

Substantial Disruption: An Inside Look at Cyberbullying and First Amendment Rights in Public Schools

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I. INTRODUCTION

The freedoms guaranteed by the First Amendment of the United States Constitution exemplify our nation's commitment to ensuring a liberated, freethinking society of individuals capable of changing the world.¹ The lives of Americans, past and present, would be radically different had the Founding Fathers built a society restricting the ability to speak freely, explore different religions and cultures, or navigate the countless genres of thought life has to offer. For generations, the U.S. has been a symbol of tolerance, innovation, and progressive thinking.² This is not to say, however, that our nation has not faced its share of immense challenges and bouts of controversy.

These noble ideals often clash with societal advancements, like technology, which foster problems never intended by our forefathers.³ One of the most controversial issues facing our society today begs the question of whether the freedoms granted by the First Amendment extend to Internet communication.⁴ On one hand, the Internet has

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¹ See U.S. CONST. amend. I.

² See United States Founded on Liberty and Freedom, PENN LIVE (Sept. 29, 2009), *available at* http://www.pennlive.com/letters/index.ssf/2009/05/united_states_founded_on_liber.html (“The right to discuss and disagree without fear of retribution is what makes the United States the great and unique country that it is.”).

³ Privacy Technology, and the USA Patriot Act, SOCIAL THEMES (Jan. 4, 2004), *available at* <http://cs.furman.edu/digitaldomain/themes/privacy/privacy1.html> (“Of course, the Founding Fathers could not have anticipated the breadth and depth of changes that circumscribe modern life.”).

⁴ David L. Hudson Jr., *Cyberspeech*, FIRST AMENDMENT CENTER (April 9, 2002), *available at* <http://www.firstamendmentcenter.org/cyberspeech/print/> (“This speech-enhancing medium has led to numerous controversies, causing many people to view the Internet as the premier First Amendment battleground.”).

transformed communication throughout the globe.⁵ On the other hand, the Internet widens the prospective audience for the crudest forms of speech.⁶

This accessibility to communicate has an immense impact on the lives of American teenagers, many of whose offline and online worlds are now completely integrated as a result of social networking sites such as Facebook, Myspace, Instagram, Twitter, and personal blogs.⁷ While a large majority of American teenagers use the Internet for non-disruptive purposes, an increasing number of teens use the Internet as an outlet to express their frustrations with fellow students, school administrators, and society at large.⁸ As a result, cyberbullying has become a distressing regularity among America's youth.⁹

This issue becomes especially problematic when determining if, when, and how far school districts may regulate and punish Internet speech made by students off school grounds.¹⁰ Students and teachers alike need to know the extent of a school's ability to regulate off-campus cyberspeech.¹¹ A fine line is important to maintain, or else a

⁵ *Id.*

⁶ DAVID L. HUDSON JR., LET THE STUDENTS SPEAK! A HISTORY OF THE RIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 159 (Christopher Finan et al. 2011).

⁷ DANAH BOYD, WHY YOUTH (HEART) SOCIAL NETWORK SITES: THE ROLE OF NETWORKED PUBLICS IN TEENAGE SOCIAL LIFE 15 (David Buckingham ed., 2007) (explaining the large impact social networking sites have on youth culture); Gustavo S. Mesch, *The Internet and Youth Culture*, IASC-CULTURE, available at <http://www.iasc-culture.org/THR/archives/YouthCulture/Mesch.pdf>.

⁸ See *infra* Part III.

⁹ *Cyberbullying vs. Free Speech*, CBS NEWS (Feb. 11, 2009), available at http://www.cbsnews.com/2102-500163_162-3768945.html?tag=contentM (noting the large scope of cyberbullying, and the effect it has on society); *Cyberbullying Statistics*, available at <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html>.

¹⁰ Daniel J. Solove, *School Discipline for Off-Campus Speech and the First Amendment*, HUFFINGTON POST (June 20, 2011), available at http://www.huffingtonpost.com/daniel-j-solove/school-discipline-free-speech_b_877203.html.

¹¹ Jacob Tabor, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 603 (2009), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2414&context=bclr> ("Without a clear understanding of the limits of the school's reach, speech will be chilled in some cases. In others, teachers will feel helpless to act and protect the children in their care.").

school's power to regulate might extend too far beyond the schoolhouse gate,¹² and infringe on the protections guaranteed by the First Amendment.

