

## NOTE

# PROTECTING THE CHILDREN: WHEN CAN SCHOOLS RESTRICT HARMFUL STUDENT SPEECH?

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*This Note advocates the appropriate framework for analyzing emotionally harmful speech in schools and illustrates the limits on school restrictions of such speech. By focusing almost exclusively on the Tinker line of “student speech” cases, scholars and lower courts have reached wildly conflicting conclusions about the permissibility of school restrictions on students’ emotionally harmful viewpoints. But the Supreme Court situated Tinker within a broader jurisprudence on protecting minors from harmful speech outside of schools. As I show, looking to that protectionist jurisprudence helpfully clarifies the contours of Tinker as it applies to emotionally harmful speech. On the one hand, protectionist cases reveal that schools can restrict emotionally harmful speech under Tinker’s “rights of others” prong. On the other hand, protectionist jurisprudence imposes clear limits on restricting harmful speech, such as when the audience consists of mature students voluntarily engaging in a civil discussion of a controversial subject. Although the doctrinal framework adopted here supports school restrictions on verbal bullying more generally, this Note focuses on the more controversial—and potentially more prevalent—category of speech not targeted at a specific student.*

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## INTRODUCTION

Over four decades ago, *Tinker v. Des Moines Independent Community School District* announced that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>1</sup> Ever since, courts have struggled to define the limits of those rights, especially when the speech of one student harms another.<sup>2</sup> Subsequent cases carved out doctrinal alternatives and exceptions to *Tinker* and thereby gave schools more discretion to restrict harmful speech.<sup>3</sup> But these decisions provided little guidance on how much, if at all, *Tinker* allows schools to restrict student speech in order to protect the physical and psychological well-being of other students. When harmful student speech is not vulgar and offensive, does not bear the imprimatur of the school, and does not advocate illegal drug use, how much can schools limit it?

In recent years, this question has been particularly central to schools’ attempts to restrict controversial student speech on race and sexuality. On the one hand, it is clear enough that schools can protect students from verbal bullying or targeted hate speech.<sup>4</sup> On the other hand, it is far less clear—and far more controversial—whether *Tinker* permits schools to protect students from harmful political, social, or religious speech. Accordingly, lower courts have reached wildly conflicting conclusions about the permissibility of restricting such student viewpoints.<sup>5</sup> Schools can ban religiously intolerant armbands,<sup>6</sup> for

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1. 393 U.S. 503, 506 (1969). On *Tinker*’s seminal importance for students’ free speech rights, see especially Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 530-32 (2000).

2. For some of the problems encountered, see *infra* Part I.

3. See *infra* Part II.B.

4. See *infra* notes 206-210 and accompanying text.

5. See generally *infra* Part I.

6. *Williams v. Eaton*, 468 F.2d 1079, 1084 (10th Cir. 1972) (holding that state university had acted reasonably in prohibiting student athletes from wearing black armbands hostile to other students’ religions during a football game).

example, but not necessarily Confederate-flag clothing.<sup>7</sup> Pro-homosexual slogans<sup>8</sup> or pro-heterosexual student speech<sup>9</sup> are protected, but anti-gay speech is not,<sup>10</sup> unless it is simply too mild to be harmful.<sup>11</sup> “Homosexuality is a sin”<sup>12</sup> is permissible student speech, but “Homosexuality is shameful” goes too far.<sup>13</sup>

Lower court disagreement has resulted from looking exclusively to *Tinker* and its progeny for guidance on restricting harmful viewpoints in schools. *Tinker* originally devised a two-prong test under which schools can restrict student speech only if it “materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school” or “collid[es] with the rights of others.”<sup>14</sup> But applying this framework to harmful student speech runs into immediate problems. Is such speech a substantial disruption or an invasion of others’ rights?<sup>15</sup> How much speech is needed to trigger either *Tinker* prong?<sup>16</sup> Does the speech have to be individually targeted, or are broad political statements also proscribable?<sup>17</sup> If a court protects student

7. Compare *Barr v. Lafon*, 530 F.3d 554, 565 (6th Cir. 2008) (upholding a ban though finding no evidence “that the Confederate flag ever caused any disruption at the school” (emphasis in original)), with *Bragg v. Swanson*, 371 F. Supp. 2d 814, 827 (S.D.W. Va. 2005) (holding that a ban on the Confederate flag was not reasonable in light of the good racial environment and absence of racial fights at the school).

8. *Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1379 (N.D. Fla. 2008) (holding that school employees cannot ban students from bringing to school symbols or slogans advocating fair treatment of homosexuals).

9. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1074 (D. Minn. 2001) (granting preliminary injunction to student allowing him to wear “Straight Pride” T-shirt to school).

10. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 (9th Cir. 2006) (holding that a high school can prohibit “derogatory and injurious remarks directed at students’ minority status, such as race, religion, and sexual orientation”), *vacated as moot*, 485 F.3d 1052 (9th Cir. 2007).

11. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 676 (7th Cir. 2008) (holding that school may not prohibit “tepidly negative” speech); *Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist.*, 2013 WL 3148272, at \*9 (E.D. Mich. June 19, 2013) (holding that school could not prohibit student from saying “I don’t accept gays”).

12. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 975 (S.D. Ohio 2005) (granting preliminary injunction for student to wear a potentially offensive t-shirt so long as no actual or imminent material disruption was likely to occur).

13. *Harper*, 445 F.3d at 1182 (holding that school could prevent student from wearing inflammatory T-shirt that violated the rights of other students).

14. 393 U.S. 503, 513 (1969) (quotation marks omitted).

15. Compare *Harper*, 445 F.3d at 1177-78 (applying “rights of others” prong to T-shirt that read “HOMOSEXUALITY IS SHAMEFUL”), with *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1071 (D. Minn. 2001) (applying “substantial disruption” prong to “Straight Pride” T-shirt). For further discussion, see *infra* notes 167-181 and accompanying text.

16. Compare *Nuxoll*, 523 F.3d at 676 (holding that “tepidly negative” speech does not trigger *Tinker*’s “substantial disruption” prong), with *Harper*, 445 F.3d at 1178 (holding that “verbal assaults on the basis of a core identifying characteristic” trigger *Tinker*’s rights of others prong), and *id.* at 1198 (Kozinski, J., dissenting) (arguing that only speech “so severe and pervasive as to be tantamount to conduct” triggers *Tinker*’s second prong).

17. Compare *Nuxoll*, 523 F.3d at 674 (addressing emotional harm or invasion of right to education), with *Nixon*, 383 F. Supp. 2d at 973 (requiring evidence beyond fact that students would likely find speech offensive).

speakers too much, it risks emotional harm to the student audience exposed to the speech; if the school protects the student audience too much, it risks impermissible viewpoint discrimination against the student speakers. Caught between this Scylla and Charybdis, courts have placed different limits on a school's ability to shield students from emotionally harmful speech by other students.

Adopting the same methodology, scholars have only replicated these basic disagreements. They, too, find that schools can prohibit verbal bullying or targeted hate speech.<sup>18</sup> But like lower courts, scholars primarily have mined the *Tinker* line of cases, alone, to glean how *Tinker* should apply to harmful political, social, or religious commentary. While some thus have analyzed such speech under *Tinker*'s "material disruption" prong,<sup>19</sup> others have advocated applying the "rights of others" prong;<sup>20</sup> scholars have disagreed over the scope of each prong, too.<sup>21</sup> Occasionally other doctrine has been used, but only to establish that a school *can* restrict harmful speech, not to consider the boundaries of that authority.<sup>22</sup>

What both scholars and lower courts have missed is that the Supreme Court actually situated *Tinker* and its progeny within a broader jurisprudence on protecting minors from all kinds of harmful speech.<sup>23</sup> That jurisprudence also balanced content or viewpoint discrimination, on the one hand, with a state's compelling interest in protecting the physical and psychological well-being of

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18. See *infra* notes 208-209 and accompanying text.

19. See Abby M. Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1517-27 (2008); Emily G. Waldman, *A Post-Morse Framework For Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 499 (2008) (arguing that "substantial disruption" prong does all the work for harmful student speech). *But see* Brian J. Bilford, *Harper's Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. C.R. & C.L. 447, 454-60 (2008) (arguing against using "substantial disruption" prong for restrictions on hate speech in schools).

20. Bilford, *supra* note 19, at 469 (agreeing that *Harper*'s approach "may be the best"); Martha McCarthy, *Curtailing Degrading Student Expression: Is a Link to a Disruption Required?*, 38 J.L. & EDUC. 607, 610-11 (2009). *But see* Mollen, *supra* note 19, at 1517-27 (rejecting the "rights of others" prong as a basis for restricting controversial student speech); *see also* Alison G. Myrha, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71, 84-85, 117-28 (1992) (arguing that *Tinker* and its progeny justify restrictions on *all* hate speech in schools).

21. Compare Mollen, *supra* note 19, at 1523-24 (doubting that "substantial disruption" refers to disruption to a single student's ability to obtain an education), *with* Waldman, *supra* note 19, at 492-502 (requiring disruption of just one student's educational experience to trigger "substantial disruption"); compare Bilford, *supra* note 19, at 469 (following *Harper* but not advocating for expanding its scope), *with* McCarthy, *supra* note 20, at 610-11 (expanding "rights of others" even beyond *Harper*'s focus on minorities)

22. Thus, Bilford, *supra* note 19, at 467-69, situates *Harper* within the broader context of hate speech. Myrha, *supra* note 20, at 85-107, similarly examines other constitutional justifications for school restrictions on hate speech to conclude, broadly, that schools can restrict all hate speech.

23. See *infra* Part II.B.

minors, on the other.<sup>24</sup> In turn, *Tinker* and its progeny cited to protectionist cases and applied those rationales to restricting speech in schools.<sup>25</sup> Examining how student speech cases modified this protectionist jurisprudence thus clarifies the limits on a school's ability to protect students from harmful student viewpoints.

Accordingly, this Note takes a fresh look at the problem of harmful student speech through the lens of protectionist jurisprudence. Part I shows how recent decisions have disagreed over whether and how much schools can protect students from harmful speech. These decisions, in turn, have left unresolved a number of key questions about protectionism and viewpoint discrimination in schools. Part II then examines how *Tinker* used protectionist principles to answer similar questions. I trace how, under *Tinker* and its progeny, the state's protective authority only expands in the special context of schools: even viewpoint restrictions on speech are permissible in order to protect students from potentially harmful speech.

Parts III and IV then use insights from protectionist jurisprudence to answer the questions left open in Part I. Part III maintains that a school's basic educational mission and the state's compelling interest in protecting minors justify some restrictions on harmful speech in schools. To the extent that such speech invades a student's right to be let alone, it falls under *Tinker*'s "rights of others prong." Still, Part IV shows, there are limits on a school's ability to restrict harmful speech. Schools should not be able to ban racist or homophobic viewpoints automatically, for not all such speech is harmful. Nor should high schools, at least, be allowed to prevent students from *voluntarily* exposing themselves to those viewpoints in civil discussion. The Conclusion considers how far this rule extends to other types of speech.

## I. INCONSISTENT APPROACHES TO HARMFUL SPEECH IN SCHOOLS

Recent lower court decisions have adopted an implicit student welfare standard—what I term protectionism—in student speech cases.<sup>26</sup> But in applying a protectionist standard, lower courts have looked exclusively to *Tinker*'s unclear framework. Accordingly, these decisions have disagreed over how far schools can go to protect students from harmful student speech. Three main views have emerged: I call these, respectively, the *institutional rights*,

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24. Compare *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (recognizing the state's important interest in deterring drug use by children that can permanently damage their health and well-being); with *New York v. Ferber*, 458 U.S. 747, 756-64 (1982) (discussing how restriction on child pornography is outweighed by state's compelling interest in safeguarding the physical and psychological well-being of minors).

25. See *infra* Part II.B.

26. See Francisco Negrón, *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard After Morse v. Frederick*, 58 AM. UNIV. L. REV. 1221, 1240 (2009) ("[P]ost-*Morse* student speech jurisprudence . . . is turning towards a student welfare standard, albeit in an unwitting fashion.").

*expanded institutional rights*, and *private rights* approaches. As will be clear, each applies a different amount of protection for student audiences under one of *Tinker*'s two prongs. The approaches consequently clash over what evidence counts for a reasonable forecast of "substantial and material disruption," for example, or what types of harms collide with the "rights of others."

