Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates

Douglas E. Abrams
University of Missouri School of Law, abramsD@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs

Part of the Education Law Commons, First Amendment Commons, Fourth Amendment Commons, and the Juveniles Commons

Recommended Citation

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.
Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates

Douglas E. Abrams*

I. INTRODUCTION

“How many more kids have to die?” asked a Boston Globe reader on January 26, 2010, less than two weeks after fifteen-year-old freshman Phoebe Prince hanged herself following months of face-to-face bullying and cyberbullying by classmates at South Hadley High School in South Hadley, Massachusetts. By this time, Americans had grown accustomed to reports of suicides by cyberbullying victims in public elementary and secondary schools from coast-to-coast. Parents, teachers, and other residents in South Hadley did not have to think hard to jog their memories. Less than a year had passed since eleven-year-old Carl Joseph Walker-Hoover of nearby Springfield hanged himself with an electrical cord from a third-floor railing at home after months of bullying from his New Leadership Charter School classmates. Carl was a Boy Scout active in sports and his church, but he had also drawn derision

* Associate Professor of Law, University of Missouri School of Law. B.A. 1973, Wesleyan University; J.D. 1976, Columbia University School of Law. Professor Abrams has written or co-authored five books, including CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE (4th ed. 2010), CONTEMPORARY FAMILY LAW (2d ed. 2009), CHILDREN AND THE LAW IN A NUTSHELL (4th ed. 2011), and A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI (2003). In 1994, he received the Meritorious Service to the Children of America Award, presented by the National Council of Juvenile and Family Court Judges for his public service. Thank you to the staff of the New England Journal on Criminal and Civil Confinement for their courtesy and hospitality before, during, and after the Symposium.

from classmates who called him gay and said he acted like a girl.4

Carl’s suicide note expressed love for his family and left his toys and video games to his six-year-old brother.5 Eleven seems much too young to attempt to write a will, but Massachusetts public school authorities evidently learned little from Carl’s suicide because the essential circumstances preceding Phoebe Prince’s suicide so soon afterwards bore close resemblance. As in Carl’s case, Phoebe had endured persistent verbal and physical abuse without meaningful efforts by school authorities to institute a bullying prevention curriculum, protect the victim, or suspend or expel the bullies. Teachers and administrators knew that Phoebe, like Carl, was a constant target because she and her parents said they had approached the school more than once to seek protection, only to be rebuffed.6

Classmates bullied Phoebe Prince in cyberspace until her life became, according to one media report, “a daily ordeal of extraordinary horrors.”7 In a steady stream of text messages and on a Facebook page accessible to the entire student body, the cyberbullies said she deserved to die and called her an “Irish slut,” a whore, and a druggie.8 After Phoebe’s twelve-year-old sister found her hanging by a scarf in a closet in the family’s apartment late in the afternoon of January 14, 2010,9 Phoebe’s tormenters logged onto her Facebook memorial page and continued mocking her in posthumous postings.10

The deliberate indifference of teachers and school administrators to the pleas of Phoebe Prince, Carl Joseph Walker-Hoover, and their parents is nothing new. Until relatively recently, death or serious injury to a particular bullying victim might provoke an investigation, arrest, or other fleeting public reaction to local media coverage, but sustained anti-bullying initiatives in the public schools gained little traction. Schools did not begin

paying closer attention to bullying until two seniors turned bombs and semi-automatic weapons on classmates at Columbine High School in Littleton, Colorado on April 20, 1999. The commando-style raid left twelve students, a teacher, and the two killers dead and two dozen other victims wounded.

Classmates had taunted the two Columbine killers for years, without intervention by school administrators. After the killers’ pent-up rage became public, parents and students told the Colorado Governor’s Columbine Review Commission that “a significant amount of bullying had occurred” at Columbine, but that “it would have been futile to report bullying to the school administration because no one there would have done anything about it.”

Bullying had apparently also plagued South Hadley High School for a generation or more. Shortly after Phoebe Prince’s suicide, angry South Hadley parents came forward to say their children too were being bullied, but school authorities had turned a deaf ear. Parents demanded the resignations of the principal and school commissioner for ignoring Phoebe’s pleas for help. One father said that a girl who bullied Phoebe also bullied his daughter for three years; “we continually went to the administration and we really got no satisfaction,” said the father, who later received an apology from school authorities. Another father told school officials at a public meeting about the bullying he had endured at South Hadley High as a student in the early 1990s.

I have written before about why face-to-face bullying and cyberbullying warrant a coordinated public response by the pediatric safety system, the network essential to protecting children’s physical and emotional well-being. The pediatric safety system begins at home with parents but may...
extend to public authorities such as the school district for public school students, law enforcement, the juvenile and criminal courts, the state child protective agency, and perhaps, in extreme cases, the state mental health agency.21

This article focuses on cyberbullying in the public elementary and secondary schools, which stand as potentially the most effective public authorities in the pediatric safety system's response to students' distress. "Unlike other instruments of the State, schools are entrusted with a unique role in our society—to mold our children into responsible and wise adult citizens."22 Public schools enroll most of the nation's school-age children,23 who interact daily during the academic year with teachers and other school authorities such as administrators, guidance counselors, school psychologists, and the school nurse or physician. These authorities are charged not only with classroom teaching, but also with monitoring attendance, supervising student behavior, and maintaining discipline and decorum.24

The public elementary and secondary schools also remain on the front lines because most cyberbullying pits perpetrators against victims who know one another largely or entirely from the school's classrooms and hallways.25 When cyberbullies target a victim, they normally foresee

Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."); Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (stating that parents hold the opportunity and responsibility for "inculcation of moral standards . . . and elements of good citizenship").

22. In re Douglas D., 626 N.W.2d 725, 742 (Wis. 2001).
25. New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) ("[S]pend the school hours in close association with each other, both in the classroom and during recreational periods."); Jaana Juvonen & Elisheva F. Gross, Extending the School Grounds?—Bullying Experiences in Cyberspace, 78 J. SCH. HEALTH 496, 497 (2008) ("[W]hen most schoolmates have Internet access at home, electronic communication is conducted largely within school-based peer networks." (footnote omitted)).
reaction only from other classmates because they know that hardly any of
the Internet’s two billion other users worldwide would have reason to pay
attention.26

"By virtually all accounts, bullying of young people by their peers online
is on the rise."27 Studies estimate that a third or more of students are
frequently involved in bullying as perpetrators or victims.28 More than 3.2
million students suffer victimization each year in the sixth through tenth
grades alone, comprising nearly one in six children in these grades.29 Half
of all students suffer varying degrees of bullying at some time before they
leave high school.30 A 2006 national survey found that one-third of all
students between twelve and seventeen, and one-sixth of all younger pre-
teens, have suffered cyberbullying.31 These disturbing figures may
underestimate the extent of school cyberbullying because some studies find
even higher percentages.32 Some researchers cite underreporting because
many, and perhaps most, cyberbullied children resist telling adults at
school or home about their plight, fearing their parents might take away
Internet privileges or the cyberbullies might retaliate.33

26. See, e.g., Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) (upholding
disciplinary sanction imposed on high school student for blog posting that concerned events
at school, and that the student encouraged her classmates to read and provide responses);
discipline imposed by middle school because “the web site was aimed not at a random
audience, but at the specific audience of students and others connected with this particular
School District”); ITU Estimates Two Billion People Online by End 2010, INT’L TELECOMM.

27. JOHN PALFREY, Searching for Solutions to Cyberbullying, FIRST AMENDMENT
(including this article as part of an online symposium of the First Amendment Center Online
titled Cyberbullying & Public Schools).

28. See, e.g., Terry Diamanduros et al., The Role of School Psychologists in the
Assessment, Prevention, and Intervention of Cyberbullying, 45 PSYCHOL. IN THE ScHs. 693,
693 (2008); Martina Stewart, New CNN Poll: 1/3 of Teens Have Been Personally Bullied,
2/3 Report That Friends Have Been Bullied, CNN AC360° BLOG (Oct. 4, 2010, 03:49 PM
ET), http://ac360 blogs.cnn.com/2010/10/04/new-cnn-poll-13-of-teens-have-been-
personally-bullied-23s-report-that-friends-have-been-bullied/.

29. James Alan Fox & Delbert S. Elliott, Bullying Prevention Is Crime Prevention 2
(2003), http://www.pluk.org/Pubs/Bullying2.pdf.

Children and Adolescents, AM. MED. ASS’N (2002), http://www.ama-assn.org/ama/no-
index/about-ama/14312.page.


32. Kimberly L. Mason, Cyberbullying: A Preliminary Assessment for School

33. See, e.g., Faye Mishna et al., Ongoing and Online: Children and Youth’s
These imposing numbers have led the American Medical Association, the National Institute of Child Health and Human Development, and the U.S. Centers for Disease Control and Prevention to identify school bullying as a “public health problem.”\(^\text{34}\) Like several other states since the Columbine tragedy, Massachusetts has responded with legislation that prohibits school bullying (including cyberbullying), and requires schools to adopt prevention curricula, discipline bullies, and cooperate with law enforcement when bullying turns criminal.\(^\text{35}\)

Statewide anti-bullying statutes are only a tentative first step because, as former Harvard Law School Dean Roscoe Pound said, “[t]he life of the law is in its enforcement.”\(^\text{36}\) Pound meant that achieving a statute’s protective purpose depends on sustained public commitment because words on paper protect no one, and statutes do not apply themselves.

Professional educators may respond to anti-bullying legislation with the professional and personal commitment that Pound envisioned. For decades, school authorities did not encourage or condone face-to-face bullying, which would intentionally do repeated harm to someone less powerful through assaults, words, ostracism, or teasing.\(^\text{38}\) Few school authorities

---


35. Abrams, supra note 19, at 405.


37. Fox & Elliott, supra note 29, at 5.

38. See Mason, supra note 32, at 323; see also RANA SAMPSON, U.S. DEP’T OF JUSTICE, BULLYING IN SCHOOLS 2-3 (2002), http://www.cops.usdoj.gov/pdfs/12011405.pdf; Wendy M. Craig, The Relationship Among Bullying, Victimization, Depression, Anxiety,
today would encourage or condone cyberbullying on the Internet and other virtual forums, "the bully’s new playground." Educators can empathize with the emotional and physical toll that torrential abuse can exact on a child through email, instant messaging, blogs, social networking sites, or even websites featuring the victim.

