

Triggering *Tinker*: Student Speech in the Age of Cyberharassment

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This essay challenges the common assumption that public schools have limited authority to regulate cyberbullying that originates and takes place off campus. That argument presumes a level of myopia, clarity, and literalism in the law that simply does not exist. First, even assuming it existed, a geographic requirement is an outdated creature of a pre-Internet age. Cyberbullying poses unique challenges to young people, educators, and schools not contemplated when the Court decided its student speech cases. Second, I argue that a campus presence requirement for regulating any kind of off-campus cyberspeech never really existed, so any suggestion to the contrary offers false clarity based entirely on dicta or assumptions. And third, to the extent that the Court referred to the geographic boundaries of a school in its quartet of student speech cases, the justices' words cannot be taken too literally. Like references to the four walls of the office in public employee speech cases, a campus presence

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requirement is just a proxy for or a paradigmatic example of applying a broader, more flexible standard focused on relationships: between the victim and her harasser and between them and the school.

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INTRODUCTION

We are often told that public schools have limited authority to regulate student-to-student cyberharassment, commonly known as cyberbullying, when it originates and takes place off campus.¹ The assumption is prevalent in cyberbullying policies² and in legal

¹ See, e.g., Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, NEW YORK TIMES (June 27, 2010), <http://www.nytimes.com/2010/06/28/style/28bully.html> (“fewer than half [of the states that had enacted anti-bullying laws] offer guidance about whether schools may intervene in bullying involving ‘electronic communication,’ which almost always occurs outside of school . . .”).

² See, e.g., SCHOOL DISTRICT OF THE CITY OF DETROIT, MICHIGAN, *Order Adopting the Detroit Public Schools Anti-Bullying Policy*, 2012-EMRR-22 (June 6, 2012), available at <http://detroitk12.org/content/wp-content/uploads/2012/06/Order-2012-EMRR-22.pdf> (“This policy also pertains to usage of electronic technology and electronic communication that is used for bullying, or cyber-bullying. Electronic technology and electronic communication that is used for bullying or cyber-bullying which occurs outside of school, school property, school-sponsored functions and activities, and school-related transportation is not within the scope of the individual school or school District’s responsibility, provided, however, if the telecommunications device or service is owned by or under the control of District, the policy applies.”).

guidance from advocacy organizations.³ This idea was also floated by at least one former Supreme Court justice.⁴ Beyond the “schoolhouse gate,”⁵ the argument goes, students enjoy all the free speech rights entitled to ordinary citizens. And short of making a true threat⁶ or engaging in any of the few other activities unprotected by the First Amendment,⁷ students are generally safe from their public schools reaching their regulatory arms into the web.

That argument presumes a level of myopia, clarity, and literalism in the law that simply does not exist. First, even assuming it

³ The ACLU of Washington State, for example, states “[g]enerally, your school cannot censor or discipline you for posting content or sending a message that is: sent during non-school hours; and sent using an off-campus Internet connection; and sent using a non-school computer; and sent using a non-school e-mail address.” *Student Rights and Responsibilities in the Digital Age: A Guide for Public School Students in Washington State*, AM. CIVIL LIBERTIES UNION OF WASH. STATE (Jan. 2012), <https://aclu-wa.org/student-rights-and-responsibilities-digital-age-guide-public-school-students-washington-state#ID>.

⁴ During the question and answer session after former Supreme Court Justice John Paul Stevens delivered his keynote address at the University of Miami School of Law’s Symposium, “The Constitution on Campus,” the Author asked the Justice if the Court’s student speech jurisprudence would permit public schools to regulate off-campus cyberbullying that targeted students. Justice Stevens suggested that he would be inclined to find that schools had no authority if the speech took place off campus. Post-Speech Question and Answer Session with Justice John Paul Stevens (Ret.), United States Supreme Court, in Coral Gables, Fla. (Feb. 5, 2016).

⁵ *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. This has been the unmistakable holding of this Court for almost 50 years.”).

⁶ *See Watts v. United States*, 394 U.S. 705, 707–08 (1969) (holding that a “true threat” is not protected by the First Amendment); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (stating that schools have broader authority over student speech than allowed by the “true threats” standard in *Watts*). *See also Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (“In light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students.”).

⁷ Among other activities, the First Amendment does not protect obscenity, “fighting words,” child pornography, incitement, “true threats,” solicitation to commit criminal acts, or defamation/libel/slander. *See Roth v. United States*, 354 U.S. 476, 481 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *New York v. Ferber*, 458 U.S. 747, 764 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Dennis v. United States*, 341 U.S. 494, 516–17 (1951); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–50 n.10 (1961).

existed, a geographic requirement is an outdated creature of a pre-Internet age. Cyberbullying poses unique challenges to young people, educators, and schools not contemplated when the Supreme Court decided its student speech cases.⁸ Second, I argue that a campus presence requirement for regulating any kind of off-campus cyber-speech never existed. And third, to the extent that the Supreme Court referred to the four walls of the school in its quartet of student speech cases,⁹ the justices' words cannot be taken too literally. Like similar references in public employee speech cases,¹⁰ any mention of a school's campus are just paradigmatic examples for applying a broader, more flexible standard focused on relationships among the victim, the harasser, and the school. This essay argues that the *Tinker* standard¹¹ for evaluating student speech is triggered not by the presence of that speech on campus, but by the speaker's actions as student *qua* student and his connections to the school environment.

To be clear, this thesis focuses on *Tinker*'s trigger, or when a court moves student speech from standard First Amendment doctrine to the more limited freedom of *Tinker* and its progeny.¹² Applying that standard to specific speech is a question for another day. What's more, eradicating cyberbullying will take a comprehensive approach from policymakers, educators, psychologists, parents, and

⁸ The four student speech cases are *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); & *Morse v. Frederick*, 551 U.S. 393 (2007). Between 2008 and 2012, petitions for certiorari on five cyber-speech cases were denied by the Supreme Court. Judge Thomas A. Jacobs (Ret.), *Will the Supreme Court Consider Cyber-Bullying?*, THOMSON REUTERS LEGAL SOL. BLOG (May 7, 2014), <http://blog.legalsolutions.thomson-reuters.com/government/will-supreme-court-consider-cyberbullying/>.

⁹ See generally *Tinker*, 393 U.S. at 503; *Fraser*, 478 U.S. at 675; *Hazelwood*, 484 U.S. at 260; *Morse*, 551 U.S. at 393.

¹⁰ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 420–21 (2006).

¹¹ See generally *Tinker*, 393 U.S. at 513.

¹² The *Tinker* standard is triggered when a student's speech or other conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513. Additionally, "the *Tinker* line of cases focus on whether or not material disruptions have occurred or whether or not they are reasonably likely to occur." *Nixon v. N. Local Sch. Dist. Bd. Of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

lawyers. Punishments alone will not achieve much.¹³ But schools have a compelling interest in having the flexibility to punish cyberbullies for at least three reasons. First, cyberbullying can devastate its victims, most of whom are already marginalized in society.¹⁴ If unaddressed, cyberbullying will stunt its victims' educational and professional achievement.¹⁵ Second, as a gendered and sexualized phenomenon,¹⁶ cyberharassment is anathematic to the core democratic principles of equality. Finally, letting cyberbullying go unpunished out of a misguided desire to protect free speech actually silences students,¹⁷ thus offending the very norms inaction is supposed to protect.

This essay proceeds in four parts. Part I briefly defines cyberbullying and distinguishes it from other forms of cyberspeech. Part II lays out the argument for a geographic campus presence requirement and shows how lower courts have applied it to the detriment of victims. Part III challenges this assumption on three grounds. I use the text of the Supreme Court's four student speech cases—

¹³ See Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 697 (2012) (discussing how overbroad definitions in state bullying criminalization statutes leads to pernicious consequences); see also Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMPLE L. REV. 385, 387 (2012) [hereinafter Waldman, *Tormented*] (arguing that pre-emptive, affirmative steps that improve school climate and provide support to marginalized students are likely to be more effective at stopping bullying than ever more draconian punishments).

¹⁴ *Recognizing a Cyberbully*, NAT'L SCI. FOUND. (Nov. 15, 2011), https://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=122271 ("Anyone who is in a marginalized group is more likely to be cyberbullied." (quoting Faye Mishna, University of Toronto)).

