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Hostile Educational Environments: On the Apparent First Amendment Barrier to Cyberbullying Punishments

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HOSTILE EDUCATIONAL ENVIRONMENTS: RECONCEPTUALIZING THE APPARENT FIRST AMENDMENT BARRIER TO CYBERBULLYING PUNISHMENTS

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Abstract

This Article is one in a series about bullying and cyberbullying in schools. I argue that the proper analysis for a First Amendment challenge to school discipline for off-campus misuse of the Internet to harm or offend a member of the school community depends on the nature of the offending behavior. For students who are punished for a single incident – what I will call cyberattacking – a Tinker analysis makes sense. Except in extraordinary circumstances, the First Amendment should immunize these single-incident attackers from punishment. For students who engage in a pattern of repeated incidents of cyberattacking – what I will call cyberbullying – their creation of a hostile educational environment for their victims parallels the behavior of workplace harassers who may be lawfully disciplined pursuant to Title VII. Therefore, the relative merit of cyberbullies’ First Amendment defenses to lawful punishment should depend more on the interaction between free speech rights and harassment than on the interaction between free speech and a single incident of aggression. In this context, just like the state has a compelling interest in protecting a captive, victimized minority in the workplace from hostile sexual abuse, so too does the state have a compelling interest in protecting bullying and cyberbullying victims in schools. For these few egregious cases, a First Amendment defense to discipline should fail.
# Table of Contents

**Introduction**

I. Properly Defining the Problem of Cyberbullying
   A. Definitions and Distinguishing Characteristics
   B. Frequency of Cyberattacking versus Cyberbullying

II. The First Amendment, Cyberattacking and Cyberbullying
   A. Campus Presence Requirement
      1. A Campus Presence Has Never Been Required for School Disciplinary Authority
      2. Most Lower Courts to Address the Issue Agree that the Supreme Court has Never Required a Campus Presence
      3. The Internet’s Role in Society and Education Make Any Campus Presence Requirement Antiquated
      4. Replacing the Campus Presence Requirement
   B. Speech/Action Distinction on the Internet

III. Analyzing First Amendment Defenses to School Discipline for Cyberattacking and Cyberbullying – Two Ways Forward
   A. Cyberattacking and *Tinker*
      1. How to Apply *Tinker* to Cyberattacking
      2. Why *Tinker*?
      3. Implications of Applying *Tinker* to Cyberattacking
   B. Cyberbullying and Title VII
      1. Hostile Environment under Title VII
      2. Bullying in Schools and Harassment in the Workplace
3. Implications of Similarities: Cyberbullying and the First Amendment

IV. Conclusion – Finding the Appropriate Balance
Amelia and Zachary are unique. They are the first in their school to be suspended for bullying two classmates whom they have never confronted in person. Neither Amelia nor Zachary have behaved in any way like a traditional bully in that neither have physically, verbally or emotionally harmed their victim in any face-to-face setting. The offensive conduct that motivated the suspension took place not in the cafeteria or during study hall or in the locker room; rather, it took place online. Amelia and Zachary are cyberbullies.\(^2\) Amelia created an “I Hate” video in which she ridiculed an overweight peer and posted it to a social networking website for her 500 friends to see. Zachary has been bullying his victim for years, using a fake online profile to post homophobic slurs, spread rumors and graphically depict his victim in compromising situations.\(^3\) Both victims reported the incidents to their principal and both felt embarrassed, depressed and increasingly unsafe in school as a result.

Our antagonists are part of an increasingly common breed of bully that is confounding the judiciary. Cyberbullies eschew traditional on-campus face-to-face harassment in favor of the anesthetized distance and potential anonymity of the Internet. By taking their conduct off campus and making exclusive use of cyberspace, their behavior implicates student free speech law in new and profound ways. But, the ways in which the First Amendment may interact or conflict with attempts to discipline cyberbullies vary. That is, while Amelia and Zachary are composites of so-called cyberbullies recently in the news as subject to school discipline for their behavior, they differ in one important respect. Strictly speaking, only Zachary is a cyberbully.

There are, then, two types of peer-to-peer cyberharassment cases, each of which merit a different analysis to determine whether the First Amendment bars punishment. Few cases are as neatly framed as the hypotheticals involving Amelia and Zachary; often, students combine cyberharassment with face-to-face abuse. But recently, courts have been confronted with similar bullies and cyberbullies and their First Amendment defenses. Amelia resembles the alleged cyberbully in *J.C. v. Beverly Hills Unified School District*,\(^4\) which involved a student who created a YouTube\(^5\) video that criticized another student, and the roommate of Tyler Clementi, a Rutgers University student who committed suicide after a roommate surreptitiously recorded and

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1 Teaching Fellow, California Western School of Law; J.D., Harvard Law School; A.B., magna cum laude, Harvard College. A version of this paper will be delivered at the Lavender Law conference, September 8-11, 2011 in Los Angeles. Special thanks to Shawn Gaylord, Jon Davidson and the National LGBT Bar Association.

2 The terms “cyberbullying” and “face-to-face bullying” are commonly used in the social science literature to distinguish between Internet-based harassment and traditional in-school bullying.

3 Amelia and Zachary are pure hypothetical characters gleaned from a variety of recent reports of cyberbullying cases.

4 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

5 YouTube is a video-sharing website on which users can upload, share, and view videos. See www.youtube.com.
distributed via Twitter\(^6\) a video of Tyler with another young man. \textit{J.C.} and Tyler’s case, on the one hand, starkly differ from stories like Kylie Kenney’s\(^7\) and Ryan Halligan’s,\(^8\) on the other. In the latter cases, tormenters repeatedly used the Internet, social networking websites and other cybertechnologies to bully and harass Kylie and Ryan over time. Neither scenario is necessarily more harmful or tragic than the other; after all, both Tyler and Ryan committed suicide. Nor are the two necessarily mutually exclusive – the video in \textit{J.C.} may have been the subject of a lawsuit, but could have been part of a pattern of conduct. But, what distinguishes these two categories of cases is the repetition of the offending behavior.

Despite the difference between a single incident and a pattern of conduct, the few courts to address First Amendment defenses to lawful disciplining of bullies and cyberbullies have approached both cases the same – through the lens of \textit{Tinker v. Des Moines}\(^5\) and its progeny. \textit{Tinker} is the foundation of the Supreme Court’s student speech jurisprudence. It concerned a single incident of student symbolic speech, which makes it the natural standard by which courts can determine if the First Amendment bars punishment of students like Amelia, who created one harmful and immature video. But, true bullying is characterized by repeated conduct and is strikingly similar to hostile workplace harassment, making a single hurtful incident of harassment qualitatively different, especially for the purposes of analyzing a potential First Amendment defense to a school’s disciplinary authority. It stands to reason that the merit of a First Amendment defense to a school’s authority to punish Zachary, the cyberbully who engaged in a pattern of harassing conduct over time, should mirror the merit of free speech arguments against other laws aimed at preventing harassing patterns of conduct. I propose that Title VII is uniquely instructive here.

I argue that the proper analysis for a First Amendment challenge to school discipline for off-campus misuse of the Internet to harm or offend a member of the school community depends on the nature of the offending behavior. For students who are punished for a single incident – what I will call cyberattacking – a \textit{Tinker} analysis makes sense. Except in extraordinary circumstances, the First Amendment should immunize these single-incident attackers from punishment because their conduct is too similar to the common, albeit immature, give-and-take among adolescents. Since the state cannot have a compelling interest to eradicate everyday immaturity, free speech protections should not bow to a school disciplinarian’s authoritarian control.

For students who engage in a pattern of repeated incidents of cyberattacking – what I will call cyberbullying – their creation of a hostile educational environment for their victims parallels the behavior of workplace harassers who may be lawfully disciplined pursuant to Title VII. Therefore, the relative merit of cyberbullies’ First Amendment defenses to lawful punishment should depend more on the interaction between free speech rights and harassment than on the

\(^{6}\) Twitter is a social networking and microblogging service that enables its users to send and read short messages under 140 characters. A “tweet” can include a hyperlink to another website, photograph or, in this case, a video. See www.twitter.com.


\(^{8}\) Ryan’s Story, www.ryanpatrickhalligan.org.

\(^{9}\) 393 U.S. 503 (1969).
interaction between free speech and a single incident of aggression. In this context, just like the state has a compelling interest in protecting a captive, victimized minority in the workplace from hostile sexual abuse, so too does the state have a compelling interest in protecting bullying and cyberbullying victims in schools. For these few egregious cases, a First Amendment defense to discipline should fail.

This Article proceeds in four parts. Part I argues that cyberbullying (and face-to-face bullying, for that matter) merits different treatment than single incident cyberattacking. Social scientists unanimously agrees that bullying depends on repeated conduct and have shown that bullying and cyberbullying can have more lasting and more serious short- and long-term effects than a single incident of cyberattacking. Part II lays out the First Amendment defense to school discipline for cyberbullying, suggesting that the argument has some intuitive appeal and warrants a rigorous response if punishments for off-campus cyberbullying are to become readily available to educators. Part III addresses the difference between cyberattackers and cyberbullies, arguing that they deserve different First Amendment analyses and suggesting that a cyberbully is less likely to find solace behind free speech rights than a cyberaggressor. Part IV concludes and argues that allowing the First Amendment to protect certain cyberattackers but not cyberbullies is the most prudent course of action because it protects the most abused student victims and strikes a balance between competing interests on the left and right of the political spectrum. The more narrow focus for school and state regulation of off-campus cyberbullies that I propose retains fidelity to core First Amendment principles and recognizes that bullying and cyberbullying in schools is most likely a social problem that the strong arm of the law cannot solve on its own.

I. Properly Defining the Problem of Cyberbullying

The evolution of bullying from the playground to cyberspace represents an insidious and growing problem for schools and adolescents. Cyberattacking and cyberbullying defy the ordinary rules of face-to-face aggression and are generally free of supervision, a natural palliative or ameliorative force in the schoolyard. It should come as no surprise, then, that cyberattacking and cyberbullying can lead to poor academic performance, social maladjustment and absenteeism, and can cause more lasting and severe effects, including depression, anxiety and suicidal ideation. Such effects, alongside a spate of recent bullying and cyberbullying tragedies, are reasons enough to at least consider a legal response. But, while the legal academy is addressing the merits of those judicial and legislative responses, the current literature suffers from a lack of specificity as to what the problem actually is and where to direct those responses. There is a difference between single-incident cyberattacking and cyberbullying, both in their frequency and effects. It makes sense, therefore, to distinguish single-incident cyberattacking from true cyberbullying for two reasons. First, the distinction is faithful to the social science literature that unanimously requires repeated conduct in any bullying definition. Second, single-incident cyberattacking occurs so frequently that its inclusion under the cyberbullying umbrella would deflect attention, overwhelm any response and give fodder to opponents of bullying regulation as over-inclusive and futile.

10 See, e.g., Danielle Keats Citron, Cyber Civil Rights, 89 B.U. L. REV. 61 (Feb. 2009); Alison Virginia King, Note, Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech, 63 VAND. L. REV. 845 (Apr. 2010); Ari Ezra Waldman, Tormented: A Critique of the Criminalization of Bullying as Retributive (submitted simultaneously for publication).
A. Definitions and Distinguishing Characteristics

Cyberattacking and cyberbullying merit different legal analyses in part because psychologists, educators and other social scientists distinguish between the two in their scholarship. The *Journal of the American Medical Association* defines “bullying” as “a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one.”\(^{11}\) The asymmetry of power could be physical (i.e., an athletic student versus a less-physically developed victim) or psychological (i.e., high self esteem versus low self esteem). The bullying can occur verbally (name calling, threats, taunts, “malicious teasing”), physically (hitting, kicking, taking personal belongings) or psychologically (spreading rumors, social exclusion).\(^{12}\) The Department of Justice adds that “[b]ullying … involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful.”\(^{13}\) Physical injury from assaults and emotional injury from direct insults and epithets may be the paradigmatic types of harm, but aggression is not limited to those injuries. Psychological harm caused by repeated exclusion, for example, also fits under the bullying umbrella.\(^{14}\) This is called indirect bullying.\(^{15}\) What social scientists call cyberbullying is, like traditional or face-to-face bullying, the deliberate and repeated hostile behavior by a strong individual or group intended to harm a weaker individual or group.\(^{16}\) The distinction is in the media of harm, such as Internet web sites, e-mail, chat rooms, mobile phones, text messaging and instant messaging.\(^{17}\)


\(^{12}\) *Id.*


\(^{14}\) Blumenfeld, *supra* note 13, at 119. Or, perhaps, the new “Ugly Meter” iPhone Application, which uses facial recognition software to tell someone how ugly he or she is, can be fodder for such bullying. *See* Rosemary Black and Lindsay Goldwert, ‘*Ugly Meter’ iPhone App May Be Hurtful to Kids and Fodder for Bullies*, DAILY NEWS (NEW YORK) (Oct. 20, 2010), available at http://www.nydailynews.com/lifestyle/2010/10/20/2010-10-20_ugly_meter_iphone_app_may_be_hurtful_to_kids_and_fodder_for_bullies.html.

\(^{15}\) Daniel Olweus, Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program, 3 J. CHILD PSYCHIATRY 1171, 1173 (1994).

\(^{16}\) *See* Nansel, *supra* note 11, at 2094 (*cited in* Susan M. Swearer et al., “*You’re So Gay!*”: *Do Different Forms of Bullying Matter for Adolescent Males?*, 27(2) SCHOOL PSYCHOLOGY REVIEW 160, 161 (2008)).

\(^{17}\) Blumenfeld, *supra* note 13, at 119. Warren Blumenfeld, a leading scholar on cyberbullying, provides the following paradigmatic examples: (1) people sending so-called “Flame Mail” to a group to humiliate a victim (“She’s so ugly, so I sent out a flame mail to the entire school making fun of her acne”); (2) electronic hate mail based on a victim’s actual or perceived race, ethnicity, religion, gender, sexual orientation, socioeconomic class, and so on; (3) taking a victim’s screen name and sending an embarrassing message under that name; (4) anonymous derogatory posts on blogs or social networking sites; (5) online polling pages to rate victims as “ugliest,” “biggest
These broad definitions – generally accepted in some form or another in the social science literature and in most states’ anti-bullying statutes – are notable for three reasons.

First, for behavior to reach the level of bullying, it must be repeated. This definition excludes single incidents and perhaps even occasional teasing, but the line between “occasional” and “repeated” are admittedly unclear. Requiring repeated behavior for bullying and cyberbullying makes sense as a natural, common sense limiting characteristic. When students are asked survey questions about “bullying” or “cyberbullying,” their responses almost unanimously assume repeated conduct. If Nancy Willard, executive director of the Center for Safe and Responsible Internet Use, were correct that cyberbullying is general cruel[ty] to others by sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies, then it is difficult to imagine who among us is not a bully or cyberbully. Capturing too much conduct under the bullying and cyberbullying umbrellas does a disservice to the victims of real bullying. Victims subjected to repeated physical, verbal and psychological bullying, like Jamie Nabozny, for example, are qualitatively different than victims in cases like . Jamie was verbally, emotionally and physically harassed for four years until he needed hospital stays, attempted suicide and switched schools. He was hit, spit on, victimized during a mock rape, attacked from behind in a restroom, kicked by bullies in the hallways and constantly berated with homophobic epithets. The victim in . reported that she was considering not going to school the day after the insulting video appeared on YouTube.

A number of studies have suggested additions or subtractions to the definition. For example, Smith and Sharp have suggested that bullying must be unprovoked by the victim. See , eds., (1994) (cited in Oyaziwo Aluede et al., , 35(2) ).

See, e.g., Mass. Gen. Laws ch. 71, § 37O (2010) (defining bullying as “the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.

Much of this discussion is taken from a forthcoming piece arguing that criminalization of bullying and cyberbullying is unlikely to solve the bullying problem in schools. See Waldman, supra note 10.

The breadth of cyberbullying research in this area is too numerous to recite. See, e.g., Blumenfeld, supra note 13, at 122-127; Sameer Hinduja & Justin W. Patchin, Bullying Beyond the Schoolyard: Preventing and Responding to Cyberbullying 17-104 (2009).


Jamie was harassed repeatedly and physically abused by his peers because he is gay between seventh and eleventh grades. Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996). His classmates regularly referred to his as a “faggot,” and physically assaulted him. They hit him, spit on him and two students even grabbed him, threw him on the floor and performed a mock rape on him. Twenty other students looked on and laughed. The harassment, and the
Second, the asymmetrical status of the victim and the aggressor are essential to bullying. At least two studies have suggested that the difference between aggression and the normal give-and-take of the schoolyard is the relationship between the parties—two athletes on the football team tease each other, the lineman bullies a math student with asthma. When the target of teasing or harassing behavior is weak, that behavior is more likely to be considered aggressive than if the parties are true peers. And, weakness can be based on any number of asymmetries, with physical strength only representing the most noticeable paradigm. Minority status causes a significant asymmetry in power, especially where the particular minority is the subject of ridicule, bigotry and hatred outside the school. It should come as no surprise then that young members of the gay and lesbian community are uniquely susceptible to bullying and its tragic consequences. They are bullied because they deviate from the norm; because they are, in the case of adolescent gay boys, less likely to be physically strong; and because anti-gay bullying is either tacitly or explicitly condoned by anti-gay bigotry in society at large.

Notably, both repeated behavior and asymmetry of status are required for actionable sexual harassment under Title VII. The Equal Employment Opportunity Commission (EEOC) has defined sexual harassment as involving repeated and unwelcome speech or conduct that principal’s refusal to take any disciplinary action against the offending students, made Jamie “petrified” to attend school. In eighth grade, Jamie was assaulted in a boys’ bathroom and, again, school officials took no action. The bullying intensified to the point that a district attorney advised Jamie to take time off from school. Id. at 451. But, even after the ten days off, the harassment resumed, leading Jamie to attempt suicide. Id. at 451-2. After a stint in the hospital, Jamie finished the year at a Catholic school.

In ninth grade, Jamie was struck from behind while using a urinal. The impact caused him to fall, allowing another student to urinate on him. Continued bullying resulted in another try at suicide, another hospital stay and a runaway attempt. Students on the bus regularly spouted epithets, such as “fag” and “queer”, at Jamie, and threw steel nuts and bolts at him. While waiting for the school library to open, Jamie was attacked by eight students. One student led the charge, kicking Jamie in the stomach for about five or ten minutes while the other students looked on in amusement. A week later, Jamie collapsed from internal bleeding. By the next year, Jamie left school, enrolled in a school in Minneapolis and was ultimately diagnosed with post-traumatic stress disorder resulting from years of being bullied. Id. at 452. Perhaps the most tragic feature of Jamie’s story is the inexplicable refusal of any school official to do anything about the harassment and their flagrant endorsement of the behavior. Id. at 451-2 (after reporting the attack by the eight boys, the official in charge of discipline “laughed and told [Jamie] that [Jamie] deserved such treatment because he is gay). Jamie’s case suggests that holding school officials responsible for failure to stop bullying under 42 U.S.C. § 1983 is one possible legal recourse. That tactic is of limited use in many other bullying cases. See Waldman, supra note 10, at _._.

24 J.C., 711 F. Supp. 2d at 1117 (the victim “never testified that she feared any type of physical attack as a result of the video. Instead, [she] felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class.”).


27 Judge Posner deserves credit for noticing that there is no such thing as “welcome sexual harassment.” Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1008 (7th Cir. 1994).
creates an unequal work environment based on gender. Although bullying need not be related to gender victimization, it certainly involves repeated and unwelcome speech and conduct that not only creates an unequal educational environment by intimidating and harming the educational opportunities of its victim, but is based on an asymmetry of power between the aggressor and the victim.

The third notable characteristic of the definition of bullying is that other than repetition, the other elements of the bullying definition – intent to harm and imbalance of power – are common to cyberbullies and cyberattackers. But, even though cyberattacking and cyberbullying can cause the same kind of effects, the repeated nature of bullying tends to amplify their gravity. A single incident of aggression can be just as harmful as repeated bullying, but, generally, victims of repeated bullying tend to experience more serious negative outcomes, from withdrawal from school activities, increased Internet use to the exclusion of face-to-face interaction with others and depression. Victims of cyberbullying more often report feelings of suicidal ideation, suicide attempts, severe depression, anxiety that impacts daily activities and post-traumatic stress disorder.

B. Frequency of Cyberattacking versus Cyberbullying

Another reason why cyberattacking and cyberbullying should be treated differently in the eyes of the law is because single-incident cyberattacking is too common to merit a departure from the First Amendment’s sacrosanct free speech protections lest students lose their speech rights altogether. When assessing the frequency and effects of cyberbullying on their test subjects, social scientists distinguish between single incidents and repeated patterns. Their data show that supermajorities of certain student populations have experienced single-incident cyberattacking, but significantly fewer report the kind of negative effects that activists and legislators have said merit a strong state or legal response. This suggests that if single-incident cyberattacking were crowded under the cyberbullying umbrella, there would be little conduct left outside the reach of anti-cyberbullying regulations.

