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Regulating Student Cyberspeech

Barry P. McDonald[*]

INTRODUCTION

In this timely symposium, the participants were asked to address various facets of the emerging problem of cyberbullying in American school systems. This Article will focus on one important aspect of that problem: the free speech constraints public school personnel operate under when they act to address cyberbullying incidents, as well as other student cyberspeech disputes courts are currently grappling with.[1]

I will not expend much effort convincing readers that cyberbullying in particular is becoming a major social problem in this country that can frequently lead to tragic consequences for our nation's youth – contributing to a recent conference hosted by the President on the subject of bullying prevention.[2] Nor will I devote much space to discussing how the phenomena of online and other electronic forms of bullying has taken the age-old problem

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* Professor of Law, Pepperdine University School of Law. I would like to extend my thanks and appreciation to Jack Balkin, Ron Krotozynski, and Bob Pushaw for helpful comments on earlier formulations of this Article. I would also like to thank Sandi Ciel and Robert Kelly for their excellent research assistance in connection with it.

1. Of course, as a general matter, the First Amendment only limits government action to regulate expressive activities. This means that the speech activities of the roughly ten percent of American minors in private elementary and secondary schools can be regulated via whatever contractual understandings those schools enter into with their constituents. My guess is that such policies allow those administrators to deal fairly readily with student bullying issues, whether online or not, which raises a more fundamental question of whether it even makes sense to read the Constitution as placing limits on the disciplinary authority of public school officials. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 418–22 (2007) (Thomas, J., concurring) (arguing that the First Amendment should not apply to K-12 students *qua* students under the original meaning of the speech clause).

I should note that this Article was designed as a symposium contribution, and I do not purport to have canvassed the voluminous legal literature that has developed on the topic of student cyberspeech disputes. I have limited the scope of my undertaking to examining American court decisions issued through February 2013 addressing claims that First Amendment free speech principles limit the ability of public middle or high school administrators to discipline such speech, asking whether the analyses being employed by those courts seem sound, and, if not, how they might be improved.

2. Jesse Lee, *President Obama & the First Lady at the White House Conference on Bullying Prevention*, WHITE HOUSE BLOG (Mar. 10, 2011, 1:05 PM), http://www.whitehouse.gov/blog/2011/03/10/president-obama-first-lady-white-house-conference-bullying-prevention.

of the schoolyard bully to whole new levels, given the ease and anonymity with which cyberbullying can be undertaken, the vast audiences it can create for such activities, and the repetitive and enduring qualities it can lend to such communications.[3] Other participants in this symposium have accomplished these tasks effectively and convincingly, and I would only be duplicating their efforts to address those subjects here. Instead, I will focus much of my Article on proposing a framework of analysis for applying the First Amendment to cyberbullying disputes.

But in order to properly conduct this task, I found it necessary to place such disputes within the overall context of student cyberspeech disputes generally. This is because much of the law being created in this area is emerging from a related but distinct area of student cyberdisputes – ones not involving online attacks by students on other students, but rather online attacks by students on school officials and other personnel. This phenomenon, which I will refer to as "cyberdissing," is being litigated more frequently in the courts than cyberbullying and is resulting in a set of First Amendment principles for dealing with student cyberspeech disputes generally that are not necessarily desirable for addressing cyberbullying incidents.

When public school personnel sanction cyberspeech critical or disrespectful of their own official action or policies, much greater First Amendment concerns are at stake than when they discipline such speech directed at the harassment or intimidation of fellow students. This is because the core purpose of the First Amendment, at least historically,[4] was to protect dissent and protest about government action. Sanctions for cyberdissing raise much greater risks and concerns that school officials are engaging in illegitimate censorship of speech critical of their own actions rather than imposing discipline to protect legitimate institutional interests. Because sanctions for cyberbullying, by contrast, are ordinarily directed towards protecting the psychological well-being of targeted students, they do not usually implicate these core free speech concerns. Hence, it becomes necessary to examine if and why the First Amendment principles governing these classes of incidents should be similar or different. And to make matters more complicated, not only do student cyberspeech disputes come in a variety of cyberbullying or cyberdissing flavors, but they can also involve expression that involves neither general category.

Part I of this Article will provide the First Amendment background for thinking about these disputes. It will explain how the Court has interpreted

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3. *See, e.g.*, Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 650-51, 652 (2011).

4. More modernly, the Court appears to be enamored with a personal autonomy rationale for protecting free speech, *see, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000), a justification with little basis in the historical reasons underlying the adoption of the First Amendment.

that amendment to provide primary and secondary students in American public schools with free speech rights, albeit not as broad as they enjoy in their capacities as ordinary citizens of our country. It has given public school administrators special power to regulate student speech as necessary to achieve the task the people have assigned them – the effective education of their children. When cyberbullying occurs then, as it often does, completely or partially off of school grounds, the first major question courts have to answer is what speech rules to apply to such disputes. Are they governed by the less speech protective rules applicable to students, or the more speech protective rules applicable to citizen speech in general? This question is critical because, as in many other areas of free speech analysis, the doctrinal rules applicable to a given dispute often dictate the outcome.[5] The other major question courts are grappling with is the proper standards to apply on the merits of a given dispute once they have determined what set of rules governs it.

Part II will provide a brief overview of what lower courts are doing in the area of student cyberspeech, particularly when it occurs off campus, when discipline imposed by school officials for engaging in it is challenged as a violation of the First Amendment. I say lower courts because the U.S. Supreme Court has recently declined to provide them with much-needed guidance in this area, at least for the time being, even though that court was presented with petitions for certiorari squarely presenting several important questions for review.[6] It will describe how the courts are in disarray in terms of deciding whether ordinary or student speech rules govern these disputes, with most federal district courts taking the position that the latter govern all of them without regard to whether the speech occurred on or off campus, while most courts of appeals that have weighed in to date have decided student speech rules apply only if the speaker could have foreseen her speech would have reached school grounds. On the merits of these disputes, because most courts are applying a substantial disruption standard to them derived from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*[7] under either of these "choice of rules" approaches (and regardless of whether they constitute cyberdissing or cyberbullying cases), they are essentially allowing school sanctions to stand if they determine the speech caused a substantial disruption at school or at least had the potential to cause such a disruption even if it did not do so in actuality. If they determine that neither of these conditions are met, then they are concluding that the sanction violated the First Amendment.

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5. *See generally, e.g.*, Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006).

6. *See* Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012) (denial of certiorari in cyberdissing case presenting question of how free speech principles apply to such disputes); Kowalski v. Berkeley Cnty. Schs., 132 S. Ct. 1095 (2012) (same in cyberbullying case).

7. 393 U.S. 503 (1969).

Part III will examine the "choice of rules" question and whether the current approaches being taken by the courts make sense. It will conclude that it is indefensible for courts to be taking the position that student speech rules, and particularly the *Tinker* disruption standard, apply to these disputes regardless of the geographic location of the speech. It will also conclude that a "reaching the campus" foreseeability standard for off campus speech is also incompatible with First Amendment jurisprudence, as well as with desirable constitutional policy. Drawing parallels to public employee speech cases, I will argue that student speech rules can apply to off campus speech that is related to school relationships or activities, and where the speech implicates legitimate and substantial functional interests of the school. Under this analysis, I will conclude that cyberdissing cases are appropriately evaluated under the function-sensitive standards of student speech rules regardless of whether such communications occur on or off campus, and cyberbullying cases may or may not be adjudicated under such standards depending upon the nature of the content at issue and the geographic location of such speech. Moreover, I will argue that there also exist many other types of potential student cyberspeech disputes where a proper "choice of rules" determination will depend upon the type of speech at issue and the nature of the functional interests of a school that such speech may implicate.

Finally, Part IV will examine the particular rules of decision that should apply to student cyberdissing and cyberbullying disputes once it is determined that they can be adjudicated by reference to student speech rules. Here, I will contend that for cyberdissing disputes, a basic application of the *Tinker* disruption standard, as most courts are doing, is simply inadequate to account for the free speech interests that may be implicated by such cases. I will propose alternative merits standards, derived from both the public employee and student speech cases, that better account for such interests. I will also argue, as other commentators sensibly have, that the *Tinker* disruption standard being applied by the courts is not the appropriate one to adjudicate most typical student cyberbullying disputes. Except in certain circumstances, the principal standard that should be applied is the nebulous "invasion of rights" standard that was also announced in *Tinker*. Here I will attempt to give this standard content that is appropriately sensitive to both the functional interests of the school, as well as the free speech interests of adolescent students accused of cyberbullying other students.

In the end, it is my hope that the analytical framework I have outlined in this Article for dealing with student cyberspeech disputes will prove useful in assisting school officials and courts to determine both when function-sensitive student speech standards are applicable to them, as well as what those rules should be for the various sorts of disputes that may arise.