The root of this debate is fostered through the practice of applying old rules to new technology.¹³ Teachers, school administrators, parents, and judges alike have wrestled over whether free speech rights allow students to say whatever they like when off school grounds.¹⁴ Just how far may a school district go to identify, address, and punish instances of cyberbullying? There is no clear answer. So far, the Supreme Court has declined to hear this thorny issue, making it nearly impossible to determine a clear-cut standard when reviewing such disputes.¹⁵ Lower courts have attempted, but each ultimately applied different standards, producing different results.¹⁶

The following sections will: (i) analyze the issues currently facing courts and lawmakers; (ii) present a plea to the Supreme Court to take a stance on this issue; and (iii) provide a proposal that would protect the rights of individual students and promote

¹² Solove, *supra* note 10.

¹³ See Stephen Wermiel, *SCOTUS for Law Students: Student Speech and the Internet*, SCOTUS BLOG (Jan. 7, 2012), available at <http://www.scotusblog.com?p=136102> (“Should a school be able to discipline a student for communication that took place in the student’s own home on the student’s own time?”); William Nolan, *Labor: Applying Old Rules to New Technologies is Becoming Increasingly Frequent*, INSIDE COUNSEL (Dec. 3, 2012), available at <http://www.insidecounsel.com/2012/12/03/labor-applying-old-rules-to-new-technologies-is-be> (arguing that the legal system needs to catch up with the ongoing computer revolution).

¹⁴ Greg Bluestein & Dorie Turner, *School Cyberbullying Victims Fight Back in Lawsuits*, HUFFINGTON POST (Apr. 26, 2012), available at http://www.huffingtonpost.com/2012/04/26/school-cyberbullying-vict_n_1457918.html.

¹⁵ See Mark Walsh, *Justices Decline Student Internet Speech Case, Others Await*, EDUCATION WEEK’S BLOGS (Nov. 1, 2011), available at http://blogs.edweek.org/edweek/school_law/2011/11/; Christian A. Carrillo, *The Supreme Court’s Refusal to Hear Cyberbullying Cases Leaves Law Unclear*, MORRIS POLICH & PURDY LLP, available at <http://www.mpplaw.com/files/Publication/691836d4-078b-454b-b0d3-306f2651471e/Preview/PublicationAttachment/c2ed8db4-f043-4194-ba82-324935e874eb/Supreme-Courts-Refusal-to-Hear-Cyberbullying-Cases.pdf>.

¹⁶ Hudson Jr., *Cyberspeech*, *supra* note 4 (“This speech-enhancing medium has led to numerous controversies, causing many people to view the Internet as the premier First Amendment battleground.”); Carrillo, *supra* note 15.

undisrupted education in our school systems, while at the same time balancing the protections guaranteed by the First Amendment.¹⁷

II. BACKGROUND

A. *Historical Perspectives and Tinker*

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.¹⁸

If we are to fully understand the present, we must first understand our past. Public education first became a popular option for American children in the early 1800s.¹⁹ During this time, public schools were extremely strict and focused heavily on rules of etiquette and courteous behavior.²⁰ It was believed that while in school, the teacher took the place of the parent: a legal doctrine known as *in loco parentis*.²¹ This ideology left the rulemaking, commands, and punishment solely within the discretion of the teacher.²² Gradually, over the years, these tight restrictions on student speech and action loosened—and in 1969, the ongoing question of students’ First Amendment rights in public schools was brought to light in the *Tinker v. Des Moines Independent Community School District* decision.²³

¹⁷ See *infra* Parts III–V.

¹⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); Tabor, *supra* note 11, at 561.

¹⁹ See Morse, 551 U.S. 393 410–11 (2007) (discussing the early history of public schooling in America).

²⁰ *Id.* at 412.

²¹ *Id.* at 413. “In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.” *Id.* at 412. See Tabor, *supra* note 11, at 572 (“The *in loco parentis* view of schools is that the teachers take on the rights and duties of the student’s parents and act in their place while the student is at school.”).

²² Morse, 551 U.S. 393 at 414.

²³ See *Tinker*, 393 U.S. at 514 (holding that student speech which does not reasonably forecast a substantial disruption of school activities is protected under the First Amendment).