High Internet use among young people makes cyberattacking all too common. According to a 2004 study conducted by i-SAFE America, an Internet safety education

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31 Swearer, supra note 16, at 170.

32 WILLARD, supra note 30.

33 A 2003 study conducted by UCLA found that approximately 91 percent of 12- to 15-year-olds and almost all – 99 percent – teenagers use the Internet on a regular basis. Much of that time is spent talking with their peers. See UCLA Internet Report: Surveying the Digital Future – Year 3 (Feb. 2003), available at http://www.freep.com/money/tech/mwedn17_20031117.htm.
In 2004, 57 percent of students reported receiving hurtful or angry messages online, with 13 percent saying it happens “quite often.” More than 44 percent of respondents received “mean” or “threatening” emails, while 43 percent admit to sending such emails to someone else. Of those, 7 percent admit to doing so “quite often.” Nearly 45 percent have been threatened online, with 5 percent saying it happens “quite often.” Finally, 42 percent reported being attacked online once, with 7 percent experiencing it “quite often.” In 2006, another survey found 11 percent of students reported being regularly harassed online. When students were asked if they experienced cyberharassment at least twice over a two-month period, the positive responses increased to 25 percent of girls and 11 percent of boys. Notably, the survey did not ask students to report if they had been the victims of single-incident cyberattacking. In 2008, a study conducted by UCLA found that nearly one-fifth of respondents (19 percent) experienced frequent online bullying in the past year, but more than 3 times as many experienced one incident of online aggression. If state legislatures and schools applied their cyberbullying rules to all these students who experienced at least one incident of bad behavior online, resources would be stretched and cyberbullying would become the norm.

An analysis of bullying and cyberbullying surveys of the LGBT community highlights the distinction between single-incident aggression and bullying even further. The Gay, Lesbian and Straight Education Network’s (GLSEN) 2009 National School Climate Survey revealed that 88.9 percent of students heard the word “gay” used in a negative way at least once, 72.4 percent heard other homophobic remarks (i.e., “dyke” or “faggot”) in school and online at least once, and 84.6 percent were verbally harassed at least once (i.e., called names or threatened with violence) because of their sexual orientation. More than 40 percent were physically harassed (i.e., pushed, shoved or otherwise physically attacked) at least once at school in the past year because of their sexual orientation and nearly 53 percent were harassed or threatened via electronic media (i.e., text messages, emails, instant messages or postings on Facebook) at least once.

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34 National i-SAFE Survey (June 28, 2004), at www.isafe.org.


37 Jaana Juvonen and Elisheva F. Gross, Extending the School Grounds? – Bullying Experiences in Cyberspace, 78(9) J. SCH. HEALTH, 496, 500 (Sept. 2008). And, those who use instant messaging, webcams and video chat technologies, such as AIM, iChat and Skype, were about 1.5 to 2.8 times as likely to be cyberbullied than those who did not use such communication tools. Id. at 501. Nearly 94 percent of adolescents, however, use those virtual communication technologies. Id.

38 Like face-to-face bullying, cyberbullying is not limited to minorities. However, gay and lesbian students, as well as those questioning their sexual orientation, are overrepresented in student populations that experience both single-incident and frequent online harassment from fellow students. As a result of the LGBT community’s unique victimization in this area, studies focusing on this student population are particularly thorough and detailed.

39 While most of this evidence refers to face-to-face or in-school bullying, it helps establish the difference between single-incident aggression and bullying, in general.
once.\textsuperscript{40} Even accounting for the increased victimization of LGBT students – whereas the latest research suggests that 19 percent of all students experience repeated incidents of cyberbullying, 37 percent of gay and lesbian students are victims of frequent online harassment\textsuperscript{41} – the number of LGBT students who experience single-incident cyberattacking is exponentially higher than those that are cyberbullied.

By broadening the term “bullying” to include single incidents of aggression, we radically change the nature of the problem. Using the data from the i-Safe Survey, there is a six-fold difference between victims of cyberbullying – just over 1 in 10 students – and victims of cyberattacking – just under 6 in 10 students. Even that pales in comparison to the 9 in 10 LGBT students who report experiencing single incidents of aggression. Including cyberattacking under the bullying umbrella minimizes the problems faced by the 1 in 10 adolescents who cannot go online without being victimized. Overextending bullying equates the aggressor in J.C. – who posted a single video criticizing another student – with the aggressor in cases like \textit{Nabozny v. Podlesny},\textsuperscript{42} who tortured Jamie Nabozny for four years until Jamie attempted suicide, switched schools and succumbed to post-traumatic stress disorder.\textsuperscript{43}

In addition, grouping all kinds of aggression together makes the problem pervasive and universal, which has two consequences. As a practical matter, it allows opponents with ulterior motives to criticize all bullying responses. Focus on the Family and other anti-gay conservative organizations, for example, oppose both state-sponsored and school-directed bullying programs for fear that anti-bullying counseling would lead to acceptance and tolerance of LGBT youth\textsuperscript{44} and the organization argues that the pervasiveness of the problem means that little can and should be done.\textsuperscript{45} By focusing instead on the cases social scientists consider bullying and cyberbullying, anti-bullying advocates can effectively silence these arguments.

More significantly, regulating and policing conduct in which supermajorities of students engage creates a new norm rather than highlights and condemns bad behavior. It would turn bullying into the jaywalking of school misbehavior. Jaywalking can net a Manhattan pedestrian a

\begin{footnotes}

\item[41] Blumenfeld, \textit{supra} note 13, at 127.

\item[42] 92 F.3d 446 (7th Cir. 1996).

\item[43] \textit{Id.} at 449-452.


\end{footnotes}
$50 ticket, but on any given day, almost everyone working in Manhattan violates that rule and no one ever gets a ticket. To paraphrase W.S. Gilbert, when everyone is a bully, then no one is.

II. The First Amendment, Cyberattacking and Cyberbullying

Both fidelity to the social science literature and strategic and practical concerns about describing too much common conduct as cyberbullying suggest that judges should treat cyberattacking and cyberbullying cases differently. Normally, cases would progress as follows: Amelia creates her video that ridicules the physical characteristics of her victim and calls her “fat,” “ugly” and “garbage.” Zachary uses his website and a fake social networking profile to harass his victim over a period of time, inviting his online friends to make fun of his victim, post ridiculing comments and even assuming, and then misusing, the victim’s online identity. Both victims inform their principal and report significant negative effects of the aggression. After the principal suspends them for two weeks, Amelia and Zachary sue school officials for violation of their First Amendment rights in connection with the suspension.

I argue that Amelia’s First Amendment defense should be judged by Tinker’s “material and substantial” disruption standard. That is, her cyberattacking would be immunized from school discipline unless her conduct caused a substantial disruption or made school officials reasonably fear a substantial disruption in the future. Since it is likely that Amelia’s conduct created neither a substantial disruption nor a reasonable fear of one, her punishment should be reversed. Conversely, I argue that Zachary’s First Amendment claim should be analyzed like a free speech challenge to Title VII’s proscription against a hostile workplace environment. While there is far less precedent in this area, it is likely that Zachary’s free speech claim will fail because his conduct created a hostile educational environment for a member of a captive audience.

46 Rule 4-04(c)(3) of the New York City Traffic Rules and Regulations.

47 Occasionally, pedestrians do get tickets, but it is hardly the norm. Rabbi Angry At NYPD Over Jaywalking Ticket, CBS NEWS (Nov. 29, 2010), at http://newyork.cbslocal.com/2010/11/29/rabbi-angry-at-nypd-over-jaywalking-ticket/.

48 The quote, “When everyone is somebody, then no one’s anybody,” is attributed to W.S. Gilbert, who wrote H.M.S. Pinafore and The Pirates of Penzance. In The Incredibles, an animated movie, a child endowed with superhero speed cannot join the track team despite his special talent. His mother says, “Everyone is special,” to which he replies, “Then no one is.”

49 Most likely, Amelia and Zachary would sue under 42 U.S.C. § 1983, the principal mechanism for seeking redress for an alleged deprivation of federal constitutional or statutory rights by state actors. Raising a § 1983 claim has its own difficulties, full discussion of which is beyond the scope of this paper. See Waldman, supra note 10, at __–__. See also generally, e.g., MICHAEL GELFAND, CONSTITUTIONAL LITIGATION UNDER SECTION 1983 (2d ed. 1996).

50 Section 1983 plaintiffs can also sue school districts in addition to school officials. This element of the hypothetical case is irrelevant for this Article’s First Amendment thesis.

51 See, e.g., J.C., 711 F. Supp. 2d at 1119 (a similar case found no substantial disruption).
But, before addressing the merits of either Amelia’s or Zachary’s free speech defenses, we have to dispose of both plaintiffs’ likely threshold argument that the off-campus origin of their conduct makes school discipline inappropriate. Schools that punish off-campus cyberattackers and cyberbullies, the argument goes, violate the students’ free speech rights in two related ways: A school’s authority to discipline its students ends at the schoolhouse gate, 52 which takes the allegedly offending behavior outside the ambit of student speech jurisprudence. As such, the argument goes, cyberaggressive behavior should not be judged under Tinker and its progeny, but rather on the speech/action fulcrum that governs nonstudent speech. Essentially, this argument aims to cut off school disciplinary authority at the threshold; that is, if a campus presence is required, a school cannot punish an off-campus cyberaggressor or cyberbully regardless of Tinker’s substantial disruption standard.

This view seems reasonable at first. In Tinker, the Court arguably used the on-campus/off-campus distinction as the basis for its finding that students enjoy fewer free speech rights than members of society at large: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 53 And, in upholding school regulation of certain student speech in a subsequent case, the Court expressly advised that a “school need not tolerate student speech inconsistent with its basic educational mission, … even though the government could not censor similar speech outside of school.” 54 Various circuits have taken the geographic distinction to heart, finding student-written parodies created and distributed off campus 55 and unofficial school newspapers distributed off campus before and after school hours 56 beyond the reach of school discipline, 57 but finding them subject to school discipline where distribution took place on campus. 58 The only exception to the rule is when the offending speech is offered at an off-campus event sponsored or organized by the school. 59 In these cases, the school’s aegis over the event creates a constructive schoolyard that extends the school’s disciplinary authority.


53 Tinker, 393 U.S. at 506 (emphasis added).


56 Shanley v. Northeast Ind. Sch. Dist., 463 F.2d 960, 964 (5th Cir. 1972).

57 See also Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004); Klein v. Smith, 635 F. Supp. 1440, 1441-42 (D. Me. 1986) (enjoining suspension of student who made a vulgar gesture to a teacher while off-campus); Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d at 454 (“Although there is limited case law on the issue, courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school official’s authority over off-campus expression is much more limited than expression on school grounds.”).

58 Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987).

59 Morse v. Frederick, 551 U.S 393, 400-01 (2007).
Though attractive, the campus presence argument should not serve as an *a priori* bar to school discipline of cyberattacking or cyberbullying for three reasons. First, a close reading of *Tinker* and its progeny suggests that the Supreme Court never intended to create a bright line rule between on-campus and off-campus speech. Second, even if it did, the Internet’s transcendent role in modern society and education makes that rule meaningless today. Third, even if a campus presence mattered, the suggestion that cyberattacking and cyberbullying are “mere speech” rather than action, thus deserving First Amendment protection, fails as a matter of theory and practice.

A. Campus Presence Requirement

1. A Campus Presence Has Never Been Required for School Disciplinary Authority

In its student speech cases, the Supreme Court has created one governing standard (*Tinker*) and carved out three limited exceptions, none of which requires a campus presence for school disciplinary authority. In *Tinker*, the Court held that a school may regulate a student’s expressive conduct if such expression causes or is reasonably likely to cause a “material and substantial” disruption to school activities. That case famously involved three students who wore black armbands to school in protest of the Vietnam War. Pursuant to a recently-adopted school policy against such protests, the students were suspended until they would return to school without the armbands. The Court concluded that the school’s disciplinary action violated the students’ First Amendment rights because the protest was “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” Conversely, school discipline would only be appropriate where the facts “reasonably [lead] school authorities to forecast substantial disruption of or material interferences with school activities” as a result of the student speech at issue. Nothing in that standard requires a campus presence to create a reasonable fear of disruption.

The Court decided three student speech cases after *Tinker* and, while it has yet to consider a case involving a First Amendment defense to school punishment for cyberattacking or cyberbullying, the exceptions to *Tinker* that it created all retained *Tinker*’s rejection of the campus presence requirement. In *Bethel School District v. Fraser*, the Court carved out an exception to *Tinker*’s “material and substantial” disruption standard for lewd and “patently offensive” speech at a school event. Such speech could be regulated by school even absent any
Fraser was a high school student who gave a speech nominating a fellow student for elective office during a school assembly. The speech was an “elaborate, graphic and explicit sexual metaphor” about the candidate’s sexual prowess, filled with double entendres about male sexuality. The Court upheld Fraser’s suspension because a school had an obligation to teach the values, civility and behavior that were “socially appropriate” and “essential to a democratic society.” So, while Fraser could have given his speech free of government interference outside the context of the “school environment,” the Court held that where a student engages in lewd, vulgar or offensive speech, the school may regulate such speech as part of its duty to teach “essential lessons of civil, mature conduct” even absent evidence of substantial disruption to the school.

As in Tinker, nothing in this standard requires a campus presence. Admittedly, Fraser gave his speech at a school assembly, on school grounds and during school hours; but, the location and time of his speech were not essential to the Court’s justification for its holding. The school’s disciplinary authority emanated from the school’s educational mission to teach its students, not simply because something lewd happened on campus. This suggests that the school could have disciplined Fraser even if the assembly took place in the Washington State Capitol’s legislative chamber on a class trip. Fraser recognizes the school’s educational mission extends beyond the boundaries of its campus.

The second exception to Tinker’s “material and substantial” disruption standard applies to school-sponsored speech, or speech that bears the official imprimatur of the school, and allows student officials great leeway in banning inappropriate student speech. In Hazelwood School District v. Kuhlmeier, the Court upheld a principal’s decision to remove two articles on teen pregnancy and divorce from the school’s newspaper. Distinguishing Tinker, the Court said that the two cases posed two different issues: Tinker concerned whether a school must tolerate student speech it does not like, but Kuhlmeier addressed whether the school must affirmatively promote student speech it believes does not comport with its educational mission. After all, the newspaper was part of a journalism class and bore the emblem of the school. As such, the

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66 Id. at 683. Notably, the Court noted that the record contained ample evidence of disruption. Teachers testified at trial that some students reacted by laughing, others were shocked and the youngest students were confused and awkward. Id. at 683-84. These reactions, however, were not essential to the Court’s holding that the school could lawfully discipline Fraser.

67 Id. at 678. The sexual nature of the speech made Chief Justice Burger so uncomfortable that he wrote his entire majority opinion without ever quoting the speech. Justice Brennan filled that void at the beginning of his dissent. Id. at 687 (Brennan, J., dissenting).

68 Id. at 681.

69 Id. at 688 (Blackmun, J., concurring).

70 Id. at 683.


72 Id. at 272-73.

73 Id. at 270.

74 Id. at 268.
Court held that “educators are entitled to exercise greater control” over speech that could reasonably be interpreted as endorsed by the school.\footnote{Id. at 271.}

The Kuhlmeier exception for school-sponsored speech has no more of a campus presence requirement than Tinker or Fraser. The principle would still apply if the newspaper was created by the students at home or as an after school enrichment activity. In the Hazelwood school district, the newspaper was a product of journalism students who did their work during their journalism class. But, in most secondary schools, the newspaper is an extra-curricular activity that is created after school hours. Either scenario would still fit under the Kuhlmeier exception because what mattered for the school’s disciplinary authority was not where the students worked, but that their work bore the imprimatur of the school. Even if the students did their work at home and after school, as long as they published their work in a school-sponsored newspaper, school officials could exercise significant editorial control.

Finally, the Court’s third exception to Tinker’s analysis captures student speech that “is reasonably viewed as promoting illegal drug use.”\footnote{Morse v. Frederick, 551 U.S. 393, 403 (2007).} In Morse v. Frederick, a student attending the Olympic Torch Relay that passed on the street in front of his high school held a sign that the principal believed promoted the use of marijuana.\footnote{Id. at 397-98.} The Court upheld the school’s suspension of that student because the student was present at a school-sponsored viewing of the Relay, unfurled his banner so everyone at the school could see and arguably promoted conduct that the school had an interest in stopping.\footnote{Id. at 397, 408.} The Court based its holding not on where Frederick stood when he expressed his opinions, but on the school’s educational mission and its legitimate goal of not only stopping illegal drug use, but also to prevent anyone from using school time to promote it.

Like Tinker and the exceptions created in Fraser and Kuhlmeier, a campus presence is not required in Morse. What is required is a student acting in a context in which he is acting \textit{qua} student, i.e., at an assembly, in a journalism class, at a school-sponsored event. Admittedly, though, these cases are littered with references to the schoolhouse, the classroom and other physical nexuses to the school. That is of no moment. The evidence of a campus presence is arguably a simple heuristic for determining when the behavior at issue characterizes the student \textit{qua} student, rather than student \textit{qua} citizen, \textit{qua} Little Leaguer, \textit{qua} church-goer, \textit{qua} surfer or any other persona not subject to school discipline. While most student speech analyses begin with Tinker’s oft-quoted premise that the “schoolhouse gate” does not eradicate student free speech rights, a close reading of these cases suggests that the Supreme Court is not speaking literally. There is no physical gate delineating the boundaries of student speech; rather, it is shorthand, a linguistic flair or euphemism for determining when a given adolescent is acting \textit{qua} student, thus subject to school discipline, and when he is not. The evidence for this conclusion is twofold. First, both the Court’s language and substance suggests that its student speech cases were more about the relationship between the student and his education than about the geographic boundaries of a school campus. Second, wherever it appears to rest its conclusions on
location or school property, the Court follows with a reminder that the physical campus is just a symbol of or stands in for the educational mission.

Students may be “‘persons’ under our Constitution” in and out of school, but it is not the boundaries of the school campus that distinguishes the extent of their rights. It is the “school environment” that plays that role. Here, a school is defined by its mission — to teach and educate minors in the ways of civil society. And, that mission may extend beyond the classroom. That was the Court’s holding in Morse. The Court upheld the school’s disciplinary authority because a school must be empowered “to safeguard those entrusted to their care,” regardless of on which side of the campus boundary line the student held the sign. Indeed, in Fraser, where a student was suspended for delivering a lewd student council nominating speech, Justice Brennan ignored the on-campus/off-campus distinction entirely, admitting that Fraser’s “speech may well have been protected had he given it in school but under different circumstances, where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty.”

Admittedly, the Court’s student speech precedents are littered with references to the schoolhouse and to officials’ authority limited to “conduct in the schools.” But, in most cases, the references to the four walls of the schoolhouse are cabined by the Court’s reminders that the school’s educational relationship to its students is salient. In Tinker, the Court distinguishes between speech inside and outside of the “schoolhouse gate,” but analyzes the students’ free speech rights in the context of students’ and teachers’ liberty interest in an education free of

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79 Tinker, 393 U.S. at 510.

80 Id. at 506; Fraser, 478 U.S. at 688 (Brennan, J., concurring).

81 Id. at 683-84 (“The process of educating our youth for citizenship in public schools is not confined to books, the curri-culum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers-and indeed the older students-demonstrate the appropriate form of civil discourse and political expression by their con-duct and deportment in and out of class. Inescapably, like parents, they are role models.”).

82 Morse, 551 U.S. at 397-98.

83 Morse has come under fire from civil libertarians. See, e.g., ACLU Slams Supreme Court Decision in Student Free Speech Case (June 15, 2007), at http://www.aclu.org/free-speech/aclu-slams-supreme-court-decision-student-free-speech-case (quoting ACLU National Legal Director Steven R. Shapiro as follows: “The Court’s ruling imposes new restrictions on student speech rights and creates a drug exception to the First Amendment. The decision purports to be narrow, and the Court rejected the most sweeping arguments for school censorship.”). It is beyond the scope of this paper to either join the chorus of that criticism or defend the Court’s analysis. I argue that, at a minimum, Morse reflects the Court’s longstanding belief that the on-campus/off-campus distinction matters little for student speech. In that respect, Morse is loyal to Tinker.

84 Fraser, 478 U.S. at 689 (Brennan, J., concurring) (emphasis added).

85 Tinker, 393 U.S. at 507. See also, e.g., id. at 511 (“state-operated schools may not be enclaves of totalitarianism”); id. at 512-13 (referring to students’ rights “in the cafeteria, or on the playing field, or on the campus during authorized hours”); Fraser, 478 U.S. at 685 (“a high school assembly or classroom is no place for a sexually explicit monologue”).

