WHEN CHILDREN'S RIGHTS "COLLIDE": FREE SPEECH VS. THE RIGHT TO BE LET ALONE IN THE CONTEXT OF OFF-CAMPUS "CYBER-BULLYING"

Christine Metteer Lorillard[*]

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INTRODUCTION

> IAGO: Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash: 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name,

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* Professor of LAWS (Legal Writing Analysis and Skills), Southwestern Law School. B.A., M.A., Ph.D., UCLA. The author wishes to thank Nicole Elzroth Oden for her research assistance, and Mathew Rudes for his assistance with the recent Third Circuit en banc decisions in *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (en banc), and *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc).

> Robs me of that which not enriches him,
> And makes me poor indeed.
>
> William Shakespeare, Othello act 3, sc. 3, 155–61.

> PRESIDENT ANDREW SHEPHERD: America isn't easy. America is advanced citizenship. You gotta want it bad, 'cause it's gonna put up a fight. It's gonna say "You want free speech? Let's see you acknowledge a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours. You want to claim this land as the land of the free? Then the symbol of your country can't just be a flag; the symbol also has to be one of its citizens exercising his right to burn that flag in protest." Show me that, defend that, celebrate that in your classrooms. Then, you can stand up and sing about the land of the free.
>
> Portrayed by Michael Douglas, *The American President* (Castle Rock Entertainment 1995).

These two passages are not only familiar to many, but also express the beliefs many of us share and hold dear. Yet, to some degree, they are antithetical. At the very least, they set up the tension between the right of privacy[1] and the First Amendment right of free speech. But they also underlie concerns that have arisen about attempts to regulate internet expression,[2] especially

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[1] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960) ("The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth." footnote omitted)).

[2] *See, e.g.*, Stephen Lendman, *Internet Threatened by Censorship, Secret Surveillance, and Cybersecurity Laws*, FOG CITY J. (May 22, 2009), http://www.fogcityjournal.com/wordpress/2009/05/Internet-threatened-by-censorship-secret-surveillance-and-cybersecurity-laws/. Lendman argues:

> At a time of corporate dominated media, a free and open Internet is democracy's last chance to preserve our First Amendment rights without which all others are threatened. Activists call it Net Neutrality. Media scholar Robert McChesney says without it "the Internet would start to look like cable TV (with a) handful of massive companies (controlling) content" enough to have veto power over what's allowed and what it costs. Progressive

that of school children. What happens when these rights collide at school?

A recent case from the Central District of California, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,[3] illustrates the problem and has gotten a great deal of attention from the media, mostly arguing for the need to protect students from cyber-bullying by other students,[4] and from free speech advocates, arguing for robust constitutional protections of student internet speech originating off campus.[5] *Beverly Hills* is unique, however, because unlike the eleven other cases of student off-campus internet expression that eventually makes its way onto campus,[6] *Beverly Hills* did not involve cyber-harassment of school teachers or administrators, but true cyber-bullying of another student in the same school.[7]

> web sites and writers would be marginalized or suppressed, and content systematically filtered or banned.

Id.

[3] 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

[4] Victoria Kim, *A Right for Students to be Cruel Online?* L.A. TIMES, Dec. 13, 2009, at A1 (responding to the as yet unpublished decision of Steven V. Wilson in *Beverly Hills*); *see also* Nancy Willard, *There Is No Constitutional Right to be a Cyberbully: Analysis of* J.C. v. Beverly Hills Unified Sch. Dist., CENTER FOR SAFE AND RESPONSIBLE INTERNET USE (Dec. 16, 2009), http://www.cyberbully.org/documents.

[5] Frank LoMonte, *Beverly Hills (Speech) Cop I: Court slams schoolhouse gate on school discipline of YouTube posting*, STUDENT PRESS LAW CENTER (Dec. 19, 2009), http://www.splc.org/wordpress/?p=361.

[6] *See* discussion *infra* Part II. The closest case seems to be *Coy v. Board of Education*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). In that case, the court considered whether a student's First Amendment rights were violated when he created a website at home, containing a "losers" list of three fellow students, with several insulting sentences written under each student's picture. The creator later accessed his own website in class on a school computer, in violation of the school's internet use policy, but apparently never showed the site to any other students, and no evidence showed that any students ever saw the site. The court characterized it as a "private viewing of his own website." *Id.* at 799. While the court found that *Tinker*'s substantial disruption standard would apply to such expression, and found that accessing the website had no effect upon the "school district's ability to maintain discipline in the school," the court found that there was a material issue of fact on the motive of the school's subsequent discipline of Coy—the content of his website or a violation of the school's internet policy. The court refused to grant summary judgment for either party. *Id.* at 801.

[7] Some commentators define cyberbullying broadly as the "use of information and communication technologies . . . to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm *others*." Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to*

In *Beverly Hills*, Judge Stephen Wilson meticulously outlined Supreme Court student speech cases, as well as application of those decisions by lower courts, including several of the cases involving the Internet. He determined that the substantial disruption standard established in *Tinker v. Des Moines Independent Community School District*[8] "applies to both on-campus and off-campus speech," yet ultimately found insufficient evidence of substantial disruption, or any foreseeable risk thereof, despite the vitriolic name-calling and profanity that caused the targeted student severe emotional distress and anxiety about attending class.[9]

The Internet creates a challenging environment in which children's rights of privacy and free speech do not easily co-exist. And, since the "well-being of children depends to a large extent on their rights and protections under the law,"[10] both rights need clear constitutional parameters. The challenge is to balance a child's right to be let alone with a child's equally compelling right of freedom of expression.[11] Although the rights are those of the child,[12] protecting those rights supposes an obligation on the part of others—parents or the state.[13] Outside school, parents may

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Students' Free Speech Rights, 33 VT. L. REV. 283, 286 (2008) (emphasis added). However, there is, as Renee Servance points out, an important distinction between "cyberbullying," which is the use of the Internet by students to bully peers, and "cyber-harassment," which is use of the Internet by students to harass adult members of the school community. Renee L. Servance, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1219 (2003); *see also* Willard, *supra* note 4 (arguing that the opinion in *Beverly Hills* went "off-track" because of "the limited legal guidance related to the constitutionality of a school response when a student is bullying, or being verbally aggressive, towards another student").

[8] 393 U.S. 503 (1969).

[9] *Beverly Hills*, 711 F. Supp. 2d at 1108.

[10] *See* JOAN CATHERINE BOHL & CHRISTINE METTEER LORILLARD, CHILDREN AND THE LAW: THE COMPETING RIGHTS, PRIVILEGES, AND INTERESTS OF CHILDREN, PARENTS, AND THE STATE ix (2010).

[11] *See* Alison King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 846 (2010); Servance, *supra* note 7, at 1224.

[12] *See* Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 19 (1993).

[13] *See* Elisa Poncz, *Rethinking Child Advocacy After* Roper v. Simmons*: "Kids are Just Different" and "Kids are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L.

protect their children, and in fact, have a constitutional right to discretion in raising their children.[14] But at school, during school hours, or off campus after hours during school-sponsored events, parents may not be able to defend the rights of their children. In these instances, under the doctrine of *parens patriae*, the state, often in the form of its public schools, is the "fallback" for the family and has an interest in the welfare of its children, an interest in promoting and protecting a child's best interests.[15]

To that end, several Acts have been proposed to protect children from online harassment and bullying. In 2000, the Children's Internet Protection Act (CIPA) was enacted by Congress to address:

> [C]oncerns about access to offensive content over the Internet on school and library computers. CIPA imposes certain types of requirements on any school or library that receives funding for Internet access or internal connections from the E-rate program – a program that makes certain communications technology more affordable for eligible schools and libraries.[16]

Yet similar regulation has drawn criticism as an abridgement to First Amendment rights.[17] In 1998, the Child Online Protection Act (COPA) was created but quickly blocked by federal courts as an unconstitutional infringement of speech.[18]

POL'Y & ETHICS J., 273, 276 (2008); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 805 (1999).

[14] In *Layshock v. Hermitage School District*, parents of a student disciplined for creating a fake internet profile of the principal of his school filed a Due Process claim against the school, alleging that the school's punishment of their son interfered with their "parental right of determining how best to raise, nurture, discipline and educate their child." 593 F.3d 249, 255 (3d Cir. 2010). However, the Third Circuit ultimately found that the parents' Due Process rights had not been violated. *Id.* at 264; *see also* Duffy B. Trager, *New Tricks for Old Dogs: The* Tinker *Standard Applied to Cyber-Bullying*, 38 J. L. & EDUC. 553, 556 (2009); Poncz, *supra* note 13, at 281.

[15] BOHL & LORILLARD, *supra* note 10, at x; *see also* Poncz, *supra* note 13, at 281 (citing the state's obligation to act in children's best interests by setting limits on curfew, driving, smoking, etc.).

[16] *Guide: Children's Internet Protection Act*, FED. COMMS. COMMISSION, http://www.fcc.gov/guides/childrens-internet-protection-act (last visited Oct. 10, 2011).

[17] *See, e.g.*, Lendman, *supra* note 2.

[18] *See id. ("*In 1998, the Child Online Protection Act (COPA) passed, but was blocked by federal courts as an infringement of free speech and therefore

The Internet, therefore, has created a dilemma for schools, which are charged with protecting students from predatory practices and inappropriate content while also honoring students' First Amendment rights to freedom of expression.[19] Are schools that punish "cyber-bullying" by one student directed at another student in violation of that student's First Amendment right of free expression when such expression originates off campus? Or is the state, through its schools, acting in its *parens patriae* capacity to protect "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone,"[20]—in this instance a student's right to be free from bullying that has had devastating consequences?[21] Additionally, every child has a "state-created property right to an education,"[22] and any expression that interferes with a student's "educational performance"[23] and the right to feel secure while receiving her

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unconstitutional and unenforceable. In 1999, the law was struck down at the Appellate Court level, but it stayed on the books. In 2002, the Supreme Court reviewed the ruling and returned the case for reconsideration. It remained blocked. Then in March 2003, the Appellate Court again ruled it unconstitutional on the grounds that it would hinder protected adult speech . . . .").

[19] Kathryn S. Vander Broek, Steven M. Puiszis, & Evan D. Brown, *Schools and Social Media: First Amendment Issues Arising from Student Use of the Internet*, 21 No. 4 INTELL. PROP. & TECH. L.J. 11, 11 (2009). Renee Servance also notes that schools can be sued for inaction in the case of student against student harassment, citing Columbine as an example. Servance, *supra* note 7, at 1215; *see also* Trager, *supra* note 14, at 560 (citing Title IX liability imposed for a school's failure to address cyber-bullying in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)).

[20] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[21] *See generally* Beckstrom, *supra* note 7, at 284 (citing several instances of student victims of cyber-bullying committing suicide). The problem is so pervasive, that at the time of this writing, a new suicide has been reported, albeit by a university student: "NEW BRUNSWICK, N.J. (CBS/AP) Tyler Clementi committed suicide Sept. 22, apparently after discovering that his Rutgers University roommate, Dharun Ravi, and friend Molly Wei, live-streamed Clementi in a sexual encounter with another male student without his knowledge, a lawyer for the Clementi family announced late Wednesday." Carlin DeGuerin Miller, *Tyler Clementi Suicide: Lawyer Confirms Student's Suicide, Molly Wei and Dharun Ravi Face Charges for Sex Tape*, CBS NEWS (Sep. 29, 2010, 6:54 PM), http://www.cbsnews.com/8301-504083_162-20018088-504083.html.

[22] Martha McCarthy, *Student Expression That Collides With The Rights of Others: Should the Second Prong of* Tinker *Stand Alone?* 240 EDUC. L. REP. 1, 15 (2009). The Supreme Court has found a "property interest in educational benefits." Goss v. Lopez, 419 U.S. 565, 576 (1975).

[23] Saxe v. State College Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001).

education[24] must be balanced against First Amendment protection for internet expression about another student, created off campus but making its way onto campus.

The Supreme Court has yet to consider a case involving student speech online, either on or off campus,[25] but the Court has set some parameters. First, the Court begins with the premise that children are "clearly persons"[26] entitled to constitutional protection. As such, the Supreme Court declared in *In re Gault*, that "neither the Fourteenth Amendment nor Bill of Rights is for adults alone."[27] Subsequently, in *Tinker*, a case that has been extolled as the "zenith of children's rights,"[28] the Court upheld students' First Amendment rights to wear black armbands to school in protest of the Vietnam war, stating that "students [do not] . . . shed constitutional rights . . . at the schoolhouse gate."[29] However, students *have* shed at least one right "at the schoolhouse gate." By virtue of their confinement to the custodial control of others, in this instance compulsory school attendance required by the states, students are deprived of a liberty interest guaranteed to all adults by the Due Process Clause.[30] As Emily Buss has observed, such a considerable diminution of personal rights should perhaps indicate an enhancement of children's other rights while within the schoolhouse gate.[31]

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[24] Willard, *supra* note 4, at 4.

[25] Vander Broek et al., *supra* note 19, at 12 (observing that "existing Supreme Court decisions involve . . . fundamentally different forms of media and arose in a markedly different context"). An additional wrinkle is that parental and state's interests in the child may collide: many take the position that off-campus speech is a matter for parental discipline; others argue that criminal or tort action is the remedy for off-campus bullying. *See* Pike, *infra* note 32, at 990.

[26] Levy v. Louisiana, 391 U.S. 68, 70 (1968) (internal quotation marks omitted).

[27] *In re* Gault, 387 U.S. 1, 13 (1967).

[28] SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 22 (2d ed. 2003).

[29] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[30] Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 362 (2005). The Supreme Court, in *Bethel School District No. 403 v. Fraser*, recognizes that parents and schools, *in loco parents*, need to protect school children that are "a captive audience." 478 U.S. 675, 684 (1986). The Ninth Circuit explained that school children are a "captive audience" because of "mandatory attendance requirements." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

[31] Buss, *supra* note 30, at 362.

The problem, as has often been observed, is that cyberspace blurs just where schoolhouse gates are[32] and which children they enclose, and "the Internet has literally (and legally) moved the schoolhouse gate to a student's home computer."[33] It is at this point that children's rights collide: a child engaging in otherwise protected expression off campus and from a non-school-owned computer would seem to have a solid First Amendment right to engage in such expression. However, when that expression makes its way onto campus, either intentionally brought there by the creator or foreseeably arriving there because the expression is about another student or member of the school community whom the speaker would not otherwise have known,[34] the Internet has created what has been called an on-campus "telepresence."[35] In such an instance, the courts must decide whether a pure right of free speech for off-campus expression takes precedence over a child's need for enhanced protection of her privacy right to be let alone, given the diminished right of liberty imposed by compulsory school attendance. In other words, when a child is exposed to cyber-bullying that was created off campus but reaches campus, and cannot shun the schoolhouse because the state requires her attendance, does the state, in the form of its schools, have the power to protect her privacy right by punishing her bullier?[36]

Schools have been afforded authority over other off-campus conduct, such as assault,[37] directing "fighting" words at a teacher

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[32] *See* Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 973 (2008).

[33] Vander Broek et al., *supra* note 19, at 12.

[34] Renee L. Servance observes that most students create websites because of the relationships formed in school. "If the parties had not attended the same school the speech would not likely exist." Servance, *supra* note 7, at 1237.

[35] Pike, *supra* note 32, at 973.

[36] Susan P. Stuart, *Fun With Dick and Jane and* Lawrence*: A Primer on Educational Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 631 (2004) (Education occurs in a public setting that "challenges individual autonomy and respect for student's privacy.").

[37] Pollnow v. Glennon, 594 F. Supp. 220 (S.D.N.Y. 1984); Nicholas B. v. Sch. Comm. of Worcester, 587 N.E.2d 211 (Mass. 1992).

in a public place,[38] and even publishing a poem in a public paper that ridiculed a school and its functions.[39] Additionally, the Supreme Court has allowed abridgement of First Amendment rights when a true threat is made.[40] Student expression may be regulated and punished in five instances: when it occurs on campus and causes a substantial disruption[41] or collides with the rights of others,[42] when it occurs on campus and is lewd, vulgar, and offensive,[43] when it occurs on campus and bears the imprimatur of the school,[44] or when it occurs on campus and promotes drug use.[45]

However, a gray area exists[46] when the speech is not expressly threatening or when students have engaged in the

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[38] Fenton v. Spear, 423 F. Supp. 767, 769 & 773 (W.D. Pa. 1976) (school had authority to punish student who loudly called his teacher "a prick" in front of him in a public parking lot).

