

## COMMENT

### FROM BULLYING TO PURE POLITICAL SPEECH: UPDATING THE SUPREME COURT’S STUDENT SPEECH JURISPRUDENCE WITH A SUBSTANTIAL HARM RULE

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“We’ve got to dispel the myth that bullying is just a normal rite of passage—that it’s some inevitable part of growing up. It’s not. We have an obligation to ensure that our schools are safe for all of our kids.”—President Barack Obama, October 21, 2010.<sup>1</sup>

## I. INTRODUCTION

Billy<sup>2</sup> was a quiet, fifteen-year-old boy at Springfield High

1. Barack Obama, President of the United States, “It Gets Better” Speech (Oct. 21, 2010) (transcript available at <http://www.whitehouse.gov/blog/2010/10/21/president-obama-it-gets-better>).

2. This is a hypothetical based on various real life incidents and court cases, listed below. All persons and places are fictional. See Michelle R. Davis, *Schools Tackle Legal Twists and Turns of Cyberbullying*, EDUCATION WEEK (Feb. 9, 2011), <http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html> (documenting the high profile teen suicides of Megan Meier, Tyler Clementi, and Phoebe Prince); Peggy O’Hare, *Parents: Bullying Drove Cy-Fair 8th-grader to Suicide*, THE HOUSTON CHRONICLE (Sept. 27, 2010),

School. He excelled in his school work, especially in science and math, but he was somewhat of an outcast amongst the school's two thousand students. Billy spoke with a noticeable speech impediment. The impediment was the result of a rare birth defect that forced doctors to remove parts of Billy's tongue as a young child. Throughout his childhood, Billy had to work extremely hard with speech therapists to be able to communicate orally. While his speech improved tremendously, he still required constant speech therapy to be able to communicate clearly in class.

As a young boy, Billy was often teased by the other kids in his class. They referred to him as "Billy Blabber" and imitated his voice to mock him. As he got older, the taunts grew more vicious. Starting in middle school, some kids began calling him a "retarded faggot" and mocked his voice in attempts to provoke him into physical fights.

Recently, in high school gym class, a group of boys pinned Billy down and pretended to perform homosexual acts on him in front of the rest of the class. Most of the boys laughed when someone said, "It's not like the retard can tell anybody!" Being teased was not new to Billy, but after the gym class incident, he came home sobbing. His mother had always told him to ignore the teasing, but his father would usually interject to say that Billy had to stand up for himself. Then his parents would argue with each other, and eventually Billy would go off to his room alone. This time was no different, except that Billy heard his

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<http://www.chron.com/disp/story.mpl/metropolitan/7220896.html> (Asher Brown, 13 years old, shot himself after being constantly bullied by a group of four kids at his school. His stepfather found him when he came home from work.); Julie Bolcer, *Bullied Youth Dies After Suicide Attempt*, THE ADVOCATE (Sept. 29, 2010), [http://www.advocate.com/News/Daily\\_News/2010/09/29/Bullied\\_Youth\\_Dies\\_After\\_Suicide\\_Attempt/](http://www.advocate.com/News/Daily_News/2010/09/29/Bullied_Youth_Dies_After_Suicide_Attempt/) (Seth Walsh, 13 years old, was bullied for being gay and hung himself from a tree in his backyard.); Kara Brooks, *Bullied Greensburg Student Takes His Own Life*, FOX 59 (Sept. 13, 2010), <http://www.fox59.com/news/wxin-greensburg-student-suicide-091310,0,1101685.story> (Billy Lucas, 15 years old, hung himself in his parents' barn in Indiana after students called him a "fag" and taunted him for being different.). For a recent survey of the legal discussion that has ensued following such incidents, see Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103 (2009); Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153 (2009); Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210 (2009).

mother state that she was going to call the principal and complain.

When Billy arrived at school the next day, he was called into Principal Harry Nelson's office along with the boys that had pinned him down—Carl, Dave, and Eddie. Principal Nelson asked each one of the boys what happened. To Billy's surprise, they admitted to the whole thing. The principal made the boys apologize to Billy and told them that they would be suspended for three days.

In the hallway outside of the principal's office, Carl, the ringleader of the boys, said within hearing distance of Billy, "I can't believe this retarded fag got us suspended." The principal's assistant overheard Carl. Billy froze for a moment, and then he walked quickly to math class, pretending he had not heard anything. About a week after the meeting in the principal's office, a rumor began circulating that Billy had performed oral sex on Principal Nelson to get the boys suspended.

The night that Billy found out about the rumor, he refused to come out of his room for dinner. He stayed up all night staring at the ceiling, and he also researched ways to kill himself online. The next morning Billy still would not come out of his room, and he refused to go to school despite his mother's pleading. When his mother asked if he was teased again, he lied and said he was just not feeling well. Nevertheless, his father made him come out of his room. When Billy saw how concerned his parents were, he felt stupid about being so dramatic and went to school.

During first period, Billy noticed Carl in the seat in front of him wearing a t-shirt that read "God hates fags and retards, Leviticus 21:16–24" on the front, and "and so do I" on the back. In the hallway, Billy noticed a student wearing a button that read, "Special Needs are Retarded. Vote Yes on Prop. 1182." The button referred to a state legislative proposal that would drastically cut state special education programs like Billy's speech therapy. Later, Billy even overheard one student say, "There shouldn't be anything *special* about our education. Either you come here and get the same treatment or you go somewhere else." Classes continued as normal for the remainder of the school day.

When Billy's parents got home from work that night, they found Billy dead in his room, hanging from the ceiling fan.

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Tragically, Billy's story is a reality for many kids today. Several recent high-profile teen suicides and statistics related to bullying demonstrate this point.<sup>3</sup> About one-third of high school students report having been bullied at school, while some researchers believe the number to be even higher.<sup>4</sup> Of those kids who have been bullied, the overwhelming majority report that they were bullied over a core feature of their identity, such as race, gender, sexual orientation, or disability.<sup>5</sup>

As a result, a national discussion on bullying has taken place over the past several years.<sup>6</sup> Forty-nine states currently have anti-bullying statutes.<sup>7</sup> Ten years ago, only about one-third of states had such statutes.<sup>8</sup> Inherent in all such statutes has been the recognition that speech alone can be tremendously harmful to young people.

The focus on bullying has also raised free speech issues for public high school students and school administrators alike. Specifically, speech by a student that bullies, harasses, intimidates, or otherwise harms other students can often overlap with public or political speech that might generally be considered protected free speech.<sup>9</sup>

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3. See generally O'Hare, *supra* note 2; Bolcer, *supra* note 2; see also Rachel Dinkes et al., *Indicators of School Crime and Safety: 2009*, NAT'L CTR. FOR EDUC. STATISTICS (2009), <http://nces.ed.gov/pubs2010/2010012.pdf>; Catherine P. Bradshaw, Ph.D. et al., *Findings from the National Education Association's Nationwide Study of Bullying: Teachers' and Education Support Professionals' Perspectives*, NAT'L EDUC. ASS'N (2011) [http://www.nea.org/assets/img/content/Findings\\_from\\_NEAs\\_Nationwide\\_Study\\_of\\_Bullying.pdf](http://www.nea.org/assets/img/content/Findings_from_NEAs_Nationwide_Study_of_Bullying.pdf).

4. See generally Dinkes, *supra* note 3; Bradshaw, *supra* note 3.

5. See generally Bradshaw, *supra* note 3.

6. See, e.g., Obama, *supra* note 1; Davis, *supra* note 2; see generally Zande, *supra* note 2; see also Backus, *supra* note 2.

7. See BULLY POLICE USA, <http://www.bullypolice.org/> (last visited June 4, 2012).

8. *Id.*

9. See, e.g., Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006) (exemplifying the debate between political speech and harassment, where a student sued a school district alleging a violation of his free speech rights after being taken out of class for wearing a t-shirt bearing the words "Be ashamed, our school has embraced what God has condemned . . . Homosexuality is shameful." The court also noted that the "shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting." *Id.* at 1176); see also Zamecnick v. Indian Prairie Sch. Dist., 636 F.3d 874 (7th Cir. 2011).

In the context of public high schools, the overlap between harmful speech and political speech must be considered under the Supreme Court's student speech jurisprudence.<sup>10</sup> Since the Court's 1969 decision in *Tinker v. Des Moines Independent School District*, students have been treated as a special class that warrants only a limited right to free speech under the First Amendment.<sup>11</sup> Through *Tinker* and its progeny, the Court has increasingly limited students' free speech rights by allowing school regulation of student speech in a variety of circumstances.<sup>12</sup> However, none of the Court's precedent directly addresses the issue of student speech that is simultaneously political and potentially harmful to other students. Consequently, under the Court's current doctrine, a school would likely be powerless to regulate much of the speech in the Billy hypothetical—speech that is both potentially harmful to Billy, a student, but also arguably presents a commentary on the state of public education in the U.S.

Both the Ninth and the Seventh Circuit Courts of Appeal have confronted this issue in two recent decisions involving student speech condemning the homosexuality of other students.<sup>13</sup> In *Harper v. Poway Unified School District*,<sup>14</sup> the Ninth Circuit created a new standard that attempted to empower schools to more adequately address such speech.<sup>15</sup> The Seventh Circuit took the opposite approach in *Zamecnick v. Indian Prairie School*,<sup>16</sup> rejecting what it called a "hurt feelings" defense to a violation of the First Amendment.<sup>17</sup>

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10. See generally *Tinker v. Des Moines Indep. 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).