86 Tinker, 393 U.S. at 506.
Later in the opinion, Justice Fortas seems to return to the school-centric focus when he states that student rights embrace not only classroom hours, but also the cafeteria, the ball field and any part of the “campus during the authorized hours,” but then reminds us that what he means is that “[s]chool officials do not possess absolute authority over their students” irrespective of their physical location and what matters is disruption to the educational mission. Similarly, in Fraser, the Court appears to suggest that the issue is what kind of speech is allowed “in the classroom or in school assembly,” but then reminds us that Fraser’s vulgar speech can be limited not because of where he spoke, but because a school has an interest in protecting minors from his arguably lewd comments. A similar analysis held sway in Kuhlmeier. In that case, officials were permitted to censor two articles in the school newspaper not because students created and distributed the newspaper on campus, but only because the paper was part of the pedagogical mission of a journalism class, bore the imprimatur of the school and the censorship was “reasonably related to legitimate pedagogical concerns.” The fulcrum upon which the merit of the First Amendment defenses was decided, therefore, was the relationship of the school to the student qua student, that is, to the adolescent as a young mind to be taught, molded and, in some cases, protected.

If a campus presence was essential to lawful school discipline, all an aggressor would have to do to avoid punishment is take his behavior just outside the gate. This reality has moved most courts to ignore the on-campus/off-campus dichotomy and assess off-campus student speech based on its on-campus effects. But, if location is not a valid distinction for determining

87 Id. at 506-7.
88 Id. at 512-13.
89 Id. at 511.
90 Id. at 513.
91 Fraser, 478 U.S. at 683 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”).
92 Id. at 684-85. Compare also id. at 685 (“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”) (emphasis added) with id. (“A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”) (emphasis added). This language suggests that the important factors are the audience and the educational mission. The location is convenient to, but not determinative of the Court’s analysis.
93 Kuhlmeier, 484 U.S. at 268, 272-73.
94 Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in Tinker when analyzing off-campus speech brought onto the school campus. See, e.g., Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075-77 (5th Cir. 1973) (student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (analyzing student poem composed off-campus and brought onto campus by the composing student under Tinker); Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then
the lawfulness of school discipline, what may animate the decisions of those jurisdictions that
honour the dichotomy are the different relationships between the school and the students involved,
for which an on- or off-campus location is a simple heuristic. In *Thomas v. Board of Education,
Granville Central School District*,\(^{95}\) for example, students could not be punished for creating and
distributing off campus a magazine inspired by National Lampoon. Nor could the students in *Shanley v. Northeast Independent School District*\(^{96}\) be punished for creating and distributing a
so-called “underground” newspaper. In these paradigmatic cases, the publications’ creators may
have been students, but they were not acting *qua* students when they wrote parodies or opinion
pieces on political topics of the day. They were humorists and political activists, two groups
whose speech rights are sacrosanct. The on-campus/off-campus distinction may simply be easy
shorthand for determining when students express themselves *qua* students and when they express
themselves *qua* citizens.

2. Most Lower Courts to Address the Issue Agree that the Supreme Court has
Never Required a Campus Presence

The Supreme Court has never had occasion to address a school’s disciplinary authority
over off-campus cyberattacking and cyberbullying. I have interpreted the Court’s precedents to
mean the Court’s school speech cases apply regardless of any off-campus origin, and most lower
courts, some of which have been confronted with cyberattacking cases, agree.

Some circuits apply *Tinker* without considering where the speech originated. In *LaVine v.
Blaine School District*,\(^{97}\) for example, the Ninth Circuit upheld a school’s authority to expel a
student who wrote a graphic and violent poem about killing his classmates. He wrote his poem
off campus, after school hours and not part of any school-related activity,\(^{98}\) but brought the poem
to school on his own. He showed his work to a teacher, who brought the poem to a school
counselor and the principal. The student was expelled as a result.\(^{99}\) Without regard to the off-
campus origin of the poem, the Ninth Circuit determined that the poem fell under *Tinker* and not
under any of the Supreme Court’s exceptions to its “material and substantial” disruption
standard. After all, neither *Fraser* nor *Kuhlmeier* applied because the poem was not vulgar, lewd
or obscene and the poem was not part of any school-sponsored event.\(^{100}\) The court upheld the

brought it onto campus; author had been disciplined before for bringing top-ten lists onto campus); *Emmett v. Kent
Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website
constructed off-campus); *Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)
(student disciplined for criticizing school officials on a website created off campus).

\(^{95}\) 607 F. 2d 1043 (2d Cir. 1979).

\(^{96}\) 463 F.2d 960 (5th Cir. 1972).

\(^{97}\) 257 F.3d 981 (9th Cir. 2001).

\(^{98}\) *Id.* at 983.

\(^{99}\) *Id.* at 986.

\(^{100}\) *Id.* at 988-89. The rule that *Tinker* applies to all student speech that does not fit within the *Fraser* or
*Kuhlmeier* exceptions is a reasonable reading of Supreme Court precedents and was established in the Ninth Circuit
school’s authority to expel the student because of a reasonable fear that a poem about killing a classmate would disrupt the school.\textsuperscript{101}

The \textit{LaVine} analysis is common in courts across various jurisdictions. In \textit{Shanley}, for example, the Fifth Circuit applied \textit{Tinker} to an underground newspaper that students created and distributed off campus, but where a few copies showed up on campus.\textsuperscript{102} And, in \textit{Boucher v. School Board of the School District of Greenfield}, the Seventh Circuit upheld discipline for a student who printed an underground newspaper off campus.\textsuperscript{103} In these and other cases, courts have gone straight to applying \textit{Tinker}’s substantial disruption standard to determine the merit of a First Amendment defense to a school’s disciplinary authority. They all ignored the lack of a campus presence. In \textit{O.Z. v. Board of Trustees}, the district court stated explicitly that “the fact that Plaintiff’s creation and transmission of the [speech] occurred away from school property does not necessarily insulate her from school discipline.”\textsuperscript{104} After all, the mere fact that the student’s conduct took place off campus does not mean that it cannot “create a foreseeable risk of substantial disruption” in the school environment.\textsuperscript{105}

Admittedly, the Second Circuit takes an extra step before reaching the \textit{Tinker} test. For \textit{Tinker} to apply, the origin of the speech is part of a threshold question: there must be a connection, or nexus, between the speech and the school, and the off-campus origin of the speech is one factor that weighs against a finding of a sufficient nexus. This is simply another way of determining if the student was acting \textit{qua} student, or as someone independent of the school community.

For example, in \textit{Wisniewski v. Board of Education of the Weedsport Central School District},\textsuperscript{106} a student created an AIM\textsuperscript{107} icon for his online profile of a gun firing at a man’s head

\textsuperscript{101} \textit{Id.} at 992.

\textsuperscript{102} Shanley, 462 F.2d at 970-71.

\textsuperscript{103} 134 F.3d 821, 827-28 (7th Cir. 1998). \textit{See also} Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying \textit{Tinker} where student was disciplined for composing degrading top-ten list and distributing it off campus to friends via email, and where one recipient brought the list to campus); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying \textit{Tinker} to a website created by a student off campus that contained mock obituaries of classmates); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying \textit{Tinker} to a website created by a student off campus that contained criticism of school authorities, when another student accessed the website at school and showed it to a teacher); O.Z. v. Bd. of Trustees of Long Beach Unified Sch. Dist., No. CV 08-5671, 2008 WL 4396895, *4 (C.D. Cal. Sept. 9, 2008) (applying \textit{Tinker} to uphold a suspension where a student created a video off campus during spring break that depicted a graphic dramatization of a teacher’s murder and then posted the video on the Internet); Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 285-86 (Ct. App. Or. 2000) (applying \textit{Tinker} to an underground newsletter distributed on campus).

\textsuperscript{104} 2008 WL 4396895, at *4.

\textsuperscript{105} \textit{Id.} \textit{See also} J.S. ex rel. Snyder v. Blue Mountain, 593 F.3d 286, 301 (3rd Cir. 2010) ("[W]e hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption … with a school need not satisfy any geographical technicality in order to be regulated pursuant to \textit{Tinker}."); Killion, 136 F. Supp. 2d at 455 (holding that the court need not consider plaintiff’s argument that a heightened standard applies to speech occurring off school grounds because "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with \textit{Tinker}.").

\textsuperscript{106} 494 F.3d 34 (2d Cir. 2007).
with red dots of “blood.” Beneath the icon, the student wrote “Kill Mr. Vander-Molen,” referring to the student’s English teacher. Another student printed a copy of the icon, showed it to the teacher and then brought it to the school’s principal. The court applied Tinker only after considering whether anything created off campus could foreseeably “reach the school property” and whether the evidence showing that it did even mattered. And, in Doninger v. Niehoff, a student sent an email to her peers and their parents and posted comments to her blog criticizing school officials for canceling a school event. She implored her peers to contact school officials and complain. The message’s purpose, then was to have the criticism reach campus, thus bringing the speech under Tinker. Finally, J.S. v. Bethlehem Area School District represents a stark use of the off-campus origin of the speech at issue as a threshold matter for the court. In that case, the Supreme Court of Pennsylvania analyzed whether a student should be disciplined for a website he created off campus that contained violent and derogatory comments about school officials. It noted that the “location” of the speech was its first inquiry, noting that if the speech was on-campus speech, Tinker would apply. But, if the speech was purely off-campus speech, it “would arguably be subject to some higher level of First Amendment protection.” The court found a sufficient nexus between the speech and the school campus because the student had accessed the website during class and informed other students about it. Also, the court reasoned that the nexus was strong because school officials were the subjects of the website.

In each of these cases, off-campus speech was ultimately subjected to the school’s disciplinary authority because of the nexus between the speech and the school, i.e., because the student was acting qua student. This also explains why a school could not discipline the student in Mahaffey v. Aldrich. In that case, a student created a website in which he told his readers to select any person and kill them in a particularly gruesome manner that was described in detail on the website. The district court found no evidence of any connection between the website and the school, particularly because the student’s calls for violence were generic, independent of the

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108 Wisniewski, 494 F.3d at 35-36.

109 Id. at 36.

110 Id. at 39.

111 527 F.3d 41 (2d Cir. 2008).

112 Id. at 44-46.

113 Id. at 50-52.

114 807 A.2d 847 (Pa. 2002).

115 Id. at 864.

116 Id. at 865.

school community and too general to be reasonably directed at any particular member of the school. As such, in cases where a school could punish an online aggressor and even where schools could not, the geographic origin of the speech is really irrelevant. When the speech originated on campus, the nexus to the school is obvious; when the speech originated off campus, the nexus is established by reference to the subject of the speech, the intent of the speaker, the intended audience and other factors. These factors establish that the speaker was acting qua student, i.e., a member of the school community, rather than just a violent member of the community at large. That critical comments originated off campus was never an a priori barrier to a school’s disciplinary authority.

3. The Internet’s Role in Society and Education Make Any Campus Presence Requirement Antiquated

I have so far argued that none of the Supreme Court’s student speech cases were based on an on-campus/off-campus distinction and that most courts that have interpreted those precedents agree. But, even if that were not the case, a bright line geographic distinction no longer makes sense. The distinction falls apart when confronted by the boundless expanse of cyberspace and by the Internet’s essential role in modern education. That is, even if a campus presence used to be required for lawful school discipline of student speech, that requirement should be dropped given the emergence and growth of the Internet as a social and educational tool.

Indeed, several courts and scholars have already commented on the pervasiveness of computer and Internet use in our daily lives, a conclusion based on incontrovertible data. Studies have shown that the Internet and other cyber- and digital technologies have taken the place of traditional media in everything from entertainment and advertising to buying coffee and

118 Id. at 784.

119 In People v. Rocco, 766 N.Y.S.2d 58 (2d Dep’t 2003), for example, the court noted that it would be difficult, if not impossible, to conduct business in contemporary society without the use of or access to a computer. Id. at 59. See also, e.g., Ickes v. Borough of Bedford, Civil No. 2009-37, 2010 WL 4959881, at *3 n.2 (W.D. Pa. Dec. 3, 2010) (referring to a well-known incident between a police officer and a young man named Andrew Meyer, who yelled, “Don’t tase Me, Bro,” the court noted that the pervasiveness of the Internet allows altercations like that to remain in the public’s mind long after they occur); Chicago Architecture Foundation v. Domain Magic, LLC, No. 07 C 764, 2007 WL 3046124, at *4 (N.D. Ill. Oct. 12, 2007) (“The pervasiveness of the Internet, and the wide range of Internet activities available to consumers, poses interesting jurisdictional issues for courts. ‘The type of Internet activity that is sufficient to establish personal jurisdiction remains an emerging area of jurisprudence.’”).

120 See, e.g., Chris Albrecht, More People Watching TV Shows Online, GIGAom (Oct. 15, 2007), at http://gigaom.com/video/more-people-watching-tv-shows-online/ (citing studies showing year-to-year increases in the use of the Internet and expectations for further increases); Marisa Guthrie, Survey Says: More People Watch TV Online, Broadcasting & Cable (July 17, 2007), at http://www.broadcastingcable.com/article/109621-Survey_Says_More_People_Watch_TV_Online.php (citing Nielsen’s NetViews and NetRatings studies showing sharp increases in Internet use for watching television).
socializing. This is because the popularity of the computer and the Internet has increased to pervasive levels in the last ten years. According to one study, there were 575 million personal computers in use world-wide at the end of 2004; that number was expected to “double to almost 1.3 billion by the end of the decade.” And, in 2008, the population of the United States was 337 million and nearly 247 million Americans (73 percent) were online.

The Internet is not only pervasive, it is borderless. This has moved some courts to question whether any Internet regulation is possible, but at a minimum, it calls into question the practical validity of any location- or geography-based rule for Internet speech and behavior. If anyone can access anything from anywhere – and statistics show that everyone is accessing everything from everywhere – then whether someone created, distributed or viewed something online at home, in France or on an airplane is irrelevant. It is also impossible to define. A YouTube video, Facebook profile or anything else on the Internet has no location, but rather is simply a set of digitized computer instructions that have no real space. Packets of 1’s and 0’s

122 See, e.g., Verne Kopytoff, Google’s Ad Targeting Goes Behavioral, S.F. GATE (Mar. 11, 2009), at http://www.sfgate.com/cgi-bin/blogs/techchron/detail?blogid=19&entry_id=36840; Scott J. Orr, Advertisers Flocking to the Internet, Where the (Inter)action Is, NJ.COM (Feb. 11, 2008), at http://blog.nj.com/digitallife/2008/02/advertisers_flocking_to_the_in.html (estimating that the amount spent on Internet advertising will reach $42 billion by 2011).


124 There are more than 500 million active users on Facebook, for example, with at least 175 million logging in each day. Statistics, People on Facebook, http://www.facebook.com/press/info.php?statistics; Nicholas Carlson, Guess How Many People Log Into Facebook Each Day, BUSINESS INSIDER (Feb. 1, 2010), at http://www.businessinsider.com/its-facebook-scale-stupid-2010-2.


127 See, e.g., Am. Libraries Ass’n v. Pataki, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) (“The borderless world of the Internet raises profound questions concerning the relationship among the several states and the relationship of the federal government to each state”). In holding the Communications Decency Act unconstitutional in ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), Judge Danzell identified four important characteristics of the Internet: “First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.”). See also C. Gosnell, Jurisdiction on the Net: Defining Place in Cyberspace, 29 CAN. BUS. L.J. 344 (1998).


-24-
organized into code are unlike flyers, newspapers, pamphlets and other traditional forms of expression – the latter exist in definable space, the former do not. In part because the Internet has come to pervade our daily lives, it has taken on an increasingly salient role in education. Secondary school teachers have integrated digital technologies into their classrooms through email exchanges;\textsuperscript{129} speaking with and learning from students in other countries;\textsuperscript{130} accessing research tools, newsgroups and RSS feeds;\textsuperscript{131} assigning homework that requires citations to Internet resources and detailed “show your work” reports on how the student found those websites;\textsuperscript{132} integrating teaching across disciplines;\textsuperscript{133} virtual class trips or virtual lessons that access Internet material;\textsuperscript{134} and in a plethora of other ways. There are countless websites aimed at further integrating the Internet into the classroom\textsuperscript{135} and all levels of government are working with outside donors to provide computers and Internet access to public schools.\textsuperscript{136} All of these programs encourage both the integration of the Internet into the classroom and the use of the Internet as an educational tool at home. If it ever was, the “school environment,” to use Justice Fortas’s term in \textit{Tinker}, is no longer defined by the four walls of the classroom. It is as boundless as the Internet tools it deploys to teach students how to add and subtract, read and write, think and grow.

4. Replacing the Campus Presence Requirement

The circuits, then, appear to be of two minds when it comes to the threshold question of whether a school has the authority to discipline a student for off-campus expression. For jurisdictions like the Ninth Circuit that have always considered the locus of origin irrelevant, the impact of the Internet in society and education requires no change in jurisprudence. For these

\textsuperscript{129} Pamela U. Silva et al., \textit{E-mail: Real-life Classroom Experiences with Foreign Languages}, 23 \textit{Learning & Leading Tech.} 10, 10-12 (1996).

\textsuperscript{130} \textit{Id.}


\textsuperscript{132} Martha D. Rekrut, \textit{Using the Internet in Classroom Instruction: A Primer for Teachers}, 42 \textit{J. Adol. & Adult Literacy} 546, 547-48 (Apr. 1999).


\textsuperscript{134} Lawrence A. Tomei, \textit{Preparing an Instructional Lesson Using Resources off the Internet}, 24 \textit{T.H.E. J.}, 93, 93-95 (1996) (discussing a lesson that allowed students to access Internet resources on the Holocaust).

\textsuperscript{135} See, \textit{e.g.}, Internet 4 Classrooms, http://www.internet4classrooms.com/.

\textsuperscript{136} President Obama’s “Race to the Top” initiative provides deserving schools with computers and Internet access to fully integrate the Internet into the school curriculum. See Race to the Top, http://www2.ed.gov/programs/racetotop/index.html. See also 2008 Access to Learning Award: Vasconcelos Program, Bill and Melinda Gates Foundation, http://www.gatesfoundation.org/atla/Pages/2008-vasconcelos-program.aspx (providing funding for “state-of-the-art mobile classrooms are equipped with laptop computers, self-directing satellite dishes with Internet connectivity, networked servers, video projectors, interactive white boards, and back-up generators” to reach poor, remote and mostly rural areas).
courts, a campus presence was never required, and, as argued above, this view is the best interpretation of *Tinker* and its progeny.

But, the Second Circuit’s view is not irrational. It represents a desire to balance sacrosanct free speech rights with deference to school authorities in a context never imagined by the Supreme Court in *Tinker*. At a minimum, though, the on-campus/off-campus distinction should never be determinative of a school’s authority to discipline cyberattacking or cyberbullying. And, in any event, the Circuit’s use of campus presence evidence may just be a shorthand way of determining if the student is acting *qua* student. To their credit, no court to follow the Second Circuit’s reasoning has ever found the off-campus origin determinative. In *Thomas*, for example, students who created an independent, non-school-sponsored magazine modeled after the National Lampoon could not be punished for its sexual content not because the magazine was created off campus, but rather because the students “deliberately designed” all activities to take place off campus and made every effort to make sure copies never showed up on campus and made no mention of their peers, teachers or school community. The students were not just expressing themselves off campus, they were divorcing their expression from the school context in its entirety. They were not acting *qua* students. This purposeful lack of any connection to the school made *Thomas* a non-student speech case, and thus out of the school’s disciplinary reach.

If my theory is correct that what matters for school disciplinary authority has always been students acting *qua* students, then neither the Ninth nor the Second Circuits need to change the way they determine the threshold question of whether that authority exists for off-campus speech. The on-campus/off-campus distinction is, at a minimum, antiquated. To determine when an adolescent is acting as a student of the “school environment,” even the Second Circuit does not simply look at the geographic origin of the speech. Instead, it looks to the relationship between the speaker and the school.

In cyberattacking and cyberbullying cases, the school nexus should similarly be determined by the relationship between the aggressor and his victim. Peer-to-peer cyberattacking and cyberbullying cases involve an aggressor targeting a victim he knows from school; that is, their antagonistic relationship exists because of their membership in the same school community. The cyberexpression would not exist but for their attendance at the same school. If a student attacks a victim he knows only because he is a student at his school, then he is acting as a student. This stands in contrast to an adolescent who attacks a victim he knows from family or church; in those cases, the aggressor is acting as a member of an entirely different community.

This theory has a number of advantages. First, it bridges the apparent circuit divide – exemplified by the Ninth Circuit, on the one hand, and the Second Circuit, on the other – about the role of the geographic origin of the speech. The Ninth Circuit ignores where the speech originated because Supreme Court precedents make the on-campus/off-campus distinction irrelevant and because speech that originates off campus can still have a substantial effect on the school environment. Conversely, the Second Circuit looks to the relationship between the off-

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137 Thomas, 607 F.2d at 1045.

138 Id. at 1050.

139 See, e.g., J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (“Importantly, 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”).
campus speaker and the school to determine if it is reasonably foreseeable that the off-campus speech would reach campus.\textsuperscript{140} When the speaker and target are part of the same school community, and especially when the speech occurs over the Internet or other digital technologies, it is reasonable to expect the speech to reach campus, thus obviating the need for the Second Circuit’s threshold question.

