’s account that commits suicide at least in part because of a cyberbully.

Additionally, it may prove difficult for the monitoring company to sort out what student speech is worth reporting and what speech is not, without having a chilling effect on student speech. While some parents and students have complained that this practice amounts to government spying into private lives, legal analysts say the district is well within its rights to pursue the idea.¹¹⁰ The Supreme Court has ruled that there are “very

¹⁰⁶ Wood, *supra* note 13.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Wood, *supra* note 13

distinct protections of privacy under the Constitution, but it has also ruled that privacy rights have to be balanced with the school’s responsibility to maintain a safe campus.”¹¹¹ Thus, the school district could argue the program is valid under the Constitution because they are attempting to address violent speech that can lead students to suicide.

Similarly, in October of 2013, Maryland Attorney General Douglas F. Gansler and the Association of Attorneys General (NAAG) announced an initiative in partnership with Facebook that affords educators in Maryland public schools a novel way to address cyberbullying.¹¹² The pilot program is designed to streamline reports of potential cyberbullying on Facebook, which may not be resolved through Facebook’s normal reporting process or which demands more immediate attention.¹¹³ Each school system must designate one “point person” who is responsible for direct communication with Facebook through a special Facebook channel called the “Educator Escalation Channel.”¹¹⁴ Through this channel, the school’s point person can request Facebook officials remove posts that amount to cyberbullying of its students.¹¹⁵ The pilot program consists of three levels of review.¹¹⁶ First, the student must feel that he or she is being cyberbullied on Facebook and notify a school official.¹¹⁷ Second, the school official must review the Facebook post(s) and agree that the language constitutes

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Richard A. Pretti, *Maryland and Facebook Pilot to Address Cyberbullying*, (November 5, 2013, 1:30 AM), Available at <http://www.kbrlaw.com/blog/category/cyber-bullying/>

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Above the Law, *Maryland Tops Off Awful Cyberbullying Law With Direct Line to Facebook to Remove Content “Without Societal Value*, (November 6, 2013, 9:00 PM), Available at <http://abovethelaw.com/2013/10/maryland-tops-off-awful-cyberbullying-law-with-direct-line-to-facebook-to-remove-content-without-societal-value/>

cyberbullying.¹¹⁸ Third, the questionable or prohibited speech must be reported to Facebook through the Educator Escalation Channel.¹¹⁹ Facebook officials will then make the ultimate determination whether the language constitutes cyberbullying and, if so, Facebook will remove the language.¹²⁰

Attorney General Gansler believes that student's First Amendment rights are not being violated because only insidious and mean behavior – true threats, intimidation and infliction of emotional distress – by one person or multiple people against a single student through Facebook will be removed.¹²¹ Opponents of the pilot program view the censorship as inherently subjective and urge that Facebook is setting a dangerous precedent.¹²² Facebook is a private enterprise entitled to decide what content is acceptable on its platform and what content amounts to bullying.¹²³ However, free speech advocates claim that it is not that simple when the censor is a state actor and the content at issue is deemed offensive not because it violates any law, but because someone is empowered to censor speech that does not comport with their subjective vision of “redeeming societal value.”¹²⁴

In addition to its Pilot Program with Facebook, Florida also passed the “Misuse of Interactive Computer Service” bill, also known as Grace's Law.¹²⁵ Grace's Law makes

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Timothy B. Flynn, *Cyber-Bully Censorship by Facebook and Teachers* (October 7, 2013), Available at <http://oplawblog.blogspot.com/2013/10/cyber-bully-censorship-by-facebook-and.html>

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Hans Bader, *Cyberbullying: Maryland criminalizes distressing student speech through Grace's Law* (April 7, 2013), Available at

make it a misdemeanor to repeatedly and maliciously use a computer or smartphone to bully someone under the age of 18.¹²⁶

This bill prohibits a person from using an “interactive computer service” to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury with the intent (1) to kill, injure, harass, or cause serious emotional distress to the minor or (2) to place the minor in reasonable fear of death or serious bodily injury. Violators are guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a \$500 maximum fine.¹²⁷

The law is named after Grace McComas, a 15-year-old Glenelg High School student who committed suicide in April of 2012 after months of being harassed on social media sites.¹²⁸ Some cyberbullying experts assert that if penalties exist for the act of cyberbullying, less people will cyberbully others, thus providing a possible solution to a nation-wide problem.¹²⁹ However, if penalties do not exist, the cyberbully will continue to harass without fear of punishment.¹³⁰ Some feel the criminalization of cyberbullying is essential, as allowing others to intentionally hurt others without penalties may lead to serious consequences, and in some instances, suicide.¹³¹ The legislature is partially aware of the pitfalls of such a law, which is why many safeguards were put into place, including the "course of conduct" language. This was added to the law to emphasize that the law was not meant to punish someone who just sent a message or two.

