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Sticks, Stones, and Cyberspace: On Cyberbullying and the Limits of Student Speech

Matthew M. Pagett

Introduction

On October 7, 2003, thirteen-year-old Ryan Halligan of Essex Junction, Vermont, committed suicide.[1] His parents, wanting to understand the circumstances of Ryan's death, searched his computer and uncovered some very disturbing information.[2] Ryan, a middle school student who had struggled against bullying since elementary school, was relentlessly harassed online just prior to taking his own life.[3] A rumor had been spreading that he was homosexual, and he was mocked for it, mercilessly, online.[4] According to Ryan's father, the online transcripts read "like a feeding frenzy . . . everyone got in on the fun."[5] Some of Ryan's peers even "goaded him into committing suicide," with one student writing "it's about (expletive) time."[6]

1. John Flowers, *Cyber-bullying Hits Community*, Addison County Indep. (Oct. 19, 2006), http://www.addisonindependent.com/200610cyber-bullying-hits-community.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

Matthew M. Pagett currently serves as a law clerk to the Honorable Judge Linda Stephens on the North Carolina Court of Appeals. A 2008 graduate of UNC-Chapel Hill, he earned his Juris Doctor from Wake Forest University School of Law in 2012. He thanks Professor Douglas Punger for his help with the publication of this article. In addition, he is grateful to the members of the North Carolina School Boards Association, especially Kathleen Boyd, for their support and guidance. He also would like to thank his family—Greg, Lisa, and Jimmy Pagett—and his partner, Elizabeth Overcash, for their enduring love and support. Any errors of fact or misstatements of law are entirely those of the author.

While Ryan's case represents an extreme example of the possible consequences of cyberbullying, it nonetheless reflects a growing trend in U.S. public schools.[7] Unfortunately, most school administrators are unsure as to the extent of their authority to punish students for online bullying, especially when that harassment occurs off campus and after school hours.[8] While some states have passed bullying or cyberbullying legislation, the purpose of these laws is often frustrated by both the nebulous meaning of the term and the lack of any real enforcement provisions.[9]

One scholarly definition of cyberbullying describes it as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[10] Because cyberbullying is inflicted through the Internet, there is virtually no place where harassed students can avoid it. Bullying is no longer limited to face-to-face interactions, the school itself, or even the physical sphere. Bullies are now able to inflict emotional harm at any time and from any place, completely independent of the classroom.[11]

This presents new questions for educators: How may school authorities discipline students for cyberbullying? Does the school have any authority to punish students for off-campus cyberbullying? What if cyberbullying affects student and teacher activities occurring on campus? Does it matter if the bullying is lewd or obscene? Where does the proverbial schoolyard gate extend to the virtual sphere, if at all?

In order to determine the extent of a school administrator's authority to punish a student for cyberbullying, it is important to understand what cyberbullying is, the circumstances under which it occurs, established law—if any—on the subject, and how courts have traditionally dealt with student speech, both on and off campus. Although the U.S. Supreme Court has yet to address this question in the context of electronic speech, this article will discuss what the Court has said so far and review the fact sets of some lower court decisions dealing with cyberbullying.

What Is Cyberbullying?

Cyberbullying has been defined, variously, as (a) "willful and repeated harm inflicted through the medium of electronic text";[12] (b) "when teens use the internet, cell phones, or other devices to send or post text or images intended to hurt or embarrass another person";[13] (c) "when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise

7. Brian Dakss, *Cyber-Bullying Growing*, CBSNEWS.com (Feb. 11, 2009), http://www.cbsnews.com/2100-500176_162-681867.html.

8. Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. Times (June 27, 2010), http://www.nytimes.com/2010/06/28/style/28bully.html?pagewanted=all.

9. *Id*.

10. Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 Archives of Suicide Res. 206, 208 (2010).

11. Hoffman, *supra* note 8 (noting that cyberbullying "almost always occurs outside of school and most severely on weekends, when children have more free time to socialize online").

12. Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 Youth Violence and Juv. Just. 148, 152 (2006).

13. D.C. v. R.R., 106 Cal. Rptr. 3d 399, 420 (Cal. Ct. App. 2010) (quoting Nat'l Crime Prevention Council, *Cyberbullying*, NCPC.com, http://www.ncpc.org/cyberbullying).

targeted by another child, preteen or teen using the internet, interactive and digital technologies or mobile phones";[14] or (d) "[a]ny kind of aggression perpetuated through technology."[15]

The wide variety of definitions speaks to the difficulty that scholars, policy makers, and judges have had in trying to establish a uniform definition of cyberbullying. For instance, definition (a) excludes electronic images and video. It also states that cyberbullying occurs after "repeated harm," whereas definition (b) makes no such distinction. Further, definitions (b) and (c) both relegate cyberbullying to teens or preteens. Definitions (a) and (d) do not. Also, definition (c) bases the occurrence of cyberbullying solely on whether the victim was "tormented," thereby excluding the bully's intentions from its meaning; yet definitions (b) and (d) are based exclusively on the intention of the bully (e.g., whether the cyberbully acted with "aggression") and do not consider the effect on the victim. Applying a standard definition to cyberbullying is as difficult for school administrators as determining whether cyberbullying has occurred in their schools at all and, if so, what to do about it.

For the purposes of this article, the term *cyberbullying* will refer to "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[16] This definition is necessarily broad because of the nebulous nature of the subject. It is important to note that the definition being used: (1) does not exclude *adults* from cyberbullying behavior; (2) represents repeated harm; (3) requires both that the harm actually occurs and is willful; and (4) allows for cyberbullying to occur via any "electronic device"—extending the definition to include texting, sexting, video, chat, social networks, Twitter, Facebook, or any other form of computer or bullying. Such a broad definition enables the discussion of a number of different cyberbullying fact sets.

