

5-1-2011

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Recommended Citation

Allison Belnap, *Tinker at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. Rev. 501 (2011).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2011/iss2/5>

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Tinker at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech

I. INTRODUCTION

Cyberbullying is essentially speech that is disseminated via electronic or digital means and is intended to embarrass, hurt, or harass another person.¹ The most common conduits of cyberbullying include text messages, instant messages, email messages, social networking sites such as Facebook or MySpace, and microblogging sites such as Twitter. Cyberbullying is considered more pernicious than traditional bullying because it allows “cruel or sadistic behavior to be amplified and publicized, not just on the campus [of a school], but throughout the world.”² This amplification of the bullying behavior may contribute to the “extreme emotional reaction”³ manifest when a victim of cyberbullying takes his or her own life. Legislators, educators, parents, scholars, and students have responded to the deaths of teenagers Ryan Hulligan,⁴ Megan Meier,⁵

1. See, e.g., Nat'l Crime Prevention Council, CYBERBULLYING FAQ FOR TEENS, <http://www.npcr.org/topics/cyberbullying/cyberbullying-faq-for-teens> (last visited Feb. 8, 2011); St. Peter's School, TERMS YOU SHOULD KNOW, http://www.stpeterprince.org/terms_you_should_know.htm (last visited Feb. 8, 2011).

2. Jeff Lieberman, *Rutgers Student's Suicide Prompts Privacy, Cyber-Bullying Debates* (PBS NewsHour broadcast Oct. 1, 2010), transcript available at http://www.pbs.org/newshour/bb/social_issues/july-dec10/rutgers1_10-01.html.

3. *Id.*

4. Thirteen-year-old Ryan took his own life in 2003 after suffering the humiliation of a classmate fabricating an online relationship with him and then telling him it was all a joke in front of a group of friends. After his death, Ryan's parents discovered an alarming number of instant messages and emails sent before Ryan's suicide that were harassing and degrading to their son. See Tiffani N. Garlic, *Dad Uses Son's Suicide to Show Dangers of Cyber-Bullying While Speaking at Somerset County School*, NJ.COM (Oct. 17, 2010, 6:02 AM), http://www.nj.com/news/local/index.ssf/2010/10/dad_uses_sons_suicide_to_show.html; RYAN'S STORY, <http://www.ryanpatrickhalligan.org/index.htm> (last visited Mar. 2, 2011).

5. Megan's mother found Megan's body in a closet after Megan hung herself before her thirteenth birthday. Megan's breaking point came when a sixteen-year old online “friend” started sending steady, cruel messages to Megan via email and MySpace. Megan died before anyone realized the boy was not real; a neighborhood parent had allegedly created the fictitious profile and sent the offensive messages herself. *Parents: Cyber Bullying Led to Teen's Suicide*, ABC NEWS (Nov. 19, 2007), <http://abcnews.go.com/GMA/story?id=>

Phoebe Prince,⁶ Tyler Clementi,⁷ and others⁸ with a vigorous debate over what role school entities can and should play in protecting students by prohibiting this type of speech.⁹

A main focus of the debate is whether a public school entity that regulates cyberbullying infringes on a student's First Amendment right to free speech. Under current and proposed statutory schemes,¹⁰ speech that originates and often takes place entirely off-campus, without the use of school computers or other school property and while the student is engaged in activities or events that are in no way related to the school or to any school purpose, could be regulated. Thus the question is whether the prevention of

3882520&page=1.

6. "[S]mart and charming" Phoebe, an Irish immigrant to Massachusetts, took her own life at fifteen and just days before she was to attend her school's winter cotillion. She had endured bullying at school that soon spilled over into "taunting text messages and harassing postings on Facebook." Kathy McCabe, *Teen's Suicide Prompts a Look at Bullying*, BOSTON.COM (Jan. 24, 2010), http://www.boston.com/news/education/k_12/articles/2010/01/24/teens_suicide_prompts_a_look_at_bullying/; see also Yunji De Nies et al., *Mean Girls: Cyberbullying Blamed for Teen Suicides*, ABC NEWS (Jan. 28, 2010), <http://abcnews.go.com/GMA/Parenting/girls-teen-suicide-calls-attention-cyberbullying/story?id=9685026>.

7. Tyler, a freshman musician at Rutgers University, died when he jumped off the George Washington Bridge in New York after his roommate and a classmate broadcast live webcam footage of Tyler in a sexual encounter with another man over the Internet. Lieberman, *supra* note 2.

8. Rachael Neblett suffered cyberbullying at the hand of an anonymous stalker and took her life in 2006. Kelly Foreman, *Cyber Crimes Division Created to Fight Internet Crimes*, KY. LAW ENFORCEMENT, Winter 2008, at 18, available at http://doct.jus.state.ky.us/Magazines/Issue%2028/Cyber%20Crime_KLE%20Winter08.pdf.

Fifteen-year-old Jeffrey Johnston took his own life after suffering for years as a victim of cyberbullying. Wayne K. Roustan, *Boca Raton Conference Targets Cyberbullying Threat*, SUNSENTINEL.COM (Oct. 23, 2010), http://articles.sun-sentinel.com/2010-10-23/news/fl-cyberbullying-boca-20101023_1_cyberbullying-phoebe-prince-safe-schools-institute. Several other teen suicides have also been linked to cyberbullying.

9. See, e.g., Gil Kaufman, *Students Speak out Against 'Senseless' Cyberbullying*, MTV NEWS (Oct 14, 2010, 6:52 AM), <http://www.mtv.com/news/articles/1649958/20101013/story.jhtml>; First Amendment Center, *Cyber Bullying & Public Schools Online Symposium*, http://www.firstamendmentcenter.org/collection.aspx?item=cyberbullying_public_schools; Laurie L. Levenson, *Cyberbullying and a Student's Suicide: What Isn't Known About Suicides*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 30, 2010, 9:43 PM), <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/what-isnt-known-about-suicides>.

10. See, e.g., ARK. CODE ANN. § 6-18-514 (2007); OR. REV. STAT. § 339.356 (2009); 24 PA. CONS. STAT. § 13-1303.1-A (2008); H.R. 2569, MASS. GEN. LAWS ch. 71, §§ 37H-37O (2010); 2010 Gen. Assemb., Reg. Sess. (Pa. 2010) 1303.1-A (a)(1)(i).

cyberbullying is so compelling an interest as to justify the ability of public school entities to regulate such a broad scope of student speech.

This debate sets states' clear interests in protecting children and maintaining a safe and educationally conducive environment at school and at school-sponsored activities against the individual student's constitutionally guaranteed right to freedom of speech. Though there is a compelling need to protect children from the insidious harm inflicted through cyberbullying, many statutes and local school policies permitting broad limitations on individual speech are not the least restrictive means through which such an interest is met. Unfortunately, considering the strong policy arguments on both sides of this issue obfuscates rather than clarifies where the appropriate balance lies. Children are often the weakest and most easily victimized members of society. Consequently, they not only deserve but often desperately need protection. Additionally, the effects of cyberbullying can be pernicious and particularly destructive to children and youth in their early adolescence.¹¹ However, First Amendment scholarship and jurisprudence make it clear that freedom of speech is a most decidedly cherished and vigorously protected constitutional right.

This Comment does not propose that cyberbullying should be tolerated without any consequences whatsoever. It recognizes that much of what is categorized as cyberbullying is a distasteful and potentially damaging form of speech. However, in order to appropriately defend the individual's right to free speech, the regulation by public-school entities of off-campus student speech must be narrowly tailored to prevent a limited class of speech that is either already under the school's authority to regulate or that rises to the level of a "true threat."¹² Thus, schools would maintain the power to regulate speech through which the speaker means "to

11. Cyberbullying has been shown to be correlated with lower self-esteem and increased tendencies towards suicide. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Self-Esteem*, CYBERBULLYING RESEARCH CTR. (2010), http://www.cyberbullying.us/cyberbullying_and_self_esteem_research_fact_sheet.pdf (last visited Feb. 8, 2011); Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CTR. (2010), http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf (last visited Feb. 8, 2011).

12. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹³ The alternative—allowing a broad infringement of students’ First Amendment rights by public-school entities in misguided and sometimes inefficient efforts to control cyberbullying—sweeps in too much speech that should be protected. Such actions cannot be upheld as permissible under the Constitution.

Therefore, school administrators must exercise care in how far they are willing to go to regulate student speech. Regulation of student speech that (1) originates and concludes wholly outside the physical boundaries of the school campus, (2) is neither created nor propagated at an event that is not reasonably discernible as a school function, (3) is facilitated with devices and services that are not school owned, and (4) does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”¹⁴ is most certainly a violation of the First Amendment. Such an infringement of a constitutionally guaranteed right would surely subject school administrators to liability under 42 U.S.C. § 1983. However, the law governing school entities’ regulation of student speech that falls short in one of these four elements is an inconsistent legal labyrinth of state and federal decisions.

Recent judicial events place the concerns in this nascent area of law in stark relief and present the opportunity to carefully evaluate where the law currently stands and where it should go from here. Courts have not extensively adjudicated disputes centered on the question of whether and to what extent school entities may regulate student-on-student off-campus speech that meets the definition of cyberbullying. However, in cases where school entities have regulated student-on-teacher or student-on-administrator cyberbullying,¹⁵ there is not only a split amongst various courts, but the United States Court of Appeals for the Third Circuit recently

13. *Id.*

14. *Burnside v. Byars*, 363 F.2d 744, 749 (1966), *cited in* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

15. Student-on-teacher or student-on-administrator cyberbullying includes instances of student speech where students have emailed, posted, or texted lewd, harassing, violent, or threatening material directed at a teacher or administrator.

itself split when it published two opposite holdings on cases with almost identical fact patterns.¹⁶

This Comment includes an analysis of the incongruous and inconclusive case law on point, an examination of the two cases that literally split the Third Circuit, and a recommendation that courts employ the “true threat” doctrine in the cyberbullying debate. Thus, schools may permissibly regulate true threats to students while preserving acceptable protection for individual students’ First Amendment rights.

II. JURISPRUDENCE: REGULATION OF STUDENT SPEECH BY PUBLIC SCHOOL ENTITIES

The case law related to regulation of off-campus student speech is extremely inconsistent. An attempt to contextualize the current jurisprudential landscape requires first, a review of the precedent under which a public school may constitutionally regulate student speech generally and second, a case-by-case analysis of the discordant decisions arising in state and federal courts when public school entities attempted to regulate off-campus student speech specifically.

A. Foundational Principles

Three cases decided by the United States Supreme Court set the basic guidelines within which public schools can permissibly regulate student speech: *Tinker v. Des Moines Independent Community School District*,¹⁷ *Bethel School District v. Fraser*,¹⁸ and *Hazelwood School District v. Kuhlmeier*.¹⁹ Generally, *Tinker* provides strong protection for student speech unless such speech causes a material and substantial interference with the appropriate discipline and operation of the school or infringes on the rights of another.²⁰ *Fraser* serves as an exception to *Tinker*’s general rule when the school can show that

16. See *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *vacated, reh’g granted* No. 08-438, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *vacated, reh’g granted* No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

17. 393 U.S. 503.

18. 478 U.S. 675 (1986).

19. 484 U.S. 260 (1988).

20. 393 U.S. at 512–13.

the student's speech was offensive, lewd, or indecent.²¹ And *Hazelwood* avers that a school may regulate student speech that bears the imprimatur of the school so long as such regulation is shown to be reasonably related to the school's pedagogical concerns.²² As the factual circumstances of these cases have bearing on the discussion at hand, a brief summary of each follows.

1. Tinker's material and substantial interference

In *Tinker*, several junior high and high school students planned to wear black armbands to school as part of a protest against the Vietnam War.²³ Administrators at the students' respective schools discovered the planned protest and adopted a policy prohibiting the wearing of armbands at school.²⁴ The students knew of the policy, but wore the armbands to school anyway.²⁵ They were subsequently sent home and suspended from school unless they returned without the armbands.²⁶ The *Tinker* Court held that this was an improper violation of the students' First Amendment rights.²⁷ The Court reasoned that unless the students' expressive conduct "materially and substantially interfer[ed] with the requirements of appropriate discipline in the operation of the school' [or] . . . collid[ed] with the rights of others," it could not be regulated without offending the First Amendment.²⁸

Additionally, the *Tinker* opinion included other guidance often cited by lower courts examining this issue and thus applicable to the contemporary debate. First, the Court stated that for fifty years it had held that neither "students [n]or teachers shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."²⁹ Additionally, the Court emphasized that in this case there

21. 478 U.S. at 685.

22. 484 U.S. at 272-73.

23. 393 U.S. at 504.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 513-14.

28. *Id.* at 512-13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

29. *Id.* at 506 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923)).

were not any “threats or acts of violence on school premises.”³⁰ Further, the Court clarified that “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not sufficient reason for a public-school entity to infringe on an individual’s free-speech rights.³¹ Importantly, the Court noted that “[s]chool officials do not possess *absolute authority* over their students” and that students, whether in or out of school, are “‘persons’ under our Constitution” and are “‘possessed of fundamental rights.’”³² Finally, there is a small piece of the opinion that subsequent courts have used to support the broad application of *Tinker* to speech that is found to have occurred off-campus:

[C]onduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.³³

2. Fraser’s offensive, lewd, and indecent speech

Conversely, in *Fraser*,³⁴ the Court upheld a school administrator’s decision to suspend a student who used “an elaborate, graphic, and explicit sexual metaphor” in a speech delivered at a school assembly.³⁵ Though there was not necessarily a material and substantial interference with school operations, the *Fraser* court held that the school acted “within its permissible authority in imposing sanctions . . . in response to [the student’s] offensively lewd and indecent speech.”³⁶ In a later case, the Court outlined the two main principles arising from *Fraser*:³⁷ first, that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”³⁸ and second, that the material and substantial-interference

30. *Id.* at 508.

31. *Id.* at 509.

32. *Id.* at 511 (emphasis added).

33. *Id.* at 513 (emphasis added).

34. 478 U.S. 675 (1986).

35. *Id.* at 677–78.

36. *Id.* at 685.

37. *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

38. *Fraser*, 478 U.S. at 682, *quoted in Morse*, 551 U.S. at 396–97.

analysis under *Tinker* is “not absolute.”³⁹ *Fraser* stands as an example of a fact-driven case in which the Court was willing to make an exception to the *Tinker* standard. Providing an exception to a generally speech-protective rule is not an uncommon stance for the Court where lewd, graphic, and sexual speech is at issue.⁴⁰ It seems even less of a surprise where such speech was asserted in a setting where minor students were essentially a captive audience.⁴¹

3. Hazelwood’s *imprimatur* and reasonable pedagogical concerns

Additionally, in *Hazelwood*,⁴² the Court upheld a school’s regulation of student speech when it held that the principal’s removal of two pages from an edition of the school paper was not an infringement of the students’ First Amendment rights.⁴³ The excised pages included two articles that detailed student experiences with divorce and teen pregnancy but also contained other articles that were not offensive.⁴⁴ The principal, upon reading the articles in question, believed first, that the topics were inappropriate for some of the students at the school, and second, that there was a risk some of the students involved in the pregnancy article could be identified from the context of the articles, and that such identification—even if unintended—would be a violation of the students’ privacy rights.⁴⁵ The Court held that the principal was justified in “exercising editorial control over the style and content of student speech” in the

39. *Morse*, 551 U.S. at 394.

