TIME TO DEFINE TINKER’S “INTERFERENCE WITH THE RIGHTS OF OTHERS” PRONG

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I.  INTRODUCTION

An ongoing question in American public education is where a school administration’s jurisdiction to censor a student’s expression begins and ends. The courts have construed the First Amendment as applied to public schools in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure, and effective learning environment.\(^1\) The Supreme Court in *Tinker* set forth a two-part test to determine whether a school has the authority to regulate a student’s speech while remaining consistent with the First Amendment.\(^2\) In applying the *Tinker* test, lower courts have consistently favored the “substantial disruption” prong of the analysis, while invariably ignoring its fraternal twin brother – the “interference with the rights of others” portion. In their limited interpretations of what constitutes a “substantial disruption,” these courts have deprived schools officials of an effective weapon to fight the pervasive war against bullying speech. This note presents the case for why lower courts, and eventually the Supreme Court, must assign a definition to *Tinker’s “interference of rights of others” standard* to establish a tool for school officials to regulate unprotected student speech that may not create a “substantial disruption,” but nonetheless inflicts psychological harm.

II.  TINKER’S TWO-PART TEST

The classic Supreme Court case outlining how far school officials may go in regulating

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\(^1\) See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (balancing the need for “scrupulous protection of Constitutional freedoms of the individual” against the need of schools to perform their proper educational function).

\(^2\) *Id.* at 512-513
student speech is *Tinker v. Des Moines*. In *Tinker*, several public school students decided to wear black armbands to school in silent opposition to the Vietnam War. School administrators learned of the planned protest in advance and preemptively banned students from taking part. When the students arrived at school wearing armbands despite the rule, they were given the option to remove the armbands or go home. Several students that were sent home sued the school district, claiming the armbands were a form of constitutionally protected speech.

Writing for the majority, Justice Fortas insisted that students do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate. The Court spoke of the need to foster openness and to protect unpopular viewpoints. Turning to the student’s specific conduct, the Court noted that there was no evidence that the student’s conduct interfered with the schools’ work or of collision with the rights of other students to be secure and to be let alone. The Court determined that so long as the speech did not interfere with the operation of the school or with the rights of other students in the school, an undifferentiated fear or apprehension of disturbance was not enough to overcome the right to freedom of expression. Thus, the Court ruled that the ban on armbands was constitutionally impermissible.

Significantly, the Court identified the two circumstances in which a school could regulate student speech: if a student’s speech 1) materially and substantially interfered with the operation of the school, or 2) interfered with the rights of others. This two-part inquiry has evolved into

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3 *Tinker*, 393 U.S. at 503.
4 *Id.* at 504.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 507
9 *Id.* at 508-09.
10 *Id.*
11 *Id.* at 508.
12 *Id.* at 514.
13 *Id.* at 512-13.
what is now known today as the *Tinker* test.

Since *Tinker*, the Supreme Court has heard three cases regarding the school’s ability to regulate a student’s speech. In each instance, the Supreme Court carved out a category of speech that is now an exception to the *Tinker* test. The three exceptions can be summarized as follows: (1) school-sponsored speech,\(^\text{14}\) (2) vulgar, lewd, obscene and plainly offensive speech which takes place inside the school,\(^\text{15}\) and (3) speech which advocates the illegal use of drugs.\(^\text{16}\) The *Tinker* test is the default analysis if the student speech does not meet one of these three categorical exceptions.

### III. *Tinker’s ‘Interference With The Rights Of Others’ Language is Unclear.*

The vast majority of cases that have analyzed a school’s regulation of a student’s speech have confined the application of the *Tinker* test to the “substantial disruption” prong. In all likelihood, the reasoning is because the precise scope of *Tinker’s* “interference with the rights of others” language is unclear.\(^\text{17}\) The Supreme Court's analysis in Tinker focused primarily on whether a substantial disruption was reasonably foreseeable.\(^\text{18}\) As a result, many lower courts have refrained from applying the “interference with the rights of others” prong from *Tinker*.\(^\text{19}\) Those that have not ignored this prong of the *Tinker* test have been left to interpret not only when student speech infringed upon the rights of other students, but also what those other rights


\(^{15}\) *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

\(^{16}\) *See Morse v. Frederick*, 127 S. Ct. 2618 (2007).