¹⁵ Stuart Wolpert, *Victims of Bullying Suffer Academically as Well*, UCLA Psychologists Report, UCLA NEWSROOM (Aug. 19, 2010), <http://newsroom.ucla.edu/releases/victims-of-bullying-suffer-academically-168220>.

¹⁶ See DANIELLE KEATS CITRON, HATES CRIMES IN CYBERSPACE 13 (2014) ("Cyber harassment disproportionately impacts women.") [hereinafter CITRON, HATE CRIMES IN CYBERSPACE]; see also Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657, 682 (2012) ("[T]argeted sexual harassment of women in cyberspace may not only produce all of the effects that 'real-life' harassment does, but also has the potential to be even more pernicious and long-lasting than 'real-life' harassment.").

¹⁷ Stephanie Pappas, *Why Bully Victims Suffer in Silence*, LIVE SCIENCE (Nov. 17, 2010, 7:37 AM), <http://www.livescience.com/8994-bully-victims-suffer-silence.html>.

Tinker v. Des Moines Independent School District,¹⁸ *Bethel School District No. 403 v. Fraser*,¹⁹ *Hazelwood School District v. Kuhlmeier*,²⁰ and *Morse v. Frederick*²¹—to demonstrate that the requirement stands on shaky dicta. I then argue that the Court, as it does in federal employee speech cases, uses geographic boundaries as proxies for a relational nexus between the school and its students. Finally, Part IV argues that, given the authority to regulate cyberbullying, schools have a compelling interest to do so and would, in fact, enhance and protect free speech.

I. DEFINING “CYBERBULLYING”

Definitions are important. There are a host of definitions of “cyberharassment” or “cyberbullying” milling around.²² Imprecise and inconsistent definitions frustrate our ability to understand, talk about, and solve the problem.²³ Danielle Keats Citron, the leading cyberhate and harassment scholar, defines cyberharassment generally as repeated online expression that intentionally targets a particular person and causes the targeted individual substantial emotional distress and/or the fear of bodily harm.²⁴ There are five

¹⁸ 393 U.S. 503 (1969).

¹⁹ 478 U.S. 675 (1986).

²⁰ 484 U.S. 260 (1988).

²¹ 551 U.S. 393 (2007).

²² The National Conference of State Legislatures, for example, defines cyberbullying as “the willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others.” *Cyberbullying*, NAT’L CONF. OF ST. LEGISLATURES (Dec. 14, 2010), <http://www.ncsl.org/research/education/cyberbullying.aspx>. The Centers for Disease Control defines bullying as “any unwanted aggressive behavior(s) by another youth or group of youths, who are not siblings or current dating partners, involving an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated.” *Featured Topic: Bullying Research*, CTR.’S FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/>.

²³ See Amanda Hess, *On the Internet, Men Are Called Names. Women Are Stalked and Sexually Harassed*, SLATE (Oct. 22, 2014, 10:00 AM), http://www.slate.com/blogs/xx_factor/2014/10/22/pew_online_harassment_study_men_are_called_names_women_are_stalked_and_sexually.html.

²⁴ CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 16, at 3; see also Danielle Citron, *Defining Online Harassment*, FORBES (Oct. 23, 2014, 11:07 AM), <http://www.forbes.com/sites/daniellecitron/2014/10/23/defining-online-harassment/#1d8b0f944360>.

core elements to that definition: repetition, use of digital technology, intent, targeting, and substantiality of harm.²⁵

Cyberbullying is a subcategory of cyberharassment that includes all five of those elements but is focused squarely on youth-to-youth behavior.²⁶ It can be understood as repeated online expression that is intended to cause substantial harm by one youth or group of youths targeting another with an observed or perceived power imbalance.²⁷ The asymmetry of power, which could be physical (i.e., an athlete attacking a non-athlete), psychological (i.e., a popular student attacking someone with low self-esteem), or based on identity (i.e., a member of the majority attacking a member of a traditionally marginalized and discriminated minority), draws the line between schoolyard teasing and bullying.²⁸ It should come as no surprise, then, that young members of the LGBTQ community are uniquely susceptible to bullying and its tragic consequences.²⁹ They are bullied because they deviate from the norm³⁰ and “because anti-gay

²⁵ Citron, *Defining Online Harassment*, *supra* note 24.

²⁶ JONATHAN CLOUGH, PRINCIPLES OF CYBERCRIME 427 (2d ed. 2015) (“As a sub-category of online harassment, cyberbullying is a multifaceted and challenging problem to address.”); *see also* Jason Koebler, *Cyber Bullying Growing More Malicious, Experts Say*, U.S. NEWS & WORLD REPORT (June 3, 2011, 8:00 AM), <http://www.usnews.com/education/blogs/high-school-notes/2011/06/03/cyber-bullying-growing-more-malicious-experts-say> (cyberlaw expert Parry Aftab defines cyberbullying as between minors).

²⁷ The definition brings together several similar definitions into one clear statement. *See, e.g.*, DAN OLWEUS, AGGRESSION IN THE SCHOOLS: BULLIES AND WHIPPING BOYS 3–6 (1978); Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001).

²⁸ *See* Waldman, *Tormented*, *supra* note 13, at 389–91 (quoting Nansel, *supra* note 27, at 2094); *see* KEN RIGBY, BULLYING IN SCHOOLS: AND WHAT TO DO ABOUT IT 19, 26 (Elisa Webb ed., rev. ed. 2007) (“[A]n imbalance of power is an essential element in any sensible definition of bullying Wherever there is a power imbalance, whatever its source, an individual can be reduced in status, and sometimes humiliated by the insensitive bully.”); *see also* Marilyn Langevin, *Teasing and Bullying: Helping children deal with teasing and bullying: for parents, teachers, and other adults*, INST. FOR STUTTERING TREATMENT & RES., http://www.isastutter.org/CDRomProject/teasing/tease_bully.html (last visited June 9, 2016) (stating that a key element of bullying is a power imbalance).

²⁹ Waldman, *Tormented*, *supra* note 13, at 391.

³⁰ *See, e.g.*, Anthony R. D’Augelli et al., *Childhood Gender Atypicality, Victimization, and PTSD Among Lesbian, Gay, and Bisexual Youth*, 21 J.

bullying is either tacitly or explicitly condoned by anti-gay bigotry in society at large.”³¹

This definition of cyberbullying captures the worst online aggressive behavior while excluding the otherwise mean, hateful, and distasteful speech that free speech norms tend to tolerate.³² Cyberbullying is, at bottom, cyberharassment involving youth.³³ And it is an epidemic affecting our schools.³⁴

II. THE CAMPUS PRESENCE ARGUMENT

One barrier to taking cyberbullying more seriously is an interpretation of the Supreme Court’s student speech cases that sees the geographic boundaries of the school as the limit of the school’s authority.³⁵ The argument has an air of credibility: it relies on intuition and the plain language of the Court’s opinions. It also has been

INTERPERSONAL VIOLENCE 1462, 1477–80 (2006) (“The impact of these early experiences of difference, labeling, criticism by others, and victimization can be seen in the current mental health findings, especially trauma symptoms.”).

³¹ Waldman, *Tormented*, *supra* note 13, at 391.

³² See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks”); see also Richard Wike, *Americans More Tolerant of Offensive Speech than Others in the World*, PEW RESEARCH CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/americans-more-tolerant-of-offensive-speech-than-others-in-the-world/> (“Americans are much more tolerant of *offensive* speech than people in other nations. For instance, 77% in the U.S. support the right of others to make statements that are offensive to their own religious beliefs . . . 67% think people should be allowed to make public statements that are offensive to minority groups . . . [and] at least half endorse the right to sexually explicit speech. Americans don’t necessarily like offensive speech more than others, but they are much less inclined to outlaw it.”).

³³ See *supra* note 26.

³⁴ See, e.g., Joseph G. Kosciw et al., *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools*, GAY, LESBIAN, & STRAIGHT EDUC. NETWORK 28 (2010) (In a survey of students in schools in all fifty states and the District of Columbia, more than half of gay, lesbian, and bisexual students reported being harassed through electronic mediums, and almost a fifth had experienced it frequently).

³⁵ See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

hammered home by lower courts.³⁶ In this section, I briefly summarize the argument for a campus presence requirement and show how it has been adopted and spread throughout the judiciary.

