

VERBAL BULLYING IN SCHOOL: THE CONSTITUTIONAL AND PSYCHOLOGICAL ARGUMENT THAT GOVERNMENT INTERVENTION MAKES THINGS WORSE

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*We don't need no education
We don't need no thought control
No dark sarcasm in the classroom
Teacher leave them kids alone
Hey, teacher, leave them kids alone!*

– Pink Floyd, Another Brick in the Wall (1979).

INTRODUCTION

Mr. Moony presents his compliments to Professor Snape, and begs him to keep his abnormally large nose out of other people's business. Mr. Prongs agrees with Mr. Moony, and would like to add that Professor Snape is an ugly git. Mr. Padfoot would like to register his astonishment that an idiot like that ever became a professor. Mr. Wormtail bids Professor Snape good day, and advises him to wash his hair, the slimeball.

– *The Marauders*, J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999).

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The attempt at public education in the United States is not going as planned.¹ Despite spending more per student than almost any other country, our schoolchildren exhibit some worrying trends by ways of standardized test scores in almost every subject compared to other nations.² Moreover, American students, both in school and in college, are exposed to a large number of dangers within the institution, including gun violence,³ drug use,⁴ gang activity,⁵ and a variety of other serious problems.⁶ One would think that verbal bullying, which probably started after the very first school bell rang, would not be a high-priority concern for teachers (much less law enforcement) in light of other, potentially more serious problems. Yet, it is in this area, rather than the others, where enforcement has been so pervasive that it makes one wonder when enough is enough.⁷ We aim to identify the limitations on these enforcement actions by examining Supreme Court

¹ Simon Rodberg, *Data Was Supposed to Fix the U.S. Education System. Here's Why It Hasn't*, HARV. BUS. REV. (Jan. 11, 2019), <https://hbr.org/2019/01/data-was-supposed-to-fix-the-u-s-education-system-heres-why-it-hasnt>; Valerie Strauss, *How Are America's Public Schools Really Doing?*, WASH. POST (Oct. 15, 2018), <https://www.washingtonpost.com/education/2018/10/15/how-are-americas-public-schools-really-doing/>; Joel Klein, *The Failure of American Schools*, THE ATLANTIC (June 2011), <https://www.theatlantic.com/magazine/archive/2011/06/the-failure-of-american-schools/308497/>.

² Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (Aug. 2, 2021), <https://educationdata.org/public-education-spending-statistics>; Max Eden, *Issues 2020: Public School Spending Is at an All-Time High*, MANHATTAN INST. (July 25, 2019), <https://www.manhattan-institute.org/issues-2020-us-public-school-spending-teachers-pay>; Dominic Rushe, *The US Spends More on Education than Other Countries. Why Is it Falling Behind?*, THE GUARDIAN (Sept. 7, 2018), <https://www.theguardian.com/us-news/2018/sep/07/us-education-spending-finland-south-korea>.

³ John Woodrow Cox et al., *More than 278,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST (Dec. 2, 2021), <https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/>; ASHLEY CANNON, *AIMING AT STUDENTS: THE COLLEGE GUN VIOLENCE EPIDEMIC* (2016), <http://www.nycrimecommission.org/pdfs/CCC-Aiming-At-Students-College-Shootings-Oct2016.pdf>.

⁴ Michael Kaliszewski, *Statistics of Drug Use in High School*, AM. ADDICTION CTRS. (Oct. 14, 2019), <https://americanaddictioncenters.org/blog/statistics-of-drug-use-in-high-school/>; Stacy Mosel, *Substance Abuse in College Students: Statistics & Addiction Treatment*, AM. ADDICTION CTRS. (Jan. 7, 2022), <https://americanaddictioncenters.org/rehab-guide/college/>; Judy A. Andrews et al., *Elementary School Age Children's Future Intentions and Use of Substances*, 32 J. CLIN. CHILD ADLOESC. PSYCHOL. 556 (2003); *Middle School Drug Use*, THE RECOVERY VILL. (Nov. 24, 2021), <https://www.therecoveryvillage.com/teen-addiction/drug/middle-school-drug-use/>.

⁵ *Gangs and Victimization at School*, NAT'L CTR. FOR EDUC. STAT. (July 1995), <https://nces.ed.gov/pubs/web/95740.asp>; Grace Chen, *The Latest Public School Initiatives Against Gang Activity*, PUB. SCH. REV. (Oct. 26, 2020), <https://www.publicschoolreview.com/blog/the-latest-public-school-initiatives-against-gang-activity/>; Marie Anderson, *Statistics on Gangs in Schools*, SEATTLE PI, <https://education.seattlepi.com/statistics-gangs-schools-2199.html> (last visited Apr. 12, 2022).

⁶ Kevin Mahnken, *The Hidden Mental Health Crisis in America's Schools: Millions of Kids Not Receiving Services they Need*, THE74 (Nov. 7, 2017), <https://www.the74million.org/the-hidden-mental-health-crisis-in-americas-schools-millions-of-kids-not-receiving-services-they-need/>.

⁷ See, e.g., Jeremy Engle, *Should Schools Be Able to Discipline Students for What they Say on Social Media?*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/learning/should-schools-be-able-to-discipline-students-for-what-they-say-on-social-media.html>.

jurisprudence and psychological literature and discussing where protections from bullies become so pervasive that they actually violate the rights of those bullies (and perhaps, ironically, even the rights of the bullied).

The problem with regulating, and even criminalizing,⁸ broad swaths of schoolhouse speech is that students have many opportunities to say the wrong thing.⁹ At the same time as our country is undergoing a reckoning on discrimination and bullying, from race to gender to sexuality, the opportunities to speak publicly (and inappropriately) on these issues have never been greater, especially for children, who may not have the same understanding of social and legal norms as adults.¹⁰ Social media is there to broadcast a poorly-considered comment to the world and preserve it forever on a profile page or within the screenshots of all who saw it.¹¹ Since scholastic relationships between students (and even teachers and professors) rarely end entirely after the bus ride home, social media exposes students to

⁸ Forty-four states currently have laws forbidding hazing, with many broad enough to encompass verbal bullying. *Nationwide Hazing Laws*, STEWART TILGHMAN FOX BIANCHI & CAIN, <https://www.stfblaw.com/hazing-lawyers/nationwide-hazing-laws/#:~:text=Is%20Hazing%20Illegal%20in%20the,to%20pass%20such%20a%20law> (last visited Apr. 12, 2022). Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming are currently the only states with no anti-hazing laws. *Id.* Many states, including Alabama, Florida, Ohio, Oklahoma, and Rhode Island, recognize the mental side of hazing. ALA. CODE § 16-1-23 (2022); FLA. STAT. § 1006.135 (2022); OHIO REV. CODE ANN. § 2903.31 (LexisNexis2022); OKLA. STAT. tit. 21, § 1190 (2022); 11 R.I. GEN. LAWS § 11-21-2 (2022). For example, Alabama's hazing statute provides that "hazing" is defined as "any willful action taken or situation created, whether on or off any school, college, university, or other educational premises, which recklessly or intentionally endangers the mental or physical health of any student." ALA. CODE § 16-1-23 (2022). Florida enacted an anti-hazing statute in an effort to prevent or reduce the incidents of "hazing," which is broad enough to encompass verbal bullying. FLA. STAT. § 1006.135 (2022) "Hazing" applies to individuals in school who are in grades six through twelve, and is defined as "any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student." *Id.* This statute makes certain hazing activities a third degree felony or a first degree misdemeanor, depending on the case. *Id.*

⁹ *See America's Racial Reckoning*, NBC NEWS, <https://www.nbcnews.com/americas-racial-reckoning> (last visited par. 12, 2022) (including a non-exclusive list of problems facing America with respect to race); Gillian K. SteelFisher et al., *Gender Discrimination in the United States: Experiences of Women*, 54 HEALTH SERVS. RSCH. 1442 (2019); Omar G. Encarnación, *The U.S. Can't Move Forward on LGBTQ Rights Without Reparations*, TIME (June 26, 2021, 7:00 AM), <https://time.com/6076090/u-s-lgbtq-rights-reparations/>; Aya Batrawy, *The U.S. Reckoning on Race, Seen Through Other Nations' Eyes*, AP NEWS (Sept. 26, 2020), <https://apnews.com/article/voting-fraud-and-irregularities-race-and-ethnicity-police-united-arab-emirates-violence-6c3a73366d92e30260d5201e6434c43f>; Marlon M. Bailey, *What Kind of Racial Reckoning is this? Black LGBTQ Practices of Care amid Spatial Marginalization*, WASH. UNIV. IN ST. LOUIS: ARTS & SCIS. (Sept. 14, 2021), <https://artsci.wustl.edu/events/what-kind-racial-reckoning-black-lgbtq-practices-care-amid-spatial-marginalization>.

¹⁰ Lola A. Burnham, *Tinkering with Student Speech in the Age of Social Media*, S. ILL. UNIV. CARBONDALE (May 1, 2018), <https://opensiuc.lib.siu.edu/dissertations/1543/>; *see, e.g.*, Devin Bates, *Distinguishing Between Bullying and Protected First Amendment Speech: Arkansas Specific Laws*, JDSUPRA (Sept. 17, 2020), <https://www.jdsupra.com/legalnews/distinguishing-between-bullying-and-42181/>.

¹¹ Burnham, *supra* note 10.

liability for speech that many of us would have considered relatively unregulatable decades ago.¹² Regulations of such speech have the potential to teach our students a lesson that would only be intentional if taught by the conniving: that students should be afraid to speak lest it offends someone.¹³

We examine whether any of these government measures psychologically help individuals who feel bullied in any way.¹⁴ At first glance, the answer seems to be a resounding “Yes!” After all, the bullying stops, at least temporarily, and the bully is punished. The bullied student’s honor, in some way, has been redeemed, perhaps even protecting the student’s mental health. But when we look deeper, this is probably not what is happening.¹⁵ Rather, the public school system deprives the student of at least one lesson: the ability to persevere despite negative commentary from peers. The result is not necessarily a stronger, more emotionally robust society.¹⁶ The result is a society that is afraid to speak and hear anything that contravenes its view of itself or reality. One cannot think of a time in human history when so many have been afraid of something so relatively insignificant as being told something they do not want to hear. Relative to the problems faced by our ancestors, the problem of verbal bullying may be minuscule. This problem is one we should not be afraid to leave to posterity so long as we also leave the constitutional protections that go with it.¹⁷

Part I of this Article documents the laws and regulations aimed at preventing bullying within schools and the enforcement of these provisions. Part II discusses the First Amendment implications of silencing disagreeable speech and the chilling effect that it has on speech overall. Part III surveys psychological literature on the prevalence of mental illness in American public schools and colleges, focusing on whether exposure to unpleasant views strengthens or weakens the individual in the long term. Here, we combine jurisprudence and psychological evidence to show that overregulation of verbal bullying not only deprives students of the

¹² *Id.*

¹³ Priyam Madhukar, *Student Free Speech Rights at the Supreme Court*, BRENNAN CTR. FOR JUST. (Apr. 27, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/student-free-speech-rights-supreme-court>.

¹⁴ Yu-Ying Chen & Jiun-Hau Huang, *Precollege and In-College Bullying Experiences and Health-Related Quality of Life Among College Students*, 135 PEDIATRICS 18 (2015); Petra Hampel et al., *Direct and Relational Bullying Among Children and Adolescents: Coping and Psychological Adjustment*, 30 SCH. PSYCH. INT’L 1 (2009); Dorothy L. Espelage & Melissa K. Holt, *Suicidal Ideation and School Bullying Experiences After Controlling for Depression and Delinquency*, 53 J. ADOLESCENT HEALTH 27 (2013); Susan M. Swearer et al., *“You’re So Gay!”: Do Different Forms of Bullying Matter for Adolescent Males?*, 37 SCH. PSYCH. REV. 160 (2019); Kelly S. Flanagan et al., *The Potential for Forgiveness as a Response for Coping with Negative Peer Experiences*, 35 J. ADOLESCENCE 1215 (2012).

¹⁵ Swearer et al., *supra* note 14; Flanagan et al., *supra* note 14.

¹⁶ Lisa Belkin, *Being Bullied Can Make Kids Stronger*, N.Y. TIMES (Apr. 7, 2009, 10:33AM), parenting.blogs.nytimes.com/2009/04/07/being-bullied-can-make-kids-stronger/.

¹⁷ U.S. CONST. amend I.

opportunity to overcome such bullying but also deprives the bullies of their constitutional rights. This Article will conclude that current restrictions on bullying reach too far and achieve the opposite of their stated goals.

I. BULLYBLOCKER: AN EXPERIMENT IN POLICING OPINIONS



18

From pre-kindergarten to graduate school, the American public school system has policed a wide variety of opinions, often working hand-in-hand with law enforcement to do so.¹⁹ The public policy reasons seem obvious: children exposed to bullying in school may be more likely to engage in self-harm, including suicide.²⁰ The risk of a child or young adult committing suicide has risen over time, and it seems natural to think that part of the cause may be negative interactions with classmates in school.²¹ Diagnoses of a large number of mental illnesses have exploded over recent years, and the remedies are not fully addressing the problem that faces our youth.²² Schools and colleges are left to pick up the slack, and many use a variety of enforcement remedies to silence the types of speech that may make others feel excluded, discriminated against, or otherwise bullied by a classmate.²³ It is difficult to tell whether this is effective, given that diagnoses of psychological disorders, instances of self-harm, and suicides among students

¹⁸ *BullyBlocker*, MOBILE CNTY. DIST. ATT'Y'S OFF., <https://www.mobileda.org/bully-blocker/> (last visited Apr. 11, 2022).

¹⁹ Justin W. Patchin, *Law Enforcement Involvement in Bullying Incidents: Different Rules and Roles*, CYBERBULLYING RSCH. CTR. (Jan. 28, 2014), <https://cyberbullying.org/law-enforcement-involvement-bullying>.

²⁰ Ann John et al., *Self-Harm, Suicidal Behaviors, and Cyberbullying in Children and Young People: Systematic Review*, J. MED. INTERNET RSCH., Apr. 19, 2019, at 1.

²¹ James Jie Tang et al., *Global Risks of Suicidal Behaviors and Being Bullied and Their Association in Adolescents: School-Based Health Survey in 83 Countries*, LANCET, Jan. 10, 2020, at 1.

²² Jean Twenge, *Mental Health Issues Increased Significantly in Young Adults Over Last Decade*, AM. PSYCH ASS'N (Mar. 14, 2019), <https://www.apa.org/news/press/releases/2019/03/mental-health-adults>.