In *Tinker*, student-protestors planned to wear black armbands during the holiday season in an effort to publicize their objection to the Vietnam War.²⁴ In response, school officials adopted a policy forcing students to remove the armbands, or face school suspension.²⁵ When a group of students refused to comply and were suspended, they subsequently initiated a suit against the school district.²⁶

The Court viewed the armbands as a form of political speech that neither interrupted educational activities nor infringed on the lives of others, and held in favor of the students.²⁷ Additionally, the Court set forth the standard that schools had the burden of showing the possibility of a “substantial disruption or material interference” with school activities.²⁸ Schools must show that its action of regulating or prohibiting student speech is caused by “something more than a mere desire to avoid the discomfort and unpleasantness” that often coincides with unpopular views.²⁹ In the landmark decision, the Supreme Court solidified the idea that students have a right to free speech—even on public school grounds—so long as such speech does not substantially disrupt the learning process.³⁰ The Court recognized the need for schools to have authority to maintain order, but stressed that this need must be exercised in a manner consistent with the Constitution.³¹

Tinker gave America’s youth a freedom and confidence never experienced by prior generations of students: First Amendment protection. In the years that followed, students gained even more rights, as school districts were dragged to court in record

²⁴ *Id.* at 504.

²⁵ *Id.*

²⁶ *Id.* at 504, 511.

²⁷ *Id.* at 514.

²⁸ *Id.*

²⁹ *Id.* at 509.

³⁰ *Id.* at 514.

³¹ Tabor, *supra* note 11, at 565.

numbers.³² By the 1980s, however, the rise of drug and alcohol use among teens gave courts reason to once again limit student freedoms. The Supreme Court cut back the rights granted in *Tinker*, allowing schools to limit student speech that was: (i) “vulgar and offensive,” *i.e.*, the *Fraser* standard; or (ii) “school-sponsored,” *i.e.*, the *Morse* standard.³³ However, the ambiguity of this language—along with the Supreme Court’s lack of direction—has resulted in very inconsistent court rulings. This continues to place school districts in a uniquely difficult position,³⁴ where administrators are forced to take a risk regardless of whether they choose to discipline students for cyberbullying, or turn a blind eye.³⁵

Today, the most controversial sub-sector of the student speech arena is whether, and to what extent, schools may regulate students’ *off-campus* speech.³⁶ It is apparent that school administrators have a duty to protect their students from harassment and cyberbullying.³⁷ However, the methods of doing so may trigger a lawsuit from a student claiming a First Amendment rights violation.³⁸

³² See *Fighting for Free Speech in Schools*, TIME (May 10, 2007), available at <http://www.time.com/time/printout/0,8816,1619549,00.html> (discussing the profound effect *Tinker* had on the volume of student speech cases during the 1970’s and 1980’s). From 1969 to 1975, an annual average of 76 school discipline cases made their way to appeals courts. *Id.*

³³ *Id.* The “vulgar and offensive” test is commonly referred to as the *Fraser* standard, and has not been applied to off-campus speech. The “school sponsored” test is known as the *Morse* standard, which asserts that the First Amendment does not prevent schools from regulating student expression occurring at a school-supervised event, if such expression can be reasonably interpreted as promoting illegal drug use. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011); see *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

³⁴ See Walsh, *supra* note 15 (noting the Supreme Court has declined to hear student Internet speech cases, and discussing the ramifications this inaction has had on our society and legal system).

³⁵ Carolyn Stone, E.d.D, *Cyberbullying: Disruptive Conduct or Free Speech?*, ASCA SCHOOL COUNSELOR (May 1, 2013), available at <http://schoolcounselor.org/magazine/blogs/may-june-2013/cyber-bullying-disruptive-conduct-or-free-speech>.

³⁶ Solove, *supra* note 10; see Tabor, *supra* note 11, at 561–62 (“ . . . [i]t is unclear where student speech posted on the Internet (“cyberspeech”) fits into the picture.”).

³⁷ Walsh, *supra* note 15; Stone, *supra* note 35 (“School district officials are obligated under federal law to seek to remedy bullying and harassment that is severe, pervasive and objectively offensive. These statutes do not distinguish between whether bullying happened on or off campus.”).

³⁸ Walsh, *supra* note 15; Solove, *supra* note 10.

