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Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse

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Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher’s Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse

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I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool the best thing to do is to encourage him to advertise the fact by speaking.1

I. INTRODUCTION

Teachers have a new beast to tame—cyberbullies. With cell phones in every pocket and Internet access in every classroom,2 edu-


cators must find a way to maintain classroom decorum and facilitate an environment pursuant to which all students are still allowed to learn. Unfortunately for some, their academic environment is littered with verbal landmines planted on the Internet or cell phones by disrespectful students. This harassment, often referred to as cyberbullying, interferes with targeted students’ education and the rights of teachers. Notwithstanding such interference, courts have routinely overturned decisions by educators to discipline cyberbullies at school, often citing the First Amendment as the reason a student cannot be disciplined for speech that originates “off campus.”

The Constitution does not shield cyberbullies from school discipline. When school authorities seek to curb the effects of cyberbullying—especially as it invades the school environment and interferes with the rights of students, teachers, or administrators who may be the target of such efforts—the cyberbully often seeks refuge behind the First Amendment. At least one scholar has aptly recognized that, because of the relationship between the targets and the website creators, courts must allow schools to address the stigmatizing and publicly humiliating problem of cyberbullying and Internet harassment, which may originate outside of the school per se but carries its sting into the classroom. Tinker v. Des Moines Independent Community School District and its progeny support school discipline in those instances where, as in many, students embark upon a cyberbullying

3. See infra notes 15–32 and accompanying text.
4. See, e.g., Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (finding insufficient “nexus” between off-campus website and the “buzz” or discussions present after the creation of student’s Myspace profile); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (noting that although the intended audience was “undoubtedly connected to” the high school attended by plaintiff, the speech was entirely “outside of the school’s supervision or control” because it “was not produced in connection with any class or school project”); Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (noting almost immediately in the factual background of opinion that an Internet website with uncomplimentary remarks about some educators was created outside of the school, on home computer, not using school resources, and that student located the program on his own to create the website).
endeavor off campus, the substance of which subsequently invades campus sometimes pushing other students to devastating measures.\textsuperscript{9} In these cases, cyberbullies should not be allowed to avail themselves of protection provided to some speech by the First Amendment.

This Article suggests that the analytical framework prescribed by \textit{Tinker} and its progeny affords school authorities broad discretion and sufficient guidance in fashioning school discipline when student speech is involved. Part II provides a brief explanation of the relatively new phenomena through which cyberbullies disrupt the school environment and the lives of those in it. Part III then provides a brief discussion of \textit{Tinker}'s balancing framework, followed in Part IV by a discussion of the rights of others—usually targets of cyberbullying such as fellow students and teachers who attend or teach at the same school as the cyberbully—which \textit{Tinker} expressly provides must be considered as part of the analysis as to what protection, if any, the First Amendment provides to cyberbullying that invades the schoolhouse. Part V then explains that, as part of a proper analysis, courts must account for the fact that educators are in a better position to make immediate decisions as to whether a cyberbully’s website or blog has disrupted the school environment or is reasonably likely to do so. Serious consideration must also be given to the cyberbully’s intent that his speech “sneak” into the school and to the effects that such speech has upon its targets and their respective rights once it is behind the schoolhouse gate. \textit{Tinker} prescribes that all of these rights and competing considerations be balanced, but courts sometimes avoid conducting this analysis, instead overstating the importance of where the speech originated prior to its injection into the school environment.\textsuperscript{10} When all of the competing rights and interests are appropriately considered, the Article concludes with the assertion that cyberbullies should not be permitted to avoid school discipline in the name of the First Amendment.


II. SAME DEFENSE, NEW OPPONENT: EDUCATORS ARE REQUIRED TO APPLY AN AGED FRAMEWORK TO NEW DISCIPLINARY SCENARIOS, SUCH AS THOSE PRESENTED BY CYBERBULLYING

Educators must be afforded the ability to preserve the educational environment in our public schools, notwithstanding new technologies readily available to students. Education is one of the most important components in the development of a young person’s character. “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”11 A well-rounded education is unquestionably “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment,”12 an important part of which requires educators to “inculcate the habits and manners of civility as values . . . conducive to happiness . . . .”13 Along these lines, the United States Supreme Court has “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”14 In today’s world, this process requires that educators not only keep up with students, but also that they keep up with technology. Simply put, the “Internet is the new bathroom wall”—the virtual place kids scrawl something when they want to be mean.”15

A. Cyberbullying Provides Students with a Relatively New, Previously Untested and Undisciplined Mechanism for Disrupting the Lives of Fellow Students and Educators

Cyberspace is now a part of any young person’s identity.16 Educators and parents alike are scrambling to catch up with young people whose online socializing includes playing pranks and seeking revenge.17 On the playground, such pranks and revenge are classified as “bullying.”18 Since those initial utterances and pranks now take

12. Id.
15. Sharon Noguchie, Cyberbullies A Growing Problem at School, SAN JOSE MERCURY NEWS, Jan. 13, 2008, at 1B.
17. Noguchie, supra note 15, at 1B.
18. Bullying has been defined as “behavior where ‘one or more individuals inflict physical, verbal, or emotional abuse on another.’ . . . This behavior is not harm-
place off of the playground, often in the form of an Internet website or chat room not immediately subject to the jurisdiction of any school discipline policy, they create relatively new issues for educators, i.e., what happens when "off-campus" speech has detrimental effects "on campus"? Some courts have attempted to answer this question, and in doing so, they overemphasize the geographic location where the speech originated en route to incorrectly concluding that such "off-campus" speech cannot be the subject of school discipline. This result is not dictated by the Supreme Court's First Amendment jurisprudence and is based upon the fallacy of overemphasizing the location of the "initial utterance," simultaneously ignoring Tinker's prescription that disruption within the school be considered when deciding the constitutionality of school discipline.

Bullying itself is nothing new; what is new is the technology. The interaction between bullying and technology has given rise to a whole new form of bullying, often referred to as "cyberbullying." Cyberbullying can be generally defined as using the Internet, cell phones, e-mails, text messaging, online chat rooms, and other forms of electronic communication to deliberately harass, mock, defame, intimidate or threaten someone. A relatively new form of social aggression that provides a perception of invisibility, cyberbullying

less teasing. Rather it is pervasive and prolonged abusive behavior whereby the bully takes pleasure in the distress of the victim and also derives power over the victim by inflicting abuse." Servance, supra note 6, at 1216 (quoting SuEllen Fried & Paula Fried, Bullies and Victims 5 (1996)).

19. See, e.g., Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007); Killion v. Franklin Reg'l. Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001) (noting that although the intended audience was "undoubtedly connected to" the high school attended by plaintiff, the speech was entirely "outside of the school's supervision or control" because it "was not produced in connection with any class or school"); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (noting almost immediately in the factual background of opinion that Internet website with uncomplimentary remarks about some educators was created outside of the school, on home computer, not using school resources, and that student located program on his own to create the website).


22. See Billitteri, supra note 20, at E1; Shull, supra note 16.

23. Cyberbullying is a form of social aggression, using the Internet or other digital technologies. It can take several forms:

- Flaming: Online "fights" using electronic messages with angry and vulgar language.
- Harassment: Repeatedly sending offensive, rude and insulting messages.
encourages the arrival of new bullies—generally students who typically would not have been the aggressor in the classroom or on the playground and who would not have brought physical harm to anyone. Like bullying, cyberbullying seeps into the halls of America's schools on a daily basis since, more often than not, the relationship that forms the basis for the cyberbullying was formed in school.

Several states empower, and many require, school districts to establish policies that prohibit bullying by students. At least fourteen

- Denigration: "Dissing" someone online. Sending or posting cruel gossip or rumors about a person to damage his or her reputation or friendship.
- Impersonation: Breaking into someone's account, posing as that person and sending messages to make the person look bad, get that person in trouble or danger, or damage that person's reputations or friendships.
- Outing and trickery: Sharing someone's secrets or embarrassing information or images online; tricking someone into revealing secrets or embarrassing information, which is then shared online.
- Exclusion: Intentionally excluding someone from an online group, such as "buddy lists."
- Cyberstalking: Repeatedly sending messages that include threats of harm or are highly intimidating; engaging in other online activities that make a person afraid for his or her safety.

Willard, supra note 21, at 1–2.

24. Shull, supra note 16; see also Willard, supra note 21, at 7 ("When people use the Internet, they perceive that they are invisible.").

25. See BETH MANKE, MindOH!, THE IMPACT OF CYBERBULLYING 1–2 (Mar. 2005), http://mindoh.com/docs/ BM_Cyberbullying.pdf ("Cyberbullying is 'open' to all children, even those who are not physically capable of bullying others face-to-face. It is the ability to keep his or her identity unknown that allows even the least physically intimidating children to assert dominance over others online."); see also Noguchie, supra note 15, at 1B ("The anonymity of the Internet and its instant and wide reach, offer temptations to mischief—even to people who normally wouldn't physically bully someone."); Shull, supra note 16 ("With the perception of invisibility, new bullies arrive who wouldn't typically bring physical harm to anyone.").

26. Servance, supra note 6, at 1214.

states\textsuperscript{28} have or soon will have statutes that allow those policies to specifically address incidents of cyberbullying, some of which may, at first blush, appear to school authorities to be entitled to First Amendment protection.\textsuperscript{29} Although the United States Supreme Court has recognized that the Internet, ubiquitous as it is, affords its users some First Amendment protection,\textsuperscript{30} the “problem [for educators expected to enforce those policies] lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”\textsuperscript{31} Nowhere is this more prevalent than in those cases where otherwise protected speech—sometimes in the form of cyberbullying—is transmitted at home or from the local mall or skating park, but nonetheless causes a disruption or creates a serious probability that such a disruption will occur at school.\textsuperscript{32} Simply uttering the message “off campus,” however, does not guaranty immunity from discipline. In many cases, school officials remain well within their rights to discipline the student-speaker whose “off-campus” utterances may cause disruptions to the educational process.


See generally Clay Calvert, Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground, 7 B.U. J. SCI. & TECH. L. 243 (2001) (asserting that school administrators should be prohibited by the First Amendment from meting out an in-school punishment against students whose speech originates off campus, but for which remedies are available through generally applicable off campus civil law remedies).


Billitteri, supra note 20, at E1.
B. Although *Tinker* and Its Progeny May Not Have Foreseen All of the Challenges Presented by Cyberbullying, the Current Constitutional Framework for Analyzing Discipline Resulting from Student Speech Is Not Insufficient

The constitutionality of school discipline resulting from a student's off-campus speech is by no means settled. Beginning with *Tinker v. Des Moines Independent Community School District*, the United States Supreme Court has, on several occasions, addressed students' First Amendment rights to freedom of speech in the context of pending discipline imposed by school authorities. Although the Court has never established a per se rule in regard to the extent of students' rights regarding students' speech on campus, the Court has repeatedly reiterated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* notwithstanding, the Court has yet to directly address the issues presented by off-campus student Internet speech and the accompanying boundaries of school officials' authority to regulate the effects of that speech within and upon the school environment.