²³ Aaron E. Carroll & Rachel C. Vreeman, *A Systematic Review of School-Based Interventions to Prevent Bullying*, 161 ARCHIVE PEDIATRIC ADOLESCENT MED. 78 (2007).

continue to rise.²⁴ What is not difficult to discern is that these policies have a tendency to punish large swaths of expressive activity for a seemingly noble (but perhaps unachievable) goal.²⁵

There is an inherent chilling effect for free speech if government agencies actively enable students to report speech they find unpleasant and then the agencies actually follow up the reports with investigations. Even though students have a variety of communication channels, which include a limitless amount of social media platforms, the prospect of being disciplined, suspended, or expelled from school for an inadvertent inappropriate comment can be daunting.²⁶ We are not talking about threats of violence here: threats of violence must be taken seriously, especially in light of the deadly violence that often occurs in American schools.²⁷ What might be less appropriate, though, are responses from school and law enforcement officials that punish students for expressing a less-than-complimentary opinion about another classmate, whether expressed to the classmate directly or to others.²⁸ This type of opinion, expressed during school hours or afterwards (perhaps via social media), is almost the definition of protected speech.²⁹ Like it or not, individuals have a right to express their feelings for one another, and there are few sound reasons to deprive students of this right when they cross the threshold of a school.³⁰

Recent examples of suicides prompted by verbal bullying on high school and college campuses may seem like a counterexample to our reasoning.³¹ Perhaps restrictions on speech are appropriate where students are texting one another to “go kill yourself” or expressing their wishes that another student would die.³² This could be particularly true if the message comes from someone the student cares for, such as a close friend, significant

²⁴ Twenge, *supra* note 22.

²⁵ Hans Bader, *Unconstitutionally Overbroad New Jersey Anti-Bullying Law Challenged; Reference to “Head Lice” Deemed “Bullying”*, COMPETITIVE ENT. INST. (Apr. 14, 2014), <https://cei.org/blog/unconstitutionally-overbroad-new-jersey-anti-bullying-law-challenged-reference-to-head-lice-deemed-bullying/>.

²⁶ AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS?* (2008), <https://www.apa.org/pubs/reports/zero-tolerance.pdf>.

²⁷ Jacey Fortin, *School Shootings Are Becoming More Frequent, After a Lull During the Pandemic*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/us/us-school-shootings-2021.html>.

²⁸ Bader, *supra* note 25.

²⁹ *Freedom of Expression*, THE AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/freedom-expression> (last visited Apr. 11, 2022).

³⁰ *Id.*

³¹ See, e.g., ‘My Son Was Bullied’: 11-Year-Old’s Suicide Has Students, Parents in Waterloo Demanding Action, ROCHESTERFIRST.COM (Sept. 22, 2022, 9:11 PM), <https://www.rochesterfirst.com/news/local-news/my-son-was-bullied-11-year-olds-suicide-leaves-students-parents-demanding-waterloo-schools-take-action/>.

³² Nicole Chavez et al., *A Boston College Student is Accused of Telling her Boyfriend to Kill Himself. She Just Made Their Last Text Messages Public*, CNN (Nov. 22, 2019, 4:14 PM), <https://www.cnn.com/2019/11/22/us/boston-college-student-suicide-texts/index.html>.

other, or even a fellow relative that is also enrolled in the same school.³³ These are reprehensible messages, especially when delivered in volume.³⁴ The question, though, is whether they should be regulated by the government, as opposed to receiving only social blowback (which ought to be very severe). While telling another student to engage in self-harm is vile, the question is whether it could reasonably be expected to lead to harm, and whether we should punish verbal conduct of this nature even if it could. A more distant question is whether enforcement against these types of “violations” is the best way to allocate law enforcement resources at a time of a surging crime wave across the nation that frequently involves juvenile or young adult perpetrators.³⁵

As we previously noted, it is clear that the risk of a child or young adult committing suicide has risen over time.³⁶ However, if those increases were caused in large part by negative interactions with classmates in school, it seems likely that the suicide rate during the COVID-19 pandemic, when students were pulled out of classrooms nationwide and schooling transitioned to remote learning, suicide rates would have decreased. In fact, the opposite has happened.³⁷ “[C]losures of schools and the move to virtual and remote learning have negatively impacted the physical and mental health of many students.”³⁸ This statistic suggests that interactions with peers—even negative interactions—may be more helpful than limited interactions.

As previously discussed, the vast majority of states have laws criminalizing hazing,³⁹ and many of these laws are broad enough to

³³ *Id.*

³⁴ For example, in the two months prior to his suicide, Inyoung You sent more than 47,000 texts to her boyfriend, Alexander Urtula, many of them telling him to kill himself. Erik Ortiz, *Boston College Student Pleads not Guilty in Boyfriend’s Texting Suicide Case*, NBC NEWS (Nov. 22, 2019, 1:15 PM), <https://www.nbcnews.com/news/us-news/former-boston-college-student-pleads-not-guilty-boyfriend-s-texting-n1089581>.

³⁵ *Juvenile Crime Facts, Archives*, THE U.S. DEP’T OF JUST. (Jan. 22, 2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-102-juvenile-crime-facts>.

³⁶ John et al., *supra* note 20.

³⁷ Erin K. Anderson, *The Impact of COVID-19 on Mental Health & Suicide Rates*, WASH. COLL. (Mar. 2021), <https://www.mheducation.com/highered/ideas/articles/the-impact-of-covid-19-on-mental-health-suicide-rates>; Yasuko Fuse-Nagase, *Increase in Suicide Rates Among Undergraduate Students in Japanese National Universities During the COVID-19 Pandemic*, 75 PSYCHIATRY & CLINICAL NEUROSCIENCES 351, 351-52 (2021).

³⁸ Anderson, *supra* note 37.

³⁹ See, e.g., ALA. CODE § 16-1-23 (1975); ARIZ. REV. STAT. ANN. § 15-2301 (2022); CONN. GEN. STAT. § 53-23a (2022); DEL. CODE ANN. tit. 14, § 9302 (2022); FLA. STAT. § 1006.63 (2010); IDAHO CODE § 18-917 (2022); 720 ILL. COMP. STAT. 5/12C-50 (2022); IND. CODE § 35-42-2-2.5 (2022); IOWA CODE § 708.10 (2022); KAN. STAT. ANN. § 21-5418 (2022); KY. REV. STAT. ANN. § 164.375 (West 2022); LA. STAT. ANN. § 17:1801 (2022); ME. REV. STAT. ANN. tit. 20-A, § 10004 (West 2022); MD. CODE ANN., CRIM. LAW § 3-607 (LexisNexis 2022); MASS. GEN. LAWS ch. 269, § 17 (2022); MICH. COMP. LAWS § 750.411t (2022); MISS. CODE ANN. § 97-3-105 (2022); MO. ANN. STAT. § 578.365 (West 2022); NEB. REV. STAT. § 28-311.06 (2022); NEV. REV. STAT. § 200.605 (2022); N.H. REV. STAT. ANN. § 631:7 (2022); N.J. STAT. ANN. § 2C:40-3 (West 2022); N.Y. PENAL LAW § 120.16 (McKinney 2022); OKLA. STAT. tit. 21, § 1190 (2022); OR. REV. STAT.

encompass verbal bullying within the definition of hazing. For example, Florida's anti-hazing law, entitled The Chad Meredith Act, went into effect in 2005, making hazing a felony in certain circumstances, even if the victim consents.⁴⁰ The Chad Meredith Act defines hazing as any action that does the following: (1) "recklessly or intentionally endangers the mental or physical health or safety of a student;" (2) pressures or coerces students into violating the law, committing or being subject to violence, exposing themselves to the elements, or consuming any food, drug, liquor, or other substance; or (3) pressures or coerces students into situations of extreme mental stress, social humiliation or exclusion, or any activity that threatens mental health or dignity.⁴¹ The Act covers hazing in grades six through twelve and violations of the Act can result in up to five years in prison.⁴² Because the Act covers conduct that endangers the *mental* health of a student,⁴³ the Act is broad enough to encompass verbal bullying.

Utah's anti-hazing law, which became effective in May 2019, prohibits "bullying," which is defined as a student intentionally committing a "written, verbal, or physical act against a . . . student that a reasonable person under the circumstances should know or reasonably foresee will have the effect of . . . causing physical or *emotional harm* to the . . . student."⁴⁴ Utah's anti-hazing law further defines "bullying" as creating a hostile, threatening, humiliating, or abusive educational environment due to "the pervasiveness, persistence, or severity of the actions" or "a power differential between the bully and the target."⁴⁵ Utah's anti-hazing law encompasses "cyber-bullying," which is defined as "using the Internet, a cell phone, or another device to send or post text, video, or an image with the intent or knowledge, or with reckless disregard, that the text, video, or image will hurt, embarrass, or threaten an individual, regardless of whether the individual directed, consented to, or acquiesced in the conduct, or voluntarily accessed the electronic communication."⁴⁶

Utah's statute also prohibits "hazing," defined as a "student intentionally, knowingly, or recklessly committing an act . . . [toward another student] that endangers the mental or physical health or safety of the student."⁴⁷ Utah's anti-hazing law provides that a student cannot engage in

§ 163.197 (2021); 18 PA. STAT. AND CONS. STAT. ANN. § 2802 (West 2022); 11 R.I. GEN. LAWS § 11-21-1 (2022); TENN. CODE ANN. § 49-7-123 (2022); TEX. EDUC. CODE ANN. § 37.151 (West 2022); UTAH CODE ANN. § 53G-9-601, 602 (LexisNexis 2019); VT. STAT. ANN. tit. 16, § 570j (2022); W. VA. CODE § 18-16-2 (2022); WIS. STAT. § 948.51 (2022).

⁴⁰ FLA. STAT. § 1006.135 (2021).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ UTAH CODE ANN. § 53G-9-601 (LexisNexis 2019) (emphasis added).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

bullying another student on school property, at a school-related or sponsored event, on a school bus, at a school bus stop, or while the student is traveling to or from a location or event described above.⁴⁸ The statute further provides that a student “may not engage in hazing or cyber-bullying a . . . student at *any time or in any location.*”⁴⁹ In addition, the anti-bullying and anti-hazing provisions apply for *two years* after the student graduates from the school, *even if the student consents to the bullying.*⁵⁰ Therefore, if an individual “bullies” another individual within two years after either individual graduated school, Utah’s anti-hazing statute would still apply to the conduct.⁵¹ Any individual who hazes another is guilty of either a Class A or Class B misdemeanor or, if the hazing results in serious bodily injury, a third or second-degree felony.⁵² Therefore, under the Utah statute, an individual could “cyber-bully” another student one and a half years after graduating from the school and be held liable for a misdemeanor or felony.⁵³

Pennsylvania’s anti-bullying statute, which became effective in 2008, provides that “bullying” is defined as “an intentional electronic, written, verbal, or physical act, or a series of acts, directed at another student; . . . that is severe, persistent, and pervasive; and that has the effect of . . . disrupting the orderly operation of the school.”⁵⁴ “Bullying” may encompass acts that occur outside of a school setting.⁵⁵ In 2015, the statute was amended to make cyber harassment a third-degree misdemeanor.⁵⁶ Bullying is deemed a third-degree misdemeanor, which carries a fine of up to \$2,500, up to one year in jail, or both.⁵⁷

New York’s anti-bullying statute, entitled The Dignity for All Students Act, became effective in 2012 and criminalizes “harassment,” defined as creating “a hostile environment by conduct or by verbal threats, intimidation or abuse that may interfere with a student’s educational performance, opportunities or benefits, or mental, emotional, or physical well-being.”⁵⁸ New York amended its anti-bullying statute in 2013 to include cyber-bullying, which includes behavior that occurs “off school property and creates or would foreseeably create a risk of substantial disruption within the school environment.”⁵⁹ If the acts are meant to seriously annoy the victim,

⁴⁸ *Id.* § 53G-9-602.

⁴⁹ *Id.* (emphasis added).

⁵⁰ UTAH CODE ANN. § 76-5-107.5 (LexisNexis 2011).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 24 PA. CONS. STAT. § 13-1303.1-A (2008).

⁵⁵ *Id.*

⁵⁶ 18 PA. CODE § 2709(c) (2015).

⁵⁷ 24 PA. CONS. STAT. § 13-1303.1-A (2008).

⁵⁸ S.B. 1987, 2009 Leg., Reg. Sess. (N.Y. 2009).

⁵⁹ S.B. 7740, 2012 Leg., Reg. Sess. (N.Y. 2012).

but do not place the victim in fear of actual harm, the bully may be charged with harassment in the second degree.⁶⁰

By analyzing the above statutes, it is clear that anti-bullying and anti-hazing laws in many states are broadly defined to encompass, and make criminal, verbal “bullying.”⁶¹ The term “bullying” is extremely broad, defined to encompass nearly any action that may negatively affect another individual’s mental health, including actions taken off of school grounds, and may result in the “bully” being charged with a misdemeanor or even a felony.⁶² As evidenced from the above statutes, states have adopted more stringent and broad statutes in recent years.⁶³

It is important to remember that most invitations for a student to engage in self-harm will be declined if the student is of sound mental health.⁶⁴ It is harsh to hear someone say that they wish you dead or that you are unattractive, unpopular, unintelligent, or unathletic, but most people will realize that either this statement is an exaggeration or that, even if it is truthful, the speaker’s advice need not be followed.⁶⁵ While students regularly hear and cope with a wide variety of negative commentary about their performance in school, sports, and social life, they generally have the mental capability to weather these challenges.⁶⁶ We know this because almost all students have heard negative comments of this type, and yet, the vast majority of them have not engaged in self-harm or the serious harm of others.⁶⁷ Nothing requires these students to act on the suggestions of their classmates, and anyone who can still remember his or her younger years will agree that following the advice of peers is rarely the best course of action (even if the peers mean well). As such, children and young adults have learned, from a plethora of life experiences, that the words of their peers should be taken with a grain of salt. What evidence is there that a mentally-fit adolescent cannot cast aside such horrible comments as easily as it is for another adolescent to voice them?

⁶⁰ N.Y. PENAL LAW § 240.26 (McKinney 2014).

⁶¹ FLA. STAT. § 1006.135 (2018); UTAH CODE ANN. § 53G-9-601 (LexisNexis 2019); 24 PA. CONS. STAT. § 13-1303.1-A (2008).

⁶² UTAH CODE ANN. § 53G-9-601 (LexisNexis 2019); 24 PA. CONS. STAT. § 13-1303.1-A (2008); N.Y. S.B. 7740.

⁶³ § 53G-9-601; N.Y. S.B. 7740.