[39] State *ex rel.* Dresser v. Dist. Bd., 116 N.W. 232 (Wis. 1908).

[40] A true threat is one of the nine basic categories of unprotected speech. *See* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1119 n.46 (2010).

[41] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513. This is the test used almost exclusively in internet expression cases to date.

[42] *Id.* at 514.

[43] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986).

[44] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[45] Morse v. Frederick, 551 U.S. 393 (9th Cir. 2007).

[46] *See, e.g.*, Dave Barry, *Third Circuit Vacates Decisions in Pair of Cases Involving Off-campus Online Student Speech and Grants Rehearing*, DREAM BELIEVE (Apr. 16, 2010, 12:55 AM), http://www.allplc.net/welcome/node/535. Barry summarized:

> On April 10, 2010, the U.S. Court of Appeals for the Third Circuit (PA, NJDE, VI) granted the motions for rehearing en banc in *J.S. ex rel. v. Blue Mountain School District* and *Layshock v. Hermitage School District*. Both cases involve students who were disciplined for using social networking sites to create parody profiles of a school official on an off-campus computer. In *Blue Mountain*, a three-judge panel split 2-1, ruling that a Pennsylvania school district did not violate a student's free speech rights when it disciplined her for creating, off campus, an online parody profile of her principal. In *Layshock*, on the other hand, a separate three-judge panel unanimously ruled that a Pennsylvania school district violated the free speech rights of a high school student who was disciplined for creating, off-campus, a parody online profile of the school's principal.

Id.

As this Article was being prepared for publication, the Third Circuit handed down decisions in both cases that find the student's First Amendment rights violated because the speech was created off campus and caused no substantial disruption on

speech outside of school walls, about people within them, foreseeably causing the speech to come onto campus. As Robert O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression, observed:

> [W]hen a true threat is made, and when speech is made using school computers, schools have clear authority to regulate students' speech. But when something falls in the gray area between an expressed threat and mere teasing, and students are accessing the Internet outside the school's walls, administrators are faced with a tricky calculus.[47]

In fact, the Second Circuit realized that "[i]f courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators . . . to predict where the line between on- and off-campus speech will be drawn in this new digital era."[48] In the end, which students will have to "shed their . . . rights . . . at the schoolhouse gate" is left in question, depending on the characterization of the speech as on-campus speech—governed by the four Supreme Court student speech cases—or off-campus speech; although the Court in *Tinker* also noted that a student's First Amendment right to free speech—at least on campus—may not "colli[de] with the rights of other students to be secure and to be let alone."[49]

What is now needed in order to uniformly and consistently protect both the rights of the speaker and the rights of the target is law directly focused on internet expression, especially expression created off campus but creating a "telepresence" on campus by targeting fellow students. Schools and courts should no longer have to guess at the constitutional parameters, or determine what is a "substantial" enough disruption before punishing students who cyber-bully. Proving that student internet

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campus. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); *see also infra* note 373.

[47] *See* Kim, *supra* note 4 (quoting Robert O'Neil, director of Thomas Jefferson Center for the Protection of Free Expression).

[48] Doninger v. Niehoff, 594 F. Supp. 2d 211, 224 (D. Conn. 2009).

[49] *Tinker*, 393 U.S. at 506, 508.

expression created off campus is a true threat to a fellow student should not be the only way to preserve another child's right to be let alone.[50]

Part I of this Article considers the four Supreme Court cases governing student speech, as well as precedent governing the more amorphous right of privacy. Part II considers the lower courts' application of these precedents in the eleven student internet expression cases and attempts to synthesize their principles for regulating student off-campus cyber-expression. Part III considers the first case of a student-upon-student cyber-attack, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, and attempts to place it within the parameters established by the earlier Internet cases to consider the propriety of the opinion. This Article's Conclusion considers possible solutions to cases falling into the "gray area" of protected speech and concludes that courts must reconsider *Tinker*'s substantial disruption requirement as the *only* test in student-on-student cyber-bullying cases. When off-campus cyber expression is shown to have a sufficient "nexus" to the school in the form of being intentionally carried there by the creator, or foreseeably making its way onto campus because its target is a fellow student and it contains prurient content intended to attract student viewers, it should be viewed as on-campus speech that may be considered under *any* of the Supreme Court's exceptions to protected student speech, in order to protect against a "collision with the rights of other students to be secure and to be let alone."[51]

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[50] Another student-on-student internet expression case arose in the Los Angeles area at the same time as *Beverly Hills*. In *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (Ct. App. 2010), the Second District California Court of Appeal considered the cyber-expression under a "true threat" analysis in the context of an anti-SLAPP (strategic lawsuit against public participation) statute intended to protect free speech, finding that such expression was never protected speech under the First Amendment and remanding to allow the hate crime suit to proceed, circumventing any necessity of protected speech within the schoolhouse gates.

[51] *Tinker*, 393 U.S. at 508.

I. COMPETING RIGHTS—PRIVACY VS. FREE SPEECH

A. The Right of Privacy

The right of privacy—for adults as well as for children—is an amorphous one, not specifically enumerated in the Bill of Rights but thought to come within its "penumbra."[52] But the right of privacy has, from its inception, been invoked in the context of new technologies that whittled away at personal rights. Louis Brandeis first discussed the concept in 1890 within the context of a recent innovative technology of the time, "[i]nstantaneous photographs," which allowed newspapers to publish photos and comments of individuals without first obtaining their consent.[53] In a passage that could be about the Internet, Brandeis wrote:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers . . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[54]

Years later, after becoming a Justice on the Supreme Court, Brandeis discussed the right to privacy in his dissent in *Olmstead*

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[52] Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life.").

[53] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[54] *Id.* at 196. Susan P. Stuart has found this article to "set out the rudiments of privacy as a positive, nearly quantifiable, concept for limiting the intrusion of technology . . . ." Stuart, *supra* note 36, at 593. State courts and legislatures soon adopted the concept.

v. United States, a case that upheld the right of Elliot Ness and his untouchables to wiretap the private telephone lines of bootleggers as long as it was done at a point between the defendants' homes and their offices,[55] again in response to a new technology. Brandeis stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . . They conferred . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[56]

William Prosser later recognized that the law of privacy comprises four distinct kinds of invasion of four different interests of an individual:

> (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs[;] (2) Public disclosure of embarrassing private facts about the plaintiff[;] (3) Publicity which places the plaintiff in a false light in the public eye[;] and (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[57]

In discussing the second, he observed that it was something "quite distinct from intrusion. The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation . . . ."[58] He warned, however, that the law of privacy was not intended "for the protection of any shrinking soul who is abnormally sensitive about such publicity. It is quite a different matter when the details of sexual relations are spread before the public gaze, or there is highly personal portrayal of his intimate private characteristics or conduct."[59]

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[55] Olmstead v. United States, 277 U.S. 438 (1928).
[56] *Id.* at 478 (1928) (Brandeis, J., dissenting).
[57] Prosser, *supra* note 1, at 389.
[58] *Id.* at 398.
[59] *Id.* at 397.

But it is generally agreed that the Supreme Court recognized a constitutional right of privacy for the first time in *Griswold v. Connecticut*, where the Court held that Connecticut's birth-control law, which made it a crime for anyone to give out information or instructions on the use of birth-control devices, intruded upon the right of marital privacy and reproductive rights.[60] The Court observed that "[w]e have had many controversies over these penumbral rights of 'privacy and repose' . . . [but many] cases bear witness that the right of privacy which presses for recognition here is a legitimate one."[61]

However, the right of privacy and the right to be let alone, while guaranteed to adults, are not necessarily co-extensive with the rights of children in public school. The Court *has* found that school children have a "liberty interest in [their] reputation," which is not "insubstantial,"[62] but also recognized the need to "strike [a] balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place . . . ."[63]

Thus, the Court abridged a child's Fourth Amendment rights, finding that a school's search of a student's purse must only be reasonable under the circumstances and is not dependent upon establishing probable cause.[64] The Court has also found that random drug testing as a requirement for interscholastic athletics did not violate a schoolchild's Fourth Amendment rights because

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[60] 381 U.S. 479, 485 (1965).

[61] *Id.* (citations omitted).

[62] Goss v. Lopez, 419 U.S. 565, 576 (1975) (finding school suspensions imposed for less than good cause may violate that interest).

[63] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

[64] *Id.* at 341. The Court stated:

> [T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

Id.

the invasion of her privacy was "negligible."[65] The Court reasoned that "while children assuredly do not shed their constitutional rights . . . at the schoolhouse gate . . . the nature of those rights is what is appropriate for children in school."[66]

Parents, as part of their right to discretion in bringing up their children, also have the right and responsibility to invade a child's zone of privacy to protect their children or to provide them medical attention. The Supreme Court recognized that in these instances parents are "prime decision-makers."[67]

But even this right is not absolute, as the Court has carved out a narrow zone of privacy for a child mature enough to make a decision her parents would otherwise make for her. This "mature minor doctrine" arose in *Belotti v. Baird*, which found a mature minor's right of privacy demanded that she be allowed to make her own abortion decision.[68] Justice Stevens' concurrence pointed out that "[t]he constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'"[69] The Court, however, has never broadened that zone of privacy in medical decision-making beyond abortion.

These kinds of decisions by parents and the state have been found by the United Nations' Convention on the Rights of the

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[65] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995); *see also* Bd. of Educ. of Indep. Sch. Dist. v. Earls, 536 U.S. 822 (2002) (upheld random urinalysis policy for competitive extracurricular activities beyond athletics).

[66] *Id.* at 656 (citation and internal quotation marks omitted).

[67] Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

[68] 443 U.S. 622 (1979). The Court found that when the state requires parental consent to a minor's abortion, the minor has the right to prove that "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-44.

[69] *Id.* at 655.

Child (CRC) to be part of a child's broad right to protection.[70] The CRC, which has been called the "gold standard"[71] and heralded as "a landmark in the history of childhood,"[72] has never been ratified by the United States, although it has been observed that the United States is "substantially in compliance . . . [at both the federal and] state level."[73] Article 16 of the CRC provides that "Children have a right to privacy. The law should protect them from attacks against their way of life, their good name, their families and their homes."[74] The CRC also provides in Article 13 that "Children have the right to get and to share information, as long as the information is not damaging to them *or to others*."[75] These two articles seem to set up the Privacy versus Free Speech tension that off-campus internet expression imposes. Only a few cases seem to do so.

In *West Virginia State Board of Education v. Barnette,* a pre-*Tinker* case, the Supreme Court discussed the concept of the rights of school children in the context of a possible "collision" of rights that *Tinker* eventually forbids.[76] In this case, Barnette and others sought an injunction to restrain enforcing a regulation requiring children in public schools to salute the American flag, when Children of the Jehovah's Witness faith had "been expelled from school and . . . [were] threatened with exclusion for no other cause."[77] The Supreme Court found that the appellees' decision *not* to salute the flag or recite the pledge did "not bring them into collision with rights asserted by any other individual."[78] The Court reasoned that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do

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[70] *See* BOHL & LORILLARD, *supra* note 10, at ix.

[71] S. Randall Humm et al., *Introduction* to CHILD, PARENT, AND STATE: LAW AND POLICY READER at xv (1994).

[72] Michael Freeman, *Introduction* to CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE 1 (Michael Freeman ed., 1996).

[73] Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 329 (1998).

[74] U.K. COMM. FOR UNICEF, CHILDREN'S RIGHTS AND RESPONSIBILITIES (1991), *available at* http://www.unicef.org/rightsite/files/rights_leaflet.pdf.

[75] *Id.* (emphasis added).

[76] 319 U.S. 624, 630 (1943).

[77] *Id.*

[78] *Id.* at 630.

so . . . . The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude."[79]

In a passage recalling Brandeis' paean to the right of privacy in his *Olmstead* dissent,[80] the Court found that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[81] In a concurring opinion, Justice Murphy reasoned that the benefits to society from the compulsory flag salute were not "sufficiently definite and tangible to justify the invasion of freedom and privacy that it entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination."[82]

In another pre-*Tinker* case, the Fifth Circuit applied *Barnette* and foreshadowed *Tinker*[83] in a discussion of behavior at school that caused "a collision with the rights of others."[84] In *Blackwell v. Issaquena County Board of Education*, thirty students at "the all-Negro" Henry Weathers High School wore "freedom buttons to class."[85] The small "buttons depict[ed] a black and white hand joined together with 'SNCC' [Student Nonviolent Coordinating Committee] inscribed in the margin."[86] According to school officials, some of the students created a disturbance in the hallways when they were scheduled to be in class.[87] Three students were brought to the principal's office and told that no one

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[79] *Id.* at 630-31.

[80] Brandeis wrote of the Constitution's recognition of the "significance of man's spiritual nature, of his feelings and of his intellect." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[81] *Barnette*, 319 U.S. at 642.

[82] *Id.* at 646. (Murphy, J., concurring).

[83] *Tinker* held that a student's First Amendment right of free speech was not protected if the speech created a substantial disruption or caused a "collision with the rights of other students." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[84] Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966).

[85] *Id.* at 750.

[86] *Id.*

[87] *Id.* at 751.

could be permitted to create a disturbance and that they would have to remove their buttons.[88]

The following Monday, approximately 150 students came to school wearing the buttons.[89] These students distributed buttons in the corridor of the school building and accosted other students by pinning the buttons on them, causing a younger student to cry.[90] This activity disrupted class instruction and resulted in a general breakdown of orderly discipline.[91] After the principal assembled the students in the cafeteria and informed them that they were forbidden to wear the buttons at school, the students became hostile and discourteous.[92]

The next day, close to 200 students appeared wearing buttons and were told that if they returned to school again wearing buttons they would be suspended.[93] The following day, the students returned to school wearing the buttons and the principal immediately sent them home.[94] As the students gathered their books to go home, some invaded classes, ignoring the teachers, and invited others to join them.[95]

Parents of the suspended children met with the superintendent and the principal, but no agreement was ever reached.[96] Those children who continued to remain at home after a period of twenty days were suspended for the balance of the school year.[97]

A mandatory preliminary injunction was sought to compel school officials to re-admit the suspended pupils and to allow them to wear freedom buttons so long as no disturbance resulted, but the injunction was denied.[98] On appeal, the Fifth Circuit considered whether the school regulation forbidding the wearing of freedom buttons was a "reasonable rule necessary for the

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 751-52.
[96] *Id.* at 752.
[97] *Id.*
[98] *Id.*

maintenance of school discipline or an unreasonable rule which infringes on the students' right to freedom of speech guaranteed by the First Amendment of the United States Constitution."[99]

The court began by noting that it was within the province of school authorities to prohibit and punish acts calculated to undermine the school routine, which it stated was "not only proper . . . but . . . necessary."[100] The court characterized the case as one that involved "regulations limiting freedom of expression and the communication of an idea which are protected by the First Amendment," and presented "serious constitutional questions," which demanded keeping in mind the fundamental constitutional rights of those being affected.[101]

The court found that the Constitution "does not confer 'unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom.'"[102] However, it opined that the interests the regulation sought to protect must be "fundamental and substantial if there is to be a restriction of speech."[103]

The court contrasted *Barnette*, in which the Supreme Court was careful to note that the students' refusal to participate in the salute and pledge "did not interfere with or deny rights of others to do so and the behavior involved was 'peaceable and orderly.'"[104] In *Blackwell*, the Fifth Circuit found there was "an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum."[105] Reasoning that the "proper operation of public school systems is one of the highest and most fundamental responsibilities of the state," yet warning that

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[99] *Id.*

[100] *Id.* at 753.

[101] *Id.*

[102] *Id.* at 754 (citation omitted).

[103] *Id.* Of interest here is Judge Kozinski's characterization of "the 'rights of others' language in *Tinker*" as referring only to "traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis added).

[104] *Blackwell*, 363 F.2d at 754 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943)).

