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Defamation is More than Just a Tort: a New Constitutional Standard for Internet Student Speech

Reesa Miles

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DEFAMATION IS MORE THAN JUST A TORT: A NEW CONSTITUTIONAL STANDARD FOR INTERNET STUDENT SPEECH

I. INTRODUCTION

The school is a special environment. While school officials must be able to punish student behavior, students have an arguably equal interest in preserving their First Amendment right to free speech. Through a series of Supreme Court decisions, the law is well established that students do not enjoy the same First Amendment protections as adults. This differential treatment is grounded in historical notions of the significant impact schools have on America's youth.

As early as *Brown v. Board of Education*, the Court held that education is essential to our democratic society, as schools are “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”¹ Since *Brown*, the Court has stated that the school must balance the “unpopular and controversial views in schools and classrooms . . . against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”² A school does not have to tolerate speech that is inconsistent with its “basic educational mission.”³ Schools may regulate speech in school-sponsored, expressive activities that are related to legitimate pedagogical concerns.⁴ The school’s role is to provide the “fundamental values necessary to the maintenance of a democratic political system” and thus the Court has made exceptions to First Amendment protections in order to allow the school to achieve these democratic notions of education.⁵

Despite the expansive role of schools in monitoring student speech, the Court has limited its analysis to speech that takes place on school grounds or during school-related activities.

¹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1985).

² *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

³ *Id.* at 685.

⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁵ *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

Promoting values through schooling has not been expanded to off-campus speech that is disseminated through the Internet. This is problematic as the Internet is playing an increasingly important role in the lives of children. What students say over the Internet, specifically on social networking sites like MySpace and Facebook, is published material that can easily be seen and read by their peers who most likely attend the same school. When this written information defames school personnel, usually an administrator or teacher, the school has an interest in punishing this conduct. On the other hand, the student has a right to free speech, especially within the confines of his or her own home. Punishing students for what they write on their home computers also can infringe on parents' right to raise their own children.

Traditionally, courts have relied on the *Tinker v. Des Moines Independent Community School District* standard, which holds that a school can punish student speech when that speech "materially and substantially disrupt[s] the work and discipline of the school."⁶ However, this standard is unworkable when punishing students for what they write on the Internet from their home computers. This test was meant to apply to student speech that occurs on school grounds.⁷ Further, the *Tinker* standard addresses school disruption, which is not the main concern regarding student Internet speech.⁸

No matter how courts rationalize their decisions, schools, teachers, and administrators defend Internet student speech cases involving school officials because of two prevailing concerns: (1) the school official targeted by the student speech will have his or her authority undermined;⁹ and (2) the democratic goals of schooling will be disrupted.¹⁰ Similarly, individuals bring defamation suits, specifically libel suits, against those who speak ill of them because they are concerned that their good name will be ruined, their authority will be undermined, or that the institution that they are a part of—

⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁷ *See id.*

⁸ *See id.*

⁹ *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 941 (3d Cir. 2011) (en banc).

¹⁰ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (en banc); *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007).

whether it be a business, a community, or society in general—will be disrupted by the information that is written about them.¹¹ However, while a school official can bring a defamation suit, the school itself lacks standing to pursue a defamation case against a student. Further, even if a school official were to bring a defamation suit, the underlying result of the suit—to reward the plaintiff with monetary damages—will not reinforce the democratic goals of schooling or have the impact on the school environment that is required for a punishment to be effective.

Currently, when a student brings a First Amendment claim against a school district, the burden is on the school district to show that it met the *Tinker* standard.¹² Under this Note’s proposed standard, when a student brings a claim, the school’s defense would no longer rest on *Tinker*. Instead, the defamation standard in tort would be used as a model to create a new First Amendment standard to replace *Tinker* as a defense. Using similar concepts, the standard would allow schools to punish off-campus student Internet speech that involves a school official and reaches a defamatory level. This test would also modify the standards of proof necessary to implicate the speech since students are not entitled to full constitutional protections as recognized by the Supreme Court time and again.¹³ This standard would only apply to a narrow category of speech, specifically off-campus Internet speech that defames a school official. Thus, this defense would not apply to other types of speech like offensive speech or true threats. This standard would also not apply to student-on-student defamatory speech or cyber bullying. While these are important concerns, they fall outside the reach of this new standard and therefore, outside the purview of this Note.

This Note urges the Supreme Court to adopt a standard that will continue to balance a student’s right to free speech with a school’s need to advance appropriate values. Part II explains the history of Court decisions that modified

¹¹ Libel, an action in tort, punishes published speech about the plaintiff that injures the plaintiff’s reputation through false statements of fact. MARSHALL S. SHAPO, *PRINCIPLES OF TORT LAW* § 66.01 (3d ed. 2010).

¹² Frank D. LoMonte, *Shrinking Tinker: Students Are “Persons” Under Our Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1328 (2009).

¹³ See, e.g., *Tinker*, 393 U.S. 503; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

constitutional protections for students. Part III discusses the circuit split that currently exists between the Second and Third Circuits with regard to how schools can punish what students say about school personnel on the Internet. Part IV examines the problems associated with using the *Tinker* standard in the Second and Third Circuit cases. Part V explores why civil defamation is not an appropriate substitute for schools punishing the student directly. Part VI advocates for the adoption of a new First Amendment standard that is modeled after the elements of defamation and accounts for the modified protections of students. Part VII will apply this new standard to the Second and Third Circuit cases and demonstrate that the outcomes would not only be different, but would resolve any split that currently exists from the confusion of applying the *Tinker* standard.

II. THE HISTORY OF STUDENT PROTECTIONS

First Amendment protections are considered expressive activities subject to a strict scrutiny analysis.¹⁴ Therefore, the government cannot restrict free speech without a compelling government interest.¹⁵ In addition, that regulation needs to utilize the least restrictive means possible.¹⁶ However, *Tinker* lowered this standard in the school setting. *Tinker* examined the various contexts in which free speech claims relating to schools could arise and determined that political, non-school sponsored speech could be regulated if there was a “material and substantial interference” with the school environment.¹⁷ In *Bethel School District No. 403 v. Fraser*, the Court found that the school also had the right to punish offensive, lewd, and indecent speech when spoken in the context of a school-sponsored activity.¹⁸ Then, in *Hazelwood School District v. Kuhlmeier*, the Court declared that schools could punish speech that is part of a school-sponsored activity so long as the regulation is reasonably related to a pedagogical concern.¹⁹

¹⁴ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.01(b) (8th ed. 2010).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Tinker*, 393 U.S. at 513.

¹⁸ *Fraser*, 478 U.S. at 685.

¹⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Instead of the traditional strict scrutiny standard, this rational review standard made it very easy for schools to punish students. In *Morse v. Frederick*, the Court continued this trend by stating that schools may punish student speech that is related to illegal drug use.²⁰ However, the burden has always been on the school district to provide a justifiable reason for depriving students of their right to free speech.

The first significant Supreme Court case to address the balance between a student's First Amendment protections and a school's ability to regulate student speech is *Tinker*.²¹ In *Tinker*, the Court invalidated a school's policy prohibiting students from wearing black armbands to protest the Vietnam War.²² The Court recognized that First Amendment rights, even in light of the special characteristics of the school environment, are still available to both students and teachers.²³ Yet the Court also addressed its history of reinforcing the school's authority to control student behavior.²⁴ Balancing these two interests, the Court, ruling in favor of the students, found that schools could not punish student expression only to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."²⁵ Schools can only prohibit student speech that "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities"²⁶ or actually does "materially and substantially disrupt the work and discipline of the school."²⁷ In applying this standard, the Court found that there were no facts in the case to show substantial disruption. The two inches of black cloth did not disrupt school activities or the lives of others. While the armbands may have caused discussion outside the classroom, they did not

²⁰ *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

²¹ *Tinker*, 393 U.S. at 503.

²² ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 13 (Harvard Univ. Press 2009).

²³ *Id.*

²⁴ Emily Gold Waldman, *Badmouthing Authority: Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 596 (2011).

²⁵ *Tinker*, 393 U.S. at 509.

²⁶ *Id.* at 514.

