CYBERBULLYING LAWS AND FIRST AMENDMENT RULINGS: CAN THEY BE RECONCILED?

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Tragedies tied to cyberbullying have made national headlines . . . but school leaders across the country are dealing with more-routine cases daily and often feel they have little legal advice or precedent to guide them in their decision making.[1]

INTRODUCTION

The U.S. Supreme Court has consistently refused to render an opinion in cases involving student Internet expression that is

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[1] Michelle R. Davis, *Cyberbullying*, EDUC. WK., Feb. 9, 2011, at 28.

disparaging or otherwise harmful, and lower courts have not spoken with a unified voice in these cases. Since the much-needed guidance does not seem forthcoming from the Supreme Court in the near future, school leaders are faced with a dilemma as to how to respond. But respond they must. They are expected to implement state anti-bullying laws that place obligations on them to curb bullying, including electronic expression. At the same time, they must comply with court decisions, some of which uphold students' rights to express their views electronically, even though the expression may be very hurtful to others in the school community.[2] Balancing these obligations is troublesome for school personnel to say the least.

This Article initially provides some background information on the scope of cyberbullying involving schoolchildren and federal and state responses to such conduct. Part II reviews pertinent First Amendment litigation. The next Part offers suggestions regarding possible Supreme Court positions that would respect students' expression rights and also recognize school authorities' duty to maintain an appropriate educational environment in which victims of cyberbullying are protected.

I. BACKGROUND

Student bullying certainly is not new; educators have had to deal with bullies since schools were first established, and school personnel always have had the authority to punish students who bully others through word or deed at school. But cyberbullying, usually defined as "[w]illful and repeated harm inflicted through

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[2] In addition, if cyberbullying allegedly results in a student committing suicide, school personnel may face a wrongful death suit seeking compensatory and/or punitive damages. *See* Francisco M. Negrón, Jr., *Maddening Choices: The Tension Between Bullying and the First Amendment in Public Schools*, 11 FIRST AMEND. L. REV. 364, 375-76 (2013); Nat'l Sch. Bds. Ass'n, *Mother of Student Who Committed Suicide Due to Peer Harassment Based on Ethnicity and Sexual Orientation Files Wrongful Death Action Against Indiana District*, LEGAL CLIPS (Sept. 10, 2012), http://legalclips.nsba.org/?p=16221. However, courts have not found a Fourteenth Amendment due process violation in a school's failure to protect a student against a classmate's bullying. *See* Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (finding no constitutional duty to shield a student from bullying by a fellow student as there was no special relationship and school officials did not create or enhance the danger associated with such third party actions), *cert. denied*, 134 S. Ct. 824 (2013).

the use of computers, cell phones, and other electronic devices,"[3] is a more recent phenomenon. Cyberbullying adds complexities because the perpetrators often post the harmful messages outside of school.

A. Scope of Cyberbullying

Cyberbullying involving schoolchildren is a significant problem, even though recent data indicate that limited progress is being made in halting the increase of bullying in general.[4] Access to the tools typically used for cyberbullying is quite prevalent as most students report that they have cell phones, about half of teens send more than 50 text messages per day (with close to one-third sending more than 100 texts daily), and three-fourths use social networking sites.[5] A report issued by the U.S. Department of Education in 2011 indicated that almost one-fifth of middle school administrators said they had to address cyberbullying daily or at least once per week.[6]

Since cyberbullies can hide behind a machine – a phone or computer – there is a sense of anonymity, and they can be bold because they do not have to confront the person who may be devastated by their remarks.[7] In some situations, school personnel have not even been able to identify who the perpetrators are. The i-generation's use of technology has "increased exponentially"

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[3] *About Us*, CYBERBULLYING RES. CENTER, http://cyberbullying.us/about-us/ (last visited Oct. 29, 2013); *see also* SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING (2009); John Schwartz, *Words that Hurt and Kill: Lessons for Society from Bullying and Its Psychic Toll*, N.Y. TIMES, Mar. 11, 2013, at C4.

[4] Nirvi Shah, *Progress, Persistence Seen in Latest Data on Bullying*, EDUC. WK., June 12, 2013, at 14.

[5] *See* MARY MADDEN ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND TECHNOLOGY 2013, at 2 (2013), *available at* http://www.pewinternet.org/Reports/2013/Teens-and-Tech.aspx; AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS, SMARTPHONES & TEXTING 11, 17 (2012), *available at* http://www.pewinternet.org/Reports/2012/Teens-and-smartphones/Summary-of-findings.aspx.

[6] SAMANTHA NEIMAN, NAT'L CTR. FOR EDUC. STATISTICS, CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS 12 (2011), *available at* http://nces.ed.gov/pubs2011/2011320.pdf.

[7] *See generally* BRENDA HIGH, BULLYCIDE IN AMERICA: MOMS SPEAK OUT ABOUT THE BULLYING/SUICIDE CONNECTION (2007), *available at* http://www.bullycide.org.

students' ability to inflict harm.[8] Indeed, given the bully-linked suicides, the computer and other electronic devices can be as deadly a weapon as a knife or gun.[9]

Surveys conducted have substantiated that between one-fifth and one-fourth of secondary school students report that they have been cyberbullied, and close to this percentage indicate that they have bullied others electronically.[10] Students report that the most common types of cyberbullying they experience are mean or hurtful comments and rumors being spread about them.[11] In a 2010 study, females were more likely than males to report cyberbullying (25% compared to 16%).[12] A survey conducted a few years earlier revealed that white students were more likely to report cyberbullying than were other racial groups, although racial differences were not quite as pronounced as were differences based on sex.[13]

Students identified as lesbian, gay, bisexual, or transgendered (LGBT) are far more likely than other students to report that they have been cyberbullied and bullied in general. The Gay, Lesbian & Straight Education Network's 2011 survey of middle and high school students revealed that more than four-fifths of LGBT students experienced verbal abuse at school in the prior year, about two-fifths had been physically harassed because

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[8] Nicole Yetter, *Addressing Bullying*, EDUC. WK., Nov. 14, 2012, at 25. The i-generation refers to the generation brought up from infancy using information technologies.

[9] *See* discussion of bullying-related suicides *infra* text accompanying note 21.

[10] Sameer Hinduja & Justin W. Patchin, *Lifetime Cyberbullying Victimization Rates*, CYBERBULLYING RES. CENTER (2010), http://www.cyberbullying.us/research.php; Sameer Hinduja & Justin W. Patchin, *Lifetime Cyberbullying Offending Rates*, CYBERBULLYING RES. CENTER (2010), http://www.cyberbullying.us/research.php.

[11] Sameer Hinduja & Justin W. Patchin, *Cyberbullying Victimization*, CYBERBULLYING RES. CENTER (Feb. 2010), http://www.cyberbullying.us/research.php.

[12] Sameer Hinduja & Justin W. Patchin, *Cyberbullying by Gender*, CYBERBULLYING RES. CENTER (Feb. 2010), http://www.cyberbullying.us/research.php.

[13] Sameer Hinduja & Justin W. Patchin, *Cyberbullying by Race*, CYBERBULLYING RES. CENTER (2008), http://www.cyberbullying.us/research.php. Although white students (21.2%) were almost twice as likely to report they had been cyberbullied as were black students (11.1%), the percentage spread was smaller between white students and multi-racial (17.8%) or Hispanic (16.1%) classmates. *Id.*

of their sexual orientation, and almost two-thirds felt unsafe at school.[14]

Public awareness of cyberbullying has never been greater,[15] and the popular media has made bullying of students one of its favorite topics. Talk shows regularly devote entire programs to this issue. As discussed in the next section, publicity given to cyberbullying victims who have committed suicide has resulted in federal initiatives and state laws that impose significant obligations on schools and educators to curb bullying, punish perpetrators, and protect victims.