[105] *Id.*

"school officials should be careful in their monitoring of student expression in circumstances in which such expression does not substantially interfere with the operation of the school," the court upheld the district court's denial of the injunction based on the "abundance of clear, convincing and unequivocal testimony" in the case.[106] As such, this decision, handed down three years before *Tinker*, seemed to anticipate and apply both its tests—the court found *both* a substantial disruption *and* a collision with the rights of others—presumably their privacy right to be left alone.

B. The First Amendment Right of Free Speech for School Students

The parameters of the right of free speech guaranteed to students emerged three years later in *Tinker v. Des Moines Independent Community School District*.[107] In *Tinker*, three students wore black armbands to school to protest the Vietnam War.[108] The school responded by adopting a policy forbidding such armbands and asked the students to remove them.[109] The students refused and were suspended.[110] The district court refused to grant the students' request for an injunction restraining school officials from disciplining them.[111] The Eighth Circuit upheld the order, but the Supreme Court reversed.[112]

Citing *Barnette*, the Court found that wearing the armbands to express political views was protected by the First Amendment and was in no way "actually or potentially disruptive conduct . . . ." but was "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[113]

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[106] *Id. But see* Burnside v. Byars, 363 F.2d 744, 746-49 (1966). *Burnside* was decided simultaneously by the Fifth Circuit, and held that a high school regulation prohibiting students from wearing "freedom buttons," which had the words "One Man One Vote" and "SNCC" and which did *not* appear to hamper the school in carrying out its regular schedule of activities, was arbitrary and unreasonable, and an unnecessary infringement on students' protected right of free expression. *Id.*

[107] 393 U.S. 503 (1969).

[108] *Id.* at 504.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 504-05.

[112] *Id.* at 505.

[113] *Id.*

Recognizing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[114] the Court found that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[115]

Citing both *Blackwell v. Issaquena County Board of Education* and *Burnside v. Byars*, the Court reasoned that a student may express opinions at school as long as they do not:

> [M]aterially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. But conduct 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.[116]

Because the Court found nothing in the record that might have led school officials to forecast "substantial disruption of or material interference with school activities," the Court reversed.[117]

The *Tinker* Court therefore set out two exceptions to on-campus expression otherwise protected by the First Amendment. Such expression will not be protected if it causes, or foreseeably will cause, a substantial disruption of school activities (the test applied in *Tinker* itself), or if it collides with the rights of others. Although the two exceptions carved out by the Court were clearly written to be disjunctive,[118] lower courts have seldom applied the

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[114] *Id.* at 506.

[115] *Id.* at 511.

[116] *Id.* at 513 (citing Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 749 (5th Cir. 1966); *Burnside*, 363 F.2d at 749).

[117] *Id.* at 514.

[118] McCarthy, *supra* note 22, at 7 (citing *Harper v. Poway Unified School District*, 445 F.3d 1166 (2006), *vacated* 549 U.S. 1262 (2007), as concluding that "both prongs of the *Tinker* principle stand alone"). The court in *Beverly Hills* similarly said that the collision with the rights of others test exists "[i]n addition to the substantial disruption test." J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1122 (2010).

second prong alone.[119] The district court in *Beverly Hills* declined to do so because the "precise scope" of *Tinker*'s "rights of others" language was unclear.[120] However, by referring specifically to *Barnette*, *Blackwell*, and *Burnside* as the source of the "collision with the rights of others" test, the Court was certainly thinking of a collision with the *privacy* rights of another student or teacher, as outlined in those cases.[121]

The Supreme Court was to create three more exceptions to on-campus protected expression after those specified in *Tinker* itself. In *Bethel School District No. 403 v. Fraser*, the Court held that a school district acted within its permissible authority in imposing sanctions upon a student in response to his "offensively lewd and indecent speech" given during a school assembly of nearly 600 students.[122] The speech was "an elaborate, graphic . . . sexual metaphor," for which the student was suspended.[123] The record showed that "students appeared to be bewildered and embarrassed by the speech," and one teacher had "to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."[124]

The Court reasoned that unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were not for political speech.[125] The Court found:

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[119] The court in *Nixon v. Northern Local School District*, 383 F. Supp. 2d 965 (2005), was urged to do so, but declined because of lack of precedent. *See* McCarthy, *supra* note 22, at 6-7. However, a year later, the Ninth Circuit, in *Harper v. Poway Unified School District*, applied *Tinker*'s second test and concluded that a student wearing a T-shirt to school proclaiming "HOMOSEXUALITY IS SHAMEFUL," had violated the rights of others, forfeiting any constitutional protection of that expression. 445 F.3d at 1178.

[120] *Beverly Hills*, 711 F. Supp. 2d at 1122. The court declined to "extend[] the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student." *Id.* at 1123; *accord* Bowlet v. Town of Hudson, 514 F. Supp. 2d 168, 176 (finding the precise scope of *Tinker*'s "rights of others" language "unclear"); *see also* Bonnie A. Kellman, *Tinkering with* Tinker: *Protecting the First Amendment in Public Schools*, 85 NOTRE DAME L. REV. 367, 368 (2009) ("Neither *Tinker* nor any other Supreme Court case [gives] lower courts any real guidance about exactly when certain speech 'colli[des] with the rights of other students to be secure and to be let alone.'").

[121] *See supra* notes 76-105 and accompanying text.

[122] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[123] *Id.* at 678.

[124] *Id.*

[125] *Id.* at 685.

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students . . . . [V]ulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[126]

Justice Brennan concurred, explaining that if Fraser had given the same speech off campus he could not have been penalized "simply because government officials considered his language to be inappropriate."[127] However, students may properly be reprimanded for expression that school officials conclude disrupted the school's educational mission.[128] Ultimately, the Court found that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[129]

Many courts have read *Fraser* as merely allowing schools to prohibit "the 'manner' of speech that is offensive, not the viewpoint expressed."[130] In this context, Justice Brennan's observation would seem to indicate that the *content* of the speech was protected, but the type of speech—that is, lewd, vulgar, and offensive speech intentionally presented on campus—was not. *Fraser* thus seems to limit its holding to "offensive form[s] of expression" and "vulgar and offensive terms" specifically delivered

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[126] *Id.* at 685-86.

[127] *Id.* at 688 (Brennan, J., concurring).

[128] *Id.*

[129] *Id.* at 683.

[130] Cindy Lavorato & John Saunders, *Public High School Students, T-Shirts and Free Speech: Untangling the Knots*, 209 EDUC. L. REP. 1, 14 (July 2006) (surveying court interpretations of *Fraser*). In *Morse v. Frederick*, the Supreme Court itself admitted that "[t]he mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech . . . . But the Court also reasoned that school boards have the authority to determine 'what manner of speech in the classroom or in the school assembly is inappropriate.'" 551 U.S. 393, 404 (2007) (quoting *Fraser*, 478 U.S. at 683). The Court did not attempt to "resolve the debate," in *Morse*. *Id.*; *see also* Joanna Nairn, *Free Speech 4 Students:* Morse v. Frederick *and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 241 (2008).

on campus.[131] Perhaps for these reasons, only one court has been willing to extend *Fraser* to expression with its inception off campus, even if that expression subsequently makes its way onto campus and causes equivalent or even greater embarrassment.[132]

However, *Fraser* steps back from *Tinker* in that the Court did not require a "substantial disruption" within the school to bring the speech outside constitutional protection.[133] The Court, without so stating, recognized that school children have a right not to be held captive to speech that "bewilder[s] and embarrass[es]" them.[134] In so doing, as Renee Servance points out, "the Court recognized the necessity of balancing the right to free speech with the goal of protecting the rights of others where speech causes harm. In sum, *Fraser* protected the rights of others."[135] For these reasons, *Fraser* has often been thought to be the closest match for cyber-bullying cases.[136]

The next exception to on-campus protected expression came in *Hazelwood School District v. Kuhlmeier*, in which the Court upheld the right of a principal to remove two articles from the

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[131] *Fraser*, 478 U.S. at 683.

[132] In *J.S. v. Bethlehem Area School District*, the court found that there was a "sufficient nexus" between a website created by a student off campus that made vulgar, profane, and threatening comments about a particular teacher and the school campus to consider the speech as occurring on campus. 807 A.2d 847, 865 (Pa. 2002). Once that "threshold question" had been answered in the affirmative, the court found that the case before it "straddled" the political speech in *Tinker*, and the lewd and plainly offensive speech in *Fraser*. *Id.* at 866. The court then applied first Fraser and then *Tinker*'s substantial disruption test, and found both satisfied. *Id.* at 868-69. The district court in *J.S. ex rel. Snyder v. Blue Mountain School District*, applied *Fraser* and held that the off-campus expression could be restricted "because the lewd and vulgar off-campus speech had an effect on campus." 2008 WL 4279517, at *7. However, the Third Circuit declined to decide whether *Fraser* could be applied to such off-campus speech. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010). *But see* Bowler v. Town of Hudson, 514 F. Supp. 2d 168 (D. Mass. 2007) (refusing to apply *Fraser* to speech that did not make it way onto campus); Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008) ("It is not clear, however, that *Fraser* applies to off-campus speech.").

[133] The Court in *Morse v. Frederick* found that the holding in *Fraser* was not based on any showing of substantial disruption, and therefore stated that the "mode of analysis" set forth in *Tinker* was "not absolute." 551 U.S. 393, 405 (2007).

[134] *Fraser*, 478 U.S. at 678.

[135] Servance, *supra* note 7, at 1229.

[136] *Bethlehem*, 807 A.2d at 868 (finding that if the court were to solely apply *Fraser*, it would have "little difficulty in upholding the School District's discipline").

school's newspaper about teen pregnancy and divorce.[137] The Court found that the issue before it was different from that in *Tinker*, which considered whether the First Amendment requires a school to *tolerate* particular student speech.[138] The question before the Court in *Hazelwood* was whether the First Amendment requires a school affirmatively to *promote* particular student speech, such that it would bear the "imprimatur of the school."[139]

The Court found that educators are entitled to exercise greater control over school-sponsored student expression "to assure that participants learn whatever lessons the activity is designed to teach, 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 attributed to the school."[140] The Court therefore held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[141] However, because *Hazelwood* particularly limited its decision to expression not merely tolerated but promoted through school-sponsored media, the decision has had little application to off-campus cyber-bullying cases.[142]

In its most recent decision, and one many hoped would revisit *Tinker* in light of the computer age,[143] the Court considered the reach of the schoolhouse gates within which student expression

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[137] 484 U.S. 260 (1988).

[138] *Id.* at 270-71.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 273.

[142] *See generally* King, *supra* note 11, at 868.

[143] *See* Martha McCarthy, *Student Expression Rights: Is a New Standard in the Horizon?*, 216 EDUC. L. REP. 15, 15 (2007) ("[T]he *Frederick* decision provides a vehicle for the Court to reinforce or alter the legal principles governing public school students' free expression rights."). McCarthy and others had for some time felt that "clarification is needed as to when student expression has to be disruptive to be censored and whether expression that conflicts with the school's mission can be curtailed in the absence of a threat of disruption." *Id.* at 30. To that end, there was some hope of a "broad interpretation of the limitations imposed by *Fraser*," extending it to off-campus speech. *Id.*

was protected unless it provoked a "substantial disruption" or collided with "the rights of others."[144] In *Morse v. Frederick*, the Court considered the case of Joseph Frederick who, along with fellow students, attended the Olympic Torch Relay that passed along a public street in front of the school.[145] The principal allowed students to leave class to attend the relay; Frederick was apparently late that day, however, and went directly to join his friends on the street in front of the school.[146] While waiting for the torch to arrive, he unfurled a fourteen-foot banner that read, "BONG HiTS 4 JESUS," apparently to attract television attention.[147] The banner was clearly visible to students across the street.[148] The school principal asked Frederick to take the banner down, he refused, and she confiscated the banner and suspended Frederick.[149]

Because the incident occurred on a public street, and at a time when classes were not in session, Frederick argued that this was not a school speech case.[150] Echoing lower court decisions that asked for clear definition of students' First Amendment rights for off-campus speech,[151] the Court admitted that "[t]here is some uncertainty at the outer boundaries as to when courts should

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

145 Morse v. Frederick, 551 U.S. 393, 397 (2007).

146 *Id.*

147 *Id.*

148 *Id.* at 397.

149 *Id.*

150 *Id.* at 400.

151 *See, e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002). The court in *Bethlehem* stated:

> Unfortunately, the United States Supreme Court has not revisited this area for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech . . . . Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media web site, accessible to fellow students, teachers, and the world.

Id. at 863-64. Because of this, the Court determined that although "lower courts, in the context of internet communication, have focused on *Tinker* . . . we are not convinced that reliance solely on *Tinker* is appropriate." Thus, the court applied both *Fraser* and *Tinker* to the case and found both standards satisfied. *Id.* at 867.

apply school speech precedents."[152] Nevertheless, the Court treated Frederick's expression, which was decidedly off campus in both its inception and display, as on-campus speech because its creator brought the banner to a school-sponsored event and displayed it in front of other members of the school community during regular school hours.[153] In perhaps the first Supreme Court opinion to enclose geographically off-campus expression within the schoolhouse gates, the Court reasoned that, "Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."[154]

Once it determined that the expression was on-campus speech, the Court neither applied *Tinker*'s "substantial disruption" test, nor reviewed and revised it, as some had guessed was the Court's reason for granting certiorari.[155] The Court simply stated that the *Tinker* standard was "not absolute."[156] Nor, as the Court admitted, did it apply *Hazelwood*, because it found no basis for concluding that the banner bore the "school's imprimatur."[157] The Court also refused to apply *Fraser*, which it found "should not be read to encompass any speech that could fit under some definition of 'offensive.'"[158] The Court determined that the concern was "not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."[159] The Court looked to the "special characteristics of the school environment,"[160] and the

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[152] *Morse*, 551 U.S. at 401.

[153] *Id.* The *Wisniewski* court summarized the finding in *Morse*:

> Since the Supreme Court in *Morse* rejected the claim that the student's location, standing across the street from the school at a school approved event with a banner visible to most students, was not 'at school,' it had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities.

Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 n.3 (2d Cir. 2007) (citation omitted).

[154] *Morse*, 551 U.S. at 401 (internal quotation marks omitted).

[155] McCarthy, *supra* note 22, at 15.

[156] *Morse*, 551 U.S. at 405.

[157] *Id.*

[158] *Id.* at 409.

[159] *Id.*

[160] *Id.* at 408 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

"governmental interest in stopping student drug abuse,"[161] in finding that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[162]

In its factually narrow holding, the Court used, arguably for the first time, what has been called "content-based regulation," which targets a particular viewpoint as undeserving of First Amendment protection.[163] The Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[164]

The Court was highly divided, however, containing four separate opinions. The three dissenting Justices agreed that the principal should not be held liable for confiscating the banner, but found:

> [T]he school's interest in protecting its students from exposure to speech reasonably regarded as promoting illegal drug use, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.[165]

In other words, the dissenters did not dispute the majority's content-based regulation of student speech but questioned whether the banner actually *was* promoting drug use.

The Court, therefore, clearly permitted content-based regulation in limited circumstances.[166] However, from its first student speech decision in *Tinker*, the Court has expressed fears that schools might become "enclaves of totalitarianism"[167] or

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[161] *Id.*

[162] *Id.* at 410.

[163] *See* Nairn, *supra* note 130, at 247.

[164] *Morse*, 551 U.S. at 403.

[165] *Id.* at 434 (Stevens, J., dissenting) (internal quotation marks omitted).

[166] The decision in *Morse* has been called a "significant philosophical departure" for the Court. Nairn, *supra* note 130, at 246. It signals "acceptance of a more inculcative approach to education and will likely extend beyond the intended context of non-political, pro-drug messages." *Id.*

[167] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

perpetrate "an official suppression of ideas," and even *Fraser* demonstrates the Court's reluctance to allow too much content-based regulation of speech in schools.[168]

II. THE INTERNET-EXPRESSION CASES: STUDENTS TARGETING SCHOOL ADMINISTRATORS AND TEACHERS

As shown above, the Supreme Court's quartet of student speech cases provide no clear method for determining students' First Amendment rights for speech originating off campus via the Internet but eventually coming onto campus. As a result, lower courts often grapple with which standard to apply. When analyzing student expression under *Tinker*'s substantial disruption test, the courts frequently engage in a highly fact-specific analysis of exactly what a "substantial disruption" looks like. This has resulted in opinions so divergent that in April of 2010, the Third Circuit vacated two of its opinions, handed down just two months earlier, by two different panels of judges, because of seemingly contradictory decisions on remarkably similar facts.[169]

Interestingly, in the pure internet-expression cases (as opposed to forms of other student expression originating off campus and making its way on campus, or anti-harassment policy cases), the earliest opinions upheld the First Amendment rights of the student under *Tinker* without considering the fact that the expression originated off campus.[170] In 1998, in *Beussink v. Woodland R-IV School District*, Brandon Beussink created a homepage on his personal computer at home and posted it on the

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[168] Nairn, *supra* note 130, at 246 (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982)).