Second, the relationship test avoids the difficulties associated with a campus presence requirement in the Internet age. The pervasiveness of the Internet in daily life and in education makes it overwhelmingly likely that any type of cyberexpression aimed at the school community will find its way to campus. And, third, the relationship test uses a principle that has a solid foundation in other areas of law. In contract law, fiduciary duties are established by particular relationships between parties;\textsuperscript{141} at common law, it determined whether a hired party was an employee;\textsuperscript{142} and, in negligence actions, the existence of a duty of care hinged on the relationship between the parties involved;\textsuperscript{143} to name just a few examples.

But, the student acting \textit{qua} student, as evidenced by the relationship between the aggressor and his victim, is not determinative of a school’s authority to punish him for cyberattacking. It answers a threshold question of whether a bad actor could be punished by his school for conduct done outside of school and online. Once this threshold is crossed, a court’s analysis of the merit of a free speech defense to that punishment should depend on the nature of the conduct at issue, i.e., the difference between single-incident cyberattacking and repeated cyberbullying.

B. Speech/Action Distinction on the Internet

It should now be clear that the off-campus origin of cyberattacking and cyberbullying should not be an \textit{a priori} barrier to a school’s disciplinary authority. In the Internet age, regulating student speech based on the location of its origin, dissemination or access ignores the sea change that cyberspace has brought to modern life and education. But, even if that were not the case – if a geographic definition were possible and reflected the Supreme Court’s intentions in \textit{Tinker, Fraser, Kuhlmeier} and \textit{Morse} – suggesting that student cyberattacking, cyberbullying and cyberexpression generally is pure speech, with no element of action, should not raise a

\textsuperscript{140} E.g., Wisniewski, 494 F.3d at 39; Doninger, 527 F.3d 50.

\textsuperscript{141} See, e.g., Chiarella v. United States, 445 U.S. 222, 233 (1980) (noting the “established doctrine that [a fiduciary] duty arises from a specific relationship between two parties”).

\textsuperscript{142} See, e.g., Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-34 (1992) (“‘Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.’”).

\textsuperscript{143} See, e.g., Hoidas v. Wal-Mart Stores, Inc., No. 09 C 7409, 2010 WL 1790864, *2 (N.D. Ill. Apr. 30, 2010) (“The law of agency does not impute a duty that the principal owes to a third party onto an agent. Instead, the duty of care flows from the relationship between the parties.”) (internal citations omitted).
second barrier to a school’s disciplinary authority. The speech/action distinction may pepper First Amendment scholarship, but these categories are “elusive”¹⁴⁴ and unhelpful.

The notion that the First Amendment protects speech, not action¹⁴⁵ is popular, yet not entirely accurate; it is a common element to many free speech cases, but it is the beginning of any analysis, not the end. The distinction, at least in part, arguably explains the difference between cases like *Cohen v. California*,¹⁴⁶ where the Court reversed a conviction for entering a courthouse wearing a jacket emblazoned with the words “Fuck the Draft”,¹⁴⁷ and *United States v. O’Brien*.¹⁴⁸ where the Court upheld the prosecution of protestor who burned his selective service card.¹⁴⁹ The First Amendment protects expression, not the “noncommunicative” element of burning a government document.¹⁵⁰

Even assuming this distinction has merit as a governing principle of free speech law,¹⁵¹ the speech/action distinction is obscure in almost every context and especially with respect to the Internet.¹⁵² As Professor Danielle Keats Citron has argued, the Internet both aggregates words into action – “hacking and denial of service attacks … are accomplished by sending communications to other computers”¹⁵³ – and disaggregates communications into components that operate as actions, as with online sexual harassers who refuse to leave cues to mitigate the victim’s fear. In other words, a threat that arrives anonymously and without any indication of a joking tone “engenders serious fear that [the threat] will be carried out offline.” The absence of these cues evidences an intent to “terrorize the victim,” which can “convert [online] expression into criminal conduct.”¹⁵⁴


¹⁴⁷ Id. at 16-17, 26 (quoting the California Supreme Court as noting that “[t]he defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.”)


¹⁴⁹ Id. at 381-82 (“the governmental interest … [is] limited to the noncommunicative aspect of O’Brien’s conduct”).

¹⁵⁰ Id.

¹⁵¹ See, e.g., LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 830 (2d ed. 1988). Professor Tribe has criticized the speech-action distinction as lacking analytical substance and being impossible for any court to define. See also Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 692-93 (1993).

¹⁵² Citron, supra note 144, at 100.

¹⁵³ Id.

¹⁵⁴ Id.
To suggest, then, that cyberattacking and cyberbullying are examples of pure speech, meriting greater First Amendment protection, is a losing argument. A Facebook page that is created solely to terrorize a student or an online polling page created to rate the attractiveness of a victim may be coded messages of 1’s and 0’s communicated from one computer to another, but they are no more examples of pure speech than face-to-face threats, intimidation and harassment. And, in any event, the inquiry into the merit of a free speech defense does not end with categorizing given behavior as speech. Even in the context of political speech, where First Amendment protections are at their zenith, such speech can be regulated or curtailed for any number of reasons.

III. Analyzing First Amendment Defenses to School Discipline for Cyberattacking and Cyberbullying – Two Ways Forward

At this point, Amelia’s and Zachary’s threshold objection to school discipline has failed. Regardless of the off-campus origin of and elements of speech to their conduct, a school can still discipline them as members of the school community. Now, the cases can proceed to the merits of their First Amendment defenses. For Amelia, her future lies with Tinker; for Zachary, his fate lies with the Title VII hostile environment model.

Three factors – the differences between single incident cyberattacking and repeated cyberbullying, the transcendent roles played by the Internet in our daily lives and in our schools and the inadequacy of the on-campus/off-campus and speech/action distinctions as governing First Amendment principles – suggest that we need distinct and more constructive ways to determine the merit of free speech defenses to punishment for cyberattacking and cyberbullying. This article aims to fill that void. I propose two answers for two different problems. First, I suggest that whether a school’s disciplinary authority over single-incident cyberattacking impinges on a student’s First Amendment rights should be governed by Tinker’s “material and substantial” disruption standard. Second, I posit that the First Amendment’s reach in repeated cyberbullying cases should be consistent with the First Amendment’s reach in Title VII hostile environment cases. Ultimately, this proposal represents a compromise – it likely limits school authority over cyberattackers while maintaining it for cyberbullies, thus protecting student free speech rights while allowing schools to address the worst peer-to-peer online aggressive behavior.

A. Cyberattacking and Tinker

We have already discussed that a cyberaggressor’s free speech defense deserves a different analysis than a cyberbully’s defense by dint of the differing nature and frequency of the conduct. I argue that Tinker’s “material and substantial” disruption test is the best way to determine if the First Amendment blocks a school’s authority to discipline a cyberaggressor.

By now, it should be clear that the off-campus origin of such aggression is irrelevant. It should also be clear that the speech/action distinction common in First Amendment discourse has no place in this analysis. Beyond that, clear instruction is hard to come by. Tinker’s “material and substantial” disruption standard is highly fact-specific, a feature of the law that likely explains why neither the Supreme Court nor the various circuit courts of appeal have stated what

kind of disruption is sufficient and when such a disruption is reasonably foreseeable. One state supreme court has said the disruption must be more than “a mild distraction” but need not be “complete chaos,” but, then again, many incidents on any given school day could fall somewhere between those extremes. Nevertheless, while no fact-intensive inquiry lends itself to bright line rules and lower courts have come to many divergent conclusions, a comprehensive review of the case law reveals eight governing principles relevant for courts faced with cyberattackers who invoke a First Amendment defense.

Most of these factors weigh in favor of an average cyberaggressor’s free speech rights, which suggests that a school may have some trouble disciplining most cyberattackers. Still, as a Tinker analysis depends on the unique facts of a given case, this review suggests that the worst cyberattackers – those who use violent or graphic imagery, who have a history of bad conduct and cause severe negative reactions in their victims – will find no protection behind the First Amendment.

1. How to Apply Tinker to Cyberattacking

First, there is no prerequisite that a specific number of people be affected by the speech. Schools have lawfully punished students for speech targeting one member of the school community and none of the litany of student speech cases to apply Tinker has ever implied a number requirement for a sufficient disruption. But, in cyberattacking cases, a sufficient disruption has been found when a student targeted a single school official, but never when a student targeted one fellow student. While this suggests it may be difficult to meet the substantial disruption standard in single-incident peer-to-peer cyberattacking cases, there is no clear rule that a sufficient disruption cannot be found when a single student is targeted. The answer to that question is left to the fact-finder. This factor makes discipline less likely in peer-to-peer cyberattacking cases.

Second, evidence that students simply react to and discuss the speech at issue does not create a substantial disruption. This principle has been clear since Tinker, where there was no substantial disruption because the armband protest merely caused students to poke fun at the protestors, make comments among themselves and caused one student to feel self-conscious.

See, e.g., O.Z., 2008 WL 4396895, at *1; Wisniewski, 494 F.3d at 36.

See, e.g., J.C., 711 F. Supp. 2d at 1119 (finding no substantial disruption where YouTube video ridiculed one student). But see O.Z., 2008 WL 4396895, at *1 (finding a substantial disruption where a student created a graphic depiction of an attack on a teacher).

Tinker, 393 U.S. at 518 (Black, J., dissenting) (discussing the facts of the case that could relate to creating a disruption in school). There was also evidence that a math class had been “wrecked” by disputes between students and protesting students. Id. at 517.
Nor did student discussion and comments about a fake MySpace profile that a student created to make fun of her principal create a sufficient disruption in *J.S. v. Blue Mountain School District*.161 In that case, a student used a fake MySpace profile to depict her principal as a pedophile and sex addict, and even solicited young children for sex.162 The district court saw the profile as lewd and offensive and decided the case under *Fraser*, but noted in dicta that evidence that “quite a few people [knew] about it” and that a small group of students discussed the website with its creator would be insufficient to reach the substantial disruption standard under *Tinker*.163 On appeal, the Third Circuit found that *Fraser* did not apply, but agreed with the district court that the evidence in the record did not show a substantial disruption of school activities.164 While the panel’s decision in *J.S.* was vacated pending an *en banc* rehearing, the weight of the case law still suggests that just because many students know about the incident and discuss it or make comments about it, such preoccupation, without more, does not rise to the level of substantial disruption. This factor suggests that a single incident of cyberattacking must be sufficiently powerful to impact the school community more than just as a topic of conversation. Therefore, this requirement may make disciplining cyberattackers more difficult for schools.

Third, violent or directly threatening speech creates a clear substantial disruption. In *O.Z.*, for example, a district court upheld a school’s removal and transfer of a student who created a graphic dramatization of a teacher’s murder and posted it online. The teacher found the video and informed the principal, but there was no evidence that the video had made its way to campus or that it affected the teacher’s ability to work.165 The court denied a preliminary injunction to stop the transfer because “the violent language and unusual photos depicted” in the video made it “reasonable” for school officials to expect a serious disruption to school activities.166 The teacher could have been attacked or she could have been the subject of ridicule from other students; either way, the court found, school activities would be substantially affected.167 And, in *Wisniewski*, where a student created a chat icon depicting a teacher shot in the head, the icon’s graphic nature was enough to show that “once made known to the teacher or other school officials, [it] would foreseeably create a risk of substantial disruption.”168 These cases suggest that the mere fact that a given incident of cyberattacking is particularly violent may be enough to

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161 No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), aff’d, J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3rd Cir. 2010), rehearing en banc granted, opinion vacated (Apr. 9, 2010). The Third Circuit panel decisions in *J.S.* and *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007), aff’d, 2010 WL 376184 (3rd Cir. Feb. 4, 2010), rehearing en banc granted, opinion vacated (Apr. 9, 2010), were both vacated after coming to opposite conclusions on the school’s disciplinary authority over cyberattackers. As of this writing, the Third Circuit has yet to issue its *en banc* decisions.

162 2008 WL 4279517, at *1.

163 Id. at *2, *6-7.

164 J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F.3d at 297-98.


166 Id. at *3.

167 Id. at *4.

168 Wisniewski, 494 F.3d at 40.
create a substantial disruption under *Tinker*. However, this factor does not help schools seeking to discipline cyberattackers. Most cyberattackers victimize an individual through name-calling, ridicule and attacks to self-worth; the students in *O.Z.* and *Wisniewski* used the Internet for depictions of gruesome violence. If the latter is almost an automatic substantial disruption, then the former requires more evidence to reach that level.

A fourth factor judges consider when determining if cyberattacking has caused a substantial disruption is the extent to which school officials must spend time, energy and effort responding to the incident and controlling any damage it caused. In *Doninger*, the court found a substantial disruption was caused by a student’s email and blog post criticizing school officials for supposedly canceling an event and exhorting her readers to call and complain because administrators had to deal with “a deluge of calls and emails.” They responded to angry emails from parents who were misled by the student’s misinformed email and some even came late to work because of it. Officials also had to take certain students out of class because they were “all riled up” and had to address a threatened sit-in. Likewise, in *Boucher*, where a student was expelled for distributing a pamphlet with instructions on how to hack into the school’s computers, the Seventh Circuit found that the time and money dedicated to fixing the problems caused by the pamphlet suggested that the school would likely prevail on any First Amendment challenge. The court noted that the school brought in computer experts to assess the security of the system and changed all passwords and access codes, suggesting a significant departure from normal day-to-day activities to respond to the student’s conduct. In both these cases, the students’ conduct forced school officials to set aside their normal responsibilities and devote a significant amount of time to fixing any problems caused by the student. At a minimum, this constitutes disruption to administrators and teachers, which may be enough for a “material and substantial” disruption finding under *Tinker*. This is another fact-specific inquiry, but it suggests that the incident of cyberattacking would have to be sufficiently serious to occupy an amount of time similar to the hours wasted in *Doninger* and *Boucher*. Like the second factor –

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169 And, in *LaVine*, for example, the Ninth Circuit found that a school could suspend a student in an emergency because officials could reasonably expect a serious disruption to stem from the student’s poem in which he graphically described his own suicide after shooting his classmates. 257 F.3d at 989-90. The school also offered evidence showing that the school counselor had met with the student to discuss his suicidal tendencies, that the student had recently been involved in a violent altercation with his father, that he had been accused of stalking his former girlfriend and that he paid close attention to school shootings then in the news. *Id.* at 984, 990. Furthermore, in *J.S. v. Bethlehem*, the Pennsylvania Supreme Court found a substantial disruption under *Tinker* where a student’s website depicted a beheaded and blood-soaked teacher with the caption, “Why Should She Die?” 807 A.2d at 851. The website also asked readers for money to pay an assassin. *Id.* When she heard of this website, the teacher was frightened and could not teach for the rest of the year. *Id.* at 852. While *LaVine* and *J.S. v. Bethlehem* involved factors over and beyond violent speech alone, the weight of the case law from other jurisdictions suggests that, in most cases, additional inculpatory evidence is not necessary. *But see* Mahaffey, 236 F. Supp. 2d at 784 (finding no substantial disruption where a student’s website asked readers to kill a person of their choosing in a particularly graphic fashion).

170 Doninger, 527 F.3d at 51.

171 *Id.*

172 Boucher, 134 F.3d at 822-23.

173 *Id.* at 827.
that students must do more than simply discuss the incident to create a substantial disruption – this factor likely narrows lawful school discipline to the most serious cases of cyberattacking.

Fifth, a school’s decision to discipline a cyberaggressor must be based on specific evidence of a foreseeable disruptive risk, rather than an unfounded and general fear. The Supreme Court made this clear in *Tinker*, where it found only an undifferentiated fear and disapproval of the armband protest, and every lower court to use the *Tinker* standard agrees. Finding in favor of a student whose website contained general, yet vulgar, criticisms of school officials, the court in *Beussink v. Woodland R-IV School District* found evidence of a foreseeable risk of disruption lacking. In that case, the principal testified that he decided to discipline the student “immediately upon viewing the homepage … because he was upset that the homepage’s message had been displayed in one of his classrooms.” An immediate suspension, without more, suggests that disciplinary action was taken without evidence; nor was there any evidence – “reasonable or otherwise” – of a risk of disruption in any event. School officials similarly jumped the gun in *Killion v. Franklin Regional School District*, where a principal suspended a student who wrote a rude and immature “Top-Ten” list ridiculing the school’s athletic director. The court granted summary judgment to the student on his First Amendment defense because the only evidence relating to a risk of disruption was that the athletic director and two other educators were upset. But, quoting *Beussink*, the court noted that “‘[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.’” And, the same principle held sway in *Bowler v. Town of Hudson*. There, students created a so-called “pro-American, pro-conservative” club outside of school, but advertised on school bulletin boards. Some of the posters listed an affiliated national club’s website, which in turn had links to various violent images, including “brutal beheadings.” School officials banned the club from advertising on campus, a move the school justified on the grounds that the graphic content of the website would substantially disrupt school activities. The court rejected that argument because the graphic content’s connection to the school community was too attenuated. Students would have to see the poster, remember the web

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174 *Tinker*, 393 U.S. at 509.

175 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

176 *Id.* at 1178 (emphasis in original).

177 *Id.* at 1180.


179 *Id.* at 448-49.

180 *Id.* at 455 (*quoting* Beussink, 30 F. Supp. 2d at 1180).


182 *Id.* at 172.

183 *Id.* at 173.

184 *Id.* at 177.
address, link to it at home, find the violent videos, click passed a warning, watch the videos and then react to them in some way as to affect the school.\textsuperscript{185} This case differed from other graphic content cases, like \textit{O.Z.} and \textit{Wisniewski}, because there were fewer degrees of separation between the violent images in those cases and teachers at the respective schools. Those violent images specifically depicted teachers. Conversely, in \textit{Bowler}, the court found no actual evidence of a foreseeable disruptive risk, especially where it was not even foreseeable that anyone would find their way to the online videos.\textsuperscript{186}

The kind of evidence sufficient to establish a foreseeable risk of a future disruption could come from any number of places. In \textit{West v. Derby Unified School District},\textsuperscript{187} for example, the Tenth Circuit found that the school’s history and experience could legitimately inform the officials’ fear. In that case, a student was suspended for drawing a Confederate flag in violation of a school policy that banned racial harassment. The court upheld the suspension because “the district experienced a series of racial incidents … in 1995, some of which were related to the Confederate flag. The incidents included hostile confrontations between a group of white and black students.”\textsuperscript{188} It was the “history of racial tension” that informed and legitimized the officials’ and parents’ future concerns.\textsuperscript{189} And, in \textit{LaVine}, a student’s disciplinary history inside and outside of school can legitimize a school’s fear of disruption. The student in \textit{LaVine}, who wrote a poem discussing a mass shooting of his classmates, was suicidal, attacked his father, stalked his former girlfriend and had been disciplined at the school numerous times, including once for an act of violence.\textsuperscript{190} That background, combined with the fact that shootings had recently taken place at other campuses, lent validity to the school’s emergency dismissal of the student as a means of avoiding a dangerous situation. Because this factor has little to do with the incident of cyberattacking itself, but rather the context in which the incident occurred, it is impossible to handicap the weight of this factor in a cyberattacking case.

Sixth, it is easier to meet the substantial disruption, or foreseeable risk of disruption, standards if the target of aggression is a teacher or a school official. In \textit{Killion}, a student made a critical Top-Ten list about a teacher.\textsuperscript{191} In \textit{Beussink}, a student created a website to poke fun at his school’s administrators.\textsuperscript{192} And, in \textit{O.Z.} and \textit{Wisniewski}, students depicted the murders of their teachers in violent, graphic fashion.\textsuperscript{193} In all of these cases, schools were permitted to discipline the offending students. Yet, in \textit{J.C.}, where a student’s YouTube video made fun of another

\begin{footnotesize}
\begin{enumerate}
\item Id. at 177-78.
\item Id. at 178.
\item 206 F.3d 1358 (10th Cir. 2000).
\item Id. at 1366.
\item Id.
\item \textit{LaVine}, 257 F.3d at 984, 989-90.
\item \textit{Killion}, 136 F. Supp. 2d at 448.
\item \textit{Beussink}, 30 F. Supp. 2d at 1177.
\item O.Z., 2008 WL 4396895, at *1; Wisniewski, 494 F.3d at 35-6.
\end{enumerate}
\end{footnotesize}
student, and in *Thomas*, where students targeted no one in particular with their parody magazine, the First Amendment barred discipline. Other factors contributed to the findings in each of these cases, but the fact remains that in a majority of cases in which aggressors targeted a particular person and could be disciplined by the school, the targets were teachers, not students. This suggests that peer-to-peer cyberattackers are more likely to win on a First Amendment defense than student-to-teacher cyberattackers.

Seventh, there is some indication that an aggressor’s disciplinary past can inform a school’s disciplinary decision and legitimize a school’s fear of substantial disruption due to that student’s conduct. In *LaVine*, a student wrote a violent poem that described the shooting of his classmates. Upholding the school’s decision to immediately expel the student, the Ninth Circuit singled out the student’s disciplinary past, his suicidal behavior, and his record of stalking his former girlfriend as sufficient evidence that the school was reasonable to expect a substantial disruption and possible violence. The poem in *LaVine* was particularly violent, and, as we have seen, the more gruesome the speech, the more likely school discipline will be appropriate. However, this factor could make disciplining cyberattackers more likely because it would situate a single incident in a pattern of conduct even when those previous incidents of misbehavior are not at issue.