B. Federal and State Responses

The U.S. Department of Education has become increasingly concerned about student bullying in our nation's schools. A "Dear Colleague" letter, issued by the Department's Office for Civil Rights in 2010, declared: "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."[16] Although this letter pertained to all types of

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[14] JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, at xiv (2012), *available at* http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf. Studies also indicate that children with disabilities are more likely to be bullied, although cyberbullying has not been the focus of these reports. *See, e.g.*, Chad A. Rose et al., *Bullying and Victimization Among Students in Special Education and General Education Curricula,* 21 EXCEPTIONALITY EDUC. INT'L 2, 3 (2011). In 2013, the U.S. Department of Education issued a guidance letter indicating that severe bullying of a student with disabilities can deny the student's right to a free, appropriate public education under the Individuals with Disabilities Education Act. Memorandum from Melody Musgrove, Dir., Office of Special Educ. Programs, & Michael K. Yudin, Acting Assistant Sec'y, Office of Special Educ. and Rehabilitative Servs., Dear Colleague Letter on Bullying (Aug. 20, 2013) (on file with the Department of Education), *available at* http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf.

[15] *See* Amici Curiae Brief of Nat'l Sch. Bds. Ass'n et al. in Support of Petitioners at 20, Blue Mountain Sch. Dist. v. Snyder, 132 S. Ct. 1097 (2012) (No. 11-502), 2011 WL 5254664, at *20.

[16] Memorandum from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dear Colleague Letter on Harassment and Bullying (Oct. 26. 2010) (on file with the Department of Education), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html. The letter not only urges schools to

student harassment and bullying, other initiatives of the federal government have specifically targeted cyberbullying. For example, the U.S. Department of Health and Human Services offers strategies to prevent and respond to cyberbullying, which it notes can take place twenty-four hours a day.[17] And the Department of Education and the White House have held conferences focusing in part on cyberbullying.[18]

In 2002, nine states had anti-bullying laws, but now Montana is the single state without such a measure. Only sixteen of these laws specifically prohibit cyberbullying, but forty-seven address electronic harassment.[19] These anti-bullying laws often share similar language with anti-harassment policies. In some of these provisions, the terms "harassment" and "bullying" are used

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aggressively address bullying, it suggests "a new legal standard that would ultimately penalize schools . . . if they fell short of completely eliminating bullying." Negrón, *supra* note 2, at 367.

[17] *See* U.S. Dep't of Health and Human Servs., STOPBULLYING.GOV, http://www.stopbullying.gov (last visited Feb. 1, 2014). The website provides examples of cyberbullying, including hateful text or email messages; insulting rumors on social networking sites; and embarrassing pictures, videos, or fake profiles shared electronically. A coalition of religious and educational organizations also issued a pamphlet in 2012 to assist school personnel in balancing free expression and school safety concerns. AM. JEWISH COMM. & RELIGIOUS FREEDOM EDUC. PROJECT, HARASSMENT, BULLYING AND FREE EXPRESSION: GUIDELINES FOR FREE AND SAFE PUBLIC SCHOOLS (2012).

[18] To illustrate, the Department of Education hosted a summit on "Federal Partners in Bullying Prevention" in 2010, and the White House held a conference in 2011 where parents, students, educators, and researchers focused on strategies to prevent and deal with cyberbullying. *See* Sameer Hinduja, *US Department of Education Bullying Summit this Week*, CYBERBULLYING RES. CENTER (Aug. 9, 2010), http://www.cyberbullying.us/blog/us-department-of-education-bullying-summit-this-week; Justin W. Patchin, *White House Bullying Conference*, CYBERBULLYING RES. CENTER (Mar. 16, 2011), http://www.cyberbullying.us/blog/white-house-bullying-conference; *see also* Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges,* 2011 BYU EDUC. & L.J. 75, 82-83 (2011).

[19] The District of Columbia also has adopted an anti-bullying provision. *See* Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws*, CYBERBULLYING RES. CENTER (Dec. 2013), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf. *See generally* John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85 (2011); BULLY POLICE USA (Apr. 2012) (a watchdog organization that monitors state anti-bullying laws), http://www.bullypolice.org/. Also, all states except Nebraska have laws prohibiting electronic stalking or harassment. *See* Steven Hazelwood & Sarah Koon-Magnin, *Cyber Stalking and Cyber Harassment Legislation in the United States: A Qualitative Analysis,* 7 INT'L J. CYBER CRIMINOLOGY 155-68 (2013).

interchangeably, even though "harassment" is associated with specific institutional liability under federal civil rights laws that do not apply to bullying.[20]

There is a direct correlation between comprehensive state anti-bullying laws and publicity given to student suicides alleged to be caused by bullying. For example, California's anti-bullying law was revised in 2011 after Seth Walsh ultimately died as a result of a suicide attempt that allegedly was linked to bullying.[21] The revised California law places an obligation on all school districts to ensure that reports of harassment are addressed quickly and that complaint procedures are clear. It also requires ongoing professional development for all school staff members.

Lawmakers also accelerated efforts to pass the Massachusetts anti-bullying statute following the suicide of Phoebe Prince in 2010.[22] The far-reaching Massachusetts law prohibits bullying at school and at any location unrelated to the school including the use of technology or electronic devices if the bullying "creates a hostile environment at school for the victim, infringes on the rights of the victim at school, or materially and substantially disrupts the education process or the orderly operation of a school."[23] Massachusetts requires anti-bullying instruction for all students as well as staff development for all school personnel, and every school district must establish an implementation plan that creates a system for collecting and

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[20] For a discussion of the different legal meanings of "harassment" and "bullying," see Martha McCarthy, *Student Electronic Expression: Unanswered Questions Persist*, 277 EDUC. L. REP. 1, 11-13 (2012). *See also infra* text accompanying note 43.

[21] A.B. 9, 2011 Assemb., Reg. Sess. (Cal. 2011); *Seth's Law*, EQUALITY CAL., http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=6586657 (last visited Oct. 30, 2013); CAL. EDUC. CODE § 32261 (West 2012). Following the suicide of a Missouri student, thirteen-year-old Megan Meier, allegedly because of postings on MySpace, Missouri revised legislation to prohibit use of electronic means to knowingly "frighten[], intimidate[], or cause[] emotional distress to another person." MO. REV. STAT. § 565.090 (2008); *see also* MO. REV. STAT. § 160.261 (2013); MO. REV. STAT. § 565.225 (2008). Federal legislation also has been proposed in this regard, but has not yet been enacted. *See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

[22] *See Suicide of Phoebe Prince*, WIKIPEDIA (Jan. 10, 2014), http://www.en.wikipedia.org/wiki/Suicide_of_Phoebe_Prince. Also, the 2009 suicide of Sarah Lynn Butler in Arkansas, which was attributed to cyberbullying, provided the impetus for Arkansas to reform its cyberbullying law to strengthen penalties against those charged with such acts. ARK. CODE ANN. § 5-71-217 (Supp. 2011).

[23] MASS. GEN. LAWS ch. 71, § 37O (2013).

responding adequately to complaints of bullying. The law also requires annual notification of all staff members of the school district's bullying prevention and intervention plan.

The anti-bullying laws in New Jersey and New York similarly portray the extensive obligations being placed on school personnel. New Jersey's Anti-Bullying Bill of Rights Act, enacted in 2011, is among the most comprehensive laws nationwide in prohibiting bullying, harassment, or intimidation that disrupts the school or interferes with the rights of others.[24] The law places a duty on school personnel to address bullying that originates off campus. Under the law, each school district must have an anti-bullying specialist, and complaints must be investigated within ten days. Schools receive a grade on how they handle such complaints, and school principals can be disciplined for failure to comply with this law. However, the state is providing only one-fifth of the amount of money school districts and charter schools requested to implement the law, which may lead to litigation.[25]

New York's Dignity for All Students Act also defines harassment broadly and requires instruction in civility and citizenship and character education for all students.[26] This law specifically recognizes that even though cyberbullying is initiated off campus, it "affects the school environment and . . . [impedes] the ability of students to learn . . . too often causing devastating effects on students' health and well-being."[27] In many other states, anti-bullying laws are becoming increasingly prescriptive, and even laws that are not as detailed as the ones cited here usually place a duty on school districts to adopt policies to curb electronic harassment.