⁶⁴ Jill Harkavy-Friedman, *Ask Dr. Jill: Does Mental Illness Play a Role in Suicide?*, AM. FOUND. FOR SUICIDE PREVENTION (Feb. 7, 2020), <https://afsp.org/story/ask-dr-jill-does-mental-illness-play-a-role-in-suicide>.

⁶⁵ *Id.*

⁶⁶ Diane Fortheringham, *The Role of Expert Judgment and Feedback in Sustainable Assessment: A Discussion Paper*, 31 NURSE EDUC. TODAY 8 (2011).

⁶⁷ *Mental Health by the Numbers*, NAT’L ALL. ON MENTAL ILLNESS (Feb. 2022), <https://www.nami.org/mhstats>.

What we know anecdotally is that a small percentage of teenagers and young adults sometimes engage in self-harm post verbal bullying.⁶⁸ Again, this is a concern, but we ordinarily do not hold a speaker responsible for the negative effect on the listener.⁶⁹ If we were to extend civil or criminal liability to anyone for self-harm merely as a result of thoughtless comments (especially online, where they are nearly infinite), then a great deal of expression would be potentially criminal.⁷⁰ As a result, people may feel too threatened to voice certain opinions since those opinions just cannot be voiced without “bullying” someone under some of our most recent definitions of the word.⁷¹

Feeling threatened to voice an opinion about another student can create a chilling effect on voicing political or quasi-political opinions regarding policies that may impact that student, especially if the restrictions on speech reach beyond the classroom by punishing social media posts.⁷² Generally, when speech embraces political issues, protections for that speech are at their highest.⁷³ Nevertheless, consider a discussion that ten years ago was a lively one, with Democrats and Republicans weighing in on both sides: same-sex marriage.⁷⁴ Today, few things are as politically obvious as the legal recognition of same-sex couples to enter into a marital union.⁷⁵ Yet less than ten years ago, a large number of states specifically prohibited this type of association, and even the federal government was actively enforcing the Defense of Marriage Act, which prevented any recognition of marriage for same-sex couples under federal law.⁷⁶ This Act itself was passed by a large portion of Congress and signed into law by President Clinton in the 1990s.⁷⁷ The heated debate over the constitutionality of this Act, which had been in effect for more than two decades, should suggest that this was a non-obvious issue to resolve at the time regarding which political speech should have been appropriate in high school, college, and even law school campuses.⁷⁸

⁶⁸ Ingri Myklestad & Melanie Straiton, *The Relationship Between Self-Harm and Bullying Behavior: Results from a Population Based Study of Adolescents*, 21 BMC PUB. HEALTH 524 (2021).

⁶⁹ RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 COLO. L. REV. 499 (2019).

⁷⁰ Andrew Marantz, *Free Speech is Killing Us*, N.Y. TIMES (Oct. 4, 2019), <https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html>.

⁷¹ Charles Lane, *We're Staying Silent out of Fear*, WASH. POST (Oct. 15, 2018), https://www.washingtonpost.com/opinions/we-need-the-exhausted-majority-to-speak-up/2018/10/15/160440fa-d090-11e8-83d6-291fced2ab1_story.html.

⁷² For example, the rights of transgender individuals to use the bathroom of their choice is a political issue that, if discussed in school, would inherently be discussing the transgender individuals therein.

⁷³ *See Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 340 (2010).

⁷⁴ Nelson Tebbe et al., *The Argument for Same-Sex Marriage*, 159 PENN. ST. L. REV. 21 (2010).

⁷⁵ *See United States v. Windsor*, 570 U.S. 744, 769 (2013).

⁷⁶ 1 U.S.C. § 7, *invalidated by Windsor*, 570 U.S. 744.

⁷⁷ Defense of Marriage Act, H.R. 3396, 104th Cong. (1996).

⁷⁸ *See Windsor*, 570 U.S. 744.

Yet today, in 2022, even raising the prospect that same-sex marriage should not be legally recognized would be considered hate speech.⁷⁹ In fact, given the status of cancel culture, anyone caught voicing such an opinion on social media can expect to receive a nearly endless stream of objections, to put it mildly.⁸⁰ The Supreme Court, in 2 close 5-4 majority rulings issued in 2013 and 2015, ruled in favor of same-sex couples' to enter into legal marriage.⁸¹ Now, the political debate upon this topic seems so settled (even with a much more conservative Supreme Court) that standing up in a seventh-grade civics classroom and voicing this opinion could potentially earn a student disciplinary sanctions.⁸² After all, even if the child believes he or she is voicing a political opinion worthy of debate, it is not difficult to see how some homosexual individuals in the classroom might view it as highly offensive.⁸³ Ordinarily, the mere fact that someone is offended would not bar speech, but under the broad reach of the anti-bullying provisions, the student can very well find himself in trouble with the faculty or administrators of his public school.⁸⁴

Similar concerns exist regarding the more current debate on transgender athletics in schools and colleges.⁸⁵ Almost by definition, this is a political debate that directly impacts student athletes and their supporters.⁸⁶ Whether an athlete who has transitioned from one gender identity to another can compete in female sports is a live and open controversial question.⁸⁷ While one day this debate might be considered as well-settled as the debate over legal recognition of same-sex marriage, today, it is rather active and directly impacts students in public institutions.⁸⁸ Nevertheless, a student might exhibit rational fear in voicing his or her opinions on the matter because,

⁷⁹ See Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249.

⁸⁰ See Elizabeth Trevathan, *Cancel Culture: Behind the Social Media Madness*, RUBICON (Dec. 14, 2021), <https://www.rubiconline.com/cancel-culture-behind-the-social-media-madness/>.

⁸¹ *Windsor*, 570 U.S. 744; *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁸² Kara Ingelhart, *LGBT Rights and the Free Speech Clause*, AM. BAR ASS'N (Apr. 14, 2020), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/march-april/lgbt-rights-free-speech-clause/.

⁸³ *Id.*

⁸⁴ Bader, *supra* note 25.

⁸⁵ Laine Higgins, *Debate over Transgender Athletes Sweeps Through U.S. Statehouses*, WALL ST. J. (Apr. 30, 2021, 8:00 AM), <https://www.wsj.com/articles/debate-over-transgender-athletes-sweeps-through-u-s-statehouses-11619762614>.

⁸⁶ *Id.*

⁸⁷ Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 SPORTS MED. 199 (2021).

⁸⁸ Bethany Alice Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED. 701 (2017); Adriana Rezal, *States Restricting how Transgender Students Play Sports*, U.S. NEWS & WORLD REP. (Dec. 1, 2021, 3:20 PM), <https://www.usnews.com/news/best-states/articles/2021-12-01/these-states-restrict-how-transgender-students-participate-in-school-sports>.

almost inevitably, the opinion will offend someone.⁸⁹ If the student favors permitting athletes to compete with the gender that they identify with, he or she risks offending the students who believe themselves to be at a competitive disadvantage if this were allowed to happen.⁹⁰ On the other hand, if the student opposes permitting transgender athletes to pick the division in which they believe they belong, the transgender individuals within the school, whether athletes or not, may be harmfully impacted.⁹¹ Given the high rate of self-harm in the transgender community that may span from social ostracization, this speech could also be considered harmful and would constitute dangerous “bullying” behavior.⁹² Hence, many students and athletes may feel too afraid to break their silence on a political issue that actively impacts their day-to-day life.

It is a sad day in the history of the United States when students, who have presumably spent at least a decade learning about their constitutionally protected rights, are afraid to exercise their rights for fear that there would be no protection. The guarantees of the First Amendment expressed in a fifth-grade history class tend to ring hollow if students have, through their own experience within the public school, learned that speech is one of the principal ways that they can get themselves into trouble. The First Amendment may never be able to shield young children from the social consequences of their statement, perhaps relying on our society to be forgiving of uncouth expression, yet it should at least prevent public schoolteachers, public college professors, and administrative officials in public academia from openly punishing students for (political and even apolitical) opinions with which these authority figures disagree.

Academia has long been considered a place that benefited from free speech and a lack of government intervention. Like it or not, government officials and their agents have a poor track record of responding appropriately to science, art, music, historical works, and a variety of other scholarly works. This is why it is so alarming to see the government extend the power of censorship to academia, especially by way of recently enacted legislation and executive policies that allow criminal penalties for school speech. In a way, the government has permitted academics to avoid censorship by allowing

⁸⁹ Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, CATO INST. (July 22, 2020), <https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share>.

⁹⁰ *Governor Says Transgender Athletes Will 'Destroy Women's Sports'*, NBC NEWS (Feb. 10, 2021, 2:36 PM), <https://www.nbcnews.com/feature/nbc-out/governor-says-transgender-athletes-will-destroy-women-s-sports-n1257342>.

⁹¹ Will Hobson, *The Fight for the Future of Transgender Athletes*, WASH. POST (Apr. 15, 2021), <https://www.washingtonpost.com/sports/2021/04/15/transgender-athletes-womens-sports-title-ix/>.

⁹² Catherine Butler, *Self-Harm Prevalence and Ideation in a Community Sample of Cis, Trans and Other Youth*, 20 INT. J. TRANSGENDERISM 447 (2019).

academics to become censors themselves: what public academics say becomes canon, and everything else becomes blasphemy.

This is done in a familiar disguise: a government program intended to help everyone with the most minimal incursion on human rights. What this approach has the potential for, though, is significantly more than a minimal incursion on the right to free speech: it has the potential to teach an entire generation of children that speaking their mind has severe negative consequences, no matter how innocent the intent. It can teach them to fear the expression of any opinion unapproved by the government. We cannot think of a less democratic lesson for young children in our schools. Because daring to speak freely already carries with it the severe consequences of cancel culture, our society should be cautious in permitting the state or federal government to teach our future leaders how to speak and think.

II. FIRST AMENDMENT IN THE CLASSROOM

*If somebody put their hands on me, alright
Otherwise stand there, talk sh*t all night.*

– T.I. & JUSTIN TIMBERLAKE, DEAD AND GONE (2009)

Just like verbal bullying, the First Amendment is also present in the American classroom, at least in theory.⁹³ The Supreme Court of the United States has frequently considered cases of classroom speech, often siding with the student.⁹⁴ Children and young adults do not check their rights at the schoolhouse door or on the campus of a public university.⁹⁵ These cases have stretched into the realm of social media, with a recent ruling by the Supreme Court declaring that a social media post about cheerleading coaches, despite being disrespectful, cannot be sanctioned by the school.⁹⁶ One might think that if students can say impolite things about coaches and teachers over the Internet, the door is open for relatively free speech about classmates or matters of public interest within the classroom (and perhaps even the virtual classroom during the times of COVID-related remote learning).⁹⁷

⁹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁹⁴ *Id.*; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁹⁵ *Tinker*, 393 U.S. 503; *Bethel*, 478 U.S. 675; *Hazelwood*, 484 U.S. 260.

⁹⁶ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021). Some decisions from the circuit courts of appeals have, notably, protected student social media speech. *See, e.g.*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (protecting a fake social media account that mocked the principal but did not, and was not likely to cause, a substantial disruption within the school); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (protecting a fake social media account ridiculing school officials).

⁹⁷ *B.L.*, 141 S. Ct. 2038.

But the matter is more complicated than that, as the public policy reasons for protecting the respect and esteem of professors may be quite different than protecting psychologically vulnerable (and much younger, less experienced, and, perhaps, less toughened-to-criticism) classmates. A large question remains unanswered: how far can students go in discussing religion, politics, race relations, gender relations, or sexuality within the classroom, on social media during class hours, on social media after school, and in a variety of other settings (such as summer break or winter holidays)? What can our current jurisprudence tell us about “bullies’ rights” to speak their minds concerning their fellow classmates, and at what point do political, religious, and moral disagreements spill into the type of bullying punishable by law?

Several law review articles discuss the importance of freedom of speech in the scholastic setting. For example, Erwin Chemerinsky, the Dean of the University of California Berkeley School of Law, argues that the First Amendment should be applied to private schools, stating that more speech is generally best and freedom of speech is “essential for freedom of thought and conscious.”⁹⁸ Chemerinsky has also argued that freedom of speech should be increased in school settings, explaining that the Supreme Court’s approach has been “uncritical deference to schools and far too little protection of student speech.”⁹⁹ In fact, when a student was dismissed from the University of Alabama for a social media post using racial epithets on several occasions, Dean Chemerinsky opined that she could have been successful in a civil rights lawsuit against the university.¹⁰⁰ He specifically noted that despite the vulgar language used and the likely insult to African-American students at the university, the student could not be punished by a state actor, like a state university, for such statements.¹⁰¹

An article by Rory Weeks argues that school officials should have less authority over students’ off-campus speech, as the failure of clear limits of such authority interferes with students’ freedom of speech rights, which must be protected.¹⁰² According to Weeks, public schools are not “enclaves of totalitarianism where students shed their constitutional rights to freedom of speech or expression.”¹⁰³ Lee Goldman echoes this sentiment and argues a similar point: that speech should be treated differently based on whether it

⁹⁸ Erwin Chemerinsky, *More Speech is Better*, 45 UCLA L. REV. 1635, 1641 (1998).

⁹⁹ Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825 (2009).

¹⁰⁰ Jeremy Bauer-Wolf, *Kicked out for Racism*, INSIDE HIGHER EDUC. (Jan. 23, 2018), <https://www.insidehighered.com/news/2018/01/23/university-alabama-may-have-violated-first-amendment-kicking-out-racist-student>.

¹⁰¹ *Id.*

¹⁰² Rory Allen Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials’ Authority Over Off-Campus Student Speech*, 46 GA. L. REV. 1157 (2012).

¹⁰³ *Id.* at 1159 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

occurs on-campus or off-campus.¹⁰⁴ Several other authors weigh in on the issue, falling all over the spectrum regarding which kinds of student cyberspeech should properly be protected by the First Amendment.¹⁰⁵

Richard Garnett, an Associate Professor of Law at the University of Notre Dame, explains the skepticism regarding the compatibility of government-run education with freedom of speech.¹⁰⁶ In addition, Alexander Tsesis, a Professor of Law at Loyola University Chicago School of Law, argues that there is a conflict between current jurisprudence that recognizes students have certain First Amendment rights at school and a different line of cases that deferentially affirm school censorship.¹⁰⁷ A recent article by Mary-Rose Papandrea also explains that public schools are “unnecessarily deferential to school administrators,” and public schools censor speech to a level that would never be tolerated outside of the school setting.¹⁰⁸

We write to side with the above scholars who champion school rights, but we extend the analysis beyond First Amendment case law by examining the psychological implications of public schools censoring free speech both within the classroom and beyond. We supplement prior analysis with more recent case law from the Supreme Court of the United States while also highlighting studies that show how necessary the enforcement of the First Amendment in the classroom may really be. Using recent studies on the psychological implications of bullying or trauma similar to bullying, we show that the Founding Fathers are vindicated in permitting unpleasant speech because free citizens, even young citizens, can weather it. Therefore, permitting such speech is necessary even at the school level to prepare our future police officers, soldiers, lawyers, doctors, and politicians for the much less courteous world that they may very well encounter outside the classroom. We interpret the legal implications of psychological studies that show the development of resiliency in children and young adults, explaining that currently stifled speech may, in fact, benefit victims of bullying in certain

¹⁰⁴ Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011).