#### A. *The Institutional Rights View*

The least restrictive and least protective approach is the institutional rights view, which frames harmful student speech as a threat only to a school's institutional rights to maintain order and good discipline. Any emotional harm caused is immaterial unless it results in emotional outbursts or provokes a violent reaction—that is, unless it creates material disorder infringing on a school's institutional rights. In short, this view treats emotionally harmful speech like any other kind of student speech under *Tinker*'s "substantial disruption" prong.

Courts have typically adopted the institutional rights approach where a protectionist justification would be redundant. Confederate flag clothing cases, for example, almost always involve material disruptions—prior incidents of racial violence, threats, or tensions—that have justified the restriction on student speech.<sup>27</sup> Likewise, when a school had prohibited students from wearing T-shirts bearing the American flag during its Cinco de Mayo celebration, the Ninth Circuit noted threats of race-related violence in upholding the restriction of speech.<sup>28</sup> Eschewing protectionism in these cases is therefore uncontroversial, for the restriction on speech already passes *Tinker*'s "substantial disruption" prong.

The institutional rights approach has been more controversial in cases involving student speech on sexuality, where there has *not* already been a material disruption or reasonable threat thereof. There, courts have used the institutional rights approach to shield student speakers—whether expressing pro-gay<sup>29</sup> or anti-gay<sup>30</sup> viewpoints. In *Nixon v. Northern Local School District*

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27. See, e.g., *Defoe v. Spiva*, 625 F.3d 324, 334 (6th Cir. 2010) (citing instances of racial violence, threats, and tensions); *Barr v. Lafon*, 538 F.3d 554, 566-67 (6th Cir. 2008) (citing racial violence, threats, and tensions, as well as racial graffiti depicting "hit lists" containing student names); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000) (citing racial incidents and hostile confrontations between white and black students); *Hardwick ex rel. Hardwick v. Heyward*, 674 F. Supp. 2d 725, 735-36 (D.S.C. 2009) (citing segregated proms, physical altercations, fights, and racially motivated burning of a black church in town), *aff'd*, 711 F.3d 426, 438-39 (4th Cir. 2013).

28. *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354, 359-60 (9th Cir. 2014), *amended and superseded on denial of rehearing en banc*, 767 F.3d 764 (9th Cir. 2014).

29. See, e.g., *Gillman v. Sch. Bd.*, 567 F. Supp. 2d 1359, 1372 (N.D. Fla. 2008) (holding that gay pride belt and T-shirt caused only hostile remarks by students, not violence or substantial disruption required under *Tinker*'s "substantial disruption" prong); *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D.R.I. 1980) (considering only previous violent incidents in

*Board of Education*, for example, a high school student won a preliminary and permanent injunction to wear a T-shirt that read in part “Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!” because there had been no actual disruption, and there was “no evidence of any history of violence or disorder in the school.”<sup>31</sup> The *Nixon* court also found no evidence that the student’s “silent, passive expression of opinion” had invaded other students’ rights.<sup>32</sup>

Eschewing protectionism altogether, the institutional rights approach thus focuses narrowly on *material* disruptions: violence, emotional outbursts, or physical invasion of other students’ rights.<sup>33</sup> By framing student speech in terms of a school’s institutional rights, moreover, lower courts adopting this standard tend either to ignore the “rights of others” prong altogether or to interpret it narrowly, as the *Nixon* court did, along the lines of physically invading others’ privacy.<sup>34</sup> As Parts I.B and I.C show, other approaches read *Tinker* more broadly in order to provide some protection for student audiences.

### B. *The Expanded Institutional Rights View*

The expanded institutional rights view espouses a limited form of protectionism and folds protection for student audiences into *Tinker*’s “substantial disruption” prong. Although a few scholars have welcomed this limited protectionist approach,<sup>35</sup> only two courts have adopted it—most prominently, the Seventh Circuit in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204*.<sup>36</sup>

In *Nuxoll*, two high school students won a preliminary injunction to wear a “Be Happy, Not Gay” T-shirt to school in protest of their school’s Day of

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holding that student’s open statement that he was a homosexual did not cause substantial disruption).

30. See, e.g., *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005) (granting preliminary injunction for student to wear a potentially offensive T-shirt so long as there was no actual or imminent material disruption); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (granting preliminary injunction to student to wear “Straight Pride” T-shirt to school).

31. 383 F. Supp. 2d at 967, 973.

32. *Id.* at 973.

33. One district court took an even more restrictive view in allowing a “Straight Pride” T-shirt despite upset students and a previous incident of anti-gay vandalism. *Chambers*, 145 F. Supp. 2d at 1069-70.

34. See *Nixon*, 383 F. Supp. 2d at 974.

35. See, e.g., Waldman, *supra* note 19, at 492-502 (taking a *Nuxoll*-like approach in expanding *Tinker*’s “substantial disruption” prong).

36. See *Nuxoll*, 523 F.3d 668, 670 (7th Cir. 2008); *Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist.*, 2013 WL 3148272, at \*8 (E.D. Mich. June 19, 2013) (following *Nuxoll*). For discussion of *Nuxoll*, see Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 466-71 (2009).

Silence.<sup>37</sup> Note that, because it was less offensive than the unabashed speech in *Nixon*, the T-shirt in *Nuxoll* likely would have been permissible under the institutional rights view. The Seventh Circuit likewise permitted the speech, but on protectionist grounds expanded the scope of emotionally harmful speech that the school permissibly *could* have restricted.<sup>38</sup>

*Nuxoll* also framed the harmful speech in terms of a school's institutional right to maintain an orderly classroom, but the court extended the institutional rights approach in two ways. First, *Nuxoll* expanded the scope of the "substantial disruption" prong to protect students from emotional and psychological harm in addition to classroom disruption.<sup>39</sup> Second, and also for protectionist reasons, it redefined that prong to encompass disruption of not just a classroom as a whole, but even a handful of students' ability to learn.<sup>40</sup> *Nuxoll* thus expanded the type of evidence relevant to forecasting substantial disruption: in addition to *Nixon*'s physical disruption (violence, emotional outbursts), schools could point to evidence of a decline in test scores or school attendance.<sup>41</sup> There simply was no evidence of either type to justify restriction of the students' "tepidly negative" T-shirt.<sup>42</sup>

Though more protective of emotionally harmed students than the institutional rights view, this approach nevertheless establishes only a limited form of protectionism. The Seventh Circuit virtually read away *Tinker*'s "rights

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37. *Nuxoll*, 523 F.3d at 676. The Day of Silence is a nationwide commemoration of the silence lesbian, gay, bisexual, and transgender (LGBT) students face and advocates tolerance for LGBT individuals. *Id.* at 670; *Harper*, 445 F.3d at 1171.

38. *Nuxoll*, 523 F.3d at 671 ("[A] school's . . . interest in protecting its students from offensive speech by their classmates is undeniable."); *id.* at 675 ("[S]chool authorities have a protective relationship and responsibility to all students.").

39. *Id.* at 674 ("We know . . . that avoiding violence, if that is what 'disorder or disturbance' connotes, is not a school's only substantial concern."). Judge Rovner, concurring, seemed to adopt *Nixon*'s institutional rights view: the speech, though outright "disparaging," was nevertheless insufficient on its own to create a hostile environment that might materially and substantially interfere with school activities. *Id.* at 679 (Rovner, J., concurring).

40. *Nuxoll* was deeply concerned about the psychological effects of student speech. See *id.* at 674 ("Imagine the psychological effects if the plaintiff wore a T-shirt on which was written 'blacks have lower IQs than whites'"). The court expressly evaluated *Nuxoll*'s T-shirt in terms of whether or not it tended to "poison the educational atmosphere." *Id.* at 676. And it equated "symptoms of a sick school" with substantial disruption. *Id.* at 674. These symptoms included a decline in test scores or absenteeism—which presumably would have affected only certain offended groups or individuals, and not the entire classroom. *Id.* at 674.

41. *Id.* at 674.

42. *Id.* at 676. Taking a similar protectionist approach, the district court in *Nuxoll* actually denied Zamecnik's request for a preliminary injunction, albeit on somewhat idiosyncratic grounds. *Zamecnik v. Indian Prairie Sch. Dist.*, 2007 WL 1141597 (N.D. Ill. Apr. 17, 2007). It held that, under Seventh Circuit precedent, a school's legitimate pedagogical concern in protecting gay students from harassment "permits the school to restrict speech expressing negative statements about gays," Zamecnik's T-shirt included. *Id.* at \*10.



of others” prong.<sup>43</sup> And by folding psychological harm to students into the “substantial disruption” prong, the court again read the “rights of others” prong narrowly—this time as encompassing only “legal rights.”<sup>44</sup> The court concluded that those legal rights simply did not include a “right to prevent criticism of [peoples’] beliefs or for that matter their way of life.”<sup>45</sup> Moreover, the court effectively required a strong causal link between the T-shirt and substantial disruption. Despite other incidents of homophobia and harassment of gay students at the school, the court held that a “tepidly negative” T-shirt could not reasonably be forecast to *cause* similar disruption.<sup>46</sup>

In short, the expanded institutional rights view offers some protectionism by expanding the scope of *Tinker*’s “substantial disruption” prong. As the next Part shows, a third approach likewise includes protectionism, but through *Tinker*’s “rights of others” prong.

### C. *The Private Rights View*

The private rights approach offers the most expansive protectionism—hence the greatest threat of viewpoint discrimination.<sup>47</sup> It views harmful student speech as a threat not to the school environment, as under both institutional rights approaches, but to the emotional and psychological development of students.<sup>48</sup> By folding protectionism into *Tinker*’s “rights of

43. *Tinker* itself created this prong, in part, to protect students from invasive speech. *See infra* notes 175-177 and accompanying text. Note, in this regard, that the kind of speech that might lead to a “decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school,” is precisely the kind of demeaning speech that might be thought to invade the rights of others. *Nuxoll*, 523 F.3d at 674.

44. 523 F.3d at 672 (“Of course a school can . . . protect students from the invasion of their legal rights by other students.”). Other courts have suggested that the “rights of others” prong extends only to tortious speech. *E.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001). *But see infra* notes 169-177 and accompanying text.

45. *Nuxoll*, 523 F.3d at 672 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 394 (1992)) (striking down as facially unconstitutional an ordinance prohibiting display of a symbol that knowingly “arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender”). Another court similarly concluded that a student’s First Amendment rights had been violated when he had been reprimanded him for saying, “I do not accept gays.” *Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist.*, 2013 WL 3148272, at \*7 (E.D. Mich. June 19, 2013). Following *Nuxoll*, the *Glowacki* court distinguished the student’s non-targeted speech from the type of harassing speech that schools can permissibly restrict under the rights of others prong. *Id.* at \*8.

46. *Nuxoll*, 523 F.3d at 676.

47. Bilford, *supra* note 19, at 468-69 (discussing *Harper*); John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 638-41 (2009) (arguing that *Harper*’s approach substantially risks purposeful viewpoint discrimination by schools).

48. *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1181 (9th Cir. 2006) (“[W]e can certainly take notice that it is harmful to gay teenagers to be publicly degraded and called immoral and shameful.”); *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977) (citing a reasonable fear of “serious emotional harm” to high school students if a sex

others” prong, the private rights approach thus expands both the amount and type of harmful speech that schools can restrict.

This approach is best illustrated by the Ninth Circuit’s decision in *Harper v. Poway Unified School District*, where a high school student sought a preliminary injunction to wear a T-Shirt that read “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” on the front, and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27’” on the back.<sup>49</sup> Under an institutional rights and possibly an expanded institutional rights view, Harper could have prevailed.<sup>50</sup> Indeed, Judge Kozinski took essentially an institutional rights approach in his dissent, under which Harper’s shirt did not meet either *Tinker* prong.<sup>51</sup> Yet under the highly protective private rights approach of the majority, Harper lost.