Most of the anti-bullying laws focus on student behavior toward classmates, but North Carolina in 2012 extended

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[24] N.J. STAT. ANN. § 18A:37-13.2 (2011).

[25] *N.J. Anti-Bullying Plan Falls Short for Schools*, EDUC. WK., July 18, 2012, at 4. In February 2013, the Anti-Bullying Task Force, charged with monitoring the impact of this law, reported that school administrators need "more discretion in deciding when to launch full-scale [investigations]" and referrals to anti-bullying specialists regarding bullying allegations. *See* Leslie Brody, *Anti-Bullying Task Force Says Principals Need More Leeway,* NORTHJERSEY.COM (Feb. 1, 2013), http://www.northjersey.com /news/189330121_Anti-bullying_task_force_says_principals_need_more_leeway.html.

[26] N.Y. EDUC. LAW §10 (McKinney 2012).

[27] *Id.*

protections to teachers, making it a crime for students to bully teachers on the Internet. Students face misdemeanor criminal charges under the law for intimidating or tormenting school employees online, which includes posting a fake electronic profile of a staff member.[28] Similar to state anti-bullying provisions directed toward classmates, this North Carolina law has implications for potential conflicts with students' First Amendment rights.

II. FIRST AMENDMENT ISSUES

This Part provides a very brief overview of U.S. Supreme Court rulings pertaining to student expression rights and the types of electronic expression that are excluded from constitutional protection. Then explored are lower court cases involving student Internet expression, with emphasis on federal appellate court rulings.

A. U.S. Supreme Court Decisions

The four Supreme Court decisions providing the legal principles to assess free expression rights of public school students have been discussed at length in the school law literature.[29] Thus, it should suffice here simply to mention briefly the principles they established. The Supreme Court in its landmark decision, *Tinker v. Des Moines Independent Community School District*, announced in 1969 that students have a free speech right to express their ideological views in public schools unless school authorities can reasonably forecast a substantial disruption because of the expression, or it collides with the rights of others.[30]

Almost two decades later the Court rendered two significant decisions placing some limitations on *Tinker*'s protections afforded

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[28] Nat'l Sch. Bds. Ass'n, *North Carolina Statute Extends Protections from Cyberbullying to Teachers*, LEGAL CLIPS (Oct. 25, 2012), http://legalclips.nsba.org/?p=16883 (citing School Violence Prevention Act, 2012 N.C. Sess. Laws 149).

[29] *See, e.g.*, Kathleen Conn, *The Third Circuit En Banc Decisions on Out-of-School Student Speech: Analysis and Recommendations*, 270 ED. L. REP. 389 (2011); Philip T.K. Daniel, *Bullying and Cyberbullying in Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-Harassment Legislation*, 268 ED. L. REP. 619 (2011); McCarthy, *supra* note 20, at 1.

[30] 393 U.S. 503, 508-09 (1969).

to student expression. In *Bethel School District No. 403 v. Fraser*, the Court held that lewd, vulgar, and plainly offensive student expression in public schools is not shielded by the First Amendment even though such expression may be protected for adults outside the school domain.[31] And two years later in *Hazelwood School District v. Kuhlmeier*, the Court held that student expression appearing to represent the school can be curtailed for legitimate pedagogical reasons, thus drawing a distinction between school-sponsored and private student expression.[32]

Nearly two more decades elapsed before the Supreme Court rendered its fourth decision, *Morse v. Frederick*, in which the Court held that student expression promoting illegal drugs could be curtailed without a link to a disruption.[33] The Court emphasized that standards in addition to *Tinker*'s disruption principle may be appropriate to use in assessing the constitutional protection afforded to student expression, but it left many questions unanswered regarding off-campus expression since the expression at issue in *Morse* occurred during a school-related activity.

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[31] 478 U.S. 675, 682-86 (1986). *Fraser* is the most ambiguous of the four Supreme Court rulings. The Third Circuit recently opined that *Fraser* established the following exceptions to constitutional protection: Student expression in public schools can be categorically restricted regardless of its content if clearly vulgar, lewd, indecent, or plainly offensive; expression also can be curtailed that is deemed ambiguously lewd or vulgar, but only if it does not plausibly comment on a social or political issue. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 319-20 (3d Cir. 2013). But this standard, which has not yet been adopted by other courts, still leaves considerable latitude to school authorities and lower courts, and it does not address electronic expression. An Indiana federal district court in 2013 faulted the Third Circuit's interpretation of *Fraser*, contending that the second part of the appellate court's standard mistakenly relied on Justice Alito's concurring opinion in *Morse v. Frederick*, 551 U.S. 393, 422 (2007). *See* J.A. v. Fort Wayne Cmty. Sch., No. 1:12-CV-155 JVB, 2013 WL 4479229, at *4 (N.D. Ind. Aug. 20, 2013) (holding that deference should be given to school authorities in determining what is lewd and vulgar student expression in a given school context).

[32] 484 U.S. 260, 271-74 (1988).

[33] 551 U.S. 393, 406-09 (2007). There is some sentiment that the Court in *Morse* created a new standard excluding expression from constitutional protection based on "student welfare." *See generally* Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech After* Morse v. Frederick, 58 AM. U. L. REV. 1221 (2009).

None of these cases involved student cyberbullying, and despite the growing volume of lower court decisions, the Supreme Court consistently has declined to review appeals of the cases regarding students' electronic expression.[34] Consequently, there is more uncertainty than clarity.

B. Exclusions from First Amendment Protection

Only in limited circumstances are the legal principles applied to student electronic expression somewhat well-defined. If such expression is considered a true threat or fighting words, obscene, or defamatory, school authorities can curtail it without fearing that they are trampling on students' First Amendment rights.

In determining if a true threat has been made, courts consider a number of factors, such as: (1) reactions of the recipient and other listeners; (2) whether the maker of the alleged threat had made similar statements to the victim in the past; (3) if the utterance was conditional and communicated directly to the victim; and (4) whether the victim had reason to believe that the speaker would engage in violence.[35] Although many of the education cases involving alleged threats or fighting words have focused on written or spoken expression,[36] some have focused on electronic expression. To illustrate, in 2011, the Eighth Circuit found a true threat in a student's text message sent from home to a classmate in which he mentioned getting a gun and shooting other students at school.[37] The serious statements were communicated to a third party, and combined with the speaker's admitted depression and access to weapons, the appeals court reasoned that school authorities did not need to wait until the

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[34] *See* McCarthy, *supra* note 20, at 1-19; *infra* text accompanying notes 52-58.

[35] *See* United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

[36] *See, e.g.*, Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 772 (5th Cir. 2007) (finding that journal entries threatening a Columbine-type attack were not protected expression); Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007) (finding that a student's story about a "dream" of shooting a teacher caused a disruption and was not protected expression); S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 425 (3d Cir. 2003) (upholding suspension of a kindergarten student for saying, "I'm going to shoot you," during a game at recess, which violated the school's prohibition on speech threatening violence and the use of firearms).

[37] D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 766 (8th Cir. 2011); *see also* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013); *infra* text accompanying note 63.

threat was carried out before taking action. Thus, the student's immediate placement in juvenile detention[38] and his subsequent expulsion for the remainder of the school year were found to be appropriate responses to the true threat.