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

12. See, e.g., *Fraser*, 478 U.S. at 684 (1986) (stating that the "[Supreme] Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children"); *Morse*, 551 U.S. at 403 (holding that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

13. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006); *Zamecnick v. Indian Prairie Sch. Dist.*, 636 F.3d 874 (7th Cir. 2011).

14. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006).

15. *Id.* at 1175 (focusing on the "rights of others" approach).

16. *Zamecnick v. Indian Prairie Sch. Dist.*, 636 F.3d 874 (7th Cir. 2011).

17. *Id. passim*.

Thus, the Supreme Court needs to articulate a uniform rule for deciphering student speech that ranges from bullying to pure public speech both to provide guidance to schools and students, as well as to prevent abuse. This article proposes that the Supreme Court adopt a rule that allows schools to regulate speech that causes substantial harm to one or more students or makes it reasonable to forecast such substantial harm in the future. Adopting such a rule would simultaneously further the interests of schools and parents in protecting their children, while also protecting students' free speech rights from the overreaching authority of schools by drawing a clear line that does not presently exist in student speech jurisprudence.

Section II of this comment addresses the relevant background law and jurisprudence associated with student speech and the First Amendment. Section III discusses and analyzes the problems that exist with current student speech jurisprudence. Section IV offers a solution to those problems by proposing the adoption of a substantial harm rule. Section V concludes with final thoughts and contemplates the likelihood of such a rule's adoption taking place.

## **II. CURRENT FIRST AMENDMENT JURISPRUDENCE— GENERAL RESTRICTIONS ON FREE SPEECH AND SPECIFIC LIMITATIONS OF STUDENT SPEECH**

The following section discusses the relevant background law and jurisprudence as it pertains to student speech. Specifically, Subsection A discusses the general restrictions on speech, in terms of unprotected categories of speech, paying particular attention to the prohibition on viewpoint discrimination. Subsection B discusses the Supreme Court's creation of the student speech category and the major cases that have defined the limits on a student's speech. Subsection C addresses two recent federal courts of appeals opinions that address the degree of First Amendment protection afforded to student speech that both conveys a political message and attacks other students' core characteristics.

### **A. GENERAL RESTRICTIONS ON SPEECH**

#### **1. THE UNPROTECTED CATEGORIES**

The First Amendment of the United States Constitution provides, "Congress shall make no law . . . abridging the freedom

of speech.”<sup>18</sup> The Free Speech Clause reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>19</sup> The Free Speech Clause also protects simple personal expression, even when it is neither about political nor public issues.<sup>20</sup> In short, the freedom of speech is one of the defining features of American democracy.

Yet, while freedom of speech is fundamental, it “is not absolute at all times and under all circumstances.”<sup>21</sup> The Supreme Court has consistently held that certain categories of speech can be regulated or restricted if they inflict unacceptable harm; such categories include speech that incites others to lawless action,<sup>22</sup> fighting words,<sup>23</sup> obscenity,<sup>24</sup> certain types of defamatory speech,<sup>25</sup> and true threats.<sup>26</sup> As the Court recently explained in *Snyder v. Phelps*, “[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain.”<sup>27</sup>

The basic distinction between protected and unprotected speech under the First Amendment can be seen in the Court’s opinion in *Chaplinsky v. New Hampshire*.<sup>28</sup> Chaplinsky, a Jehovah’s Witness, was arrested for calling a New Hampshire town marshal, “a God-damned racketeer” and “a damned Fascist.”<sup>29</sup> Chaplinsky’s epithets violated a New Hampshire statute that prohibited certain offensive language directed towards people in public.<sup>30</sup> Before being arrested, Chaplinsky had been distributing Jehovah’s Witness literature in downtown Rochester when several passersby, taking offense to Chaplinsky’s solicitations and language, began denouncing organized

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18. U.S. CONST. amend I.

19. *New York Times, Co. v. Sullivan*, 376 U. S. 254, 270 (1964).

20. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (discussing the difference between public and private speech in terms of First Amendment protections available to each).

21. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

22. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969).

23. *See, e.g., Chaplinsky*, 315 U.S. at 568.

24. *See, e.g., Miller v. California*, 413 U.S. 15 (1973).

25. *See, e.g., New York Times, Co.*, 376 U. S. at 254.

26. *See, e.g., Watts v. United States*, 394 U.S. 705, 708 (1969).

27. *Snyder*, 131 S. Ct. at 1220.

28. *See generally Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

29. *Id.* at 569.

30. *Id.*

religion.<sup>31</sup> As a crowd gathered and grew restless, police responded by attempting to remove Chaplinsky from the scene.<sup>32</sup> It was then that Chaplinsky uttered the aforementioned words.<sup>33</sup>

The Supreme Court upheld Chaplinsky's arrest and the New Hampshire statute in a unanimous decision.<sup>34</sup> The Court explained that certain utterances, such as fighting words like Chaplinsky's, are not protected by the First Amendment:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.<sup>35</sup>

While initially appearing broad in scope, the Court's holding in *Chaplinsky* was limited by subsequent opinions on the "fighting words" doctrine.<sup>36</sup> Most importantly, the distinction that the Court made in *Chaplinsky* between protected and unprotected speech under the First Amendment remains intact today.<sup>37</sup>

Following *Chaplinsky*, the Court recognized several other categories of unprotected speech. For example, in *Brandenburg v. Ohio*, a case involving speech advocating violence at a Ku Klux Klan rally, the Court held that speech can be prohibited if it is "directed to inciting or producing imminent lawless action" and it is "likely to incite or produce such action."<sup>38</sup> In *Miller v. California*, where a pornography retailer mass-mailed "adult" materials, the Court held that obscene materials did not enjoy First Amendment protection.<sup>39</sup>

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31. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-70 (1942).

32. *Id.* at 570.

33. *Id.* at 574.

34. *Id.*

35. *Id.* at 572 (internal citations omitted).

36. See generally Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993).

37. *Id.*

38. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

39. *Miller v. California*, 413 U.S. 15, 15 (1973). The standard for determining

The overarching theme in all of these cases is that a compelling interest, usually the prevention of some sort of harm, outweighs the value of protecting certain speech. Notably, in executing this balancing act, the Court has consistently held that speech on issues of public concern<sup>40</sup> receives a higher level of protection from government intervention than private speech or mere personal expression.<sup>41</sup> Lastly, the Court has consistently stressed that the categories of unprotected speech are to be narrowly tailored given the importance of protecting the freedom of speech guaranteed by the First Amendment.

## 2. VIEWPOINT DISCRIMINATION

Although the Court expanded the categories of unprotected speech following *Chaplinsky*, thereby enhancing the power of the government to regulate speech, the Court has drawn a bright line that prohibits the government from engaging in viewpoint discrimination.<sup>42</sup> Viewpoint discrimination, which the Court has deemed “an unacceptable suppression of ideas,” occurs when the government regulates speech based solely on a particular viewpoint.<sup>43</sup> The Court has noted that, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>44</sup>

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obscenity in *Miller* was redefined as:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations omitted).

40. Technically, the term “public speech” is the broader term for speech that discusses public issues, whether they be political or social. However, for the purposes of this paper, the terms “public speech” and “political speech” are used interchangeably to describe the broad meaning of speech that discusses public issues.

41. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (stating that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware, Co.*, 102 S. Ct. 3409, 3426 (1982)) (stating that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection”).

42. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

43. *Virginia v. Black*, 538 U.S. 343, 345 (2003).

44. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, “the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are

An illustrative example of viewpoint discrimination is the difference between *R.A.V. v. St. Paul* and *Virginia v. Black*.<sup>45</sup> Both cases involved challenges to state laws that effectively banned cross burning,<sup>46</sup> an activity traditionally associated with the Ku Klux Klan. In *R.A.V. v. St. Paul*, the Court found the law prohibiting cross burning in general to be unconstitutional.<sup>47</sup> In *Virginia v. Black*, however, the Court found that a law banning cross burning with the intent to intimidate was constitutional.<sup>48</sup>

After a lengthy review of the history of cross burning, the Court, in *Virginia v. Black*, recognized that cross burnings could have different meanings, and, consequently, different intentions—some of which were more harmful than others.<sup>49</sup> The Court thus concluded that cross burnings could not be banned per se, but would instead have to be examined on a fact-specific basis to determine if the cross burning was driven by an unacceptable intent to intimidate.<sup>50</sup>

## B. STUDENT SPEECH

In addition to categories of speech that may be regulated based on the harm they inflict, the Supreme Court has also recognized categories of speech that may be regulated based upon the setting in which the speech takes place.<sup>51</sup> Likewise, the Court

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misguided, or even hurtful.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995). “The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen v. California*, 403 U.S. 15, 21 (1971).

45. See *R.A.V. v. St. Paul*, 505 U.S. 377, 377 (1992); *Virginia v. Black*, 538 U.S. 343, 344 (2003).

46. The action of cross burning was considered “speech” under the First Amendment by the majority in both cases. *Black*, 538 U.S. at 344-45; *R.A.V.*, 505 U.S. at 393.

47. *R.A.V.*, 505 U.S. at 377.

48. *Black*, 538 U.S. at 343.

49. *Id.* at 365-67.

50. *Id.* at 367. The debate over viewpoint discrimination is ongoing. As the lone dissenter in *Snyder v. Phelps*, a case that upheld a church’s right to protest U.S. military funerals while condemning the dead soldiers, Justice Alito wrote, “[i]n order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims . . . .” *Snyder v. Phelps*, 131 S. Ct. 1207, 1209 (2011) (Alito, J., dissenting).

