STUDENT ONLINE OFF-CAMPUS SPEECH: ASSESSING "SUBSTANTIAL DISRUPTION"

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I. INTRODUCTION

U.S. federal courts have recognized that students have rights to free speech and free expression that must be balanced against schools' interest in maintaining an appropriate learning environment and protecting the rights of other students.

On January, 17, 2012, to the dismay of both educators and free speech advocates, the Supreme Court of the United States refused denied writs of certiorari in three student Internet speech cases, *J.S. ex rel. Snyder v. Blue Mountain School District*, combined with *Layshock ex rel. Layshock v. Hermitage School District*, and *Kowalksi v. Berkeley Count School*.[1] In each situation, students had posted hurtful speech online while off-campus and school officials had disciplined the students for the behavior.[2] This led to a lawsuit arguing the school had violated the students' constitutional rights to free speech.[3]

In *J.S.* and *Layshock*, students had posted offensive language on a social networking site, when off-campus, to denigrate school administrators.[4] In *J.S.*, the Third Circuit applied the substantial disruption standard set out in *Tinker v. Des Moines Independent Community School District* and determined that the school district had failed to demonstrate a reasonable forecast of disruption.[5] In *Layshock*, the school district had abandoned its *Tinker* substantial disruption argument.[6] The Third Circuit determined that the district had violated the student's free speech rights because the district could not demonstrate that the speech had occurred on-campus so that it could be regulated under the vulgar and offensive speech standard from *Bethel School District v. Fraser*.[7]

In *Kowalski*, the target of the off-campus speech was another student.[8] A three-judge panel of the Fourth Circuit found that

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[1] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 915 (3rd Cir. 2011), *aff'd in part, rev'd in part, remanded* (en banc); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 206 (3rd Cir. 2011), *aff'd,* (en banc); Kowalksi v. Berkeley County Sch., 652 F.3d 565, 567 (4th Cir. 2011).

[2] *J.S.,* 650 F.3d at 920; *Layshock*, 650 F.3d at 207; *Kawalski*, 652 F.3d at 567.

[3] *J.S.*, 650 F.3d at 920; *Layshock*, 650 F.3d at 210; *Kawalski*, 652 F.3d at 567.

[4] *J.S.*, 650 F.3d at 920; *Layshock*, 650 F.3d at 207.

[5] *J.S.*, 650 F.3d at 920; Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 514 (1969).

[6] *Layshock*, 650 F.3d at 219.

[7] *Id.* 214–15; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

[8] Kawalski, 652 F.3d at 567.

the language of *Tinker* supported the conclusion that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.[9] The panel determined that it was reasonably foreseeable that the speech would reach the school and cause such disruption.[10] The target of the speech was avoiding coming to school.[11]

After the announcement that the Supreme Court had denied review in all three student Internet speech cases, the Associated Press reported the following: "Lawyers on both sides were disappointed that it will be at least another year before the high court wades into the issue. Federal judges . . . have issued a broad range of opinions on the subject."[12]

While there have been a variety of federal court decisions in cases involving school discipline for student off-campus speech, with a few exceptions, the decisions are not as disparate as the above statement suggests. The courts have consistently applied the *Tinker* standard, which requires a finding of substantial disruption or that such disruption is reasonably foreseeable.[13] The decision then rests on an analysis of the actual facts.

While there may appear to be a major difference between the decisions of the Third Circuit and the Fourth Circuit, there is, in fact, one clear distinction in the facts of these cases.[14] In the Third Circuit cases, the target of the hurtful speech was the principal.[15] In the Fourth Circuit case, the target was another

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[9] *Id.*

[10] *Id.* at 574.

[11] *Id.*

[12] Associated Press, *Supreme Court Rejects Appeals in Student Online Speech Cases*, STATESMAN,COM (Jan. 17, 2012, 11:02 PM), http://www.statesman.com/news/nation/supreme-court-rejects-appeals-in-student-online-speech-2108115.html.

[13] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969). *See, e.g.*, Barr v. Lafon, 538 F.3d 554, 564 (6th Cir. 2008) (explaining that the *Tinker* standard applies to all student speech cases where the Supreme Court has not made an exception to its application).

[14] *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (en banc) (applying *Tinker* and finding that the school district could not have reasonably foreseen a substantial disruption); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (2011) (en banc) (explaining that the *Fraser* exception to the *Tinker* standard does not extend to conduct which occurred outside of school); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (2011) (applying the *Tinker* standard to justify punishment of conduct which primarily took place outside of the school).

[15] *J.S.*, 650 F.3d at 920; *Layshock*, 650 F.3d at 207.

student.[16]

The special characteristics of schools that allow school officials to restrict certain student speech are their educational mission and the importance of protecting student safety.[17] Regardless of the origin of student speech, if that speech has, or foreseeably could, substantially jeopardize the delivery of instruction, significantly interfere with the ability of another student to receive an education, or raise concerns about student safety, school officials must have the authority to formally respond.[18]

Let's consider this standard from a different perspective. If the off-campus online speech of a student or students has caused, or there are good reasons to believe it could cause, physical violence between students at school, significant interference in the ability of teachers to teach and students to learn, or prevent any other student from feeling safe at school and learning or participating in other school activities, would any rational individual argue that school officials should not have the authority to respond?

Student speech that targets staff is less likely to raise such concerns. School officials do not have the authority to respond to student off-campus speech on the grounds that such speech is vulgar and offensive or contrary to the educational mission of the schools. Further, in addition to free speech rights of students, the constitutional right of students to protest actions of government officials should also be considered.[19]

This article will discuss these issues, distinguish those factors that do not support a formal school response from those that do, and make recommendations for an effective approach for school officials to take to respond to these kinds of situations.

II. HISTORICAL UNDERPINNINGS OF FREE SPEECH

It is helpful to frame the discussion of student free speech rights with an analysis of the historical underpinnings of the free speech provision in the First Amendment.[20] According to Levy, in his excellent book, *The Emergence of a Free Press*, there is considerable disagreement about exactly what the framers of the

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[16] Kowalksi v. Berkeley County Sch., 652 F.3d 565, 567 (4th Cir. 2011).
[17] *Id.* at 571–72.
[18] *See Tinker*, 393 U.S. at 513 (noting that conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected).
[19] *Id.*
[20] LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 5 (1985).

Bill of Rights were thinking in terms of free speech.[21] It is probable that some framers of the First Amendment were thinking in terms of Blackstone's English common-law notion of freedom of speech.[22] The English common-law notion of freedom of speech prohibited prior restraints on the press, but did not preclude civil or criminal prosecution, after the fact, for obscene, blasphemous, libelous, or seditious speech.[23]

Levy noted that there is an alternative perspective on the historical basis for freedom of speech.[24] This is the natural rights philosophy advocated by John Locke, who was revered by many of the early leaders writing under their pseudonyms, while Cato, Trenchard, and Gordon expressed the natural law perspective as follows:

> Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as Publick liberty, without Freedom of Speech: Which is the Right of every Man, as far as by it he does not hurt and control the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know.[25]

The essential difference in these two philosophies is that under the English common law approach, government has the authority to determine what speech is contrary to the public good, including such social values as order, morality, and religion;[26] whereas, under the natural rights philosophy, the role of government is to enforce the fundamental rights of other individuals if those rights are injured by the exercise of speech by another.[27]

While neither the Supreme Court, nor lower federal courts, have referenced this historical basis in cases addressing school authority in the context of student speech, it appears that the courts have created standards that are grounded in both of these philosophies.[28] Understanding this distinction can assist in

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[21] *Id.* at 268.

