

Hostile Educational Environments

Ari Ezra Waldman

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HOSTILE EDUCATIONAL ENVIRONMENTS

ARI EZRA WALDMAN*

ABSTRACT

This Article is one in a series about bullying and cyberbullying in schools. I argue that the proper analysis for a First Amendment challenge to school discipline for off-campus misuse of the Internet to harm or harass a member of the school community based on the victim's identity depends on the nature of the offending behavior. For students who are punished for a single incident—what I will call cyberattacking—a student speech analysis that reflects the Court's consistent rationale in all its student speech cases, the “substantial disruption” standard, makes sense. But students who engage in a pattern of repeated incidents of cyberattacking—what I will call cyberbullying—create a hostile educational environment for their victims that parallels the behavior of harassers. Therefore, the relative merit of cyberbullies' First Amendment defenses to lawful punishment should depend more on the interaction between free speech rights and harassment than on the interaction between free speech and a single incident of aggression. And, while the Supreme Court has never explicitly considered a First Amendment challenge to a harassment or stalking statute, it has stated that threats fall outside the protections normally afforded to more valuable speech. In this context, just like the state has a compelling interest in protecting captive, victimized minorities from hostile environments and abuse in certain contexts, so too does the state have a compelling interest in protecting

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students who are bullied because of their sexual identity. For these egregious cases, a First Amendment defense to discipline should fail.

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I. INTRODUCTION

Amelia and Zachary are unique.¹ They are the first in their school to be suspended for bullying two classmates whom they have never confronted in person. The offensive conduct that motivated the suspension took place not in the cafeteria or during study hall or in the locker room; rather, it took place online. Amelia and Zachary are cyberaggressors.² Amelia created an “I Hate” video in which she ridiculed a fellow student for her short hair, tendency to wear boys’ clothing, and perceived lesbianism, and then posted the video to a social networking website for her 500 friends to see. Zachary has been bullying his victim for years, using a fake online profile to post homophobic slurs, spread rumors, and graphically depict his victim in compromising sexual situations. Both victims reported the incidents to their principal and both felt embarrassed, depressed, and increasingly unsafe in school as a result.

Our antagonists are part of an increasingly common breed of bully that is confounding the judiciary and creating seemingly conflicting case law.³ Cyberbullies eschew traditional face-to-face harassment in favor of the anesthetized distance and perceived anonymity of the Internet. By taking their conduct off campus and making exclusive use of cyberspace, their behavior implicates student free speech law in new and profound ways. But the ways in which the First Amendment may interact or conflict with attempts to discipline cyberbullies vary. That is, while Amelia and Zachary are composites of cyberaggressors recently in the news, they differ in one important respect: strictly speaking, only Zachary is a cyberbully.

There are two types of peer-to-peer cyberaggression cases, each of which merit a different analysis to determine whether the First Amendment bars punishment. Few cases are as neatly framed as the hypotheticals involving Amelia, the single-incident cyberattacker, and Zachary, the repeat offender; often, students combine single or repeated incidents of cyberaggression with face-to-face attacks. Amelia

1. Amelia and Zachary are hypothetical characters, but are also composites of aggressors in a variety of recent cyberbullying cases.

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

3. *Compare* *Kowalski v. Berkeley County Schs.*, 652 F.3d 565, 572–73 (4th Cir. 2011) (finding no First Amendment violation where school disciplined a student for the off-campus creation of a “hate website” that attacked a student), *with* *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (holding that a school could not punish a student for off-campus online speech merely because the speech was vulgar and reached inside the school).

resembles both the alleged cyberbully in *J.C. v. Beverly Hills Unified School District*,⁴ which involved a student who created a YouTube⁵ video criticizing another student, and the roommate of Tyler Clementi, a Rutgers University student who committed suicide after his roommate surreptitiously streamed via Twitter⁶ a video of Clementi with another young man.⁷

J.C. and Clementi's cases, on the one hand, differ starkly from stories like Kylie Kenney's,⁸ Phoebe Prince's,⁹ and Ryan Halligan's,¹⁰ on the other. The aggressors in the latter cases resemble our hypothetical Zachary, a tormenter who repeatedly used the Internet, social networking websites, and other cybertechnologies to bully and harass a victim over time. Neither scenario is necessarily more harmful or tragic than the other; after all, both Clementi and Ryan Halligan committed suicide. Nor are the two necessarily mutually exclusive—the video in *J.C.* may have been the subject of a lawsuit, but could have been part of a pattern of conduct. What distinguishes these two categories of cases is the repetition of the offending behavior.

Despite the difference between a single incident and a pattern of conduct, the few courts to address First Amendment defenses to a school's discipline of bullies and cyberbullies have approached both cases through the lens of *Tinker v. Des Moines Independent Community School District's* "substantial disruption" standard.¹¹ *Tinker* is the foundation of the Supreme Court's student-speech jurisprudence, so it would make sense for courts to default to that case for adjudicating students' free speech rights. Some courts have argued that because

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

5. YouTube is a video-sharing website on which users can upload, share, and view videos. See www.youtube.com.

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

7. See Richard Perez-Pena, *Stricter Law on Bullying in New Jersey*, N.Y. TIMES, Jan. 7, 2011, at A18. Clementi's roommate was convicted on 15 charges, including bias intimidation. See Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES, Mar. 17, 2012, at A1.

8. Suzanne Struglinski, *Schoolyard Bullying Has Gone High-Tech*, DESERET MORNING NEWS, Aug. 18, 2006, available at <http://www.deseretnews.com/article/645194065/Schoolyard-bullying-has-gone-high-tech.html>.

9. Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law*, SLATE (Apr. 30, 2010, 4:13 PM), <http://www.slate.com/id/2252543/>.

10. RYAN'S STORY, www.ryanpatrickhalligan.org (last visited Nov. 19, 2011).

11. 393 U.S. 503, 514 (1969). *Tinker* concerned a student protest in which a group of students wore black armbands to protest the Vietnam War. Pursuant to a recently adopted school policy against such protests, the students were suspended until they would return to school without the armbands. *Id.* at 504.

the Court has maintained the *Tinker* standard and carved out three limited exceptions for three unique situations,¹² *Tinker* remains the standard by which they should determine if the First Amendment bars punishment of students like Amelia and Zachary. But, as currently understood, the “substantial disruption” standard is, at best, unclear: courts seem incapable of connecting a “substantial disruption” with the potentially devastating effects on a student, group of students, and school community when individuals are targeted for aggression based on their identity.

What’s more, Zachary and Amelia are different kinds of aggressors. True bullying is characterized by repeated conduct, and when a pattern of harassment is directed against a victim because of real or perceived sexuality or nonconforming sexual behavior, that bullying is strikingly similar to hostile environment harassment. It stands to reason that the merit of a First Amendment defense to a school’s authority to punish Zachary, the cyberbully who engaged in a pattern of harassing conduct over time, should fail just like a free speech challenge to a harassment or stalking statute will fail.

I argue that the proper analysis for a student’s First Amendment challenge to school discipline for off-campus misuse of the Internet to harm or attack another member of the school community depends on the nature of the offending behavior. For students who are punished for a single incident—what I will call cyberattacking—a student speech analysis still makes sense. The kind of disruptions *Tinker* and its progeny envisioned were never limited to a protest-related fracas, but rather include the harm to the school’s ability to teach its students successfully and the impairment of rights caused by cyberharassment: it harms the victim’s ability to access his equal right to an education, destroys the victim’s community, and disrupts the entire school. This proposal should capture the most devastating cyberattackers, but immunize some single-incident attackers whose conduct is too similar to the common, albeit immature, give-and-take among adolescents.

For students who engage in a pattern of repeated incidents of cyberattacking—what I will call cyberbullying—their creation of a hostile educational environment for their victims parallels the behavior

12. Over time, the Court has carved out three exceptions to *Tinker*’s protection of student speech. In *Bethel School District No. 403 v. Fraser*, the Court held that schools may prohibit “offensively lewd and indecent speech.” 478 U.S. 675, 685 (1986). In *Hazelwood School District v. Kuhlmeier*, the Court held that schools may regulate a student-produced newsletter where it bears the imprimatur of the school. 484 U.S. 260, 270 (1988). And in *Morse v. Frederick*, the Court allowed schools to prohibit speech that encourages illegal drug use. 551 U.S. 393, 403 (2007).

of common harassers. Therefore, a cyberbully's First Amendment defense to school punishment should depend more on the interaction between free-speech rights and harassment than on the interaction between free speech and a single incident of aggression. In this context, the state has a compelling interest to protect victims bullied in schools for their sexual identity. For these egregious cases, a First Amendment defense to discipline should fail.

This Article proceeds in four parts. Part II will argue that cyberbullying (and face-to-face bullying, for that matter) merits different treatment than single-incident cyberattacking. Social scientists unanimously agree that bullying depends on repeated conduct and have shown that bullying and cyberbullying can have more lasting and more serious short- and long-term effects than a single incident of cyberattacking. Part III will lay out the First Amendment defense to school discipline for cyberbullying, suggesting that the argument has some intuitive appeal and warrants a rigorous response if punishments for off-campus cyberbullying are to become readily available to educators. Part IV will address the difference between cyberattackers and cyberbullies, arguing that they deserve different First Amendment analyses and suggesting that a cyberbully is less likely to find solace behind free speech rights than a cyberaggressor. Part V will conclude with policy arguments justifying this new framework.

II. PROPERLY DEFINING THE PROBLEM OF CYBERBULLYING

The evolution of bullying from the playground to cyberspace represents an insidious and growing problem for schools and adolescents. Cyberattacking and cyberbullying defy the ordinary rules of face-to-face aggression and are generally free of supervision, a natural palliative or ameliorative force in the schoolyard.¹³ It should come as no surprise then, that cyberattacking and cyberbullying can lead to poor academic performance, social maladjustment, and absenteeism, and can cause more lasting and severe effects, including depression, anxiety, and suicidal ideation.¹⁴ Such effects, alongside a spate of recent bullying and cyberbullying tragedies, are reason enough to con-

13. M. Martinez-Dick & S. Landau, *Cyberbullying: Individual Differences as Predictors of Children's Harassment of Others 2* (2008), presented at the National Association of School Psychologists Annual Convention, New Orleans, LA, available at <http://psychology.illinoisstate.edu/selandau/Cyber%20NASP%202008.pdf>.

14. See Nancy Willard, *Educator's Guide to Cyberbullying and Cyberthreats*, CYBERBULLY.ORG 5 (Apr. 2007), <http://www.cyberbully.org/cyberbully/docs/cbcteducator.pdf> (explaining that the harm—including low self-esteem, depression, school failure, and suicide—caused by cyberbullying may be even greater than harm caused by traditional bullying).

sider a legal response. But while the legal academy is addressing the merits of those judicial and legislative responses,¹⁵ the current literature suffers from a lack of specificity as to what the problem actually is and where to direct those responses. As I have described, there is a difference between single-incident cyberattacking and cyberbullying, both in their frequency and effects. It makes sense, therefore, to distinguish single-incident cyberattacking from true cyberbullying for two reasons. First, the distinction is faithful to the social science literature that unanimously requires repeated conduct in any bullying definition. Second, some single-incident cyberattacking occurs so frequently that its inclusion under the cyberbullying umbrella would deflect attention, overwhelm any response, and give fodder to opponents of bullying regulation as over-inclusive and futile.

A. *Definitions and Distinguishing Characteristics of Cyberattacking and Cyberbullying*

Cyberattacking and cyberbullying merit different legal analyses in part because psychologists, educators, and other social scientists distinguish between the two in their scholarship. The *Journal of the American Medical Association* defines bullying as “a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one.”¹⁶ The asymmetry of power could be physical (that is, an athletic student versus a less-physically developed victim) or psychological (that is, high self-esteem versus low self-esteem). The bullying can occur verbally (name-calling, threats, taunts, malicious teasing), physically (hitting, kicking, taking personal belongings), or psychologically (spreading rumors, social exclusion).¹⁷ The Department of Justice adds that “bullying . . . involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful.”¹⁸ Physical injury from assaults and emotional in-

15. See, e.g., Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89 (2009) (arguing that courts should combat cyberbullying with existing civil rights laws); Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 874 (2010) (arguing for an “innovative, multidisciplinary approach” to tackle cyberbullying); Ari Ezra Waldman, *Tormented: Anti-Gay Bullying in Schools*, 84 TEMPLE L. REV. (forthcoming 2012).

16. Tonja R. Nansel et al., *Bullying Behaviors Among U.S. Youth: Prevalence and Association with Psychological Adjustment*, 285 J. AM. MED. ASS’N 2094, 2094 (2001).

17. *Id.*

18. Warren J. Blumenfeld & R.M. Cooper, *LGBT and Allied Youth Responses to Cyberbullying: Policy Implications*, 3 INT’L J. CRITICAL PEDAGOGY 114, 115 (2010) (quoting NELS

jury from direct insults and epithets may be the paradigmatic types of harm, but aggression is not limited to those injuries. Psychological harm caused by repeated exclusion, for example, also fits under the bullying umbrella.¹⁹ This is called indirect bullying.²⁰ What social scientists call cyberbullying is, like traditional or face-to-face bullying, the deliberate and repeated hostile behavior by a strong individual or group intended to harm a weaker individual or group.²¹ The distinction is in the media of harm, such as websites, email, chat rooms, mobile phones, text messaging, and instant messaging.²²

These broad definitions—generally accepted in some form or another in the social science literature²³ and in most states' anti-bullying statutes²⁴—are notable for three reasons.²⁵ First, for behavior

ERICSON, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, FACT SHEET NO. 27, ADDRESSING THE PROBLEM OF JUVENILE BULLYING 1 (2001), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf>).

19. *Id.* at 119. Perhaps the "Ugly Meter" iPhone application, which uses facial recognition software to tell someone how ugly he or she is, can be fodder for such bullying. See Rosemary Black & Lindsay Goldwert, 'Ugly Meter' iPhone App May Be Hurtful to Kids and Fodder for Bullies, N.Y. DAILY NEWS, Oct. 20, 2010, available at <http://www.nydailynews.com/life-style/ugly-meter-iphone-app-hurtful-kids-fodder-bullies-article-1.190668>.

20. Dan Olweus, *Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171, 1173 (1994).

21. See Blumenfeld & Cooper, *supra* note 18, at 118 (defining cyberbullying).

22. *Id.* at 119. Blumenfeld and Cooper provide the following paradigmatic examples: (1) sending "Flame Mail" to a group to humiliate a victim ("She's so ugly, so I sent out a flame mail to the entire school making fun of her acne"); (2) electronic hate mail; (3) taking a victim's screen name and sending an embarrassing message under that name; (4) anonymous derogatory posts on blogs or social networking sites; (5) online polling pages to rate victims as "ugliest," "biggest dyke," or "most fem faggot"; (6) taking pictures of a victim in a state of undress and posting the picture to a social networking site; (7) creating websites to ridicule and mock others; (8) posting private material about a victim to a social networking site; (9) directly sending intimidating or threatening text messages or emails ("cyberstalking"); or (10) excluding victims from online communication with the group. *Id.*

23. A number of studies have suggested additions or subtractions to the definition. For example, Smith and Sharp have suggested that bullying must be unprovoked by the victim. See Oyaziwo Aluede et al., *A Review of the Extent, Nature, Characteristics and Effects of Bullying Behaviour in Schools*, 35 J. INSTRUCTIONAL PSYCHOL. 151, 152 (2008) (citing SCHOOL BULLYING: INSIGHTS AND PERSPECTIVES 9 (Peter K. Smith & Sonia Sharp eds., 1994)).

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

to reach the level of bullying, it must be *repeated*. This definition excludes single incidents. Requiring repeated behavior for bullying and cyberbullying makes sense for a variety of reasons. When students are asked survey questions about “bullying” or “cyberbullying,” their responses almost unanimously assume repeated conduct.²⁶ Further, if Nancy Willard, executive director of the Center for Safe and Responsible Internet Use, is correct that cyberbullying is general “cruel[ty] to others by sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies,”²⁷ then it is difficult to imagine who among us is not a bully or cyberbully.

Capturing too much conduct under the bullying and cyberbullying umbrellas does a disservice to the victims of real bullying. Victims subjected to repeated physical, verbal, and psychological bullying, like Jamie Nabozny, for example, are qualitatively different than victims in cases like *J.C.*, who face single-incident attacks.²⁸ Jamie, in contrast, was verbally, emotionally, and physically harassed for four years until he needed hospital stays to recover, attempted suicide, and switched schools.²⁹ He was hit, spit on, victimized during a mock rape, attacked from behind and urinated upon in a restroom, kicked by bullies in the hallways, and constantly berated with homophobic epithets.³⁰ Conversely, the victim in *J.C.* reported that she was

25. Much of this discussion is taken from a forthcoming piece arguing that criminalization of bullying and cyberbullying is unlikely to solve the bullying problem in schools. See Waldman, *supra* note 15.

26. The breadth of cyberbullying research in this area is too vast to recite. See, e.g., Blumenfeld & Cooper, *supra* note 18, at 128; SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 17–104 (2009); Waldman, *supra* note 15 (reporting the results of the first stage of the author’s own empirical research on bullying and cyberbullying in one San Diego high school).

27. Willard, *supra* note 14, at 1.

28. See *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010) (involving a student who posted a YouTube video that criticized another student).

29. *Nabozny v. Podlesny*, 92 F.3d 446, 451–52 (7th Cir. 1996).

30. *Id.* In tenth grade, while studying in the library before school began, Jamie was attacked by a group of students. *Id.* at 452. One student kicked Jamie in the stomach for five or ten minutes while the others looked on laughing. *Id.* Weeks later, Jamie collapsed from internal bleeding as a result of the beating. *Id.* By the next year, Jamie left Ashland High School, enrolled in a school in Minneapolis and was ultimately diagnosed with Post-Traumatic Stress Disorder resulting from years of being bullied. *Id.* Perhaps the most tragic feature of Jamie’s story is the inexplicable refusal of any school official to do anything about the harassment and their flagrant endorsement of the behavior. See *id.* (after reporting the attack by the eight boys, the official in charge of discipline “laughed and told [Jamie] that [Jamie] deserved such treatment because he is gay”). Jamie’s case suggests that holding school officials responsible for failure to stop bullying under 42 U.S.C. § 1983

considering not going to school the day after an insulting video appeared on YouTube.³¹

Second, the asymmetrical status of the victim and the aggressor is essential to categorizing the conduct as bullying. At least two studies have suggested that the difference between aggression and the normal give-and-take of the schoolyard is the relationship between the parties—two high-status students *tease* each other, while a high-status student *bullies* a low-status student.³² Low status can be based on any number of asymmetries, with physical strength representing only the most noticeable paradigm. Minority status, for example, causes a significant asymmetry in power, especially where the particular minority is the subject of ridicule, bigotry, and hatred outside the school.³³ It should come as no surprise, then, that young members of the gay and lesbian community are uniquely susceptible to bullying and its tragic consequences. They are bullied because they deviate from the norm;³⁴ because their possible nonconformity to heterosexual social norms makes them different or set apart and, thus, easy targets; and because anti-gay bullying is either tacitly or explicitly condoned by anti-gay bigotry in society at large.³⁵

The third notable characteristic of the definition of bullying is that other than repetition, the other elements of the bullying definition—intent to harm and imbalance of power—are common to cyberbullies and cyberattackers. Although cyberattacking and cyberbullying can cause the same kind of effects, the repeated nature of

is one possible legal recourse. *See id.* at 453 (bringing a § 1983 claim against school administrators for failure to stop bullying). That tactic is of limited use in many other bullying cases. Waldman, *supra* note 15.