51. See generally *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (discussing the basic contours of forum doctrine, which is predicated on the notion that speech protections fluctuate depending on the setting in which speech occurs).

has consistently recognized that student speech in public elementary and secondary schools is subject to regulation.<sup>52</sup> The basic tenet of this restricted category is that while students do not “shed their constitutional rights . . . at the schoolhouse gate,”<sup>53</sup> their free speech rights “are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment.”<sup>54</sup>

### 1. *TINKER* AND THE SUBSTANTIAL DISRUPTION STANDARD

Before 1969, it was largely thought that students did not have any speech rights whatsoever.<sup>55</sup> Indeed, from the founding times onward, order and discipline were the watchwords of schools. “In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”<sup>56</sup> But against the backdrop of the politically active student protests of the late 1960s, the Court, in *Tinker*, created a new category of free speech jurisprudence known as student speech.<sup>57</sup> In *Tinker*, school officials had learned of a plan by a handful of students to wear black armbands in protest of the Vietnam War.<sup>58</sup> The school hastily adopted a policy banning the wearing of the armbands and threatened the students with suspension.<sup>59</sup> Some of the students wore the armbands to school despite the policy, and they were subsequently suspended.<sup>60</sup> In a 7–2 decision, the Court held that the students’ suspension violated their First Amendment rights.<sup>61</sup>

The Court held that because the students’ armbands did not cause a substantial disruption to the school environment or interfere with the rights of others, the school was not allowed to

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52. See generally *Tinker v. Des Moines Indep. 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).

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

54. *Kuhlmeier*, 484 U.S. at 266 (internal citations omitted).

55. See, e.g., *Morse*, 551 U.S. at 412 (Thomas, J., concurring) (tracing the history of free speech to the first public schools).

56. *Id.*

57. *Tinker*, 393 U.S. at 511-13.

58. *Id.* at 504.

59. *Id.*

60. *Id.*

61. *Id.* at 514-16.

restrict or regulate their speech.<sup>62</sup> In recognizing that students had free speech rights, the Court also simultaneously placed restrictions on those rights that were unique to student speech. Specifically, the Court limited a student's free speech rights in two ways: (1) the speech could not cause a substantial disruption to the school environment, nor could the speech make it reasonable for school officials to forecast a substantial disruption to the school environment in the future; and (2) the speech could not materially interfere with the rights of others.<sup>63</sup>

Applying this standard to the students wearing black armbands, the Court primarily focused on the substantial disruption standard. To reasonably forecast a substantial disruption, the Court said that the school would have to show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>64</sup> Instead, the school must be able to point to specific facts that would make it reasonable to forecast a substantial disruption to the school environment, assuming one had not already taken place.<sup>65</sup> The Court found that the minor attention and comments that the armbands drew did not constitute a substantial disruption; the Court also found it relevant that only a handful of students in a school system of 18,000 children even wore the armbands.<sup>66</sup>

Lastly, the Court sought to dispel any notions that schools had complete control over their students. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ."<sup>67</sup>

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62. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 510-14 (1963).

63. *Id.* at 509-13.

64. *Id.* at 509.

65. *Id.*

66. *Id.* at 508.

67. *Id.* at 511.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.

*Tinker*, 393 U.S. at 513.

Writing for the dissent, Justice Black gave a blistering critique of the future implications of the majority's decision.<sup>68</sup> Specifically, Justice Black stated that the Court had "surrender[ed] control of the American public school system to public school students,"<sup>69</sup> and was "subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."<sup>70</sup> Justice Black's dissent would be quoted decades later by the majority in another seminal case on student speech.<sup>71</sup>

The issues raised by *Tinker* were only the beginning of the development of the student speech category. The vast majority of courts following *Tinker* employed the substantial disruption standard and not the rights of others prong. Although many courts followed the substantial disruption standard, others, including the Supreme Court itself, also developed additional standards to regulate student speech.

## 2. THE POST-*TINKER* CASES AND THE FURTHER LIMITATION OF STUDENTS' FREE SPEECH RIGHTS

In the post-*Tinker* cases, the Court recognized that schools' authority over student speech extends beyond substantial disruptions to various other types of harm. For example, in *Bethel School District No. 403 v. Fraser*, a student was suspended after he delivered a speech to a school assembly using "an elaborate, graphic, and explicit sexual metaphor," to describe the "male sexuality" of a fellow student.<sup>72</sup> Finding the speech vulgar, obscene, and offensive, the Court upheld the school's regulation without discussing whether the speech presented a substantial disruption.<sup>73</sup> The Court explained that "[i]t does not follow, however that simply because the use of an offensive form of expression may not be prohibited to adults . . . the same latitude must be permitted to children in a public school."<sup>74</sup>

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68. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 515-26 (1963) (Black, J., dissenting).

69. *Id.* at 526.

70. *Id.* at 525.

71. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (quoting Justice Black to justify a school's regulation of sexually explicit speech by a student).

72. *Id.* at 683.

73. *Id.* at 676.

74. *Id.* at 682 (referring to *Cohen v. California*, 403 U.S. 15 (1971), a case in which an adult was allowed to wear a jacket that read, "Fuck the draft," the Court in

Importantly, the Court in *Fraser* focused on the content of the speech and the effect it would have on the other students in the school, given that they were a “captive audience” at the assembly.<sup>75</sup> Specifically, the Court found the school’s regulation appropriate given the effect the speech could have on the young girls in the school.<sup>76</sup> In doing so, the Court made no reference to substantial disruption or the rights of others standards from *Tinker*.<sup>77</sup>

The Court also focused on the school’s broader educational mission to teach students the boundaries of civil discourse. Specifically, the Court stated that “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>78</sup> For the Court, school officials were in the best position to determine what manner of speech was inappropriate.<sup>79</sup>

While the Court in *Fraser* did not overrule *Tinker*, it gave schools greater latitude in regulating student speech. Several courts, following *Fraser*, limited the decision by deeming it merely a fact specific exception to *Tinker* that required sexually lewd speech in order to apply.<sup>80</sup> Other courts, however, have interpreted *Fraser* broadly to encompass speech that has harmful effects on other students, even when not sexually lewd.<sup>81</sup> Although courts have varied in their interpretations of *Fraser*, courts have universally accepted the *Fraser* principle that they should generally defer to schools within the student speech category.<sup>82</sup>

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*Fraser* said that “the First Amendment gives a high school student the right to wear Tinker’s armband, but not Cohen’s jacket.”). *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (internal citations omitted).

75. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

76. *Id.* at 683.

77. *Id.* at 683-84.

78. *Id.* at 681.

79. *Id.* at 688-90.

80. *See, e.g., Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 257-58 (3d Cir. 2010) (concluding that *Fraser* was a fact specific exception to *Tinker*).

81. *See, e.g., J. S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638 (Pa. 2002) (allowing a school to regulate a student’s blog post making fun of one his teachers based partly on *Fraser*. Note that while the speech in *Bethlehem* was directed at a teacher, its overall effect on the students was the true concern).

82. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 406-09 (2007) (acknowledging the

Most recently, the Court created an additional justification for school regulation of student speech.<sup>83</sup> In *Morse v. Frederick*, a student was suspended from school after he unfurled a fourteen-foot banner at a school event that read, “BONG HiTS 4 Jesus.”<sup>84</sup> The Olympic Torch Relay was passing by the school, and school officials allowed students to watch the event.<sup>85</sup> The student, Joseph Frederick, along with several of his friends, hoisted the banner as the torch, which was accompanied by several television camera crews, passed.<sup>86</sup> When the principal saw the banner, he immediately demanded that the banner be taken down.<sup>87</sup> After Frederick refused to comply, he was suspended for ten days and later brought suit alleging a violation of his First Amendment rights.<sup>88</sup>

The Court upheld the school’s disciplinary actions, finding that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”<sup>89</sup> Mainly, the Court reasoned that the school had a compelling interest in combating the physical and psychological harm that drugs and pro-drug messages can have on students.<sup>90</sup> Importantly, the Court suggested that Frederick’s message was not political, but was instead merely an attempt to attract the television cameras.<sup>91</sup> Had Frederick’s message been political, the Court noted, the analysis would have been different.<sup>92</sup>

In reaching its holding in *Morse*, the Court reviewed its

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conflicting interpretations of *Fraser* while asserting that the concept of deference to schools was not disputed).

83. *Morse v. Frederick*, 551 U.S. 393, 397 (2007). Another major student speech case that came after *Fraser*, but before *Morse*, was *Hazelwood Sch. Dist. v. Kuhlmeier*, in which the Court upheld a regulation of student speech in a school newspaper. Because the newspaper bore the school’s imprimatur, the school was allowed to regulate the content and was not forced to endorse views of its students it might disagree with. The case has limited relevance given its unique fact pattern. See generally *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

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

85. *Id.*

86. *Id.*

87. *Id.* at 398.

88. *Id.* at 399.

89. *Id.* at 397.

90. *Morse*, 551 U.S. at 407-10.