[22] *Id.* at 281.

[23] *Id.* at 12.

[24] *Id.* at 109–10.

[25] JOHN TRENCHARD & THOMAS GORDON, *Of Freedom of Speech: That the Same is Inseparable From Publick Liberty*, *in* CATO'S LETTERS 110, 110 (Ronald Hamowy ed., Liberty Fund 1995) (1720); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1283 (1998).

[26] LEVY, *supra* note 20, at 11–12.

[27] *See id.* at 142 (explaining how government should not punish opinions unless they fall into three categories: blasphemy, perjury, and treason).

[28] *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506–07 (1969)

gaining a better understanding of the situations under which school officials have the constitutional authority to formally respond, including imposing a disciplinary consequence, to off-campus student speech.

It is argued that while school officials have the right to restrict student on-campus speech based on both standards that are ground in either English common law and natural rights, when students are off-campus, school officials may only restrict speech under a standard that is ground in natural rights.[29] Specifically, school officials may only restrict student off-campus speech in situations where such speech has, or reasonably could, significantly interfere with the important rights of other students to be safe and receive an education.[30]

III. SIGNIFICANT FREE SPEECH CASES

There have been four Supreme Court cases addressing students' First Amendment speech rights: *Tinker v. Des Moines Independent Community School District*, *Bethel School District v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*.[31] *Tinker* involved a group of high-school students who decided to wear black armbands to school to protest the Vietnam War.[32] The Court began its opinion by stating that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[33] However, the Court acknowledged "the special characteristics of the school environment" by permitting school officials to prohibit student speech if that speech "would substantially interfere with the work of the school or impinge upon the rights of other students," including the right "to be secure."[34]

The Court upheld the rights of the students to protest because their protest had not created a substantial disruption or

(explaining how the Court has to balance freedom of speech with the authority of schools).

[29] J.C. *ex rel* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1102–03 (2010) (stating that several lower courts hold that off campus speech can be regulated if it causes material or disruption of school activities).

[30] *Id.* at 1102–03, 1122.

[31] *Tinker*, 393 U.S. at 503; Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Kuhlmeier et al. v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986); Morse v. Frederick, 551 U.S. 393 (2007).

[32] *Tinker*, 393 U.S. at 504 (1969).

[33] *Id.* at 506.

[34] *Id.* at 508–09.

interference.[35] However, this standard has been applied at the lower court level supporting the authority of school officials to respond if student speech has, or there are good reasons to believe it could, cause a substantial disruption or interference.[36] These decisions appear to be ground in a natural right approach that balanced the rights of students to protect the Vietnam War against the rights of students to receive an education.[37]

In *Fraser*, the Supreme Court found in favor of school officials who disciplined a student whose speech before a school assembly included sexual references.[38] The Court distinguished between the purely political speech in *Tinker* and the student's vulgarity, and held that in accord with the educational mission of the school, school officials had the authority "to prohibit the use of vulgar and offensive terms in public discourse."[39] This decision appears to be more in accord with English common law that allows restrictions on speech for the public good.[40]

Justice Brennan's statement in his concurrence in *Fraser* is particularly relevant to the present discussion.[41] Brennan noted that "[i]f [the] respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate[.]"[42] Thus, the authority of school officials to seek to restrict speech based on the public good or the educational mission of the school does not extend to off-campus speech.[43]

The issue involved in *Hazelwood* was a principal's decision to remove several articles from publication in the school newspaper.[44] The Court found that the school newspaper was not a public forum because the school did not intend to open the paper to indiscriminate use by the students.[45] Therefore, the

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[35] *Id.* at 513–14.

[36] *See* Barr v. Lafon, 538 F.3d 554, 566–67 (6th Cir. 2008) (finding that banning students from wearing confederate flag clothing was constitutional as it would cause a substantial disruption to students education).

[37] *See Tinker*, 393 U.S. at 513–14 (discussing how silent protest against the Vietnam War does not interfere with school activities).

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

[39] *Fraser,* 478 U.S. at 680, 683.

[40] *See id.* at 683–86 (explaining how schools can impose disciplinary action for lewd speech with the goal of protecting the children).

[41] *Id.* at 687–90.

[42] *Id.* at 688.

[43] *See id.* at 688–89 (expanding on the previous quote by stating that the school's authority would only apply to actions on school property).

[44] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262, 264 (1988).

[45] *Id.* at 260–61.

Court indicated it was appropriate for school officials to impose educationally related restrictions on student speech.[46] This standard would apply to any material that students might post on a publicly accessible school website, because this material would be presented as if coming from the school. This decision also appears to be grounded in English common law.[47]

Morse involved a cryptic, pro-drug use statement, "Bong hits 4 Jesus," on a banner raised by a student across the street from a school during a time when students had been released to watch a parade for the Olympic torch, which was considered to be a school activity.[48] The Court ruled that public school officials may restrict student speech at a school activity when the speech is reasonably viewed as promoting illegal drug use.[49] The Court specifically rejected the arguments of the school district and school leadership organizations that the First Amendment permits school officials to censor any speech that could be considered offensive.[50] Instead, the focus of the Court was on the importance of allowing school officials to respond if the speech that advocated student actions was not in accord with the antidrug message of the schools.[51]

While the *Morse* decision, in part, was based on a discussion of school safety concerns, this was not a situation where hurtful speech of one student was directed at another student or staff member.[52] Thus, this decision also appears to be ground in English common law, supporting the authority of school officials to restrict student speech that was contrary to a safety message the school sought to communicate to students.[53]

The issue of off-campus speech was briefly addressed in the *Morse* decision. "There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, . . . but not on these facts,[54]" noted the Court, citing

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[46] *Id.* at 267.

[47] *See id.* at 276 (basing the ruling on a reasonable judgment test and not under a clearly defined statute as to how to apply the situation to the rights afforded under the First Amendment).

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

[49] *Id.* at 403, 410.

[50] *Id.* at 409.

[51] *See id.* at 407–10 (explaining the importance of school action in response to illegal drug use and the effect that school action can play on it).

[52] *Id.* at 396.

[53] *Id.* at 413–14.

[54] *Id.* at 401 (citation omitted).

Porter v. Ascension Parish School Board.[55] Footnote 22 of *Porter* reads as follows:

> We are aware of the difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus either by the communicating student or others to whom the message was communicated. Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus. See *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1075-77 (5th Cir. 1973) (student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds); *LaVine*, 257 F.3d at 989 (analyzing student poem composed off-campus and brought onto campus by the composing student under *Tinker*); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then brought it onto campus; author had been disciplined before for bringing top ten lists onto campus); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website constructed off campus); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (student disciplined for article posted on personal internet site); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987) (student disciplined for writing article that appeared in an underground newspaper distributed on school campus).[56]

IV. STUDENT SAFETY AND RIGHT TO RECEIVE AN EDUCATION

While the *Morse* decision was grounded in the authority of school officials to restrict speech contrary to the educational mission of the school, an important lesson that can be derived from the *Morse* decision when considering how the Court approached the analysis of the student safety concerns.[57] The Court engaged in an extensive analysis of the concerns associated with youth drug abuse, noting: "Drug abuse can cause severe and permanent damage to the health and well-being of young

[55] 393 F.3d 608 (5th Cir. 2004).
[56] *Id.* at 615.
[57] *Morse*, 551 U.S. at 414.

people."[58] The Court further cited statistics that documented the concerns, discussed federal and state initiatives directed towards preventing drug abuse, and noted the important role schools play in addressing these concern through prevention education.[59]

The approach the Court took in this analysis can easily be emulated in the context of the harms associated with youth aggression, including statistical evidence about the profound degree of harm, federal and state bullying prevention initiatives, and the important role of schools in prevention and intervention.[60] Thus, the *Morse* decision provides ample reason to believe that school officials have significant ability to intervene in situations where, regardless of the origin of the speech, the safety and well-being of another student is at risk.[61]

The importance of the focus on student safety was strengthened by the comments made by Justice Alito in his concurring opinion:

> [A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students . . . . But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, Tinker's 'substantial disruption' standard permits school officials to step in before actual violence erupts.[62]

While, based on the *Morse* facts, an actual threat to the physical safety of the students was not present.[63] However, sometimes the harmful speech of a student has the potential of leading to violence between students at school.[64] Clearly, school officials have an important responsibility to ensure the safety of students.