[169] *Compare* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), *with* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010). Even at the district court level, Martha McCarthy observed that, "It is somewhat difficult to reconcile the outcome in [*Layshock*] and the more recent reasoning in *J.S. v. Blue Mountain* . . . ." McCarthy, *supra* note 22, at 13. The en banc rehearing occurred June, 3, 2010. As this Article went into production, the Third Circuit issued opinions upholding the students' First Amendment challenges in both cases. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); *see also infra* note 373.

[170] I treat the cases in order of the final judgments on appeal to the federal circuit court or state high court.

Internet.[171] Brandon's website was highly critical of his school's administration, contained crude and vulgar language conveying his opinions of the teachers, and provided a link to the school's website, through which he invited readers to contact the school and communicate their opinions.[172] Brandon testified that he did not intend for his website to be viewed at school—he just wanted to voice his opinion.[173] However, when he allowed a friend to use his home computer, she inadvertently, and without Brandon's authorization or knowledge, discovered his website.[174] When that friend later became angry with Brandon, she accessed the homepage during school hours and showed it to her computer teacher; there was no evidence that any other student saw the page, and there was no further disturbance at that time, although during the day, many other students viewed the homepage.[175] Brandon was suspended immediately upon the principal learning of the website.[176]

The district court applied *Tinker*'s substantial disruption standard and found that Brandon's suspension violated his First Amendment rights.[177] The court reasoned that a school official must be able to show more than a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[178] Even allowing that under *Tinker* the fear of disruption could render Brandon's expression unprotected, the court stated that the fear must be reasonable and not an "undifferentiated fear" of disturbance.[179] The court found that the principal's decision to suspend Brandon *immediately* upon learning of the incident indicated that he disciplined Brandon because he was "upset" by the content and not because he feared a disruption.[180] In sum, the court stated that "[d]isliking or being

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171 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

172 *Id.* The court found it important that the link worked both ways; Brandon's homepage could also be accessed from the school's homepage. *Id.* at 1177 n.1.

173 *Id.*

174 *Id.* at 1178.

175 *Id.* at 1178-79.

176 *Id.* at 1179.

177 *Id.* at 1180.

178 *Id.*

179 *Id.*

180 *Id.*

upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."[181]

Two years later, in *Emmett v. Kent School District*, a district court again applied *Tinker*'s substantial disruption standard to uphold a student's First Amendment rights.[182] In this case, Nick Emmett posted a website on the Internet from home that contained commentary about the school's faculty and administration, along with a "warning" that the site was not school-sponsored and was for entertainment only.[183] The website contained mock obituaries of several of Emmett's friends, written tongue-in-cheek and apparently inspired by a creative writing assignment to create one's own obituary.[184] The obituaries became a topic of discussion at school, and Emmett eventually allowed visitors to the website to vote on who would "die" next—that is, be the subject of the next obituary.[185] However, a few days later an evening television news story reported that Emmett had created a "hit list," causing Emmett to remove the site.[186] He was subsequently suspended.[187]

The district court found both *Fraser* and *Hazelwood* inapplicable as the case did not involve speech at a school assembly or school-sponsored speech, and thus applied *Tinker*'s substantial disruption standard.[188] As in *Beussink*, the court found that the expression could not be based on "undifferentiated fears of disturbances or embarrassment to school officials."[189] Since the expression was in no way connected with school classes or projects, and neither threatened nor intimidated anyone, nor ever intended to do so, the court found the speech "entirely outside the school's supervision or control."[190]

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181 *Id.*
182 92 F. Supp. 2d 1088 (W.D. Wash. 2000).
183 *Id.* at 1089.
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.* at 1090.
189 *Id.*
190 *Id.*

A year later, in *Killion v. Franklin Regional School District*, yet another district court upheld a student's First Amendment rights.[191] The student, Zachariah Paul, compiled on his home computer a lewd and vulgar "Top Ten" list about the school's athletic director's personal appearance, which he emailed to friends but did not otherwise bring to school because he had been disciplined for doing so with similar lists in the past.[192] However, another student later copied the list and brought it to school, where it was found in the teachers' lounge.[193] Paul was subsequently suspended for "verbal/written abuse of a staff member."[194]

The student, through his mother, Joanne Killion, filed a motion for summary judgment alleging that the school had no authority over off-campus speech.[195] The school also filed for summary judgment, alleging that the speech was lewd and offensive and, because distributed on campus, had the potential of causing substantial disruption,[196] essentially invoking both *Fraser* and *Tinker*. After considering the (then) three Supreme Court cases, and recognizing that there was "limited case law" on the issue,[197] the court refused to apply *Fraser* to expression having its inception off campus, quoting Justice Brennan's reasoning that "if . . . [the student] had given the same speech outside the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[198] The court therefore applied *Tinker*'s substantial disruption test and found that the speech was not threatening and

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191 136 F. Supp. 2d 446 (W.D. Pa. 2001).

192 *Id.* at 448.

193 *Id.* at 448-49.

194 *Id.* at 449.

195 *Id.* at 450.

196 *Id.*

197 *Id.* at 454. The court considered *Beussink*, *Emmett*, and the lower court opinion in *J.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Commw. Ct. 2000). *See also infra* notes 210-32 and accompanying text (discussing the 2002 Pennsylvania Supreme Court case affirming the lower court's decision).

198 *Id.* at 456 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring)). It is interesting to wonder what the *Killion* court might have made of *Morse*. There the banner was clearly created off campus and unfurled in a public street, but still deemed on-campus speech.

there was no evidence of actual disruption since the list was on school grounds for several days before the administration became aware of it and at least a week before they took action.[199] The court cited *Beussink* and reiterated that "[d]isliking or being upset by the content" of student speech is not sufficient to limit it under *Tinker*.[200]

In 2002, the federal district courts continued the string of decisions upholding a student's First Amendment rights in *Mahaffey v. Aldrich*.[201] In this case, Joshua Mahaffey contributed to a website created by another student entitled "Satan's web page."[202] The students alleged that they created and contributed to the site because they were bored and wanted something to do.[203] The site, among other things, listed "people I wish would die," "people that are cool," and near the bottom, "SATAN'S MISSION FOR YOU THIS WEEK," asking readers to "stab someone . . . throw them off a cliff . . ." then stating, "Killing people is wrong . . . don't do it unless I'm there to watch," then, "PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF AND BLAMING IT ON ME. OK?"[204] Another student's parent notified the police about the website, who notified the school, who then suspended Mahaffey.[205]

In considering the competing motions for summary judgment filed by the student and the school, the court rejected the school's contention that the expression on the website constituted a true threat, and as such was not protected by the First Amendment.[206] The court reasoned that because Mahaffey had stated that the

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[199] *Id.* at 455.

[200] *Id.* (quoting Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)).

[201] 236 F. Supp. 2d 779 (E.D. Mich. 2002). *Mahaffey* was actually decided two months after the Pennsylvania Supreme Court decided *J.S. v. Bethlehem Area School District*, but since the court apparently had not read the decision, referring only to the lower court decision in *Bethlehem*, I will treat *Mahaffey* first in order to highlight the string of federal district court cases upholding students' First Amendment rights.

[202] *Id.* at 781.

[203] *Id.*

[204] *Id.* at 782 (typographical errors in original eliminated).

[205] *Id.*

[206] *Id.* at 785-86.

website was created "for laughs," he had not intended others to see it and never communicated it to them, and in fact, made no specific threat against any individual or group, no "reasonable person" would construe the statements on the webpage as a true threat.[207] Thus, the court applied *Tinker*, and distinguished the appellate level decision in *J.S. v. Bethlehem Area School District*[208] on the fact that there was no evidence of disruption in the case before it, without further discussion.[209]

It was not until September of 2002, in *J.S. v. Bethlehem Area School District*, that the Supreme Court of Pennsylvania became the first court to render a final decision finding student internet expression occurring off campus to lack First Amendment protection.[210] In *Bethlehem*, the student, J.S., created a website on his home computer and posted it on the Internet.[211] The website, entitled "Teacher Sux," consisted of several pages of "derogatory, profane, offensive and threatening" comments, pictures, animation, and sound clips, primarily about his algebra teacher.[212]

The most striking page was captioned "Why Should She Die," and solicited $20 from readers to help pay for a "hitman."[213] "Ultimately students, faculty and administrators of the [s]chool . . . [saw] the website after J.S. told other students about the site and even showed it to another student at school."[214] The principal took the threats seriously, and informed the algebra teacher.[215] She was frightened and suffered stress, anxiety, loss of appetite and weight, short-term memory loss, headaches, and an inability to go out of the house, resulting in her being unable to return to

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[207] *Id.* at 786. Mahaffey claimed that he created the website just "for laughs" and had not intended for others to see it. *Id.* The court's decision was also influenced by the fact that Mahaffey's website made no specific threat against any individual or group. *Id.*

[208] J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000).

[209] *Mahaffey*, 236 F. Supp. 2d at 785. The Pennsylvania Supreme Court later affirmed the commonwealth court's decision.

[210] 807 A.2d 847, 869 (Pa. 2002).

[211] *Id.* at 850.

[212] *Id.* at 851.

[213] *Id.*

[214] *Id.* at 851-52.

[215] *Id.* at 852.

school to finish out the year.[216] The school was forced to hire three substitute teachers to replace her, the morale of the students was at an all-time low, and a counselor compared it to "the death of a student or staff member."[217]

The school took no action against J.S. until the end of the year, where at that time they suspended and voted to expel J.S., whose parents had by then enrolled him at an out-of-state school for the next year.[218] Both the Court of Common Pleas and the Commonwealth Court upheld the expulsion.[219] J.S. appealed to the Supreme Court of Pennsylvania, who granted allocator to "review the issue of whether the Commonwealth Court erred in its conclusion that the School District did not violate J.S.'s First Amendment rights by punishing him for the posting of the 'Teacher Sux' web site."[220]

After an extensive discussion of First Amendment jurisprudence, the court first determined that the website expression contained no true threat, although it was viewed as one by the teacher and initially treated as one by the school.[221] Looking at the overall circumstances, the court reasoned that the website was "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody . . . [and] it did not reflect a serious expression of intent to inflict harm."[222] The court reasoned that because the website focused primarily on the teacher's "physique and disposition" and used cartoon characters, hand drawings, song, and a comparison to Adolph Hitler, and because the school continued to allow J.S. to attend class and extracurricular activities and had only commenced discipline well after the conclusion of the school year, the school's position that the website contained a true threat was severely undermined.[223]

The court then considered the website in light of the Supreme Court's First Amendment exceptions for otherwise protected

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[216] *Id.*
[217] *Id.*
[218] *Id.* at 852-853.
[219] *Id.* at 853.
[220] *Id.*
[221] *Id.* at 859-60.
[222] *Id.* at 859.
[223] *Id.* at 859-60.

student speech. In order to do so, however, the court addressed as a "threshold issue" the location of the speech, because J.S. argued that it was purely off-campus speech not governed by any of the school speech cases.[224] The court determined that there was a "sufficient nexus" between the off-campus expression and the school to consider the speech as occurring on campus because J.S. accessed the site at school, on a school computer, and showed it to another student.[225]

The court recognized that, although the few courts that had considered internet communication had focused on *Tinker* in their analysis (citing *Beussink*, *Emmett*, and *Killion*), the expression before it "straddle[d] the political speech in *Tinker*, and the lewd and offensive speech expressed at an official school assembly in *Fraser*."[226] Recognizing that the Supreme Court had "not revisited this area for fifteen years," the court noted that "the breadth and contour of these cases and their application to differing circumstances continues to evolve," and that "the advent of the Internet has complicated analysis of restrictions on speech. Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media web site, accessible to fellow students, teachers, and the world."[227]

Because of this, the court was not convinced that reliance on *Tinker* alone was appropriate, although it had been the path taken by earlier internet cases.[228] The court stated that it did not need to determine whether the facts called for application of *Fraser*, to be "governed by the lewd and plainly offensive speech analysis," or *Tinker*, and thus "subject to review for substantial disruption of the work of the school," because "application of either case results in a determination in favor of the School District."[229] The court found that punishing the use of lewd, vulgar, and plainly offensive expression "fits easily within *Fraser*'s upholding of discipline for

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[224] *Id.* at 864.
[225] *Id.* at 865.
[226] *Id.* at 866-67.
[227] *Id.* at 863-64.
[228] *Id.* at 867.
[229] *Id.*

speech that undermines the basic function of a public school . . . . [W]ere we to solely apply *Fraser*, we would have little difficulty in upholding the School District's discipline."[230] Additionally, the court found a substantial disruption of the work of the school as shown by the teacher's physical and emotional injuries, the need to hire substitute teachers, and the low morale throughout the school, comparable to a death.[231]

Bethlehem's dual analysis under *Fraser* and *Tinker* has not been repeated,[232] but its discussion of a "threshold issue" concerning the nexus of the expression and the school campus, and subsequent *Tinker* analysis, began a trend for courts to uphold school restriction and punishment of off-campus speech if brought onto campus and creating a substantial disruption. In 2007, the Second Circuit upheld a school's right to discipline a student in *Wisniewski v. Board of Education.*[233] In that case, Aaron Wisniewski created an Instant Messaging icon, from his parents' home computer, to identify himself in IM messages.[234] Aaron's icon was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood, and the words, "Kill Mr. VanderMolen," Aaron's English teacher.[235] Aaron sent the icon to several friends but not to Mr. VanderMolen.[236] Eventually, another student printed out the icon and gave it to Mr. VanderMolen, who was "distressed" and took it to the principal, who then notified the police and suspended Aaron.[237]

The court first refused to consider the icon as a true threat, finding "that school officials have significantly broader authority to sanction student speech than the [Supreme Court's true threat] standard allows."[238] The court instead found the *Tinker* standard applicable, but first followed the Pennsylvania Supreme Court's

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[230] *Id.* at 868.
[231] *Id.* at 869.
[232] *See supra* note 132.
[233] 494 F.3d 34 (2d Cir. 2007).
[234] *Id.* at 35.
[235] *Id.* at 36.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 38.

lead and considered whether there must be a "nexus" between the icon and the school campus.[239] The court was "divided as to whether it must be shown that it was reasonably foreseeable that Aaron's IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability."[240] They were in agreement, however, that the *content* of the expression made it "reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot."[241] Therefore, the court applied *Tinker* and found the icon "crosse[d] the boundary of protected speech and constitute[d] student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[242]

A year later, the Second Circuit again upheld a school's right to punish off-campus student speech that had a sufficient nexus with the campus in *Doninger v. Niehoff*.[243] In *Doninger*, Avery Doninger sent an email to students and parents at her school and posted a message on her blog criticizing the school for cancelling the school's "Jamfest," and encouraging recipients to contact school administrators to complain.[244] The school administrators received an influx of telephone calls and emails, and continued to receive them after Avery posted another message on her blog calling the administrators "douchebags" and urging readers to continue to call to "piss [the administrators] off."[245] As a result of the controversy, the administrators were forced to miss, or arrived late to, several school activities over several days.[246] After eventually discovering her blog, the school determined that Avery

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[239] *Id.* at 38-39.

[240] *Id.* at 39.

[241] *Id.* The court reasoned that "[a]s in *Morse*, the student . . . was not disciplined for conduct that was merely 'offensive' . . . ." *Id.* at 40.

[242] *Id.* at 38-39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

[243] 527 F.3d 41 (2d Cir. 2008).

