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# A Trade-off That Becomes a Rip-off: When Schools Can't Regulate Cyberbullying

## I. INTRODUCTION

Imagine a place in America where groups of citizens are confined and allowed few constitutional rights. No citizen may possess a firearm,<sup>1</sup> and carrying any other weapon results in serious penalties.<sup>2</sup> No one is allowed to freely practice religion,<sup>3</sup> nor engage in political protests.<sup>4</sup> Forget freedom of the press; anything the state finds contrary to its “mission” will be suppressed.<sup>5</sup> “Reasonable” searches, including strip searches, may be performed without probable cause or a warrant.<sup>6</sup> The institution governing these citizens can make its own rules and regulations,<sup>7</sup> and the only due process available for most infractions consists merely of notice.<sup>8</sup> Even the kinds of clothing allowed are regulated by the state,<sup>9</sup> and if citizens object, they have little power to effect a change because most of them cannot even vote.<sup>10</sup>

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1. 20 U.S.C. § 7151 (2012).

2. *See, e.g.*, WASH. REV. CODE § 9.41.280 (2009) (making possession of firearms and any other weapon at school a gross misdemeanor and grounds for expulsion).

3. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 421 (1962) (prohibiting sponsoring voluntary daily prayer and Bible reading); *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985) (prohibiting voluntary silent prayer).

4. *See, e.g.*, *Madrid v. Anthony*, 510 F. Supp. 2d 425, 425 (S.D. Tex. 2007) (prohibiting students attending protest); *Walker-Serrano v. Leonard*, 168 F. Supp. 2d 332, 332–333 (M.D. Pa. 2001) (upholding prohibition of student circulated petitions). *But see* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503 (1969) (allowing armbands worn to protest the Vietnam War).

5. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988) (upholding regulation of school newspapers).

6. *See* *Safford Unified Sch. Dist., v. Redding*, 557 U.S. 364, 364 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 325 (1985).

7. *See, e.g.*, *Price v. N.Y. City Bd. of Educ.*, 855 N.Y.S.2d 530, 540 (App. Div. 2008) (holding rule banning cell phones in schools was not arbitrary and capricious).

8. *Goss v. Lopez*, 419 U.S. 565, 565 (1975) (finding due process afforded for short term suspensions).

9. *Blau ex rel. Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 381–82, 385–86 (6th Cir. 2005) (upholding dress code that prohibited baggy or revealing clothing; visible body piercings; clothing with holes; flip flop sandals or platform shoes; bottoms that are not solid navy, black, khaki, or white; and tops that are not a solid color, have writing on them or have logos except the school's logo that are larger than the size of a quarter).

10. U.S. CONST. amend. XXVI, § 1 (establishing legal voting age of 18).

Ironically, most Americans have not only spent at least thirteen years in such a state-sponsored institution,<sup>11</sup> but have also committed vast resources to maintain it.<sup>12</sup> Most of these formerly oppressed citizens not only have fond memories of their time in this institution<sup>13</sup> but also report high satisfaction<sup>14</sup> in sending their own children to this seeming “enclave[] of totalitarianism.”<sup>15</sup> This “totalitarian” institution, almost entirely supported by state and local taxes,<sup>16</sup> is the U.S. public education system.

The public trades some of its most cherished individual rights to schools who provide benefits to both the children served and society,<sup>17</sup> including an environment where schools can inculcate the “values of citizenship that will enable students to participate effectively in the nation’s economic practices and democratic institutions when they become adults.”<sup>18</sup> However, if students trade some rights, but students’ and parents’ expectations of civility,<sup>19</sup>

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11. NAT’L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATIONAL STATISTICS TO 2021 (2013), *available at* [http://nces.ed.gov/programs/projections/projections2021/tables/table\\_01.asp](http://nces.ed.gov/programs/projections/projections2021/tables/table_01.asp) (finding that in 2010, 92% of American children in grades 9-12 were enrolled in a public school).

12. Background Analysis, *Federal Education Budget Project*, NEW AMERICA FOUND., Jun. 30, 2013 [hereinafter *Education Budget*], *available at* <http://febnp.newamerica.net/background-analysis/school-finance> (“America spends over \$500 billion a year on public elementary and secondary education in the United States.”).

13. Jennifer Senior, *Why You Truly Never Leave High School*, N.Y. MAGAZINE (Jan. 20, 2013), *available at* <http://nymag.com/news/features/high-school-2013-1/> (“[F]or most of us adults, the adolescent years [in high school] occupy a privileged place in our memories . . .”).

14. Jeffrey M. Jones, *In U.S., Private Schools Get Top Marks for Educating Children*, GALLUP POLITICS (Aug. 29, 2012), <http://www.gallup.com/poll/156974/private-schools-top-marks-educating-children.aspx> (finding that in 2012, 75% of parents reported being satisfied with the quality of education their oldest child was receiving in public school).

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

16. *Education Budget*, *supra* note 12 (finding that typically almost 90% of elementary and secondary education funding is from state and local taxes).

17. Emily Buss, *Constitutional Fidelity Through Children’s Rights*, 2004 SUP. CT. REV. 355, 361 (2004) (“Schools serve as one of the primary sites for positive influence, for the development of basic intellectual skills, the acquisition of knowledge, and the cultivation of prosocial behavior. To accomplish all this, schools need a level of control that may justify a diminution of rights.”).

18. ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 9 (2009).

19. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) (“With its captive audience of children, many of whom, along with their parents, *legitimately expect reasonable regulation*, a school need not capitulate to a student’s preference for vulgar expression.”) (emphasis added).

order, and security in schools are not realized, they may see this trade-off as a rip-off. Students and parents who feel cheated by the schools create significant concerns, including contributing to an overall lack of faith in the U.S. public education system.<sup>20</sup>

One aspect of this trade-off that is a potential rip-off arises in the arena of cyberbullying. Schools have traditionally required students to trade some of their First Amendment free speech rights for protection from the negative effects of other students' unregulated speech. Unfortunately, current school speech precedent applied to cyberbullying often leaves schools unable to discipline cyberbullies. Accordingly, students and parents can feel ripped-off when, after surrendering some free speech rights in the name of a safe and orderly education system, schools are still unable to provide protection from cyberbullies. This Comment joins other commentators in arguing that relying on the second prong of the *Tinker* test,<sup>21</sup> as has been explored by some lower courts, would allow schools to consistently discipline harmful student speech no matter where it originates. Such an application of *Tinker* allows schools to uphold their end of the school speech trade-off.

This Comment also breaks new ground arguing that using *Tinker's* second prong is consistent with current school speech doctrine trade-offs and with *Tinker's* history, text, and interpretation by subsequent Supreme Court cases. Part II explains that the trading of constitutional rights for benefits is commonplace and beneficial in schools and society. Part III discusses how one such trade-off—embodied by the school speech doctrine—has changed over time, requiring more of students in exchange for the promised benefits of public schooling. Part IV shows that in spite of this expansion of restrictions in school speech doctrine, courts currently construe the doctrine too rigidly in cyberbullying cases, thus creating an unfair bargain for schools and families. Finally, Part V argues that courts

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20. Jones, *supra* note 14. Although parents are generally satisfied with the quality of education their own children receive in public school, this satisfaction has declined 5% over the last two years. *Id.* Also, Americans in general have an increasing low opinion of public schools. *Id.* In 2012, only 37% of Americans believed public school provided a “good” or “excellent” education, and every year since 2004, less than half of Americans have reported being “satisfied” with the quality of public education in the United States. *Id.*

21. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (outlining a two-prong test to determine if a school could regulate student speech: (1) if the student’s speech substantially disrupts the school, or (2) if the speech invades the rights of others to be secure and left alone).

should use *Tinker*'s second prong to consider the "rights of others" when determining if a student's cyberbullying speech is protected. This approach would ensure that students who shed many of their rights "at the schoolhouse gate"<sup>22</sup> do not find the school's promise of order and security empty.

## II. TRADING RIGHTS

Historically, schools were not required to recognize students' individual rights.<sup>23</sup> Today, public school students do not absolutely shed their constitutional rights at the schoolhouse gate; however, students' at-school rights are not as extensive as their out-of-school rights<sup>24</sup> nor "coextensive with the rights of adults."<sup>25</sup> In schools, students do not have the full rights of expression;<sup>26</sup> a full liberty interest (because of compulsory attendance requirements);<sup>27</sup> or unqualified rights under the Fourth<sup>28</sup> or Eighth Amendments;<sup>29</sup> In addition, schools can restrict the promotion of drugs<sup>30</sup> and the use of threatening,<sup>31</sup> vulgar, or obscene language.<sup>32</sup> Trading these rights furthers the state and community's interest in educating students by allowing schools to provide students with order and security that they may not receive in any other setting. Students also receive other

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22. *Id.* at 506.