North Carolina Statutory Law

In order to address the rising issue of cyberbullying in the United States, a number of state legislatures have adopted anti-bullying and anti-cyberbullying legislation.[17] In North Carolina, many statutory provisions may apply to cyberbullying. The most pertinent is the aptly named "cyber-bullying; penalty" statute.[18] That statute effectively splits the prohibited behavior into two categories—one that requires an "intent to intimidate or torment a minor" and one that does not.

The intent section prohibits the use of a computer with the intent to intimidate or torment a minor or, in some cases, the minor's parent or guardian for the purpose of: (1) building a fake profile or website; (2) posing as a minor online; (3) following a minor online; (4) posting or encouraging others to post private, personal, or sexual information about the minor; (5) posting an image of a minor on the Internet; (6) accessing, altering, or erasing any computer network,

14. WiredKids, Inc. *What Is Cyberbullying, Exactly?*, Stop Cyberbullying, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Nov. 16, 2012).

15. Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media and Youth Violence: A CDC Issue Brief for Researchers* (Atlanta, Ga.: Centers for Disease Control, 2009), http://www.cdc.gov/violenceprevention/pdf/Electronic_Aggression_Researcher_Brief-a.pdf.

16. Hinduja & Patchin, *supra* note 10, at 208.

17. Hoffman, *supra* note 8.

18. Section 14-458.1 of the 2012 North Carolina General Statutes (hereinafter G.S.).

data, program, or software (including passwords); or (7) using a computer system for repeated, continuing, or sustained electronic communications to a minor.[19]

This part of the statute prohibits cyberbullying only against minors, not adults. Thus, the statute would not apply to most cyberbullying that occurs on college campuses and in the rest of the adult world. Further, it should be noted that provisions (1) through (6) of the statute require only one occurrence of cyberbullying for a violation to occur, while provision (7) must be repeated, continuing, or sustained.

Also, there is some debate as to whether this section of the statute applies to text messaging. In one potential North Carolina cyberbullying case, the local district attorney's office decided not to prosecute two would-be cyberbullies because the prosecutors did not believe that cyberbullying via text message was prohibited, citing the statute's use of the word "computer" and not "cell phone."[20] That interpretation may be on the decline, however, with the increasing complexity of modern-day cellular phones.

With the advent of the iPhone and other so-called smart devices, cell phones are becoming more and more like miniature computers. In fact, according to the Pew Internet & American Life Project, twenty-five percent of the American population eschews personal computers in favor of smartphones when spending time on the Internet.[21] Given that the cyberbullying statute prohibits harassment using a "computer system," which is defined by the legislature as "at least one computer together with a set of related, connected, or unconnected peripheral devices,"[22] and the further knowledge that the North Carolina legislature has defined "computer" as "an internally programmed, automatic device that performs data processing or telephone switching,"[23] it is likely that cell phones and, thus, text messaging would now fall under the category of "computers" and, consequently, within the meaning of the cyberbullying statute.

The second part of the statute, however, is one of strict liability, lacking an intent element. This section states that it is unlawful, under any circumstances, to use a computer or computer network to (1) plant a statement tending to provoke or that actually provokes any third party to stalk or harass a minor, (2) register a minor for a pornographic website, or (3) register a minor for email lists or to receive junk email and instant messages, resulting in intimidation or torment without authorization.[24] Note that provision (1) of the statute prohibits the planting of either true or false statements that tend to provoke stalking or harassment of a minor.

The North Carolina cyberbullying statute is powerful both because it is meant to reach beyond the schoolyard gate and because it creates a criminal offense for cyberbullying activities, which are punishable as a misdemeanor.[25] According to the chief sponsor of the bill, former

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19. *Id.*

20. *See* John Hinton, *No Charges to Be Filed in Teen Suicide*, Winston-Salem J. (Apr. 21, 2010), http://www.journalnow.com/news/2010/apr/21/no-charges-to-be-filed-in-teen-suicide-ar-174016 (quoting the police chief) ("[the] text messages . . . did not violate the state's cyberbullying law, which prohibits using a computer to harass or torment a minor").

21. Aaron Smith, *Smartphone Adoption and Usage*, Pew Internet & American Life Project (July 11, 2011), http://www.pewinternet.org/Reports/2011/Smartphones.aspx ("When asked what device they normally use to access the internet, 25% of smartphone owners say that they mostly go online using their phone, rather than with a computer.").

22. G.S. 14-453(6).

23. G.S. 14-453(2).

24. G.S. 14-458.1.

25. *Id.*

Mecklenburg representative Nick Mackey, cyberbullying "allows the bullies to reach the victim anytime. The victim can't even go home to escape it."[26] This statement is further evidence that the statute was written with the purpose of preventing bullying both on and off campus (i.e., in the home), where government authority to regulate student speech is diminished.

As a criminal statute, the North Carolina prohibition against cyberbullying is applicable only if the local district attorney's office decides to prosecute. As noted above, at least one North Carolina district attorney's office has decided against employing the statute because it was thought to be too narrow.[27] Where the cyberbullying law proves ineffective, however, North Carolina school administrators may have some recourse under the state's school-specific bullying statute.[28]

In pertinent part, the school-specific bullying statute prohibits any electronic or otherwise threatening communication that takes place on school property, at any school-sponsored function, or on a school bus and that (1) places a student or school employee in actual and reasonable fear of harm to his or her person or property or (2) creates or is certain to create a hostile environment.[29] The statute also provides that schools must adopt policies prohibiting bullying behavior[30] and develop and implement methods and strategies for promoting school environments that are free from bullying behavior[31] while simultaneously refraining from infringing on student free speech.[32]

By charging schools with specific tasks, this school-specific statute fills some of the holes found in the cyberbullying statute, but it also creates new problems. The most important is that its protection is limited to electronic bullying that takes place either (1) on school property, (2) at any school-sponsored function, or (3) on a school bus. The broader cyberbullying bill is meant to go beyond campus and regulate speech in the home, but its breadth and enforcement are unclear because of judicial limitations on the school's ability to regulate student speech outside of the classroom. As a result, school administrators must still grapple with the question of the extent to which they may regulate off-campus speech.

