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# TINKERING WITH *TINKER*: PROTECTING THE FIRST AMENDMENT IN PUBLIC SCHOOLS

Bonnie A. Kellman\*

## INTRODUCTION

The Supreme Court has long recognized that students are protected by the First Amendment in public schools. In the seminal case, *Tinker v. Des Moines Independent Community School District*,<sup>1</sup> the Court affirmed that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>2</sup> However, the Court also laid out two instances in which schools may regulate student speech: when the speech (1) “materially disrupts classwork or involves substantial disorder”<sup>3</sup> or (2) “colli[des] with the rights of other students to be secure and to be let alone.”<sup>4</sup>

Although *Tinker* laid out two instances in which student speech may be regulated, the Court has largely ignored the “rights of others” prong of the test and instead relied solely upon the “substantial disruption” prong.<sup>5</sup> *Tinker* itself was decided using the “substantial disruption” prong,<sup>6</sup> as were the vast majority of other Supreme Court

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1 393 U.S. 503 (1969).

2 *Id.* at 506.

3 *Id.* at 513. This Note refers to the first prong of the *Tinker* test as the “substantial disruption” prong.

4 *Id.* at 508. This Note refers to the second prong of the *Tinker* test as the “rights of others” prong.

5 See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (“[T]he Court is not aware of a single decision that has focused on [the ‘rights of others’ prong] in *Tinker* as the sole basis for upholding a school’s regulation of student speech. . . . [T]he *Tinker* line of cases focus on whether or not material disruptions have occurred or whether or not they are reasonably likely to occur.”).

6 *Tinker*, 393 U.S. at 514.

cases which have since applied the *Tinker* test.<sup>7</sup> In fact, in a concurrence to *Morse v. Frederick*,<sup>8</sup> Justice Alito described *Tinker* only in terms of the “substantial disruption” prong.<sup>9</sup> Perhaps courts refrained from using the “rights of others” prong because its meaning remained ambiguous.<sup>10</sup> Neither *Tinker* nor any other Supreme Court case gave lower courts any real guidance about exactly when certain speech “colli[des] with the rights of other students to be secure and to be let alone.”<sup>11</sup>

This changed markedly, however, with the Ninth Circuit’s decision in *Harper v. Poway Unified School District*.<sup>12</sup> This case arose out of the controversy surrounding student speech criticizing homosexual conduct in Poway High School. In April 2004, the student Gay-Straight Alliance held a “Day of Silence.”<sup>13</sup> On that day, Tyler Harper wore a t-shirt stating, “I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED” on the front, and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27’” on the back.<sup>14</sup> There is no record of any incidents occurring as a result of Harper wearing the t-shirt that day, nor of the school staff noticing it.<sup>15</sup> The next day, Harper again wore the t-shirt expressing his disapproval of homosexuality.<sup>16</sup> However, he changed it to say, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” on the front.<sup>17</sup> On the back, it displayed the

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7 See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); see also Jerico Lavarias, *A Reexamination of the Tinker Standard: Freedom of Speech in Public Schools*, 35 HASTINGS CONST. L.Q. 575, 577 (2008) (noting that “because of the ambiguity of what ‘invades the rights of others’ actually extends to,” generally courts “have focused on the ‘substantial disruption’ prong”).

8 551 U.S. 393 (2007).

9 *Id.* at 422 (describing the *Tinker* test as standing only for the proposition that schools may regulate “student speech that threatens a concrete and ‘substantial disruption’”).

10 See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“The precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress.”); Lavarias, *supra* note 7, at 577.

11 *Tinker*, 393 U.S. at 508; see also Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 367 (2007) (“The Supreme Court has not explicitly elaborated what it means to interfere with the rights of other students ‘to be secure and to be let alone.’” (quoting *Tinker*, 393 U.S. at 508)).

12 445 F.3d 1166 (9th Cir. 2006).

13 *Id.* at 1171.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

same message as before: "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"<sup>18</sup> That day, his second period teacher noticed that Harper's t-shirt was distracting other students during class.<sup>19</sup> The teacher told Harper that his t-shirt was "inflammatory" and violated the school's dress code.<sup>20</sup> When Harper refused to take it off and asked to speak with an administrator, the teacher gave him a dress code violation card and sent him to the front office.<sup>21</sup>

When Harper arrived at the front office, the principal repeated the teacher's concerns that the t-shirt was "inflammatory," and Harper admitted to him that he had been involved in a "tense verbal conversation" with a group of students over the t-shirt earlier in the day.<sup>22</sup> As a result of this, and in light of the tensions surrounding the "Day of Silence" held the year before,<sup>23</sup> the principal informed Harper that he was not allowed to wear the t-shirt on the school campus.<sup>24</sup> When Harper continued to refuse to change his shirt, the principal ordered him to remain in the front office for the remainder of the school day,<sup>25</sup> effectively restricting his ability to express his viewpoint on homosexuality by wearing the shirt.

Harper sued the Poway Unified School District for violating his freedom of speech, among other things.<sup>26</sup> On appeal, after analyzing the case under the *Tinker* test, the Ninth Circuit became the first court to use the "rights of others" prong to limit a student's freedom of speech.<sup>27</sup> The court ruled that Harper's wearing of the t-shirt satisfied the "rights of others" prong because speech expressing disapproval of homosexuality amounts to "psychological attacks"<sup>28</sup> on homosexual

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18 *Id.*

19 *Id.*

20 *Id.* at 1172.

21 *Id.*

22 *Id.*

23 The Gay-Straight Alliance first held a "Day of Silence" in 2003. *Id.* at 1171. On this day, students wore duct tape over their mouths, refused to speak in class, and wore t-shirts that said "National Day of Silence" and "contained a purple square with a yellow equal sign in the middle." *Id.* at 1171 n.3. Purportedly, the purpose of this event was to "teach tolerance of others, particularly those of a different sexual orientation." *Id.* at 1171 (internal quotation marks omitted). Harper, however, felt that its "true purpose" was "to endorse, promote and encourage homosexual activity." *Id.* at 1171 n.2 (internal quotation marks omitted). This event caused several "incidents and altercations" between students, one of which resulted in a confrontation that forced the principal to physically separate two students. *Id.* at 1171.

24 *Id.* at 1172.

25 *Id.*

26 *Id.* at 1173.

27 Lau, *supra* note 11, at 366-67.

28 *Harper*, 445 F.3d at 1178.

students, a minority group, by “strik[ing] at a core identifying characteristic”<sup>29</sup> of the group.

