

**CYBERBULLYING FROM
CLASSROOM TO COURTROOM:
APPROACHES TO PROTECTING CHILDREN
IN A DIGITAL AGE***

*Panel 1—Cyberbullying In The Courtroom:
Law, Litigation, And The First Amendment*

REMARKS OF DOUGLAS ABRAMS**

I.	THE MAGNITUDE OF THE “MAJOR PUBLIC HEALTH PROBLEM”	482
II.	PUTTING A HUMAN FACE ON CYBERBULLYING	484
III.	THE PEDIATRIC SAFETY SYSTEM’S ROLE.....	488
IV.	PREVENTION.....	491
V.	THE SCHOOLS’ BROAD DISCIPLINARY AUTHORITY	493
VI.	BULLYING THAT HOLDS NO FIRST AMENDMENT PROTECTION	493

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VII.	<i>TINKER</i> (1969) AND ITS FIRST AMENDMENT PROGENY	494
VIII.	<i>T.L.O.</i> (1985) AND ITS FOURTH AMENDMENT PROGENY	495
IX.	APPLYING <i>TINKER</i> , <i>T.L.O.</i> , AND THEIR PROGENY TO CYBERBULLYING	496
X.	THE SCHOOLS' AUTHORITY TO DISCIPLINE CYBERBULLYING MESSAGES SENT FROM OFF-CAMPUS	498
XI.	CONCLUSION	500

It is a pleasure and privilege to visit Albany for a few days. In the late 1970s, I began my career here as a law clerk to Judge Hugh R. Jones, whom the *New York Times* later called the “intellectual leader” of the New York Court of Appeals.¹ Then, in the 1980s, I spent a few weeks each summer coaching youth hockey at the RPI Summer Hockey School in Troy. Both experiences were great fun: one for my legal career, and the other for my hobby. During my two-year clerkship and my weeks at RPI, I visited many of the local communities when I got together with friends and some of the young hockey players’ families. The Capital District is a great place to live, and Albany Law students who settle and raise families here will be very fortunate.

I. THE MAGNITUDE OF THE “MAJOR PUBLIC HEALTH PROBLEM”²

Today’s Symposium shines the spotlight on a national epidemic of “electronic aggression”³ that did not exist more than fifteen years or so ago. Parents, educators, and child advocates face continuing challenges today because “[b]y virtually all accounts, bullying of young people by their peers online is on the rise.”⁴

¹ David Margolick, *New York’s Court of Appeals Faces Vast Changes as a New Era Begins*, N.Y. TIMES, Nov. 7, 1982, at 1; see also Laura Mansnerus, *Hugh R. Jones* (obituary), N.Y. TIMES, Mar. 6, 2001, at A19 (calling Judge Jones “an intellectual leader of the state’s highest court and one of its best writers”). See generally Douglas E. Abrams & Mary Lou Crowley, *Remembering Judge Hugh R. Jones*, 65 ALB. L. REV. 9 (2001); Douglas E. Abrams, *Judges and Their Editors*, 3 ALB. GOV’T L. REV. 392 (2010); Douglas E. Abrams, *Hugh Richard Jones*, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 719 (Albert M. Rosenblatt ed. 2007).

² MERLE E. HAMBURGER ET AL., MEASURING BULLYING VICTIMIZATION, PERPETRATION, AND BYSTANDER EXPERIENCES: A COMPENDIUM OF ASSESSMENT TOOLS 1 (2d prtg. 2011) available at <http://www.cdc.gov/ViolencePrevention/pdf/BullyCompendium-a.pdf>.

³ *Id.* at 4; see also Faye Mishna et al., *Ongoing and Online: Children and Youth’s Perceptions of Cyber Bullying*, 31 CHILDREN AND YOUTH SERVS. REV. 1222, 1222 (2009) (“online social cruelty”).

⁴ John Palfrey, *Searching for Solutions to Cyberbullying*, FIRST AMENDMENT

2012] REMARKS OF DOUGLAS ABRAMS 483

Taken together, several recent studies suggest that cyberbullying victimizes between 20 percent and 25 percent of middle school and high school students nationwide.⁵ Some polls of students report even higher numbers.⁶ In a study conducted this summer, 76 percent of fourteen- to twenty-four-year-olds identified digital abuse as a serious problem for people their age.⁷ Researchers even suggest that some students have come to view cyberbullying as “an expectation of high school.”⁸ Other researchers predict that the volume of cyberbullying incidents will likely grow with anticipated advances in technology itself.⁹

My own “sources” confirm these disturbing findings. I coach youth hockey in Missouri, and our players have told me that cyberbullying is rampant in their schools. The high numbers nationwide have led the U.S. Centers for Disease Control and Prevention to identify school bullying as a “major public health problem.”¹⁰ The American Medical Association, the National Institutes of Health, and the World Health Organization concur in this dire assessment.¹¹

CENTER (Mar. 31, 2009), <http://www.firstamendmentcenter.org/searching-for-solutions-to-cyberbullying>.

⁵ Connie Cass & Stacy A. Anderson, *Young Find Online Abuse Pervasive, Pool Says*, BOSTON GLOBE, Sept. 28, 2011, at 10 (quoting Dr. Sameer Hinduja); see also Ann Wade & Tanya Beran, *Cyberbullying: The New Era of Bullying*, 26 CANADIAN J. OF SCHOOL PSYCH. 44, 45 (2011) (finding that “about a quarter of students are the targets of cyberbullying and a similar number cyberbully others”).

⁶ CNN Wire, *Poll: More Than Half of Teens, Young Adults Harassed Online*, Sept. 27, 2011 (reporting Associated Press/MTV poll that found that 56 percent of respondents between fourteen and twenty four years old reported that they had “experienced abuse” through digital media).