Students' right to receive an education is strongly supported in *Saxe v. State College Area School District*[65]—a decision that was written by then-Judge Alito. The State College Area School District's antiharassment policy had been challenged on the basis

[58] *Id.* at 407.
[59] *Id.* at 407–08.
[60] *See id.* (noting the Court's analysis and approach to the circumstances).
[61] *Morse*, 551 U.S. at 424–25.
[62] *Id.* at 424–25.
[63] *Id.* at 424.
[64] Nancy Willard, *Cyberbullying Guidance for School Leaders,* CENTER FOR SAFE AND RESPONSIBLE INTERNET USE (May. 22, 2010), http://csriu.org/documents/documents/cyberbullyingguidance.pdf.
[65] 240 F.3d 200 (3d Cir. 2001).

that it was overbroad and could impact speech that someone might find merely offensive.[66] Judge Alito did find some provisions were overbroad.[67] But in discussing various provisions of the policy, he stated as follows:

> We agree that the Policy's first prong, which prohibits speech that would "substantially interfer[e] with a student's educational performance," may satisfy the Tinker standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.[68]

Note specifically the use of the term "a student"—which leads to the conclusion that school officials can respond to student speech that interferes with the rights of any other individual student to receive an education.[69] Further, the court appeared to be drawing a close connection between the two prongs of *Tinker*, essentially stating that speech that substantially interferes with a student's education constitutes a substantial disruption.[70] The Court also noted that to establish a significant interference with a student's education requires an evaluation of the situation based both the subjective perspective of the student as well as an objective third party perspective.[71] This will protect against an effort to restrict the speech of a student on the grounds that another student merely found it to be offensive.

V. OFF-CAMPUS ONLINE STUDENT SPEECH CASES

The federal courts have addressed the issue of student off-campus online speech since the late 90s.[72] Some of these cases involved hurtful speech directed at other students.[73] Others

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[66] *Id*. at 203–04, 209.

[67] *Id*. at 215–17.

[68] *Id*. at 217.

[69] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (noting that a students may express themselves on controversial subjects provided that they do not collide with the rights of others).

[70] Saxe, 240 F.3d at 217.

[71] *See id*. at 205 (stating that under the 'hostile environment' theory for harassment cases must be viewed both subjectively as harassment by the victim and be objectively severe that a reasonable person would think that the behavior is harassment).

[72] *See, e.g.,* Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (where a student created a homepage on his home computer which criticized the school administration and staff using vulgar language).

[73] *See, e.g.,* Coy v. Bd. of Educ. of the North Canton City Schs., 205 F. Supp. 2d 791 (N.D. Ohio 2002) (where a student directed attacks from a website he

involved hurtful speech directed at staff.[74]

One of the earliest cases that addressed this issue was *Beussink v. Woodland R-IV Sch. Dist*.[75] Beussink made a homepage criticizing the school and the administrators.[76] He invited students to contact the principal about their opinions of the high school.[77] The district court reviewed the Supreme Court student speech decisions, declined to rely on *Fraser*, and instead applied the *Tinker* substantial disruption test, stating: "disliking or being upset by the content of student speech is not an acceptable justification for limiting student speech under *Tinker*."[78] The court further noted "no significant disruption to school discipline occurred."[79] And that, "individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection."[80]

The approach taken by other federal district and circuit courts has emulated the approach first outlined in *Beussink*.[81] Specifically, this has included a consideration of the Supreme Court student speech decisions to determine the appropriate standard to be applied, a rejection of the *Fraser* standard, determination that the *Tinker* standard is appropriate, and then a factual consideration of whether substantial disruption had resulted or was reasonably foreseeable.[82]

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created on his home computer toward a group of skateboarders that attended his school).

[74] *See, e.g.,* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001) (where a student emailed a top ten list to his friends which contained vulgarities about the athletic director at his school).

[75] *Beussink*, 30 F. Supp. 2d at 1175; Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline Of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L. J.727, 729 n.8 (2007).

[76] *Beussink*, 30 F. Supp. 2d at 1177.

[77] *Id*.

[78] *See id*. at 1180 (discussing *Tinker* as the legal standard for determining the limitations on student speech).

[79] *Id.* at 1181.

[80] *Id.* at 1182.

[81] *See, e.g.,* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2007) (holding that student speech critical of the school administration is protected where that speech occurs outside of the school and does not substantially interfere with school discipline); *see also* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004) (acknowledging the framework set fourth in *Beussink*, but distinguishing the instant case because the speech in question did not rise to the level of student speech on school premises).

[82] Coy v. Bd. of Educ. of the N. Canton City Schs., 205 F. Supp. 2d 791, 799 (N.D. Ohio 2002); Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 704 (W.D. Pa. 2003).

VI. EARLY CASES RELATED TO ATTACKS AGAINST OTHER STUDENTS

There have been a number of cases where the material students posted targeted other students. In *Emmett v. Kent School District*, Emmett created a site with mock obituaries of other students, which emulated a class assignment, with an invitation for students to select who should die next.[83] The court determined there was no evidence that this significantly interfered with the ability of any student to feel safe coming to school and receive an education.[84]

In *Coy v. Board of Education of the North Canton City Schools*, Coy created a site that denigrated several other students.[85] He was disciplined for accessing this "lewd" site from a school computer.[86] Because of how the case was presented by the school district, which focused on how Coy accessed this site from school, there was no focus on the potential harm to the students targeted by Coy.[87] The court held that the school officials could not discipline Coy for simply accessing this material because there was no evidence of any disruption at school.[88]

In *Mahaffey v. Aldrich*, Mahaffey created a web site that discussed how he hated school and joked about killing other students.[89] The court determined there was no evidence that this was a true threat, or was perceived by the students to be threatening, so therefore no substantial disruption.[90]

In *Flaherty v. Keystone Oaks School District*, the student posted material disparaging the school's volleyball team, but the Court determined there was no evidence of substantial disruption at school.[91]

In *Latour v. Riverside Beaver School District*, Latour wrote violent rap songs.[92] A girl who had had a personal relationship with Latour was targeted in one of his rap songs. Though the targeted girl did leave school subsequent to the writing of the

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83 Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088 (W.D. Wash. 2000).
84 *Id.* at 1090.
85 *Coy*, 205 F. Supp. 2d at 795.
86 *Id.* at 794.
87 *Id.*
88 *Id.* at 799–800.
89 Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 781–82 (E.D. Mich. 2002).
90 *Id.* at 786.
91 Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003).
92 Latour v. Riverside Beaver Sch. Dist., No. 05-1076, 2005 WL 2106562, at *1 (W.D. Pa. Aug. 24, 2005).

song, the Court found evidence was that this leaving was related to many additional issues, not simply the rap song.[93] Another student who was mentioned in one of Latour's raps did not view this as a threat, and thus, the Court found there to be no substantial disruption was made by the song.[94]

VII. RECENT CASES RELATED TO ATTACKS AGAINST OTHER STUDENTS

Two recent cases did raise concerns of material being posted in a manner that reasonably could have, or did, cause a significant interference with the ability of another student to feel safe at school and receive an education.

