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January Turner

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TINKERING WITH *TINKER*: APPLYING A NEW TEST TO PEER ON PEER BULLYING IN SOCIAL MEDIA

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The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures-Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.¹

I. Introduction

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² This oft quoted mantra from *Tinker v. Des Moines Independent Community School District* is a common focal point of many issues regarding student speech.³ However, this principle brings up two complex and important questions. First, how far away from the physical bounds of the brick and mortar building does the “schoolhouse gate” extend? And more specifically, should a *Tinker* analysis be invoked

¹ W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). The case considered whether the State, specifically the school, could compel students to recite the Pledge of Allegiance under penalty of expulsion. The Supreme Court was specifically concerned with the spirit of First Amendment protections in compelling student speech through an affirmation to the flag.

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Students were suspended after wearing black armbands.

³ *Id.*

whenever a minor, school-aged speaker is involved, regardless of where the speech takes place? The further schools move away from the school environment, the greater risk for constitutional violations. While schools are assigned the responsibility for the moral and educational instruction of school-age children, they have not and should not be required to infringe on the responsibilities of parents.

II. Tinkering with *Tinker*

Tinker v. Des Moines Independent Community School District is the seminal case concerning a school's restriction of student speech.⁴ In *Tinker*, a group of students were suspended for wearing black armbands to protest the Vietnam War.⁵ The Court painstakingly examined both the school's and the student's interest in this silent protest within the school environment.⁶ It also analyzed the competing concerns of maintaining good order and discipline within the school compared to permitting students to exercise their opinions on matters of perceived importance.⁷ This balancing act has since been coined the "*Tinker* test," serving as the dispositive instrument for determining whether student speech is protected under the First Amendment.⁸ Accordingly, the *Tinker* test permits a school to restrict student speech only if it (1) causes a material interference with the proper and orderly working of a school or the rights of others and (2) the interference is substantial.⁹ If a school can establish that substantial and material disruption has occurred, a school can presumptively regulate the student's speech.¹⁰

⁴ 393 U.S. 504 (1969)

⁵ *Id.* at 504.

⁶ *Id.* at 508-11.

⁷ *Id.* at 510-11.

⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

⁹ *Tinker*, 393 U.S. at 509.

¹⁰ *Id.*

When *Tinker* was argued before the Supreme Court in 1969, there was no such thing as the internet or Facebook. More than half a century later, the technology has flourished alongside the prominence of its use. In fact, a 2010 survey by the Pew Research Center shows that 93% of youths ages 12-17 go online.¹¹ These young adults can be subjected to episodes of harassment or bullying by another youth, particularly in a school setting where each are students. There is still a notion that in order to bully a child, there must be face to face interaction. However, under the reality of the technological world, bullying is present in classroom halls, text messages, instant messengers and social media such as Facebook. The label given to these types of interactions is not as important as the content therein.

A. *Tinker*'s Original Intent and Concern

In order to protect liberties, a person must be willing to exercise rights associated with such liberties. *Tinker* addressed First Amendment protections within the confines of the school community. Subsequently, the judicial system has attempted to interpret whether the Court espoused either (1) blanket approval to curtail student speech if the speech created a substantial and material disruption to the school or (2) a calculated restraint approach to school interaction. The multitude of student speech cases exhibit that the lower courts have expressed confusion over the appropriate judicial perspective for addressing student speech.

1. Blanket Approval to Curtail Student Speech

A school presents a microcosm of society. It is a specialized convergence of substantive and normative education in a finite environment. Teachers and staff are not only tasked with the

¹¹ Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, PEW RES. CENTER PUBLICATIONS (Feb. 10, 2010), available at <http://pewresearch.org/pubs/1484/social-media-mobile-internet-use-teens-millennials-fewer-blog> (last accessed May 20, 2012).

responsibility of teaching children the three R's,¹² but also instructing on the normative behaviors relevant to our societal norms. In this respect, teachers and staff are more than just educators. They are moral compasses and questioners of the norm. There is a precarious balance, however, between teaching students what is socially appropriate and emboldening them to question and explore in an environment that is protective and nurturing. Consequently, the Supreme Court has repeatedly held that the school setting is unique and entitled to special evaluation when reviewed for constitutional violations.

In *Kowalski v. Berkeley County Schools*, a female high school student created a disparaging MySpace page about a fellow student and was suspended from school for five days.¹³ That student, Kara Kowalski, returned home from school and, using her home computer, created a discussion group webpage on MySpace.com with the heading "S.A.S.H."¹⁴ Out of approximately 100 students she invited to join the group, about two dozen joined.¹⁵ A short time later, the group was accessed by one of the invited student from a school computer during an after-hours class.¹⁶ Ms. Kowalski repeatedly made remarks and encouraged her fellow students' attacks on the site of Shay N., a fellow classmate. Shay N.'s father contacted the school shortly after the pictures were posted on the website to have the derogatory website removed. The school determined that Kowalski had created a "hate website" and gave Kowalski a five day out of school and 90 day "social" suspension which prevented her from participating in social events at the high school.¹⁷

¹² Writing, Reading, and Arithmetic.

