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SCHOOL DISCIPLINE OF CYBER-BULLIES: A PROPOSED THRESHOLD THAT RESPECTS CONSTITUTIONAL RIGHTS

LAURA PAVLIK RAATJES*

I. INTRODUCTION

Julia's classmates teased and bullied her for much of her time at Central High School.¹ Three Central students posted a parody Facebook profile of Julia that describes her in a derogatory manner.² The page is private, limited to the view of the three bullies and those other students invited to view it. The bullies do not bother Julia when she is at school; instead, they purposely ignore her. Julia, who was shown the page by a friend, does not know how many others have viewed it. Not knowing what to do, Julia confides in her geography teacher Mr. Hill that she is having trouble focusing at school as a result of the Facebook posts.

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1. Compare this hypothetical situation with the real-life harassment of David Knight. Knight discovered a website some of his peers created, titled "Welcome to the page that makes fun of Dave Knight." SHAHEEN SHARIFF, *CYBER-BULLYING: ISSUES AND SOLUTIONS FOR THE SCHOOL, THE CLASSROOM AND THE HOME* 31 (Routledge 2008). According to Knight, the website included "pages of hateful comments directed at [him] and everyone in [his] family." Joan Leishman, *Cyber-bullying*, CBC.CA (Oct. 10, 2002), http://www.cbc.ca/news/background/bullying/cyber_bullying.html. Students also sent Knight numerous derogatory emails, including one stating, "You're gay, don't ever talk again . . ." *Id.* Unable to withstand the endless onslaught of bullying, Knight withdrew from high school and finished out his last year from home. *Id.*

2. Lauren Newby's story provides an example of what some anonymous posters are writing about their classmates online. Newby was relentlessly bullied by anonymous blog posters on a website created by a former student of her high school. Amy Benfer, *Cyber Slammed*, SALON.COM (July 3, 2001, 2:03 PM), http://dir.salon.com/mwt/feature/2001/07/03/cyber_bullies/index.html?sid=1039555. Posters left messages such as, "[P]eople don't like you because you are a suicidal cow who can't stop eating," and, "I guess I'll have to wait until you kill yourself which I hope is not long from now." *Id.* Moreover, there was a whole page consisting of the phrase "Die bitch queen!" repeated hundreds of times. *Id.* Newby's car was also egged and acid was thrown at her front door, which injured her mother. *Id.* The culprits were not determined. *Id.* See also JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 93 (2008) (detailing the bullying that Lauren Newby suffered at the hands of her classmates).

Despite these attacks, Julia still attends school and maintains A's and B's in her classes. Nonetheless, Mr. Hill observes that Julia's grades have been slightly lower the past few months, which coincides with the time period of the bullies' attacks.

Mr. Hill desires to discipline the bullies for their harmful behavior. He is also concerned about Julia's emotional health, in particular, because he has heard about cases of cyber-bullying that have pushed young people to suicide.³ In doing some of his own cyber-investigations, Mr. Hill searches one bully's name on Facebook and finds that she is the creator of a page titled, "Mr. Hill is the worst teacher I've ever met!"⁴ Mr. Hill is unable to access the private page, but if he could, he would see that it has thirty-five members and is devoted to sharing negative feelings about him. Mr. Hill is not sure what to do next. Can he discipline the alleged bullies? Should he talk to their parents or the administration? Should he investigate whether Facebook can remove the pages about Julia and himself? Should he call the police?

3. One such case of extreme bullying is detailed in court documents filed by the Commonwealth of Massachusetts, which exposed a group of high school students' campaign to bully and systematically demoralize their classmate, Phoebe Prince. Commonwealth's Memorandum of Law in Support of its Motion for Joinder of Youthful Offender Indictment and Delinquency Complaints Pursuant to Mass. R. Crim. Pro. 9(a)(3) and G.L. C. 119, Section 54 at 3-9, *Commonwealth v. Longe*, No. YO10H001 (Apr. 8, 2010), available at <http://www.myfoxboston.com/generic/news/Ashley-Longe-Part-I>. Among many other abusive efforts, the accused bullies authored several Facebook postings that explicitly derogated her, made threats at school to harm her, and called her offensive names, such as "stupid slut" and "Irish whore." *Id.* at 6-7. Unable to live any longer with the unrelenting abuse of her classmates, Prince committed suicide. *Documents: Bullied Teen Phoebe Prince Sought Help from School*, MY FOX BOSTON (Apr. 9, 2010), <http://www.myfoxboston.com/dpp/news/local/documents-bullied-teen-phoebe-prince-sought-help-from-school-25apx-20100409#>. The students involved now face a number of criminal charges and school sanctions. *Id.* See also Sam Dolnick, *2 Linked to Suicide Case Withdraw from Rutgers*, N.Y. TIMES, Oct. 30, 2010, <http://www.nytimes.com/2010/10/30/nyregion/30rutgers.html?ref=mollywei> (covering the story of Rutgers freshman, Tyler Clementi, who committed suicide after two other freshmen secretly videotaped him kissing another boy and then uploaded the video to the internet).

4. This fact is taken from the case *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010). There, Katherine Evans was suspended from school for creating a Facebook group titled "Ms. Sarah Phelps is the worst teacher I've ever met!" *Id.* The group was devoted to sharing negative feelings about the teacher. *Id.* According to the Southern District of Florida, the teacher "never saw the posting and it did not disrupt school activities." *Id.* The Court held that the Facebook post was protected off-campus speech. *Id.* at 1374. The school ultimately settled by removing the suspension from Evans's record, and paying Evans \$1 in nominal damages and \$15,000 in attorney's fees. Jessica Sick, *Student Wins \$1 in Free Speech Facebook Settlement*, NBC MIAMI (Dec. 28, 2010, 10:00 AM), <http://www.nbcmiami.com/news/local-beat/Student-Wins-1-in-1st-Amendment-Facebook-Settlement-112546934.html>.

Unfortunately, Julia and Mr. Hill's hypothetical situation has become an all-too-common concern piled upon teachers' already-full plates. As evidenced by this hypothetical—formed by combining facts from a number of recent bullying incidents—there are many common threads running through cyber-bullying situations. In most cases, the bullies are students at the same school attended by the victim—often a student, faculty member, or administrator. In many cases, the bullies take advantage of the perceived anonymity of the Internet to humiliate their victims, and in many cases, this bullying emotionally harms the victims.

Moreover, young victims are not likely to have fully developed coping mechanisms to handle the stress of being bullied. Cyber-bullying will likely upset even those victims who are more resilient. Yet the cases where young victims experience lifetime injuries—which affect them emotionally, physically, and educationally—often go unnoticed until it is too late to reverse the damage done. The current widespread concern over cyber-bullying is warranted in light of the tragic, sometimes even fatal effects it can have on the victims.

But several of the recently litigated cases involve student bullies who are partaking in purely off-campus speech.⁵ Such cases are perhaps best dealt with through proactive measures other than school discipline.⁶ Although this victimization can certainly be emotionally harrowing for those targeted, this type of cyber-bullying is not likely to result in substantial disruption⁷ to school

5. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, No. 07-4465, 2011 WL 2305970, at *7 (3d Cir. June 13, 2011):

It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

See also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) [hereinafter *Snyder*] (explaining that the student's creation of the profile at home coupled with the lack of any substantial disruption barred school officials from disciplining her).

6. LISA MADIGAN, *CYBERBULLYING: A STUDENT PERSPECTIVE* 4 (2010), available at http://illinoisattorneygeneral.gov/children/cyberbullying_focus_report0610.pdf (“[M]any students thought that suspension or direct punitive consequences [were] not sustainable solutions to cyberbullying.” Instead, students “preferred mediation and felt that they have the ability to work through these issues if given a safe environment.”).

7. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (coining the phrase “substantial disruption” as part of a test criterion for determining whether a student's First Amendment speech rights have been infringed upon by a public actor).

operations aside from that associated with investigating and punishing the perpetrators.⁸ Since a substantial disruption may not be present in the facts, a court may focus on the public nature of the Internet in bolstering a forecast of substantial disruption, even when only a limited number of individuals view the content.⁹ Nonetheless, educators and administrators desire to respond constructively to cyber-bullying behavior while recognizing competing concerns for maintaining authority over students and preserving their important constitutional rights.