And, eighth, the effects on the target of the aggression is relevant for proving a “material and substantial” disruption. Many student aggression cases take into account the effect on the target or victim. In *J.S. v. Bethlehem*, for example, a teacher was so affected by a website that showed her graphic beheading that she could not return to work, felt frightened and suffered debilitating anxiety. Discipline was warranted and not barred by the First Amendment in that case, but in *J.C.*, for example, a court denied a school disciplinary authority over a student whose video had a fleeting and minimal impact on its target. As substantial disruption is highly fact-specific, this factor might support discipline in some cases, but counsel against it in others. Weighing the effect on the victim has merit as a way of distinguishing between examples of the common gave-and-take among adolescents, on the one hand, and more harmful conduct, on the other. And, while this factor may make lawful discipline hinge on the dumb luck of an aggressor who chooses a weak victim, that might be a good thing. By making discipline less likely when an aggressor targets a particularly strong victim whose high self-esteem would make him able to withstand ridicule, this factor recognizes that cyberattacking, like cyberbullying, involves a strong individual attacking a weaker person or group.

This makes disciplining cyberattackers difficult. The most common single-incident cyberaggressor, exemplified by the aggressor in *J.C.*, who created a YouTube video ridiculing a

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194 *J.C.*, 711 F. Supp. 2d at 1117.
195 *Thomas*, 607 F.2d at 1045.
196 *LaVine*, 257 F.3d at 989-90.
197 *J.S. v. Bethlehem*, 807 A.2d at 852.
198 *Id.* at 869.
199 *J.C.*, 711 F. Supp. 2d at 1117 (the victim “felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class. These concerns cannot, without more, warrant school discipline.”).
fellow student, neither uses violent or graphic imagery nor encourages murder or grievous bodily harm. Nor does she attack a teacher or cause her victim to react in a profoundly negative way. Therefore, if this analysis accurately describes the current trends in determining a substantial disruption in school aggression cases, it is likely that many cyberattackers will not engage in conduct that is sufficiently serious to merit lawful discipline.

2. Why Tinker?

I have argued that using Tinker to limit a school’s disciplinary authority over cyberattackers is a good thing. But, Tinker is not a judge’s only option for single-incident cyberattacking. For example, a court could create a different standard that rejects the notion that any kind of cyberaggression – whether of the single-incident or repeated varieties – is actually speech that deserves First Amendment protection. This would make school discipline much easier, but the proposal makes little sense given the difficulties associated with an elusive distinction between speech and action. Still, this only places cyberattacking under the student speech umbrella, and to say that courts currently use the Tinker standard in peer-to-peer and student-to-teacher aggression cases does not mean they should continue to do so or that it makes doctrinal sense. Even within the student speech context, furthermore, a court could follow the Supreme Court in Fraser, Kuhlmeier and Morse and carve out another exception to the Tinker standard aimed specifically at speech that harms or is directed at another member of the school community. It could even go further and carve out two different exceptions for peer-to-peer cyberaggression and student-to-teacher cyberaggression. All of these plans would widen a school’s disciplinary authority and make it easier to punish cyberattackers. And yet, such a strategy is ill-advised for three reasons.

First, it is necessary to reaffirm and reenergize Tinker’s respect for student speech rights after decades of attack. Fraser, Kuhlmeier and Morse represent the growing power of Justice Black’s dissent in Tinker, with its sarcastic distaste for the notion of student free speech in an almost Orwellian school, at the expense of Justice Fortas’s majority opinion. While none of the Court’s subsequent school speech cases has threatened Tinker’s core holding directly, further departures from Tinker in practice will consign the presumption of student free speech to continued and unending erosion.

Second, a new exception to Tinker to capture cyberattacking would be qualitatively different than the exceptions in Fraser, Kuhlmeier and Morse, and thus not justified by those precedents. In each of those cases, the exceptions were based on the difference between tolerating dissenting speech – which is what Tinker was about – and regulating speech a school

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200 As we have seen, Tinker is the governing standard in peer-to-peer aggression cases. See, e.g., Killion, 136 F. Supp. 2d at 455 (applying Tinker against student disciplined for creating a Top Ten list that ridiculed fellow students); Emmett, 92 F. Supp. 2d at 1090 (applying Tinker to a website that contained mock obituaries of classmates). And, it is the standard in student-to-teacher aggression cases. See, e.g., Beussink, 30 F. Supp. 2d at 1180 (court applied Tinker to a website criticizing school officials); O.Z., 2008 WL 4396895, *4 (applying Tinker to a video that depicted a graphic dramatization of a teacher’s murder that was then posted to the Internet).

201 That courts currently use Tinker’s “material and substantial” disruption standard may not, without more, be a reason to continue to use the standard, but it does mean this article’s compromise proposal is practically viable. Since the only analytic changes would occur in cyberbullying cases, current cyberaggression cases would not have to be disturbed.
could be seen as endorsing – at an assembly, in a newspaper, or at a school-sponsored event. It seems, then, that the Court is willing to carve out exceptions to Tinker only where a school would be endorsing the content of the censored speech. Since there is no danger that a school could be perceived as endorsing cyberaggression in any official context, an exception would be inappropriate.

Third, in addition to being about a school’s ability to regulate official speech, Fraser, Kuhlmeier and Morse are content-based restrictions on student speech, to which the First Amendment is normally hostile. To compound that hostility by adding yet another content-based restriction that is so broad as to capture a single incident of hurtful expression between students would effectively banish the First Amendment from the school.

a. Reaffirming Tinker

Tinker is the easy answer in cyberattacking cases, but it is also the right one. Retaining the Tinker standard for school cyberattacking represents a compromise between a Supreme Court that is slowly eviscerating student speech rights by walking away from Tinker and the need to stop a devastating epidemic of cyberbullying in schools. But, it would be wrong to eliminate Tinker altogether out of a short-sighted desire to prevent the admittedly serious consequences of cyberattacking and cyberbullying. A strong Tinker, even one that restricts or eliminates a school’s disciplinary authority over cyberattackers, benefits all students and victims of peer-to-peer aggression more than a weak or meaningless Tinker.

As Dean Erwin Chemerinsky has noted, Tinker is based on three fundamental principles: “student speech is important and constitutionally protected; schools may punish expression only if there is proof of substantial disruption of school activities; and the judiciary has a crucial role in ensuring students are punished only if this standard is met.”202 Justice Fortas repeated these ideas throughout his majority opinion. Justice Black, on the other hand, denied that the Constitution protected student speech rights203 and would have deferred to the unimpeachable discretion of school officials when it came to a student’s dissenting speech: “Here the Court should accord … educational institutions the … right to determine for themselves to what extent free expression should be allowed in its schools.”204 The Supreme Court’s student speech cases since Tinker have not only been entirely devoid of Justice Fortas’s themes, but have instead elevated the themes of Justice Black’s Tinker dissent, which viewed the school as an authoritarian enclave. In Fraser, the Court stated that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”205 Similarly, in Kuhlmeier, the Court argued that its holding is consistent with the “oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”206 And, in Morse, the

202 Erwin Chemerinsky, Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What’s Left After Tinker, 48 DRAKE L. REV. 527, 545 (2000).
203 Tinker, 393 U.S. at 517 (Black, J., dissenting).
204 Id. at 524 (Black, J., dissenting).
205 Fraser, 478 U.S. at 683.
206 Kuhlmeier, 484 U.S. at 273.
Court’s central message was that “schools may take steps to safeguard those entrusted to their care” from speech that contradicted the school’s vision of its educational mission. Concurring in Morse, Justice Thomas took the final step when he recommended tossing Tinker altogether in favor of what he viewed as the historical role of the school as an authoritarian master of its students.

To discard Tinker in cyberattacking context would be another nail in its coffin, thus further eroding the constitutional basis for student speech protections. After all, a public school is uniquely suited as a “marketplace of ideas,” in which, the Court habitually notes, students are prepared for a future in civil society. A school cannot simultaneously reject the First Amendment and teach its students about free speech and the need to respect the diversity of opinions in a polyglot society. And, even if part of a school’s mission is to teach values and protect its students from negative influences, as the Court made clear in Fraser, Kuhlmeier and Morse, one of those fundamental American values is freedom of speech and one of those negative influences is anything that tries to censor that speech.

By defending student expression in the face of the discretionary censorship that Justices Black and Thomas would prefer, a strong Tinker is the ally of students and groups long victimized by bullying in schools. If Tinker’s values of free expression are replaced by Fraser’s and Morse’s values of paternalism and official discretion, school officials would be free to stamp out voices they view as inappropriate, such as groups that support openly gay students on campus. We have already seen how gay students are uniquely victimized by bullying and cyberbullying in schools. And yet, many schools ban Gay-Straight Alliances or clubs that provide safe spaces for gay youths because school officials believe that discussions of homosexuality either conflict with their traditional values or are outside the boundaries of age-appropriate discourse in schools. Since the existence of these support groups are among the best

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207 Morse, 551 U.S. at 397.

208 Id. at 410-22 (Thomas, J., concurring). The theme of Justice Thomas’s concurrence was that the doctrine of in loco parentis had always described the relationship between a school and its students, thus allowing for near complete control and regulation of student speech. Justice Thomas’s view of the history of American education has long been criticized by historians and education experts alike. See CHARLES GLENN, MYTH OF THE COMMON SCHOOL (2002).

209 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting Shelton v. Tucker, 624 U.S. 479, 487 (1960)) (“‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’”).

210 E.g., Tinker, 393 U.S. at 507 (“That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual”); Kuhlmeier, 484 U.S. at 270 (schools are a “‘principal instrument in awaking the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”) (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)).

211 Chemerinsky, supra note at 202, at 545.

212 See supra notes 38-45 and accompanying text. See also Waldman, supra note 10, at __.

tools used to combat the frequency and effects of anti-gay bullying in schools, a legal standard that grants school officials the power to ban them would harm the very students victimized by cyberattacking and cyberbullying. Weakening *Tinker* is not the answer to anti-gay bullying.

b. A Cyberattacking Exception

Even if we deny the premise that *Fraser, Kuhlmeier* and *Morse* mark the Court’s steady and continued rejection of *Tinker* or accept the premise and welcome *Tinker*’s decline, the Court’s student speech precedents would still not lend logical support for a new exception to *Tinker* in cyberattacking cases. An exception to *Tinker* would either allow school officials to discipline cyberattackers for the fact of their aggressive behavior against another student, even without a substantial disruption to school activities, or simply lower the substantial disruption standard to include any physical or psychological harm. The latter proposal is unworkable and over-inclusive – a student could be subject to discipline for not “friending” a peer on Facebook or for sending a sarcastic text message without a sufficiently clear emoticon to show the sender’s intent – and would subject almost every student to discipline for common, every day behavior.

The first proposal – an exception to *Tinker*’s substantial disruption standard for cyberexpression that targets another student – is possible, but without support from the Court’s other exceptions. *Fraser, Kuhlmeier* and *Morse* involved official or quasi-official school functions, where, if the students’ speech was permitted to stand, could reasonably place the school in a position of endorsing that speech. In *Fraser*, the Court upheld a student’s suspension after he delivered a lewd and sexual speech at a school assembly; in *Kuhlmeier*, the medium was an official school newspaper; and, in *Morse*, a student unfurled his sign about marijuana “at a school-sanctioned and school-supervised” event. In each case, arguably offensive speech reached (or was to reach) the school community through some official means – an assembly, a newspaper, a school-sponsored event where “[t]eachers and administrative officials monitored the students’ actions,” stood among the students and made it an official school event.

The Court justified its exceptions to *Tinker*’s substantial disruption standard in these cases in part on the fact that, unlike *Fraser, Kuhlmeier* and *Morse*, *Tinker* involved dissenting speech that no reasonable person would suggest bore the imprimatur of the school. That may be true, but, as in *Tinker*, no reasonable person would believe that a school endorsed, sanctioned or gave its official imprimatur to cyberattacking aimed at a particular student or group at school. Therefore, the rationale behind carving out exceptions to *Tinker* in the Court’s student speech cases does not apply to cyberattacking cases.

214 Paul D. Flaspohler et al., *Stand By Me: The Effects of Peer and Teacher Support in Mitigating the Impact of Bullying on Quality of Life*, 46(7) PSYCHOLOGY IN THE SCHOOLS X, 639, 646 (2009) (discussing results of study showing that those students who experienced high levels of teacher and peer social support indicated fewer problems with bullying and a higher quality of life in school). *See also* Waldman, *supra* note 10, at ___.

215 An emoticon is a facial expression pictorially represented by punctuation and letters, usually to express a writer’s mood. *See* http://www.techdictionary.com/emoticon.html.

216 Morse, 551 U.S. at 396.

217 *Id.* at 400, 401.
Nor does it necessarily mean that Tinker governs cyberattacking. After all, Tinker involved a protest of the Vietnam War, a form of political expression that bears little similarity to aggressive expression between students that has no greater political message. In fact, the Tinker Court explicitly distinguished the armband protest from “aggressive, disruptive action”\(^{218}\) that ostensibly would not be governed by its holding. That distinction is of no moment. First, outside of a coincidental similarity in verbiage, the Tinker Court was not referring to peer-to-peer personal hostility, what I have termed “aggression.” The Court coupled “disruptive action” with “group demonstrations,”\(^{219}\) suggesting that the Court had in mind large-scale student protests, walk-outs, sit-ins or take-overs of school buildings and offices that had been reported at college campuses. Second, the Court did not base its holding in Tinker on the relative importance of the speech. In fact, Justice Fortas seemed more persuaded by the protest’s small size and its minimal impact. Only “a few of the 18,000 students” wore the armbands and “[o]nly five students were suspended” for doing so. There were no “threats or acts of violence;” nor was it even clear that most students knew what was going on.\(^ {220}\) Third, Tinker stands as the default standard for student speech. When the Ninth Circuit crafted its student speech standard in reaction to Fraser and Kuhlmeier, it set aside lewd and vulgar speech as governed by Fraser and school-sponsored speech as governed by Kuhlmeier. Speech that fell “into neither of these categories [wa]s governed by Tinker.”\(^ {221}\) Tinker was the catch-all for any speech not covered by the narrow exceptions carved out, both of which involved official school activities. To carve another exception to Tinker on an entirely different foundation than the Supreme Court’s other student speech cases would narrow Tinker to its facts and allow student speech jurisprudence to stand on spindly legs.

c. Content-Based Restrictions

In addition to carving out exceptions for speech that could reasonably be seen as school-endorsed, Fraser, Kuhlmeier and Morse are content-based restrictions on speech, which are generally disfavored in First Amendment law. Creating another content-based restriction for cyberattacking, i.e. critical or abusive speech, based on those precedents is not only hostile to the First Amendment in general, but once again misreads the Court’s guidance on student speech. Content-based restrictions on speech have long been the bane of the First Amendment. For example, when invalidating a Chicago ordinance that banned picketing within 150 feet of a school, but exempted peaceful labor picketing, the Court in Police Department v. Mosley,\(^ {222}\) found that the central problem with the ordinance was that “it describe[d] the permissible picketing in terms of its subject matter.”\(^ {223}\) Content control was the “essence of … forbidden

\(^{218}\) Tinker, 393 U.S. at 508.

\(^{219}\) Id.

\(^{220}\) Id.

\(^{221}\) LaVine, 257 F.3d at 988-89 (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)).

\(^{222}\) 408 U.S. 92 (1972).

\(^{223}\) Id. at 95.
censorship.”\textsuperscript{224} This hostility to content-based restrictions is based on a number of factors: the “specter that the government may effectively drive certain ideas or viewpoints from the marketplace,”\textsuperscript{225} a concern that has moved Justice Kennedy to call for a \textit{per se} rule against any content-based restriction on speech;\textsuperscript{226} that by removing an entire topic from public discourse, content-based restrictions are likely to have a greater distortionary effect on the marketplace of ideas;\textsuperscript{227} and that content-based laws are less likely to be overturned at the ballot box because they are usually focused on a narrow category of speaker and, thus, do not affect sufficient pluralities of voters who can mobilize for political action.\textsuperscript{228}

Despite the First Amendment’s hostility to content-based restrictions, the Court has acknowledged that certain narrow categories of circumstances merit such censorship,\textsuperscript{229} particularly in public schools. Those precedents still do not support another content-based restriction on aggressive, or critical, speech. The content-based restrictions in \textit{Fraser} and \textit{Kuhlmeier} are close cousins – the former allows schools to censor lewd and sexual speech, while the latter carves an exception for mature subject matters, such as teen pregnancy, which has a sexual element. And, \textit{Morse} permits censorship when it comes to drugs. Sexual and drug-related content occupy a unique place in American culture and engender social anxieties in the school context. As Judge Posner has argued, we hesitate to introduce sexual discourse of any kind into a school or youth setting, letting our squeamishness or Puritanical concerns for propriety silence

\textsuperscript{224} \textit{Id.} at 96. Justice Marshall rested his opinion on the Equal Protection Clause of the Fourteenth Amendment, so while technically this was not a First Amendment case, the majority noted that “the equal protection claim in this case is closely intertwined with First Amendment interests: the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing.” \textit{Id.} at 95. The \textit{Mosley} reasoning was brought under the First Amendment umbrella in \textit{Carey v. Brown}, 447 U.S. 455 (1980).


\textsuperscript{226} \textit{Id.} at 124-28 (Kennedy, J., concurring). Justice Kennedy backed away from his preference for a \textit{per se} rule in his concurring opinion in \textit{Burson v. Freeman}, 504 U.S. 191 (1992), finding that the unique circumstance arising in the context of vote solicitation near polling stations was one of the “narrow area[s] in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right.” \textit{Id.} at 213 (Kennedy, J., concurring). For the argument that Justice Kennedy’s and others’ distaste for content-based restrictions is based on the fear that content-based restrictions are proxies for even more improper or illicit motives for censorship, like government disapproval or condemnation of a particular opinion, see Geoffrey R. Stone, \textit{Content Regulation and the First Amendment}, 25 WM. & MARY L. REV. 189 (1983).

\textsuperscript{227} Stone, \textit{supra} note 226, at 198 (“Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment… This is so, not because such a law restricts ‘a lot’ of speech, but because by effectively excising a specific message from public debate, it mutilates the ‘thinking process of the community.’”).

\textsuperscript{228} Richard Fallon argues persuasively that content-neutrality is not such an immutable rule in First Amendment doctrine. See Richard H. Fallon, Jr., \textit{Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark}, 1994 SUP. CT. REV. 1, 21-28 (1994). I agree with Professor Fallon, but his view that the Court has departed from content-neutrality for numerous types of speech does not conflict with the Supreme Court’s avowed preference for limiting the incidents of those departures.

\textsuperscript{229} \textit{See, e.g.}, \textit{Burson}, 504 U.S. at 188-89 (agreeing with Tennessee that its ban on vote solicitation near a polling place protects “the right of… citizens to vote freely for the candidate of their choice [and] protects the right to vote in an election conducted with integrity and reliability.”).
necessary educational discussion.230 And, concerns about drugs are no different. In Morse, the Court spends its last three pages describing the problem of drugs in American schools,231 as if to suggest that censorship of drug-related discussion is necessary to stamp out adolescent drug use. Despite the antiquated notion that high school students are too young to discuss sex and despite the dubious connection between censorship and decreased drug use, drugs and sex cause a kind of societal worry that ridicule and critical speech among peers do not. Concerns about what is appropriate for young people do not apply to aggression or bullying. No one advocates meanness, but the desire to be nice to one another is not a concern unique to our youth. Nor does it implicate discourse considered too mature for children. Fraser, Kuhlmeier and Morse permit restrictions on sexual, mature and drug-related speech because of a sense, legitimate or not, that such topics are inappropriate for young minds. The same can hardly be said for speech that is just mean.

3. Implications of Applying Tinker to Cyberattacking

These factors – the need to reaffirm Tinker, the lack of precedent for a cyberattacking exception and the First Amendment’s hostility toward content-based restrictions that make a cyberattacking exception a bad idea – suggest that Tinker remains the best standard for analyzing a First Amendment defense to a school’s authority to discipline single-incident cyberattacking. The most immediate and notable consequence of applying Tinker’s “material and substantial” disruption standard is a likely narrowing of a school’s disciplinary authority to student-to-teacher cyberattacking and exceptionally violent aggression. At first blush, that seems like reason enough to reject my proposal. Cyberattacking is a growing problem and even I concede that its effects on victims can be just as devastating as face-to-face physical, verbal and emotional abuse. To prevent a school from dealing with the problem by hamstringing its authority around the First Amendment is to callously let a real problem fester in the name of esoteric theory.

This poses a false dilemma. It is not a choice between absolute authority and letting the problem get worse. Given the pervasiveness of less egregious cyberattacking, subjecting so much conduct to the disciplinary discretion of school officials would create the authoritarian school that Justices Black and Thomas envisioned in their student speech opinions without even solving the problem of peers being mean to each other. As the Court noted in Tinker, “[a]ny word spoken … that deviates from the views of another person may start an argument or cause a disturbance.”232 Yet, schools should not be “enclaves of totalitarianism,” that maintain absolute control over their students and use an iron fist to stamp out all conceivable disturbances. There must be a sufficiently compelling reason to take away a student’s right to speak his mind, however immature and mean his speech may be.233 The problem is not the student’s right to speak, but rather his immature use of his freedom. But, taking away his rights will not teach him the lessons of maturity. It will infantilize him.