¹³ *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 569 (4th Cir. 2011) *cert. denied*, 132 S. Ct. 1095 (2012).

¹⁴ *Id.* at 567.

¹⁵ *Id.*

¹⁶ *Id.* at 568.

¹⁷ *Id.* at 568-69.

In determining that sanctions were permissible, the Fourth Circuit zeroed in on the Supreme Court’s language in *Tinker* stating that regulation could be “justified by a showing that the students’ activities would materially and substantially disrupt *the work and discipline of the school.*”¹⁸ However, its finding that this aspect of the Court’s holding “supports the conclusion that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying” is speculative. The Court of Appeals relied heavily on the belief that schools should not be concerned with where the behavior occurred, only that the behavior had a substantial and material effect on some aspect of the school environment.¹⁹ The Court of Appeals endorsed the school reaching into the home and punishing a student for behavior that she conducted completely apart from the school – a radical departure from student speech jurisprudence.

2. Calculated Restraint

Conversely, Supreme Court precedent has utilized a different approach to First Amendment rights within the school environment. Rather than offering blanket approval of curtailment, it has employed a deliberate balancing test in advocating a view of calculated restraint.²⁰ The Court has taken great pains in cases since *Tinker* to ensure there is a sufficient nexus to the school.²¹ This weighing reflects the Court’s concern with establishing the proper balance of administrative control of the educational process and supporting expression of youths.²²

¹⁸ *Id.* at 573.

¹⁹ *Id.*

²⁰ *See Morse. v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²¹ *Id.*

²² Paul Haskell, *Student Expression in the Public Schools: Tinker Distinguished*; 59 GEO. L. J. 37, 51 (1970).

a. On or Off Campus Distinction

Under the misguided notion that the *Tinker* Court intended such an analysis to be relevant in determining whether a First Amendment violation has occurred, much discussion has centered upon whether the speech in question occurred on or off campus. The actual terminology from the Court asserts that “conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”²³ This is the key area overlooked by subsequent courts and is the majority’s context of the observation.

In *Tinker*, the Court did not want to limit a principal’s authority to the actual classroom environment.²⁴ Speech that is conducted in conjunction with a school activity or event is still deemed to be within the school environment, even when it is conducted outside the school grounds but still within the school’s control.²⁵ Conversely, in *Porter v. Ascension Parish School Bd.*, a student’s violent drawing of the principal was found by the Fifth Circuit to be non-punishable by the school district because it was drawn off-campus at his home, shown to family members and friends within the home and hidden in a book in the closet.²⁶ It was undisputed that rather than purposely bringing the drawing into the school environment, the introduction of the drawing to the school was wholly accidental and unconnected with the student’s earlier display of the drawing to members of his household.²⁷

²³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

²⁴ *Id.*

²⁵ *See Morse*, 551 U.S. at 400. The event occurred during normal school hours. It was sanctioned by Principal Morse “as an approved social event or class trip.”

²⁶ *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004).

²⁷ *Id.*

Bethel School Dist. No. 403 v. Fraser, a case involving a student who used a school nominating speech at a school assembly to deliver lewd and sexually suggestive communication, specifically addressed the question of on versus off campus behavior. The Court noted that similar behavior conducted outside the school environment would have been wholly protected speech under the First Amendment.²⁸ However, the *Morse v. Frederick* Court, considering whether a student’s “BongHits4Jesus” banner hung across the street from the school was protected speech under the First Amendment, did not even consider the location of the student speech as an important factor.²⁹ In *Morse*, high school students were released from class to watch the Olympic torch relay passing through town.³⁰ The students were supervised by teachers during the relay and the school characterized the event as school sponsored.³¹ The student stood across the street from the school and unfurled a banner with the phrase “BongHits4Jesus” clearly visible to those on the school campus – he was subsequently punished by the administration for his action.³² The Court classified the banner hanging as a school speech case, compelling it to assess the punishment under the *Tinker* test.³³ Further, the issue of drug use and abuse is an “important—indeed, perhaps compelling” interest.³⁴ Consequently, the physical location is not determinative of a First Amendment violation under the *Tinker* test. However, the location of the speech should be a factor if schools intend to use the test to infringe on speech wholly outside the school environment.

²⁸ *Morse*, 551 U.S. at 405.

²⁹ *Id.* at 403 (“The question thus becomes whether 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. We hold that she may.”).

³⁰ *Id.* at 397.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 400-01.

³⁴ *Id.* at 407.

B. Materially and Substantially Infringe With the Work of the School

With the exception of the *Morse* ruling, the Supreme Court has consistently held that a school must prove a material and substantial interference with the work or discipline of a school to restrict student's freedom of speech.³⁵ The Court's concern with the distinct microcosm of a school – the responsibility and duty to teach and protect – provides a framework for analysis.³⁶ Schools have to maintain control over a large number of children during prescribed hours. Those children come from a variety of home and societal situations. Even outside of pedagogical flexibility, schools require the ability to discipline students for behavioral missteps in order to maintain a proper environment for learning.