23. *See* DUPRE, *supra* note 18, at 10 ("Courts . . . allowed school officials the same power to make rules regarding student conduct at school as the parent would have at home—that is, virtually without limit . . .").

24. *See infra* notes 26–32.

25. *Morse v. Frederick*, 551 U.S. 393, 404 (2007) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

26. *Bethel*, 478 U.S. at 686–87 (restricting vulgar or obscene speech); *Morse*, 551 U.S. at 393 (restricting speech promoting drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988) (restricting school-sponsored speech); *Tinker*, 393 U.S. at 503 (restricting all other disruptive speech).

27. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

28. *New Jersey v. T.L.O.*, 460 U.S. 325, 327 (1985) (holding that searches of students only need be reasonable); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822, 822 (2002) (allowing random urinalysis drug testing of students).

29. *Ingraham v. Wright*, 430 U.S. 651, 651 (1977) (finding that corporal punishment is not cruel and unusual punishment).

30. *Morse*, 551 U.S. at 393.

31. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2007).

32. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686–87 (1986).

benefits that are not necessarily available to them outside of school; schools provide extra protection to students from physical and psychological harm through interactions with school staff, who, for example, must report suspected child abuse<sup>33</sup> and keep potentially damaging student records confidential.<sup>34</sup>

The concept of trading rights is not unique to the school setting. In many contexts, Americans expect to give up some of their constitutional rights in order to gain benefits. For example, to decrease gun violence, Americans have traded a portion of their Second Amendment right to bear arms by passing laws that restrict the sale of firearms to certain individuals.<sup>35</sup> Likewise, some Fourth Amendment rights related to privacy are traded to allow police the latitude to more effectively fight crime,<sup>36</sup> and employers to discover employee misconduct.<sup>37</sup> Also, First Amendment rights are routinely abridged in the workplace to allow employers to control what messages they sponsor,<sup>38</sup> or to keep the peace in public places.<sup>39</sup>

### III. UPPING THE ANTE: INCREASING TRADE-OFFS IN SCHOOL SPEECH

Trading rights in schools benefits not only individual citizens, but society as a whole. “The state (in the form of the public school) takes away some liberty from the individual student in order to

33. VICTORIA J. DODD, *PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY* 284 (2d ed. 2010) (“All states require in some manner that school personnel report instances of suspected child abuse.”).

34. 20 U.S.C. § 1232g (2012).

35. *See* 18 U.S.C. § 922(d) (2012) (restricting the sale of firearms to, among others, convicted felons, fugitives, drug addicts, “mental[ly] defective[s],” illegal aliens, dishonorably discharged soldiers, and stalkers).

36. *Kentucky v. King*, 131 S. Ct. 1849 (2011) (allowing warrantless entry to prevent destruction of evidence).

37. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2011) (holding a government employer’s warrantless search is reasonable “when conducted for a ‘noninvestigatory work-related purpos[e]’ or for the ‘investigatio[n] of work-related misconduct’”).

38. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that “when public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”).

39. *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

preserve the liberty of a nation.”<sup>40</sup> The history of school speech explored in this Part illustrates that, inherent in the school speech trade-off, is the fact that as it becomes more difficult for schools to provide an orderly and secure environment, students are required to trade more rights.

Before *Tinker v. Des Moines Independent Community School District*,<sup>41</sup> freedom of speech was not recognized meaningfully in public schools.<sup>42</sup> This changed in 1965, when several students who wore black armbands to school to protest the Vietnam War were suspended when they refused to remove them.<sup>43</sup> Although the district court found that the school’s action was “reasonable because it was based upon their fear of a disturbance,”<sup>44</sup> the Supreme Court disagreed, reasoning that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>45</sup> Students therefore had a right to wear armbands to school even if the school disapproved.

The Court limited this newly recognized right to student speech in what has come to be known as the two-prong *Tinker* test:<sup>46</sup> “conduct by the student, in class or out of it, which . . . involves substantial disorder or invasion of the rights of others”<sup>47</sup> was not

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40. DUPRE, *supra* note 18, at 2 (explaining that schools have the “important mission of educating each generation of new citizens so they will have the tools necessary to preserve and protect those tenets of democracy upon which the United States was founded”).

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

42. *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring) (“*Tinker* effected a sea change in students’ speech rights, extending them well beyond traditional bounds.”); Kristi L. Bowman, *The Civil Rights Roots of Tinker’s Disruption Tests*, 58 AM. U. L. REV. 1129, 1130 (2009) (“*Tinker* was quite a departure from what came before it; prior to *Tinker*, it was not a foregone conclusion that students had any affirmative speech rights in public schools.”); Dan L. Johnston, *The First Amendment and Education—A Plea for Peaceful Coexistence*, 17 VILL. L. REV., 1023, 1025 (1972) (Before *Tinker*, most school administrators felt that they had “absolute authority to decide what would or would not go on within the school system during school hours, and that the Bill of Rights and the [F]irst [A]mendment did not apply to the school situation.”).

43. *Tinker*, 393 U.S. at 504.

44. *Id.* at 508.

45. *Id.*

46. Mary Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1042 (2008) (“Although virtually all the student speech cases applying *Tinker* have focused on its material-and-substantial disruption prong, it is possible that the alternative prong of *Tinker*—interference with the rights of others—will become more important particularly in the context of harassing or demeaning speech.”).

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

constitutionally protected. According to this test, student speech could still be regulated by schools if the speech 1) caused substantial disorder to the school, or 2) invaded the rights of others. At the time, it may have seemed that the *Tinker* school speech standard was sufficient to “prescribe and control conduct in the schools.”<sup>48</sup> However, times changed, and the Court came to see how the “whims and caprices of the[] loudest-mouthed”<sup>49</sup> students created harmful student speech that survived the *Tinker* test. Consequently, over time, the Court added additional limitations to the student speech doctrine requiring students to trade additional speech rights to schools.

The first major addition to the doctrine came twenty years after *Tinker* in *Bethel School District v. Fraser*, when a student gave a student body nominating speech that contained an “explicit sexual metaphor.”<sup>50</sup> In response, the Supreme Court held that vulgar student speech should not be given the same protection as adult speech, even if the school could not have restricted it under *Tinker*.<sup>51</sup> The Court reasoned that, in addition to curtailing speech that “intrudes upon the work of the schools or the rights of other students,”<sup>52</sup> schools should also be able to “inculcate the habits and manners of civility” and “teach[] students the boundaries of socially appropriate behavior.”<sup>53</sup>

Two years later, in *Hazelwood School District v. Kuhlmeier*, a school principal prevented the publication of two student-authored articles in a school newspaper because he feared the articles might invade the privacy of students and expose younger students to age-inappropriate content.<sup>54</sup> The Court discussed *Tinker* and determined that, if “reasonably related to legitimate pedagogical concerns,”<sup>55</sup> a

48. *Id.* at 507.

49. *Id.* at 525 (Black, J., dissenting).

50. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986).

51. *Id.* at 682 (“[T]he First Amendment gives a high school student the classroom right to wear *Tinker’s* armband, but not *Cohen’s* jacket.”) (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Fisher, J., concurring)).

52. *Id.* at 680.

53. *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

54. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988) (withholding from publication articles featuring current students discussing their parents’ divorces and another featuring three students’ experiences with pregnancy).

55. *Id.* at 273.



school may “disassociate itself not only from speech that would substantially interfere with its work . . . or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical . . . biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”<sup>56</sup> Accordingly, after *Kuhlmeier*, schools were able to further regulate student speech, to better “[fulfill] their role as ‘a principal instrument in awakening the [student] to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.’”<sup>57</sup>

In 2007, recognizing the increasingly “difficult” yet “vitaly important” job that school administrators face,<sup>58</sup> the Supreme Court once more required students to forgo additional speech rights. During school, students in Juneau, Alaska, were allowed to walk across the street from their high school to watch the 2002 Olympic Torch Relay. While waiting for the torch, several students unfurled a banner that read “BONG HiTS 4 JESUS.”<sup>59</sup> The banner’s creator refused to drop the banner and follow the principal to her office. He was later suspended.<sup>60</sup> In *Morse v. Frederick*, the Court held that the student’s speech was not protected because the government had a compelling interest in preventing illegal drug use.<sup>61</sup> Even the dissent agreed that, in light of the mission of schools, “it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting.”<sup>62</sup>

As *Fraser* and *Kuhlmeier* were interpreted by lower courts, schools continued to gain broad latitude in regulating on-campus student speech. Although *Fraser* concerned sexually explicit speech, the *Fraser* language relating to the promotion of civility has been applied broadly to include upholding punishments for a student swearing within earshot of a school secretary,<sup>63</sup> or at another student in the cafeteria,<sup>64</sup> or refusing to put away a small Confederate flag.<sup>65</sup> *Fraser* has also been used to uphold dress codes that banned T-shirts

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56. *Id.* at 271 (internal quotation marks and citations omitted).