The Ninth Circuit’s interpretation of the “rights of others” prong is problematic for many reasons. As will be explained in Part II.B.1, Supreme Court precedent, as well as the interpretations of other circuits, suggests that the “rights of others” prong should not be construed to encompass offensive speech. Furthermore, as will be explained in Parts II.B.2 and II.B.3, the distinctions drawn by the Ninth Circuit—both between minority and majority groups, and between speech that amounts to psychological attacks on others and speech that does not—are inherently problematic in application. For these reasons, courts should formulate a better interpretation of *Tinker*’s “rights of others” prong, such as one that would allow schools to regulate student speech only when it has the potential to spark a physical assault.

#### I. OVERVIEW OF SCHOOLS’ ABILITY TO RESTRICT STUDENT SPEECH

The Supreme Court has long recognized that students are protected by the First Amendment in public schools. Neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>30</sup> The Court has even recognized that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,”<sup>31</sup> and that “[t]he classroom is peculiarly the ‘marketplace of ideas.’”<sup>32</sup>

On the other hand, students’ First Amendment rights are not identical to the rights of adults,<sup>33</sup> and must be “applied in light of the special characteristics of the school environment.”<sup>34</sup> The *Tinker* Court recognized that students’ freedom of speech must be balanced with school officials’ ability to control student conduct in schools.<sup>35</sup>

The Supreme Court has recognized three categories of student speech, each of which is governed by a different line of precedent. First, speech that is “vulgar and offensive” due to its particular wording, rather than its content, is governed by *Bethel School District No. 403 v. Fraser*.<sup>36</sup> Second, school-sponsored speech is governed by *Hazelwood*

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29 *Id.* at 1182 n.27.

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

31 *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

32 *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

33 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

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

35 *See id.* at 507.

36 478 U.S. 675, 683 (1986); *see also Morse v. Frederick*, 551 U.S. 393, 409 (2007) (“[*Fraser*] should not be read to encompass any speech that could fit under some

*School District v. Kuhlmeier*.<sup>37</sup> All other student speech is governed by the test established by the Court in *Tinker*.<sup>38</sup> Under *Tinker*, schools may restrict student speech only if the speech (1) “materially disrupts classwork or involves substantial disorder”<sup>39</sup> or (2) “colli[des] with the rights of other students to be secure and to be let alone.”<sup>40</sup> Student speech that does not fall under either of these prongs may not be regulated, even if it contains controversial ideas.<sup>41</sup> Harper’s speech, not being vulgar or school-sponsored, falls under this third category and thus can be restricted only if it caused substantial disorder or collided with the rights of other students.<sup>42</sup>

## II. THE NINTH CIRCUIT’S DECISION IN *HARPER*

### A. *Analysis of the Ninth Circuit’s Reasoning*

In *Harper*, the Ninth Circuit emphasized that students’ freedom of speech must be balanced with schools’ “special need to maintain a safe, secure and effective learning environment.”<sup>43</sup> Schools have such a “special need” to create this environment because students are uniquely vulnerable, both because they are a captive audience due to compulsory attendance<sup>44</sup> and because, as children, they are particularly susceptible to hurtful speech.<sup>45</sup> Furthermore, the court recognized that speech causing “[a] sense of inferiority affects the motivation of a child to learn.”<sup>46</sup>

In light of these special needs, the court interpreted *Tinker*’s “rights of others” prong to allow schools to restrict speech that amounts to “psychological attacks that cause young people to question their self-worth and their rightful place in society.”<sup>47</sup> Therefore, schools may restrict speech that “strikes at a core identifying charac-

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definition of ‘offensive.’ After all, much political and religious speech might be perceived as offensive to some.”).

37 484 U.S. 260, 271–72 (1988).

38 *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1176–77 (9th Cir. 2006).

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

40 *Id.* at 508.

41 *See id.* at 513–14.

42 *See Harper*, 445 F.3d at 1176 & nn.14–15, 1177.

43 *Id.* at 1176.

44 *See id.* at 1178.

45 *See id.* at 1176.

46 *Id.* at 1180 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

47 *Id.* at 1178.

teristic of students.”<sup>48</sup> Such identifying characteristics include race, religion, and sexual orientation.<sup>49</sup>

Furthermore, this newfound ability of schools to regulate student speech only applies to speech that is offensive to minority groups, not to majority groups.<sup>50</sup> Minority groups have special status because they have “historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior.”<sup>51</sup> Majority groups, on the other hand, have “always enjoyed a preferred social, economic and political status.”<sup>52</sup> Therefore, “[g]rowing up as a member of a minority group often carries with it psychological and emotional burdens not incurred by members of the majority,”<sup>53</sup> and thus speech critical of them will be more likely to “damage their sense of security and interfere with their opportunity to learn.”<sup>54</sup>

Moreover, *Harper* allows schools to practice viewpoint discrimination. That is, a school may prohibit the expression of only one side of a debate if that speech violates either prong of *Tinker*.<sup>55</sup> Such view-

48 *Id.* at 1182 n.27.

49 *Id.* at 1183.

50 *See id.* at 1182 n.27 (“[O]ur holding is limited to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a *minority* group.” (emphasis added)); *id.* at 1183 (“[W]e limit our holding to instances of derogatory and injurious remarks directed at students’ *minority* status such as race, religion, and sexual orientation.” (emphasis added)). The *Harper* court also implicitly limited the “rights of others” prong to only minorities by suggesting that speech which is emotionally harmful to majorities could be restricted using alternative standards, such as the “substantial disruption” prong of *Tinker* or *Fraser*. *Id.* at 1183 n.28. (Of course, the Ninth Circuit’s suggestion that such speech could be governed by *Fraser* is questionable because, as explained in Part I of this Note, *supra*, *Fraser* only allows schools to restrict speech that is offensive because of its wording, not its content. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).) On the other hand, the court claims that it does “not exclude . . . the possibility that some verbal assaults on the core characteristics of *majority* high school students would merit application of the *Tinker* ‘intrusion upon the rights of other students’ prong.” *Harper*, 445 F.3d at 1183 n.28 (emphasis added). Although the precise scope of *Harper*’s interpretation of the “rights of others” prong is ambiguous in this way, most of the opinion indicates that it applies only to speech that is offensive to minorities.

51 *Harper*, 445 F.3d at 1178.

52 *Id.* at 1183 n.28.

53 *Id.*

54 *Id.* at 1178.