40. As early as *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court demonstrated a willingness to regulate speech that is lewd, obscene, and utterly without redeeming social import or value, particularly where the state interest in preserving morality is more compelling than allowing freedom of this type of speech. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Redrup v. New York*, 386 U.S. 767 (1967) (setting the stage for a period of time in which the U.S. Supreme Court would review and summarily reverse whenever five justices voted using their own individual tests); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass.*, 383 U.S. 413, 418 (1966) (holding that obscenity was speech that was “utterly without redeeming social value”); *Roth v. United States*, 354 U.S. 476 (1957).

41. Courts have indicated a willingness to allow more regulation of lewd and offensive speech when the audience consists of minors who are expected or required to attend the event at which the speech is offered. See *Fraser*, 478 U.S. at 684–85; *Morse*, 551 U.S. 393.

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

43. *Id.* at 272–73.

44. *Id.* at 263, 264 n.1.

45. *Id.* at 263.

paper because the newspaper was not a public forum and because school entities have authority to regulate speech that occurs “in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁴⁶

Tinker, *Fraser*, and *Hazelwood* form the jurisprudential foundations for, and the basic limitations on, how and when public-school entities may constitutionally regulate students’ speech.⁴⁷ Despite the seemingly strong protection afforded student speech under *Tinker* and the relatively limited exceptions in *Fraser* and *Hazelwood*, a rash of cases examining student-on-teacher and/or student-on-administrator cyberbullying have resulted in holdings that are surprisingly inconsistent when compared with these three foundational cases and are irreconcilable when compared with each other. The resulting jurisprudential morass includes narrow constructions of these foundational cases as well as expansive applications where almost any student speech could be permissibly regulated by a public school entity. Indeed, courts have willingly extended *Tinker*⁴⁸ not to protect speech but to *allow regulation* of speech that happens not only outside the classroom but wholly beyond the physical borders of the school campus and often within the confines of students’ homes.⁴⁹ Such expansive application enlarges the *Tinker* standard beyond a reasonable interpretation and places courts on the verge of granting schools unprecedented authority to regulate speech that, though unpleasant, falls squarely within the protection of the First Amendment.

46. *Id.* at 270, 273.

47. *Morse v. Frederick*, 551 U.S. 393 (2007), could be included here as well because it upheld a principal’s regulation of off-campus student speech offered at a school-sanctioned event that was contrary to the anti-drug policy of the school. This case is discussed later in this Comment, *see infra* Part II.B.1, because in this analysis, *Morse*’s holding regarding whether the speech was offered on- or off-campus seems more pertinent than the holding that speech advocating the use of illegal drugs may be regulated outside of the *Tinker* analysis.

48. Several such cases are discussed throughout this Comment.

49. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (indicating that “conduct by the student, in class *or out of it*, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech” but not explicitly authorizing regulation of speech that is wholly off-campus (emphasis added)).

B. Reaching Beyond School Boundaries: On-campus vs. Off-campus Speech

Schools may permissibly regulate speech that meets *Tinker*'s material and substantial interference standard or *Fraser*'s lewd, offensive, and indecent standard when such speech occurs on-campus, meaning within the physical boundaries of the school grounds, or at official school events such as assemblies, field trips, athletic contests, and so on. The *Tinker* standard evolved under facts occurring on a school campus.⁵⁰ *Fraser*'s lewd speech was given at an official school event.⁵¹ Additionally, under *Hazelwood*, schools may permissibly regulate expressive speech that reasonably bears the imprimatur of the school, such as newspapers, drama productions, concerts, recitals, and the like.⁵² However, regulation of speech occurring via the Internet is an entirely new playing field—one in which students can express themselves from almost any location in the world and can do so anonymously if they so choose. Cyberbullying can originate at home, in a park, from an office, or on school property. Therefore, the first question that state and federal courts have to resolve in examining this issue is “For purposes of regulation, is the student speech happening ‘on-campus’ or ‘off-campus?’”⁵³ Generally, if the speech occurs off-campus, the school's authority to regulate it is significantly diminished unless the speech is otherwise unprotected.⁵⁴

1. Explicitly on-campus speech: on school property or at school-sanctioned events

The clearest answer to the question of whether speech occurs on- or off-campus is that speech transpires on-campus if the student speaks, offers, or creates it on school property. In *Klein v. Smith*, a

50. *Id.* at 504.

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

52. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988).

53. Indeed, courts have acknowledged this distinction as the “threshold issue” when determining whether the school-entity regulation was constitutional or not. *See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (Pa. 2002).

54. *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1372–73 (S.D. Fla. 2010) (citing *Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976) (holding that a school entity could regulate “fighting words” even when they were offered off-campus and outside of any school-sanctioned activity because they are unprotected speech)).

student saw a teacher in a restaurant parking lot and made an offensive gesture by extending his middle finger.⁵⁵ Pursuant to a school policy prohibiting “vulgar or extremely inappropriate language or conduct directed to a staff member,” the school suspended the student for ten days.⁵⁶ The U.S. district court in Maine held that the connection between an offensive physical gesture made by a student to a teacher and the “proper and orderly operation of the school’s activities [was] . . . far too attenuated” to justify impinging on the student’s First Amendment rights.⁵⁷ The gesture was made off of school premises, away from any school facilities, when neither the student nor the teacher were “engaged in any school activity or associated in any way with school premises.”⁵⁸ Courts have similarly held that written student speech—such as an underground newspaper—that is created, offered, and propagated away from the school property cannot be regulated by the school without offense to the First Amendment.⁵⁹

However, schools may constitutionally regulate student speech that technically happens off school property but is related to a school-sanctioned activity or event. In *Morse v. Frederick*, the U.S. Supreme Court held there was sufficient evidence to implicate the unique concerns of the school entity when a student held up a banner that read “BONG HiTS 4 JESUS” while observing the Olympic torch relay from a position across the street from the school.⁶⁰ Though the student was away from school property, the Court reasoned that (1) the event was during school hours, (2) it was approved by the administration as a class trip, (3) the school rules provided that students were subject to student conduct rules while at the approved trip, (4) the student was surrounded by other

55. 635 F. Supp. 1440, 1440–41 (D. Me. 1986).

56. *Id.* at 1441.

57. *Id.* at 1441–42 (quoting the school policy).

58. *Id.* at 1441.

59. *See* *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (holding that a school had impermissibly punished the speech of students who created and sold an offensive publication off campus that was not related to the school or to any school activity); *Shanly v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.*, 462 F.2d 960, 970–71, 978 (5th Cir. 1972) (holding the school’s discipline of students an impermissible infringement of the First Amendment where the speech in question was a newspaper that was not disruptive and was distributed away from the school property).

60. 551 U.S. 393, 396–97 (2007).

students and teachers, and (5) the group was located just across the street from the school.⁶¹ *Morse* indicates that in addition to regulating on-campus speech, there is room to regulate off-campus speech that meets some or all of the above factors, the most relevant perhaps being that the event is school sanctioned, and that school rules of behavior apply.⁶²

Though neither of these cases deals specifically with offensive Internet speech that could be classified as cyberbullying, they set a workable boundary for where a school's authority ends and a student's autonomy begins. Significantly, although many cases involving cyberbullying seem to indicate a preference for a broadening of this boundary, some have situated themselves comfortably and squarely within the "on school property" or "at a school-sanctioned event" boundaries.