III. DISCUSSION

A. *Cyberbullying*

Internet speech law is further complicated through the widespread use of the medium to openly taunt classmates, teachers, and administrators.³⁹ While almost every state has a policy prohibiting cyberbullying, very few cover communication *outside* of school property.⁴⁰ Even when blatant instances of cyberbullying do occur, disciplinary enforcement is rare. According to attorney and child advocate Parry Aftab, “[a] lot of prosecutors just don’t have the energy to prosecute 13-year-olds for being mean.”⁴¹ Unfortunately, this leaves school districts and parents with the daunting task of identifying, addressing, and punishing instances of cyberbullying. This lack of clarity has led to several recent legal disputes.⁴²

B. *Courts Split: Cases Upholding Students’ First Amendment Rights*

In 2005, high school senior Justin Layshock was suspended after he created a parody Myspace profile from his home computer suggesting that his principal smoked marijuana and hid beer behind his desk.⁴³ In court, the school district plead under the *Fraser* standard—claiming that the profile’s substance was lewd, and therefore not protected⁴⁴ because it ultimately ended up on school grounds when students viewed the profile during class.⁴⁵ The court disagreed, stating that the district had not established a “sufficient nexus” between the speech and school, nor did it show that the speech

³⁹ Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1186–87 (2008–09) (discussing the extent to which students use the Internet to bully others).

⁴⁰ Bluestein & Turner, *supra* note 14.

⁴¹ *Id.*

⁴² See *infra* Part III.B–D.

⁴³ Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011); Bluestein & Turner, *supra* note 14; Solove, *supra* note 10.

⁴⁴ *Layshock*, 650 F.3d at 216.

⁴⁵ *Id.* at 209.

occurred on-campus so that it could be regulated under *Fraser's* “lewd and vulgar” standard.⁴⁶ Accordingly, the court held that *Fraser* does not allow schools to punish students for expressive conduct that occurs *outside* of school.⁴⁷

In a similar case, an eighth grader used her home computer to create a MySpace profile that made fun of her school principal.⁴⁸ The profile did not contain the principal’s name, school, or location—but did contain his official photograph, obtained from the school website.⁴⁹ The school subsequently suspended the student, citing that her profile caused “general rumblings” around the school, and caused some disruption when a paper copy of the profile was brought on campus.⁵⁰

The school district admitted that no “substantial disruption” had occurred, but argued punishment was nonetheless justified under *Tinker* because school officials had acted reasonably in forecasting disruption stemming from the profile.⁵¹ The court disagreed, determining that the school district failed to demonstrate a reasonable forecast of disruption.⁵² The student’s suspension, therefore, did not pass constitutional muster. According to the court, the profile was “so outrageous that no one could have taken it seriously, and no one did.”⁵³ Like in *Layshock*, discussed above, this court went on to say that the Supreme Court’s 1986 decision in *Bethel v. Fraser*—holding that a public

⁴⁶ *Id.* at 219; *Supreme Court Declines to Hear Student Internet Speech Cases*, LEGAL CLIPS (Jan. 19, 2012) [hereinafter *Supreme Court Declines*], available at <http://legalclips.nsba.org/2012/01/19/breaking-news-supreme-court-denies-cert-in-student-internet-speech-cases/>.

⁴⁷ *Layshock*, 650 F.3d at 219. The court further reasoned that the school district would not have an argument under *Tinker* either, because they did not prove a sufficient “nexus” between plaintiff’s speech and a substantial disruption to the educational environment. *Id.* at 216. See *Supreme Court Declines*, *supra* note 46.

⁴⁸ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011); *Supreme Court Declines*, *supra* note 46.

⁴⁹ *J.S. ex rel. Snyder*, 650 F.3d at 920.

⁵⁰ *Id.* at 922–24.

⁵¹ *Id.* at 928.

⁵² *Id.* at 930; *Supreme Court Declines*, *supra* note 46.

⁵³ *J.S. ex rel. Snyder*, 650 F.3d at 930.

school may discipline a student for *on-campus* offensively lewd and indecent speech under the First Amendment—does not apply to speech that occurs *off-campus*.⁵⁴ While these cases seem to set an evident standard for cyberbullying disputes, contrary rulings have made the issue less clear.

