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## Where Good Intentions Go Bad: Redrafting the Massachusetts Cyberbullying Statute to Protect Student Speech

*“People don’t appreciate how much the 1st Amendment protects not only political and ideological speech, but also personal nastiness and chatter. . . . If all cruel teasing led to suicide, the human race would be extinct.”<sup>1</sup>*

*“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain.”<sup>2</sup>*

### I. INTRODUCTION

On January 14, 2010, Phoebe Prince, a fifteen-year-old Irish immigrant and student at South Hadley High School, took her own life.<sup>3</sup> While the reasons for Phoebe’s suicide remain unknown, what emerged in the broader media coverage of her death was an allegedly systemic pattern of bullying throughout her high school, a pattern ignored by administrators, faculty, and parents.<sup>4</sup> Phoebe’s enemies attacked her with verbal insults, both in school and electronically outside of school, via Facebook.<sup>5</sup>

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1. Victoria Kim, *For Students, a Right to Be Mean Online?*, L.A. TIMES, Dec. 13, 2009, <http://articles.latimes.com/2009/dec/13/local/la-me-youtube-schools13-2009dec13> (quoting Eugene Volokh).

2. Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

3. Emily Bazelon, *What Really Happened to Phoebe Prince? The Untold Story of Her Suicide and the Role of the Kids Who Have Been Criminally Charged for It*, SLATE, July 20, 2010, at 1, 7, [http://img.slate.com/media/31/100721\\_Bull-E\\_final\\_3.pdf](http://img.slate.com/media/31/100721_Bull-E_final_3.pdf).

4. See *id.* at 3-8; see also Erik Eckholm & Katie Zezima, *Strategies Take Shape for Trials in Bully Case*, N.Y. TIMES, Sept. 15, 2010, <http://www.nytimes.com/2010/09/16/us/16bully.html> (discussing Prince case). Phoebe was an apparently frequent target of ethnic epithets and other verbal cruelties, and the news media declared her to be yet another cyberbullying victim pushed to suicide. See Bazelon, *supra* note 3, at 15-16 (highlighting media reaction). Phoebe’s classmates called her a variety of insults both online and at school, including “Irish slut” and “Irish bitch.” *Id.* at 6-7.

5. See Bazelon, *supra* note 3, at 4-6. Phoebe’s classmates taunted her mostly about her past relationships with boys at school. *Id.* at 4-6. Facebook, an online social-networking site, is one of the many

web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. . . . I don’t just write nice things about you on the site; I use the site’s tools to create a standardized link from my profile to yours. . . . This design choice has profound implications for the social interactions that take place on such sites.

James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1142-43 (2009) (quoting danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED

Massachusetts officials sprang quickly into action after the media onslaught following Phoebe's death.<sup>6</sup> Northwestern County District Attorney Elizabeth Scheibel charged five of Phoebe's classmates with a multitude of crimes stemming from their reported bullying of her, including civil-rights violations with bodily injury, criminal harassment, and stalking.<sup>7</sup> The Massachusetts General Court also acted swiftly, passing what many experts deem the most sweeping and powerful antibullying statute in the nation.<sup>8</sup> The statute creates a broad scope of illegal activities for which students can face punishment, including incidents of cyberbullying that occur outside school walls.<sup>9</sup> Because the statute grants school administrators unique authority, Massachusetts now stands as a model testing ground for the national movement to curb bullying incidents in public schools.<sup>10</sup>

As researchers further explore the impact of cyberbullying on adolescents, many fear cyberbullying causes greater harm to victims than traditional bullying because of the nature of the Internet and other electronic communication.<sup>11</sup> According to a federal government initiative supported by President Obama, student-on-student bullying is a "major concern" in schools across the country, and can cause victims to become depressed and anxious, to

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COMM. (Oct. 2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

6. See *infra* notes 7-10 and accompanying text (highlighting response of Massachusetts executive and legislative branches).

7. Bazelon, *supra* note 3, at 2, 8; see also Maria Cramer, *District Attorney Faces Unique Challenges in Prosecuting Teens*, BOSTON.COM, Mar. 31, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/03/31/district\\_attorney\\_faces\\_unique\\_challenges\\_in\\_bullying\\_case](http://www.boston.com/news/local/massachusetts/articles/2010/03/31/district_attorney_faces_unique_challenges_in_bullying_case) (highlighting possible complications with charges sought by district attorney); Milton J. Valencia, *3 Teens Charged In Bullying to Skip Arraignment*, BOSTON.COM, Apr. 6, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/04/06/3\\_teens\\_charged\\_in\\_bullying\\_to\\_skip\\_arraignment/](http://www.boston.com/news/local/massachusetts/articles/2010/04/06/3_teens_charged_in_bullying_to_skip_arraignment/) (outlining criminal charges against each defendant). The district attorney charged two male teenagers with statutory rape. See Bazelon, *supra* note 3, at 1. The district attorney also charged one male and one female defendant with criminal harassment, disturbance of a school assembly, and most critically, violation of civil rights with bodily injury. See *id.* at 2; see also MASS. GEN. LAWS ANN. ch. 265, § 37 (West 2013) (creating criminal penalty for violation of civil rights with bodily injury). Some legal experts, such as Alan Dershowitz, have questioned the wisdom of utilizing the civil rights with bodily injury statute to seek criminal charges against defendants in suicide cases stemming from bullying. See Bazelon, *supra* note 3, at 9 (noting unprecedented use of statute in suicide cases). Three other defendants were charged as juveniles for being youthful offenders. See Valencia, *supra*.

8. See MASS. GEN. LAWS ANN. ch. 71, § 37O (West 2013); see also Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law*, SLATE, Apr. 30, 2010, <http://www.slate.com/id/2252543/> (declaring Massachusetts antibullying law most comprehensive in nation); *The Commonwealth of Massachusetts, BULLY POLICE USA*, [http://www.bullypolice.org/ma\\_law.html](http://www.bullypolice.org/ma_law.html) (last visited Feb. 15, 2013) (rating Massachusetts statute A++, highest rating possible).

9. See *infra* notes 143-54 and accompanying text (discussing Massachusetts antibullying statute).

10. See Bazelon, *supra* note 8 (describing Massachusetts as "test case for the rest of the nation").

11. See Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV 153, 162 (2009) (highlighting growing fear of greater risks posed by cyberbullies than traditional bullies); see also Janet Kornblum, *Cyberbullying Grows Bigger and Meaner with Photos, Video*, USA TODAY, July 15, 2008, [http://www.usatoday.com/tech/webguide/internethome/2008-07-14-cyberbullying\\_N.htm](http://www.usatoday.com/tech/webguide/internethome/2008-07-14-cyberbullying_N.htm) (stating cyberbullying potentially "more destructive" than traditional bullying).

refuse to go to school, and to contemplate suicide.<sup>12</sup> Further studies show a correlation between teenage victims of cyberbullying and increased contemplation of suicide or attempted suicide.<sup>13</sup> A 2010 study found that one in five middle-school students were affected by “willful and repeated harm” inflicted through electronic communication.<sup>14</sup> The Internet can electronically shield cyberbullies under a cloak of anonymity, preventing a victim from discovering the identity of the bully and increasing the vitriol felt by the victim.<sup>15</sup> The ease of electronic communication allows cyberbullies to reach past school walls and into the houses of victims whose fear now extends beyond traditional school hours.<sup>16</sup> Additionally, communication technologies and social-networking sites distribute cyberbullies’ material to hundreds or thousands of people instantaneously, prolonging the duration of bullying and the associated embarrassment of the victim.<sup>17</sup> Unlike the school environment,

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12. See *Warning Signs*, STOPBULLYING.GOV, [http://stopbullying.gov/topics/warning\\_signs/index.html](http://stopbullying.gov/topics/warning_signs/index.html) (last visited Feb. 15, 2013) (discussing possible warning signs for victims and perpetrators of bullying).

13. See SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING RESEARCH SUMMARY: CYBERBULLYING AND SUICIDE 1-2 (2010), [http://www.cyberbullying.us/cyberbullying\\_and\\_suicide\\_research\\_fact\\_sheet.pdf](http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf) (noting increased risk of attempted suicide and suicidal thoughts). According to these researchers, cyberbullying victims were nearly twice as likely to attempt suicide as compared to nonbullied teenagers. See *id.* at 2; see also Miranda Leitsinger, *Family: Bullying by ‘Wolf Pack’ Led to Texas Teen’s Suicide*, NBC NEWS, Apr. 10, 2012, [http://usnews.msnbc.msn.com/\\_news/2012/04/10/11118720-family-bullying-by-wolf-pack-led-to-texas-teens-suicide](http://usnews.msnbc.msn.com/_news/2012/04/10/11118720-family-bullying-by-wolf-pack-led-to-texas-teens-suicide) (stating bullying “big factor” in youth suicide but no direct statistical correlation between two).

14. See Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 27, 2010, <http://www.nytimes.com/2010/06/28/style/28bully.html> (citing study).

15. See CTR. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS 6 (2008), <http://www.cdc.gov/violenceprevention/pdf/EA-brief-a.pdf> [hereinafter ELECTRONIC MEDIA AND YOUTH VIOLENCE] (describing impacts of Internet anonymity for cyberbullies). The Internet and electronic technology allow cyberbullies to hide behind anonymous screen names or false identities while bullying the victim. See *id.* at 7. One study shows between thirteen percent and forty-six percent of cyberbullying victims could not determine the identity of their harasser. See *id.*; see also ROBIN M. KOWALSKI ET AL., CYBER BULLYING: BULLYING IN THE DIGITAL AGE 61-62 (2008); Robin M. Kowalski, Recognizing and Treating Victim and Aggressor, PSYCHIATRIC TIMES, Oct. 1, 2008, <http://www.psychiatrictimes.com/display/article/10168/1336550#> (arguing disinhibition effect of cyberbullying amplifies harm done to victims). In her research, Dr. Kowalski argues the disinhibition effect allows cyberbullies to say and do things anonymously via electronic communication that the bully would not otherwise do in face-to-face confrontations with the victim. See Kowalski, *supra*. The anonymity and disinhibition that result from cyberbullying therefore increase the magnitude of threats—and resulting harm—that cyberbullies inflict upon their victims. See *id.*

16. See NANCY WILLARD, CTR. FOR SAFE & RESPONSIBLE USE OF THE INTERNET, EDUCATOR’S GUIDE TO CYBERBULLYING, CYBERTHREATS & SEXTING 5 (2007), [http://www.arkansased.org/public/userfiles/Learning\\_Services/Technology\\_Initiatives/Cyber\\_Safety/educatorsguide.pdf](http://www.arkansased.org/public/userfiles/Learning_Services/Technology_Initiatives/Cyber_Safety/educatorsguide.pdf) (highlighting impossibility of escape for cyberbullying victims).

17. See GLENN STUTZKY, CYBER BULLYING INFORMATION 2 (2006), <http://www.safeonline.me/printResources/cyberbullyingInformation.pdf> (claiming cyberbullying lengthens period of torment for victims). Stutzky argues cyberbullying both increases the audience of a victim’s humiliation and prolongs his or her period of torment, not only as a result of the ease of electronic communication, but also because information can remain posted on websites, blogs, or social-networking sites indefinitely. See *id.* In contrast, traditional bullying has no lasting permanence; these incidents have few witnesses and last no longer than the initial instance. See *id.*

electronic communications between adolescents remain relatively unmonitored by parents or other authorities, allowing repeated perpetration of the abuse.<sup>18</sup>

The Massachusetts statute reflects a growing trend of states attempting to curtail bullying of students via electronic media both inside and outside the classroom.<sup>19</sup> While most cyberbullying occurs outside the school walls, its effects are ever present within the school environment, contributing to the heightened sense of fear and hostility bullying victims face.<sup>20</sup> A majority of states have sought to give school administrators the legal tools to combat cyberbullying in the form of antibullying statutes that specifically target electronic communications, with varying degrees of protection for students' constitutional rights to free expression.<sup>21</sup> This trend reflects the growing realization that bullying no longer takes place exclusively during the school day and that today's children communicate significantly through electronic means.<sup>22</sup>

This growing trend of states addressing cyberbullying through statutory measures creates both direct and indirect conflict with traditional constitutional protections afforded student speech both inside and outside the school.<sup>23</sup> Even in this age of growing threats posed by cyberbullying, school administrators must not forget that students do not shed protected First Amendment rights at the schoolhouse gate.<sup>24</sup> The Supreme Court's past precedent in analyzing

18. See SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING FACT SHEET: WHAT YOU NEED TO KNOW ABOUT ONLINE AGGRESSION 2 (2009), [http://www.cyberbullying.us/cyberbullying\\_fact\\_sheet.pdf](http://www.cyberbullying.us/cyberbullying_fact_sheet.pdf) (stating that "supervision is lacking" in electronic communications); see also KOWALSKI ET AL., *supra* note 15, at 91 (citing study implicating lack of parental supervision of children's online activities). Kowalski cites one survey showing that while ninety-three percent of parents believe they know the extent of their children's online activities, forty-one percent of children reported that their parents failed to understand the full extent. See KOWALSKI ET AL., *supra* note 15, at 91; see also Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 110 (2009) (arguing lack of parental supervision leaves no one to punish cyberbullies).

19. See *infra* Part II.B (discussing state statutory and regulatory reactions needed to curb cyberbullying).

20. See Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148, 152-53 (2006), available at <http://yvj.sagepub.com/content/4/2/148.full.pdf> (discussing effects of cyberbullying on youth victims).

21. See *infra* Part II.B (discussing state cyberbullying statutes).

22. See WILLARD, *supra* note 16, at 5 (discussing growing scope of cyberbullying problem).

23. See, e.g., Morse v. Frederick, 551 U.S. 393 (2007) (removing constitutional protections for on-campus speech advocating illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (denying constitutional protections for school-sponsored speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (denying constitutional protection for lewd and vulgar on-campus speech); Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969) (protecting student speech that does not materially disrupt school environment); see also Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008) ("Permitting school officials to restrict student speech in the digital media expands the authority of school officials to clamp down on juvenile expression in a way previously unthinkable."). Because the Supreme Court has declined to interpret the scope of protection for student off-campus speech, statutes allowing schools to restrict constitutionally protected speech for *any* reason endanger students' civil rights. See Papandrea, *supra*, at 1092-93 (arguing *Tinker*'s holding "ill-suited" for application to off-campus speech).

24. See *Tinker*, 393 U.S. at 506 (noting children do not shed First Amendment rights at the "schoolhouse gate"); see also Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student*

constitutional protections of student speech uses the “schoolhouse gate” as the line of demarcation, allowing schools to restrict student speech within the school (or at school-sponsored activities) if it disrupts the school environment, is lewd and vulgar and made to a captive audience, bears the imprimatur of the school, or advocates the use of illegal drugs.<sup>25</sup> In determining schools’ ability to restrict speech deemed “cyberbullying,” however, states argue that the Internet obviates the need for traditional geographic formalism distinguishing between on- and off-campus speech.<sup>26</sup> The Supreme Court’s continued refusal to address cases concerning off-campus student speech leaves states, jurists, and school administrators in a tenuous position regarding their ability to restrict student off-campus cyberspeech they believe constitutes cyberbullying, forcing them to apply ill-fitting doctrines to a rapidly evolving problem.<sup>27</sup> Without clarification, Massachusetts and other states give school administrators the freedom to misguidedly apply these statutes to over-restrict student speech while attempting to protect students.<sup>28</sup>

This Note details the legal history of prohibitions that courts and schools have placed on student free speech in Part II.A-B.<sup>29</sup> Part II.C examines previous Massachusetts legislation under Supreme Court precedent, and Part II.D addresses school liability under existing case law.<sup>30</sup> Part II.E examines the Massachusetts antibullying statute, discussing the scope of its definitions and geographic reach.<sup>31</sup> Part II.F outlines other states’ attempts to statutorily limit the growth of cyberbullying and give school administrators authority to

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25. *See Morse*, 551 U.S. at 408-09 (denying constitutional protection for on-campus speech advocating illegal drug use); *Hazelwood*, 484 U.S. at 271-72 (declaring speech bearing imprimatur of school unprotected by First Amendment); *Fraser*, 478 U.S. at 684-85 (declaring lewd and vulgar speech made to captive audience unprotected by First Amendment); *Tinker*, 393 U.S. at 740 (declaring speech disruptive of school environment not protected by First Amendment).

26. *See* Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 880 (2008) (noting problems posed by technological advances in communication). *Compare Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012) (accepting school’s authority to discipline student for off-campus student cyberspeech), *with J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1110 (C.D. Cal. 2010) (denying school’s authority to restrict off-campus student cyberspeech not satisfying *Tinker*’s substantial-disruption test).

27. *See, e.g., Kowalski*, 652 F.3d at 565; *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (applying *Tinker* to off-campus student cyberspeech), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (Blue Mountain II)*, 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). For a discussion on the *Layshock* case, see David C. Souter, Comment, *Third Circuit Holds First Amendment Protects Off-Campus Internet Speech from School Discipline—Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011), 45 SUFFOLK U. L. REV. 1341 (2012).

28. *See infra* notes 143-54 and accompanying text (discussing Massachusetts antibullying statute).

29. *See infra* Part II.A-B.

30. *See infra* Part II.C-D.