¹⁰⁵ Qasim Rashid, *In Harm's Way: The Desperate Need to Update America's Free Speech Model*, 47 STETSON L. REV. 143 (2017); Philip Lee, *Evading the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 832 UTAH L. REV. 831 (2016); Emily Suski, *A First Amendment Deference Approach to Reforming Anti-Bullying Laws*, 77 LA. L. REV. 701 (2017); Benjamin A. Holden, *Unmasking the Teen Cyberbully: A First Amendment-Compliant Approach to Protecting Child Victims of Anonymous, School-Related Internet Harassment*, 51 AKRON L. REV. 1 (2017); Ronen Perry, *Civil Liability for Cyberbullying*, 10 U.C. IRVINE L. REV. 1219 (2020); David L. Hudson, Jr., *Is Cyberbullying Free Speech?*, AM. BAR ASS'N J. (Nov. 1, 2016, 2:50 AM), https://www.abajournal.com/magazine/article/is_cyberbullying_free_speech.

¹⁰⁶ Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45 (2008).

¹⁰⁷ Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147 (2018).

¹⁰⁸ Mary-Rose Papandrea, *The Great Unfulfilled Promise of Tinker*, 105 VA. L. REV. ONLINE 159 (2019).

ways by permitting them to develop coping mechanisms that may prove invaluable when they become adults.

A. Protected Speech On and Off Campus

*They tried to shut me down on MTV,
But it just feels so empty without me.*

– EMINEM, WITHOUT ME (2002).

First Amendment jurisprudence draws some distinctions between speech in the schoolhouse and the public square.¹⁰⁹ For obvious reasons, the types of speech allowable in a public park cannot be allowed inside a classroom where students are expected to learn.¹¹⁰ Just by its very nature, shouting about political issues (or about one’s hatred of another) in the public square is among the oldest protected rights in American history, even if some might consider it to be bullying when addressing a particular individual.¹¹¹ Nevertheless, shouting about the same subject within a classroom, whether about politics or anything else, would make learning virtually impossible for others.¹¹² This type of time, place, and manner restriction is critical within the schoolhouse or within a college classroom and would, of course, be proper.¹¹³ One can conceive of an almost infinite list of expressive activities adults can engage in while in the public sphere that school children and college students cannot be allowed to perform in school.¹¹⁴

¹⁰⁹ *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968) (holding that streets, “sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely”); *United States v. Grace*, 461 U.S. 171, 177 (1983) (holding that, in public places, the “government’s ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions are ‘content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication’”) (quoting *Perry Educ. Ass’n v. Perry Loc. Educator’s Ass’n*, 460 U.S. 37, 45 (1983)); *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010). The Supreme Court held that a school is deemed a limited public forum, meaning the government creates an outlet for a specific or limited type of expression at a location in which such expression was not previously permitted. *Martinez*, 561 U.S. 661. For example, a university may open facilities to use by student groups but not others, and a public school may distribute flyers for community education arts groups but not for all nonprofit organizations. *Id.*; see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing an armband may be a symbolic act protected by the First Amendment).

¹¹⁰ MICHAEL CROWELL, *FREE SPEECH RIGHTS IN COURTHOUSES* (2012).

¹¹¹ *Amalgamated Food Emps. Union Loc. 590*, 391 U.S. at 315.

¹¹² Tsisis, *supra* note 107.

¹¹³ James C. Denver III, *Tinker Revisited: Fraser v. Bethel School District and the Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164 (1985).

¹¹⁴ *Amalgamated Food Emps. Union Loc. 590*, 391 U.S. at 315; *Tinker*, 393 U.S. 503; *Grace*, 461 U.S. at 177; *Martinez*, 561 U.S. 661.

Yet, allowing time, place, and manner restrictions does not quite resolve the issue since there are times when a school or college inherently permits expressive activity. That activity can involve students presenting in front of the class, asking the teacher or professor questions, engaging in debates with fellow classmates, engaging in athletic or academic competitions, interacting outside of school related or unrelated to school matters, using social media during or after class time to discuss school matters, and using social media during or after class time to discuss non-scholastic matters. Each of these situations presents ample opportunity for speech activity that, in the eyes of some, can constitute bullying, especially when the presentation might have something to do with social issues as opposed to the correct way to solve a calculus problem. Almost inescapably, given a large number of students in any schoolhouse or college, someone will say something that offends someone else, which inherently raises the constitutional question: is punishment therefore appropriate under the rules and statutes? A second, and arguably more important question, is whether such a punishment would be consistent with our constitutional principles.

The Supreme Court has already considered expressive misbehavior by students, noting that it can receive constitutional protections but on a case-by-case basis.¹¹⁵ Wearing armbands to school to protest the Vietnam War is a famous example of protected speech.¹¹⁶ The students wearing these dark armbands did not disrupt class to protest the war, did not bully students who favored the war (at least not directly), did not interfere with the studies of others in any way, and did not seriously hinder schoolteachers from delivering their lessons.¹¹⁷ Hence, even though it took the intervention of the highest court in the country, the students' rights were retroactively protected to the chagrin of the school administrators that both prohibited the activity via school rules and enforced those rules against the students.¹¹⁸

On the other hand, posting a sign "Bong Hits 4 Jesus" at a school assembly approximately fifty years later goes too far.¹¹⁹ Struggling to identify the meaning of the expression (and hence unable to extend to it the deference usually extended to something like political speech), the Supreme Court declined to reverse the punishment of the student at the hands of school officials.¹²⁰ Was the student talking about religion? Or drug use? Or something in between? Was he voicing support for marijuana legalization? Or just marijuana consumption? For Christianity? For religion or spirituality in general? For the achievement of spiritual connection through the use of

¹¹⁵ *Tinker*, 393 U.S. 503.

¹¹⁶ *Id.* at 504.

¹¹⁷ *Id.* at 509.

¹¹⁸ *Id.*

¹¹⁹ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹²⁰ *Id.*

drugs or hallucinogens? These are questions that, without a clear answer, left ambiguous just how much protection this kind of speech should receive, and the Court ultimately decided that the speech was not protected at the assembly where it occurred.¹²¹ Would it have been protected if posted on Facebook? If the post was made during school hours while the student was physically in school? If the post was made outside of school hours? Or if the post was made while the student should have been in school but was not? What seems obvious, though, is that the student might have received far more protection had he simply written: “Pray to Jesus” or even “Don’t Do Drugs.”¹²² Yet, because the possibilities of expression are nearly infinite, and the Supreme Court’s time is not, it is difficult to know with any degree of precision which expression in a school or campus might receive protection and which might not.

Likewise, the Supreme Court refused to grant a student relief for making the following speech in support of a fellow classmate’s candidacy for student government:

I know a man who is rock hard—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most of all, his belief in you the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So please vote for Jeff Kuhlman, as he’ll never come between us and the best our school can be.¹²³

Even though the school certainly provided the forum for Mr. Fraser’s discussion of Mr. Kuhlman’s qualities, the sexual innuendo therein proved too much.¹²⁴ This was despite the potential political content that the speech embraced.¹²⁵ It should be noted that Fraser’s three-day suspension did not phase his actual popularity in the school, as he received a large number of write-in votes for his own election as the graduation speaker.¹²⁶ Fearing the worst, the school also did not permit him to speak at graduation, which the Supreme Court also upheld.¹²⁷ Interestingly, Fraser actually won before the federal district court and the Ninth Circuit Court of Appeals, receiving support and representation from the American Civil Liberties Union.¹²⁸ It

¹²¹ *Id.* at 405.

¹²² *Id.*

¹²³ Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986).

¹²⁴ *Id.* at 683.

¹²⁵ *Id.* at 685.

¹²⁶ *Id.* at 679.

¹²⁷ *Id.*

¹²⁸ Fraser v. Bethel Sch. Dist., 755 F.2d 1356 (9th Cir. 1985).

was the school district that was so intent upon enforcing its rules that it pushed the case all the way to the United States Supreme Court.¹²⁹ When school districts so frequently cite underfunding as a problem, it should be somewhat shocking that one could afford to enforce its speech restrictions to the Supreme Court of the United States. While this issue is between Bethel School District and the taxpayers in its county, perhaps the story can serve as a counterexample to the argument that schools do not really care about silencing speech. Bethel School District cared to the tune of probably a million dollars in lawyer fees, if not more.

Colleges, like public high schools, are not immune from First Amendment scrutiny.¹³⁰ In *Healy v. James*, the United States Supreme Court held that refusing to grant a politically affiliated organization recognition by Central Connecticut State College violated First Amendment principles, even if done in an attempt by the school to remain neutral.¹³¹ Likewise, *Papish v. Bd. of Curators of Univ. of Missouri* reversed the expulsion of a graduate student for indecent newspaper publications.¹³² “[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name along of ‘conventions of decency.’”¹³³

More recently, the Court once again waded into the realm of school speech, this time involving a cheerleader complaining on social media after a perceived injustice.¹³⁴ Using Snapchat and sharing the communication only among “close” friends, the student voiced her disagreement over failing to make the varsity squad.¹³⁵ The disagreement was not entirely civil, culminating in the following self-deleting Snapchat message: “[f]uck school fuck softball fuck cheer fuck everything.”¹³⁶ The post was accompanied by a photograph of the jilted cheerleader and a friend with their middle fingers raised.¹³⁷ Despite being subsequently deleted, this social media communication nevertheless came to the attention of the school and later, the United States Supreme Court and several media outlets.¹³⁸ Despite a school contract that the cheerleaders signed as part of their participation in this extracurricular activity, the United States Supreme Court ruled that the cheerleader could not be punished for her inappropriate language concerning cheerleading.¹³⁹ The young student likely did not believe that her Snapchat

¹²⁹ *Id.*; *Fraser*, 478 U.S. 675.

¹³⁰ *See Healy v. James*, 408 U.S. 169, 180 (1972).

¹³¹ *Id.*

¹³² *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973).

¹³³ *Id.*

¹³⁴ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

¹³⁵ *Id.* at 2040.

¹³⁶ *Id.* at 2043.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 2048.

would turn into a federal case, much less a federal case to the Supreme Court of the United States, but she ultimately prevailed.¹⁴⁰

There are important aspects of this recent decision that are both encouraging and discouraging from the perspective of protecting student First Amendment rights. The discouraging portion of the case is the majority's focus on the delineation between off-campus and on-campus speech.¹⁴¹ The delineation is important, especially when dealing with time, place, and manner restrictions, but is it really necessary to decide the case on these facts? Would the school be justified for punishing the cheerleader if she had muttered "fuck school fuck softball fuck cheer fuck everything" to a circle of friends (while throwing up her middle finger) and someone happened to report it to a teacher at a later time? Anyone who spent any time in a public high school has it on good authority that speech like this occurs frequently. We cannot think of a more frivolous waste of time than trying to enforce regulations against such in-school speech by educators (especially given their need to focus on actually raising the academic standards of our students).¹⁴² Hence, the Court's focus on the location and time of the incident may, in the future, be used to justify in-school restrictions on similar speech.¹⁴³

What was more encouraging is the majority's acknowledgement that "[t]he school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."¹⁴⁴ The Court acknowledged what we argue above: that "America's public schools are the nurseries of democracy," meaning that students need the freedom to experiment with free speech when they are young in order to become adults capable of successful endeavors in business, politics, and social interactions in the future.¹⁴⁵ The Court pointed out that the cheerleader's conduct would have been perfectly innocent had she been an adult and ultimately concluded that it was fully protected as a child (potentially helping to bring protections of child speech to a very similar level of protections of adult speech).¹⁴⁶

¹⁴⁰ *B.L.*, 141 S. Ct. at 2048.

¹⁴¹ *Id.* at 2046.

¹⁴² It is one thing if profanities are being shouted so loud that students cannot focus, but the quiet cursing of a teacher or coach under one's breath to a private group of friends cannot be punished consistently with the First Amendment. Not only does it overlook constitutional protections, but it just happens to punish the student unlucky enough to be overheard when nearly *all* students are guilty of this offense at some time or other, with some just being lucky enough to avoid detection. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008). General rules against harassment, whether by students or employees, have not fared well against constitutional challenges at the circuit courts of appeals. *See DeJohn*, 537 F.3d 301; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874 (7th Cir. 2011).

¹⁴³ *B.L.*, 141 S. Ct. 2038.

¹⁴⁴ *Id.* at 2040.

¹⁴⁵ *Id.* at 250-53.

¹⁴⁶ *Id.*

Writing for the majority, Justice Breyer raised a defense that should be at the center of every verbal bullying First Amendment challenge: “It might be tempting to dismiss the cheerleader’s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary.”¹⁴⁷ As the Court put it in *Cohen v. California*, “in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”¹⁴⁸

B. The Chilling Effect of Disregarding Supreme Court Precedent in School

The precision of language was one of the most important tasks of small children. Asher had asked for a [“]smack[”]. The discipline wand, in the hand of the Childcare worker, whistled as it came down across Asher’s hands. Asher whimpered, cringed and corrected himself instantly. “Snack,” he whispered. But the next morning he had done it again. And again the following week. He couldn’t seem to stop, though for each lapse, the discipline wand came again, escalating to a series of painful lashes that left marks on Asher’s legs. Eventually, . . . Asher stopped talking altogether.

– LOIS LOWRY, *THE GIVER* (1993).

Cases like this receive focus from legal scholars based on the facts, which we will turn to momentarily, but what always fascinates us more is the procedural history. In our practice, we have seen far more serious cases not make it past the county, district, or circuit court at the state level. Many are settled, both in the civil and the criminal context, because the litigants have financial and economic constraints on just how much litigation they can afford.¹⁴⁹ Yet, cases over something like a suspension from a scholastic activity can make their way to the United States Supreme Court. How can we square these two outcomes? Without empirical evidence, it is difficult to say for sure, but a rather obvious notion comes to mind: perhaps many cases of free speech violations within the schoolhouse or on a college campus, no matter how obvious, never come to court. This results in a chilling effect on speech from regulations that may never end up being challenged, no matter how facially unconstitutional they are.

Perhaps bringing such cases is too expensive, too embarrassing, or possibly both. If this is the case, we should already be wary of school policies

¹⁴⁷ *Id.* at 2048.