In *J.C. v. Beverly Hills Unified School District*, several students made a video disparaging another student and posted this on YouTube.[95] The disparaged student and her mother reported this to the school.[96] The principal suspended J.C., the student who had taken and posted the video.[97]

In applying the *Tinker* standard, the court focused solely on whether there was a disruption in the classroom.[98] "[T]he fact that students are discussing the speech at issue is not sufficient to create a substantial disruption, at least where there is no evidence that classroom activities were substantially disrupted."[99] The court did entertain the possible application of the second prong of *Tinker*, noting that *Tinker* also allows regulation when speech interferes with "the school's work or . . . with the rights of other students to be secure and be let alone."[100] But because this prong had not been addressed in the prior case law, the court declined to apply this standard to the case.[101]

Most significant, in this case, was the failure to evaluate the situation in light of the very clear statement made by then-Judge Alito in *Saxe*, which established that situations that significantly interfere with the ability of a student to receive an education are,

[93] *Id.* at 2.
[94] *Id.*
[95] J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).
[96] *Id.*
[97] *Id.* at 1099.
[98] *Id.* at 1101.
[99] *Id.* at 1111.
[100] *Id.* at 1122 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
[101] *See J.C.,* 711 F. Supp. 2d at 1122–23.

"almost by definition, disruptive to the school environment."[102] An argument based on the *Saxe* language may not have been presented to the Court. Such argument may have been influential, had it been presented.[103]

In a separate, interlocutory, decision in the *J.C.* case, the court also dismissed the case based on lack of due process, due to lack of notice.[104] The court noted that neither the state law nor district policy provided J.C with notice that the school would impose discipline on students for off-campus acts.[105]

Fortunately, the *J.C.* decision is balanced by an excellent Fourth Circuit decision in *Kowalski v. Berkeley County Schools*.[106] Kowalski created a MySpace webpage using her home computer called S.A.S.H. ("Students Against Sluts Herpes").[107] She invited 100 "friends" from the school and about twelve joined.[108] The group ridiculed a classmate, suggesting she had herpes. Kowalski did not post comments, but had established the environment and commented approvingly of two derogatory postings.[109] She was suspended from school for five days and excluded from extracurricular activities for a longer period of time.[110]

The circuit court decided this case based on a *Tinker* analysis.[111] Contrary to the *J.C.* Court, this court focused on both prongs of the *Tinker* decision—substantial disruption and interference with the rights of students to be secure.[112] Most significantly, the court engaged in an analysis that was similar to the student safety analysis presented in the *Morse* case, "[t]hus, the language of *Tinker* supports the conclusion that public schools have a "compelling interest" in regulating speech that interferes with or disrupts the work and discipline of the school,

[102] Saxe v. State Coll. Area Sch., 240 F.3d 200, 217 (2001).

[103] *See id.* (suggesting that any kind of disruption in the classroom is an inherent interference with the rights of others to education, as opposed to the Court in *J.C.* requiring a true disruption).

[104] Notice of Motion and Motion for Summary Judgment at 9, 12, 14 J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (Case 2:08-cv-03824-SVW-CW Document 69, Filed 12/08/2009).

[105] *Id.* at 9–12.

[106] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011).

[107] *Id.* at 567.

[108] *Id.*

[109] *Id.* at 567–68.

[110] *Id.* at 569.

[111] *Kowalski*, 652 F.3d at 567 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[112] *Id.* at 573–74; *see* cases cited *supra* notes 100–102.

including discipline for student harassment and bullying."[113]

According to a federal government initiative, student-on-student bullying is a "major concern" in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide.[114] Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment.[115] Far from being a situation where school authorities "suppress speech on political and social issues based on disagreement with the viewpoint expressed," school officials must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.[116]

"We are confident that Kowalski's speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection."[117] Note how the court's analysis of student safety issues emulated the approach taken by the Supreme Court in the *Morse*.[118] Interestingly, what was lacking in the *Kowalski* decision was reference to the then-Judge Alito's language in *Saxe*, which would have strengthened the court's conclusion.[119]

Unfortunately, the court complicated its analysis by a reference to *Fraser*: "This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to

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[113] *Id.* at 572 (citing to Morse v. Frederick, 551 U.S. 393, 407–08 (2007)); *See* DeJohn v. Temple Univ., 537 F.3d 301, 319–20 (3d Cir. 2008) (citing *Tinker*, 393 U.S. at 503).

[114] *See* Michaela Gulmetova, Darrel Drury & Catherine P. Bradshaw, *Findings From the Nat'l Edu. Association's Nationwide Study of Bullying: Teachers' and Educ. Support Professionals' Perspectives*, STOPBULLYING.GOV, 11 (April 30, 2012), http://www.stopbullying.gov/at-risk/groups/lgbt/white_house_conference_materials.pdf; *See* Government Report, STOPBULLYING.GOV (April 30, 2012, 11:23 PM), *available* at http://www.stopbullying.gov (follow "Recognize the Warning Signs" hyperlink).

[115] *See* Morse v. Frederick, 551 U.S. 393, 393–95 (2007); *cf.* Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007) ("School Officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.").

[116] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[117] Kowalski v. Berkeley Cnty. Schls., 652 F.3d 565, 572 (2011) (citing *Tinker*, 393 U.S. at 513).

[118] *Id.* (citing *Morse*, 551 U.S. at 424).

[119] *See id.* The case opinion is noticeably missing language that suggests that interfering conduct can be deemed a substantial disruption, as long as it is a threat to safety for merely one other student, *see supra* Part IV.

educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system.'"[120] The Court's decision in this case was clearly grounded in a *Tinker* substantial disruption and significant interference with students analysis, not *Fraser*.[121] The inclusion of the language from *Fraser* was not helpful.

Kowalski also raised the issue of lack of due process because of lack of notice in the district's "Harassment, Bullying, and Intimidation Policy" that such policy applied to off-campus speech.[122] While reference to off-campus speech was not in the district's policy or state statute, the court determined that Kowalski had sufficient notice that, "the prohibitions are designed to regulate student behavior that would *affect* the school's learning environment."[123]

In December 2011, the U.S. Department of Education released an *Analysis of State Bullying Laws and Policies*.[124] As of April 2011, forty-six states had bullying prevention laws, forty-five of which direct school districts to adopt bullying policies.[125] Forty-one states had model bullying policies.[126] Thirty-six states included provisions prohibiting bullying using electronic media.[127] But unfortunately, only thirteen states specify that schools have jurisdiction over off-campus behavior if it creates a hostile school environment or has caused a substantial disruption at school.[128]

In the other twenty-three states that have included provisions addressing bullying using electronic media, the issue of school response to off-campus harmful online speech likely came up in the legislative process and a specific decision was made not to include reference to off-campus harmful speech.[129] The concern is

[120] *Kowalski*, 652 F.3d at 573 (quoting *Fraser*, 478 U.S. at 681).

[121] *Id.* at 572–73 (showing that making an argument that the conduct in question was "vulgar and lewd" is extraneous in context of the case as a whole, because the main point was to prove that the conduct created a substantial disruption to the school environment).

[122] *Id.* at 575.

[123] *Id.* at 575–76.

[124] U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES, i, ii (2011).

[125] *Id.* at ix, x.

[126] *Id.* at x.

[127] *Id.*

[128] *Id.* at x, 24.