\(^{18}\) *J.C.*, 711 F. Supp. 2d at 1123.

included and whether such an infringement was an independent ground for justifying school regulation.\textsuperscript{20}

For example, in \textit{Nixon v. Northern Local School District},\textsuperscript{21} a district court addressed whether school officials could prohibit a student from wearing a T-shirt that stated in part, “Homosexuality is a sin! Islam is a lie! Abortion is murder!”\textsuperscript{22} The court acknowledged that schools can regulate speech that invades on the rights of others.\textsuperscript{23} However, the court found no authority interpreting what that language actually meant.\textsuperscript{24} Using its own analysis, the district court held that invading on the rights of other students entails invading on other students’ rights to be secure and to be let alone.\textsuperscript{25} Because the student speech at issue was, according to the court, a “silent, passive expression of opinion,”\textsuperscript{26} it did not threaten the security of other students or prevent them from being left alone. Therefore, the court found no collision with the rights of other students and no validity to the school’s regulation of the student’s speech.\textsuperscript{27}

In a particularly influential case, the Ninth Circuit went to great lengths to define its own “interference with the rights of others standard.” In \textit{Harper v. Poway Unified School District},\textsuperscript{28} in response to a “Day of Silence” held by a student group at the high school, a student wore a T-shirt to school with the handwritten statements “Be ashamed, our school embraced what God has condemned . . . Homosexuality is shameful ‘Romans 1:27.’”\textsuperscript{51} After refusing to remove the t-shirt at the request of both a teacher and the principal, the student was not permitted to return to

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\item See \textit{Nixon v. Northern Local Sch. Dist.}, 383 F. Supp. 2d at 974 (finding “invading on other students’ rights” to require physical confrontation); \textit{c.f. Harper}, 445 F.3d 1166, 1177 (9th Cir. 2006) (stating that \textit{Tinker}’s “rights of others prong” includes psychological as well as physical security).
\item See \textit{id.} (finding not one case which relied solely on an “invasion on the rights of others” as justification for regulating student speech).
\item \textit{Id.} at 967.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Harper}, 445 F.3d at 1166.
\item \textit{Harper}, 445 F.3d at 1171.
\end{enumerate}
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classes and spent the day doing homework in the school conference room.\textsuperscript{30} Shortly after, he filed suit arguing that the school violated his right to free speech.\textsuperscript{31}

In rejecting the district court’s application of the substantial disruption analysis, the Ninth Circuit focused on the student’s speech having “infringed on the rights of others” pursuant to \textit{Tinker}.\textsuperscript{32} The court noted that even when a student speaker does not “directly accost individual students with his remarks,” those remarks can still infringe upon the rights of those students.\textsuperscript{33} The court concluded that the student’s wearing of his T-shirt collided with the rights of other students in the most fundamental way, noting that public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.\textsuperscript{34} Such speech could cause psychological damage, which could interfere with that student’s right to learn.\textsuperscript{35} Therefore, the court upheld the school’s regulation of the anti-gay expression.\textsuperscript{36}

It must be noted that on appeal to the Supreme Court, the \textit{Harper} decision was vacated as moot\textsuperscript{37} because the student who brought the suit had since graduated from high school. However, the decision in \textit{Harper} should still carry precedential weight as the condition that rendered the appeal moot did not exist at the time the opinion was handed down.