The conventional wisdom states that the Court introduced the on-campus/off-campus distinction in *Tinker v. Des Moines*.³⁷ The decision's most famous line—“[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”³⁸—refers to a geographic boundary. Indeed, the entirety of *Tinker*'s world—the black arm band protest itself and Justice Fortas' discussion of student rights versus school authority—appears, on first glance, to exist only inside school grounds.³⁹ The evidence of this is manifold. The students wore their black armbands to school on two different days.⁴⁰ To argue that students retain some speech rights at school, Justice Fortas turned to *West Virginia State Board of Education v. Barnette*, where the Court upheld a student's right to refuse to salute the flag while in school.⁴¹ These student rights were balanced against the authority of states and school officials to “prescribe and control conduct in the schools.”⁴² Furthermore, when Justice Fortas referred to the disruptive potential of student speech, he limited its universe to speech that took place “in class, in the lunchroom, or on the campus.”⁴³ The prospect of having to consider a school's authority over off-campus speech never occurred to him.

A similar theme repeats in Justice White's opinion in *Hazelwood School District v. Kuhlmeier*.⁴⁴ Schools could regulate some student

³⁶ See *infra* notes 48–52 (explaining the holdings of *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); *Boucher v. Sch. Bd.*, 134 F.3d 821 (7th Cir. 1998); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); & *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000)).

³⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³⁸ *Id.* at 506 (emphasis added).

³⁹ See generally *id.* at 512–14.

⁴⁰ *Id.* at 504.

⁴¹ *Tinker*, 393 U.S. at 507; see generally *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁴² *Tinker*, 393 U.S. at 507 (emphasis added).

⁴³ *Id.* at 508; see also *id.* at 512–13 (“When [the student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . .”).

⁴⁴ See generally *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

speech, the Court stated, “even though the government could not censor similar speech *outside the school*.”⁴⁵ Nor was the student newspaper at issue in *Hazelwood* a public forum like a street or a park; rather, it was part of the “school facilities” that served the mission of educating students.⁴⁶

Accordingly, throughout the Supreme Court’s student speech jurisprudence, the speech always took place inside school grounds or closely connected to school activities.⁴⁷ This created the impression that the *Tinker* standard can only be triggered by a campus presence requirement.

Lower federal courts agree. Indeed, almost every lower court that has had occasion to take up the issue has required off-campus speech to have some connection to the geographic boundaries of the school before the *Tinker* standard can be applied. Some courts require that the speaker bring the speech through the gates himself⁴⁸ or at least know that it would be distributed within the boundaries of the school.⁴⁹ Others require reasonable foreseeability that the speech would breach campus walls.⁵⁰ Still, others require that such speech at least be seen or heard on campus.⁵¹ But there is consensus

⁴⁵ *Id.* at 266 (emphasis added).

⁴⁶ *Id.* at 267.

⁴⁷ *See, e.g., Morse v. Frederick*, 551 U.S. 393 (2007) (where students showed a banner stating “BONG HiTS 4 JESUS” at a school-sponsored, but off-campus, viewing of the Olympic torch relay).

⁴⁸ *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (upholding the suspension of a student who wrote a poem describing a school shooting because the student brought the poem inside the boundaries of campus, thus triggering *Tinker*).

⁴⁹ *See, e.g., Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 822 (7th Cir. 1998) (where *Tinker* was triggered because the student speech, an article published off-campus explaining “how to hack the school[’s] gay ass computers,” was distributed on school grounds in the bathrooms, lockers, and in the cafeteria).

⁵⁰ *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (applying *Tinker* to off-campus speech calling school officials “douchebags” only because it was “reasonably foreseeable” that the speech would make its way on to campus).

⁵¹ *See, e.g., Beussink 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 only when another student accessed the website at school and showed it to a teacher, bringing it within the geographic boundaries of the school).

under this divergence: in all cases, whether they uphold a punishment or reject it,⁵² lower federal courts have interpreted the language of the Supreme Court's rulings literally and required that off-campus speech come on to campus before it could be subject to a school's regulatory authority.⁵³ As the Second Circuit stated, "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."⁵⁴ Given the universality of the campus presence doctrine in the courts, it is no wonder it has bled so deeply into our collective conscience.

III. A RELATIONAL NEXUS

Even if we assume that the Supreme Court did intend, in its quartet of student speech cases,⁵⁵ to create a campus presence requirement, such a trigger for *Tinker* is woefully outdated in the digital age. More importantly, a close reading of the Court's decisions shows that a strict, geographic campus presence trigger never existed. Rather, the Court makes clear that its references to gates,⁵⁶ boundaries,⁵⁷ and school activities⁵⁸ are proxies for a more flexible relational standard for regulating student speech. This standard, when applied to cyberbullying cases, would give schools the flexibility to restrict cyberbullying that affects the school environment while protecting students' dissident speech on matters of truly public concern.

⁵² See, e.g., *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (refusing to apply *Tinker* because the speech at issue, a website that included mock obituaries of school personnel and allowed visitors to vote on who should "die," was created entirely off-campus).

⁵³ See generally *supra* notes 48–52.

⁵⁴ *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044–45 (2d Cir. 1979).

⁵⁵ See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

⁵⁶ See *Tinker*, 393 U.S. at 506.

⁵⁷ See *Fraser*, 478 U.S. at 681.

⁵⁸ See *Hazelwood*, 484 U.S. at 271.

A. *An Outdated Trigger*

Requiring student speech to take place on campus before school officials could censor, regulate, or punish it may have made sense in 1969 when *Tinker* was decided. It is hard to imagine how off-campus speech in a pre-Internet age could substantially disrupt the school. Things are different now.

Internet and digital technologies are everywhere. We use them to socialize⁵⁹ and date,⁶⁰ buy coffee,⁶¹ and watch movies.⁶² The Internet is in our homes and in our clothes;⁶³ it links up our home appliances and even our stuffed animals.⁶⁴ Though we may be speeding ahead without thinking things through,⁶⁵ the fact remains

⁵⁹ According to its most recent statistics, Facebook has over 1.79 billion monthly active users, which is an approximately 8.5% year-over-year increase. *Stats*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/company-info/> (last visited Jan. 27, 2017).

⁶⁰ Pew Research Center has found that approximately 15% of American adults have used online dating websites or mobile dating apps, up from 11% who reported doing so in 2013. The share of 18–24 year olds who report using online dating apps tripled between 2013 and 2015. The number of 55–64 year olds using similar platforms doubled over the same period. AARON SMITH, PEW RESEARCH CTR., 15% OF AMERICAN ADULTS HAVE USED ONLINE DATING SITES OR MOBILE DATING APPS 2–3 (2016), available at http://www.pewinternet.org/files/2016/02/PI_2016.02.11_Online-Dating_FINAL.pdf.

⁶¹ See Molly McHugh, *How to Buy Starbucks Coffee with Your iPhone*, DIGITAL TRENDS (Jan. 19, 2012, 3:07 PM), <http://www.digitaltrends.com/mobile/how-to-buy-starbucks-coffee-with-your-iphone/>.

⁶² See, e.g., Ben Popper, *Netflix Passes 81 Million Subscribers, but Predicts Slower Growth Ahead*, THE VERGE (Apr. 18, 2016, 4:28 PM), <http://www.theverge.com/2016/4/18/11454362/netflix-q1-2016-earnings-81-million-subscribers>.

⁶³ See Michael Sawh, *Sweat Detecting Wearable can Tell You when You're Tired or Dehydrated*, WAREABLE (Jan. 29, 2016), <http://www.wearable.com/wearable-tech/sweat-detecting-wearable-can-identify-health-issues-before-they-happen-2239>.

⁶⁴ See Leo Kelion, *Google Patents 'Creepy' Internet Toys to Run the Home*, BBC (May 22, 2015), <http://www.bbc.com/news/technology-32843518>.

⁶⁵ See Woodrow Hartzog & Evan Selinger, *The Internet of Heirlooms and Disposable Things*, 17 N.C. J.L. & TECH. 581, 583 (2016) (“The problem is that we are not taking the decision to wire up an artifact to the Internet seriously enough. A chip-centric mentality has taken over—one that is guided by an overly simplistic principle: ‘Internet connectivity makes good objects great.’ Guided by this upgrade mentality, we seem to be in a rush to connect everything. Meanwhile

that Internet and digital technologies are pervasive, particularly among young people. Cell phone owners between the ages of 18 and 24 send more than 109 text messages per day, on average.⁶⁶ And in 2015, 90% of young adults surveyed reported using social media platforms.⁶⁷ Both text messages and social media are home to rampant cyberbullying.⁶⁸

In part because the Internet has come to pervade our daily lives, it has taken on an increasingly salient role in education. Teachers are integrating mobile technology, Internet tools, and social media into classrooms.⁶⁹ There are countless websites dedicated to helping them.⁷⁰ And public-private partnerships are working to provide computers and Internet access to public schools.⁷¹ All of these programs encourage both the integration of the Internet into the classroom and its use as an educational tool at home. Therefore, the “school environment,” to use Justice Fortas’ term in *Tinker*,⁷² is no longer defined by the four walls of the classroom. It now extends as

seemingly none of us, including policy makers and regulators, have fully appreciated the significance of companies transforming from artifact and device ‘makers’ to ‘service providers.’”).

