FOR SCHOOLS, BULLYING CAN RAISE A COMPLEX CONSTITUTIONAL PROBLEM

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Ask anyone to talk about bullying and schools and he or she will inevitably mention the Internet as a root cause. The conversation is sure to include talk of perpetrators, victims, and what schools need to do to keep children safe. This conversation is legitimate and understandable. Indeed, ensuring safe environments for all students has long been a part of the public school mission. But, the conversation frequently lacks an appreciation for the challenges associated with the competing constitutional tensions sometimes at play in cases of bullying.

It has been over four decades since the Supreme Court ruled in *Tinker v. Des Moines* that students do not leave their constitutional free speech rights at the school house gate simply because their views are unpopular and anti-majoritarian.[1] (And, school districts may discipline students within the limitations of the First Amendment for on-campus, non-school sponsored speech if it collides with "the rights of other students to be secure and to be let alone;"[2] if the speech is "sexually explicit, indecent, or lewd;"[3] or if it "can reasonably be regarded as encouraging illegal drug use."[4] In more recent years, other jurists have weighed in even more pointedly to define exactly what we might understand to be unpopular or anti-majoritarian views. While on the 3rd Circuit Court of Appeals, for instance, then Judge Alito wrote that even harassing speech in a school setting (or elsewhere) is not categorically denied First Amendment protection.[5]

The stage is thus set. The challenge for schools is regulating speech that may contribute to a hostile environment, such as the kind of harassing speech referenced by Justice Alito, without overstepping constitutional bounds. Public schools have long understood that

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1. 393 U.S. 503, 514 (1969).
2. *Id.* at 508.
3. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).
4. Morse v. Frederick, 551 U.S. 393, 397 (2007).
5. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2001) (holding that a school district's anti-harassment policy was unconstitutionally overbroad).

students need safe environments in which to learn. And, in recent years the federal government has attempted to mandate the elimination of hostile environments through its enforcement powers. In October 2010, for instance, the U.S. Department of Education issued a much publicized missive to schools in which it noted that many cases of bullying may involve harassment prohibited by federal civil rights laws. It decreed schools should eliminate harassment—and the hostile environment it creates—and to prevent it from reoccurring.[6]

But, one person's harassment may be another's sincerely held belief. And, when a sincerely held belief is at play, the First Amendment scales tip against regulation, absent some other indicators that the speech will be disruptive or infringes on the rights of others. Phrases on t-shirts, such as "Homosexuality is a Sin" followed by a Bible verse or "I Believe in Traditional Marriage," may be just such expressions. And, even if some phrases lack religious or political import on their face, courts suggest they may not be banned without more.[7] School officials regulating this type of speech without any indicators of disruption or an infringement on the rights of others may subject themselves and their school districts to legal challenges. On the other hand, if they allow the speech, particularly in a setting where, for instance, anti-gay discrimination has been an issue, federal guidance suggests the district may be allowing a hostile environment to continue. And, because federal enforcement guidance demands schools eliminate harassment whether school officials had actual knowledge it was occurring, inadvertence is not likely to make much of a defense.

For public schools the quandary is a big one: Regulate potentially harassing messages expressing sincerely held religious or political beliefs and risk a private suit and its attendant cost and attorneys' fees for violating a student's constitutional rights, or risk federal enforcement action that threatens their federal funding for contributing to a hostile environment?

The matter is further complicated by the ubiquitous electronic forum to which students have broad access. Bullying and harassment at times takes place over the Internet or through other electronic

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6. "A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur." Letter from Russlynn Ali, U.S. Dep't. of Educ. Assistant Secretary for Civil Rights, to Colleagues: Harassment and Bullying, at 3–4 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. "If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." *Id.* at 2–3.

7. *See Saxe*, *supra* note 5; *see also* Zamecnik v. Indian Prairie Sch. Dist. #204, 636 F.3d 874, 878–79 (7th Cir. 2011) (reaffirming a panel decision granting summary judgment for a permanent injunction prohibiting school district from banning students from wearing "Be Happy, Not Gay" t-shirt).

communication and occurs entirely off-campus.[8] Disciplining students for speech is even more difficult when the speech occurs off-campus. Significantly, none of the Supreme Court cases discussing disciplining students for speech contemplate whether school districts can discipline students for off-campus speech. And, in the brave new world of social networking, linking speech that occurs in cyber space to disruption in school poses factual problems not contemplated by the *Tinker* court of yesteryear. Unfortunately, to date the federal courts have provided little consistent guidance that helps schools determine the line dividing harassing speech and student free speech, particularly in cyberspace. Only one federal circuit to date has definitely ruled whether and when a school district may discipline students for off-campus, Internet speech.[9] And, the High Court's recent denial of certiorari in some student cyber-speech cases suggests the Supreme Court is not yet ready to resolve existing circuit conflicts.[10] Until then, schools will have little choice but to navigate carefully the dangerous waters between Scylla and Charybdis.

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8. Research by Amanda Lenhart at the Pew Research Center's Internet & American Life Project indicates that most teens think bullying and harassment happens more offline than online. *See* Amanda Lenhart, *Cyberbullying 2010: What the Research Tells Us*, PEW INTERNET (May 6, 2010), http://www.pewinternet.org/Presentations/2010/May/Cyberbullying-2010.aspx (select slide 14/29).

9. *See* Wisniewski v. Bd. of Ed. of the Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (applying *Tinker*'s substantial disruption test to off-campus speech that was "reasonably foreseeable" to come on-campus). *See also* Kowalski v. Berkeley County Sch., 652 F.3d 565, 573 (4th Cir. 2011) (relying on the "nexus" of the student's speech to the school), *cert. denied*, 132 S.Ct. 1095 (Jan. 17, 2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (applying *Tinker* to find that the school district failed to demonstrate reasonable forecast of substantial disruption), *cert. denied,* 132 S.Ct. 1097 (Jan. 17, 2012); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214–215 (3d Cir. 2011) (finding that school had not shown sufficient nexus between online speech and the school), *cert. denied*, 132 S.Ct. 1097 (Jan. 17, 2012).

10. *See* cases cited *supra* note 9.