BULLYING BEYOND THE SCHOOLHOUSE GATE: HOW SCHOOL DISTRICTS CAN CONSTITUTIONALLY REGULATE OFF-CAMPUS CYBERSPEECH

I. INTRODUCTION

"Cyberbullying" is bullying through the use of electronic technology such as mobile phones, computers, social media, and

While it is clear that school authorities can punish certain types of student speech and conduct occurring on school grounds,[8] it is uncertain whether school officials can regulate speech with off-campus origins.[9] The Supreme Court handed down four seminal cases addressing school regulation of student speech.[10] However, these cases involve student speech that occurred on campus[11] or during a school-sponsored event.[12] In a landmark case, *Tinker v. Des Moines Independent Community School District*,[13] the Supreme Court held that school officials may regulate student speech that either substantially disrupts the school environment, or interferes with the rights of other students.[14] When addressing school regulation of student off-campus online speech, lower courts have applied the *Tinker* holding.[15]

A majority of lower courts limit their attention to the first prong of the *Tinker* holding, examining whether the online speech has caused a substantial disruption to the school environment.[16] However, lower court applications of *Tinker*'s "substantial disruption" standard have been inconsistent.[17] The Supreme Court has persistently refused to review cases involving student online speech.[18] The inconsistency of the lower court decisions, along with the Supreme Court's refusal to provide a legal standard, is troublesome for school officials who learn about the cyberbullying and who must mitigate the harm.[19] Thus, in order to allow schools to help victims of cyberbullying, school officials need to know the extent of their authority over off-campus cyberspeech.

This Note argues that, in order to respond to severe instances of cyberbullying, courts should apply the second prong of the *Tinker* holding:

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allowing school officials to regulate speech that invades with the rights of other students to be secure and let alone. Further, *Tinker*'s second prong should be interpreted to include off-campus conduct. Additionally, adopting decisions from the Ninth Circuit, a student's right "to be secure and let alone"[20] should be interpreted to include not just the right to be free from physical contact, but from psychological harm as well. Part II provides an overview of the cyberbullying problem and argues that state cyberbullying laws are an inadequate solution. Part III discusses the four Supreme Court student speech cases and the inconsistent application of Tinker's "substantial disruption" prong by the lower courts. Part IV argues why the "invasion of rights" standard should be applied to address cyberbullying, subject to a showing that (1) the cyberbullying has harmed the victim's learning environment, and (2) the cyberbullying is severe, pervasive, and objectively offensive. Lastly, Part V concludes. It is important to consider that the focus of this Note is limited to speech by high school students and younger, as the four Supreme Court student speech decisions involved speech in the secondary education setting.

II. THE CYBERBULLYING PROBLEM AND THE I

In 2010, about 16% of students in grade levels nine to twelve were cyberbullied.[28] Documented effects of cyberbullying include low self-esteem, depression, academic difficulties, absenteeism, and school violence.[29] Cyberbullying has also been linked to teen suicides.[30] In early 2010, the country learned about the tragic story of Phoebe Prince.[31] The fifteen-year old had just moved from Ireland to a middle-class suburb in western Massachusetts.[32] She started dating a popular football player, causing the ire of the "alpha girls."[33] They followed her around and called

drink.[43] According to Scheibel, what was particularly "troublesome" was the

is a problem plaguing our schools.[52] The White House and the Department

III. TAKING THE CYBERBULLYING PROBLEM TO COURT

The Supreme Court held in a landmark case, *Tinker v. Des Moines*,[76] that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[77] However, the First Amendment rights of students on campus must be exercised in light of the "special characteristics of the school environment."[78]

the underlying events of the most recent case occurred during a school-sponsored event outside campus.[86] The three succeeding cases specify some types of student speech that may be regulated by school authorities, namely "lewd and indecent speech,"[87] school-sponsored speech,[88] and speech promoting illegal drug use.[89] Collectively, the Court's existing jurisprudence on student speech lead to the conclusion that the free speech rights of students in the school setting are not coextensive with the First Amendment rights of adults in other situations.[90] A student's exercise of First Amendment rights must therefore be balanced against the school's countervailing interest in protecting its educational mission, as well as the rights of other students.[91]

i. Building the Gate: *Tinker v. Des Moines*

In *Tinker*

students' "silent, passive expression of opinion" did not disrupt classes, nor did it cause or threaten to cause violence on school grounds.[101] Accordingly, the school could not, consistent with the First Amendment, prohibit the speech.[102]