This Article proposes that school discipline for entirely off-campus cyber-bullying should only be permitted subject to a high standard, which requires that the speech actually cause a substantial disruption of school operations, rather than the more deferential alternative of a forecast of substantial disruption, which is the current standard used for discipline of on-campus speech. For instance, while a victim's excessive absences from school may be enough to find a substantial disruption, the fact that the cyber-bullying was done in a public or lewd manner would not be a sufficient basis for school discipline.

Part II provides background information on cyber-bullying and describes the legal frameworks currently in use for evaluating when schools may discipline students for their on- and off-campus speech. Part III explains why the traditional *Tinker* substantial disruption test as applied to off-campus cyber-bullying speech may run afoul of constitutional free speech rights. Part IV sets forth a modified version of the *Tinker* test to apply to entirely off-campus cyber-bullying. This Part also returns to Julia and Mr. Hill to examine the practical result of such a test along with alternative, and perhaps more effective, avenues for addressing their problems.

8. See, e.g., *Snyder*, 650 F.3d at 920 (holding that a humiliating MySpace profile created off-campus of the school principal "could not reasonably have led school authorities to forecast substantial disruption of or material interference with school activities") (quoting *Tinker*, 393 U.S. at 514; see also *Doninger v. Niehoff*, 527 F.3d 41, 51-52 (2d Cir. 2008) (stating that the court relied primarily on three facts in determining a substantial disruption was foreseeable: 1) the language used was not "conducive to cooperative conflict resolution," 2) the information posted was "misleading," and 3) the discipline related to the student's participation in an extracurricular activity). Not only do these facts seem to forecast at most a minor disruption, but taken together, they could likely describe any number of student rants that no doubt occur on a frequent basis away from public school campuses.

9. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 300-01 (3d Cir. 2010), *rev'd en banc*, 2011 WL 2305973 (3d Cir. 2011) [hereinafter *J.S.*] ("[D]ue to the technological advances of the Internet, J.S. and K.L. created a profile that could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days."). The court then went on to infer that many members of the community would have eventually read and been upset by the content. *Id.*

II. CYBER-BULLYING AND THE CURRENT SCOPE OF SCHOOL DISCIPLINE FOR STUDENT SPEECH

A. *Cyber-bullying: An Overview*

Cyber-bullying occurs “when teens use the Internet, cell phones, or other devices to send or post text or images intended to hurt or embarrass another person.”¹⁰ The most common form of cyber-bullying is harmful, but not criminal, involving behavior like “persistent taunts and insults and verbal aggression . . .”¹¹ Because cyber-bullying occurs via electronic means, it is distinguishable from traditional bullying that involves actions such as “hitting or punching . . . name-calling or teasing . . . or intimidation through gestures or social exclusion.”¹² Other important differences between cyber-bullying and traditional bullying are that cyber-bullying can occur on a nonstop basis, can be distributed to a public audience rapidly, and can be committed anonymously.¹³ The public audience aspect is particularly important given that a study conducted by the Illinois Attorney General found that “the broad exposure [of cyber-bullying can] mov[e] the situation from a single mean comment to a mob bullying incident.”¹⁴

Another recent study found that while victims and perpetrators of traditional bullying report similar levels of depression, victims of cyber-bullying report significantly higher levels of depression than the cyber-bullies themselves.¹⁵ The researchers noted that unlike traditional bullying, which usually involves a face-to-face confrontation, cyber victims might not see or identify their harassers.¹⁶ “[A]s such, cyber victims may be more likely to feel isolated, dehumanized, or helpless at the time of the attack.”¹⁷ Although studies on the prevalence of cyber-bullying have produced varying statistics,¹⁸ one may simply look to recent headlines to understand the emotional torment caused by this antisocial behavior. Moreover, more subtle effects are frequently

10. *Cyberbullying*, NCPD, <http://www.ncpc.org/newsroom/current-campaigns/cyberbullying> (last visited Oct. 7, 2011).

11. Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment – TISNF!*, 60 CASE W. RES. L. REV. 153, 188 (2009).

12. *Guidance on Bullying and Cyberbullying Prevention*, NYSED.GOV, http://www.p12.nysed.gov/technology/internet_safety/documents/cyberbullying.pdf (last updated Mar. 15, 2011).

13. Backus, *supra* note 11, at 158-59.

14. Madigan, *supra* note 6, at 6.

15. Jing Wang et al., *Cyber and Traditional Bullying: Differential Association with Depression*, 48 J. ADOLESCENT HEALTH 415, 416-17 (2011).

16. *Id.* at 417.

17. *Id.*

18. *Id.* at 416-17.

experienced by the victims, such as “discomfort [and] self-consciousness” that can “impact [their] daily li[ves].”¹⁹

B. Current Paradigms for School Discipline Authority

A school’s authority to discipline students for speech uttered off-campus, outside of school hours, is highly problematic because it may infringe on a number of constitutional rights. At the same time, remaining hands-off makes educators uneasy in light of the perceived prevalence of, and significant emotional harm caused by, cyber-bullying. To determine where cyber-bullying falls in the school discipline continuum, it is helpful to first consider the current paradigms for school discipline authority.

1. Title IX

Title IX of the Education Amendments of 1972 requires that, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”²⁰

Under this rule, schools can be “held liable . . . where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”²¹ Title IX is not likely an appropriate remedy for cyber-bullying due to its narrow scope. It directs that schools be able to exercise some sort of control over whether or not the actions actually occur; such is not the case with off-campus cyber-bullying. Moreover, Title IX applies only to sexual harassment, which—while many cases of cyber-bullying would likely fall under this category to some degree or another—does not encompass all instances of cyber-bullying.

At the same time though, the law is currently unclear as to whether a school may be held liable under Title IX if it knows about student-on-student or teacher-on-student off-campus sexual harassment and does not take steps to prevent it. As one commentator who supports liability in such a scenario has noted, the reasoning courts have used to uphold school discipline for cyber-bullying can be applied to liability for Title IX.²² In other words, if a plaintiff can show that “a sufficient ‘nexus’ exists between the student’s off-campus cyberspeech and the school

19. Madigan, *supra* note 6, at 4.

20. 20 U.S.C. § 1681(a) (2006).

21. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

22. Kathleen Conn, Commentary, *Sexting and Teen Suicides: Will School Administrators Be Responsible?*, 261 EDUC. L. REP. 1, 15 (2010).

[or] if school administrators reasonably believe that the message will reach school and create a substantial disruption,” then liability for Title IX can be imposed.²³ Yet, this basis for liability is inappropriate for the same reasons as is this basis for upholding school discipline for cyber-bullying, as explained below.

2. *On-Campus Speech*

Another source of school authority comes from Supreme Court case law that finds schools may, in certain defined circumstances, discipline students for disruptive on-campus or school-sponsored speech. In *Tinker v. Des Moines Independent Community School District*,²⁴ school officials suspended students for wearing black armbands to school in silent protest of the Vietnam War.²⁵ There, the Court held that school officials violated the students’ First Amendment right to free speech, stating that in order for a school to “justify prohibition” of students’ speech, the expression must substantially disrupt the operation of the school or there must be a “reason to anticipate” that the expression “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”²⁶ The Court also explained that schools could punish students for expressions that “collid[e] with the rights of others.”²⁷

Since the Court’s decision in *Tinker*, it has set forth a number of exceptions to the framework. The first exception is for lewd speech, set forth in *Bethel School District No. 403 v. Fraser*.²⁸ In *Fraser*, school officials suspended a student for three days for delivering a lewd and obscene school election speech.²⁹ There, the Supreme Court held that the school acted within its authority since the speech “undermine[d] the school’s basic educational mission” and was “unrelated to any political viewpoint.”³⁰

Later, the Court set forth a second exception for school-sponsored speech in *Hazelwood School District v. Kuhlmeier*,³¹ where school officials removed two articles discussing students’ experiences with pregnancy and divorce from the school-sponsored newspaper due to concerns that the students’ privacy would be invaded and that the material was inappropriate for younger readers.³² There, the Court upheld the school’s actions, holding

23. *Id.*

24. *Tinker*, 393 U.S. at 503.

25. *Id.* at 504.

26. *Id.* at 509.

27. *Id.* at 513.

28. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986).

29. *Id.* at 677-78.

30. *Id.* at 685.

