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## Facebook Fatalities: Students, Social Networking, and the First Amendment

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# Facebook Fatalities: Students, Social Networking, and the First Amendment

Thomas Wheeler\*

## I. Introduction

Phoebe Prince, a recent Irish immigrant, hanged herself Jan. 14 after nearly three months of routine torment by students at South Hadley High School, via text message, and through the social networking site, Facebook. . . . Northwestern District Attorney Elizabeth Scheibel said Prince's bullying was the result of a romantic relationship she had with one of the male suspects that ended weeks prior to her suicide.<sup>1</sup>

District Attorney Scheibel stated "[t]he investigation revealed relentless activity directed toward Phoebe, designed to humiliate her and to make it impossible for her to remain at school. . . . The bullying, for her, became intolerable. Nevertheless, the actions—or inactions—of some adults at the school are troublesome."<sup>2</sup> According to the district attorney, "school administrators knew of the bullying but none would be charged with criminal conduct."<sup>3</sup>

This is not an isolated incident. Facebook celebrated its

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1. Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged Herself*, ABC NEWS, Mar. 29, 2010, <http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357>.

2. *Id.* (internal citation omitted).

3. *Id.*

sixth birthday on February 4, 2010 and announced at that time that it had over 400 million members, making it the equivalent of the world's third largest country, ahead of industrial countries such as the United States (308 million), Russia (141 million), and Japan (127 million). Indeed, Facebook's population only trailed China (1.34 billion) and India (1.2 billion).<sup>4</sup> The rate of growth for Facebook has been exponential, with approximately 700,000 new users a day and 21 million new users per month.<sup>5</sup> At this rate, Facebook will soon be larger than any other country in the world.<sup>6</sup>

This explosive growth in social networking impacts all segments of society, but given the youthful nature of many Facebook users (54.3 percent of total users are ages eighteen to twenty-four),<sup>7</sup> the impact on students is dramatic and occasionally tragic. Phoebe Prince was not the first teen suicide victim of cyberbullying; there have been numerous other documented instances and they seem to be on the rise.<sup>8</sup>

Because these attacks take place in the cyberworld, the traditional pupil disciplinary framework is ill-suited to deal with this behavior. As the South Hadley School Superintendent noted in response to the suicide: "I think the principal did everything he could. . . . Everyone expects the schools to solve these problems, but we don't have magic-bullet solutions to

4. Pam Dyer, *The Facebook Juggernaut: Exponential Growth + World's Leading News Reader?*, PAMORAMA, (Feb. 10, 2010), <http://www.pamorama.net/2010/02/10/the-facebook-juggernaut-exponential-growth-worlds-leading-news-reader/>.

5. *Id.* (Just a year ago, Facebook had 150 million users and the increase of 250 million users over that period represents the statistics given.).

6. *Id.*

7. Peter Corbett, *Facebook Demographics And Statistics Report 2010 – 145% Growth In 1 Year*, iSTRATEGYLABS, (Jan. 4, 2010), <http://www.istrategylabs.com/2010/01/facebook-demographics-and-statistics-report-2010-145-growth-in-1-year/>.

8. See, e.g., Steve Bird, *Holly Grogan, 15, Leapt to her Death 'After Abuse from Facebook Bullies'*, THE TIMES, September 21, 2009, <http://www.timesonline.co.uk/tol/news/uk/article6841908.ece>; Oren Yaniv, *Long Island Teen's Suicide Linked to Cruel Cyberbullies, Formspring.me Site: Police*, NEW YORK DAILY NEWS, March 25, 2010, [http://www.nydailynews.com/news/ny\\_crime/2010/03/25/2010-03-25\\_li\\_teens\\_suicide\\_linked\\_to\\_cruel\\_cyberbullies\\_police.html](http://www.nydailynews.com/news/ny_crime/2010/03/25/2010-03-25_li_teens_suicide_linked_to_cruel_cyberbullies_police.html) ("Alexis Pilkington, 17, a West Islip soccer star, took her own life Sunday following vicious taunts on social networking sites . . .").