⁷ ASSOCIATED PRESS-MTV DIGITAL ABUSE SURVEY AUGUST 2011 CONDUCTED BY KNOWLEDGE NETWORKS 36 (2010) available at http://surveys.ap.org/data/KnowledgeNetworks/AP_DigitalAbuseSurvey_ToplineTREND_1st%20story.pdf

⁸ Deborah Goebert et al., *The Impact of Cyberbullying on Substance Use and Mental Health in a Multiethnic Sample*, 15 MATERN. HEALTH J. 1282, 1285 (2011).

⁹ Sheri Bauman & Heather Pero, *Bullying and Cyberbullying Among Deaf Students and Their Hearing Peers: An Exploratory Study*, J. OF DEAF STUDIES & DEAF EDUC. 236, 237 (2010).

¹⁰ Hamburger, *supra* note 2, at 1.

¹¹ Victoria Stagg Elliott, *AMA Recognizes Bullying As Public Health Problem*, AMEDNEWS.COM, July 16, 2001, <http://www.ama-assn.org/amednews/2001/07/09/hlsa0709.htm> (“public health problem”); Press Release, Nat’l Insts. of Health, *Bullying Widespread in U.S. Schools, Survey Finds* (Apr. 24, 2001) available at <http://www.nih.gov/news/pr/apr2001/nichd-24.htm> (same); Jorge C. Srabstein & Bennett L. Leventhal, *Prevention of Bullying-Related Morbidity and Mortality: A Call for Public Health Policies*, 88 BULL. OF W.H.O. 401 (2010) (calling school

II. PUTTING A HUMAN FACE ON CYBERBULLYING

Children tend to understand online technology better than the older generation does, but many children still view the Internet as a toy that delivers enjoyment and discovery without potentially adverse consequences. These children need reminders from their elders about how technological “toys” (such as all-terrain vehicles, dirt bikes or even automobiles, for example) can wreak plenty of damage when users ignore their power and handle them carelessly.¹²

The profound damage can destroy the lives of real people. I would like to introduce you to the story of Jamey Rodemeyer, who was a fourteen-year-old freshman at the Buffalo area’s Williamsville North High School when reached the news less than a month ago. Jamey had reportedly been bullied face-to-face ever since the fifth grade by classmates who questioned his sexual orientation.¹³ In recent months, he was cyberbullied with messages such as these:

- “JAMIE IS STUPID, GAY, FAT AND UGLY. HE MUST DIE!”¹⁴
- “I wouldn’t care if you died. No one would. So just do it :) It would make everyone WAY more happier.”¹⁵
- “Kill yourself!!!! You have nothing left.”¹⁶
- “[Y]ou’re a bad person, you don’t belong here, jump off a bridge or something.”¹⁷
- “Go kill yourself, you’re worthless, ugly and don’t have a

bullying a “major public health problem” and a “psychosocial hazard” worldwide). *See also* UNICEF, PROTECTING CHILDREN FROM VIOLENCE IN SPORT: A REVIEW WITH A FOCUS ON INDUSTRIALIZED COUNTRIES 9 (2010) (suggesting that bullying without meaningful intervention by a nation’s pediatric safety system may violate the child victim’s human rights under international law).

¹² Allison G. Dempsey et al., *Has Cyber Technology Produced a New Group of Peer Aggressors?*, 14 CYBERPSYCHOLOGY, BEHAVIOR, & SOC. NETWORKING 297, 297 (2011) (“Adolescents may underestimate risks in cyberspace and fail to exercise caution during social interactions.”).

¹³ Anahad O’Connor, *Suicide Draws Attention to Gay Bullying*, N.Y. TIMES WELL BLOG (Sept. 21, 2011 4:23 P.M.), <http://well.blogs.nytimes.com/2011/09/21/suicide-of-gay-teenager-who-urged-hope/>.

¹⁴ Sandra Tan, *Teenager Struggled With Bullying Before Taking His Life*, BUFFALO NEWS (Sept. 20, 2011), <http://www.buffalonews.com/city/schools/article563538.ece>.

¹⁵ *Id.*

¹⁶ Sandra Tan, *Teen Suicide Probe Looks at Charges in Bullying*, BUFFALO NEWS (Sept. 22, 2011), <http://www.buffalonews.com/city/communities/amherst/article565876.ece>.

¹⁷ *Id.*

2012] REMARKS OF DOUGLAS ABRAMS 485

point to live.”¹⁸

- “You weren’t born this way. You shouldn’t have ever been born.”¹⁹

Most of the world’s 2.1 billion Internet users paid no attention to the slurs,²⁰ but Jamey Rodemeyer and classmates did. Early in 2011, Jamey responded to a social media question, “What’s one thing people don’t know about you?” “How much I hate my life,” he typed, “Maybe it’s cause I’m bullied. a lot.”²¹ “People would just keep sending me hate, telling me that gay people go to hell,” he explained on YouTube.²²

In May of 2011, Jamey used his webcam to produce and post online a public service announcement for “It Gets Better,” a national project designed to fortify teens bullied because of perceptions about their sexual orientation.²³ Despite his outward expressions of optimism, on September eight he wrote that “[n]o one in my school cares about preventing suicide, while you’re the ones calling me [gay slur, not quoted in the media] and tearing me down.”²⁴ On September ninth, he wrote that “I always say how bullied I am, but no one listens. What do I have to do so people will listen to me?”²⁵ Perhaps fearing four more years of bullying in his new high school,²⁶ Jamey posted his final online message two days later and then committed suicide in his backyard.

Schoolyard bullies have been with us for a long time. Fans of old movies might remember Tom Brown’s School Days, which starred Sir Cedric Hardwicke and Freddy Bartholomew in 1940. The movie was based on an 1857 novel about a British public

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Andrew Coats, *Digital Trends: The Internet More Than Doubled in Size in 2011*, YAHOO NEWS, (Jan. 26, 2012), <http://news.yahoo.com/internet-more-doubled-size-2011-215326999.html>.

²¹ Tan, *supra* note 16.