C. Courts Split: Cases Upholding Schools' Authority to Punish

Further blurring the lines of schools' authority to address off-campus cyberbullying are recent decisions upholding school-mandated punishments. In *Kowalski v. Berkeley County Schools*, Kara Kowalski sued school officials after she was suspended from her high school for five days for creating a webpage suggesting another student had a sexually transmitted disease.⁵⁵ Kowalski argued that because her webpage was created off-campus and was not school related, the school district had no authority to discipline her.⁵⁶

The court disagreed, and applied a broad interpretation of *Tinker*, reasoning that her online publication could reasonably be expected to reach the school or impact the school environment, and further “collided with the rights of other students to be secure and to be let alone.”⁵⁷ In its analysis, the court determined that it was reasonably foreseeable that the speech would reach the school, so it was “satisfied that the nexus of Kowalski’s speech to [the school]’s pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as trustees of the

⁵⁴ *Supreme Court Declines*, *supra* note 46.

⁵⁵ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011); Bluestein & Turner, *supra* note 14; Stone, *supra* note 35.

⁵⁶ *Kowalski*, 652 F.3d at 570–71; Bluestein & Turner, *supra* note 14.

⁵⁷ *Kowalski*, 652 F.3d at 574; Stone, *supra* note 35 (“The court in the Kowalski case determined that it was reasonably foreseeable that the speech would reach the school. . .”); *Supreme Court Declines*, *supra* note 46 (“A three-judge panel of the Fourth Circuit found that the language of *Tinker* supports the conclusion that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.”).

student body's well-being."⁵⁸ The court further noted that it was unresolved whether *Fraser* applies to speech that originates *off-campus*, and thus declined to apply it—instead finding that *Tinker* provided sufficient authority for its decision.⁵⁹

In a similar case, Avery Doninger brought a suit alleging violations of her First Amendment rights after she was prohibited from running for Class Secretary for posting a message on her blog referring to school authorities as “douchebags,” and inviting fellow students to call such authorities and “piss them off some more.”⁶⁰ She argued that her posting took place within the confines of her own home, and thus the punishment was beyond the scope of the school's authority.⁶¹ The court disagreed, again applying a broad reading of *Tinker*, and recognizing “that off-campus conduct of this sort ‘can create a foreseeable risk of substantial disruption within a school,’ and that in such circumstances, its off-campus character does not necessarily insulate the student from school discipline.”⁶² According to the court, Doninger knew that other students were likely to read her blog, and its content created a risk of substantial disruption within the school environment.⁶³

Interestingly, Justice Sonia Sotomayor was part of the three-judge panel ruling against Doninger.⁶⁴ Should a similar case ever reach the Supreme Court, this could

⁵⁸ *Kowalski*, 652 F.3d at 574; *Supreme Court Declines*, *supra* note 46.

⁵⁹ *Supreme Court Declines*, *supra* note 46.

⁶⁰ *Doninger v. Niehoff*, 527 F.3d 41, 45, 47 (2d Cir. 2008); M. Alex Johnson, *Rules to Curb Bullying Online Raise Concerns*, NBC NEWS (Jan. 23, 2009), available at http://www.nbcnews.com/id/28629118/ns/technology_and_science-internet/t/rules-curb-bullying-online-raise-concerns/.

⁶¹ *Doninger*, 527 F.3d at 45; Johnson, *supra* note 60 (quoting Doninger as stating: “I think that it's really important for students to stand up for their rights, because if we don't maintain democracy on the lowest levels, we'll never be able to maintain them on the highest levels.”).

⁶² *Doninger*, 527 F.3d at 50; see *Lower Courts, Student Speech, & Cyberbullying*, UNC.EDU – CYBERBULLYING, available at <http://www.unc.edu/courses/2010spring/law/357c/001/Cyberbully/lower-courts-student-free-speech--cyberbullying.html>.

⁶³ *Doninger*, 527 F.3d at 50.

⁶⁴ *Lower Courts, Student Speech, & Cyberbullying*, *supra* note 62.

indicate a future trend of pro-school holdings in the area of cyberbullying and off-campus speech. However, until the Supreme Court takes a stance, Americans will be forced to act under a cloud of uncertainty. That being said, many parents are not willing to sit idle while watching their children become victims of cyberbullying—and they are taking matters into their own hands.⁶⁵

D. Parents Take Action

With an increasing number of children experiencing cyberbullying, libel actions against cyberbullies are becoming more common.⁶⁶ Proving damages in these cases is extremely difficult,⁶⁷ but this new breed of lawsuit exemplifies parent-child awareness of society's growing cyberbullying issue. While some may argue that these suits are “frivolous,” we must not forget that if school districts, law enforcement, legislative bodies, the Supreme Court, and even social media sites themselves will not (or cannot) take the necessary steps to eliminate cyberbullying, litigation may be the only forum in which to seek justice.

