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Unmasking the Teen Cyberbully: A First Amendment-Compliant Approach to Protecting Child Victims of Anonymous, School-Related Internet Harassment

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UNMASKING THE TEEN CYBERBULLY:

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*By: Benjamin A. Holden**

I. INTRODUCTION AND OVERVIEW

Americans have the right under the U.S. Constitution to speak anonymously.[1] However, this right is not absolute. It is subject to a

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developing body of law which allows a judge to order the involuntary disclosure, during pre-trial discovery in civil cases,[2] of the identity of anonymous speakers.[3] Courts and scholars have struggled, as the law of the Internet has developed, with line-drawing between the right to anonymity and the right to be free from tortious or harassing conduct on the Web.[4] The problem is more acute for teens, whose social universe is often more "virtual"[5] than real. Thanks to smartphones and other mobile

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1. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995); *but see id.* at 371-85 (Scalia, J., dissenting) (arguing that no such anonymity right exists under the First Amendment in *McIntyre*); *see also id.* at 358-71 (Thomas, J., concurring) (concurring in, but rejecting, the reasoning of the majority opinion while refuting some of Justice Scalia's historical presumptions of the Founding Fathers as to the right to speak anonymously in political pamphlets and political argument generally).

2. The most relevant type of cases in the context of unmasking are speech-related torts, such as defamation and harassment. The word "harassment" in the title of this Article is used generically to include all speech-related torts, including without limitation, civil harassment under state law, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false light, and public disclosure of private facts.

3. This is accomplished via a civil subpoena requesting the Internet Protocol address of the computer that sent the offending message, as a discovery demand in a lawsuit. See Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Indep. Newspaper v. Brodie, 966 A.2d 432 (Md. 2009); Maxon v. Ottawa Publ'g Co., 929 N.E.2d 666 (Ill. App. 2010); John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010).

4. *See generally* Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320 (2008); Michael S. Vogel, *Unmasking 'John Doe' Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795 (2004); Caroline E. Strickland, Note, *Applying* McIntyre v. Ohio Elections Commission *to Anonymous Speech on the Internet and the Discovery of John Doe's Identity*, 58 WASH & LEE L. REV. 1537 (2001); Kristina Ringland, *Internet User Anonymity, First Amendment Protections and Mobilisa: Changing the* Cahill *Test*, 5 SHIDLER J.L. COM. & TECH. 16 (2009); Legal Protections for Anonymous Speech, Digital Media Law Project's Legal Guide, http://www.citmedialaw.org/legal-guide/legal-protections-anonymous-speech [http://perma.cc/M4P2-F8MV] (last visited Mar. 30, 2016); Jason A. Martin, et al., *Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap*, 16 COMM. L. & POL'Y 89 (2011).

5. Gina Cerasiotis, *Parents Struggling to Drag Kids from Virtual World to Real World*, HERALD SUN (Sept. 16, 2017) http://www.heraldsun.com.au/news/parents-struggling-to-drag-kids-from-virtual-world-into-real-world/news-story/bd9494f69889898b5a058b20d6a6c5de [http://perma.cc/7VUS-LVQF].

devices, 92% of teenagers[6]—persons aged 13 through 17—go online at least daily,[7] many of them anonymously or using pseudonyms.[8]

A number of courts have reviewed the thorny issue of how best to balance the right to anonymity against the rights of presumably *adult* "Doe" defendants in lawsuits seeking damages for defamation, harassment, or similar[9] speech-related torts.[10] Commentators, as well as practitioners, have weighed in on the question of when a court can and should, consistent with the First Amendment, force an Internet Service Provider[11] to turn over the Internet Protocol address of a computer associated with an unprotected statement, such as a libelous assertion

6. Though other age groups also contain prolific users of social media, this Article adopts the "teen" or 13 to 17 age group as its focus because: 1) this age range corresponds generally to the period of greatest independence for minors, who are simultaneously subject to the substantial disruption rules of *Tinker*; 2) because there exists solid social science data studying this group's social media habits; and 3) because Internet use of children 12 and under is far more likely to be monitored or controlled by their parents.

7. *See* Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (2015), Page 2 (Summary of Findings) (showing a seminal study on student use of teen social media released April 2015 found that 92% of teens, defined as ages 13 to 17, report going online at least daily; more than half (56%) go online several times a day; and about a quarter (24%) self-report that they are on the Internet "almost constantly").

8. *See* Amanda Lenhart and Mary Madden, *Teens, Privacy & online social network 2007*, PEW RESEARCH CENTER (2007), Page 3 (Summary of Findings).

9. This Article does not address the appropriate legal standard for discovery unmasking in civil commercial tort or intellectual property unmasking cases. For background on this issue, however, *see Sony* Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (explaining that copyright infringement in context of peer-to-peer file-sharing networks); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) (explaining that trademark infringement and related business torts); Highfields Capital Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005); Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Super Ct., App. Div. 2001); *see also* Samuel A. Terilly et al., *Getting Even or Getting Skewered: Piercing the Digital Veil of Anonymous Internet Speech as a Corporate Public Relations Tactic (Vengeance is Not Yours, Sayeth the Courts)*, 4 PUB. REL. J. 1 (Winter 2010); Moira Vahey, *Free Press Exposes Astroturf Groups*, FREE PRESS (Aug. 19, 2009) http://www.freepress.net/node/71850 [http://perma.cc/BF4G-78MG]; Jonathan Saltzman, *Blogger Unmasked, Court Case Upended*, BOSTON GLOBE (May 31, 2007), http://www.boston.com/news/local/articles/2007/05/31/blogger_unmasked_court_case_upended/ [http://perma.cc/KH8X-QMN4] (explaining that pediatrician defendant in malpractice case quickly settled after being forced to admit that he was anonymous blogger complaining about the trial).

10. *See, e.g.*, Dendrite Int'l, Inc. v. Doe No. 3, 775 A. 2d 756 (2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005).

11. Discussion of protection from liability for third-party Internet services such as Facebook pursuant to § 230 of the Communications Decency Act of 1996 is beyond the scope of this Article. *See generally*, 47 U.S.C. § 230(c)(1) (1998).

about the plaintiff.[12] This process is known as "unmasking."[13] This Article reviews the First Amendment's special rules related to minors and students, summarizes the law of unmasking, and then examines the question of unmasking where the speaker's communication is *directed to* minors in a school-related context.[14]

The point of departure for this analysis is that the anonymous speaker, also known as a Cyberbully, has communicated content, which has led to (rather than may lead to) a material disruption in the school environment and/or interference with the rights of classmates.[15] The U.S. Supreme Court has not decided whether schools have authority over off-campus speech, including Cyberspeech, and the lower courts have given

12. *See* Ben Holden, *Who Was That Masked Man?: A Better Approach to "Unmasking" in Public Figure/Public Concern Libel Suits*, 1 REYNOLDS COURTS & MEDIA L.J. 33 (2011), http://issuu.com/rnccm/docs/lawjournalfinal01.05.10 [http://perma.cc/J629-PQY3]; Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audience and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007); David Sobel, *The Process that 'John Doe' is Due: Addressing the Legal Challenge to Internet Anonymity*, SYMPOSIUM 2000, 5 VA. J.L. & TECH 3, (2000); and Ashley I. Kissinger and Katharine Larsen, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, COMM. LAWYER (July 2009) [hereinafter *Shielding Jane and John*]; s*ee also* Ashley I. Kissinger and Katharine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, 13 JOURNAL OF INTERNET LAW (Mar. 2010) [hereinafter Untangling the Legal Labyrinth].

13. *See supra* note 12; Note well that the popular press surveillance-related term "unmasking" is unrelated to the issue discussed in this Article. Generally, to obtain a wiretap or similar surveillance on an American citizen, a judge's order is required. However, when foreign surveillance results in "incidental collection" of Americans' conversations, the names of those Americans are "masked" in government reports. When government officials reveal those names, those persons are said to be "unmasked." This issue became a major news story in 2017 when the Donald J. Trump Administration accused former Attorney General Susan Rice of improperly unmasking Trump affiliates. *See* David Welna, *All Things Considered, 'Unmasking' 101: The Next Chapter in The Trump-Russia Imbroglio*, NATIONAL PUBLIC RADIO (Apr. 21, 2017), http://www.npr.org/2017/04/21/525057399/unmasking-101-the-next-chapter-in-the-trump-russia-imbroglio [http://perma.cc/BHX8-83WC].

14. For purposes of this Article, "school speech" is limited to speech arising out of, or connected to, public primary or secondary schools. This Article does not address the question of whether the First Amendment Supreme Court precedents rendered in the public primary and secondary school context are applicable to college students. This question was left expressly unanswered by the Supreme Court in *Hazelwood v. Kuhlmeier*. There remains, however, a great conflict among the federal circuit courts, as well as among state courts, on whether *Hazelwood* is applicable to college students. *See, e.g.*, Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass., 868 F.2d 473, 480 n. 6 (1st Cir. 1989) ("Hazelwood . . . is not applicable to college newspapers."); Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012) ("Nothing in Hazelwood suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289-93 (10th Cir. 2004) (rejecting student's First Amendment claim based on compelled use of expletives in acting class; court held such speech "constitutes 'school-sponsored speech' and is thus governed by Hazelwood"); Keeton v. Anderson-Wiley, 664 F.3d 865, 875-76 (11th Cir. 2011) (applying *Hazelwood* in a university setting); Yeasin v. Univ. of Kan., 51 Kan. App. 2d 939, 939 (2015) (explaining that University of Kansas had no authority to expel student who made threatening remarks on Twitter).

15. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

inconsistent guidance on the issue. This lack of clarity makes it difficult for school administrators to determine when and how they may discipline *known* Cyberbullies for disruptive off-campus speech, such as Facebook or Twitter posts.[16] Where no administrative remedy is forthcoming from the school, this Article suggests a procedural adjustment in civil tort cases brought by students against Cyberbullies, which will aid the student-plaintiff in seeking legal remedies for school-based harassment.

The growing and potentially deadly[17] problem of teen-targeted bullying by electronic communication lies at the intersection of lofty constitutional principles and the parental imperative of parents to keep their kids safe. Given the new reality in which young people at school interact virtually as much as, or more than, in real life ("IRL"),[18] what is the most practical—and constitutionally appropriate—standard for unmasking the Cyberbully? What is the proper standard for revealing the identity of a "speaker" who constructs a fake online Facebook page devoted to false and anonymously posted pictures of a schoolmate's alleged sexual habits and preferences?[19] And what of the online tormentor of a thirteen-year-old girl who has been deceived and bullied so cruelly that one day the child walks into the closet, takes a belt, and hangs herself?[20] What if the online tormentor in that case was not the self-described boy named "Josh," but an adult woman named Lori, bent on using anonymity on the Internet to destroy her daughter's teen rival?[21]

This Article therefore focuses on the question of when and how the government can, consistent with the First Amendment, effect the

16. *See supra* Section II of this Article.

17. *See e.g.*, Stephanie Allen & Matthew Pleasant, *Lakeland Girl Commits Suicide After 1 ½ Years of Being Bullied*, THE LEDGER (Sept. 10, 2013), http://www.theledger.com/article/LK/20130910/News/608089639/LL/ [http://perma.cc/T3NR-4EPL] (showing a summary of Lakeland, Florida middle schooler Rebecca Ann Sedwick's saga of anonymous Cyberbullying on Instagram, Ask.fm, and Kik that led to her jumping off a building at an abandoned cement plant near her home); *About Us, Ryan's Story*, http://www.ryanpatrickhalligan.org/about-us.htm [http://perma.cc/NK32-4GPG]; Jeannie Nuss, *Families Sue Ohio School After Four Bullied Teens Die by Their Own Hand*, ASSOCIATED PRESS (Oct. 8, 2010), http://www.foxnews.com/us/2010/10/08/ohio-school-bullied-teens-dead-hand.html [http://perma.cc/6USS-4DU2]; *see also infra* notes 150-155, noting dozens of unfiled cases, some resulting in death, of young victims of anonymous Cyberbullying.

18. *In Real Life*, URBANDICTIONARY.COM. *See* https://www.urbandictionary.com/define.php?term=In+Real+Life [http://perma.cc/2HRJ-K5TS] (last visited Aug. 24, 2017).

19. *See* People v. Marquan, 19 N.E.3d 480 (N.Y. 2014).

20. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES (Nov. 28, 2007),
http://www.nytimes.com/2007/11/28/us/28hoax.html?_%20r=2&oref=slogin&_r=0 [http://perma.cc/C5TA-VVAY].

21. *Id*.

identification and punishment of an otherwise anonymous Cyberbully when the victim is a minor and the communication disrupts a primary or secondary school. Unmasking the teen Cyberbully generally presumes that the speaker is a teen, but constitutionally that is not required. The analysis here presumes only that the victim is a minor, that the communication is school-related, and that the communication disrupts a public primary or secondary school. This approach raises three distinct questions. The first is whether the off-campus speech is subject to the school's jurisdiction.[22] The second is whether the speech is nonetheless protected by the First Amendment, since some speech that *could* be regulated, in fact, is nonetheless protected.[23] The third and most important question is what standard ought to be applied in civil discovery motions to unmask speech directed at minors.[24]

The theory advanced in this Article relies heavily upon the concept of "variable constitutionality" for minors, advanced most directly in the area of obscenity.[25] Under this well-recognized doctrine, the Supreme Court has considered, and at least once has expressly adopted, a theory of a lesser First Amendment that "adjusts the boundaries" of illegality for a historically prohibited activity. The Court has rejected this theory where the subject activity is not historically prohibited.[26]

22. *See Id.*

23. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that black armband worn by student was protected by First Amendment—not because the school lacked the jurisdictional authority to punish on these facts, but because the armband did not materially and substantially disrupt school activities or interfere with the rights of other students).

24. This Article does not treat issues raised by § 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, which holds providers and users of interactive computer services harmless from liability for third-party content, under certain circumstances.

25. *See* Ginsberg v. New York, 390 U.S. 629, 636 (1968) ("Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." (citing Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75 (1996))); *but see* Erznoznik v. Jacksonville 422 U.S. 205 (1975) (detailing a Jacksonville ordinance criminalizing the showing of films with nudity if visible from a public area found invalid; rejected rationale was protection of children).

26. *See, e.g.*, Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2735 (2011) (holding the California Act violated the First Amendment because it did "not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children"); *see also* United States v. Stevens, 559 U.S. 460, 469 (2010) (finding that a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty a violation of the First Amendment because no "historical warrant" or tradition exists for banning *depiction* of such acts).

The constitutionality of general criminal harassment, hate crime,[27] "true threat,"[28] and similar criminal prohibitions are beyond the scope of this analysis.[29] Further, this Article does not address in detail the issue of financial liability for public schools when a teen takes his or her own life, despite notice to the school of Cyberbullying,[30] nor personal liability issues for teachers or school administrators who allegedly violate the First Amendment rights of student speakers under color of law,[31] or violations of Title IX[32] for alleged failure of schools to protect students from gender-based Cyberbullying. The purpose of this Article is to suggest a new discovery tool for young litigants seeking relief against anonymous defendants. The premise is that the most constitutionally permissible way to facilitate legal or administrative remedies against the *unknown* Cyberbully is to focus on the constitutionally flexible provisions already applicable to the *known* child victim.

This Article thus advances a new civil law standard for the unmasking and discipline of anonymous off-campus speakers whose Web-based communications are directed toward children in public primary and secondary schools.[33] Following this Introduction, Section II

27. Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html [http://perma.cc/5ZAR-AL3Z]; Kate Zernike, *Part of New Jersey's Bias-Intimidation Law Is Ruled Unconstitutional*, N.Y. TIMES (Mar. 17, 2015), https://www.nytimes.com/2015/03/18/nyregion/parts-of-new-jerseys-bias-intimidation-law-ruled-unconstitutional.html [http://perma.cc/M77Y-QERF].

28. *See generally* Elonis v. United States, 135 S. Ct. 2001 (2015) (holding that threatening statements require intent of the speaker to be "true threats," thus overturning Third Circuit decision affirming conviction premised on threatening Facebook pages). *See* United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (June 16, 2014).

29. *See* Allen & Pleasant, *supra* note 17, discussing Cyberbullying related teen suicides.

30. *See generally* Max Reinhart, *Mohat lawsuit against Mentor Schools dismissed*, THE NEWS-HERALD (June 21, 2011), http://www.news-herald.com/general-news/20110621/mohat-lawsuit-against-mentor-schools-dismissed [http://perma.cc/G6ZV-UVDJ].

31. Teachers, principals, and school administrators risk personal liability for, under color of law, violating the First Amendment or a related state statute when disciplining the school speech. The counter-balance to this risk is the concept of qualified immunity, which protects teachers, principals, and other administrators so long as they do not violate a clearly established constitutional or statutory right. The U.S. Supreme Court in *Morse v. Frederick*, the so-called "Bong HiTS for Jesus case," clearly restated this issue, stating that the defense of qualified immunity requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The Court said, "[T]he defense is designed to protect 'all but the plainly incompetent or those who knowingly violate the law.'" Morse v. Fredrick, 127 S. Ct. 2618, 2640 (2007) (quoting Malley v. Briggs, 475 U.S. 335, 341(1986)).