how kids behave.”<sup>9</sup> Indeed, while the school administrators were criticized in Prince, these same administrators are also frequently the target of similar vicious cyber attacks. In one recent case, a fourteen-year-old eighth grader at Blue Mountain Middle School created a fictitious profile of her principal that included his photograph from the school’s website, as well as profanity-laced statements that he was a sex addict and pedophile.<sup>10</sup> In another case, a student in Pennsylvania created a website entitled “Teacher Sux.”<sup>11</sup> The website described the student’s math teacher in obscene terms and included pictures of the teacher’s severed head dripping blood, a picture of her face morphing into Hitler, and a solicitation for funds to hire a hit man to kill her under the caption “Why Should She Die?”<sup>12</sup>

On the eve of the anniversary of Phoebe Prince’s tragic death, the purpose of this Article is to look for clues to that “magic-bullet” and to try and craft a workable legal framework to assist students, parents, and school administrators in navigating the complex legal waters that surround the regulation of off-campus cyberspeech. Utilizing Supreme Court precedent in traditional First Amendment student speech cases, this Article examines the application of that traditional framework to cases involving cyberbullying. The vehicle for doing this will be to examine two recent Third Circuit cases that involve very similar facts but resulted in dramatically different outcomes: *J.S. ex rel. Snyder v. Blue Mountain School District*,<sup>13</sup> where the Court found that a school could discipline a student for harassing off-campus speech on a social networking site, and *Layshock ex rel. Layshock v. Hermitage School District*,<sup>14</sup> which found that a school could not discipline

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9. Peter Schworm, *Schools Head Defends Response to Bullying*, THE BOSTON GLOBE, April 1, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/04/01/schools\\_head\\_defends\\_response\\_to\\_bullying/?page=2](http://www.boston.com/news/local/massachusetts/articles/2010/04/01/schools_head_defends_response_to_bullying/?page=2).

10. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290-91 (3d Cir. 2010), *vacated en banc*, (Apr. 9, 2010).

11. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist. No. 415*, 807 A.2d 847, 850-51 (Pa. 2002).

12. *Id.* at 851.

13. 593 F.3d 286.

14. 593 F.3d 249 (3d Cir. 2010).

a student for off-campus cyberspeech almost identical to that in *Snyder*. Recognizing the obvious conflict between these two panel decisions, the Third Circuit granted rehearing and the two cases were reheard en banc on June 3, 2010.<sup>15</sup> These cases are likely heading to the Supreme Court, and this Article will conclude with some suggestions regarding specific areas where clarification from the Supreme Court could provide that “magic bullet” to avoid further tragedies like the Phoebe Prince suicide.

## II. The *Tinker/Bethell/Hazelwood* Trilogy

Any examination of student free speech rights must necessarily start with the seminal Supreme Court case of *Tinker v. Des Moines Independent Community School District*.<sup>16</sup> In *Tinker*, students wore black armbands to school in order to protest the Vietnam War.<sup>17</sup> The school banned the armbands under its dress code and the students challenged the policy as violative of their First Amendment rights.<sup>18</sup> One of the key factors in the challenge was the fact that, although the school banned the black armbands under its dress code and disciplined the students wearing that symbol, it did not ban other potentially disruptive symbols such as a black cross that could have evoked images of Nazi Germany.<sup>19</sup>

In overturning the ban, the Supreme Court found that wearing black armbands was expressive conduct protected by the First Amendment and stated that “[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>20</sup> It determined that, absent the showing of a compelling interest,

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15. Ruthann Robson, *Third Circuit en banc Hears Oral Arguments About Myspace.com*, CONSTITUTIONAL LAW PROF BLOG, (June 3, 2010), <http://lawprofessors.typepad.com/conlaw/2010/06/third-circuit-en-banc-hears-oral-arguments-about-myspacecom.html>.

16. 393 U.S. 503 (1969).

17. *Id.* at 504.

18. *See id.*

19. *Id.* at 510.