Recently, 14-year-old Alex Boston and her parents decided to take action by filing a suit against two classmates and their parents for libel after the classmates created a fake Facebook account in Boston's name, using a photo of her that they deliberately distorted.⁶⁸ The account was used to post a racist video on YouTube that implied that

⁶⁵ See *infra* Part III.D.

⁶⁶ *Libel Suits Not the Long Term Solution to Cyberbullying Among Youth*, BE GOOD LA (Sept. 29, 2012), available at <http://www.begoodla.com/libel-suits-not-the-long-term-solution-to-cyberbullying-among-youth/>.

⁶⁷ Julie Hilden, *Is a Defamation Case a Good Remedy for Cyberbullying?*, VERDICT (June 11, 2012), available at <http://verdict.justia.com/2012/06/11/is-a-defamation-case-a-good-remedy-for-cyberbullying>.

⁶⁸ Kim Zetter, *Teen Sues Over Facebook Bullying*, WIRED (Apr. 27, 2012), available at <http://www.wired.com/2012/04/teen-sues-over-bullying/>; John Vinson, *Georgia Teen, Alex Boston, Sues Classmates Over Fake Facebook Account*, WEB PRO NEWS (May 1, 2012), available at <http://www.webpronews.com/georgia-teen-sues-classmates-over-fake-facebook-account-2012-05>.

Boston hated African-Americans, and to also leave crude comments on the Facebook pages of other friends.⁶⁹

Sadly, Boston and her parents unsuccessfully went through many channels to find justice prior to filing the lawsuit.⁷⁰ Upon learning of the Facebook page, Boston complained to school officials at Palmer Middle School in Kennesaw, Georgia.⁷¹ She was told that there was nothing the school district could do because the activity occurred *off-campus*.⁷² She then went to the police, who also said they could not provide relief because there was no Georgia cyberbullying law that applied to her specific circumstance.⁷³ Boston even filed a complaint with Facebook requesting that the account be taken down.⁷⁴ After her several requests had failed, she decided to sue the teens responsible for the account.⁷⁵

The Alex Boston case is just one example of the countless families negatively impacted by cyberbullying. Luckily, there appears to be positive movement to address this issue. A recent California appeals court took a step to more clearly define when free expression crosses a line into cyberbullying, by holding that the First Amendment doesn't protect hostile Internet banter among teenagers if the messages can be taken as "genuine threats of harm."⁷⁶ The 2-1 ruling by the 2nd District Court of Appeals allowed a lawsuit to proceed that was brought by the father of a 15-year-old high school student after

⁶⁹ Zetter, *supra* note 68.

⁷⁰ Vinson, *supra* note 68.

⁷¹ Zetter, *supra* note 68; Vinson, *supra* note 68.

⁷² Zetter, *supra* note 68; Vinson, *supra* note 68.

⁷³ Zetter, *supra* note 68; Vinson, *supra* note 68.

⁷⁴ Zetter, *supra* note 68; Vinson, *supra* note 68.

⁷⁵ Zetter, *supra* note 68; Vinson, *supra* note 68.

⁷⁶ Carol J. Williams, *Court Tightens Definition of Cyberbullying*, LOS ANGELES TIMES (Mar. 18, 2010), available at <http://articles.latimes.com/2010/mar/18/local/la-me-cyber-speech18-2010mar18>.

classmates posted death threats and anti-gay remarks on his son's personal website.⁷⁷ The ruling also appeared to "toughen standards for court intervention in cyber-bullying cases."⁷⁸

Similarly, in June 2011 a father filed a defamation action against three of his daughter's classmates.⁷⁹ The classmates were accused of filming themselves making false sexual remarks about his daughter and posting the video to Facebook.⁸⁰ The complaint was settled months later with apologies from the girls and a donation to a charity that fights against cyberbullying.⁸¹ While these examples of parents taking a proactive stance on cyberbullying awareness are certainly a promising start, they are by no means a long-term solution to this deeply rooted problem. To truly address this issue, the Supreme Court needs to step up to the plate and take a stance.⁸²

IV. ANALYSIS AND PROPOSAL

Cyberbullying is a major concern in schools across the nation, and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide.⁸³ Schools districts have a duty to protect their students from cyberbullying and other forms of harassment.⁸⁴ At the same time, every citizen is entitled

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Bluestein & Turner, *supra* note 14.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Tabor, *supra* note 11, at 562.