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

32. *Id.* at 263-64.

that school officials may edit school-sponsored student speech “so long as their actions are reasonably related to legitimate pedagogical concerns.”³³

The most recent exception to *Tinker* is for speech advocating illegal drug use. In *Morse v. Frederick*,³⁴ school officials suspended a student for ten days for unfurling a banner that stated “B[ong] H[its] 4 J[esus]” at an off-campus, school-approved activity.³⁵ The Court held that school officials may discipline students for speech at a school-sponsored event that can be reasonably interpreted as advocating illegal drug use.³⁶

As a result of this case law, lower courts have adopted a universal approach of applying *Tinker* to schools’ discipline of bullies (or other disruptive speakers) whose behaviors occur on-campus, during school hours. Such an approach usually involves high judicial deference to school authorities. For instance, in *Smith ex rel. Smith v. Mount Pleasant Public Schools*,³⁷ Smith, a student at Mount Pleasant High School, read aloud a written statement during lunchtime to other students criticizing, among other things, the high school’s principal and the school’s tardy policy.³⁸ Specifically, Smith referred to the principal “as a ‘skank’ and ‘tramp’ to whom people did not want to talk.”³⁹ There, the court applied the traditional *Tinker* analysis and held that the school’s eight-day suspension did not violate Smith’s free speech rights because his speech caused a substantial disruption by upsetting students who heard it and by undermining the authority of the principal.⁴⁰

3. Off-Campus Speech

How the lower courts have dealt with schools’ attempts to discipline students for off-campus bullying or speech—although a less-established area of law—is directly applicable to the issue of cyber-bullying. The majority of courts found in such cases that schools may discipline for off-campus behavior that causes or may reasonably be anticipated to cause a substantial or material disruption of the school operations.⁴¹ In other words, courts tend to

33. *Id.* at 273.

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

35. *Id.* at 397-98.

36. *Id.* at 410.

37. *Smith ex rel. Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987 (E.D. Mich. 2003).

38. *Id.* at 989.

39. *Id.*

40. *Id.* at 997.

41. *See, e.g.*, *O’Rourke v. Walker*, 128 A. 25 (Conn. 1925); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (D.C. Cal. 1969) (providing deference to school authorities, in instances of students’ off-campus behavior that may reasonably lead to substantial disruption).

apply a *Tinker*-like approach to such behavior.

For example—although far predating *Tinker*—in *O'Rourke v. Walker*,⁴² the school punished its student for bullying other students from his parents' house after school hours while the other students were walking home from school.⁴³ The court upheld the discipline, explaining that school authorities, in order to maintain good order in the school and to promote the welfare and efficiency of the school, are the only people who can effectively discipline acts of this nature, since public authorities find it "too trifling," and parents do not pay attention to it.⁴⁴

More recently, in the 1969 case *Baker v. Downey City Board of Education*,⁴⁵ two high school students were suspended for ten days for creating a newspaper—outside of school hours and off school premises—and distributing it nearby, but off school property.⁴⁶ There, the court—in a show of great deference—emphasized the administration's characterization of the newspaper as displaying a "negative attitude," and as "fail[ing] to be constructive in [its] criticism of the administration."⁴⁷ The court thus held that the administration was within its authority in regulating the speech.⁴⁸ The court also stated that being off of school premises was not a concern since the distribution occurred while students were on their way to school.⁴⁹ Several other lower courts have held that school authorities may discipline students for off-campus behavior or expression that causes or reasonably may cause a substantial disruption of the school environment.⁵⁰

On the other hand, some courts have held that schools cannot discipline students for off-campus speech that does not actually cause a disruption. For example, in *Shanley v. Northeast*

42. *O'Rourke*, 128 A. at 25.

43. *Id.* at 26.

44. *Id.* at 26-27.

45. *Baker*, 307 F. Supp. at 517.

46. *Id.* at 519.

47. *Id.* at 526.

48. *Id.* at 527-28.

49. *Id.* at 526.

50. See, e.g., *Nicholas B. v. Sch. Comm. of Worcester*, 587 N.E.2d 211, 213 (Mass. 1992) (holding that school had authority to discipline student for assaulting another student off school grounds where assault was planned while at school and occurred while students were walking home from school); *R.R. v. Bd. of Educ. of Shore Reg'l High Sch. Dist.*, 263 A.2d 180, 184 (N.J. Super. 1970) (holding that student could be suspended after a preliminary hearing if school officials had reasonable cause to feel that student was a danger to himself, others, or school property). There, the court explained, "school authorities have . . . a right [to discipline students] . . . where such is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, teachers or public school property." *Id.*

Independent School District,⁵¹ five students at MacArthur High School created a newspaper outside of school premises and school hours, and distributed it “near but outside the school premises” before and after school hours.⁵² Many copies of the newspapers ultimately made their way to the school.⁵³ As a result of this unauthorized activity, the school suspended the students for three days.⁵⁴

The court described the paper as polite and inoffensive, and rejected the “school board’s bootstrap transmogrification into Super-Parent,” holding that the school improperly disciplined the students for speech that did not reasonably forecast or create a substantial disruption of the school environment.⁵⁵ Although the court did not rule on whether a school may regulate off-campus student speech, it stated in dicta that:

[I]t is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts. For example . . . “fire” might be constitutionally yelled on the street corner, but not within the theater; or a march down the middle of a street might be protected activity, while a march down the hallway of a building might not. By the same token, it is not at all unusual in our system that different authorities have responsibility only for their own bailiwicks. An offense against one authority that is perpetrated within the jurisdiction of another authority is usually punishable only by the authority in whose jurisdiction the offense took place. Thus . . . the width of a street might very well determine the breadth of the school board’s authority. Students, as any other citizens, are subject to the civil and criminal laws of the community, state, and nation. A student acting entirely outside school property is potentially subject to the laws of disturbing the peace, inciting to riot, littering, and so forth, whether or not he is potentially subject to a school regulation that the school board wishes to extend to off-campus activity.⁵⁶

This explanation is instructive for determining where to set a limit on school authority. Although there are circumstances where disruptive behavior away from school spills over into the school’s operations, this opinion indicates that where the behavior is separate from the school in both time and place, the school is not the appropriate disciplinary authority.

In a more recent case, the Commonwealth of Pennsylvania likewise indicated that schools may only discipline students for conduct that occurs on campus while school or other functions are

51. *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972).

52. *Id.* at 964.

53. *Id.*

54. *Id.*

55. *Id.* at 966-67.

56. *Id.* at 974.

in session.⁵⁷ There, a student smoked marijuana on the school playground outside of school hours.⁵⁸ After purchasing the marijuana from another student, the student in question then used the drugs with two other schoolmates.⁵⁹ Nonetheless, the court held there was an insufficient nexus with school operations because there was no evidence the planning or drug exchange occurred at school during school hours.⁶⁰ There, the court explained that in order for a school to discipline its students, “said students must be in the district’s charge at school functions.”⁶¹ The court further explained that a school’s position of acting *in loco parentis* only “provides for such control as is necessary to prevent infractions of discipline and interference with the educational process.”⁶²

Finally, at least one court has described a possible exception from discipline where the off-campus student did not intend for the speech to reach campus. For instance, the Central District of California noted that where the student “clearly did not intend the speech to reach campus . . . the student speech precedents likely should not apply. In these . . . scenarios, school officials have no authority, beyond the general principles governing speech in a public arena, to regulate such speech.”⁶³

This intent standard—while appealing at first—is not likely an appropriate answer for schools to use to discipline cyber-bullies for several reasons. In particular, it may be difficult to discern whether an online post was intended to reach campus. Typically, a bully intends for his or her actions to be noticed by the target, usually a member of the school community. Therefore, if the standard was to whom the bully intended to aim the speech, then schools would likely have free rein to discipline all cyber-bullies, regardless of whether their speech disrupted school operations.⁶⁴

57. *D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dir.*, 868 A.2d 28, 36 (Pa. Commw. Ct. 2004).

58. *Id.* at 32.

59. *Id.* at 35.

60. *Id.* at 36.

61. *Id.*

62. *Id.*

63. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010).

64. *Cf. Snyder*, 650 F.3d at 933 (noting that if the Supreme Court’s *Fraser* decision could be used to punish the students who created the private MySpace profile at issue, then “two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark ‘offensive.’”).