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

32. *See* Ken Rigby & P.T. Slee, *Children’s Attitudes Toward Victims*, in UNDERSTANDING AND MANAGING BULLYING 119–35 (D.P. Tattum ed., 1993); Marilyn Langevin, *Teasing and Bullying: Helping Children Deal with Teasing and Bullying: For Parents, Teachers, and Other Adults*, INST. FOR STUTTERING TREATMENT & RESEARCH, http://www.stutterisa.org/CDRomProject/teasing/tease_bully.html (last visited Nov. 20, 2011) (stating that a key element of bullying is a power imbalance).

33. For a good discussion of the unique effects of cyberharassment and cyberhate on minorities and women, *see* Citron, *supra* note 15, at 68–84.

34. *See, e.g.*, Anthony R. D’Augelli et al., *Childhood Gender Atypicality, Victimization, and PTSD Among Lesbian, Gay, and Bisexual Youth*, 21 J. INTERPERSONAL VIOLENCE, 1462, 1477–80 (2006).

35. *See* Waldman, *supra* note 15 (discussing the reasons why LGBT youth and those perceived to be gay are more susceptible to bullying and cyberbullying in schools); *see also* MARY ANNE GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 101–05 (1991) (noting that silence from authority can teach society that bad behavior is acceptable).

bullying tends to amplify their gravity. A single incident of aggression can cause significant harm,³⁶ but, generally, victims of repeated bullying tend to experience more serious negative outcomes, from withdrawal from school activities³⁷ and increased Internet use to the exclusion of face-to-face interaction with others³⁸ and depression.³⁹ Victims of cyberbullying more often report feelings of suicidal ideation, suicide attempts, severe depression, anxiety that impacts daily activities, and Post-Traumatic Stress Disorder (“PTSD”).

B. Frequency of Cyberattacking Versus Cyberbullying

Another reason why cyberattacking and cyberbullying should receive different legal treatment is that some single-incident cyberattacks are too common to merit a departure from free speech values. When assessing the frequency and effects of cyberbullying on their test subjects, social scientists distinguish between single incidents and repeated patterns.⁴⁰ Their data show that supermajorities of certain student populations have experienced single-incident cyberattacking, but significantly fewer report the kind of negative effects that activists and legislators have said merit a strong state or legal response.⁴¹ This suggests that if single-incident cyberattacking were crowded under the cyberbullying umbrella, there would be little conduct left outside the reach of anti-cyberbullying regulations.

High levels of Internet use among young people⁴² make cyberattacking all too common. According to a 2004 study conducted by i-SAFE America, an Internet safety education foundation, 58 percent of

36. See, e.g., Adrienne Nishina & Jaana Juvonen, *Daily Reports of Witnessing and Experiencing Peer Harassment in Middle School*, 76 CHILD DEV. 435, 440–42, 446 (2005); Michele L. Ybarra et al., *Examining Characteristics and Associated Distress Related to Internet Harassment: Findings From the Second Youth Internet Safety Survey*, 118 PEDIATRICS 1169, 1173–75 (2006).

37. NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL CRUELTY, THREATS, AND DISTRESS 27–56 (2006).

38. *Id.*

39. Susan M. Swearer et al., “You’re So Gay!”: Do Different Forms of Bullying Matter for Adolescent Males?, 37 SCH. PSYCHOL. REV. 160, 170 (2008) (finding that adolescent gay males who frequently experience repeated bullying have increased rates of depression).

40. See *Cyber Bullying: Statistics and Tips*, I-SAFE AMERICA (June 28, 2004), http://www.isafe.org/channels/sub.php?ch=op&sub_id=media_cyber_bullying [hereinafter i-SAFE Survey] (differentiating between respondents who reported one incident of cyberattacking and those who reported repeated attacks).

41. See *infra* text accompanying notes 43–48.

42. A study conducted by UCLA found that in 2001 approximately 91 percent of twelve- to fifteen-year-olds and almost all sixteen- to eighteen-year-olds—99 percent—use the Internet on a regular basis. Harlan Lebo, *The UCLA Internet Report: Surveying the Digital Future: Year 3*, 21 (2003), available at <http://images.forbes.com/fdc/mediaresourcecenter/UCLA03.pdf>.

students reported receiving hurtful or angry messages online, with more than 40 percent saying it has happened “more than once.”⁴³ Twenty-one percent of respondents received “mean” or “threatening” emails, while 53 percent admitted to sending hurtful messages over the Internet to someone else. Of the latter group, more than one in three admitted to doing so “more than once.” Thirty-five percent had been threatened online, with nearly one in five saying it happened “more than once.” Finally, 42 percent reported being attacked online once, with one in four experiencing it “more than once.”⁴⁴ In 2006, another survey found 9 percent of students reported being regularly harassed online.⁴⁵ When students in another study were asked if they experienced cyberharassment at least once over a two-month period, 25 percent of girls and 11 percent of boys responded affirmatively.⁴⁶ In 2008, a study conducted by UCLA found that nearly one-fifth of respondents (19 percent) experienced frequent online bullying in the past year, but more than three times as many experienced one incident of online aggression.⁴⁷ If state legislatures and schools applied their cyberbullying rules to all these students who experienced at least one incident of aggressive behavior online, resources would be stretched and cyberbullying would become the norm.⁴⁸

An analysis of bullying and cyberbullying surveys of the lesbian, gay, bisexual, and transgender (“LGBT”) community highlights the distinction between single-incident aggression and bullying even further.⁴⁹ Of those who participated in the Gay, Lesbian and Straight

43. I-SAFE Survey, *supra* note 40.

44. *Id.*

45. JANIS WOLAK ET AL., ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 10 (2006), available at <http://www.unh.edu/ccrc/pdf/CV138.pdf>.

46. Andrew V. Beale & Kimberly R. Hall, *Cyberbullying: What School Administrators (and Parents) Can Do*, 81 THE CLEARING HOUSE 8, 8 (2007) (citing R.M. Kowalski & S. Limber, *Cyberbullying Among Middle School Children* (2005) (unpublished manuscript)).

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

48. *See infra* note 60.

49. Like face-to-face bullying, cyberbullying is not limited to minorities. However, gay and lesbian students, as well as those questioning their sexual orientation, are overrepresented in student populations that experience both single-incident and frequent online harassment from fellow students. *See* Waldman, *supra* note 15 (discussing the reasons why LGBT youth and those perceived to be gay are more susceptible to bullying and cyberbullying in schools). As a result of the LGBT community’s unique victimization in this area, studies focusing on this student population are particularly thorough and detailed.

Education Network's ("GLSEN") 2009 National School Climate Survey,⁵⁰ 88.9 percent reported hearing the word "gay" used in a negative way frequently or often, 72.4 percent reported hearing other homophobic remarks (such as "dyke" or "faggot") in school and online frequently or often, and 84.6 percent said they were verbally harassed at least once (for example, called names or threatened with violence) because of their sexual orientation.⁵¹ More than 40 percent were physically harassed (that is, pushed, shoved or otherwise physically attacked) at least once at school in the past year because of their sexual orientation, and nearly 53 percent were harassed or threatened via electronic media (for example, text messages, emails, instant messages or postings on Facebook) at least once.⁵² Based on this research, and accounting for the increased victimization of LGBT students—while the latest research suggests that 19 percent of all students experience repeated incidents of cyberbullying,⁵³ 31 percent of gay and lesbian students are victims of frequent online harassment—the number of LGBT students who experience single-incident cyberattacking is exponentially higher than those who are cyberbullied.⁵⁴

By broadening the term "bullying" to include all single incidents of aggression, we radically change the nature of the problem. Using the data from the i-Safe Survey, there is a two-fold difference between victims of cyberbullying—just over one in four students—and victims of cyberattacking—over four in ten students.⁵⁵ Even that pales in comparison to the nearly nine in ten LGBT students who report experiencing single incidents of aggression.⁵⁶ Including cyberattacking under the bullying umbrella minimizes the problems faced by those adolescents who cannot go online without being victimized. Overex-

50. While most of this evidence refers to face-to-face or in-school bullying, it helps establish the difference between single-incident aggression and bullying, in general.

51. Joseph G. Kosciw et al., *Gay, Lesbian and Straight Education Network, The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 16, 26 (2010) [hereinafter GLSEN Survey], available at http://glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf.

52. *Id.* at 26, 28. Other rigorous studies confirm GLSEN's findings. In a survey of gay, lesbian, and bisexual students in New York schools, nearly 70 percent reported being harassed because of their sexual orientation or gender identity at least once. Advocates for Children of N.Y., *In Harm's Way: A Survey of Lesbian, Gay, Bisexual, and Transgender Students Who Speak About Harassment and Discrimination in New York City Schools* 4 (2005), available at http://www.advocatesforchildren.org/pubs/lgbt_report.pdf.

53. See Juvonen & Gross, *supra* note 47, at 500.

54. GLSEN Survey, *supra* note 51, at 28 (finding that 52.9 percent of LGBT students experienced isolated cyberattacks while 31 percent experienced frequent cyberattacks).

55. I-SAFE Survey, *supra* note 40.

56. GLSEN Survey, *supra* note 51, at 16.

tending bullying equates the aggressor in *J.C.*—who posted a single video criticizing another student⁵⁷—with the aggressor in *Nabozny*, who tortured Jamie for being gay for four years until Jamie attempted suicide, switched schools, and developed PTSD.⁵⁸

In addition, grouping all kinds of aggression together makes the problem universal, which has two consequences. As a practical matter, it allows opponents with ulterior motives to criticize all bullying responses. Focus on the Family and other anti-gay conservative groups, for example, oppose both state-sponsored and school-directed anti-bullying programs because they believe the programs could lead to acceptance and tolerance of gays.⁵⁹ By focusing instead on the worst cases—repeated harassment and identity-based attacks—anti-bullying advocates can effectively silence this irrationality.⁶⁰

III. THE FIRST AMENDMENT, CYBERATTACKING, AND CYBERBULLYING

Fidelity to the social science literature,⁶¹ as well as strategic and practical concerns about describing too much common conduct as cyberbullying, suggests that judges should treat cyberattacking and cyberbullying cases differently. Normally, cases would progress as follows: Amelia creates her video that ridicules a classmate for failing to conform to sexual norms. Zachary uses his website and a fake social networking profile to harass his victim over a period of time. Both

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

58. *Nabozny v. Podlesny*, 92 F.3d 446, 451–52 (7th Cir. 1996).

59. Eric Lach, *Focus on the Family: Anti-Bullying Efforts Are a Gay Front*, TPM (Aug. 31, 2010, 9:59 AM), http://tpmmuckraker.talkingpointsmemo.com/2010/08/focus_on_the_family_dont_let_gay_activists_hijack.php; Robert Casey, *Focus on the Family Stands Up for Bullying*, HUFFINGTON POST (Sept. 8, 2010, 5:25 PM), http://www.huffingtonpost.com/bob-casey/focus-on-the-family-stand_b_709651.html (discussing conservative opposition to legislation directed at addressing the problem of bullying in schools).

60. More significantly, regulating and policing conduct in which supermajorities of students engage creates a new norm instead of highlighting and condemning bad behavior. It would turn bullying into the jaywalking of school misbehavior. Jaywalking is illegal in Manhattan, see N.Y.C., N.Y. RULES OF THE CITY OF N.Y. tit. 34, § 4-04(b)(2), (c) (2011), but on any given day, almost everyone working in Manhattan violates that rule and no one ever gets a ticket. Occasionally, pedestrians do get tickets, but it is hardly the norm. *Rabbi Angry at NYPD over Jaywalking Ticket*, CBS NEWS (Nov. 29, 2010, 10:30 PM), <http://newyork.cbslocal.com/2010/11/29/rabbi-angry-at-nypd-over-jaywalking-ticket/>. To paraphrase W.S. Gilbert, when everyone is a bully, then no one is. W.S. Gilbert & Arthur Sullivan, *The Gondoliers* act. II, in THE COMPLETE AND ANNOTATED GILBERT AND SULLIVAN 937 (Ian Bradley ed., 1996).

61. Some scholars argue that the psychological definition of bullying may not be appropriate as a legal definition. See Lyrissa Lidsky, *Coming to Terms with Cyberbullying*, 77 MO. L. REV. (forthcoming 2012); Lyrissa Lidsky, *Criminalizing Cyberbullying and the Problem of CyberOverbreadth*, PRAWFSBLAWG (Feb. 8, 2012, 8:37 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/cyberbullying-cyberlegislation-and-cyberoverbreadth.html>.

victims inform their principal and report significant negative effects of the aggression. After the principal suspends Amelia and Zachary for two weeks, they sue⁶² school officials⁶³ for violation of their First Amendment rights in connection with the suspension.

I argue that Amelia's First Amendment defense should be judged under the Supreme Court's student speech jurisprudence. Conversely, Zachary's First Amendment claim should be analyzed like a harasser's free speech challenge. After all, Zachary is creating a hostile environment for his victim by ridiculing him on the bases of sex and sexual nonconformity. While there is far less precedent in this area, Zachary's free speech claim should fail because his threatening conduct created a hostile educational environment for a captive audience.⁶⁴

Before addressing the merits of either Amelia's or Zachary's free speech defenses, we must dispose of the plaintiffs' likely threshold argument that school discipline is always inappropriate for conduct that takes place off-campus. Schools that punish off-campus cyberattackers and cyberbullies, the argument goes, violate the students' free speech rights in two related ways: First, a school's authority to discipline its students ends at the schoolhouse gate,⁶⁵ which takes the allegedly offending behavior outside the ambit of student speech jurisprudence. Second, the argument continues, cyberaggressive behavior should not be judged under *Tinker* and its progeny, but rather on the speech/action fulcrum that governs nonstudent speech. This argument aims to cut off school disciplinary authority at the threshold: if a campus presence is required, a school cannot punish

62. Most likely, Amelia and Zachary would sue under 42 U.S.C. § 1983, the principal mechanism for seeking redress for an alleged deprivation of federal constitutional or statutory rights by state actors. *See, e.g., Tarter v. Raybuck*, 742 F.2d 977, 978–79 (6th Cir. 1984). Raising a § 1983 claim has its own difficulties, full discussion of which is beyond the scope of this paper. *See Waldman, supra* note 15. For background on litigation under § 1983, see generally M. DAVID GELFAND, *FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT* ch. 6 (1984).

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

64. *See infra* text accompanying notes 325–341.

65. *See* David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. MICH. ST. U. DETROIT C. L. 199, 221 (rejecting one commentator's analysis because it "would allow school officials to punish students for off-campus conduct—an area beyond their jurisdiction"); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 276 (2001) (describing a view that outside the classroom, children should be classified as citizens rather than students).

an off-campus cyberaggressor or cyberbully regardless of *Tinker's* substantial disruption standard.

This view seems reasonable at first. In *Tinker*, the Court arguably used the on-campus/off-campus distinction as the basis for its finding that students enjoy fewer free-speech rights than members of society at large.⁶⁶ And, in upholding school regulation of certain student speech in a subsequent case, the Court expressly advised that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the *government could not censor similar speech outside the school.*”⁶⁷ Various circuits have taken the geographic distinction to heart, finding student-written parodies created and distributed off campus⁶⁸ and unofficial school newspapers distributed off campus before and after school hours⁶⁹ beyond the reach of school discipline,⁷⁰ but finding them subject to school discipline where distribution took place on campus.⁷¹ The only exception to the rule is when the offending speech is offered at an off-campus event sponsored and supervised by the school.⁷² In these cases, the school’s aegis over the event creates a constructive schoolyard that extends the school’s disciplinary authority.

Though attractive, the campus presence argument should not serve as an *a priori* barrier to school discipline of cyberattacking or cyberbullying for three reasons. First, a close reading of *Tinker* and its progeny suggests that the Supreme Court never intended to create a bright line between on-campus and off-campus speech.⁷³ Second, even if it did, the Internet’s ability to affect our physical spaces and its transcendent role in modern society and education makes that rule

66. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression *at the schoolhouse gate.*”) (emphasis added).

67. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (emphasis added) (citation and internal quotation marks omitted).

68. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

69. *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972).

70. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (declining to find that student drawing done off campus could be regulated by school); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001) (“Although there is limited case law on the issue, courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school officials’ authority over off-campus expression is much more limited than expression on school grounds.”); *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986) (enjoining suspension of a student who made a vulgar gesture to a teacher while off campus).

71. *Bystrom v. Fridley High Sch. Ind. Sch. Dist.*, 822 F.2d 747, 750 (8th Cir. 1987).

72. *Morse v. Frederick*, 551 U.S. 393, 400–01 (2007).

73. See *infra* Part III.A.

meaningless today.⁷⁴ Third, even if a campus presence mattered, the suggestion that cyberattacking and cyberbullying are “mere speech” rather than action, thus deserving First Amendment protection, fails as a matter of theory and practice.⁷⁵

A. *Campus Presence Requirement*

1. *The Supreme Court Has Never Required a Campus Presence for School Disciplinary Authority*

In its student speech cases, the Supreme Court has created one governing standard (*Tinker*) and carved out three limited exceptions, none of which requires a campus presence for school disciplinary authority.⁷⁶ In *Tinker*, the Court held that a school may regulate a student’s expressive conduct if such expression causes or is reasonably likely to cause a material and substantial disruption to school activities.⁷⁷ That case famously involved three students who were suspended for wearing black armbands to school in protest of the Vietnam War in violation of school rules. After the students challenged their suspension, the Court concluded that the school’s disciplinary action violated the students’ First Amendment rights because the protest was “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”⁷⁸ Conversely, school discipline would only be appropriate where the facts “reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities” as a result of the student speech at issue.⁷⁹ Nothing in that standard requires a campus presence to create a reasonable fear of disruption.

The Court decided three student speech cases after *Tinker* and, while it has yet to consider a case involving a First Amendment defense to school punishment for cyberattacking or cyberbullying, the exceptions to *Tinker* all retained *Tinker*’s rejection of the campus presence requirement. In *Bethel School District No. 403 v. Fraser*, the Court carved out an exception to *Tinker*’s “material and substantial” disruption standard for lewd and “patently offensive” speech at a

74. See *infra* Part III.B.

75. See *infra* Part III.B.

76. See *Morse*, 551 U.S. at 403; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

77. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

78. *Id.* at 508.