[129] *See id.* at 80 (speculating that a conscious determination was made by the twenty-three states in question, to leave out provisions that would allow for off-campus enforcement in school bullying laws, since the general expansion of

that in these 23 states, it is possible that a successful argument based on lack of due process would be upheld.[130]

Briefly shifting the discussion from legal considerations to school management considerations, the unfortunate underlying issue in these cases in the focus on whether the school official can punish a student for posted the material.[131] As will be discussed in the last section of this article, the constitutional authority to punish a student should not lead to the conclusion that the student who posted the hurtful material online is the one most at fault or that punishment is the most effective response.[132] Restorative interventions hold greater promise. Further, in those 23 states where it may not be constitutional for school officials to respond to off-campus student speech, an alternative restorative intervention process may be the only option.[133]

VIII. EARLIER CASES WHERE STUDENT OFF-CAMPUS SPEECH TARGETED STAFF

There have also been cases where student speech has targeted staff. These cases have also been decided based on a *Tinker* substantial disruption analysis.[134]

In a very early state court case, *J.S. v. Bethlehem Area School District*, J.S. created a website that denigrated his principal and teacher, as well as threatened his teacher.[135] The teacher was distraught and took a leave of absence.[136] The district suspended the student for ten days and then decided to expel him.[137] The court did not consider the posting to be a true threat.[138] But the court did find that the postings had created a substantial disruption, meeting the *Tinker* standard, due to the impact on the teacher.[139] "The web site posted by J.S. in this case disrupted the entire school community . . . . The most significant disruption

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bullying legislation was up for debate in those state legislatures).

[130] ANALYSIS OF STATE BULLYING LAWS AND POLICIES, *supra* note 124, at 80.

[131] *Id.*

[132] *Infra* Part X.

[133] U.S. Education Department Releases Analysis of State Bullying Laws and Policies, http://www.ed.gov/news/press-releases/us-educati18on-department-releases-analysis-state-bullying-laws-and-policies (last visited Apr. 30, 2012).

[134] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).

[135] *Id.* at 851–52.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 860–61.

[139] *Id.* at 869.

. . . was [the] direct and indirect impact of the emotional and physical injuries to [the teacher who] . . . was unable to complete the school year and took medical leave of absence for the next year."[140] As a result of this, the court determined that the education of the students, who ended the year with a substitute teacher, had been disrupted.[141]

A Second Circuit ruling in *Doninger v. Niehoff*, also applied the *Tinker* standard, but in a disturbing manner under the circumstances.[142] About a week before a popular student-planned jazz performance, the school staff member responsible for the sound/lighting control backed out and so the event was cancelled.[143] Doninger, who had been providing student leadership in planning the show, and other students were understandably upset.[144] Their student council faculty advisor suggested contacting the principal to encourage them to protest this action, however, the students decided to take public action.[145] Doninger coordinated the public activity.[146] After the students, parents, and members of the community contacted the principal and superintendent with their dismay, the principal communicated her disapproval of this public protest to Doninger.[147]

Doninger, who was under the understanding that the event may have been permanently cancelled, went home and posted a statement on her blog where she referred to the superintendent as a "douche bag" and suggested more people write to the superintendent to "piss her off more."[148] The event was subsequently rescheduled.[149] Much later, someone reported the blog post to the superintendent.[150] Doninger was not allowed to serve in student government the following school year.[151]

The court upheld this decision in a manner that raises serious concerns. The court applied the *Tinker* standard and found that

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140 J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).
141 *Id.*
142 Doninger v. Niehoff, 642 F.3d 334, 355 (2d Cir. 2011).
143 *Id.* at 339.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.* at 340.
148 *Doninger*, 642 F.3d at 340–41. .
149 *Id.* at 341.
150 *See id.* at 342 ("Doninger's blog post did not come to the attention of school officials until May 7, 2007, about two weeks later.").
151 *Id.*

the blog entry "not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy."[152] The first concern about this decision relates to causation.[153] There was a disruption at the school.[154] But the disruption was not caused by Doninger's post. It was caused by the school allowing a staff member to back out of his assistance for an important student event.[155] There was no evidence that this post caused any disruption.[156] The evidence demonstrated that only a few people had even read it.[157]

Further, there is significant concern related to the issue of foreseeability.[158] While the court concluded that it was foreseeable this post could have created a risk of substantial disruption, the existence of this post was not known until a long time after the actual disruption.[159] The only reason school officials have the authority to respond to speech that could foreseeably cause a disruption is to allow them to stop such disruption from occurring.[160] As clearly stated by Justice Alito, "[I]n most cases, Tinker's "substantial disruption" standard permits school officials to step in before actual violence erupts."[161]

Lastly, this situation must be considered in the context of another, equally important, constitutional right. The First Amendment protects the right for citizens to petition for a government redress of grievances.[162] This clearly is exactly what Doninger was doing. In the Declaration of Independence, our Founders called King George a "tyrant," more than once.[163] This assertion also likely "pissed off" King George, royally. Neither Doninger's free speech rights, nor her right to petition government officials for redress, were adequately protected by the Second Circuit.[164]

IX. MOST RECENT CASES WHERE

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[152] *Doninger,*, 527 F.3d at 50–51.
[153] *Id. at* 350.
[154] *Id.* at 348.
[155] *Id.*
[156] *See generally id.*
[157] *See generally id.*
[158] *Doninger,* 642 F.3d at 348.
[159] *Id.* at 348–50.
[160] *Id.* at 350.
[161] Morse v. Frederick, 551 U.S. 393, 425 (2007).
[162] U.S. CONST. amend. I.
[163] THE DECLARATION OF INDEPENDENCE (U.S. 1776).
[164] *Doninger,* 642 F.3d at 334.

STUDENT OFF-CAMPUS SPEECH TARGETED STAFF

The two most recent decisions in situations involving student speech attacking a staff member were recently released by the Third Circuit, *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*.[165] Inconsistent prior rulings in these cases had been issued by three-judge panels of the Third Circuit, leading to a review of both cases en banc.[166] In both of these cases, the students had created fake profiles of the school principal which presented disparaging material, significantly more disparaging than the statement posted by Doninger.[167]

In *Layshock*, the lower court had determined there was no substantial disruption resulting from the off-campus online postings.[168] The school district did not challenge that finding on appeal.[169] Instead, the district's argument was twofold:

> [A] sufficient nexus exists between Justin's creation and distribution of the vulgar and defamatory profile of Principal Trosch and the School District to permit the School District to regulate this conduct. The "speech" initially began on campus: Justin entered school property, the School District web site, and misappropriated a picture of the Principal. The "speech" was aimed at the School District community and the Principal and was accessed on campus by Justin. It was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.[170]

The court compared this situation to that in *Thomas v. Board of Education*, where students who published an off-campus periodical, when in fact some of the work had been done on campus.[171] The court determined that Layshock's actions on campus were far more minimal.[172]

The district also argued that Layshock's speech was "vulgar, lewd and offensive, and . . . not shielded by the First Amendment because it ended up inside the school community

An interesting side note on this case is that while the court

[165] Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3rd Cir. 2011); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3rd Cir. 2011).

[166] *Layshock*, 650 F.3d at 205; J.S., 650 F.3d at 915.

[167] *Layshock*, 650 F.3d at 205; J.S., 650 F.3d at 915.

[168] *Layshock*, 650 F.3d at 205.

[169] *Id.* at 214.

[170] *Id.*

[171] *Id.* at 215 (citing Thomas v. Bd. of Educ., 607 F.3d 1043, 1045 (2d Cir. 1979)).