[244] *Id.* at 44-45

[245] *Id.*

[246] *Id.* at 46.

should not be allowed to run for class secretary and did not allow her to accept the position when she won as a write-in candidate.[247]

The court found that had Avery's expression occurred in the classroom, it would have fallen within *Fraser*, but refused to apply *Fraser*, which it found did not apply to expression created off campus.[248] Therefore, the court applied *Tinker* and its rule from *Wisniewski* "that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[249] The court held, as it had in *Wisniewski*, that the posting foreseeably created a risk of substantial disruption.[250]

A few months later, in *O.Z. v. Board of Trustees*, the District Court for the Central District of California upheld the suspension and involuntary transfer of a student who created a slideshow, distributed on YouTube, which depicted the killing of her English teacher.[251] The teacher uncovered the video after performing a Google search for her name.[252] She was upset, became ill, could not sleep, and eventually informed the principal of the video, who suspended the student and sought to transfer her to another school.[253]

The court found *Tinker*'s substantial disruption standard applicable and likened the case to *Wisniewski.*[254] Although the student argued that the video was a joke and she had no intent to communicate it to her teacher, the court found that since the student *had* shared the video with her friend, and given the *content* of the video, it was reasonable to predict that it would make its way onto campus, as it eventually did.[255] Once on campus, the court found it "reasonable, given the violent language

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[247] *Id.*
[248] *Id.* at 49-50.
[249] *Id.* at 48 (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)).
[250] *Id.* at 53.
[251] No. 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008).
[252] *Id.* at *1.
[253] *Id.*
[254] *Id.* at *2.
[255] *Id.* at *4.

and unusual photos depicted in the slide show, for school officials to forecast substantial disruption of school activities."[256] Therefore, the court did not consider whether the school could satisfy the more difficult true threat test.[257]

Although these four cases seemed to set a pattern and indicate a trend to use an expression's content to predict whether the expression would come to campus and cause or portend a substantial disruption, three decisions handed down in 2010 call that into question.[258] On February 4, 2010, two different three-member panels of the Third Circuit issued opinions in two cases,[259] upholding earlier district court rulings in *Layshock v. Hermitage School District*[260] and *J.S. ex rel. Snyder v. Blue Mountain School District.*[261] The lower courts in each of these two cases reached different holdings on substantially similar facts involving students who were disciplined for using an off-campus computer to create an internet parody profile of a school official. One significant difference in the district court opinions was that the court in *Layshock* refused to bring the case under *Fraser*, finding that the Supreme Court's exception to the general *Tinker* substantial disruption rule was limited to lewd, vulgar, or

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[256] *Id.* at *3.

[257] *Id.*

[258] The dissent in the en banc rehearing of *J.S. ex rel. Snyder v. Blue Mountain School District* agreed that the decision of the court "causes a split with the Second Circuit." 650 F.3d 915, 950 (3d Cir. 2011) (en banc) (Fisher, J., dissenting).

[259] Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010). On April 9, the Third Circuit vacated both decisions and granted rehearing en banc, which occurred June 3, 2010. Ostensibly, the court granted the rehearing to reconcile its holdings, and seemed to do so in the en banc opinions of June 13, 2011. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc). The Third Circuit's en banc opinions occurred after this Article was submitted for publication, and thus are referenced, but not expanded upon here. *See infra* note 373. However, the district court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District* amended its Nov. 16, 2009 opinion after these two cases were affirmed in February 2010, "solely to address these Third Circuit opinions . . . ." 711 F. Supp. 2d 1094, 1095 n.1 (C.D. Cal. 2010). Thus, I discuss them here as they informed the California district court's opinion.

[260] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

[261] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

offensive expression *on campus*.[262] The court then found no sufficient "nexus" between the speech and any disruption at school, and concluded that any disruption that might have occurred was "minimal."[263] The district court in *Blue Mountain*, on the other hand, while noting the similarity to the facts of *Layshock*,[264] determined that it had to look beyond *Tinker* for its answer,[265] and ultimately found that the expression was not protected because it was lewd and offensive speech like that in *Fraser* and promoted illegal actions as in *Morse*.[266] Thus, the court held that "as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though it arguably did not cause a substantial disruption of the school."[267]

In the Third Circuit's review of *Layshock*, a three-judge panel unanimously ruled that a Pennsylvania school district violated the free speech rights of a high school student who was disciplined for creating, off-campus, an online parody profile of the school's principal that he created off campus and posted to MySpace.[268] Justin Layshock used his grandmother's computer to copy and paste a picture of the principal from the school's website into the MySpace profile.[269] Justin then provided "bogus" answers to the website's questionnaire in which he mocked the principal's size.[270] Justin then shared the profile with other students by adding them as friends; most other students at Justin's high school heard about the profile through word-of-mouth.[271] Three other students

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[262] *Layshock*, 496 F. Supp. 2d at 599-600.

[263] *Id.* at 600. The court stated, among other things, that there was no nexus between Justin's expression and the alleged disruption because there were three other profiles available on MySpace at the same time. *Id.* The court also found that there was no evidence that the "buzz" on campus was caused by Justin's profile "as opposed to the reaction of the administrators." *Id.*

[264] *Blue Mountain*, 2008 WL 4279517, at *8.

[265] *Id.* at *4.

[266] *Id.* at *6.

[267] *Id.*

[268] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252 (3d Cir. 2010).

[269] *Id.*

[270] *Id.*

[271] *Id.* at 253.

subsequently posted even more vulgar postings than Justin's additions to the website.[272]

When the principal eventually learned of the profiles he found them "degrading," "demeaning," "demoralizing," and "shocking," and although he was not afraid for his safety, he thought about pressing charges for harassment, defamation, or slander.[273] He asked the school administration to disable the first profile, but students found ways to access the profiles, and Justin actually used a classroom computer to access the profile and show it to others.[274] Justin ultimately admitted to creating the profile, and went to apologize to the principal, but the school administrators suspended Justin and prohibited him, among other things, from attending his graduation ceremony.[275]

After the district court granted summary judgment in Justin's favor on his First Amendment claim, the school district appealed.[276] The issue presented before the Third Circuit was whether a "school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event."[277] Although the district court found that the school district could not "establish[] a sufficient nexus between Justin's *speech* and a *substantial disruption* of the school environment"[278] (that is, make the disruption reasonably foreseeable), the school district did not challenge that finding on appeal.[279] The school district instead

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[272] *Id.*

[273] *Id.* Apparently, the principal never pressed charges.

[274] *Id.*

[275] *Id.* at 254.

[276] *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

[277] *Layshock*, 593 F.3d at 251.

[278] *Layshock*, 496 F. Supp. 2d at 600 (emphasis added).

[279] *Layshock*, 593 F.3d at 259. It is worth noting that the school district did not appeal this straight *Tinker* analysis disputing the factual finding about the nexus between the profile and any disruption, but instead asserted that there was a "sufficient nexus . . . between Justin's creation and distribution of the vulgar and defamatory *profile* of Principal Trosch and the *School* . . . ." *Id.* (emphasis added). The difference may have been critical. Only a few courts (notably the Pennsylvania Supreme Court in *Bethlehem*, and the Second Circuit in *Wisniewski* and *Doninger*) have required a substantial nexus between the expression and the foreseeability that it will reach school *before* applying *Tinker* to determine whether the expression caused or

argued that "a sufficient nexus" existed between Justin's vulgar and defamatory *profile* of the principal and the *school* to permit the school district to regulate his conduct because the "speech" began on campus when he had "entered" school property—the website—and "misappropriated" the principal's picture[280]. In other words, the school district argued that the expression was not merely the equivalent of on-campus speech, but was speech *created* on campus. The school district also argued that it was reasonably foreseeable that the profile would come to the attention of the school district and the principal because it was aimed at the principal and the school community, and was accessed on campus by Justin.[281]

The Third Circuit rejected the argument that Justin had created a nexus between the profile and the school when he "entered" the school's website and "misappropriated" the principal's photo as too attenuated.[282] While recognizing that *Tinker*'s "schoolhouse gate is not constructed solely of the bricks and mortar surrounding the school yard," the court stated that the reach of school authorities is not without limits.[283] Citing *Morse*, the court stated that although speech could be restricted on campus or at a school, had a student "delivered the same speech in a public forum outside the school context, it would have been protected."[284] The Third Circuit panel refused to "allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school."[285]

The court also upheld the district court's holding that the school's punishment of Justin was inappropriate under *Fraser* because there was no evidence that Justin fell within its narrow

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could reasonably be foreseen to cause some substantial disruption. Neither is binding on the Third Circuit. Had the school district appealed the holding under *Tinker*, it might have been able to establish, if not an actual substantial disruption, at least a reasonably foreseeable one that required the school district to take action.

[280] *Id.* at 259.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 260

[284] *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 404 (2007)) (internal quotation marks omitted).

[285] *Id.* at 260.

exception for lewd or offensive speech occurring at school.[286] Nor was the court swayed by the school district's reliance on *Bethlehem*, *Wisniewski*, or *Doninger*, where punishments were upheld for speech that originated off campus but made its way onto campus and created a substantial disruption.[287] The court distinguished *Bethlehem* on the "impact of the conduct," seemingly meaning a substantial disruption was present in *Bethlehem* but not in this case.[288] However, the Third Circuit later stated that because the school district failed to appeal the district court's finding that the profile did not disrupt the school, it would not "define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate."[289]

Without commenting on *Wisniewski*, the court described and distinguished *Doninger* on the "consequences" of the expression—Doninger was prohibited from running for class president and Layshock was suspended.[290] However, the court was quick to point out that it did not "agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment. . . ."[291] The court believed that the school districts' cases stood for "nothing more than the proposition that schools may punish expressive conduct that occurs outside of school as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here."[292] The court therefore held that Justin's use of the school's website did not constitute entering the school such that the school district was empowered to punish his "out of school expressive conduct."[293]

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[286] *Id.* at 260, 263. The Third Circuit never commented on whether it found the expression to be lewd or offensive.

[287] *Id.* at 261-63.

[288] *Id.* at 261 n.17

[289] *Id.* at 263. The Third Circuit seemed to make the point that there was no substantial disruption, as required by *Tinker*, caused by the profile, while at the same time finding that it did not need to address the question because the issue was not raised on appeal.

[290] *Id.* at 262-63.

[291] *Id.* at 263.

[292] *Id.*

[293] *Id.* The Third Circuit's holding seemed to be that the case was outside the scope of *Tinker* because the speech occurred off campus, either because there was no nexus between the speech and the school as required by some cases as a threshold

In *J.S. ex rel. Snyder v. Blue Mountain School District*, however, a different three-judge panel split in affirming the district court's determination that the creator of a similar parody profile created off campus but making its way onto campus could be punished by the school.[294] In this case, J.S. and a friend created a profile of the school's principal on their home computers by copying his picture from the school's website and posting it to MySpace.[295] The profile did not state the principal's name but contained profanity-laced statements insinuating that he was a sex-addict and pedophile.[296] The students intended the profile to appear as a self-portrayal by the principal,[297] and the profile was set as "public," which made it available to anyone who knew the URL or found it by searching MySpace.[298] J.S. ostensibly created the profile because she was mad at the principal for his treatment of her over a dress code violation, and she thought it would be "comical."[299] J.S. later changed the setting to "private," but then "granted 'friend' status" to twenty-two other students so they could view the profile.[300]

Because the school's computers blocked access to MySpace, students could only view the profile from off-campus locations.[301] The principal subsequently learned about the profile when both a teacher and another student brought it to his attention.[302]

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consideration before applying *Tinker*, or simply because it refused to grant on-campus status to any case originating off campus, applying a straight geographic-based test to the expression, although the district court below had recognized that "the test for school authority is not geographical." Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007). The court's subsequent en banc opinion affirmed and determined that "[t]he School District's attempt to forge a nexus between the School and Justin's profile by relying upon his 'entering' the District's website to 'take' the District's photo of Trosch is unpersuasive at best." *Layshock*, 593 F.3d at 259. "The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk; and we reject it." *Id.*

[294] 593 F.3d 286, 290 (3d Cir. 2010).

[295] *Id.* at 291.

[296] *Id.* at 290.

[297] *Id.* at 291.

[298] *Id.* at 292.

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

However, only a single copy of the profile was found at school.[303] The principal later found out that J.S. had created the profile, and although she initially denied it, she later admitted to creating it and was suspended.[304]

The profile's "effect"[305] at school was the creation of general "rumblings" both in and out of class, such that teachers had to quiet their classes.[306] Additionally, several counseling sessions were cancelled when the school's investigation required the school's personnel to assume additional duties.[307] Finally, fellow students decorated J.S.'s locker and congregated in the hallways to welcome J.S. back from her suspension.[308]

The district court granted the school summary judgment, acknowledging that although there was not a substantial disruption sufficient to satisfy *Tinker*, based on the facts of the case and "because the lewd and vulgar off-campus speech had an effect on-campus," the school had not violated J.S.'s rights by disciplining her; J.S. subsequently appealed. [309]

Although the district court applied *Fraser* to uphold the school's authority to punish J.S. because her profile was "vulgar, lewd, and potentially illegal speech that had an effect on campus,"[310] the Third Circuit declined to decide whether *Fraser* applied to off-campus speech that has an effect on campus because it concluded that the profile, although created off campus, fell within the realm of *Tinker*.[311] It therefore did not employ the "two-step test" used by the district court to determine first, whether the speech came on campus due to its "effect" on the middle school, and then whether the school infringed on the student's rights by

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[303] *Id.*

[304] *Id.* at 292-93.

[305] *Id.* at 293.

[306] *Id.* at 294.

[307] *Id.*

[308] *Id.*

[309] *Id.* at 295 (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *7-8 (M.D. Pa. Sept. 11, 2008)).

[310] *Blue Mountain*, 2008 WL 4279517, at *6.

[311] *Blue Mountain*, 593 F.3d at 298.

disciplining her.[312] Instead, the Third Circuit proceeded directly to a "*Tinker* inquiry."[313]

The court recognized that "[e]lectronic communication allows students to cause a substantial disruption to a school's learning environment even without being physically present,"[314] because of the potential for "rapid dissemination of information."[315] Accordingly, the court held 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*."[316] The court was persuaded by the profile's "particularly disturbing content," and the fact that the profile presented a "reasonable possibility of a future disruption, which was preempted only by principal McGonigle's expeditious investigation of the profile, which secured its quick removal, and his swift punishment of its creators."[317] The court also held that regardless of whether the profile satisfied the elements of criminal harassment or defamation, because of its "undoubtedly offensive, potentially very damaging, and possibly illegal language," the "potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test."[318]

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[312] *Id.*

[313] *Id.* In doing so, the Court recognized that it could, and was, affirming on alternate grounds. *Id.* at 298 n.5.

[314] *Id.* at 298 n.6.

[315] *Id.* at 301.

[316] *Id.*

[317] *Id.* at 300.

[318] *Id.* at 302. The court reasoned that although:

> [S]tudent speech that is critical of school officials is protected and not something we wish to censor generally, we distinguish such speech from the profile in the instant case that contained undoubtedly offensive, potentially very damaging, and possibly illegal language, including insinuations that strike at the heart of McGonigle's fitness to serve in the capacity of a middle school principal. We simply cannot agree that a principal may not regulate student speech rising to this level of vulgarity and containing such reckless and damaging information so as to undermine the principal's authority within the school, and potentially arouse suspicions among the school community about his character.

Id.

However, one member of the panel dissented, finding that the profile did not cause a substantial disruption, actual or foreseeable, because its content was so outrageous that it could not have been taken seriously.[319] He was "particularly troubled" that the majority found the potential impact of the profile's language sufficient to satisfy *Tinker*, believing that such a finding was "an application of the *Fraser* standard rather than the *Tinker* standard" and reasoning that "to focus on the vulgarity of the language is to allow the *Fraser* exception to swallow the *Tinker* rule."[320]

Less than two weeks later, the District Court for the Southern District of Florida cited *Layshock* and *Blue Mountain* in its opinion that a student's off-campus expression of her dislike of her English teacher on Facebook was protected within the First Amendment.[321] In *Evans v. Bayer*, a student, working on her home computer, created a group on Facebook entitled "Ms. Sarah Phelps is the worst teacher I've ever met."[322] The page contained Ms. Phelps' picture, but contained no threats of violence.[323] Three postings appeared on the page from other students supporting Ms. Phelps.[324] Ms. Phelps never saw the page, it did not disrupt school activities, and the student removed it after two days.[325] However, after its removal, the principal became aware of it and suspended the student and removed her from advanced placement classes.[326] The student brought suit alleging that the disciplinary action violated her First Amendment rights.[327]

The district court cited *Blue Mountain*, *Doninger*, and *Wisniewski* for the proposition that off-campus speech could be subject to analysis under *Tinker* if it "raises on-campus concerns."[328] Citing *Bethlehem*, the court stated that where the

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[319] *Id.* at 316 (Chagares, J., dissenting).