55 *Id.* at 1184–85. (“[A]lthough *Tinker* does not allow schools to restrict the non-invasive, non-disruptive expression of political viewpoints, it does permit school authorities to restrict ‘one particular opinion’ if the expression would ‘impinge upon the rights of other students’ or substantially disrupt school activities.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 511 (1969))). Of course, such viewpoint discrimination is exactly what occurred in Poway High School, when

point discrimination is permitted because, according to the court, in certain debates—such as the one over homosexuality—speech on only one side of the debate “espous[es] intolerance, bigotry or hatred.”<sup>56</sup> Such speech is contrary to the basic educational mission of schools to instill in its students “‘fundamental values of habits and manners of civility essential to a democratic society.’”<sup>57</sup>

Consequently, the Ninth Circuit ruled that Harper’s t-shirt satisfied the “rights of others” prong<sup>58</sup> because speech expressing disapproval of homosexuality amounts to psychological attacks<sup>59</sup> on homosexual students, a minority group, by “strik[ing] at a core identifying characteristic”<sup>60</sup> of that group.

### B. *Criticism of the Ninth Circuit’s Reasoning*

The Ninth Circuit’s interpretation of the “rights of others” prong is problematic for many reasons. First, Supreme Court precedent, as well as the interpretations of other circuits, suggests that the “rights of others” prong should not be interpreted to encompass offensive speech. Furthermore, the Ninth Circuit’s distinctions both (1) between minority and majority groups and (2) between speech that amounts to psychological attacks on others and speech that does not, are inherently problematic in application.

#### 1. The “Rights of Others” Prong Should Not Encompass Offensive Speech

First, it is unlikely that the Supreme Court intended for the “rights of others” prong to encompass offensive speech. Perhaps the best evidence of this comes from *Tinker* itself, in which the Court suggested that passive symbolic speech failed to invade the rights of others.<sup>61</sup> In that case, *Tinker* was suspended for wearing a black arm-

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school officials restricted Harper’s speech expressing disapproval of homosexuality while allowing pro-homosexual speech during the “Day of Silence.” See *id.* at 1171–72.

<sup>56</sup> *Id.* at 1185.

<sup>57</sup> *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

<sup>58</sup> See *id.* at 1178.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1182 n.27.

<sup>61</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); Lavarias, *supra* note 7, at 583 (“[S]ymbolic speech expressed in a T-shirt . . . would not rise to such offense that it would clearly ‘invade the rights of others’ in the public school setting.”); cf. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (holding that a t-shirt does not invade the rights of others because “[j]ust as in *Tinker*, there is no evidence that [the student’s] silent, passive

band to school in protest of the Vietnam War.<sup>62</sup> Although the case was decided only on the grounds that the school could not restrict Tinker's speech because it did not cause substantial disruption in the school,<sup>63</sup> the opinion does suggest that such symbolic speech does not collide with the rights of others. For instance, the Court characterizes Tinker's speech as "silent, passive expression of opinion," and observes that there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of *collision with the rights of other students* to be secure and to be let alone."<sup>64</sup> Later, the Court reiterates this idea by stating, "[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or *impinge upon the rights of other students*."<sup>65</sup> Therefore, the Court presumed that passive symbolic speech, such as the wearing of armbands or t-shirts, would not collide with the rights of other students.

In addition, the Court specifically stated in *Tinker* that it did not intend to allow schools to restrict the expression of controversial points of view:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.<sup>66</sup>

This suggests that the *Tinker* Court did not intend to allow school officials to restrict a particular viewpoint simply because it might hurt the feelings of other students.<sup>67</sup>

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expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone").

62 *Tinker*, 393 U.S. at 504.

63 *See id.* at 512–13.

64 *Id.* at 508 (emphasis added).

65 *Id.* at 509 (emphasis added).

66 *Id.*

67 If *Tinker* did allow this, it "would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency." *Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006); *cf. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting) ("Surely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech. Otherwise, a state legislature could effectively overrule *Tinker* by granting students an affirmative right not to be offended." (footnote omitted)).

Furthermore, other circuits have adopted the view that offensive speech does not collide with the rights of others. For instance, in *Saxe v. State College Area School District*,<sup>68</sup> the Third Circuit held that a high school policy that prohibited negative, demeaning, and derogatory speech about personal characteristics (including sexual orientation) was unconstitutionally overbroad.<sup>69</sup> The Third Circuit specified that schools “may not prohibit speech . . . based solely on the emotive impact that its offensive content may have on a listener.”<sup>70</sup> To infringe on the rights of others, “it is certainly not enough that the speech is merely offensive to some listener.”<sup>71</sup> In *Sypniewski v. Warren Hills Regional Board of Education*,<sup>72</sup> the Third Circuit reiterated this position, holding that a school policy prohibiting racial harassment and intimidation was unconstitutional insofar as it allowed school officials to prohibit materials that created “ill will” between students.<sup>73</sup> Such an interpretation of the school policy would violate the students’ freedom of speech because “by itself, an idea’s generating ill will is not a sufficient basis for suppressing its expression. ‘The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.’”<sup>74</sup>

The Second Circuit has come to a similar conclusion. In *Guiles v. Marineau*,<sup>75</sup> a student wore a t-shirt critical of former President George W. Bush to school.<sup>76</sup> Although the student wore the t-shirt many times, it never caused “any disruptions or fights.”<sup>77</sup> In fact, no one openly objected to the t-shirt until a classmate’s mother, who held an

68 240 F.3d 200 (3d Cir. 2001).

69 *Id.* at 217.

70 *Id.* at 209.

71 *Id.* at 217. The majority in *Harper*, however, disagreed with this interpretation of *Saxe*. The Ninth Circuit characterized *Saxe* as standing for the proposition that speech which “‘substantially interfer[es] with a student’s educational performance’ may satisfy the *Tinker* standard” (without specifying which prong of *Tinker* this would satisfy). *Harper*, 445 F.3d at 1179 (quoting *Saxe*, 240 F.3d at 217). Such speech may well be able to satisfy only the “substantial disruption” prong, as the majority admits in a footnote that *Saxe* “appears to conflate [the ‘rights of others’] prong with the ‘substantial disruption’ prong and to suggest, perhaps inadvertently, that injurious slurs may not be prohibited unless they also cause substantial disruption.” *Id.* at 1180 n.21. In any case, the majority concedes the correctness of *Saxe*’s conclusion that, to violate either prong of *Tinker*, “it is certainly not enough that the speech is merely offensive to some listener.” *Id.* (quoting *Saxe*, 240 F.3d at 217).

72 307 F.3d 243 (3d Cir. 2002).

73 *Id.* at 264–65.

74 *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992)).