79. *Id.* at 514.

school event.⁸⁰ Such speech could be regulated by a school even absent any disruption.⁸¹ Fraser was a high school student who gave a speech nominating a fellow student for elective office during a school assembly. The speech was an “elaborate, graphic, and explicit sexual metaphor” about the candidate’s sexual prowess, filled with double entendres about male sexuality.⁸² The Court upheld Fraser’s suspension because a school has an obligation to teach the values, civility, and behavior that are “socially appropriate” and “essential to a democratic society.”⁸³ So, while Fraser could have given his speech free of government interference outside the context of the “school environment,”⁸⁴ the Court held that where a student engages in lewd, vulgar, or offensive speech, the school may regulate such speech as part of its duty to teach “essential lessons of civil, mature conduct,” even absent evidence of substantial disruption to the school.⁸⁵

As in *Tinker*, nothing in this standard requires the speech to have taken place on campus. Admittedly, Fraser gave his speech at a school assembly, on school grounds and during school hours; but the location and time of his speech were not essential to the Court’s justification for its holding. The school’s disciplinary authority emanated from the school’s educational mission to teach its students “the shared values of a civilized social order,” not simply because the speech or event happened on campus.⁸⁶ This suggests that the school could have disciplined Fraser even if the assembly took place in the Washington State Capitol’s legislative chamber on a class trip because *Fraser* recognized that the school’s educational mission extended beyond the boundaries of the campus.

The second exception to *Tinker*’s “material and substantial” disruption standard applies to school-sponsored speech, or speech that bears the official imprimatur of the school, and allows student officials great leeway in banning inappropriate student speech. In *Hazel-*

80. *Fraser*, 478 U.S. at 684–85.

81. *Id.* at 683. Significantly, the Court noted that the record contained ample evidence of disruption. Teachers testified at trial that some students reacted by laughing, others were shocked, and the youngest students were confused and awkward. *Id.* at 683–84. These reactions, however, were not essential to the Court’s holding that the school could lawfully discipline Fraser. *Id.* at 685.

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

83. *Id.* at 681 (majority opinion).

84. *Id.* at 688 (Brennan, J., concurring).

85. *Id.* at 683 (majority opinion).

86. *Id.*

wood School District v. Kuhlmeier, the Court upheld a principal's decision to remove two articles on teen pregnancy and divorce from the school's newspaper.⁸⁷ Distinguishing *Tinker*, the Court said that the two cases posed two different issues: *Tinker* concerned whether a school must tolerate student speech it does not like, but *Kuhlmeier* addressed whether the school must affirmatively promote student speech it believes does not comport with its educational mission.⁸⁸ After all, the newspaper was part of a journalism class and bore the emblem of the school.⁸⁹ As such, the Court held that "[e]ducators are entitled to exercise greater control over" speech that could reasonably be interpreted as endorsed by the school.⁹⁰

The *Kuhlmeier* exception for school-sponsored speech has no more of a campus presence requirement than *Tinker* or *Fraser*. Even if the students did their work at home and after school, as long as they published their work in a school-sponsored newspaper, school officials could exercise significant editorial control.⁹¹

Finally, the Court's third exception to *Tinker's* analysis captures student speech that "is reasonably viewed as promoting illegal drug use."⁹² In *Morse v. Frederick*, a student attending the Olympic Torch Relay that passed on the street in front of his high school held a sign that the principal believed promoted the use of marijuana.⁹³ The Court upheld the school's suspension of that student because the student was present at a school-sponsored viewing of the Relay, unfurled his banner so everyone at the school could see, and arguably promoted conduct that the school had an interest in stopping.⁹⁴ The Court based its holding not on where Frederick stood when he expressed his opinions (which was off campus), but on the school's educational mission and its legitimate goal of not only stopping illegal drug use, but also to prevent anyone from using school time to promote it.⁹⁵ Like *Tinker* and the exceptions created in *Fraser* and *Kuhlmeier*, a campus presence is not required in *Morse*. What is required is a student acting in a context in which he is acting *qua* student, that is, at an assembly, in a journalism class, or at a school-sponsored event.

87. 484 U.S. 260, 272–73 (1988).

88. *Id.* at 270–71.

89. *Id.* at 268.

90. *Id.* at 271.

91. *Id.* (stating that educators have authority over school-sponsored publications "whether or not they occur in a traditional classroom setting").

92. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

93. *Id.* at 397–98. The sign read, "BONG HiTS 4 JESUS." *Id.* at 397.

94. *Id.* at 397, 408.

95. *Id.* at 409–10.

2. *What Matters Is a Student Acting qua Student*

Although these cases are littered with references to the schoolhouse, the classroom, and other physical nexuses to the school, that is of no moment. The evidence of a campus presence is arguably a simple heuristic for determining when the behavior at issue characterizes the student *qua* student, rather than student *qua* citizen, *qua* Little Leaguer, or any other persona not related to the school. While most student speech analyses begin with *Tinker's* oft-quoted premise that the “schoolhouse gate” does not extinguish student free speech rights, a close reading of these cases suggests that the Supreme Court is not speaking literally. There is no physical gate delineating the boundaries of student speech; rather, it is shorthand for when a given adolescent is subject to school discipline and when he is not. The evidence for this conclusion is twofold. First, both the Court’s language and substance suggests that its student speech cases were more about the relationship between the student and his education than about the geographic boundaries of a school campus. Second, whenever it appears to rest its conclusions on location or school property, the Court follows with a reminder that the physical campus is just a symbol of or stands in for the educational mission.

Students are “persons’ under our Constitution” in and out of school,⁹⁶ but it is not the boundary of the school campus that distinguishes the extent of their rights. It is the “school environment”⁹⁷ that plays that role. Here, a school is defined by its mission—to teach and educate minors in the ways of civil society.⁹⁸ That mission may extend beyond the classroom, as the Court held in *Morse*.⁹⁹ The Court upheld the school’s disciplinary authority because school officials must be empowered “to safeguard those entrusted to their care,” regardless of on which side of the campus boundary line the student held the sign.¹⁰⁰ Similarly, in *Fraser*, where a student was suspended

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

97. *Id.* at 506.

98. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.”).

99. *Morse*, 551 U.S. at 397.

100. *Id.* *Morse* has come under fire from civil libertarians. See, e.g., *ACLU Slams Supreme Court Decision in Student Free Speech Case*, ACLU (June 25, 2007), <http://www.aclu.org/free-speech/aclu-slams-supreme-court-decision-student-free-speech-case> (quoting ACLU National Legal Director Steven R. Shapiro as saying, “The Court’s ruling imposes new restric-

for delivering a lewd student council nomination speech, Justice Brennan ignored the on-campus/off-campus distinction entirely, admitting that Fraser's "speech may well have been protected had he given it *in school* but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."¹⁰¹

The Court's student speech precedents are littered with references to the schoolhouse and to officials' authority being limited to "conduct in the schools."¹⁰² But, in most cases, the references to the four walls of the schoolhouse are cabined by the Court's reminders that the school's educational relationship to its students is salient. In *Tinker*, the Court distinguished between speech inside and outside of the "schoolhouse gate,"¹⁰³ but analyzed the students' free speech rights in the context of students' and teachers' liberty interest in an education free of government intrusion and able to prepare the "young for citizenship."¹⁰⁴ Later in the opinion, Justice Fortas seemed to return to the school-centric focus when he stated that student rights embraced not only classroom hours, but also the cafeteria, the ball field, and any part of the "campus during the authorized hours."¹⁰⁵ He then reminded us that "[s]chool officials do not possess absolute authority over their students" irrespective of their physical location¹⁰⁶ and what mattered was disruption to the educational mission.¹⁰⁷ Similarly, in *Fraser*, the Court appeared to suggest that the issue was what kind of speech was allowed "in the classroom or in school assembly,"¹⁰⁸ but then clarified that Fraser's vulgar speech could be limited not because of where he spoke, but because a school has an interest in protecting minors from his arguably lewd com-

tions on student speech rights and creates a drug exception to the First Amendment."). It is beyond the scope of this paper to either join the chorus of that criticism or defend the Court's analysis.

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

102. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507. See also *id.* at 511 ("state-operated schools may not be enclaves of totalitarianism"); *id.* at 512–13 (referring to students' rights "in the cafeteria, or on the playing field, or on the campus during the authorized hours"); *Fraser*, 478 U.S. at 685 ("A high school assembly or classroom is no place for a sexually explicit monologue . . .").

103. *Tinker*, 393 U.S. at 506.

104. *Id.* at 507 (quoting *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943)).

105. *Id.* at 512–13.

106. *Id.* at 511.

107. *Id.* at 513.

108. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

ments.¹⁰⁹ A similar analysis held sway in *Kuhlmeier*. In that case, officials were permitted to censor two articles in the school newspaper not because students created and distributed the newspaper on campus, but only because the paper was part of the pedagogical mission of a journalism class, bore the imprimatur of the school, and the censorship was “reasonably related to legitimate pedagogical concerns.”¹¹⁰ The fulcrum upon which the merits of the First Amendment defenses were decided, therefore, was the relationship of the school to the student *qua* student.

If a campus presence was essential to lawful school discipline, all an aggressor would have to do to avoid punishment is take his behavior just outside the gate. This reality has moved most courts to ignore the on-campus/off-campus dichotomy and assess off-campus student speech based on its on-campus effects.¹¹¹ But, if location is not a valid distinction for determining the lawfulness of school discipline, what may have animated the decisions of those jurisdictions that honor the dichotomy are the different relationships between the school and the students involved (where a student acts *qua* student), for which an on-campus or off-campus location is a simple heuristic. In *Thomas v. Board of Education*, for example, students could not be punished for creating and distributing off campus a magazine inspired by National Lampoon.¹¹² Nor could the students in *Shanley v. Northeast Independent School District* be punished for creating and distri-

109. *Id.* at 684–85. Compare *id.* at 685 (“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the *school’s basic educational mission.*”) (emphasis added), with *id.* (“A high school *assembly or classroom* is no place for a sexually explicit monologue *directed towards an unsuspecting audience of teenage students.*”) (emphasis added). This language suggests that the important factors are the audience and the educational mission. The location is relevant to, but not determinative of, the Court’s analysis.

110. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268, 271–73 (1988).

111. Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus. See, e.g., *Boucher v. Sch. Bd.*, 134 F.3d 821, 827–28 (7th Cir. 1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (student expelled for poem composed off-campus and brought onto campus by the student); *Sullivan v. Hous. Indep. Sch. Dist.*, 475 F.2d 1071, 1075–77 (5th Cir. 1973) (student punished for authoring article printed in underground newspaper distributed off campus, but near school grounds); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 448, 455 (W.D. Pa. 2001) (student disciplined for composing degrading top-ten list distributed via email to school friends, who then brought it onto campus; author had been disciplined before for bringing top-ten lists onto campus); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website constructed off campus).

112. 607 F.2d 1043, 1050 (2d Cir. 1979).

buting a so-called “underground” newspaper.¹¹³ In these paradigmatic cases, the publications’ creators may have been students, but they were not acting *qua* students when they wrote parodies or opinion pieces on contemporary political topics. They were humorists and political activists, identities not connected to the youth’s membership in the school community. The on-campus/off-campus distinction may simply have been easy shorthand for determining when students express themselves *qua* students and when they express themselves *qua* citizens.

3. *Most Lower Courts That Have Addressed the Issue Agree That the Supreme Court Has Never Required a Campus Presence*

The Supreme Court has never had occasion to address a school’s disciplinary authority over off-campus cyberattacking and cyberbullying. I have interpreted the Court’s precedents to mean the Court’s school speech cases apply regardless of any off-campus origin, and most lower courts, some of which have been confronted with cyberattacking cases, agree.¹¹⁴

Some circuits apply *Tinker* without considering where the speech originated. In *LaVine v. Blaine School District*, for example, the Ninth Circuit upheld a school’s authority to expel a student who wrote a graphic and violent poem about killing his classmates.¹¹⁵ He wrote his poem off campus, after school hours and not as part of any school-related activity, but he brought the poem to school on his own.¹¹⁶ He showed his work to a teacher, who took the poem to a school counselor, who in turn set up a meeting with the vice principal.¹¹⁷ The student was expelled as a result.¹¹⁸ Without regard to the off-campus origin of the poem, the Ninth Circuit determined that the poem fell under *Tinker* and not under any of the Supreme Court’s exceptions to its “material and substantial” disruption standard.¹¹⁹ After all, neither *Fraser* nor *Kuhlmeier* applied because the poem was not vulgar, lewd, or obscene, and the poem was not part of any school-sponsored event.¹²⁰

113. 462 F.2d 960, 964, 975 (5th Cir. 1972).

114. *See supra* Part III.A.2.

115. *LaVine*, 257 F.3d at 990.

116. *Id.* at 983.

117. *Id.* at 984.

118. *Id.* at 986.

119. *Id.* at 989–92.

120. *Id.* at 988–89. The rule that *Tinker* applies to all student speech that does not fit within the *Fraser*, *Kuhlmeier*, or *Morse* exceptions is a reasonable reading of Supreme Court precedents and was established in the Ninth Circuit in *Chandler v. McMinville School District*, 978 F.2d 524, 529 (9th Cir. 1992).

The court upheld the school's authority to expel the student because of a reasonable fear that a poem about killing a classmate would disrupt the school.¹²¹

The *LaVine* analysis is common in other jurisdictions. In *Shanley*, for example, the Fifth Circuit applied *Tinker* to an underground newspaper that students created and distributed off campus, but where a few copies showed up on campus.¹²² And in *Boucher v. School Board*, the Seventh Circuit upheld discipline for a student who wrote an article off campus which appeared in an underground newspaper that was distributed on campus.¹²³ In these and other cases, courts have gone straight to applying *Tinker's* substantial disruption standard to determine the merit of a First Amendment defense to a school's disciplinary authority. They all ignored the lack of a campus presence. In *O.Z. v. Board of Trustees*, the district court stated explicitly that "the fact that Plaintiff's creation and transmission of the [speech] occurred away from school property does not necessarily insulate her from school discipline."¹²⁴ After all, the mere fact that the student's conduct took place off campus does not mean that it cannot "create a foreseeable risk of substantial disruption" in the school environment.¹²⁵

In many student Internet speech cases, courts have taken an extra step before reaching the *Tinker* test. For *Tinker* to apply, the origin of the speech is part of a threshold question: there must be a connection, or nexus, between the speech and the school, and the off-

121. *LaVine*, 257 F.3d at 992.

122. *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964, 970-71 (5th Cir. 1972).

123. 134 F.3d 821, 822, 824, 827-28 (7th Cir. 1998). See also *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448-49, 455 (W.D. Pa. 2001) (applying *Tinker* where student was disciplined for composing degrading top-ten list and distributing it off campus to friends via email, and where one recipient brought the list to campus); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to a website created by a student off campus that contained mock obituaries of classmates); *Beusink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177-78, 1180 (E.D. Mo. 1998) (applying *Tinker* to a website created by a student off campus that contained criticism of school authorities, when another student accessed the website at school and showed it to a teacher); *O.Z. v. Bd. of Trs.*, No. CV 08-5671, 2008 WL 4396895, at *1, *3-4 (C.D. Cal. Sept. 9, 2008) (applying *Tinker* to uphold a suspension where a student created a video off campus during spring break that depicted a graphic dramatization of a teacher's murder and then posted the video on the Internet); *Pangle v. Bend-Lapine Sch. Dist.*, 10 P.3d 275, 277, 285-87 (Or. Ct. App. 2000) (applying *Tinker* to an underground newsletter distributed on campus).

124. *O.Z.*, 2008 WL 4396895, at *4.

125. *Id.*; see also *Killion*, 136 F. Supp. 2d at 455 (holding that the court need not consider plaintiff's argument that a heightened standard applies to speech occurring off school grounds because "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*").

campus origin of the speech is one factor that weighs against a finding of a sufficient nexus. This is simply another way of determining if the student was acting *qua* student, or as someone independent of the school community.

For example, in *Wisniewski v. Board of Education*, a student created, for his online profile, an AIM¹²⁶ icon of a gun firing at a man's head with red dots of "blood."¹²⁷ Beneath the icon, the student wrote "Kill Mr. VanderMolen," referring to the student's English teacher.¹²⁸ Another student showed a copy of the icon to the teacher, who then brought it to the school's principal.¹²⁹ The court asked whether anything created off campus could foreseeably "reach the school property" and whether the evidence showing that it did even mattered.¹³⁰ In *Doninger v. Niehoff*, a student sent an email to her peers and their parents and posted comments to her blog criticizing school officials for canceling a school event. She implored her peers to contact school officials and complain.¹³¹ The message's purpose, then, was to have the criticism reach campus, thus bringing the speech under *Tinker*.¹³²

Most recently, in *Kowalski v. Berkeley County Schools*, the Fourth Circuit upheld a school's discipline of a student for engaging in off-campus cyberattacking of another student, in part, because there was a sufficient connection between the conduct and the school.¹³³ A student had created a MySpace discussion group called "S.A.S.H.," which stood for "Students Against Sluts Herpes," referring to a fellow student, Shay N.¹³⁴ The cyberattacker may have "pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home" and would reach

126. AIM refers to AOL Instant Messenger, an instant messaging service run by America Online. AOL INSTANT MESSENGER, <http://www.aim.com> (last visited Oct. 23, 2011).

127. 494 F.3d 34 (2d Cir. 2007).

128. *Id.* at 36.

129. *Id.*

130. *See id.* at 39. The panel was divided over whether it must first assess the foreseeability that the student's speech would reach school authorities. The panel declined to decide if such a determination was necessary because it agreed that it was reasonably foreseeable the icon would reach the school. *Id.*

131. 527 F.3d 41, 44–45 (2d Cir. 2008) (finding that *Tinker* was satisfied because it was clear from the purpose of the message that it was reasonably foreseeable that the speech would reach the school and cause a material and substantial disruption).

132. *Id.* at 50–52.

133. 652 F.3d 565, 577 (4th Cir. 2011) ("[W]here such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the [bullying] problem.").

134. *Id.* at 567.

and disrupt the school.¹³⁵ The attacks came from students in her high school, were directed at a fellow student, and occurred in a group called “*Students Against Sluts Herpes*,” thus indicating a strong school connection.¹³⁶

In each of these cases, off-campus speech was ultimately subjected to the school’s disciplinary authority because of the nexus between the speech and the school’s educational environment and mission, not merely a connection to the school’s geographic boundaries. The absence of this nexus also explains why a school could not discipline the student in *Mahaffey v. Aldrich*.¹³⁷ In that case, a student created a website directing his readers to select any person and to kill in a particularly gruesome manner described in detail on the website.¹³⁸ The district court found no evidence of any connection between the website and the school, particularly because the student’s calls for violence were generic, independent of the school community, and too general to be reasonably directed at any particular member of the school.¹³⁹ As such, in cases where a school could punish an online aggressor and even in cases where schools could not, the geographic origin and geographic reach of the speech is irrelevant. When the speech originated on campus, the nexus to the school is obvious; when the speech originated off campus, the nexus is established by reference to the subject of the speech, the intent of the speaker, the intended audience, and other factors. These factors establish that the speaker was acting *qua* student, rather than just a member of the community at large. That critical comments originated off campus was never an *a priori* barrier to a school’s disciplinary authority.