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231 Morse, 551 U.S. at 407-410.

232 Tinker, 393 U.S. at 508.

Those who advocate for greater school disciplinary authority over cyberattacking, therefore, myopically offer a false choice between greater school authority and student victimization. But, the increase in the former will not lead to a decrease in the latter. Aggressive students are not made less so by suspensions, expulsions or detentions. Social scientists have shown that using a school’s “soft power” – counseling, peer-to-peer and student-to-teacher social support and tolerance-inclusive curricula – and more attentive and involved parents are the best strategies for ameliorating the frequency and effects of face-to-face and cyberaggression in all its forms.\(^{234}\) Tossing aside the First Amendment will not solve the problem of aggression and bullying in schools; instead, it will subject all students, not just those holding minority opinions or members of minority groups, to the unbounded whims of a dictatorial principal. This will do more damage to those groups most victimized in schools.

B. Cyberbullying and Title VII

First Amendment freedoms are no less important for cyberbullies. Indeed, we are often reminded that it is reassuring that free speech rights extend to the worst among us.\(^{235}\) Yet, no one enjoys an absolute right to free speech; the right is balanced against competing interests in any given circumstance.\(^{236}\) A school’s authority to discipline single-incident cyberattackers wils in front of the First Amendment not because students enjoy unbridled freedom of speech beyond the schoolhouse gate, but because cyberattacking is so common and often indistinguishable from immature give-and-take among adolescents that the state has no compelling interest in regulating it. A rule that allows punishment for the more than 70 percent of students who have engaged in a single incident of aggressive behavior\(^{237}\) is simply overbroad,\(^{238}\) wildly impractical or both. But,

\(^{234}\) See Flaspohler, supra note 214, at 638; id. at 646 (discussing results of study showing that those students who experienced high levels of teacher and peer social support indicated fewer problems with bullying and a higher quality of life in school); Julia S. Chibbaro, School Counselors and the Cyberbully: Interventions and Implications, 11 ASCA 65, 66-7 (Oct. 2007).

\(^{235}\) See, e.g., Skokie, 373 N.E.2d at 25 (“the unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in ‘restricted’ areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most.”).


\(^{237}\) Given that the definition of single-incident aggression is broad – sweeping in almost anything that can be cruel or harmful to others – and a likely under-reporting among students who are willing to admit to bad behavior, most social scientists think this number is closer to 90 to 98 percent.

\(^{238}\) A statute is overbroad if, in banning unprotected speech, it sweeps in protected speech. See Virginia v. Hicks, 539 U.S. 113, 118-20 (2003) (“The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute's plainly legitimate sweep,’ suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” (quoting Broadrick, 413 U.S. at 615)). See also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 508 (1982) (White, J., concurring) (citations omitted) (“[O]verbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court.”).
an analysis that gives a school a fighting chance to discipline its worst offenders recognizes the gravity of bullying and cyberbullying, the state’s and school’s compelling interest in preventing such behavior and the relative infrequency of real cyberbullying cases. I propose that given the similarities between the conduct, effects and the hostile environments caused by bullying and cyberbullying in schools, on the one hand, and by sexually harassing behavior in the workplace, on the other, we should determine the merit of a cyberbully’s First Amendment defense to a school’s disciplinary authority like we would analyze an employer’s First Amendment defense to Title VII liability for creating a hostile workplace.

Immediately, that proposal ostensibly raises four doctrinal questions that must be addressed at the outset. First, a logician would argue that my comparison lacks parallel structure – in a bullying case, the bully raises a free speech defense; in a Title VII case, the employer would raise a free speech defense. But, the bully’s counterpart in a hostile environment harassment case is the victim’s harassing co-worker, not the employer. That facial distinction is irrelevant. My theory’s applicability does not depend on matching up plaintiffs and defendants, but on comparing constitutional rights. Defending against a hypothetical hostile environment claim involving pornography in the workplace, an employer could argue that its lack of a policy that would ban viewing, distributing or discussing pornography, or that it had a right to do nothing or a right not to have a policy, was justified because its employees have a First Amendment right to that pornography. Like the bully who argues that he has a right make abusive comments, so too does the co-worker who likes pornography. The particular party that raises the point is immaterial.

Second, I argued infra that the Supreme Court’s student speech cases never entertained a bright line on-campus/off-campus distinction for a school’s disciplinary authority because any suggestion of a campus presence requirement was merely a proxy for the broader rule that schools maintain authority over their students when they act qua students. That principle, which subjected cyberattackers to school punishment, applies equally to cyberbullies. Therefore, the argument goes, treating cyberbullies, who act qua students just as much as cyberattackers, outside Tinker and its progeny disproves my student qua student theory. I disagree. Single-incident cyberattackers are still acting qua students by directing their aggression against members of the school community they only know because they are students. Undoubtedly, cyberbullies do the same. But, unlike cyberattackers, cyberbullies are not just students; they are harassers. A cyberattacker acts qua student because he acts against someone he knows from school; his behavior is often characterized by the common give-and-take among immature and sometimes mean adolescents. The average cyberbully takes his conduct to another level, whereby his repeated behavior affects his victim in profoundly more serious ways and, as a result, the cyberbully develops a dual persona. The cyberbully is indeed a student, but the character and egregiousness of his conduct makes him primarily a harasser. He is no longer solely acting qua student.

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240 This argument might be extended to suggest that if the cyberbully is a harasser, it would be more appropriate to analyze the legitimacy of his First Amendment defense to school discipline through the lens of a free speech challenge to the expanded use of common law harassment to encompass cyberbullying, i.e., the repeated publication or Internet distribution of gossip or ridicule. Such an extension of harassment law would likely never withstand First Amendment scrutiny for two reasons: First, it could stifle the publication of non-defamatory content and opinion. See, e.g., Pamela Samuelson, Principles for Resolving Conflicts Between Trade Secrets and the First...
Third, Title VII may be a questionable choice for an analogy, especially given Title IX’s applicability to peer-to-peer harassment in schools. Title IX states that “[n]o person ..., on the basis of sex, [shall] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

241 Since Title VII is about discrimination in the workplace and Title IX applies to schools, 242 perhaps it would be more appropriate to analyze cyberbullying in schools through the more applicable lens of Title IX. This criticism misses the mark. Title VII does refer exclusively to sexual harassment in the workplace, but I do not propose that a legislature create a regime like Title VII to explicitly assign cyberbullying liability to schools. I merely propose that the merit of a free speech defense to school discipline for cyberbullying should be judged similarly to the merit of a free speech defense to Title VII liability because of the great parallels between the conduct at issue in each case. The particular statutory scheme that imposes liability is interesting and a matter for further discussion – and Title IX may already impose that liability in certain cases 243 – but the discussion is irrelevant for my proposal.

Fourth, one could argue that if cyberbullies have free speech rights at all, the contours of those rights should be determined through the Supreme Court’s student speech cases regardless of the nature of the students’ conduct. This argument combines the previous three and posits that, at bottom, Tinker and its progeny govern all student speech regardless of its nature, gravity and effects. I have already addressed this concern. Tinker is powerful precedent that merits rejuvenation as the protector of student speech rights, but Tinker is ill equipped to address the

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Amendment, 58 Hastings L.J. 777, 781 n.19 (2007) (“A city ordinance that forbade residents to gossip about private matters would surely be unconstitutional under the First Amendment”); see also Bickel v. Burkhart, 632 F.2d 1251, 1255 (5th Cir. 1980) (stating that a municipal fire department rule forbidding firemen from “‘being a party to any malicious gossip’” did not violate the First Amendment because it only applied to “false statements made with knowledge of their falsity or made with reckless disregard of whether they are false or true”). Second, it would be void for vagueness because it would be impossible to discern whether a given comment was permissible. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (discussing the “basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”); see also State v. Palendrano, 293 A.2d 747, 752 (N.J. Super. 1972) (noting that a “neighborhood gossip could ... be indicted as a Common Scold” and holding that the statute making it a crime to be a Common Scold was void for vagueness). For a learned discussion of these topics and for the argument that updated harassment and stalking laws should not be applied to cyberbullies, see Susan W. Brenner & Megan Rehberg, “Kiddie Crime?” The Utility of Criminal Law in Controlling Bullying, 8 First Amend. L. Rev. 1, 15-45 (2009).


242 In Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), the Court found that a recipient of federal funds could be liable for its own misconduct but not for the harasser’s if “[t]he recipient itself ‘exclud[ed] [persons] from participation in...den[ied] the benefits of, or...subject[ed] persons to discrimination under’ its ‘program[s] or activit[ies].’” Id. at 640-41. The Court also concluded that a school district could be liable for hostile environment sexual harassment when the student's behavior is so “severe, pervasive, and objectively offensive” as to deprive the victim of the educational opportunities provided by the school. Id. at 650. Notably, liability only attaches if the school has actual knowledge of the harassment and acts with deliberate indifference. Id. at 643.

243 The reach of Title IX is uncertain not only because of its additional requirements, but because it is not even clear to many that Title IX creates a private right of action for peer-to-peer harassment. At least four Supreme Court justices do not think so. See id. at 654-85 (Kennedy, J., dissenting).
kind of constant barrage of harassing behavior that characterizes the conduct of bullies and cyberbullies.

These objections aside, my argument is specific and novel. The striking similarity between harassment that creates a hostile environment in the workplace and bullying and cyberbullying that create a hostile environment in school, together with the similarly situated victims and the obvious dissimilarity between single-incident attacking and repeated bullying, suggests that cyberbullying and hostile environment harassment merit similar treatment. With respect to potential free speech defenses to a school’s authority to discipline cyberbullies, courts confronted with these questions should take cues from the interplay between Title VII hostile environment liability and the First Amendment. And, while there is little case law available to define that relationship clearly and though it may be the subject of significant disagreement among scholars, I argue that any speech restrictions imposed by Title VII are permissible as a reasonable balance between the state’s compelling interest in eradicating workplace sexual harassment and legitimate speech interests of co-workers. The identity of those interests in the public school context suggests that a similar balance is appropriate for cyberbullying. Therefore, just as free speech defenses to Title VII liability should fail, so too should the parallel defenses to school discipline for cyberbullying.

1. Hostile Environment under Title VII

The Supreme Court has never explicitly held that a free speech challenge to Title VII would fail, but the Court has arguably implied it. A number of scholars have already concluded as much, pointing to the Court’s silence on a possible First Amendment-Title VII conflict as evidence,244 but my reading of the Court’s Title VII case law is slightly different. I argue that the Court’s silence is indeed instructive, but its explicit distinction between the kind of repeated and aggressive behavior that triggers Title VII liability, on the one hand, and the common give-and-take of the workplace, on the other, that more strongly suggests that the behavior proscribed by Title VII may be beneath First Amendment protection.

Title VII of the 1963 Civil Rights Act makes it “an unlawful employment practice for any employer … to discriminate against any individual with respect to … compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”245 The law may not specifically reference hostile environment sexual harassment, but courts have followed the interpretation of Equal Employment Opportunity Commission (EEOC) to find that Title VII bans two types of sexual harassment: “Quid pro quo” harassment, which involves conditioning employment benefits or opportunities on the employee’s submission to sexual advances or grant of sexual favors,246 and “hostile environment” harassment,247 which is defined as “[u]nwelcome sexual advances, requests for

244 Fallon, supra note 228, at 9-12 (arguing, in part, that the Court had the opportunity to address the argument, fully-briefed by the parties, that Title VII imposed an impermissible content-based restriction on free speech, but declined to do so).


247 See id. at 65-66.
sexual favors, and other verbal or physical conduct of a sexual nature.” The latter behavior violates Title VII when “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

In *Merit Savings Bank v. Vinson*, the Court adopted the EEOC’s guidance and upheld a Title VII claim based on hostile environment sex discrimination, but it required plaintiffs to prove that the harassment was so severe and pervasive so as to “alter the condition of employment.” Lower courts after *Vinson* developed different interpretations of that standard, leading to uncertainty as to the level of harm a plaintiff must attribute to the abusive behavior. For example, some circuits required the plaintiff to prove actual psychological injury to succeed on a Title VII claim, while others did not. The Court did little to clarify the doctrine in *Harris v. Forklift Systems*. In that case, the Court rejected the psychological injury requirement, but required an objectively hostile workplace in addition to evidence that the victim subjectively perceived the environment as abusive. The inquiry is fact-intensive, determined on the totality of the circumstances, and can lead to seemingly divergent results.

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250 *Id.* at 65 (noting that in developing the hostile environment guide lines, the EEOC drew upon many judicial decisions that suggested that employees had the right to a workplace environment free “from discriminatory intimidation, ridicule, and insult.”).
251 *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).
252 After *Merit*, the circuit courts of appeal agreed that a Title VII hostile environment plaintiff had to satisfy an objective test to meet the “alter the conditions of employment” level. But, the courts diverged on whether a plaintiff must also satisfy a subjective test with proof of severe psychological injury or effect. *Compare* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986); Brooms v. Regal Tube Co., 881 F.2d 412, 418-20 (7th Cir. 1989); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987) (requiring subjective test) with *Ellison v Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (rejecting psychological harm requirement).
254 *Id.* at 20. *See also* Forrest v. Brinker Intern. Payroll Co., LP, 511 F.3d 225, 228 (1st Cir. 2007) (requiring a Title VII plaintiff demonstrate that (1) she is a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of the plaintiff’s employment and create an abusive work environment; (5) the sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) some basis for employer liability has been established.).
255 Aulicino v. New York City Dept. of Homeless Services, 580 F.3d 73 (2d Cir. 2009).
256 *See, e.g.*, Turner v. Baylor Richardson Medical Center, 476 F.3d 337 (5th Cir. 2007).
257 Professor Vicki Schultz provides the most comprehensive and insightful analyses of hostile environment case law in the lower courts. *See, e.g.*, Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 11-18 (Fall 2006); Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087-2136 (June 2003).
Professor Richard Fallon258 and others have argued that the Supreme Court has “strongly suggested”259 that a First Amendment challenge to Title VII would fail. First, the Court declined to address the free speech issues raised by a Title VII hostile environment claim in *Harris*, despite the opportunity to do so. The defendant employer briefed the issues and the plaintiff answered;260 various *amicis* also joined in the chorus,261 with a group called Feminists for Free Expression explicitly urging the Court to narrow the cause of action “to accommodate constitutionally protected speech rights.”262 Its silence on this issue, coupled with Court’s duty to adopt a narrowing construction of the statute “to avoid constitutional difficulties”263 if at all possible,264 suggests that the Justices saw no need to narrow Title VII to avoid impingement on free speech rights. This is even more noticeable given the lower courts’ cavalier approach to First Amendment objections to Title VII liability in the post-*Vinson* era. Unlike a plethora of scholars,265 those courts generally ignored free speech issues, assuming they simply did not apply.266 Second, the Court’s opinion in *R.A.V. v. St. Paul*266 implied that a hostile environment claim would survive a free speech challenge. In that case, the Court struck down a municipal “hate speech” ordinance that banned only those “fighting words” that expressed hate on the basis of race, color, creed, religion or gender.267 The problem was that the law banned only one viewpoint: “aspersions upon a person’s mother, for example, would seemingly be usable ad Libertum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.”268 In other words, as a law against intolerant

258 See Fallon, *supra* note 228, at 9-12. Because I agree with Professor Fallon’s insightful analysis, the argument in this paragraph draws almost exclusively from his work.

259 See, e.g., *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1247 (10 Cir. 1999).


262 See *generally* *Brief of Amicus Curiae Feminists for Free Expression in Support of Petitioner, Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (*quoted in Fallon, *supra* note 228, at 10*).


265 See, e.g., *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1296 (9th Cir. 1993) (“Because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech, and some workplace harassment cases seem suspect on First Amendment grounds.”).


267 *Id.* at 381.

268 *Id.* at 391.
speech, the statute was impermissible viewpoint discrimination. Four justices attacked this theory from all angles, including the warning that “hostile work environment claims based on sexual harassment should fail First Amendment review” based on the majority’s holding. Justice Scalia anticipatorily responded that Title VII can withstand scrutiny by noting that “words can sometimes violate law directed not against speech but against conduct,” and if “the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea.” As a result, so-called “fighting words” that are sexually discriminatory could still produce a hostile workplace environment in violation of Title VII.

The Court’s decision to avoid First Amendment issues in *Harris* less than two years after *R.A.V.* suggests broad agreement on Title VII’s survival. The Court’s subsequent Title VII case law buttresses this view. Whatever a hostile environment may be in a given circumstance, an actionable workplace under Title VII is defined by what it is not – namely, Title VII “does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” It requires “neither asexuality nor androgyny in the workplace.” Nor does it proscribe criticism or epithets even when they actually offend a co-worker. It permits the kind of ordinary social give-and-take, “such as male-on-male horseplay or intersexual flirtation,” that is common in everyday life. And, “‘simple teasing’… offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms or conditions of employment.’” In all of its hostile environment cases, the Court reiterates the view that Title VII is not a “general civility code” aimed at stifling every interaction, or even every offensive interaction, in the workplace. Rather, Title VII only forbids objectively offensive behavior that would force the victim to work in an abusive environment. And, to make that determination, a court must consider “the social

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269 Id. at 409-10 (White, J., concurring).

270 Id. at 380-90. This argument is buttressed by *Wisconsin v. Mitchell*, 508 U.S. 476, 487, 489 (1993) (Title VII is an example of a permissible content-neutral regulation of conduct; evidentiary use of defendant’s speech is permitted in evaluating a Title VII claim).

271 Lower courts have agreed with this analysis. See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n. 89 (D. Minn. 1993) (“Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive working environment. That expression is ‘swept up’ in this proscription does not violate First Amendment principles.”).


273 Id.

274 *Vinson*, 477 U.S. at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

275 *Oncale*, 523 U.S. at 81.


277 See, e.g., id.

278 *Harris*, 510 U.S. at 21-22.
context in which particular behavior occurs and is experienced by its target.\textsuperscript{279} The distinction between hostile and non-hostile environments may not be precise or even helpful for a district court judge weighing a Title VII claim, but it should remind us of the distinction between cyberattacking and cyberbullying. Another inexact and blurry line, the difference between single-incident aggression and repeated bullying is a matter of degree, frequency, effects and context. The Court’s apparent acceptance that free speech defenses will fail against Title VII harassment claims suggests that the similar free speech defenses to school discipline for bullying and harassment will also fail.

2. Bullying in Schools and Harassment in the Workplace

A hostile workplace, then, differs from its non-actionable cousin in the same ways that a school rife with bullying and cyberbullying differs from one characterized by aggression, cyberattacking, teasing and the normal give-and-take of adolescence. There may be no precise boundary or bright line rule that identifies the hostile environments, but like the severe and pervasive abuse that characterizes bullying and cyberbullying, harassment that is actionable under Title VII has the same five characteristics. First, both bullying and harassment require a pattern of repeated conduct. Second, the kind of abusive behavior is similar. Third, the victims of abuse are so-called weaker parties, identified, in part, by their real or perceived minority status in the school or workplace environments. Fourth, bullying and workplace harassment have the same effects on their victims. Fifth, both forms of harassment can be executed beyond the four walls of the shared environment. These striking similarities, coupled with the clear differences between this kind of harassing conduct and the behavior at issue in \textit{Tinker} and its progeny, suggest that bullying and cyberbullying in schools should be treated more like hostile environment harassment than student speech.

\textbf{Repetition:} Every court to address a Title VII hostile environment claim has either stated that repetition of the conduct is determinative\textsuperscript{280} or considers repetition an important factor in the severe and pervasive analysis.\textsuperscript{281} This makes sense given the plain language of the Court’s “severe and pervasive” test. That is, since abusive cannot be “pervasive” if it is not repeated, some circuits replace “pervasive” with “regular,” further evidencing the need for repeated conduct.\textsuperscript{282} Similarly, bullying must be repeated. The repetition of hostile acts is not only a

\textsuperscript{279} Oncale, 523 U.S. at 81.

\textsuperscript{280} See, e.g., Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 648 (2007), \textit{rev’d on other grounds by statute} (Ginsburg, J., dissenting) (\textit{quoting} Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111, 113-15 (2002)) (the nature of hostile environment claims “‘involves repeated conduct. The unlawful employment practice’ in hostile work environment claims, ‘cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.’ The persistence of the discriminatory conduct both indicates that management should have known of its existence and produces a cognizable harm. … [T]he very nature of the hostile work environment claim involves repeated conduct, …”) (internal citations omitted).

\textsuperscript{281} See, e.g., Harris, 510 U.S. at 23; Billings v. Town Of Grafton, 515 F.3d 39, 48 (1st Cir. 2008).

defining element in the social science literature, but it distinguishes between the common give-and-take among adolescents and significantly more egregious conduct. Cyberattacking does not share this characteristic.