31. *See infra* Part II.E.

discipline students for off-campus student cyberspeech.<sup>32</sup> Part III then analyzes the Massachusetts statute in light of First Amendment jurisprudence to determine whether it comports with constitutional standards afforded students outside the classroom.<sup>33</sup> In addition, Part III outlines possible consequences stemming from the application of this statute across Massachusetts and argues that its broad definitions and grants of authority create susceptibility for misguided application by school administrators.<sup>34</sup> Lastly, Part III.D proposes changes to the statute that would help maintain protections for cyberbullying victims while preserving constitutional rights afforded to all students by partially adopting the *Tinker* standard for student-speech protection.<sup>35</sup>

## II. HISTORY

### *A. The Tinker Tetralogy: Four Supreme Court Cases Creating Exceptions to Student-Speech Protections*

The First Amendment prohibits Congress—and through the Fourteenth Amendment, the states—from “abridging the freedom of speech.”<sup>36</sup> Courts and society have accepted as a “bedrock principle” of the First Amendment that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>37</sup> The Supreme Court has continually outlined the contours of its free-speech doctrine, but has yet to hear a case concerning the underlying facts of cyberbullying, where student speech specifically targets classmates for verbal abuse.<sup>38</sup>

The Supreme Court’s review of school officials’ authority often begins by recognizing the high degree of deference afforded public-school officials’ “comprehensive authority.”<sup>39</sup> Because these officials perform important and highly discretionary functions, federal courts tend to exercise restraint when considering issues within the purview of public-school officials.<sup>40</sup> The scope of authority enjoyed by public-school officials—and the deference shown to

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32. See *infra* Part II.F.

33. See *infra* Part III.A-C.

34. See *infra* Part III.A-C.

35. See *infra* Part III.D.

36. See U.S. CONST. amend. I; *Gitlow v. New York*, 268 U.S. 652 (1925).

37. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (outlining protections for offensive speech).

38. See *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 571 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012) (discussing limitations of current Supreme Court precedent in this area).

39. See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 507 (1969); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (describing public schools’ power over public-school children as both “custodial and tutelary”).

40. See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. *Pico ex rel. Pico*, 457 U.S. 853, 864 (1982) (“[F]ederal courts should not ordinarily ‘intervene in the resolution of conflicts which arise in the daily operation of school systems.’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 637 (1943) (noting officials within education process perform “important, delicate, and highly discretionary functions”).

them—is not unlimited, however.<sup>41</sup> The Supreme Court has held that the First Amendment unquestionably protects the free-speech rights of students in public schools.<sup>42</sup> While recognizing protection of student constitutional freedoms is of utmost importance, courts also recognize these rights must be applied in light of the special circumstances of the school environment.<sup>43</sup> These special circumstances mandating student constitutional rights, such as protection of free speech, are “not automatically coextensive with the rights of adults in other settings.”<sup>44</sup> Since the seminal Supreme Court decision in *Tinker v. Des Moines*, courts have struggled to find the proper balance between strict protection of students’ First Amendment rights and upholding school administrators’ authority to maintain an appropriate learning environment.<sup>45</sup> This struggle colors the current debate regarding school administrators’ ability to regulate off-campus cyberspeech, and the Supreme Court’s unwillingness to hear any cases concerning this area has left the standard unresolved.<sup>46</sup>

### I. Tinker v. Des Moines

In *Tinker*, the first of the Supreme Court’s foundational opinions governing student speech in the educational setting, the Court held that schools have no ability to discipline students for any type of on-campus speech unless it materially disrupts school activities or substantially interferes with other students’ rights within the school.<sup>47</sup> In December 1965, the Des Moines School District preemptively banned wearing black armbands in protest of the United States’ participation in the Vietnam War.<sup>48</sup> Shortly thereafter, school officials

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41. See *Blue Mountain II*, 650 F.3d 915, 926 (3d Cir. 2011) (“The authority of public school officials is not boundless, however.”), cert. denied, 132 S. Ct. 1097 (2012).

42. See *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (“Our cases make clear that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” (quoting *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

43. See *Tinker*, 393 U.S. at 506 (noting special characteristics of school environment inherently limit student constitutional protections to some degree); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (stating vigilant protection of student constitutional rights is “nowhere more vital” than in schools).

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

45. See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (establishing test of material and substantial interference); see also *Blue Mountain II*, 650 F.3d at 926 (noting tentative balance courts must strike between competing concerns).

46. See, e.g., *Blue Mountain II*, 650 F.3d at 915, cert. denied, 132 S. Ct. 1097 (2012); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011), cert. denied, 132 S. Ct. 1095 (2012); *Doninger v. Niehoff (Doninger II)*, 642 F.3d 334 (2d Cir.), cert. denied, 132 S. Ct. 499 (2011). In each of these cases, the school sought to regulate student off-campus cyberspeech, either through suspension of the student, *Kowalski*, 652 F.3d at 567-70; *Blue Mountain II*, 650 F.3d at 920-24, or through disqualifying the student from running for student government, *Doninger II*, 642 F.3d at 640-43.

47. See *Tinker*, 393 U.S. at 513 (citing no constitutional protection for materially and substantially disruptive speech).

48. See *id.* at 504 (describing school policy adopted). The specific policy required school administrators to ask students wearing an armband to remove it, and noncompliance with the demand would subject the student to suspension until he or she removed the armband. See *id.*

suspended John Tinker, Mary Beth Tinker, and Christopher Eckhardt for refusing to remove the prohibited armbands when ordered.<sup>49</sup> The students' families filed civil suit in federal court against the school district.<sup>50</sup>

Labeling the wearing of black armbands as the type of political speech granted the broadest protections under the First Amendment, the Supreme Court declared the school's actions unconstitutional and in violation of the students' rights to freedom of expression.<sup>51</sup> The Court, while recognizing the school's unique role in protecting the educational setting, balanced that role against the need to protect students' constitutional rights within the school setting, famously declaring that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>52</sup> Under the Court's holding, schools may limit constitutionally protected speech only if circumstances show such speech would materially disrupt the school environment or substantially interfere with the rights of others within the school.<sup>53</sup> Finding no facts showing the students' conduct

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49. *Id.* The students, who were barred from returning to school until they removed the armbands, chose not to return until after their suspension had accrued. *See id.*

50. *See id.* (outlining civil suit). The petitioners brought suit seeking injunctive relief to restrain school officials from imposing disciplinary measures against the students. *See id.; see also* 42 U.S.C. § 1983 (2006) (outlining requirements for claims asserting violation of civil rights by public officials). The United States District Court for the Southern District of Iowa upheld the constitutionality of the school's actions, claiming that the "disciplined atmosphere of the classroom" deserved greater protection of the law than the students' rights to political protest. *See Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966) (holding school's action constitutional), *aff'd by an equally divided court*, 383 F.2d 988 (8th Cir. 1967) (en banc), *rev'd*, 393 U.S. 503 (1969).

51. *See Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding school's actions unconstitutional). The Court determined that, because the armbands accompanied no other disruptive conduct on the part of the students, it was akin to "pure speech" and entitled to comprehensive protection under the First Amendment. *See id.* at 505-06. It should be noted, however, that *Tinker*'s holding has never been limited to strictly political speech. *See Blue Mountain II*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *cf. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-17 (3d Cir. 2001) (holding school's antiharassment policy overbroad because it restricted substantially more speech than allowable under *Tinker*).

52. *See Tinker*, 393 U.S. at 506 (holding students maintain First Amendment protections within school). The Court recognized in its balancing test that schools maintain authority to ensure compliance with prescribed conduct within the school. *See id.* at 507-08. However, schools must apply these rules of conduct within appropriate constitutional limits. *See id.* at 507; *see also* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding schools must perform all discipline within limits of Constitution). Schools maintain certain obligations and responsibilities that make the educational environment special for First Amendment purposes: Examples include development of intellectual skills and literacy training; socialization; citizenship preparation; and the inculcation of community values. *See* 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:3 (2004) (discussing relationship between duties of school and contours of First Amendment protections). As the Supreme Court has noted, the nature of the rights enjoyed by students is "'what is appropriate for children in school.'" *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)) (noting scope of rights enjoyed by students in Fourth Amendment context within school environment).

53. *See Tinker*, 393 U.S. at 513 (creating material-and-substantial-disruption test for protected speech). Absent a showing of a constitutionally valid reason to regulate the speech of students, such as the speech causing a material and substantial disruption within the school, students may exercise their freedom of speech

caused any such disruption or interference within the school, the Court instead reasoned that the school predicated its actions upon fear of some controversy springing from the students' silent protests.<sup>54</sup> Such an undifferentiated fear of potential controversy from these political statements, in the eyes of the Court, served to stifle valid discussion between the students and encourage near-totalitarian authority over students in contravention of their fundamental rights.<sup>55</sup> Absent a showing of material and substantial disruption, the Court required schools to respect the fundamental rights all students possess under the Constitution.<sup>56</sup> *Tinker* represents the high-water mark for the Court's protection of students' constitutional rights under the First Amendment; subsequent cases have continually scaled back that protection.<sup>57</sup>

The holding in *Tinker* embraces the reality that a child's status as a student does not alter his or her constitutional right to free speech outside the school.<sup>58</sup> *Tinker* requires the school demonstrate it acted pursuant to a *specific and significant* fear of disruption, not just some remote apprehension of a disturbance.<sup>59</sup> School districts need not prove with absolute certainty that a substantial disruption *will* occur.<sup>60</sup> Schools must, however, produce *evidence*

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and expression within the school community. *See id.* at 511.

54. *See id.* at 509-10 (holding no material or substantial interference). The district court found no disruption occurred, as the speech created only a few isolated instances of hostile remarks made by other students towards the students wearing armbands. *See id.* at 508-09. There were no threats or acts of violence made against the students while on campus. *See id.*

55. *See id.* at 511 (arguing states may not be "enclaves of totalitarianism"). Under the Court's holding, undifferentiated fear of disturbance within the school as a result of student speech cannot mitigate the school's requirement to uphold students' constitutional freedoms within the school's walls. *See id.* at 508. A free-flowing and open discussion between students creates risk of potential disturbances within the class, but the Court cited this "hazardous freedom" as the basis for the country's independence and national strength. *Id.* at 508-09. Promoting such discussion amongst students serves as an important part of the nation's educational process. *See id.* at 512.

56. *See id.* at 514 (stating speech that does not disrupt classwork or school environment enjoys immunity of constitutional protections).

57. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124 (2004) (discussing impact of *Tinker* for defining student free-speech rights); *see also* Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 AM. U. L. REV. 1167, 1173-75 (2009) (arguing other cases since *Tinker* represent its decline).

58. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ."); *see also* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); *rev'd in part*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *accord* *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) ("Children have First Amendment rights."); *But see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002) ("[S]tudents retain the protections of the First Amendment, but the shape of these rights in the public school setting may not always mirror the contours of constitutional protections afforded in other contexts.").

59. *See* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (interpreting *Tinker* to require "specific and significant fear of disruption").

60. *See, e.g., Blue Mountain II*, 650 F.3d 915, 928 (3d Cir. 2011) (en banc) (interpreting *Tinker* to not

that a restriction is necessary to avoid material or substantial interference with the school environment or discipline.<sup>61</sup> Courts must determine when an “undifferentiated fear or apprehension of disturbance” transforms into a reasonable forecast that the speech will likely cause a substantial disruption or material interference with the school environment.<sup>62</sup> Schools maintain a compelling interest in restricting speech that interferes with or disrupts the work and discipline of the school, which may include discipline for student harassment and cyberbullying.<sup>63</sup> *Tinker*’s holding cannot be expressly limited to political speech, and its application focuses not on the *nature* of the speech, but rather the *effects* that speech has on the school environment, disruptive or otherwise.<sup>64</sup>

## 2. Bethel School District v. Fraser

The Court began limiting *Tinker*’s express protections of student speech in its 1986 opinion, *Bethel School District v. Fraser*.<sup>65</sup> In upholding the school district’s suspension of a student who made a sexually suggestive speech at a school assembly, the Court distinguished between the silent protest speech of the students in *Tinker* and the lewd speech at issue in *Fraser*.<sup>66</sup> Citing the role schools play in the development of children and schools’ responsibility to

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require occurrence of actual disruption before school can act), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Niehoff (*Doninger I*), 527 F.3d 41, 51 (2d Cir. 2008), *rev’d on other grounds*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); Lowery v. Euverard, 497 F.3d 584, 591-92 (6th Cir. 2007), *cert. denied*, 129 S. Ct. 159 (2008).

61. See *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 178 (D. Mass. 2007) (citing *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 511 (1969)). The court in *Bowler* noted that courts have allowed this foreseeable-disruption restriction only in “narrow circumstances,” such as where student speech or expression would likely spark confrontation between students based upon specific histories of racial antagonism. *See id.; see also West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (“The history of racial tension in the district made administrators’ and parents’ concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one.” (internal citations omitted)).

62. See *Blue Mountain II*, 650 F.3d at 930 (citing *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

63. *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 572 (4th Cir. 2011) (citing *DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008)) (outlining scope of *Tinker*’s applicability to off-campus student cyberspeech), *cert. denied*, 132 S. Ct. 1095 (2012).

64. See *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 766 (9th Cir. 2006) (expressing belief that *Tinker* limits only effects of speech); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding public-school students “cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’”) (citing *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

65. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684-85 (1986) (creating additional implied restriction on student speech).

66. *See id.* at 685. Unlike the politically significant protest in *Tinker*, *Fraser*’s suspension was “unrelated to any political viewpoint.” *Id.*

inculcate students with fundamental values, the Court held that the First Amendment did not protect against lewd and vulgar speech that undermined the school's educational mission.<sup>67</sup> Because Fraser's sexually suggestive speech fell plainly within the newly created exception to *Tinker*, the Court determined the school acted within its permissible authority to prohibit Fraser's speech.<sup>68</sup> The Court made no determination of whether the speech materially disrupted the school or otherwise intruded upon other students' rights, instead refusing to extend the *Tinker* holding relied upon in the Ninth Circuit's decision to uphold the District Court's injunction against suspending Fraser.<sup>69</sup>

In a narrowly tailored concurrence, Justice Brennan invoked *Tinker*'s substantial-disruption test, arguing that schools could prohibit the use of disruptive language at a school assembly.<sup>70</sup> However, Justice Brennan also noted the geographical limitations of the school's disciplinary reach in declaring the school would have been powerless to intervene had Fraser's speech taken place off campus.<sup>71</sup> Justice Marshall, in his dissent, argued that courts must instead apply only the objective *Tinker* test to any form of student speech, given the special constitutional protections afforded speech.<sup>72</sup> Justice Marshall rejected the *Fraser* majority's test that allows courts to accept a school's subjective opinion that the speech at issue interfered with the school's educational mission.<sup>73</sup>

The Supreme Court has recently acknowledged that “[t]he mode of analysis employed in *Fraser* is not entirely clear,” but that *Fraser* stands for two

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67. See *id.* at 681-86 (holding lewd and vulgar speech as “wholly inconsistent with the ‘fundamental values’ of public school education”). According to the Court, schools must teach such fundamental values as socially appropriate behavior among students, and civil and mature conduct. See *id.* The Court reaffirmed its prior decisions that refused to extend the constitutional rights of students to the same degree as adults in other settings. See *id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)). The Court also distinguished *Fraser* with its previous decision in *Cohen v. California*, where the Court overturned an adult's conviction for disorderly conduct based upon his donning a jacket printed with the words “Fuck the Draft.” *Cohen v. California*, 403 U.S. 15, 26 (1971). The Court in *Fraser* explained:

It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. . . . [T]he First Amendment gives a high school student the classroom right to wear *Tinker*'s armband, but not *Cohen*'s jacket.

*Fraser*, 478 U.S. at 682 (internal citations omitted).

68. *Fraser*, 478 U.S. at 684-85.

69. See *id.* at 680. The Court relied upon the differences between the speech at issue in both cases when it refused to apply *Tinker*'s holding to *Fraser*. See *id.*; see also *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1360-61 (9th Cir. 1985) (holding Fraser's speech did not materially disrupt school activities), *rev'd*, 478 U.S. 675 (1986).

70. See *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

71. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (majority opinion).

72. See *id.* at 690 (Marshall, J., dissenting) (arguing for application of *Tinker* to present case and finding no disruption).

73. See *id.* (arguing Fraser's speech failed to materially disrupt school).

separate principles: The students' constitutional rights are not automatically coextensive with those of adults; and the *Tinker* test is not absolute and does allow for other types of analysis.<sup>74</sup> The Third Circuit recently overturned a district court's holding that applied *Fraser* in lieu of a finding of substantial disruption under *Tinker*, holding that *Fraser* applied only to similar circumstances, and any speech falling outside this exception must instead require application of *Tinker*'s substantial-disruption standard.<sup>75</sup> The Supreme Court has also limited *Fraser* in subsequent cases to apply only to lewd, vulgar, or plainly offensive speech that occurs *on campus*.<sup>76</sup> Other recent cases have determined that *Fraser*'s holding is limited solely to speech occurring on campus, and schools may not exercise authority over similar speech occurring outside the school.<sup>77</sup> However, the reasoning for the Court's decision in *Fraser*, based upon the need to teach civility to public-school students, does not warrant applying *Fraser* to off-campus student cyberspeech.<sup>78</sup>

### 3. Hazelwood v. Kuhlmeier

The Court further limited its broad *Tinker* holding in 1988 when it

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74. Morse v. Frederick, 551 U.S. 393, 404-05 (2007). One commentator notes *Fraser* marks a "dramatic deviation" from both *Tinker* and the Court's general treatment of First Amendment rights. See Papandrea, *supra* note 23, at 1048.

75. See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (*Blue Mountain I*), 593 F.3d 286, 297-98 (3d Cir. 2010) (rejecting application of *Fraser* to online student speech occurring outside school), *rev'd en banc*, 593 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). The lower court in *Blue Mountain* applied *Fraser* to off-campus speech posted on the Internet. See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at \*7-8 (M.D. Pa. Sept. 11, 2008) (applying *Fraser* to off-campus speech based upon lewd and vulgar nature), *rev'd in part*, 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). While the Third Circuit vacated its original opinion from 2010, it declined to apply *Fraser* in the superseding opinion because the speech did not fall within *Fraser*'s narrow exception to *Tinker*. See *Blue Mountain I*, 593 F.3d at 298 (applying *Tinker* to off-campus speech).

76. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988) (interpreting *Fraser*). The Court stated:

A school need not tolerate student speech that is inconsistent with its "basic education mission," even though the government *could not censor similar speech outside the school*. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education."

*Id.* (emphasis added) (internal citations omitted).