Educators’ empathy, however, can carry the mandates of statewide anti-bullying legislation only so far. The commitment to enforce these mandates may weaken because disciplining students nowadays may expose teachers and school administrators to adverse personal and professional consequences. Commentators have argued persuasively that school authorities often avoid meaningful discipline because they fear that the students and their parents will respond with litigation claiming rights violations. In a Harris Interactive poll, 82% of teachers and 77% of principals said that fear of lawsuits has led them to assume a “defensive teaching mode,” motivated by desire to avoid being sued. Seventy-eight percent of teachers said students reminded them that they have rights or their parents could sue, and 62% of principals said parents have threatened them with legal action.

One commentator explains:

The prospect of a lawsuit, with its resulting publicity, expense, and unpleasantness, is hardly one that will be relished by either teacher or school administrator, even if the school and teacher are ultimately vindicated. Indeed, a threat by a student or parent, even if it is based on a groundless claim and falls short of a formal lawsuit, is an extremely disagreeable experience that most teachers and school administrators will attempt to avoid if at all possible.

Even the most carefully crafted anti-cyberbullying legislation will likely

and Aggression in Elementary School Children, 24 PERSONALITY & INDIVIDUAL DIFFERENCES 123, 123 (1998); Dan Olweus, Bullying at School: Basic Facts and Effects of a School Based Intervention Program, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171, 1172 (1994); J.P. Piek et al., The Relationship Between Bullying and Self-Worth in Children with Movement Coordination Problems, 75 BRIT. J. EDUC. PSYCHOL. 453, 454 (2005).


42. Id.

43. Dupre, supra note 40 (footnote omitted).
not achieve its protective purposes until elementary and secondary educators feel greater confidence in their legal authority to discipline cyberbullies, by suspension or expulsion if necessary. Because strength must come from the top, this confidence depends first on the school board’s steadfast support of disciplinary efforts, even when litigation beckons.

Confidence also depends on the disciplinarian’s expectation that courts will uphold sanctions by applying Supreme Court doctrine, which for the past several decades has systematically strengthened and reaffirmed the public schools’ constitutional authority to discipline students for misconduct. In the Supreme Court, no disciplined student has won a constitutional challenge against school authorities in more than forty years.44 This article sets out the Supreme Court doctrine and provides a blueprint for both schools and courts.

A. The First Amendment Claim

When cyberbullies and their parents challenge a disciplinary sanction, they generally raise one or both of two primary claims. First, because cyberbullying is accomplished largely or entirely by statements of opinion, challengers argue the words are protected by the First Amendment.45 In the greater society, the First Amendment accords considerable protection to statements of opinion in the “free trade in ideas.”46 For decades, however, the Supreme Court held that students’ First Amendment expressive rights in school are less weighty than the First Amendment expressive rights adults enjoy on the outside. The Justices recognize that “‘special needs’ inhere in the public school context,”47 where “the State is responsible for maintaining discipline, health, and safety.”48

Part II of this article explores the First Amendment doctrine that began in earnest with the Supreme Court’s 1969 decision in Tinker v. Des Moines Independent Community School District.49 Tinker provides the public schools two related but distinct grounds for disciplining cyberbullying and other student expression consistent with the First Amendment. Schools may discipline student expression that causes, or reasonably threatens, (1) “substantial disruption of or material interference with school activities,”50

44. See infra notes 87-152 and accompanying text.
45. See supra notes 4, 8 and accompanying text; infra notes 69-152, 218 and accompanying text.
46. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“The ultimate good desired is better reached by free trade in ideas... the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).
48. Id. at 830.
50. Id. at 514.
or (2) "collision with the rights of other students to be secure and to be let alone." 51

Tinker neither provided a formula for determining what qualifies as substantial or material, nor explored the nature of other students' rights the decision recognized. The decision's Supreme Court progeny, however, have helped fill the void. 52 As a threshold matter, these decisions distinguished Tinker's political expression from student expression that (like virtually all cyberbullying) expresses no viewpoint on politics or public affairs, "the core of what the First Amendment is designed to protect." 53 In the face of actual or reasonably threatened disruption or rights collision, public school students' non-political expression receives only diminished First Amendment protection.

The post-Tinker Supreme Court decisions have also conferred broad discretion on public school authorities to determine when student speech threatens or creates the requisite disruption or rights collision. To fulfill their "basic educational mission," 54 school authorities may exercise this discretion to discipline student speech that compromises efforts to teach "the boundaries of socially appropriate behavior," 55 "habits and manners of civility," 56 and respect for "the sensibilities of fellow students." 57

Social science research findings provide an ample basis for determining, on an appropriate record, that particular acts of cyberbullying threaten or create the requisite rights collision by compromising the safety and security of students in school. 58 Such findings also provide predicates for determining that by its very nature, cyberbullying transcends acceptable social boundaries through incivility that assaults the sensibilities of targeted students, and sometimes of much or all of the student body. As a leading First Amendment scholar puts it, cyberbullying constitutes "a most venal and intolerable abuse of the freedom of speech that Internet users enjoy" 59 through messages that serve little or no purpose other than to torment a targeted classmate.

51. Id. at 508.
52. See infra notes 87-152 and accompanying text.
55. Id. at 682.
56. Id. at 681.
57. Id.
58. See infra notes 188-244 and accompanying text.
B. The Territorial Claim

Parents and the disciplined cyberbully may also argue that public schools lack authority to impose discipline for messages sent from off school grounds, for example, from the cyberbully’s cell phone, or from a computer keyboard in the home. As Part III of this article describes, however, schools acting in accordance with Tinker’s two-prong holding may also overcome this territorial claim. Most lower courts have held that where the cyberbully could have foreseen that the message would materially and substantially disrupt school activities, or would compromise the security of one or more identified classmates known to the cyberbully, the school may impose discipline as if the message had originated on campus. The message’s off-campus origins are not determinative because “[w]ithout a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.”

The territorial claim may also implicate Bethel School District No. 403 v. Fraser, a leading post-Tinker student-speech decision. Without applying Tinker’s two-prong test, Fraser upheld the high school’s First Amendment authority to suspend a student for delivering a “lewd,” “indecent,” and “vulgar” speech in an assembly attended by several hundred classmates. In the few decisions reaching the question, lower courts have assumed or held that Fraser reaches only on-campus speech.

These assumptions and holdings overlook lessons learned following the Supreme Court’s 1928 decision in Olmstead v. United States, which held that the Fourth Amendment did not prohibit the government from placing remote telephone wiretaps. Olmstead found no constitutional violation because “[t]here was no entry of the houses or offices of the defendants.” Nearly forty years later, the Court vindicated Justice Louis D. Brandeis’ Olmstead dissent from the five-Justice majority’s refusal to apply existing Fourth Amendment doctrine to technological advances wrought by the telephone. Because “[t]ime works changes, brings into existence new

60. See infra notes 253-289 and accompanying text.
63. Id. at 685.
64. See infra note 280 and accompanying text.
66. Id. at 464.
conditions and purposes," Justice Brandeis argued, "a principle to be vital must be capable of wider application than the mischief which gave it birth." In *Berger v. New York* in 1967, the Court overruled *Olmstead* and acknowledged that "[t]he law . . . has not kept pace with . . . advances in scientific knowledge." Where cyberbullies foresee that their off-campus speech will reach classmates on campus, courts remain true to *Fraser* by applying its express holding to technology that the Supreme Court had no reason to anticipate when it decided that case in 1986. By keeping pace with technological advances as Justice Brandeis advised, courts applying *Fraser* would provide schools significant constitutional authority to discipline cyberbullying, which frequently degenerates into lewdness, indecency, or vulgarity before long.

II. PUBLIC SCHOOLS' CONSTITUTIONAL AUTHORITY TO DISCIPLINE CYBERBULLYING

On an appropriate record, Supreme Court doctrine enables public schools to overcome the defense frequently asserted by disciplined cyberbullies and their parents that cyber messages constitute expression protected by the First Amendment.

A. Bullying that Holds No First Amendment Protection

Cyberbullies using contemporary technology can physically assault the victim at school, or communicate actual or virtual "true threats" of physical assaults. The First Amendment does not constrain public schools from disciplining cyberbullies for assaults or true threats, regardless of any other arguably protected speech the cyberbully might also have uttered.

---

68. *Id.* at 472-73 (Brandeis, J., dissenting); *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 885 (1982) (Burger, C.J., dissenting) ("The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world.").


70. *See infra* notes 267-80 and accompanying text.

71. *See, e.g.*, Juvonen & Gross, *supra* note 25, at 497; Larry Magid, *Magid on Tech: The Reality of Cyberbullying*, SAN JOSE MERCURY NEWS, July 14, 2009 (discussing study that found that 85% of students bullied online were also bullied at school) (accessible through LexisNexis online database).

72. *Cf. Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 983 n.4 (11th Cir. 2007) (upholding student's suspension for writing a story describing her dream to shoot a particular teacher in front of the other students; the student "was also punished for her clearly insubordinate behavior, and it may well have been within the school's discretion to suspend or expel [her] for her disrespectful conduct alone").
1. Assaults and true threats

In Wisconsin v. Mitchell in 1993, the Supreme Court reaffirmed that “a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”73... “[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact... are entitled to no constitutional protection.”74 Mitchell means that cyberbullies gain no First Amendment sanctuary when words accompany a blow or other physical violence delivered face-to-face.

The Supreme Court has similarly held that “[t]hreats of violence are outside the First Amendment.”75 In Virginia v. Black in 2003, the Court reiterated that true-threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”76 “The speaker need not actually intend to carry out the threat” because “a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”77

Phoebe Prince likely endured both assaults and true threats. Students reported that they saw her being pushed and shoved in South Hadley High School’s hallways and classrooms, watched a teacher console her as she wept, and saw her crying in the nurse’s office a few hours before she hanged herself.78 Phoebe told a friend that she was “not a tough girl” and “would not know how to fight,” and sometimes asked friends to surround her as she walked from class to class.79 Prosecutors also alleged that when

73. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993); see also United States v. O’Brien, 391 U.S. 367, 377 (1968) (explaining that where conduct involves elements of speech, the First Amendment permits the state to punish the conduct, if the punishment “is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”).


77. Id. at 359-60 (citation omitted); see also Mardis v. Hannibal Pub. Sch. Dist., 684 F. Supp. 2d 1114, 1122 (E.D. Mo. 2010) (stating that when a student transmits a threat to kill named students, a court determining the reasonableness of a target’s reaction may consider “the school tragedies during the past two decades and their effect on students and school administrators”).