75 461 F.3d 320 (2d Cir. 2006).

76 *Id.* at 322.

77 *Id.*

opposing political viewpoint, noticed the shirt during a school field trip.<sup>78</sup> The Second Circuit held that the subsequent censorship of the student's t-shirt violated his freedom of speech.<sup>79</sup> Central to the court's holding was the fact that the t-shirt did not result in any acts of physical violence in the school, but only offended someone who held a differing viewpoint.<sup>80</sup> Therefore, the court suggested that schools cannot ban speech simply because it is offensive to others.<sup>81</sup>

In addition, an interpretation of the "rights of others" prong that encompasses offensive speech would be contrary to established First Amendment precedent. The Supreme Court has long held that offensive speech is protected. For example, in *Cohen v. California*,<sup>82</sup> the Court recognized that "verbal tumult, discord, and even offensive utterance" are "necessary side effects of the broader enduring values which the process of open debate permits us to achieve," and reaffirmed that "so long as the means are peaceful, the communication need not meet standards of acceptability."<sup>83</sup> Similarly, in *R.A.V. v. City of St. Paul*,<sup>84</sup> the Court recognized that "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."<sup>85</sup> The Supreme Court has also protected offensive speech in the school setting. In *Fraser*, the Court recognized that students have the "freedom to advocate unpopular and controversial views in schools and classrooms."<sup>86</sup> Therefore, *Harper's* holding that the "rights of others" prong allows schools to prohibit merely offensive speech directly cuts against clearly established First Amendment precedent.

## 2. Difficulties Applying *Harper's* Minority/Majority Group Distinction

*Harper's* distinction between minority and majority group status is also problematic. Simply defining which groups are minorities and thus worthy of protection is difficult, if not impossible. First, as Judge Kozinski noted in dissent, it is difficult to determine whether a group is a minority because of the different levels of generality at which a

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78 *Id.*

79 *Id.* at 330.

80 *See id.* at 330-31.

81 *See id.*

82 403 U.S. 15 (1971).

83 *Id.* at 24-25 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

84 505 U.S. 377 (1992).

85 *Id.* at 414.

86 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

given group may be classified.<sup>87</sup> For instance, Catholics could conceivably be classified as part of the Christian majority, which would not deserve protection under the Ninth Circuit's standard.<sup>88</sup> However, they may also be classified as a minority religious sect that has suffered persecution.<sup>89</sup> In *Harper*, the Ninth Circuit gave lower courts no guidance as to how to correctly draw such lines.<sup>90</sup>

Second, it is difficult to determine which groups are in the minority because public schools are not demographically representative of society at large.<sup>91</sup> Because public schools indiscriminately admit students from surrounding communities, if the community the school is based in is not representative of the general public, the school will not be either. Which groups are majorities and which are minorities depends on the location of the school. In any given community, it is possible that a group that is only a minority of the general population—such as Asians—could be a majority of the school population.<sup>92</sup> As a result, if courts wished to protect groups that are an actual minority at a given school, the groups which received protection would differ from school to school. This would make it impossible for courts to establish any general guidelines about which groups should be protected.

Furthermore, even if courts were able to identify minority groups accurately, the Ninth Circuit's justification for awarding minority groups heightened protection from offensive speech also applies to majority groups. The Ninth Circuit explained that minority groups should receive special protection because speech critical of them will be more likely to "damage their sense of security and interfere with

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87 *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1201 (9th Cir. 2006) (Kozinski, J., dissenting).

88 *Id.*

89 *Id.*

90 This difficulty also illustrates the artificiality of the *Harper* standard. The persecution a Catholic might feel at a public school is no less real if "Catholic" is defined as part of the Christian majority than if it is defined as part of a minority religious sect. However, this technical definition will determine how much protection the group would receive from derogatory speech.

91 See *Harper*, 445 F.3d at 1201 (Kozinski, J., dissenting).

92 For example, this is the case at Mission San Jose High, a public school in the Fremont Unified School District in California. According to the most recent U.S. Census, Asians compose only 4.2% of the general U.S. public, JESSICA S. BARNES & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, *THE ASIAN POPULATION: 2000*, at 1 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>, yet they make up 69.9% of the student body at Mission San Jose, School Matters, Mission San Jose High School, <http://www.schoolmatters.com/schools.aspx/q/page=sp/sid=78803> (last visited Oct. 26, 2009).

their opportunity to learn.”<sup>93</sup> However, when criticized, members of both minority *and* majority groups can feel threatened and be distracted from their schoolwork.<sup>94</sup> A Christian, who sincerely believes that homosexuality is wrong, may be distracted by a “Day of Silence,” during which fellow students refuse to speak in class and wear duct tape over their mouths and t-shirts advertising the event.<sup>95</sup> Therefore, there appears to be no justification for allowing schools to restrict speech critical of minority groups, but not of majority groups.

### 3. Difficulties Applying *Harper’s* Distinction Between Accepting/Excluding Speech and the Example of Homosexuality

*Harper’s* distinction between accepting and excluding speech is unprincipled in application as well. *Harper’s* assumption that only one side of the debate over homosexuality can amount to a psychological attack is a prime example of the flaw in the distinction made by the Ninth Circuit.<sup>96</sup> The basic assumption underlying the Ninth Circuit’s ruling is that only the viewpoint of those who oppose homosexuality is harmful to others (that is, homosexuals), while the viewpoint of those who support homosexuality is accepting of all people, regardless of their beliefs regarding sexuality. In *Harper*, the Ninth Circuit characterized anti-homosexual speech as advancing “intolerance, bigotry or hatred,” while it characterized pro-homosexual speech as promoting “tolerance” and “equality.”<sup>97</sup> Accordingly, the court held that only speech which disagrees with homosexual conduct amounts to “psychological attacks that cause young people to question their self-worth and their rightful place in society,” therefore violating the “rights of others” prong.<sup>98</sup> Speech promoting homosexual conduct, on the other hand, does not collide with the “rights of others” because it does

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93 See *Harper*, 445 F.3d at 1178.

94 See *id.* at 1201 (Kozinski, J., dissenting) (“Students may well have their self-esteem bruised by being demeaned for being white or Christian, or having bad acne or weight problems, or being poor or stupid or any one of the infinite number of characteristics that will not qualify them for minority status.”).

95 See Brian J. Bilford, Note, *Harper’s Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. C.R. & C.L. 447, 467 (2008).

96 This section will focus on the debate over homosexuality, as this is the debate most relevant to *Harper’s* holding. The argument laid out in this section, however, could be applied to many other debates as well, such as the one over abortion rights.