¹⁴⁸ *Id.* at 2046 (citations omitted) (citing *Cohen v. California*, 403 U.S. 15 (1971)) (raising the question of whether students would have been protected if they had worn “fuck the draft” jackets to school instead of black armbands in *Tinker*).

¹⁴⁹ Charlotte Lanvers & Theodore Eisenberg, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUDS. 111 (2009).

that curtail First Amendment liberties because we should understand that a civil remedy is not always practical. Yes, in theory, one should be able to obtain high enough compensatory and punitive damages for having one's rights violated inside the schoolhouse. But the reality is that, for many jurors (and even judges), punishing a cheerleader for using profanity is piece-and-parcel of the schooling process.¹⁵⁰ In the minds of far too many, the school might have done this student a favor by teaching her not to use profanity both in and out of school. Legal scholars can disagree, but getting a jury like that to award high damages sufficient to compensate a local lawyer for his or her time in bringing a large civil rights case is far too unlikely. Non-profit organizations, and in some instances divisions of government, exist to help litigants at times, but with limited resources comes limited access to legal help to vindicate a student's rights.¹⁵¹ It might be easier just to fall silent.

Consider, for a moment, the Fourth Amendment prohibition behind unreasonable searches and seizures.¹⁵² The Fourth Amendment, combined with the common law, gave individuals who were illegally searched the right to sue the police officer for damages.¹⁵³ Yet, why did courts still apply the exclusionary rule? Why not permit a criminal defendant to recover for his or her damages suffered as a result of an illegal search in a separate civil proceeding while retaining the evidence that would help accurately resolve his criminal case? For example, exclusion of evidence that would help convict a murderer has great social costs: regardless of the illegal search, consider the ramifications that a killer goes free with the potential to reoffend.¹⁵⁴ Yet, the Supreme Court abandoned this approach at the beginning of the twentieth century.¹⁵⁵ Why? Because the Court accurately recognized, even if not explicitly stating, that a large recovery in civil court for a wrongful search would not be likely.¹⁵⁶ At the very least, it would not be likely enough to sufficiently dissuade law enforcement from violating the U.S. Constitution.¹⁵⁷ Perhaps similar logic can be applied to deferring to a student's freedom of speech: without a high amount of deference and vigilance from the courts, such freedoms can be readily stripped away by older, more clever, and more entrenched school administrators and lawmakers.

¹⁵⁰ *B.L.*, 141 S. Ct. 2038.

¹⁵¹ *Research Data on the Nonprofit Sector*, U.S. BUREAU OF LAB. STAT. (May 14, 2020), <https://www.bls.gov/bdm/nonprofits/nonprofits.htm>.

¹⁵² U.S. CONST. amend. XIV.

¹⁵³ *Torres v. Madrid*, 141 S. Ct. 989 (2021).

¹⁵⁴ *Recidivism Rates: What You Need to Know*, COUNS. ON CRIM. JUST. (Sept. 1, 2021), https://counciloncj.org/recidivism_report/.

¹⁵⁵ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

In recent years, what has become more and more apparent is that controlling speech in the classroom has political utility. When it comes to subjects like history, social studies, political science, and others, schools have always had to walk somewhat of a tightrope between the way history is viewed by one political party in American life as opposed to another.¹⁵⁸ This presented problems in any instance when discussing the historical actions of a particular political contingent.¹⁵⁹ If the actions of Republicans were portrayed in a positive light, this inherently sent a negative message about the Democrats, and vice versa. Given that today's students are tomorrow's voters, the political stakes are frequently high.

Now, there is another way that partisan politics can impact public school and public college students: by censoring certain types of speech considered uncouth towards their respective political perspectives.¹⁶⁰ Something tells us that having one's freedoms to speak and listen curtailed on school and college campuses would not be in the best interest of the students. Nevertheless, as far as politicians are concerned, it would not be surprising for them to place their own best interests ahead of the interests of their students. How do politicians achieve these ends? One way to do so is to declare speech with which the politicians disagree to be bullying, hate speech, or some mixture of the two.

When this happens, a student really has an untenable choice: say what he or she believes to be true and face an endless scorn and retribution of the school system or remain silent. Silence, of course, is a far more rewarding option, especially in a world where cancel culture can provide more disincentives for certain speech than even the government could.¹⁶¹ Whatever the student believes, and whatever facts, arguments, and anecdotes he or she might share with others concerning the student's belief, are silenced. Even if, in a hypothetical world, the Supreme Court would eventually side with the student after a First Amendment challenge, the obvious costs of this endeavor (and the unlikelihood of its ultimate success) can have a tremendously chilling effect on free speech. Hence, under the guise of curbing bullying, schools frequently curb politically undesirable speech, likely in ways that are

¹⁵⁸ Pete Burkholder & Dana Schaffer, *The Split in how Americans Think About our Collective Past Is Real—But There's a Way Out of the 'History Wars'*, TIME (Apr. 29, 2021, 10:28 AM), <https://time.com/5972867/history-wars-survey/>.

¹⁵⁹ See, e.g., Olivia B. Waxman, *'Critical Race Theory Is Simply the Latest Bogeyman.'* *Inside the Fight over What Kids Learn About America's History*, TIME (July 16, 2021, 7:42 PM EDT), <https://time.com/6075193/critical-race-theory-debate/>.

¹⁶⁰ Melissa Korn, *Education Department Blasts 'Culture of Censorship' at Colleges, Sets Up Free-Speech Email Hotline to Report Violations*, WALL ST. J. (Dec. 8, 2020, 5:53 PM), <https://www.wsj.com/articles/education-department-blasts-culture-of-censorship-at-colleges-sets-up-free-speech-email-hotline-to-report-violations-11607467380>.

¹⁶¹ Sanam Yar & Jonah Engel Bromwich, *Tales from the Teenage Cancel Culture: What's Cancel Culture Really Like? Ask a Teenager. They Know.*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/style/cancel-culture.html>.

most agreeable to the political leanings of the teachers or professors charged with enforcement.

Yet, here is the difficulty in much of this analysis: what is the distinction between name-calling and protected political speech? At what point does political speech devolve into name-calling? Even a brief time spent listening to congressional hearings on C-SPAN will reveal that few well-educated, adult politicians know the answer. In recent memory, politicians have accused one another of sexual relations with foreign spies,¹⁶² of being terrorists,¹⁶³ of being Islamophobic,¹⁶⁴ of being transphobic,¹⁶⁵ of being homophobic,¹⁶⁶ of being anti-Christian,¹⁶⁷ of being socialists,¹⁶⁸ of being communists,¹⁶⁹ of being Marxists,¹⁷⁰ of being xenophobic,¹⁷¹ of being idiots,¹⁷² and the list goes on and on. It is notable that, if done within the halls of most public schools, many of these insults would qualify as bullying and would earn the honorable Congressperson anything from a stern warning to

¹⁶² Nicholas Reimann, *Here's what we Know About Rep. Swalwell's Connection to a Suspected Chinese Spy*, FORBES (Dec. 19, 2020, 2:43 PM), <https://www.forbes.com/sites/nicholasreimann/2020/12/19/heres-what-we-know-about-rep-swalwells-connection-to-a-suspected-chinese-spy/?sh=20517d742050>.

¹⁶³ *Former House Speaker John Boehner Accuses Some in Congress of Being "Political Terrorists"*, CBS NEWS (Apr. 9, 2021, 12:32 PM), <https://www.cbsnews.com/news/former-house-speaker-john-boehner-accuses-some-in-congress-of-being-political-terrorists/>.

¹⁶⁴ Jonathan Weisman, *Republican Rebuked for Anti-Muslim Remarks in 'Islamophobia' Debate*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/2021/12/14/us/politics/ilhan-omar-house-debate-islamophobia.html>.

¹⁶⁵ Matthew Lavietes & Rachel Savage, *Trans Sights Divides Political Rivals, Young and Old in the United States*, THOMSON REUTERS (July 27, 2021, 11:27 AM), <https://www.reuters.com/article/us-lgbt-rights/trans-rights-divides-political-rivals-young-and-old-in-the-united-states-idUSL8N2P34O4>.

¹⁶⁶ Jeremy W. Peters, *Alex Morse Was Accused, Condemned and Then Vindicated. Will His Experience Change Anything?*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/2020/08/23/us/politics/alex-morse-massachusetts.html>.

¹⁶⁷ Brandon Tester, *Rep. Brewer Calls Moss' 'Anti-God' Accusation 'Out-of-Bounds'*, RICHMOND CNTY. DAILY J. (Sept. 24, 2020), <https://www.yourdailyjournal.com/news/96522/rep-brewer-calls-moss-anti-god-accusation-out-of-bounds>.

¹⁶⁸ Reid J. Epstein & Linda Qiu, *Fact-Checking Trump's Claims that Democrats Are Radical Socialists*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/us/politics/trump-democrats-socialists.html>.

¹⁶⁹ AP, *Donald Trump Calls Bernie Sanders 'A Communist' at Cleveland Rally*, THE GUARDIAN (Mar. 13, 2016, 8:48 AM), <https://www.theguardian.com/us-news/video/2016/mar/13/donald-trump-calls-bernie-sanders-a-communist-at-cleveland-rally-video>.

¹⁷⁰ David Jackson, *Trump Targets 'Marxists' in July 4th Speech, Boasts of Coronavirus Response Despite Record Case Numbers*, USA TODAY (July 5, 2020, 5:25 PM ET), <https://www.usatoday.com/story/news/politics/2020/07/04/july-4th-trumps-white-house-party-scaled-back-over-coronavirus/5355855002/>.

¹⁷¹ Peter Baker, *Trump Accuses Black Congressman and Allies of Being Racist, Deepening Feud*, N.Y. TIMES (July 28, 2019), <https://www.nytimes.com/2019/07/28/us/politics/trump-elijah-cummings-baltimore.html>.

¹⁷² Shelia Flynn, *Rep Dan Crenshaw Calls Fellow Republican Marjorie Taylor Greene 'An Idiot' on Social Media*, THE INDEP. (Jan. 4, 2022, 8:31 PM), <https://www.independent.co.uk/news/world/americas/us-politics/crenshaw-marjorie-taylor-greene-idiot-b1986670.html>.

a suspension. Yet for us, the question remains: if some degree of political debate can occur within the halls of Congress where such “nicknames” can be used, is it possible that our schoolchildren and college-attendees may be using them for similar political discussions? Is it not possible for someone to call a classmate a socialist in the hall without disturbing school functions beyond remedy? And if a classmate cannot take an insult without returning to his or her studies, perhaps after a clever retort, does that really mean the bully is the true offender, as opposed to a school system and parental upbringing that has left the child incapable of hearing and ignoring insults?

What the debates among our politicians do show is that life after college or high school can be difficult, with a potentially large number of individuals acting in offensive ways. While not the explicit purpose of school, perhaps one of the lessons it offers might be that it is not the end of the world to stumble into an opinion other than one’s own, even if such an opinion embraces something personal and insulting. Perhaps one of the most important reasons that more “bullying” should be constitutionally protected is because of how important it is for school and college students to learn how to interact with difficult people.¹⁷³ In *Brown v. Board of Education*,¹⁷⁴ the Supreme Court noted how important it was that individuals of different races study together based, in part, on the fact that they would be required to interact in daily society.¹⁷⁵ Hence, separating students based on race inherently denied them equal educational opportunity because of failure to be exposed to classmates different from themselves.¹⁷⁶

The Court later upheld affirmative actions and diversity programs that favored certain races, ethnicities, genders, national origins, or backgrounds of admittees.¹⁷⁷ The Court correctly concluded that part of a sound education comes from classmates, and a diversity of classmates inherently expands the amount of education a student can receive through social and academic interactions.¹⁷⁸ The Supreme Court understood achieving diversity in higher education to be an important purpose of institutions of higher learning. This is because individuals of different races and genders can bring different experiences to the university that other students (and perhaps even professors) could learn from.¹⁷⁹ In both of these cases involving public education, the Court recognized that learning occurred by being exposed to diverse perspectives, even if those perspectives might not be preferred by

¹⁷³ Sara Pabian et al., *Exploring the Perceived Negative and Positive Long-Term Impact of Adolescent Bullying Victimization: A Cross-National Investigation*, 48 *AGGRESSIVE BEHAV.* 205 (2021).

¹⁷⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Grutter v. Bollinger*, 593 U.S. 306 (2003).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

some of the students or their parents.¹⁸⁰ It seems only natural, then, that perspectives that are verbalized in unpleasant ways within the schoolhouse must receive some protection, as these perspectives can actually help students even if they offend them.

Nearly any situation of verbal bullying, excluding perhaps situations of incessant harassing or name calling, can communicate something to the recipient. Often, the news is not something the person wants to hear. A student might be told, in not so many words, that he or she is a poor athlete, is out of shape, lacks intelligence, is a poor student, has bad taste in clothing, or lacks artistic or musical skill. Of course, these things are difficult to hear: the authors of this Article have heard some of these comments firsthand both in school and in higher education. The important part is that these comments are not necessarily false.

While our personal experiences are not demonstrative of any general statistical trend, we want to be clear that we can empathize and even sympathize with those on the receiving end of verbal bullying within the schoolhouse. After immigrating from St. Petersburg, Russia to Birmingham, Alabama, Author Joukov was teased about everything from his accent to bad social skills to poor athleticism. It was hard to hear, but it was also *important* to hear because these were messages that teachers could not (usually as a matter of law) convey. The truth is that Author Joukov could not have become a trial lawyer if his accent did not improve. He could not have won a single trial unless he learned how to properly interact with people and speak calmly and confidently with witnesses and judges. And yes, he might have lacked the confidence to win in the courtroom unless he learned how to practice and train for success in arbitrary contests such as sports games.

Author Joukov responded by practicing speech until his accent was difficult to distinguish from that of anyone else, learning how to relate to people better, and training in sport to the point of spending a brief stint as an NCAA athlete. There is no question that the exposure to less-than-kind words can be a motivator. Verbal bullying is not behavior we should encourage in the classroom, and punishment should still exist for physical attacks and excessive verbal harassment. Yet, whether we like it or not, the input of bullies is not without value: it can cut to the bone, but it may one day become the input of co-workers, colleagues, and even supervisors, without any teacher or school police officer that will intervene to stop it. Without gaining inoculation against this type of negative feedback, students will be less prepared for the harsh world that likely awaits them outside the schoolhouse doors.