In contrast, the *Tinker* Court did not think the interference could be an “undifferentiated fear or apprehension of disturbance.”³⁷ Neither the Court nor society wanted a legion of followers who simply did what they were told and toed the line. The potential creation of “enclaves of totalitarianism” was seen as the ultimate affront to the constitutional rights of the people, even those under the age of majority.³⁸

Unfortunately, the material and substantial interference standard advanced by *Tinker* can be hard to utilize. For example, in *Saxe v. State College School District*, where a student and the student's guardian challenged the anti-harassment policy of the school district prohibiting the plaintiffs from speaking out against homosexuality, the Third Circuit found that “harassment” is

³⁵ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 265 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

³⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³⁷ *Id.*

³⁸ *Id.*

not a categorically-prohibited area of speech.³⁹ In *Cohen v. California*,⁴⁰ however, a case in which a man was prosecuted for wearing a “Fuck the Draft” jacket into the local courthouse, the Court reminded that a curtailment of speech must be more than a mere “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁴¹ As a result, controversial speech can easily be determined to constitute impermissible harassment in one court but merely an expression of unpopular beliefs, and therefore protected, by another. Considering that the manner or manifestation the disturbance can take is evaluated on an ad hoc basis, such confusion and lack of consistency is likely to occur.

Under the current standard then, it appears the court must evaluate (1) the classification of the activity – whether the activity is during or endorsed by the school, (2) whether the “speech” is individually directed or whether there is an effect on the general student population, and (3) whether the “speech” invades the right of others. As will be discussed below, the balancing of the preceding factors could create a more manageable approach to student speech cases. The amount of weight to be given to these factors is not evident from the current case law.

1. Focus on School Activities or Endorsement

The location of the student speech is very important – seminal cases decided by the Supreme Court, in addition to subsequent lower court decisions, involve speech that took place either within the bricks and mortar of the school environment or at a school sanctioned event. In *Morse v. Frederick*, the students were allowed to attend a torch ceremony passing through their

³⁹ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001). Schools may not regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.

⁴⁰ *Cohen v. California*, 403 U.S. 15, 26 (1971) (finding that a jacket with the phrase “Fuck the Draft” was protected speech under the First Amendment).

⁴¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

Alaska town.⁴² The school had released the students but required teachers and staff to continue to monitor student behavior.⁴³ Because the activity was being overseen by the school employees, the event took place during school hours, and the questioned speech was directed at the school, the Court had no problem classifying the banner as school speech.⁴⁴ Cases involving student publications can also raise the issue of whether the school may punish the same. In *Boucher v. School District of Greenfield*, an underground student newspaper was created off-campus and was still subjected to the *Tinker* student speech test.⁴⁵ Although the underground paper was not created on campus grounds, it was distributed in school bathrooms and lockers.⁴⁶ The paper advocated on-campus action and, as such, was distinguishable from off-campus publications brought on campus for distribution.⁴⁷ Yet, still other cases have found that speech deliberately kept off-campus retains the full protection of the First Amendment. In *Thomas v. Board of Education, Granville Central School District*, where a satirical newspaper was created by students off-campus had “de minimis” interaction with the school, the Third Circuit found the

⁴² *Morse v. Frederick*, 551 U.S. 393, 297 (2007).

⁴³ *Id.* Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

⁴⁴ *Morse*, 551 U.S. at 400-01 (“The event occurred during normal school hours. It was sanctioned by Principal Morse “as an approved social event or class trip,” App. 22–23, and the school district's rules expressly provide that pupils in “approved social events and class trips are subject to district rules for student conduct,” App. to Pet. for Cert. 58a. Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students.”).

⁴⁵ *Boucher v. School Bd. of School Dist. of Greenfield*, 134 F.3d 821, 828-29 (7th Cir. 1998).

⁴⁶ *Id.*

⁴⁷ *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979); *see also* *Bystrom By & Through Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987), *aff'd sub nom.* *Bystrom v. Fridley High*, 855 F.2d 855 (8th Cir. 1988) (student expression case law applies where unofficial newspaper distributed in lunch room); *Pangle v. Bend-Lapine Sch. Dist.*, 10 P.3d 275, 285-86 (Or. App. 2000) (same, with on campus distribution of underground newspaper).

school exceeded the boundaries of the school and violated the students' constitutional rights by restricting dissemination of the work and suspending the students for five days.⁴⁸ The court found the school could not reach into the home of the parents to control the students' speech when a concerted effort was made to keep the speech separate from the learning environment.⁴⁹

2. General Population versus Individualized Effect?

A clear differentiation that can be drawn in much of the student speech context is whether the speech is specifically directed at an individual student or whether there is a generalized effect. *Tinker* considered the impact on the majority of students to a group of students' passive protest of the Vietnam War.⁵⁰ Later, *Morse* considered the impact of promoting drug use to the school's general population in analyzing whether a banner was protected speech.⁵¹ In *Hazelwood School District v. Kuhlmeier*, the school district censored students' submissions to the school newspaper concerning issues on divorce and pregnancy.⁵² In *Bethel School District No. 403 v. Fraser*, the Court was concerned with a sexually suggestive speech given at a school assembly.⁵³ The common analysis in each of these cases centered on the impact of a particular student's

⁴⁸ *Thomas*, 607 F.2d at 1050 (2d Cir. 1979) ("[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.").