Despite what some perceive as "insufficiencies" in *Tinker*'s analytical framework, *Tinker* and its progeny provide a sufficient framework against which discipline imposed by school authorities and prompted, at least in part by student speech on the Internet, can and should be analyzed. *Tinker* and its progeny provide an analytical framework under which one can readily conclude that students' increasing use of the Internet has not, as some commentators and

33. 393 U.S. 503.  
35. *Tinker*, 393 U.S. at 506; see also Morse, 127 S. Ct. at 2636–37 (Alito, J., concurring) (recognizing the majority's reaffirmation of *Tinker*'s finding "that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"); Bd. of Educ. v. Earls, 536 U.S. 822, 844 (2002) (O'Connor, J., dissenting) (recognizing *Tinker*'s finding); Hazelwood, 484 U.S. at 266 (same); Fraser, 478 U.S. at 680 (same); Healy v. James, 408 U.S. 169, 180 (1972) (same).  
36. See, e.g., Erb, supra note 8, at 271 n.103 (contending that *Tinker* and its progeny may be "ill-suited" to deal with off-campus expression and its permeation throughout the schoolhouse).  
37. See, e.g., Kyle W. Brenton, Note, BONGHiTS4JESUS.COM? Scrutinizing Public School Authority Over Student Cyberspeech Through The Lens Of Personal Jurisdiction, 92 MINN. L. REV. 1206 (2008); Aaron H. Caplan, Public School Discipline for Creating Uncensored Anonymous Internet Forums, 39 WILLAMETTE L. REV. 93 (2003); Calvert, supra note 29, at 275; see also Christi Cassel, Note, Keep Out Of Myspace!: Protecting Students From Unconstitutional Suspensions And Expulsions, 49 WM. AND MARY L. REV. 643, 646 (2007) (suggesting that school officials "frequently overstep [I] constitutional boundaries" when imposing discipline for off-campus, intentional activity); Kathleen Conn, Offensive Student Web Sites:
cours\textsuperscript{38} have concluded, resulted in an inability, or at least significantly courted school officials' ability, to discipline students whose off-campus speech creates a turbulent school environment. If that speech is circulated at school and results in circumstances that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities," discipline may still be imposed that is consistent with the Constitution.\textsuperscript{39} A careful analysis of \textit{Tinker} and its progeny reveals that the authority of school officials to discipline students for such conduct—regardless of whether it is appropriately labeled as protected speech—remains well intact.

\textit{Tinker}, when read in conjunction with \textit{Bethel School District No. 403 v. Fraser},\textsuperscript{40} \textit{Hazelwood School District v. Kuhlmeier},\textsuperscript{41} and \textit{Morse v. Frederick},\textsuperscript{42} illuminates the analytical framework for evaluating the constitutional propriety of school discipline imposed upon a student for certain types of off-campus cyberbullying. As part of the analysis as to what, if any, constitutional protection should be afforded a student whose potentially disruptive off-campus cyberbullying permeates the school building, one must be cognizant of the expectations that the courts have placed upon our nation's educators to inculcate youth with core values and character.\textsuperscript{43} With those expectations comes the concurrent obligation to appropriately discipline students

\textsuperscript{38} See, e.g., Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (finding violation of student's First Amendment rights because of insufficient nexus between student's off-campus conduct and any substantial disruption of the school environment); Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 800–01 (N.D. Ohio 2002) (suggesting implausibility of school district's suggestion that there was evidence that student's website substantially disrupted school activities and inferring that without such evidence, First Amendment would likely prevent discipline from being imposed); Killion v. Franklin Reg'l. Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (explaining that \textit{Tinker} compelled conclusion that student's suspension violated First Amendment because school district failed to produce any evidence of actual disruption); Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986) (overturning ten day suspension, explaining that "[t]he First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us").

\textsuperscript{39} \textit{Tinker}, 393 U.S. at 514.

\textsuperscript{40} 478 U.S. 675 (1986).

\textsuperscript{41} 484 U.S. 260 (1988).

\textsuperscript{42} 127 S. Ct. 2618 (2007).

\textsuperscript{43} See \textit{Fraser}, 478 U.S. at 683 ("The inculcation of these values is truly the 'work of the schools.'") (quoting \textit{Tinker}, 393 U.S. at 508)
whose speech interferes—actual or nascent—with the school's work or which collides "with the rights of other students to be secure and to be le[f]t alone." Further adding to the backdrop against which a student's potential discipline should be analyzed is the fact that, while not specifically recognized under the United States Constitution as a fundamental right, a public education is considered by several state courts to be a fundamental right under those states' respective constitutions. Cyberbullying and its effects may certainly infringe upon, and in some cases completely deprive some students of, those fundamental rights. In any event, any consideration of the constitutional-

44. Tinker, 393 U.S. at 508.
47. See, e.g., Whitely, supra note 9 (discussing teen suicides attributable, at least in part, to cyberbullying); see also Abbott Koloff, States Push For Cyberbully Controls, USA TODAY, Feb. 7, 2008, available at http://www.usatoday.com/news/
ity of school discipline in such cases must begin with a thorough analysis of *Tinker* and its progeny.

III. **TINKER, FRASER, HAZELWOOD AND MORSE ARTICULATE THE CONTOURS OF A CYBERBULLY’S RIGHTS WITHIN THE SCHOOLHOUSE**

The United States Supreme Court has clearly recognized that public school students enjoy some First Amendment rights to freedom of speech at school. Specifically, the Court first explained in *Tinker v. Des Moines Independent Community School District*\(^48\) that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^49\) In the exercise of those constitutional rights, however, it “does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”\(^50\) In *Tinker* and after, the Court developed and expanded upon its framework for analyzing whether certain student speech enjoys First Amendment protection, thereby shielding the speaker from discipline.\(^51\) The Court has held that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”\(^52\)

Where things get interesting, however, is when judges and educators attempt to analyze speech that originates outside of the school, but ultimately finds its way into the halls of the schoolhouse. In an effort to short-circuit the necessary analysis in such cases, some courts will analyze whether such speech was accessed using school equipment\(^53\) or rigidly apply *Tinker* where off-campus speech makes its way to the campus, even if by some other student.\(^54\) Under *Tinker* and its

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48. 393 U.S. 503.
49. Id. at 506.
52. Hazelwood, 484 U.S. at 266 (internal citations omitted).
progeny, courts should focus less on the origination of the speech and more upon its effect and potential to cause discourse within the schoolhouse, regardless of who is responsible for injecting the speech into the school environment. Put another way, a cyberbully's "undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior," particularly in an effort to avoid encouraging infringement upon the rights of others within the school environment. Courts must also consider school authorities' good faith beliefs as to what, if any, facts are present that, at a minimum, might "reasonably lead school authorities to forecast substantial disruption of or material interference with school activities . . . ."56

A.  *Tinker v. Des Moines Independent Community School District*57

The Court's initial foray into determining the parameters within which public school authorities can regulate student speech without impinging upon the First Amendment occurred in *Tinker*.58 *Tinker* forced the Court to confront the constitutional difficulties raised by the assertion of students' First Amendment rights in a high school setting. The issue before the *Tinker* Court was whether the First Amendment prevented the school from disciplining students responsible "for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance . . . [and] not concerned speech or action that intrudes upon the work of the schools or the rights of other students."59 The Supreme Court held that the school authorities were not justified in disciplining the "pure speech" present in *Tinker*, largely because "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . ."60 The Court reiterated, one last time near the end of its opinion, that the students did not cause a disturbance or disorder on the school premises, and that they simply "caused discussion outside of the classrooms, but no interference with work and no disorder" occurred.61

Although never specifically articulating as much, *Tinker* balanced the student's First Amendment right to freedom of expression against

55. *See Fraser*, 478 U.S. at 681.
57. *Id.*
58. *Id.*
59. *Id.* at 508.
60. *Id.*
61. *Id.* at 514.
62. *Id.*
the school’s right to maintain order and foster an educational environment, part of which involves precluding student speech from infringing upon the rights of teachers or other students.63 Throughout its opinion in *Tinker*, the Court—on not less than twelve different occasions—made specific reference to the fact that there was no evidence that the students’ wearing of the armbands to protest the Vietnam War would “substantially interfere with the work of the school or impinge upon the rights of other students.”64 Since there was no evidence of any disruption or even a possibility of a disruption and since the school district did not even contend that there could be such a disruption,65 the Court easily concluded that Tinker’s passive protest was protected by the First Amendment. The Court explained that students may express their opinions, “even on controversial subjects like the conflict in Vietnam, if [they do] so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”66

The Court immediately qualified its holding, however, stating that

*Conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.*67

The Court closed its opinion by clarifying that the school authorities could have justifiably imposed discipline upon the students had they been able to demonstrate facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.68 Consequently, the “material disruption” and “reasonable forecast” standards were born.

Although *Tinker* held that the First Amendment prevented school authorities from disciplining students for peacefully wearing their black armbands, the Court repeatedly reiterated the rights of school authorities to regulate speech that materially disrupts school affairs or impinges upon the rights of others.69 *Tinker* also imposes limitations upon that authority. First, school authorities must show that their action was prompted by “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”70 Further, schools may not arbitrarily limit

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63. *See id.* at 507–08.
64. *Id.* at 509; *see, e.g.*, *id.* at 505, 508, 513, 514.
65. The school had prepared an official memorandum after the students were suspended that did not even mention the possibility of a disruption. *Id.* at 509.
66. *Id.* at 513 (citations omitted).
67. *Id.*
68. *Id.* at 514.
69. *Id.* at 508.
70. *Id.* at 509.
certain opinions, especially if those opinions are not mainstream or may inspire fear. Finally, and perhaps the most critical for analysis of cases involving cyberbullies, school authorities must have more than an "undifferentiated," unqualified fear or apprehension of disturbance, as such is "not enough to overcome the right to freedom of expression."

Thus, Tinker readily establishes that, so long as school authorities do not act upon unqualified fear of disruption—presumably to avoid educators stating such an unsubstantiated fear as a basis for suppressing unpopular, unpleasant speech—but rather can articulate some reasonable basis for finding that student speech will disrupt the school environment or invade the rights of others, school authorities' rights to develop and impose appropriate discipline will outweigh the dissident's rights to harass and annoy other students who are simply seeking to obtain an education. Put another way, if there is evidence of a disruption or that one is likely to occur, the balance must be tipped in favor of the school and the target.

B. Bethel School District No. 403 v. Fraser

Seventeen years after Tinker, the Court decided Bethel School District No. 403 v. Fraser. In Fraser, the Court availed itself of the opportunity to clarify the boundaries of a student's ability to avoid discipline in school by invoking his First Amendment right to freedom of expression. Matthew Fraser's speech was more unruly than was Tinker's armband, and when he delivered his speech replete with sexual innuendo during a required school assembly, after being warned by at least two teachers not to do so, he received mixed reviews from his fellow students. School authorities noted that some students "hooted and yelled" during Fraser's speech, some made "gestures graphically simulat[ing] sexual activities pointedly alluded to in [Fraser's] speech," and other students were "bewildered and embarrassed by the speech." For delivering his racy speech, Fraser was suspended for three days and his name was removed from the list of candidates who could be elected to speak at graduation. After he served two of the three days of his suspension, Fraser returned to school and then he sued for a violation of his First Amendment rights.