I. THE FREE SPEECH BACKGROUND

Under general principles the Court has developed interpreting the free speech guarantee of the First Amendment, except for certain categories of

"lesser protected" speech, if the government attempts to regulate speech on the basis of concerns about its content, including the effect of certain content on a listener, then such regulations are subjected to strict scrutiny and usually invalidated.[8] The principal rationale given by the Court for this approach is a distrust of government censorship – the concern that when the government singles out certain types of messages for disfavorable treatment, it might be doing so because of an illegitimate dislike for them (because they criticize government officials, for instance) rather than legitimate concerns about harm the speech might cause.[9]

However, when the government acts in certain capacities to accomplish functions assigned to it by the people beyond regulating general societal conduct, such as maintaining public facilities and other property, hiring and supervising employees to work in government agencies, maintaining a military force, or educating much of America's youth, the Court sensibly gives the government more latitude to regulate speech as necessary to effectively perform and accomplish its assigned functions.[10] Hence, in the seminal *Tinker* decision,[11] the Court implied that schools could regulate student speech activities such as wearing armbands to protest the Vietnam War to the extent they caused a substantial disruption of the school's educational mission, or constituted an invasion of the rights of others.[12] Were the government to attempt to restrict such core political expression by reason of the disruptive or invasive effects that speech might have outside of a special "functional" context like school, however, the Court would subject such action to strict scrutiny and ordinarily invalidate it.[13]

This "two-tier" framework for "functional" versus standard speech regulations means that the context in which the government is regulating speech on the basis of its content is vital. Take traditional bullying as an example. If the government desired to pass a general law prohibiting such conduct in society, to the extent the law covered mere verbal or expressive acts (i.e., those of a non-physical variety) that were deemed to constitute bullying (verbal intimidation or harassment, for instance),[14] standard doctrine would dictate that, as a content-based speech regulation, the law be subjected to strict scrutiny and ordinarily invalidated unless the offending speech fell into a

8. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2543-44 (2012) (plurality); McDonald, *supra* note 5, at 1348. For an extended examination of the Court's approach to free speech regulations, see McDonald, *supra* note 5.

9. McDonald, *supra* note 5, at 1349, 1359.

10. *Id.* at 1350, 1350 n. 5.

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

12. *Id.* at 513.

13. McDonald, *supra* note 5, at 1348.

14. Physical acts of bullying would not be protected under the First Amendment. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause.").

special category of content that the Court has traditionally viewed as lacking First Amendment protection – such as fighting words or true threats.[15] On the other hand, in public schools, student speech that amounted to bullying could be restricted or sanctioned to the extent it met the less speech protective standards applicable in that context to permit the government to effectively perform its function of maintaining a suitable environment for all students to learn in.

The regulation of traditional bullying carried on by verbal means between students presents little challenge for this two-tier jurisprudential framework for the simple reason that it normally occurs at school (or at least at a school event or function), or outside of school in the world at large. To the extent it occurs in the former context, the special student speech rules apply; if in the latter context, general free speech principles govern. The phenomenon of cyberbullying, however, upsets this settled framework because it is not tied to any geographic boundaries. While it is possible for an instance of it to occur entirely on campus or off campus (at least in terms of a bullying communication originating and being received entirely on or off campus even though it might be routed anywhere to transmit it), frequently it might originate off campus and be received by the target on campus and visa versa. Moreover, there are a dizzying array of permutations in between in which cyberbullying could occur, such as the communication originating off campus, being supplemented on campus, initially being received off campus, being received again on campus, and so forth. The point is that the two-tier framework which has traditionally been tied to geographic places in which the regulated communications occur is much more difficult to apply to communications in cyberspace. Hence, when cyberbullying and related cases reach court, it is little wonder that judges are struggling with whether to apply general free speech principles or special student speech standards to adjudicate a given dispute. The same problem exists for other forms of student cyberspeech such as cyberdissing, because criticism or lampooning of government officials and their conduct would receive strong protection under general free speech principles but could be regulated under student speech doctrine to the extent it substantially disrupted school operations or discipline.

Beyond this problem of deciding which set of rules applies to a student cyberspeech dispute, even after a court decides that the functional student speech principles apply (as they often do perhaps because such a determination makes it easier for them to side with the school administration), it is far from clear what those standards are and how they should be applied. If the pertinent student communication falls into a category of speech that the Court has deemed to be unprotected even under general free speech doctrine, such as true threats, then it does not matter what those standards are because the speech can be sanctioned under whatever set of rules applies. But in most

15. *See supra* note 8 and accompanying text.

cases involving contested student cyberspeech – which to date have rarely involved what the Court would consider to be genuine true threats[16] – what those functional standards are will determine whether the disputed speech can be sanctioned by school officials or not.

As will be discussed further below, whenever courts determine that student speech rules apply to a dispute about sanctioned cyberspeech, they are uniformly and indiscriminately applying the "substantial disruption" standard from *Tinker* to resolve it.[17] Many are even using language from that case to answer the threshold question of whether to apply ordinary or student speech rules to a given dispute involving off campus speech, even though *Tinker* had nothing to do with student speech occurring off school grounds.[18] As I will argue below, these courts are inappropriately placing more weight on that decision than its limited scope can bear to resolve student cyberspeech cases. But before getting to that discussion, a brief overview of these cases and what the courts are doing with them will be helpful.

II. THE STUDENT CYBERSPEECH BACKGROUND

Between 1998 and February of 2013,[19] courts (all federal save one) adjudicated at least twenty-six different cases involving First Amendment challenges to suspensions or other discipline public school officials have meted out to middle or high school students for various forms of off campus cyberspeech they engaged in.[20] Of these cases, roughly sixty percent, or fifteen, of

16. Out of twenty-six student cyberspeech cases discussed in Part II of this Article, in only one has a court found that the speech constituted a true threat that could be sanctioned on those grounds, and even that finding was highly questionable. *See* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist., 647 F.3d (8th Cir. 2011) (deciding that instant messages containing threats to shoot certain students made to a third-party student and not communicated to the alleged targets constituted true threats).

17. *See infra* notes 26-35 and accompanying text.

18. *See infra* notes 26-35 and accompanying text.

19. The survey of cases in this Article is limited to middle or high school student cyberspeech cases decided through February of 2013. Such cases decided after that time are outside the scope of my analysis.

20. An August 2011 compilation by the National School Boards Association of twenty cases involving off campus student cyberspeech can be found at NAT'L SCH. BDS. ASS'N, OFF-CAMPUS, ON-LINE STUDENT SPEECH CASES (2011), http://www.nsba.org/SchoolLaw/Issues/StudentRights/Off-campus-On-line-Student-Speech-Cases-Chart.pdf (although 21 cases are listed, 2 of the listings involved the same case). Five cases that have been decided since the list was compiled are *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch Dist.*, 696 F.3d 771 (8th Cir. 2012), *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128 (D. Minn. 2012), *Lack v. Kersey*, No. 1:12-CV-930-RWS, 2012 WL 1080620 (N.D. Ga. Mar. 30, 2012), *Bell v. Itawamba Cnty. Sch. Bd.*, No. 1:11CV00056-NBB-DAS, 2012 WL 877026 (N.D. Miss. Mar. 15, 2012), and *Wynar v. Douglas Cnty Sch. Dist.*, No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534 (D. Nev. Aug. 10, 2011). One unreported

them involved cyberdissing – sanctions imposed at least in part for online postings or other communications criticizing, mocking or appearing to threaten teachers, principals or other school personnel, sometimes in extremely vulgar or other inappropriate language.[21]

Ten of these cases involved forms of alleged bullying of other students, although only two of them involved what might be thought of as classic cyberbullying of one student by another – where a student or students created content designed to ridicule and disparage another student in a manner calculated to come to the attention of the targeted student.[22] The other eight cases

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decision that did not make the list was *O.Z. v. Bd. of Trs.*, No. CV 08-5671 ODW (AJWx), 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008).

21. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc) (student created a fictitious MySpace profile of school principal), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc) (student created a fictitious MySpace profile of his principal that was not threatening but was insulting), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Neihoff, 527 F.3d 41 (2d Cir. 2008) (ruling on an appeal of a motion for preliminary injunction where a student called the school administration "douche bags" on her blog.); Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007) (student created an instant message (IM) icon of a gun shooting his teacher); *Minneswaska*, 894 F. Supp. 2d. at 1332-3 (student insulted a hall monitor on a Facebook "wall," and later attacked the anonymous student who revealed the insult to school officials); *Lack*, 2012 WL 1080620 (student vilified his school's principal in a Facebook message and made disparaging remarks about the school's President's Council in a Facebook conversation); *Bell*, 2012 WL 877026 (student posted a rap song accusing coaches of sexual misconduct on Facebook and YouTube); Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (student created a Facebook discussion group to express harsh criticism of her teacher); Barnett *ex rel.* Barnett v. Tipton Cnty. Bd. of Educ., 601 F. Supp. 2d 980 (W.D. Tenn. 2009) (student created fictitious MySpace profile of assistant principal that included suggestive comments about female students); *O.Z.*, 2008 WL 4396895 (student posted a YouTube slide show that depicted the killing of one of his teachers); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007) (student made offensive film of teacher and posted it on YouTube); Neal *ex rel.* Neal v. Efurd, No. 04-2195 (W.D. Ark. Feb. 18, 2005), http://www.splc.org/pdf/nealvefurd.pdf (two students created websites that had derogatory and allegedly threatening comments about school); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) (student emailed a vulgar "Top Ten" list about school athletic director); Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (student made a homepage criticizing school and its administration); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (student created personal website criticizing principal and threatening a teacher with death).

22. *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011) (student created a MySpace group that suggested a co-student had herpes and then invited 100 people to join the group), *cert denied*, 132 S. Ct. 1095 (2012); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (student posted video of a group of friends speaking disparagingly about another female stu-

mainly involved postings or communications where the student author or authors allegedly identified a group or list of other students they wanted to kill or harm, wished were dead, or otherwise disparaged.[23] What distinguished this group of cases from the other two is that the alleged threats or bullying were much more abstract, remote or impersonal, not directed at one student in particular, and did not appear to have a complaining victim (the communications were brought to the attention of school officials by third parties concerned about their content).[24] One might call these "cyberventing" cases to indicate that any "bullying" involved was indirect in nature (if the communication was received at all by anyone identified in it). Finally, the last of the twenty-six cases did not involve any form of cyberdissing or cyberbullying, but rather what might be called "cyberbawdiness" where members of a girls' high school volleyball team were sanctioned for posting online photos of themselves where they were clothed but pretending to engage in sex acts.[25]

Most of these cases involved communications that originated off school campuses and found their way onto them through the action of parties other

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dent, including calling her a "slut" and "spoiled" on YouTube and then called the targeted student to let her know about the video).