²² *Homophobic Bullying Takes Life of Another U.S. Teen, 14*, INT’L BUS. TIMES NEWS, (Sept. 22, 2011 1:25 A.M.), <http://www.ibtimes.com/articles/218023/20110922/bullying-teenager-homosexuality-gay-homophobic-suicide-us-health.htm>.

²³ IT GETS BETTER PROJECT, www.itgetsbetter.org (last visited Aug. 1, 2012). As of this printing Jamey’s PSA video has been viewed more than 1.6 million times. Jamey from Buffalo, *It Gets Better, I Promise! YOUTUBE* (May 4, 2011) http://www.youtube.com/watch?v=-Pb1CaGmDwK&feature=player_embedded.

²⁴ Tan, *supra* note 14.

²⁵ *Id.*

²⁶ O’Connor, *supra* note 13.

school, and bullying was the main theme.²⁷ Despite bullying's endurance over time, Jamey Rodemeyer's death helps demonstrate why cyberbullying can inflict far more serious, far more lasting pain on its victims than the traditional face-to-face bullying that our parents and grandparents saw in school.²⁸

Face-to-face bullies may need to be bigger, taller or stronger than their playground victims. No more than a few classmates normally witness the physical confrontation, and no permanent public record may survive, except for word-of-mouth and perhaps physical scars that soon disappear. After the physical confrontation ends, victims can go home and feel safe for a while.

Size or strength, on the other hand, means little to cyberbullies, who speak anonymously from the sanctuary of the keyboard, without ever having to look their victims in the face. Cyber taunts, threats and insults can reach a vast audience, can be sent from any place at any time, and remain indelible once they appear.²⁹ Home provides the victim no sanctuary because cyberspace knows no physical boundaries. I recall what one Virginia mother said when her thirteen-year-old son committed suicide with a shotgun in 2005, after cyberbullies taunted him about his small size and urged him to kill himself: "If someone is picking on you in the school yard, you can go home. When it's on the computer at home, you have nowhere to go."³⁰

Because cyberbullying thrives on anonymity, "moral disengagement" encourages messages far more virulent than anything that bullies typically say face-to-face. "Moral disengagement" means that "[t]he further removed we are from the consequences of our actions, the easier it is to emotionally separate ourselves from our own behavior."³¹ "It's so much easier to be mean online," explained one high school sophomore,

²⁷ See *Tom Brown's School Days*, IMDB, <http://www.imdb.com/title/tt0033169/> (last visited Aug. 1, 2012).

²⁸ Goebert et al., *supra* note 8, at 1282 ("Cyberbullying may have more devastating outcomes than traditional forms of violence, due to its potential to reach a wider audience through mass distribution and the anonymity that technology can provide.").

²⁹ Bauman & Pero, *supra* note 9, at 238.

³⁰ Bob Meadows, *The Web: The Bully's New Playground*, PEOPLE (Mar. 14, 2005), <http://www.people.com/people/archive/article/0,,20147083,00.html>.

³¹ Adam Hanft, *Internet and Social Media Behavior 101*, CHRISTIAN SCI. MON. (May 28, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/0528/Internet-and-social-media-behavior-101>; see also Kimberly L. Mason, *Cyberbullying: A Preliminary Assessment for School Personnel*, 45 PSYCHOLOGY IN THE SCHOOLS 323, 329 (2008); Bauman & Pero, *supra* note 9, at 240–41.

2012] REMARKS OF DOUGLAS ABRAMS 487

because the bullies “don’t see your reaction.”³²

Without experiencing the victim’s body language and tone of voice, some cyberbullies may not even recognize the potential destructiveness of their conduct.³³ A few years ago, Ryan Halligan, a thirteen-year-old Vermont middle schooler, hanged himself at home after two years of cyberbullying by students who urged him to take his own life. In his final instant message, Ryan typed, “Tonight’s the night,” and the reply came back, “It’s about time.”³⁴

Suicide is not the typical response to cyberbullying, but suicide happens much more frequently than society should tolerate.³⁵ “Bullying is not the only risk factor for suicidal thoughts and behaviors, but it surely now must be added to the list.”³⁶ According to pioneering Norwegian researcher Dan Olweus, bullying “victims’ devaluation of themselves sometimes becomes so overwhelming that they see suicide as the only possible solution.”³⁷ Indeed, the term *bullycide* is fast becoming a term of art among pediatric professionals.³⁸

For the vast majority of victims who do not end their lives,

³² Pat Ferguson, *Fight “Cyberbullying,” But How to Enforce?*, THE OREGONIAN (Portland, Or.), May 17, 2007, at 8.

³³ Mason, *supra* note 31, at 329; *see also* Peter K. Smith et al., *Cyberbullying: Its Nature and Impact in Secondary School Pupils*, 49 J. CHILD PSYCHOL. & PSYCHIATR. 376, 383 (2009) (cyberbullying can “reduce any inhibition of inflicting pain due to empathy at seeing the victim’s distress”).

³⁴ Douglas Abrams, *A Coordinated Public Response to School Bullying*, in OUR PROMISE: ACHIEVING EDUCATIONAL EQUITY FOR AMERICA’S CHILDREN 399, 402, (Maurice R. Dyson & Daniel B. Weddle, eds. 2009).

³⁵ *Id.* at 408-09; *see also Bullycide in America*, available at <http://bullycide.org/>.

³⁶ Young Shin Kim et al., *School Bullying and Suicidal Risk In Korean Middle School Students*, 115 PEDIATRICS 357 (2005) (presenting U.S. findings and citing other studies reaching similar conclusions). *See also, e.g.*, Anat Brunstein Klomek, *Bullying, Depression, and Suicidality in Adolescents*, 46 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 40, 47 (Jan. 2007) (finding depression, serious suicidal ideation and suicide attempts “significantly associated with” bullying behavior among high school students in and away from school).

³⁷ Dan Olweus, *Bullying At School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171, 1182–83 (1994).