III. COURTS' ATTEMPTS TO TACKLE OFF-CAMPUS CYBER-BULLYING AND WHY *TINKER* JUST IS NOT ENOUGH

The case law on when schools may discipline students for off-campus behavior is far from clearly defined. Moreover, the cases described above all involve non-Internet behavior: drug use, in-person bullying, and underground newspaper-making. Those cases, therefore, did not have to address the additional concern of widespread publicity that occurs with the click of a mouse. In the recent past, courts have begun to tackle the cyber-bullying issue with mixed results.

A. *The Geographic Approach*

One view courts have taken as to when schools may discipline students for off-campus cyber-bullying has been coined the “geographic” approach.⁶⁵ Under this approach, no *Tinker* analysis is conducted for off-campus speech—schools simply cannot discipline the students. *Layshock* ex rel. *Layshock v. Hermitage School District*⁶⁶ provides an example of this approach. Justin Layshock, a student at Hickory High School, created an offensive parody MySpace profile of the school principal while at his grandmother’s house outside of school hours.⁶⁷ The school district’s discipline of Justin consisted of a ten-day suspension, placement in an alternative education program, and banning from all extra-curricular activities and his graduation ceremony.⁶⁸ There, the Third Circuit rejected the school district’s claim that Justin had entered school district property by copying a picture of the school principal from the school website and pasting it into the parody MySpace profile.⁶⁹ The court thus held that the school’s discipline violated Justin’s First Amendment right of free speech because there was an insufficient nexus between Justin’s expression and the school.⁷⁰ The court focused largely on the geographic location of the speech, noting that schools should not be permitted to “reach into a child’s home and control his/her actions there”⁷¹

65. The geographic approach limits a school’s authority to punish behavior outside the school boundaries. This approach, although widely discussed, is often rejected in favor of the “forecast approach.” See, e.g., *J.C.*, 711 F. Supp. 2d at 1104 (“The substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis.”). For explanation of the latter approach, see *infra* Part III.B.

66. *Layshock*, 593 F.3d at 249.

67. *Id.* at 252.

68. *Id.* at 254.

69. *Id.* at 263.

70. *Id.*

71. *Id.* at 260. Other courts have considered the geographic origin of the cyber-bullying an issue. See generally *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) (discussing, briefly, concern over off-campus online speech, but holding that speech could be

B. The Forecast Approach

Another approach can be described as the “forecast” approach. This approach directly applies *Tinker* to off-campus speech and permits discipline of the students where the school could reasonably forecast a substantial disruption of school operations.⁷² In *Kowalski v. Berkeley County Schools*,⁷³ Kowalski, a senior at Musselman High School, created an offensive MySpace profile about a fellow student while at her parent’s house outside of school hours.⁷⁴ The school district’s discipline of Kowalski consisted of a five-day school suspension and a ninety-day social suspension.⁷⁵ There, the Fourth Circuit held that “the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive”⁷⁶

The Fourth Circuit thus jumped right into the *Tinker* analysis and found that a substantial disruption had occurred at the school for three reasons: (1) the targeted classmate was absent from a day of class as a result of the post; (2) Kowalski directed the post to students at her school; and (3) Kowalski could anticipate the targeted student as understanding “the attack as having been made in the school context.”⁷⁷ Thus, the court held the school’s discipline did not violate Kowalski’s First Amendment right to free expression.⁷⁸

C. First Amendment Concerns

Whether courts apply the traditional *Tinker* test to off-campus cyber-bullying using the geographic or forecast approach,

disciplined because its violent nature reasonably forecast a disruption); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) [hereinafter *Bethlehem*] (stating that the first step of the analysis is to consider the location of the speech, but then holding that there was a sufficient nexus where the website was viewed at the school). Note that in this geographic analysis courts may conflate the issues of geographic origin and disruption of the school environment, as in *Wisniewski*, or may establish an attenuated nexus that will virtually always be found, as in *Bethlehem*.

72. The “forecast” approach provides schools the authority to intervene in scenarios where behavior, participated in off-campus, can reasonably be believed to effectuate a substantial disruption on-campus, during school hours. See *J.C.*, 711 F. Supp. 2d at 1101 (“School discipline is appropriate where the facts reasonably lead school authorities to forecast substantial disruption of or material interference with school activities as a result of the student’s speech.”).

73. *Kowalski v. Berkeley Cnty. Schs.*, No. 10-1098, 2011 WL 3132523, at *1 (4th Cir. July 27, 2011).

74. *Id.* at *1.

75. *Id.* at *3.

76. *Id.* at *7.

77. *Id.* at *8.

78. *Id.* at *9.

there is a risk of schools overstepping the bounds of their authority as well as the bounds of students' and parents' constitutional rights. To begin with, when students are disciplined for off-campus cyber-bullying, their First Amendment right to free expression may be violated. Despite the poor taste and dubious morals of many cyber-bullies, it is axiomatic that the public interest is served by the unfettered dissemination of ideas.⁷⁹

One of the central reasons for having a right to free speech is to enable members of society to argue and disagree with one another. In fact, as the Supreme Court has stated, free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."⁸⁰ Yet, politically provocative or challenging speech is not the only utterance to receive protection. The First Amendment also generally protects lewd and vulgar speech,⁸¹ and the Supreme Court has repeatedly read the First Amendment to protect offensive speech.⁸²

In part because of the lofty goals of the First Amendment, the Supreme Court has only "permitted restrictions upon the content of speech in a few limited areas' and has never 'included a freedom to disregard these traditional limitations.'"⁸³ Nonetheless, if a cyber-bullying attack falls within one of these exceptions to First Amendment protection, then the government can regulate it. Some forms of restricted speech that may be applicable to cyber-bullying include true threats, libel, and obscenity. In such cases, the speech is unprotected, and the speaker is subject to criminal sanctions. Yet, these restrictions are narrow, and the First Amendment does

79. See, e.g., *Snyder*, 650 F.3d at 939 ("[A]lthough speech like J.S.'s may appear to be worthless, it does enable citizens to vent their frustrations in nonviolent ways. . . . [and] [w]e ought not to discount the importance in our society of such a 'safety valve.'" (Smith, J., concurring).

80. *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

81. See *J.S.*, 593 F.3d at 317-18 (explaining that, "in *Morse* [the majority emphasized that] '[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.'" The court also noted that, "[t]he Supreme Court in *Cohen* held that a state may not make a 'single four-letter expletive a criminal offense.'" *Id.* at 318. The court therefore extrapolated that "a student's free speech rights outside the school context are coextensive with the rights of an adult, such as *Cohen*." *Id.*

82. In *Brandenburg v. Ohio*, the Supreme Court struck down Ohio's criminal syndicalism statute, which barred advocating violent means of political action. 395 U.S. 444, 445 (1969). There, the statute had been applied to prosecute a Ku Klux Klan member who publicly, and on television, stated at a Ku Klux Klan rally, that "there might have to be some revengeance taken" for the suppression of white people, and that "the nigger should be returned to Africa, the Jew returned to Israel." *Id.* at 446-47. This speech is clearly harmful and frightening, but is protected nonetheless.

83. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (alteration in original).

not unconditionally exclude harassing or intimidating speech.⁸⁴

Moreover, as noted by several courts, in situations where off-campus student speech raises such concerns, school officials are best off seeking assistance from law enforcement or legal counsel.⁸⁵ This is due, in large part, to the fact that school administrators and faculty are generally ill-equipped to identify nuanced distinctions between speech that is criminal and speech that is merely offensive.⁸⁶

Where the cyber-bullying does not invoke one of the limited exceptions to the First Amendment, school administrators may feel that they are still within their authority to punish students because of the perception that students' free speech rights outside of school are not co-extensive with adults' speech rights in public. But this would be a contracted understanding of Supreme Court precedent. *Tinker* admits only that students' free speech rights *in school* are not co-extensive with adults' free speech rights in public.⁸⁷ Supreme Court opinions provide evidence that this lower level of protection for students' free speech rights set forth in *Tinker* and its progeny should be construed as limited solely to speech that actually occurs at school-sanctioned events or on school grounds.⁸⁸

For instance, in *Hazelwood*, the Court stated that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”⁸⁹ The implication here is that schools, as governmental entities, cannot censor speech uttered

84. See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1097 (2008) (“[The Supreme] Court has made clear that individuals must tolerate speech that denigrates their racial or ethnic background or religious beliefs if the expression falls short of incitement or fighting words.”).

85. *E.g.*, *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 974 (5th Cir. 1972); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

86. See *Thomas*, 607 F.2d at 1051 (“In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts such as libel and obscenity. Since superintendents and principals may act arbitrarily, erratically, or unfairly, the chill on expression is greatly exacerbated.”) (internal citation omitted).