91. Frederick admitted that the “the words were just nonsense meant to attract television cameras.” *Id.* at 401.

92. *Id.* at 399, 402-04.

existing student speech jurisprudence. Beginning with *Tinker*, the Court noted that “the mode of analysis set forth in *Tinker* is not absolute.”<sup>93</sup> The Court also acknowledged that the mode of analysis in *Fraser* was not entirely clear.<sup>94</sup> Nevertheless, the Court chose not to resolve the conflicting interpretations of *Fraser* and instead created its own standard related to drug messages.<sup>95</sup>

Several lower courts have interpreted the Supreme Court’s holding in *Morse* to apply to non-drug related student speech.<sup>96</sup> Many of these cases have justified school regulation of student threats of violence by drawing on both the *Morse* imperative of allowing schools to protect students in their care and an adapted threat analysis from general First Amendment jurisprudence.<sup>97</sup> The Court has not yet revisited student speech since its holding in *Morse*.

Following *Morse*, the student speech category remains somewhat in a state of disarray. As the previous discussion has demonstrated, many of the Supreme Court’s student speech cases leave room for a variety of interpretations. Nevertheless, the majority view is that *Tinker* remains the general standard for student speech, while the post-*Tinker* cases generally serve as fact-specific exceptions.<sup>98</sup>

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93. *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

94. *Id.* at 404.

95. *Id.* at 397 (stating that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”).

96. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771-72 (5th Cir. 2007) (relying on *Morse* to find that the expulsion of a student based on the contents of his journal, which included threats of an attack on the school, was permitted because it posed an imminent danger to the student body); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (reasoning that the rationale in *Morse* applies to speech that is reasonably construed as a threat of violence in school); *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, 561 F. Supp. 2d 1078, 1091 (D. Ariz. 2008) (noting that *Morse* stands for the proposition that the *Tinker* “substantial disruption” standard is not applicable to all student free-speech cases); *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 623 (E.D. Pa. 2008) (finding that *Morse* broadly allows for the restriction of speech that promotes illegal behavior or communicates the threat of violence); *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 911 (S.D. Tex. 2007) (stating that the general principles outlined in *Morse* have “broader application”); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1188 (C.D. Cal. 2007) (citing *Morse* and *Hazelwood* in finding that groping and making out at school were not protected activities under the First Amendment).

97. See, e.g., *Ponce*, 508 F.3d at 771-72 (discussing threatening speech and *Morse* in the same analysis of a threat of student violence).

98. See Francisco M. Negron, Jr., *A Foot in the Door? The Unwitting Move*

### 3. THE CREATION OF A THRESHOLD INQUIRY: WHAT CONSTITUTES “STUDENT SPEECH”?

Not every utterance by a student is governed by the Court’s student speech jurisprudence.<sup>99</sup> Thus, no review of the student speech category is complete without considering the threshold inquiry that some lower courts have developed to determine whether speech by students is governed by the Supreme Court’s student speech jurisprudence or simply by general First Amendment jurisprudence. In the early student speech cases, this distinction was based on location—speech by a student off-campus, whether in the privacy of his or her own home or some other non-school setting, would not trigger application of the Court’s student speech jurisprudence.<sup>100</sup> Instead, general First Amendment principles would apply. Student speech jurisprudence only applied when a student was inside the schoolhouse gate.<sup>101</sup>

More recently, particularly with the advent of the internet and social media, the location distinction has proven to be insufficient. As a result, some courts have applied student speech jurisprudence to off-campus speech by students when off-campus speech comes onto campus and/or has on-campus effects, like speech over the internet.<sup>102</sup> The Second Circuit has employed the “reasonably foreseeable” test for off-campus speech, applying the Supreme Court’s student speech jurisprudence only if it was reasonably foreseeable that the off-campus speech would have effects on-campus.<sup>103</sup> Although the Supreme Court has yet to address this issue, this comment does not focus on the appropriate test for off-campus internet speech. It is simply

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*Towards a “New” Student Welfare Standard in Student Speech after Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1223-25 (2009) (reviewing the current state of student speech jurisprudence following *Morse*).

99. See generally *Thomas v. Granville*, 607 F.2d 1043 (2nd Cir. 1979) (considering a school’s power to regulate an off-campus student newspaper); *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008) (considering a school’s ability to regulate a student blog encouraging students to harass the principal); *J. S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3rd Cir. 2010) (examining whether a school could regulate a fake internet profile of the school principal created by a student).

100. See, e.g., *Granville*, 607 F.2d at 1043.

101. *Id.* at 1043, 1050.

102. Compare *Doninger v. Niehoff*, 527 F.3d 41, 49 (2nd Cir. 2008) (employing a “reasonably foreseeable” test), with *J. S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 305 (3rd Cir. 2010) (employing a “sufficient nexus” test).

103. *Doninger*, 527 F.3d at 48-49.

important to note that a threshold inquiry in the context of off-campus speech will determine whether student speech or general First Amendment jurisprudence applies.

### C. STUDENT SPEECH THAT IS POLITICAL BUT POTENTIALLY HARMFUL

Within the student speech category, a number of cases have dealt with a school's attempt to regulate student speech that, while political, attacks the core characteristics of other students in the school. A recurring example that courts have dealt with is a school's ability to prohibit students from displaying the confederate flag.<sup>104</sup> Generally, courts have analyzed this type of speech under the substantial disruption standard. But, in two recent cases in which student speech condemned the homosexuality of other students, the Ninth and the Seventh Circuits considered alternative arguments based solely on the harm that such speech posed to the recipients of those messages.<sup>105</sup>

#### 1. *HARPER V. POWAY UNIFIED SCHOOL DISTRICT*—THE RIGHTS OF OTHERS

In *Harper v. Poway Unified School District*, an assistant principal asked a student named Tyler Chase Harper to refrain from wearing a t-shirt that read, "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," on the front, and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.<sup>106</sup> Harper wore the shirt the day after the student group known as the Gay-Straight Alliance held an event at the school

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104. See *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (finding a reasonable forecast of substantial disruption from a Confederate flag display where school officials demonstrated the existence of racial tensions at the school); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000), *cert. denied*, 531 U.S. 825 (2000) (finding a reasonable forecast of substantial disruption from a Confederate flag display because of the town's history of racial tension); *but see, e.g., Bragg v. Swanson*, 371 F. Supp. 2d 814, 829 (W.D. W. Va. 2005) (finding no reasonably forecasted substantial disruption because there was no history of racial tension or violence).

105. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178-79 (9th Cir. 2006); *Zamecnick v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 881 (7th Cir. 2011).

106. *Harper*, 445 F.3d at 1171. The next day the student wore a shirt on which, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," was written on the front, and the same, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" was written on the back. *Id.*

called a “Day of Silence”<sup>107</sup>—a national event aimed at “teach[ing] tolerance of others, particularly those of a different sexual orientation.”<sup>108</sup> To participate in the event, students refrain from speaking on that day to symbolize the silencing effect of intolerance upon gays and lesbians.<sup>109</sup>

Citing previous altercations at the school over disagreement about the Day of Silence, Harper’s teacher and assistant principal called Harper’s t-shirt inflammatory and asked him to turn his shirt inside out.<sup>110</sup> When he refused, the assistant principal required that Harper have his own private study hall until the school day was over.<sup>111</sup> Harper was not suspended and did not receive any disciplinary remarks; nevertheless, Harper sought an injunction against the school’s restriction of his t-shirt—claiming, among other things, that the school violated his First Amendment right to free speech.<sup>112</sup> The district court dismissed Harper’s free speech claim, citing *Tinker* and the reasonable forecast of substantial disruption by the school.<sup>113</sup>

The Ninth Circuit affirmed the district court’s dismissal of Harper’s claim but relied on the “rights of others” prong in *Tinker* instead of the substantial disruption standard.<sup>114</sup> In doing so, the Ninth Circuit panel explicitly acknowledged the psychological harm associated with this particular type of student speech in an unprecedented way. The Court stated:

Public schools are places where impressionable young persons spend much of their time while growing up . . . . Almost all young Americans attend public schools. During the time they do—from first grade through twelfth—students are discovering what and who they are. Often, they are insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others.<sup>115</sup>

The court specifically called Harper’s speech “a verbal assault” on homosexual students that interfered with their right

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107. Harper v. Poway Unified Sch. Dist., 446 F.3d 1166, 1171 (9th Cir. 2006).

108. *Id.*

109. *Id.* at 1171 n.3.

110. *Id.* at 1172.

111. *Id.* at 1172.

112. *Id.* at 1172-73.

113. *Harper*, 446 F.3d at 1175.

114. *Id.* at 1178.

115. *Id.* at 1175-76.

to be left alone.<sup>116</sup> Specifically, the court cited numerous studies demonstrating that teenage homosexuals who receive such verbal abuse have such damaged psychological health that it leads to high rates of “academic underachievement, truancy, and dropout . . . .”<sup>117</sup> Citing *Brown v. Board of Education*, the court emphasized that this right to be left alone is intertwined with a right not to be made to feel inferior because “[a] sense of inferiority affects the motivation of a child to learn . . . . If a school permitted its students to wear shirts reading, ‘Negroes: Go Back to Africa,’ no one would doubt that the message would be harmful to young black students.”<sup>118</sup>

The court in *Harper* emphasized that, “students cannot hide behind the First Amendment . . . to abuse and intimidate other students at school.”<sup>119</sup> Specifically, the court found it unnecessary to make the school prove psychological harm to the students, holding that such strong messages made the harm self-evident.<sup>120</sup>

Nevertheless, the court in *Harper* sought to distinguish what would constitute acceptable student speech in the context of core characteristics. Specifically, the court stated that social or political debate on issues was possible without confronting or berating school children at school because of their sexual orientation.<sup>121</sup>

## 2. *ZAMECNICK V. INDIAN PRAIRIE SCHOOL DISTRICT*— REJECTING A “HURT FEELINGS” RULE

In *Zamecnick v. Indian Prairie School District*, a school prohibited two students from wearing t-shirts that read, “Be Happy, Not Gay.”<sup>122</sup> Similar to the students in *Harper*, the two students in *Zamenick* were voicing their disapproval of

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116. *Harper v. Poway Unified Sch. Dist.*, 446 F.3d 1166, 1178 (9th Cir. 2006).

