Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After *Morse v. Frederick*

by JESSICA MOY*

> In constructing and maintaining a system of freedom of expression, . . . [t]he crucial issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society.
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> —*Thomas I. Emerson*[1]

Introduction

"Cyberbullying has become increasingly . . . prevalent as today's adolescents grow up with a savvy understanding of technology and base a significant portion of their social lives around Internet interactions with their social groups."[2] A recent survey concluded that "[n]early a third of online teens say they have been harassed on the internet," including being sent "threatening or aggressive

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1. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 887 (1963).

2. Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 775 (Spring 2008); *see also* Bill Belsey, *Cyberbullying: An Emerging Threat to the "Always On" Generation* (2005), http://www.cyberbullying.ca/pdf/Cyberbullying_Article_by_Bill_Belsey.pdf.

messages."[3] These newly minted "cyberbullies" use the Internet to send or post hurtful messages or images and exploit technology to control and intimidate others on school campuses.[4]

Bullying is a powerful tool of oppression during middle school and high school years, when children form groups or cliques based on a commonality of interests, values, abilities, and tastes in order to gain acceptance and a sense of security.[5] Belonging to and identifying with a group is a healthy step towards self-realization, but the same system of group identification creates a culture that nurtures discrimination through exclusivity and exclusion.[6] According to a 2007 study by the Federal Probation Juvenile Department, "90 percent of middle-school students have had their feelings hurt online," while "75 percent have visited a [website that bashed] another student."[7] Cyberbullies also target teachers or school administrators with disparaging, defamatory, or threatening comments on the Internet. Instances when an adult is the target of this behavior are known as "cyberharassment."[8]

Bullying is defined as a "conscious, willful, and deliberate hostile activity intended to harm, induce fear through the threat of further aggression, and create terror," and usually involves three elements: an imbalance of power, intent to harm, and threats of further aggression.[9] "Cyberbullying" is a term describing "use of the [i]nternet, cell phones, or other technology to send or post text or images intended to hurt or embarrass another person."[10] "In whatever form bullying occurs, the victim always experiences a pattern of humiliation, abuse, and fear."[11] "A bully's actions are

3. Associated Press, *One-Third of Online Teens Bullied, Study Finds*, CNN.COM, June 28, 2007, *available at* http://www.cnn.com/2007/TECH/internet/06/28/cyber.bully.ap/index.html.

4. Belsey, *supra* note 2, at 3–4.

5. Chaffin, *supra* note 2, at 778; *see also* BARBARA COLOROSO, THE BULLY, THE BULLIED, AND THE BYSTANDER: FROM PRESCHOOL TO HIGH SCHOOL—HOW PARENTS AND TEACHERS CAN HELP BREAK THE CYCLE OF VIOLENCE 13, 26 (2003).

6. COLOROSO, *supra* note 5, at 26.

7. Alvin W. Cohn, *Juvenile Focus*, 71 FED. PROBATION 44, 50 (2007).

8. Stopcyberbullying.org, *What is Cyberbullying, Exactly?*, http://www.stopcyberbullying.org/whatiscyberbullyingexactly.html (last visited Sept. 15, 2008).

9. COLOROSO, *supra* note 5, at 13–14.

10. Janis Wolak et. al., *Does Online Harassment Constitute Bullying? An Exploration of Online Harassment by Known Peers and Online-Only Contacts*, 41 J. Adolescent Heath S51, S51–52 (2007) (citation omitted).

11. Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 777 (Spring 2008).

intentional, never accidental; instead, they are directed attacks against a specific victim."[12]

Unlike traditional school-yard bullies, the intimidation tactics of cyberbullies have limitless reach because they possess the ability to humiliate and harass their peers with a click of a button, thereby disseminating hurtful untruths to a wide audience.[13] Consequently, cyberbullying results in a greater impact than traditional bullying because Internet content is widely distributed and more public than traditional bullying. Constant harassment made possible by a website compounds the invasion of privacy and the impact of bullying.[14] Additionally, the Internet cloaks a cyberbully in anonymity and provides a sense of detachment from his or her victim.[15] This, in combination with the belief that they are beyond the legal reach of schools because harassment occurs outside of "the schoolhouse gates,"[16] emboldens bullies to victimize in particularly cruel, and often psychologically damaging, ways.

Victimization over the Internet can precipitate grave consequences during the vulnerable and volatile adolescent years. For example, 13-year-old Ryan Patrick Halligan took his own life as a result of cyberbullying by his peers at school.[17] Ryan's school-yard bully made him a victim of online bullying by taking a funny story out of context and spreading a rumor that Ryan was gay throughout the entire school via instant messaging ("IM") and chat rooms.[18] Additionally, a popular girl at school convinced Ryan that she liked him through a series of IMs and subsequently shared the details of her online conversations with others at school to humiliate and embarrass Ryan.[19] Later, the girl told Ryan that she would never want anything to do with such a "loser."[20] In response, Ryan said that

12. *Id.*

13. *Id.* at 817.

14. Sandy Coleman, *Battling the Web's Dark Side: Schools Balance Student Rights, Rules in Incidents on Net*, BOSTON GLOBE, Mar. 27, 2000, at B1.

15. Francoise Gilbert & Brad Laybourne, *Anonymity on the Internet Legal Aspects*, 823 PLI/Pat 205, 214–18 (2005).

16. Stopcyberbullying.com, *supra* note 8.

17. John Halligan, *Ryan's Story: In Memory of Ryan Patrick Halligan 1989–2003*, www.ryanpatrickhalligan.com (last visited February 6, 2010).