87. *Tinker*, 393 U.S. at 513-14.

88. In *Ginsberg v. State of New York*, the Court upheld a statute prohibiting the sale of obscene materials to minors, noting that “even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” 390 U.S. 629, 638 (1968) (internal quotations marks omitted). Nonetheless, the Court has made a distinction between viewing obscenity and speaking freely in the case of children. In *Tinker*, the majority opinion “assum[ed] that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.” 393 U.S. at 514-15 (Stewart, J., concurring).

89. *Hazelwood*, 484 U.S. at 266 (citing *Fraser*, 478 U.S. at 685).

outside of school simply because it undermines the educational mission. Likewise, this statement also illustrates that young people, like adults, have broad First Amendment protection away from school. Similarly, in *Fraser*, the Court expressed grave concern for the harmful psychological and emotional effects Fraser's lewd speech could have had on the student and school audience.⁹⁰ The Court even asserted that, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁹¹

Yet, just a few years ago, in *Morse*, the Court acknowledged that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."⁹² Likewise, several federal courts have asserted in dicta that when student speech is uttered outside of school, the applicable standard is the one that traditionally governs First Amendment issues arising in the community.⁹³ Although there is limited case law on the extent to which the free speech rights of children in public are co-extensive with those of adults in public, these remarks illustrate that children's First Amendment rights are, at the very least, significantly broader outside of the school context.

If schools had free rein to discipline students for off-campus, non-disruptive Internet postings that the school perceives as undermining its educational mission, the potential chill on student speech is evident. This chill of expression would be at its height if schools' policing of cyber-bullies ultimately extended to policing

90. See *Fraser*, 478 U.S. at 683 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

91. *Id.* at 685 (internal citation omitted).

92. *Morse*, 551 U.S. at 405. See *Snyder*, 650 F.3d at 927 (emphasizing that *Fraser* was limited to regulating vulgar, lewd, and indecent speech *in school*).

93. See, e.g., *Thomas*, 607 F.2d at 1050 ("Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."); *Shanley*, 462 F.2d at 974 (noting "that it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts."); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1988) ("The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable."); *Snyder*, 650 F.3d at 936 (stating that *Tinker* does not apply to off-campus speech, "and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.") (Smith, J., concurring).

the Internet activity of students criticizing the acts of school administrators or faculty,⁹⁴ or expressing themselves in a creative, but misunderstood, format.⁹⁵ Students who are punished for such speech generally do not have comparable financial resources to school districts when taking advantage of any procedural safeguards available to them.⁹⁶ Moreover, many students may not realize they are able to challenge such a decision, and may be deterred from expressing themselves on controversial subjects in the future.⁹⁷

D. Parental Rights Concerns

Likewise, permitting school officials to discipline students for conduct in their homes presents some slippery slope concerns. For instance, if schools may discipline for off-campus, non-disruptive cyber-bullying, then they may assign Internet-trolling duties to a disciplinary Dean to find new perpetrators. What other offensive behaviors in the home might schools learn of and then discipline their students for?

The Second Circuit has noted that, “it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television.”⁹⁸ There, the court was explaining that actions that occur in the home are “the proper subjects of parental discipline,” and that “the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon.”⁹⁹ This is an accurate illustration of the limits on school authority to discipline—reaching into the home may infringe upon the child’s First Amendment right to free expression and may likewise infringe on the parents’ right to raise their children as they see fit.¹⁰⁰

94. See, e.g., *Doninger*, 527 F.3d at 44-45 (critiquing administrative action via a blog that was unaffiliated with the school).

95. See, e.g., *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (involving tongue-in-cheek mock “obituaries” of student’s friends).

96. See *Thomas*, 607 F.2d at 1051 (indicating the vast power that school districts possess).

97. *Id.*

98. *Id.*

99. *Id.*

100. For an opposing viewpoint, see *Snyder*, 650 F.3d at 934:

The School District’s actions in no way forced or prevented J.S.’s parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove of her conduct. Further, there was no triggering of the parents’ liberty interest due to the subject matter of the School District’s involvement; a decision involving a child’s use of social media on the internet is not a “matter[] of the greatest importance.”

Like the First Amendment right to free speech, parental rights under the Fourteenth Amendment's Due Process Clause to direct the upbringing of their children free from government intervention are deeply entrenched in our culture and laws.¹⁰¹ The Supreme Court first recognized this right in *Pierce v. Society of Sisters*,¹⁰² where it struck down a state law mandating public school attendance.¹⁰³ There, the Court held that the law violated the parents' Fourteenth Amendment right to direct the upbringing of their children (e.g., by choosing to send their children to private school instead).¹⁰⁴

Since then, the Supreme Court has recognized there is a limit to this right. For instance, in *Prince v. Massachusetts*,¹⁰⁵ the Court upheld a state law prohibiting a child from selling any type of literature on public streets or in public places.¹⁰⁶ The Court reasoned that this was within the state's police power to regulate child labor.¹⁰⁷ It also explained that the state has broader power over children's activities, particularly where the activity encouraged by the parent is dangerous to the child's well-being.¹⁰⁸

More recently, though, the Court has affirmed this parental right even where harmful results were possible. For instance, the Court in *Wisconsin v. Yoder*¹⁰⁹ struck down a state law mandating school attendance until the age of sixteen because of its influence on the religious decisions of Amish children and their families.¹¹⁰ Nonetheless, this decision was reached over a dissent, expressing concern that Amish children may be unable to reach their full educational potential or autonomy by leaving school at eighth grade.¹¹¹ Likewise, in *Troxel v. Granville*,¹¹² the Court rejected the application of a non-parental visitation statute permitting grandparents to request visitation over the dissent's opinion that the ruling did not adequately protect children from their parents' arbitrary decisions.¹¹³ Thus, in summary, the Supreme Court cases indicate that parents' decisions trump the states' unless the child's safety will be threatened and a religious claim may strengthen the parent's case.

So, how does this right fit in with a school's right to discipline

101. U.S. CONST. amend. XIV.

102. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

103. *Id.* at 534-35.

104. *Id.*

105. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

106. *Id.* at 167-70.

107. *Id.* at 168.

108. *Id.* at 168-69.

109. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

110. *Id.* at 219.

111. *Id.* at 242-43 (Douglas, J., dissenting).

112. *Troxel v. Granville*, 530 U.S. 57 (2007).

113. *Id.* at 86 (Stevens, J., dissenting).

students for cyber-bullying? The Court in *Troxel* described this right as “perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹¹⁴ As a fundamental liberty interest, it can only be interfered with if the state demonstrates a compelling governmental interest. Perhaps schools may be justified for disciplining a student for behavior that is within the province of the parents. But to do so, the school must meet a very high standard, one that would be particularly high considering schools’ already-limited ability to discipline students for behavior outside of the school context.

In many cyber-bullying cases where students are disciplined, school officials investigate and punish the students for using their parents’ computers, in their parents’ homes, outside of school hours. Those in the school community, if they catch wind of the cyber-bullying, may view this broadcasted behavior and, indeed, students in the school may be the intended audience. Arguably, the same can be said for *Fraser*’s lewd speech; one could easily imagine how members of the school community could have viewed his speech if he had delivered it in a public forum.

But, another reason the school should not be able to discipline the student is that this speech—while ultimately ending up in the public forum—is uttered, in most cases, in the home. The home is a strongly protected place. Law enforcement may not enter it without a warrant and a showing of probable cause; likewise, the Supreme Court has repeatedly recognized that a man’s home is his castle.¹¹⁵

It stands to reason then, that if parents have a fundamental right to direct the upbringing of their children, then the area where this fundamental right would be most protected should be in the home. When the school district chooses to punish students for cyber-bullying that occurs off-campus and that does not cause a substantial and material disruption of school operations, then the school usurps the parental authority in the home. One could argue that this is not usurpation—that both the parents and the school may effectively punish the child. But it is the fact that the behavior occurred in the home and did not threaten a substantial or material disruption that is key here. Where those facts are present, the school is without authority to discipline and would be overstepping the bounds of its control if it did.

114. *Id.* at 65.

115. *See, e.g., Ker v. California*, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting); *Payton v. New York*, 445 U.S. 573 (1980); *Minnesota v. Carter*, 525 U.S. 83, 92-93 (1998) (Scalia, J., concurring); *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (accepting the widely-known maxim that “a man’s house is his castle”).