71. Id. at 508.
72. Id.
73. 478 U.S. 675 (1986).
74. Id.
75. Id. at 678.
76. Id. It should be noted, however, that the trial court in Fraser held that the suspension violated Fraser's First Amendment rights, and while the appeal was pending, Fraser was elected graduation speaker by a write-in vote of his classmates, the result of which was that he delivered a speech at the commencement ceremonies for his school. Id. at 679.
Fraser began its analysis by stating that it was “a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse,”77 and that school officials retained the authority to discipline a student delivering a “vulgar and lewd speech such as [Fraser’s]” if the authorities determined that such speech “undermine[d] the school’s basic educational mission.”78 The Court went to great lengths to explain that a school was not the appropriate forum for a speech such as Fraser’s and that there was an obvious concern on the part of “school authorities acting in loco parentis79 to protect children—especially in a captive audience—from exposure to such explicit, indecent, or lewd speech.”80 The Court explained that Fraser’s speech had “no essential part of any exposition of ideas, and was of such slight social value as a step to truth that any benefit that may be derived from it was clearly outweighed by the social interest in order and morality.”81 Citing Justice Black’s dissent in Tinker, the Court concluded that the U.S. Constitution does not compel school officials to “surrender control of the American public school system to public school students.”82

Because there was no disruption in Tinker, Fraser was the first case in which the Court actually balanced the rights of the student speaker against the rights of others—much to the chagrin of Matthew Fraser.83 The Court was careful to remind school authorities that the

77. Id. at 683.
78. Id. at 686.
79. In Loco Parentis literally means “in place of a parent,” Hickenbottom v. Hickenbottom, 239 Neb. 579, 593, 477 N.W.2d 8, 17 (1991), and “a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.” Weinand v. Weinand, 260 Neb. 146, 152–153, 616 N.W.2d 1, 6 (2000) (quoting The Parenting Act, Neb. Rev. Stat. § 43-2901–2919 (Reissue 1993, Cum. Supp. 1996 & Supp. 1997). The U.S. Supreme Court has acknowledged that for many purposes a “school authority[ly] act[s] in loco parentis” in regard to children attending school during the school day. Fraser, 478 U.S. at 684. “As early as 1837, state courts applied the in loco parentis principle to public schools.” Morse v. Frederick, 127 S. Ct. 2618, 2631 (2007) (Thomas, J. concurring) (discussing in loco parentis in great detail as it has evolved in public school context and the impact that it has upon the authority and attendant obligations of public schoolteachers, but arguing that Tinker actually began erosion of doctrine within the public school system, at least in First Amendment cases).
80. Fraser, 478 U.S. at 684.
81. Id. at 685 (citing FCC v. Pacifica Foundation, 438 U.S. 726, 746 (1978)).
82. Id. at 686 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Black, J., dissenting)).
83. The Fraser Court articulated the backdrop for its analysis by rearticulating the balancing test that was necessary.

The marked distinction between the political “message” of the armbands in Tinker and the sexual content of respondent’s speech in this
fundamental values of "habits and manners of civility" taught in the public schools must include "tolerance of divergent political and religious views, even when the views expressed may be unpopular."84 Thus, while the Court was careful to remind school authorities that unpopular speech may be a necessary component in the process of demonstrating the appropriate form of civil discourse,85 it is "the work of the schools"86 to teach the "fundamental values necessary to the maintenance of a democratic political system,"87 which maintenance likely "disfavor[s] the use of terms of debate highly offensive or highly threatening to others."88

Fraser accepted and confirmed the wide latitude afforded school officials in cases involving student speech. Observing that Fraser's speech was "plainly offensive" to many in the school environment, thereby infringing upon the rights of many others at the school,89 the Court expressly recognized that school authorities must have latitude to decide what expression and conduct is appropriate within the school.90 "Balancing the right to free speech" within the schools "with the goal of protecting the rights of others" where the speech has potential to disrupt the school or cause harm,91 the Court concluded that Fraser's speech was not protected by the First Amendment. Put another way, employing the balancing test repeatedly emphasized in Tinker, Fraser struck the balance in favor of protecting the rights of others and decorum within the school, and against affording First Amendment protection to speech of such little social value as Fraser's speech.92

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84. Id. at 681 (quoting Charles A. Beard et al., The Beards' New Basic History of the United States 228 (1968)).
85. Id. at 683.
86. Id. (quoting Tinker, 393 U.S. at 508).
87. Id. at 681 (quoting Amback v. Norwick, 441 U.S. 68, 76–77 (1979)).
88. Id. at 683.
89. Id. at 683–84.
90. Id. at 685–86.
91. Servance, supra note 6, at 1229.
92. See, e.g., id. (noting that Fraser protected the rights of others over the right to speech of minimal social value).
C. Hazelwood School District v. Kuhlmeier

Before the ink was even dry in Fraser, students in the Hazelwood School District in St. Louis challenged a principal's decision to extricate articles from a school newspaper. The newspaper was written and edited by a journalism class as part of the school curriculum. One of the censored articles described students' experiences with pregnancy, and the other was a discussion about the impact of divorce upon students at the school. The principal believed that the articles might embarrass some students because the text might indicate which students were the subjects of the articles, and there was not sufficient time to make the necessary changes in the articles if the paper was to be issued before the end of the school year. Accordingly, the articles were removed from the newspaper. Some students sued, asserting that the removal of the articles violated their First Amendment rights.

Hazelwood analyzed school authorities' ability to regulate student speech in school from a slightly different perspective. Unlike Tinker and Fraser, which both involved students' abilities to express their ideas within the school setting, Hazelwood confronted the question of whether the First Amendment prevents schools from censoring objectionable speech in school-sponsored activities created by students using school resources. Focusing upon the school's ability to "disassociate itself," "not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other

94. Id. at 263–64.
95. Id. at 262.
96. Id. at 263.
97. Id. at 263–64.
98. Id. at 264.
99. The Hazelwood Court characterized the distinction as:

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in Tinker—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. at 270–71. Thus, the critical inquiry in Hazelwood was really whether a school could suppress speech originating with the student, but appearing to actually be speech of the school, or at least material that was uttered with the school's approval.
100. Id. at 271–73.
101. Id. at 271 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).
students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane or unsuitable for immature audiences," the Court explained that "a school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and may refuse to disseminate student speech that does not meet those standards." Where the expressive activity could reasonably be understood as being conveyed with the school's imprimatur, the Court explained that Tinker's required showing of a material disruption or at least a likelihood of a disruption to the school purpose need not be satisfied—and the First Amendment would still not be offended—when educators exercise editorial control "over the style and content of student speech in school-sponsored expressive activities so long as [the school's] actions are reasonably related to legitimate pedagogical concerns." When read in conjunction with Tinker and Fraser, Hazelwood stands for the proposition that school authorities can regulate student speech that not only materially and substantially disrupts the school's educational function, but also speech that is school-sponsored and does not meet the school's standards in regard to academic integrity, decency, or is unsuitable for immature audiences, especially when the speech appears to bear the school's imprimatur. In the latter case, the school need not establish the likelihood of a substantial disruption at the schoolhouse, but only that the reasons for suppression of the student-originated speech are reasonably related to legitimate aspects of the school's basic educational mission, affording educators even more latitude in censoring student speech appearing to bear the school's imprimatur. Hazelwood explained that the First Amendment is implicated in such cases only when "the decision to censor a school-sponsored publication . . . or other vehicle of student expression has no valid educational purpose." Hazelwood might explain why some courts feel the need to develop a "nexus" between the use of school resources and speech that originates off campus to justify imposition of discipline in spite of the First Amendment, since the opinion

102. Id. at 271 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).
103. Id. at 271.
104. Id. at 271-72.
105. Id. at 273.
106. Id. at 271-73.
107. Id. at 273.
108. Id. (emphasis added).
109. See Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (noting that the school district had not established a "sufficient nexus" between the student's website and "a substantial disruption of the school environment.");
clearly articulates that there is a solid footing for discipline, or at least some censorship, once school resources are used to circulate speech of which the school disapproves.

D. Morse v. Frederick\textsuperscript{110}

The Court recently revisited the issue of school authority over student speech in \textit{Morse v. Frederick}.\textsuperscript{111} In \textit{Morse}, Joseph Frederick, a high school senior, was allowed to leave class as part of "an approved social event or class trip" to observe the Olympic Torch Relay as it passed through Juneau, Alaska on its way to the 2002 Winter Olympics in Salt Lake City, Utah.\textsuperscript{112} As the torch bearers passed Frederick and his friends, the students "unfurled a fourteen-foot banner bearing the phrase: 'BONG Hits 4 JESUS.'"\textsuperscript{113} Frederick's banner was easily readable by the students attending the event and standing on the other side of the street, as well as the school principal who was also standing opposite Frederick and his friends. Principal Morse immediately crossed the street, demanded the students take down the banner, and when Frederick complained, Morse confiscated the banner and ultimately suspended Frederick for displaying the banner which Morse believed encouraged illegal drug use.\textsuperscript{114} After an administrative appeal that resulted in his suspension being upheld, Frederick filed suit alleging, inter alia, a violation of his First Amendment rights.\textsuperscript{115}

After clarifying that \textit{Morse} was, in fact a school speech case,\textsuperscript{116} the Court reiterated what has become a foundational underpinning in school speech cases—"the constitutional rights of students in public school are not automatically coextensive with the rights of adults in

\textit{see also} Erb, \textit{supra} note 8, at 265–66 (discussing "nexus" requirement implemented by some courts as rationale for their respective conclusions).

\textsuperscript{110} 127 S. Ct. 2618 (2007).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.} at 2622.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} at 2622–23.

\textsuperscript{115} \textit{Id.} at 2623.

\textsuperscript{116} Possibly because of his concern that the Superintendent and the District Court had correctly affirmed his suspension, Frederick attempted to argue that this case was "not a school speech case." \textit{Id.} at 2624. The Court easily disposed of this argument, noting that the event at which Frederick displayed his banner occurred during normal school hours, it was sanctioned by school authorities as an "approved social event or class trip," and that the school had a presence at the event through teachers and administrators being interspersed among the students and being charged with supervising those students. \textit{Id.} "Under these circumstances," the Court explained, "Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." \textit{Id.} (citation omitted)
other settings.” On the contrary, “student First Amendment rights are 'applied in light of the special characteristics of the school environment.' [W]hile children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school.”