⁴⁹ *Id.*

⁵⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-11 (1969).

⁵¹ *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

⁵² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988). Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students.

⁵³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-78 (1986).

speech on the larger population of the school.⁵⁴ Consequently, a finding of substantial disruption is often easier to show when the speech is directed at the general population.

However, the Supreme Court has not specifically held that a school can exercise control of a student's speech when conducted off campus in a non-school sanctioned event. In *Doninger v. Niehoff*, the Second Circuit considered the First Amendment rights of a student prevented from running for Senior Class Secretary.⁵⁵ The student created a blog post, posted from her home computer but partially created on a school computer, criticizing the school's handling of a battle of the bands.⁵⁶ The court stated that the issue of a school's ability to sanction the student did not need to be addressed because the school had qualified immunity as the law governing a student's free speech protections in off-campus speech was not clearly established so as to put the school district or principal on notice.⁵⁷ Further, in *Thomas v. Board Of Education, Granville Central School Dist.*, the Second Circuit found that the purposeful avoidance of introducing a student developed newspaper to the school campus made school punishment unconstitutional.⁵⁸ In the original appeal and rehearing of *Layshock ex rel. Layshock v. Hermitage School District*, the Third Circuit found that without the requisite material and substantial interference, which even the school district conceded was not present, the school could not extend its educational control into the home of the student in order to punish him for the speech.⁵⁹ The court required a finding of a nexus between the student speech and the school in order to restrict such expression,

⁵⁴ See also *Brown ex rel. Brown v. Cabell County Bd. of Educ.*, 714 F. Supp. 2d 587, 590 (S.D.W. Va. 2010) (student expelled for writing "Free A-Train" on his hands).

⁵⁵ *Doninger v. Niehoff*, 642 F.3d 334, 338 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

⁵⁶ *Id.* at 346 ("[The] Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event.").

⁵⁷ *Id.*

⁵⁸ *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

⁵⁹ *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

specifically holding that allowing the school to reach into the grandmother's home to punish the student would establish an "unseemly and dangerous precedent."⁶⁰

The recent shift in lower court holdings towards restricting off-campus speech by schools can be attributed to a more rational assessment of a school's role in punishing student speech that occurs off-campus. The reason for the shift may be a more reasoned approach to the original intent of *Tinker*. When decided, it was designed to allow schools, tasked with addressing student speech within the confines of the school environment, to exact a level of control. Further, schools must also make determinations that may weaken their effectiveness and ability to discipline if certain speech is not curtailed. If a child posts statements on their home computer encouraging other students to behave a particular way in school, there may be a material and substantial interference with the school *and* an invasion into the rights of others, but it will still be afforded constitutional protection. For example, a student who posts on Facebook that "everyone should purposely ignore or harass student X" may create a substantial and material disruption. However, it would be undesirable to allow our schools to hold that a child telling another child not to speak to a certain third child is punishable with suspension or expulsion if done completely outside the realm of the school. Consequently, such speech should be protected. Additionally, as the normal course of social correction is still available in schools, unacceptable behavior can nevertheless be corrected without judicial interference.

3. Invasion of the Rights of Others

Decades of First Amendment precedent has shown that the Supreme Court is not willing to trample the rights of a few in order to protect others from the words of a few.⁶¹ The Court's

⁶⁰ *Id.*

stance is that “the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory”⁶² has been tested in limited respect. The Court’s balancing has centered on the speaker’s constitutional rights weighed against the school’s ability to maintain good order and discipline within its confines. The rights of others have only been peripherally addressed in the context of discrimination on the basis of race or sex.

III. No Clear Picture for Peer on Peer Bullying Online: How Far From The Brick and Mortar? Applying the *Pickering* Test to Student Speech

As explained above, the curtailment of student speech within the traditional bounds of the schoolyard has been defined by the Supreme Court but has resulted in varied application by the lower courts. In fact, the uncertainty involved in student speech leaves questions for the bully, the victim, and the families. As a parent, the uncertainty can breed frustration with the school which, in turn, interferes with the educational process for all involved. The *Tinker* Court stated it would not address speech by students that compromised the rights of others to be secure.⁶³ Peer-on-peer bullying in social media is the very type of expression the Court delegated to later adjudication. However, such restriction staunchly abuts other students’ rights to speak their mind without censorship by the government.

⁶¹ See *Cohen v. California*, 403 U.S. 15, (1971); *Morse. v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

⁶² *Elk Grove Unified Sch. Dist. v. Endow*, 542 U.S. 1, 44 (2004). A father of a student brought suit to prohibit the school district from using the Pledge of Allegiance in schools because of the words “one nation, under God”. The father, an atheist, claimed that even though there was an opt-out provision, the term exposed his child to speech that he did not believe in.