**Conduct:** The kind of abusive behavior that creates a hostile environment in the workplace is also similar to bullying behavior in schools. There may be no clear rule that defines which conduct will amount to sufficiently severe harassment in either case, but a random survey of Title VII and bullying case law evidences striking identity of bad conduct. Using derogatory and degrading sexual terms to describe the victim, making sexually explicit comments and making overtly sexual gestures, spreading sexual rumors, attempting to physically abuse the victim, drawing vulgar and explicit graffiti, grabbing the victim in aggressive and explicit ways, making negative comments about the victim’s identity, and making sexually explicit comments about the victim and the female gender with Nabozny, 92 F.3d at 451 (slurs about Jamie being gay and about gay people, in general).

It is beyond the scope of this paper to review every case in which workplace conduct rose to the level of creating a hostile environment for Title VII purposes. Instead, I took a random sampling of such cases ranging over approximately twenty years.

**Compare e.g.,** Spencer v. Gen. Elec. Co., 697 F. Supp. 204, 219 (E.D. Va. 1988) (derogatory and degrading comments about the victim and the female gender) with Nabozny, 92 F.3d at 451 (slurs about Jamie being gay and about gay people, in general).

**Compare e.g.,** Grazioli v. Genuine Parts Co., 409 F. Supp. 2d 569, 573 (D.N.J. 2005) (“‘Monday through Friday’ [the harasser] made ‘offensive, sexually related comments and hand gestures.’ …[U]sed words such as ‘fuck’ and … referenced ‘blow jobs’ ‘as part of his general conversation throughout the day.’”) with Nabozny, 92 F.3d at 451 (sexually explicit terms and gestures about gay sex) and Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 955 (D. Kan. 2005) (“faggot” and “flamer”, screaming that “Dylan likes to suck cock,” and telling the school that “Dylan masturbates with fish.”)

**Compare e.g.,** Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 61 (2d Cir. 1992) (aggressor pretended to masturbate and ejaculate at victim behind her back to express his anger with her) with Theno, 377 F. Supp. 2d at 956 (students performed mock fellatio as emblematic of the victim’s alleged sexual behavior).

**Compare e.g.,** Spain v. Gallegos, 26 F.3d 439, 442 (3rd Cir. 1994) (spreading rumors that the victim was sexually involved with a superior) and Jew v. Univ. of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990) (same) with Theno, 377 F. Supp. 2d at 956 (students started a rumor that the victim was caught masturbating in the school bathroom).

**Compare e.g.,** Cronin v. United Service Stations, Inc., 809 F. Supp. 922, 926 (M.D. Ala. 1992) (shouting match leading to assault) with Nabozny, 92 F.3d at 452 (physical abuse by a student).

**Compare e.g.,** Baty v. Willamette Indus., Inc., 985 F. Supp. 987, 992 (D. Kan. 1997) (graffiti in the men’s bathroom about the victim’s sexuality, exploits, relationships) with Theno, 377 F. Supp. 2d at 955 (depictions of Dylan or of gay sex).

**Compare e.g.,** Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1374 (8th Cir. 1996) (at least twelve different male co-workers ‘bagged’ [the victim] on some 100 occasions … ‘Bagging’ is … the intentional grabbing and squeezing of another person’s testicles.”) with Nabozny, 92 F.3d at 451 (mock rape of victim).
creating a rating system to assess the attractiveness of victims, and a plethora of other behaviors characterize hostile workplace and educational environments. Admittedly, actionable conduct under Title VII usually involved sex-based conduct, which may – but need not – characterize bullying behavior. If anything, that dissimilarity makes bullying an even worse problem than sexual harassment in the workplace; the latter is a subset of the former in that bullying can involve sex-based harassment, but can also involve aggressive behavior based on physical differences, intelligence, or minority status, to name just a few possibilities. And, while it is true that single-incident attackers can engage in these behaviors, as well, sex-based harassment characterizes many of the most egregious bullying cases, especially in minority communities.

**Victims:** In hostile workplace and educational environments, the victims of harassment are the so-called “weaker” party, or perceived as such, based on their minority status. Social scientists require an “imbalance of power” between the aggressor and the victim for conduct to meet the definition of bullying, and a prima facie case of hostile environment harassment under Title VII requires that the plaintiff prove he or she is a member of a protected class. Just like women are not the only victims in hostile workplaces, the traditional image of a bully as a popular, strong, athletic and aggressive male who targets a physically weaker student fails to capture the broad sweep of a power imbalance. A victim’s minority status can also cause a power imbalance. For example, ethnicity may function as a status characteristic and can lead to an imbalance of power, especially between members of ethnic minorities on the one hand and ethnic majority group members on the other. Women have long been minorities in the workplace and in some industries more than others. And, like women – who make up the vast majority of targets of sexual abuse in the workplace – ethnic, racial and sexual identity minorities are often the most severely bullied students in school. Though these minorities can

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292 Compare e.g., Stephenson v. Aluminum Co. of Am., 915 F. Supp. 39, 43-44 (S.D. Ind. 1995) (derogatory and demeaning comments about women in the workplace as “sluts and whores”) with Nabozny, 92 F.3d 451-52 (derogatory comments about gays).

293 Compare e.g., Wall v. A.T. & T. Tech., Inc., 754 F. Supp. 1084, 1088 (M.D.N.C. 1990) (1-to-10 rating system to assess the physical attributes of women) with Blumenfeld, supra note 13, at 119 (including online polling pages to rate victims as “hot or not” or “ugliest” as examples of cyberaggressive behavior).

294 See, e.g., Nabozny, 92 F.3d at 451-52; Theno, 377 F. Supp. 2d at 955-56.

295 See supra note 11 and accompanying text.

296 E.g., Forrest, 511 F.3d at 228.


298 Robinson, 760 F. Supp. at 1491 (the target, Lois Robinson, was a welder).

299 Women are not the only victims. See, e.g., Oncale, 523 U.S. at 76-77 (Oncale is male). For a good summary of some notable male-victim cases and their legal strategies, see Stephen J. Nathans, Comment, Twelve Years After PriceWaterhouse and Still No Success for ‘Hopkins in Drag’: The Lack of Protection for the Male Victim of Gender Stereotyping under Title VII, 46 VILL. L. REV. 713, 724-39 (2001).
be victimized by single-incident aggression, so too is almost everyone else in school. Conversely, minorities are over-represented among victims of bullying and harassment.

**Effects:** Given the similarities in conduct and types of victims, it should come as no surprise that bullying and workplace sexual abuse harm their victims in similarly devastating ways. Workplace harassment and school bullying have been found to cause stress, anxiety, mood swings and depression. They create feelings of embarrassment and shame and low self-esteem. More severe effects can include Post-Traumatic Stress Disorder, and even severe physical effects like compromised immunity to infection, headaches, spikes in blood pressure and digestive problems related to stress. Also like bullying, workplace harassment can cause

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300 The Gay, Lesbian and Straight Education Network’s (GLSEN) 2009 National School Climate Survey revealed that 88.9 percent of students heard the word “gay” used in a negative way, 72.4 percent heard other homophobic remarks (i.e., “dyke” or “faggot”) in school and online, and 84.6 percent were verbally harassed (i.e., called names or threatened with violence) at school because of their sexual orientation. More than 40 percent were physically harassed (i.e., pushed, shoved or otherwise physically attacked) at school in the past year because of their sexual orientation and 27.2 percent were harassed because of their gender expression. Nearly 20 percent were physically assaulted (i.e., punched, kicked, attacked with a weapon) and nearly 53 percent were harassed or threatened via electronic media (i.e., text messages, emails, instant messages or postings on Facebook). As a result, more than 61 percent felt unsafe at school because of their sexual orientation and 39.9 percent felt unsafe at school because of how they expressed their gender. GLSEN, The 2009 National School Climate Survey (“Climate Survey”) (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENT/file/000/001/1675-5.PDF.

The Human Rights Watch conducted a survey from October 1999 to October 2000, during which time 140 gay, lesbian, bisexual and transgender students between the ages of 12 and 21 reported “persistent and severe homophobic bullying including taunts, property damage, social exclusion and physical attacks.” Human Rights Watch, Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in the U.S. (2001) (cited in Swearer, supra note 16, at 161 (2008)). LGBT students are nearly three times as likely as heterosexual students to have been assaulted or involved in at least one physical fight at school, are three times as likely to have been threatened or injured with a weapon at school and are nearly four times as likely to have skipped school because they felt unsafe. See id. at 170.

301 For a discussion of negative economic effects and other detrimental effects on parties other than the victim, see David C. Yamada, The Phenomenon of ‘Workplace Bullying’ and the Need for Status-Blind Hostile Work Environment Protection, 88 Geo. L.J. 475, 483-84 (Mar. 2000).

302 E.g., Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1997) (feelings of fear, intimidating, anxiety).

303 E.g., Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994) (severe depression).

304 See GARY NAMIE & RUTH NAMIE, BULLYPROOF YOURSELF AT WORK! 69 (1999) (cited in Yamada, supra note 301, at 483). In particular, Professor Harvey Hornstein has showed correlations between “a boss’s abusive disrespect” and depression, anxiety, and low self-esteem. HARVEY A. HORNSTEIN, BRUTAL BOSSES AND THEIR PREY 74-75 (1996). These psychological effects have been linked to serious physical effects, like cardiovascular disease and musculoskeletal disorders. See NATIONAL INST. FOR OCCUPATIONAL SAFETY AND HEALTH, STRESS AT WORK (1999). See also Michelle L. Ybarra et al., Examining Characteristics and Associated Distress Related to Internet Harassment: Findings from the Second Youth Internet Survey, 118 PEDIATRICS 1169-77 (2006); Adrienne Nishina and Jaana Juvonen, Daily Reports of Witnessing and Experiencing Peer Harassment in Middle School, 76 CHILD DEV. 435-50 (2005); Ybarra, Linkages Between Depressive Symptomatology and Internet Harassment Among Regular Internet Users, 7 CYBERPSYCHOLOGY BEHAV. 247-57 (2004).

305 Nabozny, 92 F.3d at 452.

306 NAMIE & NAMIE, supra note 304, at 69-70 (cited in Yamada, supra note 301, at 483). See also Willard, supra note 30, at 27-56.
absenteeism and impaired productivity. The Supreme Court recognized these damaging effects in *Harris*, noting that a “discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” And, various courts and scholars have chronicled similar effects in bullying victims. Cyberattacking does not share this characteristic.

**Location:** School and workplace harassment victimize their targets even when the harassment takes place off campus or outside the office. We have already seen how bullies can harass their victims even when not on school property. And, while the out-of-office reach of Title VII is up for debate, numerous courts have found that Title VII does capture conduct outside the workplace. The EEOC is already litigating hostile environment cases that involve harassing phone calls, sexually explicit and lewd emails, and looking at pornography online, harassing text messages, vulgar and sexually explicit Facebook posts and “email bombing” are simply the modern analogs. And, just like the modern school is wired with Internet access and integrates technology into the curriculum, the modern workplace is digital. Most companies and the federal government have “telework” or “remote work” policies that allow employees to work from home and provide the hardware and software to do it.

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307 E.g., Rorrer v. Cleveland Steel Container, 712 F. Supp. 2d 422, 429 (E.D. Pa. 2010) (employee’s fear that co-worker was going to kill her was so strong she asked her mother to move into her home, she had nightmares, wet her bed, had images of co-worker in her backyard with a gun, and stayed in the house all day with her door locked).

308 *Harris*, 510 U.S. at 22.

309 See, e.g., *Nabozny*, 92 F.3d at 452.


311 See supra notes 16-17, 97-118 and accompanying text.

312 See infra notes 324-344 and accompanying text.

313 E.g., Lauderdale v. Texas Dep’t of Criminal Justice Inst’l Div., 512 F.3d 157, 164 (5th Cir. 2007) (concluding that ten to fifteen nightly phone calls for nearly four months from the plaintiff’s supervisor amounted to pervasive harassment).

314 E.g., Lee v. Pa. Dep’t of Health, No. 07-677, 2007 WL 2463404, at *2 (W.D. Pa. Aug. 28, 2007) (denying a motion to dismiss a Title VII gender discrimination claim where supporting allegations in the complaint showed that the plaintiff had received pornographic emails).


316 “Email bombing” is a form of denial of service that floods and inbox with messages.

317 Telework, http://telework.gov (“Telework,” “telecommuting,” “flexible workplace,” “remote work,” “virtual work,” and “mobile work” are terms the Office of Personnel Management uses to refer to work done outside of the traditional on-site work environment).
Increasingly, employees are hired, fired or interviewed over Skype, conduct world-wide business meetings through Internet videoconferencing technologies, and participate in internal or external employee chat rooms. Many of these individuals also maintain Facebook or online dating profiles. According to one recent study, 81 percent of adults age 30-49 and 70 percent of adults age 50-64 have an online presence. This places them squarely in the same virtual role occupied by students, making them similarly subject to cyberharassment and cyberaggressive behavior.

Ultimately, the question of extending employer liability to harassing co-worker conduct that takes place online is for another day. For the purposes of this Article, I argue that, like bullying in schools, sexually abusive conduct that creates a hostile workplace environment need not only take place within the four walls of the traditional office. This is just one of numerous striking similarities between bullying in schools and hostile environment harassment. Those similarieties mean that, with respect to a potential free speech defense, bullying should be treated more like Title VII harassment than the protest speech that was at issue in Tinker. Although I argue that online conduct that would not occur but for the employment relationship between the aggressor and the victim should be considered relevant for determining the hostility of a broader, modern workplace environment, it is not a necessary conclusion for my theory. There are, after all, important differences between schools and workplaces, students and adults, nonsexual and sexual harassment. However, by establishing that the school environment should extend to students acting against other students when they use the Internet, I can argue that the merit of a cyberbully’s First Amendment defense should mimic the merit of a free speech defense by a workplace harasser who creates a hostile environment, wherever he engages in his conduct.

4. Implications of Similarities: Cyberbullying and the First Amendment

Like Amelia, the cyberaggressor challenging her punishment on First Amendment grounds, Zachary the cyberbully is likely to offer the same campus presence and pure speech arguments. In the alternative, he is likely to argue that his conduct neither created a “material or substantial” disruption nor reasonably risked creating a substantial disruption in the future

318 How to Ace a Job Interview on Skype?, TIME.COM, at http://www.time.com/time/video/player/0,32068,46937715001_1933401,00.html.

319 WebEx by Cisco, among others, provides this commonly used technology. See WebEx, http://www.webex.com.


321 Forty-seven percent of online adults maintain a profile on a social networking site. While that is significantly lower than teenagers (ages 12-17) and young adults (ages 18-29), the number has grown exponentially in the last 5 years. See Amanda Lenhart et al., Social Media and Mobil Internet Use Among Teens and Young Adults, at 17, available at http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf

322 Id. at 5.

323 See supra notes 52- and accompanying text.
because his behavior was directed at one individual, not the school. I argue that these arguments miss the point. Harassment of one can create hostility for all, but even if there was a per se rule that intimidation of one student could never cause a substantial disruption to a school, a school’s decision to discipline Zachary should not be judged through the student speech context. Zachary was not acting qua student alone when he harassed his victims over a period of time; he was acting much like a workplace harasser who creates a hostile environment for a co-worker. His argument that he should not be subject to school discipline for conduct that took place off campus will fail not because Tinker and its progeny never required a campus presence, but because Title VII liability is not limited to face-to-face conduct that takes place in the office.324 Similarly, Zachary’s potential First Amendment defense to discipline should fail not because his conduct created a substantial disruption under Tinker, but because, similar to Title VII workplace regulation, any incidental impingements on free speech are permissible given that students are “captive audiences” for the purposes of First Amendment jurisprudence and given the state’s compelling interest to prevent harassment in schools and ensure educational opportunities for all.

a. No Office Requirement

Title VII does capture conduct outside the workplace. In Crowley v. L.L. Bean, Inc.,325 for example, the First Circuit held that evidence of non-workplace conduct was admissible to help prove the “severe and pervasive” element of a Title VII claim.326 In fact, courts have long admitted such evidence327 in part because the outside conduct – sexually inappropriate touching and aggressive behavior at a company pool party328 – “explained why [the victim] was so frightened … and why [the harasser’s] constant presence around her at work created a hostile work environment.”329 The out-of-office conduct, then, helped make the workplace a hostile environment. This suggests that the locus of harassment is not as material as the workplace effects of the harassment, wherever it may occur.

The Seventh Circuit came to a similar conclusion in Lapka v. Chertoff.330 In that case, the victim was at a mandatory off-site training session, where, after a night at a bar, another employee sexually assaulted her.331 The aggressor started showing up at his victim’s office and,

324 The school’s prima facie case for disciplinary authority should also be modeled on Harris: Zachary’s behavior created an objectively hostile workplace and his victim perceived his environment to be subjectively hostile.

325 303 F.3d 387 (1st Cir. 2002).

326 Id. at 409.

327 Id. (citing O’Rourke v. City of Providence, 235 F.3d 713, 724 (1st Cir. 2001) (crank phone calls admissible evidence).

328 Id. at 392.

329 Id. at 409-10.

330 517 F.3d 974 (7th Cir. 2008).

331 Id. at 979.
despite her fears, complaints and official requests for an order of protection, her employers did nothing about her harasser.\textsuperscript{332} The court rejected the employer’s off-site defense, stating that “harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace.”\textsuperscript{333} The training facility may have been an atypical location for workplace harassment, but it was sufficiently connected to the victim’s employment. She was there because of her employment, her employers provided lodging and food and the harasser’s behavior at the training site caused significant repercussions back at the victim’s office.\textsuperscript{334}

And, in \textit{Parrish v. Sollecito},\textsuperscript{335} the Southern District of New York found that off-site sexually explicit touching can form the basis of a Title VII claim.\textsuperscript{336} Like the Seventh and First Circuits, the court found that “[t]he proper focus of sexual harassment jurisprudence is not on any particular point in time or coordinate location that rigidly affixes the employment relationship, but on the manifest conduct associated with it.”\textsuperscript{337} An employment relationship, the court concluded, is no longer neatly bounded by walls and hours and, as a result, the workplace environment may be defined or affected by interaction outside the office.\textsuperscript{338} After all, “outside misbehavior rebounds and transposes its consequences inside the actual workplace itself.”\textsuperscript{339} What’s more, those interactions do not necessarily have to be mandated by the employer or even based on a business purpose – such as an off-site training seminar or a business meeting or an office Christmas party – but can simply be based on the “employment relationship.”\textsuperscript{340}

The courts’ reasoning in \textit{Crowley, Lapka} and \textit{Parrish} echoes my theory, discussed supra, that schools maintain disciplinary authority when their students act \textit{qua} students. It is the relationship between the school and the student, not the presence of the student in any particular location, that defines the school’s orbit.\textsuperscript{341} The important factors for the cyberattacking and cyberbullying context, then, are twofold: (1) but for the aggressor and victim being students at the same school, the former would not be targeting the latter, and (2) by virtue of both the aggressor’s and victim’s statuses as students, the school community could feel the effects of the

\textsuperscript{332} \textit{Id.} at 980.

\textsuperscript{333} \textit{Id.} at 983.

\textsuperscript{334} \textit{Id.}

\textsuperscript{335} 249 F. Supp. 2d 342 (S.D.N.Y. 2003).

\textsuperscript{336} \textit{Id.} at 350-51. The harasser had inappropriately placed his hands under the victim’s skirt and near her groin three times before, all of them at the workplace. The case focused on off-site conduct – a forth incident at a funeral for the father of the company’s owner – because that was the only incident falling within 300 days of the victim’s EEOC filing. \textit{Id.} at 347.

\textsuperscript{337} \textit{Id.} at 351.

\textsuperscript{338} \textit{Id.}

\textsuperscript{339} \textit{Id.} at 352.

\textsuperscript{340} \textit{Id.} at 351.

\textsuperscript{341} \textit{See generally supra} notes 60-96 and accompanying text.
aggression. Similarly, the Crowley, Lapka and Parrish line of cases suggests that it is the employment relationship and its attendant obligations, social interactions and connections that define the reach of the workplace. These courts see no constraints in Title VII that would limit employer liability to the four walls of the office or even to mandatory work events – the training seminar in Lapka may have been mandatory, but Crowley’s pool party and Parrish’s funeral were permissive social engagements related to employment. Like the school context, what matters is not where the aggressor misbehaves, but the same two factors: (1) but for their co-employment, the harasser would not be targeting this victim, and (2) their status as co-workers makes the workplace the locus of any effects of the harassing conduct.