23. *See Wilson*, 696 F.3d at 775 (students posted a variety of racist and sexually explicit comments about other students on a blog allegedly designed to be limited to a few school friends through the use of a foreign website address); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011) (student sent instant messages from home computer to another student that detailed which students he wanted to shoot); *Wynar*, 2011 WL 3512534 (student sent instant messages to another student about students he wanted to shoot); Latour v. Riverside Beaver Sch. Dist., No. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005) (student wrote rap songs about a fellow middle school student; one was titled "Murder, He Wrote"; another was titled "Massacre"; and another that was loaded onto his personal website); Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003) (student volleyball player posted messages on a message board about an upcoming volleyball game that disparaged the opposing team's players; at least one of the messages was posted from a computer on campus); Mahaffey *ex rel.* Mahaffrey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (student contributed to a website titled "Satan's web page," listing people he wished would die and suggesting other students commit violent acts); Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791 (N.D. Ohio 2002) (student created a personal website that included a list of "losers," who were fellow students at his middle school); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash 2000) (student created a website at home that included mock obituaries of his friends modeled after obituaries written for a school assignment and an option for visitors to the site to decide who would be the subject of the next mock obituary).

24. *See D.J.M. ex rel. D.M.*, 647 F.3d at 756; *Wynar*, 2011 WL 3512534 at *1; *Latour*, 2005 WL 2106562 at *1; *Flaherty*, 247 F. Supp. 2d at 700-01; *Mahaffey ex rel. Mahaffey*, 236 F. Supp. at 782; *Coy ex rel. Coy*, 205 F. Supp. 2d at 795; *Emmett*, 92 F. Supp. 2d at 1089.

25. T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011).

than the student speaker – mainly complaining parents, informing students, or school officials investigating allegations of inappropriate cyberspeech.[26] They also all involved the question of how *Tinker*'s substantial disruption standard should be applied to the case, with some also considering whether and how the Court's decision in *Bethel School Dist. v. Fraser*[27] (allowing the regulation of on campus vulgar or lewd student speech) might apply to a given dispute.[28] These courts generally took two main approaches to the question of whether general free speech principles or the *Tinker* standard applied. Most of them, predominately lower federal district courts, surprisingly (surprising given the two-tier structure of speech in this area) took the approach that the geographic location of the student speech was immaterial – the *Tinker* standard applied regardless of where the student speech occurred as long as it somehow made its way onto campus.[29] As one of these courts observed, "under the majority rule . . . the geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech."[30]

Most of the few federal courts of appeal that considered the issue, however, concluded that some form of threshold standard must be met before the *Tinker* standard, rather than ordinary free speech principles, applied to the case. The Second and Eighth Circuits appear to require that a student be able to reasonably foresee his or her communication will be brought onto campus before the *Tinker* standard applies.[31] The Fourth Circuit has required that a

26. *See, e.g.*, *Layshock*, 650 F.3d at 208 (fictitious MySpace page for the principal was one of four such profiles created by students; the principal's daughter brought the page to the school's attention.); *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 772 (parent of another student brought copies of lewd photos posted online by T.V. to superintendent.); *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1098 (student's parents complained to school officials about YouTube video featuring derogatory comments about her.); *Coy ex rel. Coy*, 205 F. Supp. 2d at 795 (students brought Coy's website to the attention of a math teacher); *Killion*, 136 F. Supp. 2d at 448–49 (undisclosed student distributed re-formatted email on school grounds.); *Emmett*, 92 F. Supp. 2d at 1089 (student's web site was featured on television news).

27. 478 U.S. 675, 685 (1986).

28. *See, e.g.*, Doninger v. Niehoff, 514 F. Supp. 2d 199, 213 (D. Conn. 2007) ("Under *Fraser,* then, schools are generally held to have the authority to censor on-campus speech that school authorities consider to be vulgar, offensive, or otherwise contrary to the school's mission to 'inculcate the habits and manners of civility,' without the need to show a 'substantial disruption' under *Tinker*." (internal citations omitted)), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

29. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1108.

30. *Id.*

31. *See, e.g.*, D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir. 2011) (agreeing with the District Court's application of *Tinker* because "it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment"); *Doninger*, 527 F.3d at 50 (finding that it was "reasonably foreseeable that [defendant's] posting would

sufficient nexus between the student's off campus speech and the school's pedagogical interests be established before *Tinker* applies, which might include the fact that a speaker could foresee that her speech could "reach the school or impact the school environment."[32] A majority of judges on the Third Circuit, however, have suggested that the location of the speech might be immaterial to the application of *Tinker* although that court's position remains far from clear.[33] In a word, the courts' positions on the governing rules for these disputes are currently in disarray.

Most of them seem to agree, however, that once the *Tinker* substantial disruption standard is found to apply, actual or reasonably forecasted disruption of school functions from the disputed speech is sufficient to support sanctioning it.[34] In other words, such substantial disruption need not actually occur; it is sufficient if the school officials had reasonable grounds to predict substantial disruption arising from speech even if it never actually resulted. Finally, most courts are in agreement that, although the Court's decision in *Fraser* permits school officials to sanction lewd or vulgar speech that occurs on campus, the decision *is* geographically limited in the sense it cannot be reasonably read to permit the disciplining of student speech because of its lewd or vulgar nature when it occurs off school grounds.[35]

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reach school property" therefore, under *Tinker*, the school could regulate the off-campus cyberspeech); Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007) ("[F]oreseeability of both communication to school authorities, including the teacher, and the risk of substantial disruption is not only reasonable, but clear. These consequences permit school discipline, whether or not Aaron intended his IM icon to be communicated to school authorities or, if communicated, to cause a substantial disruption.").

32. Kowalski v. Berkeley Cnty. Sch., 62 F.3d 565, 573 (4th Cir. 2011) ("[W]e are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."), *cert. denied*, 132 S. Ct. 1095 (2012).

33. *See id.* (looking only at whether substantial disruption was foreseeable without regard to where the speech was initiated). *But see* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc) ("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."), *cert. denied*, 132 S. Ct. 1097 (2012).

34. *See supra* notes 26-33 and accompanying text.

35. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 927 (3d Cir. 2011) (en banc) ("The first exception is set out in *Fraser*, which we interpreted to permit school officials to regulate 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech *in school.*" (quoting Saxe v. Sate Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001))), *cert. denied*, 132 S. Ct. 1097 (2012); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 760 (8th Cir. 2011); Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008) ("It is not clear, however, that *Fraser* applies to off campus speech."). *But cf. Kowalski*, 652 F.3d at 573–74 ("We need not resolve, however,

III. THE GOVERNING STANDARDS DISARRAY

This section will address the "disarray" mentioned above – the question of what set of principles should govern student cyberspeech disputes; ordinary free speech principles that govern the speech of the general citizen or the less speech protective rules that govern student speech under the *Tinker* line of decisions.

As noted earlier, the basic rationale the Court has relied on for allowing government entities greater leeway to regulate speech that occurs in settings where they have been tasked with performing particular functions such as educating our nation's youth, is that such regulation is sometimes necessary to the efficient and effective performance of those functions. Hence, in the *Tinker* case itself, in discussing the circumstances under which students' free speech rights allowed them to conduct peaceful protests of a political nature at school, the Court essentially said that that point was until such speech substantially interfered with the school's effective accomplishment of its mission to properly educate the students.[36] It seems clear, then, that the circumstances where such special "functional" rules should apply to a given dispute should be limited to those situations that potentially implicate the legitimate institutional interests of the government actor. I say "potentially" because the best the law can do is to prescribe general standards for resolving different types of disputes based on the interests they implicate, and then leave it to the executive (in these cases its educational agencies) and judicial branches to apply those standards to the varying facts and circumstances of particular situations.

For student speech that occurs in a school setting, where a communication is both originated and received on campus, the physical space where the speech happens provides assurances that a school's functional interests are sufficiently implicated to adjudicate any disputes that arise by reference to the appropriate functional standards. Thus, when "high-value" political speech occurs at school, such as a war protest, the Court deems it legitimate to test the constitutionality of any restriction of it by reference to a disruption standard that is not deemed sufficiently protective of such speech outside of school grounds. Or when "low value" speech occurs at school, such as the lewd and vulgar student speech at issue in *Fraser*, because part of the functional interests of a school is to inculcate civil norms of behavior, the fact that the speech occurred where such norms are being taught legitimizes the application of a less protective speech standard than would otherwise be applied to such speech off school grounds.

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whether this was in-school speech and therefore whether *Fraser* could apply because the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated").

36. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (explaining that regulation of student protests would violate students' constitutional rights "if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school").

However, when student speech occurs at least partially or totally off of school grounds, the connection between where the speech occurs and the accomplishment of a school's mission becomes more attenuated. We become less certain in such circumstances that the subordination of ordinary free speech values is necessary in order for a school to effectively achieve its legitimate institutional interests. And so it becomes necessary to examine what institutional interests might be threatened by particular types of off campus student speech, and whether those threats seem substantial enough to warrant the application of "function-sensitive" speech standards to adjudicate those disputes.