E. Jurisdictional Concerns

Aside from the constitutional bases for limiting school authority in the cyber-bullying context, the Fifth Circuit has espoused that different authorities' responsibilities should be limited to their own domain.¹¹⁶ Many of the most egregious instances of cyber-bullying are already punished in the criminal or civil law realm. For instance, in the Phoebe Prince cyber-bullying case, the bullies have been indicted on a broad array of criminal charges: statutory rape, civil rights violations resulting in bodily injury, criminal harassment, disturbing a school assembly, and stalking.¹¹⁷ Likewise, in the Tyler Clementi cyber-bullying case, the bullies face possible charges of invasion of privacy and committing a hate crime.¹¹⁸ As one commentator has noted:

It is perfectly appropriate, and perhaps preferable, for schools to abdicate to the criminal justice system when extremely harmful online speech violates criminal laws. . . . Threatening violence to people or their property, coercion, obscene or harassing phone calls or text messaging, stalking or harassment, sending sexually explicit photos of a teen, or taking a photo of someone where privacy is expected, are all acts that may run afoul of the legal system.¹¹⁹

This is also not to say that school officials may not discipline students for behavior that actually disrupts school operations or that contravenes a school rule during the school day. It is simply reasonable for school officials, not necessarily well-versed in legal analysis, to turn to law enforcement to solve student problems outside of their disciplinary authority.

The constitutional protections at stake here are fundamental. The First Amendment requires a high enough level of protection for young people's public speech that schools should not be permitted to discipline for cyber-bullying where it does not substantially disrupt the school operations. The Fourteenth Amendment protects a parent's right to direct the upbringing of his or her children, which appears to be in direct tension with a school's efforts to discipline a student for at-home behavior. Sensibly, schools need not stretch their authority to such a degree when other individuals (parents and law enforcement officers) are available to exact punishment.

116. *Shanley*, 462 F.2d at 974.

117. See *supra* note 3 and accompanying text.

118. Bill Hutchinson, *Hate Crime May Not Be Option in Suicide of Rutgers Student Tyler Clementi*, NYDAILYNEWS.COM (Oct. 5, 2010, 4:00 PM), http://www.nydailynews.com/ny_local/2010/10/05/2010-10-05_hate_crime_may_not_be_option_in_rutgers_case.html.

119. Backus, *supra* note 11, at 186.

IV. THE SUBSTANTIAL DISRUPTION IN FACT TEST

As a result of the constitutional barriers to schools disciplining students for cyber-bullying, courts should set a higher standard for permitting school discipline for schools to follow. Most commentators and courts refer to the *Tinker* test as “two-pronged.”¹²⁰ Prong one permits schools to discipline students for speech that causes or is reasonably likely to cause a material and substantial disruption of school activities. Prong two permits schools to discipline students for speech that collides with the rights of other students. Nonetheless, the *Tinker* test encompasses three circumstances where a school official can discipline a student for on-campus speech. These three circumstances are where the speech: (1) could reasonably be anticipated to cause a substantial disruption of the school operations; (2) causes a substantial and material disruption of the school operations; or (3) collides with the rights of other students.¹²¹

A *Substantial Disruption in Fact*

The collision-with-others’-rights prong has fallen to the wayside since *Tinker* and “virtually all the student speech cases applying *Tinker* have focused on . . . material-and-substantial[]disruption.”¹²² Although it has been suggested that collision with others’ rights may come into more use “in the context of harassing or demeaning speech,” it has yet to be so widely used, and therefore, will not be considered in this analysis.¹²³ Instead, prongs one and two (traditionally just prong one) will be examined here.

The reason prongs one and two are traditionally considered to be one prong is that many courts have interpreted the *Tinker* rule in a manner upon which school officials need not wait for a substantial disruption to occur before they can act; instead they can act on a well-founded belief that such disruption will occur.¹²⁴

120. See, e.g., Emily Gold Waldman, *Badmouthing Authority: Hostile Speech about School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 596-97 (“The *Tinker* decision did more than articulate the two-pronged test that has since been used in countless student speech cases. Underlying those two prongs was the first major rationale for limiting student speech rights: protection of other students and/or of the educational environment as a whole.”).

121. See *infra* Part IV.A-IV.D.

122. Papandrea, *supra* note 84, at 1042.

123. *Id.*

124. See *Wisniewski*, 494 F.3d at 38-40 (finding disciplinary action appropriate despite the fact that the expression had not yet reached the level of a true threat); see also *Fraser*, 478 U.S. at 685 (finding that action in light of potential undermining of educational mission was adequate reason for school to act). *But see, e.g., Morse*, 551 U.S. at 405 (noting that if *Fraser*’s actions had been done outside of school boundaries, the speech at issue in the *Fraser* case

This is generally construed to mean that school administrators' concerns about what might happen are a sufficient basis for them to discipline a student.

Nonetheless, in the context of completely off-campus cyber-bullying, several cases have shown that courts may be a bit too quick to defer to the school official due to the public nature of the Internet.¹²⁵ For instance, in *J.S.*, the Third Circuit emphasized that "due to the technological advances of the Internet, J.S. and K.L. created a profile that could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days," and then went on to speculate that many members of the community would have eventually read and been upset by the content.¹²⁶

As the reviewing court held, this conclusion leaves far too much up to assumptions about how the Internet and its users operate. Just because something is posted on the Internet does not mean it will be read by its intended audience, let alone read at all. Anyone can post a blog or a message on a webpage; in fact, many do.

If courts are not taken aback by the worldwide qualities of the web, there is also evidence of another problem—that courts will find a threat of substantial disruption where none exists. This is exemplified in *Doninger*, where the court's bases for upholding the student's discipline included that her blog used language that was not "conducive to cooperative conflict resolution" and "misleading."¹²⁷ This is paltry evidence that a substantial disruption would occur. For instance, the same description could likely be given to the conversations going on in any bathroom, locker room, or hallway of America's high schools on any given day.

The approach proposed in this Article is that the "substantial disruption in fact" test would permit school discipline for students' off-campus cyber-bullying only under prong two of the test, described above. In other words, schools may discipline students only where the cyber-bullying actually causes a substantial disruption of school operations. Admittedly, this would result in very few scenarios in which the school could justifiably discipline

would have been deemed protected).

125. See, e.g., *J.S.*, 593 F.3d at 290 (finding—an opinion later vacated—that out-of-school speech was subject to substantial disruption standard); *J.C.*, 711 F. Supp. 2d at 1108 (explaining that one of the reasons it was reasonably foreseeable the YouTube video would reach school was that "[p]laintiff posted her video on the Internet, on a site readily accessible to the general public," and noting 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.").

126. *J.S.*, 593 F.3d at 291.

127. *Doninger*, 527 F.3d at 51.

students for cyber-bullying. Nonetheless, as described below, there would still be circumstances where schools may use their disciplinary authority.¹²⁸

By removing the forecast-of-disruption option, school administrators would not be able to discipline students for cyber-bullying in instances where there only exists a reasonable belief that a substantial disruption will result from such behavior. To an administrator, this option may sound like the equivalent to waiting for a ticking time bomb to explode, but the truth is that discipline is not the only option available.

For instance, consider Julia and Mr. Hill's situation. They should inform the administration of the cyber-bullying behavior; upon notification, the administration should respond swiftly. Excellent options at the school's disposal include: holding parent conferences, mediation, school counseling; obtaining removal of offensive sites; or holding a meeting with the bullies and local law enforcement. The school could discipline the bullies who ultimately refuse to fully cooperate with the intervention efforts. In fact, piercing the shield of anonymity may be a surprisingly effective first step in deterring any future bullying behavior. Moreover, the removal of the forecast option in no way denounces the administrators' capability in determining when behavior is likely to cause a substantial disruption of school operations. Rather, such removal demonstrates that the constitutional concerns at issue are such that when the speech occurs off-campus in cyberspace, the threshold must be increased to avoid infringement on those rights.