In one case examining an instance of speech that, at least facially, meets the definition of student-on-student cyberbullying, a U.S. district court in Washington held that a website created by a student away from school, and without the use of any school computers or resources, had a distinctly "out-of-school nature."⁶³ In *Emmett v. Kent School District*, the student was suspended for five days after he created a website on which he posted fake obituaries of his friends and invited visitors to vote on who would die next.⁶⁴ The court reasoned that unlike the speech in *Fraser*, the website was not offered in a school assembly, and unlike *Hazelwood*, it was not offered as part of an official school publication, class, or project.⁶⁵ The court went on to say that the student speech was "entirely outside of the school's supervision or control" even if the content seemed clearly connected to the school.⁶⁶

In contrast, when examining other instances of cyberbullying, some courts have been willing to extend the schoolmaster's reach and allow school entities to regulate student speech occurring off-

61. *Id.* at 400–01.

62. *Id.* at 399–401.

63. *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1088, 1090 (W.D. Wa. 2000).

64. *Id.* at 1089. The student was initially expelled, but the expulsion was later modified to a five-day suspension. *Id.*

65. *Id.* at 1090.

66. *Id.*

campus pursuant to two basic analyses. One is more moderate and allows school entities to regulate off-campus student speech when there is a “sufficient nexus” between the student speech and the operations of the school.⁶⁷ The second allows school entities to regulate off-campus student speech when the school can show merely a foreseeable risk of a material and substantial interference of school operations.⁶⁸ Both approaches allow impermissibly broad regulation of student speech by schools.

2. *Implicitly on-campus speech: the sufficient nexus*

As noted previously, language in the *Tinker* decision indicated the possibility that schools could permissibly regulate out-of-classroom speech.⁶⁹ *Fraser* buoyed the assertion that schools may have authority to regulate behavior beyond classroom walls by rearticulating the policy that public education had the responsibility to “prepare pupils for citizenship in the Republic,” that part of that preparation included “inculcat[ing] [students with] the habits and manners of civility,”⁷⁰ and that generally, “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”⁷¹ Courts have applied these statements liberally in granting school entities the authority to regulate not just speech outside of a classroom but speech that occurs completely away from campus and often in the privacy of a student’s home. If such speech is aimed at the school or someone at the school and then reaches the school or is accessed at school in

67. *See, e.g.*, *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002).

68. *See, e.g.*, *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

69. *See supra* note 33 and accompanying text. To reiterate, the case states:

[C]onduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

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

70. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting CHARLES AUSTIN BEARD & MARY RITTER BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968) (internal quotation marks omitted)).

71. *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985)).

some form, there may be a sufficient nexus to regulate the speech under *Tinker*.

The Pennsylvania Supreme Court in *J.S. v. Bethlehem Area School District* articulated the impermissibly expansive and frustratingly ambiguous “sufficient nexus” standard.⁷² The case arose when an eighth-grade student used a computer at his home to create a website that was then available via the Internet.⁷³ The website contained “derogatory, profane, offensive, and threatening comments” directed at one of the student’s teachers and the principal of his school.⁷⁴ The website and its attendant pages were subsequently viewed by students, faculty members, and administrators at the student’s school.⁷⁵ In answering the question of whether this was speech that occurred on- or off-campus, the court quoted *Hazelwood*, saying, “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission’ even though the government could not censor similar speech outside the school.”⁷⁶ The court went on to explain that as long as there is a “sufficient nexus between the [digital or electronic communication] and the school campus to consider the speech as occurring on-campus,” then the analysis under *Tinker*, *Fraser*, and/or *Hazelwood* could move forward.⁷⁷ Thus, if a sufficient nexus can be shown, the speech becomes, essentially, on-campus speech and can be regulated under the same standards as speech that is explicitly made on school property or as part of a school-sanctioned event or activity.

Importantly, the *Bethlehem* court provided two general factors that come into play when determining whether there is a sufficient nexus to justify the school entity’s regulation of the student speech. To establish a sufficient nexus, the student speech must be “speech that is aimed at a specific school and/or its personnel [and] is brought onto the school campus or accessed at school by its originator.”⁷⁸ Though broader than the requirement that the speech

72. *Bethlehem*, 807 A.2d at 865.

73. *Id.* at 850.

74. *Id.* at 851.

75. *Id.* at 851–52.

76. *Id.* (alteration in original) (quoting *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1988)) (internal quotation marks omitted).

77. *Id.* at 865 (emphasis added).

78. *Id.* at 865. *But see* *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 801 (N.D. Ohio

happen on school property or in conjunction with a school-sanctioned event or activity, the sufficient nexus standard at least maintains the threshold question of determining whether the speech occurred on- or off-campus. Other courts have found this threshold question unnecessary if the school can show that there is at least a foreseeable risk that the speech would lead to a material and substantial interference with school discipline and operations.

3. Foreseeable risk of a material and substantial interference

The Second Circuit Court of Appeals has demonstrated a proclivity to stretch *Tinker* beyond the sufficient nexus standard of *Bethlehem* and to encourage a rule that would allow public school entities to regulate any student speech that would create a foreseeable risk of a material and substantial interference to the operation of the school. This extremely broad standard is exemplified first in *Wisniewski v. Board of Education*,⁷⁹ and second in *Doninger v. Niehoff*.⁸⁰

In *Wisniewski*, an eighth-grader created an icon for use in his instant messaging program.⁸¹ The icon was “a pistol firing a bullet at a person’s head above which were dots representing splattered blood.”⁸² Text that accompanied the icon said, “Kill Mr. VanderMolen,” who was the student’s teacher.⁸³ The eighth-grader sent the icon to some of his friends but it was never sent to the school or to the teacher.⁸⁴ The court did not even ask the “threshold question”⁸⁵ of whether the speech was on- or off-campus, but instead immediately applied the *Tinker* standard and held that the student’s off-campus speech could have “create[d] a foreseeable risk of substantial disruption within a school.”⁸⁶ The court specified that under *Tinker* the decision of whether speech will “materially and

2002) (holding that a school’s discipline of a student based on the content of a website viewed at school was impermissible pursuant to the First Amendment).

79. 494 F.3d 34 (2d Cir. 2007).

80. 527 F.3d 41 (2d Cir. 2008).

81. 494 F.3d at 35–36.

82. *Id.* at 36.

83. *Id.*

84. *Id.*

85. See *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (Pa. 2002).

86. *Wisniewski*, 494 F.3d at 39.

substantially disrupt the work and discipline of the school” is left to school officials’ reasonable conclusions.⁸⁷

The court’s foreseeable risk test was also applied in *Doninger* when the court held that the school permissibly punished a student for posting a pejorative blog regarding an administrative decision with which the student disagreed.⁸⁸ The court stated in dicta that if the student had delivered what she wrote on the Internet via handbills at school, her speech would have been subject to the *Fraser* rule, but then admitted that “[i]t is not clear . . . that *Fraser* applies to off-campus speech.”⁸⁹ Ultimately, the court found that under the previous holding in *Wisniewski* the *Tinker* standard applied and held that the student’s Internet post “foreseeably create[d] a risk of substantial disruption within the school environment.”⁹⁰

Thus, various courts have engaged in incongruent analyses ranging from a moderate application of the foundational cases to a liberal use of alternative theories under which schools can more aggressively regulate student off-campus speech. Some, like *Emmett*, hold to the proposition that there is a threshold question to be answered—did the speech occur on- or off-campus? If it is on-campus speech or speech that occurs as part of a school sanctioned event, the school entity will be allowed broad, discretionary regulation of the student speech. If it is off-campus speech, some courts will limit the school’s regulatory authority. Others, such as *Bethlehem*, hold that student speech does not have to actually occur on-campus to be deemed “on-campus speech.” Student speech can be implicitly on-campus if the school can show a sufficient nexus between the speech in question and the operation of the school. Finally, as demonstrated in *Wisniewski* and *Doninger*, the Second Circuit has adopted the most expansive rule which allows the public school entity to regulate student speech if the school entity itself can determine that there is a foreseeable risk that the speech will lead to a material and substantial interference with school operations.