Is Cyberbullying Protected Speech?

The First Amendment

The North Carolina cyberbullying statute grants broad authority to school administrators to punish students for their off-campus actions. It is possible, however, that this and other like statutes are in violation of the First Amendment to the U.S. Constitution's guarantee of free speech. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[33] In determining the extent to which that provision applies to students, especially

26. Mark Johnson, *House: No Web Bullying*, Newsobserver.com (May 14, 2009), http://projects.newsobserver.com/under_the_dome/house_no_web_bullying.
27. Hinton, *supra* note 20.
28. G.S. 115C-407.15.
29. *Id.*
30. G.S. 115C-407.16.
31. G.S. 115C-407.17.
32. G.S. 115C-407.18.
33. U.S. Const. amend. I.

in the cyberbullying context, it is necessary to look to those Supreme Court cases that directly address the extent to which a student may speak freely in school.

The U.S. Supreme Court

The first pertinent case to address this issue is the landmark 1969 decision of *Tinker v. Des Moines Independent Community School District*,[34] where the Court found that students do, in fact, have certain free speech rights. In that case, two students attending a high school in Iowa decided to wear black armbands to their classes in protest of the Vietnam War.[35] The school was aware of this plan and sent the students home until their armbands had been removed.[36] The students then brought suit, and the case ended up in the Supreme Court.

In addressing the issue of whether the First Amendment permits schools to restrict student speech, the Supreme Court first noted that the students were participating in "pure speech," which entitled them to comprehensive First Amendment protection.[37] However, the Court also noted that the school officials had the "comprehensive authority . . . to prescribe and control conduct in the schools,"[38] effectively setting up a collision of rights between the students and the authorities.[39] To resolve this, the Court ruled that pure student speech is protected in the schools as long as it does not materially or substantially interfere with schoolwork or discipline.[40] In dicta, the Court also suggested (and some courts have so ruled) that the facts of a particular case might not require that a substantial disruption actually occur so long as school authorities have good reason to predict that the speech will result in a disruption at the school. Specifically, the Court suggested that the authorities need only reasonably "forecast" a substantial disruption in order to lawfully regulate the student's speech.[41]

In the years since *Tinker*, the Supreme Court has carved out three other means by which a school might punish a student for her or his on-campus speech. The first of these cases, *Bethel School District No. 403 v. Fraser*,[42] was decided in 1986. In that case, the Court found that school officials may regulate student speech occurring at a school assembly or classroom—even pure speech—when it is vulgar, lewd, or plainly offensive.[43]

The plaintiff in *Fraser* was a student who, while attempting to show support for a friend who was running for student government, used explicit, sexual innuendo during his speech at a school assembly.[44] Among other things, the student referred to his friend as "firm in his pants" and able to "go to . . . the climax,"[45] euphemisms which, because of their use in this context,

34. 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").
35. *Id.* at 504.
36. *Id.*
37. *Id.* at 505–06.
38. *Id.* at 507.
39. *Id.*
40. *Id.* at 510–11.
41. *See id.* at 514 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .").
42. 478 U.S. 675 (1986).
43. *Id.*
44. *Id.* at 677–78.
45. *Id.* at 687 (Brennan, J., dissenting).

resulted in his suspension from school.[46] When evaluating whether the school was allowed to prohibit this speech—as it did not cause a substantial disruption—the Court resorted to a new rule, proclaiming that school officials may prohibit any "lewd, indecent, or offensive speech."[47]

In determining what is necessary for a student's speech to constitute unprotected "lewd, indecent, or offensive speech," the *Fraser* Court deferred to the school board to determine what constitutes speech that is inappropriate for the classroom or a school assembly.[48] The Court also noted, perhaps in contemplation of future decisions limiting students' speech rights, that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[49] In so saying, the *Fraser* Court limited the original *Tinker* determination that students do not shed their constitutional rights at the schoolhouse gate and granted school authorities the power to regulate lewd and vulgar speech in the schools.[50]

The Supreme Court continued its attack on *Tinker* just two years later in *Hazelwood School District v. Kuhlmeier*.[51] In that case, the principal of a Missouri high school had censored two articles on the topic of teen pregnancy and divorce that were published in the school newspaper.[52] The articles were written in the context of a journalism class, and the principal, who asserted his authority over the class, censored them.[53] The students sued on First Amendment grounds.[54]

In *Hazelwood*, the Court determined that educators may exercise editorial control over the "style and content of student speech in school-sponsored expressive activities" as long as that control relates to "legitimate pedagogical concerns."[55] The Court further noted that the speech was subject to the editorial control of the school authorities if "members of the public might reasonably perceive [it] to bear the imprimatur of the school," even if the speech occurred outside of the traditional classroom setting.[56] In distinguishing *Tinker*, the Court said that while schools may, at times, be required to tolerate some undesirable student speech, they should never be required to affirmatively promote (i.e., "sponsor") speech they believe to be unacceptable.[57]

This sentiment was echoed in the 2007 case of *Morse v. Frederick*,[58] the most recent Supreme Court opinion on student speech. In *Morse*, a high school student missed class to attend the Olympic Torch Relay parade.[59] Although the student was not attending the parade with the rest of his class, having skipped school that morning, he remained just across the road from his school during the event and was within sight of his peers and teachers.[60] As the parade passed by,