The Third Circuit’s recent *en banc* decision in *Layshock v. Heritage School District*¹⁴⁰ does not complicate or challenge this theory. In that case, the court rejected a school’s authority to discipline a student for creating an online parody of the school’s principal, but it did so not because there was an insufficient nexus—the school admitted that there was no nexus and no effect on the school environment.¹⁴¹ The school conceded *Tinker*’s relevance at oral argument and, instead, attempted to justify its discipline under *Fraser*’s lewdness excep-

135. *Id.* at 573.

136. *Id.*

137. 236 F. Supp. 2d 779 (E.D. Mich. 2002).

138. *Id.* at 781–82.

139. *Id.* at 784–86.

140. 650 F.3d 205 (3d Cir. 2011) (*en banc*).

141. *Id.* at 207, 214.

tion to *Tinker*.¹⁴² That argument had no legs to stand on; *Fraser* involved lewd speech at a school-sponsored assembly and thus implicated speech that could reasonably be assumed to bear the school's approval.¹⁴³

4. *The Internet's Role in Society and Education Makes Any Campus Presence Requirement Antiquated*

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

Indeed, several courts and scholars have already commented on the pervasiveness of computer and Internet use in our daily lives, a conclusion based on incontrovertible data.¹⁴⁴ Studies show that the Internet and other cyber and digital technologies have replaced traditional media in everything from entertainment¹⁴⁵ and advertising¹⁴⁶ to buying coffee¹⁴⁷ and socializing.¹⁴⁸ This is because the popularity of

142. See *id.* at 219. At oral argument, the school district conceded that it was "relying solely on the fact that Justin created the profile of Trosch, and not arguing that it created any substantial disruption in the school." *Id.*

143. See *supra* text accompanying notes 80–86.

144. See, e.g., *People v. Rocco*, 766 N.Y.S.2d 58, 59 (N.Y. App. Div. 2003) (noting that it would be difficult, if not impossible, to conduct business in contemporary society without the use of or access to a computer); Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L.J. 205, 211 (2010) (discussing the "global impact" of the Internet).

145. See, e.g., Chris Albrecht, *More People Watching TV Shows Online*, GIGAOM (Oct. 15, 2007, 12:37 PM), <http://gigaom.com/video/more-people-watching-tv-shows-online/> (noting that research by the Conference Board Consumer Research Center has found that the number of people who watch television online has increased since 2006 and is likely to continue growing).

146. See, e.g., Verne Kopytoff, *Google's Ad Targeting Goes Behavioral*, S.F. GATE (Mar. 11, 2009, 11:50 AM), http://www.sfgate.com/cgi-bin/blogs/techchron/detail?blogid=19&entry_id=36840 (discussing Google's plans to implement user-specific advertising based on Internet usage).

147. See Molly McHugh, *How to Buy Starbucks Coffee with Your iPhone*, DIGITAL TRENDS (Jan. 19, 2011), <http://www.digitaltrends.com/mobile/how-to-buy-starbucks-coffee-with-your-iphone/> (discussing Starbucks's app allowing users to pay for coffee with their smartphones).

the computer and the Internet has increased to pervasive levels in the last ten years. In 2008, the population of the United States was over 303 million and over 220 million Americans (72.6 percent) were on-line.¹⁴⁹

In part because the Internet has come to pervade our daily lives, it has taken on an increasingly salient role in education. Secondary school teachers have integrated digital technologies into their classrooms through email exchanges,¹⁵⁰ speaking with and learning from students in other countries,¹⁵¹ and accessing research tools,¹⁵² for example. There are countless websites aimed at further integrating the Internet into the classroom¹⁵³ and all levels of government are working with outside donors to provide computers and Internet access to public schools.¹⁵⁴ All of these programs encourage both the integration of the Internet into the classroom and the use of the Internet as an educational tool at home. If it ever was, the “school environment,” to use Justice Fortas’s term in *Tinker*,¹⁵⁵ is no longer defined by the four walls of the classroom. It extends as far as the Internet tools it deploys to teach students how to add and subtract, read and write, think and grow.

This is not a radical argument. Professor Mary Anne Franks argues that since our pervasive online presence allows “sexual harassment in one setting [that] produce[s] harms in another,”¹⁵⁶ traditional sexual harassment law that has so far protected victimized women

148. Facebook, for example, has more than 800 million active users, and more than 50 percent of those users log on to Facebook on any given day. Statistics, People on Facebook, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Nov. 5, 2011).

149. *United States of America Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS, <http://www.internetworldstats.com/am/us.htm> (last updated Feb. 14, 2011).

150. Pamela U. Silva et al., *E-mail: Real-life Classroom Experiences with Foreign Languages*, 23 LEARNING & LEADING TECH. 10, 10–12 (1996).

151. *Id.*

152. Chris Davis, *The I-Search Paper Goes Global: Using the Internet as a Research Tool*, 84 ENG. J. 27, 27–33 (1995).

153. See, e.g., INTERNET 4 CLASSROOMS, http://www.internet4classrooms.com/introducing_i4c.htm (last visited Nov. 23, 2011) (stating that the website is designed to assist teachers in locating teaching resources on the Internet).

154. See Press Release, The White House, White House to Launch “Digital Promise” Initiative (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/white-house-launch-digital-promise-initiative> (discussing initiative funded by the Department of Education, Carnegie Corporation, and William and Flora Hewlett Foundation to increase access to technology in schools).

155. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

156. Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657 (2012).

in “single, protected settings” like the workplace under Title VII, the school under Title IX, and, to some extent, at home and in prison,¹⁵⁷ inadequately captures what modern sex harassment looks like. Professor Franks argues persuasively for a multiple-setting conception of sexual harassment, because cyberharassment can have just as deleterious an effect on a victim’s ability to function in the workplace as traditional forms of workplace harassment.¹⁵⁸ This is true of any kind of cyberharassment, which can have the same kind of harmful effect on a victim’s ability to function in the physical world. Whether a peer uses his or his victim’s Facebook page to make derogatory comments questioning the victim’s sexuality, or uses Instagram to post altered graphic photos depicting the victim in compromising situations, or takes to Twitter to call a young girl a “dyke,” these attacks can cause even the strongest student to fear further humiliation, lose interest in attending school, and close herself off from a world she feels is increasingly hostile. She becomes unable to learn, participate in extracurricular activities, or participate in school society. Her educational rights have been denied her, which can constitute a civil rights violation,¹⁵⁹ regardless of where her victimization occurred.

5. *Replacing the Campus Presence Requirement*

The circuits are not really of two minds when it comes to the threshold on-campus/off-campus distinction. For jurisdictions like the Ninth Circuit that have always considered the locus of origin irrelevant, a campus presence was never required, and this view is the best interpretation of *Tinker* and its progeny.¹⁶⁰

The Second Circuit’s search for a nexus may represent an extra step,¹⁶¹ but the result will be the same. The role of the Internet in modern education and the very real effects a fellow student’s cyberbullying has on a victim’s ability to learn inside the school means that any off-campus origin of cyberbullying should be no barrier to a school’s disciplinary authority. The circuit court’s use of campus presence evidence may just be a shorthand way of determining if the

157. *Id.* at 659.

158. *See id.* (arguing that “sexual harassment in cyberspace produces harm that is equal to or more severe than sexual harassment that occurs in traditionally protected spaces”).

159. *See* Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court’s Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 376–77 (2008) (discussing the Supreme Court’s decision in *Davis v. Monroe County*, 526 U.S. 629 (1999), that in certain circumstances a school can be liable for indifference to student-on-student sexual harassment).

160. *See supra* Part III.A.3.

161. *See supra* text accompanying notes 127–132.

aggressing student is acting *qua* student. To their credit, no court to follow the Second Circuit's reasoning has ever found the off-campus origin determinative. In *Thomas*, for example, students who created an independent, nonschool-sponsored magazine modeled after the National Lampoon could not be punished for its sexual content not because the magazine was created off campus,¹⁶² but rather because the students "deliberately designed" all activities to take place off campus, made every effort to make sure copies never showed up on campus, and made no mention of their peers, teachers, or school community.¹⁶³ The students were not just expressing themselves off campus, they were divorcing their expression from the school context in its entirety. They were not acting *qua* students. This purposeful lack of any connection to the school made *Thomas* a non-student speech case, and thus out of the school's disciplinary reach.

If my theory is correct that what matters for school disciplinary authority has always been students acting *qua* students, then neither the Ninth nor the Second Circuit needs to change the way it determines the threshold question of whether that authority exists for cyberaggression. The on-campus/off-campus distinction is, at a minimum, antiquated. To determine when an adolescent is acting as a student of the "school environment," even the Second Circuit does not simply look at the geographic origin of the speech. Instead, it looks to the relationship between the speaker and the school.¹⁶⁴

In cyberattacking and cyberbullying cases, the school nexus should similarly be determined by the relationship between the aggressor and his victim. Peer-to-peer cyberattacking and cyberbullying cases involve an aggressor targeting a victim he knows from school. The cyberexpression would not exist but for their attendance at the same school.¹⁶⁵ If a student attacks a victim he knows only because he is a student at his school, then he is acting as a member of the school community. This stands in contrast to an adolescent who attacks a victim he knows from family or church; in those cases, the aggressor is acting as a member of an entirely different community.

This theory has a number of advantages. First, it bridges the apparent circuit divide about the role of the geographic origin of the

162. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979).

163. *Id.* at 1050. Some activity related to the magazine did take place at school; however, the court found that such activity was *de minimis*. *Id.*

164. *See supra* Part III.A.3.

165. *See, e.g.*, *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) ("Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District . . .").

speech.¹⁶⁶ The Ninth Circuit ignores where the speech originated because Supreme Court precedents make the on-campus/off-campus distinction irrelevant and because speech that originates off campus can still have a substantial effect on the school environment.¹⁶⁷ Conversely, the Second Circuit looks to the relationship between the off-campus speaker and the school to determine if it is reasonably foreseeable that the off-campus speech would reach campus.¹⁶⁸ When the speaker and target are part of the same school community, and especially when the speech occurs over the Internet or other digital technologies, it is reasonable to expect the speech to reach campus, thus obviating the need for the Second Circuit's threshold question.

Second, the relationship test avoids the difficulties associated with a campus presence requirement in the Internet age. The pervasiveness of the Internet in daily life and in education makes it overwhelmingly likely that any type of cyberexpression aimed at the school community will find its way to campus. And, as Professor Franks has argued in the workplace context, no longer can we assume that the locus of the harassment will always be the locus of its effects. The Internet age makes that assumption antiquated.¹⁶⁹ Third, the relationship test uses a principle that has a solid foundation in other areas of law. In contract law, fiduciary duties are established by particular relationships between parties;¹⁷⁰ at common law, the relationship between parties determines whether a hired party was an employee;¹⁷¹ and, in negligence actions, the existence of a duty of care hinged on the relationship between the parties involved;¹⁷² to name just a few examples.

166. See *supra* Part III.A.3 (describing the different approaches of the Ninth and Second circuits).

167. See *supra* text accompanying notes 115–121.

168. See, e.g., *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

169. See Franks, *supra* note 156, at 659 (“The multiple-setting conception advocated by this Article recognizes that the action and the effect of sexual harassment can be split, an increasingly common reality in the Internet age.”).

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

171. See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (“Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party” (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989))).

172. See, e.g., *Hoidas v. Wal-Mart Stores, Inc.*, No. 09 C 7409, 2010 WL 1790864, at *2 (N.D. Ill. Apr. 30, 2010) (“The law of agency does not impute a duty that the principal

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

B. Speech/Action Distinction on the Internet

It should now be clear that the off-campus origin of cyberattacking and cyberbullying should not be an *a priori* barrier to a school's disciplinary authority. In the Internet age, regulating student speech based on the location of its origin, dissemination, or access ignores the sea change that cyberspace has brought to modern life and education. But, even if that were not the case—if a geographic definition were possible and reflected the Supreme Court's intentions in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*—suggesting that student cyberattacking, cyberbullying, and cyberexpression generally is pure speech, with no element of action, should not raise a second barrier to a school's disciplinary authority. The speech/action distinction may pepper First Amendment scholarship, but these categories are “elusive” and unhelpful.¹⁷³

The notion that the First Amendment protects speech, not action,¹⁷⁴ is a common element to much free speech rhetoric, but it is the beginning of any analysis, not the end. The distinction, in part, arguably explains the difference between cases like *Cohen v. California*,¹⁷⁵ where the Court reversed a conviction for entering a courthouse wearing a jacket emblazoned with the words “Fuck the Draft,”¹⁷⁶ and *United States v. O'Brien*, where the Court upheld the

owes to a third party onto an agent. Instead, the duty of care flows from the relationship between the parties.”) (citations omitted).

173. Citron, *supra* note 15, at 100.

174. See STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 209 (2d ed. 1996) (discussing how the Supreme Court has vacillated on the speech/conduct distinction).

175. 403 U.S. 15 (1971).

176. *Id.* at 16–17, 26 (“The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence.” (quoting *People v. Cohen*, 81 Cal. Rptr. 3d 503, 505 (Cal. Ct. App. (1969)), *rev'd sub nom.* *Cohen v. California*, 403 U.S. 15 (1971))).

prosecution of a protestor who burned his selective service card.¹⁷⁷ The First Amendment protects expression, not the “noncommunicative” element of burning a government document.¹⁷⁸

Even assuming this distinction has merit as a governing principle of free-speech law,¹⁷⁹ the speech/action distinction is obscure in almost every context and especially with respect to the Internet.¹⁸⁰ As Professor Danielle Keats Citron has argued, the Internet both aggregates words into action—for example, “hacking and denial of service attacks [] are accomplished by sending communications to other computers”¹⁸¹—and disaggregates communications into components that operate as actions, as with online sexual harassers who refuse to leave cues to mitigate the victim’s fear.¹⁸² In other words, a threat that arrives anonymously and without any indication of a joking tone “engender[s] serious fear that . . . [the threat] will be carried out offline.”¹⁸³ The absence of these cues evidences an intent to “terrorize the victim,” which can “convert [online] expression into criminal conduct.”¹⁸⁴

To suggest, then, that cyberattacking and cyberbullying are examples of pure speech, meriting greater First Amendment protection, is a losing argument. A Facebook page that is created solely to terrorize a student or an online polling page created to rate the attractiveness of a victim may be communicated from one computer to another, but they are no more examples of pure speech than face-to-face threats, intimidation, and harassment. In any event, the inquiry into the merit of a free speech defense does not end with categorizing given behavior as speech. Even in the context of political speech, where

177. 391 U.S. 367, 381–82 (1968) (“[T]he governmental interest . . . [is] limited to the noncommunicative aspect of O’Brien’s conduct.”).

178. *See id.* at 376 (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

179. *But see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 829–30 (2d ed. 1988). Professor Tribe has criticized the speech/action distinction as lacking analytical substance and being impossible for any court to define. *See also* Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 *NOTRE DAME L. REV.* 673, 692–93 (1993) (discussing the limitations of the speech/action distinction).

180. Citron, *supra* note 15, at 100 n.281.

181. *Id.* at 99.

182. *Id.* at 100.

183. *Id.*

184. *Id.*

First Amendment protections are at their “zenith,”¹⁸⁵ such speech can be regulated or curtailed for any number of reasons.

IV. ANALYZING FIRST AMENDMENT DEFENSES TO SCHOOL DISCIPLINE FOR CYBERATTACKING AND CYBERBULLYING—TWO WAYS FORWARD

At this point, both Amelia’s and Zachary’s threshold objection to school discipline has failed. Regardless of the off-campus origin of their speech and other conduct, a school can still discipline them as members of the school community, as students *qua* students who chose their victims because of their school connection. Now, the cases can proceed to the merits of their First Amendment defenses. For Amelia, her future lies with the Court’s student speech cases; for Zachary, his fate lies with the harassment model.

Three factors suggest that we need distinct and more constructive ways to determine the merit of free speech defenses to punishment for cyberattacking and cyberbullying: the differences between single-incident cyberattacking and repeated cyberbullying,¹⁸⁶ the transcendent roles played by the Internet in our daily lives and in our schools,¹⁸⁷ and the inadequacy of the on-campus/off-campus and speech/action distinctions¹⁸⁸ as governing First Amendment principles. This Article aims to fill that void. I propose two answers for two different problems. First, I suggest that whether a school’s disciplinary authority over identity-based, single-incident cyberattacking impinges on a student’s First Amendment rights should be governed by the consistent rationale underlying all of the Court’s student speech cases—namely, a narrowly defined effects test that balances student expression against the school’s ability to teach its students successfully. As I argue elsewhere, *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* may use different standards for restricting different types of student speech; but, in each case, the Court is concerned with the same thing: the effects of given student expression on the school’s ability to teach.¹⁸⁹ *Tinker* accepts the connection between impingements on the rights of students and educational disruption,¹⁹⁰ and the individual,

185. See *Meyer v. Grant*, 486 U.S. 414, 421–22, 425 (1988).

186. See *supra* Part II.

187. See *supra* Part III.A.4.

188. See *supra* notes 179–185.

189. See Ari Ezra Waldman, *And All Those Like You: Identity-Based Aggression and Student Speech, A New Way Forward*, 77 MO. L. REV. (forthcoming 2012) [hereinafter Waldman, *And All Those Like You*].

190. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (“Certainly where there is no finding and no showing that engaging in the forbidden conduct

group, and community harm caused by identity-based bullying and cyberbullying most definitely impairs the educational rights and opportunities of victims¹⁹¹ and the school.¹⁹² Second, because anti-gay bullying and cyberbullying amount to egregious harassment in school, I argue that just like the First Amendment does not stand in the way of harassment and stalking statutes, free speech rights should not stand in the way of a school's disciplinary authority over its students who commit the same actions.¹⁹³

A. *Cyberattacking and Tinker*

We have already discussed that a cyberaggressor's free speech defense deserves a different analysis than a cyberbully's defense due to the differing nature and frequency of the conduct. I argue that the Court's effects test underlying all its student speech cases is the best way to determine if the First Amendment blocks a school's authority to discipline a cyberaggressor.

1. *Clarifying the Standard*

By now, it should be clear that the off-campus origin of such aggression is irrelevant.¹⁹⁴ It should also be clear that the speech/action distinction common in First Amendment discourse has no place in this analysis.¹⁹⁵ Beyond that, clear instruction is hard to come by. *Tinker's* "material and substantial" disruption standard is highly fact-specific, a feature of the law that likely explains why neither the Supreme Court nor the various circuit courts have stated what kind of disruption is sufficient and when such a disruption is reasonably foreseeable. Pennsylvania's state supreme court has said the disruption must be more than "some mild distraction" but need not be "complete chaos,"¹⁹⁶ but many incidents on any given school day could fall somewhere between those extremes. Nevertheless, while no fact-intensive inquiry lends itself to bright line rules and lower courts have

would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.") (quoting *Burnside v. Byars* 363 F.2d 744, 749 (5th Cir. 1966)).