²⁷ *Id.* at 513.

interfere with the classroom itself.²⁸

While *Tinker* symbolizes the height of student protection, this broad standard did not endure. In *Fraser*, the Court upheld the school's right to suspend a student for making a speech to the student body that referred to another candidate in terms of an "elaborate, graphic, and explicit sexual metaphor."²⁹ The Court first distinguished *Tinker* as being about a political message, as opposed to sexual conduct.³⁰ Instead of looking to whether the speech caused a "substantial disruption," the Court found that the First Amendment does not protect "vulgar and lewd" student speech since it has the ability to "undermine the school's basic educational mission."³¹ The Court also recognized the special environment that a school provides. A school needs to be able to respond to "unanticipated conduct" that disrupts the educational process.³² A school has an interest in protecting children from exposure to speech that is inappropriate and offensive to minors.³³ The school is responsible for inculcating values by teaching appropriate means of expression.³⁴ While the Court was able to reconcile this decision with *Tinker*, this case was the first deviation toward the modern trend of favoring school authority over First Amendment protections.

This trend continued in *Hazelwood School District v. Kuhlmeier*, where the Court upheld a school's policy of regulating what types of articles could be published in the school's newspaper.³⁵ Again, the Court established a new standard that a school is not required to lend its name and resources to the dissemination of student expression.³⁶ Educators may regulate school-sponsored expression "to assure that participants learn whatever lessons the activity is designed to reach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously

²⁸ *Id.* at 514.

²⁹ Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

³⁰ Waldman, *supra* note 24, at 597.

³¹ *Fraser*, 478 U.S. at 685.

³² *Id.* at 686.

³³ *Id.* at 684.

³⁴ DUPRE, *supra* note 22, at 49.

³⁵ Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).

³⁶ *Id.* at 272.

attributed to the school.³⁷ A student's First Amendment rights are not violated when a school exercises editorial control of style and content of school-sponsored student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."³⁸ Essentially, any student speech that is pedagogically opposed to the school's mission and might be confused as school speech is not protected under the First Amendment.³⁹

Morse v. Frederick is the most recent Supreme Court case to address the extent of *Tinker*.⁴⁰ In *Morse*, the Court upheld a school's decision to suspend a student for unraveling a sign that read "BONG HiTS 4 JESUS" at a school-sponsored event.⁴¹ The Court found that deterring drug use by school children is an "important—indeed, perhaps compelling" interest because of the dangers that it can pose to youth.⁴² In light of various congressional statements and school board policies, the Court found that the special environment of the school and the governmental interest in stopping student drug abuse outweighs students' interest in freedom of expression.⁴³ The school needs to be able to immediately react to situations that violate school policy and need not tolerate speech that promotes the dangers of illegal drug use.⁴⁴

Morse's interpretation of a school's authority to regulate student speech left an uncertain impact on the future of student First Amendment protections.⁴⁵ While the case specifically allowed school administrators to punish student speech that promoted illegal drug use,⁴⁶ the implications of the case are much broader. The case leaves open the possibility that

³⁷ *Id.* at 271.

³⁸ *Id.* at 273.

³⁹ Rosemary Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 233, 267–68 (1992).

⁴⁰ See *Morse v. Frederick*, 551 U.S. 393 (2007).

⁴¹ *Id.* at 397.

⁴² *Id.* at 407 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

⁴³ *Id.* at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The court declined to apply the *Tinker* test, but also declined to consider Frederick's speech as "offensive" under *Fraser*. *Id.* at 409. The Court acknowledged that much political and religious speech can be deemed offensive, but this case was about the promotion of drug use. *Id.*

⁴⁴ *Id.*

⁴⁵ *Morse*, 551 U.S. at 409.

⁴⁶ *Id.*

a school can regulate anything that undermines the school's values. In his concurrence, Justice Alito stated that the majority's opinion "does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" However, it is not hard to imagine other topics that the school would consider equivalent to promoting illegal drug use and seek to regulate, such as speech encouraging violence, sexual activity, or even skipping school.⁴⁷

The *Morse* decision has strayed the farthest from the original intent of *Tinker* to preserve student's First Amendment rights.⁴⁸ This speech took place on a public street and did not cause any substantial disruption to the school environment.⁴⁹ Yet the school was still allowed to punish the speech because the speech took place during a school activity and could be construed to be about a topic that violates the school's mission.⁵⁰ Although this holding allows for the regulation of speech that takes place off-campus, but has a nexus to the school, the Supreme Court has not addressed whether Internet student speech that takes place on the student's home computer and is directed at school personnel should likewise be regulated.

III. THE SPLIT BETWEEN THE SECOND AND THIRD CIRCUITS

The question of whether a school can punish what a student writes about school personnel on the Internet from a home computer has resulted in a split between the Second and Third Circuits. The heart of this issue explores to what extent *Tinker* extends to off-campus speech. The Second Circuit addressed this question in two cases: *Wisniewski v. Board of Education of the Weedsport Central School District*⁵¹ and

⁴⁷ *Id.* at 423 (Alito, J., concurring); Erwin Chemerinsky, *How Will Morse v. Frederick Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 21-22 (2008); *see also* Joyce Dindo, *The Various Interpretations of Morse v. Frederick: Just a Drug Exception or a Retraction of Student Free Speech Rights?*, 37 CAP. U. L. REV. 201, 233-34 (2008).

⁴⁸ *Morse*, 551 U.S. at 409.

⁴⁹ Caroline B. Newcombe, *Morse v. Frederick One Year Later: New Limitations on Student Speech and the "Columbine Factor,"* 42 SUFFOLK U. L. REV. 427, 437 (2009).

⁵⁰ *Id.* at 436-37.

⁵¹ *See* *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

Doninger v. Niehoff.⁵² In both cases, the courts applied *Tinker* to off-campus student Internet speech and ruled in favor of the schools.

In *Wisniewski*, Aaron Wisniewski, an eighth-grader at Weedsport Middle School used AOL Instant Messaging software on his parents' home computer to create an "IM icon" which showed a drawing of a pistol firing a bullet at a person's head, with dots representing splattered blood.⁵³ The drawing was labeled "Kill Mr. VanderMolen."⁵⁴ Philip VanderMolen was Aaron's English teacher at the time this icon was created.⁵⁵ While the icon was not sent to VanderMolen or other school officials directly, the icon was sent to fifteen members on his "buddy list,"⁵⁶ some of whom attended Weedsport Middle School and could view the icon for three weeks.⁵⁷ One of Aaron's classmates gave Mr. VanderMolen a copy of the icon.⁵⁸

Aaron admitted to creating and sending the icon.⁵⁹ The school initially suspended Aaron for five days and granted VanderMolen's request to stop teaching Aaron's class.⁶⁰ The police determined that Aaron's icon was just a joke and that he did not intend to actually harm VanderMolen, so criminal charges were dropped.⁶¹ However, at a superintendent's hearing, the hearing officer determined that the icon was threatening and should have not been construed as a joke.⁶² Aaron was suspended for one semester and given alternative education.⁶³

In assessing whether the school had the authority to suspend Aaron, the Second Circuit held that *Tinker* was the appropriate standard to apply.⁶⁴ The court ruled in favor of the school, finding that even if Aaron's icon was just an opinion, it

⁵² See *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

⁵³ *Wisniewski*, 494 F.3d at 36.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1060 (2008).

⁶¹ *Wisniewski*, 494 F.3d at 36.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Papandrea, *supra* note 60, at 1060-61.

was not protected under the *Tinker* standard.⁶⁵ Not only did the icon “materially and substantially disrupt the work and discipline of the school,” but it also was reasonably foreseeable that the icon would come to the attention of school officials.⁶⁶ It did not matter if Aaron never intended for either to occur.⁶⁷ The court also found that the mere fact that the speech took place off school grounds did not shield Aaron from punishment.⁶⁸

A year later, in *Doninger v. Niehoff*, the Second Circuit again found that a school had the authority to punish what a student wrote on the Internet.⁶⁹ The court applied *Wisniewski*’s interpretation of *Tinker*, stating that off-campus speech that creates a foreseeable risk of substantial disruption in a school “does not necessarily insulate the student from school discipline.”⁷⁰ In *Doninger*, a dispute arose between school administration and a group of Student Council members, including Avery Doninger, over the scheduling of “Jamfest,” an annual battle-of-the-bands concert.⁷¹ Miller, the teacher responsible for the auditorium’s sound and lighting equipment, could not attend on the scheduled date, and without Miller’s presence the students would be forced to change the date or the location of the event.⁷²

Avery and three other students drafted an e-mail to a large number of people describing the situation.⁷³ The e-mail told recipients to contact Paula Schwartz, the district superintendent, to ask that Jamfest be held as scheduled and urged the recipients to forward the e-mail to more people.⁷⁴ Additionally, Avery posted a message on her blog that said

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people...because we sent it out, Paula Schwartz is getting a TON of phone calls and emails... however, she got pissed off and decided to just cancel the whole thing all together[and] so basically we aren't

⁶⁵ *Wisniewski*, 494 F.3d at 37.