97 See *Harper*, 445 F.3d at 1185 (justifying its holding by stating that “public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred”). Such a belief is not unique to the Ninth Circuit. See *infra* notes 103–06 and accompanying text.

98 See *Harper*, 445 F.3d at 1178.

not amount to a psychological attack.<sup>99</sup> It is incorrect, however, to assume that those who support homosexuality are inherently accepting of all, while those who oppose homosexual conduct necessarily exclude and harm homosexuals. As this section will demonstrate, such a belief reflects a superficial understanding of these groups' views on the existence of an objective standard of morality. Properly understood, neither side of the debate is more inclusive (or exclusive) than the other.

First, it must be understood that when one believes that morality is objective, he follows that the same standard of morality applies to all people in society.<sup>100</sup> That is, morality is not personal to each individual, but is rather an objective standard that must be adhered to by all. When one believes that morality is subjective, however, it follows that one person has no right to impose his personal standards of morality on anyone else.<sup>101</sup> What is morally true for one person is not necessarily true for another. Therefore, one's view on the objectivity of morality has serious consequences for whether or not he believes his conception of morality can dictate the behavior of others.<sup>102</sup>

Relating to homosexuality, it is popularly believed that those who oppose homosexuality necessarily believe in an objective morality.<sup>103</sup>

99 *See id.*

100 *See* STEVEN LUKES, MORAL RELATIVISM 130–31 (2008).

101 *See id.* at 151 (“[Moral relativism’s] message is not, as its advocates typically say, *tolerance* but rather *abstention*—denial of ‘our’ right to judge the beliefs and practices of others . . . .”); *see also* Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1389 (1997) (book review) (observing that those who view morality as subjective popularly believe that “no one has a right to impose his merely subjective moral opinions on those who happen not to share them”). This modern conception of the subjectivity of morality can be traced back to the philosophy of David Hume. According to Hume, because facts and values are distinct from one another, it is not possible to deduce values from facts. DENNIS LLOYD, *THE IDEA OF LAW* 96 (1981). Therefore, our knowledge of reality cannot inform our understanding of morality. *See id.* Because morality cannot be based on objective reality, values are necessarily subjective and based on sentiment. *See id.* at 97. In essence, Hume’s reasoning questioned whether it were possible to develop a rational standard by which to judge values. *Id.* at 98.

102 *See* LUKES, *supra* note 100, at 151–52.

103 Some argue that this belief necessitates hatred of homosexuals. *E.g.*, *Harper*, 445 F.3d at 1181 (“Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful.”). Simply because such people believe homosexuality is wrong, however, does not necessarily mean that they are hateful towards homosexuals. One can oppose the practice of homosexuality on moral grounds without hating those who engage in homosexual behavior. For example, many Christians believe homosexuality to be a sin. *See, e.g.*, *Leviticus* 18:22 (“Do not lie with a man as one lies with a woman; that is detestable.”).

That is, they work to impose their values regarding sexuality—usually derived from their religious beliefs—on others in society, which results in emotional harm to and exclusion of homosexuals.<sup>104</sup> On the other hand, those who support homosexuality generally believe

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However, homosexuality is not the only sin, and homosexuals are not the only sinners. Christianity teaches that all people—homosexuals and heterosexuals alike—are sinners, and should be loved regardless, as God loves us. *See, e.g., Romans* 5:8 (“But God demonstrates His own love for us in this: While we were still sinners, Christ died for us.”); *Matthew* 22:39 (declaring that the second greatest commandment is, “Love your neighbor as yourself”).

104 The idea that those who disagree with homosexuality are prejudiced against homosexuals is evidenced by the way the gay rights movement often characterizes itself as a type of civil rights movement. For one, the term “gay rights movement” itself indicates this characterization. Furthermore, gay rights groups often characterize themselves as fighting for “equality” or “equal rights.” *See infra* note 106. Accordingly, such groups follow the lead of civil rights movements by working to enact antidiscrimination laws and policies. For instance, such activists are currently working towards passing the Employment Non-Discrimination Act, which would prohibit discrimination against homosexual employees on a national level. *See* H.R. 2015, 110th Cong. (2007); H.R. 3685, 110th Cong. (2007). This act is tellingly modeled after existing civil rights laws, such as Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)), and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)). The public, in general, has embraced this vision of the gay rights movement. Twenty-one states and the District of Columbia have already enacted laws prohibiting employment discrimination based on sexual orientation, and eighty-seven percent (or 434) of Fortune 500 companies include sexual orientation in their company nondiscrimination policies. Human Rights Campaign, Employment Non-Discrimination Act, [http://www.hrc.org/laws\\_and\\_elections/enda.asp](http://www.hrc.org/laws_and_elections/enda.asp) (last visited Oct. 26, 2009). The underlying—and often unquestioned—assumption of this characterization of the gay rights movement is that if someone expresses disapproval of homosexuality or refuses to recognize homosexuals as a group deserving special rights and protections, then he is discriminating *against* denying the *rights* of others. The characterization implies that such a person is doing something more—and worse—than simply expressing a moral or religious conviction.

The public’s poor conception of those who morally object to homosexuality is perhaps reinforced by the frequent portrayals within popular media of hateful crimes committed against homosexuals. *See, e.g., BENT* (MGM Distribution Company 1997) (depicting the persecution of homosexuals in Nazi Germany); *BOYS DON’T CRY* (Fox Searchlight Pictures 1999) (portraying the rape and murder of Brandon Teena, a transsexual); *BROKEBACK MOUNTAIN* (Paramount Pictures 2005) (suggesting that the homosexual protagonist Jack was murdered because of his sexual orientation); *THE LARAMIE PROJECT* (Home Box Office 2002) (depicting the murder of homosexual Matthew Shepard); *MILK* (Focus Features 2008) (suggesting that Harvey Milk’s assassination by Dan White may have been a hate crime).

that morality is subjective.<sup>105</sup> That is, by supporting diverse sexual practices, they are refraining from imposing their moral values regarding sexuality on other members of society, and are following a sort of “live-and-let-live” philosophy.<sup>106</sup>

This popular conception of those who support homosexuality as moral relativists, however, is inherently flawed. In reality, those who support homosexuality believe in the moral desirability of permitting homosexual conduct, and the corresponding immorality of opposing

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105 Those who support homosexuality usually express this idea by saying that morality should be “private,” as opposed to “public.” See, e.g., CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS* 2 (2003) (recognizing that many gay-rights advocates traditionally sought to advance gay rights by “protecting a separate realm of *private morality* from repressive forces seeking to regulate private conduct on the basis of *public morality*” (emphasis added)); Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J.L. & FEMINISM* 139, 142 (2005) (noting that gay-rights advocates generally argue in favor of “the liberal ideal of government neutrality toward ‘private’ morality” (emphasis added)).