⁶⁶ See AARON SMITH, PEW RESEARCH CTR., AMERICANS AND TEXT MESSAGING 2 (2011), <http://www.pewinternet.org/files/old-media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf>.

⁶⁷ See ANDREW PERRIN, PEW RESEARCH CTR., SOCIAL MEDIA USAGE: 2005–2015 4 (2015), http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.

⁶⁸ AMANDA LENHART ET AL., PEW RESEARCH CTR., TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES 38 (2011), http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf.

⁶⁹ See, e.g., Courtney Blackwell, Teacher Practices with Mobile Technology Integrating Tablet Computers into the Early Childhood Classroom, 7 J. EDUC. RES. 1, 3 (2015); Paige Abe & Nickolas A. Jordan, Integrating Social Media Into the Classroom Curriculum, 18 ABOUT CAMPUS 16, 16 (2013).

⁷⁰ See, e.g., *Teach with Technology: Everything You Need*, SCHOLASTIC (June 11, 2016), <http://www.scholastic.com/teachers/unit/teach-technology-everything-you-need>.

⁷¹ See Press Release, Office of the Press Secretary, The White House, White House to Launch “Digital Promise” Initiative (Sept. 16, 2011), available at <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).

⁷² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506. (1969).

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. Mary Anne Franks has argued that since our pervasive online presence allows “sexual harassment in one setting [to] produce harms in another,”⁷³ sexual harassment law that traditionally protected victimized women in “single, protected settings” like the workplace under Title VII, the school under Title IX, and, to some extent, at home and in prison, inadequately captures what modern sex harassment looks like.⁷⁴ Franks argues persuasively for a multiple-setting conception of sexual harassment because cyberharassment that takes place offsite can have just as deleterious an effect on a victim’s ability to function in the workplace as traditional forms of workplace harassment.⁷⁵ This is true of any kind of cyberharassment. Whether a student 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 engage in racist, homophobic, and xenophobic harassment, these attacks can cause students to fear further humiliation, lose interest in attending school, and close themselves off from a world they find increasingly hostile.⁷⁶ Students become unable to learn and unable to participate in extracurricular activities or school society.⁷⁷ Their educational rights are denied when there is no remedy for cyberbullying that negatively affects their day-to-day lives in school, regardless of where their victimization occurred.

B. *What the Supreme Court Didn’t Say*

A physical on-campus presence requirement is, therefore, antiquated and dangerous in a highly connected and networked world.

⁷³ Franks, *supra* note 16, at 657.

⁷⁴ *Id.* at 659.

⁷⁵ *Id.* (arguing that “sexual harassment in cyberspace produces harm that is equal to or more severe than sexual harassment that occurs in traditional protected spaces . . .”).

⁷⁶ See Wolpert, *supra* note 15 (“Students who get bullied run the risk of not coming to school, not liking school, [and] perceiving school more negatively . . . Children who are embarrassed or humiliated about being bullied in school are unlikely to discuss it with their parents or teachers . . . [and] are more likely to suffer in silence and dislike school.”).

⁷⁷ *See id.*

However, it is not entirely clear a campus presence trigger ever existed. The Supreme Court has never held that student speech must be within the geographic boundaries of the campus to be subject to school punishment.⁷⁸ There was never any need to. Three of its student speech cases involved speech that was on campus;⁷⁹ the fourth was across the street.⁸⁰ Therefore, although its jurisprudence is littered with references to the school campus, it would be wrong to read into them a geographic trigger for the *Tinker* test.

In *Tinker*, the Court held that a school may regulate a student's expressive conduct if it causes or is reasonably likely to cause a "material[] and substantial[]" disruption to school activities.⁸¹ The student antiwar black arm band protest did not meet that threshold because it was "silent," "passive," and caused no disruption.⁸² Nothing in that standard requires that the student speech at issue be located within the geographic boundaries of campus.⁸³ That issue was left open by *Tinker*: the protest took place on campus, so there was no geographical question to resolve.

⁷⁸ See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

⁷⁹ See generally *Tinker*, 393 U.S. at 503; *Fraser*, 478 U.S. at 675; *Hazelwood*, 484 U.S. at 260.

⁸⁰ See *Morse*, 551 U.S. at 393.

⁸¹ *Tinker*, 393 U.S. at 513. The Court really listed two triggers: material disruption to classwork and substantial disorder are usually combined into one. The second trigger is when student speech "inva[des] of the rights of others." *Id.* This essay excludes that prong from its analysis because it has rarely been applied by lower courts. See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) ("[T]he Court is not aware of a single decision that has focused on [the 'rights of others' prong] in *Tinker* as the sole basis for upholding a school's regulation of student speech . . . the *Tinker* line of cases focus on whether or not material disruptions have occurred or whether or not they are reasonably likely to occur."). That changed when the Ninth Circuit decided *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006). In that case, the court held that a school could order removal of a student's T-shirt that read, among other things, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" because the message impinged on the rights of minority students to be free of attacks to "core identifying characteristic[s]" of a marginalized group. *Id.* at 1171, 1182. Setting aside *Harper*, however, the "rights of others" prong is rarely invoked.

⁸² *Tinker*, 393 U.S. at 508.

⁸³ See *id.*

The Court's trilogy of student speech cases after *Tinker* retained this pattern: a campus presence question was never an issue to be decided.⁸⁴ They also went further, using language that made geography seem irrelevant.⁸⁵ In *Fraser*, the Court carved out an exception to *Tinker*'s substantial disruption standard for lewd and offensive speech.⁸⁶ That is, a graphic sexual speech by a student could be regulated even absent any real disruption to the school.⁸⁷ The basis for the Court's holding was not where the speech took place, but rather the inconsistency between the speech and the school's educational mission.⁸⁸ That is, while Fraser could have given his speech free of government interference outside the context of the "school environment,"⁸⁹ a phrase borrowed from *Tinker*,⁹⁰ 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."⁹¹ Fraser happened to deliver his speech on campus, but the language of the majority and concurring opinions reflect the Court's ambivalence toward a strict campus presence requirement.⁹² The words "campus" or "grounds" never appear in the decision.⁹³ Instead, Chief Justice Burger replaced it with "public school education,"⁹⁴ a phrase that encompasses more than the boundaries of a school's property.

In *Hazelwood*, the Court upheld a principal's decision to remove two articles on teen pregnancy and divorce from the school's newspaper.⁹⁵ Distinguishing *Tinker*, the Court states that the two cases

⁸⁴ See *Fraser*, 478 U.S. at 675; *Hazelwood*, 484 U.S. at 260; *Morse*, 551 U.S. at 393.

⁸⁵ See generally *id.*

⁸⁶ See *Fraser*, 478 U.S. at 684–85.

⁸⁷ *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. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.").

⁸⁸ *Id.*

⁸⁹ *Id.* at 688 (Brennan, J., concurring).

⁹⁰ *Tinker*, 393 U.S. at 506.

⁹¹ *Fraser*, 478 U.S. at 683.

⁹² See, e.g., *id.* at 685; *id.* at 689 (Brennan, J., concurring).

⁹³ See generally *id.*

⁹⁴ *Id.* at 683.