32. 20 U.S.C.S. § 1681 (1986) (providing that no person shall be excluded from participation in, denied benefits for, or be discriminated against on basis of sex by any educational program or activity receiving Federal financial assistance).

33. The word "teen" used throughout means a person aged 13 through 17, *supra* note 6.

reviews the First Amendment-compliant child protection and student speech restrictions, including the preliminary question of whether disruptive, off-campus Cyberbullying speech falls within the jurisdiction of school officials. Section III summarizes the social science data, supplemented by news reporting on the fora, prevalence, frequency, and potential solutions to Cyberbullying.[34] Section IV reviews and examines the law of unmasking civil defendants whose alleged wrongs were committed anonymously, with emphasis on cases in a school setting. Section V proposes a new standard for when an anonymous speaker, whose communications are directed to a minor attending a public primary or secondary school, should be unmasked. The Cyberbully Unmasking Test is then applied to five real anonymous Cyberbully fact patterns.

II. MINORS AND THE FIRST AMENDMENT

The U.S. Supreme Court, in a series of First Amendment cases involving the speech rights of plaintiffs who have not yet reached adulthood, has created a *de facto* parallel track of lesser First Amendment freedoms for elementary and secondary public school children in America.[35] The guiding principle emerging from these cases is that the government can legitimately curtail the speech or expression of children, as well as speech or expression directed toward children, for their own protection. These cases justify a less-rigorous application of standard speech freedoms where a minor is either the speaker or the recipient of otherwise protected First Amendment content.[36]

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34. This data might form the basis of a governmental compelling interest finding, should a court ever adopt an unmasking approach similar to the one suggested in this Article. Such a compelling interest would be required to constitutionally limit the rights of the harassing speaker if upon judicial review, a court applied a strict scrutiny constitutional analysis. *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

35. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding a school newspaper that bore imprimatur of school could be censored of articles on abortion and divorce so long as such censorship was based on some "legitimate pedagogical concern."); *see also* Morse v. Frederick, 551 U.S. 393 (2007) (holding materials such as banners advocating illegal drug use can be banned and punished when displayed by students at school-related events, even if off-campus).

36. *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2751-59 (2011) (Thomas, J., dissenting) (detailing the history of greater protection of, and, conversely, lesser free-speech and expression rights afforded to, children):

> [T]he Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors. Specifically, I am sure that the founding generation would not have understood 'the freedom of speech' to include a right to speak to children without going through their parents. As a consequence, I do not believe that laws limiting such speech—for example, by requiring parental consent to speak to a minor—'abridg[e] the freedom of speech' within the original meaning of the First Amendment.

Id. at 2759.

A. The First Amendment and Minors Generally

The U.S. Supreme Court has strictly scrutinized attempts by the government to curtail the right of American citizens to speak freely, allowing such limitations only where the speech at issue is of little or no social value.[37] The Court has been more flexible, however, in relaxing traditional First Amendment speech-protection standards where the speaker, or the recipient of the speech,[38] is a minor.[39]

The Court has developed two distinct, though sometimes interrelated, categories of speech and expression related to minors.[40] The first category of these cases will be called the "Student Speech Cases," which are decisions outlining the limits of student speech in a public school context.[41] The second may fairly be categorized as the "Child Protection Cases," with decisions which delineate the boundaries of the government's ability to curtail speech in order to protect minors.[42] This Article relies principally upon the reasoning, underlying rationale, and analysis of the Child Protection Cases in its attempt to fashion a balanced, constitutionally permissible approach to unmasking the teen Cyberbully.

B. The First Amendment and The Student Speech Cases

Five U.S. Supreme Court cases define the First Amendment rights and allowable governmental restrictions on public primary and secondary school students. This Article refers to them as the Student Speech Cases.[43]

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37. *R.A.V.*, 505 U.S. at 383 ("[Unprotected areas of speech are] of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

38. Ginsberg v. New York, 390 U.S. 629, 638 (1968) ("[W]e have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944))). The constitutional rights of adults are not automatically comparable to the constitutional rights of children. *See* New Jersey v. T.L.O., 490 U.S. 325, 340-42 (1985).

39. *See Ginsberg*, 390 U.S. at 636 ("Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." (citing Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75 (1996))); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

40. *See generally Prince*, 321 U.S. 158*; Ginsberg*, 390 U.S. at 629; Erznoznik v. Jacksonville, 422 U.S. 205 (1975)*; Brown*, 131 S. Ct. 2729.

41. *Tinker*, 393 U.S. 503; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)*;* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)*;* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); and Morse v. Frederick, 551 U.S. 393 (2007).

42. *See Prince*, 321 U.S. 158; *Ginsberg*, 390 U.S. 629; *Erznoznik*, 422 U.S. 205; and *Brown*, 131 S. Ct. 2729.

43. *Compare Tinker*, 393 U.S. 503, *Bethel*, 478 U.S. 675, *Hazelwood*, 484 U.S. 260, and *Barnette*, 319 U.S. 624, *with Morse*, 551 U.S. 393.

Because the premise of this Article is that the Child Protection Cases, rather than the Student Speech Cases, should be the primary basis of a court's unmasking analysis, the Student Speech Cases are treated here in summary format. The leading Student Speech Cases are *Tinker v. Des Moines Independent Community School District*,[44] *Bethel School District No. 403 v. Fraser*,[45] *Hazelwood School District v. Kuhlmeier*,[46] *West Virginia State Board of Education v. Barnette*,[47] and *Morse v. Frederick*.[48]

Tinker and *Hazelwood* delineate the outer limits of student speech rights, on the one hand, and schools' regulatory authority, on the other. *Tinker* stands for the proposition that a schoolchild has a First Amendment right to engage in non-disruptive, passive protest speech, even over the objection of teachers, the principal, and the school district.[49] The First Amendment dictates that the government may only restrict student speech which, "*in class or out of it* . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[50] It is noteworthy, however, that *Tinker* has been widely interpreted by the federal circuits to imply a "reasonable likelihood" of disruption component, thus allowing schools to discipline students prior to the occurrence of actual disruption.[51]

Hazelwood substantially modifies *Tinker* where the student communication bears the imprimatur or brand of the school, allowing regulation in such cases.[52] The *Hazelwood* Court reasoned that:

> [T]he question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on school premises. The latter question concerns the educators' authority over school-sponsored publications, theatrical productions,

44. 393 U.S. 503 (1969).
45. 478 U.S. 675 (1986).
46. 484 U.S. 260 (1988).
47. 319 U.S. 624 (1943).
48. 551 U.S. 393 (2007).
49. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
50. *Id*. (emphasis added).
51. LaVine v. Blaine Sch. Dist. 257 F.3d 981, 989 (9th Cir. 2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act. 'In fact, they have a duty to prevent the occurrence of disturbances.' *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.'" (citations omitted)); *See also Tinker*, 393 U.S. at 514 ("[The school district failed to] demonstrate any facts which might reasonably have led school authorities to *forecast* substantial disruption.") (emphasis added).
52. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988).

> and other expressive activities that students, parents, and members of the public might reasonably believe bear the imprimatur of the school.[53]

Although, as mentioned above, this Article relies primarily upon the Child Protection Cases, rather than the Student Speech Cases, it is noteworthy that the *Hazelwood* rationale, in addition to the oft-cited "imprimatur" concept, also relies upon the notion that schools may act to curtail speech when motivated by "legitimate pedagogical concerns" for the non-speaking student.[54]

The other three major Student Speech Cases for purposes of this Article should be considered a series of specific rules which are limited to their particular facts. The rule is a student has a constitutional right to refuse to say the Pledge of Allegiance in school under *West Virginia v. Barnette*.[55] Another rule is a public school student does not have a First Amendment right to give a lewd speech at a school assembly.[56] And finally, the last rule is public school students enjoy no constitutional protection when advocating illegal drug use, such as by unfurling a sign bearing the words "BONG HiTS 4 JESUS."[57]

C. The First Amendment and The Child Protection Cases

Lawmakers have attempted to punish adults for having children sell otherwise First Amendment-protected magazines after a government-imposed curfew;[58] or for exposing passerby children to lewd scenes from a drive-in movie;[59] or for selling lewd, but not obscene, material to kids;[60] or for selling violent video games to minors.[61] A more complete analysis of the Supreme Court cases that have wrestled with the line between protection of children and protection of speech under the First Amendment is set forth below. The Court has indicated that absent a "historical" prohibition or "tradition of proscription," otherwise

53. *Id.*
54. *Id*. at 273.
55. 319 U.S. 624, 642 (1943).
56. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680, 685 (1986).
57. Morse v. Fredrick, 551 U.S. 393, 397 (2007) ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").
58. Prince v. Massachusetts, 321 U.S. 158 (1944) (finding the statute valid).
59. Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (finding the statute invalid).
60. Ginsberg v. New York, 390 U.S. 629 (1968) (finding the statute valid).
61. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011) (finding the statute invalid).

applicable First Amendment freedoms of adults will not be "adjusted" to protect children.[62]

1. *Ginsberg v. New York*: "Variable Obscenity"[63]

Unlike its decisions in the Student Speech Cases, the Supreme Court, in its analysis under the Child Protection Cases, finds that special circumstances and an exigent interest justifies a lower standard for examining government intrusion into speech that would clearly be protected if directed toward adults.[64] The Court in *Ginsberg v. New York* took the rare step of upholding criminal penalties for the sale of legal, non-obscene material where such material, a so-called "girlie" magazine, was sold to a minor.[65] In *Ginsberg*, a New York statute outlawed the sale of sexually explicit material to a minor that could be legally sold to adults. The law made it a crime to "knowingly sell . . . to a minor" under 17 years of age "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," or "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors."[66] In upholding the defendant shop owner's conviction and thus the statute, the Court reasoned that it could not "say that the statute invade[d] the area of freedom of expression constitutionally secured to minors."[67] The Court rejected an argument based upon the First Amendment rights of minors,[68] concluding that the New York statute did not violate the First Amendment, but instead, "simply adjusts the definition of obscenity 'to the social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .' of such minors."[69] The Court further reasoned that the "State . . . has an independent interest in the wellbeing of its youth," taking note that it is "altogether fitting and proper for a state to include in a statute designed to regulate the sale of

62. *See infra* Section V.

63. 390 U.S. 629.

64. *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that a state prohibition on child sales of religious literature applied to boys under 12 and girls under 18 did not violate the First Amendment); *see also Ginsberg*, 390 U.S. at 640 ("The State also has an independent interest in the well-being of its youth.").

65. *Ginsberg*, 390 U.S. at 643.

66. *Id*. at 633.

67. *Id.* at 637.

68. The *Ginsberg* court rejected First Amendment arguments advancing the speech or expression rights of minors based on *Meyer v. Nebraska*. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 656 (1943) (citing *Pierce*, 268 U.S. 510).

69. *Ginsberg*, 390 U.S. at 638 (citing Mishkin v. New York, 393 U.S. 502, 509 (1966)).

pornography to children *special standards* broader than those embodied in legislation aimed at controlling dissemination of such material to adults."[70]

2. *Prince v. Massachusetts*: "'Protect the welfare of children' . . . 'safeguarded from abuses'"[71]

In *Prince v. Massachusetts*, the custodian of a nine-year-old girl had the child selling Jehovah Witness publications in violation of a local child labor law.[72] The *Prince* First Amendment challenge was grounded firmly in religion, rather than press or speech.[73] The Supreme Court reasoned that it "is in the interest of youth itself, and the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens."[74] The Court noted, and both sides conceded, that a similar statute, applied to adults, would be invalid.[75] But reasoned that the "state's authority over children's activities is broader than over like actions of adults."[76]

3. *Erznoznik v. Jacksonville*: "Arbitrary" content discrimination disallowed[77]

The Supreme Court considered a local ordinance in *Erznoznik v. Jacksonville*, which prohibited showing films containing non-obscene nudity by a drive-in movie theater when its screens were visible from a public street or place.[78] The manager of a drive-in, after being charged with violating the ordinance, brought a declaratory relief action alleging the ordinance violated his rights under the First Amendment to the U.S. Constitution.[79] The statute, which made arbitrary content-based distinctions between non-obscene films with and without nudity, was found by the Court to violate the Constitution.[80]

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70. *Id.* at 640 (emphasis added).
71. 321 U.S. 158 (1944).
72. Prince v. Massachusetts, 321 U.S. 158, 159 (1944).
73. *Id*. at 164 ("Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be restricted as Massachusetts has done. Hence she rests squarely on freedom of religion under the First Amendment.").
74. *Id.* at 165.
75. *Id.* at 167.
76. *Id.* at 168.
77. Erznoznik v. Jacksonville, 422 U.S. 205, 213 (1975).
78. *Id.* at 206-08.
79. *Id.* at 207.
80. *Id.* at 213.

4. *Brown v. EMA*: No "historical warrant" banning or regulating video games[81]

The Court in *Brown v. EMA* once again weighed the concept of adjusting constitutional boundaries for the protection of children.[82] In *Brown*, a trade group of video game and software manufacturers, called the Electronic Merchants Association, brought a declaratory relief action against the state of California to challenge a law restricting the sale of violent video games to minors.[83] California prohibited the sale or rental of such games to minors and required that their packaging be labeled "18."[84] The law imposed a civil fine of up to $1,000 for their illegal sale to minors.[85] California's position was that *Ginsberg's* analysis controlled the issue of whether the video game restrictions in the law were constitutional.[86] The state argued that the statute would not make wholesale new constitutional restrictions, but instead would merely "adjust the boundaries" of a historically prohibited activity, which was already outside the bounds of First Amendment protection.[87]

The Court rejected this argument, not because it intrinsically lacked validity, but because the Justices found *Ginsberg* distinguishable on the theory that obscenity is a category of unprotected speech with a long history of regulation,[88] a history lacking in arguments for regulating depictions of violence in video games.[89] The Court said that "[b]ecause speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York*."[90] The *Brown* Court, in rejecting the extension of its obscenity analysis to the area of violence, discussed *United States v. Stevens*, which found no American "tradition excluding depictions of animal cruelty."[91] The Court in *Stevens* invalidated a federal statute that criminalized the creation, sale, or possession of certain depictions of animal cruelty because no tradition or "long-established category of unprotected speech" exists for banning

81. 131 S. Ct. 2729, 2734 (2011).
82. *Id*. at 2729.
83. *Id.*
84. *Id*. at 2732.
85. CAL. CIV. CODE §§ 1746-1746.5 (West 2006).
86. Brief for Petitioners at 7-8, Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448).
87. *Brown*, 131 S. Ct. at 2731.
88. *Id.* at 2744 (citing Miller v. California, 413 U.S. 15, 23-25 (1973)).
89. *Id.* at 2735.
90. *Id.*
91. 559 U.S. 460, 469 (2010).

depiction of such acts.[92] The Supreme Court, through its *Brown-Stevens* line of cases, implies a narrow path to those who would extend *Ginsberg*, warning that: "*Stevens* was not the first time we have encountered and rejected a State's attempt to shoehorn speech about violence into obscenity."[93] However, the Court left room for analogous "adjust the boundaries" arguments to protect children in areas where speech restrictions are based on a tradition of prohibition or "historical warrant."[94]

D. Tinker Meets the Cyberbully

But what about student speech that originates off campus, such as text messages, Facebook posts, or Snapchat photos, that eventually have a disruptive impact on the school environment? Three times between 2011 and 2013 the U.S. Supreme Court denied certiorari in cases which would have reconciled the conflicting First Amendment interpretations by the federal circuits on school regulation of off-campus speech by students.[95] In early 2016, the Court was given a fourth opportunity in *Bell v. Itawamba County.*[96] The Court, however, once again denied certiorari in a case that would have settled the national dilemma over whether public schools have jurisdiction over student's bad behavior on Facebook and similar off-campus student speech.[97]

In the absence of Supreme Court guidance the question falls to the federal circuits. In a companion piece to this Article, the author researched the following question: "Does the First Amendment, as interpreted under *Tinker* and related school-speech cases, allow public primary and

92. *Id*. at 471.

93. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011).

94. *Id.* at 2734-35.

95. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012) (consolidated with Layshock v. Hermitage); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (Jan. 17, 2012); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (Oct. 31, 2011); *see also* ARTHUR S. HAYES, MASS MEDIA LAW: THE PRINTING PRESS TO THE INTERNET 49 (2013) (noting the U.S. Supreme Court's repeated decline of *certiorari* on this issue, "leaving school administrators to look to their state or federal district or appeals courts for guidance").

96. 799 F.3d 379 (5th Cir. 2015) (*en banc*) (showing that a fractured multi-opinion decision finds *Tinker* reaches off-campus Cyberspeech).