B. What Is a Substantial and Material Disruption?

The necessary components of what constitutes a substantial disruption, while not entirely clear, will take shape through a common-law process. Over time, court decisions have shown that factors that actually can be shown to disrupt students' abilities to learn are sufficient.¹²⁹ Thus, evidence that a teacher took some

128. Although school codes vary on what off-campus behavior schools can discipline for, such codes should be brought in conformity with this rule. For instance, as one commentator has noted, in the state of Georgia alone, the school codes vary by district. Benjamin T. Bradford, *Is it Really Myspace? Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era*, 3 J. MARSHALL L.J. 323, 352 (2010). While some codes permit punishment for "off-campus activities that have an immediate and direct effect on discipline in the school or an adverse effect on the safety and welfare of the students," others "expand school authority to any act by a student that disrupts the operation of the school system." *Id.* Under the proposed test, the former code would be acceptable, while the latter could be overbroad. Thus, the constitutional concern is avoided if the code states that there first must be impact in order for the discipline to occur for off-campus behavior. *Id.*

129. *See, e.g., Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir.

sick days from work as a result of the cyber-bullying may not be sufficient, while his leave of absence from school would be. Similarly, a student's excessive absences as a result of the bullying would also likely constitute a substantial disruption. Admittedly, this presents something of a reverse eggshell plaintiff rule, where whether the disruption is substantial turns on the toughness of the victim. However, this is the case because the administration's overriding interest only kicks in when there is, in fact, this substantial and material disruption of the school day. Thus, even if the substantial disruption occurs because the victim is particularly sensitive to bullying, that is okay; the important point is that the substantial disruption actually occurs prior to discipline.

Other instances where a student may be disciplined for cyber-bullying would be those involving violent behavior, invasion of classrooms, or lengthy absence from class.¹³⁰ Moreover, the school would have to be able to establish that there was "no practical alternative" to silencing the speech, and that the speech caused more than just a lack of efficiency.¹³¹

For instance, in *Tinker*, the Supreme Court found that the plaintiffs' black armbands worn to protest the Vietnam War did not substantially disrupt school operations even though "detailed testimony by some of [the students] show[ed] their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone."¹³² The testimony also stated "that a teacher . . . had his lesson period practically 'wrecked' chiefly by disputes with [one of the plaintiffs]."¹³³ Nonetheless, the Court determined that there was "no interference with work and no disorder."¹³⁴

In contrast, the Fifth Circuit, in *Blackwell v. Issaquenna*,¹³⁵ held that the plaintiffs' expression substantially disrupted the school activities where the plaintiffs "conducted themselves in a disorderly manner [and] disrupted classroom procedure."¹³⁶ There,

1992) (wearing buttons to protest aspects of teacher's strike was not "inherently disruptive" because no actual disruptive factors materialized from the students' actions).

130. See, e.g., *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Co., Fla.*, 567 F. Supp. 2d 1359, 1373 (N.D. Fla. 2008) (stating that a school board can neither discipline students nor encroach upon freedom of speech rights based on predictions that behavior, which a school board disagrees with, will evolve into material and substantial classroom disruption).

131. *Butts v. Dallas Indep. Sch. Dist.*, 436 F.2d 728, 730, 732 (5th Cir. 1971).

132. *Tinker*, 393 U.S. at 517 (Black, J., dissenting).

133. *Id.* (Black, J., dissenting).

134. *Id.* at 514.

135. *Blackwell v. Issaquenna Co. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).

136. See *id.* at 753 (demonstrating an example of material and substantial

the court found it relevant that a student involved “came into . . . class[] without permission, and ignor[ed] . . . the classroom procedure.”¹³⁷

Although these cases show that there would be a high threshold to determine that a substantial disruption of school operations occurred, this threshold would be accompanied by significant deference to the schools’ decisions. For example, the Supreme Court explained that it has “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”¹³⁸

C. Cases Where the Substantial Disruption in Fact Test Would Not Be Met

The following cases serve as useful illustrations of where cyber-bullying would not meet the substantial disruption in fact test. In *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, J.C. created a YouTube video viewed by an estimated fifteen people that contained disparaging remarks about a student.¹³⁹ The victim-student missed less than one class to talk with a school counselor about her hurt feelings.¹⁴⁰ There was no evidence the video was viewed on campus by students.¹⁴¹ The court held that it was reasonably foreseeable the bully’s video “would make its way to campus” for the following reasons: (1) it was posted on the Internet; (2) it was posted on a weeknight; (3) the bully told five to ten students to watch it; (4) the bully told the victim to watch it; and (5) the video was derogatory.¹⁴² These are attenuated connections to school operations, and as the court noted, the only access of the video at school was by the administration during its

disruption by the Supreme Court in *Tinker*).

137. *Id.* at 752.

138. *Tinker*, 393 U.S. at 507. See also *Hazelwood*, 484 U.S. at 273 (“[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”); *Morse*, 551 U.S. at 410 (recognizing that the principal had to make an “on the spot” decision about whether to do something about the banner). In concurrence, Justice Breyer also explained that school officials are entitled to qualified immunity for this very reason, and noted that such individuals are not expected to “fully understand the intricacies of our First Amendment jurisprudence.” *Id.* at 427; *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) (“Absent any suggestion that the [school] rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.”).

139. *J.C.*, 711 F. Supp. 2d at 1098.

140. *Id.*

141. *Id.* at 1099.

142. *Id.* at 1108.

investigation.¹⁴³ Even if it was reasonably foreseeable that the video would make its way to campus, the court did not determine that it was reasonably foreseeable that the video would cause a substantial disruption of school operations—which is the actual standard of the *Tinker* test. Moreover, the evidence showed conclusively that the video did not in fact cause a substantial disruption. Under the test proposed, absence from part of one class and fleeting hurt feelings of one student would not be a sufficient basis for finding that a substantial disruption had transpired, and therefore, the school would not have authority to discipline in this type of scenario.

Doninger v. Niehoff is also an example where the substantial disruption in fact test would not be satisfied.¹⁴⁴ There, the student posted a blog message that referred to school administrators as “douchebags” for repeatedly rescheduling a school musical festival, and encouraged others to contact the school superintendent to “piss her off more.”¹⁴⁵ The court held that it was reasonably foreseeable that the blog post would reach school property because: (1) it directly pertained to school events; (2) it encouraged fellow students to read and respond; and (3) the posting managed to reach school administrators.¹⁴⁶

The court also held that the blog was reasonably foreseeable to cause a substantial disruption because: (1) it contained offensive language; (2) it included misleading information that the festival had been cancelled; and (3) a sit-in was threatened as a result of students’ believing the event had been cancelled.¹⁴⁷ Here, as in the previously discussed case, the court must draw attenuated conclusions in order to establish the appropriate nexus between the speech and school operations. The most compelling evidence of a threat of substantial disruption was the threatened sit-in, but there was no evidence that any administrators or faculty were even aware of this until after the threat no longer existed.¹⁴⁸ Mere offensive language and misleading factual information on a personal blog should not even be sufficient to establish that a substantial disruption was forecasted. Therefore, it is also insufficient for establishing that a substantial disruption actually occurred.

A third example of substantial disruption not actually realized is *Beussink v. Woodland R-IV School District*.¹⁴⁹ There,

143. *Id.*

144. *Doninger*, 527 F.3d at 41.

145. *Id.* at 45.

146. *Id.* at 50.

147. *Id.* at 50-53.

148. *Id.*

149. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

the student created a website criticizing his high school's administration.¹⁵⁰ The webpage used vulgar language and "invited readers to contact the school principal and communicate their opinions [to him] . . ." ¹⁵¹ It even included a hyperlink to the school's homepage.¹⁵² The student showed the webpage to a friend, who then showed it to a teacher at school.¹⁵³ There was evidence that a few students viewed the webpage at school, and that the principal heard students discussing the incident in the halls.¹⁵⁴ Again, a few views of the webpage and some discussion in the halls is not enough for a substantial disruption to occur in light of the high threshold it requires.

Finally, consider *Emmett v. Kent School District No. 415*,¹⁵⁵ where Emmett had created a web page from his home, titled the "Unofficial Kentlake High Home Page."¹⁵⁶ Aside from statements disclaiming any school sponsorship and asserting that the page was for entertainment purposes only, the site included mock obituaries of two of Emmett's friends that were "written tongue-in-cheek."¹⁵⁷ It also had an area where visitors could vote on "who would be the subject of the next mock obituary."¹⁵⁸ The day after a nighttime television newscast characterized the site as a "hit list," the school principal issued Emmett an emergency expulsion.¹⁵⁹ There, the court concluded that the speech was not within the purview of the school's disciplinary authority because it occurred outside of the school and was not school-sponsored or connected with a school project.¹⁶⁰ The court also emphasized that because there was "no evidence that the mock obituaries and voting . . . manifested any violent tendencies whatsoever," the school's special concerns about student violence in school were not at issue either.¹⁶¹

This type of cyber-speech represents what could be very concerning to school officials. Clearly there was no substantial disruption so the school could not act. The immediate threat of violence by a student to other students is another issue altogether, and outside of the scope of this Note. While it was not present in this case, since the obituaries were "tongue-in-cheek," and inspired by a creative writing course, if actual violence is threatened

150. *Id.* at 1177.