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  \item \textsuperscript{30} \textit{Id.} at 1173.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{Id.} at 1178.
  \item \textsuperscript{33} \textit{Id.} at 1178-79.
  \item \textsuperscript{34} \textit{Id.} at 1178.
  \item \textsuperscript{35} \textit{Id.}
  \item \textsuperscript{36} See \textit{id.} at 1183.
  \item \textsuperscript{37} \textit{Harper v. Poway Unified Sch. Dist.}, 549 U.S. 1262 (2007) (by the time the case reached the Supreme Court on certiorari, the district court had entered final judgment dismissing the plaintiff’s claims for injunctive relief as moot. The Court vacated the prior judgment denying the preliminary injunction “to clear the path for future relitigation of the issues between the parties and to eliminate a judgment, review of which was prevented by happenstance”).
\end{itemize}
Overall, there is not universal recognition that the “interference with the rights of others” is a separate prong of the Tinker test. In briefly alluding to the “interference with the rights of others” prong of Tinker, one case in particular appeared to conflate that prong with the “substantial disruption” prong and to suggest, perhaps inadvertently, that injurious speech may not be prohibited unless it also causes substantial disruption. That is clearly not the case. The two Tinker prongs are stated separately, and in the alternative. Lower court cases which have solely applied the substantial disruption prong of the Tinker test acknowledge that speech that “interferes with the rights of other students” may be prohibited even if a substantial disruption to school activities is not reasonably foreseeable. Thus, this prong of the Tinker test is still a living and breathing standard merely awaiting concrete interpretation.

IV. SCHOOL’S LIMITS UNDER THE SUBSTANTIAL DISRUPTION PRONG

As noted before, in determining whether it was constitutionally permissible to regulate a student’s speech, the Tinker line of cases have focused on whether or not material disruptions have occurred or whether or not they are reasonably likely to occur. Accordingly, there is an abundance of lower court precedent to help define the limits and allowances under the substantial disruption standard.

We learned from Tinker that schools must have more than an undifferentiated fear or apprehension of disturbance to overcome the student's right to freedom of expression. Tinker also informed us that an actual disruption is not required for school officials to regulate student speech. In other words, the decision to discipline speech must be supported by the existence of

39 See Saxe, 240 F.3d at 217.
40 See Tinker, 393 U.S. at 508.
41 J.C., 711 F. Supp. 2d at 1123, citing Tinker, 393 U.S. at 509.
42 Tinker, 393 U.S. at 508.
specific facts that could reasonably lead school officials to forecast disruption.\footnote{Lavine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).} Courts will most often find an actual substantial disruption to have occurred where a student’s speech effectively disrupts normal proceedings of the classroom\footnote{Bystrom v. Fridley High School, 686 F. Supp. 1387 (D. Minn. 1987) (substantial disruption was established given a classroom disruption after students read non-school sponsored newspaper); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969) (substantial disruption established based on diminished control of students, disruption and interference with classroom study and teaching following distribution of off-campus newspaper);} Courts usually find that the mere fact that students are generally discussing the speech at issue is not sufficient to create a substantial disruption, at least where there is no evidence that classroom activities were substantially disrupted.\footnote{See Tinker, 393 U.S. at 514; J.S. v. Bethlehem, 807 A.2d 847, 868. (Pa. 2002).} It follows that disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under the substantial disruption prong – even where students find the speech to be rude, abusive, and demeaning.\footnote{Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446, 455; Beussink, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).} Thus, discussion over a student’s speech which insults, offends, or belittles another student, without more, it will be insufficient to meet the Tinker standard.\footnote{See J.C., 711 F. Supp. 2d at 1112.}

Turning to cases where courts have permissibly forecasted a disruption, several courts have found that a school can reasonably foresee substantial disruption where a student’s speech is violent or threatening to members of the school\footnote{Lavine, 257 F.3d at 981 (where a student showed a teacher a violent poem he had written that explicitly described a mass shooting of his classmates and his own suicide, the school was reasonable to forecast substantial disruption); Bethlehem, 807 A.2d at 868 (where a student created a website that included violent and threatening comments and images about the school principal and a teacher).} or where there was a history of violence at the school that could be reignited by the speech.\footnote{West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000).}

The limits placed on speech which may be regulated under the substantial disruption standard are simply too narrow to achieve consistency with the intent of the Court in \textit{Tinker}, and unacceptable in light of our nation’s omnipresent bullying epidemic. Therefore, courts should

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43 Lavine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).
44 Bystrom v. Fridley High School, 686 F. Supp. 1387 (D. Minn. 1987) (substantial disruption was established given a classroom disruption after students read non-school sponsored newspaper); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969) (substantial disruption established based on diminished control of students, disruption and interference with classroom study and teaching following distribution of off-campus newspaper);
47 See J.C., 711 F. Supp. 2d at 1112.
48 Lavine, 257 F.3d at 981 (where a student showed a teacher a violent poem he had written that explicitly described a mass shooting of his classmates and his own suicide, the school was reasonable to forecast substantial disruption); Bethlehem, 807 A.2d at 868 (where a student created a website that included violent and threatening comments and images about the school principal and a teacher).
49 West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000).
concentrate on defining an “interference with the rights of other students” standard which can curb certain speech which is no doubt harmful, but has not yet caused, or may not potentially cause, a substantial disruption.