87. *Id.* at 39 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

88. *Doninger v. Niehoff*, 527 F.3d 41, 49–51 (2d Cir. 2008).

89. *Id.* at 49.

90. *Id.* at 50 (quoting *Wisniewski*, 494 F.3d at 40).

III. THE THIRD CIRCUIT SPLIT: *LAYSHOCK* AND *BLUE MOUNTAIN*

The debate over whether the threshold question of on-campus versus off-campus speech should persevere⁹¹—whether a school need show nothing more than a foreseeable risk of a material and substantial disruption,⁹² or whether an entirely new standard should apply⁹³—is coming to a head as demonstrated by two cases that resulted in a Third Circuit split: *Layshock ex rel. Layshock v. Hermitage School District*⁹⁴ and *J.S. ex rel. Snyder v. Blue Mountain School District*.⁹⁵ Based on nearly identical facts, the cases were heard by separate three-judge panels that produced opposite holdings in opinions filed on exactly the same day. In response to petitions filed by parties in both cases, both opinions were vacated and were reheard *en banc* in June 2010.⁹⁶ As of writing this Comment, the court has not published a new opinion for either case.

91. See, e.g., Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-campus Student Internet Speech*, 36 CAP. U. L. REV. 129 (2007) (maintaining that the threshold question should be preserved to prevent schools from applying *Tinker* to off-campus speech); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008) (contending that minors are entitled to strong free speech rights and that the application of *Tinker*, regardless of whether the speech was on- or off-campus provides insufficient protection to such rights).

92. See, e.g., Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-campus Student Cyberbullying*, 13 BARRY L. REV. 103, 134 (2009) (averring that schools should be permitted to make a “reasonabl[e] forecast” of a material and substantial disruption in order to apply *Tinker* and regulate the student speech, even when it occurs off-campus); Duffy B. Trager, Note, *New Tricks for Old Dogs: The Tinker Standard Applied to Cyber-Bullying*, 38 J.L. & EDUC. 553 (2009) (asserting that the *Tinker* standard includes and is appropriate for the regulation of cyberbully-esque speech).

93. See, e.g., Markey, *supra* note 91, at 132 (discussing a standard requiring that a “student knowingly or recklessly distributes the speech on-campus”); Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B. C. L. REV. 1563, 1594 (2009) (arguing for a “control and supervision” test giving the school authority to regulate speech only when the school has assumed “control and supervision” over the student at the time the student offers her speech).

94. 593 F.3d 249 (3d Cir. 2010), *vacated, reh'g granted* No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

95. 593 F.3d 286 (3d Cir. 2010), *vacated, reh'g granted* No. 08-438, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

96. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 08-438, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

Laysbuck and *Blue Mountain* were not the first cases the Third Circuit heard on this issue. Nine years before the Third Circuit split itself, it decided *Saxe v. State College Area School District*,⁹⁷ a case that would be cited by several other courts examining the issue of school regulation of student speech.⁹⁸ In *Saxe*, the Third Circuit showed a reluctance to employ a foreseeable risk standard. The case arose when a student preemptively challenged a school policy on harassment claiming that it violated the First Amendment.⁹⁹ The court's main holding was that the harassment policy was unconstitutionally overbroad, and would sweep in a large amount of student speech that should be protected.¹⁰⁰ Because there was neither an actual restriction nor any student speech at issue in this case, the question of where the speech would occur was largely ignored.¹⁰¹ However, in its discussion of *Tinker*, the court reiterated that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"¹⁰² but that a restriction on speech may pass constitutional muster if the "school can point to a *well-founded expectation* of disruption—especially one based on past incidents arising out of similar speech."¹⁰³ Thus, the court indicated that when *Tinker* is applied, the proof of the material and substantial interference must be specific and concrete.¹⁰⁴ This precedential interpretation of the *Tinker* standard appears to hold schools to a higher standard than the foreseeable risk language promulgated by the Second Circuit, but was subsequently overlooked to varying extents in both cases that follow.¹⁰⁵

97. 240 F.3d 200 (3d Cir. 2001).

98. See, e.g., *Blue Mountain*, 593 F.3d at 296–97, 305–06, 312, 314; *Laysbuck*, 593 F.3d at 257, 261; *Guiles v. Marineau*, 461 F.3d 320, 325, 327–29 (2d Cir. 2006); *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 176 (D. Mass. 2007); *Governor Wentworth Reg'l Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410, 421 (D. N.H. 2006); *Grzywna v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139, 147 (N.D.N.Y. 2006); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 453, 455, 459 (W.D. Pa. 2001).

99. *Saxe*, 240 F.3d at 203–04.

100. *Id.* at 214.

101. *But see id.* at 216 n.11 ("Saxe even suggests that the Policy could even be read to cover conduct occurring outside of school premises. This reading is not implausible based on the Policy's plain language, and would raise additional constitutional questions.").

102. *Id.* at 211 (internal quotation marks omitted).

103. *Id.* at 212 (emphasis added).

104. *Id.*

105. Though both *Laysbuck* and *Blue Mountain* cite *Saxe*, neither relies substantially on the

A. Layshock: Limiting the Schoolmaster's Reach Under Fraser

In *Layshock*, the school district relied heavily on the sufficient nexus and foreseeable risk standards from *Bethlehem* and the Second Circuit cases discussed *supra*. The *Layshock* court summarily rejected the school district's arguments and held that where a high school senior had created a "parody profile" of his principal on a popular social networking site using his grandmother's computer while at his grandmother's house,¹⁰⁶ the school district's punishment of off-campus student speech was impermissibly violative of the student's First Amendment free speech rights.¹⁰⁷ The student did not use any school resources to create the profile, but he did copy a photo of the principal from the school district's website.¹⁰⁸ The profile contained language that was profane and lewd and that was clearly disparaging towards the principal.¹⁰⁹ It was not long before most of the student body had at least heard of, if not seen, the profile.¹¹⁰ In this case, the students were able to view and did view the profile on school computers during school hours.¹¹¹ The student claimed that the profile was made as a joke,¹¹² but was later suspended from school for ten days, placed in the Alternative Education Program at the school for the remainder of the school year, prohibited from participating in any extracurricular activities, and barred from participating in his graduation ceremony at the conclusion of the year.¹¹³

The district court analyzed the case first under the sufficient nexus standard and held that the school district was unable to "establish[] a sufficient nexus between [the student's] speech and a

specific application of *Tinker*. Thus, though *Saxe* as a whole is not overlooked, certainly the analysis concerning the proper application of the *Tinker* standard is.

106. *Layshock ex. rel Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 252 (3d Cir. 2010), *vacated, reh'g granted* 2010 U.S. App. LEXIS 7342 (3d Cir. 2010).

107. *Id.*

108. *Id.*

109. *See id.* 252–53.

110. *Id.*

111. *Id.* at 253.

112. *Id.* at 253 n.4.