⁶⁶ *Id.* at 38–39.

⁶⁷ *Id.*

⁶⁸ *Id.* at 39.

⁶⁹ *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008).

⁷⁰ *Id.* at 50 (quoting *Wisniewski*, 494 F.2d at 39).

⁷¹ *Id.* at 44.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

going to have it at all⁷⁵

Avery then reproduced the e-mail that the Student Council members sent out and also included a letter her mom sent to Schwartz and Principal Niehoff so that those who read the blog could “get an idea of what to write if you want to write something or call her to piss her off more.”⁷⁶ Several students posted comments to the blog. One comment referred to Schwartz as a “dirty whore.”⁷⁷

Schwartz and Niehoff received many phone calls and e-mails about Jamfest.⁷⁸ The controversy forced Schwartz and Niehoff to miss or arrive late to several school-related activities.⁷⁹ When Niehoff learned of the blog, she decided that Avery’s conduct did not “display the civility and good citizenship expected of class officers.”⁸⁰ The blog contained “vulgar language” and “inaccurate information” and did not demonstrate the proper way to confront school officials.⁸¹ As a result, Niehoff prohibited Avery from running for Senior Class Secretary.⁸²

The Second Circuit, applying *Wisniewski*, found that Avery’s blog involved school events and was written to encourage others to comment on the post and to call and e-mail school personnel.⁸³ Therefore, it was reasonably foreseeable that students and administrators would find out about the blog.⁸⁴ Additionally, the court pointed to three factors that showed Avery’s blog would create a foreseeable risk of substantial disruption.⁸⁵ First, the language in the blog was “plainly offensive” and had the potential to inhibit cooperative conflict resolution.⁸⁶ Second, the blog misled students to believe Jamfest had been cancelled, which caused

⁷⁵ *Doninger*, 527 F.3d at 45 (third alteration added).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 46.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Papandrea, *supra* note 60, at 1062.

⁸³ *Doninger*, 527 F.3d at 46.

⁸⁴ Papandrea, *supra* note 60, at 1064.

⁸⁵ *Doninger*, 527 F.3d at 50.

⁸⁶ *Id.* at 50–51.

students to get “all riled up” and- to threaten a sit-in.⁸⁷ Avery and the other students involved had to be pulled away from class or other activities to address the dispute.⁸⁸ Schwartz and Niehoff also missed or arrived late to activities because of the dispute.⁸⁹ Finally, the court thought that it was significant that Avery’s punishment was removal from participation in student government—an extracurricular activity, which is a privilege, not a right.⁹⁰ Avery’s activities undermined the ideals student government is designed to promote, including good citizenship, civility, and cooperative conflict resolution.⁹¹ Therefore, Avery’s speech was not protected by the First Amendment.⁹²

The Third Circuit has also addressed this question of Internet student speech in two cases: *Layshock v. Hermitage School District*⁹³ and *J.S. v. Blue Mountain School District*.⁹⁴ The Third Circuit’s original rulings on both cases resulted in an internal circuit split.⁹⁵ Therefore, both cases were reheard en banc in June 2011.⁹⁶ Each case was decided in favor of the student.⁹⁷ However, whether the *Tinker* standard should apply to off-campus student Internet speech was not definitively decided by either majority, but was raised as an issue in the concurring and dissenting opinions of both cases.⁹⁸

In *Layshock*, Justin Layshock, a student at Hickory High School, used his grandmother’s computer to create a “parody profile” on MySpace of his principal Eric Trosch.⁹⁹ Besides using a picture of Trosch from the school district’s website, no school resources were used in the making of the profile.¹⁰⁰ Justin gave a series of answers to survey questions that were

⁸⁷ *Id.* at 51.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Papandrea, *supra* note 60, at 1062.

⁹¹ *Id.*

⁹² *Doninger*, 527 F.3d at 53.

⁹³ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc).

⁹⁴ *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc).

⁹⁵ *Layshock*, 593 F.3d 249; *J.S.*, 593 F.3d 286.

⁹⁶ *Layshock*, 650 F.3d at 205; *J.S.*, 650 F.3d at 915.

⁹⁷ *Layshock*, 650 F.3d at 205; *J.S.*, 650 F.3d at 915.

⁹⁸ *Layshock*, 650 F.3d at 220; *J.S.*, 650 F.3d at 936.

⁹⁹ *Layshock*, 650 F.3d at 207.

¹⁰⁰ *Id.*

based on being “big” since Trosch is a large man.¹⁰¹ Examples of questions and answers include:

Birthday: too drunk to remember
 Are you a health freak: big steroid freak
 In the past month have you smoked: big blunt
 In the past month have you been on pills: big pills
 In the past month have you gone Skinny Dipping: big lake, not big dick
 In the past month have you Stolen Anything: big keg
 Ever been drunk: big number of times
 Ever been called a Tease: big whore
 Ever been Beaten up: big fag
 Ever Shoplifted: big bag of kmart
 Number of Drugs I have taken: big¹⁰²

Justin listed Trosch’s interests as “transgender, appreciators of alcoholic beverages” and listed “steroids international” as a club to which Trosch belonged.¹⁰³ Justin listed other students as “friends” on the MySpace page, which allowed them to view the profile.¹⁰⁴ As a result, most, if not all, of the student body found out about the profile.¹⁰⁵ Following Justin’s profile, three other students made profiles of Trosch that were more vulgar and offensive than Justin’s.¹⁰⁶

Trosch discovered all four profiles and believed the profiles were “degrading,’ ‘demeaning,’ ‘demoralizing,’ and ‘shocking.’”¹⁰⁷ He was also concerned about his reputation and contacted the local police, but he never filed criminal charges.¹⁰⁸ Justin made several in-school attempts to access the profile and show it to other students, which the school did not know about until their investigation the following week.¹⁰⁹ School officials were forced to limit school Internet access and cancel computer-programming classes.¹¹⁰

¹⁰¹ *Id.*

¹⁰² *Id.* at 208.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Layshock*, 650 F.3d at 208.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 209.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Erin Reeves, *The “Scope of a Student”: How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1144-45 (2008).

The school held a hearing and found Justin guilty of violating several provisions of the school discipline code.¹¹¹ He was suspended for ten days, placed in the Alternative Education Program for the remainder of the school year, banned from all extracurricular activities, and denied participation in his graduation ceremony.¹¹² Justin was the only one of the four profile creators to be punished.¹¹³

The Third Circuit reversed the school's actions to rule in favor of the student,¹¹⁴ primarily due to the district court's finding that there was not a "sufficient nexus between Justin's speech and a substantial disruption of the school environment."¹¹⁵ Since the school district did not challenge this finding on appeal, the school district did not argue that it could properly punish Justin under the *Tinker* standard.¹¹⁶ The school district argued that a "sufficient nexus exist[ed]" between Justin's creation and distribution of the vulgar and defamatory profile of Principal Trosch and the school district to permit the school district to regulate this conduct" because Justin used Trosch's picture from the district website, the speech was aimed at the school and the principal, Trosch accessed the website from a school computer, and it was reasonably foreseeable that the school district and principal would discover the website.¹¹⁷ The Third Circuit found, however, that the minimal use of school resources in connection with the website was not enough to create a nexus with the school.¹¹⁸

Since the school district did not dispute the *Tinker* finding, it also rested its argument on *Fraser*, which does not tolerate lewd and vulgar speech.¹¹⁹ The school district cited both *Wisniewski* and *Doninger* as support.¹²⁰ However, the court noted that *Fraser* does not extend to speech outside the school

¹¹¹ *Layshock*, 650 F.3d at 210.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 219.

¹¹⁵ *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).

¹¹⁶ *Layshock*, 650 F.3d at 214.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 214–215.

¹¹⁹ *Id.* at 216.