77. See, e.g., *Blue Mountain I*, 593 F.3d at 317 (Chagares, J., concurring in part and dissenting in part) (stating *Fraser* does not apply to off-campus speech); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 457 (W.D. Pa. 2001).

78. See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1110 (C.D. Cal. 2010) (arguing *Fraser*'s tenets do not support extension of holding to off-campus speech). Unlike *Tinker*'s holding, predicated upon the need to prevent disruption from occurring in the school environment, regulating off-campus student speech or cyberspeech would not further the school's needs of teaching civility, because off-campus speech inherently involves a parent's scope of authority to teach his or her child civility. See *id.*

determined the substantial-disruption test should not be applied to school censorship of school-sponsored student speech in *Hazelwood School District v. Kuhlmeier*.<sup>79</sup> The speech at issue concerned two articles censored from the student newspaper: One article anonymously examined the impact of pregnancies on students, and the other examined the impact of divorce upon students.<sup>80</sup> Reversing the Eighth Circuit's holding that the censorship failed to satisfy *Tinker*'s substantial-disruption test, the Court held that schools do not need to apply *Tinker* to prohibitions on school-sponsored speech—such as newspapers and theatrical productions—but school officials could exercise editorial control over student speech so long as their actions were “reasonably related to legitimate pedagogical concerns.”<sup>81</sup> Addressing the differences between a school's toleration of student speech and the school's active dissemination of student expression, the Court reasoned that because the latter type of speech bears the school's imprimatur, the school must be able to enact and enforce high standards for such speech before promoting it.<sup>82</sup> In granting great deference to school officials' judgment, the Court determined that censorship of student expression could fail to meet this low objective standard and infringe upon students' First Amendment rights only when the school's exercise had “no valid educational purpose.”<sup>83</sup> Justice Brennan, mirroring Justice Marshall's dissent in *Fraser*, rejected the Court's delineation between school-sponsored and non-school-sponsored speech—and its creation of another exception to *Tinker*—instead arguing that the *Tinker* test struck the proper balance for student speech and should therefore be applied in the present

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79. *Hazelwood*, 484 U.S. at 272-73.

80. *See id.* at 263. The school's principal removed the articles from the paper immediately before the print deadline due to privacy concerns regarding the students in the pregnancy article, concerns about sexual issues arising from a discussion of pregnancy, and invasion-of-privacy concerns in the divorce article stemming from a student's printed comments regarding her parents' relationship. *See id.* at 263-64.

81. *Id.* at 272-73. The Court explicitly determined that the question in *Tinker* differed from the issue presented in *Hazelwood*. *See id.* at 270-71. The Court later held that *Hazelwood*'s “legitimate pedagogical concern” test applied only when a student's school-sponsored speech could reasonably be viewed as speech made by the school. *See Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 834 (1995) (noting impropriety of speech restriction when school “does not itself speak”). Schools may not restrict speech based simply upon the “viewpoint of private persons whose speech it facilitates,” as this differs from a school's *own* speech. *See id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-72 (1988)). Lower courts have since held that school “sponsorship” of student speech should not be lightly presumed, and schools have a responsibility to educate audiences regarding speech disseminated by students, rather than to blindly censor it. *See Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (allowing students to disseminate literature even if “recipients would misunderstand its provenance”).

82. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988). Schools can refuse to disseminate speech that fails to meet these standards, based upon a variety of determinations, such as the intended audience or the speech's message, if that message promotes values inconsistent with the “shared values of a civilized social order.” *Id.* at 272 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

83. *Id.* at 273. The Court determined the principal's actions were reasonable given the possible violation of privacy interests for the anonymous pregnant students and the divorced parents, along with other journalistic concerns related to the article's educational purpose. *Id.* at 274-76.

case.<sup>84</sup> The Court has recently stated the *Hazelwood* holding stands for the proposition that schools may regulate speech that they could not regulate had it occurred outside school grounds.<sup>85</sup> Some commentators note the inability of lower courts to apply the *Hazelwood* holding to electronic off-campus speech because of its narrow application to on-campus, school-sponsored speech.<sup>86</sup>

#### 4. Morse v. Frederick

The Court's most recent student-speech opinion, *Morse v. Frederick*, represented yet another carefully delineated exception to the broad protection for student rights set forth in *Tinker* and—as some have noted—a departure from the precedent that schools can only proscribe student speech if it actually disrupts school activities.<sup>87</sup> In upholding a principal's suspension of a student for displaying a banner reading “BONG HiTS 4 JESUS” at an Olympic Torch Relay across the street from school, the Court sidestepped a chance to clearly determine the geographic and legal distinctions between on- and off-campus speech, preferring instead to declare the action “school speech” based upon its connection to a school-sponsored activity.<sup>88</sup> In holding that schools may prohibit student speech reasonably viewed as promoting drug use, the Court

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84. *Id.* at 289-90 (Brennan, J., dissenting). Justice Brennan vehemently argued that the majority's opinion had little legal basis upon which to create this new exception to the categories of speech to which *Tinker* does and does not apply. See *id.* at 281-82; see also Papandrea, *supra* note 23, at 1049-50 (arguing Justice Brennan “attacked the majority for abandoning the fundamental principles of *Tinker*”); J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 724-32 (declaring Court “disemboweled” *Tinker* disruption standard for school-sponsored publications).

85. *Morse v. Frederick*, 551 U.S. 393, 406-07 (2007).

86. See Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 262 (2008) (arguing *Hazelwood* generally “not instructive” in off-campus cyberbullying cases); see also Sandy S. Li, Notes & Comments, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 102 (2005) (arguing *Hazelwood* inappropriate for non-school-sponsored electronic student speech).

87. See *Morse*, 551 U.S. at 405 (choosing not to apply *Tinker* but instead allow restriction due to speech's content); see also Calvert, *supra* note 57, at 1173 (arguing *Fraser*, *Hazelwood*, and *Morse* carve out fact-specific exceptions to *Tinker*); Erwin Chemerinsky, *How Will Morse v. Frederick Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 20 (2008) (arguing *Morse* represents clear abandonment of *Tinker*); Papandrea, *supra* note 23, at 1050 (arguing *Morse* represents continued erosion of student-speech rights). While *Morse*'s facts more closely parallel those in *Tinker*, thereby leaving some to wonder if it stood as a separate exception to *Tinker*, the majority's language makes clear *Fraser*, *Hazelwood*, and *Morse* all stood as independent exceptions to—and not applications of—*Tinker*. See Denning & Taylor, *supra* note 26, at 859 (arguing *Morse* stands with other two cases as independent exceptions to *Tinker*).

88. See *Morse*, 551 U.S. at 397. At the time the cameras passed by, Frederick and his friends unfurled the large banner; however, all but Frederick complied with the principal's request to put the banner down. See *id.* at 397-98. The Court ruled that, because the event took place during normal school hours and was school sanctioned, Frederick's expression constituted “school speech” and was regulated by school disciplinary rules. See *id.* at 400-01. Commentators question if this expression occurred at a school-sponsored event, noting that the Torch Relay was privately organized and funded, bearing no relationship to the school. See Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 LEWIS & CLARK L. REV. 27, 37 (2008) (arguing Torch Relay inaccurately classified as school-sponsored).

emphasized that *Fraser* and *Hazelwood* clearly established the *Tinker* substantial-disruption analysis did not stand as the absolute standard for measuring permissible prohibitions of student speech.<sup>89</sup> Recognizing that a school environment's special characteristics inherently circumscribe students' First Amendment rights, and that schools maintain an important interest in curtailing drug use among students, the Court stated schools could act preemptively to prohibit speech promoting illegal drug use.<sup>90</sup>

The majority and concurring opinions, however, reflected the Court's cautious approach to creating exceptions to *Tinker*.<sup>91</sup> The majority rejected the school's argument that *Fraser* should be extended to allow schools to proscribe any "offensive" student speech, in fear that such a broad application could encompass political or religious speech deemed offensive to only a few listeners.<sup>92</sup> In addition, Justice Alito's concurrence, joined by Justice Scalia, critically narrowed the potentially broad scope of the majority's opinion by emphasizing the holding did not support any prohibitions beyond speech that reasonably promoted illegal drug use.<sup>93</sup> Justice Alito summarily rejected the petitioner's argument that schools may prohibit any speech that interferes with its educational mission, as stated in the latter half of the Court's *Fraser* holding.<sup>94</sup> Justice Alito further argued *Morse* could not be read as justifying other prohibitions on student speech beyond those recognized in the Court's

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89. *Morse*, 551 U.S. at 405. In examining *Fraser*, the Court determined that *Fraser*'s analysis, even if not entirely clear, did not employ the *Tinker* standard. *Id.* at 404-05. The Court also believed *Hazelwood* confirmed the rule that *Tinker* does not exist as the only basis for prohibiting student speech. *Id.* at 406.

90. See *id.* at 408-09. To support the argument regarding the circumscribed rights of students, the Court highlighted its own recent precedent upholding searches of students that otherwise would be unconstitutional under the Fourth Amendment, recognizing that students' Fourth Amendment rights within school do not equate with those rights outside of school. See *id.* at 406. The standard reasonableness analysis for Fourth Amendment searches must reflect the school's "custodial and tutelary responsibility." *Id.* Further, the Court cited scientific studies and statistics that showed the size and severity of the teenage drug-abuse problem—as well as Congressional support for drug-prevention programs in schools—to support the Court's analysis that these problems created a danger that schools could mitigate by prohibiting speech reasonably believed to promote illegal drug use. See *id.* at 407-08; see also Denning & Taylor, *supra* note 26, at 855 (arguing majority recognized a "special needs" exception to First Amendment in allowing schools to regulate speech).

91. Compare *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (rejecting extension of school's authority to offensive speech), with *id.* at 423 (Alito, J., concurring) (rejecting argument that school had authority to restrict speech running counter to educational mission).

92. See *id.* at 409 (majority opinion).

93. See *id.* at 423 (Alito, J., concurring).

94. See *id.* at 423-24; see also *supra* notes 65-78 (discussing *Fraser* holding). As schools could manipulate an inherently broad definition of "educational mission" to suppress speech with which the school disagrees, Justice Alito argued such prohibitions would implicate the core of First Amendment protections. See *Morse*, 551 U.S. at 423-24 (Alito, J., concurring). In *Harper*, decided prior to *Morse*, the Ninth Circuit permitted the prohibition of speech denigrating homosexuality on the theory that schools do not need to tolerate speech antithetical to their education missions, even though the school could not prohibit the speech had it occurred outside of school. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007). One commentator believes Justice Alito aimed his concurrence at this decision. See Papandrea, *supra* note 23, at 1052.

four major holdings, and *Morse* represents the farthest reaches of permissible prohibitions for student speech under the First Amendment.<sup>95</sup>

Regardless of these explicit limitations on the *Morse* holding created by Justice Alito's concurrence, lower courts have since incorrectly interpreted *Morse* to allow schools to prohibit speech that demonstrates a grave harm to the physical safety of students, speech that reasonably threatens school violence, or any student speech considered harmful by the school.<sup>96</sup> In *Ponce v. Socorro Independent School District*, for instance, the Fifth Circuit interpreted *Morse* to allow schools to restrict speech in order to prevent "harmful activity" therefore allowing schools to meet an "important—indeed, perhaps compelling interest."<sup>97</sup> These misinterpretations of Justice Alito's concurring opinion in *Morse* ignore the narrowing language present in the opinion, as well as represent dangerous departures from historical precedent that allow a school to restrict student speech it believes jeopardizes the health and safety of students without analyzing its disruptive potential.<sup>98</sup> Allowing schools to restrict speech

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95. See *Morse*, 551 U.S. at 423-25 (Alito, J., concurring). Justice Alito based the *Morse* prohibition upon the theory that special characteristics of the school dictate any prohibitions schools may impose on speech. See *id.* at 424. As such, the school environment creates threats to students' physical safety that did not exist outside the school, and schools can therefore prohibit speech that promotes illegal drug use, which Justice Alito characterized as a physical threat to student safety. See *id.* at 425.

96. See *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770 (5th Cir. 2007); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984-85 (11th Cir. 2007); see also 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, 5 (2008) (arguing *Ponce* wrongly allows censorship of any student speech posing potential threat to physical safety). Calvert notes "the Fifth Circuit [in *Ponce*] ripped the narrow concurring opinion of Justices Alito and Kennedy from its factual moorings and took it for a judicial joyride down a *slippery slope of censorship* that allows for squelching any student speech posing a potential threat to the physical safety of students." Calvert, *supra*, at 5 (internal citations omitted) (emphasis added).

97. *Ponce*, 508 F.3d at 769 (internal quotation marks omitted) (interpreting *Morse*). The court further determined that speech advocating physical harm—such as the speech at issue in the instant case—could be prohibited by school administrators with "little further inquiry" than the advocacy of harm. *Id.* The Fifth Circuit continued its questionable interpretation of *Morse* by stating that Justice Alito's concurrence molds the majority's opinion to allow for restriction of speech when possible harm is so great that its disruptive potential need not be evaluated under *Tinker*. See *id.* at 770 (citing *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring)). According to this broad and misguided opinion, *Tinker* is therefore rendered irrelevant as a test for the restriction of student speech when any "threat to the physical safety of students" is deemed present. See *id.* at 770-71 (quoting *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring)) (noting special characteristics of school create heightened need to prevent violence and danger); Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1237 (2009) (noting *Ponce*'s interpretation of *Morse* renders *Tinker* unnecessary in instances of potential harm to students).

98. See Calvert, *supra* note 96, at 7 (stating *Morse* "becomes a legal mechanism for stopping speech, regardless of topic, that jeopardizes the health and safety of students"); Negrón, *supra* note 97, at 1227 (noting *Morse* validated existence of new standard for restricting student speech based upon student welfare). Negrón notes that while *Morse* articulated its standard only in the context of drugs, courts could "logically" extend its reasoning to other "serious and palpable" dangers. Negrón, *supra* note 97, at 1225-26. Arguments like this ignore Justice Alito's clear language noting he joined the majority opinion "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify *any other speech restrictions*" except those advocating the use of illegal narcotics. *Morse v. Frederick*, 551 U.S. 393, 423 (2007)

that may create psychological harm—not just physical harm—creates opportunities for *Morse* to have a far greater reach than the Court clearly intended.<sup>99</sup> Removing constitutional protection for speech that may cause psychological harm opens the door for *Morse* to be used by schools to restrict cyberbullying without undertaking the traditional *Tinker* disruption analysis, thereby possibly creating grave impingements upon student constitutional rights.<sup>100</sup>

### B. Lower Court Treatment of *Tinker*

Lower courts have continually held that *Tinker* established a basic framework for assessing student free-speech claims, operating as the general rule while noting the holding is subject to “several narrow exceptions.”<sup>101</sup> Because the Supreme Court has yet to address the factual issue presented by most cases concerning off-campus student cyberspeech—whether schools may regulate this speech when brought on campus, either by the speaker or through other means—lower courts differ in how they treat this form of protected speech.<sup>102</sup> Lower courts further differ on whether *Tinker*’s substantial-

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(Alito, J., concurring) (emphasis added); *see also* Calvert, *supra* note 96, at 9 (discussing Justice Alito’s clear limiting language). *Contra Ponce*, 508 F.3d at 770 (noting some harms so great that disruptive potential does not require analysis in light of *Morse*). Justice Alito clearly denotes that his concurring opinion targets only speech aimed at advocating illegal drug use, as these activities “present[] a grave and in many ways unique threat to the *physical safety of students*” and therefore schools only “may ban speech advocating illegal drug use.” *Morse*, 551 U.S. at 425 (Alito, J., concurring). Calvert notes that *Morse* can unfortunately be easily interpreted by lower courts to restrict all “manners, modes and varieties of student speech that portend harm, be it physical . . . or psychological.” Calvert, *supra* note 96, at 28; *see also* Ponce, 508 F.3d at 770-71 (advocating *Morse* should restrict speech threatening physical harm); *Boim*, 494 F.3d at 984 (same); *cf.* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008) (recognizing limited scope of *Morse* holding, but also discussing possibility of restricting speech causing psychological harm). The Seventh Circuit’s discussion of *Morse*’s concern regarding the *psychological effect* of drugs led it to discuss—and for all intents and purposes, leave wide open—the possibility schools may restrict speech that has *psychological effects* on a target. *See Nuxoll*, 523 F.3d at 674 (noting the “*psychological effects*” of targeted racial or gender discrimination by students); *see also* Calvert, *supra* note 96, at 27-28 (discussing possible use of *Nuxoll*).

99. *See* Calvert, *supra* note 96, at 27-28 (discussing extension of *Morse* holding to cover speech that may cause psychological harm); *see also* *Morse*, 551 U.S. at 423 (Alito, J., concurring) (noting limited effect intended by majority opinion as it relates to speech concerning illegal drug use); *Blue Mountain II*, 650 F.3d 915, 938 (3d Cir. 2011) (*en banc*) (Smith, J., concurring) (interpreting Justice Alito’s concurrence to “recognize[] that *Tinker*’s substantial-disruption test does not apply to students’ off-campus expression” (citing *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring))), *cert. denied*, 132 S. Ct. 1097 (2012).

100. *See* Calvert, *supra* note 96, at 33 (noting lower courts’ use of *Morse* to support censorship of student expression “far removed” from speech advocating illegal drug use).

101. *See Blue Mountain II*, 650 F.3d at 927 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001)); *see also* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (“Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption.”). These exceptions are the cases discussed previously: *Fraser*, *Hazelwood*, and *Morse*. *See Blue Mountain II*, 650 F.3d at 927-28 (discussing three exceptions to *Tinker*).