78. Ellement & Schworm, supra note 6; Eckholm & Zezima, supra note 6.

79. Erik Eckholm & Katie Zezima, Court Documents Detail a Teenage Girl’s Final Days of Fear and Bullying, N.Y. TIMES, Apr. 9, 2010, at A12.
she told a school administrator a week before her death that she was "scared and wanted to go home" to avoid a beating from a classmate, the administrator dismissed her pleas and sent her back to class.  

2. "Fighting words"

Related to true threats is the "fighting words" doctrine, which denies First Amendment protection to statements that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." The Supreme Court announced the doctrine in 1942 in *Chaplinsky v. New Hampshire*, which unanimously upheld the conviction of a Jehovah's Witness for a street corner speech that aroused some listeners in the crowd.

The Court has never overruled *Chaplinsky*, but has declined to apply the "fighting words" doctrine to sustain a conviction in any case it has reviewed since that decision. The Court's evident discomfort stems perhaps from the doctrine's capacity to enable law enforcement to silence the speaker, rather than to restrain the heckler who professes hurt sensibilities or otherwise threatens to disturb the peace.

The "fighting words" doctrine occasionally surfaces in student-speech cases, and the bullies' face-to-face challenges to Phoebe Prince at school may have included expression that qualified. Since *Chaplinsky*, however, the Court has restricted the doctrine's reach to expression that is "directed to the person of the hearer," or that amounts to "a direct personal insult or an invitation to exchange fisticuffs."

These "face-to-face" restrictions leave little room for applying the "fighting words" doctrine to cyberbullying unless courts recognize virtual confrontation as actionable after seventy-plus years of Supreme Court decisions declining to sustain fighting-words convictions. The courts' approach to *Chaplinsky* may hold little practical consequence, however, because as the Second Circuit has concluded, the *Tinker* Doctrine grants the public schools broad First Amendment authority to discipline

82. Id. at 574.
85. See, e.g., Nuxoll, 523 F.3d at 670.
cyberbullies for almost any student expression that might fairly be characterized as fighting words (or as true threats).  

B. The Tinker Doctrine

1. Tinker's antecedents: Barnette (1943), Prince (1944), and Brown (1954)

The Tinker Doctrine's immediate pedigree began with landmark decisions grounded in two core propositions that remain central to what the Supreme Court has called our nation's "dependence on public schools." First, the pre-Tinker decisions established that children hold constitutional rights in disputes with the state, but specified that these rights are subject to greater limitation than similar constitutional rights held by adults. Second, the decisions laid the groundwork for holdings which established that children's constitutional rights are particularly subject to limitation in the public schools, whose role in educating youth and transmitting values of citizenship depends on maintaining a safe and secure learning environment.

Tinker's first direct Supreme Court antecedent was West Virginia State Board of Education v. Barnette (1943), which upheld the right of Jehovah's Witnesses schoolchildren, under the First Amendment speech clause, to refuse to salute the flag or recite the Pledge of Allegiance, state-imposed obligations that the children and their parents contended were acts of idolatry that violated Biblical commands. Barnette specified that the Constitution "protects the citizen against the State itself and all of its creatures--Boards of Education not excepted." Justice Robert H. Jackson, writing for the majority, explained that school boards "are educating the young for citizenship."

A year after Barnette, the Court decided Prince v. Massachusetts, which upheld the state's child labor law against a challenge grounded in First

90. See infra notes 87-96 and accompanying text.
91. See infra notes 87-96 and accompanying text.
93. Barnette, 319 U.S. at 637 (noting that Boards of Education have "important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights"); see also, e.g., Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) ("The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State.").
Amendment defenses of religious freedom.\textsuperscript{95} \textit{Prince} recognized that children hold constitutional rights, but permitted states to limit these rights because “the state’s authority over children’s activities is broader than over like actions of adults.”\textsuperscript{96} The Court specified that “what may be wholly permissible for adults . . . may not be so for children, either with or without their parents’ presence.”\textsuperscript{97} As in \textit{Barnette}, citizenship education could help tip the scales in favor of state authority: “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”\textsuperscript{98}

A decade after \textit{Prince}, the Court again stressed citizenship education in \textit{Brown v. Board of Education}, which unanimously held that racial segregation in the public schools denied African American children equal protection guaranteed by the Fourteenth Amendment.\textsuperscript{99} \textit{Brown} recognized public education as “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”\textsuperscript{100}

\textbf{2. \textit{Tinker} (1969)}

\textit{Tinker v. Des Moines Independent Community School District} upheld the First Amendment rights of public elementary and secondary school students to wear black armbands in school as a silent, non-disruptive protest of the Vietnam War.\textsuperscript{101} The peaceful protest would have been secure from content-based restriction on Main Street, but the Court held

\begin{itemize}
  \item \textsuperscript{95} \textit{Prince} v. Massachusetts, 321 U.S. 158, 169-70 (1944).
  \item \textsuperscript{96} \textit{Id.} at 168; \textit{see also} \textit{Bellotti} v. Baird, 443 U.S. 622, 633 (1979) (plurality opinion) (“A child, merely on account of his minority, is not beyond the protection of the Constitution, [however,] . . . the constitutional rights of children cannot be equated with those of adults . . . .”); \textit{Planned Parenthood} v. Danforth, 428 U.S. 52, 74 (1976) (“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”) (citations omitted); \textit{Goss} v. Lopez, 419 U.S. 565, 591 (1975) (Powell, J., dissenting) (“[T]here are differences which must be accommodated in determining the rights and duties of children as compared with those of adults.”) (emphasis in original); \textit{In re Gault}, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); \textit{Prince}, 321 U.S. at 173 (Murphy, J., dissenting) (“[T]he power of the state lawfully to control . . . activities of children is greater than its power over similar activities of adults.”).
  \item \textsuperscript{97} \textit{Prince}, 321 U.S. at 169.
  \item \textsuperscript{98} \textit{Id.} at 168; \textit{see also id.} at 177 (Jackson, J., dissenting) (“[State-imposed] limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”).
  \item \textsuperscript{101} \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1969).
\end{itemize}
that the public schools presented a different constitutional calculus.

On the one hand, Justice Abe Fortas wrote for the Tinker majority: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to ... students. It can hardly be argued that ... students ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”102 On the other hand, students' expressive rights are limited by the “comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”103

Tinker held that the First Amendment permits school authorities to discipline student expression that undermines one or both of two state interests, one grounded in maintaining the overall educational environment, and the other grounded in protecting the personal rights of other students. The dispositive questions are whether the record yields evidence of “interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.”104

Tinker concluded that “conduct by the student, in class or out of it, which for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”105 The student armband wearers prevailed in Tinker, but only because the record did not demonstrate “speech or action that intrude[d] upon the work of the schools or the rights of other students.”106

3. Tinker's First Amendment progeny

In the more than four decades since Tinker, “every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate.”107 The Court has reaffirmed the seminal decision's

102. Id. at 506.
103. Id. at 507 (citations omitted); see also New Jersey v. T.L.O., 469 U.S. 325, 341, 343 (1985) (discussing “the substantial need of teachers and administrators for freedom to maintain order in the schools,” in furtherance of “the legitimate end of preserving order in the schools”).
104. Tinker, 393 U.S. at 508.
105. Id. at 513.
106. Id. at 508. The students' silent protest “fail[ed] to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” Id. at 509. The Court followed by explaining that schools may impose discipline for student speech that “materially disrupts classwork or ... materially and substantially interfer[es] with the requirement of appropriate discipline in the operation of the school.” Id. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
vitality while creating three exceptions that permit school authorities to discipline student speech even without proof of the disruption or rights collision that *Tinker*’s two-prong holding recited.

i. *Fraser* (1986)

In *Bethel School District No. 403 v. Fraser*, the Court cited *Tinker* and upheld the high school’s authority to suspend a student for delivering an “offensively lewd and indecent,” “vulgar” speech laden with “an elaborate, graphic, and explicit sexual metaphor” in an assembly attended by about 600 students. The First Amendment would have protected the expression in the greater society, but the Court held that the assembly speech enjoyed more limited First Amendment protection because the constitutional rights of public school students “are not automatically coextensive with the rights of adults in other settings.” The Court acknowledged that “[t]he First Amendment guarantees wide freedom in matters of adult public discourse[,]” but rejected the disciplined student’s contention that “the same latitude must be permitted to children in a public school.”

The Court did not apply *Tinker*’s two-prong test. “Unlike the sanctions imposed . . . in *Tinker*,” wrote Chief Justice Warren E. Burger for *Fraser*’s majority, “the penalties imposed [on the student] were unrelated to any political viewpoint.” Fraser’s dispositive issue instead was that the student’s non-political speech impeded the school’s central role in citizenship education, a prime focus of *Barnette, Prince*, and *Brown* decades earlier.

“[E]ducating our youth for citizenship in public schools,” the Chief Justice explained at length, “is not confined to books, the curriculum, or civics class; schools must teach by example the shared values of a civilized social order.” “Fundamental values of public school education . . . “must . . . take into account consideration of the sensibilities of . . . fellow students.” Students’ First Amendment expressive rights in school are tempered by “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” The “basic educational mission” emphasizes teaching the “habits and manners of civility.”

110. *Fraser*, 478 U.S. at 682.
111. *Id.*
112. *Id.* at 685.
113. *Id.* at 683.
114. *Id.* at 681.
115. *Id.*
116. *Id.* at 685.
The First Amendment permitted the school to discipline the student's assembly speech, the Chief Justice continued, because "'fundamental values'..." disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'"

*Fraser* concluded that "[t]he determination of what manner of speech... is inappropriate properly rests with the school board," and not with the federal courts. To underscore this conclusion, the Court quoted, as "especially relevant in this case," a passage from Justice Hugo L. Black's forceful dissent in *Tinker*. Justice Black rejected arguments that "the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."

Justice William J. Brennan, Jr. concurred in *Fraser's* judgment "in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities." Justice John Paul Stevens dissented, but he too agreed that "a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission," and that "the school—not the student—must prescribe the rules of conduct in an educational institution."

---

117. *Id.* at 681 (citations omitted); see also, e.g., *Ambach v. Norwich*, 441 U.S. 68, 76-77 (1979) (stating that the public schools play an important role "in the preparation of individuals for participation as citizens," and inculcates "fundamental values necessary to the maintenance of a democratic political system").

118. *Fraser*, 478 U.S. at 683.

119. *Id.; see also Bd. of Educ. v. Pico*, 457 U.S. 853, 863-64 (1982) (plurality opinion) ("[L]ocal school boards have broad discretion in the management of school affairs, ... [but] the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." (citations omitted)); *Goss v. Lopez*, 419 U.S. 565, 594 (1975) (Powell, J., dissenting) ("One of the more disturbing aspects of today's decision is its indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. ... By and large, public education in our Nation is committed to the control of state and local authorities.").