It is not difficult to see why, given the majority’s portrait of students as particularly vulnerable to psychological harm.<sup>52</sup> To protect students, the court expanded *Tinker*’s “rights of others” prong to include the right to be free from “verbal assaults on the basis of a core identifying characteristic” while in school.<sup>53</sup> Although the court might have protected all students from such verbal attacks, it distinguished harm to minorities as particularly damaging<sup>54</sup> and

questionnaire were to be distributed in school). The *Trachtman* dissent found that “emotional harm” was far too nebulous and vague an extension of the “rights of others” prong to justify what amounted to “destruction of constitutionally protected free speech rights.” *Id.* at 521 (Mansfield, J., dissenting).

49. 445 F.3d 1166, 1171 (9th Cir. 2006). For an excellent discussion of *Harper* and its approach to hate speech, see Bilford, *supra* note 19, at 452-60; *see also* Curtis, *supra* note 36, at 461-66; McCarthy, *supra* note 20, at 608-11.

50. The district court noted that the previous year’s Day of Silence had resulted in “volatile behavior,” including altercations between students. *Harper v. Poway Unified Sch. Dist.*, 345 F. Supp. 2d 1096, 1120 (S.D. Cal. 2004). But, as Judge Kozinski observed, it was not clear that the students’ t-shirts had caused those disruptions. *Harper*, 445 F.3d at 1194-95.

51. *See Harper*, 445 F.3d at 1193-94 (noting that minimal actual disruption and heated discussion did not reach level of “substantial disorder”); *see also id.* at 1198 (finding that “rights of others” refers only to traditional rights, like assault, defamation, invasion of privacy, extortion, and blackmail).

52. *See id.* at 1176 (“Generally, [students] are vulnerable to cruel, inhuman, and prejudiced treatment by others.”); *id.* at 1178 (“Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic . . . have a right to be free from such attacks while on school campuses.”); *id.* at 1179 (“Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers . . .”).

53. *Id.* at 1178. The majority later seemed to narrow its holding only to “speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group,” *id.* at 1182 n.27, but left open the question of whether a school could similarly ban remarks based on gender, *id.* at 1183 n.28.

54. *Compare id.* at 1182 (rejecting a school ban on T-shirts reading “Young Republicans Suck” because they “would certainly not be sufficiently damaging to the individual . . . to warrant a limitation on the wearer’s First Amendment rights”), *with id.* at 1179 (permitting school to ban speech demeaning to gay and lesbian students because it is “detrimental not only to their psychological health and well-being, but also to their

amply documented the harm that gay students suffer from anti-gay speech and violence.<sup>55</sup> Similar attacks on someone in a majority still could warrant protection, the court noted, but probably not under *Tinker*'s "rights of others" prong.<sup>56</sup> Part of the concern here was viewpoint discrimination: the majority needed to draw the line somewhere lest a school be permitted to censor *all* demeaning speech.<sup>57</sup>

The private rights approach expands the amount and type of harmful student speech that schools can restrict under either institutional view. First, it does not distinguish between the harm of a hostile environment and that of a single demeaning comment.<sup>58</sup> Lower courts do not usually require evidence linking the student speech to actual emotional harm to other students.<sup>59</sup> Second, the private rights approach does not distinguish between personally directed abusive epithets and political statements. Even "tepidly negative" anti-gay speech, for instance, could be prohibited under *Harper*'s expansive rule.<sup>60</sup>

Given their varying views on protectionism, these three broad approaches leave unresolved key questions about applying *Tinker* to harmful student speech. First, do protectionist principles justify greater restriction of harmful speech in schools? Second, under which *Tinker* prong should courts analyze such speech—the "substantial disruption" prong or the "rights of others" prong? Third, how much viewpoint discrimination is allowed under either prong? Can a school censor all harmful viewpoints, or must it allow non-personally directed political statements? And finally, how stringent should any causation requirement be for restricting harmful speech? Must a school prove that a single student's speech would cause harm, or is it enough that the speech contributes to a harmful environment?

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educational development"). *But see id.* at 1200-01 (Kozinski, J., dissenting) (querying why other kinds of demeaning speech should not also be proscribable).

55. *Harper*, 445 F.3d at 1179.

56. *Id.* at 1183 n.28.

57. *Id.* at 1183. McCarthy has advocated expanding *Harper* so that not just minority status is at issue, *supra* note 20, at 611, 618. While I would agree insofar as I find that *Harper*'s minority/majority distinction is arbitrary, I would nevertheless urge strong limits on a school's ability to eliminate any given viewpoint entirely. *See infra* Part IV.B.

58. *Harper*, 445 F.3d at 1179 (citing social-scientific literature measuring the impact of abusive speech and violence on gay students); *Williams v. Eaton*, 468 F.2d 1079, 1084 (10th Cir. 1972) (holding that a state university had acted reasonably in prohibiting student athletes from wearing black armbands hostile to other students' religions in one game).

59. *See also Williams*, 468 F.2d at 1084 (citing no evidence that opposing team, whose religion would have been mocked by the student athletes' armbands, would have suffered harm). *Compare Harper*, 445 F.3d at 1199 (Kozinski, J., dissenting) (noting that "evidence" of harassment's effect on gay students is not actual evidence that *this t-shirt* would have interfered with gay students' education), *with Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977) (holding that schools are not required "to predict with certainty" how many students would be harmed by sex questionnaire).

60. *Harper*, 445 F.3d at 1185 (allowing schools to discuss tolerance, equality, and democracy, while censoring intolerant, bigoted, and hateful viewpoints).

Courts have struggled to answer these questions largely because they have looked exclusively to *Tinker* and its progeny for guidance. But as Part II shows, the *Tinker* line of cases drew on additional jurisprudence on protectionism; examining that jurisprudence sheds light on how far schools can and cannot go to protect students from emotionally harmful speech.

## II. PROTECTIONISM IN AND OUT OF SCHOOL

The desire to protect students from anti-gay or racist speech is a recent concern, yet protecting children from harmful speech is nothing new. Since the Victorian era, at least, the state has tried to shield minors from harmful expression, including girlie magazines, offensive television broadcasts, child pornography, and violent video games.<sup>61</sup> Although not all of these attempts have been successful, courts have recognized that the state has a “compelling state interest in protecting the physical and psychological well-being of minors.”<sup>62</sup> Part II.A examines the reasons for, and limitations on, this state interest in protecting minors from harmful speech. Part II.B then shows how *Tinker* and its progeny utilized those principles while expanding the scope of protectionist authority within schools.

### A. *Protecting Minors from Harmful Speech*

This Part examines the justifications for and limits of the state’s authority to protect minors from harmful speech outside of schools.<sup>63</sup> The seminal case in this area is *Ginsberg v. New York*, which upheld a New York statute prohibiting the sale of obscene materials to children under the age of seventeen even though such materials would not have been obscene to an adult audience.<sup>64</sup> Although subsequent cases—including the Court’s most recent protectionist case in *Brown v. Entertainment Merchants Ass’n*—have considerably narrowed the precedential scope of *Ginsberg*, its justifications for

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61. *E.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (discussing violent video games); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (discussing broadcast media), *rehearing denied*, 439 U.S. 883 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968) (discussing girlie magazines). *See generally* Erwin A. Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302, 320-21 (1967); Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 568-69 (2005); Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 436-46 (2000).

62. *Sable Commc’ns of Cal., Inc v. FCC*, 492 U.S. 115, 126 (1989). Other cases have noted this interest without calling it compelling. *E.g.*, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Ginsberg*, 390 U.S. at 640-41; *Prince v. Commonwealth*, 321 U.S. 158, 165 (1944).

63. On this principle, see generally, Elias, *supra* note 61; Garfield, *supra* note 61, at 598-621; Ross, *supra* note 61, at 494-507.

64. *Ginsberg*, 390 U.S. 629, 637 (1968); *see also* *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 (1968); *Butler v. Michigan*, 352 U.S. 380, 381 (1957).

protectionism have remained central to protectionist jurisprudence.<sup>65</sup> Those justifications include aiding parents in raising their children as they see fit; safeguarding children from harm that “might prevent their growth into free and independent well-developed men and citizens”; and, as Justice Stewart added in a concurrence, protecting children where “in some precisely delineated areas” they do not “possess[] of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”<sup>66</sup> This Part fleshes out each justification in turn.

*Ginsberg* noted that parents’ authority to raise their children however they want is “basic in the structure of our society.”<sup>67</sup> While parental responsibility of their children’s well-being is primary, the state can—and Justice Brennan suggested, should—aid parents in that responsibility.<sup>68</sup> The New York statute did just that in regulating only material that community standards would have deemed harmful to minors.<sup>69</sup> Moreover, the statute did not interfere with the parental role, for parents who so desired could still purchase the girlie magazines for their children. Subsequent cases, like *Entertainment Merchants*, have struck down just such interference where the state has tried to substitute its own judgment for parents’ on the kind of speech to which children should be exposed.<sup>70</sup>

*Ginsberg*’s second justification was that the state should protect the well-being of children to ensure that they develop into free and independent citizens. *Ginsberg* quoted *Prince v. Massachusetts* for this proposition,<sup>71</sup> and in both cases the Court applied broad protectionism to protect the moral, physical, and psychological well-being of children.<sup>72</sup> Such protectionism applied only to

65. See, e.g., *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2735-36 (affirming State’s protectionist authority while distinguishing *Ginsberg* as about unprotected obscene speech).

66. *Ginsberg*, 390 U.S. at 640-41 (internal quotation marks omitted); *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring).

67. 390 U.S. at 639; see also *Bellotti v. Baird*, 443 U.S. 622 637-39 (1979); *Prince*, 321 U.S. at 166; Ross, *supra* note 61, at 492-93.

68. *Ginsberg*, 390 U.S. at 639 (Brennan, J., concurring) (“The legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility.” (emphasis added)).

69. *Id.* (noting that statute defined “harmful” “according to ‘prevailing standards in the adult community as a whole with respect to what is suitable material for minors’”).

70. See, e.g., *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2740-41 (holding that a California statute prohibiting sale of violent video games to minors was not narrowly tailored because not all children have parents who object to their purchase of such games); *Reno v. ACLU*, 521 U.S. 844, 865 (1997) (striking down the Communications Decency Act, which prohibited dissemination of indecent material to minors via the internet, because it would have applied irrespective of parental consent).

71. *Ginsberg*, 390 U.S. at 640-41 (quoting *Prince*, 321 U.S. at 165 (upholding child labor law against aunt who let nine-year-old ward publicly distribute copies of religious magazine)).

72. In *Ginsberg*, this well-being encompassed at least their “ethical and moral development,” which exposure to obscenity might impair. 390 U.S. at 641-42. Similarly, *Prince* pointed to the “crippling effects” of child labor, the “dangers” of the streets for young children, and the harms of “emotional excitement and psychological or physical injury” from

children, however: the statutes in *Ginsberg* and *Prince* would have been invalid had they also applied to adult audiences.<sup>73</sup> Moreover, this protectionism applied even without clear evidence that the restricted speech would, in fact, harm children. *Ginsberg* expressly recognized that no evidence had *proven* a causal relationship between exposure to obscenity and moral impairment.<sup>74</sup> Even so, because obscenity for children was unprotected speech, the majority simply accepted as reasonable the legislative finding that such causality exists.<sup>75</sup>

*Entertainment Merchants* recently clarified that *Ginsberg*'s less deferential approach to causation is appropriate only where the regulated speech is unprotected.<sup>76</sup> Otherwise strict scrutiny is required, including means narrowly tailored to achieve a compelling state interest.<sup>77</sup> In addition, the Supreme Court has narrowed the scope of *Ginsberg* and *Prince* to an almost exclusive focus on the physical and psychological well-being of children; *Ginsberg*'s concern for *moral* harm has disappeared.<sup>78</sup> To demonstrate narrow tailoring, the state must show a causal link between the restricted speech and physical or psychological harm to minors.<sup>79</sup> Only sexual speech seems exempt from this causation

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being a religious martyr that justified prohibiting minors under a certain age from selling magazines in the streets. 321 U.S. at 168-70.

73. *Ginsberg*, 390 U.S. at 638; *Prince*, 321 U.S. at 167.

74. *Ginsberg*, 390 U.S. at 641-42 (“While these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.” (citation omitted)).

75. *Id.* at 641-43. Likewise, *Prince* did point to the dangers of child employment and street preaching in general. 321 U.S. at 169. But on the specific harm posed by a child’s distributing religious literature in the street, the Court spoke only of tendencies and “harmful possibilities”—never of certain causality. *Prince*, 321 U.S. at 168-70; *see id.* at 170.