18. *Id.*

19. *Id.*

20. *Id.*

"it was girls like her that made him want to kill himself," and he did just that.[21]

A significant amount of student speech has become cyberspeech due to the proliferation of social networking sites, such as MySpace and Facebook, videos on YouTube, IM, and online blogs.[22] In 2005, 87% of teenagers used the Internet, compared to 73% in 2000.[23] Today, 65% to 75% of teenagers use social networking websites and have online profiles.[24] Victims of bullying experience a variety of negative effects from psychological abuse, such as lowered self-esteem, anxiety, decreased attentiveness, and lowered grades.[25] Although most of the content produced by cyberbullying originates outside the orbit of school campuses and on personal computers, "the effects of such content can be felt every day within the schoolhouse gates."[26] In light of these developments, schools increasingly face the issue of how to deal with online speech that takes place off of school grounds.

"Harassing speech poses perhaps the most difficult challenge to any argument limiting the power of schools to punish student expression."[27] As illustrated above, cyberbullying and cyber-harassment can cause serious psychological damage to students, severely undermine their ability to learn and succeed in school, and at

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21. Gretchen Voss, *MeanKids.Com: The Internet is raising the stakes on traditional bullying, often with devastating results. Is your kid at risk?* http://www.bostonmagazine.com /articles/meankidscom/ (last visited February 7, 2010).

22. Amanda Lenhart & Mary Madden, *Teens, Privacy & Online Social Networks—How teens manage their online identities and personal information in the age of MySpace*, PEW INTERNET & AM. LIFE PROJECT (2007), *available at* http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf (last visited February 6, 2010).

23. Amanda Lenhart, Mary Madden & Paul Hitlin, *Teen and Technology—Youth are leading the transition to a fully wired and mobile nation*, PEW INTERNET & AM. LIFE PROJECT (2005), *available at* http://www.pewinternet.org/~/media//Files/Reports/2005/PIP Teens_Tech_July2005web.pdf.pdf.

24. Social network use by adult Americans on the rise survey. http://en.kioskea.net/news/11805-social-network-use-by-adult-americans-on-the-rise-survey (2009) (last visited February 7, 2010).

25. Kathleen Conn, *Bullying, Harrassment, and Student Threats: Are Schools and The Courts Working Together?*, 203 EDUC. L. REP. 1, 1 (2005).

26. Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 258 (2008).

27. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1094 (2008); *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that a private action may lie against the school board in cases of student-on-student harassment, but only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit).

times lead to truancy, violence, and suicide.[28] "Courts and commentators disagree about when schools should have authority to restrict harassing, intimidating, or otherwise hurtful speech even when it plainly occurs on school grounds."[29]

> One reason for this lack of consensus is that the First Amendment does not categorically exclude harassing or intimidating speech from its protections. Indeed, the Court has made it clear that individuals must tolerate speech that denigrates their racial or ethnic background or religious beliefs if the expression falls short of [fighting words, obscenity, certain types of defamatory speech, and true threats].30

In the public secondary school setting, courts have disagreed about whether schools can prohibit speech that is not covered by federal anti-discrimination law. For example, the Ninth Circuit held in *Harper v. Poway Unified School District* that a school could restrict anti-gay speech even if it is non-disruptive and not directed specifically at another student.[31] On the other hand, the Third Circuit struck down a similar anti-harassment policy as unconstitutionally overbroad, holding instead that schools can restrict harassing speech only when it satisfies *Tinker v. Des Moines School District's* "substantial disruption" standard (as discussed *infra* in section I.A).[32]

Weaving the Internet into the school regulation equation adds an additional layer of complexity. The borderless, omnipresent nature of the Internet defies geographical limits and blurs the traditional on-campus off-campus threshold for school regulation of student speech.[33] Unlike traditional methods of disseminating speech, the Internet is a boundless ubiquitous medium that allows for instantaneous, continuous, and comprehensive distribution of one's message. Amid rapid technological evolution, schools continue to

28. Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216–24 (2003).

29. Papandrea, *supra* note 27, at 1096.

30. *Id.* at 1096–97 (footnote omitted); *see also* Thomas E. Wheeler, *Lessons from the Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 EDUC. L. REP. 227, 234 (2007) (citing Boucher v. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 854 (7th Cir. 1998)).

31. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171–78 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

32. *See infra* section I.A.; *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3rd Cir. 2001).

33. Servance, *supra* note 28, at 1214.

struggle with balancing the rights of speakers against the rights of others within the school community.[34]

Cyberbullying on the Internet by high school and middle school students is a unique social harm, yet it is not addressed by any current social reforms.[35] Section I of this Note discusses the traditional standards applied by school authorities when determining the scope of student speech. Sections II and III illustrate how the Supreme Court's recent decision in *Morse v. Frederick* has impacted and fragmented subsequent lower court rulings in student speech cases. In light of student use of the omnipresent and amorphous medium of the Internet, Section IV discusses lower court interpretation and application of the *Morse* decision and examines the courts' struggle to reconcile the tension between respecting student free speech rights and protecting other students' and administrators' individual rights. Finally, Section V proposes two possible alternative approaches to *Morse* to address the challenges presented by cyberbullying and cyberharassment cases.

I. Traditional Student Speech Rights As Defined by the *Tinker-Fraser-Hazelwood* Trilogy

School districts frequently seek to punish students under the school discipline code for off-campus Internet speech. Once the school district levies punishment, a student may seek the aid of courts to vindicate her First Amendment rights through overturning the punishment. In these lawsuits, courts typically apply the *Tinker* standard of substantial and material disruption to the off-campus Internet speech to determine whether or not the school district's punishment was justified. Lower courts generally have not applied the Court's subsequent rulings in *Bethel School District v. Fraser* and *Hazelwood School District v. Kuhlmeier* to off-campus Internet speech cases. This section provides an overview of the traditional standards governing the scope of student speech and the reach of school authority.