97. Bell v. Itawamba Cty. Sch. Bd., *cert. denied*, 136 S. Ct. 1166 (2016). It is noteworthy that the Court declined to hear *Bell* on February 29, 2016—16 days after the death of Justice Antonin Scalia left the Court with an eight-judge panel and a potential 4-4 split on many critical issues. It is thus unclear whether *certiorari* was denied because the Court did not find the question presented worthy of resolution—despite the ongoing circuit conflict—or whether the Court declined to settle the matter because a decision might lay on unfirm ground due to the uncertainty of how the yet-unnamed ninth Justice would vote.

secondary schools to regulate student off-campus speech?"[98] No federal circuit holds that *Tinker* puts off-campus speech beyond the school's reach as a matter of law.[99] The federal circuits (or their district courts in the absence of a circuit decision) have generally opined, with various and sometimes conflicting rationales, that on appropriate facts, *Tinker* does allow school jurisdiction over off-campus speech that has a disruptive impact on campus.[100] In this Article, I conclude that the modern trend is to find that public primary and secondary schools in fact *do* have jurisdiction over students' off-campus Cyberspeech.

III. CYBERBULLYING: FORUM, PREVALENCE, FREQUENCY, & SOLUTIONS

Traditional bullying occurs on a schoolyard, in a lunchroom, or on a school bus, while Cyberbullying takes place both on and off campus via the Internet.[101] Although Cyberbullying may frequently take place outside school grounds, researchers have concluded that Cyberbullying clearly has an effect on children at school and has impacted school attendance, alcohol use, drug use, and grades.[102] The ability of a Cyberbully to remain anonymous enhances the amount of intimidation felt by the victim of the bullying and makes it more difficult to trace and discover the source of the bullying.[103]

Studies show that both Cyberbullying and traditional bullying "have distinct effects on social anxiety, symptoms of depression, [and] subjective health."[104] Children who fall victim to Cyberbullying are more

98. Benjamin A. Holden, *Tinker Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, FORDHAM INTELL. PROP., MEDIA & ENT. L. J., (Forthcoming Winter 2018) [hereinafter *Tinker Meets the Cyberbully*].

99. *Id*.; Note well that a five-judge concurring opinion in *J.S.* does take the view that *Tinker* forbids school jurisdiction over off-campus speech as a matter of law, while joining with the eight judges who signed the majority opinion, which presumes *Tinker* allows school jurisdiction, but nonetheless found in favor of the web-based student-speaker. *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (Brooks, J., concurring).

100. *Tinker Meets the Cyberbully*, *supra* note 98.

101. Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 290 (2008).

102. American Society for the Positive Care of Children, *Cyberbullying: Effects of Cyberbullying*, AMERICANSPCC.ORG, http://americanspcc.org/bullying/cyberbullying/ [http://americanspcc.org/bullying/cyberbullying/] (last visited Sept. 10, 2017).

103. Mindy McDowell, *Security Tip: Dealing with Cyberbullies*, U.S. COMPUTER EMERGENCY READINESS TEAM (June 1, 2011), https://www.us-cert.gov/ncas/tips/ST06-005 [http://perma.cc/L6PY-GKUE].

104. Raúl Navarro, et al., *The Impact of Cyberbullying and Social Bullying on Optimism, Global and School-Related Happiness and Life Satisfaction Among 10-12-year-old Schoolchildren*, 10 APPLIED RESEARCH IN QUALITY OF LIFE 15, 17 (2013).

likely to have lower self-esteem and higher rates of anxiety because the child may not know the source of the bullying.[105] It therefore follows that anonymous Cyberbullying is a particularly pernicious form of bullying because of the element of anonymity and the victim's difficulty of escape.[106] Studies have shown that the academic performance of victims decreases, instances of truancy increase, and some victims even run away or commit suicide.[107] Victims of Cyberbullying are more likely to develop eating disorders and aggressive-impulsive behavioral problems.[108] Additionally, bullies themselves are at a greater risk of socio-emotional and physical health consequences.[109]

A. The Cyberbully's Playground[110]: A Brief History of Facebook

Facebook did not invent anonymous Cyberbullying, but the service made it easier. The world's dominant text, gossip, picture, and information sharing company among teens came to be Facebook on October 28, 2003.[111] Originally based at Harvard University, the website had been called "Facemash," and its initial purpose was to compare and rate the physical attractiveness of school classmates.[112] Facebook in 2017 is a publicly traded company with about 2.01 billion active users worldwide.[113]

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105. American Society for the Positive Care of Children, *supra* note 102.

106. *Id*.

107. Bonnie Bell Carter and Vicky G. Spencer, *The Fear Factor: Bullying and Students with Disabilities*, 21 INT'L J. SPECIAL EDUC. 11, 12 (2006).

108. Victoria Stuart-Cassel, et al., *Analysis of State Bullying Laws and Policies*, U.S. DEP'T OF EDUC. 1, 1 (2011), http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf [http://perma.cc/TWM8-MCYR].

109. *See id.*

110. Facebook is not the exclusive home of Cyberbullying. But its current dominance in the social media space makes it the most reliable opportunity for bullies. *See also* notes 117-134 for brief overview of competing websites and online apps which are new and developing grounds for anonymous Cyberbullies, among them: Instagram, Twitter, Tumblr, YouTube, Ask.fm, Flickr, Google+, and kik.

111. Mary Bellis, *The History of Facebook and How it Was Invented*, THOUGHTCO.COM https://www.thoughtco.com/who-invented-facebook-1991791 [http://perma.cc/AQ7Q-MKB7] (last visited Sept. 23, 2017).

112. Jeff Burt, *Facebook at 10: Highlights in the Social Networking Pioneer's History*, EWEEK.COM, Slide 1, http://www.eweek.com/cloud/slideshows/facebook-at-10-highlights-in-the-social-networking-pioneers-history.html [http://perma.cc/QP24-3GZL] (last visited Jan. 10, 2016); Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007), https://www.theguardian.com/technology/2007/jul/25/media.newmedia [http://perma.cc/5VWT-S8E2] (last visited Jan. 10, 2016).

113. Dan Noyes, *Top 20 Valuable Facebook Statistics*, ZEPHORIA DIGITAL MARKETING, https://zephoria.com/top-15-valuable-facebook-statistics [http://perma.cc/7K55-X22D] (last visited Sept. 27, 2017).

How does this all drive Cyberbullying? A May 2013 study by the Pew Institute reinforced the obvious: 94% of American teens use Facebook.[114] And Facebook's own regulatory reporting with the U.S. Securities & Exchange Commission indicates that 1.5% of its accounts (more than 30 million) are undesirable or essentially fake.[115] Any teenager knows that Cyberbullies can be far bolder and obnoxious when hiding behind an anonymous Facebook account.

B. Other Social Media Websites (and Apps) Used for Anonymous Cyberbullying

It is not likely that the meanness children mete out to gain social primacy amongst each other has changed over the past few generations. However, the means and delivery systems for that meanness have undergone a revolution. In addition to Facebook, a number of "dot-coms" (and mobile phone applications ("apps")) are in the midst of a virtual arms race to supplant Facebook, just as Facebook supplanted Myspace as the dominant social media site in America.[116] Thus, any legal rule crafted by lawyers and judges to curb harmful anonymous Cyberbully speech under the First Amendment must take into account that the dominant social media network on the scene when the rule is created may be long gone by the time the rule is fully implemented. This short section is offered with the foregoing admonition in mind. With that said, some of the most viable combatants in the arms race to become the "next big thing" in social

114. Mary Madden, et al., *Teens, Social Media, and Privacy*, THE PEW RESEARCH CENTER AND THE BERKMAN CENTER FOR INTERNET AND SOCIETY AT HARVARD UNIV. (2013), http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf [http://perma.cc/E28M-PHYJ].

115. FACEBOOK, INC. Form 10Q, filed with the United States Securities & Exchange Commission, for the quarter ending on June 30, 2012, outlining "undesirable accounts" among Monthly Average Users at page 22. The 30 million figure is the product of the 2.01 billion figure in this Article from Zephoria Digital Marketing, multiplied by Facebooks' self-reported 1.5% "undesirable accounts" factor.

116. *See, e.g.*, Kelly Schryver, *11 Sites and Apps Kids Are Headed to After Facebook*, HUFFPOST (Sept. 26, 2013), http://www.huffingtonpost.com/common-sense-media/11-sites-and-apps-kids-are-heading-to-after-facebook_b_3991614.html [http://perma.cc/RWW4-ASGG].

networking include Instagram;[117] Twitter;[118] Tumblr;[119] YouTube;[120] Ask.fm;[121] Flickr;[122] the Money App;[123] Houseparty;[124] Saraha;[125] Yik

117. INSTAGRAM, https://instagram.com/?hl=en [http://perma.cc/9PJF-2TRE]. Instagram is an online/mobile photo and video sharing platform that can be used for Cyberbullying through the comment section where followers comment on other's photos. *Id.* For Cyberbullying on Instagram, *see* http://cyberbullying.org/cyberbullying-on-instagram/ [http://perma.cc/F9QY-EPG9].

118. TWITTER, https://twitter.com/?lang=en [http://perma.cc/VG4S-63G5]. Twitter is social networking online site that gives users the chance to write 140-character messages called "tweets." People can follow you on Twitter and you can follow others. Twitter can be used to bully via the gossiping phenomenon known as subtweeting. Subtweeting is when individuals indirectly talk about others through tweets without using a specific name. *Id.* For Cyberbullying on Twitter, *see* Steven Woda, *Subtweeting: Inside the Harmful New Social Media Trend*, UKNOW KIDS, http://resources.uknowkids.com/blog/subtweeting-inside-the-harmful-new-social-media-trend [http://perma.cc/S2B4-KAFN] (last visited Sept. 15, 2017); Lisa Larter, *Katy Perry: Queen of Subtweeting or Online Bully?*, HUFFPOST (Sept. 15, 2015), http://www.huffingtonpost.com/lisa-larter/katy-perry-queen-of-subtw_b_8134120.html [http://perma.cc/WJ5V-4S67]; *see also The Mash: Chicago Tribune's High School Journalism Program*, CHICAGO TRIBUNE, http://themash.com/blog/news/2013/03/07/subtweet-heat-undercover-twitter-drama-spreading-like-wildfire/ [http://perma.cc/K3F4-MR7L] (last visited Sept. 28, 2017); *see also* P. Brooks Fuller, *The Angry Pamphleteer: True Threats, Political Speech, and Applying Watts v. United States In the Age of Twitter*, 21 COMM. L. & POL'Y 87, 89 (2016) ("Twitter has also become a well-known site for antisocial practices including bullying, harassment and communicating threats . . . .").

119. TUMBLR, https://www.tumblr.com/ [http://perma.cc/6MSQ-M72Y]. Tumblr is a blogging and social networking site that allows users to create personalized blogs; some come to Tumblr to create blogs steeped in personal beliefs. There is the option to send anonymous messages to blog creators, therefore, hate can infiltrate what one once considered a serene space for personal expression. *Id.* On Tumblr and bullying *see* John Paul Titlow, *Tumblr Launches a Campaign Against Cyberbullying*, FAST COMPANY (May 13, 2015), http://www.fastcompany.com/3046283/fast-feed/tumblr-gets-serious-about-bullying [http://perma.cc/WCP7-46MT]; Leigh Cuen, *When Cyberbullying Goes Too Far: Apparent Suicide Attempt Fuels Debate*, VOCATIV (Oct. 27, 2015), http://www.vocativ.com/243477/zamii-suicide-attempt-cyberbullying/index.html [http://perma.cc/EU3E-BK2W].

120. YOUTUBE, https://www.youtube.com/ [http://perma.cc/Z2PN-XRL6]. YouTube is a video-sharing site that allows users to upload videos and for viewers to check out various videos using a key-word search tool. *Id.* It can be used for bullying via the comment section to videos.

121. ASK.FM, http://ask.fm/ [http://perma.cc/QQT3-QCM8]. Ask allows users to ask and send questions to one another. *Id.* Ask.fm is rife with Cyberbullying. Users pose a question that other users can answer. Questions range from "Am I pretty?" to those concerning suicide. With an account not connected to other social media sites, users can answer under any screen name with any response. Kelly Wallace, *Parents, Beware of Bullying on Sites You've Never Seen*, CNN (Jan. 9, 2015), http://www.cnn.com/2013/10/10/living/parents-new-apps-bullying/ [http://perma.cc/TTD4-3BA2]; *Stories of 7 Teen Suicides Because of Ask.fm* Bullying, NOBULLYING.COM (Aug. 14, 2016), http://nobullying.com/stories-of-7-teen-suicides-because-of-ask-fm-bullying/ [http://perma.cc/B5T6-B433]; Ryan Broderick, *9 Teenage Suicides in the Last Year Were Linked to Cyber-Bullying on Social Network Ask.fm*, BUZZFEED (Sept. 11, 2013), http://www.buzzfeed.com/ryanhatesthis/a-ninth-teenager-since-last-september-has-committed-suicide [http://perma.cc/6UL8-FHXP]; Blathnaid Healy, *After Cyberbullying Suicides, Ask.fm Gets Cold Shoulder in Ireland*, MASHABLE (Nov. 5, 2014), http://mashable.com/2014/11/05/ask-fm-relocation-ireland-cyberbullying-suicides-cold-shoulder/#1xPL.OPdJGqf [http://perma.cc/7S29-PBAB].

122. FLICKR, https://www.flickr.com/ [http://perma.cc/3535-QY2G]. Flickr is a website

Yak;[126] imo;[127] Whisper;[128] Brighten;[129] Formspring;[130] ooVoo;[131] Google+;[132] and kik.[133] Kik is a hot new app that specializes in anonymity because you can communicate without sharing your email, your phone number, or even your name. A teen user meeting another just asks, "[w]hat's your kik?" He gets a username (which is quite likely fictitious) or at least unrelated to the other teen's actual name, and the other might say, "I'll kik you when I get home."[134]

C. Prevalence and Frequency Studies

The prevalence or frequency of Cyberbullying has been the subject of a number of studies, spawning a cottage industry in government, non-

allowing users to post personally created images and videos through an online community. The relevance to Cyberbullying: users upload photos, which can be electronically altered or "photoshopped" to harass or ridicule. Others can then comment.

123. Downloadable at https://Monkey.cool [http://perma.cc/4CPT-URAY].

124. Downloadable at https://joinhouse.party [http://perma.cc/9FX3-42DG].

125. Anonymous app that allows users to chat. Downloadable at https://itunes.apple.com/us/app/sarahah/id1239779861?mt=8 [http://perma.cc/6MMZ-VL4V].

126. Anonymous app that allows users to chat and share messages anonymously; shuttered in April 2017 after being one of the hottest apps in America—by one estimate—worth $400 million just a few years earlier. *See* Biz Carson, *The Yik Yak App Is Officially Dead*, BUSINESS INSIDER (Apr. 28, 2017), http://www.businessinsider.com/yik-yak-shuts-down-2017-4 [http://perma.cc/RTR3-C4BP].

127. App available at the Apple Store for video games and chat at https://itunes.apple.com/us/app/imo-video-calls-and-chat/id336435697?mt=8 [http://perma.cc/U8FV-UJ3P].

128. Anonymous site that allows users to divulge a secret, presumably about themselves. *See* http://whisper.sh/ [http://perma.cc/39SJ-HSCN].

129. An app aimed—at least in theory—at delivering anonymous compliments to recipients. *See* https://brighten.in/ [http://perma.cc/G2EZ-Q2MB].

130. Similar to Ask.fm. *See* https://www.twoo.com/?utm_campaign=springme_cobrandreg [http://perma.cc/83KX-D5ME].

131. An anonymous online video, chat and messaging service. *See* http://www.ooVoo.com [http://perma.cc/DN7C-PL7L].

132. GOOGLE+, https://plus.google.com/ [http://perma.cc/U6KW-VEEB]. A social networking website controlled by Google Inc. that allows users to video chat in what is known as "Google Hangouts" with more than two people and connects users in one complete network. *Id.* The relevance to Cyberbullying: groups called "circles" can be created in which content is shared between everyone in the group. This grants the possibility of unwanted/uncensored photos or information being shared.

133. Kik Messenger is a phone app that has caught the imagination of kids as an alternative to standard texting for social networking. *See* kik.com [http://perma.cc/LLY5-PR6S]. The feature allows users to invite everyone in a phone's address book to join kik, since only someone with the kik app can receive a kik communication. An app called OinkText, linked to kik, allows communication with strangers who share their kik usernames to find people to chat with. There's also a kik community blog where users can submit photos of themselves and screenshots of messages (sometimes displaying users' full names) to contests. *See* Schryver, *supra* note 116.