⁹⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988).

posed different issues: *Tinker* asked whether a school had to tolerate speech it did not like; *Hazelwood* addressed whether the school must affirmatively promote student speech that ran counter to its educational mission.⁹⁶ After all, the newspaper was part of a journalism class and bore the school's emblem.⁹⁷ In such circumstances, teachers can exercise control over speech that could be interpreted as endorsed by the school.⁹⁸ Therefore, the *Hazelwood* exception for school-sponsored speech has no more of a campus presence requirement than *Tinker* or *Fraser*. The issue was not ripe to be decided, as the newspaper was an in-class activity.⁹⁹ But even if students worked on their articles at home and after school, and even if the paper was distributed off campus, it would still have the school's emblem and imprimatur.¹⁰⁰ References to the geographic boundaries of the school are also absent.¹⁰¹

The final case in the quartet is *Morse v. Frederick*.¹⁰² In that case, a student attended a school-sponsored viewing of the Olympic Torch Relay as it passed on the street in front of his high school and held a sign that the principal believed promoted the use of marijuana.¹⁰³ The Court upheld the school's suspension of Frederick not because of where he stood when he expressed his opinions—which was technically, though just barely, off campus—but because the school was entitled to make the decision that promoting illegal drug use was anathematic to its educational mission.¹⁰⁴

In *Morse* and in the other cases, the Court never had the occasion to hand down a definitive holding on whether a school's regulatory authority over student speech requires that the speech exist within the boundaries of the school. The issue never came up. To suggest that *Tinker* and its progeny could never be applied to off-campus speech transmogrifies a fact of these particular cases into an essential element of their holdings.

⁹⁶ *Id.* at 270–71.

⁹⁷ *See id.* at 268.

⁹⁸ *Id.* at 271.

⁹⁹ *Id.* at 268.

¹⁰⁰ *See id.* at 262.

¹⁰¹ *See generally id.*

¹⁰² 551 U.S. 393 (2007).

¹⁰³ *Id.* at 397–98. The sign read “BONG HiTS 4 JESUS,” (whatever that means). *Id.* at 397.

¹⁰⁴ *Id.* at 409–10.

C. *Students Acting Qua Students*

If the Supreme Court never had occasion to adopt a campus presence requirement, what are we to make of the myriad references in its opinions to schoolhouse gates,¹⁰⁵ classrooms,¹⁰⁶ lunchrooms,¹⁰⁷ and other physical places in the school?¹⁰⁸ Not much. 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; there is no geographic nexus. Rather, the Court has always employed a relational nexus for applying *Tinker*, where physical presence is just one among many ways to show that a student was acting *qua* student—or, in her capacity or status as a member of the school community—when she spoke. This interpretation of the law makes sense for two reasons. First, both the Court’s language and substance supports it. The Court follows almost every reference to physical locations on campus with a reminder that the campus is just a symbol of, or stands in for, the educational mission.¹⁰⁹ Second, the Court employs a relational nexus in other, similar circumstances, particularly to determine when the limited free speech rights of public employees are triggered.¹¹⁰ Like a government worker engaging in speech in her capacity as a federal employee,¹¹¹ students acting *qua* students are subject to state regulatory authority.¹¹²

1. WHAT THE SUPREME COURT DID SAY

Students are “‘persons’ under our Constitution” in and out of school,¹¹³ but it is not the boundary of the school campus that delimits the extent of their rights. Rather, it is the “school environment”¹¹⁴ that plays that role. In its student speech jurisprudence, the Court defined a school by its mission—to teach and educate minors

¹⁰⁵ *Tinker*, 393 U.S. at 506.

¹⁰⁶ *See, e.g., id.* at 512; *Fraser*, 478 U.S. at 681, 683.

¹⁰⁷ *See, e.g., Tinker*, 393 U.S. at 512–13.

¹⁰⁸ *See id.*

¹⁰⁹ *See, e.g., Fraser*, 478 U.S. at 688–89; *Hazelwood*, 484 U.S. at 266.

¹¹⁰ *See Garcetti v. Ceballos*, 574 U.S. 410, 418 (2006).

¹¹¹ *See Connick v. Myers*, 461 U.S. 138, 147 (1983).

¹¹² *See, e.g., Fraser*, 478 U.S. at 685.

¹¹³ *Tinker*, 393 U.S. at 511.

¹¹⁴ *Id.* at 506.

in the ways of civil society.¹¹⁵ That mission may extend beyond the physical classroom. The Court upheld a school's disciplinary authority in *Morse*, for example, 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.¹¹⁶ Similarly, in *Fraser*, where a student was suspended for lewd 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," i.e., not at an assembly dedicated to nominating candidates for student council.¹¹⁷ It was the context in which the speech was given—the school teaching civic engagement through student council activities—not the location of the speech that tipped the scales.¹¹⁸

It makes sense, then, that the Court's references to a school campus are cabined by 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,"¹¹⁹ but analyzed the students' free speech rights in the context of students' and teachers' liberty interest in an education that is free of government intrusion and able to prepare the "young for citizenship."¹²⁰ Later in the opinion, Justice Fortas seemed to return to the physical boundaries of the school 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."¹²¹ But he had already reminded us that "[s]chool officials do not possess absolute

¹¹⁵ *Fraser*, 478 U.S. at 683 ("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.").

¹¹⁶ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

¹¹⁷ *Fraser*, 478 U.S. at 689 (Brennan, J., concurring).

¹¹⁸ *See id.*

¹¹⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹²⁰ *Id.* at 507 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

¹²¹ *See id.* at 512–13.

authority over their students,” irrespective of their physical location.¹²² What mattered, instead, was disruption to the educational mission of the school.¹²³ 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,”¹²⁴ but then clarified that Fraser’s vulgar speech could be limited not by virtue of *where* he spoke, but because a school has an interest in both protecting minors from his arguably lewd comments and teaching them about civic responsibility.¹²⁵ A similar analysis held sway in *Hazelwood*. In that case, officials were permitted to act 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,¹²⁶ and the censorship was “reasonably related to legitimate pedagogical concerns.”¹²⁷ 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.

This is the original wisdom of *Tinker*. Students retain free speech rights up to the point that their speech substantially interferes with the school’s ability to fulfill its mission and educate its community.¹²⁸ For student speech that occurs on campus, the fact that it did so is just helpful and easy proof that the educational interests of the school are at least implicated. The *Tinker* standard,¹²⁹ as opposed

¹²² *Id.* at 511.

¹²³ *Id.* at 513.

¹²⁴ *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.”).

¹²⁵ *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.”), *with id.* (“A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”). 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.

¹²⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1998).

¹²⁷ *Id.* 273.

¹²⁸ *Tinker*, 393 U.S. at 514.

¹²⁹ *Id.* at 513 (“When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on con-

to complete free speech rights, would apply. Judges considering such cases can presume, much like the Supreme Court did in its student speech cases, that on-campus speech may be subject to school disciplinary authority. But when student speech occurs off campus, its potential impact on the school's ability to teach is not non-existent. It is just a little less obvious. These cases do not have an easy proxy of physical presence to meet the substantial impact test. They have quite a bit of other evidence, though.

2. THE PUBLIC EMPLOYEE ANALOGY

An analogy to the limited free speech rights of government employees shows how a relational nexus would work. As we have seen, in cases where a student alleges that public schools have infringed her free speech rights, most lower courts start by asking whether the student's speech took place on or off campus.¹³⁰ If the latter, school discipline often violates the First Amendment;¹³¹ if the former, *Tinker* and its progeny apply¹³² and discipline may or may not be constitutional depending on the substantial disruption test¹³³ and its exceptions for lewd,¹³⁴ sponsored,¹³⁵ and drug-related speech.¹³⁶ In the public employee context, courts ask a more nuanced question: whether the speaker/employee was acting *qua* public employee at the time or acting in her capacity as a private "citizen [commenting]

troversial subjects . . . if he does so without 'materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.'") *See also supra* note 12.

¹³⁰ *See supra* notes 48–52 and accompanying text.

¹³¹ *See, e.g.,* *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (refusing to apply *Tinker* because the speech at issue was created entirely off-campus).

¹³² *See supra* notes 48–52, briefly discussing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 822 (7th Cir. 1998); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008); and *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177–78, 1180 (E.D. Mo. 1998).

¹³³ *Tinker*, 393 U.S. at 513.

¹³⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

¹³⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

¹³⁶ *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

on a matter of public concern.”¹³⁷ If the former, she has no free speech claims against employer sanction; if the latter, she may have free speech claims if the benefits to society outweigh the harm to the workplace’s ability to conduct its business.¹³⁸ This relational nexus, defined by the connection between her actions and her environment, could reach speech conducted entirely off campus.