Focusing a great deal on the substance of Frederick's banner and agreeing with Morse that the banner undeniably promoted illegal drug use amongst his fellow students, the Court concluded that the danger of illegal drug use among students was “far more serious and palpable” than an “undifferentiated fear or apprehension of disturbance.” The decision to suspend Morse therefore “extend[ed] well beyond an abstract desire to avoid controversy.” As such, the Court concluded that the First Amendment does not require “schools to tolerate at school events student expression that contributes to [the] dangers of drug use, and conveys the message that the school is not concerned about illegal drug use among its students.

Since Tinker, the Court has repeatedly attempted to articulate the boundaries of school authority to regulate student speech. Although those boundaries may not be quite as definite as some courts and commentators might desire, Tinker and its progeny do provide a structured analytical framework for determining whether the First Amendment prohibits schools from disciplining students for injecting certain types of speech into the school environment. Clearly, schools have authority to regulate student speech, so long as school authorities can show a reasonable belief that speech will substantially and materially disrupt school activities or will substantially interfere with the rights of others.

A student's First Amendment rights are less compelling when school authorities determine that the speech is inappropriate for the school setting, even though it may be speech that would be protected if uttered by an adult outside of the school.

117. Id. at 2626 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
118. Id. at 2627 n.2 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
119. Id. at 2627 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).
120. Id. at 2629 (quoting Tinker, 393 U.S. at 508).
121. Id. at 2629.
122. Id.
123. See id. at 2624 (noting that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents”); Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595 n.5 (W.D. Pa. 2007) (discussing how the complexity of the area is illustrated by the 5-4 split of the U.S. Supreme Court Justices in Morse).
125. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–686 (1986); see also Morse, 127 S. Ct. at 2626 (noting that Fraser's speech would have been protected had it been uttered outside of a school setting).
When school resources are devoted to the distribution of inappropriate speech, the student’s speech enjoys even less protection under the First Amendment.126

Cyberbullying is hardly speech that “is at the core of what the First Amendment is designed to protect.”127 Thus, cyberbullying is entitled to little, if any, protection. As such, Tinker and its progeny command that school authorities be afforded ample opportunity to protect the educational environment via disciplining cyberbullies at school. The need for such authority is emphasized when considered in light of how the rights of others are affected when cyberbullying sneaks through schoolhouse gates. By ignoring the impact cyberbullying has upon the rights of others and focusing on the impractical circumstance of where the speech originated, courts are handcuffing educators in the name of the Constitution.

Courts should resist the temptation to focus on where the speech originated since such an approach is not suited to the practical realities of today’s technology.128 Instead, analysis should focus on where the student speech has its impact (and often its intended impact) and whether that impact is or potentially could be of such a magnitude to justify discipline for injecting that speech into the school environment.129 The analysis of the impact that the speech does or reasonably could have within the school is only one part of Tinker’s balancing test. To assess the propriety of school discipline, cyberbullies’ limited First Amendment rights must be balanced against the rights of others affected when cyberbullying finds its way into the schoolhouse. Properly balancing those rights of others with the contribution to the “marketplace of ideas”130 provided by the cyberbully, if any, confirms the impropriety of overturning school discipline of cyberbullies in the name of the First Amendment.

128. See, e.g., Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 800 (N.D. Ohio 2002) (discussing significance of transformation from what was originally off-campus speech into on-campus speech because students accessed the website at school); Killion v. Franklin Reg’l. Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001) (noting that “school officials’ authority over off-campus expression is much more limited than expression on school grounds”); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (noting that although the intended audience was “undoubtedly connected to” the high school attended by plaintiff, the speech was outside of the school’s supervision or control because it was not produced in connection with any class or school); Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (conducting Tinker analysis of what became on-campus speech because several individuals had accessed the website at school).
129. See Tinker, 393 U.S. at 514.
130. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).
IV. THE RIGHTS OF TARGETED STUDENTS AND THEIR TEACHERS’ OBLIGATIONS BOTH WEIGH HEAVILY IN FAVOR OF ALLOWING DISCIPLINE TO BE IMPOSED UPON THE CYBERBULLY

When cyberbullies are facing discipline at school, targets of cyberbullies have rights that must factor into the calculus of whether the imposition of discipline violates the First Amendment. Some states find those rights to even be compelling.131 Even though the Supreme Court of the United States has suggested that the right to an education is not a fundamental right under the United States Constitution,132 some state courts have held that education is a fundamental right under state law.133 Implicit in this fundamental right is that the cyberbully’s target has an ample opportunity for an education.134 Some courts have even held that the state itself has a compelling interest in educating its students.135 Thus, any claim by a cyberbully that his or her speech is constitutionally protected must be juxtaposed with both the State’s compelling interest in educating its students, as well as the rights of the bully’s target to receive an education.

Largely because the insignificant value of his speech is outweighed by states’ interests136 and the rights of others,137 the cyberbully facing discipline has no fundamental right to an education.138 This is critical, from an analytical standpoint, because any discipline meted out by school authorities will be constitutional so long as there is a rational basis supporting the school’s imposition of discipline.139 Put

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131. See infra note 133 and accompanying text.
133. See supra note 46.
136. See supra notes 131–35 and accompanying text; see also infra notes 156–64 and accompanying text.
137. See infra notes 181–99 and accompanying text.
139. Kolesnick, 251 Neb. at 582, 558 N.W.2d at 813; see also Houston v. Prosser, 361 F. Supp. 295, 298 (D. Ga. 1973) (applying the rational basis test to a school’s policy differentiating between students with children and students without children); Leonard v. Sch. Comm. of Attleboro, 212 N.E.2d 468, 472 (Mass. 1965) (applying the rational basis test to a school dress code); Shows v. Freeman, 230 So. 2d 63, 64 (Miss. 1969) (stating that the Court will let stand a school policy as long as
another way, as long as the school's disciplinary actions are directed to a legitimate purpose and are rationally related to achieving that purpose, it is not unconstitutional. In light of the Supreme Court's consistent affirmation of the "comprehensive authority of the [s]tates and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools," courts do not hesitate to conclude that suspension or expulsion is rationally related to the school official's interest in protecting other students and staff, as well as the environment in which the educational mission must be fostered and implemented. Such a conclusion is quite easy to reach in states where legislatures have provided that teaching personnel may take actions regarding student behavior which are reasonably necessary to aid the student, further school purposes, or prevent interference with the educational process.

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140. Kolesnick, 251 Neb. at 582, 558 N.W.2d at 813; see also Lewis, 470 S.W.2d at 734 ("All that is necessary is a reasonable connection of the rule with the proper operation of the schools.").


142. Kolesnick, 251 Neb. at 582, 558 N.W.2d at 813; see also Lewis, 470 S.W.2d at 734 (applying the rational basis test to a school's decision to expel students for disruptive behavior).


144. See In re Randy G., 28 P.3d 239, 243 (Cal. 2001) (discussing statute permitting any certificated employees to exercise the same degree of physical control over students which parents would be legally privileged to exercise as long as it is reasonably necessary to maintain conditions conducive to learning); Beeching v. Levee, 764 N.E.2d 669, 679 (Ind. Ct. App. 2002) (discussing Indiana statute authorizing school principal to take any action within the principal's jurisdiction reasonably necessary to carry out or prevent interference with an educational function or school purpose); Showe, 230 So. 2d at 64 ("Provided there is some rational basis for a rule by school authorities, the courts will not pass upon its wisdom or desirability."); Daily v. Morrill County Sch. Dist., 256 Neb. 73, 84-85, 588 N.W.2d 813, 821 (1999) (providing discussion of Neb. Rev. Stat. § 79-258); Lewis, 470 S.W.2d at 734 ("The quicker judges get out of the business of running schools the better. Except in extreme cases the judgment of school officials should be final in applying a regulation to an individual case.")
A. Cyberbullies Hide Behind the First Amendment Because Their Conduct Prevents Invocation of Other Rights

Even in states where the cyberbully has a fundamental right to an education, his conduct can result is his forfeiture of that right.\footnote{RM & BC v. Washakie County Sch. Dist., 102 P.3d 868, 874 (Wyo. 2004).} Since a school and its officials will nearly always be able to articulate a rational basis for the discipline imposed,\footnote{See, e.g., Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (Mass. 1995); Kolesnick, 251 Neb. 575, 558 N.W.2d 807; LoPresti v. Galloway Twp. Middle Sch., 885 A.2d 962, 969 (N.J. Super. Ct. Law Div. 2005); see also Parker ex rel. Parker v. Ariz. Interscholastic Ass'n, Inc., 59 P.3d 806, 812 (Ariz. Ct. App. 2002) (applying the rational basis test in analyzing a rule requiring students to refrain from participation in interscholastic activities immediately after transfer); Leonard v. Sch. Comm. of Attleboro, 212 N.E.2d 468, 472 (Mass. 1965) (upholding decision to prevent student with extreme haircut from attending high school because decision and rule pursuant to which it was made were based upon "some rational basis"); Price v. New York City Bd. of Educ., 855 N.Y.S.2d 530, 538 (N.Y. App. Div. 2008) (subjecting school rule prohibiting cell phones possessed by students to rational basis analysis).} a cyberbully's only chance to successfully avoid discipline in these cases is to convince a court that the United States Constitution prohibits the imposition of discipline based upon a material disruption, or the reasonable probability that a perceived disruption will materialize from a cyberbully's off-campus speech.\footnote{Dodd v. Rambis, 535 F. Supp. 23, 29 (S.D. Ind. 1981) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).} Enter . . . the First Amendment. In the context of such a challenge, \textit{Tinker} not only allows discipline when there is an actual disruption of school activities, but \textit{Tinker} also prescribes that a cyberbully's rights must be kept in check when school authorities could reasonably have been led "to forecast substantial disruption of or material interference with school activities . . . [or] instru[s]ion in the school affairs or the lives of others."\footnote{Id. at 29–30.} As such, the First Amendment does not require school officials to forestall action until disruption of the educational system actually occurs.\footnote{New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (quoting Goss v. Lopez, 419 U.S. 565, 580 (1975)); see also Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) (noting that Principal Morse had "to decide to act—or not to act—on the spot").} Much to the contrary, educators are expected to protect and to foster the educational environment, as "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action."

When educators are called upon to discipline the cyberbully, the First Amendment does not provide the cyberbully impenetrable shel-
ter. Of course, cyberbullying may not rise to the level of obscenity, fighting words, or hate speech, each of which the Supreme Court has specifically explained enjoys no protection under the First Amendment. If it does rise to such a level, courts need not address the issue that arises when speech created off campus finds its way onto campus. Quite possibly, a cyberbully's speech—if posted on the Internet by an adult who is not a part of the school environment—may very well be speech that enjoys First Amendment protection. The Supreme Court has provided, however, that a student's rights are not coextensive with those of adults. In fact, the "preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." As cogently expressed by one jurist, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." Since cyberbullying causes a disruption, or at least there is a reasonable probability that other students' reactions thereto will cause a disruption for teachers or other students, Tinker allows educators wide latitude to impose discipline before the disruption escalates to something other than civil disobedience. In other words, Tinker foresaw the possibility that educators may need to be proactive in imposing discipline, recognizing, at least implicitly, that there may be cases where it would be improvident to await actual harm before disciplining a student.