134. Interview by Author with Royale Lampley, 17, Jordan High School, Columbus, Georgia, (Jan. 3, 2016).

profit, and consulting efforts bent on curbing or eliminating Cyberbullying.[135] This Article, while adhering to the plain-language definition of Cyberbullying[136] discussed above, notes the definition used by the Centers for Disease Control ("CDC") for the term "electronic aggression" to describe Cyberbullying. Electronic aggression is defined as a communication, such as a text message, online chat, social media page, or anonymous comment on another's website, which "allows adolescents to hide their identity, either by sending or posting messages anonymously or under a false name."[137]

How common is Cyberbullying? The studies are inconsistent, somewhat dated, and use different methodologies.[138] A May 2009 Cox Communications study found that 19% of teens reported being victims of Cyberbullying and 10% of teens reported being perpetrators of Cyberbullying.[139] A 2006 Harris Interactive study found that among teens 13 through 17, as of the spring 2007, 43% reported being Cyberbullied in

135. *See generally Vine Smartphone App Being Abused For Bullying In Video Form*, CBS LOCAL (May 15, 2013), http://newyork.cbslocal.com/2013/05/15/vine-smartphone-app-being-abused-for-bullying-in-video-form/ [http://perma.cc/WQT5-5MRT]; Leonie Smith, *Are Kik, Keek, Instagram, Snapchat, and Vine Safe For Kids?*, THE CYBER SAFETY LADY (Feb. 15, 2013), http://thecybersafetylady.com.au/2013/02/are-kik-keek-instagram-snapchat-and-vine-safe-for-kids/ [http://perma.cc/33LG-GPDT]; Wallace, *supra* note 121; *Stories of 7 Teen Suicides Because of Ask.fm Bullying*, *supra* note 121; Titlow, *supra* note 119; Cuen, *supra* note 119; Woda, *supra* note 118; *For Teens & Tweens: Cyberbullying*, MONT. DEP'T OF JUSTICE, https://dojmt.gov/safeinyourspace/for-teens-tweens-cyberbullying [http://perma.cc/V5LE-JFQ7]; Laura Barnhardt Cech, *Raising Kids in the World of Texting, Tweeting and Tagging*, BALTIMORE SUN (Mar. 24, 2015), http://www.baltimoresun.com/features/maryland-family/bal-kids-and-the-dangers-of-social-media-20150323-story.html [http://perma.cc/76A5-BCFW]; *see also infra* Section III of this Article, discussing the meteoric growth of Facebook as the dominant social media website for teens toward the end of the year 2015.

136. As referenced, *supra*, note 1, Cyberbullying is "willful and repeated harm inflicted through the use of computers, cell phones and other electronic devices." *See For Teens & Tweens*, *supra* note 135.

137. *See* Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media and Youth Violence: A CDC Issue Brief for Researchers*, CENTERS FOR DISEASE CONTROL (2009), http://www.cdc.gov/violenceprevention/pdf/electronic_aggression_researcher_brief-a.pdf [http://perma.cc/Q2AD-F9MN].

138. Some analyses of the law surrounding adult harassment or stalking seem to reveal higher numbers. *See, e.g.*, Joseph Russomanno, *Facebook Threats: The Missed Opportunities of Elonis v. United States*, 21 COMM. L. & POL'Y 1, 32 n. 203 (2016) (citing Sonia Pau, *Pew: Women Suffering Online Harassment Worse Than Men*, MEDIASHIFT (Oct. 22, 2014), http://mediashift.org/2014/10/pew-women-suffering-online-harassment-worse-than-men/ [http://perma.cc/W6AT-F54D]) ("Almost 90% of Internet users say they have experienced some form of cyber-harassment.").

139. *Teen Online & Wireless Safety Survey*, COX COMMUNICATIONS, http://ww2.cox.com/wcm/en/aboutus/datasheet/takecharge/2009-teen-survey.pdf?campcode=takecharge-research-link_2009-teen-survey_0511 [http://perma.cc/7CSB-J5LM] (last visited Feb. 14, 2014).

the past year.[140] The Harris study found the "[i]ncidence of Cyberbullying is higher among females than males and is most prevalent among 15- and 16-year-olds, with more than half of these teens reporting at least one Cyberbullying incident in the past year."[141]

How common is anonymous Cyberbullying? According to the CDC, "[B]etween 13% and 46% of young people who were victims of electronic aggression reported not knowing their harasser's identity. Likewise, 22% of perpetrators of electronic aggression reported not knowing the identity of their victim."[142]

Researchers have determined that Cyberbullying can appeal more to girls than boys because it does not require physical confrontation and is often anonymous.[143] The role of the bully has changed genders with the dawn of the electronic age, as girls are more likely to take on the bully role.[144] The demographic that Cyberbullying affects the most is 15 and 16-year-old girls.[145]

One study has concluded that poor parent-child relationships contribute to the likelihood that a student will become a Cyberbully.[146] This finding also correlates with the discovery that how much parents supervise their child's online activities contributes to the amount of bullying they may face online.[147] Another study has indicated that a student's consumption of alcohol and drugs, as well as their participation in school violence, contribute to a student's likelihood of being both a victim and perpetrator of Cyberbullying.[148]

140. David-Ferdon & Hernandez, *supra* note 137. This report was organized following an expert panel convened by the Centers for Disease Control and Prevention, Division of Adolescent and School Health and Division of Violence Prevention held on September 20-21, 2006.

141. *Id*.

142. *Id*. at 6.

143. *See* Lori O. Favela, *Female Cyberbullying: Causes and Prevention Strategies*, INQUIRIES JOURNAL/STUDENT PULSE (2010), http://www.inquiriesjournal.com/a?id=322 [http://perma.cc/C3GR-5HKE] (last visited Sept. 10, 2017).

144. *Id*.

145. Ellen M. Kraft & Jinchang Wang, *Effectiveness of Cyber Bullying Prevention Strategies: A Study on Students' Perspectives*, 3 INT'L J. CYBER CRIM. 513, 514 (2009); *see also* Sarah Nash Bumpas, *Cyberbullying Prevention: Intervention Effects on Student Involvement*, BELLARMINE UNIV. GRADUATE THESES, DISSERTATIONS, AND CAPSTONES 1, 11 (2015).

146. Bumpas, supra note 145 at 12.

147. Bumpas, supra note 145 at 13.

148. Bumpas, supra note 145 at 13.

D. Cyberbully Victims: Real-World Examples

This section attempts to highlight the disparity between the number of filed lawsuits and the real volume of extreme anonymous Cyberbully occurrences, based on research into national, state, and local news reports of egregious Cyberbullying. Parents appear far more likely to go to local police or to the school district to seek relief, as indicated by many local news reports from 2012 and 2013 across the nation on anonymous Cyberbullying.[149] The trend continued in 2014,[150] including at least one

149. In Veazie, Maine, in 2012, a former Orono High School student faced felony terrorizing and harassment by electronic communication charges after posting anonymous, threatening messages on classmate Alexis Henkel's Tumblr account. The Henkel family was forced to leave their home on several occasions due to the nature of the death threats. After the plaintiff closed the Tumblr account, the threats moved to plaintiff's cell phone. *See* Dawn Gagnon, *Former Orono High student charged in Cyberbullying case; target and family speak out*, BANGOR DAILY NEWS (Nov. 11, 2015), http://bangordailynews.com/2012/11/15/news/bangor/former-orono-high-student-charged-in-cyberbullying-case-target-and-family-speak-out/ [http://perma.cc/W8VT-VBN4].

In Portland, Oregon, in 2013, an anonymous Instagram user posted threatening and sexually violent messages directed toward a da Vinci middle school girl and her friends. Posts also encouraged certain individuals to commit suicide. The school district contacted Instagram in attempts to have posts removed. *See* Nicole Dungca, *da Vinci Middle School Cyberbullying Incident Prompts Officials to Contact Instagram to Take Down Posts*, THE OREGONIAN (Nov. 18, 2013), http://www.oregonlive.com/portland/index.ssf/2013/11/da_vinci_middle_school_cyberbu.html [http://perma.cc/6K3D-6VDN].

In 2013, a Manchester, New Jersey, anonymous Cyberbully created a page on Instagram called "MRHS_FAKES" and posted photos of a half-dozen students calling several girls "lesbians" or "fat" or "ugly"; one girl was urged to kill herself, according the parents of some of the victims. *See Manchester H.S. parents alert cops to cyberbullying attack targeting students*, THE RECORD (Feb. 5, 2013), http://www.northjersey.com/news/manchester-h-s-parents-alert-cops-to-cyberbullying-attack-targeting-students-1.547204 [http://perma.cc/63CT-6B4U].

In Murfreesboro, Tennessee, in 2013, an anonymous Instagram account posted photos depicting young girls in the Rutherford County School District and invited users to post demeaning comments about them. The matter was pending as of December 16, 2013, and no further information was available. *See Rutherford County Students Targeted In Cyberbullying*, WORLDNOW, FRANKLY MEDIA AND RAYCOM (Updated Dec. 31, 2013), http://raycomgroup.worldnow.com/story/24246854/rutherford-county-students-targeted-in-disturbing-cyberbullying [http://perma.cc/P7QX-FQK6].

150. In Klein, Texas, in 2014, parents Reymundo and Shellie Tingle-Esquivel sued six of their daughter's classmates and their parents based on an Instagram page created about their daughter that included explicit pictures of underage males and females, as well as malicious, derogatory, inflammatory and sexually explicit statements about the teen. The six students are being sued for libel and the classmate's parents for negligence. *See* David Boroff, *Texas Parents To Sue 6 Cyberbullies For Allegedly Harassing Their Teen Daughter On Instagram*, NEW YORK DAILY NEWS (Jan. 27, 2014), http://www.nydailynews.com/news/national/texas-parents-sue-cyberbullies-instagram-post-article-1.1592841 [http://perma.cc/5A36-3K4X].

In Maryville, Missouri, in 2014, a teenage girl previously at the center of a controversial rape case in October 2013 attempted to take her own life after she was attacked anonymously on Facebook for attending a party. No action was taken against the perpetrators. *See Cyberbullying Drove the Maryville Rape Victim to Attempt Suicide this Weekend*, THINK PROGRESS (Jan. 7, 2014), http://thinkprogress.org/health/2014/01/07/3127711/maryville-rape-victim-suicide/

new lawsuit.[151] Research revealed one additional lawsuit among the many 2015 high-profile media reports of cruel Cyberbullying.[152] Unfortunately,

[http://perma.cc/7SYL-HE2V].

In Watertown, Wisconsin, in 2014, an anonymous Cyberbully posted on Instagram photos which publicly shamed students of Watertown High School. These comments were described by police as "hateful" and "harassing" and targeted a few specific teens at Watertown High School. Two 16-year-old students were discovered as the creators of this account and were arrested and charged with second-degree harassment. *See WaterTown Teens Arrested For Instagram Bullying*, FOX 61 NEWS (July 8, 2014), http://fox61.com/2014/07/08/watertown-high-school-students-allegedly-caught-using-anonymous-instagram-account-to-harrass-others/ [http://perma.cc/K2YD-5EUP].

In Vineland, Indiana, in 2014, two sixth graders were arrested and charged with harassment after sending an anonymous message to a classmate that included racist and profane language, as well as posting through a fake social media account in her name. The two students have been disciplined, the terms of which have not been released. *See Two Girls Charged in Case of Cyber Bullying*, THE DAILY JOURNAL (Jan. 24, 2014), http://www.thedailyjournal.com/story/news/2015/06/18/2-girls-charged-in-case-of-cyber-bullying/28936789/ [http://perma.cc/5FVH-QT5A].

In Greenfield, Indiana, in 2014, an anonymous Cyberbully used the fictitious name "Molly Thots" to create a page on which he or she posted photos of teens at Greenfield Central High School with accusations of sexually transmitted diseases, abortions, and drugs, as well as derogatory and inappropriate comments. *See* Dana Hussinger Benbow, *Facebook bullying case disturbs school officials*, USA TODAY (Feb. 20, 2014), http://www.usatoday.com/story/news/nation/2014/02/20/facebook-bullying-case-disturbs-school-officials/5666481/ [http://perma.cc/46YZ-6NFA]. "Thot" is an insult used by modern teens to suggest lack of chastity among girls; it denotes "That Hoe Over There." URBANDICTIONARY, http://www.urbandictionary.com/define.php?term=Thot&page=2 [http://perma.cc/Q8ZT-2Q3D].

151. *See* Boroff, *supra* note 151.

152. In Chicago, in 2015, students at the University of Chicago were targeted by a fake Facebook account under the anonymous name "Rachel Corrie." The author attacked members and allies of the University of Chicago's Students for Justice in Palestine; the attacks used Islamaphobic, misogynistic, homophobic, and transphobic rhetoric in accusing students of supporting terrorism, as well as intimidation and threats. *See Palestine Legal Demands that University of Chicago Take Action to Protect Student Activists*, PALESTINE LEGAL (Nov. 19, 2015), http://palestinelegal.org/news/2015/11/19/palestine-legal-demands-action-from-university-of-chicago-to-protect-palestine-advocates [http://perma.cc/8EV7-9FGB].

In 2015, in Fredericksburg, Virginia at the University of Mary Washington, three leaders of a student group called Feminists United—Paige McKinsey, Kelli Musick, and Grace Rebecca Mann—were threatened through more than 700 anonymous posts on the social media app YikYak because some believed they were responsible for the suspension of the university's rugby team. A week later, Grace Rebecca Mann was murdered. The campus group, with help from attorneys Debra Katz and Lisa Banks, filed a Title IX complaint to the Department of Education. There was also an investigation by the department's Office of Civil Rights. *See* William D. Cohan, *Putting the Heat on Yik Yak After a Killing on Campus*, N.Y. TIMES (Jan. 6, 2016), http://www.nytimes.com/2016/01/07/business/dealbook/07db-streetscene.html?_r=0 [http://perma.cc/AYN4-RSRS].

In Perrysburg, Ohio, in 2015, the Perrysburg Police Department launched an investigation after the school's administration was alerted of an Instagram account user that posted pictures of students at Perrysburg Junior High with derogatory comments. The account was set up to single out a handful of students, and the account was also created in the name of one of the Cyberbullying victims. *See* Christine Long, *Police Investigate Cyberbullying Against Perrysburg Junior High Students on Instagram*, ABC 13 NEWS (Sept. 22, 2015), http://www.13abc.com/home/headlines/Police-investigate-cyberbullying-against-Perrysburg-Junior-

sometimes Cyberbullying turns deadly. The perpetrator, in retrospect, also often has his or her life destroyed, as was the case with Cyberbully Ravi Dharum, who secretly filmed his roommate having homosexual intercourse and then posted the footage online, leading to the roommate's suicide.[153] But, there are many other victims who get less national attention, though the results of the anonymous Cyberbullying are no less deadly, such as the cases of Grace Rebecca Mann, Jacob Marberger, and Rebecca Ann Sedwick.[154] When trial courts *do* confront the First Amendment and related questions in the context of Cyberbullying, there is more limited guidance than with other types of Internet-related disputes, because it appears many of the controversies simply never result in lawsuits. And just a small subset of those tried cases make it to the appellate courts. But professional news reporting and scholarly research points to a trend that is real and growing, effecting the most vulnerable segment of society—children and adolescents. When the Cyberbullying cases *are* filed, they are often matters of first impression for a trial court

High-students-on-Instagram—328754411.html [http://perma.cc/M6GP-UNJ5].

In Kirkland, Arizona, in 2015, the family of a former Kirkland Elementary School student sued the Lake Washington School District for its lack of action after the student was Cyberbullied through a false Instagram account in his name with inappropriate images. The school first ignored the bullying, then accused the son himself of "creating the account and forgetting." After further investigation, authorities discovered a girl at the school was responsible for creating the account, but the boy continued to be the subject of anonymous Cyberbullying on Instagram. The lawsuit accuses both the girl's parents and the school district of gross negligence, among other claims. *See* TJ Martinell, *LWSD being sued for alleged bullying incidents at Kirkland elementary school*, KIRKLAND REPORTER (Oct. 14, 2015), http://www.kirklandreporter.com/news/332814391.html [http://perma.cc/Z7ER-H3T5].

153. *See* Ian Parker, *The Story of a Suicide: Two College Roommates, a Webcam, and a Tragedy*, THE NEW YORKER (Feb. 6, 2012), https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide [http://perma.cc/NF9G-5VWD] (Tyler Clementi case); *see also* Ela Dutt, *A Reprieve for Dharum Ravi: Sliver of Hope in N.J. Court Ruling on Bias Crime Law*, NEWS INDIA TIMES (Mar. 24, 2015), http://www.newsindiatimes.com/a-reprieve-for-dharun-ravi-sliver-of-hope-in-n-j-court-ruling-on-bias-crime-law [http://perma.cc/R3HH-BTVS].