V. **SCHOOL’S OFFICIALS ARE WITHOUT SUFFICIENT AUTHORITY TO HELP COMBAT THE WAR ON STUDENT BULLYING**

Public schools are a place where impressionable young people spend much of their time while growing up.\(^{50}\) During the time students are in school – from first grade through twelfth – they are discovering what and who they are.\(^{51}\) Often, they are insecure.\(^{52}\) Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others.\(^{53}\) There is nothing new about the problem of bullying in schools, yet it seems the passage of time has made bullying worse. An estimated 160,000 children a day stay home from school because they are afraid of being bullied.\(^{54}\) The effects of bullying are extensive. Students may experience negative physical, school, and mental health issues, and are more likely to experience depression, anxiety, increased feelings of sadness, and loneliness.\(^{55}\) Continuous bullying may leads to decreased academic achievement—GPA and standardized test scores—and school participation.\(^{56}\)

What’s more, bullying is evolving, and along with it, the mounting level of harm inflicted onto its victims. Acute particularities and the technological advancements of the modern technological age make it difficult for school authorities and students to keep off-campus speech, in effect, off campus. In today’s Internet accessible world, *Tinker’s* simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by the complex

\(^{50}\) Harper, 445 F.3d at 1177.
\(^{51}\) Id.
\(^{52}\) Id.
\(^{53}\) Harper, 445 F.3d at 1177
\(^{54}\) Bullyingstatistics.com, (last visited 2012) http://www.bullyingstatistics.org/content/bullying-and-suicide.html
\(^{56}\) Id.
multi-media website, accessible to fellow students, teachers, and the world. The Internet and other digital modes of communication have lead to the phenomenon of “cyberbullying,” generally defined as “any child, preteen, or teen that is tormented, threatened, harassed, humiliated, embarrassed, or otherwise targeted by another child, preteen, or teen using the Internet, interactive and digital technologies or mobile phones.”

Whereas students before could leave the effects of traditional bullying at school, in the Internet and digital age, students carry the hurtful messages of intimidation and persecution from school to home and vice-versa. The inability to escape such torment has lead to a growing number of student suicides, stories of which are regularly seen in the headlines of major American newspapers today. The problem with the current application of the Tinker test is that there is no real standard for school officials to follow when instances of bullying and cybergbullying arise that do not cause actual or foreseeable disruptions at school. Consequently, districts must determine what, if any, action can be taken.

VI. THE “INTERFERENCE WITH THE RIGHTS OF OTHERS” PRONG IS A READILY AVAILABLE METHOD FOR SCHOOLS TO COMBAT HARMFUL AND BULLYING SPEECH.

Particularly for incidents of bullying speech, the defining of the “interference of the rights of others” standard can assist school administrators in showing that prohibition of the bully’s speech is constitutional. The “right to be let alone” has been recognized by the Supreme Court

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57 Bethlehem, 807 A.2d at 864.
58 Sarah O. Cronan, Grounding Cyberspeech: Public Schools’ Authority to Discipline Students for Internet Activity, 97 KY. L. J. 149, 149 (2008).
60 Karly Zande, When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying, 13 BARRY L. REV. 103, 117 (2009).
as the most comprehensive of rights and the right most valued by civilized men.\textsuperscript{61} There is little doubt that the effects of cyberbullying invade the rights of its victims and their performance in the classroom.\textsuperscript{62} Cyberbullying may very well be the perfect vehicle for widespread acceptance of the “interference with the rights of others” prong of Tinker.\textsuperscript{63} The recognizable privacy interest in avoiding unwanted communication is perhaps most important when persons are powerless to avoid it.\textsuperscript{64} Although name-calling, directed insults, and offensive speech is ordinarily protected outside the school context, students cannot hide behind the First Amendment to protect their right to abuse and intimidate other students at school.\textsuperscript{65}

Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. Because minors are subject to mandatory attendance requirements, the Supreme Court has emphasized the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children.\textsuperscript{66} Administrators in our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development.\textsuperscript{67}

The Ninth Circuit’s decision in Harper provides courts with the example of support they must be willing to give to educators in holding that students have a right to be “secure from both

\textsuperscript{62} Kevin Turbert, Note, Faceless Bullies: Legislative and Judicial Responses to Cyberbullying, 33 SETON HALL LEGIS. J. 651 (2009).
\textsuperscript{63} Zande, supra, at 117.
\textsuperscript{64} Hill, 530 U.S. at 716 (quoting Cohen v. California, 403 U.S. 15, 21-22 (1971).
\textsuperscript{65} Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F. 3d 243, 264 (3rd Cir. 2002).
\textsuperscript{66} Fraser, 478 U.S. at 684.
\textsuperscript{67} See Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996) (stating that elementary schools may restrict speech “that could crush a child's sense of self-worth”); Saxe, 240 F.3d at 217 (observing that speech that “substantially interferes with a student's educational performance” may satisfy the Tinker standard).
physical and psychological attacks” which “interfere with their opportunity to learn.” 68 However, unlike Harper, courts should not haphazardly limit the standard to assaults directed at students’ minority status involving race, religion, and sexual orientation. Students can suffer psychological harm by being attacked on the basis of their gender, weight, social class, and overall appearance. Thus, where bullying or harassing speech takes place on school grounds, or cyberbullying leaks onto campus, when it results in a psychological attack that affects the victim's very self-esteem, security, and ability to perform in the classroom, courts should allow schools to regulate such speech while remaining consistent with the First Amendment.

VII. SCHOOL OFFICIALS ARE STILL PROHIBITED FROM VIEWPOINT DISCRIMINATION

A definite interpretation of the “interference with the rights of others” standard merely narrows the extensive level of First Amendment protection that is currently afforded to students while at school. It still remains that students will maintain the freedom to advocate unpopular and controversial views in schools and classrooms. 69 It is essential that students have the opportunity to engage in full and open political expression, both in and out of the school environment. Engaging in controversial political or disagreeable speech is an important right of all Americans and learning the value of such freedoms is an essential part of a public school education. However, there is no constitutional right to be a bully, and where courts find that student speech has resulted in a psychological attack that hinders the student’s ability to learn, such speech must be found to have interfered with the child’s right to feel secure at school.

68 Harper, 445 F.3d at 1177-78.
69 Fraser, 478 U.S. at 681.
VIII. CONCLUSION

The Supreme Court just recently denied certiorari for a case where school officials regulated a student’s cyberbullying speech directed at other students, and two additional cases where students’ off-campus Internet speech were directed at administrators. Undoubtedly, a decision by the Supreme Court on the issue of student speech, created off-campus, will need to be a highly calculated one. The ramifications in creating a standard will have to be applicable to many fact-specific and distinguishable student speech cases. While the Supreme Court may be awaiting further guidance from the federal circuit courts before finally granting certiorari, public policy and the war on student-bullying demands that the Court take the opportunity to assign a definition to the “inference of rights of other” prong of the *Tinker* test.

As it stands, the substantial disruption prong does little more than loosen the ties behind the backs of school officials. Establishing an unambiguous standard for speech which “interferes with the rights of other students” will provide school administrators with a less inhibited ability to report, regulate, and censor harmful student speech without the fear of violating a student’s First Amendment Rights. As *Tinker* clearly states, students have the right to “be secure and to be let alone” at schools. Being secure involves not only freedom from physical assaults, but from psychological attacks that cause young people to question their self-worth and their rightful place in society. When harmful speech scales the four walls of the school, school officials must be able to quickly and efficiently interrupt its dissemination across campus and mitigate the prolonged psychological effects it could have on our youth.

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70 See *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011).
72 *Tinker*, 393 U.S. at 508.
73 *Harper*, 445 F. 3d at 1178.