46. *Id.* at 678.
47. *Id.* at 683.
48. *Id.* at 676.
49. *Id.* at 682.
50. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
51. 484 U.S. 260 (1988).
52. *Id.* at 263–64.
53. *Id.*
54. *Id.* at 263.
55. *Id.* at 273.
56. *Id.* at 271.
57. *Id.* at 270–71 ("The question of whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular speech.").
58. 551 U.S. 393 (2007).
59. *Id.* at 397.
60. *Id.*

the student held up a sign with the words "BONG HiTS 4 JESUS" written on it in large letters.[61] The school principal saw the sign and directed the student to take it down.[62] When the student refused, the principal confiscated the banner and suspended the student.[63]

In another limitation on *Tinker's* declaration that students have free speech rights, even in the classroom, the *Morse* Court held that a school may punish a student if that student's speech could reasonably be regarded as encouraging illegal drug use.[64] While the student-plaintiff in *Morse* was not technically attending school at the time of his speech, the Court held that, in effect, the student had been under the control of school authorities because he was standing in the midst of his fellow students, during school hours, at a school-sanctioned activity.[65] In so holding, and by allowing the speech of students who are not technically attending school to continue to "collide" with the rights of educators, the *Morse* decision further blurred the understanding of where, exactly, the "schoolhouse gate" extends.[66] This is especially relevant in the context of cyberbullying, which provides for the possibility that a would-be cyberbully might be subject to regulation for speech occurring off campus, the primary locale from which cyberbullies torment their victims.[67]

Because cyberbullying constitutes "willful and repeated harm," it is also helpful to look to the recent Supreme Court decision in *Virginia v. Black*,[68] which allows for the regulation of speech that qualifies as a "true threat." In that case, a Virginia statute prohibited cross burning when it occurred with an intent to intimidate.[69] Oddly, the statute also provided that the very act of burning a cross was evidence of an intent to intimidate. Thus, the statute effectively prohibited all cross burning. Under this prohibition, two different groups of individuals were convicted of illegal cross burning. The first was a group of KKK members who burned a cross at a Klan rally on a privately owned and isolated field.[70] The second was a group of two men who burned a cross on the lawn of an African-American family.[71]

In deciding this case the Supreme Court noted, in agreement with the statute, that it was appropriate to ban "cross burning with an intent to intimidate," especially in light of the fact that cross burning can be a "particularly virulent form of intimidation."[72] However, the Court disagreed that cross burning connotes intimidation in all circumstances.[73] With respect to the KKK members, the Court found that their actions were protected because they did not burn the cross in view of any other individuals and, thus, did not burn it with an intent to intimidate.[74] With respect to those two men who burned a cross on the African-American family's lawn,

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61. *Id.* Justice Stevens referred to it as "Frederick's ridiculous sign" in his dissent. *Id.* at 438.
62. *Id.* at 398.
63. *Id.*
64. *Id.* at 393.
65. *Id.* at 401 (quoting the superintendent) ("[The student cannot] stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim that he is not in school.").
66. *Id.* (noting that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents").
67. Hoffman, *supra* note 8.
68. 538 U.S. 343, 359–60 (2003).
69. *Id.* at 344–45.
70. *Id.* at 348.
71. *Id.* at 350.
72. *Id.* at 362–63.
73. *Id.* at 365–66.
74. *Id.*

however, the Court determined that they had clearly intended to intimidate that particular family and remanded the case for further proceedings.[75]

With *Virginia v. Black*, the Court found that some cross burnings fit within the ambit of constitutionally proscribable "true threats."[76] In the majority opinion, Justice O'Connor defined a true threat as "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," noting that "[t]he speaker need not actually intend to carry out the threat," as long as she or he intends to express it.[77]

These rulings (*Tinker, Fraser, Hazelwood, Morse,* and *Black*) generally constitute the body of controlling case law that appellate and trial courts look to when determining whether a form of cyberbullying is protected speech. While the Supreme Court has never specifically ruled on a cyberbullying case, those instances in which the lower courts have grappled with that particular issue are discussed below.

U.S. Courts of Appeals

Consider first the case of *Wisniewski v. Board of Education of Weedsport Central School District*.[78] There a middle school student sent instant messages to his friends displaying a drawing of a bullet going through his teacher's head.[79] The image included the message "kill Mr. Vander-Molen."[80] For three weeks, the icon was visible to the student's online "buddies."[81] The messages were composed and sent to the student's friends while he was off campus.[82] Eventually, one of the student's classmates decided to show the picture to the local police, the superintendent, and the student's parents.[83] As a result, the student was suspended for five days.[84]

In *Wisniewski*, the Second Circuit Court of Appeals turned to the *Tinker* decision for guidance.[85] The court determined that a student may be disciplined for expressive conduct under *Tinker*, even if that conduct occurs off campus, when it poses a reasonably foreseeable risk of coming to the attention of school authorities and materially and substantially disrupting the work and discipline of the school.[86] The court reasoned that the student's drawing in that case was sufficient to pose a reasonably foreseeable risk of a substantial disruption at the school because of the "potentially threatening content" of the icon and its "extensive distribution."[87] The court also argued that once the icon was made available to the teacher, it would likely have created a risk of a substantial disruption within the school environment.[88]

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75. *Id.* at 357, 367.
76. *Id.* at 359–60.
77. *Id.*
78. 494 F.3d 34 (2d Cir. 2007).
79. *Id.* at 35–36.
80. *Id.* at 36.
81. *Id.*
82. *Id.* at 39.
83. *Id.*
84. *Id.*
85. *Id.* at 38.
86. *Id.* at 39.
87. *Id.* at 39–40.
88. *Id.* at 40.