After all, the Court has properly recognized that a "functional" government institution's legitimate interests do not always stop at the institution's physical boundaries. For instance, in *Morse v. Frederick*,[37] it dealt with the question of whether the exhibition of a "Bong Hits for Jesus" banner across the street from a school, but within the scope of a school-sponsored event, could be sanctioned where such speech would ordinarily be protected under general free speech principles. The Court ruled that it could, and rejected the argument that the latter principles should govern the case because the student speakers were not on school grounds.[38] Although it did not clearly explain its reasoning, the Court indicated that the speakers were effectively at school because the banner was displayed at a school-sponsored and controlled event in close proximity to the school.[39] In other words, one might say, the school's legitimate functional interests extended to the space across the street from the school under the circumstances of that case. And given that one such interest is teaching kids that promoting illegal drug use is not desirable behavior, the Court ruled that the speech could properly be sanctioned by the school.[40]

The Court has made the point about an institution's functional interests extending beyond geographic markers even more forcefully in the government employment context. Ordinarily, in cases where a government employee alleges that her employer has violated her First Amendment rights by sanctioning her speech, the Court asks whether the employee engaged in the speech in her employment capacity (i.e., on a matter of personal dispute regarding the employment), or in her capacity as a general citizen (i.e., on a matter of public concern).[41] If the former, no constitutional protection applies and the speech can be sanctioned; if the latter, the speech can still be sanctioned under a balancing test if harm caused by the speech in terms of interfering with the effective discharge of the employer's function outweighs the benefits of the speech in terms of the value it provides for public monitoring

37. 551 U.S. 393 (2007).
38. *Id.* at 400–01.
39. *Id.*
40. *Id.* at 407–08.
41. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

of government operations (standards less protective of speech than general free speech principles would provide).[42]

While most of these cases have involved discipline imposed upon employee speech that occurred in the workplace, where once again the location of the speech serves as a proxy for the judgment that the employer's legitimate interests are sufficiently implicated to subject disputed speech to such "function-sensitive" rules,[43] some of them have involved speech engaged in outside the workplace which the government attempted to discipline or otherwise regulate. In the seminal case of *Pickering v. Board. of Education*,[44] for instance, a school board terminated a teacher in the district for writing a letter to a newspaper editor complaining about certain actions the board had taken. Even though this was off-worksite speech, the Court believed the school's interests to be sufficiently implicated by its work-related content to justify applying the functional public concern balancing test described above to evaluate the constitutionality of the firing.[45]

Similarly, in *City of San Diego v. Roe*,[46] a San Diego police officer was discovered to be selling videos on the Internet in which he was performing explicit sexual acts in a generic police uniform and otherwise intimating that he worked as a police officer. The Ninth Circuit invalidated his firing on First Amendment grounds, principally because the officer's speech took place off duty and away from his employer's premises, and was unrelated to his employment.[47] The Court unanimously and summarily reversed this ruling, holding that under the function-sensitive rules for government employee speech, the officer's expression was not of public concern and hence lacked constitutional protection (even though such speech would have been fully protected had the Court seen fit to apply general free speech principles).[48]

In so ruling, the Court distinguished an earlier case where it had applied heightened (i.e., stricter than normal) First Amendment scrutiny to a law that prohibited certain federal employees from making money from speeches and writings they made or produced outside the scope of their employment.[49] Where in that case "it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer,"[50] here the officer's speech was linked to his employment and the police department had "demonstrated legitimate and substantial interests of

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42. *See id.* at 416; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

43. *See, e.g.*, *Garcetti*, 547 U.S. at 420-2; Connick v. Myers 461 U.S. 138, 140-42 (1983).

44. 391 U.S. 563 (1968).

45. *Id.* at 573–74.

46. 543 U.S. 77 (2004) (per curiam).

47. Roe v. City of San Diego, 356 F.3d 1108, 1110–11, 1122 (9th Cir. 2004), *rev'd*, 543 U.S. 77 (2004).

48. 543 U.S. at 84–85.

49. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1994).

50. *City of San Diego*, 543 U.S. at 81 (construing *Nat'l Treasury Emps. Union*).

its own that were compromised by his speech."[51] In fact, the Court concluded, the officer's speech "was detrimental to the mission and functions of the employer"[52] in that "it brought the mission of the employer and the professionalism of its officers into serious disrepute."[53]

These cases, then, provide support for the principle that a functional government agency's legitimate interests may not be limited to the geophysical boundaries of that institution. In them, the Court suggested that where the content of "off-location" speech is related to the speaker's involvement with the institution, and the institution has demonstrated "legitimate and substantial interests" that may be harmed by it, then any regulation of it should be tested by the appropriate function-sensitive standards applicable to that institution rather than general free speech principles. In the context of a school's regulation of off campus student cyberspeech, this analysis suggests that when its content is related to the student's attendance at school, and schools can demonstrate legitimate and substantial functional interests that could potentially be impaired by that speech, then the constitutionality of its regulation by the school should be tested by a standard that is sufficiently sensitive to both the student's free speech rights and the protection of those interests.

In cases of off campus cyberdissing that is brought onto school grounds through no action by, or intent of, the student speaker, the "content relationship" requirement is satisfied by definition. Since such communications ordinarily involve the criticism, disparagement or mocking of school personnel because of their roles at school, the content of those communications would obviously be related to the student's attendance at it. The question is then whether the schools have legitimate and substantial functional interests sufficient to adjudicate such disputes by reference to function sensitive speech standards. Here, at least three such interests come to mind as potential candidates.

The first and main one can be drawn from *Tinker* itself – the possibility that such communications could substantially disrupt the educational process of the school. This could conceivably occur either by undermining the authority of school personnel to such a degree that they could not adequately manage and control students for the purpose of providing an effective teaching and learning environment, or by disrupting that environment in situations where attacks caused targeted school personnel to request leaves or assignment changes. Second and relatedly, is a school's interest in protecting the psychological well-being of its teachers and other personnel, particularly where the communications contained arguable threats to their person or potentially defamatory material (of course, to the extent such communications contained "true threats" as defined by the Court the issue would be moot because the speech would lack any form of constitutional protection to begin

51. *Id.*
52. *Id.* at 84.
53. *Id.* at 81.

with).[54] Finally, one could argue that a school might have a *Fraser*-type interest in teaching students appropriate and civil modes of challenging authority in cases where the disputed communications contained uncivil modes of discourse.[55]

However, would these interests be both legitimate and substantial enough to "lessen" the constitutional protection available under free speech standards that normally prohibit the regulation of communications on the basis of what they say? The last interest in the group seems clearly inadequate to allow schools to police such off campus communications under a less protective function-sensitive standard. While schools can legitimately demand civil communications during times and places that are under their control and supervision, it would strain credulity to believe that the public has tasked schools, rather than parents or other guardians, with the responsibility of shaping the characters and manners of our youth outside of school. The virtually unanimous position of the courts that *Fraser* interests only justify the regulation of student expression on campus or otherwise during school-sponsored activities seems clearly correct regardless of whether one is speaking about cyberdissing, cyberbullying or other forms of student cyberspeech.

With respect to protecting the educational process from substantial disruption, as well as the psychological well-being of school personnel, these interests seem sufficiently legitimate and substantial to at least test any sanctioning of off campus cyberdissing by an appropriate function-sensitive standard (particularly in cases where such communications have impaired the ability of teachers or other personnel to perform their normal job responsibilities). In other words, school officials ought to at least have the power to evaluate such cyberdissing for potential sanction under function-sensitive standards because of its ability in serious cases to substantially implicate these interests even though, as noted earlier, such cases present a risk that school officials might abuse this regulatory authority for the purpose of stemming legitimate criticism of their actions. However, the answer to this risk is not to make schools virtually powerless to address these situations under ordinary free speech principles, but to adopt function-sensitive standards for adjudicating these disputes that are also sufficiently protective of

54. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 344 (2003) ("[T]he First Amendment permits a State to ban 'true threats' . . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.").

55. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) ("It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board.").

the speaker's free speech rights and attuned to the risk of illegitimate censorship. Just what such a "merits standard" should be, and whether the popular *Tinker* substantial disruption standard is the proper one for these cases, will be examined in the next section of this article.

Moreover, if these functional interests of a school are sufficiently weighty to justify applying student speech rules to cyberdissing that takes place off campus and is only brought onto it through no action or intent of the speaker, then *a fortiori* they would also justify the application of such rules where the speaker either brought the speech onto campus herself (say by accessing a webpage and sharing it with other students), or took actions to direct the communications onto school grounds.

Cyberbullying of one student by another that is engaged in entirely or partially off campus, however, raises similar or different concerns than cyberdissing depending on the type of it that is at issue (i.e., the "classic" form of cyberbullying or the more remote and indirect "cyberventing" type, both as described above). Preliminarily, however, one major difference from cyberdissing that holds true regardless of the variety of student cyberbullying at issue is that the content of such speech may or may not relate to the speaker's attendance at school (whereas cyberdissing by definition is always about school relationships). For instance, a student might engage in the cyberbullying of another student from the same school for reasons that have nothing to do with their relationship at school or status as students.