106 Many gay rights groups characterize their mission as simply fighting for equal rights, rather than imposing a certain set of values or beliefs, or standard of behavior, on anyone else. See, e.g., National Gay and Lesbian Task Force Foundation, About Us: Mission Statements, [http://www.thetaskforce.org/about\\_us/mission\\_statements](http://www.thetaskforce.org/about_us/mission_statements) (last visited Oct. 26, 2009) (declaring that the mission statement of the National Gay and Lesbian Task Force Foundation is to “provide[ ] research and policy analysis to support the struggle for *complete equality*” as well as to “create a nation that respects the diversity of human expression and identity and creates *opportunity for all*” (emphasis added)); International Gay & Lesbian Human Rights Commission, About Our Work, <http://www.iglhrc.org/cgi-bin/iowa/content/about/missionandvision/index.html> (last visited Oct. 26, 2009) (advertising that the Commission’s official mission is to “advanc[e] human rights for everyone, everywhere to end discrimination based on sexual orientation, gender identity, or gender expression”); The Human Rights Campaign, Who We Are, [http://www.hrc.org/about\\_us/who\\_we\\_are.asp](http://www.hrc.org/about_us/who_we_are.asp) (last visited Oct. 26, 2009) (“As the largest national lesbian, gay, bisexual and transgender civil rights organization, HRC envisions an America where LGBT people are ensured of their *basic equal rights*, and can be open, honest and safe at home, at work and in the community.” (emphasis added)). These groups’ official mission statements, and even names, are evidence that they wish to portray themselves to the public as simply fighting for equal rights. That is, they wish the public to view them as fighting for the freedom of each individual to live according to his or her own conscience, rather than as imposing any standard of morality on anyone else. Such a purpose, if true, could only be based on an underlying belief in the subjectivity of morality. Cf. BALL, *supra* note 105, at 2–3 (recognizing that such equality-based arguments in favor of gay rights are largely viewed as “morally neutral,” in that they supposedly stem from an “inclination to separate notions of morality from society’s response to and regulation of homosexuality”); Feldblum, *supra* note 105, at 142 (noting that gay-rights advocates “generally respond to conservative moral rhetoric by invoking a counter moral rhetoric of equality and rights”, which amounts to a position in favor of “government neutrality toward ‘private’ [i.e., subjective] morality”).

it.<sup>107</sup> The true objectivity of their viewpoint is apparent from the way many gay-rights advocates strongly believe that those who disagree with them are wrong. If one truly believed in the subjectivity of morality, he would be unable to express disapproval of the moral views of anyone else.<sup>108</sup> Because he would believe that morality is personal to each individual, it would not be his place to contradict the moral beliefs of anyone else. Many gay-rights advocates, however, clearly believe that their views regarding the permissibility of homosexuality are correct and that those who disagree with them are wrong.<sup>109</sup> Furthermore, although many do not directly say that those who hold contrary beliefs are wrong, the fact that they believe this is evidenced by the hostility they display toward those who disagree with them. Such hostility ranges from the personally<sup>110</sup> and politically<sup>111</sup> extreme to

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107 See BALL, *supra* note 105, at 11 (arguing for a morality “grounded on individual autonomy and choice” in the realm of gay rights). Some also argue in favor of the moral desirability of homosexuality itself. See, e.g., Feldblum, *supra* note 105, at 141; see also Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 521–22 (1989) (arguing that although those who support homosexuality often claim they are fighting only for “liberal toleration,” they in fact believe in the moral desirability of the conduct they support).

108 See *supra* note 101 and accompanying text.

109 For example, the National Gay and Lesbian Task Force Foundation directly states that those who disagree with them are wrong. Their self-reported mission statement is to “provide[ ] research and policy analysis to . . . counter right-wing lies.” National Gay and Lesbian Task Force Foundation, *supra* note 106 (emphasis added).

110 For example, in *Lopez v. Candaele*, currently pending decision in the Central District of California, a professor was openly hostile toward a student who held religious beliefs contrary to homosexuality. See Verified Complaint for Injunctive and Declaratory Relief, Monetary Damages, and Attorneys’ Fees and Costs at 8, *Lopez v. Candaele*, No. CV09-0995 (C.D. Cal. Feb. 11, 2009). The professor taught a speech class in which he gave students an open-ended assignment to give an informative speech. *Id.* A student decided to speak on God and morality. *Id.* He read a dictionary definition of marriage, which defined marriage as being between a man and woman. *Id.* The student also read two Bible verses. *Id.* The professor, a supporter of homosexuality, interrupted the student, called him a “fascist bastard,” and dismissed class. *Id.* In addition, when Proposition 8 (which amended the California Constitution to ban same-sex marriage) was passed in November 2008, the same professor told the class, “[I]f you voted yes on Proposition 8, you are a fascist bastard.” *Id.* at 9.

111 For example, during the 2008 election, the Church of Latter-day Saints raised millions of dollars to campaign in support of Proposition 8, which amended the California Constitution to ban same-sex marriage. Jessica Garrison & Joanna Lin, *Mormon’s Prop. 8 Aid Protested*, L.A. TIMES, Nov. 7, 2008, at B1. After Proposition 8 was passed, more than a thousand gay-rights activists protested outside of a Mormon temple in Los Angeles in response to the role Mormons played in supporting Proposition 8. *Id.* The protestors screamed “Bigots” and “Shame on You” at men inside the temple. *Id.*

more reserved criticisms.<sup>112</sup> Just like those they oppose, gay-rights advocates consistently express their disapproval of contending viewpoints and those that hold them.