⁸³ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011); Perri Klass, *At Last, Facing Down Bullies (and Their Enablers)*, N.Y. TIMES (June 9, 2009), available at <http://www.nytimes.com/2009/06/09/health/09klas.html?pagewanted=print> (discussing the effects of cyberbullying); David McNamee, *Cyberbullying Causes Suicidal Thoughts in Kids More Than Traditional Bullying*, MEDICAL NEWS TODAY (Mar. 11, 2014), available at <http://www.medicalnewstoday.com/articles/273788.php> (noting the negative impact cyberbullying has on American children). "Potentially, the effects of cyberbullying are more severe because wider audiences can be reached through the Internet and material can be stored online, resulting in victims reliving denigrating experiences more often." *Id.*

⁸⁴ *Kowalski*, 652 F.3d at 572.

to protections under the First Amendment. Balancing these two considerations is essential.

Legislators have made commendable attempts to publicize and rectify the issue of cyberbullying—even expending valuable time and resources attempting to pass the *Megan Meier Cyberbullying Prevention Act*, which aimed to tighten the restrictions on cyberbullying.⁸⁵ This leads to an interesting inquiry: if lawmakers are spending precious time on cyberbullying, why has the Supreme Court consistently turned away from opining on the issue? This refusal to hear cyberbullying cases leaves unclear the state of First Amendment free speech rights of students for social media-related acts, and also the ability of schools to regulate and discipline students for them.⁸⁶ School districts, students, and parents alike will enjoy no reprieve until the Supreme Court lends guidance.

If and when the Court decides to exercise its right to hear this issue, it will have a plethora of standards to choose from. One approach might lead the Court to apply an extended version of *Tinker’s* “substantial disruption” standard.⁸⁷ This would be a meaningful compromise, where school officials would be required to make a compelling demonstration to show how the off-campus speech interferes with life on campus.⁸⁸ Another alternative might be to adopt a modified version of *Fraser’s* “vulgar and

⁸⁵ Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009) § 881; David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED.COM (Sept. 30, 2009), available at <http://www.wired.com/2009/09/cyberbullyingbill/> (discussing politicians’ skepticism of a cyberbullying bill). “From the outset of the 90-minute hearing, however, committee members from the left and the right said they thought the measure was an unconstitutional breach of free speech. ‘We need to be extremely careful before heading down this path,’ Bobby Scott, a Democrat from Virginia and the committee’s chairman, said during the hearing’s opening moment.” *Id.*

⁸⁶ Carrillo, *supra* note 15; Tabor, *supra* note 11, at 562.

⁸⁷ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (explaining the substantial disruption standard).

⁸⁸ Solove, *supra* note 10 (“But the lesson drawn from these cases is that schools must document a really compelling case, one that is not based on speculation or very loose linkages between the speech and on-campus activities.”).

offensive” standard.⁸⁹ In either case, real disruption—beyond occasional chatter and ridicule of school officials—should be required.⁹⁰

Ultimately, any Supreme Court plan should aim to protect the rights of individual students, while promoting uninterrupted education in our school systems. My proposal allows schools to regulate students’ off-campus speech that: (a) is reasonably foreseeable to reach school property or the instrumentalities thereof (including other students); and (b) creates a risk of foreseeable substantial disruption within the learning environment. In addition, whenever a school regulation is challenged, my proposal mandates that the school will hold the burden of proving that the restriction of speech is *necessary* to prevent a *compelling* interest of avoiding school disruption; one may think of it as a strict scrutiny standard, of sorts.⁹¹ The intent of this test is to take the focus out of *where* or *when* this speech was created, and instead consider to *whom* the speech is directed, and the potential ramifications of its publication at large.⁹²

In addition, parents and school districts should work together to take preventative measures to fight against cyberbullying.⁹³ Schools should take proactive roles in “fostering a particular climate and make students aware of the effects of cyberbullying, creating a sense for students about the importance of treating their peers with respect.”⁹⁴

According to one commentator, the best way to tackle this difficult issue may be found in

⁸⁹ See J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) (explaining the *Fraser* “vulgar and offensive” standard).