154. *See*, e.g., Allen & Pleasant, *supra* note 17 (giving a summary of Lakeland, Florida middle schooler Rebecca Ann Sedwick's saga of anonymous Cyberbullying on Instagram, Ask.fm, and Kik that led to her jumping off a building at a cement plant near her home); *see also*, Karen Araiza, *Jacob Marberger's Suicide Prompts an Outpouring of Condolences and Accusations of Bullying*, NBC 10 NEWS (Nov. 22, 2015), http://www.nbcphiladelphia.com/news/local/Jacob-Marberger-Suicide-Washington-College-Hawk-Mountain-Cheltenham-352949961.html [http://perma.cc/NPX7-VJGF]. In 2015, in Chestertown, Maryland at Washington College, a student named Jacob Marberger disappeared and his body was found six days later, indicating suicide. His suicide seems to be the result of bullying and anonymous Cyberbullying, based on a string of mean-spirited anonymous comments posted on Yik Yak about his absence from the college and the repercussions of these posts. *Id.*; *see also* Cohan, *supra* note 151 (detailing efforts to reform Yik Yak through its founders and financiers because of anonymous Cyberbullying communications leading up to the killing of Grace Rebecca Mann, for which former college rugby player Steven Vander Briel has been charged with murder).

judge, yielding decisions that may not be the result of clear appellate guidance and application of a fair and consistent rule of law. Whether using *Tinker* as a tool with the aid of the school, or by taking it on alone and filing a civil lawsuit, the student-victim of anonymous Cyberbullying has options which are not precluded by the First Amendment.

IV. THE LAW OF UNMASKING IN CIVIL SUITS UNDER THE FIRST AMENDMENT

A. Framing the Issue

Despite the variation in empirical data among social scientists, each of the studies referenced above note some material incidence of Cyberbullying.[155] Overall, Cyberbullying studies note the exacerbating impact of anonymity on Internet-based bullying. The issue thus becomes how to appropriately curb anonymous Cyberbullying among school children, without violating the First Amendment.

As discussed extensively above in the Student Speech Cases and Child Protection Cases earlier in this Article, the First Amendment generally provides a lesser level of protection for school speech and for adults whose behavior may harm minors. Civil defendants accused of speech or expression-based torts or other communication-based infringements as a preliminary matter have the right to anonymity, as discussed below. These individuals do *not*, however, have the right to anonymously commit civil or criminal harassment, to lodge true threats, to violate intellectual property interests, or to commit defamation. The difficulty is determining when the government, generally, and courts, ought to "unmask"—that is, through court order require—the identification of the IP address of the offender's computer, thus likely leading to the identity of the anonymous defendant. Imbedded in the "when" or "under what circumstances" question is the minutiae of distinguishing one fact pattern from another, thus distinguishing the speech that Americans as a society want to and ought to protect, from that which can be regulated and punished.

The issue of when to unmask anonymous adult speakers has been examined at length.[156] Central to the analysis of virtually every court

155. *See supra* Section III.

156. *See generally* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Krinsky v. Doe 6, 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008) (explaining that a corporation's president brought action against ten fictitious named defendants based on posts these individuals made about the corporation on a financial website); Indep. Newspaper v. Brodie, 966 A.2d 432 (Md. 2009) (explaining that a business owner brought suit seeking identifying

reviewing these matters is the premise that Americans have a constitutional right to speak anonymously, subject to legitimate civil tort claims, such as defamation, as well as criminal prohibitions against harassment, criminal threats, and the like.[157] In McIntyre v. Ohio, Justice John Paul Stevens wrote for the Court's majority, detailing the important historical basis for protecting anonymous authors and authors using pseudonyms:[158]

> [A]n author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible . . . . Accordingly, an author's decision to remain anonymous,

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information on five anonymous posters who posted allegedly defamatory comments on the newspaper's Internet discussion forum); Solers v. Doe, 977 A.2d 941 (D.C. 2009) (explaining that a software developer filed a lawsuit against Doe for defamation and tortious interference and subpoenaed a non-party to disclose Doe's true identity); Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128 (D.D.C. 2009). Sinclair posted a video on YouTube and later brought an action against three anonymous Internet users, alleging defamation and reckless misrepresentation related to responses users made to the video. Sinclair subpoenaed YouTube and other websites to compel information regarding true identities of the users. The court found that where compelled identification threatens the First Amendment right to remain anonymous, the party seeking the subpoena must show (1) proof of a compelling interest and (2) a narrowly tailored restriction serving that interest. *Id. See generally* Maxon v. Ottawa Publ'g Co., 929 N.E.2d 666 (Ill. App. 2010) (explaining that Maxon, a private citizen, brought suit against Ottawa Publishing seeking the identity of several anonymous posters on the newspaper's Internet website); McVicker v. King, 266 F.R.D. 92 (W.D. Pa. 2010) (explaining that former employee brought an employment discrimination lawsuit against several borough and council members; the plaintiff subpoenaed a non-party media company seeking the identities of seven anonymous/pseudonymous bloggers who had discussions related to the subject of the lawsuit); Doe v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008) (explaining that two female law students brought suit against several unknown individuals using thirty-nine different pseudonyms who posted derogatory comments about the female students on the AutoAdmit.com website); Enterline v. Pocono Med. Ctr., 751 F. Supp. 2d 782 (M.D. Pa. 2008) (explaining that plaintiff, who had filed a sexual harassment lawsuit, sought the identities of several anonymous posters on a newspaper's website article about the lawsuit); *In re* Does 1-10, 242 S.W.3d 805 (Tex. Ct. App. 2007) (explaining that hospital brought an action against ten Does who allegedly defamed the hospital and hospital personnel; the trial court granted the hospital's motion to identify a blogger as one of the Doe defendants); Stone v. Paddock Publ'n, 961 N.E.2d 380 (Ill. Ct. App. 2011) (explaining that a mother sought the discovery of the identity of an anonymous/pseudonymous commentator who allegedly made defamatory statements about her son); Polito v. AOL Time Warner, Inc., No. Civ.A. 03CV3218, 2004 WL 3768897 (78 Pa. D. & C.4th 328 Jan. 28, 2004). Polito filed this action against defendant AOL seeking the identities of AOL subscribers who forwarded "harassing . . . pornographic, embarrassing, insulting, annoying and . . . confidential" electronic communications to her via the Internet. The anonymous individuals transmitting the abusive emails and instant messages to Polito use multiple screen names, which they frequently change, thereby preventing Polito from permanently blocking her receipt of these harassing communications. *Id.*

157. *See supra* note 156.

158. For purposes of this Article, anonymous speech (speech without a named author) and pseudonymous speech (speech from an author using a fictitious name) are treated interchangeably.

> like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[159]

Stevens noted that the history of anonymous speech in the United States dates to the anonymous authors of The Federalist Papers: "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."[160]

Carrying this principle forward to modern technology, anonymous posts to the Web, both in their substance and the right to remain anonymous, are protected under the First Amendment. The U.S. Supreme Court has consistently stated that content on the Internet is not subject to a lesser standard of First Amendment protection.[161] While the Court has found a clear, historical right to speak anonymously, it has also consistently held that certain kinds of speech do not enjoy First Amendment protection, and thus "the right of free speech is not absolute at all times and under all circumstances."[162] For example, "it is . . . clear that the First Amendment does not protect defamatory speech."[163]

B. Mechanics of Unmasking

Those jurisdictions faced with the unmasking question as a matter of first impression have generally developed a test that requires plaintiffs seeking a court order for the IP address of a hidden defendant's computer to establish the following five elements: (1) make a substantial showing of proof to support each element of the defamation allegations; (2) attempt to notify the Doe defendant of the claim; (3) give the Doe defendant sufficient time to respond; (4) convince the judge that the claim would survive either a motion for summary judgment or a motion to dismiss; and (5) in most cases, survive some sort of balancing of the defendant's First Amendment interests against the right of the plaintiff to pursue redress for

159. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) (emphasis added).

160. *Id*. at 357.

161. Reno v. ACLU, 521 U.S. 844, 845 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.").

162. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

163. Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005). *See also* Dendrite Int'l, Inc. v. Doe No. 3, 775 A. 2d 756 (2001).

legitimate damages.[164] This Article refers to these factors as the "*Dendrite* test," based on the New Jersey case that is often associated with the test. The mechanics of unmasking are covered extensively in a number of cases and law review articles.[165] First Amendment analysts have gathered a state-by-state compendium of the rights of Americans to speak anonymously in the face of an unmasking challenge.[166]

Ultimately, courts across the country have settled on a standard that calls for giving the Doe defendant notice of the plaintiff's effort to obtain identifying information and then taking an early look at the merits of the plaintiff's case to make sure the plaintiff has a realistic chance of prevailing on the merits.[167] Furthermore, "state appellate courts have been fairly unanimous in following a standard that requires an evidentiary showing of merit."[168]

In addition, one practitioner with extensive experience in this area has noted that judges sometimes appoint *ad litem* counsel to protect the

164. *See* A.Z. v. Doe, 2010 WL 816647, at *1 (N.J. Super., App. Div. 2010) ("In Dendrite, we held that where an anonymous person posted defamatory speech on broadly-available Internet message boards, a plaintiff would be entitled to an order divulging the identity of the anonymous author only if the plaintiff provides sufficient information to demonstrate that his or her cause of action could withstand a motion to dismiss for failure to state a claim, supported by prima facie evidence to support each element of such cause of action (third prong); and establishes, through a balancing test, that the necessity of the disclosure of the anonymous defendant's identity outweighs the defendant's First Amendment right of anonymous free speech (fourth prong)." (citing Dendrite, 775 A.2d at 756)); *see also Cahill*, 884 A.2d 451 (explaining that wherein the Maryland Supreme Court held four years after *Dendrite* was decided by a New Jersey appellate court that the Dendrite test contained redundant or unnecessary parts, and collapsed the inquiry from four parts to two, eliminating the requirement of setting forth the allegedly defamatory statements (the second prong of the Dendrite test) and the balancing test (Dendrite's fourth prong), on the theory that they are already covered indirectly by the other prongs) ("To satisfy the summary judgment standard a plaintiff will necessarily quote the defamatory statements in his complaint. The fourth Dendrite requirement, that the trial court balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case is also unnecessary. The summary judgment test is itself the balance.").

165. *See generally infra* Section IV; *see also* Paul Alan Levy, *Developments in Dendrite*, 14 FL. COASTAL L. REV. 1, n.105 (2012) (citing Anonymous I, 611 F.3d 653, 658-61 (9th Cir. 2010), withdrawn and replaced by Anonymous II, 661 F.3d 1168); Lidsky & Cotter, *supra* note 12; Sobel, *supra* note 12; and *Shielding Jane and John*, *supra* note 12. *See also Untangling the Legal Labyrinth*, *supra* note 4; Gleicher, *supra* note 4; *Legal Protections for Anonymous Speech*, *supra* note 4; Vogel, *supra* note 4; and Ringland, *supra* note 4.

166. The Digital Media law Project has gathered an incomplete, but very useful, state-by-state glance at unmasking protections for libel defendants, which apparently was not updated after 2014. *See generally Legal Protections for Anonymous Speech*, *supra* note 4 (collecting cases) (last visited Sept. 9, 2017).

167. Citing, as a good example, Ingenuity 13 LLC v. Doe, No. C 12—4450 MMC (MEJ), 2012 WL 4110991 (N.D. Cal. 2012); First Time Videos, LLC v. Does 1-500, 276 F.R.D. 241 (N.D. Ill. 2011); and Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556 (2004).

168. Levy, *supra* note 165 at n. 61.

First Amendment interests of the Doe defendant in unmasking discovery disputes.[169] This approach provides additional constitutional protection for the Doe defendant facing unmasking, at the discretion of the judge hearing the discovery motion. Such an appointment of counsel (as would be appointed by a court for a child or incapacitated adult) allows the Doe defendant vigorous defense of his or her constitutional rights, even though the client remains unknown to the court, the judge, or even the lawyer.[170] The courts have already determined generally that unmasking standards should vary depending upon the nature of the speaker and the speech, with commercial speech receiving less protection.[171]

This Article below, accordingly, posits the theory that where the government interest at stake is child protection, *Dendrite* and similar judicial unmasking tests can be made substantially less rigorous without violating the First Amendment. Under the variable obscenity analysis of *Ginsberg v. New York*, discussed above, the government can constitutionally adjust the protections afforded certain speech to the social realities associated with such speech.[172] The Court's condition of such adjustment, found lacking in the video games sales-to-minors case, *Brown v. EMA*, and the depiction of cruelty-to-animals case, *United States v. Stevens*, is a historical warrant or tradition of limiting the particular kind of speech at issue.[173] This historical warrant requisite is ever-present in the jurisprudence governing torts, such as civil defamation and harassment.[174] Thus, the entire adult unmasking paradigm can be, and indeed should be, collapsed into a single prong of the *Dendrite* test: its fourth and final prong. As argued more fully in Section V below: can the school make a concrete showing under applicable state law that the anonymous Cyberbully would be subject to discipline if his or her identity were already known?

C. Cyberbully Unmasking Litigation

Research revealed few "pure" Cyberbullying cases where the First Amendment is directly tested against a student's right to anonymity *and*

169. *See generally id.* at 35-52.

170. *Id.* at 52.

171. *Id.* at n.105 (2012) (citing Anonymous I, 611 F.3d 653, 658-61 (9th Cir. 2010), withdrawn and replaced by Anonymous II, 661 F.3d 1168).

172. *Ginsberg*, 390 U.S. at 638 (1968) (citing Mishkin v. New York, 393 U.S. 502 (1966)).

173. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734-36 (2011) (discussing and contrasting *Ginsberg* with *Brown* and *Stevens)*.

174. Of course, the premise of this analysis is that these are civil disputes or government-imposed regulations on non-criminal speech. An entirely separate paradigm, beyond the scope of this Article, governs anonymous speech supporting probable cause that a crime has been committed.

against that student's right to avoid punishment altogether on the theory that the underlying utterances are protected speech. Below is a brief discussion of six cases involving anonymous Internet Cyberbullies whose communications may have disrupted the school environment. In these cases, many, but typically not all, of the issues discussed in this Article arise.

1. *Doe v. Individuals*

In *Doe*, two female Yale Law School students (Jane Doe I & Jane Doe II) brought suit against unknown individuals using 39 different pseudonymous names to post sexually explicit and defamatory statements about Jane Doe I & II on the website AutoAdmit.[175] From 2005 through 2007, nearly 200 Internet conversations or "threads" containing derogatory and harassing statements about Doe II by "AK47" and others were posted on AutoAdmit.[176] Some of the posters appeared to be Doe II's classmates at Yale Law School because of personal information they revealed.[177] Among the 200 posts, along with the comments on the posts, were derogatory falsehoods about one of the plaintiffs' sexuality, alleged heroin addiction, rape, and her father's alleged criminal history.[178] One of the false claims was allegedly communicated to a plaintiff's future employer.[179]

The two female Yale law students sued, and during litigation served a subpoena on AT&T as the Internet Service Provider of AutoAdmit, seeking the Internet protocol address of the computer used by the individual using the pseudonym "AK47."[180] One defendant intervened in the lawsuit to file a motion to quash the plaintiffs' unmasking subpoena, as well as a motion to proceed anonymously in litigation through his counsel.[181] The *Doe* court employed a slightly modified version of the *Dendrite* test, listing six distinct steps[182] to be taken by plaintiffs before

175. Doe v. Individuals, 561 F. Supp. 2d. 249 (D. Conn. 2008).

176. *Id.* at 251.

177. *Id*.

178. *Id*.

179. *Id*.

180. *Id.* at 252.

181. *Id*. While the issues are identical, the *Doe* case is technically both an unmasking case and a case requesting a *de facto* court finding against unmasking in defendant Doe's motion to proceed anonymously.

182. The steps, which essentially elongate the *Dendrite* test without substantively changing it, were: 1) notice to the anonymous defendant of the unmasking subpoena and opportunity to respond; 2) plaintiffs' responsibility to set forth the precise actionable statements allegedly made by the anonymous defendant; 3) the specificity of plaintiffs' discovery request and whether alternatives were

the anonymous defendant would lose his right to anonymity before the court.[183] The *Doe* court, like the *Dendrite* court, required, among other elements, an adequate or concrete showing of each element of the plaintiffs' prima facie case. The *Doe* court found that the two female law students had satisfied each of the six requirements and rejected defendant's motion to quash the unmasking subpoena served on the Internet Service Provider, functionally ordering the unmasking of the defendant.[184]

2. *Juzwiak v. Doe*

The *Juzwiak v. Doe* case offers the rare appellate court Cyberbullying opinion with a decision squarely on the legal issue of unmasking the Cyberbully in a public primary or secondary school context.[185] It is also representative of the novel, but not altogether unprecedented, fact pattern wherein an apparent student Cyberbullies a teacher.[186] In *Juzwiak*, a tenured teacher at Highstown High School in New Jersey filed an intentional infliction of emotional distress claim against an anonymous defendant who sent emails criticizing the teacher and expressing the hope that the teacher would be "gone permanently."[187] The teacher served a subpoena on Yahoo, the Internet Service Provider, ordering Yahoo to provide him with the author's identity.[188] Yahoo notified its subscriber, who, proceeding as John/Jane Doe, filed a motion to quash the subpoena, which was denied.[189] The Doe defendant appealed, and the appellate court reversed.[190] The appellate court, citing and following *Dendrite*, concluded that the plaintiff did not establish a *prima facie* case, failing to produce enough evidence on each of the elements of his cause of action for intentional infliction of emotional distress.[191] Disclosure of defendant's identity, thus, was not needed to allow plaintiff

available; 4) whether there was a central need for the defendant's name in order to advance plaintiffs' claim; 5) the defendant's expectation of privacy at the time the online material was posted; and 6) whether plaintiffs had made an adequate or concrete showing as to each element of the prima facie case.