ii. Censoring Indecent Speech: *Bethel School District No. 403 v. Fraser*

The Supreme Court then reexamined student free speech rights in *Bethel School District No. 403 v. Fraser*.[103] In *Fraser,* the Court upheld the school district's punishment of a student who made use of sexual innuendos when he gave a speech at a school assembly.[104] Chief Justice Burger explained that the free speech rights of students in public school are not equal to those of adults engaged in public dialogue.[105] The Chief Justice quoted Judge Newman, reasoning that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[106] The school district was therefore acting "within its permissible authority" when it disciplined the student for giving an "offensively lewd and indecent speech."[107] Additionally, the Court emphasized that free speech rights in schools "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[108] Thus, the First Amendment does not prohibit schools from regulating speech that may run afoul with its educational mission.[109]

iii. Exercising Editorial Control Over School-Sponsored Speech: *Hazelwood School District v. Kuhlmeier*

A few years later in *Hazelwood School District v. Kuhlmeier*, the Supreme Court upheld a principal's decision to remove two pages from a

101. *Id.*

102. *Id.* at 514.

103. 478 U.S. 675 (1986).

104. *Id.* at 683.

105. *Id.* at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).

106. *Id*. at 682-83 (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in result). In *Cohen v. California*, appellant was seen in a courthouse wearing a jacket with the words "Fuck the Draft." 403 U.S. 15, 16 (1971). He was

school newspaper.[110] The *Kuhlmeier* Court distinguished *Tinker*, finding that the issue addressed in *Tinker* involved the school's authority over student speech on school grounds, which is different from the issue of whether schools have authority over school publications, theatre productions, and other forms of student expression that may be considered part of the curriculum.[111] The Court held that school officials are constitutionally permitted to exercise "editorial control" over student speech in school-sponsored expressive activities "so long as their actions are reasonably related to legitimate pedagogical concerns."[112]

iv. Prohibiting Speech that Promotes Illegal Drugs: *Morse v. Frederick*

Most recently in *Morse v. Frederick*, the Court ruled that the school principal did not violate a student's First Amendment rights when she suspended the student for displaying a banner, which was viewed as advocating illegal drug use.[113] The student in *Morse* did not exhibit the banner on school grounds.[114] Instead, the student revealed the banner at a public street during a school-sponsored class trip.[115] The Court found that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use]."[116] Writing for the majority, Chief Justice Roberts reiterated the significance of the speech's setting, repeating the language in *Fraser* and *Kuhlmeier* that school officials may control student speech "even though the government could not censor similar speech outside the school."[117]

110. *See Kuhlmeier*, 484 U.S. 260, 264-66 (1988).
111. *Id.* at 270-71.
112. *Id.* at 273.
113. Morse v. Frederick, 551 U.S. 393, 396-97 (2007).
114. *Id.* at 397.
115. *Id.*
116. *Id.* at 410.
117. *Id.* at 405-06.

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speech cases.[127] The Second Circuit, for example, requires that there must be "a sufficient nexus between the off-campus speech and the school."[128] However, lower court decisions do not provide a clear guidance as to what

had to respond to questions from parents and the local media.[165] Additionally in *Wilson*, two teachers found it difficult to manage their classes because the off-campus speech distracted some of her students.[166] Lastly, in *Wynar v. Douglas County School District*,[167] the Ninth Circuit found that the school district did not violate the First Amendment when it expelled a student who informed several classmates online that he would carry out a school shooting.[168] The *Wynar* court found that *Tinker*'s first prong was met because it was reasonable for school administrators to predict that they would need to devote "considerable time" establishing safety protocols and addressing the concerns of the student body and their parents.[169]

On the other hand, gossiping between students would not amount to a substantial disruption to the school environment.[170] In *Tinker* there was evidence that the armbands caused comments and warnings by other students;[171] however, the Supreme Court found that this was insufficient to find that the student speech disrupted the work of the school. Student-on-student cyberbullying would only result in chatter within the school halls. Typical instances of cyberbullying would not produce a flood of phone calls and emails[172] nor would it require school administrators to deal with local media contacting the school.[173] Yet, as law professor Barry McDonald pointed out, courts strained to find a substantial disruption in cases where the apparent concern was to protect the targeted student.[174]

Courts are hesitant to apply *Tinker*'s "invasion of rights" standard.[175] The hesitation is arguably because, as then-Circuit Judge Alito observed, the "scope of *Tinker*'s 'interference with the rights of others' language is

165. *Id.* at 774.

166. *Id.*

167. 728 F.3d 1062 (9th Cir. 2013).