As in the student speech context, most public employee speech cases involve speech inside the workplace.¹³⁹ But those are just the easiest cases, not the full extent of the doctrine. Government employees’ speech can be restricted even if it originated and took place beyond the four walls of the office if, when engaging in speech, the employees were acting in their capacity as employees. In *Pickering v. Board of Education*, for example, a public school teacher was fired for writing and sending a letter to the editor of a local newspaper criticizing educational policy decisions made by the school board.¹⁴⁰ The Court nevertheless applied the balancing test because the speech was closely related to the teacher’s role as a teacher.¹⁴¹ In *City of San Diego v. Roe*, in which a San Diego police officer sold pornographic videos of himself dressed in a generic police uniform,¹⁴² the Supreme Court explicitly rejected a physical workplace presence requirement for triggering the balancing test.¹⁴³ The videos and related website, made entirely outside the workplace, made a point of connecting the officer to his career as a policeman: he wore a uniform, made law enforcement references, and described himself as “in the field of law enforcement.”¹⁴⁴ The balancing test did not

¹³⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This is known as the *Pickering* balancing test, originating in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹³⁸ *See id.* at 417–18; *see also Pickering*, 391 U.S. at 568 (1968).

¹³⁹ *See, e.g., Connick v. Myers*, 461 U.S. 138, 141 (1983) (public employee distributed a questionnaire to office coworkers that challenged, criticized, and called for reform of the office transfer policy).

¹⁴⁰ 391 U.S. 563, 564 (1968).

¹⁴¹ *Id.* at 568–69 (“The problem in any case is to arrive at the balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”).

¹⁴² 543 U.S. 77, 78 (2004) (per curiam).

¹⁴³ *See id.* at 82–84.

¹⁴⁴ *Id.* at 81.

ultimately apply because the officer was clearly leveraging his position as a police officer and because his expression did not qualify as a matter of public concern.¹⁴⁵ On the other side of the coin is *United States v. National Treasury Employees Union*.¹⁴⁶ There, the Court refused to trigger the balancing test to evaluate a ban on federal employees receiving honoraria for outside writing and speeches because, like other former federal workers-cum-writers Nathaniel Hawthorne, Herman Melville, and Walt Whitman,¹⁴⁷ these plaintiffs expressed their views on matters of public concern in their capacities “as citizens, not as Government employees.”¹⁴⁸ The evidence of this was considerable: the expression had nothing to do with their jobs, they did not address their writing to other government employees, and their speech had no impact on the workplace.¹⁴⁹ In these cases, the geographic origins of the speech made little difference. What mattered was the relational nexus between the speaker and her audience and between the speaker and the workplace.

3. APPLYING THE RELATIONAL NEXUS

A smattering of lower courts have applied a relational, rather than a geographic, test for determining whether *Tinker* applied to student speech. In *Thomas v. Board of Education*, for example, students who created an independent magazine modeled after the “National Lampoon” could not be punished for its sexual content not

¹⁴⁵ *Id.* at 84. *See also id.* at 83 (“*Connick* held that a public employee’s speech is entitled to *Pickering* balancing only when the employee speaks ‘as a citizen upon matters of public concern’ rather than ‘as an employee upon matters only of personal interest.’” (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983))).

¹⁴⁶ 513 U.S. 454 (1995).

¹⁴⁷ Hawthorne, author of *The Scarlet Letter*, and Melville, author of *Moby Dick*, worked for the United States Customs Office. Whitman, the transcendentalist poet and author of *Leaves of Grass*, worked for the Department of Justice and the Department of the Interior. *See* EDWIN HAVILAND MILLER, SALEM IS MY DWELLING PLACE: A LIFE OF NATHANIEL HAWTHORNE 169 (Iowa City 1st ed. 1991); Steven Olsen Smith, *Introduction* to MELVILLE IN HIS OWN TIME: A BIOGRAPHICAL CHRONICLE OF HIS LIFE, DRAWN FROM RECOLLECTIONS, INTERVIEWS, AND MEMOIRS BY FAMILY, FRIENDS, AND ASSOCIATES xviii (Steven Olsen Smith, ed. 2015); GAY WILSON ALLEN, THE SOLITARY SINGER: A CRITICAL BIOGRAPHY OF WALT WHITMAN 319–20, 322, 408 (1967).

¹⁴⁸ *Nat’l Treasury Emp.’s Union*, 513 U.S. at 465–66.

¹⁴⁹ *Id.* at 465.

because the magazine was created off campus,¹⁵⁰ but because the students “deliberately designed” their work to have no connection to the school, their education, or their peers.¹⁵¹ As such, they were not acting *qua* students and this was a non-student speech case.¹⁵² They were humorists and political activists, identities not connected to the youth’s membership in the school community.¹⁵³

However, students were acting *qua* students when their otherwise off-campus speech targeted specific members of the school community. In *Wisniewski v. Board of Education*, a student’s off-campus creation and narrow distribution of an icon that depicted the murder of a teacher triggered *Tinker* because the graphic, which would not have been created but for the student’s connection to the school, had the potential to affect the educational environment.¹⁵⁴ The Pennsylvania Supreme Court came to a similar decision in *J.S. v. Bethlehem Area School District*, in which a student created a vulgar and derogatory website on his teacher.¹⁵⁵ The website, which depicted the teacher’s head dripping with blood, morphing into Adolph Hitler, and soliciting funds to pay for a hit man,¹⁵⁶ was never distributed inside the geographic boundaries of the school, but it had a significant effect on its target.¹⁵⁷ The teacher took a leave of absence and suffered physical and emotional harm, not to mention humiliation and loss of respect.¹⁵⁸ *Tinker* was triggered not by physical presence, but by the content and effects of the website and its creator’s and target’s connection to the school.¹⁵⁹

A relational nexus should also be applied in cyberbullying cases. Peer-to-peer cyberbullying cases that involve an aggressor targeting

¹⁵⁰ *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979).

¹⁵¹ *Id.* at 1050. Admittedly, some activity related to the magazine did take place at school; however, the court found that such activity was de minimis. *Id.*

¹⁵² *See id.*; *See also* *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964, 975 (5th Cir. 1972) (where students similarly authored a newspaper during after-school hours and without using any materials or facilities related to the school system).

¹⁵³ *See Thomas*, 607 F.2d at 1045.

¹⁵⁴ 494 F.3d 34, 36, 39–40 (2d Cir. 2007).

¹⁵⁵ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850–51 (Pa. 2002).

¹⁵⁶ *Id.* at 851.

¹⁵⁷ *Id.* at 852.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 865.

a victim he or she knows from school would not exist but for their connection to the school. As the court noted in *J.S.*, “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.”¹⁶⁰ If a student reaches into the school community and attacks a victim he knows only through school, then he is acting as a member of the school community.¹⁶¹ *Tinker* applies.¹⁶² More generally, the lesson from the Supreme Court’s quartet of student speech cases and, by analogy, its public employee speech cases, is that *Tinker* can be triggered by student speech that is related to the speaker’s contextual connection to the school—when he is acting as a student *qua* student. Most student-to-student cyberbullying, particularly where the aggressor and victim attend the same school, will qualify. This stands in contrast to adolescents who engage in dissident speech that has nothing to do with the school environment or students who may cyberharass someone they know (or have never met) in an entirely different context.

Consider a few hypotheticals. Jill is a sophomore. After a few weeks attending the local public high school, she grows close to Jack, a junior, with whom she has one class and lunch. During their three-month relationship, Jill consents to Jack taking several intimate photos of her. After their breakup, Jack posts these photos to his blog¹⁶³ along with derogatory, misogynistic, and hateful comments. He considers them funny jokes and commentary on “how difficult women can be.”¹⁶⁴ He also taunts Jill on Twitter and sends her text messages that alternate between criticizing her character and

¹⁶⁰ *Id.* at 865.

¹⁶¹ *See id.*

¹⁶² *See id.* at 867–68.

¹⁶³ For now, I put to one side Jack’s liability as a perpetrator of nonconsensual pornography or cyberexploitation, or the posting on the Internet of graphic or intimate images of another without their consent. As of January, 2017, thirty-four states and the District of Columbia had criminal nonconsensual pornography laws and California, under Attorney General Kamala Harris, has been aggressively pursuing those who violate their victims in this way. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 368 (2014). This essay is exclusively focused on a school’s disciplinary authority over student-to-student cyberbullying.