⁶³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

The same special environment of a school is applicable when restricting a teacher's right to speak freely.⁶⁴ In *Pickering v. Board of Education of Township High School District 205*, the Court analyzed a teacher's First Amendment right to speak out after a vote concerning his employer's handling of school funds through an editorial letter.⁶⁵ The Court once again emphasized the unique environment of a school and developed the *Pickering* test to analyze whether teacher expression can be limited.⁶⁶ The test is a "sequential five-step" inquiry which considers: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the State had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the State would have taken the adverse employment action even absent the protected speech".⁶⁷ As is discussed below, instead of a continued reliance upon *Tinker*, subjecting student speech to this test may be a more effective approach.

A. Public Concern

In *Snyder v. Phelps*, the Fourth Circuit held that a court should determine whether a matter is of public concern by "examining the content, form, and context of such speech, as revealed by the whole record"⁶⁸ with no clearly delineated constraints.⁶⁹ Everything from

⁶⁴ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, Will County, Illinois, 391 U.S. 563, 571 (1968) (dismissal of a teacher for criticizing the school board after a bond election for the perceived disproportional sports expenditures through an editorial letter to the local paper).

⁶⁵ *Id.* at 572.

⁶⁶ *Id.*

⁶⁷ *Johnson v. Poway Unified Sch. Dist.*, 658 F. 3d 954, 961 (2011).

⁶⁸ *Snyder v. Phelps*, 580 F.3d 206, 220 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

⁶⁹ *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

excessive spending on athletics,⁷⁰ criticism of official conduct,⁷¹ and even the protesting of America's acceptance of gays⁷² has been labeled a public concern. In conducting the analysis, a court must not evaluate the speech in a vacuum; instead, it should be examined in context of the person and place that it was made.⁷³ In the case of student speech that is conducted solely off-campus on a social network, it is reasonable to argue that such communication is matter of public concern. However, it could also be legitimately argued that peer-on-peer bullying via social networking sites is solely "private speech."⁷⁴ As such, the bullying would be afforded the same protection an adult would receive in a libel suit.⁷⁵ As evidenced in the *Phelps* case, what is of public concern has become so broad that just about any topic can be incorporated. As a result, victims of bullying would face the burden of classifying attacks as private speech.

B. Private Citizen vs. Student

In applying the *Pickering* test to students, a finding that the speech is of public concern is not dispositive of whether it is protected. A court will also have to consider whether the speech was conducted as a private citizen or as a student. Although the determination is not as clear as in an employment setting, it can certainly be accomplished with a similar degree of effectiveness. In such a situation, the court looks to whether the context of the speech was performed in an

⁷⁰ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 572 (1968) (public statements upon issues then currently the subject of public attention).

⁷¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964) (newspaper article critiquing conduct of government official).

⁷² *Snyder*, 131 S. Ct. at 1212 (2011) (the church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military).

⁷³ See *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011). Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community."

⁷⁴ *Connick*, 461 U.S. at 147.

⁷⁵ *Id.* An employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but he would still be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.

employee's official capacity or with a special knowledge not available to the general public.⁷⁶ When a person speaks on matters of public concern, the speaker must have no more knowledge of the information discussed than the general public does.⁷⁷ When the same person speaks with knowledge obtained by their work for the school, the speech moves away from speaking as a general citizen and more into an agent of the school.⁷⁸ In a student speech scenario, a court may look to whether the speech involved events or issues pertaining to the speaker as a student. If the source of information brings the speech within the school environment, the scales of justice could weigh more towards allowing schools to act on the behavior under a *Pickering* analysis.

C. Speech as the Motivating Factor for Punishment

The third factor in balancing a student's First Amendment rights and a school's discretion to punish behavior is determining whether the speech is the motivating factor for the school's punishment. In *T.V ex rel. B.V v. Smith-Green Community School Corporation*, two high school students were suspended from extracurricular activities for posting lewd pictures on the internet.⁷⁹ The school district concluded that the creation of the photographs was the cause for the suspension, not the posting of such pictures on the internet and was therefore a separate and permissible ground for disciplining the girls.⁸⁰ Upon appeal to the district court, however, it was determined that the making, publishing and circulating of the photos may qualify as protected speech, therefore making the suspension unconstitutional.⁸¹ As a result, if a school is able to

⁷⁶ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 572 (1968) (matters of public record on which plaintiff's position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer).

⁷⁷ *Id.* at 574.

⁷⁸ *Id.*

⁷⁹ *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 776-77 (N.D. Ind. 2011).

⁸⁰ *Id.*

⁸¹ *Id.*

point to a different behavior or reasoning as the dispositive basis for punishment, one that does not stem from a contested speech violation, then such punishment is unlikely to be precluded by any constitutional considerations.