57. *Id.* at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

58. *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

59. *Id.* at 397.

60. DUPRE, *supra* note 18, at 233.

61. *Morse*, 551 U.S. at 410.

62. *Id.* at 409.

63. *Anderson v. Milbank Sch. Dist.* 25-4, 197 F.R.D. 682 (D.S.D. 2000).

64. *Heller v. Hodgin*, 928 F. Supp. 789 (S.D. Ind. 1996).

65. *Scott v. Sch. Bd.*, 324 F.3d 1246 (11th Cir. 2003).

with sexual innuendo,<sup>66</sup> those that cast the school's administration in a negative light,<sup>67</sup> and those that "promote[d] destructive conduct and demoralizing values."<sup>68</sup> *Kuhlmeier* has also been broadly applied to other extracurricular activities such as protecting an administrator's choice to change the school's mascot,<sup>69</sup> disciplining a student who gave a candidate's speech that was "in bad taste,"<sup>70</sup> and allowing the school to remove material a student repeatedly posted in her workspace that offended classmates.<sup>71</sup>

Although this broad authority concerns some scholars,<sup>72</sup> when schools have encroached impermissibly upon the core speech rights of students, courts have stepped in to keep schools in check. For instance, the Ninth Circuit ruled against a school when it attempted to use *Hazelwood* to ban anti-draft advertisements in a school paper, although it allowed advertisements from military recruiters,<sup>73</sup> and a Michigan federal district court ruled against a school when it attempted to censor a student article on a pending lawsuit against the school district because the superintendent disagreed with the student's views.<sup>74</sup>

It could be argued that *Morse* has a very narrow application to only student speech that refers to illegal drugs, and some courts have applied it accordingly.<sup>75</sup> However, like *Fraser* and *Kuhlmeier*, it too has gradually been applied broadly to other types of speech when courts feel that doing so helps schools "protect those entrusted to

66. Pyle *ex rel.* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 158–59 (D. Mass. 1994) (applying school dress code to T-shirt slogans including: "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" and "Coed Naked Band: Do It to the Rhythm.").

67. Gano v. Sch. Dist. No. 411, 674 F. Supp. 796, 797 (D. Idaho 1987) (denying student's request to wear a shirt depicting three school administrators with alcoholic beverages acting drunk).

68. Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469 (6th Cir. 2000) (upholding prohibition of Marilyn Manson T-shirts).

69. Crosby *ex rel.* Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1988) (upholding the change of mascot "Johnny Reb" because it offended black students).

70. Poling v. Murphy, 872 F.2d 757, 759–62 (6th Cir. 1989) (holding that "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic").

71. Fister v. Minn. New Country Sch., 149 F.3d 1187 (D. Minn. 1998).

72. See generally Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527 (2000).

73. San Diego Comm. Against Registration & the Draft v. Governing Bd., 790 F.2d 1471, 1478 (9th Cir. 1986).

74. Dean *ex rel.* Elsarelli v. Utica Cmty. Schs., 345 F. Supp. 2d 799, 803 (E.D. Mich. 2004).

75. DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71, 77 (2d Cir. 2010) ("Speech that can 'reasonably be regarded as encouraging illegal drug use' may be restricted by school administrators.").

their care.”<sup>76</sup> Since one rationale for the holding of *Morse* was to avoid the “severe and permanent damage to the health and well-being of young people,”<sup>77</sup> *Morse* has been used to support the punishment of speech promoting other kinds of actions that may affect the health and well-being of students, including threats of school violence,<sup>78</sup> speech promoting illegal behavior,<sup>79</sup> and speech promoting racial conflict.<sup>80</sup>

Under the current school speech doctrine, schools expect to be able to regulate speech that is potentially disruptive, lewd or vulgar, or dangerous in exchange for the benefits of public education they provide. Similarly, parents and students accept these regulations and make these concessions because they expect doing so will allow schools both to protect students from harm and to facilitate a positive learning environment.

#### IV. THE CYBERBULLY RIP-OFF

In 1968, the *Tinker* Court could not have imagined the avenues for student speech that currently create serious challenges for today’s schools. Back then, teens watched the *Monkees* or *Star Trek*<sup>81</sup> on black-and-white televisions.<sup>82</sup> Today’s teens can watch *Vampire Diaries* or *American Idol*<sup>83</sup> at any location via the Internet<sup>84</sup> on their

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76. *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

77. *Id.* at 407.

78. *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (quoting *Morse*, 551 U.S. at 408) (reasoning that just as *Morse* restricted student speech “that they reasonably regard as promoting illegal drug use,” so too a court should permit schools to restrict student speech “reasonably construed as a threat of school violence”).

79. *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 623 (E.D. Pa. 2008).

80. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 339 (6th Cir. 2010) (“If we substitute ‘racial conflict’ for ‘drug abuse,’ the analysis in *Morse* is practically on all fours with this case.”).

81. *1968 TV Shows*, TV PARTY, <http://www.tvparty.com/fall68.html> (last visited Jan. 16, 2014).

82. Richard Powelson, *First Color Television Sets Were Sold 50 Years Ago*, POST GAZETTE.COM (Dec. 31, 2003), <http://old.post-gazette.com/tv/20031231colortv1231p3.asp> (stating that many Americans did not enjoy color television until the late 1960s when set prices dropped and more programs were available in color).

83. Laurel Brown, *2012 Teen Choice Awards Nominees: ‘Vampire Diaries,’ ‘Idol’ and ‘Bieber Score Big*, BUDDY TV (May 18, 2012), <http://www.buddytv.com/articles/the-vampire-diaries/check-out-the-first-round-of-t-45748.aspx>.

84. See Amanda Lenhart et al., *Social Media and Young Adults*, PEW INTERNET (Feb. 3, 2010), <http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx> (stating that 73% of teenagers ages 12–17 access content on the internet).

smart phones or laptops.<sup>85</sup> This proliferation of technology has given the age-old problem of bullying a high-tech platform.

In August 2010, the U.S. Department of Education held its first federal bullying prevention summit. At the summit, Secretary of Education, Arne Duncan, stated that “bullying is very much an education priority that goes to the heart of school performance and school culture,” and “[c]yber-bullying . . . is a new and especially insidious form of bullying.”<sup>86</sup> Cyberbullying “refers to any kind of harassment that takes place on the Internet or over text messaging,” and is usually perpetrated by students against their peers.<sup>87</sup> Recent research also recognizes the growing problem of teacher victimization by students,<sup>88</sup> including the cyberbullying of teachers.<sup>89</sup>

Cyberbullies can threaten anonymously,<sup>90</sup> incessantly, and often with impunity.<sup>91</sup> The negative effects<sup>92</sup> on the victims of cyberbullying may be even stronger than traditional bullying because it is so pervasive. Victims cannot physically escape cyberbullies<sup>93</sup> and

85. Amanda Lenhart, *Teens, Smartphones & Texting*, PEW INTERNET 3, 27 (Mar. 19, 2012), *available at* [http://www.pewinternet.org/-/media//Files/Reports/2012/PIP\\_Teens\\_Smartphones\\_and\\_Texting.pdf](http://www.pewinternet.org/-/media//Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf) (stating that 23% of all teens ages 12–17 have a smartphone, 31% of teens ages 14–17 have a smartphone and 74% of all teens ages 12–17 own a desktop or laptop computer).

86. Arne Duncan, Sec’y of Educ., U.S. Dep’t of Educ., Keynote Address at the Federal Partners in Bullying Prevention Summit: The Myths About Bullying (Aug. 11, 2010), *available at* <http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit>.

87. Mary Kingston, *Board Member Testifies at Cyber Safety Hearing*, EDUC. DIGEST, Jan. 2011, at 10.

88. Dorothy Espelage et al., *Understanding and Preventing Violence Directed Against Teachers*, AM. PSYCHOLOGIST, Feb.–Mar. 2013, at 75.

89. Teemu Kauppi & Maili Pörhölä, *School Teachers Bullied by Their Students: Teachers’ Attributions and How They Share Their Experiences*, 28 TEACHING AND TCHR. EDUC. 1059, 1060 (2012).