³⁸ Neil Marr & Tim Field, *BULLYCID: DEATH AT PLAYTIME* (2001); *see also* Michael Ollove, *Bullying and Teen Suicide: How Do We Adjust School Climate?*, CHRISTIAN SCI. MON. (Apr. 28, 2010), <http://www.csmonitor.com/USA/Society/2010/0428/Bullying-and-teen-suicide-How-do-we-adjust-school-climate>; Sameer Hinduja & Justin W. Patchin, *BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING* 66 (2009) (“cyberbullycide”).

pediatric professionals nonetheless recognize bullying as child abuse, ordinarily committed by other children rather than by adults.³⁹ Cyberbullying can abuse victims not only for sexual orientation, but also for social isolation, race, ethnicity, physical or emotional disability, obesity, small size, or lack of social skills.⁴⁰ Researchers have also identified a link between bullying and children with special physical health needs, such as speech or language impairment, vision problems, cancer, cerebral palsy, diabetes or muscular dystrophy.⁴¹

Bullying victims frequently display wrenching psychosomatic symptoms resembling ones suffered by many child abuse victims, including sleep disturbances, bedwetting, abdominal pain, anxiety and depression, loneliness, low self-esteem and heightened fear for personal safety.⁴² Bullying can also induce school phobia, increase truancy, or impair the victim's concentration and classroom achievement.⁴³

III. THE PEDIATRIC SAFETY SYSTEM'S ROLE

Acts of cyberbullying warrant a coordinated public response because, as President Obama puts it, "no child should be afraid to go to school in this country."⁴⁴ The coordinated public response

³⁹ See, e.g., Richard Goldbloom, *Children's Inhumanity to Children*, 144 PEDIATRICS 3, 3 (2004); Susan P. Limber, *Addressing Youth Bullying Behaviors*, in AM. MED. ASS'N, EDUC. FORUM ON ADOLESCENT HEALTH: YOUTH BULLYING 5, 6 (May 3, 2002); Kirsti Kumpulainen et al., *Bullying and Psychiatric Symptoms Among Elementary School-Age Children*, 22 CHILD ABUSE & NEGLECT 705, 706 (1998); Dan Olweus, *supra* note 37, at 1173.

⁴⁰ See, e.g., Am. Ass'n of Univ. Women Educ. Found., *HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL* (2001); Ian Janssen et al., *Associations Between Overweight and Obesity With Bullying Behaviors in School-Aged Children*, 113 PEDIATRICS 1187 (2004); Kumpulainen, *supra* note 39, at 712; Young Shin Kim et al., *School Bullying and Youth Violence*, 63 ARCH. GEN. PSYCHIATRY 1035, 1039-40 (2006).

⁴¹ See, e.g., Limber, *supra* note 39, at 9-10; Jeanne Van Cleve & Matthew M. Davis, *Bullying and Peer Victimization Among Children With Special Health Care Needs*, 118 Pediatrics 1212 (2006).

⁴² See, e.g., Louise Arseneault, *Bullying Victimization Uniquely Contributes to Adjustment Problems in Young Children: A Nationally Representative Cohort Study*, 118 PEDIATRICS 130 (2006); Minne Fekkes et al., *Bullying Behavior and Associations With Psychosomatic Complaints and Depression*, 144 PEDIATRICS 17, 21 (2004); Gwen M. Glew et al., *Bullying, Psychosocial Adjustment, and Academic Performance in Elementary School*, 159 ARCH. PEDIATR. ADOLESCENT MED. 1026, 1030-31 (2005).

⁴³ See, e.g., Glew et al., *supra* note 42, at 1030; Kirsti Kumpulainen et al., *supra* note 39, at 715.

⁴⁴ Press Release, Remarks by the President and First Lady at the White

2012] REMARKS OF DOUGLAS ABRAMS 489

implicates the “pediatric safety system,” the child-protective network that begins with parents, who are primarily responsible for protecting and disciplining their children and teaching them values.⁴⁵ When parents fall short, the system may extend to public entities such as the schools, the focus of the rest of my presentation this afternoon.⁴⁶

For most children, the schools are the pediatric safety system’s primary public entities because of the essential characteristics of public education itself. Most school-age children attend public schools, and they interact with teachers and administrators daily during the academic year;⁴⁷ most bullies know their victims largely or entirely from school;⁴⁸ and most bullies foresee that their abuse will gain attention only among the school population.⁴⁹ Bullying can also exact a heavy physical and

House Conference on Bullying Prevention (Mar. 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/10/remarks-president-and-first-lady-white-house-conference-bullying-prevent>. *See also, e.g.*, Olweus, *supra* note 37, at 1183 (“No student should be afraid of going to school for fear of being harassed or degraded, and no parent should need to worry about such things happening to his or her child!”).

⁴⁵ *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (plurality opinion) (“[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”)); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (holding parents have the opportunity and responsibility for “inculcation of moral standards . . . and elements of good citizenship.”). *See also J.R. v. Parham*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment for making life’s difficult decisions.”).

⁴⁶ Abrams, *supra* note 34, at 400, 413–23 (discussing other public entities in the pediatric safety system: law enforcement; the juvenile, family and criminal courts; the state child protective agency; and the state mental health agency).

⁴⁷ Forum on Child and Family Statistics, AMERICA’S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING, 2011 x, *available at* http://www.childstats.gov/pdf/ac2011/ac_11.pdf (74.2 million children in the U.S.); U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, 146 tbl.220, (2009) *available at* <http://www.census.gov/prod/2009pubs/10statab/educ.pdf> (51 million children attended public schools below the collegiate level in 2007).

⁴⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (Powell, J., concurring) (students “spend the school hours in close association with each other, both in the classroom and during recreational periods.”); Jaana Juvonen & Elisheva F. Gross, *Extending the School Grounds?—Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 497 (2008) (“when most schoolmates have Internet access at home, electronic communication is conducted largely within school-based peer networks”).