Also, if student electronic expression targeting the school community is considered obscene, the student can be subject to disciplinary action at school. The Supreme Court has not precisely defined the contours of obscene expression, but in a 1973 case, the Court provided several criteria to use in making this determination.[39] The Court articulated the following "basic guidelines" for lower courts to apply in assessing if material should be considered obscene:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[40]

Moreover, the Supreme Court has recognized the government's authority to adjust the definition of obscenity as applied to minors.[41] In 2013, a federal district court in Nevada ruled that a student's tweet considered obscene was not entitled to First Amendment protection as a matter of law, even though the students' non-obscene tweets were protected.[42] Yet, substantiating

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[38] School authorities notified the police who placed the student in juvenile detention. *D.J.M.*, 647 F.3d at 756-57.

[39] Miller v. California, 413 U.S. 15, 24 (1973).

[40] *Id.* (citations omitted).

[41] *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 643-45 (1968) (upholding a state law prohibiting the sale to minors of magazines depicting female nudity).

[42] Rosario v. Clark Cnty. Sch. Dist., No. 2:13-CV-362 JCM (PAL), 2013 WL 3679375, at *3 (D. Nev. July 3, 2013). Of course, in the public school context, student expression does not have to be obscene to be curtailed; students can be disciplined for lewd and vulgar expression that would not satisfy the obscenity criteria. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686-87 (1986); *supra* text accompanying note 31.

that a student's electronic expression is obscene is a difficult task.[43]

Defamatory expression also is beyond the protective arm of the First Amendment. Defamation entails false statements that expose another to public shame or ridicule and are communicated to someone other than the defamed individual.[44] If students' electronic expression defames another individual, a suit for damages can be brought under state tort law, and a First Amendment defense will not shield such defamatory expression.

C. Lower Court Internet Cases

As mentioned, lower courts have reflected a range of rationales for their decisions in cases involving student electronic expression that does not represent a true threat, fighting words, harassment, obscenity, or defamation.[45] For example, in some of

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[43] Also, the Supreme Court has provided limited guidance where student expression is considered harassment, in that the education institution can be liable under several federal civil rights laws that protect individuals against discrimination based on race, sex, and disabilities if school personnel were aware of the harassment and reflected deliberate indifference toward victims. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (requiring school personnel who can take corrective action to have actual knowledge of the severe and persistent peer sexual harassment and reflect deliberate indifference toward the victim for damages to be assessed against a school district under Title IX of the Education Act Amendments of 1972); *see also* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012) (race, color, national origin); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012) (disabilities); Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2012) (disabilities). The standard that must be satisfied by those alleging peer harassment is extremely difficult to meet. *See, e.g.*, Long v. Murray Cnty. Sch. Dist., 522 F. App'x 576, 577 (11th Cir. 2013) (recognizing that the response to peer harassment must clearly be unreasonable to meet the "exacting" deliberate indifference standard, which was not met in this case involving disability harassment). Although the federal laws do not refer to bullying, some of the letters issued by the U.S. Department of Education have comingled the terms "bullying" and "harassment." *See* Ali, *supra* note 16 (noting that "[t]he label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications."). Even if the distinction between bullying and harassment were clarified in terms of institutional penalties, this would not resolve whether the First Amendment protects some student bullying. The Supreme Court has not articulated an exception from First Amendment protection for harassing or bullying expression.

[44] *See* BLACK'S LAW DICTIONARY 479-80 (9th ed. 2009).

[45] Federal courts also have rendered conflicting decisions regarding higher education students' First Amendment rights to post comments on social networks. *See, e.g.*, Murakowski v. Univ. of Delaware, 575 F. Supp. 2d 571, 590-91 (D. Del. 2008)

the early Internet cases, federal district courts upheld students' expression rights to create a website with mock obituaries that allowed visitors to vote on who should "die" next, finding no threat of harm to anyone;[46] to establish a home page criticizing school administrators that was not shown to interfere with school discipline;[47] and to send an email message with a discourteous and rude "top ten list" about the school's athletic director, finding no link to a disruption of classes or the management of the school.[48]

In contrast, schools have prevailed in disciplining students for a website with derogatory comments about teachers and a graphic depiction of the algebra teacher's death;[49] a video posted on YouTube that showed a teacher bending over with a classmate making pelvic thrusts behind her;[50] and an instant messaging buddy icon that showed a pistol firing at a person's head with the caption, "Kill Mr. VanderMolen."[51] In these cases a sufficient link to a disruption of the school was established. Most of these cases have involved comments about school personnel rather than classmates.

More recently, federal appellate courts have continued to issue divergent opinions. For example, the full Third Circuit in 2011 rendered decisions favoring students' expression rights in two cases that had generated conflicting decisions by different

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(finding students' articles pertaining to violence and sexual abuse posted on his website did not constitute a true threat or pose a material disruption); Tatro v. Univ. of Minnesota, 800 N.W.2d 811, 822 (Minn. Ct. App. 2011) (upholding sanctions against a mortuary student for Facebook postings that were disrespectful about cadavers and violated professional standards).

[46] Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

[47] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998).

[48] Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001); *see also* Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (finding an insufficient connection between the disruption of any school activity and a student's website, "Satan's Web Page," which contained likes and dislikes, including a list of people he wished would die).

[49] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868-69 (Pa. 2002); *infra* text accompanying note 82.

[50] Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1283 (W.D. Wash. 2007).

[51] Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-40 (2d Cir. 2007).

Third Circuit panels.[52] At issue in *Layshock v. Hermitage School District* and *J.S.* ex rel. *Snyder v. Blue Mountain School District* were mock MySpace profiles of the school principals that were vulgar and linked the principals to drugs, alcohol, sexual abuse, and other degrading activities. The appeals court reasoned that school districts cannot punish students for expression that originates outside of school and does not create a substantial disruption of the educational process, which the mock profiles did not do.[53] The en banc court rejected the assertion that *Fraser*'s exclusion of lewd, vulgar, or plainly offensive expression from constitutional expression could be applied to students' off-campus electronic expression.[54]

In contrast to the Third Circuit's position, the Second Circuit in *Doninger v. Niehoff* ruled in favor of school authorities who prevented a student from running for senior class secretary because of a vulgar blog entry she posted from home. The blog encouraged others to contact school administrators and complain about a change in scheduling a school event involving an annual

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[52] Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). However, the school policies requiring students to express their ideas in a respectful manner and to refrain from verbal abuse were not found to be overbroad in either case. For a more detailed treatment of these cases, see Conn, *supra* note 29, at 396-400; McCarthy, *supra* note 20, at 6-9.

[53] *Layshock*, 650 F.3d at 219; *J.S.*, 650 F.3d at 936; *see also* R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1141-49 (D. Minn. 2012) (holding that a middle school student could not be disciplined for off-campus postings on Facebook and that she had a valid Fourth Amendment claim regarding school officials requiring her to provide passwords to her Facebook and personal email accounts); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1126 (C.D. Cal. 2010) (finding a violation of a student's free speech rights in disciplinary action imposed for posting a YouTube video that was disparaging toward a classmate because there was not a sufficient link to a school disruption); *infra* text accompanying note 120.

[54] *Layshock*, 650 F.3d at 216-17; *J.S.*, 650 F.3d at 932-33. The Third Circuit also basically ignored *Tinker*'s exclusion from constitutional protection of expression interfering with the rights of others, although the federal district court in *J.S.* had given some credence to this prong of the *Tinker* standard. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *6 n.4 (M.D. Pa. Sept. 11, 2008) (recognizing that student expression invading the rights of others is not protected under *Tinker* and that it would be very damaging to a school principal to have a profile on the Internet indicating that he engages in inappropriate sexual activity).

battle of the bands concert.[55] The court held that the school officials could reasonably conclude that the expression might disrupt student government functions. Also at issue were t-shirts supporting the blogger's freedom of speech that classmates planned to wear to the school assembly where candidates for the class offices were to give their speeches. Acknowledging that the shirts might be protected under *Tinker* if not linked to a disruption, the court nonetheless held that the school defendants were entitled to qualified immunity on this claim as well because the rights at issue were not clearly established.