A. *Tinker* Standards

In *Tinker v. Des Moines School District*, the United States Supreme Court created a distinction between expression taking place off-campus and expression that occurs inside "the schoolhouse

34. Servance, *supra* note 28, at 1218.

35. Chaffin, *supra* note 2, at 776.

gates."[36] The Court held that the school district violated students' free speech rights when it prohibited them from wearing black armbands in protest of the Vietnam War.[37] It set forth the "substantial disruption test," which established that student speech may be punished if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[38] The Court also found that First Amendment rights must be "applied in light of the special characteristics of the school" and that undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.[39] Subsequent Supreme Court decisions applied the "substantial disruption test" to on-campus speech, but the Court has never specified the proper method of evaluating off-campus student speech.

B. *Fraser* Standards

In *Bethel School District v. Fraser*, the Court expanded school districts' ability to regulate student speech occurring during school-sponsored activities and events on campus.[40] Matthew Fraser, a junior at a Washington State high school, delivered a speech laced with sexual references before the student assembly.[41] School officials suspended Fraser for several days even though his speech caused no actual disruption.[42]

In *Fraser,* the Court noted a "marked difference" between the political speech in *Tinker* and what it termed Fraser's "sexual speech."[43] The Court held that the First Amendment does not bar a school from punishing a student's "lewd and inappropriate" speech when delivered at a school assembly.[44] Student expression constituting lewd, vulgar, and offensive speech do not enjoy the protection of the First Amendment.[45] Additionally, the Court also accorded less respect to student rights in general, writing that "the constitutional rights of students in public school are not automatically

36. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
37. *Id.* at 514.
38. *Id.* at 513.
39. *Id.* at 506.
40. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 676 (1986).
41. *Id.* at 675.
42. *Id.*
43. *Id.* at 680, 682.
44. *Id.* at 685.
45. *Id.* at 676.

coextensive with the rights of adults in other settings."[46] Thus, the Court established a balancing test, explaining that "the . . . freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[47] However, in alignment with *Tinker*, the *Fraser* Court asserted that the same type of expression would not be punished if spoken outside the schoolhouse gates.[48]

C. *Hazelwood* Standards

In *Hazelwood School District v. Kuhlmeier*, a high school principal in Missouri objected to two student articles in the school newspaper addressing teen pregnancy and the impact of divorce upon teenagers.[49] Because the newspaper was produced as part of a high school journalism class, the principal asserted that he had control over the newspaper.[50] Subsequently, he ordered the articles excised from the newspaper, and several students sued, claiming a violation of their First Amendment rights.[51] The Supreme Court sided with the school, recognizing that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[52] The Court created a distinction between school-sponsored and incidental expression, holding that school administrators could censor student writings from school-sponsored publications and activities as long as the restriction is based on "legitimate pedagogical concerns."[53]

II. *Morse v. Frederick*: Expanding the Reach of School Authority Beyond 'The Schoolhouse Gates'

Tinker, *Fraser*, and *Hazelwood* all involved speech that occurred on-campus. However, the Supreme Court's most recent decision concerning student speech failed to delineate a clear on/off-campus

46. *Id.* at 682.
47. *Id.* at 681.
48. *Id.* at 688.
49. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988).
50. *Id.*
51. *Id.*
52. *Id.* at 266 (citation omitted).
53. *Id.* at 271–73.

distinction for moderating student speech.[54] Unlike the cases before it, *Morse v. Frederick* involved conduct that occurred away from school premises.[55]

In *Morse*, a high school student from Juneau, Alaska, unfurled a fourteen-foot banner across the street from the school emblazoned with the words "BONG HiTS 4 JESUS."[56] The act occurred while the 2002 Olympic torch relay passed in front of the school.[57] The student argued that his case should not be analyzed within the traditional school speech framework because his expressive conduct ostensibly occurred off-campus at an event attended by the general public.[58] The Court rejected Frederick's argument and held that his conduct was school speech occurring on-campus because the Olympic torch relay event was a school-sponsored class trip during school hours, school teachers and other administrators were supervising the students, and Frederick unfurled his banner while standing amongst his fellow students.[59]

In ruling on the case, the Supreme Court carved out new area of unprotected student expression: speech advocating illegal drug use.[60] In addition to creating this new exception restricting student speech rights within the schoolhouse gates, the Court extended the restriction beyond the school's physical boundaries.[61] The majority refused to read *Fraser* expansively to "encompass any speech that could fit under some definition of 'offensive.'"[62] In their joint concurrence Justices Alito and Kennedy joined the majority opinion only

> on the understanding that (a) it goes no further than to hold that public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or

54. Morse v. Frederick, 551 U.S. 393, 400–04 (2007).
55. *Id.* at 400–01.
56. *Id.* at 397.
57. *Id.*
58. *Id.* at 397–400.
59. *Id.* at 400–01.
60. *Id.* at 396–97, 403–10.
61. *Id.*at 400–01.
62. *Id.* at 409.

> social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[63]

Justice Alito also noted that "*in most cases*, *Tinker's* 'substantial disruption' standard permits school officials to step in before actual violence erupts."[64]

III. Controversial Lower Court Interpretations of the Alito/Kennedy Concurrence in *Morse*

The following cases indicate that lower courts are willing to extend the logic and reasoning of *Morse* to support the censorship of student speech that either threatens physical violence or causes emotional injury.[65] These fragmented lower court interpretations suggest that *Morse* did little to calm what one federal appellate court called "the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents."[66]

Ponce v. Socorro Independent School District involved an extended notebook diary, written in first-person perspective, describing the creation of a pseudo-Nazi group at a high school.[67] The Fifth Circuit held that "a *Morse* analysis" is appropriate, rather than the traditional, well-established, and more rigorous *Tinker* "substantial disruption" standard when the student speech at issue "threatens a Columbine-style attack on a school."[68] The court relied on what it called "Justice Alito's concurring, and controlling, opinion" in *Morse* to establish a very broad, pro-censorship principle that "speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment is unprotected."[69] The court's decision extended application of *Morse* to include *harm to*

63. *Id.* at 422. (Alito, J., concurring).

64. *Id.* at 425 (emphasis added).

65. Clay Calvert, *Misuse and Abuse of* Morse v. Frederick *by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 21–24 (Fall 2008).

66. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006), *cert. denied*, 551 U.S. 1162 (2007).

67. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 766 (5th Cir. 2007).

68. *Id.*

69. *Id.* at 770.

others, as opposed to mere *harm to self,* as implicated by *Morse*'s allowance of prohibiting speech advocating illegal drug use.[70]

The Ninth Circuit, in *Harper v. Poway Unified School District,* further extended the Court's holding in *Morse.*[71] In *Harper*, Ponway High School punished a student for wearing a T-shirt to school that read "Be Ashamed, Our School Embraced What God Has Condemned" on the front, and "Homosexuality Is Shameful 'Romans 1:27'" on the back.[72] In upholding the student's punishment, the Ninth Circuit reasoned that *Morse* affirms that school officials have a duty to protect students, as young as fourteen or fifteen years of age, from degrading acts or expressions injurious to students' physical, emotional, or psychological well-being and development which, in turn, adversely impacts the school's educational mission.[73] The court relied on *Morse* to support its holding that restriction of speech by school officials is proper if it is considered harmful and undermines "the rights of other students."[74] As such, the court found that the expression was properly censored because students who were the targets of the shirt's homophobic message suffered emotional distress.[75]

The Seventh Circuit's holding in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204* likewise suggests that *Morse* can be used to suppress speech that causes psychological harm.[76] This case involved a T-shirt emblazoned with the phrase "Be Happy, Not Gay."[77] The court reasoned that the *Morse* holding encompassed the *psychological* effects of speech, referencing the *Morse* Court's citation of its prior opinion in *Vernonia School District 47J v. Acton* that "school years are the time when the physical, *psychological*, and addictive effects of drugs are most severe."[78] *Nuxoll* is perhaps the most dramatic indication of the way that lower courts are willing to

70. Calvert, *supra* note 65, at 15–17.

71. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 , 1192 (9th Cir. 2006), *vacated,* 549 U.S. 1262 (2007).

72. *Id.* at 1171.

73. *Id.* at 1178–1184.

74. *Id.* at 1178–80.

75. *Id.*

76. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008).

77. *Id.* at 670.

78. *Id.* at 674; Morse v. Frederick, 551 U.S. 393, 407 (2007) (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–62 (1995)) (emphasis added).

broaden the traditional limitations set forth in *Tinker* based on their perception and interpretation of the logic set forth by the Supreme Court in *Morse*.

IV. Implications for Student Cyberspeech and Cyberbullying In Light of Expansive Lower Court Interpretations of *Morse*

Reno v. ACLU was the first major Supreme Court ruling regarding the regulation of materials distributed via the Internet.[79] In *Reno*, the Court voted to strike down provisions of the Communications Decency Act and held that the Internet is a forum fully protected by the First Amendment.[80] The basis for the Court's decision in *Reno* was that restricting indecent speech on the Internet to protect minors unconstitutionally infringed the free speech rights of adults.[81]

The Supreme Court, however, has not addressed school officials' authority to punish student speech involving the digital media. While all of the Court's school speech cases involved speech occurring on school grounds or during school-sponsored activities, the Court's increasing deference to school administrators suggests that it is willing to expand the ability of schools to regulate student speech, regardless of the medium involved.[82] The Court has recognized that public school students do not receive the same level of free expression rights as adults in a general setting.[83] In circumscribing students' constitutional rights, the Court emphasized in *Tinker* that these rights must be interpreted in light of the unique environment of the public school.[84] In his concurring opinion in *Morse*, Justice Alito likewise acknowledged that "schools can be places of special danger" because students "may be compelled on a daily basis to spend time at close quarters with other students who may do them harm."[85]

Courts typically rely on the "substantial disruption" test articulated in *Tinker* when addressing incidents of cyberbullying originating from personal computers which affect students attending

79. Reno v. ACLU, 521 U.S. 844, 849 (1997).
80. *Id.* at 844, 874–79.
81. *Id.*
82. *Morse*, 551 U.S. at 433 (Stevens, J., dissenting).
83. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).
84. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
85. *Morse*, 551 U.S. at 422 (Alito, J., concurring).

the public schools.[86] First, courts consider the threshold issue of whether Internet speech originating on personal computers is "on-campus" or "off-campus" speech.[87] "When doing so, courts have analogized these incidents to cases dealing with 'underground newspapers' or other types of publications that were printed off-campus but later made their way onto campus."[88] "In some cases, courts have [determined] that where there is a 'sufficient nexus between the web site and the school campus,' the speech can be considered 'on-campus.'"[89] "[The] nexus [was] established in cases where a student accessed a web site at school during class and . . . where the web site content was aimed specifically at the school and was carried by students onto campus."[90] Under the "substantial disruption" standard, however, the majority of courts held that cyberspeech created off-campus falls beyond the jurisdiction of school disciplinary action.[91]

In a case where the court finds a sufficient nexus between speech and the school campus, it will then examine whether the speech substantially or materially disrupted the learning environment.[92] There is no precise test for what defines a "substantial disruption," but courts have reasoned that there must be more than some mild

86. Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 263 (2008); *see, e.g.*, J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002).

87. Erb, *supra* note 86, at 263; *see, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004); *J.S.*, 807 A.2d at 865.

88. Erb, *supra* note 86, at 264; *see, e.g.*, LaVine v. Blaine Sch. Dist., 257 F.3d 981, 983–84, 989 (9th Cir. 2001); Boucher v. Sch. Bd. Of Sch. Dist. of Greenfield, 134 F.3d 821, 822–23 (7th Cir. 1998); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1074–77 (5th Cir. 1973).

89. Erb, *supra* note 86, at 264; *see J.S.*, 807 A.2d at 865 (determining whether a sufficient nexus exists between off-campus speech and a school environment is based upon the point of receipt, not necessarily transmission); *see also* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) (finding that the test for school authority is not geographical and that the reach of school administrators is not strictly limited to the school's physical property).