D. Justification for Disparate Treatment

A school district must be able to explain why peer-on-peer bullying through social media is handled differently than if those same words had been expressed to the victim off-campus. For example, if a student uses a derogatory name for a student while in his own neighborhood, the school district must be able to distinguish between not punishing the student for *that* speech and still exacting punishment for the same conduct expressed via social media. The disparate treatment of identical insults would be difficult to reasonably explain. Schools are not in the business of addressing bullying incidents after students have left the school or school sponsored activity under current precedent – why does curtailing student speech expressed via social media differ?⁸² Currently, the answer has not been conclusively resolved by the courts.⁸³

E. Whether the Action Would Have Been Taken Regardless

Evaluating whether the punishment would have been applied irrespective of the contested speech is closely aligned to whether the school district had other grounds for punishing the student. A school's ability to "to prescribe and control conduct in the schools" is essential to smooth and consistent operation.⁸⁴ Providing discretion to the institution to determine the best practices for reprimand is nevertheless tempered by the constraints of the Constitution. If

⁸² Schools know that social media can and does get accessed at school and are pressured to address bullying occurring in social media.

⁸³ Social media has become an important communication tool for young adults. Technology has become an important aspect of daily life, but abuses on social media have not been clearly and definitively addressed by the courts.

⁸⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

behavior falls within areas the courts have delegated discretionary judgment, specifically the daily questions of when, where and how to discipline and instruct students for infractions of school policies and procedures, then reaching into a student's home will exponentially expound this discretion.⁸⁵ Such an invasion into the home is not only prohibited by First Amendment, but a litany of Supreme Court precedent.⁸⁶

IV. Who is Responsible for Facebook Posts?

Facebook and other social media create a special First Amendment problem. The question of whom, if anyone, is responsible for the messages of minors that are deemed to be offensive or dangerous is particularly difficult to answer. Such messages may be a driving factor behind any suicides and self-inflicted injuries among high school students. According to a 2007 study by the Center for Disease Control and Prevention, nearly twenty percent of all female high school students contemplated suicide in the last 12 months alone, undoubtedly due in part to interaction and messages through social media.⁸⁷ However, schools may not be in the best position to solve the problem through punishment. Further, the responsibility of the parent cannot be overlooked.

A. Leave Schools Out of the Argument

⁸⁵ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

⁸⁶ *See Stanley v. Georgia*, 394 U.S. 557 (1969) (obscene material prohibited by state statute found in man's home; Court held that regardless of whether it is a First Amendment issue or Fourth Amendment issue, courts cannot forbid such material from being privately used in his home but could forbid public dissemination thereof); *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (*all* details [inside the home] are intimate details, because the entire area is held safe from prying government eyes); *Lawrence v. Texas*, 539 U.S. 558 (2003) (state cannot prohibit consensual sexual conduct between adults inside the home); *United States v. Karo*, 468 U.S. 705, 716 (1984) ("indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.").

⁸⁷ *See Suicide Data Sheet*, CENTERS FOR DISEASE CONTROL & PREVENTION (2009), *available at* <http://www.cdc.gov/violenceprevention/pdf/Suicide-DataSheet-a.pdf> (last accessed August 11, 2012).

Schools are responsible for the protection of children for an average of eight hours, five days a week. This number does not account for extra-curricular activities or special events. However, the Supreme Court has consistently held that parents retain the right to raise their child in the manner they deem appropriate, with few constraints. As early as *Meyer v. Nebraska*⁸⁸ and *Pierce v. Society of Sisters*,⁸⁹ the Court has reiterated that the State may not infringe on a parent's right to reasonably control and determine the proper upbringing of their children.⁹⁰ This has allowed parents to dictate when and where they will receive education, including the learning of foreign languages and remaining in school past the tenth grade. The judicial system has operated on the presumption that the parents will act in a child's best interest and only intervenes when the parents' behavior greatly diverges from accepted health and welfare norms.⁹¹

1. Parental Responsibility

When a minor child acts inappropriately, critics are usually quick to ask whether the parents were negligent in preventing the behavior. It appears that in recent years, parents have taken more of a detached approach to their children's behavior.⁹² However, there has been a recent push for society to intervene in the direction parents have gravitated regarding

⁸⁸ *Meyer v. Neb.*, 262 U.S. 390, 400 (1923) (holding that a state could not prevent a teacher in a private school from teaching German to his students).

⁸⁹ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

⁹⁰ *Id.* at 534-35.

⁹¹ *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (preventing grandparent visitation where the custodial parent has deemed visitation not in the child's best interest); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (giving parents the power to institutionalize their child without a contested hearing); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (restricting a parent's ability to have her child pass out religious newsletters on the street corners of Boston).

⁹² *See* AMITAI ETZIONI, *THE PARENTING DEFICIT* (n.d.), <http://www.demos.co.uk/files/theparentingdeficit.pdf?1240939425> (last accessed May 22, 2012) (arguing that the socioeconomic structure in modern society where both parents work away from home has caused the parents to have less involvement with their children compared to past generations. This, in turn, has resulted in a greater reliance upon outside resources for parental duties).

childrearing.⁹³ The use of hateful and harming words can usually be traced back to the child's family life.⁹⁴ Parental responsibility at this level provides a mechanism for determining what is acceptable outside of legislation or school intervention. Although not the most prudent course of action, a parent's right to raise their child in the manner they seem fit is a fundamental belief in American society and has been staunchly defended by the Supreme Court.⁹⁵ As a result, at least from a legal standpoint, how parents choose to raise their children will not be dictated to a meaningful extent through legislation or regulation.