117. *Id.* at 1179.

118. *Id.* at 1180.

119. *Id.* at 1178 (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3rd Cir. 2002)).

120. *Id.* at 1180 (stating, “[y]ou don’t need an expert witness to figure out the self-evident effect of certain policies or messages.”) (citations omitted).

121. *Id.* at 1181 (stating that “[t]o say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful. There are numerous locations and opportunities available to those who wish to advance such an argument. It is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.”).

122. *Zamecnick v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 875 (7th Cir. 2011).

homosexuality on religious grounds following the Day of Silence.<sup>123</sup> The school had a policy in place that forbade derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability and suspended the students.<sup>124</sup>

Unlike the Ninth Circuit in *Harper*, however, the Seventh Circuit, in an opinion authored by Judge Richard Posner, upheld the students' claim for an injunction to prohibit the school's restriction of the shirt. Notably, Judge Posner rejected the Ninth Circuit's use of the rights of others prong, calling it a "hurt feelings" defense to what was really a violation of the students' First Amendment rights. Instead, Judge Posner chose to analyze the shirt under the substantial disruption standard, finding that there was not sufficient evidence to make it reasonable to forecast a substantial disruption to the school.<sup>125</sup> He explained that "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality . . . people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life."<sup>126</sup>

Nevertheless, Judge Posner acknowledged that the phrase, "Be Happy, Not Gay" was less severe than the message in *Harper* that read, "Homosexuality is shameful."<sup>127</sup> For Posner, the more severe comments were likely to fall into the fighting words category first established in *Chaplinsky*.<sup>128</sup> In drawing this distinction, the court in *Zamecnick* also recognized the harm caused by speech that harasses other students.<sup>129</sup> Specifically, Judge Posner stated that harassment, which "blends insensibly into bullying, intimidation, and provocation," can have serious effects on students.<sup>130</sup> Consequently, the court noted that school officials are entitled to exercise discretion when student speech "crosses the line between hurt feelings and substantial disruption

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123. *Zamecnick v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 875 (7th Cir. 2011). During the Day of Silence, students wore t-shirts that read "Be Who You Are." *Id.*

124. *Id.*

125. *Id.* at 877, 880 (noting that judges employing the substantial disruption standard, "tend[] to rely on judicial intuition rather than on data"). *Id.* at 877.

126. *Id.* at 876.

127. *Id.* at 876-77.

128. *Id.* at 876.

129. *Zamecnick*, 636 F.3d at 876.

130. *Id.* at 877.

. . . .”<sup>131</sup> However, the court did not discuss in detail how to determine when speech crosses the line between hurt feelings and substantial disruption.

### III. PROBLEMS WITH CURRENT STUDENT SPEECH JURISPRUDENCE

This section analyzes the various problems and issues presented by the student speech jurisprudence discussed in Section II. Specifically, Subsection A discusses how it is currently unclear which of the student speech precedents applies to a given case. Subsection B discusses the problems that arise when the substantial disruption standard is used as a general rule to govern student speech. Subsection C discusses the additional problems that arise when the post-*Tinker* cases are used. Lastly, Subsection D analyzes how the contrasting attempts by the Seventh and Ninth Circuit to reconcile Supreme Court student speech jurisprudence through the rights of others standard have provided for equally unsatisfactory results.

#### A. WHICH SUPREME COURT PRECEDENT APPLIES?

One of the most basic problems with the Supreme Court’s student speech jurisprudence is that it is unclear how it applies.<sup>132</sup> Specifically, every time the Court has accepted a student speech case since *Tinker*, it has continued to create additional standards instead of using the substantial disruption standard.<sup>133</sup> Several lower courts have interpreted the post-*Tinker* cases as “exceptions” to the general *Tinker* substantial disruption standard.<sup>134</sup> Yet, the Court itself has never referred to any of the post-*Tinker* cases as exceptions and has merely stated that *Tinker* is “not absolute.”<sup>135</sup> Not surprisingly, other courts have questioned *Tinker*’s viability following *Morse* by suggesting that the court has moved away from the substantial disruption standard altogether.<sup>136</sup> As Justice Thomas noted in his concurrence in *Morse*, the confusion over which standard to apply

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131. *Zamecnick v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 878 (7th Cir. 2011).

132. *See Negron, Jr.*, *supra* note 98, at 1222-25.

133. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 675 (1986) (allowing regulation of lewd student speech); *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (permitting regulation of student speech advocating illegal drug use).

134. *See Negron, Jr.*, *supra* note 98, at 1223-25.

135. *Morse*, 551 U.S. at 405.

136. *See Negron, Jr.*, *supra* note 98, at 1223-25.

has produced a frustrating result: “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not . . . .”<sup>137</sup>

Faced with this dilemma, the Court has essentially three choices going forward. First, it could retain the existing jurisprudence and attempt to wedge future scenarios into those decisions without creating any more standards. Several courts have taken this approach and tried to expand the definition of substantial disruption and the educational mission of the school.<sup>138</sup> Second, the Court could keep the existing jurisprudence while continuing to create additional standards. The Supreme Court has taken this approach, most recently in *Morse*.<sup>139</sup> Third, the Court could create a new general standard by incorporating its previous jurisprudence into one clear, comprehensive student speech rule. The substantial harm standard as proposed and discussed further in Section IV of this comment adopts this third approach.

#### B. PROBLEMS WITH THE SUBSTANTIAL DISRUPTION STANDARD AS A GENERAL RULE

Most fundamentally, the substantial disruption standard only addresses a certain set of speech while ignoring other types of speech that pose legitimate concerns for schools. In particular, the substantial disruption standard largely ignores the harm of speech that bullies, harasses, or intimidates a student. In order to constitute a substantial disruption, the speech must disrupt the entire school environment, and it is not clear if speech affecting one particular student qualifies. Thus, individual victims of harassment must coordinate an effort of uprising, absence, poor performance, or the threat thereof among the entire student body in order for a substantial disruption to exist. This places an unrealistic burden on those students and ignores the severity of the harm that certain types of speech can inflict on just one student. The Billy hypothetical illustrates this point.<sup>140</sup> If Billy is the only special education student in his school, then

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137. See *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).

138. See *e.g.*, *J. S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3rd Cir. 2010) (finding it was reasonable to forecast a substantial disruption based on a website criticizing the principle); see also *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246 (11th Cir. 2003).

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

140. See *supra* Section I.

virtually any speech that attacks Billy for his disabilities will not create a substantial disruption. Additionally, even if there are other special education students in the school, if Billy is the only one targeted by such speech, then he still suffers the same harm, even though there is no substantial disruption.

Some commentators have also criticized the substantial disruption standard for its lack of clarity as to what exactly constitutes a substantial disruption.<sup>141</sup> Part of the problem is not the standard itself, but the attempts of some courts to expand the standard to encompass situations it was never meant to cover.<sup>142</sup> Specifically, the substantial disruption standard was never meant to address bullying or attacks on students' core characteristics.<sup>143</sup> The Court in *Tinker* was primarily concerned with student protests and the havoc that they could wreak on public schools if students were allowed to stage protests en masse.<sup>144</sup> Nevertheless, the Court in *Tinker* contemplated other types of speech that should be regulated when it created the rights of others standard.<sup>145</sup>

Yet the reluctance by lower courts, as well as by the Supreme Court, in the post-*Tinker* cases to employ the rights of others standard has meant that they have limited themselves to the substantial disruption standard. Unfortunately, the substantial disruption standard is ill-equipped to adequately address speech that directly harms particular students and not just the school environment in general. The shortcoming of the substantial disruption standard partly explains the disparate attempts to create additional standards like those in *Fraser* and *Morse*.

### C. PROBLEMS WITH THE POST-*TINKER* CASES

While the post-*Tinker* cases have attempted to address the shortcomings of the substantial disruption standard, they have

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141. See Zande, *supra* note 2, at 115; *Nuxoll v. Indian Prairie Sch. Distr.*, 523 F.3d 668, 674 (7th Cir. 2008) (posing the rhetorical questions, "But what is 'substantial disruption?' Must it amount to 'disorder or disturbance?' Must classwork be disrupted and if so how severely?").

142. See Zande, *supra* note 2, at 114-17.

143. Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. La Verne L. Rev. 171, 185 (2012).

144. *Id.*

145. *Id.* at 508.

failed to create a single comprehensive student speech standard. For example, the Court in *Morse* acknowledged that the *Fraser* analysis was unclear,<sup>146</sup> perhaps because a plain reading of *Fraser* would seem to allow schools to regulate almost any student speech.

Moreover, the language of the holding in *Morse* indicates the Court's desire to limit its holding to drug-related messages. However, some lower courts have read *Morse* more broadly by seizing on the language in *Morse* that discusses schools "protecting students entrusted to their care." Even if such language were not meant to apply strictly to drug messages, it is entirely too vague to constitute a general student speech standard. Specifically, if schools are allowed to restrict student speech on the basis of protecting students from any conceivable harm, then students would again cease to have any free speech rights whatsoever.