One judge on the Second Circuit panel disagreed with this interpretation, arguing that a school should discipline a student only if that student's speech is reasonably likely to reach the school *from the perspective of the student*.[89] He opined that the student in *Wisniewski* "could never have anticipated [the image] reaching the school" and, thus, should not have been punished.[90]

The Second Circuit followed its reasoning from *Wisniewski* one year later and, in *Doninger v. Niehoff*,[91] again ruled that a student's cyberbullying speech is not protected under the First Amendment. In that case, a student posted derogatory statements on a blog while she was off campus.[92] In the blog, the student referred to her school administrators as "those douchebags in central office" and encouraged her classmates to repeatedly call one particular administrator on the telephone and "piss her off more."[93] As a result, the student was barred from running for senior class secretary.[94]

The *Doninger* case marked the second time in two years that the Second Circuit was confronted with the issue of whether school officials have the authority to discipline students for online speech that occurs off campus and not as a part of a school-sponsored event. As it had done in the *Wisniewski* case, the court determined that the school officials did not violate the First Amendment by punishing the student for her statements.[95] Again relying on *Tinker,* the *Doninger* court found that it was reasonably foreseeable for the student's blog to reach school property and cause a substantial disruption on the campus. Thus, the court reasoned, the speech could be proscribed.[96]

In dicta, the court also commented that the law on cyberbullying is murky, especially when student speech occurs off campus and is not school-sponsored, pointing out that the Supreme Court had failed to address this issue.[97] Interestingly, one of the judges on the *Doninger* panel is current Associate Supreme Court Justice Sonia Sotomayor.[98] Thus, if the Supreme Court were to take on a cyberbullying case today, one might expect that Justice Sotomayor would vote similarly, disallowing a student's speech if she believed it was reasonably likely to cause a substantial disruption.

The experience of the Third Circuit Court of Appeals illustrates, perhaps most aptly, how difficult it can be to apply *Tinker* and its progeny. Deciding cases with strikingly similar facts, two panels of that appeals court came out with very different rulings, so much so that the Third Circuit agreed to rehear the cases en banc to clarify the law, at least as it applied in that circuit.[99] The first panel, in *Layshock v. Hermitage School District (Layshock I),* upheld the district court's

89. *Id.* at 40, n.4.
90. *Id.*
91. 527 F.3d 41 (2d Cir. 2008).
92. *Id.* at 45.
93. *Id.*
94. *Id.* at 46.
95. *Id.* at 53.
96. *Id.* at 52–53.
97. *Id.* at 48–49.
98. *Id.* at 43.
99. J.S. *ex rel.* Snyder v. Blue Mtn. Sch. Dist., 593 F.3d 286 (3d Cir. 2010) [hereinafter *Blue Mountain I*], *rev'd on reh'g en banc*, 650 F.3d 915 [hereinafter *Blue Mountain II*]; Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010) [hereinafter *Layshock I*], *aff'd on reh'g en banc*, 650 F.3d 205 [hereinafter *Layshock II*].

determination that a student's speech had not resulted in a substantial disruption at the school and noted that "the [school district] is not empowered to punish [the student's] out of school expressive conduct under the circumstances here."[100] The second panel, in *J.S. v. Blue Mountain School District (Blue Mountain I)*, determined that the student's speech was, however, reasonably likely to result in a substantial disruption and, thus, could be regulated by the school.[101] The difference in the panels' two decisions in these cases turned on their varied understandings of the extent to which school administrators may punish students' off-campus activities and, further, whether such speech is reasonably likely to cause a substantial disruption at school.

In *Layshock I*, a student was suspended by school authorities for creating a "parody profile" of his principal while at his grandmother's home using the then-popular social networking website MySpace.[102] There the student developed a pseudo "profile" of his principal, characterizing him as a "big whore," a "steroid freak," and a "big fag."[103] While the student did not use any school resources to develop the profile, he accessed the site at school and used a photograph of the principal that had been taken from the school district's website.[104] There is no evidence, however, that the student engaged in any lewd or profane speech.[105] When the website finally came to the attention of school administrators, they attempted to limit the site's accessibility in the school by supervising student use of the computer labs.[106] The student was eventually informed that he had violated a number of school policies and suspended for ten days.[107]

The *Layshock I* panel relied heavily on a Second Circuit decision dealing with a student newspaper written and published off campus, but distributed on campus, in which the newspaper was determined to be protected student speech.[108] While the *Layshock I* court stated that the schoolhouse gate was no longer relegated to just "the bricks and mortar surrounding the school yard," and could be extended to restrict student speech occurring off campus in certain circumstances,[109] it affirmed that the school administrators' authority was "not without its limits." In weighing that authority against the interests of the student, the court came down in favor of the student.[110]

The court stated that while it was true the student's speech reached into the school (in that it was accessed on campus and the photo of the principal was taken from the district's website), the speech did not cause a substantial disruption on campus and the school district was unable "to establish a sufficient nexus between [the student's] speech and a substantial disruption of the school environment" to warrant punishment.[111] The court stated that it had "no authority that

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100. *Layshock I*, *supra* note 99, at 263.

101. *Blue Mountain I*, *supra* note 99, at 301–02 ("Regardless of whether J.S.'s creation of the profile satisfied the elements of criminal harassment or defamation, we hold that the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test.").

102. *Layshock I*, *supra* note 99, at 252–54.

103. *Id.* at 252–53.

104. *Id.* at 253, 260.

105. *Id.* at 252 ("The only school resource that was even arguably involved in creating the profile was a photograph of [the principal] that [the student] copied from the school district's website.").

106. *Id.* at 253.

107. *Id.* at 254.

108. *Id.* at 259 ("We find the reasoning in *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979), far more persuasive.").

109. *Id.* at 260.

110. *Id.*

111. *Id.* at 260–61.

would support punishment for creating such a profile unless [the profile] result[ed] in [a] foreseeable and substantial disruption," which the court did not find.[112] With respect to prior cases that found substantial disruptions under similar facts, the court stated that those cases occurred "under certain very limited circumstances, none of which are present here."[113] The court was not specific on what those circumstances were.