113. *Id.* at 254. Other students who created subsequent fictional profiles of the principal that were more vulgar and offensive than the original parody profile were not punished at all. *Id.*

substantial disruption of the school environment.”¹¹⁴ On appeal, the Third Circuit held that the punishment in this case was an improper regulation that infringed on the student’s First Amendment rights, that there was no nexus between the student speech and a material and substantial interference with school operation, and that the school district could not punish the student based only on the fact that his speech came within the physical boundaries of the school.¹¹⁵

The *Layschock* court first examined the school district’s argument that the student had “entered” school property by accessing the school district website to copy the principal’s picture.¹¹⁶ The court compared the facts in this case with *Thomas v. Board of Education* where the court held that school regulation of the speech in question was impermissible even when students stored an offensive student-written and student-edited periodical in a school classroom and completed some work on the publication at school while using school resources.¹¹⁷ In *Layschock*, the court held that the connection between the student’s conduct and the school was even more fragile than the connection in *Thomas* and refused to “allow the School District to stretch its authority so far that it reaches [a student] sitting in his grandmother’s home after school.”¹¹⁸ The court added that “[i]t 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 they can control that child when he/she participates in school sponsored activities.”¹¹⁹

The *Layschock* court then turned to the school district’s second argument—that the speech was permissibly regulated because it was lewd and vulgar and “was aimed at the School District community and the Principal and was accessed on campus by [the student] [and] [i]t was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.”¹²⁰ The court

114. *Id.* at 258 (quoting *Layschock ex rel. Layschock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007)).

115. *Id.* at 263.

116. *Id.* at 259.

117. *Id.* (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979)).

118. *Id.* at 260.

119. *Id.*

120. *Id.* (internal quotation marks omitted).

analyzed this question pursuant to *Fraser* rather than *Tinker* because the school district failed to show that the student's out of school speech created a material and substantial interference of school operations.¹²¹ Importantly, the court distinguished key cases¹²² upon which the school district's argument relied, and through which various courts had sanctioned the regulation of off-campus student speech that was lewd, vulgar, and/or offensive under *Tinker*'s material and substantial interference analysis, rather than under the narrow exception for such speech created in *Fraser*.¹²³ The *Laysbuck* court reiterated that the "willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."¹²⁴ The court stopped short of making a precise determination of the perimeter of the schoolmaster's reach, but held that in this case the student speech did not disrupt the school as required by *Tinker* and that, pursuant to *Fraser*, even if the off-campus speech is lewd, vulgar, or offensive, it is still protected under the First Amendment.¹²⁵

B. Blue Mountain: Expanding the Schoolmaster's Reach Under Tinker

The facts in *Blue Mountain* closely parallel those in *Laysbuck*, but the analysis and subsequent holdings are significantly divergent. In *Blue Mountain*, a middle school student and her friend working at their respective homes, using personal computers, and using an instant messaging program to facilitate their collaboration, created a sham profile on a social networking site.¹²⁶ Unlike the profile in *Laysbuck*, this profile did not mention the real name of any person, but like the *Laysbuck* profile, it did use a photograph of the school

121. *Id.* at 261.

122. Including *Bethlehem* (sufficient nexus), *Wisniewski* (foreseeable risk), and *Doninger* (foreseeable risk).

123. *Laysbuck*, 593 F.3d at 261.

124. *Id.* at 263 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979)).

125. *Id.*

126. 593 F.3d 286, 291 (3d Cir. 2010) (rehearing en banc granted, opinion vacated Apr. 09, 2010).

principal that the students had copied from the school district's website.¹²⁷

Like the profile in *Layshock*, this profile included insulting and vulgar content, and like the student in *Layshock*, the student here asserted that she created the site as a joke with her friends.¹²⁸ In this case, though, the profile could not be viewed on-campus using school-owned computers because the school's network blocked the particular social networking site.¹²⁹ Still, word of the profile spread and students accessed it from other locations.¹³⁰ The students in this case were also suspended from school for ten days, but unlike the more severe penalties imposed on the student in *Layshock*, these students were not punished beyond the temporary suspension from school.¹³¹ Ultimately, one of the students brought suit claiming that the school had violated her First Amendment right to free speech.¹³² The district court granted summary judgment to the school district, holding that even though the student created the profile at her home, and even though the profile did not materially and substantially disrupt school, the school district's punishment of her speech did not violate the student's First Amendment rights because her "lewd and vulgar off-campus speech had an effect on campus."¹³³

In her appeal, the student argued that her speech, even if it were lewd and vulgar, was protected by the First Amendment "because it occurred entirely outside the Middle School" and generally, the First Amendment protects even lewd and vulgar speech outside of a school setting.¹³⁴ Unlike the *Layshock* court, the *Blue Mountain* court declined to engage in an analysis under *Fraser* and instead went immediately to *Tinker*, stating that the speech may be regulated "if it would substantially disrupt school operations or interfere with the right of others."¹³⁵ Moreover, the court explicitly stated that an

127. *Id.*

128. *Id.* at 292.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 295 (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist. No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685, *7-8 (M.D. Pa. 2008)).

134. *Id.* at 299 (citing Cohen v. California, 403 U.S. 15, 16, 25-26 (1971)).

135. *Id.* at 298 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir.

inquiry regarding where the speech occurred—on- or off-campus—was unnecessary.¹³⁶

In its analysis, the *Blue Mountain* court relied on *Doninger* and other cases in finding that a school entity does not have to wait for an actual disruption of school operations to occur. Contrary to the requirement of specific and concrete proof of the material and substantial interference articulated in *Saxe*,¹³⁷ this court reasoned that it could “[look] to all of the circumstances confronting the school officials that might reasonably portend disruption.”¹³⁸ Ultimately, the *Blue Mountain* court held that the “profile presented a *reasonable possibility* of a future disruption” of operations¹³⁹ and that “off-campus speech that causes or *reasonably threatens* to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*.”¹⁴⁰ In stark contrast with the considerably more restrained approach by the *Layschock* court, *Blue Mountain*’s “reasonable possibility of a reasonable threat of a substantial disruption or material interference” is imprecise, unwieldy, and even more inclusive than the foreseeable risk standard. Moreover, it sweeps in mounds of student speech that should clearly be protected under the First Amendment.

Thus, even within the same circuit court, it is unclear whether public school entities may permissibly regulate off-campus student speech under *Tinker*, or if off-campus student speech that is vulgar or lewd can be analyzed only under *Fraser*. Additionally, under the

2001)). Note the contradictory reasoning and outcomes in these cases. The *Layschock* court accepted the district court’s holding that the speech in that case did not meet the material and substantial requirement of *Tinker* and thus fell under a *Fraser* analysis and held the regulation of speech impermissible. The *Blue Mountain* court also accepted the district court’s holding that the speech in this case was lewd and vulgar under *Fraser*, but found the *Fraser* analysis unnecessary because the “profile at issue, though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*” and because the speech had an effect on-campus, the regulation was constitutionally permissible. *Id.*

136. *Id.* (citing *Saxe* 240 F.3d at 212 (holding that when a public school entity “can point to a well-founded expectation of disruption—especially one based on previous incidents arising out of similar speech—a restriction may pass constitutional muster”)).

137. *Saxe*, 240 F.3d at 299.

138. *Blue Mountain*, 593 F.3d at 298 (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)) (internal quotation marks omitted).

139. *Id.* at 300 (emphasis added).

140. *Id.* at 301 (emphasis added).

Tinker analysis, it is unclear whether school entities must establish a “sufficient nexus” between the speech in question and the school disturbance. It is also unclear whether the school entity must provide *specific and concrete evidence* of similar speech that previously resulted in a material and substantial interference with school operations, if the school entity must demonstrate *a well-founded belief* that the disruption will occur, or if the school must assert that there is merely *a foreseeable risk* that the speech would result in a material and substantial disruption of the school operations. It is in this quagmire of erratic case law and ambiguous precedent that these cases have been reheard and must now be re-decided.

IV. INTENT MATTERS: HOW “TRUE THREATS” CAN BRING *TINKER* BACK FROM THE BRINK

The foreseeable risk standard asserted in *Wisniewski* and *Doninger* and relied on in the vacated opinion in *Blue Mountain* turns *Tinker* on its head and will allow ever-increasing regulation of student speech. Indeed, there is a foreseeable risk that the previously narrow *Fraser* and *Hazelwood* exceptions to the protective *Tinker* standard will now be swallowed up and analyzed under the new, broader application of *Tinker*—an application that is designed not to protect speech but to more freely regulate it. This seems particularly to be the case if *Blue Mountain*’s “reasonable possibility” standard survives. Such a standard leaves the school free to regulate an almost indeterminate amount of student off-campus speech.