Our society should be cognizant of at least one purpose of education: to convey to students the skills necessary to be functional employees for the

¹⁸⁰ *Id.*

next fifty years of their lives. Anyone who has worked even a short stint outside of a college or other school can tell you that feedback can come in a highly unpleasant manner. The legal profession itself is an excellent example: we are aware of no attorney that has escaped a dressing down (if not several) from a partner, a judge, a client, or maybe all of the above. Some of these might very well qualify as bullying under school rules, but what really matters is how the young lawyers handle this type of “feedback.” Ironically, an attorney who has dealt with this type of behavior before is likely to handle it better than the first time around, and that is precisely the point: though it might have been unfortunate to face adversity at the age of thirteen, it may help you when you are twenty-five.

This example transcends the legal profession, though, and applies to any line of work. When students enter the “real world,” they will have no choice but to cope with the idea that almost anyone can say almost anything to them without punishment. The First Amendment will protect almost any speech outside of “fighting words” and statements that create a clear and present danger of imminent lawless action.¹⁸¹ That means that current students can expect to leave the protection of their high school or college and be immersed in speech that is unpleasant to them. Perhaps if this speech is encountered in the course of employment, the law and the employer might step in to shield the employee, but in almost all other instances, students will have to come to terms with the idea that unpleasant speech must be tolerated and coped with in the best way that one can. We cannot, after all, expect state and federal laws to police every conceivable insult the creative members of our society come up with.

We should also consider why the Founding Fathers and a long line of Supreme Court decisions enshrine the protection of someone to say something vile to someone else.¹⁸² It is partly because state resources are better spent enforcing laws that redress mere emotional harm from an unkind word. Turning police officers and sheriffs’ deputies into word and thought police is not a beneficial way to allocate resources in society and the schoolhouse. The United States is currently suffering from a serious wave of criminal activity.¹⁸³ This crime wave finds its way into the schoolhouse, onto college campuses, into our stores, and sometimes even our homes.¹⁸⁴ Given

¹⁸¹ U.S. CONST. amend. I; *see, e.g.*, *Healy v. James*, 408 U.S. 169 (1972) (ruling that general fear or apprehension of a material disruption to the substantial order of a school is insufficient to justify silencing expression).

¹⁸² *See, e.g.*, Timothy Snowball, *The Founding Fathers of our Limited Government: Thomas Jefferson and the Freedom of Speech*, PAC. LEGAL FOUND. (July 24, 2019), <https://pacificlegal.org/the-founding-fathers-of-our-limited-government-thomas-jefferson-and-the-freedom-of-speech/>.

¹⁸³ Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way to Treatment*, 20 NEV. L.J. 547 (2020).

¹⁸⁴ Dale Willits et al., *Schools, Neighborhood Risk Factors, and Crime*, 59 CRIME & DELINQ. 292 (2013).

the desperate need for policing violent conduct or conduct that results in grave losses of property, does it really make sense to allocate the resources of the criminal justice system to students (or adults) that might have offended others through speech alone?¹⁸⁵ Does it make sense to allocate holding space for juvenile delinquents that violate school rules by mere words? It seems appalling to see states misallocate their resources to something so comparatively inconsequential and something that has already led a variety of school districts to costly constitutional legal battles.

That inherently means that our public education system must allow some verbal “bullying.” While violent action must be condemned and strictly addressed, there actually is value to even the vilest forms of “bullying” speech. It is, after all, possible that the bullies have something accurate to convey to a listener. Perhaps what they are really doing is looking after themselves by verbally policing conduct they find uncomfortable. Perfect adherence to laws prohibiting such speech might create greater tyranny from the teachers and professors than from the occasional bully. Additionally, by removing from our educators the imperative to police expression, we can direct them back to their original purpose: teaching. If professors and teachers must put aside their task to tend to every sensitive sensibility of a student who perceives offense from another (to the point of involving the police and even testifying in a trial), our lagging education indicators will continue to fall behind other nations.¹⁸⁶

¹⁸⁵ In past works, we have argued extensively against the trend to criminalize large amounts of conduct, including speech, via state and federal statutes that cause a diverse number of social ills. See William N. Clark & Artem M. Joukov, *The Criminalization of America*, ALA. LAW, July 2015, at 225; Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL ADVOC. 459, 481, 522 (2018) (discussing the large number of state and federal statutes that may lead to prosecution); Artem M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M.L. REV. 383, 394 (2020) (pointing out the significant challenges that a criminal conviction can create for bar admission applicants); Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 43 (2018) (showing the constitutional problems with criminalizing extraterritorial speech); Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 315 HOFSTRA L. REV. 315 (2021) (demonstrating how unscrupulous prosecutors can use the legal code to do tremendous harm to criminal defendants and increase the strain on the criminal justice system); Samantha M. Caspar & Artem M. Joukov, *Worse than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution*, 47 HASTINGS CONST. L.Q. 499 (2020); Artem M. Joukov & Samantha M. Caspar, *The Alarming Legality of Security Manipulation Through Shareholder Proposals*, 44 SEATTLE U. L. REV. 707, 753 n.347 (2021) (arguing that, while stock manipulation through shareholder proposals should carry penalties, these penalties should be non-criminal to avoid adding to the criminalization problem in the United States). These arguments need not be restated, but they apply equally with respect to schoolhouse speech.

¹⁸⁶ *Education at a Glance 2021: Putting U.S. Data in a Global Context*, INST. OF EDUC. SCI. (Nov. 2, 2021), <https://nces.ed.gov/blogs/nces/post/education-at-a-glance-2021-putting-u-s-data-in-a-global-context>.

III. THE PSYCHOLOGICAL IMPACT OF BULLYING

*When you thought that it was over
 You could feel it all around
 And everybody's out to get you
 Don't you let it drag you down*

—EVERYTHING'S NOT LOST, COLDPLAY (2000).

At first glance, research in psychology describes the tendency to engage in bullying behavior to be troubling.¹⁸⁷ Some of these studies do not distinguish very well between verbal and physical bullying, which would, of course, be critical for First Amendment purposes.¹⁸⁸ Physical attacks rarely even implicate the First Amendment, while verbal insults, within the schoolhouse or otherwise, inherently involve free speech considerations.¹⁸⁹ A cursory look at the literature might document verbal bullying, even if done indirectly, to be perceived as a negative stimulus.¹⁹⁰ Studies have shown that it can make individuals feel isolated, anxious, and depressed because they feel left out and not a part of the group.¹⁹¹ This feeling has important roots in evolutionary psychology. For millennia, to be isolated from one's tribe meant reduced protection, unavailability of resources, and limited reproductive opportunities.¹⁹² Members of primate tribes who found themselves so isolated and did not feel anxiety as a result were less likely to remedy the situation, which, in turn, meant that they did not reproduce.¹⁹³ As a result, we are a species that predominantly hates to be in isolation since the genes of our ancestors tell us that it can imply death and failure to pass on our DNA to a future generation.¹⁹⁴

¹⁸⁷ Kirsti Kumpulainen, *Psychiatric Conditions Associated with Bullying*, 20 INT'L J. ADOLESCENT MED. HEALTH 121 (2008); *Bullying Others Increases the Risk of Developing Mental Health Problems and Vice Versa*, SCI. DAILY (Dec. 4, 2019), <https://www.sciencedaily.com/releases/2019/12/191204145750.htm>.

¹⁸⁸ See Adrienne Berard, *The First Amendment: Freedoms and Limitations*, WM. & MARY (Jan. 15, 2021), <https://www.wm.edu/news/stories/2021/the-first-amendment-freedoms-and-limitations.php>.

¹⁸⁹ *Id.*

¹⁹⁰ Niamh O'Brien, *Understanding Alternative Bullying Perspectives Through Research Engagement with Young People*, FRONTIERS IN PSYCH. (Aug. 28, 2019), <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.01984/full>.

¹⁹¹ *Consequences of Bullying Behavior*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (2016), <https://www.ncbi.nlm.nih.gov/books/NBK390414/>.

¹⁹² Larissa Swedell, *Primate Sociality and Social Systems*, 3 NATURE EDUC. KNOWLEDGE 84 (2012).

¹⁹³ *Understanding the Stress Response*, HARV. MED. SCH. (July 6, 2020), <https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response>.

¹⁹⁴ Joseph E. LeDoux, *Evolution of Human Emotion: A View Through Fear*, 195 PROGRESS BRAIN RSCH. 431 (2012).

This might suggest that bullying is highly negative: it raises fear and social anxiety in the individual on the receiving end.¹⁹⁵ Yet, one must also wonder if bullying itself has any basis in evolutionary psychology. As it turns out, bullying might properly be classified as a type of dominance struggle,¹⁹⁶ which is not so different from what we see in many animals.¹⁹⁷ Dominance struggles frequently occur in nature among members of the same “pack” of animals and are ordinarily characterized by “verbal”¹⁹⁸ and physical antagonization of one another as part of an attempt to achieve dominance.¹⁹⁹ Ultimately, the conflicts are resolved in a physical confrontation, though the vast majority of inner-pack fights among animals do not result in serious injury or death.²⁰⁰ The conflict must stop before that, as even a pack-member that opposes another in a dominance struggle can be useful in the future, perhaps as an ally in hunting prey or guarding against predatory animals (depending on the species).²⁰¹

Still, losing these dominance struggles, even when the result is non-deadly, has a negative effect on the losing creature, even if it is lucky enough to avoid prolonged physical injuries.²⁰² The serotonin levels of the losing animal tend to drop, and the animal become less confident and less likely to reach for dominance in the future.²⁰³ In a way, this reduces violent confrontation within the “pack,” perhaps leading it to focus on more productive activities.²⁰⁴ Still, the implications from evolutionary psychology and our ancestors in the animal kingdom do not paint bullying in a pleasant light.²⁰⁵ It is not a trait we should be proud of inheriting, given our capacity for morality and reason.

Yet evolutionary psychology is not the only lens through which we can interpret bullying behavior and responses to that behavior. If we limit our focus to verbal bullying, which is the only type of bullying this Article considers protected by the First Amendment, one can see that it has positive

¹⁹⁵ Maria Pontillo et al., *Peer Victimization and Onset of Social Anxiety Disorder in Children and Adolescents*, 9 BRAIN SCIS. 132 (2019).

¹⁹⁶ Ken Rigby, *Addressing Bullying in Schools: Theory and Practice*, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS (June 2003), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/addressing-bullying-schools-theory-and-practice>.

¹⁹⁷ Elizabeth A. Hobson et al., *Aggression Heuristics Underlie Animal Dominance Hierarchies and Provide Evidence of Group-Level Social Information*, 118 PROCS. NAT’L ACAD. SCIS. U.S. 1 (2021).

¹⁹⁸ Perhaps in the case of animals, the more descriptive word is auditory, though it can, in certain species, approximate human speech.

¹⁹⁹ Hobson et al., *supra* note 197.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Jan Rillich & Paul A. Stevenson, *Serotonin Mediates Depression of Aggression After Acute and Chronic Social Defeat Stress in a Model Insect*, FRONTIERS IN BEHAV. NEUROSCIENCE (OCT. 8, 2018), <https://doi.org/10.3389/fnbeh.2018.00233>.

²⁰³ *Id.*

²⁰⁴ Hobson et al., *supra* note 197.

²⁰⁵ *Id.*

and negative effects.²⁰⁶ Yes, it can cause fear, social anxiety, and depression, but it can also cause the victim to engage in problem-solving, gain confidence by overcoming this type of adverse stimuli, and ultimately become acclimated to similar dominance struggles.²⁰⁷

In 2021, a retrospective study consisting of closed and open-ended questions was conducted among 1010 Flemish and 650 Dutch emerging adults, ages 18 to 26.²⁰⁸ The study focused on the “potential mediating role of the perceived long-term negative and positive impact of adolescent bullying victimization to understand its relations with mental health and well-being problems during emerging adulthood.”²⁰⁹ The study was conducted on individuals who were the victims of bullying between the ages of ten and eighteen.²¹⁰ In the Flemish sample, many respondents (approximately fifteen to twenty percent) recounted how their bullying experiences positively affected their current personality and self-image.²¹¹ In the Dutch sample, approximately twenty-five percent of respondents provided examples of how prior bullying experiences led to positive current social functioning.²¹² Participants described the positive impact of adolescent bullying victimization on their current functioning through examples such as “paying more attention to respecting others and treating them properly,” “valuing friendships more,” “having stronger friendships with those who supported me while I was bullied,” “being better at defending myself,” “being more assertive,” and “being better in recognizing bullying and standing up for others who are bullied.”²¹³ The positive impact of adolescent bullying

²⁰⁶ Aileen Fullchange & Michael J. Furlong, *An Exploration of Effects of Bullying Victimization from a Complete Mental Health Perspective*, SAGE OPEN, Jan.-Mar. 2016, at 1.

²⁰⁷ Pabian et al., *supra* note 173. A Flemish and Dutch study showed that adolescent bullying victims experienced the following positive outcomes as a result of being bullied: paying more attention to respecting others and treating them properly, valuing friendships more, having strong friendships with those who supported the victim while he or she was being bullied, better at defending himself or herself, being more assertive, being better in recognizing bullying and standing up for others who are bullied, becoming more resilient, having more self-esteem, being mentally stronger, being physically stronger, and being more self-assured. *Id.*; *What is PTG?*, CHARLOTTE POSTTRAUMATIC GROWTH RSCH. GRP., <https://ptgi.charlotte.edu/what-is-ptg/> (last visited Apr. 12, 2022) (explaining that post-traumatic growth, a well-known concept in psychology, is a positive change experienced as a result of the struggle with a major life crisis or traumatic event). Post-traumatic growth can open new opportunities, improve a person’s relationships with others, improve a person’s sense of his or her own strength, and cause individuals to develop a greater appreciation for life in general. *Id.*; Aija Mayrock, *The Surprising Benefits of Being Bullied*, TEEN VOGUE (Oct. 29, 2015), <https://www.teenvogue.com/story/bullying-benefits-discovering-personal-strength> (stating that being bullied taught her that she is strong, determined, a hard worker, and grateful); *see also* Ari Ezra Waldman, *Are Anti-Bullying Laws Effective*, 103 CORNELL L. REV. ONLINE 135 (2020).