¹²⁰ *Id.* at 217.

doors.¹²¹ Further, the court distinguished both *Wisniewski* and *Doninger* by stating that in both cases the court found that there was a substantial disruption to the work and discipline of the school under *Tinker*.¹²² The court clearly noted that it did not necessarily support the finding of *Doninger*, but distinguished the case as a means of responding to the school's argument.¹²³ The court noted that while *Tinker* may not be limited to the school yard, "it would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."¹²⁴

Since the school district did not contest the district court's finding that there was no substantial disruption to the school environment,¹²⁵ the question remains as to what extent *Tinker* applies to off-campus speech. The concurrence addressed this issue head-on and concluded that *Tinker* should apply to off-campus speech.¹²⁶ The concurrence referred to two specific quotes in *Tinker* that support this statement. First, the concurrence cited *Tinker* to state that student speech "in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is" not protected by the First Amendment.¹²⁷ Secondly, the concurrence cited *Tinker* to say that "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" can be punished.¹²⁸

Recognizing that the Internet has no "place," the concurrence stated that trying to put physical boundaries on the First Amendment could only lead to serious problems with a school's ability to discipline.¹²⁹ Using modern technology, a substantial disruption can be caused by speech that takes place

¹²¹ *Id.* at 219 (citing *Morse*, 351 U.S. at 404).

¹²² *Layshock*, 650 F.3d at 219.

¹²³ *Id.* at 218.

¹²⁴ *Id.* at 216.

¹²⁵ *Id.* at 219 (Jordan, J., concurring).

¹²⁶ *Id.* at 220 (Jordan, J., concurring).

¹²⁷ *Id.* (citing *Tinker*, 393 U.S. at 513).

¹²⁸ *Layshock*, 650 F.3d at 220 (Jordan, J., concurring).

¹²⁹ *Id.* at 220-21 (Jordan, J., concurring).

off-grounds.¹³⁰ The concurrence compared this situation to falsely shouting “fire” in a theater.¹³¹ Whether the person is standing inside the theater or right outside shouting in, the resulting panic and the resulting punishment would be the same.¹³² That rationale applied in this context should also result in the school being able to punish disruptive speech that occurs both inside and outside the school.¹³³ School officials have the difficult job of maintaining an environment conducive to learning, and applying *Tinker* would preserve their authority.¹³⁴

The court filed its opinion for *J.S. v. Blue Mountain School District* on the same day as *Layshock*.¹³⁵ Using her parent’s home computer, J.S. and her friend K.L created a fake Myspace profile under the name of their principal, James McGonigle.¹³⁶ The profile contained McGonigle’s official photograph from the school district’s website.¹³⁷ The principal was given the name “M-Hoe” and was identified as a bisexual, Alabama middle school principal.¹³⁸ The profile contained “crude content and vulgar language” ranging from juvenile humor to personal attacks aimed at the principal and his family.¹³⁹ Under “M-Hoe’s” interests, the profile read “detention, being a tight ass, riding the fraintain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.”¹⁴⁰ Under the “about me” section, the profile read:

HELLO CHILDREN[,] yes. It’s your oh so wonderful, hairy, expressionless, sex addict, fagott . . . put on this world with a small dick PRINCIPAL[,] I have come to mspace so i can pervert the minds of other principal’s [sic] to be just like me. I know, I know, you’re all thrilled[,] Another reason I came to mspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren’t in my school[,] I

¹³⁰ *Id.* at 221.

¹³¹ *Id.*

¹³² *Id.* at 221–22 (Jordan, J., concurring).

¹³³ *Id.* at 222 (Jordan, J., concurring).

¹³⁴ *Id.*

¹³⁵ *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Layshock*, 650 F.3d at 215.

¹³⁶ *J.S.*, 650 F.3d at 915.

¹³⁷ *Id.* at 920.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN[.]¹⁴¹

J.S. said she intended the profile to be a joke.¹⁴² Initially the profile was open to anyone, but the following day J.S. made it private so that only “friends” could view it.¹⁴³ Since the school computers blocked Myspace, no student ever viewed the profile at school.¹⁴⁴ McGonigle learned about the profile from another student who eventually brought a copy of the website to McGonigle upon his request.¹⁴⁵

After J.S. admitted to creating the profile, McGonigle suspended J.S. and K.L. for ten days.¹⁴⁶ He decided not to press criminal charges.¹⁴⁷ The school district said the profile created “general rumblings” in the school.¹⁴⁸ Additionally, two teachers said that the profile was discussed during their class time, which created a disruption, and one of the teachers had to tell the students to stop talking several times and was forced to raise his voice.¹⁴⁹ However, the teacher admitted that it was common for students to talk in class.¹⁵⁰ Students approached another teacher to talk about the profile, but this teacher said class time was not disrupted.¹⁵¹ Counselor Frain also had to reschedule several student meetings because of the disruption the profile created.¹⁵²

The Third Circuit assumed, but did not decide, that *Tinker* applied in this case.¹⁵³ Applying *Tinker*, the court found that there was no substantial disruption to the school.¹⁵⁴ The court said that the profile was a joke and could only be viewed

¹⁴¹ *Id.* at 921. Debra Frain was one of the guidance counselors at the school and also McGonigle’s wife.

¹⁴² *J.S.*, 650 F.3d at 921.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 921.

¹⁴⁶ *Id.* at 922.

¹⁴⁷ *Id.*

¹⁴⁸ *J.S.*, 650 F.3d at 922.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 923.

¹⁵¹ *Id.*

¹⁵² *Id.* at 923

¹⁵³ *Id.* at 926.

¹⁵⁴ *J.S.*, 650 F.3d at 926.

by friends.¹⁵⁵ The profile did not identify who McGonigle was by name, school, or location.¹⁵⁶ Additionally, the profile was “so juvenile and nonsensical that no reasonable person could take its content seriously.”¹⁵⁷ The only reason that the profile was brought into school was because McGonigle requested it be brought to him.¹⁵⁸ Besides a few minutes of talking, no disruption occurred during class time.¹⁵⁹ The court found that if *Tinker’s* black armbands could not have reasonably led school authorities to forecast disruption then neither could J.S.’s profile.¹⁶⁰

Although the dissent in *J.S.* acknowledged the split with the Second Circuit, the majority denied its existence.¹⁶¹ The majority stated that the dissent overstated the Second Circuit’s holdings.¹⁶² The majority also dismissed the school district’s argument that under *Tinker*, the school could punish J.S. because the profile defamed McGonigle.¹⁶³ The school district based this argument on the language in *Tinker*, which states that school officials could stop conduct that would “inva[d]e the rights of others.”¹⁶⁴ The court found that there have been no decisions expanding this language to those who are not students.¹⁶⁵ Further, the court found that broadening this language would pose a danger to First Amendment protections.¹⁶⁶ The court also said J.S.’s speech could not be regulated under *Fraser* because *Fraser* does not apply to off-campus speech.¹⁶⁷

Once again, though, the question of whether *Tinker* applies to off-campus speech was left open. The concurrence in *J.S.*, however, declared that *Tinker* should not apply to off-campus speech and that the First Amendment protects

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 929.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *J.S.*, 650 F.3d at 929.

¹⁶¹ *Id.* at 931 n.8.

¹⁶² *Id.*

¹⁶³ *Id.* at 931 n.9.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *J.S.*, 650 F.3d at 931 n.9.

¹⁶⁷ *Id.* at 932.

students' off-campus speech to the same extent it protects that of other citizens.¹⁶⁸ Applying *Tinker* to off-campus speech would “create a precedent with ominous implications” and would allow schools to regulate student speech “no matter where it takes place, where it occurs or what subject matter it involves—so long as it causes a substantial disruption at school.”¹⁶⁹ Further, while J.S.'s speech may lack value, such speech gives students an outlet to vent their frustrations without resorting to violence.¹⁷⁰ Applying *Tinker* to off-campus speech also leaves open the possibility that adults in the community can be punished for what they say when it causes a substantial disruption to the school environment.¹⁷¹

Yet the concurrence also noted that deciding where speech takes place can be very complicated.¹⁷² Whether speech takes place on- or off-campus cannot “turn solely on where the speaker was sitting when the speech was originally uttered.”¹⁷³ Speech that is purposely sent to the school via e-mail could be punished, but speech that could foreseeably make its way onto campus should not be punished.¹⁷⁴ The First Amendment should be applied normally and as a result J.S.'s speech is protected.¹⁷⁵

The dissent in *J.S.* asserted that the *Tinker* standard was not properly applied to the facts of the case.¹⁷⁶ *Tinker* was not intended to protect J.S.'s type of speech.¹⁷⁷ Even though no substantial disruption occurred, the profile's potential to cause disruption was reasonably foreseeable, which is sufficient under *Tinker*.¹⁷⁸ The speech could have interfered with the educational environment by undermining McGonigle's

¹⁶⁸ *Id.* at 936 (Smith, J., concurring).

¹⁶⁹ *Id.* at 939 (Smith, J., concurring).