⁴⁹ *See, e.g., J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002)

emotional toll that denies victims full enjoyment of the free public education that state law guarantees.⁵⁰ “Freedom from fear of bullying is not enough to ensure successful learning,” says one researcher, “but it is a necessary condition for effective learning.”⁵¹

An unfortunate common denominator of many serious bullying cases is that teachers and school administrators soon learn about a student’s victimization but may offer little, if any, meaningful protection or remedy.⁵² Even cyberbullies often do not remain anonymous for very long because, like face-to-face bullies, they typically crave an audience and brag to their friends.⁵³ School officials may be able to pierce the veil of anonymity by keeping their eyes and ears open and doing “good old-fashioned sleuthing.”⁵⁴

Why would elementary or secondary educators feel reluctant to come to the aid of a cyberbullied student? This symposium takes place in the oldest law school in New York State, so I should tell you that fear of lawsuits often gives school officials second thoughts about imposing meaningful discipline.⁵⁵ Too often teachers and administrators feel an impulse to turn their backs when they see a student throwing spit balls in the cafeteria or running down the hallway—or bullying a classmate. The disciplinarians may not know whether the student’s parents will show up at the principal’s office later that week with a lawyer who threatens to make the school look silly with litigation whose procedural or substantive claims may have little or no merit.

Some parents cannot or will not discipline their own children at home, but will seek to discipline the principal or teacher by

(upholding discipline imposed by middle school because “the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District”).

⁵⁰ See, e.g., N.Y. Const Art XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” (2012)).

⁵¹ Kris Bosworth et al., *Factors Associated With Bullying Behavior in Middle School Students*, 19 J. EARLY ADOLESCENCE 341, 342 (1999).

⁵² Douglas E. Abrams, *Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 186–87 (2011).

⁵³ Limber, *supra* note 39, at 7.

⁵⁴ Amanda Paulson, *Internet Bullying*, CHRISTIAN SCI. MON (Dec. 30, 2003), <http://www.csmonitor.com/2003/1230/p11s01-legn.html>.

⁵⁵ Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 94–95 (1996).

2012] REMARKS OF DOUGLAS ABRAMS 491

filing a lawsuit challenging reasonable measures that protect the educational environment or student safety.⁵⁶ Lawsuits are expensive to defend, and school officials sometimes find it more expedient to look the other way in the face of demonstrable misconduct.

New York and most other states have statutes mandating that school districts adopt anti-cyberbullying policies, but these measures depend on daily implementation by teachers and school administrators. Former Harvard Law School Dean Roscoe Pound was right that “[t]he life of the law is in its enforcement.”⁵⁷ Pound meant that achieving a statute’s protective purpose depends on personal commitment because words on paper protect no one and statutes do not apply themselves.

IV. PREVENTION

The public schools’ commitment to protect students from cyberbullying should begin with well conceived and effectively taught in-school prevention curricula, including ones that energize parents, students, school personnel and other local constituencies in a concerted effort.⁵⁸ The nation cannot expect to discipline or prosecute its way out of the cyberbullying epidemic because the volume of incidents is simply too large.⁵⁹ Even if the volume were more manageable, however, safe schools acts, zero-tolerance policies and other public mandates sometimes hurt children by inducing schools to deliver them too hastily to the

⁵⁶ See, e.g., *Smith v. McGlothlin*, 119 F.3d 786, 787 (9th Cir. 1997). In that case a high school vice principal searched students who were acting suspiciously; one sixteen-year-old student was carrying a double-edged dagger with a four-inch blade, a folding knife with a three-inch blade, and a smaller folding knife; the student filed suit alleging that the vice principal had searched her unlawfully; the 9th Cir. denied the claim on the merits and upheld the search. In concurrence, Judge Kozinski wrote: “[b]efore bringing suit, Smith’s parents might profitably have pondered their own culpability and considered what they might have done to prevent their child’s misconduct. Smith’s lawyer might have thought about whether it was right to impose the cost, risk and pain of a lawsuit on a civil servant who acted responsibly under difficult circumstances. . . . Smith and the adults who abetted her might all have taken a lesson in common sense from the other students who were subjected to the same search—and thus suffered the same ‘harm’—but did not make a federal case out of it.” *Id.* at 788–89 (Kozinski, J., concurring).

⁵⁷ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 619 (1908).

⁵⁸ Abrams, *supra* note 34, at 410–19.

⁵⁹ See *supra* Part I.

juvenile justice system for offenses that schools formerly handled themselves.⁶⁰

Expectations must remain reasonable, however, because successful prevention programs can significantly reduce incidents of the targeted antisocial conduct but prevention programs cannot be expected to reduce the number to zero.⁶¹ Anti-bullying curricula have been shown to reduce incidents of between 25 percent and 50 percent in some schools,⁶² and these percentages mark success.

Indeed, anti-cyberbullying curricula may already be changing student behavior for the better. For years, studies have shown that most students who witness or hear about bullying do not intervene on the victim's behalf or report the bullying to an adult; the typical response is to avoid associating with the victim, or even to join the bully in an effort to boost the bystander's own social position or to avoid being targeted.⁶³ In a poll released just last month, however, 56 percent of fourteen to twenty-four-year-olds surveyed said that they would intervene if they knew that someone suffering harassment online, an increase from 47 percent in 2009.⁶⁴ Perhaps it is the optimist in me, but I would like to think that when thoughtful anti-bullying curricula teach empathy and sensitize students to slurs like the ones that led to Jamey Rodemeyer's suicide in suburban Buffalo last month, many students "get it" and begin to change their ways.

What about the schools' reaction to cyberbullies whose behavior prevention curricula do not change? School officials have reasons to tread carefully in cyberbullying cases, but more than forty years of Supreme Court decisions should reassure these officials who seek to enforce effective discipline.

Ever since *Tinker v. Des Moines Independent School District*⁶⁵ in 1969, the Supreme Court has strengthened the public schools' authority to discipline students. In more than four decades since *Tinker*, no disciplined student has ever won a Supreme Court

⁶⁰ Justice Policy Inst., *THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE* 1 (2009).

⁶¹ Abrams, *supra* note 34, at 411.