20. *Id.* at 506.

the school could not ban the armbands.<sup>21</sup> In doing so the Court crafted a two-pronged test.<sup>22</sup> Under this test, the court first determines whether student speech is protected under the First Amendment.<sup>23</sup> In determining whether the speech is protected, the court considers whether the student intended to convey a particularized message and whether that message is indeed the type of speech entitled to protection.<sup>24</sup> It then considers whether there is a reasonable likelihood that those who viewed the speech would understand this message.<sup>25</sup> If both of these conditions are met then the speech is entitled to constitutional protection and the court moves on to the second inquiry: whether the school can demonstrate a sufficiently compelling interest to permit it to restrict the protected speech, *i.e.* a substantial disruption of or material interference with school activities.<sup>26</sup> In *Tinker*, the Supreme Court found that the armbands were intended to and did in fact convey a particularized anti-Vietnam war message and thus constituted speech protected by the First Amendment.<sup>27</sup> The Supreme Court then determined that the school failed to show that the mere wearing of the armbands at school posed a serious threat of material and substantial interference with the operation of the school and therefore there was no compelling interest in restricting the speech.<sup>28</sup> The ban was overturned as a

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21. *See id.*

22. *Id.* at 509.

23. *Id.*

24. *Id.* There are certain types of speech that are not protected regardless of the circumstances. The classic example is the “fighting words” doctrine most recently explored by the Supreme Court in *Virginia v. Black*, 538 U.S. 343, 359 (2003) (burning a cross is the symbolic equivalent of fighting words as it is speech designed to elicit an immediate violent response). However, more pertinent to this discussion are “true threats.”

25. *Tinker*, 393 U.S. at 509.

26. *Id.*

27. *Id.* at 512-13.

28. *Id.* Although it is true that students do not shed their constitutional rights at the school house gate, *id.* at 506, it is also true that the constitutional rights of students in public schools “‘are not automatically coextensive with the rights of adults in other settings,’ and must be ‘applied in light of the special characteristics of the school environment.’” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citation omitted).

consequence.<sup>29</sup>

Thus, the high water mark for student free speech rights, not surprisingly, came from the Warren Court in the 1960s.<sup>30</sup> Since that time, the Supreme Court has consistently viewed student First Amendment rights more critically through the prism of the unique needs of the Nation's public school system, generally coming down on the side of the school.

In *Bethel School District No. 403 v. Fraser*,<sup>31</sup> the issue was slightly different. Although *Fraser* also involved on-campus speech, the question presented was whether the school could discipline a student for giving a nominating speech for a fellow senior that referred to the candidate in terms of "an elaborate, graphic and explicit sexual metaphor" in front of six hundred students.<sup>32</sup> The Supreme Court, while reaffirming the continuing vitality of *Tinker*, nevertheless indicated that student expressive rights at school were not co-extensive with those of adults outside of school.<sup>33</sup> The court refused to protect student speech when it deemed that speech to intrude upon the educational mission of the school.<sup>34</sup> In so doing, the court made it clear that vulgar, indecent, or disruptive speech can be punished and prohibited in classrooms, assemblies, and other school-sponsored educational activities, as such speech runs counter to the educational objectives of schools.<sup>35</sup> In a later case the Supreme Court distilled two lessons from *Fraser*:

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29. *Tinker*, 393 U.S. at 508.

30. In 1969, just a few months after *Tinker* was decided, the "Warren Court" was no more. Chief Justice Earl Warren resigned at the conclusion of the 1968-1969 term and was replaced by Nixon appointee Warren Burger. Justice Fortas was replaced by another Nixon appointee, Harry Blackmun.

31. 478 U.S. 675 (1986).

32. *Id.* at 677-78.

33. *Id.* at 682.

34. *Id.* at 685.

35. *Id.* at 684-85 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. 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 schools.'"). *Id.* at 683 (internal citation omitted).

For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser’s First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker*.<sup>36</sup>

The final case in the trilogy is *Hazelwood School District v. Kuhlmeier*.<sup>37</sup> Unlike *Tinker* and *Bethel*, where the issue was whether the school had to tolerate certain types of student speech, the question in *Hazelwood* was whether the school could be forced to sponsor such speech.<sup>38</sup> A student newspaper sought to publish articles on sexual activities and birth control but, upon review, the principal removed the articles because he felt that the sexual references were inappropriate for younger students and contained personally identifiable information.<sup>39</sup> The students sued, alleging that the removal of the articles violated their First Amendment rights.<sup>40</sup> The Supreme Court disagreed, distinguishing *Tinker* where “[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student

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36. *Morse v. Frederick*, 551 U.S. 393, 404-05 (2007) (internal citation omitted).