102. *See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1102-03 (C.D. Cal. 2010) (noting Supreme Court’s inaction regarding treatment of off-campus student cyberspeech); *Zande, supra* note 18, at 119 (noting inconsistent application of precedent concerning treatment of off-campus student speech

disruption test governs students' off-campus expression.<sup>103</sup> While some courts maintain off-campus student speech enjoys constitutional protections beyond those discussed in *Tinker*, others recognize "it is now well established that *Tinker's* 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school."<sup>104</sup> These inconsistencies illustrate the central dilemma in determining the extent of a school's authority over off-campus student cyberspeech: the need to balance order in public schools with respect for constitutional protections afforded free speech.<sup>105</sup>

### *1. The Material and Substantial Disruption Prong*

Since the advent of electronic-speech-restriction cases, most courts have chosen to apply *Tinker's* substantial-disruption prong to evaluate whether speech restrictions impacted constitutionally protected student speech.<sup>106</sup> Four recent cases, each denied certiorari by the Supreme Court, illustrate the varying—and confusing—ways in which lower courts have applied traditional constitutional protections for student speech to off-campus cyberspeech.<sup>107</sup> Beyond these four cases, lower courts have traditionally differed in their application of *Tinker*, with some gravitating towards a strict geographic formalism while others ignore the speech's location in focusing on its disruptive abilities.<sup>108</sup> The majority of federal and state courts have applied

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and cyberspeech); Benjamin L. Ellison, Notes, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 819 (2010) (noting differentiated treatment of same subject by lower courts in absence of Supreme Court guidance). Zande notes the variety of approaches employed by lower courts illustrates the need for a "standardized, adaptable test" to apply in cyberbullying cases, one that reflects the shrinking geographical distinction between on- and off-campus speech due to the Internet's power. Zande, *supra* note 18, at 119-20. Zande further posits that, rather than create a new standard strictly for cyberbullying (and likely an additional exception to *Tinker*), *Tinker* should be applied as the "best test" for courts to apply in these cases, given its acceptance and ease of application. *See id.* at 130. *But see* Papandrea, *supra* note 23, at 1092 ("The application of *Tinker's* materially and substantially disruptive standard to all digital speech is also a tempting but ultimately unsatisfying approach.").

103. *Compare* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615, 620 (5th Cir. 2004) (stating *Tinker* does not apply to students' off-campus speech), Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050, 1053 n.18 (2d Cir. 1979) (distinguishing *Tinker* in case of off-campus speech), *and* Klein v. Smith, 635 F. Supp. 1440, 1441 (D. Me. 1986) (same), *with* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 & n.4 (2d Cir. 2007) (applying *Tinker* to off-campus speech in certain circumstances), *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1104, 1107 (same), *and* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001) (same).

104. *See Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

105. *See id.* at 221 (Jordan, J., concurring).

106. *See Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1102-10 (discussing scope of speech restriction cases analyzed under *Tinker* test).

107. *See Blue Mountain II*, 650 F.3d 915, 926-30 (3d Cir. 2011) (en banc) (applying *Tinker* to off-campus student cyberspeech in lieu of other precedent), *cert. denied*, 132 S. Ct. 1097 (2012). *See generally Layshock*, 650 F.3d 205; Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *Doninger II*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

108. *See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1102-10 (C.D. Cal.

*Tinker's* substantial-disruption test to student off-campus cyberspeech without regard for the legal distinctions in school authority concerning on- and off-campus speech.<sup>109</sup>

## 2. Tinker's "Rights of Others" Prong

The Supreme Court in *Tinker* also held that schools may restrict student speech that interferes with the rights of other students within the school.<sup>110</sup> Because of the lack of judicial interpretation, the precise scope of *Tinker's* "rights of others" language is unclear.<sup>111</sup> Two cases dealing with similar circumstances illustrate the difficulty lower courts have faced in properly interpreting the unclear mandate that *Tinker's* "rights of others" prong adopts: *Harper v. Poway Unified School District* and *Nixon v. Northern Local School District Board of Education*.<sup>112</sup> In *Nixon*, the district court denied a school's attempted prohibition on a student's right to wear a t-shirt condemning homosexuality, abortion, and Islam under *Tinker's* "rights of others" prong.<sup>113</sup> The court rejected the school's argument that the shirt infringed upon the rights of other students in the school, instead interpreting that schools must show the speech in some way violated "other students' rights to be secure and to be let alone" by proving some degree of actual violation of these rights.<sup>114</sup>

In contrast, the Ninth Circuit sought to more fully interpret the rights

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2010) (discussing breadth of lower-court cases applying *Tinker* to off-campus student speech). The court in *Beverly Hills* indeed noted that the "majority rule" regarded the geographic origin of the speech as immaterial; only the effect of the speech governed a court's analysis of the constitutionality of speech restrictions. See *id.* at 1108.

109. See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989-92 (9th Cir. 2001); *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998); *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 970-71 (5th Cir. 1972); *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1110; *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

110. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (allowing schools to restrict speech that impinges upon rights of other students).

111. See *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 176 (D. Mass. 2007) (noting lack of clarity regarding second prong of *Tinker*). The court in *Bowler* noted the Supreme Court had deferred interpretation of whether *Tinker's* second prong extends only to speech capable of triggering tort liability. See *id.* "'In any case, it is certainly not enough that the speech is merely offensive to some listener.'" *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

112. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005).

113. See *Nixon*, 383 F. Supp. 2d at 974 (holding prohibition violated constitutional rights). The student refused to remove a t-shirt that declared "Homosexuality is a sin! Islam is a lie! Abortion is murder!" *Id.* at 967.

114. See *id.* at 974 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). The court extrapolated from *Tinker's* brief language on the "rights of others" analysis that—in some way—students possess rights to be secure and let alone at school, even though the court provided little clarity regarding just what these rights entail. See *id.* Without more of a showing that homosexual or Muslim students felt their rights were violated, the Court held that the student's "silent, passive expression" did not collide with the "rights of others" in the school. *Id.*

protected from infringement under the “rights of others” prong in upholding a school’s similar prohibition of a student’s antihomosexual t-shirt in *Harper*.<sup>115</sup> The court interpreted the scope of *Tinker*’s “rights of others” prong to include not just freedom from physical assaults—like in *Nixon*—but also psychological attacks.<sup>116</sup> Because the student speech in question targeted homosexual students—a minority class—and could possibly cause them psychological damage, the court determined the speech fundamentally collided with the rights of these students to be free from psychological attacks.<sup>117</sup> As such, the court determined that public-school students have a right to be free from psychological harm while on school campuses.<sup>118</sup>

Judge Kozinski, in a scathing dissent that accused the majority of “judicial creation,” argued vehemently that the “rights of others” language of *Tinker* incorporated only traditional rights against assault, defamation, invasion of privacy, extortion, and blackmail, whose application had been previously harmonized with the First Amendment.<sup>119</sup> Judge Kozinski argued that the court instead sought to incorporate traditional harassment claims under the panoply of rights protected by *Tinker*; such an interpretation, he warned, would give state legislatures broad authority to unconstitutionally subvert students’ First Amendment protections to legislative definitions of harassment.<sup>120</sup> The Supreme Court, however, vacated the decision as moot, robbing the Ninth Circuit’s opinion of any precedential value.<sup>121</sup> Even if *Harper* were good law, however, the Ninth Circuit expressly limited its holding to “instances of

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115. See *Harper*, 445 F.3d at 1178 (holding t-shirt collided with rights of other students in most fundamental way).

116. See *id.* The court was concerned with the psychological injuries suffered by homosexual students subjected to verbal assaults based upon their sexual orientation. See *id.* According to the court, verbal assaults based upon physical characteristics of the victim—race, religion, or sexual orientation, for instance—had the potential to psychologically injure or intimidate the victim and therefore interfered with a victim’s right to learn. See *id.* at 1179-80.

117. See *id.* at 1178-79.

118. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007).

119. *Id.* at 1198-1201 (Kozinski, J., dissenting).

120. See *id.* (arguing *Tinker* does not give state legislatures right to overrule First Amendment protections). Judge Kozinski noted the majority’s opinion appeared to allow for a school to prohibit any language it may deem offensive to a particular group of students, based upon an argument that such offensive language constituted “harassment” under California law. See *id.* at 1197-98. Similar actions could be undertaken by state legislatures to define “rights of others” to include harassing or offensive language for purposes of student-speech prohibitions, which Judge Kozinski preemptively declared unconstitutional. See *id.* at 1198. The extension of harassment law to the rights protected by *Tinker* troubled Judge Kozinski because harassment law generally encroaches upon the protections given to speech by the First Amendment. See *id.* While harassment law could be reconciled under traditional First Amendment jurisprudence if its authority was limited to situations in which the harassment was severe and pervasive so as to be “tantamount to conduct,” the speech at issue in this case failed to meet this standard. See *id.*

121. See *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007), vacating as moot 445 F.3d 1166 (9th Cir. 2006); see also Cnty. of L.A. v. Davis, 440 U.S. 625, 634 n.6 (1979) (“[V]acating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect.”).

derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation.”<sup>122</sup>

### C. Massachusetts's Statutory Treatment of Tinker and Its Interpretations

In 1974, the Massachusetts General Court passed legislation (section 82) that protected students' rights to free expression by codifying the *Tinker* substantial-disruption test as the single standard by which schools can restrict on-campus speech.<sup>123</sup> Section 82 protects students' rights to freely express themselves on school grounds provided that the exercise of said right does not create any “disruption or disorder within the school.”<sup>124</sup> Students may exercise this right through speech, symbols, written words, and assembly, among other ways.<sup>125</sup>

Massachusetts's highest court, the Supreme Judicial Court (SJC), has interpreted the language of section 82 only once.<sup>126</sup> In *Pyle v. School Committee of South Hadley*, the SJC answered a question of state law certified to it by the First Circuit: “Do high school students in public schools have the freedom under G.L. c. 71, § 82 to engage in non-school-sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder?”<sup>127</sup> The SJC answered in the affirmative, stating the statute's clear and unambiguous language provided a court no room to construe an exception for “arguably vulgar, lewd, or offensive language absent a showing of

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122. See *Harper*, 445 F.3d at 1183.

123. See MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2013); see also Act of July 31, 1974, ch. 670, 1974 Mass. Acts 663 (providing protection for students' freedom of expression).

124. See ch. 71, § 82; see also id. § 84 (preventing discipline of students for conduct not connected with any school-sponsored activities).

125. *Id.* § 82. The statute proclaims freedom of expression “shall include [but is not limited to] the rights and responsibilities of students . . . (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions.” *Id.*

126. See *Pyle v. Sch. Comm. of S. Hadley (Pyle III)*, 667 N.E.2d 869, 871-72 (Mass. 1996) (interpreting statutory language); see also *Pyle v. S. Hadley Sch. Comm. (Pyle II)*, 55 F.3d 20, 21 (1st Cir. 1995) (noting no Massachusetts decisional law existed interpreting section 82).

127. *Pyle III*, 667 N.E.2d at 871 (citing *Pyle II*, 55 F.3d 20, 22 (1st Cir. 1995)). In *Pyle*, two students sued the South Hadley School Committee to challenge the dress code prohibiting clothing the school considered “lewd, obscene, profane or vulgar”; this prohibition extended to clothing that included political views as well. *Pyle v. S. Hadley Sch. Comm. (Pyle I)*, 861 F. Supp. 157, 160-64 (D. Mass. 1994) (discussing facts of case). The district court granted summary judgment and upheld the school's right to prohibit such clothing, arguing that deference was appropriate because local schools were in the “best position to weigh the strengths and vulnerabilities” of a town's students. See *id.* at 170. The court further held that “reasonable limitations on vulgarity do facilitate a school's educational mission.” *Id.* Most importantly, however, the court found that “Section 82 [had] no relevance . . . to the analysis of a school administrator's efforts to curb vulgarity and sexual innuendo. This statute does not affect *Fraser*'s central holding. The court must apply a constitutional, not state statutory, analysis.” *Id.* at 168. On appeal from the grant of summary judgment to the school, the First Circuit certified the question because the court was “not convinced that the statutory question is of sufficient and prospective importance to state policy in the administration of its school system, and affects students and school administrators statewide for us to make a far-reaching decision without advice.” *Pyle II*, 55 F.3d at 22.

disruption within the school.”<sup>128</sup> The SJC’s interpretation of section 82 effectively bars schools from restricting student speech within the school under any of the Supreme Court’s other student-speech cases: *Fraser*, *Hazelwood*, or *Morse*.<sup>129</sup>

#### *D. The Hostile School Environment: Adopting Antiharassment Policies to Prevent School Liability Under Davis*

Massachusetts has adopted language in section 37O allowing schools to prohibit student cyberspeech if it creates a “hostile environment at school” for the victim.<sup>130</sup> The “hostile school environment” standard stems from the 1998 Supreme Court case of *Davis v. Monroe County Board of Education*,<sup>131</sup> the first case to recognize civil liability under Title IX for schools that fail to adequately respond to systemic peer-on-peer sexual harassment.<sup>132</sup> In holding that schools

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128. *Pyle III*, 667 N.E.2d at 872. The SJC noted that the “clear and unambiguous language” of the statute limits the protected rights of all students only when the expression—speech, clothing, assembly, etc.—disrupts the school environment. *See id.* The SJC further held: “The language is mandatory. The students’ rights include expression of views through speech and symbols, ‘without limitation.’ There is no room in the statute to construe an exception for arguably vulgar, lewd, or offensive language absent a showing of disruption within the school.” *Id.*

129. *See id.*; *see also Pyle II*, 55 F.3d at 21-22 (discussing application of *Hazelwood* to interpretation of section 82).

130. *See MASS. GEN. LAWS ANN. ch. 71, § 37O(b)* (West 2013) (including hostile school environment as one of three standards for prohibitions of student off-campus cyberspeech); *id.* § 37O(a) (defining “hostile environment”). The majority of states that include a similar standard for student-speech prohibitions do so as a standard independent from the *Tinker* substantial-disruption analysis. *See ALA. CODE § 16-28B-3(2)(d)-(e)* (2012) (creating standards of “hostile environment” and “intimidating, threatening, or abusive educational environment”); *ARK. CODE ANN. § 6-18-514(b)(2)(C)* (2012) (defining bullying as creating “hostile educational environment” for victim); *DEL. CODE ANN. tit. 14, § 4112D(a)(2)* (2012) (defining bullying as “creating a hostile, threatening, humiliating or abusive educational environment”); *GA. CODE ANN. § 20-2-751.4(a)(3)(C)* (2012) (defining bullying to include creation of “intimidating or threatening educational environment”); *KAN. STAT. ANN. § 72-8256(a)(1)(A)* (West 2012) (defining bullying to include threats that create “intimidating, threatening or abusive educational environment”); *N.H. REV. STAT. ANN. § 193-F:3(l)(a)(4)* (2013) (defining bullying as creating a “hostile educational environment”); *24 PA. CONS. STAT. ANN. § 13-1303.1-A(e)(4)(ii)* (West 2012) (defining bullying as “creating a threatening environment”); *WYO. STAT. ANN. § 21-4-312(a)(i)(C)* (2012) (defining “harassment, intimidation or bullying” to include “creating an intimidating, threatening or abusive educational environment”). Some states, however, predicate their inclusion of a hostile-school-environment standard upon an independent finding of substantial disruption under *Tinker*. *See MD. CODE ANN., EDUC. § 7-424(a)(2)(i)* (LexisNexis 2012) (requiring hostile educational environment to substantially interfere with victim’s access to education); *N.C. GEN. STAT. § 115C-407.15(a)(2)* (2012) (requiring hostile environment to substantially interfere with or impair student’s performance, opportunities, or benefits); *OR. REV. STAT. ANN. § 339.351(2)(a)-(c)* (West 2012) (requiring substantial interference with victim’s school environment before using effect of “hostile educational environment”).

131. 526 U.S. 629 (1999).

132. *See id.* at 650 (holding schools liable when deliberately indifferent to peer sexual harassment). Prior to *Davis*, the Court had held that civil liability for the school only attached when the aggressor in a particular case was a school official or teacher, and not a victim’s peer. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding school officials must have actual knowledge of teacher’s sexual harassment before liability attaches); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66-74 (1992) (creating damages remedy when schools liable for teacher’s sexual harassment of student under Title IX). *See generally Kay P. Kindred, When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and*

could be liable under Title IX only in the most extreme circumstances of sexual harassment, the Court conditioned this liability upon a finding that the school acted with deliberate indifference to systemic harassment “so severe, pervasive, and objectively offensive” that it deprived the victim of access to educational opportunities or benefits he or she would otherwise have.<sup>133</sup> Contrary to a finding of this type of systemic sexual harassment against a victim, the Court explicitly stated that single acts of teasing and name-calling cannot constitute the actionable systemic harassment required for attachment of Title IX liability.<sup>134</sup>

Juxtaposing the Third Circuit’s cases of *Saxe v. State College Area School District* and *Sypniewski v. Warren Hills Regional Board of Education* provides an example of the factors courts use in analyzing school-harassment policies that prohibit student speech under a *Tinker* analysis.<sup>135</sup> In an opinion authored by then-Judge Alito, the Third Circuit in *Saxe* overturned a school-harassment policy as overbroad, reasoning that the policy—which had adopted a *Davis*-related hostile-environment standard—prohibited speech that posed no realistic threat of substantial disruption to the school, in violation of the First Amendment.<sup>136</sup> The court’s overbreadth analysis focused on two key issues: First, the policy circumvented *Tinker*’s substantial-disruption test by allowing schools to prohibit speech that had the purpose—but not the effect—of interfering with the victim’s educational performance; and second, the broad language of the hostile-environment prong could encompass protected speech that posed no realistic threat of disruption to the school.<sup>137</sup> Under the court’s

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*the First Amendment in School*, 75 N.D. L. REV. 205 (1999) (discussing development of sexual-harassment jurisprudence under Title IX).

133. *Davis*, 526 U.S. at 649-50. The Court’s holding interprets severe cases of harassment to be the equivalent of discrimination for the purposes of Title IX liability based upon the victim’s gender. *See id.* (stating sexual harassment meets definition of discrimination in school context under Title IX); *see also Gebser*, 524 U.S. at 281 (defining sexual harassment as form of discrimination for Title IX purposes). A court must also find that the school had adequate notice it could be liable for the conduct at issue and the school exercised “substantial control” over both the harasser and the context in which the harassment occurred. *See Davis*, 526 U.S. at 644-50.