⁶² *Id.*

⁶³ AMELIA KOHN ET AL., *ISSUE BRIEF: WHAT DO BYSTANDERS DO WHEN CHILDREN ARE BEING BULLIED . . . AND WHY DO THEY DO IT?* 1-2 (2006) available at http://www.chapinhall.org/sites/default/files/publications/ChapinHallDocument_4.pdf.

⁶⁴ *Associated Press-MTV Digital Abuse Survey*, *supra* note 7, at 23.

⁶⁵ 393 U.S. 503 (1969).

2012] REMARKS OF DOUGLAS ABRAMS 493

case against the school district. In the rest of my time, I will discuss why the schools' unbroken string of Supreme victories confers broad authority on schools to discipline students, and why this authority would extend to most cyberbullying that targets a specific student with messages sent from off-campus.

V. THE SCHOOLS' BROAD DISCIPLINARY AUTHORITY

When cyberbullies and their parents sue to overturn discipline that resists prevention curricula, the plaintiffs usually raise two primary claims. First, they claim that First Amendment free speech protects the cyberbully's statements, which usually express opinions (such as "JAMIE IS STUPID, GAY, FAT AND UGLY. HE MUST DIE.").⁶⁶ Second, the plaintiffs claim that the school may not impose discipline for messages that students send from off campus locations. When the school district's lawyers try the case effectively, the district can win on both of these claims.

VI. BULLYING THAT HOLDS NO FIRST AMENDMENT PROTECTION

As a threshold matter, cyberbullying frequently also involves two types of face-to-face conduct that enjoy no First Amendment protection at all—assaults and "true threats." The Supreme Court has held that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. . . . '[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."⁶⁷

Much cyberbullying is combined with physical bullying that involves punching, shoving, pushing, or spitting in the victim's face at school.⁶⁸ High school freshman Jamey Rodemeyer, for example, had reportedly been physically bullied ever since the fifth grade.⁶⁹

The school may discipline the cyberbully's assaults without running afoul of the First Amendment. The lawsuit may still require close fact finding, but (like Jamey Rodemeyer's classmates) cyberbullies whose identities become known

⁶⁶ See *supra* note 14 and accompanying text.

⁶⁷ *Wisconsin v. Mitchell*, 508 U.S. 476, 484–85 (1993) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984)).

⁶⁸ Wade & Beran, *supra* note 5, at 45.

⁶⁹ See *supra* Part II.

normally leave rich paper trails that would help disciplinarians and courts distinguish between wrongdoers and victims.

True threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁷⁰ “The speaker need not actually intend to carry out the threat” because “a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”⁷¹

The First Amendment permits the school to discipline a cyberbully’s true threats delivered face-to-face or virtually (“I am going to beat you up. Oh, and by the way, I’m not going to put you in the hospital. I’m going to put you in the morgue.”).⁷² Similar to the evidentiary issues that attend proof of assaults, the cyberbully’s paper trail will likely aid disciplinarians and factfinders.

VII. *TINKER* (1969) AND ITS FIRST AMENDMENT PROGENY

In 1969, *Tinker v. Des Moines Independent Community School District*⁷³ upheld the First Amendment rights of students to wear black armbands in their elementary school and high school in a silent, non-disruptive protest of the Vietnam War. The peaceful protest would have been secure from content-based restriction on Main Street, but the Court held that the public schools presented a different constitutional calculus because school authorities must maintain the educational environment and protect students during their attendance.⁷⁴ *Tinker* held that public schools may constitutionally discipline student expression that causes, or reasonably threatens, (1) “substantial disruption or material interference with school activities,”⁷⁵ or (2) “collision with the rights of other students to be secure and to be let alone.”⁷⁶ The

⁷⁰ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citations omitted).

⁷¹ *Id.* at 359–60 (citation omitted).

⁷² Daarel Burnett, *Bullitt East Group Fights Suicide and Cyber-Bullies*, COURIER-J. (Louisville, Ky.), May 9, 2007, at 5H (anonymous message sent on MySpace.com to seventeen-year-old Louisville, Ky. junior who committed suicide three weeks later).

⁷³ 393 U.S. 503 (1969).

⁷⁴ *Id.* at 507.

⁷⁵ *Id.* at 514.

⁷⁶ *Id.* at 508.

2012] REMARKS OF DOUGLAS ABRAMS 495

armband wearers won their case, but only because the Court found no such disruption or collision.

Tinker was the last time a disciplined student won a First Amendment challenge against a public school in the Supreme Court. In three later First Amendment decisions that did not depend on showings of disruption or collision with other students' personal security, the Court cut back on Tinker.

In *Bethel School District No. 403 v. Fraser*⁷⁷ in 1986, the Court upheld the high school's First Amendment authority to suspend a student for delivering a "lewd," "indecent" and "vulgar" speech in an assembly attended by several hundred classmates.⁷⁸ In *Hazelwood School District v. Kuhlmeier*⁷⁹ in 1988, the Court upheld the high school principal's authority to remove two articles (one about teenage pregnancy and the other about divorce) before they were published in a school newspaper that was produced as part of the school's journalism curriculum. In *Morse v. Frederick*⁸⁰ in 2007, the Court upheld the suspension of a high school senior for unfurling, during a school-sanctioned and school-supervised event, a large banner that the school's principal reasonably regarded as promoting illegal drug use.⁸¹

VIII. T.L.O. (1985) AND ITS FOURTH AMENDMENT PROGENY

In three Fourth Amendment decisions upholding schools' searches of students in school, the Court's rationales strengthened the schools' disciplinary authority in First Amendment speech cases. In *New Jersey v. T.L.O.*⁸² in 1985, the Court held that the Fourth Amendment validity of a public school administrator's in-school search of a student depends on the search's reasonableness under the circumstances, and not on probable cause or a warrant.⁸³

In *Vernonia School District 47J v. Acton*⁸⁴ in 1995, the Court rejected a Fourth Amendment challenge to the school district's policy that authorized random urinalysis drug testing of its interscholastic athletes, including athletes whom the district had

⁷⁷ 478 U.S. 675 (1986).