183. *Doe*, 561 F. Supp. 2d. at 254-55.
184. *Id*. at 257.
185. *See* Juzwiak v. Doe, 2 A.3d 428 (N.J. Super.A.D. 2010).
186. *Id*.
187. *Id*. at 430.
188. *Id*.
189. *Id*. at 430-31.
190. *Id*. at 436.
191. *Id*. at 435-36.

to proceed, as required by the multi-part *Dendrite* test.[192] The court recounted the facts underlying the plaintiffs' claim in explicit detail[193] and found that the email comments upon which the unmasking claim was based expressed anger, but were not "extreme and outrageous" or beyond decency.[194]

3. *A.Z. v. Doe*

In *A.Z. v. Doe*,[195] A.Z., a minor, was a high school student and part of a club for high academic achievers.[196] A faculty advisor received an anonymous email stating that certain members of this club were in violation of the law.[197] Several pictures were attached to the email, one of which depicted A.Z.[198] A.Z. filed a complaint alleging defamation against the anonymous emailer.[199] A.Z. sought to compel Optimum Online to reveal the anonymous emailer's identity.[200] Applying *Dendrite*, the court declined to unmask the anonymous defendant, finding that plaintiff did

192. *Id*.

193. The defendant, using the pseudonym "Josh" or "Josh Hartnett," sent three emails to the plaintiff. *Id* at 430. The first, on July 23, 2009, contained the subject line: "Hopefully you will be gone permanently[.]" Additional relevant facts as found by the court are summarized as follows: "The body of the e-mail read, 'We are all praying for that. Josh' A second e-mail was sent on August 11, 2009. It also indicated it was sent by 'Josh Hartnett' '<jharthat@yahoo.com.' The subject line of this e-mail stated, 'I hear Friday is 'D' day for you[.]' The text read, 'I certainly hope so. You don't deserve to be allowed to teach anymore. Not just in Hightstown but anywhere. If Hightstown bids you farewell I will make it my life's (sic) work to ensure that wherever you look for work they know what you have done.' Again, it was signed, 'Josh.' A third e-mail was sent two days later, on August 13, 2009; it bore the same sending address; its subject line was 'Mr. Juzwiak in the Hightstown/East Windsor School System.' The text of this e-mail read: 'It has been brought to my attention and I am sure many of you know that Mr. J is reapplying for his position as a teacher in this town. It has further been pointed out that certain people are soliciting supporters for him. This is tantamount to supporting the devil himself. I am not asking anyone to speak out against Mr. J but I urge you to then be silent as we cannot continue to allow the children of this school system nor the parents to be subjected to his evil ways. Thank you. Josh.' The context of this third e-mail makes clear that it was sent to individuals in the area served by the school district, but the record does not disclose the number of people to whom it was directed." *Id.* at 430.

194. *Id.* at 433-34.

195. 2010 WL 816647; 2010 N.J. Super. Unpub. LEXIS 472 (N.J.Super.A.D.2010). This is an unpublished case with no technical precedential value according to New Jersey Rule 1-36:3, which states: "No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court." *Id.*

196. *Id*. at *1.

197. *Id*. at *1-2.

198. *Id*. at *2.

199. *Id*.

200. *Id*.

not establish a *prima facie* cause of action for defamation because the allegations forming the basis for plaintiff's defamation complaint were true, and thus inadequate as a matter of law to support the claim.[201] The plaintiff in A.Z. was alleged in the anonymous email to have engaged in underage drinking. As proof of this allegation, the email included a photograph, obtained from Facebook, of the plaintiff throwing a ping pong ball at a table topped with cups and alcohol containers.[202]

4. *Wilson v. Doe*

In *Wilson v. Doe*, an unreported federal case that was dismissed quickly after filing,[203] Tulane University student and plaintiff Tara Wilson sought damages for intentional infliction of emotional distress after demeaning comments about her were posted on a blog called Tulane Watch and, later, on Twitter.[204] Her younger sister was also attacked via Twitter by the same anonymous poster. Wilson argued that Doe's words were "fighting words"[205] and, as a result, were not entitled to First Amendment protections. [206]

Defendant John Doe was advised of the suit via Twitter.[207] In a letter to the defendant, which became an attachment to a pleading in the lawsuit, Wilson asked the defendant to unmask himself and said she would otherwise subpoena Google to determine his identity.[208] Doe ignored the request and "made a few comments about the First Amendment before shutting the site down."[209] On March 27, 2013, Wilson's lawyer filed an emergency motion to expedite discovery in an apparent attempt to immediately unmask defendant.[210] It appears, however, from the *Wilson*

201. *Id*. at *7.

202. Id. at *5-7 (showing during the litigation pictures depicting the plaintiff actually drinking alcohol).

203. Plaintiff Tara Wilson's Emergency Motion to Expedite Discovery and Brief in Support at 4, Wilson v. Doe, No: 4:13-CV-00521 (S.D. TX Mar. 27, 2013).

204. *Id*. at 3-4.

205. For the "fighting words" argument, Wilson cited the seminal case of Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Among the offensive tweets by the anonymous Cyberbully in *Wilson v. Doe*: "I made you my bitch last night so you better come back and check up on my website. I know you will. Oh, and try to get some rest. Later, my stupid bitch." Wilson's Emergency Motion to Expedite Discovery and Brief in Support at 10-11. To Wilson's younger sister he Tweeted: "A brown paper sack placed over your head would really help with your appearance." *Id*. at 5.

206. *Id.* at 9-12.

207. *Id.* at 6.

208. *Id.* at 6-8.

209. *Id*.

210. *See generally*, Plaintiff Tara Wilson's Emergency Motion to Expedite Discovery and Brief in Support, Wilson v. Doe, No: 4:13-CV-00521 (S.D. TX Mar. 27, 2013).

pleadings that Tara Wilson's Cyberbully simply abandoned the Cyberbullying behavior in the face of the threat of unmasking.[211]

5. *Thomas M. Cooley Law School v. Doe*

In 2013, the Michigan Court of Appeals decided *Thomas M. Cooley Law School v. Doe*,[212] in which Doe I created an Internet website titled "THOMAS M. COOLEY LAW SCHOOL SCAM" under a pseudonym,[213] claiming the law school engaged in fraudulent practices, and that the school preyed on its students.[214] The school filed a complaint against Doe I, alleging that he made defamatory accusations against the school[215] and issued a subpoena to the website administrator, ordering it to produce documents that would reveal Doe I's account information.[216] Doe I filed a motion to quash,[217] and the trial court denied Doe I's motion, allowing the law school to use the information it discovered from the website administrator.[218] The Michigan Court of Appeals reversed the trial court's denial of defendant's motion to quash, applying Michigan civil procedure law to protect defendant's "First Amendment interests in anonymity."[219]

6. *Hadley v. Doe*

In 2011, the *Freeport Journal Standard* posted an online newspaper article concerning Bill Hadley and his candidacy for the Stephenson County board.[220] A pseudonymous commenter, "Fuboy," posted: "Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire[221] from his front door."[222] Hadley filed a defamation suit against Fuboy and issued a subpoena to Comcast Cable Communications requesting information about Fuboy's identity.[223] The trial court granted

211. *Id.* at 6. Plaintiff Tara Wilson's Emergency Motion to Expedite Discovery and Brief in Support, Wilson v. Doe, No: 4:13-CV-00521 (S.D. TX Mar. 27, 2013) (case terminated by Judge David Hittner, Apr. 25, 2013).
212. Thomas M. Cooley Law Sch. v. Doe, 833 N.W.2d 331, 342 (Mich. Ct. App. 2013).
213. *Id.* at 335.
214. *Id*. at 335-36.
215. *Id.*
216. *Id.* at 336.
217. *Id.*
218. *Id.* at 336-37.
219. *Id.* at 342.
220. Hadley v. Doe, 12 N.E.3d 75, 78 (Ill. App. Ct. 2014).
221. A local school.
222. *Hadley*, 12 N.E.3d at 78.
223. *Id.* at 79.

Hadley leave to file suit under Illinois's Rule 224[224] and later directed Comcast to release Fuboy's name and address.[225] The court of appeals affirmed the trial court's order.[226] In its analysis, the court of appeals reasoned that:

> [C]ourt[s] must balance the potential plaintiff's right to redress for unprotected defamatory language against the danger of setting a standard for disclosure that is so low that it effectively chills or eliminates the right to speak anonymously and fails to adequately protect the chosen anonymity of those engaging in non-defamatory public discourse.[227]

In the decades since the *Dendrite* decision, the analytic framework implemented by the New Jersey court in *Dendrite* has often been applied by other states and even the federal circuits in the United States.[228] States vary in their application of the tests—some only apply the *Dendrite* four-part test, while others apply a hybrid of *Dendrite* and some other standard. Still others apply basic state discovery/procedural concepts.[229] Because it appears the *Dendrite* analysis has proven itself superior to the alternatives in the eyes of judges faced with unmasking as a matter of first impression (and in the absence of a clear legislative/procedural state rule), any developing unmasking standard for adults must likely start with some version of the *Dendrite* test. As discussed in Section II above, however, the *Dendrite* case and its teachings are relevant, but not dispositive, of how courts ought to apply the First Amendment to the issue of anonymous teen Cyberbullying that emanates outside the schoolhouse, but creates in-school disruption.

V. TOWARD A NEW STANDARD: THE CYBERBULLY UNMASKING TEST

Formulation of a fair and workable legal rule that might vie for consideration as a preferred approach in the adjudication of Cyberbully unmasking cases requires context. Section II of this Article focused on the controlling precedents and rules governing children and the First Amendment—the Child Protection Cases and Student Speech Cases. But

224. Rule 224 permits a person or entity to file an independent action for discovery to ascertain the identity of someone who may be responsible for damages. ILL. S. CT. RULE 224(a)(1)(i) (2010).

225. *Hadley*, 12 N.E.3d. at 80.

226. *Id.* at 96.

227. *Id.* at 82.

228. *See, e.g.*, A.Z. v. Doe, 2010 WL 816647; 2010 N.J. Super. Unpub. LEXIS 472 (N.J.Super.A.D.2010)

229. *See, e.g.*, *Hadley*, 12 N.E.3d at 78 (employing ILL. S. CT. RULE 224 in an anonymity unmasking discovery dispute); *see also* Yelp v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 441 (Va. 2015) (showing that this unmasking suit was decided on jurisdictional grounds).

the overwhelming majority of the underlying principles and assumptions of these two lines of cases pre-date the widespread use of the Internet by teens and those who would harm them. And *all* of these principles and assumptions pre-date the ubiquity of anonymous social media networks.[230] The following section provides social media context to the legal discussion on validly limiting anonymous Cyberbullying under the First Amendment.

A. A Constitutionally Valid Unmasking Standard Based on Child Protection

1. *Tinker*'s Cyber Reach Presumed by Most Courts

As discussed above, the U.S. Supreme Court has been silent on the question of whether schools have jurisdiction to regulate off-campus speech by students. And, based on the analysis above, this Article accepts the premise that the federal circuits have collectively moved toward a modern trend answering that schools do have such jurisdiction in many circumstances.[231]

The analysis is less clear on the question of what standards or criteria ought to inform the decisions of school administrators to regulate off-campus speech, and courts, upon review, where the off-campus student speaker is *unknown*. The issue, which is likely to soon become ubiquitous, is not whether schools can regulate off-campus speech. The trend in that direction is clear. The issue just over the horizon is whether *unmasking* in the school discipline or litigation discovery context follows from the conclusion that Cyberbullying speech *can* be regulated by schools, a question addressed in precious few authoritative appellate judicial opinions.[232]

What is needed is a thoughtful, underlying rule, which this Article contends ought to be grounded in the rationale of the Supreme Court's Child Protection Cases and gleaned from the most thoughtful legal principles set forth in the off-campus Cyberspeech cases, but also divorced from the peculiar facts of each case. As discussed in Section IV above, many of the student Cyberspeech cases have harsh, even disgusting, language, sometimes interspersed with legitimate literary

230. Note that the most recent Student Speech Case decided by the U.S. Supreme Court was *Morse v. Frederick*, in 2007—two years before Facebook supplanted MySpace as America's dominant social media network. *Morse* is briefly discussed in Part II of this Article.

231. *See supra* Section II, citing to *Tinker Meets the Cyberbully*, *supra* note 98.

232. *See* A.Z. v. Doe, 2010 WL 816647 (N.J.Super.A.D.2010); Doe v. Individuals, 561 F. Supp. 2d 249, 251, 252-53 (D.Conn.2008); Juzwiak v. Doe, 2 A.3d 428 (N.J.Super.A.D. 2010).

parody, social criticism, or critiques of the school or its administrators. If the government, as manifest in school authority, misbehaves, students may know this first and best—and they deserve the right to speak and expose wrongdoing. Failing to acknowledge this concern would invite the evil of sedition—where the school administrator as government actor is allowed to hide behind the First Amendment to intimidate student-whistleblowers.[233]

Thus, the premise of this Article is that judges faced with discovery motions to unmask the anonymous and likely[234] teenage Cyberbully should presume *Tinker's* reach to the Internet, then vary or soften traditional unmasking analysis based on the rationale of the Child Protection Cases, rather than the Student Speech Cases. A standard premised on the Child Protection Cases is focused more on the well-being of child victims than child speakers, and is thus more likely to facilitate judicial unmasking than the reverse premise. Focusing on the victim also avoids the dilemma that would otherwise face courts: do they presume that the speaker has either the full adult range of First Amendment anonymity protections under *McIntyre*, or the more muted First Amendment child/school treatment of the *Morse-Fraser-Hazelwood* progeny of *Tinker*? To presume either way in an anonymous speaker context would lead courts down dangerous paths of assumptions based on the nature of the communication, the context of the speech, and pure guesswork. No precedent for such presumptions exists in the law.

There is precedent, however, for a First Amendment "variability" presumption on speech restrictions for the protection of children. This concept was discussed earlier in the case of *Ginsberg v. New York*.[235] This "variable" standard is the fundamental basis of the Cyberbully Unmasking Test, discussed and applied to actual cases below.[236]

Courts should begin with the premise that traditional boundaries of the schoolhouse gate are meaningless in 2017 and will become even more irrelevant in the future.[237] I, therefore, suggest a modern, four-part

233. *See* Bell v. Itawamba County, 799 F.3d 379 (5th Cir. 2015).

234. Although the context is likely to indicate the speaker is a non-adult, the premise of anonymity or pseudonymous speech makes this firm conclusion impossible by definition.

235. 390 U.S. 629.

236. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011).

237. This is not to suggest that the Supreme Court's basic principles guiding analysis for application of the First Amendment to new media should be imperiled or even amended. *See Brown*, 131 S. Ct. 2729. The Cyberbully Unmasking Test extends, rather than creates, a new basic principle. "And whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown*, 131 S. Ct. at 2733, (citing Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 503 (1952). Indeed, virtual teaching and virtual

composite test that *presumes* the constitutionality of regulation of off-campus, disruptive Cyberspeech. The argument moves forward to when and under what circumstances courts ought to unmask the anonymous Cyberbully. It presumes that new devices, interactive systems, and creative ways to bully will arrive before the ink is dry on this, or any, new legal standard.

2. Applicability of Child Protection Cases to Cyberbullying

The standard for unmasking the Cyberbully in the school context must be flexible and it must presume the obsolescence of current technologies. But what should that standard be? Preliminarily, a number of courts have already developed multi-part tests, discussed *supra* at Section IV, to fairly adjudicate when adults ought to be unmasked in civil cases. Similarly, this Article has discussed at length the distinction between Child Protection Cases and Student Speech Cases, and emphasized that the First Amendment under the Child Protection Cases has employed the doctrine of variable constitutionality where protection of children is at issue. In *Ginsberg*, discussed throughout this Article, the Court upheld a New York statute that criminalized the sale of non-obscene "girlie" magazines to minors.[238] The sale of these magazines to adults was perfectly legal by merchants, but the merchant became a criminal by selling the same magazines to minors.[239] The *Ginsberg* rationale, which the Court further elaborated on in the landmark video games case *Brown v. EMA*, is that constitutional lines separating protected from unprotected speech can sometimes be re-drawn when the target of the constitutionally protected speech is a child.[240] The exigent interest of the government in keeping harmful material away from children justified an essential change in constitutional standards.[241] As a result of this interest, discussed above, the *Ginsberg* court adjusts the boundaries of an existing category of speech unprotected by the First Amendment—criminal obscenity—to a level appropriate for the protection of minors.[242] The Court reasoned that because obscenity is unprotected speech, the new obscenity line drawn for minors by the state of New York would survive First Amendment scrutiny

classrooms, already common at the college level, will undoubtedly make their way more frequently to the doorstep of home schooled and other public school children who are nonetheless under the jurisdiction of local school districts.