134. *See Davis*, 526 U.S. at 651-53. The Court argued that actionable harassment cannot arise from a single incident of peer-on-peer harassment, but must be systemic in nature so as to deny the victim equal access to the educational programs or activities of the school. *See id.* at 652-53.

135. *See Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 252-69 (3d Cir. 2002) (upholding student-speech prohibitions under antiharassment policy using *Tinker* analysis); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211-17 (3d Cir. 2001) (analyzing school-speech prohibitions per harassment policy under *Tinker* substantial-disruption standard).

136. *See Saxe*, 240 F.3d at 216-17 (arguing hostile-environment standard incorporates speech generally protected by First Amendment unless materially disruptive); *see also id.* at 202-03 (highlighting school district’s harassment policy). The school’s policy allowed for the prohibition of speech that had the purpose or effect of substantially interfering with the victim’s educational performance or creating an “intimidating, hostile or offensive” school environment for the victim. *See id.* at 202.

137. *See id.* at 216-17. Allowing schools to prohibit speech the school believed was undertaken for the purposes of disruption ignored *Tinker*’s requirement that schools show either the speech created a disruption, or the school reasonably believed it would. *See id.* at 217; *Sypniewski*, 307 F.3d at 262; *see also C. Eric Wood*,

analysis, strictly verbal harassment still enjoys constitutional protections under the First Amendment, and imposing restrictions on such protected speech was “without precedent” in federal jurisprudence at any level.<sup>138</sup> Furthermore, the Third Circuit noted that such an argument “belie[d] the *very real tension* between anti-harassment laws and the Constitution’s guarantee of freedom of speech.”<sup>139</sup>

In comparison, the Third Circuit in *Sypniewski* upheld a more narrowly tailored school-harassment policy on the grounds that the school’s history of racial tension provided a substantial basis for the school’s reasonable belief that racially inflammatory language would disrupt the school environment.<sup>140</sup> Without the history of racial disruption within the school, the court argued prohibitions of this speech would equate to nothing more than an unsubstantiated fear of a disturbance, prohibited under any *Tinker* analysis as insufficient for school-speech prohibitions.<sup>141</sup> However, the court advised the school and others that any harassment policy or speech code, in order to avoid future constitutional issues, should adopt *Tinker*’s substantial-disruption test as the sole standard by which the school can prohibit speech.<sup>142</sup>

#### E. Section 37O: Massachusetts’s Antibullying Statute

Many antibullying advocates have declared section 37O a model for other

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Note, *Learning on Razor’s Edge: Re-Examining the Constitutionality of School District Policies Restricting Educationally Disruptive Student Speech*, 15 TEX. J. ON C.L. & C.R. 101, 122-27 (2009) (discussing generally *Tinker*’s “reasonable forecast” of substantial-disruption test). Because the policy’s language included no threshold showing of either pervasiveness or severity of harassment, as required under *Davis*, the school could use the standard to prohibit “negative name calling and degrading behavior” or “derogatory comments” as used in the policy. *See Saxe*, 240 F.3d at 203 (outlining policy language for harassment based on race or sexual orientation). These prohibitions, without a showing of material or substantial disruption, violated students’ free-speech protections. *See id.* at 217.

138. *See Saxe*, 240 F.3d at 209.

139. *Id.* (emphasis added). While noting the court was not suggesting that antiharassment laws could never withstand constitutional scrutiny under the First Amendment, Judge Alito noted no categorical rule existed that divested “‘harassing’ speech, as defined by federal anti-discrimination statutes, of First Amendment protection.” *See id.* at 210. Even though a listener or recipient could consider the harassing speech “evil and offensive,” the speech could be used to communicate protected ideas or opinions that enjoy constitutional protections. *See id.* at 209.

140. *See Sypniewski*, 307 F.3d at 262 (arguing history of racial difficulties reasonably likely to cause substantial disruption). The school had experienced a long history of disruption stemming from a school gang’s use of the Confederate flag. *See id.* at 254.

141. *See Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 262 (3d Cir. 2002) (holding substantial evidence of racial discord enough to satisfy *Tinker*). The court believed this policy would likely be held unconstitutional in other school districts or even this one at a different time. *See id.* at 265.

142. *See id.* at 266, 268-69 (arguing school should more directly address factors that justify prohibition of student speech). The district court had interpreted into the policy’s language a *Tinker* requirement for material and substantial disruption in an effort to address fears of the school, in addition to constitutional questions. *See id.* at 262. The court pointed out that the school district in *Saxe* had modified its harassment policy since the *Saxe* decision to more narrowly address disruption under the hostile-school-environment standard. *See id.* at 261 n.20 (outlining new harassment policy).

states in combating the growing cyberbullying problem among adolescent students.<sup>143</sup> Section 37O mirrors other states' antibullying statutes by prohibiting bullying and cyberbullying on school grounds, at school-sponsored or -related activities, on school buses or at bus stops, or through the use of school-owned computers or other technologies.<sup>144</sup> Massachusetts, however, goes farther than most states by expanding the reach of its measure past the school walls.<sup>145</sup> Section 37O also prohibits bullying at any activity, function, or program, even if not school related, and through the use of any technology or electronic device, even if not owned by the school, if the bullying behavior "creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school."<sup>146</sup> Section 37O also defines a "hostile environment" as a "situation in which bullying causes the school environment to be permeated with intimidation, ridicule or insult that is sufficiently severe or pervasive to alter the conditions of the student's education."<sup>147</sup> This definition gives school administrators wide latitude to determine, after a fact-based analysis, whether the pattern of bullying warrants disciplinary action.<sup>148</sup>

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143. See MASS. GEN. LAWS ANN. ch. 71, § 37O (West 2013); *supra* note 8 and accompanying text (highlighting commentary regarding strength of Massachusetts antibullying statute); see also Christine Legere, *Pushing Back: Bolstered by a New State Law Addressing Bullying, Schools Move to Educate Staff, Students on Responding to Aggression*, BOSTON.COM, May 13, 2010, [http://www.boston.com/community/moms/articles/2010/05/13/schools\\_move\\_to\\_evaluate\\_staff\\_students\\_on\\_response\\_to\\_bullying/](http://www.boston.com/community/moms/articles/2010/05/13/schools_move_to_evaluate_staff_students_on_response_to_bullying/) (referring to bill as "one of the strongest legislative measures" in country to combat bullying); Jonathan Saltzman, *Antibully Law May Face Free Speech Challenges*, BOSTON.COM, May 4, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/05/04/antibully\\_law\\_may\\_face\\_free\\_speech\\_challenges/](http://www.boston.com/news/local/massachusetts/articles/2010/05/04/antibully_law_may_face_free_speech_challenges/) (declaring bill "most far-reaching effort yet by a state" to deter cyberbullying).

144. See ch. 71, § 37O(b)(i) (outlining geographical prohibitions on bullying); *id.* § 37O(a) (providing definitions for "school district" and "school grounds"); see also *infra* notes 155-78 and accompanying text (describing cyberbullying prohibitions enacted in other states).

145. See *infra* Part II.F.2 and accompanying text (outlining less expansive state statutory approaches to cyberbullying).

146. Ch. 71, § 37O(b)(ii). These three objective standards measuring off-campus bullying and cyberbullying mirror the five standards for on-campus bullying and cyberbullying. See *id.* Under the statute's language, however, "on-campus" bullying also prohibits behavior that physically or emotionally harms the victim, damages the victim's property, or places the victim in reasonable fear of harm to his or her person or property. See *id.* § 37O(a) (defining bullying).

147. See *id.*; see also 603 MASS. CODE REGS. 49.03 (2010) (defining "hostile environment" in matching language to section 37O); *infra* Part III.C (discussing development and constitutionality of "hostile environment" standard).

148. See ch. 71, § 37O(a) (defining "hostile environment"). The statute provides no further guidance on the interpretation of "sufficiently severe or pervasive to alter the conditions of the student's education," leaving the decision up to school administrators to determine whether bullying behavior satisfies the requirements of "alter[ing] the conditions" of the victim's education. See *id.*; see also John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 119 (2011) (discussing lack of clear definition for what constitutes "hostile environment" in section 37O). Hayward notes that this lack of clarity creates a ripe challenge to the statute for vagueness, noting the "chilling effect" it could have on student speech. See *id.* at 119-20.

Massachusetts has defined bullying expansively as a repeated pattern of expressions or gestures directed at a victim.<sup>149</sup> Section 37O measures bullying conduct using an objective standard, including whether the conduct creates a hostile school environment for the victim or materially and substantially disrupts the school environment.<sup>150</sup> Section 37O also incorporates cyberbullying into its definition of prohibited conduct, and includes any communications involving the transfer of images, words, or other data over an electronic medium that satisfy the statute's objective standards for "bullying."<sup>151</sup> Most importantly, given the rise in use of social-networking sites by adolescents, section 37O includes any bullying conducted on sites such as Facebook by outlawing the posting of material reasonably considered "bullying" on these websites.<sup>152</sup> Under section 37O, such behavior does not constitute criminal conduct and is punishable only using intraschool disciplinary methods.<sup>153</sup> Other statutes, however, create criminal sanctions for cyberstalking or cyberharassment, deemed "willful and malicious" conduct that targets the victim.<sup>154</sup>

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149. *See MASS. GEN. LAWS ANN. ch. 71, § 37O(a)* (West 2013) (outlining definition of "bullying" within statute). Bullying requires "the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim . . ." *Id.*

150. *See id.* (defining "bullying"). Additional standards by which on-campus bullying conduct is measured include: Whether the conduct caused physical or emotional harm to the victim or the victim's property; whether the conduct placed the victim in a reasonable fear of harm to his or her person or property; or whether the conduct infringes upon the rights of the victim at school. *See id.*

151. *See id.* (explicitly stating "bullying" includes cyberbullying for purposes of statute). Therefore, any bullying conduct that includes electronic communications of this type must either cause physical or emotional harm to the victim or damage the victim's property, place the victim in reasonable fear of harm, create a hostile school environment for the victim, infringe upon the victim's rights at school, or materially and substantially disrupt the education process or orderly operation of the school. *See id.*; *see also* 603 MASS. CODE REGS. 49.03 (2010) (defining "cyberbullying"). The Massachusetts Department of Education, in regulations promulgated pursuant to section 37O, defines cyberbullying as:

[B]ullying through the use of technology or any electronic communication, which shall include . . . any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted . . . by a wire, radio, electromagnetic, photo electronic or photo optical system, including . . . electronic mail, internet communications, instant messages or facsimile communications.

603 MASS. CODE REGS. 49.03 (2010). Under the definition, cyberbullying also includes creation of a webpage or blog where the author intends to assume the identity of the victim, or the knowing impersonation of the victim if said impersonation creates any of the conditions under the definition of "bullying." *Id.*

152. *See ch. 71, § 37O(a)* (defining "cyber-bullying"). Under the terms of the statute, any cyberbullying that meets one of the five objective standards of bullying conduct under the statute would be subject to discipline. *See id.*

153. *See id.* § 37O(d)(v) (outlining requirement for range of disciplinary actions possibly taken against bullies); *see also* ELECTRONIC MEDIA AND YOUTH VIOLENCE, *supra* note 15, at 6 (detailing balancing of interests in enacting disciplinary methods).

154. *See MASS. GEN. LAWS ANN. ch. 265, § 43* (West 2013) (detailing crime of cyberstalking); *id.* § 43A (providing updated statute for criminal cyberharassment). Cyberstalking requires a perpetrator to engage in a willful or malicious pattern of conduct, directed at a victim, that seriously alarms or annoys the victim, reasonably causes the victim to suffer from substantial emotional distress, or threatens the victim so as to place

#### *F. Other State Statutes Targeting Cyberbullying*

A majority of states have enacted legislation aimed at preventing cyberbullying or bullying via electronic communications.<sup>155</sup> Within these statutes, some distinctions exist between the different state approaches regarding the degree to which schools can prohibit speech and therefore impact students' free-speech rights.<sup>156</sup> Some states—in the same vein as Massachusetts—choose to grant expansive authority to school officials to prohibit electronic bullying off campus.<sup>157</sup> Other states have chosen instead to require any bullying behavior be motivated by a personal characteristic of the victim, such as his or her race, national origin, or sexual orientation.<sup>158</sup> A greater number of states limit the authority of school officials to punish for speech on school grounds or conducted through school-owned technology.<sup>159</sup>

##### *1. Expansive Cyberbullying Statutes*

Arkansas, Maryland, New Hampshire, New Jersey, and Oklahoma have all passed broad legislation—similar to section 37O—that grants school officials the authority to restrict off-campus cyberbullying.<sup>160</sup> Arkansas and Oklahoma

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him or her in reasonable fear of imminent death or bodily injury. *See id.* § 43. Cyberharassment requires similar conduct, but does not require the perpetrator to threaten the victim with imminent death or bodily injury. *See id.* § 43A.

155. *See SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES* (2013), [http://cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf) (compiling state cyberbullying laws); NATIONAL ASS'N OF STATE BDS. OF EDUC., BULLYING, HARASSMENT AND HAZING (2012), [http://nasbe.org/healthy\\_schools/hs/bytopics.php?topicid=3131&catExpand=acdnbtn\\_catC](http://nasbe.org/healthy_schools/hs/bytopics.php?topicid=3131&catExpand=acdnbtn_catC) (last visited Feb. 15, 2013) [hereinafter NASBE REPORT] (detailing and summarizing state cyberbullying laws); *see also* Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 291 (2008) (highlighting reasons why cyberbullying statutes less prevalent than bullying statutes).

156. *See infra* notes 160-78 (discussing different state approaches to cyberbullying statutes).

157. *See infra* Part II.F.1 (discussing expansive state approaches to cyberbullying statutes).

158. *See infra* Part II.F.2.a (discussing states defining bullying motivated by victim's personal characteristics).

159. *See infra* Part II.F.2.b-c (discussing state approaches predicated upon physical location of cyberbullying conduct).

160. *See* ARK. CODE ANN. § 6-18-514(e)(2)(B) (2012) (prohibiting any bullying committed via "electronic act"); MD. CODE ANN., EDUC. § 7-424(a)(2)(ii) (LexisNexis 2012) (prohibiting intentional acts of bullying that substantially disrupt school); N.H. REV. STAT. ANN. § 193-F:3(I) (2012) (prohibiting off-campus cyberbullying that interferes with victim's educational opportunities or substantially disrupts school); N.J. STAT. ANN. § 18A:37-14 (West 2012) (preventing off-campus cyberbullying activity that substantially disrupts or interferes with school environment); OKLA. STAT. tit. 70, § 24-100.4(A)(1) (2012) (prohibiting off-campus cyberbullying specifically directed at students and meeting statutory definition of bullying). In addition, Iowa and Minnesota adopted legislation that requires each state's Board of Education to adopt a model plan for implementation by the state's school districts prohibiting cyberbullying in schools. *See* IOWA CODE ANN. § 280.28(3) (West 2012) (declaring minimum standards required for school policy); MINN. STAT. ANN. § 121A.03(1) (West 2012) (requiring adoption of model policy); *see also* IOWA DEP'T OF EDUC., ANTI-BULLYING/HARASSMENT POLICY 1 (2012), [http://educateiowa.gov/index.php?option=com\\_docman&task=doc\\_download&gid=12920&Itemid=5111](http://educateiowa.gov/index.php?option=com_docman&task=doc_download&gid=12920&Itemid=5111). Iowa's statute qualifies this prohibition by requiring schools to show the electronic act was based upon an actual or perceived characteristic of the victim and created an objectively hostile school environment. *See*

also restrict traditional bullying that occurs off campus.<sup>161</sup> Both Maryland and New Jersey require the electronic speech in question be motivated by a personal characteristic of the victim, such as his or her race, gender, national origin, or sexual orientation.<sup>162</sup> Each state requires that the off-campus cyberspeech materially disrupt the school environment in some way before the school may restrict the speech.<sup>163</sup> These states also impose other restrictions upon a school's authority to limit off-campus student cyberspeech; for example, Arkansas defines "substantial disruption" to include behavior that creates a hostile school environment for the victim or causes teachers and administrators to issue "severe or repetitive" discipline in response, while Oklahoma requires the speech be "specifically directed" at either a student victim or school personnel.<sup>164</sup> The Supreme Court has not settled the legality of a school's authority to prohibit speech outside its own walls or school-related activities, having refused to hear cases regarding this issue.<sup>165</sup>

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IOWA CODE ANN. § 280.28(2)(b) (outlining requirements for prohibition against cyberbullying).

161. Compare MD. CODE ANN., EDUC. § 7-424(a)(2) (prohibiting any verbal, physical, or written off-campus conduct), N.H. REV. STAT. ANN. § 193-F:4 (prohibiting off-campus bullying and cyberbullying), and N.J. STAT. ANN. § 18A:37-14 (prohibiting electronic speech and other conduct that substantially disrupts school environment), with ARK. CODE ANN. § 6-18-514(e)(2)(B) (allowing schools to restrict student electronic speech that occurs off campus), and OKLA. STAT. ANN. tit. 70, § 24-100.4(A)(1) (requiring schools to restrict bullying and other behavior conducted off campus through electronic communications).