Assume there are two boys who live in the same neighborhood and attend the same large school, but have never seen each other at school because they are in different grades and classes. Assume also that they get into a dispute playing baseball at a local park, which then leads to an off campus cyberbullying incident where one boy emails or texts harassing or insulting messages to the other boy. If the school were to receive a complaint about such bullying from a parent of the bullied boy, even were it appropriate for the school to take cognizance of such a dispute (say, for instance, the school's policies were drafted to cover cyberbullying by one student of another regardless of why it occurred or the location of the speech), it seems clear it would have no legitimate interest in applying student speech rules in evaluating a potential sanction even if the communications were to impact the targeted student's learning environment (say, because, he was intimidated by the bully and was in the same class with him or saw him in the library, etc.). Where the content of the bullying speech was unrelated to the communicants' status as students and it took place entirely off campus, the speech would seemingly lack a link to the school that would make it permissible for it to sanction unless such an action was constitutional under general free speech principles (not to mention other constitutional requirements such as due process that would likely be implicated were a school to sanction such speech). Ordinarily, such a matter would be the responsibility of the boys' parents to address, with the assistance of local police in sufficiently serious cases who would undoubtedly be operating under standard free speech constraints.

But, a person might reasonably ask, what if the bully in such a case did not use a targeted communication like a text or email, but rather posted his bullying communication on a website for the world to see, or posted it on a social networking site like Facebook or MySpace and distributed it to a group of friends that included other students from the school? And what if the bullying communication was then accessed at school through no action on the part of the student bully? Again, because the content of the bullying communication had nothing to do with school, it would still seem illegitimate for the school to apply student speech rules to such a dispute merely because it happened to reach school grounds in a way other than by a complaining party bringing it there. In today's interconnected world of cyberspace, permitting schools to sanction a communication that was unrelated to the speaker's or target's relationship with the school merely because it was accessed there through no purposeful action or intent on the part of the speaker would arguably expand school authority beyond its legitimate sphere. Hence, even courts that might apply some sort of loose foreseeability standard before evaluating student cyberspeech disputes under student versus ordinary speech rules, applying functional standards so long as the speaker could foresee that the communication might reach school grounds, would seem to be on questionable ground in cases where the communication was unrelated to school.

On the other hand, if the speaker in our scenario were to post or otherwise disseminate his bullying content in such a way that he knew there was a high degree of likelihood it would be received or otherwise accessed on school grounds – in other words, he purposefully directed the communication to school grounds either actually (say by emailing students he knew was at school and telling them to access his post) or constructively (say by transmitting his content to an audience comprised principally of co-students at the school under circumstances where he knew it was highly likely it would be accessed there) – then it seems that a sufficient nexus with the disciplinary authority of the school would be created sufficient to make it legitimate for the school to apply student speech standards to the matter even where the content was unrelated to school attendance. This situation would then be akin to cyberbullying occurring entirely on school grounds (say by a text or email sent and received on school property) where a school would clearly be warranted in applying student speech rules to the dispute even if the problematic content arose out of events entirely unconnected with the school.

In sum, in cases where the content of off campus cyberbullying communications are unrelated to the students' attendance and relationships at school, it would seem illegitimate for a school to apply student speech rules to such incidents unless the speaker were to purposefully direct those communications, either actually or constructively, to school grounds. But what about off campus cyberbullying between students where the content *did* arise out of relationships or events at school, and hence at least satisfied the "content relationship" requirement for applying functional speech standards beyond the geographic boundaries of the government institution? Would a school have legitimate and substantial interests to warrant the application of student

speech rules to exclusively off campus cyberbullying where the communication is brought on campus and to the attention of school officials through no action or intent on the part of the bully?

It is here where the distinction between "classic" or true cyberbullying, and remote or indirect cyberbullying (i.e., cyberventing, if you will), becomes important. In the former type of case, where a student or students have directly targeted another student for abusive and potentially harmful treatment through cyberspeech, schools would seem to have a legitimate and substantial interest that extends beyond the school's physical facilities in ensuring that such communications do not impair his or her ability to effectively learn what they are attempting to teach. Such bullying, even though occurring off school property, can plainly impair the target's ability to concentrate in the classroom and have a variety of other detrimental effects on the learning process at school.[56] Moreover, anyone who has parented a school-age youth can attest to the fact a substantial part of the school's teaching process is homework which they expect parents to supervise and account to teachers for having had their child do. Hence, when cyberbullying arises out of relationships or events under the supervision and control of school officials, and in this sense we can say that it is occurring because of the students' identities *qua* students rather than in their roles as general citizens, it would seem legitimate for the school to apply appropriate function-sensitive student speech rules to such an incident (just what functional standards would be appropriate will be discussed in the next section of this Article).

But, one might reasonably object, why should this be so? What if a student verbally bullied another student on a Saturday in the neighborhood park because of events that transpired earlier that week at school? Could the school legitimately impose discipline for such conduct pursuant to student speech standards? The answer would almost certainly be "no." But this would be mainly because schools ordinarily are not authorized by statute or policy to police such off campus disputes in the "physical" world, whereas many laws have been written to require schools to police the cyberbullying of students regardless of its location or the reasons for its occurrence.[57] However, even if this were not so, and schools did have authorization to police such disputes, could they permissibly apply student speech versus ordinary speech standards from a First Amendment perspective? Once again my response would be "no" for the reason that it would be illegitimate to apply the former standards to speech that occurred so far removed from school grounds or the educational process that occurs there. But why then, the objection

56. *See, e.g.*, Tanya Beran & Qing Li, *Cyber-Harassment: A Study of a New Method for an Old Behavior*, 32 J. EDUC. COMPUTING RES. 265, 272 (2005) (noting that bullying victims may suffer from sadness, anxiety, fear and an inability to concentrate that affected grades).

57. *See Cyberbullying*, NAT'L CONF. OF ST. LEGISLATURES, www.ncsl.org/issues-research/educ/cyberbullying.aspx (last visited Sept. 26, 2012).

would go, should schools be able to police cyberbullying between students that occurs off campus under functional student speech standards?

My response would be that although we technically speak of cyberbullying as occurring off campus when the communications are sent or received via devices that are located off school grounds, in truth cyberspace knows no geographic boundaries and cybercommunications are much more pervasive, enduring and easy to engage in than communications in the "physical" world (in the sense of reaching a particular person over electronic networks rather than locating them in the physical world to speak with directly). Hence cyberbullying has an "everywhere" and "all the time" quality which bullying that occurs in the physical world generally lacks. Moreover, as noted earlier, cyberbullying can be engaged in with much less effort or notice than traditional bullying, even anonymously, and the concomitant threat to the targeted student's psychological well being seems sufficiently greater to make it legitimate for schools to take cognizance of such disputes and apply speech standards to them that take into account the need to protect the learning environment for targeted students.

In sum, a strong argument can be made for allowing schools to police off campus student cyberbullying that arises out of school interactions under student speech rules even though the schools' interests might not be sufficiently legitimate and substantial to reach the same conclusion were schools given authority to police similar real world bullying incidents. And if those interests are sufficiently legitimate and substantial for student cyberbullying that occurs exclusively off campus, *a fortiori* they would support the application of student speech rules where such communications originated off campus and made their way to school grounds either through the actions of the speaker or anyone else.

But what about cases that can arguably be characterized as cyberbullying in the sense of one student making disparaging or threatening comments about another student, and yet it is of a more remote and less targeted nature (what I have referred to as cyberventing)? And, again, what if such communications are made entirely off campus and brought onto through no action or intent of the speaker? In most of these cases to date, even though it seemed clear that the disputed communications arose fully or at least partially out of school interactions, there was no evidence that the targeted students were aware of them or at least that any of them or their parents had complained to school officials.[58] However, because of the potential in more serious cases

58. *See, e.g.*, D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 758–59 (8th Cir. 2011) (adult friend of a student, to whom D.J.M. sent instant messages indicating which students he would shoot, reported the information to school officials as did the student to whom D.J.M. sent the messages); Wynar v. Douglas Cnty. Sch. Dist., No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534, at *1 (D. Nev. Aug. 10, 2011) (students who were not the targets of the threats in instant messages brought the messages to the attention of the school); Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 795–96 (N.D. Ohio 2002) (school officials became aware

for such communications to impair the learning process for the targeted students even in the absence of a formal complaint, it would seem appropriate to permit schools to assess them for possible sanction under a function-sensitive standard that is also responsive to the more attenuated nature of any bullying that occurred.

Moreover, to the extent such communications contain arguable threats of gun violence occurring at school, it is clear that the school's institutional interests in preventing such violence or, more likely, the substantial disruption of school operations that could occur from threatening speech that fell short of true threats actionable by law enforcement agencies (simply because it might be interpreted by cautious parents or other students as presenting such a threat), would justify the application of function-sensitive standards to such speech. And this result would be true regardless of whether the content of such cyberventing arose out of school relationships or not.

So that leaves the question of whether off campus cyberventing that does not pose such concerns, and mainly disparages other students in a non-directed fashion because of relationships or incidents that have nothing to do with the youths' attendance at school, should be subject to ordinary or student speech protection. Here, as with true cyberbullying involving such facts (see earlier discussion),[59] it is difficult to see what legitimate and substantial interests of the school would justify functional standards being applied to such disputes unless the speaker were to purposefully direct the communications to the campus in an actual or constructive manner.

Finally, of the types of student cyberspeech cases discussed in the foregoing section, that leaves the one involving off campus cyberbawdiness by clothed members of a high school girls' volleyball team to consider.[60] This case is a good example of how, even beyond cyberbullying, cyberventing and cyberdissing, there is undoubtedly going to be a wide variety of student cyberspeech cases that raise different concerns unique to that particular type of speech. Hence, what sort of rules should govern these disputes will undoubtedly vary based on the particular concerns they raise. Now if this case had merely involved clothed students engaged in lewd or vulgar expression in off campus cyberspeech, even if it involved content related to school relationships or interactions, it is difficult to see any legitimate and substantial interests of the school that would justify the application of function-sensitive

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of student created website with objectionable content when student accessed his own website on campus and other students notified a math teacher about the site); Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002) (police notified school officials about student created "Satan's web page" after learning of the site from another student's parent).