90. Erb, *supra* note 86, at 264; *see, e.g.*, *J.S.*, 807 A.2d at 852, 865 (illustrating a time when students and administrators accessed a website at school); Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177–80 (E.D. Mo. 1998) (using the Tinker standard for on-campus speech when students and teachers access the website on school computers, but ruling that the website did not cause a substantial disturbance).

91. Erb, *supra* note 86, at 265; *see, e.g.*, Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

92. Erb, *supra* note 86, at 266; *see, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969); *Boucher*, 134 F.3d at 827–28.

distraction or curiosity created by the speech,[93] while "complete chaos is not required."[94]

> In determining the magnitude of disruption, courts consider factors such as: the reaction of the students and teachers to the speech,[95] whether any students or teachers had to take time off from school because of the speech,[96] whether teachers were incapable of controlling their classes because of the speech,[97] whether classes were cancelled,[98] and how quickly the administration responded to the speech.[99]

"If the court . . . finds that the Internet speech actually disrupted or foreseeably could have disrupted the school's learning environment, the administration's disciplinary measures [are generally] upheld."[100]

The following cases illustrate the way in which the concept of what constitutes "on-campus" and "off-campus" activities has evolved given growing concern about cyberbullying, and how this concern has been juxtaposed with expansive interpretations of the reach of school authority after *Morse*. In a world of rapid technological development, adolescent adeptness in navigating cyberspace, and the Supreme Court's ruling in *Morse*, lower courts continue to struggle with how to reconcile new technological mediums, traditional standards, and the potentially devastating impact of cyberbullying and cyberharassment.

A. The 'Sufficient Nexus and Specific Audience' Approach

In *J.S. ex rel H.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court upheld the school's decision to expel a

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93. Erb, *supra* note 86, at 266.; *see* Burnside v. Byars, 363 F.2d 744, 748–49 (5th Cir. 1996).

94. Erb, *supra* note 86, at 266; *see J.S.*, 807 A.2d at 868.

95. *J.S.*, 807 A.2d at 869.

96. *Id.*; *see also* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

97. *Killion*, 136 F. Supp. 2d at 455.

98. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).

99. *Id.*; *see also J.S.*, 807 A.2d at 869.

100. Erb, *supra* note 86, at 266 ; *see, e.g.*, Wisnieski *ex rel.* Wisnieski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–40 (2d Cir. 2007) (upholding school disciplinary measures because it was reasonably foreseeable that the student's conduct would "disrupt the work and discipline of the school"); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1390, 1392 (D. Minn. 1987) (finding that an underground publication that contained vulgar language and advocated violence against teachers substantially disrupted school operations because teachers "found it necessary to quell these disruptions").

student for a website he created entitled "Teacher Sux."[101] The website portrayed a teacher as Hitler, solicited funds for a hit man under the caption "Why Should She Die," and included pictures of the teacher's severed head dripping blood.[102] When the teacher viewed the website, she became very distressed, as manifested by the onset of physical illness.[103] Because she was so emotionally distraught due to the website's contents, the teacher was unable to finish the school year.[104]

The court held that speech will be considered on-campus speech where there is a "sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus... Importantly, the website was aimed not at a random audience, but at the specific audience of students and other connected with this particular School District."[105] Specifically, the court held that "where speech that is aimed at a specific school and/or its personnel is brought onto school campus or accessed at school by its originator, the speech will be considered on-campus speech."[106] Applying this rule, the court concluded that the student's website was on-campus speech even though he created it off-campus because he accessed the website at school, showed it to another student, and told other students about it.[107]

The court found that the student's expulsion fit within the punishment allowed by the Court's *Fraser* framework of discipline "for speech that undermines the basic function of a public school."[108] Applying *Tinker*, the court also found that the website caused a material and substantial disruption at the school.[109] Accordingly, the court found in favor of the school administrators and upheld the expulsion of the student for posting the derogatory and threatening comments on his website.[110] The significance of this case is that the Pennsylvania Supreme Court acknowledged the authority of school administrators to discipline a student for Internet speech; however,

101. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).
102. *Id.*
103. *Id.* at 852.
104. *Id.*
105. *Id.* at 865.
106. *Id.*
107. *Id.*
108. *Id.* at 868.
109. *Id.* at 869.
110. *Id.*

the court first had to find that the speech was considered "on-campus."[111]

In contrast to *J.S.*, the court in *Layshock v. Hermitage School District* granted summary judgment in favor of a student who claimed the school violated his First Amendment rights by punishing him for creating an unflattering mock profile of his principal on MySpace.com, which suggested that the principal had alcohol abuse problems and labeled him as a "big fag," "big steroid freak," and "big whore."[112] Layshock mentioned the profile to just a few classmates, but word of the computer profile spread through the student body.[113] Students began viewing the profile so frequently that the school found it necessary to shut down student access to the computer system for five days.[114] The court, however, found that disruption insufficient to meet the *Tinker* standard because "no classes were cancelled, no widespread disorder occurred, [and] there was no violence or student disciplinary action."[115]

B. The 'Reasonably Foreseeable' Approach Combined with the *Tinker* Test

Two controversial decisions of the Second Circuit, *Wisniewski v. Board of Education* and *Doninger v. Niehoff*, directly invoked *Morse* and grappled with crafting the appropriate regulatory standard to apply in instances of administrative cyberharassment. The *Wisniewski* court upheld a suspension based on the student's creation of an icon depicting a pistol firing a bullet at a person's head and the words "Kill Mr. VanderMolen" attached to the instant messages that he sent his friends.[116] The Second Circuit emphasized that "[t]he fact that [the student]'s creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."[117] The icon appeared only in private communications Wisniewski sent to his friends, he did not use a school computer to send these communications, and the icon came to the school's attention only weeks later when another student, who

111. *Id.* at 864.

112. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).

113. *Id.* at 591.

114. *Id.* at 592.