This reasoning can, and should, extend to instances of cyberharassment. There have been precious few Title VII hostile environment cases about online conduct, but some courts to confront the issue have, at a minimum, accepted that the harassing behavior online is relevant for assessing the hostility of the work environment. In Blakey v. Continental Airlines, for example, a female pilot claimed that Continental had created a hostile environment by allowing her male co-workers to post lewd and derogatory comments on an internal electronic bulletin board. The New Jersey Supreme Court allowed the suit to continue, finding that “if the employer had notice that co-employees were engaged on such a work-related forum in a pattern of retaliatory harassment directed at a co-employee, the employer would have a duty to remedy harassment.” But, the court’s reasoning would appear to limit the relevance of online harassment when it occurs in an online forum controlled by the employer. This hardly describes the kind of harassment that can occur after hours, or over email, text or through social networking sites. To that point, cases like Clegg v. Falcon Plastics may be more instructive. There, the court allowed a hostile environment claim based, in part, on a series of sexually vulgar emails between a manager and an employee that took place entirely online, through their personal emails and after work hours. Granted, this conduct was paired with face-to-face harassment in the work place, but that is often the case in the cyberbullying context, as well. Clegg shows that online conduct that is not only physically outside the workplace, but also has nothing to do with the workplace other than the relationship between the harasser and victim can fall within the ambit of a Title VII hostile environment claim. The hostile environment at work, much like the hostile environment at school, can be made more severe or even created by this cyberharassment. And, as argued above, the modern workplace is increasingly dependent on cybertechnologies. If we are willing to recognize the fact that harassment outside the workplace can contribute to a hostile environment, then the boundaries of out-of-office conduct should be flexible enough to accommodate a workplace that is no longer confined to an office tower, but is as boundless as the Internet itself.

342 751 A.2d 538 (N.J. 2000).
343 Id. at 543.
344 No. 05-1826, 2006 WL 887937 (3rd Cir. Apr. 6, 2006).
345 Id. at *1 (“Filthy” and “graphic” emails between home computers, resulting in victim “slowly phas[ing] … out” Internet communication).
346 See supra notes 313-322 and accompanying text.
b. Hostile Environment Regulation Withstands Free Speech Defense in the Workplace and in Schools

Context pervades First Amendment jurisprudence. Context is essential for determining when restrictions on speech are permissible. And, given the similarities between the workplace and school contexts, free speech defenses to Title VII liability and school disciplinary authority should fail, as a matter of First Amendment doctrine, for the same three reasons. First, the state’s interest in restricting, eradicating and punishing hostile, harassing or abusive speech may clash with fundamental free speech principles, but any such clash, even with significant impingements on co-worker speech rights, would survive strict scrutiny. To survive strict scrutiny, a restriction on expression must be supported by a “compelling” government interest, it must be necessary to accomplish that interest and it must be narrowly tailored so it exerts the least possible burden on free speech rights. Even laws that are content- or viewpoint-based are permissible if they pass strict scrutiny.

The state has a compelling interest in eradicating hostile environment discrimination. And, the specific focus of Title VII – reaching objectively and subjectively hostile workplaces while leaving untouched the kind of ordinary give-and-take among the sexes – means that the statute is both necessary and sufficiently narrowly tailored to survive any strict scrutiny analysis.

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347 See FCC v. Pacifica Foundation, 438 U.S. 736, 748 (1978) (“Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission’s action was constitutionally permissible.”)

348 I ignore the speech/action distinction for the reasons stated supra notes 144-155 and accompanying text, even though at least one court has relied on the differences between speech and harassing conduct to explain the legitimate orbit of Title VII. See Robinson, 760 F. Supp. at 1535 (“the pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment”).


352 Harris, 510 U.S. at 20.

353 Oncale, 523 U.S. at 81.
on a claim that it violates fundamental free speech rights. The similarities between hostile workplace environments caused by sex-based harassers and hostile educational environments caused by bullies, together with the salient and unique roles schools play in educating the nation’s youth for participation in civil society, suggests that there is a compelling interest in eradicating hostile educational environments, as well. Presumably, if the state has a compelling interest in eradicating hostile environment discrimination, the school has a mandate to teach anti-harassing behavior; after all, a school would not be adequately preparing students for the workforce if it was training workplace harassers. Subjecting bullies and cyberbullies to school discipline is also a sufficiently narrowly tailored tactic given the egregiousness and rarity of true bullying cases.

But, this argument may prove too much. The state’s compelling interest in eradicating hostile environments in the workplace is bound up with the sex-based discrimination that causes it. Congress already transferred that compelling interest into the school context with Title IX, which makes the denial of educational opportunities actionable when based on sex. Bullying and cyberbullying in schools, however, are not limited to harassment based on sex. They can be sex-based, as some of the more egregious bullying cases in recent memory have focused on the sex- or gender-identity-based harassment of gay youth, but bullying is no more harmful when it occurs because of reasons captured by Title IX than when it is based on differences in academic achievement, physical strength or personal vendettas, none of which would be actionable as sex-based harassment.

I argue that the unique context of the school creates a compelling interest in eradicating from our schools the kind of harassment caused by bullying and cyberbullying even when it is not based on sex. The Supreme Court has repeatedly recognized that the role of public education is to do more than teach reading, writing and arithmetic. It “must prepare pupils for citizenship” and “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensible to the practice of self-government.”

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354 See Epstein, supra note 351, at 442-46 (more fully developing the necessity and narrow tailoring arguments). Notably, in her landmark analysis of Title VII hostile environment law, Professor Suzanne Sangree saw no need to subject Title VII to strict scrutiny. Suzanne Sangree, Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 RUTGERS L. REV. 461 (1995). Professor Sangree asserted that “prohibiting harassing speech enhances First Amendment free speech principles,” and that therefore “it is clear that the First Amendment is not harmed by hostile environment law” because eliminating harassment eliminates the intimidation and chilling effect on victims’ willingness and ability to express themselves. Id. at 481, 559. This argument has intuitive appeal, but it appears to paint a utilitarian or collective face to First Amendment a la John Stuart Mill. That is, the First Amendment is meant to enhance our society’s total speech, with incidental restrictions on speech being permissible if those restrictions permit a greater amount of speech to flourish. Presumably, that would be the effect of Title VII – it would restrict the harassing speech of the few misogynistic men and finally let all women express themselves. No court or First Amendment scholar, however, has ever suggested that the First Amendment is aimed at collective speech rights. Instead, the protection is individualized.

355 See, e.g., Theno, 377 F. Supp. 2d at 973 (“Based on the origin and common theme of harassment, which was a rumor that plaintiff was caught masturbating in the bathroom in seventh grade, a rational trier of fact could conclude that plaintiff was harassed because his harassers perceived that he did not act as they believed a man (or perhaps more accurately a teenage boy) should act.”).

356 Fraser, 478 U.S. at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
values” not only through books, but by example, teaching “lessons of civil, mature conduct” both in and out of the classroom. The lesson that we should not harass, abuse or mistreat those that are different, weak or easy targets is undoubtedly part of the “civil, mature conduct” that is both essential to growing up and essential to a functioning democracy. Furthermore, just like the Court acknowledged that schools have an “important – indeed, perhaps compelling” interest in deterring illegal behavior, such as drug use, and buttressed that strong interest with evidence about the extensive school drug problem, there is ample evidence that growing incivility among our youth and adult population is causing personal and systemic harm. Bullying and cyberbullying is getting worse, and has contributed to the deaths of no less than ten young men and women in the last year alone. It has particularly devastating effects on minority populations and those so-called “hidden populations” that are victimized not only by aggressors at school, but by a greater community that hates them. And, outside the school context, our public discourse is so deeply infected with incivility, ad hominem attacks and expressions of hate that it took the shooting of Representative Gabrielle Giffords to even get us talking about how we treat one another. Politicians are adults; they can handle themselves. Children cannot. And, if the Court is serious about “civil, mature conduct” being essential to both schooling and democracy, then schools have a mandate to punish behavior that is incongruous with those principles.

358 Fraser, 478 U.S. at 683.
359 Morse, 551 U.S. at 394-95 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).
360 Comparing two Youth Internet Safety Surveys conducted in 2000 and 2006 suggests that cyberbullying is becoming more common. In 2006, 9 percent of survey participants reported being harassed online with almost 33 percent surveyed admitting to activities that fit the cyberbullying definition. Those numbers are up from 6 percent and 12 percent, respectively, from the 2000 study. Janis Wolak et al., Online Victimization of Youth: Five Years Later, National Center for Missing and Exploited Children (2006), available at http://www.unh.edu/c_crc/pdf/CV138.pdf.
362 Douglas D. Heckathorn, Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations, 49 SOCIAL PROBLEMS 11-34 (2002). Gays and lesbians are only one type of hidden population. Another is one that cannot come forward and identify himself for fear of legal reprisal, like an intravenous drug user. As such, it is difficult for social scientists to reach this population for study. Professor Heckathorn has pioneered the use of online social networks to reach this type of population.
Second, harassing or abusive speech that creates hostile working or educational environments falls within the “captive audience” exception to the First Amendment. The First Amendment permits restrictions on certain kinds of offensive speech when the target of the speech has no recourse to avoid it. The exception appears to be based on the privacy interests of the listeners, inasmuch as their privacy is being invaded by aggressive, intolerable speech, and requires that they have no ready means of avoiding the unwanted speech. After all, “the right to express ideas does not include the right to impose the communication of those ideas on an unwilling listener. … Citizens have a right to speak. Citizens also have a right not to be forced to listen.” Because of the unique characteristics of a workplace and a school, workers and students should be considered captive audiences.

The case law involving captive audiences suggests the doctrine is a misnomer. Permissible regulation of speech does not hinge on the relative “captivity” of the audience wherever they may be, as the doctrine’s name might suggest, but on the unique relationship between the audience and the place holding that audience “captive.” This explains why the Court has used the doctrine to uphold restrictions on television broadcasts, mail and harassing phone calls in the home, even though it is easy to change the channel, throw out unwanted mail or hang up the telephone, but has declined to extend the doctrine to restrictions on offensive speech in places, like a school board meeting, from which it possible to escape, but only if you are willing to give up your right to be heard. Even though residents in their home can avoid what they feel is offensive or abusive speech by ignoring or discarding it, the fact that the speech invades the home – where we are lords of our own manors – is paramount. This near exclusive application of the “captive audience” doctrine to the home has moved some scholars, most

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370 See, e.g., Gormley v. Director, Conn. State Dep’t of Probation, 632 F.2d 938, 941 (2d Cir. 1980) (upholding constitutionality of telephone harassment statute).


notably Professor Eugene Volokh, to argue that this exception does not adequately justify Title VII’s restrictions on co-worker speech.373

Professor Volokh believes that this precedent means that the home may be the only locus of a captive audience, but in so concluding, he misses the Court’s multi-layered reasoning. What permits a captive audience exception in the home is not the home itself, but rather our refusal to accept that evidently easy avoidance should be necessary in the home. We are not held “captive” in the home any more than we are captive on the street because we can simply turn off a television, walk into another room or step outside. But, because of the unique role of the home in the privacy rights of the resident, we should not have to. The Court’s precedents limiting the captive audience exception to the home are based on “[the ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter…’]”374 It is not the edifice that gives meaning to this well-worn saying; it is our expectation of privacy within the home that does. This explains why Paul Cohen could wear his “Fuck the Draft” jacket in a courthouse despite the argument that he “thrust” his “distasteful mode of expression … upon unwilling or unsuspecting viewers.”375 Courthouse visitors have no right to a captive audience exception because we do not associate important privacy rights with visitors to courthouses. This suggests that the captive audience doctrine is particularly strong in the home because of one’s privacy rights within the home. It is the imbalance of rights – the offensive speaker’s relatively weak right to speak compared to the resident’s robust privacy rights within his home – that gives the captive audience exception in the home any meaning. It stands to reason, then, that equally as important rights in other contexts could outweigh an offensive speaker’s right to speak.

Granted, while my theory that the captive audience exception is applicable to those contexts that implicate important, perhaps fundamental, privacy rights takes the exception out of the limited boundaries of the home, it does not necessarily extend it to the workplace. Workers certainly have an expectation of privacy in their office,376 but it is not as strong as a person’s expectation of privacy in his home. That concern is of no moment. Fundamental privacy rights happen to be the counterweight that makes it inappropriate to expect a resident to walk outside of his home to avoid offensive speech, but there is no principle that makes privacy the only possible counterweight. Admittedly, it may be an extension of the Court’s precedents to recognize a captive audience exception based on fundamental rights other than privacy in the home, but such an extension makes sense. There are other fundamental rights that are just as important as being the king of one’s castle.

Equal protection is a paradigmatic example. As Professor Deborah Epstein has noted, Congress expressly enacted Title VII based on the Commerce Clause and on the “Fourteenth Amendment, Section 5 authority ‘to enforce, by appropriate legislation, the provisions of’ the Fourteenth Amendment,377 of which the equal protection clause is one essential part. In Heart of


374 Rowan, 397 U.S. at 737.

375 Cohen, 403 U.S. at 21.


377 Epstein, supra note 351, at 437.
Atlanta Motel, Inc. v. United States, the Court recognized this dual source of authority, and while the majority found no need to address the Fourteenth Amendment issue, Justices Douglas and Goldberg wrote separately to make clear that the Fourteenth Amendment’s grant of enforcement authority would have been a legitimate independent basis for Title VII. The law was meant to “vindicate human dignity,” a fundamental right that is assaulted by hostile environment harassment and bullying and cyberbullying in schools. We should not expect harassed co-workers and abused students to have to look the other way, transfer or quit in order to avoid their tormenter because they have a fundamental right to the same opportunities as those around them.

Indeed, those options may not even be possible. Most employees cannot simply leave work to avoid harassment, lest they be fired. They can ask for transfers, but that is neither a feasible option in small companies nor an effective option in large companies. Furthermore, transfers to another office, building or city may allow the victim to avoid her harasser, but not only is moving to another city often infeasible, but the notion that harassment victims should be “run out of town” before the harasser has his right to abusive speech curtailed is laughable. And, if the victim stays and remains subject to her harassment, her job performance, psychological well-being and health will suffer. Any suggestion that employees can simply avoid their harassers or ignore them is to misconstrue the workplace: To say that harassment victims in the workplace are not “captive” in the literal sense is to actually say that harassment victims who can afford not to work are not captives. Therefore, female employees constitute the quintessential captive audience. We “should not force a woman into a Hobson’s choice between quitting her job” and denying herself her right to equal protection, “or facing a work environment in which she is subjected to severe or pervasive harassing speech that is not inflicted on her male counterparts.”

Student victims of school bullying and cyberbullying confront a worse situation. Bullying and cyberbullying victims have the same right, under the Equal Protection Clause, to the same educational opportunities as everyone else. That is, after all, what Title IX is about in the gender discrimination context. But, one student’s right to the same educational opportunities as others is no less real even outside the Title IX umbrella. Yet, his exercise of that right is diminished when repeated harassment from a peer interferes with his academic success, mental and physical health and self-esteem. It would be absurd to expect parents to deny their children their fundamental rights by taking them out of school or spending significant time and money placing them in new schools before a bully’s First Amendment rights are curtailed. And, the prospect of avoiding a harasser is even more dismal for students than for employees. In the workplace, quitting is technically an option, albeit one rife with difficulties and virtually impossible for


379 Id. at 281-86 (Douglas, J., concurring); id. at 291-93 (Goldberg, J., concurring).

380 Id. at 377 (Goldberg, J., concurring) (quoted in Epstein, supra note 350, at 437).

381 Epstein, supra note 351, at 425.

382 See, e.g., Theno, 377 F. Supp. 2d at 968 (“damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”).
those without other means of financial support. Students cannot simply quit school,\textsuperscript{383} and transferring is difficult, especially in small towns. Recent bullying cases have resulted in their victims transferring to entirely different school districts,\textsuperscript{384} but that option is unavailable to those without large families willing to take them in. Schools can change schedules,\textsuperscript{385} so that bullies and victims are never in class together, but these half-hearted solutions never work; everyone sees everyone in the hall, in the cafeteria or after school. And, neither of these options can protect a victim from cyberbullying, where harassment can reach its victims wherever they are located.

In addition to the strict scrutiny and captive audience arguments, there is a third reason why the First Amendment should not limit Title VII liability for hostile environment harassment and a school’s authority to discipline bullies and cyberbullies. Harassing speech, by its very nature, deserves minimal First Amendment protection. Harassing speech is targeted at one victim, and targeted speech has traditionally been afforded fewer constitutional protections than speech aimed at larger audiences.\textsuperscript{386} The latter is more likely to have political value and the former is more likely to be harmful.\textsuperscript{387} Bullying and cyberbullying is similarly targeted toward one person and likely has limited political value. Undoubtedly, abusive speech has almost no political value compared to the armband protest in \textit{Tinker}, which further explains why \textit{Tinker} is an inappropriate lens through which to evaluate bullying and cyberbullying.

IV. Conclusion – Finding the Appropriate Balance

I have argued that cyberattacking and cyberbullying should be treated differently, with respect to potential First Amendment defenses to a school’s disciplinary authority, because as single-incident actors, cyberattackers are simply too common and are solely acting like immature students, whereas cyberbullies, as repeated harassers, are relatively rare and mimic workplace harassers in striking ways. Within that argument, I propose a number of theories – that the Supreme Court’s student speech jurisprudence used the on-campus/off-campus distinction as a proxy for when students are acting \textit{qua} students; that modern technology has dramatically changed the nature of the school and office such that presence in one location is meaningless; that neither the Court’s student speech cases nor Title VII hostile environment cases have ever, and should ever, be restricted to conduct that occurs within the boundaries of the school or office; that, in addition to the Court’s silence on First Amendment concerns raised by Title VII, the statute will withstand First Amendment challenges; and, that a “captive audience” doctrine that is neither about the ability to escape or the location of captivity, but rather the clash between

\textsuperscript{383} Students can be home-schooled, but few parents have the resources or ability to exercise this option.

\textsuperscript{384} See, \textit{e.g.}, Nabozny, 92 F.3d at 452 (transferring twice to a Catholic school in the district and then to Minneapolis).

\textsuperscript{385} See, \textit{e.g.}, \textit{id.} at 451.

\textsuperscript{386} Fallon, \textit{supra} note 228, at 42 (citing client solicitation by attorneys and criticism over late night phone calls as two examples of targeted speech that is not protected).

\textsuperscript{387} See, \textit{e.g.}, Kent Greenawalt, \textit{Insults and Epithets: Are They Protected Speech?}, 42 \textit{RUTGERS L. REV.} 287, 292-93 (1990) (\textit{cited in Fallon, supra} note 228, at 42).
competing fundamental rights, protects both Title VII and a school’s disciplinary authority from First Amendment attack.

The practical implication of this argument is that, on average, cyberattackers will not be punished, but cyberbullies will. Free speech principles will protect most cyberattackers pursuant to Tinker, as their single-incident conduct is unlikely to cause a substantial disruption to the school. But, the First Amendment will not protect cyberbullies because of their striking similarities with workplace harassers, a group not afforded significant free speech rights. Admittedly, this leaves significant bad conduct outside the reach of punishment. As well it should. It forces those schools that want to regulate single-incident cyberattacking to do so without the iron fist of expulsions, suspensions, detentions and other forms of punishment. This may be the most beneficial result, as studies show that more than any other factor, creating a school climate where bullying is rejected as a social evil and where bullying victims can find support among their peers and teachers and in an inclusive curriculum will reduce the frequency and effects of bullying in schools. Increasingly harsh punishments will not. My proposal’s narrow focus recognizes that ultimately, punishing all bad students will not, without more, solve the problem of harassment and cyberharassment in schools. Discipline should be left to capture the outliers, the egregious cases that defy the reach of a school’s “soft power.” After all, bullying and cyberbullying are social, not legal, problems. To the extent that legal issues are implicated, the lawyer’s role is to provide the boundaries of rulemaking, leaving the social scientist, educator and counselor the latitude to use the most effective tools.

By taking away a school’s authority to discipline single-incident cyberattackers, my theory also protects the vast majority of students. Many of us have engaged in immature and mean conduct once, but our behavior bears little similarity to the constant, pervasive harassment that have caused too many victimized students to commit suicide. At the same time, by permitting school discipline for bullies and cyberbullies, my theory protects harassment victims from their enemies on the right, who would ignore the devastating effects bullying has on minorities and deny schools’ the chance to teach inclusive curricula for fear of endorsing tolerance and acceptance of gays, lesbians and other disfavored populations.\(^388\)

The long-term health of the First Amendment is another beneficiary of my approach. We want to give schools the power to punish the most serious peer abusers and harassers, but we neither want to chill speech nor apply the school’s iron fist to the common, everyday give-and-take among all adolescents. In other words, my proposal protects the First Amendment from attacks from all angles. By maintaining and re-energizing Tinker as the lens through which we judge First Amendment defenses to a school’s punishment of a cyberaggressor, my proposal protects Tinker from its enemies on the right. The conservative drift of the Supreme Court since Tinker, carving out exceptions in Fraser, Kuhlmeier and Morse, leaves Tinker bereft of ammunition to protect the free speech rights of students. At the same time, my proposal protects Tinker from the left, as liberal proposals to toss Tinker aside in favor of a speech/action distinction for regulating harassing conduct would further magnify the dictatorial and

authoritarian school envisioned in Justice Black’s dissent in *Tinker* and Justice Thomas’s concurrence in *Morse*.

From both perspectives, my proposal protects *Tinker*, still the Court’s talismanic homage to student speech as important, constitutionally protected and part of what defines a school environment. To undermine that vision in the name of disciplining single-incident cyberattacking is to show little respect for students and their speech rights and to elevate an almost Orwellian view of the public school to the point where students have few, if any, rights to call their own.