A fourth 2011 federal appellate decision, *Kowalski v. Berkeley County Schools*, focused on a MySpace page created by Kara Kowalski that ridiculed a specific classmate, Shay, alleging that Shay had herpes among other things. Given the negative impact of the website on Shay, school authorities disciplined Kara for creating the page.[56] Kara contested the disciplinary action as violating her First Amendment expression rights as well as her Fourteenth Amendment due process rights. In part, she argued that the comments about herpes were not directed toward Shay[57] and that her expression was protected because the page was created off campus. Several classmates responded to the page with disparaging comments and edited pictures of Shay.

The Fourth Circuit agreed with school authorities that Kara's website abridged the school's policy prohibiting "harassment,

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[55] Doninger v. Niehoff, 642 F.3d 334, 357 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); *see also* Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834, 841-42 (N.D. Miss. 2012) (upholding disciplinary action against a student for the Internet posting of a vulgar rap song that accused two school coaches of improper contact with female students). *But see* TC v. Valley Cent. Sch. Dist., 777 F. Supp. 2d 577, 606 (S.D.N.Y. 2011) (holding that a student could proceed with claims of a violation of free speech rights, in addition to racial discrimination, in his suspension for possessing a rap song with offensive lyrics that were not shown to have distracted classmates).

[56] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 568-69 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012). Her punishment included a five-day suspension from school (reduced from ten days originally imposed) and a ninety-day suspension from attending school events in which she was not a direct participant. Kara also was removed from the cheerleading squad for the remainder of the year and not allowed to crown the next "Queen of Charm." *Id.* at 569.

[57] The MySpace webpage was called S.A.S.H., which Kara said stood for "Students Against Sluts Herpes," but a classmate testified that the acronym stood for "Students Against Shay's Herpes." *Id*. at 567.

bullying, and intimidation."[58] The student handbook was clear regarding the prohibited bullying and harassing behavior and the penalties that would be imposed for violations. The court reasoned that the website attack on a classmate substantially collided with the rights of another student, which impeded school discipline, and therefore created a disruption of the work of the school. The Supreme Court declined to review all four of the 2011 federal appellate decisions.

Adding to the range of opinions, the Eighth Circuit in 2012 reversed and vacated the lower court's injunction that kept school authorities from imposing disciplinary action on twin brothers for creating a website and blog that were offensive, racist, and sexist.[59] The Missouri federal district court had reasoned that forcing the students to transfer to another school in lieu of a long-term suspension would create irreparable harm, but the appeals court found sufficient evidence that the website and blog were disruptive of the work of the school and that the brothers knew their posts would be viewed by classmates.[60] Noting that "[t]he repercussions of cyber-bullying are serious and sometimes tragic,"[61] the Eighth Circuit cited *Doninger* and *Kowalski* approvingly in recognizing that like those cases, the posts in this situation also were directed toward members of the school community.[62] Thus, the targets of the expression, rather than where it originated, seemed to be the Eighth Circuit's key concern.

In 2013, the Ninth Circuit in *Wynar v. Douglas County School District* also upheld school authorities in expelling a Nevada student for his online comments initiated off campus about committing a violent shooting spree at his school.[63]

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[58] *Id.* at 574-75. Also rejecting Kara's due process claim, the court was satisfied that the school's policy on harassment, bullying, and intimidation along with its student code of conduct gave Kara adequate notice of the type of behavior that could be punished for adversely affecting the school environment. In addition, the Fourth Circuit rejected Kara's claim that the disciplinary action resulted in intentional or negligent infliction of emotional distress under state law as the defendants' actions were not extreme or outrageous. *Id.* at 576.

[59] S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 780 (8th Cir. 2012).

[60] *Id.* at 778.

[61] *Id.* at 779.

[62] *Id.* at 777-78.

[63] 728 F.3d 1062, 1065 (9th Cir. 2013).

Although the appellate panel could have found the student's threatening statements that named specific students to constitute a true threat, which is outside First Amendment protection,[64] the court nonetheless applied *Tinker* in this case.[65] Concluding that school officials may take disciplinary action under *Tinker* when they confront an identifiable threat of school violence, the Ninth Circuit found the expulsion justified because the expression both threatened a substantial disruption and invaded the rights of others.[66] Thus, the panel used both prongs of the *Tinker* standard in ruling that the student's expression was not constitutionally protected.[67]

Given the diversity across lower court rationales for their decisions,[68] school leaders often feel confused as to the governing legal principles. They are expected to implement prescriptive state anti-bullying provisions, but the controlling court decisions in their jurisdictions may protect students' rights to express hurtful and disparaging views electronically.[69]

III. STRATEGIES TO BALANCE THE INTERESTS INVOLVED

Rather than leaving school personnel in the uncomfortable position of trying to comply with state laws that conflict with lower court interpretations of the Free Speech Clause, the Supreme Court should render an opinion that will provide direction for school personnel and students on the reach of the First Amendment and whether state anti-bullying legislation

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[64] *See supra* text accompanying note 35.

[65] *Wynar*, 728 F.3d at 1067-69 (citing Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[66] *Id.*

[67] *Id.*

[68] In addition to the federal appellate decisions, federal district courts and state courts have used various rationales in upholding students' rights to post hurtful comments electronically or in upholding school authorities in curbing such electronic expression. *See, e.g.*, *supra* text accompanying notes 46-50; *infra* text accompanying notes 82-86.

[69] *See* Hayward, *supra* note 19, at 120 (arguing that state anti-bullying laws are unconstitutionally vague and overbroad). Particularly problematic is expression that might be hurtful and disparaging but is based on sincerely held religious beliefs. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 203-04 (3d Cir. 2001) (striking down a school district's overly broad anti-harassment policy that prevented a student from expressing his religious belief that homosexuality is sinful).

complies with the constitutional requirements. This Part discusses two possible positions the high court could take that would assist in reconciling state anti-bullying laws and First Amendment guarantees.

A. Considering Electronic Expression to be In-School Speech

One option would entail considering student electronic expression directed toward school personnel or classmates to be *in-school speech* and thus governed by the same First Amendment standards applied to any other student expression at school. If the Supreme Court would assess electronic expression based on its *targets* and *impact* rather than on where it *originates*, this would answer at least some of the unresolved questions and would provide more coherence between state anti-bullying provisions and First Amendment judicial rulings. Granted, the application of legal standards to in-school student speech is not absolutely clear, but these criteria are more certain than are the standards in connection with student expression that originates off campus.[70]

If electronic expression targeting classmates and/or school personnel and viewed by the school community is considered in-school speech, it would be subjected to *Fraser*'s exclusion of lewd, vulgar, and plainly offensive student expression from constitutional protection.[71] The Supreme Court in *Morse v. Frederick* suggested that *Fraser* might not apply to off-campus student expression in a public forum,[72] but the actual distinction drawn in *Fraser* was between the broad protection of *adults'* expression rights outside the school and the more limited rights of

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[70] The discussion here focuses primarily on interpretations of the legal principles established in *Fraser* and *Tinker*. Seldom is a claim made that student electronic expression represents the school and thus is not protected expression under Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Also, the central holding in *Morse*, that student advocacy of illegal drugs is unprotected, is not usually at issue in the electronic expression cases, although the *Morse* Court's conclusion that standards other than *Tinker*'s disruption standard can be applied in student expression cases can have a bearing on the constitutionality of students' electronic expression.

[71] A private e-mail exchange between two students would not satisfy this standard; it would not be reasonably foreseeable that such expression would be viewed by a large segment of classmates, so it would not trigger *Fraser*'s or *Tinker*'s exclusions from constitutional protection.