90. Robert S. Tokunaga, *Following You Home from School: A Critical Review and Synthesis of Research on Cyberbullying Victimization*, COMPUTERS IN HUM. BEHAV. 277, 279 (explaining that because of the anonymity offered through electronic media, cyberbullying is an “opportunistic offense” where “[s]tudents who would not otherwise engage in traditional bullying behaviors do so online”).

91. *Id.* (“Instructors or school administrators are seen as agents of enforcement in traditional bullying. In cyberbullying, however, there is no clear individual or groups who serve to regulate deviant behaviors on the Internet.”).

92. *Id.* at 277 (“Victims of cyberbullying have lower self-esteem, higher levels of depression, and experience significant life challenges.”).

93. *Id.* at 279 (“Victims can be reached through their cellular phones, e-mail, and instant messengers at any given time of the day.”).

cyberbullies can “victimize a greater number of targets in front of a larger audience without significant risk.”<sup>94</sup> The practice takes on a heightened “measure of mean-spiritedness . . . [b]ecause technology provides a screen behind which young people may hide” where they do not “have to be accountable for their actions.”<sup>95</sup> This anonymity not only “emboldens” the perpetrators, it also “increases the fear factor for the victim.”<sup>96</sup> This disinhibition creates a sense of invincibility where “[i]ndividuals who might otherwise be afraid to engage in bullying behavior . . . are more willing to do so.”<sup>97</sup> Perhaps this is why the gender pattern of cyberbullying is “the opposite of what happens off-line.”<sup>98</sup> Face-to-face, boys tend to be the school bullies, whereas “online, girls are the major players.”<sup>99</sup>

Because much student electronic speech originates off-campus, courts first hesitated to classify it as school speech.<sup>100</sup> Some scholars<sup>101</sup> still feel that “a child engaging in otherwise protected expression off campus and from a non-school-owned computer would seem to have a solid First Amendment right to engage in such expression.”<sup>102</sup> However, a number of district and circuit courts have determined that “off-campus speech that subsequently is brought to campus or to the attention of school authorities [is subject to] the substantial disruption test from *Tinker* without regard to the location where the speech originated.”<sup>103</sup> Unfortunately, because of the covert nature of cyberbullying, its effects often do not qualify as a

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94. John Snakenborg, et al., *Cyberbullying: Prevention and Intervention to Protect Our Children and Youth*, 55 PREVENTING SCH. FAILURE 88, 90 (2011).

95. Andrew V. Beale & Kimberly R. Hall, *Cyberbullying: What School Administrators (and Parents) Can Do*, 81 THE CLEARING HOUSE, Sept.–Oct. 2007, at 8.

96. *Id.*

97. Snakenborg et al., *supra* note 94, at 90.

98. Beale & Hall, *supra* note 95, at 8.

99. *Id.*

100. *E.g.*, *Emmett v. Kent School District*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

101. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011) (arguing that *Tinker* does not apply to student speech that is outside the supervision of the school); Papandrea, *supra* note 46, at, 1094–95 (“[P]unish[ing] students for any digital expression that harasses or bullies . . . pose[s] a grave threat to juvenile speech rights.”).

102. Christine Metteer Lorillard, *When Children’s Rights “Collide”: Free Speech vs. The Right to be Left Alone in the Context of Off-Campus “Cyber-bullying,”* 81 MISS. L.J. 189, 196 (2011).

103. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1103 (C.D. Cal. 2010).

substantial disruption under *Tinker*. Even in situations where great disruption occurs to one teacher, administrator, or student,<sup>104</sup> and could spread to others if unchecked, courts have hesitated to find substantial disruption to the work of the school as a whole.<sup>105</sup>

In *Layshock v. Hermitage School District*, a high school senior created a vulgar MySpace “parody profile” of his principal, off-campus during non-school hours, that characterized the principal as a marijuana-smoking, promiscuous alcoholic.<sup>106</sup> Later, he accessed the profile at school and showed it to other students.<sup>107</sup> Although three other students, in efforts to “one-up” each other, posted their own profiles, which were more “vulgar and more offensive”<sup>108</sup> than the first, and the school district had to limit students’ access to the internet and cancel the computer programming classes for a week,<sup>109</sup> the court’s *en banc* panel determined, under *Tinker*, that there was no “foreseeable and substantial disruption of school,” and the student’s speech was protected.<sup>110</sup>

*J.S. v. Blue Mountain School District* was decided the same day as *Layshock* by the same Third Circuit panel. Perhaps unsurprisingly, in *J.S.*, the panel reached the same conclusion as in *Layshock*.<sup>111</sup> An eighth-grader and her friend created a vulgar MySpace profile of her school principal on her home computer.<sup>112</sup> The profile used graphic language to portray the principal as a bisexual, child-molesting sex addict.<sup>113</sup> The school district argued that the profile disrupted school because students were discussing the profile in class and staff had to

104. Thomas E. Wheeler, *Lessons From Lord of the Flies: The Responsibility of Schools to Protect Students From Internet Threats and Cyber-Hate Speech*, 215 EDUC. L. REP. 227, 241 (2007) (discussing the problem of “off-campus speech that has the practical effect of precluding only one or a few students from receiving the benefits of a public education because of the nature of that speech”).

105. *J.C.*, 711 F. Supp. 2d at 1121 (holding that “no reasonable fact finder could conclude that the YouTube video [that the student posted harassing a fellow student] was reasonably likely to cause . . . substantial disruption”).

106. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011).

107. *Id.* at 209.

108. *Id.* at 208.

109. *Id.* at 209.

110. *Id.* at 219.

111. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d. 915, 933 (3d Cir. 2011).

112. *Id.* at 920.

113. *Id.* at 920–21. The profile professed that the principal’s interests included hitting on students and their parents, having “any kind” of sex in his office, and “riding the fraintain”—a reference to the principal’s wife and counselor at the school, Deborah Frain. *Id.* at 921, 941.

be reassigned to deal with the two students.<sup>114</sup> In the deeply divided *en banc* decision, the court again concluded that, under *Tinker*, no substantial disruption occurred and J.S.'s Internet speech was protected.<sup>115</sup>

The decisions in *Laysbuck* and *J.S.* are a rip-off to students and parents because the bullying of school staff affects the ability of a school to provide a quality education. The principal in *Laysbuck* found the profile degrading, demeaning, and demoralizing,<sup>116</sup> and scholars have found that teacher bullying is not only demoralizing, but also affects the ability of teachers to teach their students.<sup>117</sup> Further, although school administrators do not always teach classes, their ability to effectively lead the school is affected by bullying directed towards them and other staff members. The *J.S.* dissent acknowledged that “[b]roadcasting a personal attack against a school official . . . not only causes psychological harm to the targeted individuals but also undermines the authority of the school,”<sup>118</sup> and that “[i]nsubordinate speech always interrupts the educational process . . . [;] [f]ailing to take action . . . would not only encourage the offending student to repeat the conduct, but also would serve to foster an attitude of disrespect towards teachers and staff.”<sup>119</sup> The *J.S.* dissent concluded that the majority’s decision left schools “powerless to discipline students for the consequences of their actions,”<sup>120</sup> and had “unwisely tipped the balance struck by *Tinker*, *Fraser*, *Kuhlmeier* and *Morse*, thereby jeopardizing schools’ ability to maintain an orderly learning environment.”<sup>121</sup>

In addition, scholars have found that both “[t]eachers and other school staff members who experience . . . abusive interactions with students” are not only at risk for “impaired . . . performance” but also for leaving the profession.<sup>122</sup> The *J.S.* dissent recognized that

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114. *Id.* at 923.

115. *Id.* at 933.

116. *Laysbuck v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (3d Cir. 2011).

117. Espelage et al., *supra* note 88, at 77.

118. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 941 (3d Cir. 2011) (Fisher, J., dissenting).

119. *Id.* at 945 (Fisher, J., dissenting).

120. *Id.* at 941 (Fisher, J., dissenting).

121. *Id.* at 952 (Fisher, J., dissenting).

122. Anne Gregory et al., *Teacher Safety and Authoritative School Climate in High Schools*, 118 AM. J. OF EDUC. 401, 401 (asserting that teacher victimization therefore contributes “to the high national rates of . . . attrition”).

“[t]his kind of harassment has tangible effects on educators. It may cause [them] to leave the school and stop teaching altogether.”<sup>123</sup> Precedent that leads to impaired teacher performance, undermines school authority, and contributes to attrition cheats parents, students, and the community, who have already traded numerous rights to receive the benefits of a public education, including a supportive atmosphere of civility and order.