120. *Fraser*, 478 U.S. at 686.


122. *Fraser*, 478 U.S. at 687 (Brennan, J., concurring).

123. *Id.* at 691 (Stevens, J., dissenting) (footnote omitted).

124. *Id.* at 692 (citing *Arnold v. Carpenter*, 459 F.2d 939, 944 (7th Cir. 1972) (Stevens,
ii. Kuhlmeier (1988)

In Hazelwood School District v. Kuhlmeier, the Court cited Tinker and Fraser and upheld the high school principal’s authority to remove two articles (one about teenage pregnancy and the other about divorce) before they were published in a school newspaper that was funded by the board of education and produced as part of the school’s journalism curriculum. The state’s pre-publication removal from an ordinary newspaper would constitute a prior restraint prohibited by the First Amendment. Kuhlmeier rejected the First Amendment claims of the newspaper’s three student staff members, however, without applying Tinker’s two-prong holding. Because the newspaper was produced as part of the school’s journalism curriculum, the dispositive issue was that “members of the public might reasonably perceive [it] to bear the imprimatur of the school.”

Kuhlmeier quoted Brown’s instruction about citizenship education and reaffirmed the public schools’ broad authority to limit student speech that threatens or compromises the schools’ efforts to inculcate values. “[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Judicial intervention is warranted only when editorial control “has no valid educational purpose,” a restrictive standard that students are unlikely ever to satisfy.

Kuhlmeier reiterated the Court’s “oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges.” The reiteration came with particular force because the Court quoted, and found “equally relevant to the instant case,” the passage from Justice Black’s Tinker dissent that Fraser had quoted two years earlier.

---

127. Kuhlmeier, 484 U.S. at 271.
128. Id. at 272.
129. Id. at 273.
130. Id.
131. Id. (citations omitted); see also, e.g., Goss v. Lopez, 419 U.S. 565, 590 (1975) (Powell, J., dissenting) (“Such an approach properly recognizes the unique nature of public education and the correspondingly limited role of the judiciary in its supervision.”).
132. Kuhlmeier, 484 U.S. at 271-72 n.4.
iii. Morse (2007)

In Morse v. Frederick, the Court cited Tinker with approval and upheld the suspension of a high school senior for unfurling, during a school-sanctioned and school-supervised event, a large banner ("BONG HITS 4 JESUS") that the school's principal reasonably regarded as promoting illegal drug use or possession.\(^{134}\) The Court concluded that Fraser and Kuhlmeier "confirm[] that the rule of Tinker is not the only basis for restricting student speech."\(^{135}\) Without applying Tinker's two-prong holding, Morse upheld the school's First Amendment authority to impose discipline "to safeguard those entrusted to their care"\(^{136}\) from messages promoting drug use or possession, conduct which "can cause severe and permanent damage to the health and well-being of young people."\(^{137}\)

As in Fraser, the distinction between political and non-political student speech loomed large. Morse distinguished the student's "bong hits" banner from the message that the Tinker armband wearers sought to convey, which "implicat[ed] concerns at the heart of the First Amendment"\(^{138}\)—political speech, which is "at the core of what the First Amendment is designed to protect."\(^{139}\) Morse classified the banner as non-political speech that contributed nothing to the "political debate over the criminalization of drug use or possession."\(^{140}\)

4. Tinker's Fourth Amendment progeny

The Tinker Doctrine's First Amendment approach to schoolchildren's expressive rights has provided bases for strengthening limits on students' Fourth Amendment rights arising from searches of their persons or property by public school authorities. The Court's Fourth Amendment approach to searches of students' persons and property in school, in turn, has provided bases for strengthening limits on public school students' First Amendment expressive rights under the Tinker Doctrine.

i. T.L.O. (1985)

In New Jersey v. T.L.O., the Supreme Court cited Tinker and held that the Fourth Amendment validity of a public school administrator's in-school search of a student depends on the search's reasonableness under the

\(\text{HeinOnline} -- 37\) New Eng. J. on Crim. & Civ. Confinement 200 2011

\(^{134}\) Morse v. Frederick, 127 S. Ct. 2618, 2624, 2629 (2007).

\(^{135}\) Id. at 406 (footnote omitted).

\(^{136}\) Id. at 397.

\(^{137}\) Id. at 407.

\(^{138}\) Id. at 403.

\(^{139}\) Id. (quoting Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion)).

\(^{140}\) Id.
circumstances, and not on probable cause or a warrant. T.L.O. limited students’ Fourth Amendment rights because “preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”


In *Vernonia School District 47J v. Acton*, the Court cited T.L.O. and rejected a Fourth Amendment challenge to the public school district’s policy that authorized random urinalysis drug testing of its interscholastic athletes, including athletes whom the district had no reason to suspect of drug use. *Vernonia* reiterated *Tinker*’s instruction that children do not “shed their constitutional rights . . . at the schoolhouse gate” but specified that “the nature of those rights is what is appropriate for children in school.”

*Vernonia* explained that children’s “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere.” “The nature of [the State’s power over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”

The Court extended *Vernonia* in *Board of Education v. Earls*, which upheld a public school district’s random suspicionless drug testing policy for students in all competitive extracurricular activities. *Earls* cited *Tinker* and specified that students’ constitutional rights may be limited because “‘special needs’ inhere in the public school context,” where the State is responsible for maintaining discipline, health, and safety. “Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”

---

142. Id. at 339.
144. Id. at 655-56 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
145. Id. at 656 (citation omitted).
146. Id.
147. Id. at 655; see also, e.g., Bd. of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (“Certainly, the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values.”).
149. Id. at 829 (quoting Vernonia Sch. Dist., 515 U.S. at 653).
150. Id. at 830.
151. Id. at 831.
because “the school has the obligation to protect pupils from mistreatment by other children.”

iii. Redding (2009)

In Safford Unified School District v. Redding, the Court applied T.L.O. and held that on the facts of the case, the school violated the Fourth Amendment rights of a thirteen-year-old middle school girl whom it strip-searched on suspicion that she was hiding a few over-the-counter and prescription medications in her undergarments. The student denied the charge, and the search turned up no contraband. Redding restated that “standards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed,” and reemphasized “the high degree of deference that courts must pay to the educator’s professional judgment.”

C. Applying Tinker to Cyberbullying

For forty years after Tinker, school authorities won every Supreme Court constitutional case brought by a student. It took a middle school’s misguided strip search of a thirteen-year-old girl to finally break the string in 2009.

1. The dual foundations

Two foundations, one grounded in judicial deference and the other in the nature of First Amendment concerns, enhance the public schools’ authority to overcome First Amendment challenges to disciplinary sanctions imposed on students who cyberbully their classmates. As applied in the lower courts, these foundations invigorate the Court’s instruction that “the nature of [students’ constitutional] rights is what is appropriate for children in school,” where “‘special needs’ inhere because ‘the school has the obligation to protect pupils from mistreatment by other children.”

152. Id. (quoting T.L.O., 469 U.S. at 350 (Powell, J., concurring)).
154. Id. at 2638.
155. Id. at 2640 n.1 (citing T.L.O., 469 U.S. at 342, n.9).
156. Id. at 2643.
157. Id. at 2644.
160. Earls, at 831 (quoting T.L.O., 469 U.S. at 350 (Powell, J., concurring)).
Fraser and Kuhlmeier instruct that determining the appropriateness of disciplinary sanctions imposed on student expression is primarily the responsibility of parents, teachers, and public school officials, and not of federal judges in constitutional litigation. A public school student's asserted speech rights, explained the Eleventh Circuit, "should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve." The Seventh Circuit confers considerable First Amendment deference because "judges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere conducive to learning," and because "[m]utual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning."

The Third Circuit has held that school authorities' discretion is greatest when a student's non-political speech threatens that atmosphere. The Seventh Circuit explains that schools may discipline some speech that would be constitutionally protected on Main Street because "high-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students."

---

162. See supra notes 115-17, 127-29 and accompanying text.
163. Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 983 (11th Cir. 2007) (quoting Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247 (11th Cir. 2003)). "Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school." Id. (quoting Scott, 324 F.3d at 1247).
164. Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 671 (7th Cir. 2008).
165. Id. at 672.
166. S.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 419, 421-22 (3d Cir. 2003) (holding that the school did not violate the kindergartner's First Amendment rights by suspending him for saying "I am going to shoot you" to a classmate in the playground during recess). The court noted that "the determination of what manner of speech is inappropriate properly rests with school officials." Id.
167. Nuxoll, 523 F.3d at 674-75; see also, e.g., Wofford v. Evans, 390 F.3d 318, 323 (4th Cir. 2004) ("[S]chool officials have been afforded substantial leeway to depart from the prohibitions and procedures that the Constitution provides for society at large. . . . Such leeway is particularly necessary when school discipline is involved."); id. at 324 ("[T]he balance or rights and interests to be struck in the disciplinary process is a task best left to local school systems, operating, as they do, within the parameters of state law."); Bear v.
Judicial deference, however, has its limits. Without applying Tinker's two-prong test, that decision's Supreme Court progeny have authorized First Amendment limitations on three categories of non-political student expression—lewd, indecent or vulgar speech (Fraser); school-sponsored or school-funded speech the public might reasonably perceive to bear the school's imprimatur (Kuhlmeier); and speech that clashes with school rules about illicit drug use or possession (Morse).

The broad citizenship-education language of Kuhlmeier, Morse, and particularly Fraser, however, transcended the particular facts of each case. Some lower courts have applied this language to uphold imposition of school discipline on other categories of non-political student expression that, while not reasonably characterized as lewd, indecent, or vulgar, run afoul of "socially acceptable methods of discourse." The public schools' First Amendment authority is more limited in cases concerning arguably political speech.

The more prudent approach, however, taken by many lower court decisions cited in this article, is to apply this broad Supreme Court language to help explain the rationale for disposition under one or more of the Tinker Doctrine's existing holdings, and not to grant public schools First Amendment authority to determine when citizenship education supports disciplinary authority over yet new categories of student speech. Part III will explain why, in accordance with their terms and in

---

Fleming, 714 F. Supp. 2d 972, 984-85 (D.S.D. 2010) (stating courts should "tread carefully in the realm of school policy"); In re Douglas D., 626 N.W.2d 725, 730 (Wis. 2001) (reversing the delinquency adjudication on First Amendment grounds and upholding a school's suspension of an eighth grader who wrote a story expressing hostility toward his teacher and depicted a student beheading her with a machete).