Parental responsibility also requires that parents teach children the impact of words from the point of view of both the speaker and the recipient. A school is not the only entity able to create teaching moments from bullying. Children may not always heed their parents' advice, but they can certainly listen to it. Instead of passing knee-jerk legislation and invading the protected area of the home, a parent can speak to a minor about the cutting power of words. Additionally, parents are equally capable of helping children understand that words are simply that - words. Such words are only effective at injuring the listener when credence is afforded to the remarks. As a parent, these lessons are ones that must be taught children in the home, not the school system, Congress, or courts. Parents are ultimately responsible for their children's behavior until the age of majority;⁹⁶ in turn, they must be provided the necessary freedom to develop their

⁹³ Marc Bornstein, *Refocusing on Parenting*, PARENTHOOD IN AMERICA, <http://parenthood.library.wisc.edu/Bornstein/Bornstein.html> (last accessed May 22, 2012).

⁹⁴ Patricia Neufeld, *School Violence—Family Responsibility*, 10 FAM. J. 207 (2002).

⁹⁵ *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

⁹⁶ *Bellotti v. Baird*, 443 U.S. 622, 637-38 (1979) (finding a Massachusetts' law requiring minors to obtain both parents or judicial consent to obtain an abortion was valid due to responsibility of parents to protect their children); *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2403-04 (2011) (requiring age to be a factor in a *Miranda* analysis).

children so both parent and child may act in accordance with the law. This same responsibility is also found in other areas of law – harassment, intentional infliction of emotional distress, and negligent entrustment, among others.⁹⁷ There is no reasoned rationale to diverge from this perspective.

2. Schools as *Loco Parentis*

Asking the school to become *loco parentis* adds another dimension to the educational landscape. Schools have already been tasked with feeding, counseling, and nursing their students. In addition, they are being asked to be responsible for the social, moral and substantive education of their students. Schools have even been granted the authority to teach students social normative behavior.⁹⁸ A problem arises, however, in the fact that America is a conglomeration of moral, cultural and ethical configurations. To assign a school district with determining and implementing the standard for every child is inviting disaster. The Court has repeatedly recognized that schools are tasked with teaching students the importance of our constitutional rights and protections.⁹⁹ Regrettably, they can often teach these rights and protections while denying the same to the students.¹⁰⁰ Children cannot be expected to exercise their constitutional rights at the age of majority if they have been denied throughout their educational upbringing. Students are traditionally taught to be good citizens by voting, being informed, and recognizing the rights guaranteed under the Constitution. These lessons are handled differently among grade levels, but the overarching policy is to teach students the traditional core values upon which

⁹⁷ 59 Am. Jur. 2d Parent and Child § 103.

⁹⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986). It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.

⁹⁹ *Id.* at 683.

¹⁰⁰ *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Students were expelled for failing to salute the American flag in contradiction to their First Amendment freedom of speech.

America was founded. Students are given the opportunity to experience these same rights and responsibilities through school elections, school hearings and a multitude of other activities.¹⁰¹ Consequently, restricting a student's free speech rights within the confines of other civic lessons will have the impact of stifling speech when the minor is constitutionally encouraged to speak.

Schools are also in a unique position to have a positive impact in reducing peer-on-peer bullying. They can bring an educational aspect to prevention that cannot be addressed on nearly as large of a scale outside of the school environment. Social correction is a major part of a child's educational journey as children learn by seeing the reaction of their peers. For example, a child who sees another child ostracized by classmates for picking on a disabled fellow student would quickly learn that behavior is not acceptable. Furthermore, schools influence the lives of a majority of the country's children. They can incorporate lessons on the effect of words into curriculum in a manner that does not infringe on a student's ability to continue to exercise their right to expression. However, schools should not be required to both educate and punish behavior that occurs outside the educational setting. The role of the school is to address behaviors that occur during prescribed times and locations. Requiring schools to operate outside these times and places infringe on the parental control and responsibility for raising children. The legislative reaction to the increase in suicides related to peer-on-peer bullying requires schools to be responsible for educating and punishing students who engage in speech that is determined to constitute such behavior.

3. Slippery Slope

Extending school control to social media would set a dangerous precedent for school intervention, especially for behavior that is conducted solely removed from the school

¹⁰¹ John Patrick, *Teaching the Responsibilities of Citizenship*, ERICDIGESTS.ORG (Apr. 1991), <http://www.ericdigests.org/pre-9219/teaching.htm>.

environment. Simply because the perpetrators or victims are students should not automatically make the issue the provenance of the school. Allowing schools to intervene in this setting would permit them to step into the parents' protected area of responsibility in other situations. For example, a child who gets bullied by another student in his own front yard, an area removed from the bricks and mortar of the schoolhouse or school environment, would potentially be subject to school discipline.¹⁰² This type of bullying is closely correlated to the type of behavior at issue in social media expression. Under the *Tinker* test, society would require the school to exact its power to punish the students. However, there is no question that the school does not and should not have the ability to punish either child.¹⁰³ This has, and remains, the responsibility of the parent of the child to address.