The fact that supporters of homosexuality can be hostile toward those who disagree with them makes them just as capable of “espousing intolerance, bigotry or hatred” as those who oppose homosexuality.<sup>113</sup> In the school setting, strong speech on the part of gay-rights advocates may, in fact, hurt those it is targeted at, “damag[ing] their sense of security and interfer[ing] with their opportunity to learn.”<sup>114</sup>

Furthermore, such speech often may be directed at a core identifying characteristic of those who oppose homosexual conduct—their religion.<sup>115</sup> Because the viewpoint that homosexual conduct is wrong is often grounded in a religion, such as Christianity,<sup>116</sup> it necessarily follows that those who support homosexuality believe that certain religious beliefs of their opponents are wrong. Although gay-rights advocates are not directly attacking their opponents for belonging to a certain religion, they are attacking the beliefs that compose their religion. The line between attacking certain religious beliefs and attacking a religion itself can easily become blurred. That is, it is difficult to claim that another person’s religion is *not* wrong at the same time one argues that the belief system that religion is composed of *is* wrong. Consequently, speech that is hostile toward a Christian’s sincere belief that homosexuality is a sin can easily become an attack on that person’s religion.<sup>117</sup>

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112 See, e.g., Freedom to Marry, Opposition, [http://www.freedomtomarry.org/get\\_informed/landscape/opposition.php](http://www.freedomtomarry.org/get_informed/landscape/opposition.php) (last visited Sept. 29, 2009) (characterizing those who oppose same-sex marriage as “anti-gay, anti-choice, anti-civil-rights, anti-women’s equality, and anti-separation of church and state”).

113 *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006); cf. *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 801–02 (E.D. Mich. 2003) (“That Defendants can say with apparent sincerity that they were advancing the goal of promoting ‘acceptance and tolerance for minority points of view’ by their demonstrated intolerance for a viewpoint that was not consistent with their own is hardly worthy of serious comment.”).

114 *Harper*, 445 F.3d at 1178.

115 The *Harper* majority specifies that religion, in addition to sexual orientation, is a core identifying characteristic that qualifies for protection against negative speech. *Id.* at 1183.

116 See, e.g., *Leviticus* 18:22 (“Do not lie with a man as one lies with a woman; that is detestable.”). But see Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 456–60 (2001) (recognizing that some Christians do not believe that homosexuality is forbidden by Christianity).

117 The reality of this is especially apparent in situations such as the protest outside of the Mormon temple. See *supra* note 111. There, the line between the gay-

Therefore, speech in support of homosexuality can satisfy *Harper's* interpretation of the "rights of others" prong, just as the Ninth Circuit argues that speech in opposition to homosexuality can. That is, such speech can amount to "psychological attacks that cause young people to question their self-worth and their rightful place in society."<sup>118</sup> Furthermore, *Harper's* requirement that such speech "strike[ ] at a core identifying characteristic of students"<sup>119</sup> is also satisfied by speech that is directed toward those who oppose homosexual conduct, as it often strikes at their religious beliefs. Therefore, those who oppose homosexual conduct qualify for protection under *Harper's* definition of the "rights of others" prong.

The point here, however, is not to prove that those who oppose homosexuality should be protected under the "rights of others" prong. The point is simply that *Harper's* interpretation of the "rights of others" prong is inherently problematic. Neither side of the debate over homosexuality believes that morality is relative, so neither side is truly accepting of all moral viewpoints. Therefore, *Harper's* separation of this debate into one side that accepts others and another side that excludes others, is superficial and inaccurate. In reality, whenever a person engages in a heated debate on a controversial topic such as homosexuality, he will naturally believe that he is right and the other side is wrong. Such a belief, on either side of the debate, could easily lead to a psychological attack on those who disagree with him when it is expressed in an inappropriate manner. Such is the nature of argument and debate. The Ninth Circuit should recognize this simple truth in its interpretation of the "rights of others" prong, and not interpret the prong as bestowing special protection on certain groups against offensive speech that "strikes at a core identifying characteristic of students."<sup>120</sup> Neither side of the debate deserves such special protection under *Tinker*.

### III. AN ALTERNATIVE INTERPRETATION OF THE "RIGHTS OF OTHERS" PRONG

As explained above, the Ninth Circuit's interpretation of the "rights of others" prong is problematic for many reasons. First, Supreme Court precedent, as well as the interpretations of other circuits, suggests that the "rights of others" prong should not be inter-

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rights activists protesting only the Mormons' contributions in support of Proposition 8 and protesting Mormonism itself arguably became blurred.

118 *Harper*, 445 F.3d at 1178.

119 *Id.* at 1182 n.27.

120 *Id.*

puted to encompass offensive speech.<sup>121</sup> Furthermore, the Ninth Circuit's distinctions—both between minority and majority groups, and between speech that amounts to psychological attacks on others and speech that does not—are inherently problematic in application.<sup>122</sup> For these reasons, a better interpretation of the “rights of others” prong should be formulated.

A better interpretation of the “rights of others” prong would allow schools to restrict only speech that has the potential to lead to physical violence.<sup>123</sup> In order to determine what kinds of words would lead to physical violence, school administrators could look to what types of comments have led to fights in the school district in the past.<sup>124</sup> Often, the likelihood that a certain comment will lead to physical assault is largely determined by a specific school's social environment. For example, if a certain school has a long history of racial tension, students are likely to be more attuned to racially divisive comments and, therefore, more likely to react violently if such a comment is directed at them.<sup>125</sup> Once such a category of speech is identified, all viewpoints associated with that type of speech should be restricted.

#### A. *Support from Supreme Court Precedent and Other Circuits*

Such an interpretation of the “rights of others” prong would be consistent with First Amendment precedent, as the Supreme Court

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121 See *supra* Part II.B.1.

122 See *supra* Parts II.B.2, II.B.3.

123 Cf. *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) (“The ‘rights of others’ language in *Tinker* can only refer to traditional rights, such as those against *assault*, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.” (emphasis added)); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“[A]t least one court has opined that [the ‘rights of others’ prong] covers only independently tortious speech like libel, slander or intentional infliction of emotional distress.”).

124 Cases from circuits that support such an interpretation of the “rights of others” prong suggest that past experience is the correct standard for determining when certain speech will lead to physical violence. See *infra* Part III.A (discussing the precedent from these circuits in detail). For instance, the Third Circuit, in *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), considered Warren Hills School District's history of violent racial conflict when it ruled that parts of the school district's harassment policy were constitutional because the speech it prohibited had the potential to lead to physical violence. *Id.* at 264–65. Furthermore, in *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000), the Tenth Circuit noted that racial conflict in the school district had previously led to physical violence when it ruled that the school could constitutionally prohibit students from displaying the Confederate flag. *Id.* at 1366.

125 Such an environment was present in the school districts involved in both *Sypniewski* and *West*. See *infra* Part III.A (discussing these two cases in detail).

has recognized that the government may prohibit “fighting words,” if the speech (1) “tend[s] to incite an immediate breach of the peace” by provoking physical violence;<sup>126</sup> (2) is a “personally abusive epithet[ ] which, when addressed to the ordinary citizen, [is], as a matter of common knowledge, inherently likely to provoke violent reaction;”<sup>127</sup> and (3) is “‘directed to the person of the hearer,’” and so is “a direct personal insult.”<sup>128</sup> Therefore, a restriction on First Amendment rights for words likely to provoke physical violence is supported by Supreme Court precedent.