168. In re Douglas D., 626 N.W.2d at 743; see also, e.g., Sayreville Bd. of Educ., 333 F.3d at 420 (student said, "I'm going to shoot you," to friends in the playground during recess); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (upholding the school's authority to prohibit students from wearing Marilyn Manson t-shirts because the court of appeals found that the Goth rock band's t-shirt featured "symbols and words that promote values that are . . . patently contrary to the school's educational mission," including suicide, murder, and racially derogatory terms); Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 902 (W.D. Mich. 2005) ("Insubordinate speech always interrupts the educational process [under Tinker] because it is contrary to principles of civility and respect that are fundamental to a public school education.").

169. See, e.g., Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 321-22 (2d. Cir. 2006) (limiting Fraser and Kuhlmeier to their facts and upholding high school student's right to wear t-shirt reading "George W. Bush, Chicken-Hawk-In-Chief" and criticizing his alleged drug and alcohol abuse); DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 644 (D.N.J. 2007) (holding that plaintiffs had reasonable probability of success on the merits of their claim that they had a First Amendment right to wear buttons featuring photograph of members of the Hitler Youth to protest the school district's mandatory uniform policy).

170. See, e.g., Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008); Evans, 390 F.3d
light of evolving technology, the holdings of *Tinker* and its progeny may be applied not only to on-campus student speech, but also to off-campus speech (such as cyberbullying) that foreseeably had the requisite harmful effects in school. The question whether to create additional exceptions to *Tinker*, however, is best left to the Supreme Court itself.171

ii. "[C]oncerns at the heart of the First Amendment . . . ."172

*Tinker*'s Supreme Court progeny directs that as non-political speech, student cyberbullying deserves comparatively little First Amendment protection when schools fulfill their "custodial and tutelary"173 obligations to maintain a non-disruptive, safe, and secure environment conducive to learning.174 *Tinker, Fraser,* and *Morse* yield a political-nonpolitical distinction readily perceptible on the facts of those cases. *Tinker*’s Vietnam War protest clearly concerned a matter of spirited public debate and profound national discord; *Fraser*’s assembly speech laced with sexual innuendo and *Morse*’s “BONG HiTS” banner itself (which the disciplined student himself argued was “just nonsense meant to attract television cameras”)175 bore no resemblance to public affairs.

Like so many other distinctions in law, however, the distinction between political and non-political student speech can sometimes be hazy. Cyberbullying, however, typically presents no such haze because the messages may vent pure spite or personal animosities, but they rarely, if ever, implicate issues of greater social concern. Phoebe Prince’s cyberbullies, for example, neither intended nor conveyed any message reasonably characterized as political when they said that she deserved to die and called her an “Irish slut,” a whore, and a druggie in a stream of text


174. *Posthumus v. Bd. of Educ.*, 380 F. Supp. 2d 891, 901-02 (W.D. Mich. 2005) (discussing school's discretionary authority to impose discipline is strongest where student speech does "not concern a political issue or a matter of public concern, as in *Tinker*" but rather a "private grievance" or other effort to strike at a particular classmate for personal reasons).

175. *Morse*, 127 S. Ct. at 2624.
messages, on a Facebook page, and then in posthumous postings on her Facebook memorial page.\textsuperscript{176}

Under \textit{Tinker}, face-to-face bullying and cyberbullying constitute non-political speech that often materially and substantially disrupts the work and discipline of the school,\textsuperscript{177} and that almost always produces "collision with the rights of other students to be secure and to be let alone."\textsuperscript{178} The remainder of this Part II discusses how the lower courts' application of these dual \textit{Tinker} prongs enhances the schools' authority to discipline cyberbullies.

2. \textit{Tinker}'s "disruption" prong and cyberbullying

Vigilant school authorities sometimes intervene early against cyberbullying, when a few messages may foreshadow an ongoing barrage. By authorizing limitations on student speech that reasonably threatens material and substantial disruption of the school's work, \textit{Tinker} imposes on school officials "an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place."\textsuperscript{179} The Seventh Circuit has rejected the contention that "a school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue. That could rarely be proved. . . It is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.'"\textsuperscript{180}

The Third Circuit requires "a specific and significant fear of disruption, not just some remote apprehension of disturbance."\textsuperscript{181} The Second Circuit has held that school authorities reasonably anticipate material and substantial disruption where student speech poses "a substantial risk that . . . administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion."\textsuperscript{182}

At many public elementary and secondary schools, pervasive cyberbullying almost naturally produces this diversion by draining administrators' time and energies from the core mission to provide effective education. At one suburban New Jersey middle school, for

\begin{itemize}
\item \textsuperscript{176} Eckholm \& Zezima, \textit{supra} note 6; Ream, \textit{supra} note 10.
\item \textsuperscript{177} \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
\item \textsuperscript{178} \textit{Id.} at 508.
\item \textsuperscript{179} Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007); Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007) (stating a school's authority does not depend on allegations or proof that the student speaker intended to cause disruption).
\item \textsuperscript{180} Nuxoll \textit{ex rel.} Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (emphasis omitted) (citations omitted).
\item \textsuperscript{181} Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001).
\item \textsuperscript{182} Doninger v. Niehoff, 527 F.3d 41, 51-52 (2d Cir. 2008).
\end{itemize}
example, the seventh-grade guidance counselor reports that she can spend up to three-quarters of her time mediating student disputes that began with insults sent online or in text messages; these disputes also distract the school’s principal from other pedagogical responsibilities.183

Once non-political student speech signals such disruption of the school’s work, most lower courts do not set the Tinker bar particularly high. Courts have held that disruption of a school’s work is material and substantial where it creates, or reasonably threatens to create, “more than a brief, easily overlooked, de minimis impact.”184 “While school officials must offer facts to support their proscription of student speech,” concludes the Fifth Circuit, “this is not a ‘difficult burden’ and ‘their decisions will govern’ if they are ‘within the range where reasonable minds will differ.’”185

These tests set an appropriate balance as the United States confronts a “crisis,” perceived for at least the past generation, in the quality and performance of public education.186 The Supreme Court rightfully views public education as “perhaps the most important function of state and local governments.”187 Because the nation depends on public education to help sustain leadership in the increasingly global environment marked by swift technological advances, disruption of a public school’s work is material and substantial whenever students’ non-political speech leads the school’s professional educators to divert significant attention from teaching toward maintaining order and discipline, mediating student disputes, or preventing or stemming daily violence and recrimination.

Lower courts have found material and substantial disruption where student speech disturbs or distracts classroom teaching or lesson plans.188

---

184. Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 983 (11th Cir. 2007) (citations omitted); see also J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002) (“[W]hile there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required.”) (citation omitted).
188. See, e.g., Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1392 (D. Minn. 1987),
Indeed, proof of such disturbance or distraction would almost certainly have won for the school district in Tinker itself.\textsuperscript{189} The finding is also appropriate where the principal or other administrators must spend a bulk of their in-school time responding to the reasonable concerns of students or parents for as little as a week, or communicating with parents who threaten to remove their children from school.\textsuperscript{190}

In the Seventh Circuit, material and substantial disruption or its reasonable threat occurs “if there is reason to think that a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”\textsuperscript{191} Material and substantial disruption also occurs where student speech causes one or more teachers such stress that the school must grant them time away from work and engage substitute teachers, or where students express anxiety and concern for their own safety.\textsuperscript{192}

School authorities exercising discretion may also reasonably conclude that cyberbullying would disrupt the entire school environment (as it almost certainly did in Phoebe Prince’s case) by encouraging violence, interrupting teaching, or scaring or demoralizing other students.\textsuperscript{193} Researchers have found, for example, that “both bullying and being bullied are associated with higher rates of weapons carrying, fighting, and fighting injuries” on and off campus, and that rates of overall school violence consistently rise with increased bullying.\textsuperscript{194}

Cyberbullying may lead to fights in school between bullies and victims.

\textsuperscript{189} Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 514 (1969); see also id. at 517-18 (Black, J., dissenting) (finding evidence of disruption in the record).

\textsuperscript{190} Boucher v. Sch. Bd., 134 F.3d 821, 827 (7th Cir. 1998) (vacating preliminary injunction in favor of high school student who was expelled for distributing an underground newspaper that taught students how to hack into the school’s computers and published the school’s restricted access codes; school officials had to spend time and energy controlling the damage); Mardis v. Hannibal Pub. Sch. Dist., 684 F. Supp. 2d 1114, 1123 (E.D. Mo. 2010).

\textsuperscript{191} Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008); see also J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852, 869 (Pa. 2002) (upholding disciplining a middle school student whose web site threatened to kill a teacher and “had a demoralizing impact on the school community”).

\textsuperscript{192} Bethlehem Area Sch. Dist., 807 A.2d at 852.

\textsuperscript{193} See, e.g., Dorothy L. Espelage et al., Examining the Social Context of Bullying Behaviors in Early Adolescence, 78 J. COUNSELING & DEV. 326, 326 (2000); Gwen Glew et al., Bullying: Children Hurting Children, 21 PEDIATRICS IN REV. 183, 185 (2000).

\textsuperscript{194} Tonja R. Nansel et al., Relationships Between Bullying and Violence Among U.S. Youth, 157 ARCHIVES PEDIATRICS MED. 348, 353 (2003).
and sometimes among defenders of each.\textsuperscript{195} A post-Columbine report by the U.S. Secret Service and the U.S. Department of Education found that bullies may not be the only targets of victims bent on disruptive revenge,\textsuperscript{196} and some researchers conclude that bullying can breed crimes against students who are not the bully's direct targets.\textsuperscript{197} Courts have found material and substantial disruption where the school administration must increase security, for example by locking access to the school or by assigning teachers or other school personnel to additional monitoring duties.\textsuperscript{198}

3. \textit{Tinker}'s “personal security” prong and cyberbullying

Some lower courts perceive the “disruption” prong as the sole basis for \textit{Tinker}'s holding,\textsuperscript{199} but other lower courts have perceived that prong and the “personal security” prong as related yet distinct bases for meeting what Justices Lewis F. Powell, Jr. and Sandra Day O'Connor have called the schools’ obligation “to protect pupils from mistreatment by other children.”\textsuperscript{200} In decisions that created exceptions to \textit{Tinker} without applying that decision’s standards, the Supreme Court has sent mixed signals that do not foreclose the issue.\textsuperscript{201}

In accordance with the express terms of \textit{Tinker}'s majority opinion itself, the two prongs are best viewed as related yet distinct. The “disruption” prong focuses on actual or reasonably anticipated threats to the school’s educational environment, and the “personal security” prong focuses more

\begin{footnotes}
\item[197] \textit{Id.} at 16.
\end{footnotes}
directly on actual or reasonably anticipated threats to the physical or emotional well-being of individual students. Together the two prongs recognize that, as the Wisconsin Supreme Court puts it, "[s]chool officials not only educate students who are compelled to attend school, but they have a responsibility to protect those students . . . from behavior that threatens their safety and the integrity of the learning process."  