115. *Id.* at 600.

116. Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

117. *Id.* at 39.

had not received an email from Wisniewski himself, told the teacher about it.[118]

The court justified its holding by reasoning it was "reasonably foreseeable" that the icon would come to the attention of the school authorities and would "materially and substantially disrupt the work and discipline of the school."[119] The icon disrupted school operations because it diverted the attention of school officials, required the replacement of the threatened teacher (who refused to teach Wisniewski), and required officials to interview students during class time.[120] Given these factors, the court ruled that it was irrelevant whether the student's icon constituted a "true threat" because "we think that school officials have significantly broader authority to sanction student speech than the [*Fraser* "true threat"] standard allows."[121]

In determining what standard should be used to review the case, the court stated that where a "student's expression [is] reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District*."[122] Because of the violent nature of the icon, the court applied the *Tinker* standard due to "[t]he fact that [the student's] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."[123]

In determining that the speech was not automatically outside of the school's jurisdiction, the court noted the Supreme Court's decision in *Morse*, and the lack of clarification provided therein with respect to the reach of a school's authority to discipline students for off-campus speech.[124] Specifically, the Second Circuit stated:

> Since the Supreme Court in *Morse* rejected the claim that the student's location, standing across the street from the school at a school approved event with a banner visible to most students, was not 'at school,' it had no occasion to consider the

118. *Id.* at 36.
119. *Id.* at 38–39.
120. *Id.* at 36.
121. *Id.* at 37–38.
122. *Id.* at 38.
123. *Id.* at 39.
124. *Id.*

> circumstances under which the school authorities may discipline students for off-campus activities.[125]

The court went on to conclude that the "substantial disruption" test of *Tinker* was met because "it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot," and there was "no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."[126]

The United States District Court in Connecticut, and subsequently the Second Circuit followed the *Wisniewski* decision in *Doninger v. Niehoff,* upholding the punishment of a student who called the school principal a "douchebag" on her social networking website.[127] *Doninger v. Niehoff* involved a disagreement concerning a "battle of the bands" concert.[128] After learning that school administrators were likely to postpone the concert, Avery Doninger collaborated with some of her classmates to raise awareness of the postponement and to pressure the school administrators to rethink the schedule.[129] One of Doninger's pressure tactics was to post an entry to her LiveJournal blog in which she referred to the school administrators as "douchebags" and encouraged others to contact the school principal to "piss her off" more.[130] In turn, the school disqualified her from running for Senior Class Secretary and from speaking at graduation because the administration concluded that her conduct "failed to display the civility and good citizenship expected of class officers."[131]

The District Court rejected Doninger's First Amendment challenge, and the Second Circuit affirmed.[132] Significantly, the court acknowledged that the case was unique in that it did not deal with content created at school or under the auspices of the classroom, but rather was created on Doninger's personal time, outside of school,

125. *Id.* at 39 n.3 (citing Morse v. Frederick, 551 U.S. 393 (2007)).

126. *Id.* at 39–40.

127. Doninger v. Niehoff, 514 F. Supp. 2d 199, 202, 206 (D. Conn. 2007).

128. *Id.* at 203–04.

129. *Id.* at 203.

130. *Id.* at 206.

131. *Id.* at 202; Doninger v. Niehoff, 527 F.3d 41, 43 (2d Cir. 2008).

132. Doninger, 527 F.3d at 54.

and on her own computer.[133] But the "off-campus character" of the posting did "not necessarily insulate [Doninger] from school discipline."[134]

The court found it was reasonably foreseeable that Doninger's post would reach school property because the content directly pertained to school events, its intent was to get students to read and respond, and Doninger knew school community members were likely to read the post.[135] Moreover, on the point of "substantial disruption," the court found that the post contained offensive language, was misleading, and did not comport with the standard of conduct expected of a school government participant.[136] The Second Circuit's decisions in *Wisniewski* and *Doninger* demonstrate the lower court's willingness to extend the reach of school authority beyond "the schoolhouse gates" in student Internet speech cases. However, the divergent standards and varying outcomes in other cases highlight the need for a more uniform and predictable standard for student speech in this new context.

V. Streamlining Lower Court Confusion and Inconsistency: Two Alternative Solutions to Assessing Cyberbullying and Cyberharrassment

As evidenced by the lower court splintering regarding cyberbully regulation post-*Morse*, courts must define a more concrete approach to the conundrum of applying the traditional free speech framework to the amorphous virtual world of cyberbullying. Rather than stretch the Court's holding in *Morse* in an attempt to deter this behavior, I propose two alternative solutions in this section that the courts might consider applying instead. One possible solution is for courts to determine that cyberbullying and cyberharassment are not "speech" within the definition of the First Amendment. Flowing from the Court's refusal to afford certain expression First Amendment protection, these harmful actions should not be constitutionally protected because they provide little value to society and can cause great injury to others. In the alternative, I propose that if courts continue to find that cyberbullying constitutes "speech" within the definition of the First Amendment, they should consider applying the

133. *Id.* at 49–50.

134. *Doninger*, 514 F. Supp. 2d at 216.

135. *Id.* at 217.

136. *Id.*

Tinker standard to these cases with a more nuanced application of the second prong of the test, which calls for consideration of the speech's "invasion of the rights of others."[137]

A. Determining That Cyberbullying Is Not 'Speech' Within the Definition of the First Amendment

Granting minors free speech rights promotes the principles animating the right to free speech under the First Amendment: (1) the promotion of democratic self-government,[138] (2) the search for truth in the marketplace of ideas,[139] and (3) the fostering of autonomy and self-fulfillment.[140] All three ideas justify robust free speech rights for adolescents.[141] However, the Supreme Court has opined that "not all speech is of equal First Amendment importance"[142] because some speech does not serve the purposes of the First Amendment. The Court's dictum in *Chaplinsky v. New Hampshire* presents the idea that free speech protection of words with low social value may be "outweighed" by the social interest in preventing the harm they cause.[143] Low value speech is not afforded the protections of the First Amendment because it does not further the reasons for providing protection in the first place.[144] Thus, the First Amendment should not immunize cyberbullies who use words to invade the rights of others.[145]

1. Traditional Categories of Unprotected Speech and Application to Student Speech

Although the First Amendment guarantees free speech, the right is not absolute.[146] Governments impose limitations on many types of speech, including fighting words[147] false statements of fact,[148] and

137. *Tinker*, 393 U.S. at 513.

138. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 21 (2003).

139. DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 25 (1989).

140. *Id.* at 25.

141. SAUNDERS, *supra* note 138, at 23.

142. Dun Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

143. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

144. *Id.*

145. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

146. *Id.* at 521–22.

147. *Chaplinsky*, 315 U.S. at 572.

148. New York Times Co. v. Sullivan, 376 U.S. 254, 280–81 (1964).

obscene speech.[149] Moreover, courts distinguish between constitutionally protected speech and other less socially valuable categories of speech.[150] Other examples of unprotected speech include speech that incites others to engage in lawless behavior[151] and that which constitutes "true threats."[152]

Since the Columbine High School Massacre in 1999 which left twelve students and one teacher dead,[153] almost no school has tolerated student speech containing even the slightest reference to, or depiction of, violence.[154] Characterizing student speech as a "true threat" is a threshold issue; speech falling into this category merits no protection, and analysis under *Tinker, Fraser*, and/or *Hazelwood* is unnecessary.[155] The Supreme Court addressed "true threats" in *Watts v. United States*,[156] and subsequent holdings in lower courts have developed a number of tests for determining whether speech constitutes a "true threat." These tests consider various factors, such as intention of the speaker,[157] the reaction of a reasonable recipient,[158] and whether the speech was conditional.[159]

149. Roth v. United States, 354 U.S. 476, 485 (1957).

150. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography is unprotected by the First Amendment); Young v. American Mini Theatres, 427 U.S. 50 (1976) (finding that materials shown in adult movie theaters to be "low value speech" more susceptible to government regulation); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (finding nude dancing to be low value speech and holding that the state has the constitutional authority to regulate this form of expression because it furthers a substantial government interest in protecting the morality and order of society).

151. Brandenberg v. Ohio, 395 U.S. 444, 444–47 (1969).

152. Watts v. United States, 394 U.S. 705, 705–07 (1969); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

153. Evelyn Nieves, *Terror in Littleton: The Mourning; Long Week of Funerals Finally Comes to an End*, N.Y. TIMES, Apr. 30, 1999, at A26.

154. *See, e.g.*, LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001) (upholding that the expulsion of a student who brought his teacher a poem he had written entitled "Last Words" that depicted the shooting of fellow students); Bystrom v. Fridley High Sch., 686 F. Supp. 1387 (D. Minn. 1987) (permitting a school to punish students who distributed on campus an underground newspaper that advocated violence against teachers).

155. Kara D. Williams, Comment and Casenote, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. Cin. L. Rev. 707, 711 (2008).

156. *Watts*, 394 U.S. at 705–06.

157. U.S. v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).

158. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002).

159. United States v. Kelner, 534 F.2d 1020, 1026–27 (2d Cir. 1976).

2. Cyberbullying Should Not Be Afforded First Amendment Protection

Cyberbullying does not fit squarely within any of the traditional categories of unprotected speech. However, the underlying harm stemming from such speech is analogous to that of speech which is not constitutionally protected. While true threats and other forms of traditionally unprotected speech may be punished under basic First Amendment principles, bullying is not always so overt. For example, sexually explicit gossip is a pervasive and damaging form of cyberbullying, but it cannot neatly be characterized as a "true threat." Websites consisting of detailed personal information about female classmates, including their phone numbers, addresses, and accounts of their sexual exploits are harmful and provide no social value.[160] Several national sites, such as Slambook.com have been created where students can post vicious, obscene, and often threatening questions online for others to answer and read.[161] On a similar site entitled Schoolrumors.com, students can post graphic messages full of sexual innuendo aimed at individual students and focusing on such topics as the "weirdest people at your school."[162]

These bullying tactics serve only to silence, intimidate, and inflict pain on other students and do not encourage any reasoned deliberation about "truth" on which a community can agree.[163] Moreover, cyberbullying silences the victims, denying them any benefit of speech.[164] Grouping cyberbullying into a category of "political" or "academic" speech is also illogical. It is difficult to argue that websites allowing students to vote on "Who's the biggest slut in school" will substantially "diminish the marketplace of ideas."

The recent tragedy of Megan Meier catapulted the gravity of cyberbullying into the national spotlight.[165] In 2006, thirteen-year-old Megan Meier met a teenage boy named Josh Evans on the social

160. Student Press Law Center, District Attorney Will Not Prosecute Students for Posting Sexual Rumors on Website (June 13, 2001), *available at* http://www.splc.org/newsflash.asp?id=292.

161. Kathryn Balint et al., *Personal Fouls: Students Get Rude and Crude with Internet Slambooks*, SAN DIEGO UNION-TRIB., Nov. 3, 2001, at E1.

162. Sandy Banks, *Website Where Students Slung Vicious Gossip is Shut Down*, L.A. TIMES, Mar. 3, 2001, at A1.

163. Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 802 (Spring 2008).

164. *Id.* at 804.

165. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23, *available at* http://www.nytimes.com/2007/11/28/us/28hoax.html (last visited February 7, 2010).

networking website MySpace.[166] The two had an amicable relationship until Josh began making derogatory comments to Megan, such as "the world would be a better place without you."[167] Later that night, Megan's mother found her hanging from her closet, and she died the next day.[168] Six weeks after Megan's death, her parents discovered that "Josh" was actually a collective creation of Lori Drew, Drew's teenage daughter, and Ashley Grills, a part-time employee.[169] Lori Drew was the mother of one of Megan's friends who lived four houses away from the Meiers, and who created the alias "Josh" to find out how Megan felt about her daughter.[170] In this case, "Josh's" words posed a very real danger to Megan—the precise concern that played a central role in the Court's analysis in *Morse*.[171] But even if this kind of bullying would be "inappropriate" in a school setting, it cannot be punished because it did not take place "on campus."