168. *Id.* at 1067.

169. *Id.* at 1071.

170. *See, e.g.*, J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1120 (C.D. Cal. 2010). *But see* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (holding that the school can regulate the student's off-campus online speech because conversations took place among other students as a result of the speech).

171. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517-518 (1969) (Black, J., dissenting).

172. *But see* Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008).

173. *But see* S.J.W. *ex rel.* Wilson, 696 F.3d 771, 774 (8th Cir. 2012).

174. McDonald, *supra* note 17, at 756. *See also* Hostetler, *supra* note 118, at 16 (finding that several courts "uphold disciplinary actions under *Tinker*'s 'substantial disruption' standard based largely on the impact the Internet speech has on the targeted individual").

175. Hudson, *supra* note 9, at 624. *See also* McDonald, *supra* note 17, at 756.

disruption to the school environment.[186] In the same vein, schools also have an equally important interest in protecting the teaching and learning environment for every student; off-campus cyberspeech that impairs a student's ability to learn would implicate this interest.[187] Accordingly, *Tinker*'s "invasion of rights" standard should also apply to student online speech that originated outside the schoolhouse gate.

Tinker's "invasion of the rights of others" standard, along with the substantial disruption standard, was based on two Fifth Circuit cases involving students who were suspended for wearing political buttons on campus.[188] In the latter of those cases, the Fifth Circuit upheld the suspension finding that, in addition to causing a disturbance within the campus, the students disregarded the rights of others because they were trying to pin the buttons on students walking down the hall.[189] While unwanted physical contact undoubtedly collides with the rights of other students,[190] two Ninth Circuit decisions have held that *Tinker*'s "invasion of the rights of others" standard is not limited to physical confrontation.[191]

One such decision is *Harper v. Poway United School District*, which involved a student wearing an anti-homosexuality t-shirt in violation of the school dress code.[192] The student was made to spend the rest of the school day in a school conference room after refusing to remove the t-shirt.[193] The Ninth Circuit upheld the school regulation, finding that the t-shirt collided with the rights of other students "in the most fundamental way."[194] The court rejected an "overly narrow reading" of *Tinker*'s second prong, refusing to find that the standard is limited to instances where student expression has physical accosted another student.[195] The court concluded that "speech

C. Proposed Threshold Requirements to Prevent an Overbroad Application of the "Invasion of Rights" Standard

An unrestrained application of *Tinker*'s "invasion of rights" standard may grant school authorities the license to regulate a student's off-campus speech simply because another student finds it offensive.[206] Thus, in order to ensure that the school's authority is narrowly tailored to meet its goal of protecting a student from cyberbullying, this Note recommends that the school must be required to show that (1) the cyberbullying has triggered the school's interest in protecting the targeted student's learning environment, and (2) the cyberbullying is severe, pervasive, and objectively offensive.

i. School Officials Should Be Required to Prove That the Cyberbullying Has Implicated its Pedagogical Interest in Protecting a Student's Learning Environment

Prior to taking any disciplinary action against the off-campus speech, school authorities must show that the cyberspeech has affected the targeted student's learning environment.[207] This requisite showing ensures that the school is justified in regulating the off-campus speech because the speech has triggered the school's interest in protecting the teaching and learning environment.[208] School officials can meet this threshold requirement through evidence of the student's resistance in attending school, a drop in grades, self-esteem problems, or alcohol or drug use.[209] In *Harper*, the Ninth Circuit recognized the consequences of abusive speech, including "academic underachievement, truancy, and dropout."[210] Limiting school regulation to circumstances where the off-campus speech led to detrimental effects on-campus guarantees that schools do not have an excessively broad authority over student speech.

Moreover, it is undeniable that a school's primary function is to teach.[211] Accordingly, if the cyberbullying has impaired the targeted student's learning ability, then the cyberbullying has implicated the school's primary function.[212] The Supreme Court has held that school authorities may regulate

206. McCarthy, *supra* note 52, at 832.

207. *See id*. Professor McCarthy proposed that "[a]t a minimum," speech "should adversely impact another student's education or the ability of educators to perform their jobs" in order to trigger *Tinker*'s second prong.

208. *See* McDonald, supra note 17, at 755-56.

209. *The Real Effects of Cyberbullying*, NO BULLYING, http://nobullying.com/the-effects-of-cyber-bullying (last updated Aug. 30, 2016).

210. *Harper*, 445 F.3d at 1179.

211. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2006).