59. *See supra* notes 19-35 and accompanying text.

60. T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 771 (N.D. Ind. 2011).

speech rules to it.[61] As discussed above, *Fraser* has been properly read to apply exclusively to on campus expression. It is also not likely that such expression, except perhaps under the most extraordinary circumstances, would present a significant risk of substantially disrupting school operations and its learning environment.

In this particular case, however, beyond making a weak argument of substantial disruption to the volleyball team, the school also argued that the postings cast disrepute on the team.[62] Because the team was part of school-sponsored extracurricular activities, the school was invoking interests akin to those recognized in *Hazlewood v. Kuhlmeier*[63] – that because the team was sponsored by the school, the public might believe it found such speech acceptable if it did not do something about it. While such interests might be sufficiently legitimate and substantial to support off campus regulation of the disputed photos were the speakers to sufficiently connect it to the volleyball team (such as wearing team uniforms in the photos), in this case there were no such connections that were made and most members of the general public would not have identified the girls' lewd expression with the team.[64] Hence, in off campus cyberbawdiness situations, it is difficult to envision school interests that would support the application of anything but full free speech protection to them absent the presence of special circumstances such as speakers connecting such expression to school-sponsored activities.

To summarize the foregoing discussion, in the area of student cyberdissing which by definition consists of speech related to school operations, I have argued that there are normally substantial and legitimate interests of the school at stake that would justify the application of appropriate function-sensitive student speech rules to such incidents, as opposed to highly speech-protective standard principles, no matter whether such speech takes place on or off a school's campus. However, as I will discuss in the next section, such student speech standards would need to be sensitive not only to relevant functional interests of the school, but also to the heightened risk of illegitimate censorship such cases present.

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61. This might be a different story if the girls had been partially or entirely nude. Although this would still be primarily a parenting issue, it is possible that such speech might be unprotected as a form of child pornography or raise other concerns that might implicate a school's legitimate functional interests. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (noting that child pornography is not protected speech). Such a determination would depend upon the particular facts of such a case.

62. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 773 ("Defendants explain the basis for Principal Couch's decision [to suspend T.V. from school and extracurricular activities] as his determination that the photographs were inappropriate, and that by posing for them, and posting them on the internet, the students were reflecting discredit upon the school." (internal quotation marks and citation omitted)).

63. 484 U.S. 260 (1988).

64. *See T.V. ex rel. B.V.*, 807 F. Supp. 2d at 771-72.

With respect to cases of true cyberbullying or cyberventing that occur off campus, I have argued that it is important to distinguish between situations where the bullying speaker is engaging in such communications as a general citizen, or because of their status as a student. Hence, in situations where the disputed content is unrelated to the communicants' roles as students, but rather arose out of non-school related interactions or relationships, it would be difficult to justify applying anything but ordinary free speech rules to such disputes with two notable exceptions. The first is where the speaker actively or constructively directs such speech onto school grounds, and the second is where such speech raises substantial institutional concerns that gun or other forms of mass violence might occur at school. By contrast, where the content of the bullying communication, whether of the direct or indirect variety, is related to school in the sense it refers to school events or arises out of relationships or interactions formed or occurring there, I have argued that the school has sufficiently substantial interests at stake to justify the application of function-sensitive speech rules regardless of where it occurs.

Lastly, I have argued that whether ordinary or student speech principles will apply to other forms of off campus student cyberspeech disputes such as those involving cyberbawdiness will depend on the unique concerns and interests of a school that may be implicated by the speech at issue. As to mere cyberbawdiness that does not involve actual nudity or other special circumstances, there would appear to be insufficient justification for applying anything but standard free speech principles to such incidents. But as to any form of student cyberspeech that both originates and is received on campus, it seems clear that appropriate school function-sensitive standards are the ones that ought to apply to govern disputes arising from it.

I have attempted to visually capture these conclusions in the following chart:

Missouri Law Review, Vol. 77, Iss. 3 [2012], Art. 7

DO GENERAL FREE SPEECH PRINCIPLES (FS) OR FUNCTION-SENSITIVE STUDENT SPEECH RULES (SS) GOVERN STUDENT CYBERSPEECH DISPUTES?

		FORM OF COMMUNICATIONS			
		Exclusively on-campus cyberspeech	Originating off campus but purposefully directed on (actually or constructively)	Originating off campus and not purposefully directed on	Exclusively off-campus cyberspeech
CONTENT OF COMMUNICATIONS	Arises out of school interactions or related to school activities	Cyberdissing (CD): SS	CD: SS	CD: SS	CD: SS
		Cyberbullying & Cyberventing (CB/CV): SS	CB/CV: SS	CB/CV: SS	CB/CV: SS
		Cyberbawdiness (CW): SS	CW: SS	CW: FS	CW: FS
	Unrelated to school interactions or activities	CD: n/a	CD: n/a	CD: n/a	CD: n/a
		CB/CV: SS	CB/CV: SS	CB/CV: FS	CB/CV: FS
		CW: SS	CW: SS	CW: FS	CW: FS

Whether one agrees with these conclusions or not, one thing that seems clear is that the two main approaches currently being taken by the courts to the "governing rules" issue are misplaced or inadequate.' Certainly the courts applying the *Tinker* disruption analysis to all forms of student cyberspeech disputes without regard to where the speech occurred, or how its content relates to the school, are missing the boat and in many cases will be applying function-sensitive rules where the application of more robust free speech principles would be warranted. And even the courts of appeal that are cor-

rectly undertaking a threshold analysis of the governing rules question are failing to identify the proper factors that should govern it as I have outlined above. Merely asking whether a student speaker could foresee that her speech could reach the school campus, particularly in the interconnected world of cyberspace, is effectively saying the same thing that the lower courts are – that they will apply student speech standards to virtually all of these disputes, essentially giving schools carte blanche to wield supervisory power over student cyberspeech even where they do not have a legitimate and substantial basis for doing so.

In the next section of this Article I will take up the question of what the appropriate function-sensitive standards are that should be applied to different student cyberspeech disputes where such application is warranted under the foregoing analysis. As one might expect, I will be arguing that an indiscriminate application of the *Tinker* disruption standard to all such disputes as the courts are currently doing is also not the correct approach.

IV. MERITS STANDARDS FOR STUDENT CYBERSPEECH DISPUTES

As noted earlier, once it has been determined which set of rules it is appropriate to apply to a given student cyberspeech dispute – ordinary free speech principles or student speech standards that attempt to honor free speech rights while being more sensitive to the functional concerns of schools – the next main question becomes precisely what those principles or standards should be. These are the rules of decision that will be applied to decide the merits of a given dispute. Because this Article is focused on how student speech rules should be applied in cyberspeech cases, I will leave for a later day the discussion of how ordinary free speech principles might apply to them when they supply the appropriate rule of decision.

As the Court has illustrated in the student speech area, the relevant merits standard to apply will depend upon the functional interests of the school that are threatened by particular types of speech. So for student speech alleged to promote illegal activity, for example, *Morse* would say that such speech can be regulated so long as it can reasonably be understood by other students to in fact promote such activity in order to protect the school's function of teaching proper norms of social behavior.[65]

As mentioned above, most courts that have adjudicated student cyberspeech disputes where a student was challenging sanctions imposed for the speech as a violation of the First Amendment, have applied the *Tinker* substantial disruption standard to resolve them regardless of the type of speech that was at issue.[66] If the cyberspeech created an actual or reasonably foreseeable risk of substantially disrupting the educational process or another legitimate function of a school such as extracurricular activities, the courts are

65. *See* Morse v. Frederick, 551 U.S. 393, 403-410 (2007).

66. *See supra* notes 19-35 and accompanying text.

generally upholding them; where not, the sanctions are generally found to violate the First Amendment.[67] But in truth, the problem of determining when a sufficient disruption has occurred, or, in the absence of one, whether school officials nonetheless reasonably forecasted that the speech could have caused a substantial disruption, as the basis for sanctioning it, has created a situation where courts seem to be permitting or disallowing cyberspeech according to their subjective views of whether students should be allowed to engage in it or not. Stated bluntly, the key question seems to be, "Was it bad enough to warrant punishment?" Such undesirable subjectivity could be reduced, however, by inquiring about whether the *Tinker* disruption standard is the correct one to apply to the different types of cyberspeech disputes courts are seeing, replacing it when it is not, and tightening it up to better address the interests threatened by particular speech when it is.

Let us start with the cases that have involved various forms of cyberdissing, which as described above have ranged from harsh and caustic criticism of school personnel, to crude, vulgar, and threatening comments about them, to the lampooning of such individuals through the posting of fake profiles of them.[68] Sometimes such postings or communications have contained critical commentary about the school or the attacked person's performance in it, sometimes immature and personal attacks about things such as a person's physical features having nothing to do with his or her performance, and sometimes a combination of both.[69] Moreover, as noted earlier, these communications are rarely directed at the targeted teacher or official for fear of reprisal, and generally come to their attention through informing students, complaining parents or relatives of the targeted party.[70]

As I also argued earlier, the principal interests of the school at stake which justify the application of function-sensitive student speech standards in such cases to even off campus cyberdissing are akin to those identified in *Tinker*: preventing the undermining of school personnel authority to the extent of interfering with the school's educational processes and discipline, and protecting the well-being of those personnel. On the student speakers' side of interests to be protected can be listed the right to criticize government institutions and their employees (and, conversely, the right not to have the government engage in illegitimate censorship), as well as the free speech right to simply vent about things and people one dislikes provided that certain limits are not exceeded such as making true threats or engaging in libelous speech.