⁷⁸ *Id.* at 680–86.

⁷⁹ 484 U.S. 260 (1988).

⁸⁰ 551 U.S. 393 (2007).

⁸¹ *Id.* at 401, 410.

⁸² 469 U.S. 325 (1985).

⁸³ *Id.* at 341–42.

⁸⁴ 515 U.S. 646 (1995).

no reason to suspect of drug use.⁸⁵ In 2002, the Court extended *Vernonia* in *Board of Education v. Earls*,⁸⁶ which upheld a school district's random suspicionless drug testing policy for students in all competitive extracurricular activities.⁸⁷

A student did not win a post-*Tinker* constitutional claim against a public school district until *Safford Unified School District v. Redding*⁸⁸ in 2009. *Safford* held that on the facts of the case, the school violated the Fourth Amendment rights of a thirteen-year-old middle school girl whom it strip searched on suspicion that she was hiding a few over-the-counter and prescription medications in her undergarments.⁸⁹

IX. APPLYING *TINKER*, *T.L.O.*, AND THEIR PROGENY TO CYBERBULLYING

The Court's First Amendment and Fourth Amendment decisions strengthen the schools' constitutional authority to discipline student expression. Some of these decisions stress principles that strengthen the schools' general authority to discipline students.

T.L.O., *Fraser*: “[P]reservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”⁹⁰ “The First Amendment guarantees wide freedom in matters of adult public discourse,” but this freedom does not mean that “the same latitude must be permitted to children in a public school.”⁹¹

Acton, *Earls*: “The nature of [the state's authority over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over adults.⁹² “Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults”⁹³ because “the school has the obligation to

⁸⁵ *Id.*

⁸⁶ 536 U.S. 822 (2002).

⁸⁷ *Id.*

⁸⁸ 557 U.S. 364 (2009).

⁸⁹ *Id.*

⁹⁰ *N.J. v. T.L.O.*, 469 U.S. 325, 339 (1985).

⁹¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

⁹² *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–55 (1995).

⁹³ *Id.*

2012] REMARKS OF DOUGLAS ABRAMS 497

protect pupils from mistreatment by other children.”⁹⁴

Fraser, Kuhlmeier, Safford: Courts play only a limited role in reviewing discipline of students because “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges.” “[S]tandards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed,”⁹⁵ and courts must pay a “high degree of deference . . . to the educator’s professional judgment.”⁹⁶

The Supreme Court’s First Amendment decisions strengthen the schools’ specific authority to discipline student expression, including cyberbullying.

Tinker: Employing their heightened authority, school officials may discipline student expression that causes, or reasonably threatens, (1) “substantial disruption or material interference with school activities,”⁹⁷ or (2) “collision with the rights of other students to be secure and to be let alone.”⁹⁸

Morse: The schools’ authority to discipline student expression is greatest where, unlike *Tinker*’s political expression concerning the nation’s involvement in the Vietnam War, the expression is unrelated politics or public affairs, “the core of what the First Amendment is designed to protect.”⁹⁹

Fraser: To fulfill their “basic educational mission,”¹⁰⁰ school authorities may discipline student expression that compromises efforts to teach students “the boundaries of socially appropriate behavior,”¹⁰¹ “habits and manners of civility”¹⁰² and respect for “the sensibilities of fellow students.”¹⁰³

How does this Supreme Court doctrine support the schools’

⁹⁴ *Id.*, 469 U.S. at 350 (Powell, J., concurring) (quoting *T.L.O.*); see also *Morse v. Frederick*, 551 U.S. 393, 397, 407 (2007) (stressing the schools’ obligation “to safeguard those entrusted to their care” from messages promoting drug use, which “can cause severe and permanent damage to the health and well-being of young people”).

⁹⁵ *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, n.1 (2009).

⁹⁶ *Id.*

⁹⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

⁹⁸ *Id.* at 508.

⁹⁹ *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

¹⁰⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

¹⁰¹ *Id.* at 681, 685.

¹⁰² *Id.* at 681.

¹⁰³ *Id.*

First Amendment authority to discipline cyberbullies? Applying *Tinker* itself, lower courts have found requisite disruption or interference when teachers and school administrators must spend a bulk of their professional time intervening among students restive about bullying.¹⁰⁴ In view of its physical and emotional toll, cyberbullying typically compromises (as *Tinker* put it) the rights of victims to be let alone during the school day. By disciplining cyberbullies who remain resistant to prevention curricula, schools also teach civility and respect for the sensibilities of classmates. The Court has repeatedly instructed that in close cases, judges should defer to the professional expertise of local school officials who are charged with maintaining the educational environment and student safety.

X. THE SCHOOLS' AUTHORITY TO DISCIPLINE CYBERBULLYING MESSAGES SENT FROM OFF-CAMPUS

Parents and the disciplined student cyberbully typically argue that public schools lack authority to impose discipline for messages sent from off campus, for example, from the cyberbully's cell phone, or from a computer keyboard at home.

Lower courts have held, however, that the message's off-campus origins are "not material"¹⁰⁵ where the cyberbully could have foreseen that the message would materially and substantially disrupt school activities, or that it would compromise the personal security of one or more identified students known to the cyberbully. "[O]ff-campus conduct can create a foreseeable risk of substantial disruption within a

¹⁰⁴ Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 206–09 (2011).

¹⁰⁵ *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp.2d 1094, 1108 (C.D. Cal. 2010) (citing decisions). *See also, e.g., J.S. ex rel. Snyder v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 941 (3d Cir. 2011) (en banc) (Fisher, J., dissenting) ("The majority[] apparent[ly] adopt[s] . . . the rule that off-campus student speech can rise to the level of a substantial disruption"); *Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp.2d 421, 436 (N.D.N.Y. 2006) ("The simple fact that conduct occurs off school grounds 'does not preclude the possibility that such conduct . . . may adversely affect the educative process or endanger the health, safety or morals for pupils within the education system for which the school authorities are responsible."); *Mardis v. Hannibal Pub. Sch. Dist.*, 684 F. Supp.2d 1114, 1118 (E.D. Mo. 2010) ("Several [federal] courts of appeal . . . have applied 'school speech' law to cases where the communications occurred off school grounds but their effects reverberated to the classroom.") (citing decisions).