The "personal security" prong is particularly relevant to cyberbullying because most persistent messages worth disciplining could also subject the cyberbully to delinquency adjudication or criminal conviction under the typical harassment statute. Courts generally uphold content-neutral harassment statutes that focus on the speaker's intent and the target's reasonable reaction. The statute may criminalize "willful," "malicious," or similar conduct or speech driven by specific intent; require proof that the conduct or speech be "directed at" a specific individual; require proof that a reasonable person would be substantially alarmed, annoyed, or menaced; apply only to speech or conduct that has "no legitimate purpose"; and exclude constitutionally protected acts or speech such as public demonstrations or labor picketing.  

Social science research findings provide persuasive evidence that student bullying almost always impinges on Tinker's recognized right of students to be secure and to be let alone in school. The affected students are the bully's target, bystander students who know about the bullying, and sometimes even the bullies themselves.  

i. The role of social science research findings  

Where the school district supports its decision to suspend or expel a student with proof about social science research findings concerning the actual and potential harms of cyberbullying to individual students, lower courts applying Tinker may rely on these findings because the Supreme Court itself relies on social science findings to decide matters of childhood  

202. State v. Angelia D.B., 564 N.W.2d 682, 689 (Wis. 1997); see also, e.g., Goss v. Lopez, 419 U.S. 565, 591 (1975) (Powell, J., dissenting) (discussing the state's interest in "the proper functioning of its public school system for the benefit of all pupils and the public generally") (emphasis omitted); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 614 (5th Cir. 2004) ("[B]alanc[ing] the First Amendment rights of students with the special need of educators to maintain a safe and effective learning environment."); Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 341 F.3d 1197, 1201 (10th Cir. 2003) ("[T]he [s]chool has a legitimate interest in providing a safe environment for students and staff."); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 (5th Cir. 2001) ("Educators have an essential role in regulating school affairs and establishing appropriate standards of conduct."); Busch v. Omaha Pub. Sch. Dist., 623 N.W.2d 672, 678 (Neb. 2001) ("The day-to-day operation of a school requires that a safe learning environment be provided for students and school employees.").  

and adolescent development. In *Maryland v. Craig* in 1990, for example, the Court rejected a Sixth Amendment Confrontation Clause challenge to a state statute that permitted child witnesses in child abuse cases to testify at trial against the defendant, outside the defendant’s physical presence, by one-way closed circuit television.204 To justify the unusual departure from the Sixth Amendment’s requirement of face-to-face confrontation, *Craig* credited “the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court.”205

In *Roper v. Simmons* in 2005, the Court underscored its traditional “concern for the vulnerability of children”206 by stressing that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”207 *Roper* credited “scientific and sociological studies” cited by the defendant and various *amicis*.208

In *Graham v. Florida* in 2010, the Court held that *Roper* had “established” the soundness of these studies concerning childhood and adolescent development.209 By citing research presented in amicus briefs filed by, among other professional organizations, the American Medical Association and the American Psychological Association, *Graham* concluded that “[n]o recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.”210

205. *Id.* at 855.
207. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); see *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005) (holding that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits states from executing individuals who were under eighteen when they committed their capital crimes; crediting research findings (1) that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young”; (2) that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” partly because “juveniles have less control, or less experience with control, over their own environment”; and (3) that “the character of a juvenile is not as well formed as that of an adult”).
209. *Graham*, 130 S. Ct. at 2016 (citing *Roper*, 543 U.S. at 569-70). The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits imposition of life imprisonment without parole on a defendant who was under eighteen at the time of the non-homicide crime. *Id.* at 2015.
ii. Social science research findings concerning bullying

a. Victims

Pediatric professionals recognize bullying as a form of child abuse, perpetrated by other children rather than by adults. Researchers have found that bullying can lead victims to suffer school phobia, increased truancy, or impaired concentration and classroom achievement. Victims may be at greater risk of dropping out of high school before graduation, and may display psychosomatic symptoms resembling ones suffered by many child abuse victims, including sleep disturbances, bedwetting, abdominal pain, high levels of anxiety and depression, loneliness, low self-esteem, and heightened fear for personal safety.

Face-to-face bullying may leave bruises or other physical manifestations, but cyberbullying unknown to the victim’s parents or other adults can work its psychic damage undetected for weeks or months. A victim’s plight may be particularly severe because a few keystrokes can inflict hurt sometimes even more severe than fists or playground

211. See, e.g., Susan P. Limber, Addressing Youth Bullying Behaviors, in AM. MED. ASS’N, EDUCATION FORUM ON ADOLESCENT HEALTH: YOUTH BULLYING, 5, 6 (2002); Richard Goldbloom, Children's Inhumanity to Children, 144 J. PEDIATRICS 3, 3 (2004); Kirsti Kumpulainen et al., Bullying and Psychiatric Symptoms Among Elementary School-Age Children, 22 CHILD ABUSE & NEGLECT 705, 706 (1998); Olweus, supra note 38, at 1173.

212. See, e.g., Tanya Beran & Qing Li, Cyber-Harassment: A Study of a New Method for an Old Behavior, 32 J. EDUC. COMPUTING RES. 265, 272 (2005) (showing sadness, anxiety, fear and an inability to concentrate that affected grades); Gwen M. Glew et al., Bullying, Psychosocial Adjustment, and Academic Performance in Elementary School, 159 ARCHIVES PEDIATRICS & ADOLESCENT MED. 1026, 1030 (2005); Kumpulainen et al., supra note 206, at 715; Michele L. Ybarra et al., Examining the Overlap in Internet Harassment and School Bullying: Implications for School Intervention, 41 J. ADOLESCENT HEALTH, 325, 346 (2007) (truancy).

213. See Kris Bosworth et al., Factors Associated with Bullying Behavior in Middle School Students, 19 J. EARLY ADOLESCENCE 341, 341 (1999).

214. See Louise Arseneault et al., Bullying Victimization Uniquely Contributes to Adjustment Problems in Young Children: A Nationally Representative Cohort Study, 118 PEDIATRICS 130, 131, 136 (2006); Minne Fekkes et al., Bullying Behavior and Associations with Psychosomatic Complaints and Depression in Victims, 144 J. PEDIATRICS 17, 21 (2004); Gianluca Gini & Tiziana Pozzoli, Association Between Bullying and Psychosomatic Problems: A Meta-analysis, 123 PEDIATRICS 1059, 1063-64 (2009); Glew et al., supra note 207, at 1030-31; Mason, supra note 31, at 325, 327-28; Justin W. Patchin & Sameer Hinduja, Cyberbullying and Self-Esteem, 80 J. SCH. HEALTH 614, 619 (2010) ("Experience with cyberbullying, both as a victim and as an offender, was associated with significantly lower levels of self-esteem, even after controlling for demographic differences."); Gitanjali Saluja et al., Prevalence of and Risk Factors for Depressive Symptoms Among Young Adolescents, 158 ARCHIVES PEDIATRICS & ADOLESCENT MED. 760, 761-62, 764 (2004).
confrontations. Internet postings can hound victims around the clock at home, where they are supposed to feel safe, and can leave them feeling “tethered to their tormenters.” “If someone is picking on you in the school yard, you can go home,” said the mother of a thirteen-year-old Virginia boy who committed suicide with a shotgun after cyberbullies taunted him about his small size and dared him to kill himself for more than a month. “When it’s on the computer at home, you have nowhere to go.”

“Cyberspace creates an illusion of invisibility because it is faceless.” Because the victim’s body language and tone of voice disappear, researchers doubt that some cyberbullies even summon empathy to recognize the potential destructiveness of their conduct. Virulence may escalate because of what psychologists call “moral disengagement”—“[t]he further removed we are from the consequences of our actions, the easier it is to emotionally separate ourselves from our own behavior.” In 2003, for example, thirteen-year-old Vermont middle schooler Ryan Halligan hanged himself at home after two years of cyberbullying by students who urged him to take his own life. It is difficult to imagine whether Ryan’s cyberbullies thought seriously about the potential consequences of what they were doing. In his final instant message, Ryan typed, “Tonight’s the night,” and the reply came back, “It’s about time.”

Face-to-face bullying and cyberbullying normally share at least one common denominator: most victims are no match emotionally for the bullies. If the playing field were level, chances are that the victim would not be bullied in the first place. The victim may be a student coping with depression, special mental health needs, or social isolation. Similarly
inviting targets are children who attract attention for such reasons as perceived sexual orientation, race, ethnicity, gender, physical or emotional disability, obesity, small size, or difficulties with social skills. Researchers have even identified a link between bullying and children with special physical health needs such as speech or language impairment, vision problems, cancer, cerebral palsy, diabetes or muscular dystrophy.

The suicides of Phoebe Prince and Carl Joseph Walker-Hoover in Massachusetts and Ryan Halligan in Vermont were not typical, but they were also not unique. Researcher Dan Olweus found that "victims' devaluation of themselves sometimes becomes so overwhelming that they see suicide as the only possible solution" to bullying. Other bullying victims may harbor suicidal thoughts that diminish enjoyment of daily life even when they do not ripen into suicide attempts. Recent studies have found depression and suicide ideation common among nine to thirteen-year-old boys and girls victimized by bullying.

"Bullycide" is fast becoming a term of art in educational circles.
Researchers do not know the precise number of bullying victims who are driven to contemplate or attempt suicide, but what researchers do know reinforces studies that find "compelling reasons to associate at least some of the child and adolescent risk for suicidal thoughts and actions to school bullying."\footnote{MARR & TIM FIELD, BULLYCIDE: DEATH AT PLAYTIME (2001).} Half the nation's forty-nine million elementary and secondary students, for example, suffer face-to-face or cyberbullying at some time before leaving high school; a victim may endure bullying for weeks, months, or even years,\footnote{See Amie E. Grills & Thomas H. Ollendick, Peer Victimization, Global Self-Worth, and Anxiety in Middle School Children, 31 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 59, 60 (2002). Olweus, supra note 37, at 1182. See generally Susan P. Limber & Maury M. Nation, Bullying Among Children and Youth, (Apr. 1998), http://ojjdp.ncjrs.org/jb bulletin/9804/bullying2.html.} and suicide is the third leading cause of death among American adolescents.\footnote{CTRS. FOR DISEASE CONTROL AND PREVENTION, SUICIDE: FACTS AT A GLANCE 2 (2010), http://www.cdc.gov/violenceprevention/pdf/Suicide-DataSheet-a.pdf.} As researchers intimate, the lines likely cross often.