191. See *infra* Part IV.A.1.

192. Waldman, *And All Those Like You*, *supra* note 189.

193. See *infra* Part IV.B.

194. See *supra* Part III.A.1.

195. See *supra* text accompanying notes 179–185.

196. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

come to many divergent conclusions,¹⁹⁷ the case law is not without instruction.¹⁹⁸ But instruction as to what? To the extent that a given event causes a substantial disruption, *Tinker's* standard was developed to balance students' political speech rights and the negative effects of "disorder" in school caused by a mass student protest.¹⁹⁹ Cyberaggression neither involves political speech nor student protests, so that standard must be clarified. To do that, we need look no further than the Court's other student speech cases.

Face-to-face aggression and cyberaggression are targeted attacks that affect the victim's physical and mental health, his ability to function as a competent member of society, and his access to education.²⁰⁰ This kind of aggression, if left untouched by a school's disciplinary authority, also creates an atmosphere of intimidation throughout the entire school, making it impossible for students to feel safe and, therefore, impossible for them to learn. Anti-gay bullying is a special breed of harassment; it attacks a victim because of his identity. This not only affects the victim *qua* individual, but it is an affront to those who share his identity and, for that matter, all minorities.²⁰¹ To permit the kind of attack on gay identity bound up with the statement "All faggots must die" scrawled on a person's Facebook profile picture is to conceive of the individual target of that speech—the person

197. Compare *e.g.*, *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (invalidating a school policy "condition[ing] distribution of all written materials on school premises upon prior school review for censorship purposes"), with, *e.g.*, *Wiemerslage v. Me. Township High Sch. Dist.* 207, 29 F.3d 1149, 1153 (7th Cir. 1994) (upholding a school loitering rule on the grounds that the school's concerns over safety and property damages outweighed the incidental effect on student speech and assembly), and *Poling v. Murphy*, 872 F.2d 757, 763 (6th Cir. 1989) (upholding the ability of a school to exclude a student from a student council race because he made a rude comment about the assistant principal).

198. See *infra* Part IV.A.2.

199. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 & n.3 (1969) (stating that a prohibition on expression must be motivated by more than a "mere desire to avoid" the discomfort, disorder, and disruption associated with the expression at issue).

200. See *King*, *supra* note 15, at 851–52 (noting that cyberbullying can cause psychological harm and stress that "negatively impacts other areas of [adolescents'] psychological and cognitive development" and "can spill over into victims' social, academic, and family lives"); see also Arne Duncan, U.S. Secretary of Education, *The Fight to Stop Bullying*, Remarks to the Anti-Defamation League National Leadership Conference (Apr. 6, 2011), <http://www.adl.org/education/Letter-adl-bullying-remarks.asp> ("Our second principle is that no school can be a great school until it is a safe school. My wife and I have two young children. We want them to learn every day in school, but to do that, they must feel safe first. You cannot do your best or concentrate academically if you are scared.").

201. I expand upon this point, arguing that identity-based peer-to-peer aggression is a special category of student speech that merits school discipline under any metric. See Waldman, *And All Those Like You*, *supra* note 189; Citron, *supra* note 15, at 89 ("Such attacks also harm the community that shares the victim's race, gender, religion, or ethnicity—community members experience attacks as if the attacks happened to them.").

whose picture was defaced—as separate and apart from his community. His injury is not simply personal, but communal, an attack on his very identity that says all gay people are unworthy of life.²⁰²

A narrow reading of *Tinker*'s substantial disruption standard would exclude almost all targeted aggression because, by definition, the effects could not cause school-wide disorder or unrest like a protest.²⁰³ While we can certainly imagine a particularly egregious case of cyberaggression that bleeds into a face-to-face attack, which in turn erupts into a massive fight, such incidents are rare and fail to account for all the devastation to the student and the school beneath that high threshold. But only a myopic interpretation of *Tinker* and its progeny would restrict a school's authority to discipline cyberaggressors to the stereotypical "disorder" caused by a massive protest. First, the standard in *Tinker* may have been applied to protest,²⁰⁴ but the Court was concerned with any interference with "appropriate discipline in the operation of the school" or the "work of the school."²⁰⁵ The school's disciplinary authority begins where any "conduct by the student . . . materially disrupts classwork or involves . . . invasion of the rights of others."²⁰⁶ A protest is only one way to do that. Peer-to-peer aggression "collid[es] with the rights of others"²⁰⁷ and can impair a daily lesson plan when one student fears being near the other or fears raising

202. Citron, *supra* note 15, at 89 (describing the harmful effects of anti-gay bullying). Catharine MacKinnon pioneered a similar view in the 1970s, arguing that sexual harassment of women in the workplace damages all women and that traditional tort remedies are, therefore, inadequate. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 174–92 (1979); see also Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1220 (1998) ("[S]exual harassment as a practice rooted in a struggle between men and women in the workplace that perpetuates both male control and the primacy of conventionally masculine norms, that genders both men and women through a variety of dynamics commensurate with their individual and subgroup based variations, and that interferes with the capacity both to define oneself as a subject and to seek less stereotypic or confining roles."); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997) ("Sexual harassment is a technology of sexism. It is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms . . ."); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1797 (1998) (explaining that sexual harassment jurisprudence "has failed large numbers of people who are not subjected to sexual abuse, but whose competence as workers is constantly thrust into conflict with their identities as women or gender-nonconforming men").

203. See *supra* Part II.A.

204. A tiny one, at that. See *Tinker*, 393 U.S. at 508 (noting that "[o]nly a few of the 18,000 students in the school" participated, only five of whom were suspended).

205. *Id.* at 509.

206. *Id.* at 513.

207. *Id.*

his hand in class for fear of being attacked in the hall or online. That is what the Fourth Circuit recently found in *Kowalski v. Berkeley County Schools*.²⁰⁸ And when a culture of fear pervades a school that sits idly by when attacks go on in person or online, no one can teach anyone anything, and the school turns into a prison. Second, *Tinker* applies to all “personal intercommunication among . . . students,” not only their politically-related ones.²⁰⁹ At a minimum, then, *Tinker* accepts that impingements on other students’ rights and impairments to discipline and education can occur when students interact with one another beyond the political arena. Third, one of the values underlying the Court’s respect for the armband walkout was a school’s educational mission: to “discover[] truth” and to train the nation’s future leaders.²¹⁰ No student can engage in the kind of free exchange of ideas that Justice Brennan had in mind in *Keyishian v. Board of Regents* as necessary for civic education when he fears what will happen to him afterward.²¹¹

These same effects on the school also animated the Court’s decisions in *Fraser*, *Kuhlmeier*, and *Morse*. If the purpose of American public education is to “prepare pupils for citizenship” or teach the “habits and manners of civility,”²¹² permitting a student to deliver a graphically lewd speech winking toward a male student’s sexual prowess was inconsistent with that mission for a number of reasons: vulgar language has no place in civilized debate, the school would become a model for inappropriate behavior,²¹³ and the speech itself would damage other young students whom the school must teach and protect.²¹⁴ It was the effects of the speech, and their inconsistency with a school’s basic educational mission, that brought Chief Justice Burger to this decision.

In holding that schools can determine that vulgar and lewd speech would undermine the schools’ basic educational mission, *Fraser* not only tells us that the Court is concerned with effects on the school when balancing the unique school environment with free speech principles but also broadens the types of effects that merit re-

208. 652 F.3d 565 (4th Cir. 2011). Specifically, the court stated that, “[g]iven the targeted, defamatory nature of Kowalski’s speech, aimed at a fellow classmate, it created ‘actual or nascent’ substantial disorder and disruption in the school.” *Id.* at 574.

209. *Tinker*, 393 U.S. at 512.

210. *Id.* (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

211. 385 U.S. at 603 (noting that the “marketplace of ideas” of the classroom is most effective in the absence of “authoritative selection”).

212. *Fraser*, 478 U.S. at 681.

213. *Id.* at 683.

214. *Id.* at 683–84.

striction. *Tinker* addressed protests, and the attendant disruption possible from students getting up in the middle of class, agitating the school population, and inciting a riot.²¹⁵ *Fraser* saw more subtle, but no less damaging effects on a school that is put in the position of tacitly approving inappropriate language by allowing Fraser to go on without punishment. That is, the reason the First Amendment allows a student to “wear Tinker’s armband, but not Cohen’s jacket”²¹⁶ is the effect Cohen’s jacket would have on the school. Teaching respectful debate and civic engagement that does not interfere with the school’s work has a positive effect on the school, its ability to teach, and its reputation: it becomes a place of active learning, civility, and debate. But allowing students to use vulgar and lewd language at a school-sponsored event would make it impossible to teach the impropriety of curse words and sexist language in civil society.

Kuhlmeier reaffirmed the Court’s focus on student speech that handicaps a school’s ability to teach. There, the Court concluded that schools cannot be forced into a position of countenancing inappropriate speech that bears the imprimatur of the school, whether inappropriate via bad grammar or vulgarity, or inappropriate for student readers.²¹⁷ Otherwise, schools “would be unduly constrained from fulfilling their role” of teaching cultural values, preparing students for professional training, and helping children adapt to the civilized world.²¹⁸ To the Court, this kind of student speech could have just as much effect on the school’s ability to teach as disciplinary breakdowns associated with group protests and lewd and vulgar speeches at school assemblies. All three forms of speech distract the classroom from the curriculum, with all the attendant effects on the school’s reputation, its practical and moral authority, and student academic success.

The same analysis held sway in *Morse*.²¹⁹ The admittedly “silly” banner could be interpreted to encourage illegal drug use, which is anathematic to school and public policy, in general.²²⁰ The Court went to great lengths to remind us of the devastating effects of drug use on young children; on the growing drug problem among American youth; and the time, money, and energy Congress, the states, and local schools boards have spent on drug-prevention programs, not on-

215. *Tinker*, 393 U.S. at 504–08.

216. *Thomas v. Bd. of Educ., Granville Central Sch.*, 607 F.2d 1043, 1057 (2d Cir. 1979).

217. *Kuhlmeier*, 484 U.S. at 271.

218. *Id.* at 272.

219. *Morse*, 551 U.S. at 403.

220. *Id.* at 407.

ly to establish the evils of drugs but also to highlight the incongruity between drug-related speech and a school.²²¹ After all, students who “celebrat[e] illegal drug use at a school event, in the presence of school administrators and teachers, ... pose[] a particular challenge for school officials working to protect those entrusted to their care”²²² because, like the school in *Fraser*, any overt or tacit approval of the speech would put the school in the position of teaching lessons contrary to the curriculum, thus handicapping the school’s ability to teach. Taken together, these conclusions paint a more accurate picture of what concerned the Court when it rejected student discipline in *Tinker*, but blessed it in *Fraser*, *Kuhlmeier*, and *Morse*—the effects on the school’s ability to teach its students.

Therefore, moving beyond the obscure confines of the “substantial disruption” standard to the consistent rationale underlying all of the Court’s student speech cases to include serious infringements on victims’ access to education, to a school’s culture of learning, and to the victims’ community at large would retain fidelity to the language and spirit of *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*. It would also reflect a modern understanding of how we learn and the psychology of the student, data that was not available in 1968.²²³ Today, we know that intimidation and fear prevent a victim from participating in the learning process, which includes anything from raising a hand in class to answering a question to actually going to school in the first place.²²⁴ When students feel unsafe or ridiculed, they will not learn, infringing on their equal right to access an education at a public school.²²⁵ We also know that harassment not only affects the individual victim in this way, but attacks his community.²²⁶ To suggest that a school does not have an interest in avoiding the disruption caused by group harm and

221. *Id.* at 407–08.

222. *Id.* at 408.

223. The breadth of literature in this area is too vast to cite in total. *See generally* MATT JARVIS, *THE PSYCHOLOGY OF EFFECTIVE LEARNING AND TEACHING* (2005) (discussing modern educational psychology and how it can be used to increase teaching effectiveness); Andrew Pollard, *Towards a Sociology of Learning in Primary Schools*, 11 *BRIT. J. SOC. IN EDUC.* 241 (1990) (discussing sociological issues regarding learning processes for primary education students); *see also, e.g.*, OKLA. STAT. ANN. § 70-24-100.3 (West 2005) (“The Legislature finds that bullying has a negative effect on the social environment of schools, creates a climate of fear among students, inhibits their ability to learn, and leads to other antisocial behavior.”).

224. WILLARD, *supra* note 37, at 27–56.

225. *See supra* text accompanying notes 200–201.

226. *See supra* text accompanying notes 201–202.

attendant minority unrest²²⁷ is to ignore common sense and the basic realities of the school environment.

2. *How to Apply this Standard to Cyberattacking*

A comprehensive review of the case law reveals several governing principles relevant for courts faced with cyberattackers who invoke a First Amendment defense. When the cyberattack takes on a decidedly dark and targeted purpose of singling out a victim because of his identity, the Court's effects test should justify disciplining the aggressor.

First, there is no prerequisite that a specific number of people be affected by the speech. Schools have lawfully punished students for speech targeting one member of the school community²²⁸ and none of the litany of student speech cases has ever implied a number requirement to justify discipline. If we understood a homophobic cyberattack as more than simply a slight poke to the victim's self-esteem, but rather as an attack on the victim's broader identity and his entire community, then degrading the victim can be just as threatening as a more overtly graphic attack.

Second, that students simply react to and discuss the speech at issue does not create a sufficient effect on a school's ability to teach. This principle has been clear since *Tinker*, where there was no substantial disruption because the armband protest merely caused students to poke fun at the protestors, make comments among themselves, and caused one student to feel self-conscious.²²⁹ Nor did student discussion and comments about a fake MySpace profile that a student created to make fun of her principal create a sufficient effect

227. See Citron, *supra* note 15, at 89 (noting that the marginalization of individuals in traditionally "subordinated groups" causes "deep psychological harm" that deprives individuals of their right to participate in society, provokes retaliation, and promotes community unrest); see also Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 STAN. L. & POL'Y REV. 251, 258 & n.20 (2008) (describing how the "mere perception of a bias crime" incited the Crown Heights riots in Brooklyn).

228. See, e.g., *O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist.*, No. CV 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008) (noting that an administrative review panel upheld disciplinary action against a student who created a threatening video targeting her English teacher); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 34-37 (2d Cir. 2007) (upholding the suspension of a student for threatening a teacher via an instant messaging system).

229. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 517-18 (1969) (Black, J., dissenting) (noting that the armbands provoked student comments and diverted attention from regular lessons). There was also evidence that a math class had been "wrecked" by disputes between protesting students and nonprotesting students. *Id.* at 517.

in *J.S. v. Blue Mountain School District*.²³⁰ Here, the court was talking about idle chatter, the banal “did you hear what happened” of the schoolyard.²³¹ This case, then, does not speak to the very real reaction that the community of gay students, their friends, and other minorities may have to a homophobic cyberattack in their community. Idle chatter is one thing, but when a group of students are impaled on their very identity by a racist or homophobic attack, the disruption to the school is more pronounced.

Third, violent or directly threatening speech significantly impairs the school’s ability to teach. In *O.Z.*, for example, a district court upheld a school’s removal and transfer of a student who created a graphic dramatization of a murder and posted it online.²³² A teacher found the video and informed the principal, but there was no evidence that the video had made its way to campus or that it affected the teacher’s ability to work.²³³ The court denied a preliminary injunction to stop the transfer because “the violent language and unusual photos depicted” in the video made it “reasonable” for school officials to expect a serious disruption to school activities.²³⁴ The teacher could have been attacked or she could have been the subject of ridicule from other students; either way, the court found, school activities would be substantially affected.²³⁵ And, in *Wisniewski*, where a student created a chat icon depicting a teacher shot in the head, the icon’s graphic nature was enough to show that “once made known to the teacher and other school officials, [it] would foreseeably create a risk of substantial disruption.”²³⁶ These cases suggest that the mere fact that a given incident of cyberattacking is particularly violent may be enough under the Court’s effects test.²³⁷

230. See *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931–32 (3d Cir. 2011).

231. See *id.* at 922–23 (describing the minor school disruptions caused by students discussing the profile).

232. See *O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist.*, No. CV 08-5671, 2008 WL 4396895, at *1, *2 (C.D. Cal. Sept. 9, 2008) (denying student’s request for a court order mandating the school district to re-enroll the student).

233. See *id.* at *1 (describing the video at issue and the means by which it was discovered).

234. *Id.* at *3.

235. *Id.* at *4.

236. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39–40 (2d Cir. 2007).

237. In *LaVine*, for example, the Ninth Circuit found that a school could suspend a student in an emergency because officials could reasonably expect a serious disruption to stem from the student’s poem in which he graphically described his own suicide after shooting his classmates. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989–90 (9th Cir. 2001). Furthermore, in *J.S. v. Bethlehem*, the Pennsylvania Supreme Court found a substantial disruption under *Tinker* where a student’s website depicted a beheaded and blood-soaked teacher with the caption, “Why Should She Die?” *J.S. v. Bethlehem Area Sch. Dist.*, 807

A fourth factor judges consider when determining if cyberattacking has caused a sufficient effect on the school is the extent to which school officials must spend time, energy, and effort responding to the incident and controlling any damage it caused. In *Doninger*, the Second Circuit found a substantial disruption was caused by a student's email and blog post criticizing school officials for supposedly canceling an event and exhorting her readers to call and complain because administrators had to deal with "a deluge of calls and emails."²³⁸ They responded to angry emails from parents who were misled by the student's misinformed email and some even came late to work because of it.²³⁹ Officials also had to take certain students out of class because they were "all riled up" and had to address a threatened sit-in.²⁴⁰ Likewise, in *Boucher*, where a student was expelled for distributing a pamphlet with instructions on how to hack into the school's computers,²⁴¹ the Seventh Circuit found that the time and money dedicated to fixing the problems caused by the pamphlet suggested that the school would likely prevail on any First Amendment challenge.²⁴² The court noted that the school brought in computer experts to assess the security of the system and changed all passwords and access codes, suggesting a significant departure from normal day-to-day activities to respond to the student's conduct.²⁴³ In both these cases, the students' conduct forced school officials to set aside their normal responsibilities and devote a significant amount of time to fixing any problems caused by the student. At a minimum, this constitutes disruption to administrators and teachers, which may be enough for a "material and substantial" disruption finding under *Tinker*. This is another fact-specific inquiry, but it suggests that the incident of cyberattacking would have to be sufficiently serious to occupy an

A.2d 847, 851 (Pa. 2002). When she heard of this website, the teacher was frightened and could not teach for the rest of the year. *Id.* at 852. While *LaVine* and *J.S.* involved factors over and beyond violent speech alone, the weight of the case law from other jurisdictions suggests that, in most cases, additional inculpatory evidence is not necessary. *See, e.g., Wisniewski*, 494 F.3d at 35–36 (concluding that the substantial disruption standard had been met after a student created and shared a violent image, suggesting that his teacher should be killed, despite findings that the student posed no true threat and had created the image as a joke). *But see Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 782, 784–85 (E.D. Mich. 2002) (finding no substantial disruption where a student's website asked readers to kill a person of their choosing in a particularly graphic fashion).