²⁰⁸ Pabian et al., *supra* note 173.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

victimization on the victim's current personality or self-image was described as "being more self-assured," "having higher levels of self-esteem," "being more resilient," "being stronger," and "having a thicker skin."²¹⁴

Moreover, in 2016, a study was conducted on 1,452 college students in Taiwan, which sought to describe school bullying experiences and to examine their associations on health-related quality of life among the students.²¹⁵ Different types of bullying experiences (physical, verbal, relational, and cyber) prior to and during college were measured.²¹⁶ According to the study results, college students with cyber-bullying victimization experiences prior to college reported a significantly higher quality of life in physical health.²¹⁷ The authors of the study hypothesized that these students may have reduced the amount of time they spent on the Internet and instead devoted more time to activities that enhanced their physical health.²¹⁸ Additionally, students experiencing cyber-bullying in college reported a significantly higher quality of life in the environmental domain.²¹⁹ This result suggests these students might find "solace in their environment outside the cyberspace."²²⁰ Therefore, these individuals may develop a better understanding and appreciation for their environment.²²¹

Psychology has a well-known concept called "post-traumatic growth," which is applicable here.²²² Developed in the 1990s by psychologists Richard Tedeschi and Lawrence Calhoun, post-traumatic growth holds that individuals who experience psychological struggle following adversity (including verbal bullying) often experience positive growth thereafter.²²³ According to Tedeschi, post-traumatic growth causes individuals to "develop new understandings of themselves, the world they live in, how they relate to other people, the kind of future they might have and a better understanding of how to live life."²²⁴

In 2016, a study was conducted to measure optimism on victims of bullying in 2,441 participants ages 12 to 19 across 13 schools in Ireland.²²⁵ The results demonstrated that victims of bullying had lower levels of overall optimism compared to those who had not been bullied.²²⁶ However, further

²¹⁴ Pabian et al., *supra* note 173.

²¹⁵ Chen & Huang, *supra* note 14.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Chen & Huang, *supra* note 14.

²²² Lorna Collier, *Growth After Trauma*, 47 AM. PSYCH. ASS'N 48 (2016).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Jolanta Burke, *Post Traumatic Growth: Examining an Increase of Optimism Amongst Targets of Bullying in Ireland*, 16 IRISH ASS'N FOR COUNSELING & PSYCHOTHERAPY 11 (2016).

²²⁶ *Id.*

analysis demonstrated that young people who experience bullying on a daily basis reported the “highest levels of optimism in negative situations.”²²⁷ This result suggests that experiencing bullying may have helped the victims develop post-traumatic growth symptoms.²²⁸ The “ordeal of having to bear daily perpetration may have helped [the victims] advance their life skills, such as optimism, which help them survive their torment.”²²⁹

It is well-known that experiencing adversities may lead an individual to experience increased depression, anxiety, and aggression.²³⁰ However, “what is not often mentioned is that pathologies are not an inevitable consequence of adversities.”²³¹ Studies show that after facing a traumatic event, only five to thirty-five percent of individuals experience symptoms of post-traumatic stress disorder, but the “vast majority” report resilience and psychological growth post-trauma.²³² Additionally, research demonstrates that individuals who experience moderate life adversities are happier than those who do not experience such adversity.²³³ “This may be due to the stress inoculation that occurs when people cope with life challenges, which in turn enhances their self-efficacy and preparedness to tackle subsequent life difficulties. This ‘positive’ side to adversity is often neglected by researchers and practitioners.”²³⁴ Benefits arising from post-traumatic growth include increased personal strength and resilience, improved relationships, an increased appreciation for life, and spiritual growth.²³⁵ Approximately seventy percent of individuals who have undergone a traumatic event experience at least one of the post-traumatic growth benefits, and many people may report all five symptoms at the same time.²³⁶ These qualities are important for the development of future adults.²³⁷

Some rather controversial and perhaps entirely unethical experiments in psychology show what can happen if adults are too afraid of social pressure

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Burke, *supra* note 225.

²³² *Id.*; Matthew J. Cordova, *Facilitating Posttraumatic Growth Following Cancer*, in *TRAUMA, RECOVERY AND GROWTH: POSITIVE PSYCHOLOGICAL PERSPECTIVE ON POSTTRAUMATIC STRESS* 185 (S. Joseph & P.A. Linley eds., 2008); Maria Kangas et al., *Posttraumatic Stress Disorder Following Cancer—A Conceptual and Empirical Review*, 22 *CLINICAL PSYCH. REV.* 449 (2002).

²³³ Burke, *supra* note 225; Mark D. Seery et al., *Whatever Does Not Kill Us: Cumulative Lifetime Adversity, Vulnerability, and Resilience*, 99 *J. PERSONALITY & SOC. PSYCH.* 1025 (2010).

²³⁴ Burke, *supra* note 225.

²³⁵ Richard G. Tedeschi, *Growth After Trauma*, *HARV. BUS. REV.* (2020), <https://hbr.org/2020/07/growth-after-trauma>.

²³⁶ Post-traumatic growth is an outcome experienced by the majority of people that have endured trauma, rather than a select few. Burke, *supra* note 225.

²³⁷ Sherie Newman, *The Importance of Self-Esteem*, *N. ILL. UNIV. CHILD DEV. AND FAM. CTR.*, <https://www.chhs.niu.edu/child-center/resources/articles/self-esteem.shtml> (last visited Apr. 12, 2022).

to think independently.²³⁸ Perhaps the best-known experiment is one where a professional in a lab coat instructed subjects to continue to press buttons that appeared to shock another individual with progressively greater levels of electricity.²³⁹ While this was a ruse, with no actual subject on the other side receiving the electric shocks, pre-taped audio would be played of increasingly severe pain responses, including claims made to the subject pressing the buttons that the recipient of the shock is “having a heart attack” and ultimately dies from the shock.²⁴⁰ Viewing the video of this experiment is shocking, as a large percentage of subjects asked to do this verbally, with no physical or pecuniary coercion, chose to shock the fake subject on the other side of the wall to death.²⁴¹ The individuals exhibited a large amount of guilt and anxiety when doing so, but the presence and stern voice of the lab technician “bullied” them into compliance, which perhaps might not have happened if they had developed the social skills and capabilities of independent thought that would prevent them from complying.²⁴²

This experiment, despite its ethical problems, is significant because it sought to explain something very real: how previously decent men and women in Germany could be convinced by authority that the Holocaust was in any way acceptable.²⁴³ In light of this experiment and the historical record of 1930s Germany, it seems obvious that bullying tactics and social pressure were a large part of it.²⁴⁴ These tactics, adopted by Hitler’s government, might have been far less successful in a nation of individuals hardened to such strategies. Indeed, the experiment did observe differences in the likelihood of compliance between members of different nationalities.²⁴⁵ One must wonder, then, whether we would be better off teaching our students to deal with verbal bullies themselves rather than shielding them from such behavior only to have them exposed to it without preparation in the “real world.” From a government perspective, in a dystopian reality, it might be better if people were less prepared so they could be more easily controlled.

²³⁸ Nestar John Charles Russell, *Milgram’s Obedience to Authority Experiments: Origins and Early Evolution*, 50 J. SOC. PSYCH. 140 (2011).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Arthur G. Miller, *What Can the Milgram Obedience Experiments Tell Us About the Holocaust? Generalizing from the Social Psychology Laboratory*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL* 193 (2004).

²⁴⁴ *Id.*

²⁴⁵ Gunter Bierbrauer, *Stanley Milgram’s Legacy to Cross-Cultural Psychology*, 7 J. PSYCH. EVERYDAY ACTIVITY 37 (2014).

Many people fear social pressure and verbal bullying from a young age.²⁴⁶ We can observe that children so young they cannot fully speak can still identify a situation where one adult bullies another.²⁴⁷ One way to show this is to pick an activity the child seems to enjoy and place the child in a laboratory setting.²⁴⁸ Without any stimuli, the child will engage in the activity in the presence of adults with whom he or she is comfortable.²⁴⁹ The stimuli come by way of a new adult entering the room.²⁵⁰ The child then observes one of the adults he or she knows engage in the enjoyable activity.²⁵¹ The new adult will react negatively, with a verbal expression of disapproval.²⁵² Then, left to his own devices, the child will usually avoid the activity he or she had previously enjoyed after seeing the negative reaction it caused in this new, potentially threatening adult.²⁵³ When the “bullying” adult leaves the room, however, the child is happy to return to the activity he or she had previously enjoyed.²⁵⁴

This experiment is an excellent demonstration of how verbal “bullying,” even when aimed at someone else, can reduce the action set of even a child that cannot yet fully speak.²⁵⁵ Extrapolating this result forward implies that when one student is verbally bullied by another in a school setting, the public humiliation affects not only that student but also those around him. They will now be less likely to engage in activities that draw the attention of the bully. If we assume that the activities the children were previously engaged in were positive, such as studying hard or performing well on academic assignments, then verbal bullying that dissuades them from these activities is of obvious concern.²⁵⁶ In fact, this type of bullying does occur worldwide, though the primary negative impact seems to spring from the physical nature of the misconduct rather than the verbal abuse of fellow classmates who are performing well.²⁵⁷

Yet another branch of psychology suggests that the adversity caused by verbal “bullying” may provide a sort of “training” for the student to handle

²⁴⁶ Ugo Uche, *How a Mindset of Fear Contributes to Bullying*, PSYCH. TODAY (May 6, 2013), <https://www.psychologytoday.com/us/blog/promoting-empathy-your-teen/201305/how-mindset-fear-contributes-bullying>.

²⁴⁷ Carol M. Worthman et al., *When Can Parents Most Influence Their Child's Development? Expert Knowledge and Perceived Local Realities*, 154 SOC. SCI. MED. 62 (2016).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Worthman et al., *supra* note 247.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Ian Rivers et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 SCH. PSYCH. Q. 211 (2009).

²⁵⁷ *Id.*

conflict. For example, clinical psychologists frequently use exposure therapy to help their clients deal with frightening situations that cause discomfort, anxiety, and other similar responses.²⁵⁸ A patient undergoing exposure therapy ordinarily has some fear that might be considered at least partly irrational.²⁵⁹ That is, someone might be afraid of spiders, even though most spiders are incapable of doing any significant damage to a human being.²⁶⁰ Then, he or she might be exposed, in increments, to a tarantula in hopes that the fear will subside as the client begins to associate the appearance, proximity, and perhaps even the feel of the spider on one's skin with something non-harmful.²⁶¹ Over time, and if done carefully, this exposure will actually desensitize the individual and permit him or her to live a more fearless life.²⁶²

While exposure therapy is not easy to do and requires a lot of training to administer correctly, our brains are wired to receive this type of therapy in the real world.²⁶³ First, our brains are already pre-wired to have an aversion to creatures like spiders and to being outcasts among our species.²⁶⁴ The reasons are evolutionarily simple: some spiders *are* dangerous, and it increases a person's odds of survival (and therefore odds of reproduction) to treat all spiders like they are poisonous and avoid them altogether.²⁶⁵ Likewise, being socially ridiculed by others is also a poor bet for reproductive success, as described above, so it is best avoided. This fear of looking foolish in public is so prevalent that one cannot help but assume it is programmed by evolutionary biology.²⁶⁶ That may explain, at least in part, why some people fear public speaking more than death: they are mortified at the possibility of ridicule in the event of failure.²⁶⁷

²⁵⁸ David Sars & Agnes van Minnen, *On the Use of Exposure Therapy in the Treatment of Anxiety Disorders: A Survey Among Cognitive Behavioral Therapists in the Netherlands*, 3 BMC PSYCH. 26 (2015).

²⁵⁹ *Arachnophobia (Fear of Spiders)*, CLEVELAND CLINIC (Sept. 2, 2021), <https://my.clevelandclinic.org/health/diseases/21852-arachnophobia-fear-of-spiders>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Jennifer Lish, *What is Exposure Therapy? CBT in the Real World*, WORCESTER CTR. FOR CBT, <https://worcestercognitivebehaviortherapy.com/exposure-therapy/> (last visited Mar. 21, 2022).

²⁶⁴ *Itsy Bitsy Spider: Fear of Spiders and Snakes is Deeply Embedded in us*, MAX PLANCK INST. FOR HUM. COGNITIVE AND BRAIN SCIS. (Oct. 19, 2017), <https://www.cbs.mpg.de/Fear-of-spiders-and-snakes-is-deeply-embedded-in-us#:~:text=%22We%20conclude%20that%20fear%20of,animals%20as%20dangerous%20or%20disgusting.>

²⁶⁵ *Id.*

²⁶⁶ Kaya Burgess, *Speaking in Public is Worse than Death for Most*, THE TIMES (Oct. 30, 2013, 12:01 AM), <https://www.thetimes.co.uk/article/speaking-in-public-is-worse-than-death-for-most-512bvqlmbnt#:~:text=A%20fear%20of%20public%20speaking,of%20society's%20most%20pervasive%20fears.&text=The%20top%20ranking%2C%20at%206.41,a%205.63%20for%20public%20speaking.>

²⁶⁷ *Id.*

An important caveat should be noted when considering almost all of the psychological literature regarding bullying. Studies that suggest verbal bullying causes irreparable harm, as well as studies suggesting it provides an excellent opportunity for developing coping mechanisms, suffer from a selection bias.²⁶⁸ Selection bias can render some results unreliable despite the best efforts of the researcher, and it is virtually unavoidable when studying bullying.²⁶⁹ Because it would be unethical to gather a random sample of students and then administer bullying as a treatment, researchers must inevitably observe a group of students that is being bullied and compare their academic and professional outcomes in longitudinal studies to the outcomes of students that were not bullied (or that reported that they were not bullied).²⁷⁰

Putting aside the potential unreliability of results gathered by relying on subjects to report their experiences accurately, we must note that there may be some underlying reasons that some students are bullied while others are not.²⁷¹ Therefore, it is possible that these underlying reasons are driving the empirical results we observe, and not the bullying itself.²⁷² For example, a student who is being bullied for poor scholastic performance may not become a successful professional because of the bullying. Or, the student may not become a successful professional because he lacks the work ethic to do so, which is what the student's bullies noted and used against him when his poor work ethic caused underperformance in academics. This selection bias problem is pervasive in the studies and must be noted when discussing their results.²⁷³ The results are the best we have, but there is always the possibility that the true effect of bullying is wildly different than what is reported.

What is also critical about noting the selection bias is that, like it or not, it is possible for bullies to accurately diagnose a person's character defects. In the above example, the same selection bias that might create problems in measuring longitudinal student outcomes post-bullying might signify to the selected that there is something about themselves that they could improve.

²⁶⁸ See generally Eric J. Hegedus & Jennifer Moody, *Clinimetrics Corner: The Many Faces of Selection Bias*, 18 J. MANUAL & MANIPULATION THERAPY 69 (2010). Another recent study found that measures intended to soften the blow of potentially "triggering" content, in general, may be more harmful than helpful. Payton J. Jones et al., *Helping or Harming? The Effect of Trigger Warnings on Individuals with Trauma Histories*, 8 CLINICAL PSYCH. SCI. 905 (2020). In another instance of good intentions leading to unintended consequences, psychologists showed that giving "trigger warnings" before presenting potentially traumatizing information to individuals actually exacerbates the trauma, reduces the subject's ability to cope, and perpetuates victim identity. *Id.* The latter, psychologists have concluded, is counterproductive to coping with traumatic events. *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Neil Tippet & Dieter Wolke, *Socioeconomic Status and Bullying: A Meta-Analysis*, AM. PUB. HEALTH ASS'N (May 13, 2014), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2014.301960>.