[172] *Id.* at 215–16.

discussed the *Doninger* decision in the context of the fact that *Tinker* is the controlling standard, the court also had this to say about the decision in the *Doninger* case: "[m]oreover, in citing *Doninger*, we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there."[173]

The decision in *J.S. v. Blue Mountain School District* presents a greater range of diversity of opinion. The majority opinion, written by Judge Chagares with seven judges concurring, is in accord with the general trend in the case law, with the exception of *Doninger*.[174] A concurring opinion, written by Judge Smith with four judges concurring, is based on the perspective largely argued by civil rights advocates, such as the American Civil Liberties Union.[175] The dissenting opinion, written by Judge Fisher with five judges concurring, takes the position generally argued by educational leadership organizations, such as the National School Board Association.[176] Not surprisingly a petition for a writ of certiorari to the Supreme Court was filed in this case, but was denied.[177]

The circuit court noted: "Ultimately, the District Court held that although J.S.'s profile did not cause a 'substantial and material' disruption under *Tinker*, the School District's

[173] *Id* at 212, 218 (discussing *Doninger*, a case decided by the Court of Appeals, even though it is not controlling and *Tinker*, which is controlling).

[174] *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 920, 930–31 (3d Cir. 2011) (distinguishing the present case from *Doninger*).

[175] *See id.* at 937 (Smith, J., concurring) (addressing the issue of whether *Tinker* applies to off campus speech and holding that it does not); *Student Speech: Recent Court Cases, Issues and Articles*, ACLU, http://www.aclu.org/free-speech/student-speech (last visited Sept. 16, 2012) ("In its landmark 1969 ruling in *Tinker v. Des Moines*, the Supreme Court found that students do not 'shed their constitutional rights at the schoolhouse gate.' The ACLU argued that case on behalf of Mary Beth Tinker, defending her right to wear a black armband at school to protest the Vietnam War. We continue to fight for students' constitutional right to free speech.").

[176] *J.S.*, 650 F.3d at 941 (Fischer, C.J., dissenting) (stating that the majority opinion "undermines schools' authority to regulate students"); Brief of National School Boards Ass'n et al. as Amicus Curiae Supporting Petitioners, at 17–19; Blue Mountain Sch. Dist. v. J.S., 650 F.3d 915 (3d Cir. 2011) *petition for cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012) (No. 11-502) (stating that activity outside of the classroom can cause substantial disruption inside the classroom and, thus, should be punishable by the school in order to maintain "a safe and orderly learning environment").

[177] Petition for Writ of Certiorari, Blue Mountain Sch. Dist. v. Snyder, 2011 WL 5014761 (2011) *petition for cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012) (No. 11-502).

punishment was constitutionally permissible because the profile was 'vulgar and offensive' under *Fraser* and J.S.'s off-campus conduct had an 'effect' at the school."[178]

On appeal, the school district conceded that there was no substantial disruption at school, and instead argued that there were "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . ."[179] The circuit court determined that the facts did not support the conclusion that a substantial disruption was reasonably foreseeable because the profile had been created as a joke and was so juvenile that no one would ever take it seriously.[180] The fake profile did not have the principal's name or the school name.[181] J.C. had made the profile private, thus only accessible to a few friends and the profile was on a site that was blocked by the school.[182] The court noted that under *Tinker*, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[183]

The school district also argued "although J.S.'s speech occurred off campus, the district was justified in disciplining her because it was 'lewd, vulgar, and offensive [and] had an effect on the school and the educational mission of the District.'"[184] The Court readily dismissed this argument:

> The School District's argument fails at the outset because Fraser does not apply to off-campus speech. Specifically in Morse, Chief Justice Roberts, writing for the majority, emphasized that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[185]

Thus, the majority decision followed the approach that has been more frequently adopted by courts in these cases: *Fraser* does not apply to off-campus student speech, *Tinker* does.[186] Under *Tinker*, the district must be able to demonstrate an actual disruption or provide solid reasons why such disruption is foreseeable.[187]

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[178] *J.S.,* 650 F.3d at 924.
[179] *Id.*
[180] *Id.* at 929–31.
[181] *Id.* at 929.
[182] *Id.*
[183] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); *see J.S.,* 650 F.3d at 929.
[184] *J.S.,* 650 F.3d at 932.
[185] *Id.*
[186] *See id.* at 931–32 (explaining how the Districts Court's argument using the *Fraser* exception to *Tinker* should not apply in this case).
[187] *Tinker*, 393 U.S. at 514.

In the concurring opinion, written by Judge Smith, the judges rejected the premise that school officials should ever be able to impose discipline on students for any off-campus speech, even if that speech had, or foreseeably could, cause a substantial disruption on campus.[188] Judge Smith relied on arguments based on two prior cases, *Thomas v. Board of Education, Granville Central School District* and *Porter v. Ascension Parish School Board*.[189] In these cases, the courts had indicated that the school officials could not impose punishment on students for off-campus speech in situations where there was clearly no negative impact at the school, but both also asserted that Tinker could apply in some situations.[190] Based on this, Judge Smith essentially argued that regardless of the impact at school, school officials have no authority over student's off-campus speech.[191] This argument is not in accord with the overwhelming majority of the case law.[192]

In making a point about this issue, Judge Smith suggested the following scenarios:

> Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.[193]

Judge Smith's scenario and argument raises attention to the core challenge the courts are facing in these cases, which is the lack of specific attention to what is meant by the phrase "substantial disruption."[194] "Substantial disruption" of what?

This is how viewing the *Tinker* standard in the context of the

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[188] *See J.S.*, 650 F.3d at 936–37, 941 (explaining that free speech should remain free outside of schools, even if it affects those within the school community).

[189] *See id.* at 937–39 (noting both *Thomas* and *Porter* assist in the argument that the *Tinker* decision does not apply to off-campus speech by students).

[190] Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050–53 (2d Cir. 1979); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615, 620 (5th Cir. 2004).

[191] *See J.S.*, at 939–41 (explaining that all off-campus speech should be unregulated as long as the speech itself would not be protected under the 1st Amendment).

[192] *See Tinker*, 393 U.S. at 503 (noting the cases that followed the *Tinker* standard).

[193] *J.S.*, 650 F.3d at 939 (Smith, J., concurring).

[194] *Id.*

natural rights historical underpinnings of the Free Speech provision of the First Amendment is helpful. Under certain situations, especially off-campus speech, school officials only have the right to restrict the speech of students to protect important rights of other students.[195] As clearly addressed by Justice Alito in *Morse* and Judge Alito in *Saxe*, those important rights include the right to receive an education and the right to be safe while at school.[196]

Sometimes, the impact of student off-campus speech has or reasonably could come right back through those "schoolhouse gates" and has, or very well could, significantly undermine the overall operations of school, including instruction and school activities.[197] Such speech could also cause significant emotional distress for another student that this will significantly interfere with the right of that student to receive an education. Further, such speech could lead to violent verbal or physical altercations between students. In all of these situations, it is imperative that school officials have the authority to intervene, including the authority to remove a student from the school if that is perceived necessary to get the situation under control.

To provide an illustration of this, let's take Judge Smith's scenario from above and revise it: Suppose a high school student, while at home after school hours, were to establish a Facebook profile dedicated to attacking another student who is known to be gay. Suppose this profile contains derogatory language about the gay student, with highly offensive images and cartoons—and contains links to news articles about gay students who have committed suicide with suggestions that the gay student should do the same. Suppose other students have joined this profile and are posting or agreeing with the derogatory statements. Suppose the gay student is reportedly exceptionally distraught and is no longer willing to come to school. Other sexual minority students are also extremely upset and frightened. Suppose other sexual minority students are also very upset. Suppose this student's friends are reportedly angry and are threatening violence against

[195] *Id.* at 932–33 (discussing school officials inability to limit students' off-campus speech).