155. T.L.O., 469 U.S. at 339; see also supra notes 50-52, 116-26 and accompanying text.
156. T.L.O., 469 U.S. at 339.
157. See Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979); see also infra note 192 (summarizing Cohen v. California, 403 U.S. 15 (1971)).
158. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1969). Tinker presupposes that analysis is properly conducted from the perspective of the educator, neither from the perspective of the student or from the post hoc perspective of a court considering whether to justify and/or overturn the educator's decision.
159. This is never more apparent than when extreme cases of cyberbullying are analyzed in hindsight. Certainly, in light of what happened in cases such as Ryan Halligan's and Megan Meier's, it would be difficult to see how one might contend that teachers should have to wait for at least one catastrophic "disruption" before censoring student speech. Tinker does not require that educators do so. See Courtney Blanchard, Hacked MySpace Page Used To Deliver School Threat, STAR TRIB., November 18, 2007, available at http://www.startribune.com/local/11890866.html.
B. If Fostering and Maintaining an Educational Environment Is Truly “the Work of the Schools,” Educators Must Be Allowed to Do Their Jobs

Teachers have, and traditionally have had, great latitude in preserving an orderly, educational environment for schoolchildren. Educators are expected to foster an educational environment through serving as role models and teaching “by example the shared values of a civilized social order.” An educator’s responsibility is arguably more than simply teaching by example. The High Court has expressly recognized the state’s interest in having school authorities, “acting in loco parentis,” to protect children—as part of a captive audience—from exposure to indecent and other types of speech. These obligations extend far beyond decisions over whether educators should be allowed to circumscribe the cyberbully’s ability to disrupt the school environment from his or her den at home. Those obligations include protecting the rights of the other students, preserving the educational environment at the schoolhouse, and in some instances, protecting the school and even the educators themselves from facing individual liability as a result of not addressing the harassment meted out by the cyberbully in a timely fashion.

Potential liability aside, it has been recognized that school officials “have a duty to prevent the occurrence of disturbances,” and that “[f]orecasting disruption[s] is unmistakably difficult to do.”

161. See Morse v. Frederick, 127 S. Ct. 2618, 2632 (2007) (Thomas, J., concurring) (“Applying in loco parentis, the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order . . . . [In this regard], courts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals.”). In Fraser, the Court acknowledges that an obvious concern “on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.” Fraser, 478 U.S. at 684. Other courts have restated this view. See Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 570 (N.D. Tex. 2004); Jamshidnejad v. Cent. Curry Sch. Dist., 108 P.3d 671, 677 (Or. Ct. App. 2005).
162. Fraser, 478 U.S. at 683.
163. Id. at 684.
164. See, e.g., Susan H. Kosse, Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?, 43 ARIZ. L. REV. 905, 919–20 (2001) (explaining the legitimacy of the concern of schools and students alike as to whether cyberbullying via the Internet can create a hostile work environment actionable under Title IX).
tors need not await an actual disruption. Consequently, the proper inquiry when evaluating the propriety of school discipline in the wake of turbulent student speech is whether there are "facts which might reasonably lead school officials to forecast a substantial disruption."167

Tinker allows educators to be proactive. If educators are proactive, courts must not presume that educators will overreact to innocent student speech or speech that is not likely to infringe upon the rights of others at the schoolhouse. Such a presumption, without more, is the type of "undifferentiated fear"168 that the Supreme Court has held should not govern the outcome of cases involving student speech. Courts must afford educators the ability to fashion appropriate discipline if the circumstances present themselves, especially since educators may be held individually liable for violations of a students' constitutional rights at the schoolhouse.169 The potential for such liability helps alleviate the concern of those who fear that educators will, in every case, seek to impose discipline or "to justify a prohibition of a particular expression of opinion . . . [based upon nothing] more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."170 At a minimum, educators should be trusted to refrain from imposing discipline upon the cyberbully unless circumstances within the school require it. If, in fact, they do not, the potential for liability poses a significant deterrent.

166. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969); see also LaVine, 257 F.3d at 989 ("Tinker does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances.") (citations omitted); Dodd v. Rambis, 535 F. Supp. 23, 29 (S.D. Ind. 1981) (noting that "consideration must also be given to all other circumstances confronting school authorities which might reasonably prompt a forecast of disruption").

167. Tinker, 393 U.S. at 514.

168. Id. at 508.

169. See Pinard v. Clatskanie Sch. Dist. 6J, 446 F.3d 964, 977 (9th Cir. 2006) (holding that there was genuine issue of material fact in regard to school officials' liability for retaliatory motive in suspending basketball players, potentially in violation of First Amendment); Byars v. Waterbury, 795 A.2d 630 (Conn. Super. Ct. 2001) (involving action by student seeking to hold school officials liable for violation of, inter alia, First Amendment rights); Morlock v. West Cent. Educ. Dist., 46 F. Supp. 2d 892, 914 (D. Minn. 1999) (recognizing that individuals are subject to liability under Section 1983 for violations of Title IX and other constitutional rights); Bauchman ex rel. Bauchman v. West High Sch., 900 F. Supp. 254, 266–67 (D. Utah 1995) (discussing student's attempt to hold school officials responsible for violation of First Amendment rights); see also Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir. 1994) (articulating standard pursuant to which school officials can be liable for subordinate's violation of student's constitutional rights, albeit not First Amendment rights).

170. Tinker, 393 U.S. at 509.
Mindful of the potential for individual liability in the most egregious cases, educators will certainly be wary of adhering to policies favoring or requiring discipline in the most questionable cases, where there is little to no likelihood of a disruption. It is not suggested, nor would the law support the conclusion, that educators be afforded unbridled discretion, as such a position would undoubtedly transform schools into "enclaves of totalitarianism" and convert students into "closed-circuit recipients of only that which the [schools] choose . . . to communicate." Schools must not become "an Orwellian guardianship of the public mind" that can "strangle the free mind at its source," but, at a minimum, schools must be allowed to prevent the cyberbully—often someone who is afraid to even confront the subject of his or her attack—from causing a disruption from miles away when that same person does not believe in his or her speech enough to even have it originate on the school grounds.

Some have expressed fear that affording teachers wide latitude in censoring cyberbullies would have a chilling effect on speech because it gives rise to self-censorships and the diminishment of the marketplace of ideas. Logically, however, if cyberbullies are seeking to contribute anything to the "marketplace of ideas," then their conduct will likely not subject them to discipline within the school system, since such speech is more than likely not the type of speech that will cause a substantial or material disruption, or would reasonably lead educators to the conclusion that such a disruption is imminent. It is hard to comprehend how allowing educators to discipline speech soliciting financial support for a "hit" on a teacher, compiling a vulgar top ten list about an educator or fellow student, or misusing private information disclosed by a student under false pretenses to humiliate

171. Id. at 511.
173. Tinker, 393 U.S. at 507 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); see also Colin, 83 F. Supp. 2d at 1141 (explaining that schools do not have the power to "strangle the free mind at its source") (quoting Barnette v. West Virginia Bd. of Educ., 319 U.S. 624, 637 (1943))).
174. See, e.g., Noguchie, supra note 15, at 1B.
175. Caplan, supra note 37, at 148–49; see also Erb, supra note 8, at 283 (noting that a criticism of allowing school districts to discipline off-campus speech is that it may have a chilling effect on speech).
that student to the point that he takes his own life\textsuperscript{178} will in any way diminish the "free trade of ideas."\textsuperscript{179} It is difficult to conceive of the contribution being made to the "marketplace" by cyberbullies. Rarely do these people even suggest that they are contributing to the "marketplace,\"\textsuperscript{180} and teachers are in at least as good of a position as judges to evaluate a cyberbully's contribution. As such, teachers should be afforded the latitude provided in \textit{Tinker}.

C. Encouraging Cyberbullies to Respect the Rights of Others Is Not a Bad Thing

Targets of cyberbullying should be allowed to attend school without fear of being subjected to hurtful, sometimes malicious, cyberbullying. As one commentator has correctly asserted:

The right for one student to feel safe and comfortable in the school setting should outweigh another student's right to make offensive remarks. Hateful or purposefully derogatory speech should be treated differently than political or academic speech, especially when directed to those of tender years. If allowing schools to discipline children for cyberbullying incidents will encourage students to "monitor their thoughts and statements" and have a "chilling effect" on the type of harassment and bullying taking place on the web sites of school children, \textit{it may not be such a bad thing.}\textsuperscript{181}

In this context, "chilling" the cyberbully hardly seems like anything more than an inconvenience imposed upon someone who "add[s] little information and even fewer ideas to the marketplace."\textsuperscript{182} As such, cyberbullying is hardly the type of expression "at the core of what the First Amendment is designed to protect."\textsuperscript{183}

1. Cyberbullies Add Very Little to the "Marketplace of Ideas"

The reason for the First Amendment's ban on official censorship is because in a free society, we rely upon this so-called "marketplace of ideas."\textsuperscript{184} The potential, yet not likely, impact on the "marketplace" if schools are afforded latitude in disciplining cyberbullies however, overshadows and even ignores the duties placed upon our educators to

\begin{itemize}
  \item \textsuperscript{178} See Whitely, \textit{supra} note 9 (explaining how private information disclosed to classmates via e-mail under pretense that he was sharing information with coveted classmate was used to spread rumors that teenage boy was gay, and suggesting that such conduct played a role in teenager's suicide).
  \item \textsuperscript{179} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
  \item \textsuperscript{181} Erb, \textit{supra} note 8, at 283–84 (emphasis added).
  \item \textsuperscript{182} U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 935 (3d Cir. 1990).
  \item \textsuperscript{183} See Virginia v. Black, 538 U.S. 343, 365 (2003).
  \item \textsuperscript{184} See Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
\end{itemize}
preserve and foster an educational environment, and through the doctrine of *in loco parentis*,\(^{185}\) to inculcate in our young people "habits and manners of civility."\(^{186}\) Such manners and civility, of course, include a "tolerance of divergent political and religious views, even when the views expressed may be unpopular."\(^{187}\) Though the state education system, through its educators, has the awesome responsibility of inculcating moral and political values,\(^{188}\) educators should not act as "thought police" seeking to inhibit all discussion that is not approved by, and in accord with, the official position of the school.\(^{189}\) Just the same, cyberbullies must be cognizant that the First Amendment is different in public schools than elsewhere,\(^{190}\) and that, "in light of the special characteristics of the school environment,"\(^{191}\) educators must be afforded latitude to decide what student speech is appropriate, subject to constitutional limitations.