[320] *Id.* at 317.

[321] Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

[322] *Id.* at 1367.

[323] *Id.*

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] *Id.* at 1368. The student also alleged that her punishment resulted in an "unjustified strain on her academic reputation and good standing." *Id.*

[328] *Id.* at 1370.

expression was created must be determined at the outset to decide whether the "unique concerns" of the school are implicated.[329] However, citing *Morse*, the court reasoned that "the operative test is not a simple one of geography. Where the speech is published is not the only question that needs to be asked."[330]

The court considered *Bethlehem* and determined that "student speech concerns are implicated when speech published off-campus is brought on-campus" or accessed at school, [331] especially when that "speech . . . is aimed at a specific school and/or its personnel."[332] The court found this test not easily suited to "intangible situations like the [I]nternet," although realizing that some guise of it could control.[333] The court thus considered another "possibility," which would be "whether the speech is directed at a particular audience," which, while problematic in some instances, was "much more simple" and not "fundamentally unsound."[334] However, the court found that the simple fact that the speech was aimed at a particular audience at the school was not enough to render it on-campus speech when it was created off campus, was never accessed on campus, and was no longer accessible when the principal learned of it.[335]

The court next compared Evans' speech to Layshock's and found that because her posting did not occur at a school-sponsored event, and she had not even gone as far as Layshock and accessed it at school, the posting was off-campus speech over which the school's authority was "far less reaching."[336] The court determined that under *Tinker*—as reinforced by the Third Circuit in *Blue Mountain*—the test was whether the school had a "well-founded

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[329] *Id.*

[330] *Id.* at 1371.

[331] *Id.*

[332] *Id.* (quoting J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002)) (internal quotation marks omitted).

[333] *Id.*

[334] *Id.* The court found this test problematic in that it "would prohibit students from publishing a newspaper off-campus aimed at other students and distributing that paper off-campus, a scenario which has been decided in favor of the students[,]" but ultimately decided that "any test is going to be over or under inclusive." *Id.*

[335] *Id.* at 1371-72.

[336] *Id.* at 1372-73.

belief that a 'substantial' disruption [would] occur."[337] The court found no such well-founded expectation of disruption,[338] and thus determined that Evans' speech fell within the "wide umbrella of protected speech."[339]

To date, these eleven cases are the only cases addressing internet expression created off campus but ultimately arriving on campus. Perhaps because of that, courts have been diligent in reviewing and applying the past precedent, and some clear patterns appear, as well as some trends. From 1998 to 2002, four cases came to various federal district courts, and each court found that the students' First Amendment rights had been violated.[340] In none of the cases did the creator intend the expression to make its way to campus, or bring the expression to campus himself.[341] Two of these cases, *Beussink* and *Killion*, involved crude, vulgar language,[342] and two, *Emmett* and *Mahaffey*, involved expression touching upon death or killing generally, but not threatening a specific person.[343] Yet, in *Beussink*, *Emmett*, and *Killion*, the courts seemed to focus more on the creator's *intent* than on the expression's *content*, expressly refusing to consider "[d]isliking or

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[337] *Id.* at 1373. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)). The court relied on the district court's opinion in *Layshock* for the proposition that "[a] mere desire to avoid discomfort or unpleasantness will not suffice . . . ." *Id.* (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007)). The court also relied on the Third Circuit's decision in *Blue Mountain* for the determination that a "showing of past incidents arising out of similar speech may pass muster." *Id.* (citing J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010)).

[338] *Id.*

[339] *Id.* at 1374. In an unusual aside, the court stated that although it agreed that "a school should not condone the use of vulgar or lewd language, quite simply, the case at hand does not involve the same type of speech as *Fraser*, nor is it in the same context. Evans' Facebook group does not undermine the 'fundamental values' of a school education." *Id.* It is unclear whether the court was implying that truly lewd and offensive speech originating off campus *could* come within *Fraser*.

[340] *See* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

[341] *See Mahaffey*, 236 F. Supp. 2d at 786; *Killion*, 136 F. Supp. 2d at 448; *Emmett*, 92 F. Supp. 2d at 1089; *Beussink*, 30 F. Supp. 2d at 1177.

[342] *Killion*, 136 F. Supp. 2d at 448; *Beussink*, 30 F. Supp. 2d at 1177.

[343] *Mahaffey*, 236 F. Supp. 2d at 782 (asks readers to kill); *Emmett*, 92 F. Supp. 2d at 1089 (obituaries).

being upset by the content"[344] of the expression or "undifferentiated fears of possible disturbances"[345] sufficient reason for limiting a student's speech under *Tinker*. And, despite lewd or offensive content, these courts refused to apply *Fraser*. In *Mahaffey*, the court simply found that the content of the website was not a "true threat," and found no substantial disruption under *Tinker*.[346]

However, beginning with *Bethlehem* and continuing in the next three cases beyond it, the courts found the student expression was not protected.[347] The expressions in *Bethlehem*, *Wisniewski*, and *O.Z.* involved expression advocating the killing of a specific person,[348] and in *Bethlehem* and *O.Z.* those persons were truly frightened and suffered mental and physical distress,[349] while the teacher in *Wisniewski* was "distressed" enough to report it to the school who called the police.[350] In *Wisniewski* and *O.Z.*, the courts found that the speech was not protected despite the creator's lack of intent to have the expression come onto campus (although O.Z. had shared it with a third person).[351] In *Doninger*, the expression was created for the express purpose of reaching campus and causing a disruption and "pissing off" administrators.[352]

In these cases, the *content* of the expression, especially when coupled with intent to have the expression make its way to campus, was sufficient for the courts to find the expression

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[344] *Killion*, 136 F. Supp. 2d at 455; *Beussink*, 30 F. Supp. 2d at 1180.

[345] *Emmett*, 92 F. Supp. 2d at 1090 (quoting Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988)).

[346] *Mahaffey*, 236 F. Supp. 2d at 784-86.

[347] The 2007 *Layshock* district court decision breaks the chain and was upheld by the Third Circuit in 2010. *See* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010). But since that opinion has been vacated with no further word from the court to date, this discussion will not include the *Layshock* district court opinion in the discussion of the pattern emerging with *Bethlehem*.

[348] Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007); O.Z. v. Bd. of Trustees, No. 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).

[349] O.Z. v. Bd. of Trustees, No. 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008); *Bethlehem*, 807 A.2d at 847.

[350] *Wisniewski*, 494 F.3d at 36.

[351] *Id.* at 38-40; *O.Z.*, 2008 WL 4396895, at *4.

[352] Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008).

unprotected. The expression would foreseeably[353] end up on campus because of the fear or interest it would cause in the school community,[354] and once there, it would cause or portend a substantial disruption, creating what has been called a "passive telepresence."[355]

It may be that sufficient time had passed since the first case in 1998 for courts to see the impact that telepresence could have on campus, regardless of the intent of the creator to bring the speech onto campus. Additionally, from the time of *Wisniewski*, these courts looked also to *Morse*, which has been described as the first of the Supreme Court's student speech opinions to venture into "content-based regulation" of student speech.[356] In any case, a distinct pattern occurs in these cases as the courts began to find that the *content* of the expression was directly correlated to the foreseeability of the expression making its way onto campus and portending disruption.

However, in 2010, the Third Circuit's decisions in *Layshock* and *Blue Mountain* seemed to strike out in other directions, perhaps fueling its decision to vacate both opinions and re-evaluate. In fact, these cases almost seem to be decided backwards, using a strict *Tinker* analysis. In *Layshock*, where both the district court and the Third Circuit panel found that the student's expression was protected under *Tinker*, there was a direct attack on a specific person within the school, which was

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[353] The ease of obtaining internet expression is clearly what distinguishes it from other off-campus speech. Although possible, it is not reasonably foreseeable, for example, that a student writing untoward comments about another member of the school community in her diary is going to have that expression make its way onto campus without her intent or consent. The diary expression requires the speaker's active participation to bring the speech on campus. The internet speaker's intent is irrelevant. It is not for nothing that federal authorities and child safety advocates advise parents to warn their children not to post anything online that they would not want others to see or read. *See* Brad Bechler, *"Online 'Sextortion' of Teens Rising—Sexual Extortion—What is it and How to Prevent it?*, GATHER NEWS (Aug. 16, 2010), http://news.gather.com/viewArticle.action?articleId=281474978448754.

[354] Most students create websites because of the relationships formed in school. "If the parties had not attended the same school, the speech would not likely exist." Servance, *supra* note 7, at 1237.

[355] Pike, supra note 32, at 1002.

[356] Nairn, *supra* note 130, at 247.

crude and offensive.[357] The victim of that speech, as the victims in *Bethlehem*, *Wisniewski*, and *O.Z.*, was "shocked" by the expression, and while not afraid for his safety—just as VanderMolen was not in *Wisniewski*—felt the expression was "degrading" to the point he thought about filing suit against Layshock for defamation or slander,[358] just as the school in *Wisniewski* had gone to the police.

In addition to the crude and offensive *content*, which the district court admitted was similar to *Bethlehem*, although less extreme,[359] Layshock actually accessed the website on campus, from a school computer, showing his *intent* to bring the expression on campus.[360] This is similar to the student in *Bethlehem* who told others about the site and showed it at school, the student in *Doninger* who intended the readers to contact and "piss off" the school's administration, and the student in *O.Z.* who showed the site to another student.[361] With content that was nearly as onerous as that in *Bethlehem*, *Wisniewski*, and *O.Z.*, coupled with an intent to bring the expression on campus by actually accessing it there, as did the student in *Bethlehem*, the court could seemingly have found that the content of the speech made it foreseeable that it would reach the school—regardless of whether Justin accessed it there himself—because it was about a specific member of the school community and, if not actually causing a disruption of the proportions present in *Bethlehem*, making it reasonably foreseeable that such a disruption would occur.

The district court admitted that although there were clear parallels between *Bethlehem* and *Layshock*, it choose to reach a "slightly different balance between student expression and school authority,"[362] without further explanation, in what the court

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[357] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252, 260 (3d Cir. 2010).

[358] *Id.* at 253.

[359] *Id.* at 261 n.17 (citing Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007)).

[360] *Id.* at 591.

[361] *See* Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008); O.Z. v. Bd. of Trustees, No. 08-5671, 2008 WL 4396895, at *4 (C.D. Cal. Sept. 9, 2008); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851-52 (Pa. 2002).

[362] *Layshock*, 496 F. Supp. 2d at 602.

admitted was a "difficult case."[363] On appeal, however, the Third Circuit refused to apply *Tinker* to Justin's expression because it had been created off campus and no subsequent event turned it into on-campus expression. It then went further than the district court, determining that *Bethlehem* was not even "on point," because of the difference in "impact" (the actual disruption) the speech had on campus.[364] The court also distinguished *Doninger* on the less serious consequences to the student, and in addition, disagreed with the Second Circuit's overall decision.[365]

In *Blue Mountain*, however, a student created a similar parody profile that, while not naming the principal, included his picture, obtained from the school's website, and stated that he was a sex addict and a pedophile.[366] J.S. created the profile because she was "mad" at the principal, and therefore set the profile as "public," which made it possible for anyone on the Internet to see the expression, and also "friended" twenty-two students.[367]

The court directly applied *Tinker*, without engaging in *Bethlehem*'s two-step analysis that first requires a court to find that the off-campus speech will foreseeably come onto campus.[368] The court recognized that because of its "rapid dissemination of information,"[369] internet expression makes it possible to cause a substantial disruption of the school environment without the student being "physically present."[370] That possibility becomes reasonably foreseeable, according to the *Blue Mountain* court, when the content is sufficiently disturbing, in which case "the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test."[371] Therefore, the court found *Tinker* satisfied despite the profile having been

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[363] *Id.* at 595.
[364] *Layshock*, 593 F.3d at 261 n.17.
[365] *Id.* at 263.
[366] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010).
[367] *Id.* at 292.
[368] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002).
[369] *Blue Mountain*, 593 F.3d at 301.
[370] *Id.* at 298 n.6.
[371] *Id.* at 302.

created off campus and despite the mere "rumblings" that *actually* occurred on campus.[372]

Layshock and *Fraser* then reached very different conclusions on similar facts. Yet, the disruption was certainly greater in *Layshock*, as was the principal's reaction to the parody profile. The difference in the cases was due entirely to how the different three-judge panels viewed the nature of the off-campus speech that came onto campus. The Third Circuit en banc decision will have to determine which route that court will take.[373]

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[372] *Id.* at 294.

[373] As this Article is being prepared for publication, the Third Circuit has handed down decisions in both cases that find the student's First Amendment rights violated because the speech was created off campus, requiring a "substantial disruption," or threat of one, in order to bring them within the Supreme Court's *Tinker* exception. The Court found no such disruption in either case. Therefore, the Third Circuit upheld the panel decision in *Layshock* but reversed on that issue in *Blue Mountain*. In *Layshock*, the decision relied on the fact that the school district had not argued that the profile created a substantial disruption. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, at *11 (3d Cir. 2011) (en banc). In *Blue Mountain*, the court reasoned that there was no substantial disruption and no reasonable fear that a substantial disruption was likely to occur:

> J.S. created the profile as a joke, and she took steps to make it 'private' so that access was limited to her and her friends. Although the profile contained McGonigle's picture from the school's website, the profile did not identify him by name, school, or location. Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.

J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 929 (3d Cir. 2011). These cases demonstrate that *Tinker* is still the central battleground in off-campus student speech cases; the *Tinker* standard of reasonably foreseeable substantial disruption is the first step of any analysis. Until the Supreme Court hears a case of off-campus speech, there will continue to be the confusion that cases like *Blue Mountain* and *Layshock* create, and splits on the issue, as between the Second and Third Circuit Courts. However, a few days after *Layshock* and *Blue Mountain*, the Supreme Court ruled in favor of children's First Amendment right to buy, rent, and watch violent video games—holding a California law restricting the sale or rental of violent video games to minors unconstitutional. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011). The Court reiterated:

> [A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . There are of course exceptions. . . . These limited areas—such as obscenity, . . . incitement, . . . and fighting words, . . . represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

The final case, *Evans v. Bayer*, considered the Third Circuit's decisions in *Layshock* and *Blue Mountain*, and came down on the side of *Layshock*, although with facts that were much more susceptible to holding the student expression protected.[374] Evans' "worst teacher" page was not threatening, her teacher never saw the page, and Evans removed the page before the school ever became aware of it.[375] The court recognized *Bethlehem* and its progeny as standing for the undisputed proposition that student expression might not be protected when it is created off campus but brought onto campus or actually accessed at school, especially when aimed at the school or one within the school community.[376] However, the court limited *Bethlehem*'s rationale to instances in which the expression was actually accessed on campus, and did not find that the mere content of the expression—the fact that the expression was targeted at a member of the school community—was sufficient to make such expression on-campus speech.[377] The court also refused to find that the school could have a "well-founded belief that a 'substantial' disruption [could] occur" merely because the expression targeted a member of the school community.[378]

In the dozen years of specifically internet-related student speech cases, it has become clear that "[t]he place of origination has little relation to the disruption [of] the school environment."[379] However, synthesis of these eleven cases shows that the decisions

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Id. at 2733 (internal citations and quotation marks omitted). However, the Court also reiterated that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Id.* at 2734. The Court therefore seems unlikely to resolve any dispute over the Third Circuit's recent decisions in favor of the school districts, despite Justice Thomas' dissenting view that the First Amendment does not reach to minors at all. He argues that "[t]he practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians." *Id.* at 2751 (Thomas, J., dissenting).

374 Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

375 *Id.* at 1367.

376 *Id.* at 1371.

377 *Id.*

378 *Id.* at 1373.