¹⁷⁰ *Id.* at 940 (Smith, J., concurring). See also Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 675 (1988) (describing a safety valve rationale for free speech where “dissidents will do less mischief if they are permitted to let off steam.”)

¹⁷¹ *J.S.*, 650 F.3d at 940 (Smith, J., concurring).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 941 (Fisher, J., dissenting).

¹⁷⁷ *J.S.*, 650 F.3d at 941 (Fisher, J., dissenting).

¹⁷⁸ *Id.*

authority and disrupting the educational progress¹⁷⁹ or by disrupting the operations of the classroom by not allowing McGonigle and Frain to do their jobs.¹⁸⁰ The educational process was undermined by accusing McGonigle of having sex in his office, hitting on students and parents, and being a sex addict, as well as the statement “I love children [and] sex (any kind).”¹⁸¹

The dissent also argued that J.S.’s speech could cause school officials to suffer psychological harm. McGonigle was “embarrassed, belittled, and possibly defamed” by J.S.’s speech.¹⁸² Not punishing this speech sends a message that the school is condoning the student’s actions.¹⁸³ Tolerating insubordinate speech is contrary to the democratic notions of education and the school’s role of inculcating values.¹⁸⁴ The school also needs the authority to punish this speech because of the speech’s potential impact on the community.¹⁸⁵ Parents and other teachers could question McGonigle’s character, especially with regards to his position as an educator responsible for constantly interacting with children.¹⁸⁶ Parents could also foreseeably be worried about having a man who engages in certain sexual behavior around their children.¹⁸⁷

Furthermore, allowing this type of speech to go unpunished could also lead teachers who are attacked to leave the school or their profession entirely.¹⁸⁸ Those who stay in the profession may be so affected by the incident that they become anxious and depressed and are not able to be effective in the classroom or to maintain relationships with their students.¹⁸⁹ McGonigle and Frain would thus be less effective as educators if they were unable to punish J.S.¹⁹⁰

Unlike the majority, the dissent acknowledged that the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 945 (Fisher, J., dissenting).

¹⁸² *Id.*

¹⁸³ *J.S.*, 650 F.3d at 945 (Fisher, J., dissenting).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 947 (Fisher, J., dissenting).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 946 (Fisher, J., dissenting).

¹⁸⁸ *Id.*

¹⁸⁹ *J.S.*, 650 F.3d at 946-47 (Fisher, J., dissenting).

¹⁹⁰ *Id.* at 947 (Fisher, J., dissenting).

J.S. decision caused a split with the Second Circuit.¹⁹¹ The Second Circuit extended *Tinker* to apply to “off-campus hostile and offensive student internet speech that is directed at school officials [and] results in a substantial disruption of the classroom environment.”¹⁹² The majority distinguished *Wisniewski* and *Doninger* because *J.S.*’s speech could not be taken seriously, and *J.S.* did not intend for the speech to reach campus.¹⁹³ However, the dissent stated that the court ignored the other harmful effects of the speech and the fact that it was reasonably foreseeable that the speech would reach campus.¹⁹⁴

IV. WHY *TINKER* SHOULD NOT APPLY TO OFF-CAMPUS INTERNET STUDENT SPEECH

Wisniewski, *Doninger*, *J.S.*, and *Layshock* make it apparent that *Tinker* does not adequately apply to off-campus speech. The *Tinker* standard was intended to regulate on-campus speech.¹⁹⁵ Solely due to the off-campus nature of the speech, courts have difficulty determining whether it was reasonably foreseeable that the speech would cause a substantial disruption to the school environment and whether the off-campus speech amounted to more than a mere apprehension of disturbance.¹⁹⁶ Applying *Tinker* to these cases results in decisions turning on specific facts and unpredictable outcomes.

Courts’ lack of experience with the practical school-based consequences of student Internet speech only exacerbates the problem of applying *Tinker*. *Tinker* was meant to punish speech that clearly interferes with the educational process.¹⁹⁷

¹⁹¹ *Id.*

¹⁹² *Id.* at 950 (Fisher, J., dissenting).

¹⁹³ *Id.* at 947 (Fisher, J., dissenting).

¹⁹⁴ *Id.* at 941 (Fisher, J., dissenting).

¹⁹⁵ See Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1177–78 (2009) (describing how Judge Fortas’s opinion in *Tinker* and the cases that have interpreted *Tinker* including *Fraser* and *Kuhlmeier* limited *Tinker* to on-campus speech).

¹⁹⁶ *First Amendment—Student Speech—Second Circuit Holds That Qualified Immunity Shields School Officials Who Discipline Students for Their Online Speech—Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *Cert. Denied*, No. 11, 125 HARV. L. REV. 811, 816 (2012).

¹⁹⁷ Papandrea, *supra* note 60, at 1093.

Therefore, when a teacher's ability to carry out a lesson is clearly impaired, the teacher can take measures to remedy the situation. However, disruptions that come from the Internet do not always have the same immediate impact that occurs during an on-campus incident. While there are plenty of instances where a teacher is no longer able to teach because of Internet speech,¹⁹⁸ many times the disruption caused by Internet speech is more properly classified as intangible or emotional harm, as opposed to the traditional physical or tangible disruption described in *Tinker*.¹⁹⁹ Intangible harm, like a general disrespect for a teacher's authority, is much more difficult to measure. The community's response to the speech can also be hard to measure. If the community takes the speech seriously, it can result in an atmosphere of contempt. It is this harm to the school environment that is left without a remedy under *Tinker*. The Second and Third Circuit's attempt to distinguish this intangible harm is what has complicated these decisions.

Further, extending the *Tinker* standard to Internet speech has the potential to expand a school's authority to punish students in unnecessary ways. The Internet is a forum for students to express their feelings on various topics and this may not always be conducive to the messages that the school seeks to promote. Students are entitled to criticize the educational process and those that contribute to it. If a school is allowed to punish mere "name calling," the essential aspects of First Amendment protections are lost.²⁰⁰

Finally, *Tinker* holds that any speech that is reasonably foreseeable to cause a substantial disruption may be punished.²⁰¹ This idea was expanded by the cases in the Second Circuit to justify punishing the student.²⁰² According to the Second Circuit, as long as it was reasonably foreseeable that the speech would come onto school grounds and cause a material

¹⁹⁸ See *infra* Part VI.

¹⁹⁹ Waldman, *supra* note 24, at 655.

²⁰⁰ James M. Patrick, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 886-87 (2010).

²⁰¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

²⁰² *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 37 (2d Cir. 2007).

disruption, it could be punished by the school.²⁰³ Yet with the Internet, few instances exist where it would not be reasonably foreseeable that the speech would reach school grounds. The speech could be brought onto campus by another student, searched for on the Internet by a curious school official, or overheard in gossip and rumors among students and teachers.²⁰⁴ There is virtually no such thing as private Internet speech. It should be assumed that what a student writes on the Internet could make its way onto school grounds. The Second and Third Circuits have relied on *Tinker* and come to varied conclusions because the courts have no other standard to rely on, not because it is the most applicable standard. This is clear from the debate between the concurring and dissenting judges in *Layshock* and *J.S.*, as well as the majority's clear avoidance of the issue in both of these cases. Therefore, courts need a better standard to distinguish the school from the home and a way to preserve a parent's right to govern speech that takes place within the home.

V. WHY DEFAMATION IN TORT IS NOT AN APPROPRIATE REMEDY

An ultimate decision not to bring criminal charges against the offending student is a recurring theme in the Second and Third Circuit cases.²⁰⁵ While the teacher or principal involved in each case debated pursuing charges, ultimately they realized that a lawsuit would not be a successful means of remedying the situation.²⁰⁶ The police even stated in one instance that the person hurt would be unlikely to prevail.²⁰⁷ Therefore, the only possible remedy left was a civil suit, most likely under the tort of defamation.²⁰⁸ While defamation is a possible solution, it is an extremely difficult case to prove and does not address the immediate harm

²⁰³ *Id.*

²⁰⁴ Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 235-36 (2009).

²⁰⁵ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (3d Cir. 2011) (en banc); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 922 (3d Cir. 2011) (en banc); *Wisniewski*, 494 F.3d at 36.

²⁰⁶ *Layshock*, 650 F.3d at 209; *J.S.*, 650 F.3d at 922; *Wisniewski*, 494 F.3d at 36.

²⁰⁷ *J.S.*, 650 F.3d at 922.