The Court in *Morse* recognized vulnerabilities in school-aged children relating to drug-use, noting that "[s]chool years are a time when the physical, psychological, and addictive effects of drugs are most severe" and recognizing an "important [and] perhaps compelling" public interest in deterring drug use.[172] An analogy can be drawn between the harmful effects of cyberbullying and cyberharassment. This analogy provides justification for an additional exception placing harmful cyberspeech outside the First Amendment's protective circle.[173] An argument that such speech should not be afforded First Amendment protection is further underscored and supported by the Court's prior statement in *Hazelwood* that "[a] school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to

166. Maag, *supra* note 165; *see also* Steve Pokin, *Pokin Around: A Real Person, A Real Death*, ST. CHARLES JOURNAL, Nov. 10, 2007, *available at* http://stcharlesjournal.stltoday.com/articles/2007/11/10/news/sj2tn20071110-1111stc_pokin_1.ii1.txt.

167. Maag, *supra* note 165.

168. *Id.*

169. *Id.*

170. *Id.*

171. Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring).

172. *Id.* at 12.

173. Sarah Cronan, Note, *Grounding Cyberspeech: Public Schools' Authority to Discipline Students for Internet Activity*, 97 Ky. L.J. 149, 168 (2008).

advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'"[174]

B. An Alternative Solution to Cyberbully Regulation: Revisiting and Reexamining the *Tinker* Standard

Alternatively, if courts determine that cyberbullying is, in fact, speech protected by the First Amendment, they should re-examine and apply the test set forth in *Tinker* instead of straining to apply and extend the narrow and somewhat convoluted opinions in *Morse.* Given the proliferation of online student interaction and the unique pervasive modality of the Internet, old distinctions physically demarcating authority over student speech to "on" or "off" campus inadequately address and oversimplify the issue. However, a more careful and nuanced application of the *Tinker* test might adequately address the challenges presented by cyberbullying and cyberharassment cases.

The overall tone of *Tinker* strongly respects the expressive rights of students outside of the special context of the school environment.[175] The *Tinker* Court stressed the importance of exposing future leaders to a

> robust exchange of ideas."[176] However, the Court also stated that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or *invasion of the rights of others* is, of course, not immunized by the constitutional guarantee of freedom of speech.[177]

In the cases involving cyberspeech discussed in this Note, lower courts typically applied *Tinker's* "substantial disruption test" to determine whether the action fell within the school's ambit of authority. In *Harper*, however, the Ninth Circuit breathed new life into the "invasion of the rights of others" prong of *Tinker* by holding that a high school student could be prohibited from wearing a t-shirt stating "HOMOSEXUALITY IS SHAMEFUL" because it

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174. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)).

175. Anne Profitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49 (1996).

176. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

177. *Id.* at 513 (emphasis added).

"undermined the rights of other students."[178] Unlike the "silent, passive" armbands at issue in *Tinker*, the court found the anti-gay T-shirt "'collid[ed] with the rights of other students' in the most fundamental way"[179] because it targeted students of a minority group and could cause psychological damage and interfere with their right to learn.[180] This decision suggests that Tinker's "interference with the rights of others" standard might become significant, particularly in the context of harassing or demeaning speech.[181] However, the speed with which the Supreme Court vacated the Ninth Circuit's decision in *Harper* suggests that the Court was not anxious to take that question up itself, or to permit the broad language of the Ninth Circuit's opinion to serve as precedent for other courts.

Applied in its entirety, the two-pronged *Tinker* test can potentially address the delicate balance of rights presented by cyberbullying and cyberharassment cases. The nexus between the school and the student speech at issue required by the "substantial disturbance" prong provides a check against abuse and overreach of school authority. The second prong's mechanism for regulation of speech resulting in the "invasion of the rights of others" ensures protection of the rights of students to be secure in the school environment. Taken together, the two prongs provide protection for student speech rights and individual rights, and do not require clever conceptual leaps and linkage of logic, as does the application of *Morse*. As such, courts might consider revisiting the nuances of the *Tinker* test in future application.

Conclusion

While schools must not become "enclaves of totalitarianism,"[182] they must not be powerless to confront harassers either. Ever-increasing evidence reveals the negative effects of peer harassment on the school community and the resulting disruption.[183] Victimized students may avoid school and suffer emotional harm, and they may

178. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171, 1177–78 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

179. *Id.* at 1178.

180. *Id.* at 1178–79.

181. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1042 (2008).

182. Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1237 (2003).

183. *Id.*

not be able to participate fully in their education as a result of such bullying. Moreover, given the pervasive and omnipresent nature of the Internet, it is impractical to rely on traditional, bright-line geographical boundaries to determine the reach of authority.

"Because the internet offers a far more powerful vehicle for harassment than traditional methods of speech, the invasion of the rights of the targeted individual is more potent."[184] The Constitution guarantees freedom of speech, but it should not be a license for students to personally attack school administrators and fellow students. The unpredictability and splintering of lower court decisions post-*Morse* indicates the need for a more clearly defined uniform standard to apply to student Internet speech if courts continue to uphold that cyberbullying is speech that should be afforded First Amendment protection. Applying the traditional *Tinker* test in a way that more closely considers the speech's "invasion of rights of others" while ensuring a sufficient nexus between that speech and the school through "substantial disruption" prong potentially strikes the most appropriate balance between a student's freedom of expression and "the right and responsibility of a public school to maintain an environment conducive to learning."[185]

184. *Id.* at 1244.

185. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595, 602 (W.D. Pa. 2007).