Notably, had either of these profiles been circulated on paper at school, they absolutely could have been regulated under *Fraser* because they were lewd and vulgar, or possibly under *Tinker* because paper copies of the profile could likely not have been circulated without creating a substantial disruption. Ironically, the Third Circuit earlier noted this tension between regulating cyber and traditional bullying. In a school speech case decided prior to *Laysbuck* and *J.S.*, the Third Circuit found a student’s off-campus internet speech unprotected when she referred to school administrators as “douchebags” and stated that had the student “distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court’s precedents” holding that “offensive forms of expression may be prohibited.”<sup>124</sup>

As serious as educational staff victimization is to learning, the more poignant rip-off to parents and students is when a student, rather than a principal, is on the receiving end of cyberbullying. In *J.C. v. Beverly Hills Unified School District*, J.C. and several friends made a video in which they ridiculed fellow classmate C.C., calling her a “slut” and the “ugliest piece of shit I’ve ever seen in my whole life.”<sup>125</sup> J.C. posted the video on YouTube and contacted C.C. and five to ten other students, encouraging them to view the video.<sup>126</sup> Later, a school counselor estimated that about half of the eighth grade eventually viewed the video.<sup>127</sup> The next day, C.C. went to school with her mother, crying and telling administrators that she felt too humiliated to go to class.<sup>128</sup> Although the district court determined the speech occurred off-campus, it cited a “long line of

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123. *J.S.*, 650 F.3d at 946 (Fisher, J., dissenting).

124. *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008).

125. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).

126. *Id.*

127. *Id.* at 1120.

128. *Id.*



cases”<sup>129</sup> that supported the “off-campus character [of the speech] does not necessarily insulate the student from school discipline,”<sup>130</sup> and that “*Tinker* applies to both on-campus and off-campus speech.”<sup>131</sup> However, as in *Layshock* and *J.S.*, the court concluded that under *Tinker* there was no substantial disruption to the school from the posting of J.C.’s video, so her speech was protected.<sup>132</sup> The court did discuss *Tinker*’s “rights of others” prong, but felt insufficient authority existed to apply the prong to “speech that may cause some emotional harm to a student.”<sup>133</sup> So, despite the harm to C.C. and her education, J.C. could not be punished.

## V. ENDING THE CYBERBULLYING RIP-OFF

Some scholars have called for the Supreme Court to remedy the inadequacy of *Tinker*’s substantial disruption test in order to address cyberbullying.<sup>134</sup> Unfortunately, the Court does not appear ready to issue any guidance soon.<sup>135</sup> However, new precedent may not be necessary to end the cyberbullying rip-off if courts will apply *Tinker*’s “rights of others” prong, which allows schools to regulate speech that invades “the rights of other[s]. . . to be secure and to be let alone.”<sup>136</sup> The Fourth Circuit recently used this prong in conjunction with the substantial disruption prong, and other circuits have suggested that the “rights of others” prong could stand alone in regulation of student speech.<sup>137</sup> Circuits should allow the “rights of others” prong to stand alone to keep the school speech trade-off from shortchanging students and parents.

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129. *Id.* at 1105.

130. *Id.* at 1106.

131. *Id.* at 1108.

132. *Id.* at 1120.

133. *Id.* at 1123.

134. Martha McCarthy, Commentary, *Student Electronic Expression: Unanswered Questions Persist*, 277 EDUC. L. REP. 1, 19 (2012) [hereinafter *Unanswered Questions*] (“[A] decision clarifying the reach of the First Amendment to student expression initiated off school grounds but accessible to the school community would be very helpful to school personnel.”). See generally Philip T.K. Daniel & Scott Greytak, Commentary, *A Need to Sharpen the First Amendment Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21 (2011).

135. Three of the school speech cases discussed in this Comment were denied certiorari Jan. 17, 2012: *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); and *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

136. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

137. See discussion *infra* Part V.B.4.

*A. Considering the Rights of Others with the Substantial Disruption Standard*

It is not clear why early courts addressing student Internet speech cases ignored the “rights of others” prong entirely.<sup>138</sup> Fortunately, the only two federal cases addressing student-on-student cyber-bullying both mention it, although they treat the prong differently.<sup>139</sup> In *J.C.*, as mentioned above, the court found the prong inapplicable, but in *Kowalski v. Berkeley County Schools*, “the Fourth Circuit seemed to connect the two prongs in a novel way by reasoning that interference with the rights of others *creates* the disruption required to trigger *Tinker’s* exception.”<sup>140</sup> Kowalski, a high school senior, created a MySpace discussion group after school on her home computer to ridicule another student, Shay N.<sup>141</sup> She invited approximately 100 of her MySpace “friends” to join the group, entitled “S.A.S.H. (Students Against Shay’s Herpes).”<sup>142</sup> The students, took turns making derogatory comments about Shay and posted pictures of her with an X across her crotch accompanied by the message, “Warning: Enter at your own risk.”<sup>143</sup> Shay and her parents met with the vice principal the next day, filed a harassment complaint, and returned home.<sup>144</sup> Kowalski was suspended from school for ten days and from social activities for ninety days.<sup>145</sup>

The Fourth Circuit upheld the school’s discipline and determined that *Tinker* applied, quoting the entire two-prong test twice.<sup>146</sup> As scholar Martha McCarthy noted, “In several places, the

138. *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

139. *Kowalski*, 652 F.3d at 565; *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

140. *Unanswered Questions*, *supra* note 134, at 10.

141. *Kowalski*, 652 F.3d at 567.

142. *Id.* (“Kowalski claimed in her deposition that ‘S.A.S.H.’ was an acronym for ‘Students Against Sluts Herpes,’ but a classmate, Ray Parsons, stated that it was an acronym for ‘Students Against Shay’s Herpes.’”).

143. *Id.* at 568 (stating another posted picture of her was captioned, “portrait of a whore”).

144. *Id.*

145. *Id.* at 568–69. Her school suspension was reduced to five days, but her social suspension was upheld, preventing her from participating on the cheerleading squad for the rest of the year and from crowning the school’s next “Queen of Charm” as she had been elected Queen the previous year. *Id.* at 569.

146. *Id.* at 571 (“[I]n *Tinker* . . . student speech . . . was protected because it did not ‘materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school’ [or] collid[e] with the rights of others.”).

Fourth Circuit seemed to give credence to *Tinker's* second prong as a viable exception to constitutional protection of student expression that collides with the rights of others.”<sup>147</sup> The court stated that “[b]ecause the Internet-based bullying and harassment in this case could reasonably be expected to *interfere with the rights of a student* at Musselman High School *and thus disrupt* the school learning environment, Kowalski was indeed on notice that Mussel-man [sic] High School administrators could regulate and punish the conduct at issue here.”<sup>148</sup>

*Kowalski* keeps with the broad reading of school speech precedent and prevents the cyberbullying rip-off by allowing schools to punish cyberbullies. However, this approach is not the most effective because tying the “rights of others” to “substantial disruption” may lead to disparate discipline against different cyberbullies depending on which victims they select. *Kowalski* allowed that invading Shay’s rights could create substantial disruption by focusing on how Shay had to miss school because of the harassment, and how, because classmates descended on Shay in a “pack,”<sup>149</sup> potential existed for a “snowballing effect” of abuse.<sup>150</sup> This use of “substantial disruption” requires a court to consider the outward effects of cyberbullying on the victim in determining whether to uphold school discipline. This interpretation could encourage bullies to seek out victims who are less likely to seek help. Students who have little parental support, are already susceptible to depression, or are just afraid of retaliation from cyberbullies may hide how they are affected by cyberbullying, but cyberbullying of these victims could actually have the most tragic results.<sup>151</sup> If courts can determine that cyberbullying itself collides with the rights of others and deserves discipline regardless of the victim’s reaction, only then have courts truly ended the cyberbully rip-off.

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147. *Unanswered Questions*, *supra* note 134, at 10.

148. *Kowalski*, 652 F.3d at 575–76 (emphasis added).

149. *Id.* at 576.

150. *Id.* at 574.

151. *Cyberbullying-linked Suicides Rising Study Says*, CBC NEWS (Oct. 20, 2012), <http://www.cbc.ca/news/technology/story/2012/10/19/cyberbullying-suicide-study.html> (finding that “[t]here have been 41 suicides since 2003 involving cyberbullying in the United States, Canada, Australia and the United Kingdom”).