379 Servance, *supra* note 7, at 1215.

are "highly fact-specific,"[380] and the strongest scenarios for legitimate school restriction of cyber-expression are, in descending order, those in which: (1) the expression conveys a threat against a specific person, coupled with an intent that the expression be seen on campus and causes that person physical and/or emotional distress (*Bethlehem*);[381] (2) the expression conveys a threat against a specific person that is not specifically intended to be accessed on campus and causes that person physical and/or emotional distress (*O.Z.*);[382] (3) the expression conveys a threat against a specific person that is not specifically intended to be accessed on campus and causes no real distress to that person (*Wisniewski*);[383] (4) lewd, vulgar, or offensive expression directed at a particular person, which is intended to be accessed on campus but causes the targeted person no reported distress (*Blue Mountain*);[384] and (5) vulgar, offensive expression that is intended to make its way onto campus and cause disruption, and actually does so (*Doninger*).[385] Within this context, *Layshock* stands out as a case for reconsideration, since the expression was vulgar and offensive, directed at a particular member of the school community, and intended to be accessed on campus.[386]

On the other hand, cases in which the creator of the expression had no intent for the expression to reach campus, coupled with another mitigating factor, will not suffice: (1) no intent and no one saw the expression on campus (*Beussink*);[387] (2) no intent, and although seen, no one was distressed by it (*Emmett*);[388] (3) no intent, and although reaching campus, the expression was not immediately discovered or discussed (*Killion*);[389] and (4) no intent, no threat, and no specific target (*Mahaffey*).[390]

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[380] *See, e.g.*, Vander Broek et al., *supra* note 19, at 20.
[381] *See supra* notes 210-37 and accompanying text.
[382] *See supra* notes 251-57 and accompanying text.
[383] *See supra* notes 233-42 and accompanying text.
[384] *See supra* notes 294-320 and accompanying text.
[385] *See supra* notes 243-50 and accompanying text.
[386] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).
[387] *See supra* notes 171-81 and accompanying text.
[388] *See supra* notes 182-90 and accompanying text.
[389] *See supra* notes 191-200 and accompanying text.
[390] *See supra* notes 201-09 and accompanying text.

This above synthesis also indicates the relevance of targeting a specific individual whose privacy right to be "let alone" has been impacted in regulating such speech (*Bethlehem*, *O.Z.*).[391] In fact, as the district court in *Blue Mountain* realized, "the protections provided under *Tinker* do not apply to speech that invades the rights of others . . . . [T]he speech at issue affected McGonigle's rights. As a principal of a school, it could be very damaging to have a profile on the [I]nternet indicating that he engages in inappropriate sexual behaviors."[392]

Finally, although lewd, vulgar, and offensive speech (*Doninger*), especially when targeted at a specific individual within the school community (*Bethlehem*, *Blue Mountain*), presented a valid reason for regulating the speech, only the Pennsylvania Supreme Court in *Bethlehem* and the district court in *Blue Mountain* have been willing to extend *Fraser* to speech created off campus but foreseeably making its way onto campus, "even though it arguably did not cause a substantial disruption of the school."[393]

III. *J.C. EX REL. R.C. V. BEVERLY HILLS UNIFIED SCHOOL DISTRICT*: STUDENT-ON-STUDENT INTERNET ATTACKS

It is against the above synthesis of cases that *J.C. ex rel. R.C. v. Beverly Hills Unified School District*[394] makes its entry into the internet expression arena. In fact, Judge Stephen Wilson specifically amended his November 16, 2009 opinion in the case to take into consideration the Third Circuit's opinions in *Layshock* and *Blue Mountain*.[395] The problem, as Judge Wilson points out,

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[391] *Layshock* would certainly seem to fit here. Additionally, as both the district court and the Third Circuit noted in *Blue Mountain*, the principal's *property* right to practice his profession was also impacted by the expression calling him a sex addict and a pedophile. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 302 (3d Cir. 2010); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *6 n.4 (M.D. Pa. Sept. 11, 2008).

[392] *Blue Mountain*, 2008 WL 4279517, at *6 n.4.

[393] *Id.* at *6.

[394] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

[395] Although the amended opinion is dated May 6, 2010, Judge Wilson clearly wrote the opinion before the Third Circuit, sitting en banc, vacated both opinions on April 9, 2010. *Id.* at 1097 n.1.

is that there have been no prior cases that address expression by one student targeted at another student;[396] the eleven internet expression cases all concerned student expression targeted at the school or one of its administrators or teachers.

Beverly Hills, however, is a true "cyber-bullying" case in which a student, through her parents, sued her school, after it suspended her for posting a video maligning another student on YouTube.[397] In that case, the plaintiff, J.C., and her thirteen-year-old friends, gathered at a nearby restaurant and recorded a four and one-half minute video on her personal recording device, after having been dismissed from school for the day.[398] On the video, J.C. and her friends talked about their classmate, C.C., and one of J.C.'s friends called C.C. a "slut," "spoiled," and "the ugliest piece of shit I've ever seen in my whole life," while also talking about "boners," and using profanity throughout.[399]

Later that evening, J.C. posted the video on YouTube from her home computer and contacted five to ten students from the high school, including C.C., and told them to look at the video.[400] The video received ninety "hits" that evening.[401] The next morning, J.C. overheard at least ten students discussing the video,[402] and ultimately, nearly half the eighth grade class saw the video.[403] Students could not access YouTube on the school computers, and cell phones that had Internet capability were prohibited from being used on campus; consequently, there was no evidence that any student viewed the video from a cell phone while at school.[404]

C.C. came to school with her mother that morning to make the school aware of the video.[405] C.C. spoke with the school counselor and was crying when she told the counselor that she did

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[396] *Id.* at 1111. The court does not mention *Coy v. Board of Education*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). *See supra* note 6.

[397] *Id.* at 1098-99.

[398] *Id.* at 1098.

[399] *Id.*

[400] *Id.*

[401] *Id.*

[402] *Id.*

[403] *Id.* at 1120.

[404] *Id.* at 1099.

[405] *Id.* at 1098.

not want to go to class because she felt humiliated.[406] After twenty to twenty-five minutes of counseling, C.C. was convinced to return to class, and ultimately only missed part of her first class.[407]

School administrators viewed the video while on campus and then demanded that J.C. delete it.[408] They also questioned the other students involved in making the video, one of whose father came to campus, watched the video, and then took his daughter home for the rest of the school day.[409]

Ultimately, the school only took disciplinary action against J.C., who had a prior history of secretly videotaping her teachers, for which she had been suspended and told not to make further videos on campus.[410] During the investigation of the current incident, school administrators discovered another video that J.C. had posted on YouTube of two friends talking on campus, clearly made while at school.[411] After the investigation, J.C. was suspended from school for two days. [412] J.C., through her parents, sued the school for violation of her constitutional rights, and the parties filed cross motions for summary adjudication.[413]

Judge Stephen Wilson determined that to resolve the issue, the court had to "determine the scope of a school's authority to regulate speech by its students that occurs off campus but has an effect on campus."[414] To do so, he considered the quartet of Supreme Court precedents on student speech and determined that neither *Hazelwood* nor *Morse* applied[415] because the expression neither "bore the 'imprimatur' of the school,"[416] nor could reasonably be construed as promoting drug use.[417] Nor did he apply *Fraser*, because it has been limited to speech that originates

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406 *Id.*
407 *Id.*
408 *Id.* at 1098-99.
409 *Id.* at 1099.
410 *Id.*
411 *Id.*
412 *Id.*
413 *Id.* at 1097.
414 *Id.* at 1100.
415 *Id.* at 1109.
416 *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).
417 *Id.* (citing Morse v. Frederick, 551 U.S. 393 (2007)).

on campus, reasoning that a school has the power to determine what speech is appropriate in its classrooms and assemblies.[418]

Thus, the court found that *Tinker* applied to determine "whether a school can regulate student speech or expression that occurs outside the school gates, and is not connected to a school-sponsored event, but that subsequently makes its way onto campus, either by the speaker or by other means."[419] The court then considered the Ninth Circuit's decision in *LaVine v. Blaine School District*,[420] which determined that a violent and graphic poem about killing classmates—written off campus but later brought to campus and shown to a teacher—was not protected, applying *Tinker*'s substantial disruption test, and "conclud[ing] that the school was reasonable to portend a substantial disruption."[421]

The court also considered the Second Circuit's approach, which considers the location of the speech as an important threshold question to be resolved before applying *Tinker*, requiring a "nexus" between the expression and the school before applying the substantial disruption test.[422] The court ultimately synthesized all these cases and concluded:

> [T]he majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means. The end result established by these cases is that any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause, a substantial disruption of school activities can be regulated by the school. Second, some courts will apply the Supreme Court's student speech

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[418] *Id.* at 1110 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

[419] *Id.* at 1102-03.

[420] LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001).

[421] *Beverly Hills*, 711 F. Supp. 2d at 1103 (citing *LaVine*, 257 F.3d at 992). The court recognized that "many other courts analyzing off-campus speech that subsequently is brought to campus or to the attention of school authorities apply the substantial disruption test from *Tinker* without regard to the location where the speech originated (off campus or on campus)," and "have directly applied the *Tinker* substantial disruption test to determine if a First Amendment violation occurred, without first considering the geographic origin of the speech." *Id.* at 1103-04.

[422] *Id.* at 1104-05 (citing Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007)).

> precedents, including *Tinker*, only where there is a sufficient nexus between the off-campus speech and the school. It is unclear, however, when such a nexus exists. The Second Circuit has held that a sufficient nexus exists where it is "reasonably foreseeable" that the speech would reach campus. The mere fact that the speech was brought on campus may or may not be sufficient.[423]

Applying these principles, the Court found that the plaintiff's "geography-based argument . . . that the School could not regulate the YouTube video because it originated off campus," failed under both *LaVine* and the Second Circuit's approaches, because "the YouTube video clearly ha[d] a sufficient connection to the Beverly Vista campus," and actually made its way onto campus.[424] The court reasoned that content may increase the likelihood that the expression will reach campus, finding that "[c]ases considering the relationship between off-campus speech and the school campus more readily find a sufficient nexus exists where speech over the Internet is involved."[425]

After finding that *Tinker* applied to both off-campus speech and on-campus speech, the court considered whether the video "created, or was reasonably likely to have created, a substantial disruption of school activities," and found that it did not.[426] The court determined that while the disruption did not need to rise to the level of "complete chaos,"[427] it must be more than a "mild distraction,"[428] or creating a "mere 'buzz'"[429] on campus. However, the court acknowledged that violent or threatening expression could reasonably portend disruption.[430] But ultimately the court found that what was required was that the school's decision to discipline be based on evidence or facts, rather than

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[423] *Id.* at 1107.

[424] *Id.* at 1107-08.

[425] *Id.* at 1108 (citing *Wisniewski*, 494 F.3d 34; *Doninger*, 527 F.3d 41).

[426] *Id.* at 1110, 1122.

[427] *Id.* at 1111 (quoting J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002)).

[428] *Id.*

[429] *Id.* at 1112.

[430] *Id.*

"undifferentiated fears or mere disapproval."[431] Only "where 'a school can point to a well-founded expectation of disruption–especially one based on past incidents arising out of similar speech–the restriction may pass constitutional muster.'"[432]

Under these parameters, the court found any disruption *de minimus* when a few students missed some portion of classes on a single day, where the speech was neither violent nor threatening, no one's safety was ever in danger, and the student was merely embarrassed and was able to be counseled back to class.[433] Under such circumstances, the court found that the video could not be said to have had any effect on class activities.[434]

The court also considered the second prong of *Tinker*, which allows that a school may regulate student speech that "[collides] with the rights of other students to be secure and be let alone."[435] Although the court reasoned that "'speech that impinge[s] upon the rights of other students' may be prohibited even if a substantial disruption to school activities is not reasonably foreseeable," the court found "the precise scope of *Tinker*'s 'interference with the rights of others'" language unclear, and not often applied by lower courts.[436]

The defendant school district urged the court to follow a Ninth Circuit case, *Harper v. Poway Unified School District*, which held "that a student's decision to wear a T-shirt with a religious message condemning homosexuality during the school's 'Day of Silence' impinged upon the rights of other students under *Tinker*."[437] The court in *Harper* "held that student speech that

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[431] *Id.* at 1115.

[432] *Id.* at 1116 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001)).

[433] *Id.*

[434] *Id.* at 1119.

[435] *Id.* at 1122 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). This test has been determined to be independent of the other. *See supra* note 120.

[436] *Beverly Hills*, 711 F. Supp. 2d at 1122.

[437] *Id.* (citing Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006)). The *Harper* decision was vacated as moot because when "the case reached the Supreme Court on certiorari, the district court had entered final judgment dismissing plaintiff's claims for injunctive relief as moot." *Beverly Hills*, 711 F. Supp. 2d at 1122 n.16 (citing Harper v. Poway Unified School District, 549 U.S. 1262 (2007)).

attacks 'particularly vulnerable' students on the grounds of 'a core characteristic'—namely, race, religion, and sexual orientation—impinged on the rights of others and could be regulated under *Tinker*,"[438] but expressly limited its holding to speech attacking students on those three grounds, declining to extend its holding even to remarks based on gender.[439]

Although the defendants argued that *Harper* demonstrated that "California schools have an obligation to protect students from psychological assaults that cause them to question their self worth,"[440] the court refused to allow schools to "exercise this obligation in a manner that infringes upon other student's First Amendment rights."[441] The court found no "authority, including *Harper*, that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student."[442] The court declined to be the first.[443]

The question, then, is where does *Beverly Hills* stand within the parameters established by the previous cyber-expression cases? The first and most obvious distinction is that the cyber-expression in this case was directed at a fellow student, rather than at the school or one of its employees.[444] There are simply no cases directly on point.[445] The court notes the distinction,[446] but

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[438] *Id.* at 1123 (quoting *Harper*, 445 F.3d at 1182).

[439] *Id.*

[440] *Id.* (citing Defendant's Motion at 11, Harper v. Poway Unified School District, 549 U.S. 1262 (2007) (No. 06-595)).

[441] *Id.*

[442] *Id.*

[443] *Id.*

[444] *Id.* at 1098.

[445] *See* Willard, *supra* note 4, at 6. Nancy Willard has explained:

> One reason for the lack of case law is likely that there are very few attorneys[,] such [as] J.C.'s father, Evan Cohen, who filed the case, who are inclined to file a law suit against a school district arguing that students should have a First Amendment right to torment and harass other students.

Id. The Los Angeles Times reported Evan Cohen as explaining, "[T]he case highlighted the school district's failure to realize the limits of its authority. Yeah, sure, they can fall back on cyber-bullying, but when you actually ask them questions and dig down deep into their understanding, they think it's OK for them to be a super-parent." *See* Kim, *supra* note 4 (quoting Evan Cohen, the child's attorney and father) (internal quotation marks omitted).

makes nothing of it. But this difference from the other cyber-expression cases touches on the *nature* of the disruption that had or foreseeably would occur.

If *Tinker*'s substantial disruption test is the only test to be used in cyber-expression cases, it is important for courts to take note of the difference of that disruption in student-on-student attacks. When off-campus internet expression involves student online speech targeted at school administrators or teachers, the question of whether the speech has or foreseeably will cause a substantial disruption of general school activities in the larger sense is relevant.[447] However, when such speech is directly targeting a fellow student, there stands to be little or no such broad disruption. In *Beverly Hills*, there was no reported general disruption of classroom or school activities; the disruption of the school activity was to C.C., the targeted student.[448] The expression caused her to want to skip class, which she in fact did, until counseled back to class with the promise that the school was taking steps to put a stop to the attacks.[449]

Yet, as then-Judge Alito pointed out in *Saxe v. State College Area School District*, "The primary function of a public school is to educate its students; conduct that substantially interferes with the mission (including speech that substantially interferes with a student's educational performance) is, almost by definition, disruptive to the school environment."[450] As Nancy Willard, Director of the Center for Safe and Responsible Internet Use observed, "The inquiry should have focused on one question: Was

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[446] *Beverly Hills*, 711 F. Supp. 2d at 1111.

[447] Willard, *supra* note 4, at 6.

[448] *Beverly Hills*, 711 F. Supp. 2d at 1122.