¹⁶⁴ Though altered, the fact pattern is based on a real case on which the author has consulted. Names have been changed to protect the privacy of all individuals involved. Consent was obtained from the victim to include her story in this essay.

appearance and begging for her to take him back. Some of Jack's friends join in on the behavior, and Jill notices that many people will no longer talk to her at school and appear to be whispering behind her back. There is, however, no evidence that any image or harassing behavior made it onto school grounds. It would be difficult to subject Jack to *Tinker's* substantial disruption standard under a campus presence requirement. Posting images, commenting on them, and attacking Jill on Twitter and through text messages all took place off campus. Yet there is no doubt that Jack was acting in his capacity as a member of the school both he and Jill attend. He met her through school and his behavior after they parted was both reasonably likely to—and actually did—have an effect on Jill and the educational environment in the school.

At the other end of the spectrum are cases where the aggressor, victim, and harassment have no relational nexus to the school, i.e., where they are not acting *qua* student. Sasha and Samantha, for example, are 15 and 17 years old respectively, and are teammates on a county-run soccer team. When they are not playing soccer, they attend public schools in neighboring districts. After losing out to Samantha in a competitive tryout for goalie, Sasha creates a fake Facebook profile of Samantha and posts critical comments and unflattering or doctored photos. She also trolls Samantha on Twitter using a pseudonymous handle. Sasha would be violating Facebook's Terms of Service, which prohibit impersonation and fake profiles.¹⁶⁵ Depending on the types of comments she made on Twitter, Sasha might also run afoul of Twitter's anti-harassment policies.¹⁶⁶ But it is hard to see how either Samantha's or Sasha's school could get involved, absent a stronger connection between the young women and their school communities.

As always, the tougher cases are in the middle. Behavior that is multicontextual, i.e., in part based on the aggressor's and victim's connections to the school environment and in part related to outside connections, can still trigger *Tinker* because the behavior at least somewhat arises from students acting *qua* students and members of

¹⁶⁵ Community Standards, FACEBOOK, <https://www.facebook.com/communitystandards#> (last visited Jan. 27, 2017).

¹⁶⁶ The Twitter Rules, TWITTER, <https://support.twitter.com/articles/18311> (last visited Jan. 27, 2017).

the same school.¹⁶⁷ And attenuated connections may break the link: a student who cyberbullies a fellow student's friend he or she met at a house party may not fall under *Tinker's* sweep if the connection was truly divorced from the school context. The central point is this: the fulcrum upon which to judge *Tinker's* applicability to student cyberspeech is the student's capacity as a student acting *qua* student and his connection to the school environment and educational mission.¹⁶⁸ In most student-to-student cyberbullying cases involving students of the same school, that requirement would be satisfied. It would not be met when students exercise their rights to contribute to the marketplace of ideas through satire, critique, and public comment.

IV. A COMPELLING INTEREST

So far I have argued that *Tinker's* substantial disruption standard for evaluating student speech can be applied even when the speech originated and took place off campus. A physical presence requirement is meaningless in the Internet age. And, in any event, the Court never actually stated that student speech must be within the school's physical boundaries to come under *Tinker's* umbrella.¹⁶⁹ Rather, the Court's language in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, not to mention its public employee speech cases, suggests that the test for applying the substantial disruption standard is a relational one, based on the speaker's connection to the school environment and his behavior as student *qua* student.¹⁷⁰ Applying that test would permit greater school disciplinary authority over cyberbullies. And despite the fact that school administrators have not always perfectly deployed that authority,¹⁷¹ more flexibility to move against cyberbullying would, on balance, be a good thing for several reasons.

¹⁶⁷ See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

¹⁶⁸ See generally *id.*

¹⁶⁹ See generally *id.*

¹⁷⁰ See *supra* Section C and accompanying notes.

¹⁷¹ This is particularly true in the LGBT context. See, e.g., Elahe Izadi, *A Florida School Board Just Blocked Transgender Kids from Choosing Bathrooms*, WASH. POST (Apr. 27, 2016), <https://www.washingtonpost.com/news/education/wp/2016/04/27/a-florida-school-board-just-blocked-transgender-kids-from-choosing-bathrooms/>; Meghan Dwyer, *Outrage After Transgender Student Told*

First, cyberbullying can devastate its victims, most of whom are members of marginalized groups. In her definitive account of cyberharassment and its effects, *Hate Crimes in Cyberspace*, Danielle Keats Citron notes that victims experience mood swings, anxiety, depression, panic attacks, fear of social interactions, post-traumatic stress disorder,¹⁷² and a panoply of other injuries.¹⁷³ Cyberharassment victims also report increases in alcohol and substance abuse.¹⁷⁴ Student victims of cyberbullying withdraw from school activities and both face-to-face and online social interaction.¹⁷⁵ To adults, these effects are serious enough, but to adolescents, they can be devastating.¹⁷⁶ Cyberharassment has been linked to lower educational achievement and diminished professional success.¹⁷⁷ Adolescent

He Can't Run for Prom King: 'We Stand with Him 100%', FOX6NOW.COM (Apr. 6, 2016, 9:00 PM), <http://fox6now.com/2016/04/06/transgender-student-told-he-cant-run-for-prom-king/>; Kamaria Roberts, *Chicago School District Discriminated Against Transgender Student, Report Says*, PBS (Nov. 4, 2015, 5:34 PM), <http://www.pbs.org/newshour/rundown/chicago-school-district-discriminated-transgender-student-report-says/>.

¹⁷² CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note 16, at 10–12. *See also* Adrienne Nishina & Jaana Juvonen, *Daily Reports of Witnessing and Experiencing Peer Harassment in Middle School*, 76 *CHILD DEV.* 435, 444 (2005) (measuring anxiety, humiliation, school dislike, and anger as negative effects of peer harassment); Michele L. Ybarra et al., *Examining Characteristics and Associated Distress Related to Internet Harassment: Findings From the Second Youth Internet Survey*, 118 *PEDIATRICS* 1169, 1172 (2006) (reporting that 38% of youth were distressed by a single incident of harassment); Michele L. Ybarra, *Linkages between Depressive Symptomatology and Internet Harassment among Young Regular Internet Users*, 7 *CYBERPSYCHOLOGY & BEHAV.* 247, 252 (2004) (discussing depressive symptomatology as “significantly related to the report of online harassment”).

¹⁷³ *See* Ybarra, *Linkages*, *supra* note 172, at 249.

¹⁷⁴ *Id.* at 248.

¹⁷⁵ NANCY E. WILLARD, *CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS* 47 (2007).

¹⁷⁶ *See* Waldman, *Tormented*, *supra* note 13, at 399.

¹⁷⁷ Danielle Keats Citron, *Cyber Civil Rights*, 89 *B.U. L. REV.* 61, 70, 73 (2009) [hereinafter Citron, *Cyber Civil Rights*].

anxiety contributes to poor socialization, long term depression, and marginalization.¹⁷⁸ The list goes on.¹⁷⁹

When adolescent victims of cyberharassment are members of a traditionally marginalized group like women and the LGBT community, the effects may be even worse.¹⁸⁰ Women and young girls are uniquely targeted online.¹⁸¹ Over an 11-year period, they consti-

¹⁷⁸ See *id.* at 69–71; see also CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 16, at 11.

¹⁷⁹ See, e.g., Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006) (“Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn. The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that ‘academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school.’ One study has found that among teenage victims of anti-gay discrimination, 75% experienced a decline in academic performance, 39% had truancy problems and 28% dropped out of school. Another study confirmed that gay students had difficulty concentrating in school and feared for their safety as a result of peer harassment, and that verbal abuse led some gay students to skip school and others to drop out altogether. Indeed, gay teens suffer a school dropout rate over three times the national average. In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students’ health and welfare, but also to their educational performance and their ultimate potential for success in life.”) (internal citations omitted). See also MICHAEL BOCHENEK & A. WIDNEY BROWN, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 49 (Human Rights Watch, 2001); Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 76–77 (1994) (describing how abuse by peers causes gay youth to experience social isolation and drop out of school); Maurice R. Dyson & Nicolyn Harris, *Safe Rules or Gays’ Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 187 (2004) (gay teens “face greater risks of . . . dropping out [and] performing poorly in school”); Amy Lovell, “*Other Students Always Used to Say, ‘Look at the Dykes’*”: *Protecting Students from Peer Sexual Orientation Harassment*, 86 CALIF. L. REV. 617, 625–28 (1998) (summarizing the negative effects on gay students of peer sexual orientation harassment).

¹⁸⁰ Citron, HATE CRIMES IN CYBERSPACE, *supra* note 16, at 11.