*B. Letting the “Rights of Others” Prong Stand Alone*

*Tinker’s* substantial disruption standard falls short of addressing cyberbullying that targets students individually. In some cases of cyberbullying, educational disruption may only be felt by an individual, rather than throughout the school. Other commentators<sup>152</sup> have also suggested that allowing the “rights of others” prong to stand alone is a viable solution to addressing cases of cyberbullying. Philip Daniel stated, “[t]hrough the right of students to attend school free from psychological harm has rarely been discussed in courts, it presents a promising analytical framework for school personnel to wield against cyberbullies’ potential First Amendment claims.”<sup>153</sup> Accordingly, the school district in *J.S.* seized upon the “rights of others” prong to justify its regulation of *J.S.’s* cyber speech.<sup>154</sup> But, as discussed above, the court did not accept this argument and found against the school. As in *J.S.*, courts have been hesitant to apply the second prong of *Tinker* alone, presumably because there is little case law defining the standard.<sup>155</sup>

The balance of this Part argues that allowing the “rights of others” prong to alone justify the regulation of school speech is supported by Supreme Court and circuit precedent and that a usable definition of the “rights of others” is not impossible to craft. Support for the independent use of the “rights of others” prong can be found in the *Tinker* text itself, the circuit cases relied upon to create the *Tinker* test, *Tinker* analysis in past Supreme Court school speech cases, and reasoning by other circuits. Together, these sources provide ample support for lower courts to allow school regulation of student speech under the “rights of others” prong of the *Tinker* test.

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152. *E.g.*, Joe Dryden, *It’s a Matter of Life and Death: Judicial Support for School Authority over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171 (2012); Martha McCarthy, *Curtailling Degrading Student Expression: Is a Link to Disruption Required?*, 38 J. L. & EDUC. 607 (2009); Martha McCarthy, *Student Expression that Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 EDUC. L. REP. 1 (2009).

153. Philip T.K. Daniel, Commentary, *Bullying and Cyberbullying in Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-Harassment Legislation*, 268 EDUC. L. REP. 619, 632 (2011).

154. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 n.9 (3d Cir. 2011).

155. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1123 (C.D. Cal. 2010) (“[T]he Court is not aware of any authority . . . that extends the *Tinker* rights of others prong so far . . . . This court declines to be the first.”).

Courts should act accordingly, allowing schools more tools to protect the trade-offs they require students to make.

*1. The stand-alone use of the “rights of others” prong is allowed by the text of Tinker*

The *Tinker* test is outlined several times in the opinion, always using the disjunctive “or” between the disruption prong and the “rights of others” prong. In the first articulation, the “rights of others” is mentioned twice:

There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work OR of *collision of the rights of other students to be secure and to be let alone*. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools OR *the rights of other students*.<sup>156</sup>

The standard is summarized in full at the end of the opinion:

[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place or type of behavior—materially disrupts classwork or involves substantial disorder OR *invasion of the rights of others* is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>157</sup>

Although court opinions are not necessarily subject to the rules of statutory interpretation, it is prudent to assume that the holding of a case, “ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word will be superfluous, void, nugatory, or insignificant.”<sup>158</sup> This is particularly true when interpreting the critical provisions of the case where the Court is articulating a novel legal test. In a relatively short opinion,<sup>159</sup> why would the majority repeatedly mention “the rights of others” as part of its disjunctive test if the phrase were to have no independent meaning? The best reading of the *Tinker* test would ascribe significance to each half of the Court’s disjunctive test—not merely to one of two clearly articulated prongs.

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156. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (emphasis and capitalization added).

157. *Id.* at 513 (emphasis and capitalization added).

158. 82 C.J.S. *Statutes* § 433 (2012).

159. *Tinker*, 393 U.S. at 503–14. The majority opinion is only eleven pages long.

The Court does more than merely reference the “rights of others” in its articulations of the *Tinker* test. In fact, the Court *discusses* “the rights of others” five times. The Court found there was no evidence that the wearing of armbands was in “collision with the rights of other students to be secure and to be let alone,”<sup>160</sup> nor that the armbands “impinge[d] upon the rights of other students.”<sup>161</sup> The Court affirmed that opinions expressed “without colliding with the rights of others”<sup>162</sup> and without seeking “to intrude in the school affairs or the lives of others”<sup>163</sup> were permissible but held that the “invasion of the rights of others is, of course, not immunized by the [Constitution].”<sup>164</sup> This discussion of the “rights of others” demonstrates that the Court felt that this prong of the test held meaning independent of the substantial disruption prong. A full and fair reading of the *Tinker* decision supports the use of each prong independently of the other.

## 2. The “rights of others” test is supported by cases relied on by *Tinker*

No Supreme Court precedent before *Tinker* predicted its outcome.<sup>165</sup> In crafting the *Tinker* test, the Court relied instead upon decisions in two Fifth Circuit civil rights cases, *Burnside v. Byars* and *Blackwell v. Issaquena County Board of Education*<sup>166</sup> that involved student speech similar to that in *Tinker*. In *Burnside v. Byars*, black students at the all-black Booker T. Washington High School in Philadelphia, Mississippi, wore “freedom buttons” that included the phrase “One Man One Vote”<sup>167</sup> to protest the denial of voting rights to black adults.<sup>168</sup> Like the principal in *Tinker*, the black principal<sup>169</sup> threatened to suspend any student who wore one of the buttons, fearing the buttons “would cause commotion, and

160. *Id.* at 508.

161. *Id.* at 509.

162. *Id.* at 513.

163. *Id.* at 514.

164. *Id.* at 513.

165. Bowman, *supra* note 42, at 1130 (“Looking at Supreme Court precedent alone, it would seem as though the *Tinker* tests were created out of whole cloth . . .”).

166. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).

167. *Burnside*, 363 F.2d at 746.

168. Bowman, *supra* note 42, at 1131.

169. *Id.* at 1136.

would be disturbing [to] the school program.”<sup>170</sup> The district court shared the principal’s concern and upheld the school’s regulation.<sup>171</sup> These concerns were well warranted considering the volatile political climate in Mississippi at the time.<sup>172</sup> The Fifth Circuit, however, determined that since there was “no interference with educational activity,” the students’ speech was protected.<sup>173</sup>

In *Blackwell v. Issaquena County Board of Education*<sup>174</sup> consolidated with *Burnside* and decided on the same day by the same Fifth Circuit panel,<sup>175</sup> students at the all-black Henry Weathers High School, in Rolling Fork, Mississippi, wore their freedom buttons to school.<sup>176</sup> After their school’s black principal<sup>177</sup> heard several students talking loudly in the hall when they should have been in class, he called an assembly and notified the students that if they continued wearing the buttons and disrupting school, they would be suspended.<sup>178</sup> Throughout the week, many students were suspended and sent home. Some of those students returned to the school, tried to pin buttons on other students, and tried to get the non-suspended students to leave school too.<sup>179</sup> At least one student who had been suspended entered a classroom during class to enlist other students in the cause, and some students threw the buttons into the building through the windows.<sup>180</sup> The court upheld the school’s discipline because the students not only disrupted the school but also *invaded the rights of others* through their protest.<sup>181</sup>

The disruption in *Blackwell* was clearly more substantial than in *Burnside*. Accordingly, the Fifth Circuit could have used the

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170. *Burnside*, 363 F.2d at 746–47 (alterations in original) (internal quotations omitted).

171. *Id.* at 746.

172. Bowman, *supra* note 42 at 1134–35. In the summer of 1964 President Lyndon B. Johnson had just signed the Civil Rights Act of 1964 and hundreds of civil rights volunteers, mainly from the North, flocked to the South to register black voters. Just six weeks earlier, the mutilated bodies of three of these voter registration volunteers—their story is featured in the movie MISSISSIPPI BURNING—were found in an earthen dam near Philadelphia, Mississippi. *Id.*

173. *Burnside*, 363 F.2d at 748.

174. *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).

175. Bowman, *supra* note 42, at 1141.

176. *Blackwell*, 363 F.2d at 750.

177. Bowman, *supra* note 42, at 1139.

178. *Blackwell*, 363 F.2d at 750–51.

179. *Id.*

180. *Id.* at 752.

181. *Id.* at 754.

magnitude of the disruption alone to measure whether the students' speech was protected. Instead, the court upheld the school's discipline, not only because the student created a disruption, but because by doing so, they had shown "complete disregard for the rights of their fellow students."<sup>182</sup> The court repeated that the button-wearing students' right to speak could not "[collide] with the rights of others."<sup>183</sup>

The Supreme Court could have adopted only the *Burnside* "substantial disruption" standard in crafting the *Tinker* test, and distinguished *Blackwell* by the disruption standard alone. In fact, early drafts of the majority opinion omit the mention of *Burnside* or *Blackwell* and "the rights of others" completely.<sup>184</sup> However, after his law clerk Marcia Field<sup>185</sup> wrote to Justice Fortas pointing out that the weighing of the rights of others was what distinguished *Tinker* and the fact-similar *Burnside* from *Blackwell*,<sup>186</sup> this concept found its way into his majority opinion. Presumably, when Justice Fortas revised his *Tinker* opinion to include "the rights of others" prong from *Blackwell* with a disjunctive "or" after the "substantial disruption" prong, he meant to clarify that both speech that is substantially disruptive *and* speech that collided with the rights of others is not protected by the First Amendment.