162. See MD. CODE ANN., EDUC. § 7-424(a)(2)(i) (defining requirements for bullying); N.J. STAT. ANN. § 18A:37-14(a) (defining objective standard for punishable behavior). Maryland also alternatively allows for restricting the speech if it is "threatening or seriously intimidating." See MD. CODE ANN., EDUC. § 7-424(a)(2)(i)(2). New Jersey's statutory language is especially appropriate, given that the impetus for the legislation was the death of Tyler Clementi, a gay Rutgers University student who committed suicide after his roommate streamed a sexual encounter between Clementi and another man over the Internet. See Matt Friedman, *N.J. Gov. Christie Approves Toughest Anti-Bullying Law in the Country*, NJ.COM, Jan. 7, 2011, [http://www.nj.com/news/index.ssf/2011/01/nj\\_gov\\_christie\\_approves\\_tough.html](http://www.nj.com/news/index.ssf/2011/01/nj_gov_christie_approves_tough.html) (highlighting signing of bill). While the bill had been discussed nearly a year earlier, Clementi's death served as a rallying cry for supporters and helped spur easy passage through the New Jersey General Assembly. See id.

163. See ARK. CODE ANN. § 6-18-514(b)(2)(D) (prohibiting speech that substantially disrupts orderly operation of school or educational environment); MD. CODE ANN., EDUC. § 7-424(a)(2)(ii)(2) (requiring speech to substantially disrupt orderly operation of school before school can restrict); N.H. REV. STAT. § 193-F:3(I)(b) (prohibiting off-campus cyberbullying that interferes with victim's educational opportunities or substantially interferes with school environment); N.J. STAT. ANN. § 18A:37-14(c) (prohibiting off-campus cyberspeech that substantially interferes with orderly operation of school); OKLA. STAT. ANN. tit. 70, § 24-100.3 (prohibiting off-campus cyberspeech disrupting or interfering with school's educational mission or student's education).

164. See ARK. CODE ANN. § 6-18-514(b)(5) (defining substantial disruption); OKLA. STAT. ANN. tit. 70, § 24-100.4(A)(1) (requiring cyberbullying specifically directed at students or school personnel).

165. See Papandrea, *supra* note 23, at 1035 (outlining Supreme Court's lack of clarification on schools' authority to prohibit off-campus speech); see also Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011) (noting plethora of lower-court cases and inconsistent results attributable to Supreme Court inaction). As previously noted, the Supreme Court has declined four recent opportunities to grant certiorari in cases concerning off-campus student cyberspeech. See Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc), cert. denied sub nom. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 132 S. Ct. 1097 (2012); *Blue Mountain II*, 650 F.3d 915 (3d Cir. 2011) (en banc), cert. denied, 132 S. Ct. 1097 (2012); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011), cert. denied, 132 S. Ct. 1095 (2012); *Doninger II*, 642 F.3d 334 (2d Cir.), cert. denied, 132 S. Ct. 499 (2011).

## 2. Limited Cyberbullying Statutes

### a. Limited by Victim's Personal Characteristics

Alabama and Illinois limited their respective cyberbullying statutes based upon both the speech's content and the speaker's intent or motivation.<sup>166</sup> The geographic prohibitions in each statute include bullying conducted on school property, on school buses, or at school-sponsored activities.<sup>167</sup> Both statutes define bullying as a severe or repeated pattern of intentional physical or electronic acts that place the victim in reasonable fear of harm, substantially interfere with the victim's educational performance, or create a hostile school environment for the victim.<sup>168</sup> Unlike other states, Alabama and Illinois have chosen to limit their definitions of bullying to conduct reasonably perceived to be motivated by an actual or perceived distinguishing characteristic of the victim, such as the victim's race, gender, religious beliefs, or disability.<sup>169</sup>

### b. Prohibitions: "On-Campus Speech"

The majority of states with cyberbullying legislation allow schools to prohibit electronic speech that only occurs "on campus," which includes on school property, on school buses or vehicles, or at school-sponsored activities or events.<sup>170</sup> This majority includes the following states: California, Kansas, Nebraska, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, and Wyoming.<sup>171</sup> This geographic prohibition limits schools'

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166. See ALA. CODE § 16-28B-3(2) (2012) (defining characteristics for harassment); 105 ILL. COMP. STAT. ANN. 5/27-23.7(a) (West 2012) (defining characteristics required for bullying).

167. ALA. CODE § 16-28B-4(a); 105 ILL. COMP. STAT. ANN. 5/27-23.7(a). In addition, the Illinois statute prohibits bullying through the transmission of information from a school-owned computer. 105 ILL. COMP. STAT. ANN. 5/27-23.7(a).

168. See ALA. CODE § 16-28B-3(2) (defining "harassment" under statute); 105 ILL. COMP. STAT. ANN. 5/27-23.7(b) (defining "bullying").

169. See ALA. CODE § 16-28B-3(2) (defining characteristics for harassment); 105 ILL. COMP. STAT. ANN. 5/27-23.7(a) (defining characteristics required for bullying). The Alabama statute does not list victims' characteristics that bullies must target, but leaves that responsibility to the Department of Education. See ALA. CODE § 16-28B-5(13). Nevertheless, Alabama's model antiharassment policy, which local boards can choose to fully adopt, prohibits harassment based upon the victim's race, sex, religion, national origin, or disability. See Memorandum from Thomas R. Bice, Deputy State Superintendent of Educ., to City and Cnty. Superintendents, Model Anti-Harassment Policy 2 (Oct. 20, 2009), available at [http://alex.state.al.us/stopbullying/sites/alex.state.al.us.stopbullying/files/Model\\_Policy.pdf](http://alex.state.al.us/stopbullying/sites/alex.state.al.us.stopbullying/files/Model_Policy.pdf). The Illinois statute lists the following as characteristics of a victim that can constitute bullying: "race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service," or association with a person who possesses one or more of these characteristics. 105 ILL. COMP. STAT. ANN. 5/27-23.7(a).

170. See generally NASBE REPORT, *supra* note 155 (outlining each state's approach to suppression of student cyberbullying).

171. See CAL EDUC. CODE § 48900(s) (West 2012); KAN. STAT. ANN. § 72-8256(b) (West 2012); NEB. REV. STAT. ANN. §§ 79-267(8), 79-2,137 (LexisNexis 2012); NEV. REV. STAT. ANN. § 388.135 (LexisNexis 2011); N.C. GEN. STAT. § 115C-407.15(a) (2012); N.D. CENT. CODE § 15.1-19-18 (2011); OR. REV. STAT.

authority to the areas traditionally afforded the greatest discretion by the Supreme Court, and as such, has the least implication for students' First Amendment rights.<sup>172</sup> Each statute creates differing standards by which the cyberbully's conduct must be judged.<sup>173</sup> Each statute also explicitly defines "cyberbullying" or prohibits bullying through intentional electronic communications.<sup>174</sup>

*c. Prohibitions: Through the Use of School-Owned Computers or Electronics*

Delaware, Florida, and Georgia have created prohibitions in their respective cyberbullying statutes that could plausibly allow schools to restrict cyberspeech occurring completely off campus.<sup>175</sup> These states prohibit cyberbullying that occurs through the access of some electronic communication by a student, such as a website or some other software, using a school-owned computer.<sup>176</sup> The Delaware and Georgia statutes create specific standards by which school administrators must weigh the alleged bullying conduct, requiring the speech to intentionally place the victim in reasonable fear of harm, create a threatening school environment for the victim, or substantially interfere with the school environment.<sup>177</sup> Unlike Delaware and Georgia, Florida seemingly creates

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ANN. § 339.351(2)(b) (West 2012); 24 PA. CONS. STAT. ANN. § 13-1303.1-A(e)(2) (West 2012); S.C. CODE ANN. § 59-63-120(2) (2012); WYO. STAT. ANN. § 21-4-312(a)(ii) (2012).

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

173. See CAL. EDUC. CODE § 48900.4 (defining bullying as sufficiently severe harassment, threats, or intimidation); OR. REV. STAT. ANN. § 339.351(2) (defining harassment); see also KAN. STAT. ANN. § 72-8256(a)(1)(A) (requiring bullying to create an "intimidating, threatening or abusive educational environment" for victim); N.C. GEN. STAT. § 115C-407.15(a) (requiring bullying to place victim in reasonable fear of harm or create hostile environment); N.D. CENT. CODE § 15.1-19-18 (requiring bullying to cause victim fear of harm or substantially interfere with victim's educational opportunities); 24 PA. CONS. STAT. ANN. § 13-1303.1-A(e) (requiring bullying to substantially interfere with victim's education or create threatening environment); S.C. CODE ANN. § 59-63-120(1) (requiring reasonable fear of harm or substantial disruption of school operation); WYO. STAT. ANN. § 21-4-312(a)(i) (requiring reasonable fear of harm, substantial disruption of school, or creation of threatening school environment). But see NEB. REV. STAT. ANN. § 79-2,137(2) (giving no standards by which to judge conduct but deferring to each school district); NEV. REV. STAT. ANN. § 388.134(1) (delegating authority to board of trustees to determine applicable standards).

174. See CAL EDUC. CODE § 32261(g) (West 2012) (defining "electronic act"); KAN. STAT. ANN. § 72-8256(a)(2) (defining "cyberbullying"); NEB. REV. STAT. ANN. § 79-2,137(2) (defining bullying to include "electronic abuse"); NEV. REV. STAT. ANN. § 388.123 (defining cyberbullying); N.C. GEN. STAT. § 115C-407.15(a) (defining "bullying or harassing behavior" to include pattern of electronic communications); OR. REV. STAT. ANN. § 339-351(1) (defining cyberbullying); 24 PA. CONS. STAT. ANN. § 13-1303.1-A(e) (defining bullying to include intentional electronic acts); S.C. CODE ANN. § 59-63-120(1) (defining "harassment, intimidation or bullying" to include electronic communications); WYO. STAT. ANN. § 21-4-312(a)(i) (defining "harassment, intimidation or bullying" to include intentional electronic communications).

175. See DEL. CODE ANN. tit. 14, § 4112D(b)(2)(a) (2012) (defining minimum requirements for school antibullying policy); FLA. STAT. ANN. § 1006.147(2) (West 2012) (defining prohibitions on bullying); GA. CODE ANN. § 20-2-751.4(a) (2012) (defining bullying to include accessing school computer network).

176. See DEL. CODE ANN. tit. 14, § 4112D(b)(2)(A); FLA. STAT. ANN. § 1006.147(2); GA. CODE ANN. § 20-2-751.4(a).

177. See DEL. CODE ANN. tit. 14, § 4112D(a) (creating four standards for measuring bullying conduct);

greater discretion for school authorities to prohibit any speech that they believe caused the victim physical or emotional distress through teasing, social exclusion, intimidation, or other means.<sup>178</sup>

### III. ANALYSIS

In the forty years since the Court's seminal decision in *Tinker*, the evolution of the Internet and other electronic technologies as the main communication medium for minors has forever changed how courts and schools treat student speech.<sup>179</sup> No longer can simple geographic boundaries easily separate a court's judgment of what is on-campus versus off-campus speech, although school officials have far more discretion to prohibit speech on school grounds.<sup>180</sup> While under assault in recent years from both sides of the student-speech debate, *Tinker* remains the primary barometer by which courts adjudicate challenges to student-speech prohibitions.<sup>181</sup> *Tinker*, *Fraser*, *Hazelwood*, and *Morse* create greater confusion rather than increased clarity regarding the scope of authority school officials maintain to prohibit student speech.<sup>182</sup> The Court has yet to address school officials' authority as it relates to prohibitions placed on speech originating off campus.<sup>183</sup> While recognizing students' First Amendment rights are not automatically coextensive with those of adults due to the special nature of the school environment, courts have yet to adequately answer the extent to which students' constitutional rights protect electronic off-campus speech that impacts the school environment.<sup>184</sup>

Because of the Court's inaction in determining the limits of school authorities to regulate student off-campus speech, state legislatures attempting to curb cyberbullying risk overstepping constitutional boundaries in their well-

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GA. CODE ANN. § 20-2-751.4(a)(3) (creating four standards for measuring bullying conduct). The Delaware statute allows for a more subjective analysis of cyberbullying conduct by prohibiting speech reasonably interpreted to "demean, dehumanize, embarrass or cause emotional, psychological or physical harm to another student" or school official. DEL. CODE ANN. tit. 14, § 4112D(a)(4).

178. See FLA. STAT. ANN. § 1006.147(3)(a). The Florida statute, which distinguishes between behavior deemed "bullying" and "harassment," does not provide objective standards to measure "bullying" behavior. *See id.* In comparison, for the speech to constitute "harassment," it must reasonably place the victim in fear of harm, substantially interfere with the victim's educational environment, or substantially disrupt the school. *See id.* § 1006.147(3)(b).

179. *See supra* notes 22-27 and accompanying text (discussing general impacts of cyberbullying and state statutory responses to its rise).

180. *See Denning & Taylor, supra* note 26, at 843 (arguing geographic boundaries should not apply).

181. *See Morse v. Frederick*, 551 U.S. 393, 410-11 (2007) (Thomas, J., concurring) (arguing Court should overturn *Tinker* because students have no First Amendment protection in schools); Papandrea, *supra* note 23, at 1102 (arguing courts applying *Tinker* grant too much deference to suppress student speech).

182. *See Morse*, 551 U.S. at 404-05 (stating *Fraser*'s mode of analysis unclear).

183. *See Papandrea, supra* note 23, at 1054 (stating past cases provide little guidance on authority of schools to restrict off-campus speech).

184. *See Morse*, 551 U.S. at 396-97 (arguing *Fraser* indicates student rights not automatically coextensive with adult rights); Backus, *supra* note 11, at 166 (noting lower courts struggle to apply current precedent to off-campus student cyberspeech).

intentioned efforts to eradicate this behavior.<sup>185</sup> While most statutes governing these speech prohibitions remain geocentric in prohibiting the school's authority to its area of greatest traditional discretion, some states—like Massachusetts—have drawn inspiration from other sources to broaden the authority given to school administrators.<sup>186</sup> Massachusetts's decision to abandon *Tinker* as the controlling standard by which to judge student speech creates dangerous implications for students' constitutional rights and risks judicial action in overturning the statutory scheme.<sup>187</sup>

#### *A. Tinker's Substantial-Disruption Standard and the Massachusetts Statute*

*Tinker*'s substantial-disruption test stands as the test that most lower courts have relied upon in adjudicating cases involving a school's restriction of off-campus student cyberspeech.<sup>188</sup> *Fraser*, *Hazelwood*, and *Morse* all prove inadequate for application to the restrictions of off-campus student cyberspeech.<sup>189</sup> The Court's opinion in *Fraser* explicitly stated that courts and schools could not restrict the same lewd and vulgar speech should it have occurred off campus, while *Hazelwood* and *Fraser* include categorical exceptions in the cases of school-sponsored speech and speech promoting illegal drug use, both of which seem extremely unlikely to arise in cases under a cyberbullying statute.<sup>190</sup> *Tinker* therefore remains the default standard by which schools can exercise authority to restrict student speech, so long as the speech creates a substantial disruption.<sup>191</sup>

Massachusetts has equally embraced in its own statutory code the idea that *Tinker*'s substantial-disruption test is the *only* means by which student speech may be restricted.<sup>192</sup> The SJC determined after both *Fraser* and *Hazelwood* that the General Court specifically intended section 82 to offer greater

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185. See Beckstrom, *supra* note 155, at 309 (highlighting possibility recent state legislation will magnify issues of unclear guidance).

186. See *infra* Part III.B-C (discussing "rights of others" and hostile-environment standards).

187. See *infra* Part III.A-C (arguing only *Tinker* can apply to cases involving off-campus student cyberspeech).

188. See *supra* Part II.B.1 (discussing lower-court cases applying *Tinker* to off-campus student electronic speech).

189. See *supra* notes 65-100 and accompanying text (discussing issues inherent in applying non-*Tinker* cases to Internet speech).

190. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (stating school powerless to restrict same speech if occurring outside school environment); see also *supra* notes 65-78 and accompanying text (discussing *Fraser*'s inapplicability to off-campus student cyberspeech cases).

191. See Frank D. LoMonte, *Shrinking Tinker: Students Are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1328 (2009) ("Most courts continue to recognize *Tinker* as supplying the default standard under which regulation of student expression is to be judged unless the facts fit one of the relatively narrow exceptions carved out by the Supreme Court.").

192. See MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2013) (requiring *Tinker* as sole test for restriction of student speech); see also *supra* notes 123-29 and accompanying text (discussing section 82 and interpretation by courts).

protections for student speech than were afforded students under the Constitution.<sup>193</sup> Adoption of the language of section 37O, while certainly within the purview of the legislature, falls counter to the intent of section 82 and in fact offers *less* protection to student speech now than does the Constitution.<sup>194</sup> This inherent dichotomy between the statutes—which the General Court has yet to resolve—arguably shows the legislature acted with undue haste while attempting to fashion an appropriate action to prevent cyberbullying.<sup>195</sup>

Not only does *Tinker* remain the default standard for weighing off-campus student cyberspeech restrictions, but it also remains the predominant test for state legislatures and schools to adopt within their cyberbullying statutes.<sup>196</sup> *Tinker* represents the balancing test that must occur between a student's protected constitutional rights to free speech and the school's need to maintain an environment free from disruption for all students.<sup>197</sup> Schools have a right to maintain an educational environment for all students free from disruptions caused by the speech of other students.<sup>198</sup> However, by adopting *Tinker* as the sole restriction, a school also adequately protects the rights of students to engage in any sort of speech that does not substantially disrupt the school environment.<sup>199</sup>

Academics continue to debate the application of *Tinker* to off-campus student cyberspeech, given the Supreme Court's inaction as it regards clarifying the scope of the school's authority to regulate this type of speech.<sup>200</sup> A strict reading of *Tinker* assumes that students regain the full constitutional rights they do not possess at school once they leave school premises.<sup>201</sup> Most

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193. See *Pyle III*, 667 N.E.2d 869, 871-72 (Mass. 1996) (noting clear language of section 82 requires speech materially disrupt classroom to warrant restriction); see also ch. 71, § 82 (allowing student-speech restriction only for materially disruptive effect).

194. Compare ch. 71, § 82 (requiring substantial-disruption effect for speech restrictions in public schools), with *id.* § 37O (allowing speech restrictions in excess of material disruption).