²⁰⁸ *Layshock*, 650 F.3d at 209.

suffered by the school itself.²⁰⁹

Yet those against extending *Tinker* to speech outside the school look to the availability of tort remedies, such as defamation and libel specifically.²¹⁰ Defamation has traditionally been governed by state law. While each state differs on its requirements for defamation, the basic elements of defamation, specifically libel, are that (1) the defendant must publish (2) material that sufficiently identifies the plaintiff (3) which injures the plaintiff's reputation (4) by false statements, purportedly of fact, or of opinion implying the existence of facts and (5) is unprivileged.²¹¹ A statement is considered defamatory if it falsely "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."²¹² To be published, it is only required that the defendant communicate information to a third party.²¹³ In most defamation cases, plaintiffs are allowed to recover general damages.²¹⁴ This means that a plaintiff can recover for the emotional trauma and harm suffered as a result of the reputational injury without any proof beyond the defamatory nature of the communication.²¹⁵

While defamation is a tort remedy, it overlaps with First Amendment law, complicating the remedy by placing constitutional constraints on what must be shown to recover. *New York Times v. Sullivan* implemented a higher standard of actual malice for defamation suits by public officials.²¹⁶ The case addressed a full-page advertisement in *The New York*

²⁰⁹ See Waldman, *supra* note 24, at 594 n.450. McGonigle brought a successful defamation lawsuit against J.S. Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. 153, 188 (2009) (citing Ken Rodriguez, *A Lesson in Cyber Ambushes: The Guilty Might Have to Pay Up*, SAN ANTONIO EXPRESS-NEWS, Oct. 4, 2006, at 3A). The defamation suit brought by Trosch against Layshock is still pending. Trosch v. Layshock, DIGITAL MEDIA LAW PROJECT (Mar. 23, 2010), <http://www.citmedialaw.org/threats/trosch-v-layshock>. *But see* Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal. Rptr. 494, 498 (Cal. Ct. App. 1990) (holding that the teacher did not have an action in defamation against the student).

²¹⁰ See Calvert, *supra* note 195, at 1178.

²¹¹ SHAPO, *supra* note 11.

²¹² RESTATEMENT (SECOND) OF TORTS § 559 (1977).

²¹³ SHAPO, *supra* note 11, at § 66.02.

²¹⁴ JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 21.02 (3d ed. 2007).

²¹⁵ *Id.*

²¹⁶ *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964).

Times that was signed by prominent religious, entertainment, and community leaders asking for donations to defend Martin Luther King, Jr. against perjury and to assist with the Civil Rights struggle.²¹⁷ The advertisement contained several false statements.²¹⁸ The Montgomery City Commissioner Sullivan, whose duty it was to oversee the police, filed a defamation action against *The New York Times* and four of the people who had signed their names to the advertisement.²¹⁹ The Supreme Court, finding that Alabama's defamation law was too lenient and fearing the chilling effect a lenient standard could have on free speech, established a new standard for defamation actions against public officials.²²⁰ The Court ultimately held that a public official may not recover damages for a defamatory statement relating to his or her official conduct unless it can be shown that the statement was made with "actual malice," that is, with "knowledge that it was false or with reckless disregard of whether it was false or not."²²¹ This heightened standard increased the difficulty of public officials' recovering in defamation suits.²²²

In *Gertz v. Robert Welch, Inc.*, the Court addressed the standard that private individuals must meet in order to show defamation by publishers or broadcasters.²²³ States must have defamation standards requiring some degree of fault, meaning a minimum of negligence.²²⁴ The Court also found that by finding at least negligence, the party could recover for "actual injury," which was expanded to include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."²²⁵ The Supreme Court has not addressed cases involving private individuals against private individuals, so the common law elements of defamation continue to control these types of cases.²²⁶

²¹⁷ *Id.* at 256..

²¹⁸ *Id.* at 257.

²¹⁹ *Id.* at 256.

²²⁰ *Id.* at 296.

²²¹ *Id.*

²²² *See id.* at 254.

²²³ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²²⁴ *Id.* at 347.

²²⁵ *Id.* at 350.

²²⁶ *Id.* at 345-46.

With more case law regulating the constitutional boundaries of defamation in tort, defamation is not an easy case for a teacher or principal to bring against a student. First, courts are split over whether school principals and teachers are public figures, which means that they must show actual malice to succeed in a defamation suit.²²⁷ For those school officials in jurisdictions with the heightened standard of proof, the case becomes even more difficult to bring. Additionally, forcing a school official to wait for a defamation suit to take place, does not allow the school to stop the disruption immediately.²²⁸ The student may have graduated by the time the suit is brought, and by that time the harm is already done. Even though the student may still be prosecuted, without immediate punishment, the school cannot set an example for other students that such behavior is unacceptable. This is important because *Tinker* and its progeny demonstrate that schools impose punishments to seek retribution and deter other students from repeating the same conduct. However, school punishments are only effective when they are understandable to students. Students do not appreciate the consequences or availability of a defamation suit in the way they would understand suspension or expulsion. In a defamation suit, the student's parents would have to pay the judgment and the student would remain in school. The consequences of a school punishment, rather than the monetary punishment imposed by a defamation suit, are much more palpable for the student and can serve as a more effective deterrent. Additionally, in a defamation suit, the person written about is the one who is able to seek a remedy. Yet when a student writes about a school official, the harm is not just to the victim, but also to the school and the school district. The authority of the school as a whole is undermined when students cannot be properly punished and monitored and when students do not trust in the

²²⁷ Courts in New York, Maryland, and Minnesota have ruled that principals are public figures. See *Jee v. N.Y. Post Co.*, 671 N.Y.S.2d 920 (N.Y. 1998); *Kapiloff v. Dunn*, 343 A.2d 251 (Md. Ct. Spec. App. 1975); *Johnson v. Robbinsdale Indep. Sch. Dist. No. 281*, 827 F. Supp. 1439 (D. Minn. 1993). Courts in Georgia, Illinois, Indiana, Ohio, and South Carolina have found that principals are not public figures. See *Ellerbee v. Mills*, 262 Ga. 516 (Ga. 1992); *Stevens v. Tillman*, 568 F. Supp. 289 (N.D. Ill. 1983); *Beeching v. Levee*, 764 N.E.2d 669 (Ind. Ct. App. 2002); *E. Canton Educ. Ass'n v. McIntosh*, 709 N.E.2d 468 (Ohio 1999); *Goodwin v. Kennedy*, 347 S.C. 30 (S.C. Ct. App. 2001).

²²⁸ Waldman, *supra* note 24, at 594 n.450.

authority of the people in charge. A defamation suit does not properly remedy this school-wide injury.

Further, bringing a lawsuit is very costly.²²⁹ Many school officials do not have the proper means or resources to initiate a suit or carry it to trial, especially on a teacher's or principal's average salary.²³⁰ Even if the school official could afford to carry out a suit and subsequently won, the student and his or her family may be judgment-proof.²³¹ Additionally, a real defamation suit requires individuals to "air their dirty laundry," involving an investigation into much of their private background. Most people would rather not bring a lawsuit than allow the public to pry into their personal lives. Finally, schools, and not courts, are in the best position to determine whether the speech had a harmful effect on the school environment. This is because schools understand the special environment of a school and the need to address certain issues that would not normally be problems in other settings.²³²

The availability of a tort remedy is not sufficient as a substitute for regulating student speech under the First Amendment. However, there is a way to apply constitutional remedies to the special school setting without fully removing a student's constitutional protections and without hindering a school's ability to regulate student behavior. As shown by *Tinker*, the First Amendment standard was modified in order to fit the needs of schools. Although that standard may no longer be applicable for cases of Internet speech, the idea behind the standard was to make more lenient constitutional

²²⁹ Jay Braiman, *New Case, an Old Problem, a Teacher's Perspective—The Constitutional Rights of Public School Students*, 74 BROOK. L. REV. 439, 474 (2009).

²³⁰ The median expected salary for a typical public school teacher in the United States is \$51,009. *Salary Wizard: Public School Teacher*, SALARY.COM (May 2013), <http://www1.salary.com/Public-School-Teacher-Salary.html>. The median expected salary for a typical school principal in the United States is \$94,278. *Salary Wizard: School Principal*, SALARY.COM (May 2013), <http://www1.salary.com/School-Principal-Salary.html>. Yet the average cost of defending a libel suit is \$500,000. *Defamation in the United States*, THE LEGAL PROJECT (2013), <http://www.legal-project.org/issues/us-libel-law>.