That same day, the Third Circuit filed a second opinion on this question, *Blue Mountain I*, in which it determined that the school did, in fact, have the authority to punish students in this circumstance.[114] The two students in that case had also created a mock profile of their principal.[115] The profile referred to the principal as a "tight ass" and alluded to his sexual habits, calling him a "pervert," "sex addict," and "fagass," among other things.[116] When the school discovered the profile, the students each received a ten-day suspension.[117] According to the principal, a number of the other pupils had decorated their lockers in anticipation of the students' return home, which created "quite a buzz" at the school.[118]

In evaluating the case, the district court determined that *Tinker* did not apply because no substantial disruption had occurred.[119] Instead, the court applied a combination of *Fraser* and *Morse*, determining that the speech was vulgar, lewd, and potentially illegal.[120] While the appellate court agreed that there had been no actual disruption, it disagreed that this ended the use *Tinker*.[121] Instead, the Third Circuit panel restricted the speech under *Tinker* because it presented a "reasonable possibility of a future disruption."[122] The panel noted that, without the mitigating actions taken by the principal, the speech would likely have resulted in a substantial disruption.[123] In addition, the profile's "blatant allusions" to sexual misconduct, the fact that the students had disseminated the profile to other students with the intent of humiliating the principal, and the fact that the principal had noticed a "severe deterioration in discipline in the Middle School . . . following the publication of the profile and the punishment of [the students]," all evidenced a strong likelihood of substantial disruption.[124] As a result, the panel determined that school authorities had the right to regulate the students' speech.[125] The panel said that while students have free speech rights, they must be applied in light of the special characteristics of the school environment, and, in that case, the interest of the school in maintaining an educational environment superseded the rights of the students.[126]

The disparity between the outcomes in these two cases speaks to the difficulty of determining when and, more importantly, how the *Tinker* standard ought to be applied in a cyberbullying

112. *Id.* at 263.
113. *Id.*
114. *See Blue Mountain I, supra* note 99.
115. *Id.* at 290.
116. *Id.* at 291.
117. *Id.* at 293.
118. *Id.* at 294.
119. *Id.* at 310.
120. *Id.*
121. *Id.* at 300.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 311.

case. In both, the students created (while off campus) derogatory, aggressive, parody profiles of their respective principals that reached the school only in a limited capacity. The *Layshock I* panel rested its finding for the student on the fact that no disruption had occurred and that the school district could not show that a substantial disruption was reasonably likely. The *Blue Mountain I* panel—on nearly the same facts—held that a substantial disruption was reasonably likely to have occurred and held for the school district. This speaks to the flaw in the *Tinker* test.

The fact situations in *Layshock I* and *Blue Mountain I* were strikingly similar, but the outcomes were notably different. As discussed above, the full Third Circuit Court of Appeals took notice of this difference and reheard both cases en banc and not just as panels.[127] On that review, the full court held that both school administrators had violated their respective students' First Amendment free speech rights.[128]

In the en banc *Layshock* decision (*Layshock II*), the court ruled that a school system cannot punish a student merely because his speech reached inside the school.[129] While the speech was lewd and indecent within the meaning of *Fraser*, and could have been punished if it had occurred in the school, the mere fact that the student created a profile of the principal—which was accessible at the school but did not result in a disruption—was not sufficient to justify punishment.[130]

In the en banc *Blue Mountain* decision (*Blue Mountain II*), the full court again held that the school system could not punish the student.[131] The school, when it became aware of the student's off-campus posting, could not have reasonably forecasted a substantial disruption or material interference with the school.[132] As with *Layshock II*, the court here noted that the speech was in fact lewd and indecent and could have been punished if it had been in-school speech. In addition, the court noted that the mere fact that another student had brought a printed copy of the posting to the school did not transform the student's off-campus speech into in-school speech.[133]

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127. *Blue Mountain II*, *supra* note 99; *Layshock II*, *supra* note 99.

128. *Blue Mountain II*, *supra* note 99, at 931 ("The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile. Under *Tinker*, therefore, the School District violated J.S.'s First Amendment free speech rights when it suspended her for creating the profile."); *Layshock II*, *supra* note 99, at 216 ("[W]e therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.").

129. *Layshock II*, *supra* note 99, at 216.

130. *Id.* at 219 ("We believe the cases relied upon by the School District stand for nothing more than the rather unremarkable proposition that schools may punish expressive conduct that occurs outside of the school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here."). The limited circumstances to which the court refers are those where, despite the fact that the expressive conduct occurred off campus, it results in a substantial disruption within the schoolhouse gate.

131. *Blue Mountain II*, *supra* note 99, at 932.

132. *Id.* at 930 ("The profile was so outrageous that no one could have taken it seriously, and no one did. Thus, it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption or material interference in school, and this case is therefore distinguishable from the student speech at issue in *Doninger*, *Lowery*, and *LaVine*.").

133. *Id.* at 932 ("Under these circumstances, to apply the *Fraser* standard to justify the School District's punishment of J.S.'s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority.").

So, in both *Layshock II* and *Blue Mountain II*, the full Third Circuit took special note of the lack of an actual disruption at the school and clarified that, without a substantial disruption, the school districts' power to punish students for lewd and vulgar speech under *Fraser* did not reach beyond the physical confines of the schoolhouse gate.[134]

Other Decisions

Courts have also found, however, that school administrators had the authority to limit students' speech under *Tinker* (not *Fraser, Hazelwood*, or *Morse*, though) because of a genuine "substantial disruption" on campus. A salient example comes from a 2001 opinion by the Pennsylvania Supreme Court in *J.S. v. Bethlehem Area School District*.[135] In that case, the student created a website that contained numerous violent and derogatory comments about the school's principal and a teacher.[136] One page asked "Why Should She Die?"—referring to the teacher—and solicited money for the purpose of hiring a hit man to kill her.[137] The site repeated the words "Fuck You Mrs. Fulmer. You Are A Bitch. You Are A Stupid Bitch." on 136 separate occasions.[138] Another page of the website even showed the teacher's head cut off with blood dripping down her neck.[139]