195. See *supra* note 194 and accompanying text (discussing discrepancies between protections afforded by statutes); see also *supra* note 10 and accompanying text (discussing speed with which Massachusetts Legislature acted to pass section 37O).

196. See Zande, *supra* note 18, at 130 (arguing *Tinker* best standard by which to judge these types of student speech restrictions).

197. See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (balancing schools need to protect students' rights with need to "prescribe and control conduct" consistent with constitutional safeguards).

198. See *Requa v. Kent Sch. Dist.* No. 415, 492 F. Supp. 2d 1272, 1281 (W.D. Wash. 2007) (discussing *Tinker*'s recognition that schools have right to maintain disruption-free environment for students).

199. See *supra* notes 51-64 and accompanying text (discussing *Tinker* holding and protection of student-speech rights).

200. Compare Calvert, *supra* note 57, at 1177 (arguing *Tinker* never designed for application to off-campus scenarios), and Papandrea, *supra* note 23, at 1102 (arguing *Tinker* "ill-suited" to off-campus student cyberspeech), with Denning & Taylor, *supra* note 26, at 890 (arguing formal distinction between on- and off-campus speech unnecessary), and Zande, *supra* note 18, at 130-31 (arguing for *Tinker*'s applicability to off-campus student cyberspeech).

201. *Tinker*, 393 U.S. at 506; see also Calvert, *supra* note 57, at 1177-78 (arguing *Tinker*'s inapplicability

states' cyberbullying statutes still adhere to the argument that schools may not restrict off-campus student speech, regardless of any disruption it may cause on campus.<sup>202</sup> Given the Supreme Court's refusal to clarify the scope of school authority over off-campus student speech, some critics have posited this is arguably the better approach and preserves the ideal that student off-campus speech deserves constitutional protection equal to that of any other citizen.<sup>203</sup>

The nature of electronic communication and the effects that severe cyberbullying can have on the victim's educational environment should obviate the need for such rigid formalism between *Tinker*'s application to on- or off-campus speech.<sup>204</sup> The desertion of this geographic formalism recognizes that, for many cyberbullying victims, the effects of the bully's conduct can be amplified within the school, due to cyberspeech's ability to reach many fellow students instantaneously and repeatedly.<sup>205</sup> A school's authority to restrict student speech that disrupts the educational environment at the school should not be dependent upon the speech's geographic location or point of origin.<sup>206</sup> Schools must be able to act upon their duty to protect students from harassment and bullying in the school environment, especially when those actions create substantial disruptions to the school environment for the victim, school officials, and other students.<sup>207</sup> In addition, schools must maintain the ability to prevent reasonably foreseeable disruptions from occurring in the school environment.<sup>208</sup> Therefore, state statutes like section 37O, which allow schools to restrict off-campus student cyberspeech that substantially disrupts the school environment, uphold the central balancing test inherent in *Tinker* by protecting the rights of students to engage in nondisruptive cyberspeech, regardless of its content or offensive nature.<sup>209</sup>

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to off-campus student cyberspeech). Given the Court's recent holding in *Morse*, this same theory now extends to school-sponsored off-campus activities. *See supra* notes 87-100 and accompanying text (discussing *Morse* holding).

202. *See supra* Part II.F.2.b (discussing state statutes restricting school authority to traditional grounds).

203. *See* LoMonte, *supra* note 191, at 1354 (arguing geocentric restriction on scope of school authority arguably better application of *Tinker*).

204. *See* Denning & Taylor, *supra* note 26, at 880 (arguing formalistic approach to application of *Tinker* based upon geography untenable); Zande, *supra* note 18, at 133 (arguing *Tinker* should apply to both in light of nature of electronic speech).

205. *See supra* notes 11-18 and accompanying text (highlighting severity of cyberbullying behavior).

206. *See* Denning & Taylor, *supra* note 26, at 843 (arguing origination of disruptive behavior immaterial to authority of school to restrict speech).

207. *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 572 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *see also* Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007) ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place."), *cert. denied*, 129 S. Ct. 159 (2008).

208. *See* Lowery, 497 F.3d at 596 (discussing ability of school officials to restrict speech based upon foreseeable disruption).

209. *See* MASS. GEN. LAWS ANN. ch. 71, § 37O (West 2013) (adopting substantial-disruption test as means for restriction of student speech); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (discussing balancing between student-speech rights and needs of school administrators).

### B. Tinker's "Rights of Others" Standard and Section 37O

In defining the scope of school-administrator authority, section 37O adopts both prongs of the supposed two-part test adopted in *Tinker*: (1) the speech must materially or substantially disrupt the school environment; or (2) it must infringe upon the rights of the victim at school.<sup>210</sup> Given the tenor of the *Tinker* opinion and its focus upon whether the students' political speech materially disrupted the school environment and not whether it infringed upon other students' rights, some courts and commentators have instead questioned whether the Court even created a two-prong standard of analysis for student-speech prohibitions in the opinion.<sup>211</sup> For example, Justice Roberts's majority opinion in *Morse*—while not relying on *Tinker* to uphold the school's punishment of the student—defined the *Tinker* standard as only including the “material and substantial disruption” prong, perhaps discarding the “rights of others” prong as a viable exception to student-speech rights.<sup>212</sup> *Tinker*'s lack of clarity regarding the “rights of others” prong has left lower courts to interpret important questions without the aid of any further clarification, such as when does student speech infringe on the rights of other students, what rights does the “right of others” prong incorporate, and whether the standard is a means by which schools can regulate student speech.<sup>213</sup> No court has yet invoked the “rights of others” prong as the sole basis for upholding a school's prohibition of student speech under the First Amendment, which makes its inclusion in the Massachusetts statute all the more troubling.<sup>214</sup>

The dissonance between the majority and dissenting opinions in *Harper* illustrates the perils of courts and state governments attempting to utilize

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210. See ch. 71, § 37O(b)(ii) (adopting three-part test for prohibitions on off-campus student cyberspeech); see also *Tinker*, 393 U.S. at 513 (prohibiting speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others”).

211. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“The precise scope of *Tinker*'s ‘interference with the rights of others’ language is unclear . . . .”); Denning & Taylor, *supra* note 26, at 846-47 (arguing Court did not definitively create two-prong standard).

212. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (stating school can prohibit speech only when it “materially and substantially disrupt[s]” school). One possible reason for this exclusion of the *Tinker* “rights of others” analysis in Justice Roberts's definition of the *Tinker* standard is that the Ninth Circuit relied only upon a lack of material disruption in declaring *Morse*'s actions unconstitutional. See *Frederick v. Morse*, 439 F.3d 1114, 1121-23 (9th Cir. 2006), *rev'd*, 551 U.S. 393 (2007). While Justice Roberts's statement—or lack thereof—is technically dicta, some commentators who argue for the abolition of the “rights of others” prong under *Tinker* have noted Justice Roberts's opinion. See *Calvert*, *supra* note 57, at 1182 (noting importance of Justice Roberts's omitting “rights of others” exception from *Morse* holding).

213. See Denning & Taylor, *supra* note 26, at 847 (stating role of lower courts in interpreting “rights of others” language). Compare *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (holding physical confrontation required for infringement of rights of others to occur), with *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177-78 (9th Cir. 2006) (holding violation of psychological security infringes on rights of others), *vacated as moot*, 549 U.S. 1262 (2007).

214. See *Nixon*, 383 F. Supp. 2d at 984 (finding no case relying solely on “rights of others” as justification for prohibition on student speech); see also Denning & Taylor, *supra* note 26, at 866 (comparing “rights of others” prong to “wild card” because of lack of interpretation).

*Tinker's* "rights of others" prong to prohibit student speech without further guidance of that language's interpretation from the Supreme Court.<sup>215</sup> While some commentators declared that the Ninth Circuit's opinion had breathed new life into the "rights of others" prong, the Supreme Court vacated the decision after granting a petition for certiorari, robbing *Harper* of any precedential value.<sup>216</sup> One commentator has posited that the speed with which the Court vacated the Ninth Circuit's opinion suggests the Court did not want *Harper* to stand as precedent for other courts interpreting *Tinker's* "rights of others" prong.<sup>217</sup> Given the amorphous nature of the standard and the unwillingness of the Court to create clear guidance on its scope, some commentators have questioned whether the "rights of others" prong should have any role in defining constitutional prohibitions of student speech.<sup>218</sup> Because the issues inherent in the use of the "rights of others" prong remain—the lack of clear guidance as to what rights *Tinker* actually protects—the test's adoption in the Massachusetts statute gives schools unrestricted discretion to define the rights of students and the degree to which speech constitutes an invasion of those rights.<sup>219</sup> Were a Massachusetts school to adopt an interpretation of this prong that mirrors the Ninth Circuit's decision in *Harper*—where derogatory remarks can be prohibited if predicated upon a student's minority status—the school would likely have the authority to prohibit speech in excess of *Tinker's* substantial-disruption standard.<sup>220</sup> Alternatively, school officials could

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215. See Denning & Taylor, *supra* note 26, at 849 (citing lack of guidance from Supreme Court, creating problems of application).

216. See *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007), *vacating as moot* 445 F. 3d 1166 (9th Cir. 2006); Papandrea, *supra* note 23, at 1042 (stating significance of *Harper* opinion for rebirth of *Tinker's* second prong). The Court vacated the Ninth Circuit's opinion due to the district court's dismissal of Harper's claims for injunctive relief as moot. *Harper*, 549 U.S. at 1262. Supreme Court precedent dictated vacating the prior judgment by the Ninth Circuit and the Court then remanded the case to the Ninth Circuit to dismiss the appeal as moot. See *id.*; see also Denning & Taylor, *supra* note 26, at 850 (stating case robbed of precedential value due to Court vacating decision).

217. Denning & Taylor, *supra* note 26, at 859. If this was not the Court's true intention, the authors suggest, it at least indicates the Court's unwillingness to further clarify *Tinker* for the benefit of states and lower courts. See *id.*

218. See Papandrea, *supra* note 23, at 1094 (noting "unclear whether this relatively obscure aspect of *Tinker* should play a role in any student speech cases"). The author asserts that allowing schools and states to prohibit speech under analysis lacking any standards, such as the "rights of others" prong, would be "anathema to the First Amendment." See *id.* at 1092.

219. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting) (arguing broad reading of prong could allow states to circumvent First Amendment), *vacated as moot*, 549 U.S. 1262 (2007); see also Denning & Taylor, *supra* note 26, at 849 (stating school authority now unclear as to what speech it may prohibit under second *Tinker* prong). Because the Massachusetts General Court adopted *Tinker's* substantial-disruption test as the statutory guide for the protection of students' rights to freedom of expression, no case law exists where Massachusetts courts have interpreted what the "rights of others" prong means. See MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2013) ("The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school.").

220. See Papandrea, *supra* note 23, at 1094 (arguing adoption of "rights of others" test in *Harper* poses

interpret *Tinker* to protect a student's rights to be free from all behavior that insults or demeans that student by drawing inspiration from section 37O but exceeding its actual prohibitions.<sup>221</sup> The amorphous and unresolved nature of *Tinker*'s second prong lends to a wide variety of interpretations with grave implications, including the subversion of students' First Amendment rights to the demands of overzealous school administrators.<sup>222</sup>

In theory, the application of the at-best ambiguous language in *Tinker*'s second prong mirrors the argument—rejected forcefully by Justice Alito in his *Morse* concurrence—that school officials may prohibit any speech that interferes with the basic educational mission of the school.<sup>223</sup> The broad authority granted to school officials to determine the speech rights of students vis-à-vis those of their fellow students should give Massachusetts legislators and courts pause going forward.<sup>224</sup> In order to effectively create clear guidelines and authority for school officials to curb instances of bullying—while maintaining constitutional respect for students' speech rights—Massachusetts's legislators should act to either remove *Tinker*'s second prong as a means by which school officials may prohibit student speech, or clarify the statutory language pertaining to students' rights.<sup>225</sup>

### C. Section 37O's Hostile-Environment Standard

Given the Supreme Court has yet to clarify the relationship between harassment law and the First Amendment, section 37O's wholesale adoption of the harassment language in *Davis* should trouble courts and legal analysts.<sup>226</sup>

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greater threat than material disruption); Zande, *supra* note 18, at 118 (noting cases interpreting second prong give schools "fairly wide latitude" to prohibit speech). Equally troubling about the Ninth Circuit's interpretation was its failure to determine how "core characteristics" or "minority" should be interpreted when applying *Tinker*'s second prong. *See Harper*, 445 F.3d at 1201 (Kozinski, J. dissenting) (citing lack of guidance with majority opinion on definition of minority status). The Court's opinion left open-ended the definition of "minority," allowing schools great discretion to decide who exactly constitutes a "minority" group for purposes of speech prohibitions and what protections to give that group. *See id.*

221. *See ch. 71, § 37O.*

222. *See Denning & Taylor*, *supra* note 26, at 849 (noting lack of Supreme Court guidance creates application problems).

223. *See Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (rejecting argument schools can prohibit speech interfering with educational mission); Denning & Taylor, *supra* note 26, at 884-85 (arguing vagueness of prong would allow states to punish student speech as broad as "educational mission"). The school district in *Morse* had argued that, under *Fraser*, a school could prohibit speech that interfered with its basic "educational mission." *See Morse*, 551 U.S. at 399; *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (stating schools could prohibit lewd and vulgar speech that would undermine educational mission).

224. *See Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) (warning against granting states broad authority to redefine First Amendment protections under school-speech codes).

225. *See Calvert*, *supra* note 57, at 1191 (arguing for abandonment of "rights of others" prong due to speculative nature of application). *But see Zande*, *supra* note 18, at 131 (suggesting "rights of others" prong "especially suited to cyberbullying cases" in safeguarding against psychological trauma).

226. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (suggesting tension between

As the Third Circuit previously stated in *Saxe*, harassing speech—even though offensive and potentially damaging to the recipient—enjoys no categorical exception from traditional First Amendment protections.<sup>227</sup> The facts in *Davis* show the harassment at issue was not merely verbal—thereby pure speech and implicating *Tinker*—but rather mixed physical and verbal conduct, which does not fall under traditional speech prohibitions.<sup>228</sup> Unlike cases of cyberbullying, which typically involve pure speech or expression and not necessarily physical conduct, lower courts have interpreted *Davis* to require significant physical conduct constituting sexual discrimination—not just verbal harassment—to attach liability to the school's actions.<sup>229</sup> The strict adoption of the hostile-environment prong in section 37O is particularly ill fitted to suffice as a constitutional prohibition on speech, because *Davis*'s interpretation requires physical conduct in addition to harassing speech, coupled with the fact that schools can suppress speech that falls short of the *Davis* standard.<sup>230</sup> For these reasons, school officials could clearly restrict more speech than is constitutionally permissible under the vague definitions the hostile-

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antiharassment laws and freedom of speech); *see also* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J. dissenting) (stating interaction between harassment law and free speech remains “difficult and unsettled”), vacated as moot, 549 U.S. 1262 (2007). Judge Kozinski argued harassment-law prohibitions on speech often implicate First Amendment protections of the exact same speech. *See Harper*, 445 F.3d at 1198; *see also* Colleen Barnett, Note, *Cyberbullying: A New Frontier and a New Standard—A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPAC L. REV. 579, 614 (2009) (arguing *Davis* standard collides with *Tinker*). But see Lynn Mostoller, Note and Comment, *Freedom of Speech and Freedom from Student-on-Student Sexual Harassment in Public Schools: The Nexus Between Tinker v. Des Moines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N.M. L. REV. 533, 558 (2003) (arguing schools may prohibit student speech that falls short of sexual harassment liability). *See generally* Thomas R. Baker, Commentary, *Tinkering with Tinker: The Third Circuit’s Overbreadth Test for School Anti-Harassment Codes*, 164 EDUC. L. REP. 527 (2002) (outlining different analyses regarding interaction between antiharassment policies and First Amendment).

227. *See Saxe*, 240 F.3d at 211 (stating courts have never embraced harassment exception to First Amendment); *see also Morse*, 551 U.S. at 409 (stating *Fraser* does not permit school to regulate any speech it considers offensive); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating bedrock principle of First Amendment that government cannot prohibit speech it simply considers offensive). Any such exception, given the principles the policy promotes, would suppress speech with expressive content in violation of First Amendment principles. *See Saxe*, 240 F.3d at 209. The *Saxe* court did hold, however, that the Supreme Court has never determined whether harassment enjoys First Amendment protection. *See id.* at 207.

228. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 634 (1999) (highlighting conduct of harassment perpetrator).

229. *See, e.g.*, *Burwell v. Pekin Cmty. High Sch. Dist.* 303, 213 F. Supp. 2d 917 (C.D. Ill. 2002); *Johnson v. Indep. Sch. Dist. No. 47*, 194 F. Supp. 2d 939 (D. Minn. 2002); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447 (S.D.N.Y. 2000); *see also Kindred*, *supra* note 132, at 222 n.116 (highlighting all student-on-student sexual harassment cases involved physical conduct in addition to harassing speech). Because Title IX governs discrimination and not harassment per se, the Court has determined sexually harassing conduct that is sufficiently severe and pervasive gives rise to the level of discrimination under the statute. *See Davis*, 526 U.S. at 650 (identifying severe sexual harassment as form of discrimination in schools under Title IX); *see also* 20 U.S.C. § 1681(a) (2006) (stating no person subject to discrimination on basis of sex in public schools).