76. 131 S. Ct. at 2735 (distinguishing California statute that did not “adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children”).

77. *See id.* at 2738-39 (holding that California had failed to show any direct causal link between violent video games and harm to minors); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989) (holding that prohibition of adult access to indecent but not obscene ‘dial-a-porn’ service far exceeded what was necessary to limit minors’ access to same); *see also Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 755 (1996) (applying narrowly-tailored test). *Denver* raises, but does not address, the possibility that lower scrutiny might apply where indecent speech is at issue. 518 U.S. at 755.

78. For example, *New York v. Ferber* justified a New York law prohibiting the promotion of child pornography by a lengthy analysis of the “physiological, emotional, and mental” harms children suffer by participating in pornography. 458 U.S. 747, 757-58 (1982). Despite the ideal opportunity, *Ferber* made no mention of any impairment to the *moral* development of sexually exploited children. *See also Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (noting that “disgust is not a valid basis for restriction”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (discussing “physical and psychological well-being of a minor”); *Sable*, 492 U.S. at 126 (same).

79. *See Garfield, supra* note 61, at 608-15 (discussing the difficulties in showing empirical causality of harm to children); *Ross, supra* note 61, at 501-07 (showing how neither violent nor sexual speech meets evidentiary demands).

requirement.<sup>80</sup> Where there is no actual harm to minors, then, the state cannot restrict the speech on protectionist grounds.<sup>81</sup>

*Ginsberg's* third justification for protectionism, taken from Justice Stewart's concurrence, is that children, like a captive audience, sometimes lack the capacity for full choice to hear harmful speech.<sup>82</sup> This captive audience justification stems from the idea that individuals should have some autonomy to ward off unwanted, offensive speech.<sup>83</sup> In *FCC v. Pacifica Foundation*, for example, the Court upheld a restriction on artistic speech—a patently offensive comic routine about sex and excretion that may have been protected in other contexts—because it was uniquely accessible to children and uniquely intruded into the homes of unwilling listeners.<sup>84</sup>

As *Pacifica* suggests, captive audiences occur primarily where there are unwanted intrusions into one's home: protests immediately outside a residence, loud noises disturbing a tranquil residential area, or indecent mailings to one's home.<sup>85</sup> But even outside of the home, courts have upheld speech restrictions so long as there was no meaningful opportunity for an unwilling listener to avoid the offensive speech.<sup>86</sup> Conversely, when the listener is indifferent or willing, or when there is no captive audience, the restriction on speech is impermissible.<sup>87</sup>

80. Note that *FCC v. Pacifica Foundation*, *infra*, relied on *Ginsberg* and provided no discussion of causation, accordingly. 438 U.S. 726, 749 (1978) (citing *Ginsberg*, 390 U.S. at 640). In turn, *Denver* relied on *Pacifica* and also eschewed causality. 518 U.S. at 744-45. For further discussion, see Ross, *supra* note 61, at 463-68.

81. Thus, where a statute required parental permission for a minor to get an abortion, *Bellotti v. Baird* carved out an exception in case the abortion would not have been harmful—that is, if it were actually in the minor's best interests. 443 U.S. 622, 648 (1979).

82. *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring).

83. See, e.g., *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970) (“[A] sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.”).

84. 438 U.S. 726, 746, 748-51 (1978).

85. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (protests immediately outside a residence posed captive audience problem); *Rowan*, 397 U.S. at 729 (“no one has a right to press even ‘good’ ideas on an unwilling recipient”); *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949) (loud noises intruded on unwilling listeners in their home). For discussion of the captive audience doctrine, see William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 404-09 (2002); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

86. *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (“[O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where ‘the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.’”) (citations omitted); *Cohen v. California*, 403 U.S. 15, 21 (1971) (“The ability of government . . . 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.”).

87. *Sable Commc'ns of Cal., Inc., v. FCC*, 492 U.S. 115, 128 (1989) (striking down ban on dial-a-porn messages as pertains to adults because no captive audience problem exists where recipient of speech “takes affirmative steps to receive the communication”); *Frisby*, 487 U.S. at 497 (Stevens, J., dissenting) (striking down as overbroad an ordinance prohibiting picketing in front of residence on grounds that picketing before willing or

To the extent that Justice Stewart's view justifies protectionism only some of the time, there can be no rationale for protectionism when minors are not like a captive audience. In this vein, *Bellotti v. Baird* excepted minors of sufficient maturity from a state statute requiring parental consent to obtain an abortion.<sup>88</sup> And *Board of Education, Island Trees Union Free School District v. Pico* held that school libraries do not have absolute discretion to restrict students' voluntary access to speech by removing books from the library.<sup>89</sup> Although the school had asserted protectionist grounds for removing racist and vulgar books, *Pico* distinguished between mandatory curricula and students' voluntary enrichment at the library.<sup>90</sup> Under *Pico*, one final limit on protectionism—perhaps the outer limit of this jurisprudence—is viewpoint discrimination, particularly when children are mature enough to make an informed decision about the harmful speech.<sup>91</sup>

This protectionist jurisprudence imposes clear limits on the state's broad authority to protect minors from harmful speech outside of school. The state can neither interfere with parents' role in raising their children nor protect minors from moral harms. And to justify protectionism, the state must show a causal relationship between the speech and harm to minors, including—for protected speech—means narrowly tailored to protect children from physical or psychological harm. Where there is no harm, or when children actually have the maturity to make an informed decision, the state cannot restrict their rights. Finally, the state cannot engage in viewpoint discrimination even to protect children.

The next Subpart shows how the state's protectionist authority only increases within the context of public schools.

### B. *Protecting Students from Other Students' Expression*

Ever since *Tinker*, First Amendment rights in school have been “applied in light of the special characteristics of the school environment.”<sup>92</sup> Within the school context, courts have only expanded protectionist jurisprudence to shield

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indifferent residents would not be an invasion of privacy); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (striking down city ordinance prohibiting the showing of films with nudity at drive-in theaters because viewers could readily avert their eyes).

88. 443 U.S. 622, 647 (1982).

89. 457 U.S. 853, 863-69 (1982).

90. *Id.* at 869.

91. In *New York v. Ferber*, too, the majority expressly recognized that there was no “question here of censoring a particular literary theme.” 458 U.S. 747, 763 (1982). Justice O'Connor's concurring opinion echoed that the child pornography statute amounted not to a restriction of ideas, but to an obstacle for making depictions of child pornography more realistic. *Id.* at 774-75; see also *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (recognizing danger that the “real reason” for California regulation of violent video games was to restrict certain ideas, like violence or gore).

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



students from harmful speech.<sup>93</sup> As this Subpart shows, schools used to have very broad authority to discipline students, including by restricting speech, in order to guide their moral development and shield them from harm. *Tinker* did not so much erode that authority as force schools to reframe it in terms of institutional and individual rights.<sup>94</sup> And post-*Tinker* cases continued to defer to school authorities even to protect students from moral harm, and even through viewpoint restrictions on student speech.

Prior to *Tinker*, public schools had almost unlimited authority to impose speech restrictions to instill core values in students.<sup>95</sup> This power arose from the state's *in loco parentis* authority and the institutional judgment that courts should not micro-manage schools.<sup>96</sup> In this way, protectionism in schools was *per se* an aid to parental authority.<sup>97</sup> Courts applied a highly deferential "reasonableness" standard to any school regulation restricting speech.<sup>98</sup> One such iteration of the standard was the actual disruption test applied by the U.S. Court of Appeals for the Fifth Circuit in *Burnside v. Byars*<sup>99</sup> and later adopted

93. *E.g.*, *Morse v. Frederick*, 551 U.S. 393, 406 (2007) ("[S]chools may regulate some speech 'even though the government could not censor similar speech outside the school.'" (citation omitted)).

94. Hence, schools have prevailed overwhelmingly in post-*Tinker* student speech cases. Chemerinsky, *supra* note 1, at 528-29; Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1300 (2008).

95. *Morse*, 551 U.S. at 410-21 (Thomas, J., concurring); see Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129, 1148-57 (2009) (noting that in the period before *Tinker* "students' speech rights were extremely limited in reality").

96. *E.g.*, *Morse*, 551 U.S. at 413-16 (Thomas, J., concurring) (discussing the breadth of a school's *in loco parentis* authority); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986).

97. *E.g.*, *Morse*, 551 U.S. at 413-14 (Thomas, J., concurring) ("One of the most sacred duties of parents is to train up and qualify their children . . . . The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power.") (quoting *State v. Pendergrass*, 19 N.C. 365, 365-66 (1837)). *But see Morse*, 551 U.S. at 424 (Alito, J., concurring) ("When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents.").

98. *See, e.g.*, *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966) ("In these circumstances we consider the rule of the school authorities reasonable."); *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (providing that courts must determine whether school rules "are a reasonable exercise of the power and discretion of the school authorities"); *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613, 618 (M.D. Ala. 1967) ("[T]he school and school officials have always been bound by the requirement that the rules and regulations *must be reasonable*" (emphasis in original)); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966) ("Unless the actions of school officials . . . are unreasonable, the Courts should not interfere.").

99. 363 F.2d at 749 (holding that high school regulation prohibiting students from wearing "freedom buttons" which did not disrupt regular school activities was unconstitutional infringement on students' freedom of expression).

by *Tinker*.<sup>100</sup> Under this test, the threshold for actual disruption was as low as merely distracting another student in class.<sup>101</sup>

In permitting students to wear black armbands in silent protest of the Vietnam War, *Tinker* raised this threshold some, but not by much.<sup>102</sup> Indeed, as Justice Black's dissent in *Tinker* suggested, *Tinker* did not so much augur an era of expansive student rights as reframe the prevailing "reasonableness" test<sup>103</sup> in terms of institutional and individual rights limitations on student speech.<sup>104</sup> On the institutional side, schools retained expansive authority to maintain order and discipline under the "substantial disruption" prong taken from *Burnside*.<sup>105</sup> And on the individual side, student speech could not interfere with others' rights "to be secure and to be let alone."<sup>106</sup>

With this last "rights of others" prong, *Tinker* extended the *Burnside* rule and thereby folded in latent protectionism. Although *Tinker* itself did not concern harmful speech,<sup>107</sup> the majority recognized that certain viewpoints might be expressed in a harmful, invasive way, as had occurred in *Blackwell v.*

100. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 504, 509, 513 (1969); *see also Burnside*, 363 F.2d at 748 ("Regulations which are essential in maintaining order and discipline on school property are reasonable.").

101. *Waugh v. Miss. Univ.*, 237 U.S. 589, 596-97 (1915) (upholding state law banning Greek fraternities that "divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions"); *Burnside*, 363 F.2d at 748 (noting twice that wearing freedom buttons did not "distract" other students).

102. The school's actions would have been permissible under *Burnside* since there was "distraction," but not "disruption." *Tinker*, 393 U.S. at 518 (Black, J., dissenting). That *Tinker* was not as expansive as later critics have portrayed is rightly emphasized in Nuttall, *supra* note 94, at 1293-302. In this vein, Professor Wright has advocated a shift away from *Tinker* precisely so that schools can have broad latitude to regulate "distracting" student speech. R. George Wright, *Tinker and Student Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 105 (2008).

103. *See Tinker*, 393 U.S. at 516-17 ("[T]he Court decides that the public schools are an appropriate place to exercise 'symbolic speech' as long as normal school functions are not 'unreasonably' disrupted."). For discussion, see Nuttall, *supra* note 94, at 1293-302. Indeed, cases since *Tinker* have hewed more closely to Justice Black's dissent, which provided even greater deference to schools, than to the majority opinion. Chemerinsky, *supra* note 1, at 541.

104. The only prior Supreme Court case on student speech had taken the same approach. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) ("The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual . . . . The sole conflict is between [school] authority and rights of the individual.").

105. *See Tinker*, 393 U.S. at 506-07 (balancing student's First Amendment rights with the "comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."); *id.* at 508 ("[T]his case does not concern speech or action that intrudes upon the work of the schools . . .").

106. *Id.* at 508.

107. At best, only Justice Black found protesting the war in Vietnam an inherently harmful viewpoint, and then only because it distracted students from learning. *Id.* at 522-24 (Black, J., dissenting).