¹⁸¹ See *id.* at 13–14.

tuted at least 72% of cyberharassment victims and 60% of cyberstalking victims.¹⁸² They are 90% of revenge porn victims.¹⁸³ Internet chat users with female names receive, on average, 100 harassing messages for every four received by users with male names.¹⁸⁴ That is twenty-five times more hate directed at women than men. They are routinely attacked, reduced to sexual objects, shamed, and threatened, merely for being women.¹⁸⁵ These effects may be even worse for LGBT individuals for several reasons. Because LGBT and questioning youth often rely on online social networks to replace non-existent face-to-face communities,¹⁸⁶ cyberharassment threatens to cut off their only outlet in which they can be themselves. As early as 2001, more than 85% percent of LGB adolescents reported that the Internet had been the most “important resource for them to connect with LGB peers.”¹⁸⁷ Destruction of that online social support network through cyberharassment is, therefore, particularly harmful because it turns what might have been a gay student’s safe space into a danger zone. Furthermore, institutional discrimination faced by LGBT individuals metastasizes the psychological effects of cyberharassment because, as Mark Hatzenbuehler has shown, in-

¹⁸² *Id.* at 13.

¹⁸³ Cyber Civil Rights Initiative, Inc., *Revenge Porn Statistics*, END REVENGE PORN (2014), http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/12/RPStatistics.pdf.

¹⁸⁴ Citron, HATE CRIMES IN CYBERSPACE, *supra* note 16, at 14.

¹⁸⁵ *See id.* at 14.

¹⁸⁶ *See* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003) (describing how the Internet has provided isolated gay men and lesbians in otherwise hostile environments “a virtual community that constitutes an emotional lifeline”).

¹⁸⁷ Vincent M.B. Silenzio, et al., *Connecting the Invisible Dots: Reaching Lesbian, Gay, and Bisexual Adolescents and Young Adults at Risk for Suicide Through Online Social Networks*, 69 SOC. SCI. MED. 469, 469 (2009) (citing Lynne Hillier et al., AUSTL. RESEARCH CTR. IN SEX, HEALTH, AND SOC’Y, ‘IT’S JUST EASIER’: THE INTERNET AS A SAFETY-NET FOR SAME SEX ATTRACTED YOUNG PEOPLE (2001), available at https://www.latrobe.edu.au/arcschs/downloads/arcschs-research-publications/its_just_easier.pdf).

stitutional discrimination enhances all mood, anxiety, and psychological disorders.¹⁸⁸ In a 2010 study, Hatzenbuehler found that institutional discrimination can have a statistically significant negative effect on the mental health of LGB persons: lesbians, gay men, and bisexual individuals who lived in states that banned gay couples from marrying experienced mood, anxiety, and psychiatric disorders at higher rates than LGB persons living in equality states.¹⁸⁹ It makes sense, then, that LGBT victims of bullying and harassment rival only homeless LGBT youth in the frequency and severity of psychological injury in the community.¹⁹⁰ Schools have an interest in protecting their most vulnerable students from having their lives derailed by cyberharassment.¹⁹¹

Second, and as these statistics suggest, cyberbullying is often a gendered and sexualized phenomenon that amounts to discrimination on the basis of sex.¹⁹² Whether victims are attacked for being gay, bisexual, or transgender, for gender nonconformity, or for being a woman in a man's world, cyberharassment tends to take on the characteristics of an identity-based attack.¹⁹³ This piles on its own

¹⁸⁸ Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUB. HEALTH 452, 452 (2010).

¹⁸⁹ *Id.* at 454. The study, the results of which were published in 2010, took place before the Supreme Court's decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). See also Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH & ADOLESCENCE 1001, 1001 (2009).

¹⁹⁰ See Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 773, 773–75 (2002). See also Michelle Birkett, Dorothy L. Espelage, & Brian Koenig, *LGB and Questioning Students in Schools: The Moderating Effects of Homophobic Bullying and School Climate on Negative Outcomes*, 38 J. YOUTH & ADOLESCENCE 989, 997 (2009).

¹⁹¹ See generally Birkett, Espelage & Koenig, *supra* note 190, at 997 (“This study demonstrates that the high rates of negative outcomes for LGB and questioning students might, in fact be preventable with a positive school climate and absence of homophobic teasing.” (internal citations omitted)).

¹⁹² See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 16, at 13 (“Cyber harassment disproportionately impacts women.”).

¹⁹³ See *id.* at 16.

horrors. It conveys a message of worthlessness, stigmatizing an entire group of people as second class.¹⁹⁴ This in turn encourages others to join in the aggression and instills a sense of self-hatred within victims.¹⁹⁵ It also makes cyberbullying anathematic to an effective educational environment: when victims feel attacked and treated like second class citizens, they are less likely to participate in class and succeed.¹⁹⁶

Third, far from protecting speech, tolerating cyberbullying silences speech.¹⁹⁷ Victims retreat from online life, excluding valuable perspectives from public discourse.¹⁹⁸ We know, for example, that one of the most common refrains victims of cyberbullying and cyberharassment hear is to turn off their computers, leave Facebook, or stop checking Twitter.¹⁹⁹ As a response to the problem, that recommendation is offensive: it puts the onus on the victim to rescue herself and absolves the perpetrator of any real punishment.²⁰⁰ As Citron has argued, preventing online harassment and allowing those

¹⁹⁴ See Ari Ezra Waldman, *All Those Like You: Identity-Aggression and Student Speech*, 77 MO. L. REV. 653, 670 (2012) [hereinafter Waldman, *All Those Like You*].

¹⁹⁵ *Id.*; see also Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 86 (1994); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 144–46, 179 (1982); Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 453, 468 (1990).

¹⁹⁶ Waldman, *All Those Like You*, *supra* note 194, at 670.

¹⁹⁷ See Citron, *Cyber Civil Rights*, *supra* note 177, at 97–98.

¹⁹⁸ Waldman, *All Those Like You*, *supra* note 194, at 672.

¹⁹⁹ See generally End to Cyber Bullying Organization, *Cyberbullying Prevention for Teens*, END CYBERBULLYING.ORG, <http://www.endcyberbullying.org/cyberbullying-prevention/cyberbullying-prevention-for-teens/> (last visited Jan. 2017).

²⁰⁰ See *id.* (“Why should a victim be required to interrupt an online experience because of someone else’s maliciousness? It is not appropriate to blame the victim for another’s aggressive actions. No one should have to turn off his or her computer due to harassment received online, just like no one should avoid going to school because of school bullying. . . Cyberbullying can continue regardless of whether the target is online. For example, a bully could set up a defamatory Web page or spread rumors via social networking sites. Unfortunately, mistreatment still continues and the bully perpetuates his assaults and cruelty, even when the victim is offline.”).

who would otherwise be bullied into silence to contribute to the marketplace of ideas would “advance the reasons why we protect speech in the first place.”²⁰¹ Otherwise, adolescent victims in school will stop contributing to school society; many will move to escape their harassers even though a new address is not safe from a cyberharasser.²⁰²

When a school considers punishing one of its students for cyberbullying another, these are the values at stake: the school’s commitment to educating its students, ensuring equality, and preventing the marginalization of minority groups. These values are simply not at issue when students engage in “higher value” speech that does not target, defame, and harass. Therefore, schools have a compelling interest to take steps to eradicate cyberbullying, wherever it takes place, because of the significant damage it can do to the school’s ability to teach all its students.

CONCLUSION

That cyberbullies harass their victims outside the physical boundaries of a school does not immunize them from school discipline.²⁰³ The First Amendment is not blind to changes wrought by Internet technologies. Nor has the Supreme Court ever held that *Tinker* can only be triggered by on-campus speech.²⁰⁴ But punishment can only get us so far. Although this essay is limited to arguing for a relational trigger for *Tinker*, it does not suggest that greater discipline can eradicate cyberbullying on its own. Schools need to take affirmative steps to improve school climate, address the root causes of bullying and cyberbullying, and teach full acceptance of marginalized groups. Disciplining cyberbullies can help establish norms that recognize cyberharassment as anathematic to freedom, autonomy, and equality. That is undoubtedly part of a school’s educational mission.

²⁰¹ Citron, *Cyber Civil Rights*, *supra* note 177, at 98 (quoting DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 129 (Yale Univ. Press 2007)).

²⁰² *See, e.g.*, CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note 16, at 7.

²⁰³ *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

²⁰⁴ *See generally* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse*, 551 U.S. at 393.