<http://www.examiner.com/article/cyberbullying-maryland-criminalizes-distressing-speech-through-grace-s-law>

¹²⁶ *Id.*

¹²⁷ Amy A. Devadas, *H.B. 396, Criminal Law- Misuse of Interactive Computer Service (Grace’s Law)* (April 1, 2013).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 258 *Ariz. St. L.J.* 40:0257 (2008).

On the other hand, many believe that criminalizing cyberbullying is both unconstitutional and ineffective.¹³² Experts compare the criminalization of cyberbullying to other Acts whose intent was monitoring minors online, such as the Communications Decency Act or the Child Online Protection Act.¹³³ These Acts were declared unconstitutional because they restricted free speech rights.¹³⁴ Additionally, experts believe that bullying will simply move to other platforms or even continue illegally if cyberbullying were to be criminalized.¹³⁵ The critics of criminalization believe that in order to curb cyberbullying, schools must develop educational programs that make children aware of the dangers of cyberbullying.¹³⁶ Schoolyard bullying has been around for centuries, and while it is cruel and hateful, it should not be a crime. Even though social media can magnify the pain, students should not face the possibility or jail time for bullying. While students should be punished for their misbehavior, criminalizing bullying may be an extreme measure. The proper response is teaching students proper behavior, rather than “branding them a criminal forever.”¹³⁷ Because states should not criminalize what is a form of playground misbehavior, schools should be given deference to prevent and remedy cyberbullying.

Finding The Right Response

¹³² Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 Vand. L. Rev. 845, 880-84 (2010).

¹³³ *Id.* at 853

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Laura W. Murphy, *Subcommittee Hearing on Protecting Youths in an Online World*. American Civil Liberties Union. Washington Legislative Office. 15 July 2010. PDF file.

¹³⁷ Caralee Adams, *Cyberbullying: What Teachers and Schools Can Do*, (November 3, 2013), <http://www.scholastic.com/teachers/article/cyberbullying-what-teachers-and-schools-can-do>

Public schools are better equipped to handle student speech than criminal or civil courts. It is the schools basic educational mission and responsibility to teach students the boundaries of socially appropriate behavior. As we have seen, cyberbullying laws alone are an insufficient response because of the inconsistent rulings of lower courts and a lack of constitutional guidance from the Supreme Court. Thus, schools must play a proactive role in educating students on importance of safe online habits.¹³⁸ Education and training on how to respond to and prevent cyberbullying should extend to parents, students, teachers, and school administrators. New Jersey's "Anti-Bullying Bill of Rights Act" is a perfect example of the proper response to cyberbullying. The amendment requires detailed reporting procedures once the school learns of potential cyberbullying. In addition to the duty of schools to prevent and remedy cyberbullying, parents must also monitor student Internet access and limit it when necessary. Emplacing Internet-filtering software enables parents to monitor their children's access to certain websites.

However, when schools and parents fail to prevent cyberbullying from occurring, cyberbullies deserve to face penalties, both for retributive purposes and to deter others from engaging in similar conduct. In order to validate anticyberbullying measures emplaced by the school, there must be consequences for students who were made aware of the dangers of cyberbullying, yet continue to bully.

Conclusion

The Supreme Court has established that a student's constitutional right to freedom of expression will give way to the school's interests in education, order, and discipline if

¹³⁸ King, *supra* note 132, at 884.

the expression is substantially disruptive, plainly offensive, perceived to be school sponsored expression, or advocates illegal drug use.¹³⁹ However, the Supreme Court only addresses student speech that occurs within the school environment, and has not directly addressed the question of what protections the Constitution affords student speech that is generated from a student's home computer or cell phone while off-campus.

The advent of electronic communication has given rise to the growing problem of cyberbullying. Highly publicized student suicides attributed to cyberbullying has brought national awareness and sparked legislative action. Many state legislatures now require school districts to adopt anti-cyberbullying measures in order to prevent and respond to cyberbullying. It is imperative that courts do not invalidate these measures as conflicting with the First Amendment because both schools and the law are capable of distinguishing off-campus speech that must be protected under the First Amendment and cyberbullying that is so severe, persistent and pervasive that it substantially interferes with a student's educational opportunities.

Thus, courts must defer to the school's basic educational mission and responsibility to teach students the boundaries of socially appropriate behavior. As there is no redeeming societal value to cyberbullying, the risk of student harm should outweigh any alleged infringement of a student's freedom of expression to cyberbully.

¹³⁹ Fenn, *supra* note 48, at 2750.