*Issaquena Country Board of Education* only one year prior.<sup>108</sup> *Tinker* noted with approval that *Blackwell* had upheld a ban on freedom buttons because students who wore the buttons had “harassed” other unwilling students by trying to pin buttons onto them.<sup>109</sup> Protecting students from this type of invasive speech thus seems to have motivated the Court to create the “rights of others” prong.<sup>110</sup> Just as in *Ginsberg*, Justice Stewart’s concurring opinion offered a different route to the same protectionist end: because minors are like a captive audience, he reasoned, they do not always enjoy full First Amendment rights.<sup>111</sup>

*Tinker* may only have gestured to schools’ authority to protect students from harmful speech, but it nevertheless augmented that authority by allowing viewpoint discrimination—defined in Part II.A as the outer limit of protectionism. On this point *Tinker* was clear: schools can restrict any viewpoint that materially disrupts the classroom or invades the rights of others.<sup>112</sup> Hence, while “an undifferentiated fear or apprehension of disturbance” could not justify the restriction of an idea,<sup>113</sup> a reasonable forecast of substantial disruption in class or invasion of others’ rights could.<sup>114</sup> Lacking this additional justification of reasonableness, schools might become “enclaves of totalitarianism”<sup>115</sup> instead of “marketplace[s] of ideas.”<sup>116</sup> Justice Black dissented, but only because he thought that schools had *greater* authority to restrict viewpoints in order to serve their fundamental role of training students to become good citizens.<sup>117</sup>

108. 363 F.2d 749, 754 (5th Cir. 1966) (upholding high school regulation prohibiting students from wearing ‘freedom buttons’ where there was boisterous commotion, collisions with rights of other students, and undermining of authority).

109. 393 U.S. at 505 n.1 (discussing *Blackwell*, 363 F.2d at 749).

110. Christine Metteer Lorillard, *When Children’s Rights “Collide”: Free Speech vs. The Right to Be Let Alone in the Context of Off-Campus “Cyber-Bullying,”* 81 *Miss. L.J.* 189, 205-08 (2011). In fact, the language of *Tinker* matches that in *Blackwell* almost exactly. Compare *Tinker*, 393 U.S. at 508 (“collision with the rights of other students”), with *Blackwell*, 363 F.2d at 754 (“There was . . . a collision with the rights of others.”).

111. In fact, he quoted his *Ginsberg* concurrence in *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (quoting *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968)).

112. *Tinker*, 393 U.S. at 513 (noting that a viewpoint restriction would “violate the constitutional rights of students, at least if it could not be justified by a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school.”); see also Taylor, *supra* note 47, at 632-35 (noting that *Tinker* should not be read as requiring viewpoint-neutral effects).

113. *Tinker*, 393 U.S. at 508.

114. *Id.* at 514 (“[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”).

115. *Tinker*, 393 U.S. at 511.

116. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

117. *Tinker*, 393 U.S. at 524 (Black, J., dissenting). Justice Black would have upheld the school’s ban because the student speech caused distraction, though not disruption. *Id.* at 518.

Subsequent Supreme Court cases expanded *Tinker*'s latent protectionism by carving out alternatives and exceptions to its rule; in so doing, they upheld even viewpoint restrictions in order to protect students from moral, emotional, and physiological harm. *Bethel School District v. Fraser*, for instance, upheld the punishment of a student for making a nomination speech at a school assembly in a vulgar and offensive manner (the entire speech was a sustained sexual metaphor).<sup>118</sup> Distinguishing *Tinker* as dealing with political, not sexual speech, *Fraser* seemed to apply a "reasonableness" standard to the school's actions.<sup>119</sup> Punishing the student was reasonable because the speech disrupted the school's basic educational mission: namely, the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."<sup>120</sup> In the school context, the *Fraser* Court noted, these values include civilized discourse and being considerate of the sensibilities of other students even when expressing a politically unpopular viewpoint.<sup>121</sup>

*Fraser* justified this highly deferential standard on expansive, protectionist grounds. Citing *Ginsberg* and *Pico*, the Court recognized "the obvious concern . . . to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."<sup>122</sup> But in two ways *Fraser* actually enlarged the protectionist scope of *Ginsberg* within schools. First, *Fraser* allowed restriction of more than indecent and obscene speech: vulgar and lewd speech were also fair game.<sup>123</sup> Further, although the Court suggested that the students were a captive audience, the assembly at which *Fraser* had spoken was not mandatory.<sup>124</sup> In this respect, *Fraser* seemed to follow Justice Stewart's

118. 478 U.S. 675 (1986).

119. *Compare Fraser, Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."), *with id.* at 689 n.2 (Brennan, J., concurring) (noting that "it was not unreasonable for school officials to conclude that respondent's remarks were inappropriate for a school-sponsored assembly").

120. *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). *See also Fraser*, 478 U.S. at 688-89 (Brennan, J., concurring) ("Thus, the Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission.").

121. 478 U.S. at 681 ("Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.").

122. *Id.* at 684 (citing *Pico*, 457 U.S. at 871-72; *Ginsberg v. New York*, 390 U.S. 629 (1968)).

123. *See Fraser*, 478 U.S. at 689 (Brennan, J., concurring) ("[T]he language respondent used does not even approach the sexually explicit speech regulated in *Ginsberg* . . . or the indecent speech banned in *FCC v. Pacifica*." (citations omitted)). Perhaps to contain the scope of this protectionism, *Morse* subsequently noted in dicta that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some." *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

124. Note how the *Fraser* majority, quoted above, emphasized a captive audience in summarizing the rule from *Ginsberg* and *Pico*. 478 U.S. at 684. Yet neither *Ginsberg* nor

concurring opinion in *Tinker* (and *Ginsberg*) and treated children *like* a captive audience—sometimes deficient in their First Amendment faculties.<sup>125</sup>

*Hazelwood School District v. Kuhlmeier* reached the same deferential result as *Fraser*, but by creating an exception to *Tinker* under which a school could restrict some speech “inconsistent with its basic educational mission.”<sup>126</sup> There, a high school principal had censored from the school newspaper two articles discussing teen pregnancy, sexual activity, and birth control.<sup>127</sup> Distinguishing the private speech in *Tinker*, *Hazelwood* made an exception for student speech that might “reasonably [be] perceive[d] to bear the imprimatur of the school.”<sup>128</sup> Under *Hazelwood*, when a school is reasonably thought to endorse a speaker, it may engage in content discrimination and perhaps even viewpoint discrimination.<sup>129</sup>

As in *Fraser*, the appropriate standard here was a highly deferential reasonableness standard.<sup>130</sup> And like *Fraser*, *Hazelwood* justified this reasonableness standard on protectionist grounds. The majority emphasized that schools cannot be “unduly constrained” in inculcating values in children and “in helping [them] to adjust normally to [their] environment.”<sup>131</sup> And, it held, the principal’s actions were reasonable in this case: they protected emotionally immature students from sensitive topics like sex and birth control.<sup>132</sup> Yet *Hazelwood* required no proof of any causal link between the controversial articles and harm to students; rather, it required only that the

*Pico* involved a captive audience, and the school assembly at which *Fraser* gave his speech was not mandatory. *Id.* at 677.

125. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 504, 515 (1969) (quoting *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring)).

126. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Fraser*, 478 U.S. at 685).

127. *Hazelwood*, 484 U.S. at 263-64.

128. *Id.* at 270-71.

129. There is broad disagreement over the extent to which *Hazelwood* permits viewpoint discrimination. Compare *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003) (providing that *Hazelwood* does not permit viewpoint discrimination, even if reasonable), with *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1217-20 (11th Cir. 2004) (Black, J., concurring) (surveying Circuit split and finding that *Hazelwood* allows viewpoint discrimination); see also Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008) (providing that *Hazelwood* allows some viewpoint-based regulation of school-sponsored speech).

130. 484 U.S. at 270 (“School officials were entitled to regulate the content of [the school newspaper] in any reasonable manner.”); *id.* at 273 (“[E]ducators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns.”); *id.* at 274 (“We also conclude that Principal Reynolds acted reasonably . . .”).

131. *Id.* at 272. In his dissent, Justice Brennan railed against just such protectionism. *Id.* at 285-87 (Brennan, J., dissenting) (concluding that it was illegitimate to censor speech to shield students from sensitive topics).

132. *Id.* at 274-75 (majority opinion).

school's *assumption* of causality be reasonable.<sup>133</sup> In this respect, *Hazelwood* actually expanded the protectionist scope of *Fraser* and *Ginsberg*, for it applied a relaxed causation requirement even outside the realm of sexual speech.<sup>134</sup>

Most recently, *Morse v. Frederick* created another exception to *Tinker*, this time for student speech advocating illegal drug use.<sup>135</sup> There, a principal had suspended a student who, in a hapless quest for national TV exposure during the Olympic Torch relay, had unfurled a fourteen-foot banner reading, “BONG HiTS [sic] 4 JESUS.”<sup>136</sup> Holding that the speech was “school speech”—student speech at a school-sponsored, school-sanctioned event—the *Morse* majority upheld the suspension because it had been reasonable for the principal to think that the sign promoted illegal drug use.<sup>137</sup> Once again, therefore, the Court applied only a reasonableness standard.<sup>138</sup> And again, restrictions on viewpoint were allowed, albeit for a narrow class of pro-drug speech.<sup>139</sup> In his concurring opinion, which decided the judgment, Justice Alito furthered narrowed the Court's holding so that it did not encompass political and social commentary.<sup>140</sup>

*Morse* notably departed from earlier school speech cases in two respects, both predicated on a *Ginsberg*-like approach for speech that caused physiological, not moral harm.<sup>141</sup> First, *Morse* cited an “important—indeed, perhaps compelling” interest in deterring drug use among children, which can harm their psychological and physical well-being.<sup>142</sup> The majority supported this interest with a Congressional mandate and extensive documentation of how drugs harm children.<sup>143</sup> By contrast, neither *Fraser* nor *Hazelwood* had defined, let alone documented, any actual harm to students.<sup>144</sup>

133. *See id.* (“It was not unreasonable for the principal to have concluded that the frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students’ even younger brothers and sisters.”).

134. *Id.* (concluding that even absent graphic accounts of sexual activity, frank talk on sexuality was reasonably inappropriate for young audiences). On the protectionist scope of *Fraser* and *Ginsberg*, see *supra* notes 74-75 and accompanying text.

135. 551 U.S. 393, 410 (2007).

136. *Id.* at 397-98, 401.

137. *Id.* at 410 (“It was reasonable for [the principal] to conclude that the banner promoted illegal drug use . . .”).

138. *See id.* at 408.

139. *Id.* at 409; *id.* at 439 (Stevens, J., concurring in the judgment in part and dissenting in part).

140. *Id.* at 422 (Thomas, J., concurring) (“I join the opinion of the Court on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”).

141. Of course, it did so without once citing *Ginsberg* or its line of cases.

142. *Morse*, 551 U.S. at 407 (majority opinion) (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995)).

143. *Id.* at 407-08.

144. Instead, both simply pointed to some abstract “basic educational mission” that reasonably excluded certain types of student speech. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1977).

Second, just as *Ginsberg* had done, *Morse* completely relaxed any causal link between speech and harm.<sup>145</sup> Although the majority documented well how drugs harmed children, it simply could not show how the message, “BONG HiTS 4 JESUS,” did the same.<sup>146</sup> It pointed to only aggregative causation at best: a slight causal link between a *school-wide* norm tolerating drug use and more students doing drugs.<sup>147</sup> Where *Fraser* and *Hazelwood* required at least a reasonable assumption that the speech would cause harm, *Morse* required merely a reasonable inference that a particular message advocated illegal drug use—irrespective of whether or not that message itself was harmful.

Within the special context of the school, then, the state has expansive authority to protect minors from harmful speech. Both *Tinker* and *Morse* permit viewpoint discrimination, provided that it can be justified on some other (reasonable) ground. *Fraser* and *Hazelwood* enlarged the type of speech that might be deemed harmful to a student audience. And all of the cases relaxed any causation requirement: schools need show only reasonable assumptions, not empirically proven causal links. Parts III and IV will use these insights about protectionism to argue for a more consistent application of protectionist principles to harmful student speech.