Another factor to be balanced against the distribution of electronic harassment at school is that, unlike other targets of unpopular speech or expressive activities, targets of cyberbullying are seriously limited in their ability to avoid cyberbullying and its effects. Certainly, targets of cyberbullies are "captives" who are "subject to objectionable speech"\(^{192}\) when their classmates are talking about derogatory information posted on the Internet by other students. Allowing cyberbullies to use the schoolhouse as their soapbox is particularly troubling when the cyberbully is able to paint his or her disparaging remarks with such a "broad stroke." In one case, for example, a student posted a website on which he included a list of "the losers [he] would love to

\(^{185}\) Morse v. Frederick, 127 S. Ct. 2618, 2632 (2007) (Thomas, J., concurring).

\(^{186}\) Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

\(^{187}\) See id.

\(^{188}\) See, e.g., Morse, 127 S. Ct. at 2627 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).


\(^{190}\) Cohen v. California, 403 U.S. 15, 21 (1971). Cohen, of course, involved California's attempt to convict an individual for disturbing the peace because he wore a jacket bearing the words "Fuck the Draft" in a place where women and children were present. Relying, at least in part, upon *Tinker*, the Court emphasized that Mr. Cohen's jacket caused no disruption in the courthouse and that there was no evidence that others even objected to Cohen's jacket. Id. at 21–23. The Court then explained that upholding the conviction would be "unteleable," reasoning that doing so would be tantamount to allowing the States to impose censorship in the name of avoiding physical censorship "of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless." Id. at 23. In the Court's view, allowing such censorship was not far removed from allowing school discipline based only upon an "undifferentiated fear or apprehension of disturbance." *Id.* The First Amendment, of course, sanctions neither, and it is not suggested herein that it should.
shoot and freshmen girls [he] would love to kill."

Aside from students' rights to transfer to another school or to attend private school, and a teacher's right to find work elsewhere, it is difficult to imagine a more captive audience than public school students and teachers. Students often have few, if any, choices that might allow them to avoid cyberbullying, particularly in light of compulsory attendance laws requiring that students attend school through a certain age and/or grade level.

When viewed in light of the potential effects upon the targets of cyberbullies it becomes more apparent that school cyberbullies should not be allowed to hide behind the First Amendment in the face of discipline from school authorities. Allowing them to continue to do so certainly exacerbates issues currently facing students and school officials subject to such attacks, all the while allowing cyberbullies to continue to trample rights of those fellow students or teachers from miles away. Although the cyberbully certainly has a protected interest in "expos[ing] unwilling viewers" to some speech, the First Amendment does not afford him or her "an unqualified constitutional right to follow and harass an unwilling listener." Targets should not be forced to try and avoid the bully, his cohorts, and their discussion of the bully's off-campus speech, especially when the targeted student is required to be in attendance at the school where the relationship is centered. Similarly, the targeted student should not be expected to transfer and a targeted teacher should not be required to look for other employment because a cyberbully is savvy enough to post death threats on the Internet.

2. The Rights of Other Students and Teachers Outweigh the Cyberbully's Contribution, if Any, to the "Marketplace of Ideas"

In light of the foregoing, the cyberbully's First Amendment rights, if any, to disparage his or her teachers and classmates on the Internet

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194. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (acknowledging "the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech").
196. See, e.g., Servance, supra note 6, at 1216 nn.14–23; infra notes 240–45.
should not protect him or her from school discipline. The bully's speech is entitled to little protection when weighed against the rights of others.\textsuperscript{199} So long as there are reasonable facts that could lead "school authorities to forecast substantial disruption of or material interference with, school activities,"\textsuperscript{200} discipline is warranted. Any analysis of cyberbullies' rights must begin from the touchstone of knowing that cyberbullies' speech is not entitled to absolute protection when the speech finds its way onto school property. When that speech does find its way onto school property, it often is the "type of behavior [that] materially disrupts classwork or involves [a] substantial disorder or invasion of the rights of others [and] is, of course, not immunized by the constitutional guarantee of freedom of speech."\textsuperscript{201}

When the protections afforded that speech are analyzed in light of the rights of others affected—including the rights of the other students, the teachers, and the school system itself to educate its students, as \textit{Tinker} commands—the conclusion is readily apparent that those courts who have not cowered in the face of cyberbullies' First Amendment defenses have made the correct legal decision.\textsuperscript{202} Any analysis of these types of cases must keep in mind that

\begin{quote}
[t]he purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values and consequences of the speech that is protected by the First Amendment.\textsuperscript{203}
\end{quote}

As such, cyberbullying must be analyzed for what it is—distasteful commentary intended to harm another student or a teacher, which often interferes with the rights of others to participate in their education, with the school's ability to educate properly and effectively, and perhaps with an educator's ability to do his or her job.\textsuperscript{204} As the Su-

\textsuperscript{199} See Svedberg v. Stamness, 525 N.W.2d 678, 684 (N.D. 1994) (affirming lower court's issuance of restraining order preventing child from taunting and harassing another juvenile and supporting conclusion by noting that, on the facts of this case, "incessant teasing" and harassment constituted fighting words not protected by First Amendment).


\textsuperscript{201} Id. at 513 (citation omitted).

\textsuperscript{202} See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 419 (Pa. Commw. Ct. 2000), aff'd, 807 A.2d 847 (Pa. 2002) (holding that First Amendment was not violated, even after noting that "the matter presently before [the Court] involve[d] speech that occurred off of school premises and was communicated to others via the Internet"); Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007).

\textsuperscript{203} Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1188 (6th Cir. 1995) (quoting Swank v. Smart, 898 F.2d 1247, 1250–51 (7th Cir. 1990)).

\textsuperscript{204} Servance, supra note 6, at 1238.
preme Court recently stated, "[s]chool principals have a difficult job and a vitally important one."205 Consequently, "[c]ourts [must] recognize that schools are in a better position to decide whether off-campus conduct poses a disruption to school[s],"206 and refrain from interfering with those decisions by subjecting them to rigid rules, the application of which incorrectly focuses largely on where the speech originated instead of where it has the greatest impact.207

V. PROPERLY FOCUSING ON WHETHER A DISRUPTION OF THE SCHOOL ENVIRONMENT TAKES PLACE, IN SPITE OF THE ORIGINATION POINT OF THE STUDENT SPEECH, ALLOWS A PROPER ANALYSIS OF STUDENT WEBSITES UNDER TINKER

Territoriality is not necessarily a useful concept in determining the limit of an educator's authority to discipline student speech.208 Contrary to some suggestions, Tinker and its progeny do not suggest that the Court has assumed that school authority over student speech "ends as the student leaves the schoolhouse."209 Much to the contrary, although Tinker and its progeny likely did not foresee the advent of student blogging and its potential impact upon teachers and students inside the schoolhouse, those cases do provide an analytical framework under which courts can uphold students being disciplined for off-campus speech, so long as that speech disrupts or has the tendency to disrupt the school environment.210 With the Internet readily available and accessible, students often resort to websites or similar mediums to express frustration with teachers or those in power, or to mimic popular culture or other students.211 Often, their doing so is not with good intentions.

Usually cyberbullying is created with the intent that it has an effect at school. When courts curtail authorities' jurisdiction over stu-

206. Servance, supra note 6, at 1234; see also Pollnow v. Glennon, 594 F. Supp. 220, 221 n.2 (S.D.N.Y. 1984) (wherein the court acknowledged that school authorities are in the best position to determine whether their school's educative process may be adversely effected or the health, safety or morals of its pupils may be so effected).
207. See, e.g., Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008); Wisniewski, 494 F.3d at 39; Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007); J.S. ex rel. H.S., 807 A.2d at 856.
dent speech just because it originates outside of the schoolhouse, they ignore the reality that the speech likely would never have occurred in the first instance but for the relationship between the speaker and the target of the speech—a relationship deriving from both of their presence within the schoolhouse. The more appropriate analysis, then, is to focus upon the impact of the speech in light of the intent of the speaker, the analysis under which the Supreme Court initially analyzed Tinker's wearing of his black armband.

A. Analysis of Students' First Amendment Rights to Cyberbully Must Account for the Borderless Nature of the Internet

The High Court has recognized that, unlike the school grounds, the Internet has no borders. Consequently, targets of cyberbullies are required to confront their aggressors outside of the schoolhouse, as well as in the school corridors. Cyberbullying spreads quickly because of the swift distribution fostered by the Internet, and students also face their aggressors on buses, at school activities, and possibly even at community functions having nothing to do with the school. Given its quick and easy distribution to recipients both known and unknown, cyberbullies are given an advantage that distributors of traditional forms of expression such as flyers, posters, newspapers, and other forms of printed materials did not enjoy. Even more problematic is that the cyberbully can utter his or her hurtful words from within the comfort of his or her own home and disseminate them to a larger number of people than if he or she was actually standing in the school foyer or auditorium. Given this inherently different mode of expression, courts analyzing disruptions inside the schoolhouse based upon where the disruptive speech originated are doing educators and the First Amendment a major disservice. Although the origination point of the speech may be relevant, it must not be determinative. Homage must be paid to the effect of the bullying, as well as to the rights of those at whom it is aimed.

Clearly, the First Amendment does not immunize students who use words to invade the rights of others. Given the lack of physical borders of the Internet and the potential harm caused by cyberbul-

213. See Servance, supra note 6, at 1235.
214. See id. at 1235–36.
lies, the critical determination, as Tinker prescribes, must be whether there is a reasonable probability that the cyberharrassment will cause a material disruption within the school environment and whether that speech invades the rights of the other students and/or teachers. Certainly, educators are not required to await an incident like the Columbine shootings if they believe a student might execute other students, or cause significant stress to others on his "hit list." If the focus remains upon the school environment and the potential disruption therein, educators can at least account for the personalities and similarities involved, past history of the speaker and the target, and the fact that much of the speech would never have been uttered in the first place absent a relationship that was conceived at school. Removing that relationship from the school corridors, and placing it on the Internet in the form of cyberbullying, should not immunize the speaker from discipline when the latter subsequently disrupts the school environment—the very environment encouraging the bullying in the first instance.

Courts are ill-equipped to delineate boundaries in regard to student Internet speech, and their attempts to do so turn the First Amendment inside out. One cannot reasonably dispute that the content of student-created Internet websites is discussed at school. In the context of cyberbullies, those websites often involve seriously disturbing parodies or false information regarding members of the school community, much of which has a very probable likelihood to disrupt the school environment. Increasing the probability of disruption is the fact, or at least the possibility, that many of the students reading the website may know the target of the conversation, and more students call the website to the attention of others who may know the target, all of whom then discuss the website at school. In the case of teachers and fellow students alike, the on-campus discussion of the student website cultivates an attitude of disrespect and contempt toward the cyberbully's target at school. Certainly, if the website is not the subject of disrupting discussions at school, then the circumstances are significantly different.