230. *See Papandrea*, *supra* note 23, at 1095-96 (stating plaintiff unlikely to adequately allege all required elements of Title IX claim in cyberbullying case).

environment standard provides.<sup>231</sup>

While the *Davis* standard alone remains ill-suited for the prohibition of student speech, some school districts have responded by crafting antiharassment policies designed to preemptively limit liability.<sup>232</sup> These antiharassment policies are similar in intent to recent antibullying statutes, and designed to convert the liability standards for indifference into school policies that allow for the prohibition of harassing student speech.<sup>233</sup> Schools, however, must be cognizant of First Amendment principles while adopting antiharassment policies, because harassing speech does not enjoy a categorical exception to First Amendment protections.<sup>234</sup> Courts have cautioned states against inadvertently breaching traditional First Amendment protections when statutorily defining harassment—and bullying—in the scope of their harassment policies.<sup>235</sup>

The *Saxe* case displays the inherent conflicts between the First Amendment and school-antiharassment policies, which grant school officials the authority to prohibit student speech.<sup>236</sup> Adoption of similar language within section 37O

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231. *See id.* The issue of cyberspeech and cyberharassment creates no liability for schools under Title IX because student plaintiffs cannot show the school could exercise control over both the harasser and the context of the speech. *See id.* In the cyberbullying context, the speaker and the speech are often located off campus, beyond the control of the school. *See id.* at 1096. School liability for cyberbullying is thereby limited to cyberspeech that takes place on campus. *See id.* Some commentators have noted similar constitutional clashes between speech restricted by employers under Title VII's hostile-environment standard and the First Amendment. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1812 (1992) (arguing vague "hostile work environment" standard gives employers incentives to prohibit more speech than required).

232. *Compare Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202-03 (3d Cir. 2001) (highlighting school's antiharassment policy), *with Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 249 (3d Cir. 2002) (highlighting school's anti-racial-harassment policy).

233. *See Sypniewski*, 307 F.3d at 249 (highlighting school's anti-racial-harassment policy); *Saxe*, 240 F.3d at 202-03 (highlighting school's antiharassment policy); *see also supra* Part II.F and accompanying text (discussing variety of state cyberbullying statutes).

234. *See Saxe*, 240 F.3d at 211 (noting harassing speech not exempt from First Amendment protection); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,038, 12,045-46 (Mar. 13, 1997) (requiring school policies to comport with First Amendment). A school must formulate and apply the rules of its antiharassment policy to protect free speech. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,045. The Department of Education further noted:

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [The Office of Civil Rights] recognizes that the offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.

*Id.*

235. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting), vacated as moot, 549 U.S. 1262 (2007) (arguing state laws cannot define harassment beyond limits of First Amendment).

236. *See Saxe*, 240 F.3d at 203 (outlining text of harassment policy). The harassment policy in question stated:

creates an equal collision between the authority of school officials and the protection of student speech under the First Amendment.<sup>237</sup> As it currently stands, the creation of a hostile school environment for a student cannot act as an independent justification for prohibiting student speech.<sup>238</sup>

Many states that have adopted similar “hostile environment” language to the Massachusetts statute also require a finding of substantial disruption before the school may restrict any off-campus cyberspeech that creates a hostile environment for the victim.<sup>239</sup> By not requiring a finding of substantial disruption to the school environment for this type of ridicule or insult, the Massachusetts legislature has attempted to redefine the scope of protected activity under First Amendment precedent and effectively overrule *Tinker*’s standing as the basis for any exception to the required constitutional protections for student speech.<sup>240</sup> Were the statute to adopt *Tinker*’s substantial-disruption test as the sole basis for the restriction of off-campus student speech, schools could still restrict severe and pervasive patterns of ridicule or insult that substantially disrupted the educational environment at the school, while refusing to allow schools to restrict any incidents of similar behavior that do not rise to a substantial disruption.<sup>241</sup> While the state may find ridicule or insults among students to be offensive to the victim and believe that such behavior should be curtailed, this does not permit a state to restrict student speech—regardless of any compelling interest—without a showing of substantial disruption.<sup>242</sup> Therefore, Massachusetts should remove the hostile-environment standard by which schools can restrict off-campus student cyberspeech, in favor of requiring a school to show that any pattern of ridicule

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Harassment means verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile or offensive environment.

*Id.* at 202 (emphasis added).

237. See MASS. GEN. LAWS ANN. ch. 71, § 37O(a) (West 2013) (defining “hostile environment”); *Saxe*, 240 F.3d at 206-10 (discussing tensions between harassment laws and First Amendment).

238. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-18 (3d Cir. 2001) (measuring suppression under *Tinker* even though policy incorporated hostile-environment standard).

239. See, e.g., MD. CODE ANN., EDUC. § 7-424(a)(2)(i)-(ii) (LexisNexis 2012) (requiring school to show substantial disruption in addition to finding of hostile educational environment); N.H. REV. STAT. ANN. § 193-F:4(I)(b) (2012) (requiring off-campus cyberbullying to cause substantial disruption, not just hostile environment); N.J. STAT. ANN. § 18A:37-14 (West 2012) (requiring off-campus cyberbullying that causes hostile environment to also substantially disrupt or interfere with school).

240. See *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) (arguing state governments cannot use legislation to redefine scope of First Amendment protections afforded students).

241. See *infra* Part III.D (proposing changes to section 37O); see also *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1110 (C.D. Cal. 2010) (examining possible cyberbullying based upon pattern of online videos under substantial-disruption test only).

242. See *Saxe*, 240 F.3d at 203, 217 (prohibiting speech restrictions for “negative name calling” or “derogatory comments” without showing of substantial disruption).

or insult materially and substantially disrupted the school environment prior to punishing the speaker.<sup>243</sup>

#### D. Proposing Changes to Section 37O

Before proposing changes to section 37O, we must recognize the following four truths when determining the scope of school administrators' authority regarding student speech: First, students are considered persons who possess the full panoply of constitutional rights afforded free expression, and students do not check these constitutional rights at the schoolhouse gates.<sup>244</sup> Second, the constitutional rights of students in public schools are not automatically coextensive with those of adults in similar settings outside of the school.<sup>245</sup> Third, because students' constitutional rights are not automatically coextensive, they must be measured in light of the special characteristics of the school environment.<sup>246</sup> Fourth, student off-campus cyberspeech cannot be suppressed unless the speech materially and substantially disrupts the school environment.<sup>247</sup>

Given this reliance on *Tinker* as the sole standard by which schools may suppress student speech, Massachusetts officials should bear in mind there has been little judicial interpretation of *Tinker*'s "rights of others" prong, a standard easily misunderstood by overzealous administrators.<sup>248</sup> In addition, the hostile-school-environment standard adopted by section 37O serves as an imprecise and dangerous standard under which to craft a student-speech-suppression policy, given its tenuous interaction with harassment law and the First Amendment.<sup>249</sup> Further, including the "hostile environment" language leaves the statute open to a clear First Amendment challenge that the Commonwealth would likely lose as a result of the language's vagueness.<sup>250</sup>

Given the inadequacies of section 37O in balancing the protection of the constitutional rights of students with the obligation for schools to protect the school environment from disruption, this Note proposes the following changes to the statute. First, the statute's definition of "bullying" should be rewritten to

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243. See *infra* Part III.D (suggesting changes to section 37O).

244. See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

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

246. See *Tinker*, 393 U.S. at 506.

247. See *id.* at 513; see also *supra* Part III.A and accompanying text (discussing why *Tinker*'s substantial-disruption test remains best test to use for such speech restrictions).

248. See *supra* Part III.B and accompanying text (discussing issues inherent in *Tinker*'s "rights of others" analysis).

249. See *supra* Part III.C and accompanying text (discussing concerns of adoption of hostile-environment standard).

250. See Hayward, *supra* note 148, at 117 (discussing likelihood of success for challenges to "hostile environment" cyberbullying statutes). In his analysis, the author notes because these types of statutes cannot be the basis for damages under federal antidiscrimination laws, they likely cannot survive constitutional scrutiny under the First Amendment. See *id.* (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999)).

reflect adoption of *Tinker*'s substantial-disruption test as the sole means to restrict student speech, which also provides schools greater clarity as to the type of behavior "bullying" incorporates:

- "Bullying," a continuous pattern of written, verbal, or electronic expressions or physical acts or any combination thereof, for the purposes of intimidating, harassing, or threatening another student with physical violence that a reasonable person under the circumstances would expect to have the effect of:
- (i) causing physical or emotional harm to the victim or damage to the victim's property;
  - (ii) placing the victim in a reasonable fear of harm to himself or damage to his property; or
  - (iii) materially or substantially disrupting the education process or the orderly operation of the school.<sup>251</sup>

This proposed language would allow schools to proactively restrict student speech and to discipline offending students when the student's speech actively threatens another student or causes emotional harm, but would not allow restrictions on the type of "ordinary personality conflicts" or general taunts or teasing often associated with adolescent behavior.<sup>252</sup>

Massachusetts should next remove its definition of "hostile environment" in conjunction with its inability to stand as a viable restriction on student speech.<sup>253</sup> In its place, Massachusetts should define the "material and substantial disruption" standard to provide greater clarity for schools as to the types of impacts student speech must have within the school to satisfy *Tinker*:

"Material and substantial disruption" means acts of student expression or physical acts that, without limitation, result in or may reasonably result in one or more of the following:

- (i) necessary cessation of instruction or educational activities;
- (ii) interference with the ability for students to focus on learning or function within the classroom; or

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251. Author's Proposed Language. *Compare id.* (proposing new definition of "bullying" in Massachusetts statute), with MASS. GEN. LAWS ANN. ch. 71, § 37O(a) (West 2013) (defining bullying), ALA. CODE § 16-28B-3(2) (2012) (defining harassment), and DEL. CODE ANN. tit. 14, § 4112D(a) (2012) (defining bullying). This proposed definition incorporates aspects of all of these states' statutes. *See* Author's Proposed Language, *supra*.

252. J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010); *see* ALA. CODE § 16-28B-3(2) (defining harassment); DEL. CODE ANN. tit. 14, § 4112D(a) (defining bullying); MASS. GEN. LAWS ANN. ch. 71, § 37O(a) (defining bullying).

253. *See supra* Part III.C (analyzing hostile-school-environment standard). Continued use of the "hostile school environment" language could have a grave chilling effect on student speech that infringes upon students' constitutionally protected rights. *See* Hayward, *supra* note 148, at 119.

(iii) exhibition of disruptive behavior by other students in reaction to the speech at issue that substantially interferes with the school environment.<sup>254</sup>

This revised language, modeled after the Arkansas cyberbullying statute, would sufficiently define “material and substantial disruption” for school administrators so as to prevent overreaching.<sup>255</sup> Instead of the focus being on the obsolete distinction between speech originating either on or off campus, the statute would focus instead on the *effects* of the speech, i.e., whether it substantially disrupted the school environment.<sup>256</sup> Courts that have forsaken traditional *Tinker* analysis concerning the speech’s geographic origins indeed focus more attention on the speech’s effects, and rightly so.<sup>257</sup> In addition, adequately defining what exactly constitutes a substantial disruption would give true effect to the words, as the Supreme Court intended in *Tinker*.<sup>258</sup> Requiring the school to show one of these four instances would ensure the words “material and substantial” actually mean something more than simply the “ordinary personality conflicts” among adolescents or an administrator’s well-intentioned intervention to remedy taunting or teasing commonplace in the same demographic.<sup>259</sup> The focus should indeed be not where the speech originated, but the effects—if any—felt within the school community and on the victims.<sup>260</sup>

Lastly, the geographic prohibitions within the statute should also be rewritten to remove both *Tinker*’s “rights of others” prong and the hostile-school-environment language as standards by which schools may suppress off-

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254. Author’s Proposed Language. *Compare id.* (revising Massachusetts statute), *with* ARK. CODE ANN. § 6-18-514(a)(3)(i) (2012) (defining “substantial disruption”).

255. *Compare* MASS. GEN. LAWS ANN. ch. 71, § 37O (declining to define or restrict what constitutes substantial disruption), *with* ARK. CODE ANN. § 6-18-514(a)(3)(ii) (defining “substantial disruption”). Even courts have traditionally granted substantial deference to schools when analyzing whether disruption occurred, and such deference would be even greater without clarification within section 37O. *See* Papandrea, *supra* note 23, at 1067.

256. *See* Denning & Taylor, *supra* note 26, at 884-85 (discussing need for inquiry to focus on *effects* of speech and not location).

257. *See Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1119 (discussing definition of “substantial” disruption); *see also* Denning & Taylor, *supra* note 26, at 884 (discussing effects test).

258. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (stating school must have more than “undifferentiated fear or apprehension of disturbance”).

259. *See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010) (discussing definition of “substantial” disruption). The court further noted *Tinker* requires the disruption at issue must actually affect the work of the school or school activities, and cannot be simply premised on taunting or teasing of a student, which caused that student emotional angst. *See id.* Rewriting section 37O accomplishes much of this same task, requiring the school to show *actual* disruption of the school activities. *See supra* note 254 and accompanying text. This issue, inherent in the substantial-disruption analysis, can be illustrated in the exceptional deference given by courts to a school’s claim of disruption without further examination. *See* Papandrea, *supra* note 23, at 1067 (discussing ill-advised deference).

260. *See Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1105-06 (dismissing argument that location of speech dispositive); Denning & Taylor, *supra* note 26, at 884 (arguing against courts diluting disruption when determining effects of speech).

campus student cyberspeech:

Bullying shall be prohibited:

- (i) on school grounds, on property immediately adjacent to school grounds, at a school-sponsored or school-related activity, function, or program whether on or off school grounds, at a school bus stop, on a school bus or other vehicle owned, leased, or used by a school district or school, or through the use of technology or an electronic device owned, leased, or used by a school district or school; and
- (ii) at a location, activity, function, or program that is not school-related, or through the use of technology or an electronic device that is not owned, leased, or used by a school district or school, if the bullying materially and substantially disrupts the education process or the orderly operation of a school,<sup>261</sup> or if such disruption will reasonably result given the circumstances.

Adolescents' growing use of cyberspeech has obviated the once-relevant geographic distinctions between on- and off-campus speech in American schools, and upholding this rigid distinction makes little sense at a time when students can access speech posted on social-media sites and the Internet via smartphones and other technologies from any location, including in school.<sup>262</sup> Doing so would ignore the increased risks associated with cyberbullying and the harmful effects felt by students both inside and outside a school.<sup>263</sup> By removing these geographic distinctions, Massachusetts legislators would allow school administrators to act quickly to ameliorate situations where traditional *Tinker* restrictions would leave them powerless, while maintaining broader protections for student-speech rights.<sup>264</sup>

#### IV. CONCLUSION

The decision as to whether *Tinker* applies to off-campus cyberspeech has yet to be answered by the United States Supreme Court and many state supreme courts, including the SJC. Regardless, the application of a nearly fifty-year-old precedent—created before personal computers and smartphones became ubiquitous—serves little utility in correcting a problem that critically harms students of every age in today's schools. While the traditional *Tinker*

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261. Author's Proposed Language. *Compare id.* (rewriting geographic prohibitions), with MASS. GEN. LAWS ANN. ch. 71, § 37O(b) (West 2013).

262. *See supra* Part III.A and accompanying text (discussing why traditional distinctions under *Tinker* no longer relevant in Internet age).

263. *See supra* notes 11-18 and accompanying text (outlining summary of risks posed by cyberbullying).

264. *See supra* Part III.B (advocating for removal of "rights of others" language because of concern for constitutional violations); Part III.C (arguing for removal of "hostile school environment" language due to similar concerns).

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geographic analysis would typically protect any and all speech created outside the school environment, that precedent proves unworkable in this era of modern technology and cyberspeech.

In summarizing these proposed changes to section 37O, it should be emphasized that legislators must take seriously their duty to balance the protection of students' speech rights against giving school administrators the tools necessary to protect students from repeated harm. These proposed changes would slightly restrict the remedy afforded school administrators by removing some sections of language, but the hope is that the increased clarity provided in the proposed changes would help elucidate for administrators the exact scope of their authority to discipline students for off-campus cyberspeech. Legislative acts should always create clear, bright-line rules for school administrators, especially in the area concerning constitutionally protected rights enjoyed by students. The legislature must recognize that school administrators will likely err on the side of caution—and with that, violating a student's speech rights—when facing a cyberbullying situation unless given clear and concise rules regarding the scope of their authority. For this particular reason, *Tinker*'s "rights of others" prong and the *Davis* hostile-environment standard prove to be exceptionally poor frameworks under which to guide these administrators, given the lack of interpretation regarding the former, and the clash between harassment codes and speech rights implicit in the latter.

This Note does not propose that school officials ignore cyberbullying or harassment within their respective schools. These proposed reforms to section 37O would create a workable, nongeographic framework that can be easily understood by both students, who seek to understand the limits of their rights, and school administrators, who seek to act responsibly and swiftly to protect vulnerable students. While the traditional boundaries between on- and off-campus speech dissipate, increased clarity regarding what exactly constitutes substantial disruption will alert students to the breadth of their rights and define the speech in which they may engage.

Beyond section 37O, school administrators must continue to proactively monitor their student body and be ready and willing to step in to mediate conflicts amongst students. While these proposed changes indeed limit the school's ability to restrict student speech via discipline such as suspensions or expulsions, schools may still act in other ways to ameliorate bullying situations. In Massachusetts, school administrators and teachers must be given the necessary training and tools to recognize cyberbullying as it occurs and be able to effectively respond in ways outside of traditional discipline methods. Not only must schools play a more proactive—yet less confrontational—role in preventing cyberbullying, but also so must the parents of both victims and perpetrators of this behavior.

This reformation of section 37O would in some ways chill student speech;

such effects are inevitable, yet are a necessary byproduct of giving schools some tools to respond to the increased threats posed by cyberbullying. Schools must also recognize that the Internet, much like the 1960s classroom in *Tinker*, provides students a public forum in which they can experiment with their First Amendment rights. These proposed changes attempt to strike a more delicate balance between the traditional constitutional protections afforded students in Massachusetts and the increased flexibility school administrators need to alleviate the risks and proactively quell severe harassment before the consequences grow dire. Cases such as Phoebe Prince's, while perhaps more extreme than most, are unfortunately becoming the new norm amongst adolescents. We must recognize Massachusetts's need to provide a safe environment for students, as well as the public's interest in protecting the free-speech rights of its younger members. Section 37O must strike a more appropriate balance if our traditional protections of student speech rights are to mean anything in this day and age.

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