[72] 551 U.S. 393, 405 (2007).

schoolchildren in this regard.[73] Since bullying expression often is lewd and vulgar, if electronic comments are considered *in-school* because they are intended to harm or disparage students or school personnel and are widely accessible to the school community, the debate surrounding whether *Fraser* applies to such expression would become moot. Lewd or vulgar posts on websites, blogs, or Facebook and other electronic expression viewed broadly in the school environment could be censored similarly to lewd and vulgar comments made in a school assembly. Quoting *Fraser*, the Fourth Circuit concluded in *Kowalski* that the disparaging website "is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system.'"[74]

Setting aside concerns with how *Fraser* is applied to *in-school* speech,[75] it is puzzling why some courts are inclined to apply to student electronic expression *Tinker*'s exclusion from constitutional protection of expression that threatens a substantial disruption but not *Fraser*'s exclusion of lewd and vulgar expression.[76] The expression at issue in both *Tinker* and *Fraser* occurred on campus.[77] One might logically conclude that *Fraser* would be applied to Internet expression in a similar fashion as *Tinker*.[78] Yet the Third Circuit, for example, was definitive that

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[73] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[74] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (quoting *Fraser*, 478 U.S. at 681), *cert. denied*, 132 S. Ct. 1095 (2012).

[75] Lower court interpretations of *Fraser* have not been consistent**.** For a discussion of cases applying *Fraser*, see B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 302-19 (3d. Cir. 2013). Even the Supreme Court in *Morse* recognized that "[t]he mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404.

[76] *See* Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1175-79 (2009) (contending that even *Tinker* should not be applied to expression initiated off school grounds because such expression enjoys greater constitutional protection than in-school speech).

[77] *See Fraser*, 478 U.S. at 677; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

[78] Of course, it might be argued that Fraser's expression represented the school since his sexual innuendo was used in a speech in a school assembly, which might distinguish it from the children in *Tinker* wearing black armbands to protest governmental policies—clearly private expression. But if Mary Beth Tinker had worn her armband when introducing a speaker in a school assembly, it is unlikely that this would have lessened the protection of her silent protest. And the armbands were worn

Fraser does not apply to electronic expression originating off school grounds; such expression can generate disciplinary action against the student speaker only if linked to a disruption of the work of the school under *Tinker*.[79]

Regardless of the standard applied, several courts have indicated that students' electronic comments originating outside of school but directed toward classmates or school employees should be treated as in-school speech in applying constitutional principles. For example, the Fourth Circuit in *Kowalski* concluded that the expression originating at home was punishable because it targeted a classmate.[80] Noting that it might consider the controversial website to be in-school expression for purposes of applying *Fraser*'s exclusion of lewd and vulgar expression from constitutional protection, the Fourth Circuit reasoned, however, that it did not have to make such a pronouncement because the expression at issue was not protected under *Tinker*.[81]

In *J.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court upheld disciplinary action against a student who posted derogatory, profane, and threatening comments directed toward a teacher and the principal on a "Teacher Sux" website.[82] The school district argued that the expression was on-campus speech because it was accessed at school, even though it was initiated off campus. The court agreed that there was "a sufficient nexus between the website and the school campus to consider the [electronic] speech as occurring on campus."[83]

Also, a California federal district court said that "the geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech."[84] This court, however, found the hurtful expression at issue protected under *Tinker*. A

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during classes throughout the school day, whereas Fraser's innuendo was used briefly during his nominating speech in a setting where attendance was not required.

[79] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216-17 (3d Cir. 2011), *cert. denied*, 132 S. Ct 1097 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *supra* text accompanying notes 52-54.

[80] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 567 (4th Cir. 2011).

[81] *Id.* at 573.

[82] 807 A.2d 847, 850 (Pa. 2002).

[83] *Id.* at 865.

[84] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010); *infra* text accompanying note 120.

Florida federal district court similarly indicated that it was not suggesting "that speech made off-campus and accessed on-campus cannot be handled as on-campus speech."[85] Nonetheless, in this case involving a student's creation of a social networking site to voice disdain for a teacher, the court found that the disciplinary action did not even comport to that governing on-campus expression and thus upheld the student's right to express her views.[86]

In urging the Supreme Court to consider electronic expression that targets the school community to be in-school speech, the National School Boards Association (NSBA) on behalf of several professional organizations argued that differentiating electronic speech simply because of its origin is a "distinction without a difference."[87] The NSBA asserted that "[t]he ubiquity and power of this electronic forum make jurisprudential concepts such as 'off- and on-campus' analytically anachronistic."[88] The ability of the vast majority of the student population to receive messages electronically on cell phones and other devices[89] has certainly blurred on-campus and off-campus expression. Indeed, students can reach far more people with one click on a computer than they ever could by distributing print materials at school.

In some cases, the electronic expression has been accessed at school. This was true with the MySpace parody of the principal in *Layshock*, but the Third Circuit was not convinced that this made the expression "in school."[90] The Eighth Circuit reasoned somewhat differently in a more recent case, relying to some extent on the fact that the racist and sexist website at issue was accessed at school in upholding disciplinary action against the site's creators.[91]

It is difficult to distinguish the protection of electronic expression that originates from home but reaches the school from

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[85] Evans v. Bayer, 684 F. Supp. 2d 1365, 1371-72 (S.D. Fla. 2010).

[86] *Id.* at 1376-77.

[87] Amici Curiae Brief, *supra* note 15, at *14.

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

[89] *See generally* LENHART, *supra* note 5, at 11.

[90] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011), *cert. denied*, 132 S. Ct 1097 (2012); *supra* text accompanying note 52.

[91] S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012); *supra* text accompanying note 59.

a note written at home and brought to school that can be the basis for disciplinary action. In *LaVine v. Blaine School District*, the Ninth Circuit upheld a school's emergency expulsion of a student who wrote a graphic and violent poem about killing his classmates.[92] The poem was written in the evening at home and was not part of any school project.[93] The writer later brought the poem to school to show one of his teachers. The teacher was disturbed by the poem and brought it to the school counselor and eventually to the principal. The student was expelled following an investigation regarding the poem coupled with an assessment of the student's history.[94] Should a blog or MySpace post be entitled to greater First Amendment protection than this poem? Electronic expression can reach many more classmates than a poem composed at home and shared with a teacher.

Another reason that the distinction between electronic and in-school student speech seems illogical is because school districts increasingly are offering online courses, which extends the instructional program beyond the confines of the school building and the regular school day. It was estimated in 2012 that two-thirds of the school districts were offering some type of online or blended instruction, and a survey documented a sixteen percent increase in enrollments in virtual K-12 schools between 2011 and 2012 alone.[95] If a student says something inappropriate in the evening when responding from home to an online course discussion, surely the teacher would be justified in disciplining the student for such "in-school" speech that originates from home. Few would argue that school personnel have no jurisdiction over the nature of student participation in online instruction, including online forums hosted by the school.[96]

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[92] 257 F.3d 981 (9th Cir. 2001).

[93] *Id.* at 983-84.

[94] *Id.* at 986. The school district rescinded his expulsion after 17 days, but the student's parents continued to appeal the expulsion. *Id.*

[95] JOHN WATSON ET AL., EVERGREEN EDUCATION GROUP, KEEPING PACE WITH K-12 ONLINE & BLENDED LEARNING: AN ANNUAL REVIEW OF POLICY AND PRACTICE 5, 21 (2012), *available at* http://kpk12.com/cms/wp-content/uploads/KeepingPace2012.pdf; *see also* ANTHONY G. PICCIANO & JEFF SEAMAN, SLOAN CONSORTIUM, K-12 ONLINE LEARNING: A 2008 FOLLOW-UP OF THE SURVEY OF U.S. SCHOOL DISTRICT ADMINISTRATORS 1 (2009), *available at* http://www.sloanconsortium.org/sites/default/files/k-12_online_learning_2008.pdf.

[96] *See* Amici Curiae Brief, *supra* note 15, at *15-16.