238. Ginsberg v. New York, 390 U.S. 629, 635-36 (1968).

239. *Id* at 631-33, 638.

240. *Id*.

241. *Id* at. 636.

242. *Id*. at 638.

so long as that standard passed the so-called rational basis test, that is, the legislature's line-drawing "was not irrational."[243]

This approach was further explained in *Brown v. EMA* because, the Court reasoned, violent video games are not illegal for adults.[244] In a very helpful analysis clarifying *Ginsberg's* variable constitutionality argument, the Court in *Brown* noted that it had not allowed the government in *Ginsberg* to ban whole new categories of protected speech from teens, but instead allowed New York to "adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children."[245] And while this Article assumes most Cyberbully activity is created by and directed toward teens, that assumption is not a premise of the analysis.

That is, the Cyberbully Unmasking Test, detailed immediately below, *does not* rely upon the presumption that the Cyberbully is in fact a teen, subject to a variable First Amendment standard under *Ginsberg*. The analysis proceeds, instead, based on a known prerequisite that the *victim* is a minor worthy of *Ginsberg's* protection, and no more.[246] The rationale behind blocking or unmasking material whose intended recipient is a minor is akin to the Court-accepted rationale of *Ginsberg*, rather than the government's position rejected in *Brown*. Extreme Cyberbullying that is libelous, criminally harassing, or communicates true threats is illegal for adults and not entitled to anonymity protection under *McIntyre*. Such speech therefore needs no discussion here because it has no First Amendment protection, even in the mouths of adults. And limiting the "slippery slope" wholesale erosion of speech protections, the Court has declared in the *Ginsberg* line of cases that it will only apply a variable version of the First Amendment to protect children where there is

243. *Id*. at 641.

244. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2735 (2011). *Brown* is distinguished from *Ginsberg* by invalidating a California statute under the First Amendment because, unlike the New York law prohibiting sales of otherwise legal "girlie" magazines to minors, the California law "does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children . . . . It wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children." *Id*.

245. *Id*. at 2735.

246. Thus, Cyberbully cases involving teen harassment of teachers, principals, and school district officials would not be subject to the Cyberbully Unmasking Test. *See generally*, J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc) (explaining that a divided court assumed, without deciding, that the *Tinker* substantial disruption test applies to online speech harassing a school administrator); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc). However, given appropriate severity of the teen speech, adult school-related plaintiffs would presumably have the tools at their disposal to expel the student on other grounds or to file a personal civil harassment, defamation, or intentional infliction of emotional distress complaint—or to involve police in the case of true threats or criminal harassment.

"historical warrant" and "an American tradition of forbidding" this subject category of speech.[247]

What is novel about Cyberbullying, and indeed factually and legally distinguishable from the Court's video-game analysis in *Brown*, is that there *is* both "historical warrant" and an American tradition for limiting speech directed at children, consistent with the First Amendment in the anonymous Cyberbullying context. The new proposed standard, like the New York statute in *Ginsberg*, is fundamentally focused on *the child's* right to receive otherwise constitutionally protected material, rather than the *sender's* right to communicate it. The penalty for the adult seller is a collateral result of the constitutionally valid limitation on the right of the child to consume "girlie" magazines. Similarly, in another Child Protection case, *Prince v. Massachusetts*, the Court found that a state prohibition on child sales of religious literature that applied to boys under 12 and girls under 18 did not violate the First Amendment.[248]

By the same rationale, the courts can and should adjudicate the *anonymity* question in Cyberbully cases not with exclusive reference to *Tinker* and its progeny, but in light of *Ginsberg* and *Prince*, discussed above in this Article. As the Court said in *Ginsberg*, "[m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children."[249] In other words, the concept of "unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined."[250] Thus, just as in *Ginsberg*, courts can and should constitutionally adjust the standard for unmasking under *Dendrite* to provide clarity and, in some cases, lower the barrier to unmasking Cyberbullies whose victims are minors.

B. The Cyberbully Unmasking Test

This Article now suggests that where the relevant school, district, or broader jurisdiction takes the view that regulating or punishing off-campus speech is beyond its reach, the student should consider civil litigation, if feasible. Where the bullying is anonymous, the Cyberbully Unmasking Test offers a significant step in overcoming this hurdle. It is a

247. *See supra* Section II (*see supra* note 89, citing *Brown*, which distinguished both *Stevens* and *Brown* from the variable obscenity analysis of *Ginsberg* because neither of those cases contained a "historical warrant" or "American tradition of forbidding" the proscribed behavior). *Brown*, 131 S. Ct. at 2734.

248. Prince v. Massachusetts, 321 U.S. 158 (1944).

249. Ginsberg v. New York, 390 U.S. 629, 636 (1968).

250. *Id.*

practical test that protects First Amendment values, while providing tools to protect student *victims*. Comments directed toward teachers, administrators, and the school itself would be beyond the scope of this analysis.

The proposed new rule would govern only Cyberbullying speech directed to a minor attending a public primary or secondary school. It would adjust the boundaries that govern an existing, historically prohibited area of speech, including, but not limited to, civil harassment, intentional infliction of emotional distress, and defamation;[251] where the victim of such speech is a child. These torts collectively and individually are considered "Cyberbullying speech" for purposes of the Cyberbully Unmasking Test. The proposed new standard would not create new categories of prohibited speech like the failed animal cruelty depiction statute in *United States v. Stevens.*[252] It would instead create a parallel structure for Cyberbullying speech directed at children, as opposed to adults, just as the Court allowed in *Ginsberg.* Under the proposed standard, the entire *Dendrite* unmasking paradigm and its multi-part test can and should be collapsed into a single question: can the student-plaintiff make a *concrete showing* under applicable state law that the anonymous Cyberbully would be subject to discipline if his or her identity were already known?[253] This becomes the final step in a modified child protection analysis, which would require the student-plaintiff, as a condition of unmasking, to satisfy the following test:[254] (a) Can the student-plaintiff make a *concrete showing*[255] that the anonymous Cyberbully would be subject to discipline if his or her identity were

251. The premise of this analysis is that these unmasking disputes generally arise in the context of civil tort disputes involving non-criminal speech. *See supra* note 2. An entirely separate paradigm, beyond the scope of this Article, governs anonymous speech supporting probable cause that a crime has been committed.

252. United States v. Stevens, 559 U.S. 460, 464-65 (2010).

253. Criminal speech, including words inciting lawless action, which is imminent and likely (Brandenburg v. Ohio, 395 U.S. 444 (1969)), overtly sexual speech that would be obscene to a minor-recipient under applicable local law (Ginsberg v. New York, 390 U.S. 629 (1968)), or true threats (Virginia v. Black, 538 U.S. 343 (2003); Elonis v. United States, 135 S. Ct. 2001 (2015)) would be unprotected on other grounds and would not require this Cyberbully speech analysis, which is aimed at civil bullying by teens toward teens.

254. Note that a court may very well independently have jurisdiction over an online dispute between two students in the same district independent of the analysis here. That judge would apply *Dendrite* or some other general unmasking test. The Cyberbully Unmasking Test is offered as a remedy for suspected school-based student-to-student Cyberbullying only upon satisfaction of the standards and criteria discussed here.

255. The concrete showing standard would be derived from the individual state law's civil procedure rules on summary judgment.

known?[256] If no, stop. The speech is protected by the *McIntyre-Dendrite* anonymous speech analysis of the First Amendment;[257] (b) Was it *reasonably foreseeable* that the speech would be transmitted to campus? If no, stop. The speech is protected by the First Amendment;[258] (c) Was the fundamental message a legitimate *critique* of the job performance or decisions of school-related agents[259] or employees, the school itself or an obvious *parody* of the school or adults working there?[260] If yes to any, stop. The speech is protected by the First Amendment;[261] and (d) Did the

256. Essentially, can the school satisfy parts (b), (c), and (d)?

257. As discussed above, the developing unmasking test for adults requires a tort plaintiff who seeks unmasking to: (1) make a substantial showing of proof to support each element of the defamation allegations; (2) attempt to notify the Doe defendant of the claim; (3) give the Doe defendant sufficient time to respond; (4) convince the judge that the claim would survive either a motion for summary judgment or a motion to dismiss; and (5) in most cases, survive some sort of balancing of the defendant's First Amendment interests against the right of the plaintiff to pursue redress for legitimate damages. The Cyberbully Unmasking Test collapses this entire test into the concrete showing question. Compare this test to *Doe v. Individuals*, a private law school Cyberbully case in which a judge used a six-part test to order unmasking of an anonymous Cyberbully.

258. The court is limited by the First Amendment in its punishment of non-disruptive speech as government-actor, just as a school in Des Moines, Iowa would be. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

259. This would include the paid and unpaid athletic and cheer staff, school board, lawyers, accountants, and similar professionals for the district, as well as anyone controlling the school's budget, facilities, extracurricular activities, or the overall student experience. All of these government employees and quasi-government actors should be subject to legitimate student critique and should not be allowed to retaliate against students who comment anonymously on matters of public concern. This large carve-out creates a *de facto* privilege for the online speaker who is making a legitimate critique.

260. *See* Hustler v. Falwell, 485 U.S. 46, 48, 57 (1988) (finding First Amendment protection for the parody of a public figure preacher claiming he had sex with his mother in an outhouse). However, when dealing with schoolchildren and mean-spirited speech, particularly over the Internet, the vexing "parody problem" becomes more complicated. That is, where is the line between the *Layshock* and *J.S.* fake web pages claiming principals used steroids or "hit on" students, which the Third Circuit said nobody took seriously, versus the web page in *Kowalski* which claimed a young woman had herpes? Or the phony "Josh" MySpace messages that drove Megan Meier to suicide? *See supra* Section I; *see also* W. Wat Hopkins, *Symposium: Sexually Explicit Speech: Snyder v. Phelps, Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMEND. L. REV. 149, 178-79 (2010) ("[The *Hustler*] opinion tells us almost nothing about whether the Constitution protects outrageous communications that are privately disseminated rather than displayed in the pages of a nationally distributed magazine . . . or whether it protects outrageous communications that are designed to hurt or embarrass private figures.").

261. The Supreme Court has repeatedly held that a main purpose of a public school system is to reinforce the values of free thought, democracy, and self-governance. *See*, *e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust

speech ***in fact***[262] (i) *substantially disrupt the learning environment* or (ii) *materially interfere with the ability of any other student to learn*? If no to both, the speech is protected by the First Amendment. If yes to either, the speech is unprotected by the First Amendment and the defendant is unmasked.

This unmasking standard implies the premise, "[W]e don't care who the sender is. Where the *recipient* of speech or expression is a minor, we are adjusting *McIntyre v. Ohio*, inasmuch as a constitutional right to communicate First Amendment-protected material allows independent analysis of the government's exigent interest in protecting the child recipient of that content."[263] It is the sender's right to communicate *with a child recipient*, melding *McIntyre* and *Ginsberg*, which is adjusted. Accepting this premise, the Court need only make a small step away from *McIntyre* to accept something akin to the Cyberbully Unmasking Test, which merely adjusts the boundaries of the *McIntyre* right to anonymity for speech or expression directed toward minors.[264] This approach does less violence to the Constitution than a wholesale inquiry into the *speaker's* identity, and is less problematic than an unmasking standard that presumes (sometimes incorrectly) that every Cyberbully of a teen is herself also a teen. If and when the Supreme Court grants certiorari on an

exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.") (internal citations omitted). Note that while *Keyishian* was handed down by the U.S. Supreme Court in 1967, in the context of a college classroom, the Third Circuit favorably cited *Keyishian* in a 2011 Cyberbullying case, quoting this exact language from *Keyishian* and adding: "Schools should foster an environment of learning that is vital to the functioning of a democratic system and the maturation of a civic body." J.S. v. Blue Mountain, 650 F.3d 915, 944 (3d Cir. 2011) (en banc).

262. As discussed earlier, *Tinker* does not require *actual* disruption, but merely its likelihood. By contrast, the Cyberbully Unmasking Test would be applicable only to *actual* disruption or interference with the ability of another student to learn. This requirement would serve to balance the boundary adjustment on traditional First Amendment rights with a reality check on potentially speculative or biased hunches of school teachers, principals, and school districts. A reasonable "forecast" of disruption may be good enough to punish the known Cyberbully under *Tinker*. *See Tinker*, 393 U.S. at 514. But it should not be adequate to unmask the unknown speaker under this proposed analysis. Note, however, that like several of the Cyberbully cases, *supra* Section IV, reasonable foreseeability of *transmission* of the offending speech is required to satisfy prong (b) of the Cyberbully Unmasking Test. Thus, the artist's sketch pad brought inadvertently onto a school bus two years later by the brother of a purported communicator of improper bullying content would be protected by the First Amendment.

263. Ginsberg v. New York, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth."); *see also* Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that a state prohibition on child sales of religious literature applied to boys under 12 and 18 did not violate the First Amendment); *see generally supra* Section II, the Child Protection Cases, discussing, among other issues, the government's exigent interest to protect children.

264. *See generally supra* Section II, the Child Protection Cases, discussing, among other issues, the government's exigent interest to protect children.

anonymous Cyberbully case, a rule of law that adjusts the boundaries in the developing area of unmasking law *could* be subject to only a rational basis review, as was the case in *Ginsberg*,[265] but that is highly unlikely.

C. Constitutional Analysis of the Cyberbully Unmasking Test

1. Is *Ginsberg* Limited to Obscenity?

The Supreme Court has previously allowed the government to regulate the content of offensive speech that could harm children, even though that same speech would have been fully protected if directed to an adult.[266] Such regulations are constitutionally permissible because the Court has recognized that minors' First Amendment rights are less extensive than those of adults.[267] The Court's rationale is simple and longstanding: the freedoms guaranteed by the First Amendment to make an informed choice of what to publish, read, or view in order to promote a "free trade in ideas"[268] presupposes the capacity of the individual to make a reasoned choice.[269]

One might argue that the *Ginsberg* decision should be limited to its facts—that variable obscenity means just that, and that only the constitutional boundaries of obscenity are subject to constitutional adjustment to protect children. But this conclusion is contradicted by the reasoning in both *Brown* and *Stevens*, which invalidated statutes not because *Ginsberg's* "adjust the boundaries" concept *could not* be extended, but because the two fact patterns advanced in those cases—statutes regulating video games and animal cruelty videos—did not merit such adjustment.

By inference, then, the Court was and is open to extending *Ginsberg* on appropriate facts. This Article argues that the intersection of Cyberbullying, unmasking, the First Amendment rights of children, and the law of anonymity create a unique confluence of legal, factual, and technology issues that warrant adjustment of traditional boundaries. The developing law of unmasking is hardly well-settled, and thus its contours

265. The *Ginsberg* court said that historically proscribed areas of expression like obscenity are unprotected speech, therefore, the new obscenity line drawn for minors by their government would survive First Amendment scrutiny so long as that standard was not irrational. The step-by-step review of the Cyberbully Unmasking Test, below, is not irrational. *See Ginsberg*, 390 U.S. at 641-43.

266. *Id.* at 636.

267. *See supra* Section I, a discussion of Minors & The First Amendment.

268. *Ginsberg*, 390 U.S. at 649 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

269. *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring).

are hardly solidly formed in 2017. Thus, employing an unmasking standard that varies from the more traditional *Cahill* or *Dendrite* tests does little violence to the Constitution.

2. Applicable Standard

Accepting the premise that the unmasking standard for anonymous online speakers who commit torts against adults is not the appropriate standard for anonymous speech directed to children, the next question becomes: what should that standard be in order to pass constitutional muster? In the case of *Brown v. EMA*, the Court was asked to decide the appropriate level of scrutiny to be assigned to a law that restricted the sale of violent video games to minors.[270] The state of California in *Brown* argued that the *Ginsberg* rational basis standard was the applicable test to be applied to the challenged law.[271] Rejecting this approach, the Supreme Court instead concluded that strict scrutiny was appropriate, and applied that standard,[272] leading to a judgment in favor of EMA, rejecting the government's child protection law as violating the First Amendment.[273]

In light of *Brown*, it is therefore conceded that the special circumstances involving obscenity that allowed a rational basis review in *Ginsberg* are inapplicable to general Cyberbullying communications directed toward a minor. The strict scrutiny standard applies. The Cyberbully Unmasking Test then must be narrowly tailored to reach a compelling government interest, with no less-restrictive alternative available to achieve that end. But this heightened level of scrutiny is by no means fatal.[274] The Cyberbully Unmasking Test, like the age-based video game purchase restriction law in *Brown*, imposes a restriction on the content of protected speech and would therefore be invalid absent a demonstration that it is the least restrictive means to satisfy a compelling government interest.[275]

270. 131 S. Ct. 2729 (2011).