238. *Doninger v. Niehoff*, 527 F.3d 41, 50–51 (2d Cir. 2008).

239. *Id.* at 45–46.

240. *Id.* at 51.

241. *Boucher v. Sch. Bd.*, 134 F.3d 821, 823 (7th Cir. 1998).

242. *See id.* at 827 (finding that the school suffered "tangible harm" and concluding that, "more likely than not," the school would prevail on the merits).

243. *Id.* at 827.

amount of time similar to the hours wasted in *Doninger* and *Boucher*. A racist or homophobic cyberattack can have real effects on not only the victim, but on all minority students, suggesting that this kind of hate and aggression may cause teachers and administrators to devote significant time to address the community's fears.

Fifth, there is some indication that an aggressor's disciplinary past can inform a school's disciplinary decision and legitimize a school's fear of effects on the school due to that student's conduct. In *LaVine*, a student wrote a violent poem that described the shooting of his classmates.²⁴⁴ Upholding the school's decision to immediately expel the student, the Ninth Circuit singled out the student's disciplinary past, his suicidal behavior, and his record of stalking his former girlfriend as sufficient evidence that the school was reasonable to expect possible violence.²⁴⁵ The poem in *LaVine* was particularly violent, and, as we have seen, the more gruesome the speech, the more likely school discipline will be appropriate. However, this factor could make disciplining cyberattackers more likely because it would situate a single incident in a pattern of conduct even when those previous incidents of misbehavior are not at issue.

And, sixth, the effects on the target of the aggression are relevant for proving the sufficiency of any effects. Many student aggression cases take into account the effect on the target or victim. In *Kowalski*, the Fourth Circuit noted that the cyberattacks were "targeted, defamatory" and "forced [the victim] to miss school in order to avoid further abuse."²⁴⁶ The court was persuaded that the potential for continued abuse "was real" and that, if the conduct had gone unpunished, it would have a "snowballing effect, in some cases resulting in 'copycat' efforts by other students or in retaliation for the initial" attack.²⁴⁷ Discipline was warranted and not barred by the First Amendment in that case,²⁴⁸ but in *J.C.*, for example, a court denied a school disciplinary authority over a student whose video had a fleeting and minimal impact on its target.²⁴⁹

Any determination of effects is highly fact-specific, so this factor might support discipline in some cases but counsel against it in oth-

244. *Id.* at 983–84.

245. *Id.* at 989–90.

246. *Kowalski v. Berkeley County Schs.*, 652 F.3d 565, 574 (4th Cir. 2011).

247. *Id.*

248. *Id.* at 576–77.

249. *See J.C. v. Beverly Hills Sch. Dist.*, 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010) ("[The victim] felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class. These concerns cannot, without more, warrant school discipline.").

ers. Weighing the effect on the victim has merit as a way of distinguishing between examples of the common gave-and-take among adolescents, on the one hand, and more harmful conduct, on the other. And while this factor may make lawful discipline hinge on the dumb luck of an aggressor who chooses a weak victim, that might be a good thing. By making discipline less likely when an aggressor targets a particularly strong victim whose high self-esteem would make him able to withstand ridicule, this factor recognizes that cyberattacking, like cyberbullying, requires an imbalance of power between the aggressor and the victim. But, this limited reach of the effects test should be expanded to account for not only individual harm, but group harm based on a cyberattack on a victim's identity.²⁵⁰ The harm caused by "All Faggots Must Die," for example, is not limited to one gay teenager, but reaches to every gay member of his school and every minority who could be the target of the next hateful attack.²⁵¹

B. *Cyberbullying and Harassment*

First Amendment freedoms are no less important for cyberbullies. Indeed, we are often reminded that free speech rights extend to the worst among us.²⁵² Yet, no one enjoys an absolute right to free speech; the right is balanced against competing interests in any given circumstance.²⁵³ A school's authority to discipline single-incident cyberattackers only wilts in front of the First Amendment when the cyberattacking is indistinguishable from immature give-and-take among adolescents.²⁵⁴ A rule that allows punishment for the more than 70 percent of students who have engaged in a single incident of aggressive behavior²⁵⁵ is simply overbroad,²⁵⁶ wildly impractical, or both.²⁵⁷

250. *See supra* text accompanying notes 201–202.

251. *See* Waldman, *supra* note 201.

252. *See, e.g.,* Vill. of Skokie, v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 25 (Ill. 1978) ("[T]he unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in 'restricted' areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most." (quoting Rockwell v. Morris, 12 A.D.2d 272, 282 (N.Y. App. Div. 1961))).

253. *E.g.,* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465–66 (1995) (noting that in evaluating a restraint on speech, a court must balance the interest of the state in maintaining order and efficiency against that of the citizen "in commenting upon matters of public concern" (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968))).

254. *See supra* Part II.

255. Given that the definition of single-incident aggression is broad—sweeping in almost *anything* that can be cruel or harmful to others—and the likely under-reporting among students who are willing to admit to bad behavior, most social scientists think this

But an analysis that gives a school a fighting chance to discipline its worst offenders recognizes the gravity of bullying and cyberbullying, the state's and school's compelling interest in preventing such behavior, and the relative infrequency of real cyberbullying cases. I propose that given the similarities between the conduct, effects, and hostile environments caused by identity-based bullying and cyberbullying in schools, on the one hand, and by standard harassing behavior, on the other, we should determine the merit of a cyberbully's First Amendment defense to a school's disciplinary authority like we would analyze a harasser's First Amendment defense to the liability imposed by harassment statutes.²⁵⁸ And while the Supreme Court has never explicitly ruled on the constitutionality of harassment or stalking statutes, all evidence suggests that harassers enjoy little, if any, First Amendment protection.²⁵⁹ The same should be the case for Zachary, our cyberbully.

My proposal ostensibly raises two doctrinal questions that must be addressed at the outset. First, I argued above that the Supreme Court's student speech cases never entertained a bright line on-campus/off-campus distinction for a school's disciplinary authority because any suggestion of a campus presence requirement was merely a proxy for the broader rule that schools maintain authority over their students when they act *qua* students.²⁶⁰ That principle, which sub-

number is closer to 90 to 99 percent. See GLSEN Survey, *supra* note 51, at xvi (noting that 62.4 percent of students who were harassed or assaulted failed to report it to school administration; and about 90 percent of students participated in or heard derogatory and harassing remarks about LGBT students).

256. A statute is overbroad if, in banning unprotected speech, it sweeps in protected speech. See *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (“The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep,’ suffices to invalidate *all* enforcement of that law, ‘until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.’” (internal citations omitted)); see also *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 508 (1982) (White, J., concurring) (citations omitted).

257. See Susan W. Brenner & Megan Rehberg, “Kiddie Crime”? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 43–44 (2009) (suggesting that an expansive regime of criminal liability for cyberbullying would be unworkable and have little impact in discouraging cyberbullies).

258. For a description of state harassment and stalking statutes and their application to cyberbullying, see *id.* at 15–38.

259. For a discussion of the application of First Amendment principles to harassment, see Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1028 (2008).

260. See *supra* Part III.A.

jected cyberattackers to school punishment, applies equally to cyberbullies. Therefore, the argument goes, treating cyberbullies, who act *qua* students just as much as cyberattackers, outside *Tinker* and its progeny disproves my student *qua* student theory. I disagree. Single-incident cyberattackers are still acting *qua* students by directing their aggression against members of the school community they only know because they are students. Undoubtedly, cyberbullies do the same. But, unlike cyberattackers, cyberbullies are not just students; they are harassers. A cyberattacker acts *qua* student because he acts against someone he knows from school; his behavior is sometimes characterized by the common give-and-take among immature and sometimes mean adolescents. The average cyberbully takes his conduct to another level, whereby his repeated behavior affects his victim in profoundly more serious ways and, as a result, the cyberbully develops a dual persona. The cyberbully is indeed a student, but the character and egregiousness of his conduct make him primarily a harasser.²⁶¹ He is no longer solely acting *qua* student.

Second, one could argue that if cyberbullies have free speech rights at all, the contours of those rights should be determined through the Supreme Court's student speech cases regardless of the nature of the students' conduct. This argument posits that, at bottom, *Tinker* and its progeny govern all student speech regardless of its nature, gravity, and effects. I have already addressed this concern. *Tinker* is powerful precedent and may merit rejuvenation as the protector of student speech rights, but neither *Tinker* nor any student speech case decided through its lens was based on repeated, targeted student speech. The precedent is, therefore, ill-equipped to address the kind of constant barrage of harassing behavior that characterizes the conduct of bullies and cyberbullies.

These objections aside, I argue that anti-gay bullying and cyberbullying in schools create a hostile educational environment through harassment based on sex or sexual nonconformity. That puts bullies' and cyberbullies' behavior more in line with standard harassers or stalkers, rather than student speakers. The striking similarity between harassment and bullying, together with the similarly situated victims and the obvious dissimilarity between single-incident attacking and repeated bullying, suggests that identity-based cyberbullying and harassment merit similar treatment. Other scholars have discussed how

261. See Brenner & Rehberg, *supra* note 257, at 2–3. For a learned discussion of the argument that updated harassment and stalking laws should not be applied to cyberbullies, see *id.* at 15–45.

and to whom to attach liability for bullying and cyberbullying.²⁶² With respect to potential free speech defenses to that liability, courts should remember that harassers, who engage in nearly identical conduct as bullies, enjoy little, if any, First Amendment protections. And while there is little case law available to define that boundary clearly, I argue that any speech restrictions imposed by harassment statutes are permissible as a reasonable balance between legitimate speech interests and the state's compelling interest in eradicating the harmful effects of harassment. The identity of those interests in the public school context suggests that a similar balance is appropriate for cyberbullying. Therefore, just as free speech defenses to harassment and stalking liability should fail, so too should the parallel defenses to school discipline for cyberbullying.

1. *Harassment Statutes*

As Professor Susan Brenner has noted, harassment statutes are among the few criminal statutes that target speech because of the effect it has on its target.²⁶³ For example, some states criminalize sending a letter that conveys a threat,²⁶⁴ and many states criminalize making obscene telephone calls,²⁶⁵ but in all cases, a communication is criminalized because of its harmful content. Under the Model Penal Code, harassment occurs when, with the intent to harass another, one (a) "makes a telephone call without purpose of legitimate communication;" (b) "insults . . . or challenges another in a manner likely to provoke violent or disorderly response;" or (c) "makes repeated communications anonymously or at extremely inconvenient hours."²⁶⁶ Since the underlying event in any harassment case is a series of communications, we may wonder whether antiharassment laws violate the First Amendment. The Supreme Court has never explicitly held that a free speech challenge to a harassment statute would fail, but the

262. See, e.g., King, *supra* note 15, at 875 (noting that if schools do not take steps to address cyberbullying, they may face liability); see also Brenner & Rehberg, *supra* note 257, at 53 (noting that criminal liability may be imposed against a cyberbully convicted of defaming another individual).

263. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 328 (2003).

264. See, e.g., ARIZ. REV. STAT. ANN. § 13-3004 (West 2010) (criminalizing the sending of a threatening letter); see also MODEL PENAL CODE § 211.3 (Proposed Official Draft 1962) (criminalizing a threat to terrorize others through violence); see also *id.* § 250.4(3) (criminalizing the harassment of others through crude language).

265. See, e.g., GA. CODE ANN. § 16-12-100.3 (LexisNexis 2011) (criminalizing obscene telephone calls with minors).

266. MODEL PENAL CODE § 250.4(1)-(3) (1985).

Court has arguably implied it.²⁶⁷ After all, anti-harassment statutes criminalize the communication of low value speech if it “strays . . . from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, [where] the state has greater latitude to regulate expression,”²⁶⁸ and requires that those communications be done in a manner likely to provoke a nega-

267. The same is true for a free speech challenge to Title VII, the most well known subset of harassment statutes that bans sexual harassment in the workplace. A number of scholars have already concluded as much in the Title VII subcontext, pointing to the Court’s silence on a possible First Amendment-Title VII conflict as evidence. Richard H. Fallon, Jr., *Sexual Harassment, Content-Neutrality, and the First Amendment Dog That Didn’t Bite*, 1994 SUP. CT. REV. 1, 9–12 (arguing, in part, that the Court had the opportunity to address the argument, fully briefed by the parties, that Title VII imposed an impermissible content-based restriction on free speech, but declined to do so). Professor Fallon and others have argued that the Supreme Court has “strongly suggested” that a First Amendment challenge to Title VII would fail. See *id.* (arguing that “it is highly unlikely that workplace expressions of gender-based hostility and communications of explicitly sexual messages will receive categorical [First Amendment] protection”); see also, e.g., *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1247 (10th Cir. 1999) (“We note that the Supreme Court has strongly suggested that Title VII, in general, does not contravene the First Amendment.”). First, the Court declined to address the free speech issues raised by a Title VII hostile environment claim in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), despite the opportunity to do so. The defendant-employer briefed the First Amendment issues and the plaintiff answered. See Fallon, *supra*, at 9. Various *amici* also joined in the chorus. *Id.* at 9–10. The Court’s silence on this issue, coupled with its duty to adopt a narrowing construction of the statute “to avoid constitutional difficulties” if at all possible, suggests that the Justices saw no need to narrow Title VII to avoid impingement on free-speech rights. *Id.* at 11.

Second, the Court’s opinion in *R.A.V. v. St. Paul*, 505 U.S. 377 (1993), implied that a hostile-environment claim would survive a free-speech challenge. See *id.* at 389 (noting that because words can violate laws directed against conduct, such words that are sexually derogatory may violate Title VII). In that case, the Court struck down a municipal hate-speech ordinance that banned only those “fighting words” that expressed hate on the basis of race, color, creed, religion, or gender. *Id.* at 381. The problem was that the law banned only one viewpoint: “aspersions upon a person’s mother, for example[,] would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.” *Id.* at 391. In other words, as a law against intolerant speech, the statute was impermissible viewpoint discrimination. *Id.* Four Justices attacked this theory from all angles, including the warning that “hostile work environment claims based on sexual harassment should fail First Amendment review” based on the majority’s holding. *Id.* at 409–10 (White, J., concurring). Justice Scalia anticipatorily responded that Title VII can withstand scrutiny by noting that “words can in some circumstances violate laws directed not against speech but against conduct,” and if “the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea.” *Id.* at 389–90 (majority opinion). As a result, so-called “fighting words” that are sexually discriminatory could still produce a hostile workplace environment in violation of Title VII. Lower courts have agreed with this analysis. See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (“Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive working environment. That expression is ‘swept up’ in this proscription does not violate First Amendment principles.”).

268. *In re M.S.*, 896 P.2d 1365, 1371 (Cal. 1995).

tive response from the victim.²⁶⁹ Most state harassment and stalking statutes agree. Missouri's stalking statute, for example, states that anyone "who purposely and repeatedly harasses . . . another person commits the crime of stalking," and defines "harasses" as engaging in "a course of conduct directed at a specific person that serves no legitimate purpose, that would cause a reasonable person to suffer substantial emotional distress, and that actually causes substantial emotional distress to that person."²⁷⁰ Delaware's harassment statute makes it a crime to "harass . . . another person" by insulting, taunting, or challenging them, or engaging "in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to . . . cause a reasonable person to suffer substantial emotional distress."²⁷¹ This interplay between communication of harmful speech and a reasonable production of actual harm or fear in the victim is precisely what has upheld the constitutionality of other statutes, like anti-intimidation or anti-stalking rules, from free speech challenges.²⁷² As their close cousins, harassment laws are likely similarly immune from First Amendment challenges.

2. *Bullying in Schools and Harassment*

Harassment, then, differs from its non-actionable cousin of simply being mean to one another in the same ways that a school rife with bullying and cyberbullying differs from one characterized by the normal give-and-take of adolescence. There may be no precise boundary or bright line rule that identifies the hostile environments created by harassment, but it is clear that the severe and pervasive abusive conduct that characterizes bullying and cyberbullying shares the same five characteristics as behavior that falls under standard harassment statutes. First, both bullying and harassment require a pattern

269. MODEL PENAL CODE § 250.4(3) (Proposed Official Draft 1962).

270. MO. ANN. STAT. § 565.225 (West 1999). Michigan's statute is almost identical. *See* MICH. COMP. LAWS ANN. § 750.411h(1)(b) (West 2004) (criminalizing stalking).

271. DEL. CODE ANN. tit. 11, § 1311(a)(1) (2007). Massachusetts's statute treats harassment as a separate offense, and makes it a crime to inflict emotional distress upon a victim. MASS. GEN. LAWS ANN. Ch. 265, § 43A(a) (West 2008).

272. *See* Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 HARV. J. ON LEGIS. 1, 19 (1994) (noting that expression of a "violent nature" which perpetuates fear in the victim is not speech protected by the First Amendment).

of repeated conduct.²⁷³ Second, the kind of abusive behavior is similar.²⁷⁴ Third, the victims of abuse are so-called weaker parties, identified, in part, by their real or perceived minority status in the school or workplace environments.²⁷⁵ Fourth, bullying and harassment have the same effects on their victims.²⁷⁶ Fifth, both forms of harassment can be executed beyond the four walls of the shared environment.²⁷⁷ These striking similarities, coupled with the clear differences between this kind of harassing conduct and the behavior at issue in *Tinker* and its progeny, suggest that bullying and cyberbullying in schools should be treated more like harassment than student speech.

a. Repetition

Every court to address a criminal harassment claim has stated that repetition of the conduct is determinative.²⁷⁸ This makes sense given the plain language of most states' harassment and stalking statutes. Notably, this is also the case in the Title VII harassment context.²⁷⁹ Similarly, bullying must be repeated. The repetition of hostile

273. See Brenner & Rehberg, *supra* note 257, at 2–3 (describing cyberbullying as a pattern of repeated behavior); see also MO. ANN. STAT. § 565.225 (West 1999) (defining harassment as involving a “course of conduct”).

274. For a discussion of cyberbullying behavior, see *supra* Part II. See also DEL. CODE ANN. tit. 11, § 1311(a)(1) (2007) (describing harassment as behavior consisting of insults, taunts, or challenges made with the intent to “harass, annoy, or alarm another person”).

275. See Brenner & Rehberg, *supra* note 257, at 3–4 (observing that bullying often involves a “power imbalance” whereby the bully has “some advantage” that can harm the victim); Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII’s Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 135–36 (2008) (noting that sexual harassment in the workplace arises from the power imbalance between males and females).