Upon learning about the site, the teacher became so frightened and anxious that she was unable to teach for the rest of the year.[140] Three substitute teachers were called in to make up for her absence.[141] The court even remarked that school morale was so poor it was "comparable to the death of a student or staff member."[142] Parents became concerned about their children's safety and the quality of instruction of the replacement teachers.[143] As a result, the school decided to suspend and, ultimately, expel the student.[144]

Addressing those facts, the Supreme Court of Pennsylvania first noted that the speech was not a "true threat." Rather, the website was merely "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody" and not a serious expression of an intent to inflict harm—the necessary qualification for a true threat to have occurred.[145]

Second, the court determined that—despite not being a true threat—the student's speech was unprotected. The court reasoned that there was "a sufficient nexus between the web site and the school campus in order to consider the speech as occurring on campus."[146] Further, when taken

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134. *Id.* ("The School District's argument fails at the outset because *Fraser* does not apply to off-campus speech."); *Layshock II*, *supra* note 99, at 216 ("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."); *see also* Morse v. Frederick, 551 U.S. 393, 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

135. 807 A.2d 847 (Pa. 2002).

136. *Id.* at 851.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 852.

141. *Id.*

142. *Id.*

143. *Id.* at 869.

144. *Id.* at 852.

145. *Id.* at 856. *But see* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d at 870 (Castille, J. dissenting) (finding that a website and the statements therein constituted true threats).

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

together, the general drop in morale, the teacher's incapacitation, and the use of substitutes were sufficient to constitute a substantial disruption.[147] The court also attempted to provide some guidance for other courts faced with applying the *Tinker* standard, noting that a substantial disruption should be considered to be more than "a mild distraction or curiosity created by the speech" but not necessarily "complete chaos."[148]

In contrast to the *Bethlehem* decision, a number of U.S. district courts have found that a student's cyberbullying behavior did not result in a substantial disruption and, thus, constituted protected speech under *Tinker*.[149] One such case is *J.C. ex rel. R.C. v. Beverly Hills Union School District*.[150]

In *Beverly Hills*, a high school student ("the student") recorded a video at a local restaurant, after school, in which one of her friends ("the friend") mocked a fellow classmate ("the classmate").[151] In the video the friend called her classmate a "slut" and "spoiled," using extensive profanity and sexual innuendo.[152] At one point the friend even called the classmate "the ugliest piece of shit I've ever seen in my whole life," while the student encouraged her in the background.[153] Later that day, the student posted the video on YouTube and contacted a number of other pupils, asking them to watch.[154] When the classmate finally discovered the video, she was upset and spoke with the school counselor.[155] As a result, the student who recorded the video was suspended for two days.[156]

Using *Tinker*, the Central District of California found that the facts did not support a finding that there had been or would reasonably likely have been a substantial disruption on the school campus, treating the video as protected speech.[157] The court reasoned that, while an actual disruption is not required for speech to be regulated under *Tinker*, there must be more than an "undifferentiated fear or apprehension of disturbance" to overcome a student's right of

147. *Id.* at 869.

148. *Id.* at 868.

149. *See* Beussink *ex rel.* v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (holding that a high school student who criticized the school over the Internet was protected under the First Amendment because the site did not substantially interfere with school discipline but merely upset the principal); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (finding that a high school student who created a website with mock student obituaries was outside of school supervision because the website did not manifest any violent tendencies, despite the fact that it reached campus in the form of discussion and rumors); Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (holding that "Evan's [disparaging website] falls under the wide umbrella of protected speech. It was an opinion of a student about a teacher that was published off campus, did not cause any disruption on campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior."); *see also* Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (holding that a student who extended his middle finger at his teacher while off campus at a local restaurant was protected under the First Amendment because his conduct was "far removed from any school premises or facilities").

150. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

151. *Id.* at 1098.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1099.

157. *Id.* at 1117.

free expression.[158] The court noted that the regulation or prohibition of student speech must be caused by something more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" and must be substantiated by citing "specific facts."[159]

In making its determination, the *Beverly Hills* court noted that the video was not violent or threatening and that there was no reason for the school to be concerned about the classmate's safety.[160] Further, the court stated that, as a matter of fact, the classmate's hurt feelings simply did not cause a disruption at the school.[161] The classmate did not confront her tormentor at the school, nor did she indicate an intention to do so.[162] At most, the classmate missed one class.[163] And the investigation itself caused no "ripple effects on class activities or the work of the School."[164] Therefore, the court found that the video itself did not affect classroom activities.[165] It did not spark a "widespread whispering campaign," and, according to the record, not one single student watched the video while at school.[166] Based on these facts, the district court ruled that the student's video did not cause a substantial disruption and, thus, was protected speech.[167]

This case speaks to the fundamental limitation of the *Tinker* test, its lack of clarity in determining what constitutes a substantial disruption. Should a "widespread whispering campaign," as the court implies, constitute a substantial disruption? While the student's video and the reaction on campus did not result in the finding of a "substantial disruption," the court could have determined that the video was reasonably likely to cause substantial disruption, but for the fact that the student did not get sufficiently upset. The result is that a court may make this determination based on its own understanding of public policy, the First Amendment, or any number of things other than the actual likelihood of a disruption. This sort of test cannot be consistently applied to cyberbullying fact scenarios as evidenced, perhaps most saliently, by the split between the Third Circuit panels in *Layshock I* and *Blue Mountain I*.