"Bullying is not the only risk factor for suicidal thoughts and behaviors, but it surely now must be added to the list."\footnote{Id. at 9.} Even if cyberbullying is only one cause among others, the numbers are daunting. The United States had 1231 suicides of children between the ages of five and eighteen in 2007,\footnote{Kim et al., supra note 231, at 361.} and the numbers show no signs of falling. In a 2009 nationwide survey by the U.S. Centers for Disease Control and Prevention, 26.1% of high school students said they felt so sad or hopeless every day for two consecutive weeks in the prior month that they stopped doing some usual activities.\footnote{BUREAU OF JUSTICE STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, at iii (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs10.pdf.} During the twelve months preceding the survey, 10.9% of students had planned how they would attempt suicide, 6.3% of students had actually attempted suicide one or more times, and 1.9% of students had made a suicide attempt that resulted in an injury, poisoning, or overdose that required treatment by a physician or nurse.\footnote{DANICE EATON ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE-UNITED STATES, 2009, 8 (2010), http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf.} These alarming predictors may be underestimates because medical experts believe that...
many child and adolescent deaths reported as “accidental” are in fact suicides.238

Social science research thus demonstrates how cyberbullying’s “electronic aggression”239 can compromise educational opportunity and endanger the physical and emotional health of student victims. States guarantee children the right to a free public education, and they maintain compulsory education statutes and truancy proceedings to compel attendance by children who do not attend private schools or receive home schooling.240 “[F]reedom from fear of bullying,” concludes a leading researcher, “is not enough to ensure successful learning but it is a necessary condition for effective learning.”241

b. Bystanders

Bystanders—students who watch or hear about face-to-face bullying or cyberbullying of classmates—have been called “secondary victims.”242 The audience may be physical or virtual, but bystanders may suffer emotional or physical insecurity regardless of whether they remain on the sidelines, join the bullying, or defend the victim.

Most student bystanders do not intervene on a victim’s behalf or report the bullying to an adult; the normal response is to avoid associating with the victim, or even to join the bully in an effort to boost the bystander’s own social position or to avoid being targeted.243 One study found that 85% of bullying incidents had student bystanders, but that bystanders intervened for the victim in only 10% of the incidents.244 Non-intervention, common in cases of face-to-face bullying, can be even more likely in cases of cyberbullying, whose potentially larger virtual audience can “accelerate mob behavior.”245 Regardless of the medium, bullies wield real or perceived power, and (as we know from incidents of adults who recoiled from aiding victims during perpetration of violent crime)246 publically

239. Ctrs. For Disease Control & Prevention, supra note 33; see also Mishna et al., supra note 32, at 1222-27 (“online social cruelty”).
244. Rona S. Atlas & Debra J. Pepler, Observations of Bullying in the Classroom, 92 J. EDUC. RES. 86, 92 (1998); Jeffrey, supra note 242.
stepping forward takes courage.

Meekness may weaken bystanders’ empathy for the distress of others, and may damage bystanders’ schoolwork and self-esteem by inducing lasting guilt about timidity and lack of resolve in the face of a classmate’s overt victimization. A few nights after Phoebe Prince’s suicide, a student-organized candlelight vigil on the school’s softball field drew hundreds, including many students who likely had known about the face-to-face and cyberbullying that she had endured in the prior weeks and months.247 “I wish I could have stopped [the suicide],” said a fourteen-year-old boy who planned to take Phoebe to the winter dance two nights later. “I wish I could have talked to her when she got home.”248 The reactions came from the heart, but they came too late and likely will endure.

c. Bullies

Bullies hold the same right to a free public education as other students, and researchers conclude that bullies “may need help as much as their victims.”249 Bullies undisciplined by the school and overlooked by other public agencies in the pediatric safety system “experience poor psychosocial and emotional adjustment, difficulty making friends, and increased loneliness.”250 Bullying may signal generally antisocial, aggressive, and even delinquent and criminal conduct that can escalate throughout adolescence and adulthood.251 “[B]ullies have a more positive
attitude towards violence than students in general,” often have “a strong
need to dominate others,” and “seem to enjoy ... subdu[ing] others.”
Bullies may sense that violence, intimidation, or degradation are
acceptable, or at least tolerable, ways to impose their will on others,
including future dating partners, spouses, children, neighbors, or co-
workers. Some studies have shown that one in four boys who bully will
have a criminal record before they turn thirty. At least one researcher has
even reported that bullying can be inter-generational: “Adolescent bullies
tend to become adult bullies and then tend to have children who are
bullies.”

Some observers might hold misgivings about the public schools’
obligation to protect cyberbullies from the short-term and long-term
personal consequences of their own conduct. The bottom line, grounded in
social science research, however, is that even cyberbullies themselves can
benefit when the school disciplines their virtual speech that is designed to
inflict “willful and repeated harm” on targeted classmates.

III. THE PUBLIC SCHOOLS’ AUTHORITY TO DISCIPLINE STUDENT
CYBERBULLYING SENT FROM OFF CAMPUS

A. The Tinker Doctrine and Technology: Lessons from Olmstead
(1928)

1. The state of the law

In 2010, the New York Times reported about suburban New York parents
who begged the local public elementary school to protect their sixth-grade
daughter from repeated sexually explicit threats sent from the cell phone of
a twelve-year-old boy in her class. The threats “occurred out of school,
on a weekend,” responded the principal, “[w]e can’t discipline him.”

Like Phoebe Prince, Carl Joseph Walker-Hoover, and thousands of other
vulnerable cyberbullying victims left unprotected in school by teachers and

---

252. Olweus, supra note 38, at 1180-81.
253. See, e.g., Kumpulainen et al., supra note 211; Rolf Loeber & Dale Hay, Key
Issues in the Development of Aggression and Violence From Childhood to Early Adulthood,
48 ANN. REV. PSYCHOL. 371, 378 (1997); Smith, supra note 228.
254. Limber, supra note 211, at 1.
255. David P. Farrington, Understanding and Preventing Bullying, 17 CRIME & JUST.
256. Justin W. Patchin & Sameer Hinduja, Bullies Move Beyond the Schoolyard: A
257. Hoffman, supra note 183.
258. Id.
administrators, the girl likely continued to suffer in the classroom, on the
campus, and at home. The principal was wrong. Because the technology
that supports cyberbullying is so new, the Supreme Court and state
supreme courts have yet to decide the public schools’ authority to
discipline cyberbullies for messages sent from off-campus. Despite “some
uncertainty”\(^\text{259}\) in the case law, however, “[t]he overwhelming weight of
authority has analyzed student speech (whether on or off campus) in
accordance with \text{\textit{Tinker}},”\(^\text{260}\) provided that the school handbook provides
appropriate notice to students and their parents,\(^\text{261}\) that the cyberbully
receives procedural due process guaranteed in the handbook and by the
Constitution,\(^\text{262}\) and that the record demonstrates the harm recited
by one or both prongs of that decision.\(^\text{263}\) The message’s off-campus origins are not
determinative because most courts recognize that “off-campus conduct can
create a foreseeable risk of substantial disruption within a school.”\(^\text{264}\)

\(^{259}\) Morse \emph{v.} Frederick, 127 S. Ct. 2618, 2624 (2007).


\(^{261}\) \textit{See, e.g.}, Posthumus \emph{v.} Bd. of Educ., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005) (upholding discipline of student whose speech violated student handbook provisions that the court held constitutional); Flaherty \emph{v.} Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 705-06 (W.D. Pa. 2003) (striking down discipline of high school student because the student handbook did not limit the school’s disciplinary authority to conduct that occurred on school premises or that related to school activities).

\(^{262}\) \textit{See, e.g.}, Goss \emph{v.} Lopez, 419 U.S. 565, 581, 584 (1975) (stating that the state guarantees children a free public education, public school students have a due process property interest in that guarantee and a liberty interest in not having their reputations sullied by suspension for less than good cause; where a student faces suspension for less than ten days, however, due process requires only “an informal give-and-take between student and disciplinarian”).

\(^{263}\) \textit{See, e.g.}, Mahaffey \emph{ex rel.} Mahaffey \emph{v.} Aldrich, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (holding that school violated student’s First Amendment rights by disciplining him for website created off campus because the record contained no evidence of disruption to the school); \textit{Killion}, 136 F. Supp. 2d at 455 (holding that the school violated student’s First Amendment rights by disciplining him for criticizing the school’s athletic director by email sent from his home computer because the school “failed to adduce any evidence of actual disruption” of the school’s work); Emmett \emph{v.} Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (holding that school violated student’s First Amendment rights by disciplining him for website created off campus with “no evidence” that the site created a threat); Beussink \emph{v.} Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1181-82 (E.D. Mo. 1998) (holding that the school violated student’s First Amendment rights by disciplining him for website created off campus).

\(^{264}\) O.Z. \emph{v.} Bd. of Trs., No. CV 08-5671 ODW, 2008 WL 4396895, at *4 (C.D. Cal. Sept. 9, 2008); \textit{see also, e.g.}, \textit{Beverly Hills Unified Sch. Dist.}, 711 F. Supp. 2d at 1101 (“not material”) (citations omitted); Cohn \emph{v.} New Paltz Cent. Sch. Dist., 363 F. Supp. 2d 421, 436 (N.D.N.Y. 2005) (“The simple fact that conduct occurs off school grounds ‘does not
Before applying the *Tinker* Doctrine, some lower courts assume the school's disciplinary authority over messages transmitted from off-campus that foreseeably produce targeted harm on campus.\(^{265}\) Other decisions discuss this authority before conferring it. In *Doninger v. Niehoff*, for example, the Second Circuit explained that in the twenty-first century, "off-campus conduct can create a foreseeable risk of substantial disruption within a school"\(^{266}\) because "students both on and off campus routinely participate in school affairs... via blog postings, instant messaging, and other forms of electronic communication."\(^{267}\)

*Doninger* rejected the First Amendment speech claims of a student who, on a blog from her home, posted a vulgar message about a school administrator identified by name in the message.\(^{268}\) After concluding that the school could have disciplined the student if she had distributed hard copies of the message in school, the court of appeals concluded that "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of preclude the possibility that such conduct... may adversely affect the educative process or endanger the health, safety or morals for pupils within the education system for which the school authorities are responsible.'" (citation omitted); Mardis v. Hannibal Pub. Sch. Dist., 684 F. Supp. 2d 1114, 1118 (E.D. Mo. 2010) ("Several [federal] courts of appeal... have applied 'school speech' law to cases where the communications occurred off school grounds but their effects reverberated to the classroom.") (citations omitted).