151. *Id.*

152. *Id.*

153. *Id.* at 1177-78.

154. *Id.* at 1177-81.

155. *Emmett*, 92 F. Supp. 2d 1088.

156. *Id.* at 1089.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1090.

161. *Id.*

against students or school authorities, the school should certainly be given more leeway to respond appropriately to deal with such threats.

In sum, brief absences from school, threatened behavior that teachers are unaware of until after the fact, hurt feelings, offensive language, and content targeted at members of the school community are factors that alone are not sufficient to constitute a substantial and material disruption of school operations. Further, all of those factors together would not likely constitute a substantial enough disruption. Rather, in order for this test to be satisfied, there would need to be more. What exactly constitutes more would have to be evaluated on a case-by-case basis. Certainly, excessive absence from school, violent behavior, or behavior that severely disrupts several class sessions would be examples of where the high threshold is met.

*D. Cases Where the Substantial Disruption in Fact Test
Would Be Met*

Few cases that address disciplinary actions for cyber-bullying have involved substantial disruption actually occurring at the schools. This is largely due to the fact that “digital communications do not intrude into the public space, and therefore by their very nature cannot cause an immediate disruption to the work of the school.”¹⁶² Nonetheless, where substantial disruption has actually occurred, either in the case of a collision with the rights of other students, or in the likely more common case of excessive absences from school, the school can act if the reaction is shown to be caused by the cyber-bullying. Likewise, excessive absences of a teacher-victim may also cause a substantial disruption of school operations.

For instance, in *J.S. ex rel. H.S. v. Bethlehem Area School District*, J.S., a student, created a website that, among other things, included a picture of his teacher, Mrs. Fulmer, that showed “her severed head dripping with blood . . . [and] her face morphing into Adolph Hitler.”¹⁶³ The image was also accompanied by “a solicitation . . . for funds to cover the cost of a hit man.”¹⁶⁴ As a result of physical and emotional injury from viewing this image, Mrs. Fulmer did not finish out the school year and took a medical leave of absence for the following year.¹⁶⁵ Because of these absences, the school had to employ numerous substitute teachers to temporarily teach in her stead.¹⁶⁶ The facts also indicated that

162. Papandrea, *supra* note 84, at 1093.

163. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 421 (Pa. Commw. Ct. 2000).

164. *Id.*

165. *Id.*

166. *Id.* at 417.

the website “had a demoralizing impact on the school community.”¹⁶⁷

This is clearly a case where the cyber-bullying has caused a substantial disruption of school operations. The students in Mrs. Fulmer’s classroom were not receiving the quality instruction they would have received if she had not taken the leave of absence in response to the students’ violent posting. Similarly, where the bullying actually spills over into the school day and causes a substantial disruption, the school may immediately discipline the students for that behavior. As explained in more detail below, this type of ceaseless bullying may be best dealt with through alternative methods of conflict resolution in addition to traditional school punishments.

V. PRACTICAL APPLICATION AND ALTERNATIVES

One of the greatest difficulties that both courts and school administrators would face with this type of threshold for disciplining students would be their strong inclination to discipline cyber-bullies. This is an understandable reaction. School officials may feel the pressure from their communities to act swiftly and perhaps even in a draconian fashion in light of the highly-publicized instances of cyber-bullying. They may also feel insulted and tempted to extend their authority to the at-home behavior of students whose behaviors reach their attention. Nonetheless, the school is not without recourse.

Let us return to Julia and Mr. Hill. Remember that Julia is separately being bullied at both school and in cyberspace; furthermore, Mr. Hill believes he is being cyber-bullied. In Julia’s case, the bullying that has occurred at school can be documented and disciplined because this is on-campus behavior that falls squarely within the scope of *Tinker*.

But, for both of their cyber-bullying situations, there has been no substantial disruption of school operations. Julia is still attending school, and still getting high grades while Mr. Hill has not been able to access the posts written about him. Rather than immediately disciplining the bullies for their harmful behavior, Mr. Hill has several other options. For example, he may report the behavior to the bullies’ parents or schedule a parent-teacher conference with them. Depending on the content of the cyber-bullying, Mr. Hill and Julia can explore their rights as private citizens under criminal or civil laws against the bullies for their conduct. As mentioned above, the school can also discipline the bullies if they refuse to comply with intervention procedures. Moreover, Mr. Hill and Julia can contact Facebook to report the

167. *Id.*

imposter profile.¹⁶⁸

Moreover, there are a number of different and possibly more effective and appropriate avenues than discipline available for remedying the problems that cyber-bullies pose.¹⁶⁹ For instance, disciplining the bullies is not necessarily protective of the victim. One reason is that school discipline affects the student's behavior at the school, but cyber-bullying is not even occurring at the school. Moreover, commentators have recognized that there is no evidence that such discipline would eliminate the behavior,¹⁷⁰ and many students have agreed.

One study found that "many students thought that suspension or direct punitive consequences [we]re not sustainable solutions to cyberbullying."¹⁷¹ That same study noted that students "preferred mediation and felt that they have the ability to work through these issues if given a safe environment."¹⁷² Some other options available to schools include Internet safety training programs; teacher, parental, or peer-to-peer mediation; legal action when necessary; and partnerships with cellular and social networking industries to promote safe behavior. Schools may also look into implementing diversions or alternative programs to provide students with productive activities to partake in after school. Likewise, the school could create and implement parental training programs, which can be done by partnering with the local police departments.

VI. CONCLUSION

Cyber-bullying victims do not have to suffer in silence. Schools can offer these students many outlets to help them with cyber-bullying issues and can let all of their students know about the extremely harmful effects that such behavior can have on everyone involved. Yet, where cyber-bullying occurs off-campus

168. Susan Arnout Smith, *The Fake Facebook Profile I Could Not Get Removed*, SALON.COM (Feb. 1, 2011, 7:39 PM), http://www.salon.com/life/feature/2011/02/01/my_fake_facebook_profile. Both Facebook and Myspace have links in the help sections of their websites to facilitate the reporting of impostor profiles. *Id.* Unfortunately, as at least one victim, Susan Arnout Smith, has recounted, the road to getting Facebook to remove a profile can be a long one. *Id.* One month after filing a report with Facebook, Smith had not received a response. *Id.* But, after contacting the school principals of the bullies (from a school outside of the U.S.), the principals were able to get the Facebook page removed in a very short time. *Id.*

169. See Madigan, *supra* note 6, at 8-9 (providing various alternatives to discipline, including but not limited to: educating children about cyber-bullying, getting parents more involved in educational programs, and implementing anonymous and confidential reporting systems).

170. See Backus, *supra* note 11, at 186 (explaining commentators analyses of disciplining cyber-bullies).

171. Madigan, *supra* note 6, at 4.

172. *Id.*

and does not actually cause a substantial disruption of school operations, this behavior should fall outside of the school's disciplinary authority. The First Amendment demands it. The Fourteenth Amendment demands it. There are others who are better suited to handle the more egregious cases.

Moreover, where there are seriously harmful issues such as cyber-bullying facing our nation's students, school discipline will not definitively solve the problem. This is not to say that there is no place for punishment in school. Having school discipline in place no doubt deters most students from disobeying the rules.

Nonetheless, this harmful and antisocial behavior may best be addressed by eliminating the shroud of anonymity that many cyber-bullies believe they are covered in. Where administrators or students know who the bullies are, or are able to find them out, then, the school should initiate all remedial efforts they can to expose the bullies for who they are and what they have been doing. It is perhaps only through these remedial efforts that the true root of the problem can be determined and remedied.

At the same time, by restricting schools to prevention and mediation efforts in this area, students are able to take the expressive risks that the First Amendment permits in the public forum, and at the same time respect their parents' rights to choose whether to teach their children appropriate in-home behavior.