This may not initially offend our sense of First Amendment protections because the speech that schools want to regulate is often profane, rude, violent, or all of the above. Additionally, the publicity surrounding the tragic deaths of teenagers who are victims of similar speech may encourage us to embrace more rather than less regulation of student speech. Approval of censorship of speech or conduct that we find offensive or harmful seems to be an appropriate response of a civilized society. However, a core belief of American society and a fundamental principle of our democracy is that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of . . . truth.”¹⁴¹ It is this strong belief in the freedom to think and speak independent of

141. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

interference from the government that has led to the development of First Amendment jurisprudence that has vigorously protected speech and expressive conduct with the exception of speech or conduct that falls within well-defined and narrowly applied categories that reside wholly outside the protections of the First Amendment.¹⁴²

One such category, “true threats,”¹⁴³ is a prospective answer to the off-campus student speech question.¹⁴⁴ The true threat doctrine as established in *Watts v. United States*¹⁴⁵ and reiterated in *Virginia v. Black*¹⁴⁶ sets the boundaries of a category of speech that resides wholly outside the protection of the First Amendment. Such speech is a manifestation of the speaker’s purpose “to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁴⁷ As opposed to a questionable *mélange* of jurisprudence that allows capacious regulation of student speech, a true threat analysis would strike the

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

143. See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 621–27 (8th Cir. 2002) (en banc) (applying *Watts*’s true threat analysis in a case involving a school regulating student speech); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371–73 (9th Cir. 1996) (also applying *Watts*’s threat analysis in a case of a school regulating student speech). The *Wisniewski* court addressed this analysis and dismissed it in the case of schools regulating student speech, distinguishing the criminal statute in question in *Watts v. United States*, 394 U.S. 705, 705 (1969), from a school entity’s “authority to discipline a student’s expression reasonably understood as urging violent conduct.” *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007). That court found it more appropriate to evaluate such cases under *Tinker*, a case where the speech did not involve any threat of violence or personal attack of any kind.

144. The ultimate solution to controlling student speech that may qualify as cyberbullying must include a combination of legal, social, and educational reform that includes regulation of student speech or expressive behavior only on the rare occasion that such speech constitutes a true threat to another individual or violates already existing criminal or civil statutes as well as 1) help for potential victims to learn how to protect themselves and get help when needed; 2) encouragement of a culture and environment of civility and respect; 3) programs designed to educate students about appropriate and inappropriate use of humor; and 4) creation and support for assistance and resources to students and parents regarding bullying in general, the risks to bullies and victims, warning signs that a child is bullying or is being bullied, networks through which to report instances of cyberbullying, and so forth. This Comment is limited to a discussion of the First Amendment implications of regulating off-campus student speech, but realizes that this problem can and should be attacked from a variety of fronts. In narrowing the purview of schools’ authority to regulate speech, the Comment does not purport that other attacks on pernicious cyberbullying should be any less vigorous.

145. 394 U.S. 705 (1968).

146. 538 U.S. 343 (2003).

147. *Id.* at 359.

proper balance between the interests in protecting children and maintaining an effective educational environment, and the interest in protecting individual free speech rights. It is consistent with already developed First Amendment jurisprudence. Moreover, the true threat standard is more congruent with the strong protections initially granted to student speech in *Tinker*.

As the principal case on point, *Tinker* set a standard that was highly protective of student speech, particularly speech that was in danger of being regulated because of its content or viewpoint. Courts have already granted public school entities considerably more leeway in regulating student speech when compared with speech that the government may generally regulate. This is because though neither “students [n]or teachers shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,”¹⁴⁸ neither are such First Amendment rights “automatically coextensive with the rights of adults in other settings”¹⁴⁹ and such rights may be limited according to the “special characteristics of the school environment.”¹⁵⁰

The *Tinker* Court realized that the overwhelming tendency of a government organization seeking to maintain order and an authoritarian atmosphere would be to limit divergent views through censorship. The Court expressly reminds school entities that

[a]ny departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But *our Constitution says we must take this risk*, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.¹⁵¹

Thus, the *Tinker* standard incontrovertibly required that

[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to

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

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

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

151. *Id.* at 508–09 (emphasis added) (citations omitted) (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

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. Certainly *where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.*¹⁵²

However, when students began to engage in off-campus speech over the Internet, that speech was immediately available to a worldwide audience, and schools were grasping for ways in which to control it. As the Third Circuit held in *Laysbrook*, *Fraser* could not be extended to regulate vulgar, lewd or offensive off-campus speech. *Fraser*'s exception to *Tinker* is powerful when applied appropriately to lewd or offensive speech at a school-sanctioned event where there is a captive audience of other minor school children. In such a case, the school may decide whether the speech is lewd, vulgar, or offensive and may permissibly regulate such speech. But if such speech occurs off-campus, the application of *Fraser* becomes treacherously tenuous.

Likewise, the narrow exception of *Hazelwood* did not provide a quick or easy remedy to prevent such inappropriate speech over the Internet or through text messages. *Hazelwood* required that the speech in question reasonably bear the imprimatur of the school and be related to a legitimate pedagogical concern. There is little doubt that student speech arising from a posting on a personal networking site while at home, outside of school hours, and using the student's own computer or cellular device would not bear the imprimatur of the school. And so, schools and courts looked back again to the *Tinker* language.

If it were possible to commandeer the *Tinker* standard and show that off-campus student speech would cause a material and substantial disruption at the school, that might justify the regulation of speech that occurs entirely away from campus. Some courts were unwilling to stretch *Tinker* that far and continued to require a finding that the speech was implicitly on-campus speech, or that there was a sufficient nexus between the speech and the disturbance

152. *Id.* at 509 (emphasis added) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

at the school. However, the most permissive interpretations of *Tinker* required only that the school demonstrate that the speech could foreseeably cause a material and substantial disturbance; once the school entity could show that, the location where the speech occurred no longer had any bearing. The nature of the speech lost its relevance as well—it may be lewd, vulgar, or other speech that could be otherwise protected under the First Amendment, but if it was reasonably foreseeable that it could lead to a substantial disturbance, the school could permissibly punish the student for the speech or conduct.

This abundant willingness to justify overbroad regulation of off-campus student speech pursuant to *Tinker* is inappropriate and will lead to impermissible regulations of student speech. Think for a moment about a fictional student, Ahmed, who is Muslim and has moved to a school district that is overwhelmingly populated with students from conservative Christian homes. On his Facebook account, Ahmed begins to post and discuss his religion. There is little understanding of Islam in this fictional school district and most automatically associate Ahmed's postings with terrorist acts propagated by Islamic extremists. In such a case, there is an absolutely foreseeable risk of a material and substantial disturbance at the school. The disturbance would, most likely, be related to the student's speech. But the school should absolutely not be allowed to punish Ahmed for such speech. Under the First Amendment, such speech is vigorously protected.

The initial *Laysbuck* opinion was correct; neither *Laysbuck* nor *Blue Mountain* should be analyzed under *Tinker* because the speech occurred away from school property, without the assistance of any school resources, and was not offered at or in conjunction with any school-sanctioned event. In both cases the speech occurred in the privacy of the student's home or the home of a close family member. Extending *Tinker* to apply to such speech would allow schools to exercise *in loco parentis* influence well beyond appropriate limitations and would infringe not only on the student's free speech and privacy rights, but on parents' rights as well.