### III. A PROTECTIONIST APPROACH TO HARMFUL SPEECH IN SCHOOLS

Situating harmful student speech within the broader context of protectionist jurisprudence resolves the questions left open by lower courts in Part I. As Part II examined, protectionist cases already have struck a balance between the Scylla of viewpoint discrimination and the Charybdis of protecting the physical and psychological well-being of minors.<sup>148</sup> Taking seriously the protectionist purposes of restricting harmful student speech thus clarifies how *Tinker* should apply to that speech. Specifically, Part III.A shows that, because of their fundamental role in inculcating values and the state’s compelling interest in the well-being of minors, schools have augmented authority to protect students from emotionally harmful speech. Part III.B concludes that courts should analyze such speech under *Tinker*’s “rights of others” prong because it is an offensive invasion of students’ right to be let alone.

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145. Noted most forcefully by Justice Stevens in his dissent. *Morse*, 551 U.S. at 438-39, 444 (showing that *Morse*’s ban on speech promoting illegal drug use falls well short of proscribable incitement and, regardless, should not apply when the speech does not actually advocate drug use). On *Ginsberg*’s relaxed causation, ramped up by subsequent cases, see *supra* notes 74-81 and accompanying text.

146. *Morse*, 551 U.S. at 444 (Stevens, J., dissenting) (“The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.”).

147. *Morse*, 551 U.S. at 408 (“[S]tudents are more likely to use drugs when the norms in school appear to tolerate such behavior.”) (citation omitted).

148. See *supra* Part II.

A. *Justifications for Protectionism Under Tinker*

In light of the special characteristics of the school environment, schools have especially great authority to restrict harmful student viewpoints for three main reasons. First, schools play a fundamental role in inculcating values in students.<sup>149</sup> As *Fraser* recognized, this basic educational mission encompasses the “habits and manners of civility,” including learning to be considerate of other students’ sensibilities even when advocating unpopular and controversial views.<sup>150</sup> On this view, restrictions of harmful speech like the Confederate flag or “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27’” may be necessary to foster consideration of the sensibilities of other students.

Second, harmful speech frustrates a school’s responsibility to help students adjust to their environment, a proposition that *Hazelwood* borrowed from *Brown v. Board of Education*.<sup>151</sup> Central to *Brown* was the idea that stigmatization prevents just such adjustment and, ultimately, the ability to learn in school.<sup>152</sup> Scholars have shown how speech demeaning of other students, or of race or homosexuality more generally, stigmatizes students profoundly.<sup>153</sup>

A third justification for shielding students from such harmful speech is that the state has a compelling interest in protecting the well-being of children. As the *Harper* majority documented, such speech causes students not just stigmatization, but a host of other harms to their psychological and emotional development as well.<sup>154</sup> Victimization tends to result in physical sickness, emotional insecurity, and problems adjusting socially.<sup>155</sup> Consequently, studies

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149. On this justification for restricting harmful speech in schools, see especially Myrha, *supra* note 20, at 84-85, 114-17.

150. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

151. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1977) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

152. *See Brown*, 347 U.S. at 494 (“A sense of inferiority affects the motivation of a child to learn.”); *see also, e.g.,* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 145 n.67 (1982) (“*Brown* turned, clearly, on the stigmatizing effect—the indignity or affront of separate schools—because by hypothesis the schools were equal.” (internal quotation marks omitted)).

153. *See Delgado, supra* note 152, at 136-43; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2336 (1989); Myrha, *supra* note 20, at 80-82 (discussing the emotional distress and long-term psychological harm caused by abusive verbal epithets).

154. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006); *see Amy Lovell, Other Students Always Used to Say, ‘Look at the Dykes’: Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 623-28 (1998) (documenting the effects of harassment on gay students).

155. Anthony R. D’Augelli et al., *Childhood Gender Atypicality, Victimization, and PTSD Among Lesbian, Gay, and Bisexual Youth*, 21 J. INTERPERSONAL VIOLENCE 1462 (2006); Adrien Nishina, Jaana Juvonen & Melissa R. Witkow, *Sticks and Stones May Break My Bones, but Names Will Make Me Feel Sick: The Psychosocial, Somatic, and Scholastic Consequences of Peer Harassment*, 34 J. CLINICAL CHILD ADOLESCENT PSYCHOL. 37, 46 (2005).



have shown that gay and lesbian students, for example, are at greater risk for dropping out of school,<sup>156</sup> depression,<sup>157</sup> and suicide.<sup>158</sup> Although context certainly matters here,<sup>159</sup> the special characteristics of a school may only exacerbate the harm, for a demeaned student's friends can witness the harmful speech, thereby increasing the stigma.<sup>160</sup>

Even so, this compelling interest in students' well-being does not justify a *Morse*- or *Fraser*-like categorical exception to *Tinker* for harmful student speech. Professor Waldman recently has argued for just such an exception for "verbal bullying" targeted at other students.<sup>161</sup> On analogy to *Morse*, she argues, such speech threatens student safety and typically lacks political content.<sup>162</sup> But although *Morse* documented similar psychological harms to students, its ban on drug advocacy stood "at the far reaches of what the First Amendment permits" and was in agreement with longstanding congressional policy to educate students on the harms of drug use.<sup>163</sup> By contrast, emotionally harmful speech—especially anti-gay speech—as yet lacks any such congressional mandate. It also stands far afield from the vulgar and lewd speech restricted under *Fraser*'s expansive rule. Perhaps most importantly, even targeted verbal bullying can have political overtones.<sup>164</sup> For all these

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156. Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 *FORDHAM URB. L.J.* 641, 655 (2001).

157. Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 *DEV. PSYCHOL.* 1580, 1585-86 (2010).

158. D'Augelli et al., *supra* note 155; Lovell, *supra* note 154, at 626-27 (noting that lesbian, gay, and bisexual students are at greater risk of suicide than heterosexual students).

159. Timothy Jay, *Do Offensive Words Harm People?*, 15 *PSYCHOL., PUB. POL'Y & L.* 81, 89 (citing literature showing that the harm of speech depends, in part, on bystanders' reactions and the perceived intent of the message); Laura Leets & Howard Giles, *Words as Weapons—When Do They Wound? Investigations of Harmful Speech*, 24 *HUM. COMM. RES.* 260, 260 (Dec. 1997) (finding that group membership, message severity, message explicitness, and medium of presentation affect the harm of a racist message); Susan M. Swear et al., "You're So Gay!": *Do Different Forms of Bullying Matter for Adolescent Males?*, 37 *SCH. PSYCHOL. REV.* 160 (2008) (finding that anti-gay bullying correlates with more negative perceptions of school climate, and higher anxiety than other types of bullying).

160. See Nishina et al., *supra* note 155, at 45 (noting that being a target of rumors fosters greater psychosocial maladjustment).

161. Waldman, *supra* note 19, at 496 n.17. Professor Curtis similarly seems to classify bullying as a true threat categorically excepted from *Tinker*. Curtis, *supra* note 36, at 489-90. But mere name-calling often will not rise to the level of true threats.

162. Waldman, *supra* note 19, at 492-96.

163. 551 U.S. 393, 425 (2007) (Alito, J., concurring).

164. Both *Morse* and *Fraser* distinguished *Tinker* on the grounds that the punished speech was not political. *Morse*, 551 U.S. at 403; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

reasons, it should fall under *Tinker*, as Professor Waldman advocates for non-targeted harmful speech.<sup>165</sup>

Due to its special characteristics and its protectionist authority, a school can restrict harmful student speech more than other forms of speech. As in the expanded institutional rights and private rights approaches, therefore, *some* protectionism under *Tinker* is warranted. But which *Tinker* prong should apply? To that question Part III.B now turns.

### B. *Harmful Speech and Tinker's "Rights of Others" Prong*

*Tinker* originally framed its two prongs in terms of institutional rights and private rights limitations on student speech.<sup>166</sup> Which of these prongs is a better 'fit' for the emotional harm caused by, say, anti-gay or racist speech? Some scholars have adopted a *Nuxoll*-like approach, viewing the harm as an institutional disruption threatening classroom learning as a whole.<sup>167</sup> Others, however, have followed *Harper* in framing the harm as colliding with the rights of others.<sup>168</sup> This Part shows that protectionist jurisprudence supports *Harper's* framing: emotionally harmful speech harms students just like offensive speech harms a captive audience.

*Nuxoll* framed anti-gay speech in terms of institutional rights in part because it had a hard time conceptualizing the T-shirt "Be Happy, Not Gay" as a violation of other students' rights.<sup>169</sup> Although the T-shirt was offensive, the court reasoned, "people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life."<sup>170</sup> *Nuxoll's* narrow view of the "rights of others" prong thus forced the court to squeeze harmful speech into *Tinker's* substantial disruption prong instead. This doctrinal move narrowed the scope of the "rights of others" prong while simultaneously expanding the "substantial disruption" prong to include disruption to a group's right to

165. Waldman, *supra* note 19, at 497-502 (analyzing non-targeted anti-gay speech under *Tinker's* substantial disruption prong); *see, e.g.*, *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) (applying *Tinker*, not *Fraser*, to anti-gay speech because of the political value of the speech).

166. *See supra* notes 103-106 and accompanying text.

167. *See* Waldman, *supra* note 19, at 497-502; Mollen, *supra* note 19, at 1521-24 (rejecting "rights of others" prong for restricting controversial student speech); *see also* *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 672 (7th Cir. 2008) (noting that the competing interests were free speech and ordered learning).

168. *See, e.g.*, *McCarthy*, *supra* note 20, at 610-11; *Bilford*, *supra* note 19, at 454-60 (arguing against "substantial disruption" prong and concluding that *Harper's* approach "may be the best"); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006).

169. *Nuxoll*, 523 F.3d at 672 ("There is no indication that the negative comments that the plaintiff wants to make about homosexuals or homosexuality names or otherwise targets an individual or is defamatory . . . . The school is on stronger ground in arguing that [the case falls under *Tinker's* first prong].").

170. 523 F.3d at 688.

learn.<sup>171</sup> Such extensive doctrinal revision, however, is undesirable, especially here, where it conflicts with *Tinker*'s clear balancing of institutional and private rights limits on speech.<sup>172</sup>

Scholars adopting *Nuxoll*'s approach have raised a second objection to using the “rights of others” prong: “[t]he substantial disruption language itself already fills the space . . . the students’ rights language is meant to fill.”<sup>173</sup> Note, again, that this objection is possible only if we expand the “substantial disruption” prong as the *Nuxoll* court did. At that point, it is true that *Harper*, at least, repeatedly tied emotional and psychological harm to a student’s ability to learn.<sup>174</sup> To the extent that the “substantial disruption” prong also encompasses disruptions to the learning environment, therefore, this objection seems justified.

But *Tinker*'s “rights of others” prong was not even primarily about threats to a learning environment. *Tinker*'s references to *Blackwell* are instructive here. No verbal tort, federal right, or impaired learning environment was at issue in *Blackwell*, where students wearing freedom buttons ran up and pinned buttons onto unwilling students.<sup>175</sup> Rather, the “rights” at issue stemmed from the fact that those who wore freedom buttons in *Blackwell* “harassed” those who did not.<sup>176</sup> This was an invasion of privacy, and *Tinker*'s elaboration of the prong as “the right to be secure and to be let alone” unmistakably referenced that right to privacy.<sup>177</sup>

171. *Supra* notes 43-45 and accompanying text. See Mollen, *supra* note 19, at 1527-30 (reading the “rights of others” clause as a First Amendment “savings clause”). Mollen thus reads *Tinker* as prohibiting viewpoint discrimination—which is forbidden under normal First Amendment jurisprudence. Mollen, *supra* note 19, at 1530. But *Tinker* itself would have permitted viewpoint discrimination provided there was some other reasonable basis for restricting the speech. See, e.g., Kristi L. Bowman, *Public School Students’ Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 222 (2007).

172. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); see also Bilford, *supra* note 19, at 452-60 (discussing how *Tinker*'s “substantial disruption” prong is not a good basis for prohibiting hate speech).

173. Mollen, *supra* note 19, at 1523; see Waldman, *supra* note 19, at 499 (“*Tinker*'s ‘substantial disruption’ prong seems to be pulling the laboring oar here.”).

174. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179-80 (9th Cir. 2006).

175. *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749, 751 (5th Cir. 1966) (describing students wearing freedom buttons “accosted other students by pinning the buttons on them even though they did not ask for one”). McCarthy, *supra* note 20, at 612 (*Tinker*'s second prong is not exclusively about federally protected rights).

176. *Tinker*, 393 U.S. at 505 n.1.

177. Justice Holmes famously termed “the right to be let alone” as “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928). Although Holmes was referring to a Fourth Amendment right of privacy, in *Hill v. Colorado Justice Stevens*' majority opinion noted that the “right to be let alone” encapsulated not so much a right as an interest justifying restrictions on speech. 530 U.S. 703, 718 (2000) (citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

Protectionist jurisprudence illuminates how harmful student speech can invade other students' privacy: students in school are (like) a captive audience in need of protection from offensive speech.<sup>178</sup> Courts relying on the "rights of others" prong thus have consistently pointed to the need to shield students from offensive speech.<sup>179</sup> If one student wears a demeaning T-shirt to class, other students sitting behind her must stare at that message throughout class.<sup>180</sup> Just as in the protectionist context, they have no reasonable opportunity to turn away from the offensive speech. And even if they could, the special characteristics of the school environment nevertheless make them *like* a captive audience in need of protection. Harmful speech becomes amplified within the school context: students quickly recount the speech to their friends; as everyone hears it, a student's shame only grows.<sup>181</sup> As a result, students may develop a distorted perception of school-wide norms that diminishes their ability to internalize harmful speech healthily when they do encounter it.

Harmful student speech in schools thus poses a captive audience problem: schools should be able to protect students who are unwilling audiences from having their privacy invaded by offensive speech. As we have seen, this protectionist justification dovetails well with *Tinker's* "rights of others" prong. Yet there are nevertheless certain implications for this doctrinal move: if protectionism justifies restrictions on harmful student speech, then it must limit such restrictions as well.

A few questions remain then. Can schools altogether ban harmful viewpoints? If not, what type of harm must a school forecast before it can restrict harmful student speech? And are there any further limitations imposed by protectionism? Part IV will address these questions.

#### IV. THE LIMITS OF PROTECTIONISM

Part III laid out a protectionist justification for restricting harmful speech in schools. This justification rested on the twin assumptions that such speech is harmful and that students either are, or are like, a captive audience needing protection from unwanted, offensive speech.<sup>182</sup> As Part IV explores, both of

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178. See Bilford, *supra* note 19, at 467-68 (discussing students as a captive audience to offensive speech); cf. Strauss, *supra* note 85, at 114-16 (discussing the problems of applying the captive audience doctrine to offensive speech).

179. *Harper*, 445 F.3d at 1178; *Trachtman v. Anker*, 563 F.2d 512, 516-17 (2d Cir. 1977); *Williams v. Eaton*, 468 F.2d 1079, 1084 (10th Cir. 1972).

180. Both the majority and the dissent in *Harper* explicitly recognized this problem. 445 F.3d at 1178 ("[T]he recognizable privacy interest in avoiding unwanted communication is perhaps the most important when persons are powerless to avoid it" (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (internal quotation marks omitted)); *id.* at 1207 (Kozinski, J., dissenting) ("This t-shirt may well interfere with the educational experience even if the two students never come to blows or even have words about it.").

181. Nishina et al., *supra* note 155, at 45 (stating that being a target of rumors fosters greater psychosocial maladjustment).

182. See *supra* notes 154-160, 178-181 and accompanying text.

these justifications also create implicit *limits* on a school's ability to restrict harmful viewpoints. Part IV.A argues that a school cannot ban all harmful speech unless it can reasonably forecast some minimum threshold of actual harm, be that from a personally directed insult or a negative political statement within a harmful environment. That conclusion will answer our two final questions on viewpoint restrictions and causality. But even if a school can forecast such harm, Part IV.B argues there are still further limits to its ability to prohibit the speech. Schools can never prevent the voluntary, civil discussion of harmful viewpoints by students who are sufficiently mature or who have parental permission.

#### A. *When Do Harmful Viewpoints Invade the Rights of Others?*

Under *Tinker*, the upper limit on a school's ability to protect students from certain viewpoints is when those viewpoints do not harm other students. But at what point does speech invade another student's rights? At what point does it become harmful? Borrowing from *Morse*, this Subpart argues that a school can restrict harmful speech so long as it can reasonably forecast harm from either a harmful environment as a whole, or personally directed speech on its own.

##### 1. Speech in a Hostile Environment

We encountered above the distinction between targeted hate speech—"verbal bullying," as Professor Waldman has termed it—and non-targeted speech that has political overtones.<sup>183</sup> But hate speech need not be targeted to cause lasting emotional and psychological harm. Rather, even non-targeted political commentary that takes a negative view of a particular group can be harmful, especially when it occurs in an already hostile environment.<sup>184</sup> It is the hostile environment as a whole that causes harm.<sup>185</sup>

In this respect, non-targeted harmful speech operates much like the pro-drug speech in *Morse*, which contributed to a harmful school-wide norm tolerating drug use.<sup>186</sup> *Morse* permitted schools to restrict even the mildest speech advocating the use of drugs—"BONG HiTS 4 JESUS" included. Likewise, a school should be able to restrict even "tepidly negative" speech if

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183. See *supra* note 19.

184. See Leets & Giles, *supra* note 159, at 290 (finding that *indirect* racist messages are more harmful to minorities than majorities perceive); Lovell, *supra* note 154, at 628 ("Harassment may produce negative outcomes for a gay, lesbian, or bisexual student even if that student is not the specific target of harassment.").

185. See Ritch C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCHOL. 261, 267 (1994) (surveying the literature on aggregate verbal and physical abuse of gay students and concluding that "harassment and negative outcomes . . . are clearly associated with each other").

186. *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

that speech contributes to a school environment hostile to other students. Even though, alone in isolation, such speech would be insufficient to trigger the “rights of others” prong, its contribution to a hostile environment, like ineffectual drug advocacy, is harm enough. Just like in *Morse*, therefore, a highly relaxed causation requirement would be appropriate with emotionally harmful speech.<sup>187</sup>

But where *Morse* drew a line at banning social and political commentary about drugs, the same should not apply to, say, anti-gay or racist political comments. Social and political commentary about drugs has at best an unclear or *de minimis* impact on school-wide norms tolerating drug use.<sup>188</sup> Yet even negative political speech about race or sexuality can shame students and contribute to a harmful school environment.<sup>189</sup> As the *Harper* majority noted, “To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful.”<sup>190</sup>

So long as a school can point to a hostile environment as a whole, therefore, it can restrict even harmful political commentary.

## 2. Reasonable Forecast of Harm

The term “hostile environment,” as I use it, need not implicate the standard for peer-to-peer sexual harassment under Title IX as articulated in *Davis v. Monroe County Board of Education*.<sup>191</sup> Indeed, “hostile environment” *should* not be such a high bar. Whereas *Davis* determined at what point schools can be held liable for *failing* to restrict harassing speech, *Tinker* articulated at what point schools can be held liable for action actually restricting speech.<sup>192</sup> Schools should have some degree of latitude between these two bounds. To give schools only a razor-thin margin for error here would be unworkable at best and catastrophic at worst.<sup>193</sup> At the same time, a school’s determination

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187. For discussion, see further McCarthy, *supra* note 20, at 608 (finding that a link to disruption is neither required nor workable for degrading statements that do not identify specific individuals). On this relaxed causation requirement in *Morse*, see *supra* notes 145-147 and accompanying text.

188. If the commentary might reasonably be viewed as endorsing illegal drug use, then a school could ban it even under Justice Alito’s controlling concurrence in *Morse*. To hold otherwise would create absurd results: “Drugs are cool” could be prohibited, but “The United States should change its drug policy because drugs are cool” could not.

189. This is a critical omission in the expanded institutional rights approach in *Nuxoll*: *Tinker*’s “substantial disruption” prong does not satisfactorily address the aggregate harm of a hostile environment, which can arise even from a mass of “tepidly negative” statements.

190. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1181 (9th Cir. 2006).

191. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (upholding a Title IX challenge where school showed deliberate indifference to student-on-student harassment and the harassment was so severe, pervasive, and objectively offensive that it deprived victim of access to educational opportunities).

192. For further discussion on this distinction, see Waldman, *supra* note 19, at 500-01.

193. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 675 (7th Cir. 2008) (noting this problem and upholding school policy banning derogatory words based on

that a hostile environment exists cannot amount to “an undifferentiated fear or apprehension of disturbance.”<sup>194</sup> That would permit banning controversial speech simply because a school disagrees with the viewpoint.

The question, then, is how much deference schools should receive in determining that student speech might be harmful. The Confederate flag cases seem particularly instructive here, for they have adopted a rule similar to a “hostile environment” theory of harm, albeit under *Tinker*’s “substantial disruption” prong. Typically courts have upheld a ban where there had been previous racial tensions at the school.<sup>195</sup> Yet even where there is clear evidence that the Confederate flag had never caused any disruption on its own, courts still have found the bans reasonable because of a history of such tensions.<sup>196</sup> These rulings have given schools broad latitude to ban a symbol with strong political overtones precisely because that symbol could become disruptive in the context of a hostile environment. Only in the *absence* of both a hostile environment and flag-based physical violence have courts been willing to strike down school bans on the Confederate flag.<sup>197</sup>

A similar approach to *Tinker*’s “rights of others” prong would allow a school to restrict speech only if it reasonably perceived that students might be harmed by the speech—for example, through a hostile environment in the school. Two circuits have adopted just such a reasonableness standard for *Tinker*’s “rights of others” prong. The Second Circuit framed its inquiry as a reasonableness test in *Trachtman v. Anker*, where a school had prevented distribution of a sex questionnaire to students in school.<sup>198</sup> There, the court upheld the school’s restriction on speech because there was a reasonable

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“highly sensitive personal-identity characteristics” even without requiring that the comments be severe or pervasive).

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

195. *Defoe v. Spiva*, 625 F.3d 324, 334 (6th Cir. 2010); *Barr v. Lafon*, 538 F.3d 554, 566-67 (6th Cir. 2008); *West v. Derby*, 206 F.3d 1358, 1366 (10th Cir. 2000) (citing racial incidents and hostile confrontations between white and black students).

196. *See B.W.A. v. Farmington Sch. Dist.*, 554 F.3d 734, 740 (8th Cir. 2009) (“Moreover, no other circuit has required the administration to wait for an actual disruption before acting.”) (citing *Barr*, 538 F.3d at 565 (upholding a ban though finding no evidence “that the Confederate flag ever caused any disruption at the school”)); *Hardwick v. Heyward*, 674 F. Supp. 2d 725, 733 (D.S.C. 2009) (citing *D.B. ex rel. Brogdon v. Lafon*, 217 F. App’x 518, 525 (6th Cir. 2007) (“[N]othing in *Melton* or *Tinker* requires evidence of a preexisting incident of the banned symbol evoking disruption.”)).

197. *Bragg v. Swanson*, 371 F. Supp. 2d 814, 827 (W.D.W. Va. 2005) (holding that a ban on the Confederate flag was not reasonable in light of the good racial environment and absence of racial fights at the school); *see also Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354, 360 (9th Cir. 2014) (upholding ban on clothing containing the U.S. flag during school’s Cinco de Mayo celebration in part because school permitted students to wear the clothing where it was clear no violence would result).