2012] REMARKS OF DOUGLAS ABRAMS 499

school,”¹⁰⁶ the prime target of the Tinker line of Supreme Court decisions. “[W]ithout a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.”¹⁰⁷

The lower court cyberbullying decisions upholding the schools’ disciplinary authority recall the Supreme Court’s own experience with *Olmstead v. United States*.¹⁰⁸ In 1928, *Olmstead* held, five to four, that the Fourth Amendment did not prohibit the government from intercepting telephone conversations by wiretaps installed outside the conversants’ homes. The slender majority concluded that the government had not done a search or seizure because “[t]he evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”¹⁰⁹

Justice Louis D. Brandeis dissented from *Olmstead*’s refusal to apply Fourth Amendment doctrine to technological advances wrought by the telephone, a technological advance obviously not contemplated by the Fourth Amendment’s ratifiers in the early 1790s. The Court had often sustained the government’s constitutional authority “over objects of which the fathers could not have dreamed,” said Justice Brandeis, who found it “immaterial where the physical connection with the telephone wires leading into the defendants’ premises was made.”¹¹⁰ Because “[t]ime works changes, brings into existence new conditions and purposes,” he concluded, “a principle to be vital must be capable of wider application than the mischief which gave it birth.”¹¹¹

The passage of years vindicated the Brandeis position. In *Berger v. New York*¹¹² in 1967, the Court finally acknowledged that “[t]he law, though jealous of individual privacy, has not kept

¹⁰⁶ *O.Z. v. Board of Trustees*, No. CV 08-5671, 2008 WL 4396895 * 4 (C.D. Cal. Sept. 9, 2008).

¹⁰⁷ *Cobb v. W. Va. Human Rights Comm’n ex rel. Wattie*, 619 S.E.2d 274, 289 (W. Va. 2005) (citation omitted). *See also, e.g.*, *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004) (discussing “the special needs of educators to maintain a safe and effective learning environment”).

¹⁰⁸ 277 U.S. 438 (1928) (overruling *Katz v. United States*, 389 U.S. 347, 351–52 (1967)).

¹⁰⁹ 277 U.S. at 464.

¹¹⁰ *Id.* at 472, 479 (Brandeis, J., dissenting).

¹¹¹ *Id.* at 472–73 (Brandeis, J., dissenting); *see also, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 885 (1982) (Burger, C.J., dissenting with Powell, Rehnquist and O’Connor, J.J.) (“The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world.”).

¹¹² 388 U.S. 41(1967).

pace with . . . advances in scientific knowledge.”¹¹³ In *Katz v. United States*¹¹⁴, the Court overruled *Olmstead* because “the Fourth Amendment protects people, not places. . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communications.”¹¹⁵

Much as the capacity for government wiretapping of telephones from remote locations lay beyond the contemplation of the Fourth Amendment’s ratifiers, student cyberbullying from remote locations lay beyond the Supreme Court’s contemplation when the Justices decided *Tinker, T.L.O.* and their progeny. By applying these decisions to uphold the public schools’ authority to discipline cyberbullying that originates from off-campus, lower courts heed Justice Brandeis’ reasoned voice that it is “immaterial where the physical connection . . . was made” because “[t]ime works changes.”¹¹⁶

Decisions applying the *Tinker, T.L.O.* and their progeny to cyberbullying recognize that the First Amendment in the public schools, like the Fourth Amendment in the greater society, “protects people, not places.”¹¹⁷ In the context of public elementary and secondary education, the “people” protected are schoolchildren, typically including the school’s most vulnerable students once cyberbullies have targeted them.

XI. CONCLUSION

The *Tinker* Doctrine, illuminated by the Supreme Court’s Fourth Amendment student-search decisions, strikes an appropriate balance in student-expression cases. First Amendment values are disserved by interpretations that would confine professional educators to the sidelines, constitutionally disabled from protecting emotionally and physically distressed children for weeks or months from messages that classmates undeterred by prevention curricula transmit with intent to inflict immediate and lasting harm.¹¹⁸ The Supreme Court’s

¹¹³ *Id.* at 49.

¹¹⁴ 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

¹¹⁵ *Id.* at 351–52.

¹¹⁶ *Olmstead*, 277 U.S. at 472, 479 (Brandeis, J., dissenting).

¹¹⁷ *Katz v. United States*, 389 U.S. 347, 351–52 (1967).

¹¹⁸ See, e.g., Justin W. Patchin & Sameer Hinduja, *Cyberbullying and Self-Esteem*, 80 J. SCH. HEALTH 614, 615 (2010) (defining cyberbullying as intentional, deliberate behavior that uses various electronic devices to

2012] REMARKS OF DOUGLAS ABRAMS 501

constitutional balance is particularly appropriate in cyberbullying cases, which typically arise once the victim has suffered sustained torment during compelled attendance at public schools.¹¹⁹

A few years ago, I served on the Missouri Governor's Internet Harassment Task Force, which was assembled to draft legislation to combat cyberbullying. I testified before the state House and Senate in support of the constitutionality of the legislation, which was ultimately enacted. As we explored cyberbullying's destructive effects on schoolchildren, I reminded the lawmakers that the Supreme Court once observed that "while the Constitution protects against invasions of individual rights, it is not a suicide pact."¹²⁰ As courts weigh the rights of cyberbullies, neither should the Constitution be a pact with suicide.

intentionally and deliberately cause the target real, nontrivial pain).

¹¹⁹ *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("Most parents, realistically, have no choice but to send their children to a public school.").

¹²⁰ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–60 (1963) (citizenship denaturalization case).