### *3. The "rights of others" prong is allowed by subsequent Supreme Court school speech rulings*

Subsequent Supreme Court opinions either articulate the entire two-prong *Tinker* test, or craft new rules after determining that *Tinker* does not apply. No subsequent precedent questions the validity of the "rights of others" prong.

*a. Fraser v. Bethel School District.* Justice Burger's majority opinion in *Fraser* addresses both prongs of *Tinker*.<sup>187</sup> It does so by noting, first, that Fraser's speech interfered with the work of school because "a highly appropriate function of public school education

182. *Id.* at 753.

183. *Id.* at 754.

184. Bowman, *supra* note 42, at 1161.

185. *Id.* at 1159 n.181. Field went on to teach at Harvard Law School and became the second woman to be awarded tenure there. *Id.*

186. *Id.* at 1161.

187. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).



[is] to prohibit the use of vulgar and offensive terms in public discourse,”<sup>188</sup> and, second, that Fraser’s speech intruded upon the rights of other students.<sup>189</sup> The Court explained this second point: “By glorifying male sexuality . . . the speech *was acutely insulting* to teenage girl[s] . . . [and] could well be seriously damaging to its less mature audience, many of whom were only 14 years old.”<sup>190</sup> This language clearly allows lower courts to consider the negative psychological effects of challenged speech on the rights of others in school when determining whether school regulation is constitutionally permissible.

*b. Hazelwood v. Kuhlmeier.* When this case was before the Eighth Circuit, the court ruled that a school newspaper could not be censored unless it met the *Tinker* test.<sup>191</sup> In articulating the test, the Eighth Circuit applied both prongs of *Tinker*.<sup>192</sup> Unfortunately, since the *Tinker* court did not explicitly elaborate on what the “invasion of the rights of others”<sup>193</sup> entailed, the Eighth Circuit deferred to a student-written law review article on school newspapers<sup>194</sup> that opined that “the rights of others” prong only referred to conduct that would open the school up to tort liability.<sup>195</sup> When the Supreme Court reversed, it gave no credit to the Eighth Circuit’s *Tinker* analysis<sup>196</sup> and fully articulated the two-prong *Tinker* test in its own opinion.<sup>197</sup> Therefore, after *Kuhlmeier*, the *Tinker* standard stood unmodified as the Court left it in *Fraser*, neither expanding upon—nor, most importantly, limiting—the applicability of the “rights of others” prong.

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188. *Id.*

189. *Id.*

190. *Id.* (emphasis added).

191. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 265 (1988).

192. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1371 (8th Cir. 1986), *rev’d sub nom.* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

193. *Id.* at 1375 (“We must first determine what the *Tinker* Court meant by ‘invasion of the rights of others.’”).

194. Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625 (1984).

195. *Kuhlmeier*, 795 F.2d at 1375–76.

196. *Kuhlmeier*, 484 U.S. at 273 n.5 (“We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid ‘invasion of the rights of others,’ except where that speech could result in tort liability to the school.”).

197. *Id.* at 266 (“[Students] cannot be punished . . . 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.’”).

c. *Morse v. Frederick*. Although a reasonable reading of *Fraser* may reveal that it demonstrates a *Tinker* analysis,<sup>198</sup> in *Morse*, Justice Roberts determined that the *Tinker* standard was not applied at all in *Fraser*.<sup>199</sup> This led him to believe that the *Tinker* analysis was “not absolute.”<sup>200</sup> However, in cases where the Supreme Court would find *Tinker* still applicable, nothing in *Morse* suggests that the second prong is not viable on its own. In addition, the dissent in *Morse* discussed the “rights of others” prong independently by arguing that there was no evidence that the “banner’s reference to drug paraphernalia willful[ly] infringed on anyone’s rights.”<sup>201</sup>

#### 4. The “rights of others” prong has been recognized by circuit courts

As early as 1977, circuit courts recognized *Tinker*’s “rights of others” as a separate prong from the substantial disruption prong. In *Trachtman v. Anker*,<sup>202</sup> the Second Circuit prevented a student newspaper staff from distributing an anonymous survey asking about students’ sexual behavior because under *Tinker*’s second prong it would “invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm.”<sup>203</sup> Even the plaintiffs did not argue that the school lacked authority to “protect the physical *and psychological* well being of students while they [were] on school grounds”; rather, they argued only that their right of expression in giving the survey outweighed this interest of other students who might be harmed.<sup>204</sup>

Further, in spite of its decisions in *J.S.* and *Layschock*, the Third Circuit has formerly given credence to *Tinker*’s second prong. In *Saxe v. State College Area School District*, the Third Circuit found a school district’s policy that prohibited any speech creating an

198. *Id.* at 281–82 (Brennan, Marshall & Blackmun, JJ., dissenting) (“This Court applied the *Tinker* test just a term ago in *Fraser*. . . . *Fraser* faithfully applied *Tinker*.”).

199. *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (“*Fraser* . . . certainly did not conduct the ‘substantial disruption’ analysis prescribed in *Tinker*.”) The majority in *Kuhlmeier* agreed. “The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*. We disagree.” 484 U.S. at 271 (majority opinion).

200. *Morse*, 551 U.S. at 405.

201. *Id.* at 440 (Stevens, Souter & Ginsberg, JJ., dissenting) (internal quotations omitted).

202. *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977).

203. *Id.* at 516.

204. *Id.* (emphasis added).

“intimidating, hostile or offensive environment” overbroad, but suggested that under *Tinker*’s second prong such a policy might be constitutional<sup>205</sup> if it “require[d] [a] . . . threshold showing of severity or pervasiveness.”<sup>206</sup> Later, the Third Circuit found in *Sypniewski v. Warren Hills Regional Board of Education*, that the school could regulate speech promoting racial hatred<sup>207</sup> because of its likelihood to cause disruption, but that the school could not regulate speech that promoted general “ill-will.”<sup>208</sup> The dissent argued that because “*Tinker* spoke not only in terms of disruption of school activities but in the disjunctive, interference with the rights of others,”<sup>209</sup> that schools should also be able to restrict speech with “element[s] of enmity, spite, or improper purpose.”<sup>210</sup>

In *Harper v. Poway School District*,<sup>211</sup> the Ninth Circuit found that a student’s speech was unprotected solely under the “rights of others” prong<sup>212</sup> when he refused to change his shirt containing a message condemning homosexuality during the school’s Day of Silence.<sup>213</sup> The court reasoned that since most children attend public school<sup>214</sup> and attendance is mandatory, students should be able to take advantage of their opportunity for an education free from physical and psychological attacks.<sup>215</sup>

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205. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (“[The school district] could argue that speech creating a ‘hostile environment’ may be banned because it ‘intrudes upon . . . the rights of other students.’”) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969)).

206. *Id.*

207. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

208. *Id.* at 264–65.

209. *Id.* at 274 (Rosenn, J., dissenting in part).

210. *Id.* at 275 (Rosenn, J., dissenting in part).

211. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *cert. granted, vacating as moot sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007).

212. *Id.* at 1183 (“Although we, like the district court, rely on *Tinker*, we rely on a different provision—that schools may prohibit speech that ‘intrudes upon . . . the rights of other students.’”).

213. *Id.* at 1171. Poway High School allowed the student Gay-Straight Alliance to organize a Day of Silence to “teach tolerance of others.” *Id.*

214. *Id.* at 1176.

215. *Id.* at 1178.

*C. Definitional Problems with the Rights of Others*

A legitimate hesitation to using the “rights of others” prong is the concern over the lack of a sufficiently narrow definition.<sup>216</sup> Courts and scholars have proposed two theories: (1) a right to be free from torts, and (2) a right to be free from psychological harm. Although the right to be free from torts is an attractive interpretation because it is an easily definable bright-line rule, it adds no additional protection to parents, students, or schools because it only allows schools to regulate student speech that they can already regulate under existing First Amendment doctrines. In contrast, a right to be free from psychological harm, appropriately limited, not only offers students a benefit in the speech rights trade-off, but also aligns with the Supreme Court’s use of the *Blackwell* precedent and subsequent circuit cases.