276. For a discussion of some of the impacts of cyberbullying, see *supra* Part II. See also DEL. CODE ANN. tit. 11, § 1311(a)(1) (2007) (defining harassment as acting in such a manner “which the person knows is likely to provoke a violent or disorderly response or cause a reasonable person to suffer substantial emotional distress”).

277. See *infra* Part IV.B.2.e; see also Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 563 (2001) (noting that a significant amount of the workplace harassment claims involve behavior taking place outside of the office).

278. See, e.g., Schwefel v. Kramschuster, No. 2010AP2924, 2011 WL 4550217, at ¶24 (Wis. Ct. App. Oct. 4, 2011) (“Harassment, as relevant here, is defined as ‘[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.’” (quoting WIS. STAT. § 813.125(1)(b))).

279. See, e.g., Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 648 (2007), (Ginsburg, J., dissenting) (quoting Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111, 113–15 (2002)) (noting that the nature of hostile environment claims “involves repeated conduct. The unlawful employment practice’ in hostile work environment claims, ‘cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.’ The persistence of the discriminatory conduct both indicates that man-

acts is not only a defining element in the social science literature,²⁸⁰ but it distinguishes between the common give-and-take among adolescents and significantly more egregious conduct. Cyberattacking does not share this characteristic.

b. Conduct

The kind of abusive behavior that constitutes harassment is also similar to bullying behavior in schools. There may be no clear rule that defines which conduct will amount to sufficiently severe harassment in either case, but a random survey of all harassment cases (including Title VII) evidences the striking identity of bad conduct. Using derogatory and degrading sexual terms to describe the victim,²⁸¹ repeatedly communicating in a manner likely to alarm,²⁸² making sexually explicit comments²⁸³ and overtly sexual gestures,²⁸⁴ spreading sexual rumors,²⁸⁵ attempting to physically abuse the victim,²⁸⁶ drawing

agement should have known of its existence and produces a cognizable harm. . . . [T]he very nature of the hostile work environment claim involves repeated conduct” (internal citations omitted)), *superseded on other grounds by statute*.

280. Nansel defines “bullying” as “a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one.” Nansel, *supra* note 16, at 2094.

281. *Compare, e.g.,* Spencer v. Gen. Elec. Co., 697 F. Supp. 204, 218–19 (E.D. Va. 1988) (discussing “derogatory and degrading comments” about the victim and the female gender), *with* Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (noting that the student endured slurs about his sexuality).

282. *See, e.g.,* TEX. PENAL CODE ANN. § 42.07(a)(4) (West 2011) (criminalizing harassment of others).

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

284. *Compare, e.g.,* Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 61 (2d Cir. 1992) (noting that the aggressor “pretended to masturbate and ejaculate at victim behind her back to express his anger with her”), *with* Theno, 377 F. Supp. 2d at 955 (describing how students performed mock fellatio as emblematic of the victim’s alleged sexual behavior).

285. *Compare, e.g.,* Spain v. Gallegos, 26 F.3d 439, 442 (3d Cir. 1994) (spreading rumors that the victim was sexually involved with a superior), *and* Jew v. Univ. of Iowa, 749 F. Supp. 946, 949 (S.D. Iowa 1990) (noting that a rumor spread about the victim and her colleague having a sexual relationship), *with* Theno, 377 F. Supp. 2d at 956 (describing how students started a rumor that the victim was caught masturbating in the school bathroom).

vulgar and explicit graffiti,²⁸⁷ grabbing the victim in aggressive and explicit ways,²⁸⁸ making negative comments about the victim's identity,²⁸⁹ creating a rating system to assess the attractiveness of victims,²⁹⁰ and a plethora of other behaviors characterize harassing environments.

c. Victims

In hostile workplace and educational environments, the victims of harassment are the so-called "weaker" party, or perceived as such, based on their minority status. Social scientists require a "power imbalance" between the aggressor and the victim for conduct to meet the definition of bullying,²⁹¹ but just like women are not the only victims of harassment, the traditional image of a bully as a popular, strong, athletic, and aggressive male who targets a physically weaker student fails to capture the broad sweep of a power imbalance. A victim's minority status can also cause a power imbalance; for example, ethnicity may function as a status characteristic and can lead to an imbalance of power, especially between members of ethnic minorities on the one hand and ethnic majority group members on the other.²⁹² Women have long been minorities in the workplace and in some in-

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

287. *Compare, e.g.,* Baty v. Willamette Indus., 985 F. Supp. 987, 992 (D. Kan. 1997) (discussing the existence of graffiti in the men's bathroom specifically pertaining to the victim's sexuality, exploits, and relationships), *with Theno*, 377 F. Supp. 2d at 955-56 (displaying depictions of the plaintiff or of gay sex).

288. *Compare, e.g.,* Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1374 (8th Cir. 1996) (alleging that "at least twelve different male co-workers bagged [the victim] on some 100 occasions . . . 'Bagging' is . . . the intentional grabbing and squeezing of another person's testicles."), *with Nabozny*, 92 F.3d at 451 (describing the mock rape of the victim).

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

290. *Compare, e.g.,* Wall v. A.T. & T. Tech., Inc., 754 F. Supp. 1084, 1088 (M.D.N.C. 1990) (using a one-to-ten rating system to assess the physical attributes of women), *with Blumenfeld & Cooper, supra* note 18, at 119 (including online polling pages to rate victims as "hottest" or "ugliest" as examples of cyberaggressive behavior).

291. Brenner & Rehberg, *supra* note 257, at 4; Ericson, *supra* note 18.

292. Elizabeth G. Cohen et al., *Treating Status Problems in the Cooperative Classroom*, in COOPERATIVE LEARNING: THEORY & RESEARCH 203-05 (Shlomo Sharan ed., 1990) (describing race and ethnicity as status characteristics that impact the "prestige and power order" of small groups working together). *See also* Waldman, *supra* note 201.

dustries more than others.²⁹³ And, like women—who make up the vast majority of targets of sexual abuse in the workplace²⁹⁴—ethnic, racial, and sexual identity minorities are often the most severely bullied students in school.²⁹⁵ Though these minorities can be victimized by single-incident aggression, so too is almost everyone else in school. Conversely, minorities are over-represented among victims of bullying and harassment.

d. Effects

Given the similarities in conduct and types of victims, it should come as no surprise that bullying and harassment harm their victims in similarly devastating ways. Harassment and school bullying have been found to cause stress, anxiety, mood swings, and depression. They create feelings of embarrassment, shame, and low self-esteem.²⁹⁶

293. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1491 (M.D. Fla. 991) (noting that the target, Lois Robinson, was a welder, and thus a minority in the welding industry).

294. Women, however, are not the only victims. *See, e.g.*, *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 76–77 (1998) (noting that Oncale was a male subject to sexual harassment in the workplace). For a good summary of some notable male-victim cases and their legal strategies, see Stephen J. Nathans, Comment, *Twelve Years After Price Waterhouse and Still No Success for “Hopkins in Drag”: The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713, 724–39 (2001).

295. The GLSEN Survey revealed that 88.9 percent of students heard the word “gay” used in a negative way, 72.4 percent heard other homophobic remarks (that is, “dyke” or “faggot”) in school and online, and 84.6 percent were verbally harassed (that is, called names or threatened with violence) at school because of their sexual orientation. GLSEN Survey, *supra* note 51, at xvi. More than 40 percent were physically harassed (that is, pushed, shoved, or otherwise physically attacked) at school in the past year because of their sexual orientation, and 27.2 percent were harassed based on their gender expression. *Id.* Nearly 20 percent were physically assaulted (that is punched, kicked, or attacked with a weapon), and nearly 53 percent were harassed or threatened via electronic media (that is, text messages, emails, instant messages, or postings on Facebook). *Id.* As a result, more than 61 percent felt unsafe at school because of their sexual orientation and 39.9 percent felt unsafe at school because of how they expressed their gender. *Id.*

296. *Id.* In particular, Professor Harvey Hornstein has showed correlations between “a boss’s abusive disrespect” and depression, anxiety, and low self-esteem. HARVEY A. HORNSTEIN, *BRUTAL BOSSES AND THEIR PREY* 74–75 (1996). *See* Jane E. Brody, *Researchers Unravel the Motives of Stalkers*, N.Y. TIMES, Aug. 25, 1998, <http://www.nytimes.com/1998/08/25/science/researchers-unravel-the-motives-of-stalkers.html?pagewanted=all&src=pm> (noting that “the repeated harassment commonly results in acute emotional distress and can seriously disrupt the way victims live”). These psychological effects have been linked to serious physical effects, like cardiovascular disease and musculoskeletal disorders. *See* NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, *STRESS AT WORK* 11 (1999), <http://www.cdc.gov/niosh/docs/99-101/pdfs/99-101.pdf> (noting that psychologically demanding positions can cause cardiovascular and musculoskeletal disorders, among others). *See generally* Ybarra, *supra* note 36 (discussing the psychological effects of cyberbullying, including depression); Nishina & Juvonen, *supra* note 36 (discussing the psychological and social effects of harassment on youth); Michele L. Ybarra, *Linkages Between Depressive*

More severe effects can include PTSD,²⁹⁷ and even severe physical effects like compromised immunity to infection, headaches, spikes in blood pressure, and digestive problems related to stress.²⁹⁸ The Supreme Court recognized these damaging effects in *Harris v. Forklift Systems, Inc.*, noting that a “discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”²⁹⁹ And various courts and scholars have chronicled similar effects in bullying victims. Single-incident cyberattacking does not share this characteristic.

e. Location

Harassment targets its victims anywhere and everywhere. We have already seen how bullies can harass their victims even when not on school property³⁰⁰ and how the multi-location reach of state criminal harassment statutes is clear from their plain language. Harassment can involve phone calls,³⁰¹ sexually explicit and lewd emails,³⁰² looking at pornography online, knowing it will be seen or heard by others,³⁰³ harassing text messages, and vulgar and sexually explicit Facebook posts, and “email bombing.”³⁰⁴ Just like our modern lives are

Symptomatology and Internet Harassment Among Regular Internet Users, 7 CYBERPSYCHOLOGY BEHAV. 247 (2004) (describing the link between depression and cyberbullying).

297. *See, e.g.*, *Nabozny v. Podlesny*, 92 F.3d 446, 452 (7th Cir. 1996) (noting that the victim was diagnosed with PTSD as a result of the trauma exhibited from bullying).

298. David C. Yamada, *The Phenomenon of ‘Workplace Bullying’ and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 483 (2000). *See* U.S. DEP’T OF JUSTICE, STALKING AND DOMESTIC VIOLENCE: REPORT TO CONGRESS 21–23 (2001) (describing victim experiences of stalking); *see also* WILLARD, *supra* note 37, at 27–56 (discussing how bullying affects victims in many different ways).

299. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

300. *See supra* Part II.A.

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

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

303. *E.g.*, *E.E.O.C. v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 171 (4th Cir. 2009) (discussing an employee who watched pornography at his desk and cursed loudly to retaliate against a co-worker, who sat adjacent to his desk).

304. Email “bombing” is a form of net abuse where an attacker sends huge volumes of email to an address in an attempt to overflow the mailbox or a server host. This usually causes the victim’s service to be shut off. As Professor Citron has detailed, email “bomb-

digital,³⁰⁵ the modern school is wired with Internet access and integrates technology into the curriculum. Many employers allow “telework” or “remote work,” permitting their employees to work from home and providing the hardware and software to do it.³⁰⁶ Increasingly, we communicate with one another over Skype,³⁰⁷ and participate in chat rooms. Many of us maintain Facebook or online dating profiles.³⁰⁸ According to one recent study, 81 percent of adults age thirty to forty-nine and 70 percent of adults age fifty to sixty-four have an online presence.³⁰⁹ This places them squarely in the same virtual role occupied by students, making them similarly subject to cyberharassment and cyberaggressive behavior.

3. *Implications of Similarities: Cyberbullying and the First Amendment*

Like Amelia, the cyberaggressor challenging her punishment on First Amendment grounds, Zachary the cyberbully is likely to offer the same campus presence and pure speech arguments.³¹⁰ In the alternative, he is likely to argue that his conduct could have no effect on the school because his behavior was directed at one individual, not the school. These arguments miss the point. Harassment of one can create hostility for all, but even if there was a *per se* rule that intimidation of one student could never cause a sufficient effect on a school, a school’s decision to discipline Zachary should not be judged through the student speech context. Zachary was not simply acting *qua* student when he abused his victims over a period of time; he was acting much like a harasser. His argument that he should not be subject to

ing” is a common tool used by men to silence women’s voices online. See Citron, *supra* note 15.

305. See Ari Waldman, *Aristotle’s Internet: Classical Values in Our Digital Lives* (unpublished manuscript).

306. See OFFICE OF PERSONNEL MANAGEMENT, STATUS OF TELEWORK IN THE FEDERAL GOVERNMENT: REPORT TO THE CONGRESS (2011), http://www.telework.gov/Reports_and_Studies/Annual_Reports/2010teleworkreport.pdf (describing the increased incidence of teleworking).

307. See *How to Ace a Job Interview on Skype*, TIME, http://www.time.com/time/video/player/0,32068,46937715001_1933401,00.html (illustrating how companies, in efforts to save costs, increasingly use Skype or online video chat to conduct interviews).

308. Forty-seven percent of online adults maintain a profile on a social networking site. While that is significantly lower than teenagers (ages twelve to seventeen) and young adults (ages eighteen to twenty-nine), the number has grown exponentially in the last five years. Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, PEWINTERNET.ORG, at 17 (2010), http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplevels.pdf.

309. *Id.* at 5.

310. See *supra* notes 65–72 and accompanying text.

school discipline for conduct that took place off campus will fail not because the Court's effects test never required a campus presence, but because liability under traditional harassment law is not limited to face-to-face conduct. Similarly, Zachary's potential First Amendment defense to discipline should fail not because his conduct affected the school, but because, similar to harassment laws, any incidental impingements on free speech are permissible given that students are "captive audiences" for the purposes of First Amendment jurisprudence and given the state's compelling interest to prevent harassment in schools and ensure educational opportunities for all.

Context pervades First Amendment jurisprudence; it is essential for determining when restrictions on speech are permissible.³¹¹ And, given the similarities between traditional harassment and bullying in schools, free speech defenses to harassment liability and school disciplinary authority should fail, as a matter of First Amendment doctrine, for the same three reasons. First, the state's interest in restricting, eradicating, and punishing hostile, harassing, or abusive speech may clash with fundamental free speech principles, but any such clash, even with significant impingements on harasser speech rights, would survive strict scrutiny. To survive strict scrutiny, a restriction on expression must be supported by a "compelling" government interest, it must be necessary to accomplish that interest, and it must be narrowly tailored so it exerts the least possible burden on free speech rights.³¹² Even laws that are content- or viewpoint-based are permissible if they pass strict scrutiny.³¹³

311. See *FCC v. Pacifica Found.*, 438 U.S. 736, 747–48 (1978) ("Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.").

312. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (holding that an agreement between a union representative and a school board, giving that representative exclusive access to the teachers' mailboxes and thereby excluding a rival union, was unconstitutional because restricting the speech of the rival union was not narrowly tailored to a compelling interest of the school board); see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535–36 (M.D. Fla. 1991) (ruling that a prohibition on gender discrimination in the workplace constitutes "compelling" state interest within the meaning of First Amendment strict scrutiny).

313. See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (ruling that intentional financial discrimination designed to suppress certain ideas is not *per se* suspect); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 814 (2000) (noting that where a statute regulates speech based on its content, it is subject to strict scrutiny); *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 878 (2d Cir. 2008) (requiring narrow tailoring aimed at a compelling government interest).

The state has a compelling interest in eradicating harassment and its resulting discrimination.³¹⁴ And the specific focus of harassment and stalking statutes—reaching significant harm while leaving untouched the kind of ordinary give-and-take among people—means that the statutes are both necessary and sufficiently narrowly tailored to survive any strict scrutiny analysis on a claim that they violate fundamental free speech rights.³¹⁵ The similarities between harassment and bullying, together with the salient and unique roles schools play in educating the nation’s youth for participation in civil society, suggests that there is a compelling interest in eradicating hostile educational environments, as well. Presumably, the school has a mandate to teach anti-harassing behavior; after all, a school would not be adequately preparing students for the workforce if it was training workplace harassers. Subjecting bullies and cyberbullies to school discipline is also a sufficiently narrowly tailored tactic given the egregiousness and rarity of true bullying cases.

The unique context of the school creates a compelling interest in eradicating from our schools the kind of harassment caused by identity-based bullying and cyberbullying even when it is not based on sex. The Supreme Court has repeatedly recognized that the role of public education is to do more than teach reading, writing, and arithmetic. It “must prepare pupils for citizenship” and “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government”³¹⁶ Schools “inculcat[e] fundamental values”³¹⁷ not only through books, but by example, teaching “lessons of civil, mature conduct” both in and out of the classroom.³¹⁸ The lesson that we should not harass, abuse, or mistreat those who are different, weak, or easy targets is undoubtedly part of the “civil, mature conduct” that is both essential to growing up and essential to a functioning democracy. Furthermore, just like the Court acknowledged that schools have an “important—indeed, per-

314. See, e.g., *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984) (affirming that the state has a “compelling interest in eradicating discrimination against its female citizens”); *Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (same). See also Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace: Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 436–42 (1996) (providing an in-depth and comprehensive constitutional and policy argument in favor of the government’s compelling interest in eradicating sex discrimination in the workplace).

315. See Epstein, *supra* note 314, at 442–46 (developing more fully the necessity and narrow tailoring arguments).

316. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

317. *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979).

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

haps compelling” interest in deterring illegal behavior, such as drug use,³¹⁹ and buttressed that strong interest with evidence about the extensive school drug problem, there is ample evidence that growing incivility among our youth and adult population is causing personal and systemic harm. Identity-based bullying and cyberbullying is getting worse,³²⁰ and has contributed to the deaths of no less than ten young men and women in the last two years alone.³²¹ It has particularly devastating effects on minority populations and those so-called “hidden populations” that are victimized not only by aggressors at school, but by a greater community that hates them.³²² And outside the school context, our public discourse is so deeply infected with incivility, *ad hominem* attacks, and expressions of hate that it took the shooting of Congresswoman Gabrielle Giffords to even get us talking about how we treat one another.³²³ Politicians are adults; they can

319. *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

320. A comparison of two Youth Internet Safety Surveys conducted in 2000 and 2006 suggests that cyberbullying is becoming more common. In 2006, 9 percent of survey participants reported being harassed online with almost 33 percent surveyed admitting to activities that fit the cyberbullying definition. Those numbers are up from 6 percent and 12 percent, respectively, from the 2000 study. JANIS WOLAK ET AL., *ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 10–11* (2006), <http://www.unh.edu/ccrc/pdf/CV138.pdf>.