217. See supra notes 192–98 and accompanying text.
218. See East, supra note 193; see also supra notes 176–80 and accompanying text.
219. Servance, supra note 6, at 1223; see supra notes 208–11 and accompanying text.
221. See Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (noting that student's website was not involved in "the buzz" at school).
The current state of the law as to how the *Tinker* analysis applies to cyberbullying is, at best, unsettled. Several courts have found that Internet speech created off-campus cannot be the subject of school disciplinary action.²²² Had Courts properly focused on the disruptive tendencies of the student websites in some of the cases that have been decided,²²³ not only would those students have been disciplined for conduct warranting as much, but perhaps the current state of the law in this regard would be less muddled. For example, one court even rationalized its decision that a student had a substantial likelihood of success on his First Amendment claim by explaining that "[a]lthough the intended audience was undoubtedly connected to [the school], the speech was entirely outside of the school's supervision or control."²²⁴ Such a rigid analysis ignores what *Tinker* was intended to protect against—a disruption of the educational environment. Moreover, educators and students are provided no clear guidance as to what speech is protected by the First Amendment and what is not.

B. In an Effort to Accommodate the Borderless Nature of the Internet, Courts Get Caught Up in Distinctions and Demarcations Not Pertinent to the *Tinker* Analysis

Between decisions focusing on where student speech originated and others adhering to *Tinker*, perhaps because courts are uncomfortable with cyberbullying, courts have reached differing conclusions on cases with similar facts. In one case, a Pennsylvania court correctly upheld discipline imposed upon a student, taking note of the disruption that the student's website had upon a teacher and upon the school environment in general.²²⁵ In a similar case, a federal court in Missouri overturned a suspension reasoning that the discipline stemmed not from a fear of disruption so much as it did from the administrators of the school being offended.²²⁶ In another case, it was concluded that there was no disruption caused by a student-created “Satan's Page,”

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²²³ See Servance, *supra* note 6, at 1237 ("Courts should instead apply the principle that is intuitive to most Internet users: Internet speech resides in cyberspace, which is borderless and exists wherever there is a connection to the Internet.").

²²⁴ Emmett, 92 F. Supp. 2d at 1090.


²²⁶ Beussink ex rel. Beussink, 30 F. Supp. 2d at 1178.
which listed students that the creator thought were "cool" or that he "wish[ed] would die,"\textsuperscript{227} even though the Court presented very little analysis underpinning its ultimate conclusion. Had the courts focused on the impact of the student speech or even analyzed the nature of the speech and its likely (and certainly intended) effect upon its targets at school, the outcome of all three cases likely would have been the same. The suspensions of all of the students would have been upheld.

Certainly, the law is not incapable of distinguishing between activity that concerns the school community and activity that does not, and each of the aforementioned cases certainly targeted members of the school community.\textsuperscript{228} Educators must be allowed to discern whether such off-campus speech is likely to cause a disruption within the four walls of the schoolhouse, particularly since educators are more likely to be aware of the students and the teachers at the center of such disputes. Educators are likely aware of past disputes between the cyberbully and the target and they may actually be in a position to make a decision to prevent an actual disruption—foregoing the need to impose discipline at all. If there is a reasonable basis for concluding that a disruption will occur and discipline is subsequently imposed, however, the cyberbully should not be allowed to avoid the consequences of his or her actions\textsuperscript{229} by seeking refuge in the First Amendment.

Analysis of cyberbullying cases must focus on the impact that such speech has on its targets, and it must also consider the school environment in which those targets are asked to function.\textsuperscript{230} Properly focusing the analysis of student speech on the disruption or likelihood of a material disruption, at least some of which is cyberbullying of teachers or classmates, will clarify the propriety of the discipline and will

\textsuperscript{227} Mahaffey ex rel. Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002). As one commentator has pointed out, Mahaffey's website created a disruption. See Servance, supra note 6, at 1243. The website was violent, and because of its nature, it was foreseeable that the students portrayed and discussed on the website would be adversely affected. Id. Those students identified as those Mahaffey wanted to "die" could have interpreted the site as a threat, and they may have decided against attending school, which would, in turn, interfere with the school's ability to educate those students and with those student's rights to obtain an education. Id. Since no analysis of the impact of this website was conducted by the court, there was no way of knowing whether the Court even considered the possibility that disruption of the educational environment occurred or was reasonably likely to occur.

\textsuperscript{228} Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring).

\textsuperscript{229} See id. ("Possibly the traditional standard of the law that holds a person responsible of the natural and reasonably foreseeable consequences of his action might have some pertinent applicability to the issue."). Notably, this circumstance is rarely, if ever, mentioned by the courts deciding student cyberbullying cases; instead, the courts continue to focus on the locale where the speech originated.

\textsuperscript{230} See Servance, supra note 6, at 1241–42.
not undermine the practical realities of the situation, i.e., student Internet speech originating within a cyberbully's home or from his cell phone can, and often does, cause a disruption in the school environment.\textsuperscript{231} In fact, absent the school environment, there would often be no impetus for creating the bullying material. The correct result can only be reached—especially in light of the special circumstances of the school environment\textsuperscript{232}—when balancing the value of the cyberbully's speech against the intrusion upon the rights of the others involved, usually other students and the teachers.\textsuperscript{233}

\textit{Wisniewski v. Board of Education of Weedsport Central School District},\textsuperscript{234} for example, upheld discipline imposed upon an eighth grader for instant messaging in which he portrayed and suggested the killing of his English teacher.\textsuperscript{235} \textit{Wisniewski} held that the messaging “crosse[d] the boundary of protected speech and constitute[d] student conduct that . . . would ‘materially and substantially disrupt the work and discipline of the school.’”\textsuperscript{236} Had \textit{Wisniewski} focused on the origination of the speech, a different result might have been dictated. \textit{Wisniewski} emphasizes the fallacy of ignoring such realities and pretending as if the student's rights are no longer subject to school discipline when the student exits the schoolhouse. If students know their conduct is subject to such a rigid rule, cyberbullying may very well increase because students know their conduct will not be subject to discipline except in those rare cases where schools can establish an \textit{actual} disruption.\textsuperscript{237} Because such speech is of such little social value and adds nothing to the “marketplace of ideas”\textsuperscript{238} protected by the First Amendment, courts should not hesitate to analyze such speech as what it is—that of cowardly persons who seek to disparage others through sometimes anonymous, hurtful Internet websites.\textsuperscript{239}

Just as the analysis of whether student speech is subject to discipline should not turn upon which side of the door the speech originated, courts must not forget that the effects of cyberbullying extend well beyond the schoolyard. Certainly, students do not forget

\textsuperscript{233} See supra notes 199–207 and accompanying text.
\textsuperscript{234} Wisniewski \textit{v. Bd. of Educ.}, 494 F.3d 34 (2d Cir. 2007).
\textsuperscript{235} See id. at 37–39.
\textsuperscript{236} \textit{Id.} at 38–39 (quoting \textit{Morse v. Frederick}, 127 S. Ct. 2618, 2625 (2007)).
\textsuperscript{237} See, e.g., Mahaffey \textit{ex rel. Mahaffey v. Aldrich}, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (failing to analyze the likelihood of disruption, even though student's web site contained information suggesting possible threats to others within the school environment).
\textsuperscript{238} See, e.g., Abrams \textit{v. United States}, 250 U.S. 616, 630 (Holmes, J., dissenting).
\textsuperscript{239} Perhaps the Danish philosopher, Soren Kierkegaard, best explained the cyberbully seeking protection under the First Amendment when he said: “People demand freedom of speech as compensation for the freedom of thought which they seldom use.”
about their school day when they exit the building and being subjected to continued ridicule and harassment at school has serious effects upon their mental and emotional development.\textsuperscript{240} Ironically, the effects of such cyberbullying could cause these students to refrain from participating in other activities,\textsuperscript{241} thereby further diminishing the "marketplace of ideas."\textsuperscript{242} Furthermore, when the student or teacher leaves the schoolhouse and retreats to home, the effects of the cyberbullying impact others within their home, sometimes in quite unfortunate ways.\textsuperscript{243} Given the "borderless" nature of the Internet,\textsuperscript{244} the targets face this bullying not only at school, but they also face the real possibility of facing the unwelcome speech within their own homes. Being harassed at home can destroy the security of a place where children [and teachers] should feel the safest.\textsuperscript{245} Encouraging cyberbullies by incorrectly affording them First Amendment protection only exacerbates the otherwise obvious effects of cyberbullying.

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\item \textsuperscript{240} See, e.g., National Crime Prevention Council, \textit{Cyberbullying} (2008) http://www.ncpc.org/topics/by-audience/parents/bullying/cyberbullying ("Victims of cyberbullying may experience many of the same effects as children who are bullied in person, such as a drop in grades, low self-esteem, a change in interests, or depression."); Reuters, \textit{Bullying Harms Kids' Mental Health: Study}, Feb. 6, 2008, http://www.reuters.com/article/healthNews/idUSCOL67503120080206 ("Bullied children are known to be more likely to have anxiety, depression and thoughts of suicide, as well as to experience social isolation . . . . Having such problems early in life increases a person's future risk of depression and anxiety disorders.").
\item \textsuperscript{241} See Cara J. Ottenweller, Note, \textit{Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act}, 41 \textit{Val. U. L. Rev.} 1285, 1292–93 (2007) ("Similar to the effects of typical schoolyard bullying, children may experience dropping grades, low self-esteem, loneliness, a change in interests, depression, an urge to drop out of school, and suicidal tendencies."); see also Chris Webster, \textit{What is Cyberbullying}, Jul. 28, 2008, http://www.cyberbullying.info/resources/whatis.pdf ("'Cyberbullying has the same insidious effects as any kind of bullying, turning children away from school, friendships, and in tragic instances, life itself . . . [m]ost victims, however, suffer shame, embarrassment, anger, depression and withdrawal.") (citation omitted).
\item \textsuperscript{242} See supra notes 176–80 and accompanying text.
\item \textsuperscript{243} See, e.g., Abbot Koloff, \textit{States Push For Cyberbullying Controls}, USA TODAY, Feb. 6, 2008, http://www.usatoday.com/news/nation/2008-02-06-Cyberbullying_N.htm; see also MANKE, supra note 25, at 6 ([C]hildren who both bully others online and are themselves the victims of cyberbullying are in the greatest need of intervention and services. These youth manifest the highest levels of depression and behavior problems such a[s] vandalizing property, stealing, and drinking.) (emphasis omitted).
\item \textsuperscript{244} See supra notes 212–15 and accompanying text.
\item \textsuperscript{245} See Ottenweller, supra note 241, at 1295; see also National Crime Prevention Council, \textit{Cyberbullying} (2008) http://www.ncpc.org/topics/by-audience/parents/bullying/cyberbullying (noting that "being bullied at home can take away the place children feel most safe").
\end{itemize}
C. Territoriality Is Irrelevant When Analyzing Student Speech, as well as Remedies

The fallacy underlying the courts' continued use of the schoolhouse gate as the demarcation point from which to determine whether speech is protected is easily exposed. Most, if not all, champions of the First Amendment would likely agree that the character of most speech depends upon the circumstances in which it is uttered,\(^{246}\) and there can be no question that the speech rights of school students are not coextensive with those of adults in different settings.\(^{247}\) As Justice Holmes stated many years ago in one of the most famous First Amendment quotations found in jurisprudence\(^{248}\) discussing exceptions to the First Amendment, even “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”\(^{249}\) If the same heckler were not present at the theater but, in any event, called in a bomb threat\(^{250}\) causing the

\(^{246}\) See Schenck v. United States, 249 U.S. 47, 52 (1919).