²³¹ See Eugene C. Bjorklun, *Are Teachers Public Officials For Defamation Purposes?*, 2 WEST'S EDUC. L. Q. 405 (1993) ("it might similarly be argued that innocent teachers will be unable to secure damages for defamation simply because they have pursued a profession that brings them into contact with children and young adults.")

²³² Todd D. Erb, *A Case For Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 282 (2008).

standards for students.²³³ The same concept has been applied to Fourth Amendment rights. In *New Jersey v. TLO*, the Court modified search and seizure protections so that school officials may inspect a student's belongings when they have a reasonable suspicion—a lower standard than probable cause—that a student has violated school rules.²³⁴ Essentially, there is a trend of modifying constitutional protections for students that should be an important consideration when balancing the rights of students and schools.

VI: APPLYING A MODIFIED DEFAMATION STANDARD TO FREE SPEECH

The best way to address concerns about defamation of school officials is not through defamation in tort, but rather through the application of a modified defamation standard to students' First Amendment rights. Essentially, the elements of defamation should be used as a model in order to determine what off-campus Internet speech a school can and cannot punish. The modified defamation standard would replace the *Tinker* constitutional standard in cases brought by students against schools for alleged violations of First Amendment rights. Therefore, if a school punishes a student and the student brings a claim against the school district that his or her First Amendment rights have been infringed, the court must rely on the following standard to determine if the school was within its rights to punish the student. This standard would also be used in schools' official policies regarding speech that is punishable. This would allow school rules to flow from court orders, truly connecting the two regulating institutions. Additionally, the following method would allow the school to react immediately, while constraining the school from punishing speech that does not rise to a defamatory level.

Using defamation as a model, the new standard proposes that a student should be punished if the student's statement about the school official (1) is defamatory, (2) is published by the student, (3) is related to a school official who works in the school itself, (4) is related to the official's capacity in his or her role as a school official, and (5) rises to the level of negligence.

²³³ LoMonte, *supra* note 12, at 1324.

²³⁴ *New Jersey v. TLO*, 469 U.S. 325 (1985).

There would be no requirement to prove monetary damages, nor would there be a requirement to prove that the statement resulted in actual reputational harm, just that it had the potential to do so.

First, the student's statement must be defamatory. A statement is defamatory if it "tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."²³⁵ A student's statement must rise to this level because, while the Supreme Court has recognized that students' First Amendment rights are not lost at the schoolhouse gate,²³⁶ schools have an obligation to preserve their educational missions. This balancing act means that schools do not have the authority to regulate student opinions and thoughts that are simply upsetting to the victim, especially when the speech takes place off school grounds. Internet speech, however, falls into a gray area because Internet speech written at home has no physical connection to the school grounds, but is also not restricted to the privacy of the student's home. Therefore, student Internet speech is neither subject to full First Amendment protections, nor subject to full school control.

While the Supreme Court has never overruled *Tinker*, through subsequent cases, the Court continues to distinguish *Tinker* and chip away at protections for student speech. *Fraser* carves out an exception for "vulgar and lewd" because it "undermine[s] the school's basic educational mission" and the school does not want other students exposed to that language.²³⁷ *Hazelwood* allows schools to remove school newspaper articles on divorce and pregnancy to make sure that "readers or listeners are not exposed to material that may be inappropriate for their level of maturity."²³⁸ Similarly, defamatory speech undermines a school's mission by imposing reputational harm on school officials, and the school has an interest in preventing other students from being exposed to this speech in order to prevent them from mimicking that behavior. The political speech in *Tinker* goes to the heart of

²³⁵ *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379 (1977).

²³⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²³⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

²³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

the First Amendment in a way that vulgar speech, school-sponsored speech, and reputational harm does not. Defamatory speech is easily aligned with prior Supreme Court decisions as an exception to the broad standard of *Tinker* and can be categorized as the type of student speech a school should be able to regulate.

The next element is that the student must publish the statement. To meet this standard, the student must have written the statement online and have it read by a third party. However, to make this more specific and applicable to the school setting, the third party must be a school official or another student at the school. Students and other school officials would have the greatest impact on whether a teacher's or principal's authority is undermined. Therefore, if just the student's parents read the online speech, this element would not be met. It must be read by a person who has the ability to spread the information to other individuals at the school.

The third element requires that the person being written about is a school official who works in the school. This would mainly apply to principals, teachers, deans, guidance counselors, and others in positions of authority within the school, but not to superintendents or members of the school board. If the official serves in multiple roles, then the court must evaluate which role was implicated when the statement was made.

The student's statement needs to be the proximate cause of the school official's authority being undermined. This includes being unable to perform job functions effectively or not receiving the same respect as before. While the court would have to evaluate the specific facts of the case, students generally do not directly interact with someone such as a superintendent or a member of the board and do not have the same educational relationship. Therefore, the person being written about must somehow be directly responsible for the student's education.

The fourth element requires that the statement relate to the official in his or her capacity as a school official. This means that if the statement is unrelated to the educational mission of schooling to the point that it does not question a school official's ability to educate, then the statement should not be regulated. However, this provision should be read

broadly because most defamatory statements will have some relation to officials in their educational capacity. Examples of statements related to officials in their educational capacity include statements that a teacher or principal makes sexual advances on students, engages in inappropriate sexual behavior, or is having intercourse with another school official. In evaluating this element, the court must evaluate the nature of the statement and its capacity to have a real effect on the school environment.

The fifth element asks whether the student's statement rises to the level of negligence—whether the student knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression in some material respect. Alternatively, the standard asks whether a reasonable student would believe the statement was true. A reasonable student does not have the same means or resources to research a topic or a statement, as would a publisher, broadcaster, or even an adult. Using an objective standard, if a student heard a statement and wrote it online with a reasonable belief that the statement had some merit to it, then the statement should not be able to be regulated by the school. Students do not have the same capacity to filter what they hear or to decipher what is true from what is not. Therefore, if the court determines that a student wrote the statement and in good faith thought the statement was true, that should be enough to overcome any punishment.

The fifth element requires that the standard be lowered from actual malice to negligence in all cases involving a student's defamatory writing about a school official. Although some courts consider school officials to be public officials in defamation cases, thus requiring them to prove actual malice, in instances involving students, the standard must be modified to allow schools to regulate student behavior. The actual malice standard is too high a burden for a school official to meet. Students can claim that they were unsure if the statement was false or not. Rumors can be spread and students can say that simply hearing the rumor made them unsure whether the statement was definitely false. Therefore, the standard must be lowered so that schools can punish speech that is deemed unacceptable while not completely infringing on students' First Amendment rights. In order to lower this

standard, however, it is the school's responsibility to make these standards clear to its students. The school should have an official policy that spells out the standard and describes the students' liability. Giving students notice will help ensure that students' procedural due process rights are protected.

Unlike defamation in tort, the school would not seek to recover damages. It is simply a standard for determining whether the school could punish the student's speech. Therefore, there is no requirement under this standard that requires the school or the victim to show that there was any form of monetary loss. Even further, schools or individuals are not required to show that any reputational harm was actually suffered. Proving that students no longer listen to a teacher or principal in the same way can be difficult to prove. Much of the harm a school official will suffer will be emotional or intangible. Requiring proof of reputational harm is too high of a burden to put on professionals, especially if they are not seeking to be compensated. Therefore, all that is required is that the statement be defamatory and thus have the potential for damaging the reputation of the individual about whom the student writes.

The policy behind modifying the defamation standard is the concern that the authority of the victim, as well as the school itself will be undermined. The injury is not just to the person who is being written about, but is a school-wide injury. The school's culture and environment suffers when a student can write defamatory comments about a school official and get away with it.²³⁹ When a student cannot be punished, the school's lack of action sets an example that the student is more powerful than the principal or teacher.²⁴⁰ As a result, school officials will not be able to carry out their educational duties effectively, whether this means controlling a classroom or enforcing disciplinary measures.²⁴¹ The school could be disrupted to the point where the school and its school officials are unable to function. For example, the teacher in *Wisniewski* "became distressed and had to stop teaching the student's class."²⁴² In a Pennsylvania case, a teacher who was written

²³⁹ Waldman, *supra* note 24, at 594.

²⁴⁰ *Id.* at 648.

²⁴¹ *Id.* at 652.