212. McDonald, *supra* note 17, at 755-56; *see also* Puiszis, *supra* note 157, at 219.

student speech, albeit on-campus speech, that would interfere with the school's primary function.[213] The Court ruled that schools "need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[214] Therefore, if the school district can show that the cyberbullying has impeded upon a student's learning ability, then the school has a legitimate pedagogical interest to intervene and protect the student.

ii. School Officials Should be Required to Prove that the Cyberbullying is Severe, Pervasive, and Objectively Offensive

Additionally, school officials must show that the cyberbullying is so severe, pervasive, and objectively offensive that it detracts the targeted student's learning ability.[215] This requirement ensures that the regulated speech is not just merely offensive[216] but has invaded with the right to be free from verbal assaults that cause psychological harm.[217]

This proposed threshold showing is based the Supreme Court's decision in *Davis v. Monroe Country Board of Education*.[218] In *Davis*, the Court held that a school district can be liable for damages under Title IX for student-on-student sexual harassment if the harassment is so severe, pervasive, and objectively offensive, thereby diminishing the student's learning experience and effectively denying the student of equal access to the school's resources.[219] Title IX prohibits schools receiving federal financial assistance from discriminating on the basis of gender.[220] In *Davis*, the Court acknowledged that students, while still learning how to mingle with their peers, may occasionally insult, tease, or upset other students.[221] Thus, the threshold showing guarantees that only conduct that is serious enough to impact the targeted student's educational opportunities is actionable.[222]

213. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (finding that school officials may exercise editorial authority over school-sponsored speech so long as the regulation is "reasonably related to the school's legitimate pedagogical concerns").

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The evaluation of severity and pervasiveness involves an objective inquiry, based on the totality of the circumstances.[223] According to the Supreme Court in *Davis*, factors that are relevant in the evaluation include the ages of the students and the number of individuals involved.[224] The Third Circuit in *Saxe* mentioned additional factors to consider, such as the frequency of the conduct, whether the conduct is physically threatening, and whether a reasonable person would find the conduct hostile or abusive.[225]

A required showing of severity or pervasiveness may rehabilitate an otherwise constitutionally infirm school policy. In *Saxe*, the school district enacted an anti-harassment policy, which prohibited speech that either (1) "substantially interfer[es] with a student's educational performance" or (2) creates "an intimidating, hostile or offensive environment."[226] In addressing an overbreadth challenge to the school policy, then-Circuit Judge Alito held that the first prong, which prohibited speech that interferes with a student's educational performance, "may satisfy the *Tinker* standard."[227] However, the *Saxe* court continued to strike down the policy on overbreadth grounds because the second prong, which regulated speech that creates a hostile environment, did not "require any threshold showing of severity or pervasiveness."[228]

Other commentators have proposed the application of the standard in *Davis* to allow school officials to regulate off-campus speech,[232] providing legitimate reasons for adopting the Title IX threshold standard.[233] First, the standard enables school authorities to protect the targeted student's educational environment,[234] which as explained above, is associated with the school's pedagogical mission. Moreove ' the' standard is well-established given the amount of precedent for applying Title IX to off-campus behavior.[235] Thus, school officials have adequate guidelines in applying the *Davis* threshold standard ensuring that the school's authority over -off campus speech is limited to speech that is severe, pervasive, and patently offensive.

V. CONCLUSION

Cyberbullying is one of the top challenges for our public schools,[236] and as social media use increases each year,[237] it will continue to be a challenge. School officials need a clear standard that would enable them to properly address the issue. *Tinker*'s "substantial disruption" test does not properly address cyberbullying mainly because instances of cyberbullying rarely cause a substantial disruption to the school environment. An analysis based on *Tinker*'s "invasion of rights" standard is appropriate because the' standard focuses on the school's underlying concern in cyber llying cases protecting the targeted student's learning environment from the harmful effects of cyberbullying.[238]

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232. *See, e.g.*, Hostetler, *supra* note 118, at 3 (suggesting a merger of *Tinker*'s "substantial disruption" prong and the standard for Title IX cases articulated by the Supreme Court in *Davis*); Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment*, 31 PACE L. REV. 182, 226 (2011) (proposing that if harassing speech is "sufficiently severe and pervasive to impair the students' right to a public education under *Davis*," then the speech should be regulated under *Tinker*'s second prong).

233. Hostetler, *supra* note 118, at 23.

234. *Id.*

235. *Id.*

236. Goodno, *supra* note 3.

237. *See* Andre Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CTR. (Oct. 8, 2015), http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015.

238. McDonald, *supra* note 17, at 758.

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