265. See, e.g., LaVine v. Blaine Sch. Dist., 257 F.3d 981, 990 (9th Cir. 2000), (applying *Tinker* without considering that student composed his violent poem outside of school); Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075-77 (5th Cir. 1973) (student disciplined for writing article printed in underground newspaper published off-campus); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 970-71 (5th Cir. 1972) (applying *Tinker* to student underground newspaper written and distributed off the high school campus but brought to the campus); Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d at 1098, 1102-03 (disciplining student's YouTube posting of a video clip demeaning a classmate) (citations omitted); O.Z., 2008 WL 4396895, at *4 (disciplining student-created video, posted on the Internet, showing graphic dramatization of a teacher's murder); Killion, 136 F. Supp. 2d at 455 (describing student-created abusive "Top-Ten" list distributed off-campus by email); Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 285-86 (Or. Ct. App. 2000) (disciplining student-created underground newsletter distributed on campus); Emmett, 92 F. Supp. 2d at 1090 (disciplining student-created website with mock obituaries of some classmates); Benussink, 30 F. Supp. 2d at 1180 (disciplining student-created website with criticism of school authorities).

266. Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007)).

267. Id. at 49; see also, e.g., Mardis, 684 F. Supp. 2d at 1118; J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002) ("*Tinker*'s simple armband[s], worn silently and brought into a... classroom, has been replaced by... complex multi-media website[s], accessible to fellow students, teachers, and the world").

268. *Doninger*, 527 F.3d at 41, 45, 53.
substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."^{269}

2. *Olmstead* redux

Where a lower court applies the *Tinker* doctrine to off-campus student speech transmitted electronically through technology that the Supreme Court had no reason to anticipate when it created and refined that doctrine, the court remains true to the doctrine’s express holdings. Contemporary application also avoids the jurisprudential gymnastics that may attend unwillingness to apply established constitutional principles to technology reasonably unanticipated. The Court’s ultimate overruling of its 1928 decision in *Olmstead v. United States* informs the issue.^{270}

*Olmstead* held, five-to-four, that the Fourth Amendment did not prohibit the government from intercepting telephone conversations by wiretaps installed outside the conversants’ homes.^{271} The slender majority concluded that the government had not done a search or seizure because “[t]he evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”^{272}

Justice Louis D. Brandeis dissented from *Olmstead*’s refusal to apply Fourth Amendment doctrine to technological advances wrought by the advent of the telephone. The Court had often sustained the government’s constitutional authority “over objects of which the [f]athers could not have dreamed,”^{273} said Justice Brandeis, who found it “immaterial where the physical connection with the telephone wires leading into the defendants’ premises was made.”^{274} Because “[t]ime works changes, brings into existence new conditions and purposes,” he concluded, “a principle to be vital must be capable of wider application than the mischief which gave it birth.”^{275}

The passage of years vindicated the Brandeis position. In *Berger v. New York* in 1967, the Court finally acknowledged that Fourth Amendment doctrine “has not kept pace with ... advances in scientific knowledge.”^{276}

---

^{269} *Id.* at 48 (quoting Wisniewski, 494 F.3d at 40).
^{271} *Id.* at 464.
^{272} *Id.*.
^{273} *Id.* at 472 (Brandeis, J., dissenting).
^{274} *Id.* at 479.
^{275} *Id.* at 472-73; see also, e.g., Bd. of Educ. v. Pico, 457 U.S. 853, 885 (1982) (Burger, C.J., dissenting) (“The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world.”).
In *Katz v. United States*, the Court overruled *Olmstead* because “the Fourth Amendment protects people, not places. . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communications.”

Much as the capacity for government wiretapping of telephones from remote locations lay beyond the contemplation of the Fourth Amendment’s framers in the early 1790s, the capacity for student cyberbullying from the Internet and other remote locations lay beyond the Supreme Court’s contemplation when it articulated and later refined *Tinker*’s First Amendment Doctrine. By upholding the public schools’ authority to discipline cyberbullying that originates from off-campus, lower courts heed Justice Brandeis’ reasoned voice, long since vindicated, that it is “immaterial where the physical connection. . . . was made” because “[t]ime works changes.”

Perhaps most important, applying the *Tinker* Doctrine to cyberbullying also recognizes that the First Amendment in the public schools, like the Fourth Amendment in the greater society, “protects people, not places.” The recognition is particularly critical to public education because the “people” the doctrine protects are schoolchildren, typically including the school’s most vulnerable children once cyberbullies have drawn their targets.

B. Applying *Fraser* to Cyberbullying

The wisdom of applying established Supreme Court doctrine to new technologies relates not only to *Tinker*’s “disruption” and “personal security” prongs, but also to *Bethel School District No. 403 v. Fraser*, which permits the public schools to discipline lewd, indecent, or vulgar student speech laden with sexual innuendo. *Fraser* acknowledged that “[t]he First Amendment guarantees wide freedom in matters of adult public discourse,” but rejected the disciplined student’s contention that “the same latitude must be permitted to children in a public school.” Two years later, dictum in *Kuhlmeier* advanced *Fraser* for the proposition that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”

---

278. *Olmstead*, 277 U.S. at 472, 479; see also J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010) (holding that the off-campus origins of cyberbullying are “not material” where the message has the requisite effect on-campus).
281. Id. at 682 (emphasis added).
Lower courts have applied *Fraser* to a wide range of student speech deemed vulgar, even if not overtly sexual in nature. Citing the territorial language italicized above, however, the relatively few lower courts reaching the issue have held or assumed that the decision applies only to speech that the student actually utters inside the school building.

*Olmstead*’s lineage demonstrates persuasively that courts remain faithful to *Fraser* by applying that decision’s holding to remote student speech that foreseeably reaches the school campus. For one thing, the language italicized above distinguished between the “school,” where educators exercise a “custodial and tutelary” role, and “the government” outside of school; the distinction plausibly suggests that the latter category describes merely what *Fraser* itself called “matters of adult public discourse.”

First Amendment regulation of such adult matters has been narrower than its regulation of children’s activities ever since *Prince v. Massachusetts* in 1944.

Applying *Fraser* to cyberbullying is also appropriate in light of that decision’s lengthy, indeed passionate, embrace of the school’s “basic educational mission” to teach “the boundaries of socially appropriate behavior,” “habits and manners of civility,” and respect for “the sensibilities of fellow students.” When a student communication directed at a particular classmate foreseeably reaches inside the school building, fulfillment of the educational mission does not depend on where the communication originated.

Phoebe Prince’s cyberbullies, for example, used Facebook repeatedly to call her an “Irish slut,” a whore, and a druggie. With documentary evidence, this language would likely provide the school a constitutional predicate for imposing discipline under *Fraser*, without having to prove

---


286. *Fraser*, 478 U.S. at 682.


288. *Fraser*, 478 U.S. at 685.

289. Id. at 681.

290. Id.

291. Id.

disruption of the school’s work under Tinker.293

IV. CONCLUSION

“In an age when the home and church play a diminishing role in shaping the character and value judgments of the young,” wrote Justice Powell a generation ago, “a heavier responsibility falls upon the schools.”294 Teachers and administrators frequently assume responsibility not only as classroom instructors, but also as counselors, confidantes, psychologists, hygienists, nutritionists, and various other authority figures essential to the growth and development of an entire generation of children.295

When parents—the primary agents in the pediatric safety system—falter in preventing and responding effectively to cyberbullying, professionals who teach the young assume additional responsibilities as protectors, cyber ethicists, and disciplinarians. “Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.”296 The public schools’ response to bullying begins with prevention curricula because “fairly consistent evidence suggests that children’s bullying behavior can be significantly reduced by well-planned interventions.”297 Amid the growth of cyberbullying in the age of technology, schools cannot reasonably expect to discipline their way out of the “public health problem.”298 Goals must remain realistic, however, because bullying-prevention efforts cannot eliminate all incidents, any more than criminal statutes can eliminate all incidents of the conduct they target. Reduction, the most realistic aspiration of prevention efforts, spares many student cyberbullying victims, who will likely not even know of their good fortune.299

For acts of cyberbullying that elude prevention efforts and land in court

293. Fraser, 478 U.S. at 685-86.
298. See supra note 33.
299. See generally Abrams, supra note 19, at 410-23.
following imposition of discipline, *Tinker*’s two related yet distinct prongs “balance some students’ rights to free speech with ‘the rights of other students to be secure and to be let alone,’ taking into account the authority of school officials to maintain the discipline and learning environment necessary to accomplish the school’s educational mission.”

Regardless of whether the cyberbully’s messages originate from on-campus or elsewhere, the *Tinker* Doctrine confers constitutional authority on the public schools to discipline student expression that causes, or reasonably threatens, (1) “substantial disruption of or material interference with school activities,” or (2) “collision with the rights of other students to be secure and to be let alone.” Application of *Fraser* provides yet another potent basis for disciplining cyberbullying that descends into lewdness, indecency, or vulgarity.

More than a generation ago, the Supreme Court observed that “while the Constitution protects against invasions of individual rights, it is not a suicide pact.” Neither should the Constitution be a pact with suicide. Cyberbullying victims do not typically choose suicide, but they choose it more often than society should tolerate. The principles underlying the First Amendment are best served by recognizing that students need “to feel safe in school and to be spared the oppression and repeated, intentional humiliation implied in bullying.” These principles are disserved by constitutional interpretations that would relegate professional educators to the sidelines, disabled from protecting distressed children from non-political messages that classmates undeterred by prevention efforts transmit to inflict “willful and repeated harm.”

The *Tinker* Doctrine provides a matrix that authorizes the public schools to convey, in Justice Powell’s words, “an early understanding of the relevance to the social compact of respect for the rights of others.” “No student,” says pioneering anti-bullying researcher Dan Olweus, “should be afraid of going to school for fear of being harassed or degraded, and no parent should need to worry about such things happening to his or her child!”

---


301. *Tinker*, 393 U.S. at 514.

302. *Id.* at 508.


307. Olweus, *supra* note 38; *see also*, e.g., Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) (“Most parents, realistically, have no choice but to send their children to a public school.”).