Furthermore, this interpretation of the “rights of others” prong is supported by other circuits. For example, in *Sypniewski*, the Third Circuit upheld a policy prohibiting racial harassment and intimidation as well as the display and possession of materials that were “racially divisive or create[d] ill will or hatred,”<sup>129</sup> only insofar as the speech it prohibited had the potential to escalate into physical assault or abuse.<sup>130</sup> Specifically, the Warren Hills School District could prohibit name calling only because “schools are generally permitted to step in and protect students from abuse.”<sup>131</sup> Similarly, the school district could prohibit racially divisive materials only because “racially divisive” connotes “conflict” and “a mutual antagonism between competing individuals or groups of people that could erupt into genuine hostilities.”<sup>132</sup> On the other hand, the school district could not constitutionally prohibit materials that created only ill will.<sup>133</sup> This is because the court interpreted “ill will” as encompassing more speech than that which is likely to lead to conflict, and “by itself, an idea’s generating ill will is not a sufficient basis for suppressing its expression.”<sup>134</sup> Furthermore, the court made clear that the school district’s context of racial tension, which often erupted into physical violence,<sup>135</sup> played a large

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126 See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

127 *Cohen v. California*, 403 U.S. 15, 20 (1971).

128 *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

129 *Id.* at 260 n.17, 261.

130 *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264–65 (3d Cir. 2002).

131 *Id.* at 264.

132 *Id.* at 265.

133 *Id.* at 264–65.

134 *Id.*

135 For instance, when a white student associated with several African Americans in Warren Hills Regional High School, a group of students drove to his house and physically threatened him. *Id.* at 248. Furthermore, a black student and a white student physically fought at the school, leaving one student with a concussion and requiring stitches. *Id.*

role in making such a policy constitutional.<sup>136</sup> Therefore, the court considered physical violence a factor in determining what amounts to interference with the rights of others.<sup>137</sup>

Similarly, in *West v. Derby Unified School District*,<sup>138</sup> the Tenth Circuit held that a school could constitutionally prohibit students from displaying the Confederate flag only when such displays threatened students' physical security.<sup>139</sup> The court noted that the school district had experienced "racial incidents or confrontations," including a fight at a football game, in connection with the Confederate flag a few years before.<sup>140</sup> Therefore, the school policy prohibiting the display of Confederate flags sprang from "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>141</sup> Rather, the context of racial tensions in the school district made concerns that displaying the flag would cause "substantial disruptions" reasonable.<sup>142</sup> This reasoning suggests that the threat of physical violence is a factor in determining what type of speech amounts to interference with the rights of others.<sup>143</sup>

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136 *Id.* at 265.

137 On the other hand, *Sypniewski* seems to conflate the two prongs of *Tinker*. The court explains *Tinker* in terms of both prongs and sometimes fails to distinguish between them when applying *Tinker's* test to the facts of the case. See, e.g., *id.* at 264 (explaining that *Tinker* requires either that "the speech at issue gives rise to a well-founded fear of disruption *or* interference with the rights of others" (emphasis added)).

138 206 F.3d 1358 (10th Cir. 2000).

139 See *id.* at 1366.

140 *Id.*

141 *Id.*

142 *Id.* The *Harper* Court, on the other hand, characterizes *West* as standing for the proposition that a "'display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone,'" even though students were not physically accosted. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (quoting *West*, 206 F.3d at 1366). This view, however, ignores the fact that the display of the Confederate flag resulted in physical violence in the past, which made concerns of "disruptions" reasonable. *West*, 206 F.3d at 1366.

143 On the other hand, *West* seems to conflate the two prongs of *Tinker*, as *Sypniewski* does. See *supra* note 137. The Tenth Circuit states that the display of Confederate flags could both "cause disruption *and* interfere with the rights of other students to be secure and let alone." *West*, 240 F.3d at 1366 (emphasis added). After discussing the history of racial tension in the school district, the court concludes that "administrators' and parents' concerns about future substantial *disruptions* from possession of Confederate flag symbols at school [were] reasonable," *id.* (emphasis added), suggesting that the court is referring to the "substantial disruption" prong.

*B. Advantages of the Alternative Interpretation*

If courts were to adopt such an interpretation of the “rights of others” prong, many of the difficulties resulting from *Harper’s* interpretation of the prong would be avoided. For one, courts would not need to draw any problematic distinctions between majority and minority groups, or discern which viewpoints amount to psychological attacks on others and which do not. Courts would only need to look at what types of comments led to physical violence in that particular school district in the past. This would make the determination of what speech should be prohibited under the “rights of others” prong much easier.

Most importantly, however, deciding which types of comments led to physical violence in the past is a concrete determination that would not be open to interpretation by school administrators. That is, such an interpretation of the prong would avoid the need for school administrators to decide exactly what types of sentiments amount to “psychological attacks that cause young people to question their self-worth and their rightful place in society.”<sup>144</sup> As the line between speech that amounts to an impermissible psychological attack on others and speech that expresses an uncomfortable—but constitutionally protected—personal belief is fuzzy at best, it is all too easy for school officials to simply label speech they personally view as offensive as a psychological attack. If school administrators used the school district’s history of physical violence as a guide, however, there would be less danger that they would label a certain viewpoint as a psychological attack based on their personal opinion of offensiveness rather than on the divisiveness it actually causes.

CONCLUSION

Although it is true that some groups, such as homosexuals, may be troubled by speech suggesting that their conduct is immoral, courts should keep sight of the “broader enduring values which the process of open debate permits us to achieve.”<sup>145</sup> An integral function of free speech is to advance knowledge and the discovery of truth by exposing individuals to all viewpoints in a given debate, allowing them to “hear all sides of the question, consider all alternatives, test [their] judgment by exposing it to opposition, and make full use of different minds.”<sup>146</sup> Furthermore, youth is a critical time of life during which

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144 *Harper*, 445 F.3d at 1178.

145 *Cohen v. California*, 403 U.S. 15, 25 (1971).

146 THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970).

one forms lasting values and opinions. Therefore, it is especially important that students be able to hear significant, and potentially true, viewpoints from their fellow classmates. Rather than shield students from one side of a debate, schools should equip students with the intellectual tools they need to decide for themselves what conduct is right and what conduct is wrong. Only then will students be able to make educated choices about what type of life they would like to lead as adults.