[449] Willard, *supra* note 4, at 5. Willard observed:

> [C.C.'s] willingness to go to class was predicated on the fact that she knew that the school officials were intending to call the aggressors to the office and deal with the situation. The fact that the school officials at Beverly Vista School responded promptly and effectively to this situation was held against the district. Due to the district's effective disciplinary actions, the foreseeable significant interference with C.C.'s ability to participate in school activities was prevented!

Id. It should be noted that the creators of the expression also had their classroom day interrupted, as did administrators and counselors.

[450] Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

the speech of J.C. sufficiently severe or pervasive that it had or foreseeably would substantially interfere with C.C.'s educational performance and right to feel secure at school, and thus her right to receive an education?"[451]

Secondly, the expression certainly collided with the privacy rights of C.C. to be let alone and to receive and exercise her education, in which the Supreme Court has found a "property interest."[452] In *Harper*, the Ninth Circuit applied *Tinker*'s second test to find that wearing a T-shirt to school that condemned homosexuality impinged on the rights of other students, even though no substantial disruption occurred.[453] Although the court limited its holding to expression attacking "particularly vulnerable students" on a "core characteristic" such as race, religion, or sexual orientation," even dissenting Judge Kosinski recognized that *Tinker*'s "rights of others" test referred to "traditional rights, such as . . . invasion of privacy."[454]

Additionally, although the expression did not threaten C.C., it was lewd, vulgar, and offensive speech specifically about her, intended for her and other students to see, and actually brought to their attention.[455] It achieved its intention; it caused her humiliation, but not where it was originally created and not where it was initially read, but only at school where the expression had rather foreseeably made its way onto campus, where other students, eventually as much as half her class,[456] were discussing it. As such, the facts exceed those in *Blue Mountain*, where the lewd and vulgar speech caused the principal no reported distress—although certainly impacting other rights,[457] and brings it close to the expression causing the teacher distress in *Wisniewski*.[458] Although no other case has treated cyber-expression by one student targeted at another, the Third Circuit

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451 Willard, *supra* note 4, at 5.

452 Goss v. Lopez, 419 U.S. 565, 576 (1975).

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

454 *Id.* at 1198 (Kozinski, J., dissenting).

455 J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).

456 *Id.* at 1120.

457 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 302 (3d Cir. 2010).

458 Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007).

recognized in a case about the constitutionality of a school's racial harassment policy that "[i]ntimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully."[459]

Finally, the expression would certainly have come within *Fraser* if J.C. and her friends had stood up in class, in the assembly hall, in the cafeteria, or on the athletic field[460] and made the same statements. In *Fraser*, the Court protected the rights of school children to be let alone, to be protected by the school from expression that was *generally* offensive and embarrassing, but in no way targeted any child herself.[461] Certainly, then, there is an argument to be made that a school child must also be protected from lewd, vulgar, and offensive expression that, although originating off campus, foreseeably makes its way onto campus and is *specifically* targeted at a child, causing her to feel "humiliated," regardless of the substantiality of any resultant overall school disruption. The Supreme Court's edict seems to apply equally in *Fraser*:

> The First Amendment does not prevent the school officials from determining that to permit [] vulgar and lewd speech . . . would undermine the school's basic educational mission. . . . [When] directed towards an unsuspecting audience of teenage students. . . . [V]ulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[462]

One is therefore forced to ask whether a student too cowardly to say such things to another student's face for risk of punishment (and J.C. had been suspended before for secretly videotaping her teachers and had posted another video on YouTube about her

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[459] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002).

[460] The Supreme Court recognized that children's rights at school extended beyond the classroom and classroom hours, and included time spent "in the cafeteria, or on the playing field, or on the campus during authorized hours . . . ." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969).

[461] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 679 (1986).

[462] *Id.* at 685-86.

classmates that had clearly been made at school)[463] should be allowed to say them on the Internet, call them to the attention of the target and other students—virtually ensuring that the expression would come to campus the next day—and then be allowed to hide behind her computer and say that her expression is protected because it was not *initiated* on campus? Perhaps the Third Circuit's edict applies equally to cyber-expression: "Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school."[464]

CONCLUSION: APPLYING THE "SUBSTANTIAL NEXUS" INQUIRY BEYOND *TINKER*

Unlike the political expression in *Tinker* that did not "intrude[] upon the work of the schools or the rights of other[s],"[465] J.C.'s expression may not have substantially disrupted the work of the school (except for that of the administrators and counselor), but it certainly disrupted C.C.'s work of getting an education and intruded upon C.C.'s right to be let alone and her privacy interest in her reputation.[466] The question is, whether and how to allow schools to regulate and punish such expression.

Certainly *Tinker* teaches that children's rights do not stop at the schoolhouse gate, but it also teaches that children's rights sometimes require modification in light of the "special characteristics of the school environment."[467] The Supreme Court has so far enumerated four instances where children's First Amendment rights may be modified—yet all of them require that the speech *originate* within the schoolhouse gates: Student expression may be regulated and punished when it occurs on campus and causes a substantial disruption,[468] when it occurs on campus and is lewd, vulgar, and offensive,[469] when it occurs on

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463 *Beverly Hills*, 711 F. Supp. 2d at 1099.
464 *Sypniewski*, 307 F.3d at 264.
465 *Tinker*, 393 U.S.at 508.
466 Prosser, *supra* note 1, at 398.
467 *Tinker*, 393 U.S. at 506.
468 *Id.* at 514.
469 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

campus and bears the imprimatur of the school,[470] or when it occurs on campus and promotes drug use.[471] The Court in *Morse* later recognized that *Tinker*'s substantial disruption test was not "absolute,"[472] although rejecting the contention that *Fraser* encompassed "any speech that could fit under some definition of 'offensive.'"[473]

But the Court has also indicated that rights may need to be *balanced*, and the right to free speech on campus may not "colli[de] with the rights of other[s],"[474] although none of its cases give any real guidance about when this happens or *how* it happens. What is needed now is a fair and consistent way for schools to balance those rights in internet expression cases where speech is created off campus, and would otherwise be protected, but intentionally or foreseeably makes its way onto campus.

To that end, there have been various proposals for extending school authority over online speech created off campus. The broadest proposals simply call for universally applicable analysis of the expression under *Tinker*, regardless of inception of the speech,[475] or to treat *all* internet expression as on-campus speech if a student "knowingly [or] recklessly distributes the speech on-campus," regardless of the target.[476]

Others have found that *Tinker*'s "collision with the rights of other[s]" test is particularly pertinent in litigation involving student internet expression and apply it as the most reasonable solution.[477] However, one commentator finds the "better interpretation of *Tinker*'s . . . [second] prong . . . [is to] allow

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[470] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[471] Morse v. Frederick, 551. U.S. 393, 397 (2007).

[472] *Id.* at 405.

[473] *Id.* at 409.

[474] *Tinker*, 393 U.S. at 508

[475] *See* Pike, *supra* note 32, at 997. This is essentially the method that lower courts have been using with inconsistent results. *See Tinker*, 393 U.S. at 506.

[476] Justin 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, 132 (2007).

[477] McCarthy, *supra* note 22, at 1; Kellman, *supra* note 120, at 370. The only court to do so was the Ninth Circuit in *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), later vacated by the Supreme Court "as moot" because the district court had entered final judgment. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).

schools to regulate student speech only when it has the potential to spark a physical assault."[478] The problem with this limitation, of course, is that it lends itself to a "true threat" analysis, which is more difficult to prove,[479] and leaves schools the tough job of determining just what speech has the potential to spark a physical assault.

Others have realized that because each internet expression case demands a fact-specific inquiry, what is needed is a "multi-factor analysis."[480] Several formulas have been proposed. Renee Servance suggests an "impact analysis," finding that schools may regulate if the target and creator of the internet expression are members of same school, the expression causes actual or foreseeable harm, and there is a disruption to the school's ability to educate or maintain classroom control.[481] Another, narrower, proposal is to treat student expression created off campus as protected, subject to review of whether it was viewed at school, whether and to what extent students discussed it on campus, and whether the school's measures against the perpetrator were appropriate.[482]

Nancy Willard, Director of the Center for Safe and Responsible Internet Use, proposes considering whether the expression was "sufficiently severe or pervasive that it had or foreseeably would substantially interfere with [a student's] educational performance and right to feel secure at school, and thus her right to receive an education."[483] She proposes:

> [T]his determination should be made based both on the subjective perspective of [the student], as well as an objective third party perspective – informed by research insight on bullying. . . . [in order to] effectively distinguish between student speech that is merely "offensive" but should be considered protected speech and speech that is truly harmful

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478 Kellman, *supra* note 120, at 370.
479 *See supra* note 47 and accompanying text.
480 King, *supra* note 11, at 876.
481 Servance, *supra* note 7, at 1239.
482 King, *supra* note 11, at 876.
483 Willard, *supra* note 4, at 5.

> and interfering with the right of another student to feel secure at school and receive an education.[484]

Whatever method might be employed, another obvious proposal is that schools should have to provide adequate notice that certain speech is prohibited in order not to raise due process concerns, and the actual punishment meted out must be reasonable.[485]

Beverly Hills, however, is a case calling into relief the need for courts to be liberated from applying *Tinker*'s substantial disruption requirement as the *only* test in student-on-student cyber-bullying cases, because, as has been shown in Part III,[486] it is not well-suited to addressing student cyber-expression targeting another student. To that end, a modest proposal: off-campus internet expression comprising a *student-on-student* attack that intentionally or foreseeably[487] makes its way onto campus, must be treated as on-campus speech.[488] To do so would merely extend

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[484] *Id.*

[485] Waldman, *supra* note 40, at 1114. The author of this proposal notes that this would raise the problem of self-censorship. Justice Stevens observed in his dissent in *Fraser* that it was "highly unlikely that [the student] would have decided to deliver the speech if he had known" the consequences. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986) (Stevens, J., dissenting).

[486] *See supra* notes 445-49 and accompanying text.

[487] Benjamin Ellison has commented that treating cyber expression as on-campus speech when it is only reasonably foreseeable that it will come to campus is not enough to restrict student expression because the Internet is so readily available in school and elsewhere, that it is reasonably foreseeable that once speech is on the Internet, it will end up anywhere there is a computer and a user interested in accessing it—including at school. "Allowing schools to punish speech that merely reaches school, through a medium that essentially exists everywhere, would result in a strong chilling effect on student speech outside of school." Benjamin Ellison, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 844-45 (2010). While this is undoubtedly true, it is also the point in student-on-student attacks perpetuated via the Internet. Limiting restriction of expression reasonably foreseeable to come onto campus to *student-on-student attacks* will allow school officials, *in loco parentis*, to protect children's educational and privacy rights, rights that are not implicated in student-on school-employee cases. Teachers and administrators do not have a right to education at their school and adults would be presumed to be "adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006).

[488] This proposal is based on the "nexus" approach originated in *Bethlehem* and taken up by the Second Circuit. Those courts found that establishing a "sufficient

the general premise, adopted by the lower courts over the last twelve years in applying *Tinker*'s substantial disruption test, 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."[489] This would, for example, allow schools to restrict and punish such expression that is clearly shown to "colli[de] with the rights of other students to be secure and to be let alone,"[490] or is lewd, vulgar, and offensive[491] to the child targeted, such that it impacts her ability to receive and participate in her education.

Although doing so will further limit students' freedom of expression, it is important to recognize that lewd, vulgar, offensive, or threatening expression by one student directed at a fellow student, is not an expression of "opinion . . . on controversial subjects," which *Tinker* so carefully sought to protect,[492] or "divergent political and religious views" that *Fraser* found must be tolerated even if unpopular.[493] Although name-calling aimed at other students is ordinarily protected outside the school context, lewd, vulgar, or offensive internet expression that intentionally or foreseeably makes its way onto campus, even when created off campus, targets students for *public* harassment within the enclosed environment of the schoolhouse gates. In the words of the *Fraser* Court, such speech must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[494] "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive speech. . . ."[495] The only stretch of *Fraser*'s restriction of such "manner" of speech is that of geographic

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nexus" between the expression that was created off campus and the school was enough to make it "on-campus" expression and bring it within *Tinker* to then consider whether the expression caused a substantial disruption of school activities. *See* discussion *supra* Part II.

489 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010).

490 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (3d Cir. 2010).

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

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

493 *Fraser*, 478 U.S. at 681.

494 *Id.*

495 *Id.* at 683.

origination, which the court in *Beverly Hills* and other internet expression cases now recognizes is "not material," at least to an application of *Tinker*.[496]

Secondly, as Renee Servance has observed, the theory that any harm such expression causes is outweighed by the greater danger of suppressing free speech may be appropriate for adults, but not for school children.[497] Studies show that a child's sense of and need for privacy develops as everyday experiences teach them about privacy as they are exposed to different interactions with themselves and their information.[498] "Very young children have difficulty in the conscious recognition of private space and private information. However, parallel to their psychological and social development, they learn the boundaries of personal space and the privacy of information."[499] "Childhood privacy practices are therefore inextricably intertwined in the child's developing cultural sense of autonomy in her upbringing."[500] "By adolescence, children are acutely aware of the significance of privacy, both territorial and informational."[501] Eventually, privacy becomes "volitional," and the need for adult supervision ceases, but until that time, a child's privacy protection is "subject to the 'whim' of her caretaker."[502]

And because school children are subject to mandatory attendance requirements, the Supreme Court has emphasized "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive

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[496] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010); *accord* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) ("It is clear that the test for school authority is not geographical.").

[497] Servance, *supra* note 7, at 1214.

[498] Stuart, *supra* note 36, at 618.

[499] *Id.* at 620.

[500] *Id.* at 618.

[501] *Id.*

[502] *Id.* The Ninth Circuit, in *Harper v. Poway Unified School District*, similarly realized that limitations on student speech must be narrow, and limited its holding to conduct occurring in public elementary and high schools, because "[a]s young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years." 445 F.3d 1166, 1183 (9th Cir. 2006).

audience . . . ."[503] Schools have authority over some other off-campus conduct in certain circumstances where the conduct affects the school community,[504] and schools are in the best position to decide whether off-campus expression that intentionally or foreseeably is brought onto campus should be restricted in order to prevent substantial disruption or a collision with the rights of other students.

The negative effects of an invasion of a child's privacy right to be let alone by cyber-bullying has by now been well-documented, and as Alison King points out, the "negative effects of cyberbullying are often more serious and long-lasting than those of traditional forms of bullying."[505] As the Ninth Circuit recognized, such "psychological attacks . . . cause young people to question their self-worth and rightful place in society."[506] The Internet provides a "veil of anonymity," encouraging expression that might not otherwise have been made, as well as providing immediate access to it by endless others at the click of a mouse, and allowing the expression to remain indefinitely.[507] As such, it is "pervasive and prolonged abusive behavior," that can result in severe psychological damage, such as low self-esteem, anxiety, and depression leading to social withdrawal, as well as truancy, and ultimately can impair academic achievement.[508] There is also documentation that bullied children tend to strike back with violence either towards the bully, or others, or even themselves by suicide.[509]

Children such as thirteen-year-old C.C. have a right to be protected from these abuses that violate what the Supreme Court has called a "liberty interest in [their] reputation"[510] and a right to be let alone and receive and exercise their education. When student-against-student expression created off campus is shown to have a "nexus" to the school by being intentionally carried there

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503 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

504 *See supra* notes 36-38 and accompanying text.

505 King, *supra* note 11, at 850.

506 Kellman, *supra* note 120, at 371 (quoting *Harper*, 445 F.3d at 1178).

507 King, *supra* note 11, at 850.

508 Servance, *supra* note 7, at 1216-17.

509 *Id.* at 1217.

510 Goss v. Lopez, 419 U.S. 565, 576 (1975).

by its creator, or foreseeably making its way onto campus because its target is a fellow student and it contains prurient content intended to attract viewers in the school community, it should be treated as on-campus speech, allowing children's rights to be properly balanced under any of the Supreme Court's student speech exceptions. Such a classification would have allowed the court in *Beverly Hills* to consider the case under *Fraser* because the expression would have been considered on-campus speech, or used *Tinker*'s "collision with the rights of other[s]" test to restrict on-campus speech that collided with C.C.'s privacy rights.