What, then, is the best rule of decision to reconcile these competing interests? To the extent that cyberdissing does exceed established free speech limits even under general principles, such as the making of true threats of

67. *See supra* notes 19-35 and accompanying text.
68. *See supra* note 21 and accompanying text.
69. *See supra* note 21 and accompanying text.
70. *See supra* note 58 and accompanying text.

harm to school personnel[71] or creating a believable Internet profile of one containing false and harmful speech,[72] this question answers itself because the speech would be generally sanctionable by the school without regard to constitutional constraint. But where not categorically excepted from basic free speech protection, one can once again draw parallels to the Court's government employee speech cases. As discussed above, in assessing the permissibility of sanctions imposed upon government employees for speech they engaged in, it begins with a threshold analysis of whether the speech addressed matters of public concern such as the legitimate criticism of government officials or actions.[73] If so, the Court does an ad hoc balancing of the value of the speech to public oversight of the government as weighed against the harm it caused or could potentially cause to the functional interests of the government agency. If not, the speech is considered to involve an internal personnel dispute that lacks constitutional protection.[74]

In cyberdissing cases, I would argue that a similar analysis should be applied but with some significant differences. A similar threshold question should be asked: did the sanctioned student's speech address matters of public concern, or did it mainly address a personal gripe the student had with particular teachers or administrators, or the school in general? Where it did address matters of public concern,[75] I would argue that the value of the speech in terms of its potential for informing the public about legitimate problems at the school that may require addressing should be weighed against the costs of the speech in terms of its disruptive effects on the school's educational processes. And here, how one measures disruptive effects is key to providing an appropriate level of free speech protection to the contested student speech. Should an actual and substantial disruptive effect be required before allowing the speech to be sanctioned, or is mere foreseeability of such an effect sufficient as most courts are interpreting *Tinker* to say?

I would submit that at least two important factors should be considered in answering this question. First, although I have argued that off campus cyberdissing should be evaluated under student speech rules because of its potential in serious cases to impact a school's performance of its mission, this

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71. *Cf., e.g.*, D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 764 (8th Cir. 2011) (holding instant messages to a co-student that D.J.M. wanted to shoot other students were true threats).

72. *See, e.g.*, Barnett *ex rel.* Barnett v. Tipton Cnty. Bd. of Educ., 601 F. Supp. 2d 980, 984 (W.D. Tenn. 2009) (asserting that "visitors to the fraudulent website believed it was authentic and that LeFlore had engaged in the inappropriate behavior. . . . [T]he Court cannot find that Plaintiffs' websites are protected as parodies under the First Amendment . . . .").

73. *See supra* note 41 and accompanying text.

74. *See supra* note 42 and accompanying text.

75. *See, e.g.*, Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1181–82 (E.D. Mo. 1998) (finding the public interest was served by student website criticizing school administration).

does not mean that the physical space in which cyberspeech occurs is irrelevant. The more off campus such speech is, the more we question the legitimacy of a school's right to police it simply because we expect a school's authority and disciplinary power to be wielded mainly in the physical spaces where it can be said the public has given the school authority to wield it – namely, at school or in school-supervised and controlled activities or events. We understand that there have to be some boundaries between a school's authority and that of a student's parent or guardian (or other civil authorities in serious cases). Hence, I would argue that for "public concern" cyberdissing that only comes onto campus through no purposeful action on the part of the speaker – say by complaining or informing third parties, or by other students under circumstances where it could not be said there was a high degree of likelihood the speaker knew it would be brought onto campus – only actual substantial disruption, or such disruption that is both probable and imminent – should be sufficient to warrant a school sanction. By contrast, where such cyberdissing occurs on campus or the speaker purposefully directs it there, actual or reasonably foreseeable substantial disruption would seem sufficient.

But even in this latter case, another important factor ought to be weighed in the calculus. Just as in public employee speech cases, I would argue that the greater the value of the disputed speech in terms of permitting effective public oversight of the school system, the greater the actual or forecasted disruption ought to be regardless of the location where it occurs. Although these factors obviously invite some of the subjectivity I objected to earlier in terms of the lower courts' application of the basic *Tinker* standard in student cyberspeech cases, some discretion is inevitable and desirable to account for the myriad of different circumstances these cases can arise in. Moreover, this proposal at least cabins some of the subjectivity by creating standards for different categories of cyberspeech, espousing the sort of categorical balancing the Court has implemented generally in free speech cases.

In cases where cyberdissing does *not* contain content that can reasonably be construed as addressing matters of public concern, but rather addresses personal gripes or other content of a non-public concern nature (such as purported threats about killing teachers,[76] or vulgar parodic profiles of school officials,[77] that lack any sort of legitimate criticism or commentary related to

76. Wisniewski v. Bd of Educ., 494 F.3d 34, 36 (2d Cir. 2007) (student created an IM icon that was "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood. Beneath the drawing appeared the words 'Kill Mr. VanderMolen.' Philip VanderMolen was [the student's] English teacher at the time.").

77. *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207-08 (3d Cir. 2011) (en banc) (vulgar "parody profile" of school principal created on MySpace), *cert. denied*, 132 S. Ct. 1097 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc) (same), *cert. denied*, 132

the targeted person's official behavior or performance), such speech should enjoy some constitutional protection even though their counterpart communications in the public employee context (i.e., speech lacking public concern components) does not. After all, while public employees choose to work in government employment, primary and secondary school students in this country are generally compelled to attend these institutions whether they want to or not. And certainly the First Amendment protects some amount of venting about government authority figures whether such speech informs the public or not.

But what should that protection be? I would contend that here the basic *Tinker* disruption standard – where student speech can be sanctioned that causes actual and substantial disruption of the educational process, or even such disruption when it is reasonably forecasted by school officials – is probably as good as any other in the cyberdissing area regardless of whether such speech occurs off or on campus (keeping in mind that when it occurs on campus, to the extent it also implicates *Fraser* or even *Kuhlmeier* concerns, it might be independently regulable under the standards applicable to on campus lewd or vulgar speech, or school-sponsored student speech, respectively). Substantial disruption or a reasonable forecast of it seems to strike the right balance for such cases between free speech rights and the functional interests of the school.

However, because the sanctioning of either "public concern" or "non-public concern" cyberdissing presents a significant risk that school officials will be motivated by ire over being disrespected or "dissed" by youth they are also trying to teach the values of respect to, rather than disciplining them for legitimate pedagogical or other institutional concerns, reviewing courts ought not to apply the foregoing standards in a manner that is deferential to the judgments of those officials. Rather, a healthy amount of scrutiny and skepticism regarding claims of substantial disruption, and especially claims of forecasted disruption, should be applied in such cases.

With respect to student to student cyberbullying cases, as discussed above, such cases – including those involving true cyberbullying and what I have termed more remote cyberventing – merit the application of student speech rules only when they contain content related to school or otherwise arise out of school relationships or interactions, unless they occur on campus or are purposefully directed onto campus by the speaker (or otherwise can reasonably be read to present a possible threat of violence occurring at school even where such speech does not amount to true threats that are regulable under any applicable constitutional standard).[78] In such cases, unlike those involving cyberdissing, the main functional interest of schools implicated by them is plainly the protection of the teaching and learning environment for

S. Ct. 1097 (2012); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001) ("Top Ten" e-mail list parodying school's athletic director).

78. *See supra* notes 19-35 and accompanying text.

the individual targeted student – that is, protecting the target's sense of psychological and emotional well-being to the extent it is being harmed by the bullying and is impairing that person's normal learning potential. Secondarily, such cases can also implicate a school's functional interests in preventing a substantial disruption of its educational process, particularly in the threat-of-violence-at-school scenarios, but in most cases of true or remote cyberbullying – particularly where schools have personnel trained to investigate and handle such cases – such risk of disruptions would seem to be attenuated except in unusual circumstances.

This obviously means, as commentators have already pointed out, that in most cases of cyberbullying the most appropriate function-sensitive standard to apply in such cases would be the "invasion of rights" standard from *Tinker* rather than its one attuned to disruption of process.[79] Then why have virtually all of the courts to date applied the latter standard in cyberbullying cases, appearing to strain to find a process disruption in cases where it seemed like the court's greatest concern was with potential harm to the targeted student?[80] I would argue that the answer is fairly simple. First, the "invasion of rights" standard is inherently vague, although perhaps not that less vague than its substantial disruption counterpart. Relatedly, the Court has yet to apply that standard in a case to provide guidance to the lower courts on how to apply it. But lack of guidance seems to be a poor excuse for failing to apply the more appropriate function-sensitive standard to cyberbullying cases, lest situations involving psychological or emotional harm but no disruption of operations (save to the targeted student's learning ability) are removed from the ambit of a school's disciplinary authority. This has arguably occurred in a least one case to date.[81]

So how should the nebulous invasion of rights standard be applied to such cases in a way that also appropriately accounts for the free speech rights of the alleged cyberbully? After all, just as students enjoy some free speech protection for criticizing or lampooning school personnel even when such speech addresses no subjects of public concern, students also surely enjoy

79. *See, e.g.*, John Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying* Tinker *in the Internet Age*, 39 PEPP. L. REV. 939, 943 n.15 (2012).