Conclusion

Because the *Tinker* standard has not been applied consistently, and the Supreme Court has yet to hand down a definitive ruling, schools are left with continued uncertainty as to whether they may punish a would-be cyberbully. However, when evaluating a cyberbullying case, courts will

158. *Id.* at 1111.
159. *Id.*
160. *Id.* at 1117.
161. *Id.*
162. *Id.* Allowing the classmate's decision not to confront her tormenter to affect the court's calculus is worrisome because it means that the friend's actual words may be less dispositive than how certain people react to them. *See generally* Harry Klaven Jr., The Negro & The First Amendment 140 (1965) (postulating the theory behind the idea of the "Heckler's Veto," whereby an individual's speech may be limited not through his or her actions, but merely as a result of the overly raucous response of the listeners).
163. J.C. *ex rel.* R.C. v. Beverly Hills Union Sch. Dist., 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010).
164. *Id.*
165. *Id.* at 1118.
166. *Id.*
167. *Id.* at 20.

often ask similar questions and look to those Supreme Court cases referenced herein.[168] Because many of those rulings may dispose of cyberbullying behavior on grounds unrelated to *Tinker*, a school may make certain reliable predictions about its ability to discipline a student for cyberbullying speech. Thus, while some cyberbullying cases may, ultimately, turn on a judge's unique interpretation of the extent of the harm or "disruption" occurring at the school, they may also be decided on a number of other grounds, thereby cutting down on some of the uncertainty surrounding *Tinker*.

First, inasmuch as cyberbullying necessarily lends itself to hostile and threatening remarks, a court might first look to see if a cyberbully's communications constitute a "true threat" under the Supreme Court decision in *Virginia v. Black*. True threats are unprotected speech and are subject to school officials' authority. For example, in *D.C. v. R.R.*,[169] the California Court of Appeals noted that a student's speech could be either objectively or subjectively threatening. If it is objectively threatening, the court must affirmatively answer that a reasonable person would interpret the speech as constituting a threat to inflict bodily harm.[170] If it is subjectively threatening, the court would need to find that the speaker subjectively intended to threaten to inflict bodily harm.[171] Using this rationale, a court might rely on either or both methods in determining whether a student's speech constituted an unprotected true threat.

Second, it might be that certain cyberspeech, while hurtful, is not sufficient to constitute a true threat. In such a circumstance, a court would likely look to *Hazelwood* and ask if the speech was "school-sponsored." School-sponsored speech, which is any speech that might reasonably be perceived to bear the "imprimatur," or approval, of the school, is subject to regulation by school authorities. For instance, a would-be cyberbully might be instructed by his or her teacher to create a website for a class project. If that website was used for the purpose of cyberbullying another student, then the website would be considered school-sponsored and, thus, subject to regulation by school authorities.

Third, if the speech is neither a true threat nor school sponsored, a court would likely turn to *Fraser* to see if the speech is lewd, indecent, or offensive. In determining whether some form of speech qualifies as "lewd," according to the *Fraser* decision, a court would defer to the school board's judgment. If the school board determined that the speech was lewd, indecent, or offensive, the court would then need to determine if that speech could be regulated simply because of its lewdness or if it must occur on school property, possibly before a captive audience, before it could be regulated. While lower courts are somewhat split on the issue of whether a captive audience is necessary to find that a student can be punished for her or his speech, the general trend is to relegate *Fraser* to its facts and require that the speech occur on school property and before a captive audience, perhaps in an auditorium or classroom, in order to allow for administrative punishment. In *Morse*, for instance, the Supreme Court commented that the student's vulgar speech in *Fraser* would have been protected had it occurred off campus,[172] suggesting that a captive audience is necessary for *Fraser* to apply.

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168. *See* David L. Hudson Jr., *Student Online Expression: What Do the Internet and MySpace Mean for Students' First Amendment Rights?* First Amend. Ctr. First Forum Report *at* 11 (Dec. 19, 2006), http://archive.firstamendmentcenter.org/PDF/student.internet.speech.pdf.

169. 106 Cal. Rptr. 3d 399, 415–16 (Cal. Ct. App. 2010).

170. *Id.* at 415.

171. *Id.*

172. Morse v. Frederick, 551 U.S. 393, 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

It should be noted, however, that a student's speech need not occur within the physical schoolhouse gate in order for it to be considered on-campus speech. Using *Morse*, speech may be censored if it occurs near a school-sanctioned event and within sight of the other students and administrators, even if that event technically occurs off campus. In fact, the rationale behind the *Morse* decision suggests that while a student might be punished for his or her speech, if that speech advocated some sort of illegal activity, it would certainly be proscribable if it encouraged illegal drug use. Therefore, a court might also ask if a student's cyberbullying speech advocated illegal drug use or any other illegal activity during a school-sanctioned event and while on campus. If so, the analysis would stop there and the student speech could be regulated.

If, however, a student's speech managed to avoid regulation as a true threat, as school-sponsored speech, as lewd speech occurring on campus or at a school-sanctioned event, or as speech advocating an illegal activity (especially illegal drug use), then the only remaining means of regulation is *Tinker*. Under that standard, a court would need to determine if a would-be cyberbully's speech is (1) reasonably likely to create a substantial disruption at the school or (2) has already created such a disruption. If either were true, then the speech would be found unprotected and vulnerable to school sanction.[173]

Unfortunately the question as to what exactly constitutes a substantial disruption is not easily answered. The *Tinker* standard is nebulous and has resulted in inconsistent rulings. The Pennsylvania Supreme Court has defined it as something more than "a mild distraction or curiosity created by the speech" but not necessarily "complete chaos."[174] Until the Supreme Court provides further guidance, however, this broad definition is the best that courts—and, by extension, school officials—have at their disposal.

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173. Examples of fact sets in which courts have found a substantial disruption or a reasonably likely chance thereof can be found in *Wisniewski*, *Doninger*, *Blue Mountain I* (reversed on rehearing en banc), and *Bethlehem*, *supra*. Examples of fact sets in which courts did *not* find such a disruption can be found in *Tinker*, *Layshock I* (affirmed on rehearing en banc), *Klein*, *Beussink*, *Emmett*, *Evans*, and *Beverly Hills*, *supra*.

174. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002) (noting that "while there must be more than some mild distraction or curiosity created by the speech . . . complete chaos is not required for a school district to punish student speech.").