[196] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (discussing the school district's compelling interest to guarantee a safe learning environment); *See also* Morse v. Frederick, 551 U.S. 393, 424 (2007) (discussing disturbances to education in public schools).

[197] *J.S.*, 650 F.3d at 942 (Smith, J., concurring).

the creator of this profile and his close friends. Would Judge Smith and the concurring colleagues still argue the position that school officials have no constitutional authority to intervene? Hopefully not.

Judge Fisher and his concurring colleagues took the position that school officials must be able to respond to much wider range of student off-campus speech, especially including hurtful speech that is directed at school staff, arguing:

> J.S.'s speech had a reasonably foreseeable effect on the classroom environment. In addition to causing a diminution in respect for authority and a diversion of school resources, J.S.'s speech posed reasonably foreseeable psychological harm to McGonigle and Frain that would impact their ability to perform their jobs. Being subject to such personal attacks, they may have been discouraged to interact with students and perhaps even motivated to leave without the institutional support of the School. Without effective punishment, McGonigle and Frain would have been less effective in fulfilling the educational mission of their positions. Furthermore, if the Middle School did not punish J.S., it was foreseeable that other students may have decided to personally attack McGonigle, Frain, or other members of the school. . . . The Middle School protected its employees against such a vicious and personal attack, thereby preventing substantial disruption of the classroom environment. I believe our Court errs in precluding schools from protecting teachers and officials against such harassment.[198]

Note that Judge Fisher analyzed the situation based on a *Tinker* substantial disruption standard.[199] Where this opinion falls down is in the interpretation of the obvious facts and in trying to make the stretch to that the speech foreseeably could have significantly interfered with the rights of other students.[200]

The majority opinion had set forth the specific language J.S. had used in the "About Me" section of the profile to describe the principal, which it described as "nonsense and juvenile humor":

> HELLO CHILDREN
> yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL
> I have come to myspace so i can pervert the minds of other principal's to be just like me. I know, I know, you're all thrilled
> Another reason I came to myspace is because-I am keeping an eye

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[198] *Id.* at 947 (Fisher, J., dissenting).
[199] *Id.* at 941.
[200] *Id.* (discussing the interpretation of facts).

on you students
(who I care for so much)
For those who want to be my friend, and aren't in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs)
MY FRAINTRAIN
. . .[201]

The dissenting opinion argued:

> "The majority fails to recognize the effects of accusations of sexual misconduct . . . . Such accusations interfere with the educational process by undermining the authority of school officials to perform their jobs . . . . It was reasonably foreseeable that the accusations made in the MySpace profile would be shared with parents and teachers. McGonigle's character would come under investigation, and his fitness to occupy a position of trust with adolescent children would be questioned."[202]

The argument that anyone would take J.S.'s juvenile fake profile material seriously borders on the absurd. It is simply not reasonable to presume that this possibility was foreseeable. In some other situation, a student's false accusations of educator sexual misconduct could be taken seriously and could result in the removal of the educator from his or her tasks. Thus, in such situations, disruption of the rights of students to receive an education could be foreseeable. But not on these facts.

Secondly, the dissent focused on the emotional harm suffered by the school staff who have been targeted by such speech.[203] Forecasting additional emotional trauma to school staff, the dissent stated:

> J.S.'s speech posed reasonably foreseeable psychological harm to McGonigle and Frain that would impact their ability to perform their jobs. Being subject to such personal attacks, they may have been discouraged to interact with students and perhaps even motivated to leave without the institutional support of the School. Without effective punishment, McGonigle and Frain would have been less effective in fulfilling the educational mission of their positions. Furthermore, if the Middle School did not punish J.S., it was foreseeable that other students may have decided to personally attack McGonigle, Frain, or other members of the

201 *Id.* at 921 (majority opinion) (all text and formatting retained as in original MySpace posting, as was published in the opinion).
202 *Id.* at 945–46 (Fisher, J., dissenting).
203 *J.S.,* 650 F.3d at 947 (Fisher, J., dissenting).

school.[204]

To buttress this argument, Judge Fisher relied on research studies related to educator stress, as well as other cases where the educator involved did suffer from emotional distress. Judge Fisher also noted, "In our case, McGonigle stated that he became distressed after viewing J.S.'s MySpace profile. He stated, 'I was very upset and very angry, hurt, and I can't understand why [J.S.] did this to me and my family.'"[205] There may be a situation when the online attacks of a student are so egregious, that an educator may suffer serious emotional distress, necessitating the removal of that educator from the school setting. In such situations, it may be possible an argument could be made that this had created a substantial disruption in the overall operations of the school and the delivery of instruction. But based on the facts in this case, clearly this is not what happened, nor was it reasonably foreseeable that this would happen.

The underlying sense of the dissenting opinion is grounded in the phrase that appeared in the first quote—the concern related to the "diminution in respect for authority" and the need to punish J.S. to maintain such authority.[206] In fact, the other arguments, the concerns related to accusations of sexual misconduct or emotional distress is likely subsidiary to this overarching concern. Effective school leaders do not build and maintain their "authority" by punishing students. They do so by maintaining a positive school climate and resolving negative situations in an effective manner.

The majority, concurring, and dissenting opinions of *J.C.* have aptly outlined the range of opinions on the issue of the bounds of school official authority to respond to hurtful off-campus student speech.[207] The majority opinion presents a balanced approach ground in *Tinker*, that allows for the possibility that in some situations it is permissible for school officials to restrict student off-campus speech.[208] But that school officials clearly do not have the authority to seek to inculcate values or suppress speech that is not in accord with the educational mission of the school when that speech is made by a student who is off campus.

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[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at 926, 936, 941.
[208] *Id.* at 926.

X. EFFECTIVE INVESTIGATIONS AND RESTORATIVE INTERVENTIONS

It is necessary to shift from a legal analysis to a discussion of the situations that arise in the context of students' harmful online postings of material directed at school staff or students. If a student has posted hurtful material online denigrating a staff members is not advisable, nor necessary, to simply ignore the situation. While a punitive response may not be constitutionally warranted this does not mean there is nothing that can be done.

When such situations arise it is necessary for the school official to fully investigate the situation to determine the potential contributing factors. It is essential that school officials recognize the inadequacy of punitive school responses and intervene in these situations in a restorative manner that holds all participants accountable for the harm caused and prevents similar harm from occurring in the future.

Students who feel happy and successful, attend schools with a positive climate and effective dispute resolution procedures, feel that school staff members are competent and kind, and perceive they are treated fairly by those school staff members are generally not posting hurtful material denigrating staff members online. So if a student has posted hurtful material denigrating a school staff member, it is highly probable that something is going wrong in one or more of these other dimensions. Essentially, when a student posts hurtful material denigrating a school staff member, this should be viewed as a "red flag" that other concerns exist. Failure to fully investigate and effectively address the underlying concerns will not result in an effective resolution of the situation.

One concern that has not been adequately addressed, either through research or school policy and procedures, is the problem of school staff who regularly bully, harass, and denigrate students.[209] Sometimes what students post online is cell phone recorded evidence of this abuse (conduct a search on the terms: "teacher bully student").[210] In any situation where a student has denigrated a staff member, the potential that this action may be

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[209] ALAN MCEVOY, TEACHERS WHO BULLY STUDENTS: PATTERNS AND POLICY IMPLICATIONS (2005).