The *Laysbuck* court was also correct in holding that the speech cannot be regulated under *Fraser*. Even though the speech may be categorized as lewd, or vulgar, it was not offered at a school-sanctioned event wherein a large number of minor school students were a captive audience to the speech in question. This type of

speech is of the variety that falls squarely under the protection of the First Amendment. The Third Circuit should be reluctant to endorse a standard that would open the door to “permissible” regulations of student speech that surpass in breadth any previously permissible regulation of speech. Even in the case of sexually explicit or obscene speech, where the Supreme Court has demonstrated an inclination to allow broader state regulation of an individual’s speech compared to other types of speech, the boundary of regulation ended at the threshold of the speaker’s home. If the Third Circuit were to endorse *Bethlehem’s* ephemeral sufficient nexus standard, *Wisniewski’s* ambiguous foreseeable risk standard, or the reasonable possibility test from *Blue Mountain*, it would extend the schoolmaster’s reach where *Stanley v. Georgia* did not dare tread—into the privacy of individuals’ households.¹⁵³

Rather, because the speech in both cases occurred off-campus and not in conjunction with any school-sanctioned activities, the Third Circuit should examine the intent of the students and determine whether either scenario rose to the level of a true threat that could be a constitutional regulation of student off-campus speech.¹⁵⁴ The true threat doctrine encompasses speech “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁵⁵ Though “the speaker need not actually intend to carry out the threat,” and courts may consider the victim’s subjective fear of violence,¹⁵⁶ the government would bear the burden of the proving that a true threat existed, and the expression in

153. 394 U.S. 557, 559 (1969) (invalidating state laws that regulate private possession of obscene materials). Granted, the speech in *Stanley* was an adult consuming pornography, and it may be more accurate here to think of the publication or production of speech—for example, pornography. Even then, the Supreme Court has only allowed regulation of speech that either meets the narrow obscenity exception or that is demonstrated to actually harm individuals unable to consent to such harm. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747 (1982). For example, the production of child pornography cannot be constitutionally regulated unless it is produced with actual minors in the parts of the children. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In other words, one may engage in speech by producing child pornography using actors who look young but are of age to consent or using computer generated imagery. *Id.* at 256.

154. *See, e.g.*, *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007).

155. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

156. *Id.*

question would be “taken in context” with regard to “the nature of the statement and the reaction of the listeners.”¹⁵⁷

In both *Laysbuck* and *Blue Mountain*, the students indicated, and the school districts did not dispute, that the profiles were created as a joke. Both students apologized to the affected administrators and indicated that they did not intend any harm. Though their speech was immature, vulgar, lewd, ill-advised, and perhaps plain stupid, it can be credited to adolescents who have not yet developed a clear understanding of what type of online speech can be appropriate humor and what is not. In neither case, though, did the students demonstrate sufficient intent to communicate a serious expression of an intent to commit an act of unlawful violence to an individual or a particular group of individuals. Indeed, the speech in question here was more akin to the “political hyperbole” of *Watts v. United States*¹⁵⁸ that was “a kind of very crude offensive method of stating a[n] . . . opposition” to a person in authority.¹⁵⁹ If we are willing to limit this kind of student speech, it will effectively chill speech not only while the students are school-aged, but will likely chill anti-establishment speech even later in life. Additionally, in both *Laysbuck* and *Blue Mountain*, the “victim” of the speech was an adult in a position of considerable power and authority over the minor speaker with the means to pursue alternative remedies for any imagined or actual harm the speech may have caused.

The more difficult question is whether such an analysis is sufficient for cases that involve student-on-student cyberbullying. Indeed, the true threat standard can be used effectively not only for student-on-teacher or student-on-administrator cyberbullying, but also for student-on-student cyberbullying. Such speech would also be regulated when the school can demonstrate that it rises to the level of a true threat. The school may rely on the victim’s subjective fear of violence, but must also consider the context in which the expression was offered as well as the reaction of the audience to the expression. If the school successfully carries that evidentiary burden, then it could constitutionally regulate the speech in question. Otherwise, the interest in protecting the speaker’s First Amendment

157. *Watts v. United States*, 394 U.S. 705, 707–08 (1968).

158. *Id.* at 708.

159. *Id.*

rights would outweigh the interest in limiting such speech. Recall the facts of *Emmett*—a student created a website with fake obituaries for his friends and a poll application by which visitors could vote on who would die next.¹⁶⁰ Such a site could seem terribly threatening. However, “[t]he obituaries were written tongue-in-cheek, [and were] inspired . . . by a creative writing class.”¹⁶¹ Additionally, the student deleted the site after it was characterized as a “hit list” on the local news. Moreover, the school did “not present[] any evidence that any student actually felt threatened by the web site.”¹⁶² Generally, the evidence suggested that it was a joke and that no harm was intended. Though it was likely an infantile and unwise expression, and though it may have even resulted in some students feeling intimidated,¹⁶³ it was not likely a true threat.

In contrast, consider a hypothetical situation based loosely on other cyberbullying cases. Suppose that a teenager, Cassie, is angry with a classmate, Victor. Suppose Cassie creates a fake profile on a social networking site of an imaginary girl, Fiona. As Fiona, Cassie interacts online with Victor. She pretends to be interested in him, becomes his confidante, his friend, and perhaps even his love interest. Then, Cassie starts using Fiona to make threats to Victor. She uses information she has discovered to humiliate and frighten Victor. Imagine she posts a fake obituary of Victor in a place where Victor will see it, and suppose she posts in Fiona’s social networking status, “Watch out, Victor. You are next.” Imagine Victor is frightened by the threat and suppose the school marshals ample evidence that Cassie intended her speech to communicate a serious expression of an intent to commit an act of unlawful violence towards Victor. In this case, Cassie’s intent makes a difference and pushes her actions into the realm of a true threat which could be permissibly regulated by a school entity.

In addition to permissible regulation of student speech by schools pursuant to the true threat analysis, much speech that can be categorized as cyberbullying is punishable through criminal or civil statutes that constitutionally regulate harassment, defamation,

160. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

161. *Id.*

162. *Id.*

163. *Id.*

slander, stalking, and so on. Furthermore, social and educational programs can make effective inroads in this arena without posing a threat to individual free speech rights. This Comment does not suggest that we leave victims of cyberbullying with no remedy, only that we tread carefully when extending the power of the government to regulate speech even when, perhaps especially when, that regulation is coming from a powerful school entity and is directed at students directly under their authority.

V. CONCLUSION

Because the area of law is relatively new and because the U.S. Supreme Court has yet to weigh in on the issue of speech that could be defined as cyberbullying, state and federal courts have struggled to fit recent instances of off-campus digital or electronic speech into the foundational framework created by *Tinker*, *Fraser*, and *Hazelwood*. The regulated speech in each of those foundational cases was speech occurring on school grounds or in connection with a school-sanctioned class or event, or both.

Cases dealing with student-on-teacher or student-on-administrator cyberbullying, or both, have demonstrated a disturbing disposition to extend *Tinker* to allow regulation of off-campus student speech that would normally fall squarely in the realm of protected speech pursuant to the First Amendment. This is an inappropriate extension of power to government agents and will result in the regulation of speech that should be protected.

Rather than cling to a tenuous line of case law that permits an overbroad regulation of off-campus student speech, courts should engage in a true threat analysis to determine whether the off-campus student speech in question was offered with the intent to communicate a serious expression of an intent to engage in an act of violence against the threatened party. In many cases, the speakers will lack the necessary intent because the speech was offered as ill-advised humor with perhaps little understanding of the total effects the speech would have.

In conclusion, utilizing the true threat analysis will in no way diminish the criminal or civil remedies available to victims of such speech. Rather, it will provide apposite protection for the First Amendment right of free speech that we hold central to our culture and which is a foundational principle of our democracy.

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