⁹⁰ Solove, *supra* note 10.

⁹¹ For example, if a school is restricting off-campus speech simply to protect the feelings of the school principal, this would be a violation of free speech rights. But if the school was restricting off-campus speech in order to prevent race riots or abuse of homosexual students, this standard would be satisfied.

⁹² See Brief of Appellee, Blue Mountain School District at 22, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (No. 08-4138) (arguing that less focus should be placed on where and when such content is created, and more emphasis should be placed on to whom it is likely to harm).

⁹³ *Libel Suits Not the Long Term Solution to Cyberbullying Among Youth*, BE GOOD LA (Sept. 29, 2012), available at <http://www.begoodla.com/libel-suits-not-the-long-term-solution-to-cyberbullying-among-youth/>.

⁹⁴ *Id.*

“preventative education.”⁹⁵ In California, for example, steps towards one-on-one dialogues between teachers and parents with students about the effects of this problem are beginning to take shape. The ACLU of Southern California recently sent a letter asking Orange County Schools to collaborate with the ACLU’s LGBTQ Student Rights Project to stop offline and online bullying of students.⁹⁶ The goal is “collaboration and empowering teachers.”⁹⁷

My proposal would require each state to enact an anti-bullying statute, mandating that every school district in the jurisdiction adopt a harassment, intimidation, and cyberbullying prevention policy.⁹⁸ Such statute should also include instructions for victims of cyberbullying to retain evidence—through saving URLs, taking screen-shots, or printing out harmful messages.⁹⁹ Lastly, each school should also develop a *Cyberbullying Awareness Program* where students are educated on the topic and can engage in collaborative discussions.

V. CONCLUSION

Cyberbullying affects America’s youth on a daily basis. Over half of adolescents have been bullied online, and about the same number have engaged in cyberbullying.¹⁰⁰ In a legal sense, this issue is exacerbated when determining the extent to which school districts may regulate and punish Internet speech made by students. Schools have a duty

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., WASH. REV. CODE § 28A.300.285 (2010), available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.300.285> (exemplifies requirements of such statute).

⁹⁹ Emily Bazelon, *Is Facebook Protecting Bullies?*, SLATE.COM (Apr. 1, 2010, 6:28 PM), http://www.slate.com/articles/life/bulle/2010/04/is_facebook_protecting_bullies.html.

¹⁰⁰ *Cyberbullying Statistics*, available at <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html>.

to protect their students from cyberbullying and other forms of harassment,¹⁰¹ but at the same time, must balance this responsibility with the rights granted by the First Amendment. Just how far may a school district go to identify, address, and punish instances of cyberbullying? There is no clear answer. Unfortunately, the Supreme Court has declined hearing this unique issue, making it nearly impossible to determine a clear-cut standard when reviewing such disputes.¹⁰²

Sooner rather than later, the Supreme Court must consider the pleas of lower courts, school districts, parents, and students—and address this immense societal issue. As time goes on, more and more communication will take place over the Internet. The sooner school districts and students understand what is permissible, the better.¹⁰³ As evidenced by recent litigation, school officials cannot afford to wait any longer for a definitive answer.¹⁰⁴ Without an evident standard, Americans will be forced to continually act under a cloud of fear and uncertainty. This is surely is not what our Founding Fathers had intended. We need to evoke change now in order to protect and expand our liberated, freethinking society of individuals capable of changing the world.

¹⁰¹ Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011); Stone, *supra* note 35.

¹⁰² See Walsh, *supra* note 15; Tabor, *supra* note 11, at 562 (“This problem is only exacerbated by the lack of guidance provided by the U.S. Supreme Court, which has not addressed whether public schools may punish off-campus student speech, let alone off-campus cyberspeech.”).

¹⁰³ Tabor, *supra* note 11, at 604.

¹⁰⁴ See Walsh, *supra* note 15 (noting the Supreme Court has declined to hear student Internet speech cases, and discussing the ramifications this inaction has had on our society and legal system).