[210] *See* HAIRSTON ET AL., *VIDEO: Teacher Unloads On Special Needs Student*, NBC PHILADELPHIA (Mar. 2, 2012), http://www.nbcphiladelphia.com/news/local/Investigators-Student-Accuses-Teacher-of-Bullying—133858078.html (reporting on a teachers abuse that was captured on camera).

in retaliation for hurtful actions taken by the staff member must be kept in mind and fully investigated.[211]

In every situation such as this, a close analysis of the overall circumstances in the relationship between the student(s) and staff members(s), along with other potential challenges the student may be facing, must be conducted by an unbiased, objective investigator—specifically, a person who is not a staff member of the school.

It is also important that a full investigation be made in situations where a student has posted hurtful material targeting another student. Sometimes these postings are in retaliation for harm that the student targeted online is inflicting on the student who posted the hurtful material. It is essential that school officials investigating these situations consider all factors:

- Review the digital material and gain insight from the student reporting to assess the harmful relationships.
- Determine who is playing what role in this situation, with what apparent motivation.
- Look closely to determine whether online incident is a continuation of—or in retaliation for—other hurtful interactions between the parties.
- Determine whether the evidence gathered raises concerns that any student may pose a risk of harm to others or self.

Further, after a full and unbiased investigation that has evaluated the actions of all parties, the resolution of the situation must be focused on holding all parties accountable, remedying the harm, and restoring relationships. While a principal may not be able to formally punish a student who has denigrated a staff member online, pursuing an informal restorative intervention is an appropriate and advisable alternative. Restorative interventions are also preferable in situations where a student has targeted another student.

One reason it is imperative to pursue a restorative intervention is the futility of reliance on punishment. The ability of people in positions of authority to exert "authority" over those with lesser power by punishment has been significantly undermined by the easy availability of digital technologies in the hands of those with lesser power. These are important lessons

[211] MCEVOY, *supra* note 211; *see* Stuart W. Twemlow & Peter Fonagy, *The Prevalence of Teachers Who Bully Students in Schools With Differing Levels of Behavioral Problems*, 162 AM. J. PSYCHIATRY 2388 (2005) (discussing the relationship of schools with teacher that bully and suspension rates).

that were recently learned by Mubarak in Egypt and Gaddafi in Libya.[212]

If a principal's response generates anger, the student or others have an easy ability to anonymously retaliate online. Students, who function in large digital communities, can also easily bring in compatriots for this retaliation who are beyond the reach of the principal. The target of this retaliation could be a student involved in the situation, a staff member, or the principal who imposed the punishment.

The argument in the *J.S.* dissent that the principal must be able to punish students to prevent other attacks is called into question.[213] In the digital age, punitive responses have a potential of stimulating more egregious, uncontrollable retaliation.[214]

The International Institute for Restorative Practices is an excellent source for information on restorative practices.[215] Punishment-based approaches ask these questions:

- Who did it?
- What "rule" was broken?
- How should the offender be punished?

Restorative interventions view transgressions as harm done to people and communities.[216] Restorative approaches ask these questions:

- What is the harm to the person and to the community?
- What needs to be done to repair the harm?
- Who is responsible for this repair?
- What needs to occur to prevent similar harm in the future?

The intent of a restorative intervention is to hold the person who caused harm accountable in a manner that is restorative.[217] To be held accountable requires that this person:

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[212] *See* Peter Beaumont, *Can Social Networking Overthrow A Government?*, THE SYDNEY MORNING HERALD (Feb. 25, 2011), http://www.smh.com.au/technology/technology-news/can-social-networking-overthrow-a-government-20110225-1b7u6.html (discussing social network's role in the Arab Spring uprising).

[213] J.S. *ex el.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 941 (dissent).

[214] Embracing Digital Youth, *Digital Risk: Investigation and Intervention*, http://www.embracingdigitalyouth.org/reports-issue-briefs/issue-briefs/investigations-interventions/ (last visited Sept. 13, 2012).

[215] *See* International Institute For Restorative Practices, http://www.iirp.edu/what-is-restorative-practices.php (last visited Sept. 13, 2012) (discussing restorative practices).

[216] *See Digital Risk: Investigation and Intervention, supra* note 216.

[217] *Id.*

- Acknowledge that he or she caused harm.
- Understand the harm as experienced by the other person.
- Recognize that he or she had a choice.
- Take steps to make amends and repair the harm.
- Enunciate an intent to make changes in future behavior so that the harm will be unlikely to happen again.
- Further, if a student is also having other challenges that are not being effectively addressed, it is important to develop a plan to address these challenges.

Obviously, it is in the best interests of all members of a school community, staff, students and parents, if hurtful acts that denigrate any member of the community are handled in an effective manner. By shifting from an ineffective punitive approach, to a restorative intervention, school officials can effectively ensure that the harms are remedied—at the same time as they avoid a response that raises concerns of an unconstitutional restriction of students' free speech rights.

XI. SIDEBAR

From a school official perspective, the factors that must be considered when they are considering a response to a student's off-campus speech include:

Notice.[218] It is prudent for districts to ensure that their disciplinary policy provides clear notice to students and their parents that the school can and will discipline students for off-campus speech that causes or threatens a substantial disruption at school or interference with rights of any other students to be secure and receive an education. It is necessary to obtain local legal guidance to determine whether, based on the current status of the state laws this is possible.

School "nexus" or impact.[219] If a school official intends to respond, there must be a nexus between the off-campus online speech and the school community and an impact that has or is predicted to occur at school. In the context of this, "school" includes school-sponsored field trips, extracurricular activities, sporting events, and transit to and from school or such activities. Therefore, administrators could respond if student speech could lead to violence at a school football game.

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[218] *Id.*
[219] *Id.*

If impact has not occurred, it must be reasonably foreseeable.[220] School Officials must be able to point to a specific reason why they believe a substantial disruption or interference will occur. Timing is an issue. Their formal response needs to be for the purpose of preventing a foreseeable substantial disruption or interference.

Material and substantial.[221] The impact is significant. This does not include school official anger or annoyance, a situation that requires the administrator to investigate.

Disruption of school or interference with rights of students.[222] The speech must have caused, or it is reasonably foreseeable it will, cause: significant interference with the delivery of instruction, school activities, or school operations; physical or verbal violent altercations; significant interference with a student's ability to participate in educational programs or school activities.[223] It is necessary to assess the interference with students' education based on the target's subjective response and a reasonable observer perspective. This does not include situations where there is disapproval of the expression of a controversial opinion or speech that is contrary to the educational mission of the school.

Causal relationship.[224] The speech has, or it is reasonably foreseeable it will, be the actual cause of the disruption, not some other factor.

Full and unbiased investigation. School officials can use digital evidence to more fully understand the situation, but this evidence could be deceptive or not disclose the entire situation. It is important to gain an understanding of the entire situation—including face-to-face interactions, as well as digital.

Restorative Intervention.[225] The primary objective in these situations is to stop and remedy the harm. Interventions in situations involving harmful online postings directed at another student or a staff member that is grounded in restoration—and directed at ensuring that all students involved get back onto a healthy positive track—is essential.

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220 *Id.*

221 *Id.*

222 *Digital Risk: Investigation and Intervention, supra* note 216.

223 *Id.* at 11–12.

224 *Id.* at 12.

225 Nancy Willard, *Cyberbullying, Sexting and Predators, Oh My! Addressing Youth Risk in the Digital Age in a Positive and Restorative Manner,* CENTER FOR SAFE AND RESPONSIBLE INTERNET USE (Aug. 22, 2011), http://csriu.org.