80. *See, e.g.*, Kowalski v. Berkley Cnty. Schs., 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

81. *See* J.C. *ex rel.* R.C. v. Beverly Hills Unifed Sch. Dist., 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010). In this case, a middle school student made a YouTube video in which she called another student "a slut" and made other disparaging remarks about her. *Id.* at 1098. Applying a substantial disruption standard, the court found it was not met in part because the targeted student's "hurt feelings did not cause any type of school disruption" nor was there any foreseeable risk of future disruption. *Id.* at 1117. Additionally, the court found that *Tinker's* language concerning the invasion of a student's rights was unclear and that lower courts usually did not apply that standard. *Id.* at 1122-23. It therefore concluded it was not applicable to that case. *Id.* at 1123.

some protection for being immature minors and saying mean or hurtful things to other students at times. It is interesting to note that this standard, as well as the disruption standard that was actually employed by the Court in *Tinker*, appears to have been adopted from a pair of earlier Fifth Circuit cases involving the wearing of buttons at school by students bearing civil rights messages.[82] In one of those cases, the court held that wearing the buttons was not protected speech because, among other things, students promoting the buttons had "collided" with the rights of other students by attempting to pin them on some who did not want to wear them.[83] While it is clear that such unwanted physical contact can invade the rights of others sufficient to withhold free speech protection for the expressive conduct with which it was associated, knowing when the cyberbullying of one student by another crosses that line is much more difficult to discern.

Moreover, this problem is exacerbated by the differing definitions of cyberbullying that seem to exist. For instance, the National Conference of State Legislatures' website, which compiles state laws on various subjects, defines cyberbullying as "the willful and *repeated* use of . . . electronic communication devices to harass and threaten others."[84] In other words, this definition suggests that a single incident of sending a rude and offensive email or text message to someone would not be considered bullying, but rather rude and offensive conduct. By contrast, the federal government's "Stop Bullying" website gives one example of cyberbullying as merely sending a hurtful, rude, or mean text message to others.[85] Yet other sources, such as California's cyberbullying law, seems to define it in terms of a sufficiently "severe or pervasive" communication that a reasonable person should know would cause a harmful effect on another student.[86]

These varying definitions illustrate that drawing a line between cyberbullying and mere immature adolescent rudeness can be very difficult – but the line is critical because, as mentioned earlier, one would think that our youth should enjoy some First Amendment "breathing space" to make mistakes and learn by them without the threat of government sanction. As the Court said in a case holding that a private right of action under federal law can lie against schools that fail to stop serious sexual harassment of a student by another student, "[c]ourts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that

82. Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

83. *See Blackwell*, 363 F.2d at 751, 754.

84. *Cyberbullying*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org /issues-research/educ/cyberbullying.aspx (last visited Sept. 28, 2012).

85. U.S. Dep't of Health & Human Servs., *What is Cyberbullying*, STOP BULLYING, http://www.stopbullying.gov/cyberbullying/what-is-it/index.html (last visited Sept. 28, 2012).

86. CAL. EDUC. CODE § 48900 (West, Westlaw through 2012 Reg. Sess.).

would be unacceptable among adults."[87] It proceeded to observe that there may be a "dizzying array of immature . . . behaviors by students,"[88] including "insults, banter, teasing, shoving, pushing, . . . [and] name-calling,"[89] while also noting that these behaviors were "understandable"[90] given that "at least early on, students are still learning how to interact appropriately with their peers."[91] And in addition to the First Amendment interests in giving minors room to make mistakes and grow, similar interests exist in not unduly chilling harsh but legitimate criticism and commentary by students regarding the actions of others. Moreover, there is a concern that alleged cyberbully "victims" could level such charges, not because they were truly harmful, but for insincere or ulterior reasons.

What is the best standard, then, for striking the proper balance between these free speech interests and providing adequate protection for student targets of cyberbullying? At least one thing seems clear, and that is such a standard ought to key off the principal functional concern at issue – the school's interest in maintaining and protecting a targeted student's normal learning capacity. Hence, under an "invasion of rights" rationale, alleged cyberbullying ought not to be sanctionable by school officials absent evidence that this capacity has actually been harmed in some way by it, or at least that such harm is reasonably possible absent formal action by the school to stop any ongoing cyberbullying. Additionally, to address situations where targeted minors are unusually vulnerable to being harmed from such communications, a requirement ought to be imposed that a reasonable minor engaging in them knew or should have known that they could cause emotional or psychological harm to an ordinary youth. Moreover, because a speaker might reasonably believe that allegedly bullying communications will not reach the purported victim, such as when they send an email or text to another student who they reasonably believe will not distribute it further, or content is posted to a social networking site that the speaker reasonably believes has limited access, another requirement for official sanction should be that the speaker intended or knew it was reasonably possible that the targeted student would receive the communication. Finally, because there might be legitimate reasons why one student might address another in harsh terms, it should be required that the speaker's main purpose for engaging in the communication was to harass, intimidate, threaten, insult or embarrass the targeted student for no legitimate purpose.

If these four "threshold" requirements are satisfied in a given case of alleged cyberbullying, one can be fairly certain that the disputed communica-

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87. Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 651 (1999).

88. *Id.* (quoting Brief of Amici Curiae National School Boards Ass'n et al. in Support of Respondant at 11, *Davis*, 526 U.S. 629 (No. 97-843), 1998 WL 847120).

89. *Id.* at 651–52.

90. *Id.* at 651.

91. *Id.*

tion sufficiently invaded the rights of a targeted student without adequate free speech justification – and hence that a sanction would be constitutionally permissible. Notably, the first and third requirements would likely remove many cyberventing-type cases from the ambit of school disciplinary authority except in rare cases that also implicated a school's interest in protecting its processes from disruption (to be discussed further below). Yet it seems that even an intentionally offensive and hurtful communication directed by one adolescent to another can amount more to an immature mistake than a genuine bullying situation, particularly under the stronger, more protective versions of cyberbullying definitions that appear to cover a single hurtful communication. Accordingly, I would submit that even in situations where the foregoing threshold requirements were met for a school to officially sanction such speech, that it also be required to adhere to certain proportionality standards in doing so.[92]

First, it should be asked whether a proposed sanction would be proportionate to the character of the offense and the apparent harm it caused to the targeted student. Moreover, it should also be asked whether the sanction would be no greater than necessary to restore psychological normalcy to the targeted student, or at the most to provide reasonable deterrence against other students engaging in similar cyberbullying in the future. In less serious cases, one can envision that an official warning from school officials combined with a showing of remorse and willingness to apologize to the targeted student might be sufficient to achieve the goal of restoring a sense of well-being and security to that person. In more serious cases, however, an immediate suspension or even expulsion might be warranted. In either set of cases, a school might require that the offender participate in a cyberbullying prevention program as part of his or her discipline. And schools would be entitled to consider whether the sanctions they impose would also provide an effective deterrent against other students engaging in similar behavior. The bottom line is that any official sanctions should be tied to the protection of a school's interest in safeguarding the learning capacity of victimized students or those that could be targeted in the future, and also be proportionate to the achievement of those goals.

In unusual cases, the cyberbullying of one student by another could also potentially implicate a school's interests in preventing substantial disruption of its educational or other processes; although, as mentioned earlier, as more school personnel are being designated and trained to handle such complaints it seems that the disruptive effects of such incidents will be generally contained to the students involved. As also noted, the most likely scenario for

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92. *Cf.* Doninger v. Niehoff, 527 F.3d 41, 53 (2nd Cir. 2008) (finding that student's behavior demonstrated less than good citizenship necessary to participate in student government so sanction banning student from student government was appropriate, explaining "[w]e have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.").

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substantial disruption is in cases that present a reasonable appearance or reality that gun or other sorts of mass violence could occur at school (which to date has mainly occurred in the areas of cyberventing or cyberdissing). Regardless, whenever cyberbullying incidents do implicate these functional interests, a straightforward application of the *Tinker* actual or foreseeable disruption standard seems adequate to balance them against the free speech interests implicated by such cases. And, of course, to the extent cyberbullying occurred on campus or was directed there by the speaker, any *Fraser* interests implicated by such speech could be addressed under the relevant standards of that case.

The last question becomes what level of scrutiny or deference ought to be employed by courts asked to review the application of the foregoing merits standards to cyberbullying disputes. Should it be the fairly vigorous scrutiny that I have urged for cyberdissing cases? Here, I would again make a distinction based on the location of the speech because I have urged that sanctions imposed for off campus cyberbullying can be evaluated under function-sensitive speech standards where the content is related to the school. Because allowing schools to impose sanctions on such speech where warranted under functional standards does risk an undue expansion of their regulatory power beyond school campuses, and considering, as noted earlier, that students are generally compelled to attend schools and assume identities as students, I would argue that courts should apply a reasonably healthy dose of scrutiny to the application of such standards to off campus speech (including such speech that may reach campus through no purposeful action by the speaker). By contrast, where cyberbullying occurs on campus or is purposefully directed there by the speaker, it would be more appropriate to be deferential to reasonable judgments by school administrators in applying the applicable standards in order to avoid constitutionalizing every such dispute.

V. CONCLUSION

The application of traditional, "physical world" legal standards to communications that occur in cyberspace is understandably a difficult task at times. It is my hope that the approaches I have outlined in this Article to our schools' handling of student cyberspeech disputes will prove helpful to at least clarify the major issues at stake and to suggest ways in which they should be addressed.

https://scholarship.law.missouri.edu/mlr/vol77/iss3/7