²⁴² *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 947 (3d Cir. 2011) (en banc) (citing

about on the Internet by a student “suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight . . . a general sense of loss of well being[,] . . . short-term memory loss[,] . . . an inability to go out of the house and mingle with crowds[,] . . . headaches[,] and was required to take anti-anxiety/anti-depressant medication.”²⁴³ In a Seventh Circuit case, a teacher subjected to anti-homosexual speech suffered a “nervous breakdown that ultimately resulted in his termination.”²⁴⁴ These examples demonstrate the power that Internet student speech can have, the disruption it can cause, and why schools need a workable standard by which to punish this speech.

Preventing a school from punishing the student also undermines the democratic notions of schooling, which includes the inculcation of societal values and morals.²⁴⁵ Schools are given the great responsibility of teaching students cultural norms and the proper way to behave. The Court has modified protections for students in order to serve the compelling governmental interest of teaching students, and this cannot stop just because the speech has exited the school door. Public speech on the Internet is no more private than shouting a statement into a crowded room. Therefore, there must be a way to control what takes place on the Internet. There must be a balance between both student and school interests; otherwise, Internet speech has the potential to damage the fundamental educational mission itself.

VII. PROPOSED STANDARD APPLICATION

While the outcomes of *Wisniewski*, *Doninger*, *Layshock*, and *J.S.* vary, application of the proposed standard will create logical and consistent outcomes. The proposed standard applies to defamatory Internet speech, which is the prevailing type of speech seen in these cases. This standard does not extend to on-campus speech, which would still be governed by *Tinker*. For example, in *Wisniewski*, the plaintiff created an “IM icon” which showed a drawing of a pistol firing a bullet at his

Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35–36 (2d Cir. 2007).

²⁴³ *Id.* (quoting *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852 (Pa. 2002)).

²⁴⁴ *Id.* (quoting *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950 (7th Cir. 2002)).

²⁴⁵ Waldman, *supra* note 24, at 653.

English teacher's head, with dots representing splattered blood.²⁴⁶ This speech could not be classified as defamatory. If the claim is found to have merit, the speech is closer to a "true threat" and therefore, would not be protected under the First Amendment despite *Tinker's* protections. However, in this case, the speech icon was found not to be indicative of a true threat.²⁴⁷ Therefore, under the proposed standard the school would not be able to punish the plaintiff.

If the Supreme Court wanted to regulate off-campus threats that were intended as jokes, the Supreme Court could extend *Tinker* to apply, since a threat is more likely to have a material and substantial disruption on the school. This type of threat could even be justified under the *Morse* rationale because threatening speech could pose a substantial danger to the school even when it does not take place directly on school grounds. However, this would require extending *Morse* to more than school-sponsored activities. Further, the issue of true threats is outside the scope of this Note and is not the typical subject matter of Internet student speech.

In *Doninger*, the plaintiff called the school administrators "douchebags in central office" and encouraged classmates to "piss [Paula Schwartz] off more" by sending phone calls and e-mails asking for Jamfest to continue as scheduled.²⁴⁸ Applying the proposed standard, it is clear that the statement was published on the Internet and related to two school officials, a principal and a superintendent. The speech regarding Principal Niehoff would qualify as a statement regarding a school official that works in the school. However, the statements made about Schwartz would fail to meet the third prong of this standard because she is a superintendent who does not directly work in the school. Therefore, there is less of a concern that her ability to work in the school environment would be undermined. Applying the fourth element to Niehoff, most of the statements made were about Schwartz.²⁴⁹ Doninger asked that the phone calls and e-mails be sent to Schwartz specifically.²⁵⁰ Schwartz was also called a

²⁴⁶ *Wisniewski*, 494 F.3d at 36.

²⁴⁷ *Id.*

²⁴⁸ *Doninger v. Niehoff*, 527 F.3d 41, 44 (2d Cir. 2008).

²⁴⁹ *Id.* at 45.

²⁵⁰ *Id.*

“dirty whore” by someone responding to the blog.²⁵¹ Further, the statement “douchebags in central office”²⁵² most likely relates to Schwartz as well, since the principal would not be located in the central office.

Even if Schwartz did qualify under this prong, it is unlikely that this statement would rise to the level of defamatory speech. While calling the administrators “douchebags” can be viewed as disrespectful and would likely not be tolerated on school grounds, it does not rise to a level that exposes the administrators to public contempt or ridicule. No reasonable person would think that this phrase would destroy administrators’ reputation, as it does not accuse them of participating in unacceptable conduct or undermine their ability to do their jobs. Therefore, under the proposed standard, Doninger would not have been punished.

The Second Circuit case holdings under the proposed standard starkly contrast with the recent outcomes in the Third Circuit cases. In *Layshock*, the plaintiff accused the principal of using steroids and drugs, drinking, shoplifting, and being a transgender individual.²⁵³ Under the proposed standard, this statement was published and related to a school official in his role as such. These statements can easily be argued to be defamatory. They accuse the principal of committing illegal acts and expose his reputation as a role model for children to ridicule. These statements could change the opinion of parents, students, and other school workers with regards to how they view the principal. The statements also reflect poorly on the character and reputation of the principal. Although being transgendered is becoming more acceptable in society, many people still do not condone this lifestyle.²⁵⁴ Further, although drinking is a legal activity for adults, the perception that the principal is a heavy drinker, when he works so closely with children, could expose him to

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 208 (3d Cir. 2011) (en banc).

²⁵⁴ *See, e.g.*, Jesse McKinley, *Ruling Extends Sex-Discrimination Protection to Transgender Woman Denied Federal Job*, N.Y. TIMES (Apr. 24, 2012), http://www.nytimes.com/2012/04/25/us/sex-discrimination-protection-extended-to-transgender-woman.html?_r=0 (describing employment discrimination against a transgendered individual that resulted in a favorable ruling for the individual by the EEOC).

public ridicule and contempt. Finally, this statement could rise to the level of negligence since the student admitted to knowing that the statements were false. A reasonable student would know that these statements would create a false impression about the principal, even if they were intended as a joke. Therefore, in *Layshock*, the school could punish the student under the proposed standard.

In *J.S.*, the language used by the student was even more disturbing. The plaintiff accused the principal of being a sex addict and loving children and sex.²⁵⁵ The statement painted the principal to be a pedophile.²⁵⁶ Once again, the statement was written online and related to a school official in his official capacity. Further, the statement could be viewed as defamatory. As a principal, McGonigle's role was to protect the welfare of students. Accusing him of loving sex and children certainly questions his ability to serve as an effective principal and to be around children in the first place. Hearing this statement could cause many parents to be concerned about him being in an environment with their children, and his reputation is clearly undermined if he is accused of having sex with children. Additionally, the speech rises to the level of negligence because the student admitted to writing a false statement, and a reasonable student would know that this would cause others to think of McGonigle in a false light. Therefore, under the proposed standard, the school could punish the student.

Under this proposed standard, the Second Circuit cases would be decided in favor of the students instead of the schools and the Third Circuit cases would be decided in favor of the schools. Yet the four decisions would make sense as a whole since they would be based on the same definitive standard. If the statement were defamatory and met the other prongs of the proposed standard, the school could punish the student. Under the *Tinker* standard, the judges themselves were confused as to whether they were really applying *Tinker*, so the proposed standard clears up any inconsistencies. The proposed standard also punishes defamatory speech, which is considered unprotected speech, while protecting students' rights to express their opinions. Both courts tried to achieve

²⁵⁵ *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 921 (3d Cir. 2011) (en banc).

²⁵⁶ *See id.*

this balance, but failed. This proposed standard accomplishes their goal.

VIII. CONCLUSION

The Supreme Court has always addressed student free speech cases as a balance between First Amendment protections and the democratic values of teaching and schooling. *Tinker* is the classic example of modifying First Amendment protections for students in order to address both interests. The standard proposed by this Note follows suit. Defamatory speech is harmful to both school officials and the school itself. This Note's proposed standard would allow schools to more easily address the needs of the special school environment and to punish defamatory speech. This standard is more appropriate than *Tinker* when addressing the Second and Third Circuit split. The school does not have to deal with the difficult task of determining exactly which off-campus speech can be considered a substantial disruption. Instead, the school can use a definitive standard of what is defamatory speech and what reasonable students should know about the effects of their speech. Therefore, using the common law elements of defamation to form the basis of a new First Amendment provision is the most appropriate way to address the issue of punishing off-campus Internet student speech.

*Reesa Miles**

* J.D. Candidate 2013, St. John's University School of Law; M.A. 2010, Columbia University Teachers College; B.A. 2009, Boston University. Ms. Miles would like to thank Professor Rosemary Salomone for all of her advice and guidance in writing this Note.