B. If Not Schools, Then Who?

School punishment is not the only recourse for the subjects of bullying – parents and victims have access to the criminal and civil judicial system. In contrast to schools, the courts have unquestioned, legally-recognized power to impose punishment as statute allows. However, authorizing the educational system to enforce the current judicial test for school speech outside the school system would weaken the effectiveness of other remedies. Even then, expecting school administrators to make consistent judgments when legally-trained courts still cannot do so

¹⁰² However, other out of school behaviors can be disciplined by the school, such as alcohol-related and violent crime offenses. These offenses, when punished, have related back to a particular area influencing the school. *Wood v. Strickland*, 420 U.S. 308, 312-13 (1975) (expelling two girls for spiking the punch at a school dance); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661-62 (1995) (affirming a school's drug testing policy for student athletes), *Mitchell v. Bd. of Trustees of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660, 663 (5th Cir. 1980) (upholding school policy regarding automatic expulsion for bringing a dangerous weapon to school).

¹⁰³ Words placed on a website do not have the same immediate effect that intoxication or a weapon have to a student's safety within the time and place of the school environment. Although equally as damaging in the long run, the other legal and societal alternatives do not support a school expanding their responsibility and control over the home.

is a recipe for disaster. The potential for infringement upon constitutional rights and protections is enormous under such a scenario. Although there is an understandable reluctance to criminalize the misguided behavior of the immature, it is clear that the issue cannot be ignored. The question of who is responsible for preventing hurtful words from creating real tragedies is a multi-disciplinary problem for future scholars to address. However, to assign such responsibility to school districts based merely on the fact that the speech involved a student is certain to invite constitutional inconsistencies.

Further, schools will be asked to make determinations that may weaken their effectiveness to discipline. Schools should not be put in the position to say that a child telling another child not to speak to a certain third child, all done while off school grounds, is punishable with suspension or expulsion. The normal course of social correction is still available in the school system – unacceptable behavior will be corrected on its own without school interference. In addition, parents and students still have access to courts for protection.

V. Conclusion

Schools are a unique environment. They are filled with children possessing immature moral compasses and limited common sense. Students are feeling out their place in the larger world and testing the boundaries of what is acceptable and what will result in a positive self-affirmation. The Supreme Court's school speech jurisprudence has remained confined to the school environment or activities endorsed by the school. This has left a glaring whole when addressing bullying in light of modern technology. Students do not need to be face-to-face in order to inflict a verbal assault on the other person. That same assault can now be effectuated through social media, text, or other electronic devices.

Schools are overwhelmed with the day to day education and protection of an enormous number of children despite an overall reduction in staff per capita.¹⁰⁴ In light of this burden, requiring schools to control the behavior outside school hours or sponsored activities is an unrealistic liability. Society has not delegated schools the authority to parent children within their own homes. This provenance is illustrated by the unquestioned responsibility of parents to raise their child without the interference of the state. This is not to say that the parents of victims are left without recourse for bullying, however. Parents are able to engage both the criminal and civil justice systems to counteract perceived and actual threats. Furthermore, the educational aspect of schools is available to instruct without creating criminals out of children.

If the judicial system insists on involving schools in the punishment of off-campus student speech, a better approach would be something akin to the school employee speech test set out in *Pickering*. This analysis would allow the court to evaluate the student's speech rights and only intervene when such rights are overwhelmed by the school's responsibility for maintaining discipline and appearances. Current judicial precedent is ineffective for addressing peer-on-peer bullying in social media and will require a new perspective that incorporates both the location of the speech as well as the effective of the speech within constitutional parameters. Until then, courts will be forced to tinker with tests that cannot resolve the true issue at hand.

¹⁰⁴ For example, the number of school staff has significantly decreased in recent years in both Texas and California, two states that account for over 62 million of the estimated 311 million people currently living in the United States according to the U.S. Census Bureau. Ryan Murphy & Morgan Smith, *Interactive: 25,000 Fewer School Employees*, TEX. TRIB. (Mar. 8, 2012), <http://www.texastribune.org/library/data/school-district-fte-totals> (stating that Texas schools have seen a 3.8% decrease in overall employees, a total of 25,000 in all, in just one year); Jennifer Bonnett, *Fewer Young People Becoming Teachers; Schools Could Be Short-Staffed in Years Ahead*, LODI NEWS-SENTINEL (Lodi, Cal.) (Feb. 8, 2011), http://www.lodinews.com/news/article_2c2f3121-95e0-50dc-a9ec-f5a12ad98ad4.html (citing a study by the Center for the Future of Teaching and Learning in Santa Cruz, California, that the state had the fewest number of teachers in a decade after losing nearly 11,000 between 2008-10).