321. See, e.g., Meghan Barr, *1 Ohio School, 4 Bullied Teens Dead at Own Hand*, MSNBC (Oct. 8, 2010, 2:56 PM), http://www.msnbc.msn.com/id/39578548/ns/health-kids_and_parenting/ (noting three teen suicides and one overdose over the past two years as a result of school tormenting); Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, at A1 (describing the suicide of a male college student following his roommate’s online posting of a webcam video); Andrew Knittle, *North Grad Took Own Life After Week of ‘Toxic’ Comments*, NORMAN TRANSCRIPT, Oct. 10, 2010, <http://normantranscript.com/headlines/x1477594493/-I-m-sure-he-took-it-personally> (describing a teen suicide following attendance at a series of anti-homosexual town meetings); Kevin Cullen, *Standing Up for Phoebe*, BOS. GLOBE, Mar. 30, 2010, http://www.boston.com/news/local/massachusetts/articles/2010/03/30/standing_up_for_phoebe/ (describing a prosecutor’s decision to press charges against a teen’s tormenters following the teen’s suicide).

322. See Douglas D. Heckathorn, *Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations*, 49 SOC. PROBS. 11, 11–13 (2002) (discussing methods of sampling hidden populations, including homosexuals). Gays and lesbians are only one type of hidden population. Another is someone who cannot come forward and identify himself for fear of legal reprisal, like an intravenous drug user. *Id.* at 11. As such, it is difficult for social scientists to reach this population for study. *Id.* Professor Heckathorn has pioneered the use of online social networks to reach this type of population.

323. See, e.g., Helene Cooper & Jeff Zeleny, *Obama Calls for a New Era of Civility in U.S. Politics*, N.Y. TIMES, Jan. 12, 2011, at A1. Some have argued that increasingly aggressive bullies and cyberbullies are taking their cues from an increasingly aggressive political and social discourse. See, e.g., Judith Barr, *Bullying in the Policial Arena: What are we Teaching Our Children?*, HUFFINGTON POST (Sept. 28, 2011, 6:21 PM), http://www.huffingtonpost.com/judith-barr/political-bullying_b_982079.html (listing examples of bullying in politics and

handle themselves. Children cannot. And, if the Court is serious about “civil, mature conduct” being essential to both schooling and democracy,³²⁴ then schools have a mandate to punish behavior that is incongruous with those principles.

Second, harassing or abusive speech that creates hostile working or educational environments falls within the “captive audience” exception to the First Amendment. The First Amendment permits restrictions on certain kinds of offensive speech when the target of the speech has no recourse to avoid it.³²⁵ The exception appears to be based on the privacy interests of the listeners, inasmuch as their privacy is being invaded by aggressive, intolerable speech,³²⁶ and requires that they have no ready means of avoiding the unwanted speech.³²⁷ After all, “The right to express ideas does not include the right to impose the communication of those ideas upon an unwilling listener. . . . Citizens have a right to speak. Citizens also have a right not to be forced to listen.”³²⁸ Because of the unique characteristics of a workplace and a school, workers and students should be considered captive audiences.

The case law involving captive audiences suggests the doctrine is a misnomer. Permissible regulation of speech does not hinge on the relative “captive” of the audience wherever they may be, as the doc-

questioning the impact such examples have on children). And, still, our political discourse is uncivil. After testifying at a House of Representatives committee hearing, Georgetown law student Sandra Fluke was called a “slut” and a “prostitute” by conservative talk radio host Rush Limbaugh. These disgusting comments prompted a tepid response from the Republican Party’s leading candidate for its presidential nomination, Mitt Romney: “It’s not the language I would have used.” Alex Seitz-Wald, *Romney Declines To Criticize Limbaugh — Again*, THINK PROGRESS, Mar. 7, 2012, at <http://thinkprogress.org/politics/2012/03/07/439483/romney-limbaugh-fail/?mobile=nc>.

324. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (finding that schools have an obligation to promote civil and mature conduct).

325. See *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 541–42 (1980) (the government cannot prohibit “speech as intrusive unless the ‘captive’ audience cannot avoid objectionable speech,” and therefore ruling that a utility company may include “controversial matters of public policy” within the same envelope as a billing statement because a customer can easily “avoid further bombardment of their sensibilities by averting their eyes”).

326. See *Cohen v. California*, 403 U.S. 15, 21 (1971) (“[T]he ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”).

327. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (citing *Cohen*, 403 U.S. at 21–22). In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), Justice Douglas, a usual ally of Justice Black’s First Amendment absolutism, stated that there is “no right to force [a] message upon [those] incapable of declining to receive it.” *Id.* at 307 (Douglas, J., concurring).

328. *Von Lusch v. C & P Tel. Co.*, 457 F. Supp. 814, 819 (D. Md. 1978) (quoting *Von Lusch v. State*, 39 Md. App. 517, 525, 387 A.2d 306, 310 (1978)).

trine's name might suggest, but on the unique relationship between the audience and the place holding that audience "captive."³²⁹ This explains why the Court has used the doctrine to uphold restrictions on television broadcasts,³³⁰ mail,³³¹ and harassing phone calls³³² in the home, even though it is easy to change the channel, throw out unwanted mail, or hang up the telephone, but has declined to extend the doctrine to restrictions on offensive speech in places like a school board meeting,³³³ from which it possible to escape, but only if you are willing to give up your right to be heard. Even though residents in their home can avoid what they feel is offensive or abusive speech by ignoring or discarding it, the fact that the speech invades the home—where we are lords of our own manors—is paramount. This near exclusive application of the "captive audience" doctrine to the home has moved some scholars, most notably Eugene Volokh,³³⁴ to argue that this exception does not adequately justify Title VII's restrictions on co-worker speech.³³⁵

Professor Volokh believes that this precedent means that the home may be the only locus of a captive audience,³³⁶ but in so concluding, he misses the Court's multi-layered reasoning. What permits a captive audience exception in the home is not the home itself, but rather our refusal to accept that evidently easy avoidance *should* be necessary in the home. We are not held "captive" in the home any more than we are captive on the street because we can simply turn off a television, walk into another room, or step outside. But because of

329. See *Lehman*, 418 U.S. at 307 (arguing that a municipality cannot post advertisements on the inside of city buses, not because of the posters' content but because buses are a practical necessity for individuals in urban areas and thus they are a "captive audience").

330. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

331. See, e.g., *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970).

332. See, e.g., *Gormley v. Dir., Conn. State Dep't of Prob.*, 632 F.2d 938, 942 (2d Cir. 1980).

333. See, e.g., *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972).

334. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1838–40 (1992) (arguing that the captive audience doctrine should not be extended to the workplace).

335. See, e.g., Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563, 565–67 (2001) (noting that the captive audience exception "as currently structured does not fit harassment cases"); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1031 (1993) ("A workplace is not a home.").

336. See Volokh, *supra* note 334, at 1834–35 (rationalizing that only the physical boundaries of the home could reconcile the Supreme Court's decision to protect speech in *Rowan* and *Cohen*, two cases in which the listeners were arguably more captive than a listener in a home who could simply throw a pamphlet in the trash or turn off the radio).

the unique role of the home in the privacy rights of the resident, we should not have to. The Court's precedents limiting the captive audience exception to the home are based on "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter . . .'"³³⁷ It is not the edifice that gives meaning to this well-worn saying; it is our expectation of privacy within the home that does. This explains why Paul Cohen could wear his "Fuck the Draft" jacket in a courthouse despite the argument that he "thrust" his "distasteful mode of expression . . . upon unwilling or unsuspecting viewers."³³⁸ Courthouse visitors have no right to a captive audience exception because we do not associate important privacy rights with visitors to courthouses.³³⁹ The captive audience doctrine is particularly strong in the home, then, because of one's privacy rights within the home. It is the imbalance of rights—the offensive speaker's relatively weak right to speak compared to the resident's robust privacy rights within his home—that gives the captive audience exception in the home any meaning. It stands to reason, then, that equally as important rights in other contexts could outweigh an offensive speaker's right to speak.

Granted, while my theory that the captive audience exception is applicable to those contexts that implicate important, perhaps fundamental, privacy rights takes the exception out of the limited boundaries of the home, it does not necessarily extend it to the workplace or the school, for example. Workers certainly have a reasonable expectation of privacy in their office,³⁴⁰ but it is exceedingly unlikely to be as strong as a person's expectation of privacy in his home.³⁴¹ That concern is of no moment. Fundamental privacy rights happen to be the counterweight that makes it inappropriate to expect a resident to walk outside of his home to avoid offensive speech, but there is no principle that makes privacy the only possible counterweight. Admittedly, it may be an extension of the Court's precedents to recognize a captive audience exception based on fundamental rights other than

337. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970).

338. *See Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

339. *Id.* at 21–22.

340. *See O'Connor v. Ortega*, 480 U.S. 709, 726 (1987) (plurality opinion) (a search of an employee's office is "justified at its inception" if there are reasonable grounds for suspecting that evidence of work-related misconduct will be uncovered).

341. *See id.* at 716 ("As with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the Amendment.'" (quoting *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984))).

privacy in the home, but such an extension makes sense. There are other fundamental rights that are just as important as being the king of one's castle.

Equal protection is a paradigmatic example. As Deborah Epstein has noted, Congress expressly enacted Title VII based on the Commerce Clause and on the "Fourteenth Amendment, Section 5 authority 'to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment],'"³⁴² of which the Equal Protection Clause is one essential part. In *Heart of Atlanta Motel, Inc. v. United States*, the Court recognized this dual source of authority,³⁴³ and while the majority found no need to address the Fourteenth Amendment issue, Justices Douglas and Goldberg wrote separately to make clear that the Fourteenth Amendment's grant of enforcement authority would have been a legitimate independent basis for Title VII.³⁴⁴ The law was meant to be a "vindication of human dignity,"³⁴⁵ a fundamental right that is assaulted by hostile environment harassment and bullying and cyberbullying in schools. We should not expect harassed co-workers and abused students to have to look the other way, transfer, or quit in order to avoid their tormenter. They have a fundamental right to the same opportunities as those around them.

Indeed, those escape options may not even be possible. Most employees cannot simply leave work to avoid harassment, lest they be fired. They can ask for transfers, but that is neither a feasible option in small companies nor an effective option in large companies. Furthermore, while transfers to another office, building, or city may allow the victim to avoid her harasser, not only is moving to another city often infeasible, but the notion that harassment victims should be "run out of town" before the harasser has his right to abusive speech curtailed is laughable. And if the victim stays and remains subject to her harassment, her job performance, psychological well-being, and health will suffer. Any suggestion that employees can simply avoid their harassers or ignore them is to misconstrue the workplace: to say that harassment victims in the workplace are not "captives" in the literal sense is to actually say that harassment victims *who can afford not to work* are not captives. Therefore, female employees constitute the

342. Epstein, *supra* note 314, at 437 (quoting U.S. CONST. amend. XIV).

343. 379 U.S. 241, 249 (1964) ("The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution.").

344. *Id.* at 283–86 (Douglas, J., concurring); *id.* at 291–93 (Goldberg, J., concurring).

345. *Id.* at 291 (Goldberg, J., concurring).

quintessential captive audience. We “should not force a woman into a Hobson’s choice between quitting her job” and denying herself her right to equal protection, “or facing a work environment in which she is subjected to severe or pervasive harassing speech that is not inflicted on her male counterparts.”³⁴⁶

Student victims of school bullying and cyberbullying confront a worse situation. Bullying and cyberbullying victims have the same right, under the Equal Protection Clause,³⁴⁷ to the same educational opportunities as everyone else. That is, after all, what Title IX is about in the gender discrimination context.³⁴⁸ But one student’s right to the same educational opportunities as others is no less real even outside the Title IX umbrella. Yet his exercise of that right is diminished when repeated harassment from a peer interferes with his academic success, mental and physical health, and self-esteem. It would be absurd to expect parents to deny their children their fundamental rights by taking them out of school or spending significant time and money placing them in new schools before a bully’s First Amendment rights are curtailed. And the prospect of avoiding a harasser is even more dismal for students than for employees. In the workplace, quitting is technically an option, albeit one rife with difficulties and virtually impossible for those without other means of financial support. Students cannot simply quit school,³⁴⁹ and transferring is difficult, especially in small towns. Recent bullying cases have resulted in their victims transferring to entirely different school districts,³⁵⁰ but that option is unavailable to those without the financial means to relocate or to those without an extended family willing to take them in. Schools can change their students’ class schedules so that bullies and victims are never in class together, but these half-hearted solutions rarely work; everyone sees everyone in the hall, in the cafeteria, or after school. And neither of these options can protect a victim from cyberbullying, where harassment can reach its victims wherever they are located.

346. Epstein, *supra* note 314, at 425.

347. U.S. CONST. amend. XIV.

348. *See, e.g.*, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 968 (D. Kan. 2005) (“Damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.” (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999))).

349. Students can be home-schooled, but few parents have the resources or ability to exercise this option.

350. *See, e.g.*, *Nabozny v. Podlesny*, 92 F.3d 446, 452 (7th Cir. 1996) (noting that Jamie transferred twice to escape his harassers).

In addition to the strict scrutiny and captive audience arguments, there is a third reason why the First Amendment should not limit harassment liability and a school's authority to discipline bullies and cyberbullies. Harassing speech, by its very nature, deserves minimal First Amendment protection. Harassing speech targets one victim, and targeted speech has traditionally been afforded fewer constitutional protections than speech aimed at larger audiences.³⁵¹ The latter is more likely to have political value and the former is more likely to be harmful.³⁵² Bullying and cyberbullying is similarly targeted toward one person and likely has limited political value. Undoubtedly, abusive speech has almost no political value compared to the armband protest in *Tinker*, which further explains why *Tinker* is an inappropriate lens through which to evaluate bullying and cyberbullying.

V. CONCLUSION: FINDING THE APPROPRIATE BALANCE

I have argued that cyberattacking and cyberbullying should be treated differently, with respect to potential First Amendment defenses to a school's disciplinary authority, because as single-incident actors, some cyberattackers are sometimes simply too common and generally act like immature students, whereas cyberbullies, as repeated harassers, are relatively rare and mimic workplace harassers in striking ways.³⁵³ Identity-based aggressors, however, should be treated the same. Within that argument, I propose a number of theories: that the Supreme Court's student speech jurisprudence used the on-campus/off-campus distinction as a proxy for when students are acting *qua* students;³⁵⁴ that modern technology has dramatically changed the nature of the school and office such that presence in one location is meaningless;³⁵⁵ that neither the Court's student speech cases nor any harassment cases have ever, and should ever, be restricted to conduct that occurs within the boundaries of the school or office or home;³⁵⁶ that, taken together, the Court's student speech cases reflect a consistent effects test as the basis for justifying school discipline of student speakers; and that a "captive audience" doctrine that is nei-

351. See Fallon, *supra* note 267, at 42.

352. See, e.g., Kent Greewalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 292-93 (1990) (arguing that when a speaker verbally attacks a listener, the intention is to inflict emotional pain on the listener; by contrast, in the absence of the same listener, the speaker would simply be expressing his opinion).

353. See *supra* Part IV.

354. See *supra* Part III.

355. See *supra* Part III.4.

356. See *supra* Part IV.B.2.e.

ther about the ability to escape nor the location of captivity, but rather the clash between competing fundamental rights, protects both harassment statutes and a school's disciplinary authority from First Amendment attack.³⁵⁷

The practical implication of this argument is that some cyberattackers will not be punished, but all identity-based aggressors and all cyberbullies will. Free speech principles will protect some cyberattackers if their single attacks do not touch the school's ability to successfully teach its students, but not those who use the sword of Internet aggression to attack their victim's identity and community. But the First Amendment will not protect cyberbullies because of their striking similarities with harassers, a group not afforded significant free speech rights.³⁵⁸ Admittedly, this leaves some bad conduct outside the reach of punishment, as well it should. It forces those schools that want to regulate single-incident cyberattacking to do so without the iron fist of expulsions, suspensions, detentions, and other forms of punishment. This may be the most beneficial result, as studies show that more than any other factor, creating a school climate where bullying is rejected as a social evil and where bullying victims can find support among their peers and teachers and in an inclusive curriculum will reduce the frequency and effects of bullying in schools.³⁵⁹ Increasingly harsh punishments will not. My proposal's narrow focus recognizes that ultimately, punishing all bad students will not solve the problem of harassment and cyberharassment in schools. Discipline should be left to capture the outliers, the egregious cases that defy the reach of a school's "soft power." After all, bullying and cyberbullying are social, not legal, problems. To the extent that legal issues are implicated, the lawyer's role is to provide the boundaries of rule-making, leaving the social scientist, educator, and counselor the latitude to use the most effective tools.

My theory also protects the vast majority of students. Many of us have engaged in immature and mean conduct, but our behavior bears little similarity to attacks on identity or the constant, pervasive harassment that have caused too many victimized students to commit

357. See *supra* Part IV.B.3.

358. See *supra* Part IV.B.2.

359. See Paul D. Flaspohler et al., *Stand by Me: The Effects of Peer and Teacher Support in Mitigating the Impact of Bullying on Quality of Life*, 46 *PSYCHOLOGY IN THE SCHOOLS* 636, 638, 646 (2009), <http://onlinelibrary.wiley.com/doi/10.1002/pits.v46:7/issuetoc> (concluding that those students who experienced high levels of teacher and peer social support indicated fewer problems with bullying and a higher quality of life in school); Julia S. Chibbaro, *School Counselors and the Cyberbully: Interventions and Implications*, 11 *ASCA* 65, 66–67 (Oct. 2007).

suicide. At the same time, by permitting school discipline for bullies and cyberbullies and identity-based aggressors, my theory protects the hardest hit victims from the argument that “boys will be boys” or that “this is all part of growing up.”³⁶⁰

The long-term health of the First Amendment is another beneficiary of my approach. We want to give schools the power to punish the most serious peer abusers and harassers, but we do not want to chill speech or apply the school’s iron fist to the common, everyday give-and-take among adolescents. In other words, my proposal protects the First Amendment from attacks from all angles. By clarifying the Court’s student speech jurisprudence as the lens through which we judge First Amendment defenses to a school’s punishment of a cyberaggressor, my proposal protects student free expression from the Court’s rightward drift when it comes to student speech. To undermine the *original Tinker* vision in the name of disciplining single-incident cyberattacking is to show little respect for students and their speech rights and to elevate an almost Orwellian view of the public school to the point where students have few, if any, rights to call their own.

360. See, e.g., Andy Birkey, *Family Council Claims Success in Stopping Anti-Bullying Efforts in Anoka-Hennepin*, MINN. INDEP. (Dec. 29, 2010, 11:20 AM), <http://minnesotaindependent.com/75517/family-council-claims-success-in-stopping-anti-bullying-efforts-in-anoka-hennepin> (discussing the anti-gay Minnesota’s Family Council’s campaign to prevent anti-bullying programs because it would cause “child corruption”). See also Casey, *supra* note 59 (discussing conservative opposition to addressing the problem of bullying in schools).