\(^{247}\) Corales v. Bennett, 488 F. Supp. 2d 975, 981 (C.D. Cal. 2007) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)); see also Cuff v. Valley Central Sch. Dist., 559 F. Supp. 2d 415, 418 (S.D.N.Y. 2008) (citing Fraser, 478 U.S. at 682) (stating that “it is . . . clear that students in public schools enjoy a more limited form of First Amendment protection than do adults in society at large”) (emphasis supplied).

\(^{248}\) See, e.g., Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 772 (5th Cir. 2007) (citing to Schenck and stating that “[w]hen a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling ‘fire’ in a crowded theater”); Balboa Island Village Inn, Inc. v. Lemen, 156 P.3d 339, 356 (Cal. 2007) (failing to cite Schenck, but making statement in analysis that such speech is not protected); Minnesota v. French, 460 N.W.2d 2, 15 (Minn. 1990) (omitting cite to Schenck, same reference as Lemen); Jamshidnejad v. Central Curry Sch. Dist., 108 P.3d 671, 677 (Or. Ct. App. 2005) (omitting cite to Schenck, but explaining that “[t]he exercise of appropriate discipline to deter disruptive forces within the school environment is as consistent with First Amendment rights as are constitutional limitations on free speech in other environments, such as constraints on yelling ‘Fire!’ in a crowded movie theater”) (quoting Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 286 (Or. Ct. App. 2000)).

\(^{249}\) Schenck, 249 U.S. at 52.

\(^{250}\) Beyond the breadth of this argument is an in-depth discussion of the “true threat” doctrine. In Watts v. United States, 394 U.S. 705 (1969), the Supreme Court recognized that threats of violence fall within the realm of speech that the government can prescribe without offending the First Amendment. Although the United States Courts of Appeals differ on whether the threat is evaluated from the perspective of the speaker or the recipient, all agree that the threat must be viewed objectively in order to determine if it is a “true threat.” See Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622–23 (8th Cir. 2002) (discussing divergent views among the circuits and the “true threat doctrine”); Lovell ex rel. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371–73 (9th Cir. 1996). The “true threat” doctrine has been applied in cases of student speech posted on the Internet, as well as some cases have allowed students to be disciplined in cases where student expression on the Internet poses a serious, or a “true threat” to a person or group. See, e.g., Latour v. Riverside Beaver Sch. Dist., No. 05-1076,
same panic with the same theater goers, his speech would still not be protected by the First Amendment.\textsuperscript{251} Just the same, speech that constitutes bullying and harassment, if it took place on the school playground, would probably not enjoy First Amendment protection.\textsuperscript{252} Consequently, just as the theater heckler cannot cloak his worthless speech with First Amendment protection by using the telephone to voice his threat instead of being present, so too the cyberbully should not be afforded First Amendment protection just because his or her speech originates outside of the schoolhouse, particularly when the cyberbully intends the speech not only to penetrate the school’s walls, but to have the injurious effects and cause the material disruptions there that \textit{Tinker} expressly prohibits.\textsuperscript{253} Both the bomb threat and cyberbully cause harm; the only real difference is that the latter harm is caused by someone who undoubtedly has more limited First Amendment rights in the school setting, in an environment where even the Supreme Court has limited the protection afforded to speech with little to no social value.\textsuperscript{254} Since cyberbullying has little to no social value, it should not be protected;\textsuperscript{255} if allowing discipline over this type of speech in the schools avoids one serious incident, the scales are

\textsuperscript{251} See, e.g., United States v. Viefhaus, 168 F.3d 392, 396 (10th Cir. 1999); United States v. Popa, 187 F.3d 672, 679 (D.C. Cir. 1999) (Randolph, J., concurring); Jackson v. Delaware, 821 A.2d 881, 884 (Del. 2003); State ex rel. RT, 781 So. 2d 1239, 1245 n.9 (La. 2001).

\textsuperscript{252} See Svedberg v. Stamness, 525 N.W.2d 678, 684 (N.D. 1994) (affirming lower court’s issuance of restraining order preventing child from taunting and harassing another juvenile and supporting conclusion by noting that, on facts of this case, “incessant teasing” and harassment constituted fighting words not protected by First Amendment); see also Colleen Creamer Fielkow, \textit{Bullies, Words, and Wounds: One State’s Approach In Controlling Aggressive Expression Between Children}, 46 DePaul L. Rev. 1057, 1078–83 (1997) (discussing various aspects of bullying behavior and conduct).

\textsuperscript{253} But see Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004), cert. denied 544 U.S. 1062 (2005) (characterizing speech as “off-campus” when drawing was completed at home, stored for two years, never intended to be brought to campus, and student “took no action that would increase the chances that his drawing would find its way to school”).

\textsuperscript{254} See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Wisniewski v. Bd. of Educ., 494 F.3d 34, 37–40 (2d Cir. 2007) (discussing more limited application of First Amendment in school environment and discussing that school authorities have “significantly broader” authority to sanction student speech than the Watts standard allows).

\textsuperscript{255} See \textit{supra} notes 238–39 and accompanying text.
further tipped in favor of deferring to school authorities as to how the schools should be operated.\textsuperscript{256}

Some commentators have contended that targets of cyberbullies have adequate civil and criminal remedies outside of the school discipline context and that, therefore, the schools should not step in to protect the targets of a cyberbully.\textsuperscript{257} This position ignores the issue—the need for discipline in the school.\textsuperscript{258} Requiring school officials to defer to the courts does \textit{nothing} to prevent disruption within the schools. Given the time that such cases take to materialize and to end, the disruption—one that likely could have been avoided if swift discipline were allowed without fear of it being overturned later—is immediate and the option of resorting to the court system is at best, largely ineffective. Deferring to the civil and criminal justice system and examining incidents of cyberbullying from this perspective also ignores the actual impact that cyberbullying has on those involved. For example, allowing tort remedies for Ryan Halligan’s parents will hardly compensate them for their loss, especially when viewed in the context of whom the defendant(s) would be.\textsuperscript{259} Moreover, even if a teacher or fellow student succeeds in bringing a defamation claim or an invasion of privacy claim, how will the school environment benefit from the disruption injected by the likely judgment-proof cyberbully when his or her underlying speech went without discipline? It will not.

Civil remedies, and even criminal or juvenile court proceedings, are often inadequate\textsuperscript{260} to compensate the target or their loved ones for all of the damage and hurt that some cyberbullies have perpetrated.\textsuperscript{261} Such a stance ignores the realities of the situation insofar as those civil remedies fail to provide any cure for the insurrection within the school corridors—some of which may rise to the level of actually depriving students and teachers alike of their rights within

\textsuperscript{256} See Servance, supra note 6; see also Texarkana Indep. Sch. Dist. v. Lewis, 470 S.W.2d 727, 734 (Tex. Civ. App. 1971) (“Except in extreme cases the judgment of school officials should be final in applying a regulation to a given case.”).

\textsuperscript{257} See Calvert, supra note 29, at 245.

\textsuperscript{258} See Fraser, 478 U.S. at 681.

\textsuperscript{259} See supra note 159 and accompanying text.

\textsuperscript{260} The inadequacy of criminal proceeding in cyberbullying cases was also explored in Megan Meier’s case. After carrying on an online relationship with Megan, posing as a young boy, and already having knowledge of Megan’s depression and vulnerable psyche, Lori Drew told Megan Meier that the world would be a much better place without her. After Megan committed suicide, Drew was convicted only of minor offenses of unauthorized access of a computer. Scott Glover, Jury Delivers Mixed Verdict in MySpace Bullying Trial, L.A. TIMES, Nov. 27, 2008, available at http://www.latimes.com/news/printedition/front/la-me-myspace-trial-verdict27-2008nov27,0,5931636.story.

\textsuperscript{261} Compare Erb, supra note 8, at 276–80, with Calvert, supra note 29, at 245.
the school environment. As such, the proper focus for one seeking to alleviate cyberbullying within the school hallways is not to resort to the tort system, but to resort to the framework provided by the Supreme Court over the last forty years and allow teachers and school administrators to discipline students for behavior—speech or otherwise—that is likely to and usually does materially disrupt the educational environment.

VI. CONCLUSION

First Amendment rights are different in public schools than anywhere else. Even outside of the school context, the First Amendment right to freedom of speech is not absolute. By recognizing the limitless reach of the Internet and allowing school authorities broad discretion in disciplining students for off-campus websites and cyberbullying that disrupts the school environment or has a reasonable probability of doing so, courts would simultaneously be protecting students and teachers from undue harassment and allowing schools to resume their roles as those who must effectuate what is best for the school environment. Educators are expected to inculcate our young people with "habits and manners of civility," including a "consideration of the sensibilities of others," but courts routinely second-guess their decisions as to how that inculcation should be administered. During that process, courts often lose sight of the balancing called for by the Court's opinion in Tinker, and many decisions are therefore hastily decided, by focusing, in large part, upon the geographic location where the cyberbullying originated.

Cyberbullying cases should be analyzed under the balancing framework provided in Tinker and its progeny. In assessing the impact that the nearly worthless expression that is cyberbullying has upon the school environment as well as upon the participants in that environment, courts must resist placing educators in the proverbial catch-22 of having to choose between protecting the educational mission in the school and the rights of the targets of such speech and risking liability for violation of the cyberbully's First Amendment

262. See supra notes 192–95 and accompanying text.
265. See Tinker, 393 U.S. at 521–22 (Black, J., dissenting) ("It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, when he pleases. Our Court has said exactly the opposite.").
266. See Erb, supra note 8, at 276–80.
Conducting a rigid analysis based upon where the speech originated, instead of considering all of the rights involved—including those of targeted students and teachers—disregards Tinker’s balancing test and creates an inflexibility not conducive to analyzing the Internet and its potential disruptive impact within the schools.

Certainly, Americans have the right to “criticize . . . and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.”270 When that criticism invades the schoolhouse, however, berating teachers and fellow students, causing a material disruption to the educational mission, and infringing upon students’ and teachers’ rights, courts must remain aware that “[t]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”271 Consequently, when confronted with First Amendment challenges to school disciplinary action imposed as a result of a cyberbully’s intrusion upon those fundamental principles, courts must be mindful that “[t]o elevate such impertinence to the status of constitutional protection [is] farcical and would indeed be to ‘surrender control of the American public school system to public school students.’”272 In such cases, “those who run public schools should be the judges, . . . not the courts. The quicker judges get out of the business of running schools, the better.”273

269. Kosse, supra note 164, at 906.
273. Texarkana Indep. Sch. Dist. v. Lewis, 470 S.W.2d 727, 734 (Tex. Civ. App. 1971); see also Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (recognizing broad degree of control afforded educators in operating nation’s schools so long as decisions are made consistent with the Constitution).