Considering the expression based on its target and impact seems to be more viable and fair than focusing solely on where the expression originates. It is difficult to understand the rationale for the distinction some courts are drawing between electronic expression considered protected and other types of student expression that school personnel have been allowed to curtail.[97] Even if the student speaker intends for the harmful expression to remain off campus, the ease of accessing the Internet may very well render the speaker's intentions in this regard irrelevant.

B. Placing More Weight on Tinker's Second Prong

The Supreme Court in *Tinker* articulated two circumstances under which student expression would not be constitutionally protected: if the expression threatens a substantial disruption of the educational process or if it collides with the rights of others.[98] Therefore, another option to balance students' free expression rights and school authorities' obligations to comply with prescriptive state anti-bullying laws and ensure an appropriate educational environment would be for the Supreme Court to rely at least in part on the second prong of the *Tinker* principle. But the disruption standard has become dominant over time, practically eclipsing the "collision with the rights of others" portion of the *Tinker* standard.

The Supreme Court has not addressed the potency of *Tinker*'s second prong. And among federal appellate courts, only the Ninth Circuit has taken a definitive stand that *Tinker*'s exclusion of expression impinging on the rights of others is a viable constitutional guarantee that stands alone, independent of the forecast of a disruption. It first articulated this position in a 2006 ruling, *Harper v. Poway Unified School District*, which involved a

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[97] *See, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 471 (6th Cir. 2000) (upholding a ban on students wearing Marilyn Manson t-shirts that were offensive and inconsistent with the school's efforts to denounce drugs and promote human dignity and democratic ideals); *see also infra* text accompanying note 99. A t-shirt arguably would be seen by far fewer classmates than would a Facebook post.

[98] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09, 513 (1969); *supra* text accompanying note 30. The Supreme Court used interchangeably "collides with," "conflicts with," and "invades" others' rights to refer to this prong of the standard, so these terms also are used interchangeably here.

controversial t-shirt rather than cyberbullying.[99] Finding no First Amendment right for a student to wear a t-shirt with disparaging comments about homosexuality, the Ninth Circuit reasoned that expression interfering with the rights of others can be curtailed regardless of whether it creates a disruption of the work of the school.[100] But the Supreme Court vacated this decision as moot because the district court had entered a final judgment dismissing the petitioner's claim for an injunction.

More recently, in its *Wynar* decision that did involve electronic expression, the Ninth Circuit gave equal weight to *Tinker*'s exclusion of expression linked to a disruption and expression invading the rights of others in upholding expulsion of a student for his threatening online comments. Regarding *Tinker*'s second prong, the court declared: "Whatever the scope of the 'rights of other students to be secure and to be let alone,' without doubt the threat of a school shooting impinges on those rights."[101] The court reasoned that comments threatening the student body as a whole and targeting specific students by name represented "the quintessential harm to the rights of other students to be secure."[102]

No other federal appellate court has taken such a strong position regarding the viability of *Tinker*'s second prong, but the Fourth Circuit in its 2011 *Kowalski* decision seemed to link the two parts of the *Tinker* standard in upholding school disciplinary action against a cyberbully.[103] The appeals court referred to the "collision with the rights of others" prong of the *Tinker* standard numerous times throughout its decision[104] and concluded that if expression interferes with the rights of even one other student, this establishes the necessary disruption to trigger *Tinker*'s exclusion of student expression from constitutional protection.[105]

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[99] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1167 (9th Cir. 2006), *vacated and remanded*, 549 U.S. 1262 (2007).

[100] *Id.* at 1184.

[101] Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013) (quoting *Tinker*, 393 U.S. at 508); *supra* text accompanying note 63.

[102] *Id.*

[103] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573-75 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *supra* text accompanying note 56.

[104] *Id.* at 571-75.

[105] *Id.* at 573-75.

If the Supreme Court should follow the reasoning of the Ninth or Fourth Circuits, it would increase the discretion of school authorities to discipline students for their hurtful and disparaging online communication and bring the First Amendment standard more in line with state anti-bullying laws that broadly view the types of student electronic expression that can, and under some laws *must*, be the basis for school disciplinary action. Several state anti-bullying laws have actually adopted the wording of *Tinker*'s second prong in specifying what student conduct is prohibited and must be punished. For example, the Massachusetts law stipulates that among the proscribed student conduct is any behavior that "creates a hostile environment at school for the victim [or] infringes on the rights of the victim at school."[106] The New Jersey anti-bullying law similarly mentions that behavior interfering with others' rights is prohibited.[107] Unless the Supreme Court recognizes the credibility of the second prong of the *Tinker* standard, these state laws may be found to conflict with students' First Amendment expression rights.[108]

In addition to the Ninth and Fourth Circuits, a few other courts have at least hinted that additional emphasis should be placed on the "collision with others' rights" prong of the *Tinker* standard. For example, in a case dealing with restrictions placed on the display of Confederate flag symbols in public schools, the Tenth Circuit indicated that evidence of a disruption would not be required to curtail such expression and suggested that Confederate flag displays could impinge on others' rights.[109] But the appellate court also found a link to a disruption, so it did not have to address *Tinker's* second prong in this case.

In another case upholding restrictions on students displaying Confederate flags, the Eleventh Circuit declared that "students' First Amendment rights . . . should not interfere with a school administrator's professional observation that certain expressions have led to . . . an unhealthy and potentially unsafe learning

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[106] MASS. GEN. LAWS ch. 71, § 37O (2013); *supra* text accompanying note 23.

[107] N.J. STAT. ANN. § 18A:37-13 (2002); *supra* text accompanying note 24.

[108] *See generally* Hayward, *supra* note 19.

[109] West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366-67 (10th Cir. 2000).

environment for the children they serve."[110] The court reasoned that in the absence of a likely disruption, school authorities still must have discretion to control expression that is highly offensive to others.[111]

A Florida federal district court similarly seemed to give credence to *Tinker*'s second prong in a challenge to a school district's dress code policies.[112] Students who belonged to the Dove World Outreach Center church wore t-shirts with the phrase "Islam is of the Devil." They were disciplined for violating the dress code that prohibits disruptive attire as well as attire that is offensive to others or inappropriate at school or school events. The court reasoned that school authorities "must have the flexibility to control the tenor and contours of student speech . . . , even if such speech does not result in reasonable fear of immediate disruption."[113]

The Second Circuit in *Doninger* was responsive to school authorities in curtailing student electronic expression that was vulgar and critical of school authorities,[114] but this court has not addressed *Tinker*'s second prong in a student expression case. In *Doninger*, the appeals court simply interpreted broadly what constitutes disruptive student expression that can be curtailed. And more recently, the Eighth Circuit upheld disciplinary action against students for creating a website considered racist and sexist, but again did not have to address whether the website invaded the rights of others because it found sufficient evidence of a disruption to consider the expression unprotected.[115]

The Supreme Court seems to be in no rush to provide clarification regarding the weight (if any) that should be given to *Tinker*'s second prong, and as noted, most courts addressing student expression rights have focused on the disruption aspect of

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[110] Scott v. Sch. Bd., 324 F.3d 1246, 1247 (11th Cir. 2003).

[111] *Id.* at 1248 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)); *see also* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *6 n.4 (M.D. Pa. Sept. 11, 2008).

[112] Sapp v. Sch. Bd., No. 1:09cv242-SPM/GRJ, 2011 WL 5084647, at *6 (N.D. Fla. Sept. 30, 2011).

[113] *Id.* at *3 (citing *Scott*, 324 F.3d at 1248).

[114] Doninger v. Niehoff, 642 F.3d 334, 358 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); *supra* text accompanying note 55.