The Billy Hypothetical demonstrates the shortcomings of the post-*Tinker* cases. Under either a *Fraser* standard of inappropriate or offensive speech, or a *Morse* standard of protection from any conceivable harm, a school would be allowed to regulate all speech in the hypothetical. This would include the student who remarks in the hallway, "There shouldn't be anything *special* about our education. Either you come here and get the same treatment or you go somewhere else." Thus, even the mildest student comments could be suppressed under expansive readings of *Fraser* and *Morse*. Cutting off all student speech should not be the goal of the student speech category. Rather, the goal should be to balance schools' interests with their students' free speech rights.

#### D. THE PROBLEM WITH THE RIGHTS OF OTHERS STANDARD AND THE "NO HURT FEELINGS" APPROACH

Given the shortcomings of the Supreme Court's student speech jurisprudence, it is unsurprising that the Ninth Circuit in *Harper* and the Seventh Circuit in *Zamecnick* struggled to articulate cogent standards for political speech that can be substantially harmful to students. Both courts acknowledged the harm and the dilemma presented by such speech even though they reached different results. Yet, both courts assumed

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146. *Morse v. Frederick*, 551 U.S. 393, 404 (2007).

positions at the extreme ends of the spectrum without exploring a potential middle ground.

On the one hand, the Ninth Circuit, in *Harper*, employed the rights of others standard. However, there is a lack of case law on this standard, and the Ninth Circuit failed to define its limits. Specifically, the rights of others standard, similar to expansive *Fraser* and *Morse* standards, would seem to limit most, if not all student speech because there was no discussion of which rights are at stake under this standard other than a general right to be left alone. As the Court in *Tinker* noted, free speech cannot exist only in principle but not in fact.<sup>147</sup>

On the other hand, the Seventh Circuit completely rejected the rights of others standard as a “hurt feelings” defense that violated the First Amendment. Indeed, as the above discussion on substantial disruption demonstrates, speech that neither constitutes a substantial disruption nor fighting words can still be potentially harmful to students. Specifically, the student in the Billy Hypothetical wearing the button that reads “Special Needs are Retarded, Vote Yes on Prop. 1182,” illustrates this point. As discussed previously, this student speech is not likely to cause a substantial disruption. Additionally, it is not likely to constitute “fighting words” given its general political message and the minimal risk that this message will incite immediate violence. Nevertheless, this speech deserves a more rigorous examination given the potential harm it could inflict on students with disabilities, like Billy, who may be forced to absorb such messages on a daily basis.

In sum, with regard to student speech that simultaneously conveys a political message and attacks other students, there is currently no clear, workable rule that balances the interests of schools with the interests of students and their free speech rights. More specifically, there is presently no rule capable of differentiating between the various types of student speech that range from bullying to pure political speech. As *Harper* and *Zamecnick* demonstrate, the need for such a rule clearly exists.

#### IV. A PROPOSED SOLUTION: A TWO-PART SUBSTANTIAL HARM RULE

This Section proposes a solution to the problems discussed in

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

Section III by suggesting that the Supreme Court adopt a two-part substantial harm rule as the new student speech standard. Subsection A lays out the specifics of the substantial harm rule by presenting the actual proposed language of the rule that the Court should adopt. This Subsection also addresses how the rule should be interpreted in future cases by addressing the amount of deference courts should give to schools' disciplining of students as a result of student speech. Subsection B both explains the rationale behind the proposed rule by articulating how the rule comports with existing student speech precedent, while also filling the many gaps that currently exist in the jurisprudence. Subsection C applies the substantial harm rule to the Billy Hypothetical from Section I to demonstrate how the rule will work in various student speech situations. Finally, Subsection D addresses potential criticisms of the rule and offers counterarguments where appropriate.

#### A. THE SUBSTANTIAL HARM RULE

This comment proposes that the Supreme Court adopt the following two-part substantial harm rule for speech by a student that is classified as student speech:

**A school can regulate student speech that:**

**(1) (a) causes substantial disruption to the school environment or (b) makes it reasonable to forecast such substantial disruption in the future; or**

**(2) (a) *causes substantial harm to student(s) of the school* or (b) makes it reasonable to forecast such substantial harm in the future.**

In addition to the basic two-part structure, there are several important parts of this rule. First, this rule only applies to student speech, not all speech by a student. Second, a school should generally use the least restrictive means in regulating the speech to remedy or prevent substantial disruption or harm.<sup>148</sup> If a school is trying to prevent future substantial disruption or harm, it will often be more appropriate for a school to ask the student to remove the speech from public view instead of suspending or expelling that student. To prevent excessive litigation in this context, courts should generally extend the traditional deference given to schools in regulating student

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148. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006).

speech. The amount of deference the courts should show is discussed in detail in the next subsection.<sup>149</sup> Lastly, because part (1) of the rule adopts the *Tinker* substantial disruption standard, given the forty years of case law and academic study that have already been devoted to substantial disruption, this comment does not explore this prong in detail. The additional aspects of this rule are discussed in detail in the following Sections.

### 1. A THRESHOLD INQUIRY

Before applying the substantial harm rule, this comment proposes a threshold inquiry for on-campus speech by a student. Specifically, while *off-campus* speech by a student may or may not be classified as student speech, a third category of speech by a student should be created for *on-campus* speech that falls outside of the scope of the First Amendment altogether and squarely within the regulatory authority of the school. This third category should be defined by the following threshold inquiry:

**On-campus speech by a student falls directly under the authority of a school, and not under student speech or general First Amendment jurisprudence, when that speech:**

**(1) is strictly private, personal expression and not speech on issues of public concern (public speech); and**

**(2) falls within the basic, fundamental role of the school.**

A typical example would be if one student, not asserting any political message of any kind, directly called another student a derogatory name, like “fatty” or “idiot” to his face in class or in the halls. Another example would be a student interrupting his or her teacher while the teacher was trying to conduct class. This third category operates on the basic assumption that there are certain types of speech that a school clearly can and should be able to regulate without being subject to the student speech or general First Amendment jurisprudence. A school simply would not be able to function if every utterance by a student on campus required an application of student speech jurisprudence. Instead, there should be a basic category of speech that is subject to a school’s fundamental authority as an educator. Although the

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149. See *infra* Section IV(A)(3).

Supreme Court has never explicitly discussed this category, the inference is clear. If a school under either the *Tinker* or post-*Tinker* standards can restrict public speech, the most protected form of speech under the First Amendment, in order for the school to carry out its basic educational mission, then logically a school can also regulate less protected private speech to do the same.

This threshold inquiry will allow schools to adequately regulate pure bullying, harassment, and intimidation. In such situations, the balancing test inherent in student speech demonstrates why there is no need to apply an additional test. Specifically, the school's interest in preventing speech that solely bullies, harasses, or intimidates so greatly outweighs any interest the student has in this type of personal expression that a school's authority over the speech is self-evident.

Thus, under this proposed threshold inquiry, on-campus speech by a student could fall into two categories: (1) speech that falls directly under school regulation, or (2) speech that must be subject to the Court's student speech jurisprudence, namely the substantial harm rule, to determine whether the school is authorized to regulate the speech.

## 2. DEFINING SUBSTANTIAL HARM

In developing the substantial harm standard, defining the term "substantial harm" is necessary. "Substantial" is defined as "consisting or relating of substance, considerable in quantity."<sup>150</sup> "Harm" is defined as "physical, mental, or emotional damage, impairment, or deterioration."<sup>151</sup> Putting the plain meanings together, "substantial harm" means physical, mental, or emotional damage, impairment, or deterioration that is of substance or considerable in quantity.

While the plain meaning of substantial harm may not always provide complete clarity in every case, it is evident that the rule includes speech that causes substantial physical or psychological harm. More specifically, the rule includes, but is not limited to, the physical harm which may result from students' embracing of

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150. *Substantial Definition*, MERRIAM WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/substantial> (last visited June 4, 2012).

151. *Harm Definition*, MERRIAM WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/harm> (last visited June 4, 2012).

drug messages like the one in *Morse*, as well as the psychological harm discussed in both *Harper* and *Zamecnick*. The rule also captures the emotional harm associated with bullying, harassment, and intimidation.

More generally, substantial harm can be defined as the point at which speech that is merely offensive crosses over into speech that harasses, bullies, intimidates, provokes, or otherwise substantially harms another student. This critical point is determinative of substantial harm regardless of whether a public issue is attached to the message. This point was also a key difference between the message, “Homosexuality is shameful,” and the message, “Be Happy, Not Gay,” in the cases of *Harper* and *Zamecnick*, respectively.<sup>152</sup>

For some speech, it will be unnecessary for the court to conduct a detailed inquiry to determine whether the speech is merely offensive or likely to cause substantial harm. In *Harper*, the Ninth Circuit explained that the messages “Negroes: Go Back to Africa,” or “Hitler Had the Right Idea. Let’s Finish the Job” present obvious substantial harm to students that would be forced to endure such messages.<sup>153</sup> For other speech, determining whether the speech constitutes substantial harm will require a more fact-specific inquiry. In such cases, courts should give school authorities discretion in making these determinations. Additionally, when there are genuine issues of material fact over the severity of a message and its potential for substantial harm, childhood psychology experts are likely to be in the best position to inform a court whether the speech presents a substantial harm. Most often, questions over substantial harm will likely emerge in the application of part (2)(b) of the rule, forecasting substantial harm in the future.