²⁷² *Id.*

²⁷³ Hegedus & Moody, *supra* note 268.

Specifically, in studies that show bullying can lead to underperformance, perhaps being selected by bullies is merely a *predictor* of future struggles. That is, if the student who is selected by bullies alters his or her behavior, then he or she might avoid a negative outcome down the road. This is not the only way to interpret the selection bias present in these studies, but it is one way to illustrate that psychological findings on this issue are not always as certain as they appear.

Yet, if we do not know the effect of verbal bullying with certainty, is there any justification for banning speech some students find offensive in the schoolhouse, even if it does not interfere with pedagogy? If the harm is at best uncertain, while the First Amendment encroachment is self-evident, then what basis can there be to circumvent constitutional protections? At the very least, we should err on the side of caution and avoid the guaranteed violation of constitutional liberties for the mere chance that our measures might improve a person's life (but could, just as well, actually harm the person's development). Curtailing classroom speech should be a last resort, not a first impulse.

The human brain, whether exposed to negative stimuli or not, has an amazing capacity for adaptation.²⁷⁴ Our mental framework allows us to adjust for fears that were once well-founded but are now more harmful than they are helpful.²⁷⁵ This can be very important since fear or aversion toward something is not expense-free: it is costly, as the person must now spend energy, suffer from stress, and expend time planning to avoid exposure to undesirable stimuli.²⁷⁶ It was costly for the same reasons during our evolutionary past.²⁷⁷ Hence, over time, the human brain will lessen our fear of certain creatures, heights, social situations, etc., if, after exposure to them, no harm follows.²⁷⁸ One critical example of this is the fear that some humans and other primates have of birds: once, large birds could kill our evolutionary ancestors and were among our most feared predators.²⁷⁹ Yet, now that particularly large birds have gone extinct, even children who fear birds initially become desensitized to the fear because the fear is not reinforced by a fear response from the adults around them.²⁸⁰

It is perhaps notable that humans have some common phobias, many of which we have overcome because our brain provides us with an override to our evolutionary predispositions.²⁸¹ It is no wonder that our mythology

²⁷⁴ Ralph Adolphs, *The Biology of Fear*, 23 CURRENT BIOLOGY R79 (2013).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Did Ancestors Fear Birds?*, CHI. TRIB. (Jan. 13, 2006, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2006-01-13-0601130428-story.html>.

²⁸⁰ *Id.*

²⁸¹ *See Itsy Bitsy Spider: Fear of Spiders and Snakes is Deeply Embedded in us*, *supra* note 264.

frequently includes the dragon, a never-existent creature that is frequently considered to represent the ultimate evil.²⁸² With claws and wings like a predatory bird, scales and mouth like a snake, and the ability to breathe fire, it amalgamates our real fears of potentially deadly things. Snakes can kill a primate in a variety of ways, as can birds, and perhaps the deadliest thing of all for creatures that prefer living in trees is a forest fire.²⁸³ No wonder this is what our minds have conjured to represent something frightful: an amalgamation of everything that can and has historically killed our evolutionary ancestors.²⁸⁴

Oddly enough, our myths almost always involve a protagonist engaging in war with this frightful creature, facing his fears because of the rewards associated with slaying the beast. These rewards almost uniformly include the hand in marriage of a princess, wealth, social recognition, and honor: all things that are likely to lead to reproductive, evolutionary success. The symbolism is clear: those who can conquer their fear of fire can cook food, which kills bacteria and increases the likelihood of survival and reproduction. Those who can kill snakes and large birds, not to mention other predatory animals, can protect their family, also increasing evolutionary odds. That does not mean that slaying the proverbial dragon is easy (it is far from it), but it does mean that it is the only path to evolutionary success.

Applying our brain's ability to become desensitized to certain fears and aversions, it is clear that exposure to verbal bullying does not have to have a negative outcome.²⁸⁵ Yes, it can hurt to hear someone call you a name: it is an experience nearly everyone has had.²⁸⁶ Yet, ironically, we tend to get used to it. While we might remember the first time (or approximately the first time) a peer said something mean to us, which would qualify as bullying behavior, the hundredth time is much harder to recall. The obvious reason for this is because our brains adjust: we learn that even though it is unpleasant to hear that someone is displeased with us, it ultimately is not the end of the world. In a healthy society, almost every child can learn to deal with these types of remarks without outside intervention, perhaps with help from parents, siblings, friends, and school counselors.²⁸⁷ At the end of the day,

²⁸² See generally Robert Blust, *The Origin of Dragons*, 95 ANTHROPOS 915 (2000). We borrow this analogy, at least in part, from the works of Jordan B. Peterson. See, e.g., JORDAN B. PETERSON, MAPS OF MEANING: THE ARCHITECTURE OF BELIEF (1999).

²⁸³ See Morgan Russell & John M. Tomecek, *Effects of Fire on Wildlife*, TEX. A&M AGRILIFE EXTENSION, <https://agrillifeextension.tamu.edu/library/wildlife-nature-environment/effects-of-fire-on-wildlife/> (last visited Mar. 21, 2022).

²⁸⁴ Adolphs, *supra* note 274. The sphynx is also an interesting amalgamation of our fears, which includes the image of not only birds but predatory cats. *Id.*

²⁸⁵ Pabian et al., *supra* note 173.

²⁸⁶ See *Rates of Incidence, Stats*, PACER'S NAT'L BULLYING PREVENTION CTR. (Nov. 2020), <https://www.pacer.org/bullying/info/stats.asp>.

²⁸⁷ See Jennifer Lamb et al., *Approach to Bullying and Victimization*, 55 CANADIAN FAM. PHYSICIAN 356 (2009).

dealing with conflicts is an important part of life and a skill that requires exposure to learn well.²⁸⁸

This capability of coping with verbal stimuli, such as bullying, greatly vindicates the First Amendment and its stringent application in public schools and public colleges. It gives credence to our Founding Father's assumption that people would be able to withstand a large amount of speech without the need to restrict it. Keeping in mind that schooling in the late 1700s was rare to begin with, and that children would frequently enter adulthood in their teens, the prohibition on speech restrictions inherently included the consideration that youthful members of society would be subjected to a large amount of objectionable content, both from other children and adults. It was worth the risk then, and it is worth the risk now, when our children have so many more resources available to them to cope with unpleasant speech.²⁸⁹

CONCLUSION

If you speak the truth, have one foot in the stirrup.

–Turkish Proverb

In public schools and colleges, interventions in student speech have always been on suspect constitutional grounds.²⁹⁰ The First Amendment's protection against free speech restrictions properly applies to students who find themselves in a public school,²⁹¹ especially given that school attendance is mandatory in most states until the age of sixteen.²⁹² While some time, place, and manner restrictions on speech are appropriate, given the inability to teach classes without them, when schools regulate speech based on content, they end up stifling expression and thought.²⁹³ Some classify the type of speech they wish to silence as "bullying," and justify punishing students that say something deemed unpleasant by teachers, staff, or a student listener.²⁹⁴ What they are really doing, though, is depriving the speaker of the

²⁸⁸ See Ann C. Lowry & Amy R. Overton, *Conflict Management: Difficult Conversations with Difficult People*, 26 CLINICS COLON & RECTAL SURGERY 259 (2013).

²⁸⁹ See generally Michael D. Staudt et al., *Evolution in the Treatment of Psychiatric Disorders: From Psychosurgery to Psychopharmacology to Neuromodulation*, FRONTIERS IN NEUROSCIENCE, Feb. 15, 2019, at 1.

²⁹⁰ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

²⁹¹ *Tinker*, 393 U.S. 503; *Bethel*, 478 U.S. 675; *Hazelwood*, 484 U.S. 260.

²⁹² *Table 1.2. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017, State Education Practices (SEP)*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab1_2-2020.asp (last visited Mar. 15, 2022).

²⁹³ *Tinker*, 393 U.S. 503; *Bethel*, 478 U.S. 675; *Hazelwood*, 484 U.S. 260.

²⁹⁴ Suski, *supra* note 105, at 737.

speaker's constitutional rights and denying the listener an important lesson: that it is possible to process and react to unpleasant speech in positive ways without involving the force of government.²⁹⁵

The First Amendment already requires adults to suffer quite a bit of unpleasantness in the public square, protecting speakers from recourse whether hateful language is aimed at an ordinary person, an officer of the law, the President of the United States, or even the Supreme Court itself.²⁹⁶ It makes little sense that our public schools and colleges, which are supposed to teach students civics, deprive them of the very first right our Founding Fathers sought to protect.²⁹⁷ Sure, verbal bullying can be hurtful, and it can have significant adverse effects on those on the receiving end.²⁹⁸ The key is to realize that it does not stop in middle school or high school.²⁹⁹ It is a protected activity in the adult world, and the best way our citizens can be prepared for it is by learning a way to address it in school without using government intervention (which will be largely unavailable in the adult world).³⁰⁰ Refusing to intervene is an important action (or inaction) that government workers can take: it protects them from being involved in a civil rights violation, protects the speaker's expressive rights, and gives other students the opportunity to learn that verbal bullying can be overcome.³⁰¹

Many who are concerned about the impact of bullying within our schools and colleges point to the rise in depression, anxiety, suicidal tendencies, violent tendencies, and even retaliation that involves school shootings by victims of bullying.³⁰² The studies we highlight clarify that this is too easily blamed on verbal bullying in the schoolhouse.³⁰³ Arguably, we have more rules against bullying than ever in this nation's history (and less opportunity to bully due to COVID-19 and remote learning), and yet, the aforementioned psychological illnesses, as well as their symptoms and

²⁹⁵ Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

²⁹⁶ U.S. CONST. amend. I.

²⁹⁷ Jay Cost, *James Madison's Lesson on Free Speech*, NAT'L REV. (Sept. 4, 2017, 8:00 AM), <https://www.nationalreview.com/2017/09/james-madison-free-speech-rights-must-be-absolute-nearly/>.

²⁹⁸ Sophie E. Moore et al., *Consequences of Bullying Victimization in Childhood and Adolescence: A Systematic Review and Meta-Analysis*, 7 WORLD J. PSYCHIATRY 60 (2017).

²⁹⁹ Stacey Colino, *The Long Reach of Adult Bullying*, U.S. NEWS & WORLD REP. (Dec. 15, 2017, 9:49 AM), <https://health.usnews.com/wellness/mind/articles/2017-12-15/how-adult-bullying-impacts-your-mental-and-physical-health>.

³⁰⁰ U.S. CONST. amend. I.

³⁰¹ Olivia Byjos et al., *Overcoming Bullying: The Narrative Experiences of Adults and Potential Roles for Occupational Therapy*, AM. J. OCCUPATIONAL THERAPY, Fall 2016, at 1.

³⁰² *The Little-Known Health Effects of Bullying*, *Bullying*, NIH MEDLINEPLUS MAG. (Sept. 30, 2020), <https://magazine.medlineplus.gov/article/the-little-known-health-effects-of-bullying>.

³⁰³ See Pabian et al., *supra* note 173.

manifestations, are trending up.³⁰⁴ It is almost as if “bullying” is a stand-in phrase used to describe speech unpleasant to our authorities, giving them an opportunity to condition future voters not to speak their mind through associating free speech activity with negative reinforcement.

Perhaps the psychological problems suffered by today’s youth are not caused by verbal bullying but a significant number of other factors, from an increase in fatherless families to social media, that drive school and college students to feel lost.³⁰⁵ The way to address at least part of the problem is to teach techniques for handling and overcoming adversity, not shielding these students from it.³⁰⁶ If psychological studies tell us anything about character growth, it is that individuals develop beneficial character traits by tackling problems head-on, not by being forever shielded from them.³⁰⁷ Even if a student is suffering ridicule by another in the schoolhouse, the best way to handle the ridicule is a mix of self-improvement and the realization that the opinions of other schoolchildren do not greatly change one’s circumstances. That lesson cannot be learned if each violation of restrictions on verbal bullying involves an infringement on the First Amendment liberties of the “bully” to the benefit of the alleged victim. This can only incentivize a “victim” mentality, which studies suggest has little connection to subsequent success.³⁰⁸

Our Article highlights a worrying trend by public school officials and governments to police an ever-growing amount of speech on school and college campuses.³⁰⁹ Because “bullying” is a conveniently large category that is difficult to define and that can shrink or expand at the whim of an administrator, prosecution of students under bullying regulations almost assuredly implicates the First Amendment.³¹⁰ The rules are fraught with vagueness, do much to silence and chill expression, and have very questionable benefits (if they have benefits at all).³¹¹ The obvious thing to do for constitutionally minded officials would be to stop their enforcement

³⁰⁴ Petr Winkler et al., *Increase in Prevalence of Current Mental Disorders in the Context of COVID-19: Analysis of Repeated Nationwide Cross-Sectional Surveys*, EPIDEMIOLOGY & PSYCHIATRIC SCIS., Sept. 29, 2020, at 1.

³⁰⁵ Fazida Karim et al., *Social Media Use and its Connection to Mental Health: A Systematic Review*, CUREAUS (June 15, 2020), <https://www.cureus.com/articles/31508-social-media-use-and-its-connection-to-mental-health-a-systematic-review>.

³⁰⁶ Bari Walsh, *The Science of Resilience, Usable Knowledge*, HARV. GRADUATE SCH. OF EDUC. (Mar. 23, 2015), <https://www.gse.harvard.edu/news/uk/15/03/science-resilience>.

³⁰⁷ Anthony D. Mancini, *When Acute Adversity Improves Psychological Health: A Social-Contextual Framework*, 126 PSYCH. REV. 486 (2019).

³⁰⁸ *Id.*

³⁰⁹ Phillip Williamson, *Schools Can Regulate Off-Campus Speech—Within Tight Limits*, TAFT/ (July 1, 2021), <https://www.taftlaw.com/news-events/law-bulletins/schools-can-regulate-off-campus-speech-within-tight-limits>.

³¹⁰ U.S. CONST. amend. I.

³¹¹ Raul R. Calvo et al., *Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 378 (2013).

measures. If they refuse to do that, we can only hope that state and federal courts are militant in enforcing the First Amendment and that judges remain unpersuaded by the hollow argument that speech rights should apply differently to children than they do adults. Only then can we be sure that our children receive the full civic education they deserve for the price of our taxpayer dollars: that under our system, expression is of paramount importance and that our Founding Fathers wished for us to tolerate a large volume of it in hopes that this tolerance eventually encourages valuable public discourse.³¹²

³¹² Cost, *James Madison's Lesson on Free Speech*, *supra* note 297.