*1. A right to be free from torts*

Upon finding no disruption to the school under *Tinker*’s first prong, the Eighth Circuit in *Kuhlmeier* applied *Tinker*’s second prong and made one of the first explicit efforts to define the “rights of others.” Although it noted the second prong analysis from *Trachtman*, it was more persuaded by a student law review note on school newspapers that stated “[l]imiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression.”<sup>217</sup> The court reasoned that “[a]ny yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.”<sup>218</sup> This argument is unpersuasive because the Supreme Court has since made it clear in both *Kuhlmeier* and *Morse* that schools *can* curtail some student speech

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216. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 421 (2011) (“*Tinker*’s interference with the rights of others prong might eliminate all student First Amendment speech rights. After all, other students arguably have a right not to be captive to unwanted speech.”).

217. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375–76 (8th Cir. 1986), *rev’d sub nom. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

218. *Id.* at 1376.

that does not meet *Tinker*'s substantial disruption prong, even if it does not result in potential tort liability for the school.<sup>219</sup>

The dissent in *Harper* adopted a similar position to the Eighth Circuit, arguing that “[t]he ‘rights of others’ language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.”<sup>220</sup> The dissent feared that any broader definition would allow “the First Amendment rights of students [to be defined] out of existence.”<sup>221</sup> As discussed below, a definition of the “rights of others” can be crafted that both protects victims of cyberbullying and preserves First Amendment rights for students.

A workable definition of the “rights of others” would not only preserve First Amendment rights of students, but as part of the ongoing school speech trade-off, would also provide additional benefits to students. The “rights of others” definition to be free of torts does not accomplish this. Schools can already, under *Tinker* or other First Amendment precedent, restrict student speech that threatens unlawful activity.<sup>222</sup> To say that “the rights of others” means nothing more than to allow schools to regulate speech already under their control makes the prong unnecessary.

## 2. *Right to be free from psychological harm*

Schools should be able to use “rights of others” prong to restrict cyberbullying because restricting harmful student speech gives public school students the benefit of being free from psychological harm, a

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219. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (permitting regulation of speech related to legitimate pedagogical interests); *Morse v. Frederick*, 551 U.S. 393 (2007) (permitting regulation of speech promoting illegal drug use).

220. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1198 (9th Cir. 2006), *cert. granted, vacating as moot sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (Kozinski, J., dissenting).

221. *Id.*

222. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding incitement to imminent lawless behavior unprotected); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007) (“[W]e think that [under *Tinker*] school officials have significantly broader authority to sanction student speech [urging violent conduct] than the *Watts* standard allows.”); *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (Ct. App. 2010) (determining that the violent and threatening nature of cyberbullying was a “true threat” and not protected under the First Amendment). *See also* *Morse v. Frederick*, 551 U.S. 393, 439 (2007) (Stevens, Souter & Ginsburg, JJ., dissenting) (quoting *Fraser* and arguing “that our rigid imminence requirement ought to be relaxed at schools”).

benefit they would not have outside of the school setting. As discussed below, a workable definition of the “rights of others” distilled from case law includes the right to be free from intimidation, humiliation, or harassment that is severe or pervasive.

An understanding of the historical context of *Blackwell*, where the phrase “the rights of others” originates, suggests that one meaning of the phrase was to allow students to be free from intimidation. Given the setting of *Blackwell*—a voting rights protest at an all-black segregated high school at the heart of racial violence in Mississippi in 1965<sup>223</sup>—students afraid of the repercussions of wearing a button<sup>224</sup> likely felt intimidated by other students. The enemy of the right to vote was not inside the high school,<sup>225</sup> but in the community at large.<sup>226</sup> Therefore, the non-protesting students’ right to be let alone would include being free from the psychological harm of intimidation resulting from the protestors’ coercive actions.

In *Trachtman*, the proposed student survey hoped to solicit responses from students about “pre-marital sex, contraception, homosexuality, masturbation and the extent of students’ ‘sexual experience.’”<sup>227</sup> However, it was not designed to “guarantee the anonymity of those who answered.”<sup>228</sup> Arguably, for both teens who were sexually experienced and those who were not, the possibility that such information could be individually identified and shared at school likely would have caused humiliation resulting in

223. Bowman, *supra* note 42, at 1137–38. In addition to the murder of the three voting rights volunteers near Philadelphia, Mississippi, the site of the *Burnside* case, Rolling Fork, the site of the *Blackwell* case was also geographically sandwiched between two hotbeds of racial violence: the city of McComb, where fifteen racially motivated bombings had recently occurred, was 150 miles to the south, and Selma, Alabama was 300 miles to the north where, the day after the students in *Blackwell* wore their buttons, Martin Luther King Jr. was arrested with 300 other protestors because the town refused to register black voters. *Id.*

224. *Id.* at 1136 (suggesting that had the principal allowed the wearing of the buttons, “the reaction from the African-American community probably would have been privately mixed, but publicly quiet. And, the White community likely would have reacted with hostility at best and violence visited upon the principal and his family at worst”).

225. *Id.* at 1140 (arguing that the principal likely attempted to prevent students from wearing their buttons because they “faced potentially violent retaliation from the local White community”).

226. *Id.* at 1134. The Council of Federated Organizations estimated that in retaliation for the voting rights drive in Mississippi in 1964 there were over 1000 arrests, 65 burned or bombed buildings, and at least 6 murders. *Id.*

227. *Trachtman v. Anker*, 563 F.2d 512, 515 (2d Cir. 1977).

228. *Id.*

“considerable anxiety and tension.”<sup>229</sup> Students should be free from humiliation at school that results from public sharing of information that will hold them up to ridicule.

Like the Second Circuit in *Trachtman*, the Ninth Circuit in *Harper* “unequivocally reject[ed]” the argument that the “rights of others” only referred to the right to be free from physical confrontation,<sup>230</sup> and defined “the rights of others” instead as freedom from harassment. The majority argued that although name-calling is constitutionally protected outside of school, “students cannot hide behind the First Amendment to protect their ‘right’ to abuse and intimidate other students at school.”<sup>231</sup> Further, school administrators need not “tolerate verbal assaults that may destroy the self-esteem of . . . teenagers and interfere with their educational development.”<sup>232</sup>

In order to provide that the definition of the “rights of others” does not sweep in otherwise protected speech, the severity or pervasiveness of the intimidation, humiliation, or harassment should be examined, as advocated in *Saxe*,<sup>233</sup> to determine if it rises to the level of cyberbullying. Therefore, an effective test to determine if *Tinker*’s “rights of others” has been violated would consist of two steps: first, whether the speech involved intimidation, humiliation, and harassment; and second, whether such behavior met a “threshold showing of severity and pervasiveness.”<sup>234</sup> If the speech qualifies under both steps, it is not protected. Under this definition, the speech in *J.S., Layschock, J.C.*, and *Kowalski* would not have been protected since it was humiliating, harassing, and severe. In *J.C.* and *Kowalski*, the speech was also clearly intimidating since neither girl wanted to return to school as a result of the ridicule. This definition, with its limiting threshold, would not open students up to discipline

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229. *Id.* at 518.

230. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *cert. granted, vacating as moot sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (acknowledging Harper’s interpretation of *Blackwell* where he concludes that the accosting of other students was the only instance of a collision with the rights of others).

231. *Id.* (quoting *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002)).

232. *Id.* at 1179.

233. *See supra* notes 205–06 and accompanying text.

234. *See supra* notes 205–06 and accompanying text.

for “simple acts of teasing or name-calling” or grant students an “affirmative right not to be offended.”<sup>235</sup> Instead, it would give school administrators,<sup>236</sup> guided by elected school boards, and supported by parents, the tools and flexibility to end the cyberbullying rip-off.

## VI. CONCLUSION

Schools’ inability to address cyberbullying has created a rip-off for schools and students where speech that otherwise could be restricted as part of the public school trade-off<sup>237</sup> is allowed because its covert nature defies *Tinker*’s substantial disruption test. Using the “rights of others” standard from *Tinker* is more consistent with how school speech precedent has evolved, the text from *Tinker* itself, and subsequent Supreme Court and circuit cases. Schools should be able to regulate cyberbullying when it invades the rights of other students to be free from intimidation, humiliation, and harassment provided the invasion is sufficiently severe and pervasive. This both preserves the balance of the public school trade-off, and sends a message that, “[t]here is no constitutional right to be a bully.”<sup>238</sup>

*Stacie A. Stewart\**

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235. *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999)).

236. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) (“The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.”).

237. *See Layshock v. Hermitage Sch. Dist.* 650 F.3d 205, 222 (3d Cir. 2011) (Jordan, J., concurring) (“[A]ny claimed right to spread scurrilous falsehoods about school administrators may well be outweighed by society’s legitimate interest in the orderly administration of public schools.”).

238. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

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