### 3. DEFERENCE AND SPECIFIC FACTS

As the Supreme Court noted in *Fraser* and *Morse*, schools, not courts, are in the best position to determine the harm and disruption that particular student speech can have.<sup>154</sup> Because many of these student speech cases are intensely fact-specific,<sup>155</sup>

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152. See *supra* Section II(C).

153. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1207 (9th Cir. 2006) (Kozinski, J., dissenting).

154. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

155. See Zande, *supra* note 2, at 104.

courts have generally shown schools deference in regulating student speech,<sup>156</sup> and the court should continue the same trend in applying the proposed substantial harm rule. The alternative would allow courts to continually second guess public school officials around the country every time a school official disciplined or failed to discipline a student for his or her speech.

Although the courts should give the schools deference in applying the substantial harm rule, a school's actions must have been reasonable overall. This concept of reasonableness is built into the language of the rule itself and is consistent with the Court's existing student speech jurisprudence.<sup>157</sup> Thus, courts should generally defer to both a school's reasonable decision to regulate the speech based on school officials' perception of substantial disruption or harm and also to the school's decision to employ a reasonable type of regulation.

Deference, however, does not mean blanket authority for a school to regulate any and all student speech. Just as *Tinker* required under its substantial disruption standard,<sup>158</sup> a substantial harm rule would also require a school to demonstrate, by pointing to specific facts, that the circumstances described in either of the two prongs actually exist. Therefore, even though the courts may defer to schools, the schools must show their regulation is based on specific facts that amount to "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>159</sup> Conversely, a student challenging a school's regulation of his or her speech may also present specific facts to demonstrate why deference should not be given in that particular case.

## B. THE RATIONALE

In essence, the substantial harm rule captures what the Supreme Court and circuit courts have been groping their way towards ever since *Tinker*—the restriction of student speech is about the harm that speech can cause to students in addition to speech that disrupts the school environment. Whether it is

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156. Negron, Jr., *supra* note 98, at 1223.

157. See *Morse v. Frederick*, 551 U.S. 393, 406 (2007); see also *id.* at 422 (Alito, J., concurring).

158. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

159. *Id.* at 509.

sexually explicit messages as in *Fraser*, messages promoting drug use as in *Morse*, or speech that attacks the core characteristics of other students as in *Harper*, the common thread is that schools should be allowed to regulate student speech in certain instances when it poses substantial harm to students. The substantial harm rule proposed herein articulates this common thread in a concrete, comprehensive fashion by addressing the problems discussed in Section III that have resulted from a piecemeal approach to student speech.

Even in *Tinker*, the Supreme Court recognized that schools should be allowed to regulate both speech that disrupts the school environment *and* speech that causes harm to others when the Court created its rights of others prong.

A student's rights, therefore, do not embrace merely the classroom hours. 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 controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.<sup>160</sup>

As the previous discussion<sup>161</sup> on the shortcomings of the rights of others prong has demonstrated, this prong failed to take hold in post-*Tinker* jurisprudence partly because courts viewed it as dicta that was too ambiguous to follow. But the Court's attempt, via the rights of others prong, to address speech that poses harm to other students is evident in post-*Tinker* cases like *Fraser* and *Morse*, as well as in circuit cases like *Harper* and *Zamecnick*. Consequently, in adopting the substantial harm rule, the Court could read the rule into the rights of others prong without having to create an entirely new standard.

More specifically, the substantial harm rule is a refinement and update of the original *Tinker* standard. Specifically, the substantial harm standard replaces the rights of others prong with a more defined and workable substantial harm rule. By providing a catchall rule that is clearly defined, the substantial harm rule is likely to provide clarity for lower courts, schools, and students that does not presently exist. The substantial harm rule

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160. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

161. *See supra* Sections III.B, III.D.

also eliminates the need for courts to over-expand the definition of substantial disruption or create new patchwork exceptions to the existing student speech jurisprudence. Additionally, by adopting the substantial harm rule, the Court would abandon the additional alternative standards posed by the post-*Tinker* cases in exchange for one clear and workable substantial harm rule. Because cases like *Morse* and *Fraser* are read into the second prong of the substantial harm rule, they may remain good law by becoming examples of what constitutes substantial harm.

The substantial harm rule also rectifies the specific problem posed by student speech that ranges from bullying to pure political speech. In *Harper* and *Zamecnick*, the lack of a workable student speech standard led to the diametrically opposed holdings of the Ninth and Seventh Circuits, despite similar fact patterns in their respective cases.<sup>162</sup> In *Harper*, the Ninth Circuit was concerned about the inability of schools to address the harm that political student speech posed to other students in the school. The substantial harm rule definitively addresses this concern by parsing out exactly which types of speech may be regulated based on the type of harm they pose, regardless of the political content of the speech. Conversely, in *Zamecnick*, the Seventh Circuit was concerned about giving schools blanket authority to regulate all student speech. The substantial harm rule addresses this concern by integrating two fundamental limits on a school's regulatory authority—namely the requirements that the harm be substantial and that forecasts of substantial harm be reasonably based on specific facts. Thus, the substantial harm rule stakes out a workable middle ground between *Harper* and *Zamecnick* to provide schools and students with a clear standard.

At the heart of this rule is the same balancing of interests present in all First Amendment jurisprudence. The substantial harm rule attempts to balance a school's compelling interest in protecting its students from substantial harm while allowing students to maintain a limited free speech right. Because the balance in the student speech category has always tipped in favor of schools, the substantial harm rule does the same.

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162. *See supra* Section II.C.

### C. APPLYING THE RULE TO THE BILLY HYPOTHETICAL

Recalling the Billy Hypothetical from the introduction, Billy was the soft-spoken, fifteen-year-old that was bullied and harassed for his speech impediment. He committed suicide as a result of feelings arising from several statements made by his fellow students.

The Billy Hypothetical contains four different relevant speeches: (1) Carl's statement outside the principal's office, (2) Carl's t-shirt, (3) the student button, and (4) the student talking in the hallway about special education.<sup>163</sup>

There are three steps to apply the substantial harm rule to each instance of speech in the Billy Hypothetical. First, a threshold inquiry will be used to determine whether the speech is directly under the school's regulatory authority or is subject to the Court's student speech jurisprudence and the substantial harm rule. Second, the message itself will be analyzed to determine if the speech constitutes self-evident substantial harm. Third, the specific facts surrounding the statement will be analyzed to make a final determination of substantial harm. Each speech is analyzed from the perspective of a school official at the time the speech was made, not after Billy committed suicide.

#### 1. APPLICATION TO CARL'S STATEMENT OUTSIDE THE PRINCIPAL'S OFFICE—SCHOOL AUTHORITY AT THE THRESHOLD

*"I can't believe this retarded fag got us suspended"—Carl outside of the principal's office*

Applying the threshold inquiry, the school can regulate Carl's speech outside of the principal's office without applying the substantial harm rule. Calling Billy a "retarded fag" in Billy's presence is not public speech. It is private expression. Although special education and homosexuality may be public issues in certain contexts, Carl's speech in this context does not constitute an attempt to discuss public issues. Carl's speech is, at best, simply a derogatory remark about another student, and at worst, an attempt to intimidate Billy given Billy's presence within hearing distance when Carl offered his remark. In addition, Carl

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163. See *supra* Section I, Billy Hypothetical.

made the remark at school, during school hours. Consequently, Carl's speech falls under the category of speech subject to school regulation because of a school's fundamental role as an educator. Neither student speech jurisprudence, nor free speech jurisprudence, more generally applies to Carl's speech. Thus, the school can regulate Carl's speech outside of the principal's office without applying the substantial harm rule.

## 2. APPLICATION TO CARL'S T-SHIRT—SELF-EVIDENT SUBSTANTIAL HARM

*“God hates fags and retards, Leviticus 21:16–24 . . . and so do I.”—Carl's T-shirt worn at school throughout the day*

It is questionable whether the threshold inquiry places Carl's t-shirt under the fundamental role of the school category or instead under the substantial harm rule. Unlike Carl's speech outside of the principal's office, his t-shirt could constitute an attempt to discuss public issues. Specifically, the words, “God hates fags and retards” could be construed as an attempt to comment about gay marriage or any other public issue that debates the recognition of homosexuals. Yet, unlike the t-shirts in *Harper* and *Zamecnick*, the t-shirt in the Billy hypothetical was not worn in the context of a Day of Silence that would allow a court to more clearly infer the meaning and purpose of Carl's shirt. Additionally, Carl's history of intimidating and bullying Billy could demonstrate that Carl's speech is meant solely to intimidate and harass, not to engage in public expression. If that is the case, Carl's t-shirt would fall under the school's fundamental educator category. More facts, including testimony from Carl, would aid this inquiry.

Assuming that Carl's t-shirt falls under the substantial harm rule, the first inquiry is whether the speech constitutes easily recognizable substantial harm. Saying that the “Almighty condemns you for your disability and sexual orientation” is certainly more severe than saying, “Be Happy, Not Gay.” Additionally, the words “retard” and “fag” are not just condemnation, but are trademark derogatory slurs for disability and homosexuality that are universally understood to convey hatred and to connote inferiority. The “and so do I” statement also adds a certain level of severity to the message. Such stark messages to single out and condemn the core characteristics of young people are likely to present a self-evident substantial harm that does not require a fact specific inquiry. Thus, an application

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of the substantial harm rule appears to allow the school to regulate Carl's t-shirt at this point.