198. 563 F.2d 512, 517 (2d Cir. 1977) (“[S]chool officials [must] demonstrate that there was reasonable cause to believe that distribution of the questionnaire would have caused significant psychological harm to some of the Stuyvesant students.”).

probability of “serious emotional harm” resulting from the distribution.<sup>199</sup> Similarly, in *Williams v. Eaton*, the Tenth Circuit found it reasonable for a state university to prohibit student athletes from wearing black armbands mocking another school’s religion.<sup>200</sup> Such a prohibition was reasonable, the court held, because the armbands were hostile to other students’ religions—and thus might violate their rights.<sup>201</sup>

There are a couple additional reasons to apply a reasonableness standard to a school’s determination that student speech would harm other students. First, *Tinker*’s inclusion of a reasonable forecast test was a significant departure from the Fifth Circuit’s actual disruption test in *Burnside* and *Blackwell* and was intended to balance student speech rights against the rights of schools and other students.<sup>202</sup> To that extent, it would be odd to apply the reasonable forecast test to only one *Tinker* prong. Inasmuch as both *Tinker* prongs defined automatically *reasonable* limitations on student speech rights, it makes sense to include a reasonable forecast test with the “rights of others” prong, too.<sup>203</sup>

Second, the same pragmatic reasons that justify a reasonable forecast standard for the “substantial disruption” prong apply equally to the “rights of others” prong. Requiring actual violation of rights would be too stringent a rule—likely resulting in significant disruption to learning—and would require courts to second-guess the fact-specific judgments of local school administrators far too often.<sup>204</sup> Only a reasonable forecast standard, under both *Tinker* prongs, would maintain courts’ traditional deference to schools.<sup>205</sup>

For all these reasons, schools should be permitted to restrict harmful viewpoints whenever they reasonably believe that such speech will contribute to an already hostile environment.

### 3. Verbal Bullying

Though focused on non-targeted student speech, the above discussion touches on how schools might prohibit targeted hate speech as well. After all, a hostile environment is not the only way for hate speech to harm students:

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199. *Id.* at 519 (“We believe that the school authorities did not act unreasonably in deciding that the proposed questionnaire should not be distributed . . .”).

200. 468 F.2d 1079, 1081 (10th Cir. 1972) (defining question on appeal as whether Board of Trustees’ action was “reasonable and lawful”).

201. *Id.* at 1084. Ultimately, this was a reasonable determination only that the armbands *might* invade the other students’ rights, for the court did not decide whether student use of armbands would have constituted state action, hence a violation of the Establishment Clause. *Id.*

202. Bowman, *supra* note 95, at 1162-63.

203. *See supra* notes 98-106 and accompanying text.

204. *See, e.g.,* Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977) (holding that the district court erred in second-guessing school officials where there was possibility of emotional and psychological harm to students).

205. On this deference, see generally Chemerinsky, *supra* note 1, at 535-40; Nuttall, *supra* note 94.



personally directed insults also cause harm. Such *ad hominem* insults cause more harm than mere teasing,<sup>206</sup> and they do not comport with the habits of civility that schools must inculcate in students.<sup>207</sup> Though they disagree on the exact justification,<sup>208</sup> scholars do agree that schools can ban such “verbal bullying.”<sup>209</sup>

For two reasons, *Tinker*’s “rights of others” prong supports the general consensus that schools have broad latitude to proscribe personally directed hate speech. First, by its own force, hate speech might cause physiological and psychological harm and thereby invade the rights of other students.<sup>210</sup> As with hostile environment speech, an offensive insult harms students like a captive audience and should therefore be proscribable under the “rights of others” prong.

Second, and perhaps more importantly, a reasonable forecast standard already permits schools to prohibit even mere “tepid” insults where those insults reasonably contribute to a hostile environment. Because it is stronger than tepid insults, hate speech would contribute even more to a hostile environment. Adding a reasonable forecast standard to the “rights of others” prong thus permits schools to prohibit verbal bullying, especially within an already hostile environment.

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206. Terry A. Kinney, *An Inductively Derived Typology of Verbal Aggression and its Association to Distress*, 21 HUM. COMM. RES. 183 (1994); Leets & Giles, *supra* note 159, at 277 (“[R]acist speech was perceived as more harmful when it was severe.”)

207. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (“Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.”). To the extent that verbal abuse causes physiological harm, *Morse*’s protection of student safety might provide an alternate justification for restrictions on personally directed verbal abuse. Waldman, *supra* note 19, at 493-95.

208. See, e.g., Curtis, *supra* note 36, at 489-90 (discussing categorical exception akin to true threats); McCarthy, *supra* note 20, at 621 (describing *Tinker*’s “rights of others” prong); Myrha, *supra* note 20, at 123-28 (noting that both *Tinker* prongs, *Fraser*, and *Kuhlmeier* provide bases for restricting student hate speech); Waldman, *supra* note 19, at 492-95 (describing categorical exception to *Tinker* by analogy to *Morse*).

209. E.g., Curtis, *supra* note 36, at 489-90 (“In the interest of teaching civility, schools should ban focused verbal bullying and name-calling.”); McCarthy, *supra* note 20, at 617 (“[S]ome expression, including student speech that is degrading towards others would justify viewpoint-based constraints . . . .”); Myrha, *supra* note 20, at 123-28 (examining numerous constitutional bases for proscribing hate speech in schools); Waldman, *supra* note 19, at 493-96 (contending that verbal bullying should be automatically proscribable).

210. For similar arguments, see Martha McCarthy, *Student Expression that Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?* 240 EDUC. L. REP. 1, 15 (2009) (concluding that schools can prohibit targeted expression under *Tinker*’s “rights of others” prong even if the speech does not threaten the learning process); Myrha, *supra* note 20, at 124 (noting that schools can prohibit hate speech under “rights of others” prong).

### B. *When Do Harmful Viewpoints Not Invade the Rights of Others?*

The captive audience doctrine also includes certain limits on when offensive speech is proscribable—for example, where the audience is willing or when a minor has sufficient maturity to make an informed decision about the harmful speech.<sup>211</sup> A few additional limits on a school’s authority to protect students from harmful viewpoints thus present themselves.

#### 1. Political Commentary in a Non-Hostile Environment

In *Hansen v. Ann Arbor Public Schools*, a student sued after her high school refused to include her viewpoint—that homosexuality is a sin—on a non-mandatory diversity panel on religion and sexuality.<sup>212</sup> Though analyzing the school’s speech under *Hazelwood* and not *Tinker*, the district court held that the school’s commitment “to provide a safe and supportive environment for gay and lesbian students” was not legitimate in this case.<sup>213</sup> The school had offered no evidence that gay students would be harmed by the speech, a particularly problematic omission because five other panel members would have spoken in support of gays.<sup>214</sup> There also had been “no reports, surveys, or complaints about harassment or victimization because of a student’s sexual orientation”: this anti-gay speech would have been an isolated occurrence in a non-hostile environment.<sup>215</sup> Just as the school’s viewpoint discrimination was not reasonable under *Hazelwood*, it would have failed under *Tinker*’s “rights of others” prong had a student been speaking instead of the school.

*Hansen* illustrates that viewpoint discrimination without more than some undifferentiated fear of harm remains the upper limit of protectionism in schools. As with Confederate flags or the anti-gay speech in *Hansen*, so with all harmful student speech: schools cannot restrict speech simply because it is unpopular or causes discomfort. Schools can, however, restrict student speech that directly harms other students or is reasonably thought to contribute to a hostile environment that causes such harm. Even so, *Hansen* raises one final question about the limits of protectionism: can schools restrict harmful speech when students voluntarily expose themselves to it?

#### 2. Voluntary Civil Discussions Among Mature Students

Part II.A showed that justifying speech restrictions by treating students as a captive audience has its limits. Both *Bellotti* and *Pico* allowed mature minors

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211. *See supra* notes 87-91 and accompanying text.

212. 293 F. Supp. 2d 780 (E.D. Mich. 2003).

213. *Id.* at 802.

214. *Id.*

215. *Id.*

access to harmful speech when they voluntarily sought it out.<sup>216</sup> More broadly still, the state's protectionist authority itself is limited only to aiding parents in raising their children as they see fit.<sup>217</sup> Taken together, these points suggest two further limits to when schools can restrict harmful student speech.

First, a school cannot prevent mature students, or students with their parents' permission, from voluntarily engaging in civil discussion about harmful viewpoints.<sup>218</sup> *Bellotti* never clearly defined what constituted a "mature" minor: it noted only that the minor must satisfy a court that "she is mature and well enough informed to make an intelligent decision about abortion on her own."<sup>219</sup> Schools are well-equipped to make this kind of determination about a student's maturity, but probably only high school students would qualify. And if parents want to substitute their own judgment for the school's, they can do so under *Ginsberg* and *Entertainment Merchants*.<sup>220</sup>

Second, this exception would apply only to voluntary civil discussions; it would not give students license to abuse others verbally. By providing an alternative avenue for student expression, this approach thereby obviates Professor Curtis's concern that outright bans on anti-gay viewpoints, say, might drive students to express them in subtler messages like "The Truth Cannot Be Silenced."<sup>221</sup> Nevertheless, given the requirement that students be sufficiently mature or have parental permission, such civil discussions likely would have to be non-mandatory, formal school events. Under these conditions, harmful student speech simply does not pose a captive-audience problem, even if there is an otherwise hostile environment at the school.<sup>222</sup>

This exception represents an important limit on a school's ability to engage in viewpoint discrimination. If students want an otherwise harmful viewpoint to be heard, then it is incumbent on them to present it in a responsible way to a

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216. *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (holding that statute could not require a minor who is mature and well-informed to get parental permission for an abortion); *Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982) (holding that school libraries do not have absolute discretion to impede students' voluntary enrichment by removing vulgar books from the library).

217. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740-41 (2011); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

218. Professor McCarthy similarly notes that "[t]he civil exchange of contrary opinions" would not violate *Tinker's* second prong. McCarthy, *supra* note 210, at 15 n.85. On my view, this is too broad, for younger students may be unable to recognize the difference between a civil discussion and a threatening, harmful statement.

219. *Bellotti*, 443 U.S. at 647.

220. *Entm't Merchs.*, 131 S. Ct. at 2740-41; *Ginsberg*, 390 U.S. at 639.

221. See Curtis, *supra* note 36, at 485-86. By contrast, the approach outlined here would encourage students to express harmful viewpoints in as civil and harmless a fashion as possible.

222. Because the students would be mature enough to exercise their First Amendment capabilities responsibly, there would be no protectionist justification here. After all, the state has no interest in protecting similarly mature *adults* from harmful viewpoints.

willing audience.<sup>223</sup> If students want to arrange for an optional political debate about race or homosexuality or want to organize their own panel for a non-mandatory diversity day event, they can do so. Hansen's actions were paradigmatic in this regard: she sought to have adults discuss her viewpoint in a civil fashion at a non-mandatory panel that also included pro-gay viewpoints.<sup>224</sup> As the court correctly concluded in that case, the school had no legitimate reason to silence Hansen's viewpoint.<sup>225</sup> Indeed, civil discussions about controversial viewpoints only *further* the school's basic educational mission to inculcate values of civility, pluralism, and self-government.

#### CONCLUSION

This Note has examined the justifications for, and consequent limits on, a school's ability to protect students from harmful student speech. Given the special characteristics of the school environment and the nature of the harm caused by such speech, schools wield substantial authority to restrict hate speech and harmful political, social, or religious commentary. So long as a school can reasonably forecast a hostile environment towards other students, it can prohibit harmful speech even with strong political or religious overtones.

The analysis here can and should be applied to all types of harmful student speech, not just to speech about minority groups. Although anti-gay speech, for example, might be particularly damaging to students,<sup>226</sup> any demeaning verbal abuse or a hostile environment more generally can conflict with a school's basic educational mission. Indeed, all students unwillingly subjected to demeaning speech or to an offensive, hostile environment are like a captive audience. Schools have the power to protect them, accordingly.

Of course, this is to say only that schools have the option to do so. Whether a judicially authorized restriction on harmful viewpoints is the *best* solution is for schools—and especially for students—to decide. I have stressed that despite a school's compelling interest in safeguarding its students, a school cannot fully curb students' access to controversial *ideas*, though it can require that those ideas be presented in as harmless a manner as possible. Civility may not be required outside of a school, but that does not diminish its fundamental democratic value in protecting every student's well-being.

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223. Such civic responsibility already has pervaded some of the more successful attempts by students to have a responsible climate of speech in schools. *See, e.g.*, Curtis, *supra* note 36, at 490-92 (discussing how, after one school district treated racial controversy as a learning experience by encouraging dialogue, students decided to tolerate both the Confederate flag and Malcolm X insignias); Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate—Students' Rights Thirty Years after Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 445, 452-53 (2000) (discussing how students have held public fora and negotiated with school administrations to preserve balanced protection of gender-based and sexual-orientation-based expression).

224. Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780, 785-91 (E.D. Mich. 2003).

225. *Id.* at 800-03.

226. Swear et al., *supra* note 159.