[115] S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 779 (8th Cir. 2012); *supra* text accompanying note 59.

the *Tinker* principle.[116] The judicial hesitation to exclude from constitutional protection student expression that collides with the rights of others is understandable, given fears that this standard could be broadly interpreted to curtail any expression found plainly offensive by someone else.[117] At a minimum, the expression should be intentionally harmful or disparaging toward others to satisfy exclusion under *Tinker*'s second prong.[118] It should adversely impact another student's education or the ability of educators to perform their jobs. Exceptions to constitutional protection should be clearly and narrowly defined to reduce the likelihood that school personnel might exceed their authority in curtailing student expression.

No legal standard is perfect, and any restriction on student expression can be abused. But simply because a standard is difficult to apply does not mean it should be abandoned. Just as it is not always clear whether expression threatens a disruption, fact-specific judgments also are required to determine if expression collides with others' rights to the extent that it is not constitutionally protected.[119]

Possibly because of concerns regarding an overreliance on the "rights of others" prong, some courts have reasoned that there *must* be evidence of a threat of a school disruption for the rights of others to be adversely affected by student expression.[120] As

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[116] *See generally* Dan V. Kozlowski, *Toothless Tinker: The Continued Erosion of Student Speech Rights*, 88 JOURNALISM & MASS COMM. Q. 352 (2011).

[117] *See* Calvert, *supra* note 76, at 1180-84. Schiffhauer has argued that *Tinker*'s second prong should be applied only to expression considered harassment, threatening, or having "serious emotive impact." Matthew I. Schiffhauer, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN'S J. LEGAL COMMENT. 731, 765 (2010); *see also infra* note 124.

[118] School personnel "must avoid 'knee-jerk' reactions to Internet speech that they simply do not like or find offensive." Schiffhauer, *supra* note 117, at 761.

[119] Many standards pertaining to expression rights "lack perfect clarity." Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2764 (2011) (Breyer, J., dissenting); *see also* Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 543-44 (6th Cir. 2001) (noting that regardless of the judicial standard used, schools must make individual assessments, based on the specific factual circumstances, in applying the First Amendment to restrictions on student expression).

[120] To illustrate, a California federal district court also upheld a student's free expression right to videotape and post on YouTube an off-campus conversation between classmates in which they made derogatory comments about another student, reasoning that the anguish of one student and the general "buzz" around school about the video

discussed, the Third Circuit has been the most emphatic federal appellate court in holding that *Tinker*'s disruption standard alone controls student electronic expression.[121] The Seventh Circuit also has suggested that evidence of a disruption would be required to curtail student hurtful expression directed toward classmates, noting that there is no constitutional protection of "hurt feelings."[122] Although this case involved students wearing a t-shirt with "Be Happy, Not Gay" rather than electronic expression, the Seventh Circuit seemed protective of students' expression rights in the absence of a link to a disruption of the work of the school. This conclusion does not seem supported by the language in *Tinker*; the Supreme Court in 1969 made no such qualification that a threat of a disruption is needed for expression to collide with another's rights to the extent that it is removed from constitutional protection.[123]

Given prior rulings and the number of federal appellate courts that have not articulated a position on *Tinker*'s second prong, it may be unlikely, but still possible, that a majority of the lower federal courts will rely primarily on the impact of expression on classmates or link the two aspects of the *Tinker* standard as the Fourth Circuit has done.[124] If lower courts would become more consistent, school authorities might feel additional confidence that their actions are congruent with the First Amendment. Of course,

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did not create the necessary disruption to remove the expression from constitutional protection. J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1123 (C.D. Cal. 2010). Nonetheless, the court reasoned that school administrators were covered by qualified immunity in their individual capacities because the law in this area could not be considered clearly established.

[121] *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011), *cert. denied*, 132 S. Ct 1097 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *supra* text accompanying notes 54, 79.

[122] Zamecnik v. Indian Prairie Sch. Dist. # 204, 636 F.3d 874, 877 (7th Cir. 2011).

[123] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09, 513 (1969).

[124] Since the Supreme Court stated in 2007 that standards other than *Tinker*'s disruption standard can be used to assess the legality of student expression, the door was left open as to whether the second prong of *Tinker* can be applied in student expression cases. Morse v. Frederick, 551 U.S. 393, 405 (2007). While arguing against giving equal weight to *Tinker*'s second prong under most circumstances, Goldman has asserted that "[c]onsideration of the rights of others even more clearly deserves weight where a school's failure to act may subject it to a lawsuit for negligent supervision or harassment." Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 422 (2011).

a Supreme Court decision clarifying the legal standard applied to cyberbullying would be extremely helpful in this regard.

CONCLUSION

No freedoms are more preciously guarded than First Amendment expression rights, and the government should not be allowed to prohibit speech because of disapproval of the ideas expressed.[125] Yet, the fact that expression originates off campus does not mean that it should be beyond the school's control if harmful and disparaging student expression focuses on students or school personnel. In short, First Amendment freedoms are extremely important, but there are limits on their exercise, especially among minors. The Supreme Court has reiterated many times its 1969 statement that students' expression rights are not coextensive with those of adults because of the "special characteristics of the school environment."[126]

School leaders currently are caught in the crossfire between students asserting a First Amendment right to air their views, no matter how hurtful, and state laws requiring school authorities to curb cyberbullying. School personnel desperately need guidance, which unfortunately the Supreme Court has declined to provide. Francisco Negrón, General Counsel for the National School Boards Association, noted that we lack "a definitive decision from the United States Supreme Court that offers schools a polestar to follow as they attempt to balance their strong interest in ensuring safe learning environments with a similarly strong interest in protecting the free speech rights of students."[127] The void in applicable legal principles left by the Supreme Court has been filled with confusion and conflicting lower court decisions.[128]

A combination of the strategies discussed here would bring congruence between First Amendment interpretations and most state anti-bullying laws. And if the Supreme Court adopted only

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[125] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[126] *Tinker*, 393 U.S. at 505-06; *see Morse*, 551 U.S. at 397, 405; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[127] Negrón, *supra* note 2, at 365-66.

[128] *See* Amici Curiae Brief, *supra* note 15, at *5-10.

the first strategy, considering student electronic expression that targets the school community to be on-campus expression, this would resolve many of the troublesome conflicts. The current distinction between on-campus and off-campus student expression that several federal courts have adopted is not justified in an electronic age when messages can be accessed anywhere.[129]

No one today can seriously question that the Internet has dramatically altered how students communicate with their classmates and others.[130] The law needs to reflect this reality in safeguarding student expression while recognizing that school authorities should have discretion to protect vulnerable children from the harmful, and at times deadly, effects of cyberbullying.[131]

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[129] *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring) (emphasizing the "somewhat 'everywhere at once' nature of the internet"). Traditionally, school personnel could deal with bullies by physically separating the victim from the bully to maintain peace and protect the victim, but that is practically impossible with cyberbullies.

[130] *See* Amici Curiae Brief, *supra* note 15, at *3. The brief declared: "The ubiquitous use of social networking and other forms of online communication has resulted in a stunning increase in harmful student expression that school administrators are forced to address with no clear guiding jurisprudence." *Id.* at *10.

[131] Of course, educators can take steps to try to curtail cyberbullying in the absence of clear legal guidance. They can instruct students regarding the responsible use of technology and hold sessions for parents as well. Most of the anti-bullying laws include provisions for staff training regarding bullying prevention strategies. Willard asserted: "Despite the challenges, one fact remains crystal clear: The cruelty that some young people inflict on others can cause significant harm. It is imperative that school leaders focus attention on this concern, proactively implement effective school-wide prevention and intervention initiatives, and . . . evaluate the effectiveness of their initiatives." Willard, *supra* note 18, at 125. *See generally* Charles J. Russo et al., *Cyberbullying and Sexting: Recommendations for School Policy*, 269 EDUC. L. REP. 427 (2011); Kathleen Allen, *A Bullying Intervention System: Reducing Risk and Creating Support for Aggressive Students*, 54 PREVENTING SCH. FAILURE 199 (2010).