If Carl's t-shirt did not give rise to a self-evident substantial harm, the inquiry under the substantial harm rule would turn to the context in which Carl conveyed his message. Carl's history of bullying and intimidating Billy, the harm that such activity has already caused Billy, and Carl's placement in front of Billy in class would likely be sufficient to demonstrate substantial harm and permit the school to regulate the speech. This part of the substantial harm inquiry is explored in more detail in the next subsection.

### **3. APPLICATION TO THE STUDENT BUTTON—SPECIFIC FACT ANALYSIS REQUIRED**

*“Special Needs are Retarded, Vote Yes on Prop. 1182”—Student Button*

The student button appears to be a borderline case. Under the threshold inquiry, the public speech elements of the button easily place the speech under the substantial harm rule and not under the direct authority of the school. The part of the message that says, “Vote Yes on Prop. 1182” is purely political, and it would be unreasonable for a court to forecast substantial harm based on that message alone. Yet the other half of the message that contains the words, “Special Needs are Retarded,” raises the issue of whether this speech crosses the line from offensive to substantially harmful. While the phrase “Special Needs are Retarded,” does use the slur “retarded,” the message is arguably less severe than “God Hates Fags and Retards.” Essentially, it is a play on words to convey a political point, albeit in an offensive way. Thus, based on the message itself, it does not appear that the student button constitutes a self-evident substantial harm.

Looking at the circumstances surrounding the button, the school would have to demonstrate some specific facts that elevate this message from being merely offensive to substantially harmful. While the school's determination would be treated with deference, the existence of a pending state legislative proposal to cut special education does not help the school because it tends to suggest that the message is designed to make a political statement rather than to harm. Based on testimony and affidavits from school officials and students, the school could attempt to demonstrate that similar messages previously caused

harm to students like Billy, if that type of evidence exists. Otherwise, the school would likely have to offer testimony from child psychology experts or academic studies demonstrating that the buttons were harmful. Even then, the school faces an uphill battle in proving its case under the given facts. Thus, determining whether or not the substantial harm rule would ultimately grant the school authority to regulate the speech depends on the nature and quality of the school's evidence.

#### 4. STUDENT TALKING IN THE HALLWAY—NO SUBSTANTIAL HARM

*“There shouldn’t be anything special about our education. Either you come here and get the same treatment or you go somewhere else.”—Student talking to a friend in the hallway.*

Under the threshold inquiry, it is evident that this student's speech is discussing the public issue of special education and its place in his school. Hence, the substantial harm standard applies. Although some students, like Billy, might be offended by the message, the message does not appear to be of such magnitude as to present a substantial harm. Unlike the previous messages, the student's remarks in the hallway do not attempt to single out a particular person or condemn a particular disability or other core characteristic. The student simply conveys an opinion about a public issue, which is currently being debated in that state. While the message does indicate that the student does not believe that special education students belong in the school, which certainly could create feelings of inferiority among special education students, it does so in a political manner, not in a personal, hateful, or particularly vicious way.

Looking at the specific facts surrounding the message, similar to the previous speech, a school would have to demonstrate by past history or expert prediction that such speech will present a substantial harm to one or more students in the school. Because this speech is more political and does not contain the condemning remarks of the student button, the balance weighs in favor of the student in this example. Consequently, this student speech likely does not present a substantial harm, and a school would in all probability be unable to regulate this speech.

#### D. ADDRESSING POTENTIAL CRITICISMS

##### 1. THE EGG-SHELL SKULL PROBLEM

As Judge Posner noted in *Zamecnick*, allowing a hurt feelings defense to a First Amendment violation is threatening to free speech because it essentially allows the audience's reaction to control the speaker's freedom to speak. The substantial harm rule addresses this concern by requiring the harm to be substantial before permitting school regulation, which ensures that an incursion into a student's freedom of speech is limited to justifiable situations where the balance between harm and freedom of speech tips in favor of regulation. But the problem re-emerges with the egg-shell skull student—the student that is extremely sensitive. In such a case, the student's oversensitivity throws off the balance, some would say, in an unjust way. Practically speaking, a student's First Amendment right would be greatly reduced if a school could regulate student speech every time an overly sensitive student was substantially harmed. Exacerbating the problem, many adolescents may be considered egg-shell skulled because of the very fact that they are not adults.

One way to solve this problem would be to assess whether speech causes substantial harm to a *reasonable* student in that position to justify school regulation. This would protect students from incursions by school authorities on their free speech rights on the basis of protecting an unreasonably sensitive student. Although the unusually sensitive student will still be harmed, the substantial harm rule is not the only tool for dealing with harmful speech. The substantial harm rule merely provides the outer limit on what schools can do in regulating free speech. Inside that limit, parents, teachers, and social workers all have a critical role to play. This is especially true in the context of the egg-shell skull student.<sup>164</sup>

Applying this modification to the Billy Hypothetical, it is

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164. Contrarily, the iron-skull student—the student who is not substantially harmed by speech that a reasonable student would be harmed by—may present a different issue. It would seem unjust to regulate a student's speech that did not actually harm an iron-skull student. Although this scenario seems rare, it will probably simply play out in the fact specific inquiry portion of the test, which will demonstrate that no actual harm was done. A specific fact that may demonstrate a lack of harm in this scenario might be the student that is willing to engage the speaker with speech of their own to counter the original speaker's message. Obviously, all of the specific facts would have to be explored.

tough to say whether Billy would qualify at any point as such a student. In the beginning of the hypothetical, there is nothing to indicate that he is extremely sensitive, but after his contemplation of suicide, there may be an argument that Billy was particularly sensitive to the array of messages that confronted him at school. Nevertheless, the school's interest in protecting Billy from substantial harm at that point in time was greater. Consequently, any egg-shell modification to the substantial harm rule should be used with caution.<sup>165</sup>

## 2. THE VIEWPOINT DISCRIMINATION PROBLEM

The most difficult part of the substantial harm rule is that it forces school officials and courts to wade into the particular content of a student's speech and judge its potential for substantial harm. Generally, courts have shied away from examining content for fear of engaging in viewpoint discrimination, yet the content inherently determines the harm presented by speech in many cases. This is the case in both the unprotected free speech categories, as well as in existing student speech jurisprudence. Under the unprotected free speech categories, for example, courts examine the content of the speech, as well as the surrounding facts, to determine whether speech constitutes fighting words or a true threat.

Similarly, under the student speech category, courts routinely examine the content of a student's speech to determine whether speech can be regulated. In *Tinker*, for example, the Court essentially permitted viewpoint discrimination when it stated that speech could be regulated if it caused a substantial disruption to the school. Inherent in the *Tinker* substantial disruption standard was the concept that certain unpopular,

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165. Related to the egg-shell skull problem is the issue of causation. Specifically, explicit in the substantial harm rule is an element of causation. There could very well be cases in which using solely a "but for" causation would be unjust. A typical example would be for one student's political message to be used by others to harass and intimidate other students. For instance, say the student in the Billy Hypothetical who said special education students should go elsewhere wrote his or her message on a website instead of saying it to a friend. Further, say that Carl and his gang decided to print the message out and plaster it on Billy's locker. In such a case, but for the author's message, any potential harm from that speech would not be present. It does not follow that the original author should have his or her speech restricted. While this comment does not seek to establish one particular theory of causation over another, "but for" causation will not always be sufficient in successfully applying the substantial harm rule.

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minority opinions could be discriminated against if their expression would cause a substantial disruption to the school. Similarly, the Court regulated the specific content of the student's speech in *Morse* by allowing schools to regulate messages advocating the use of illegal drugs. Thus, given the special characteristics of the school environment, student speech has always allowed a degree of viewpoint discrimination, and the substantial harm rule is no different.

Nevertheless, given the difficulty of this task, it is important to reiterate that the substantial harm rule does not simply measure how offensive speech may be. It is instead a measure of how harmful speech is. Nevertheless, the more offensive speech is, the more likely it is to be harmful. However, speech that is extremely offensive is not per se substantially harmful. That is precisely why the rule requires that the harm be substantial and why the rule provides an opportunity to present the specific facts surrounding each particular instance of speech.<sup>166</sup>

**V. CONCLUSION**

Student speech issues are not going away, and as this comment has demonstrated, getting student speech right is no easy task. Supreme Court jurisprudence in this area is ambiguous at best, and in a state of disarray at worst. Appellate courts, like the Seventh and the Ninth Circuits, have disagreed on how to approach speech that is political but also substantially harmful to other students. The substantial harm rule is an attempt to make it a little easier. There is a growing need to create a single, clear, and workable student speech standard, which would benefit the student speech category generally as well as speech ranging from bullying to political speech. The substantial harm rule addresses these problems by updating the *Tinker* standard and incorporating the holdings of *Fraser* and *Morse* to focus on harm to students. By combining substantial disruption and substantial harm, there should no longer be a need to stretch substantial disruption beyond its limits or create additional standards ad hoc.

While some people, like Justice Thomas, do not think that students should have any free speech rights under the First

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166. The specific fact inquiry and the requirement that the harm be substantial are derived from *Virginia v. Black*, 538 U.S. 343 (2003), and adapt the case to the student speech context.

Amendment, some free speech advocates think that students should be prepared to engage in and endure all types of speech. Looking at the issue of political speech that intimidates in the Billy Hypothetical, it is apparent that neither of these extreme views adequately addresses the nuances inherent in the current student speech situation. By contrast, the substantial harm standard balances the competing interests of schools with the free speech rights of students.

Sam Winston