271. Brief for Petitioners at 7-8, Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448).

272. *See Brown*, 131 S. Ct. at 2731, 2741-42.

273. *Id.*

274. *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) ("The existence of adequate content neutral alternatives thus 'undercut[s] significantly' any defense of such a statute." (quoting Boos v. Barry, 485 U.S. 312 (1988)).

275. *Id*.

3. Compelling Government Interest

There is a compelling government interest in curbing the Cyberbullying of minors, as discussed extensively in the many studies and anecdotal factual examples from Section III of this Article. While most cases of extreme anonymous Cyberbullying do not result in suicide, certainly some do, and preventing both the loss of life and protecting that right of students to be left alone in a safe learning environment is a compelling government interest. The government's specific means of accomplishing this goal, obtaining a judge's discovery ruling to unmask an anonymous Cyberbully by employing a lower standard than if the victim were an adult, is the least restrictive means of accomplishing this interest.

4. Narrow Tailoring/Least Restrictive Means

The Cyberbully Unmasking Test is constructed to comply with the Supreme Court's requirement that content-based laws must pursue the least restrictive means of achieving their stated end, and that the existence of less-restrictive alternatives undercuts their validity.[276] Thus, unlike the basic *Tinker* test, which allows the government to discipline foreseeable or *potential* harm,[277] only *actual* harm will trigger the unmasking paradigm proposed here against the anonymous Cyberbully.[278]

A considered and rejected construction of the test for unmasking Cyberspeech aimed at teens could quite easily adopt the likelihood standard of *Tinker*, and thereby afford anonymous online speakers far less protection when interacting online with minors. But that is not the suggestion here. The Cyberbully Unmasking Test self-consciously backs away from the ultra-low *foreseeability* standard of *Tinker*, which courts

276. *See generally id.* (existence of less-restrictive alternatives undercuts potential validity of a statute).

277. Wisniewski v. Bd. of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 39, n.4 (2007) (Walker, J., concurring) (emphasis added).

278. Several circuit courts have expressly analyzed *Tinker* on the "likelihood versus actual" harm question and virtually all come down in favor of likelihood. *See e.g.,* LaVine v. Blaine Sch. Dist. 257 F.3d 981, 989 (9th Cir. 2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act. 'In fact, they have a duty to prevent the occurrence of disturbances.' [*T]inker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.'") (citations omitted); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 928 (3d Cir. 2011) (citing *LaVine*, 257 F.3d at 989) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act."); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (discussing school district's burden to "demonstrate any facts which might reasonably have led school authorities to *forecast* substantial disruption") (emphasis added).

have interpreted to allow schools to discipline students for speech just because it *might* cause substantial disruption or interfere with the rights of others.[279] A far less-restrictive means of achieving the government's compelling interest in protecting kids from online bullying speech is to only allow unmasking in the event of *actual* material disruption or interference with the rights of others.[280] That is the proposal here. Additionally, adjusting the boundaries of unmasking for the suspected public school teen (or the adult posing as one) for only disruptive and school-related Cyberbullying is far less restrictive than a blanket license for a minor-plaintiff to claim a generalized right to unmask any person who sends an unkind, mean-spirited, or hurtful anonymous email. Finally, the Cyberbully Unmasking Test gives ample protection to student-whistleblowers from retaliation by teachers, principals, school administrators, or their agents.

D. Applying the Cyberbully Unmasking Test to Five Actual Cases

An academic or theoretical solution to a real-world problem fails under its own weight if it has no practical application. Worse, if it yields incongruous or unexpected results, it is worse than no solution at all. Below the Cyberbully Unmasking Test is applied to five actual anonymous Cyberbullying cases.[281] Each of the five were referenced earlier in this Article.

1. Case 1: *People v. Marquan*[282]

The anonymous online bully in *Marquan* was ultimately identified by police and charged under local New York law with the crime of Cyberbullying.[283] And while the means by which Marquan's identity was revealed is distinguishable from the other cases discussed in this Article, the underlying behavior is quite representative and worthy of analysis. The offensive speech in *Marquan* was a fake Facebook page called

279. *Wisniewski*, 494 F.3d at 39, n.4 (Walker, J., concurring) (emphasis added).

280. Compare using the least restrictive means by only allowing unmasking in the event of actual material disruption or interference with the rights of others to the holding in *Tinker*. *Tinker*, 393 U.S. at 514.

281. Other than the first three cases, which need no alteration, the facts may be altered slightly to allow application of the Cyberbully Unmasking Test. But given the plethora of unfiled cases reported, *supra* Section IV, there is little doubt that each of these fact patterns is a potential future lawsuit. The case of *People v. Marquan* was referenced briefly, *supra* note 19, but was not referenced in the actual text.

282. 19 N.E.3d 480 (N.Y. 2014).

283. *Marquan*, 19 N.E.3d at 484.

Cohoes Flame, which contained anonymously posted pictures and alleged sexual habits of its victims.[284] And while this Article and the Cyberbully Unmasking Test focuses on non-criminal speech, the facts here are similar to Cyberbullying facts, which are typically handled civilly and administratively in many states. Thus, an application of the Test to these facts would, not surprisingly, yield no First Amendment protection for the student speaker. The student-plaintiff could clearly meet the foreseeability prong of the test, since the Web page was actually marketed to other high school students of the Cyberbully and his victim. There is no critique and this was no parody. The interference with the right to learn of the victim in *Marquan* was substantial and devastating.[285] The student-plaintiff here would fairly easily meet the criteria for unmasking, had the police not beat them to it.

2. Case 2: *A.Z. v. Doe*[286]

A.Z. v. Doe involved a high school student leader of a values-based group who was caught drinking alcohol in photographs that were transmitted to a school official.[287] The court in that case found unmasking was unwarranted because the allegations forming the basis of A.Z.'s libel claim were true, therefore, she failed to state a claim as a matter of law.[288] The Cyberbully Unmasking Test would reach the same result, finding the unmasking request lacking under both the critique prong and the substantial disruption requirement.

3. Case 3: *Juzwiak v. Doe*[289]

This case involves a Cyberbully in the context of a local school system, but with a teacher as the victim.[290] In *Juzwiak*, an apparent student launched an anonymous campaign to have a tenured teacher at Highstown High School in New Jersey barred from returning to teach at his school.[291] The teacher filed an intentional infliction of emotional distress claim against the anonymous defendant because of anonymous emails criticizing the teacher and expressing the hope that the teacher would be

284. *Id.*
285. *See id.*
286. A.Z. v. Doe, 2010 WL 816647 (2010 N.J. Super.) (showing an unpublished opinion with no precedential value under New Jersey law).
287. *See* discussion above.
288. *See* discussion above.
289. Juzwiak v. Doe, 2 A.3d 428 (N.J.Super.A.D. 2010).
290. *Id.*
291. *Id*. at 430.

"gone permanently."[292] There were other insults, including a reference to the teacher as the devil.[293] And while such language should not be condoned in students, the Cyberbully Unmasking Test would not apply directly to these facts because there is no student victim.[294]

Cases No. 4 and No. 5, while school-related Cyberbully unmasking cases, both arise in a professional school context.[295] Both are also in private schools.[296] *Doe v. Individuals* relates to Cyberbullying at the Yale Law School and *Wilson v. Doe* arose in connection with online bullying at the Tulane School of Law.[297] Each case is considered on its merits below, setting aside the issue that *Tinker* applies only to public schools, and the further question of whether *Hazelwood*, in fact, would apply to any school of higher education.[298]

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292. *Id*., as discussed, *supra* Section IV.

293. *Id.*

294. It is noteworthy that the anonymous criticisms here go directly to the heart of performance appraisal, albeit childishly. But as the courts hearing these matters often acknowledge, kids are less-than-adult in their criticisms of their environments. If the same critique were directed toward, say, the head of student council or the class president, the Cyberbully Unmasking Test would protect the speech. In the actual case, the New Jersey court found the words were protected as well.

295. At least two courts have concluded that off-campus Cyberspeech may be regulated by professional schools, which award licenses or other indicia of competence, where the Cyberspeech makes the student unqualified to hold such a license. *See* Oyama v. Univ. of Hawaii, 813 F.3d 850, 856 (9th Cir. 2015) (explaining that a student seeking professional certification enjoyed no First Amendment protection where student's stated views rendered him unfit to receive such certification); Tatro v. Univ. of Minnesota, 816 N.W.2d 509, 518-21 (Minn. 2012) (explaining that a mortuary science student who had posted offensive material on Facebook was protected by First Amendment as to *Hazelwood's* "legitimate pedagogical concerns" standard, but has no First Amendment protection from university's sanctions for violation of academic program rules which were "narrowly tailored and directly related to established professional conduct standards").

296. It would presumably be easier to apply the Cyberbully Unmasking Test to civil litigation involving a private school victim and presumed private school anonymous Cyberbully. The threshold issue of whether *Tinker* forbids government reach to the online speech becomes a non-issue, since *Tinker* only applies to public schools, and may not apply to higher education. But the strictures of the First Amendment serve as limits, not permissions, on government action. Thus, the only government actor in the case of a Cyberbully tort dispute arising out of private school would be the judge, as opposed to both the judge and the school, serving to limit the otherwise applicable First Amendment assertions of the anonymous student speaker-Cyberbully under *Tinker*. Of course, a private school Cyberbullying dispute would remain subject to the requirements of civil due process, as well as the First Amendment limits on the judge as state actor. Two examples of private school unmasking cases which contain the additional overlay of higher education are Wilson v. Doe, No: 4:13-CV-00521 (S.D TX 2013) (explaining that a Tulane law student and her sister cruelly Cyberbullied by what appeared to be a fellow Tulane student) and Doe v. Individuals, 561 F. Supp. 2d 249, 251 (D. Conn. 2008) (explaining that two Yale laws students repeatedly anonymously Cyberbullied by, apparently, a fellow student).

297. *Doe*, 561 F. Supp. 2d 249 and *Wilson*, Case No: 4:13-CV-0052.

298. *See* detailed analysis and discussion of general applicability of *Tinker* to college, *supra* note 14.

4. Case 4: *Doe v. Individuals*[299]

Doe v. Individuals involved cruel Cyberbullying devoid of any redeeming policy or social critique, which goes to the heart of what the Cyberbully Unmasking Test would try to expose and stop.[300] The case involved a female law student plaintiff who was viciously harassed in sexist, threatening, and demeaning ways. The Court in *Doe* denied defendant's motion to quash, facilitating defendant's imminent unmasking. The case meets each prong of the Cyberbully Unmasking Test and the result thereunder, unmasking, would be the same as the actual result in the real case.

5. Case 5: *Wilson v. Doe*[301]

In this case involving Tulane University student Tara Wilson and her sister, Defendant John Doe was advised of the suit via Twitter,[302] as referenced above. The Doe Cyberbully relented from his harassing behavior in the face of a potential unmasking order.[303] The relevant facts to be applied to the Cyberbully Unmasking Test here are straightforward and would yield the same result as the one in *Wilson v. Doe*: Defendant engaged in disruptive, school-related Cyberbullying that was not a critique of the school, its employees, or any way privileged under the carve-out for legitimate critique. It was fully foreseeable that Ms. Wilson would receive the offending messages, and she in fact did receive them. The result in this case under the Cyberbully Unmasking Test would have been to unmask John Doe, assuming the *Tatro/Oyama* professional certification extension of *Tinker's* reach to higher education[304] were deemed accepted in the Houston federal jurisdiction where the case was filed.

6. Other Relevant Cases

Two additional cases are worthy of note: *Thomas Cooley v. Doe*[305] and *Hadley v. Doe.*[306] Each of these cases are examples of school-related Cyberbullying, which are most relevant to underscore what the test is not

299. *Doe*, 561 F. Supp. 2d 249.
300. *See* discussion above.
301. *Wilson*, Case No: 4:13-CV-0052.
302. Wilson v. Doe, Emergency Motion to Expedite Discovery and Brief in Support at 6.
303. *Id.*
304. *See supra* note 295.
305. Thomas M. Cooley Law Sch. v. Doe, 833 N.W.2d 331, 342 (Mich. Ct. App. 2013).
306. Hadley v. Doe, 12 N.E.3d 75, 78 (Ill. App. Ct. 2014).

intended to do. The victim in *Thomas Cooley* is a law school, and the victim in *Doe* is an accused child molester. The Cyberbully Unmasking Test does not and should not apply to non-child victims or behavior outside the context of a public primary or secondary school. The Cyberbully Unmasking Test is not proposed as a talisman to manage every instance of Cyberbullying. Its reach and application should be strictly limited as discussed above. Finally, a case that never became a Cyberbully unmasking motion in a lawsuit merits mention, and it is the case of Lori Drew, previously noted.[307] Lori was the parent of a cheerleader rival of 13-year-old Megan Meier, who killed herself when the fake boy named "Josh" turned mean and abusive.[308] Of course, Josh was really Lori, and her Cyberbullying was fully in the context of Megan's school, disrupted Megan's ability to learn, and had no attached privilege.[309] The Cyberbully Unmasking Test would have applied had Megan sued "Josh." As an intentional infliction of emotional distress plaintiff, she would have been granted an unmasking order and learned that "Josh" was not Josh at all.

VI. CONCLUSION

The Cyberbully Unmasking Test combines the best-practice analysis of courts struggling to balance competing First Amendment interests. Much of the scholarly discussion surrounding giving new remedies for victims of Cyberbullying involve expansion or modernizing existing criminal statutes.[310] These efforts have frequently failed for a number of reasons, among them are laws which "zealously target Cyberbullying risk 'overcriminalizing' it by creating new crimes that overlap existing ones."[311] Other scholarly efforts at development of new remedies for Cyberbullying victims have proposed such general solutions as small claims court or "court-annexed arbitration and remediation."[312] The Cyberbully Unmasking Test, by contrast, proposes the sharpening of an existing tool—*Ginsberg's* variable constitutionality concept—to offer a real remedy for a wrong that did not exist a generation ago.

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307. *See supra* note 260.

308. *Id.*

309. *Id.*

310. *See, e.g.*, Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693 (2012), http://scholarship.law.ufl.edu/facultypub/173 [http://perma.cc/2663-JN69].

311. *Id.* at 697.

312. Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457, 1484 (2012), http://scholarship.law.unc.edu/nclr/vol90/iss5/7 [http://perma.cc/8RHU-V6YY].

This new proposed standard is extrapolated from *known* Cyberbully discipline cases under *Tinker*, but it relies more heavily on the Child Protection Cases, such as *Prince* and *Ginsberg.* The Child Protection Cases focus, as the name implies, on the constitutional limits on speech rights of others in pursuit of the hyper-compelling or exigent government interest in the protection of children. Indeed, a growing number of legal commentators have suggested that allowing victims a legitimate means of redress does not undercut the fundamental First Amendment value of encouraging the free flow of ideas; it supports the notion. For example, Danielle Keats Citron, in *Cyber Civil Rights*,[313] theorizes that online sites and chatrooms "have increasingly become breeding grounds for anonymous online groups that attack women, people of color, and members of other traditionally disadvantaged classes . . . . Acting against these attacks does not offend [the] First Amendment."[314]

If a traditional student bullies another at the school lunch table during school hours, that behavior is deemed materially disruptive or a *de facto* interference with the rights of the student victim under *Tinker*. The speaker can be punished by administrators without fear of a First Amendment defense.[315] But the uncertainty surrounding a public school's ability to discipline off-campus speech, combined with the increasing prevalence of anonymous Cyberspeech, has created a unique problem. The anonymous Cyberbully can torment his victims with near impunity. But through civil litigation, student victims (and their parents) may be able to do something about it. And the Cyberbully Unmasking Test's approach to removing the cloak of anonymity will help to level the playing field with the Cyberbully.

The premise of this Article is that students who Cyberbully should be on notice that they will not escape the consequences of their school-related disruptive misbehavior. The modern trend is that schools' discipline of such speech is constitutionally permissible. The logical extension of this trend should be to recognize that such speech, when anonymous, is also entitled to less First Amendment protection in the context of civil litigation.

313. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

314. *Id.* at 62. (Abstract) (parenthetical added).

315. *See* Raychelle Cassada Lohmann, *Cyberbullying Versus Traditional Bullying*, PSYCHOLOGY TODAY (May 14, 2012), https://www.psychologytoday.com/blog/teen-angst/201205/cyberbullying-versus-traditional-bullying [http://perma.cc/32D9-VEJH].