37. 484 U.S. 260 (1988).

38. *Id.* at 270-71.

39. *See id.* at 262-64.

40. *Id.* at 264.

speech.”<sup>41</sup> The Supreme Court decided that it did not and concluded:

[T]he standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. . . . Educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns.<sup>42</sup>

These three seminal Supreme Court cases all involved some form of on-campus speech. By comparison, the Phoebe Prince case involved mostly off-campus cyberspeech. While the Supreme Court has not directly addressed this issue, it did brush up against it in *Morse v. Frederick*.<sup>43</sup> That case was widely viewed at the time as involving off-campus speech, and school attorneys hoped that it would provide a glimpse into a legal framework for addressing student cyberspeech.

In *Morse*, a student unfurled a banner with the words “BONG HiTS 4 JESUS” across the street from the school after being released to watch the 2002 Olympic Torch Relay as it passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah.<sup>44</sup> The student was suspended for ten days because the principal believed that the banner encouraged illegal drug use in violation of established school policy.<sup>45</sup>

The student challenged the ban, arguing that the speech on his banner was protected under the First Amendment and that the school had no right to restrict his off-campus speech.<sup>46</sup> Writing for the majority, Chief Justice Roberts did not find the case particularly difficult. He viewed the student’s actions,

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41. *Id.* at 270-71.

42. *Id.* at 272-73.

43. 551 U.S. 393 (2007).

44. *Id.* at 397.

45. *Id.*

46. *Id.* at 399.

despite taking place across the street from the school, as on-campus speech, writing:

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. The event occurred during normal school hours. It was sanctioned by Principal Morse “as an approved social event or class trip,” and the school district's rules expressly provide that pupils in “approved social events and class trips are subject to district rules for student conduct.”<sup>47</sup>

Given the possible “pro-drug interpretation of the banner”<sup>48</sup> and the fact that the banner was unfurled at a school sponsored event, Chief Justice Roberts felt that the case fell squarely within the parameters of *Fraser's* educational mission criteria: “The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.”<sup>49</sup>

This decision notwithstanding, citing *Porter v. Ascension Parish School Board*,<sup>50</sup> Chief Justice Roberts acknowledged that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.”<sup>51</sup> *Porter* involved a fourteen year old student who sketched a picture of a siege on his school by various armed persons.<sup>52</sup> The sketch also contained obscenities and racial epithets directed at fellow students.<sup>53</sup> He did the sketch at home and stored it in a closet.<sup>54</sup> Two years later, his younger

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47. *Id.* at 400-01 (internal citation omitted).

48. *Id.* at 402.

49. *Id.* at 403.

50. 393 F.3d 608 (5th Cir. 2004).

51. *Morse*, 551 U.S. at 401 (citing *Porter*, 393 F.3d at 615 n.22).

52. *Porter*, 393 F.3d at 611.

53. *Id.*

54. *Id.*

brother used the same sketch pad and took it to school.<sup>55</sup> Students showed the siege sketch to administrators stating that “Miss Diane, look, they’re going to blow up EAHS.”<sup>56</sup> Administrators called the student, then sixteen years old, down to the office where he was searched.<sup>57</sup> During the search they “found a box cutter with a one-half inch exposed blade in his wallet. The officials also found notebooks in Adam’s bag containing references to death, drugs, sex, depictions of gang symbols, and a fake ID.”<sup>58</sup> The Fifth Circuit held that the school could not discipline the student for the sketch even though it ended up on campus:

Given the unique facts of the present case, we decline to find that Adam’s drawing constitutes student speech on the school premises. Adam’s drawing was completed in his home, stored for two years, and never intended by him to be brought to campus. He took no action that would increase the chances that his drawing would find its way to school; he simply stored it in a closet where it remained until, by chance, it was unwittingly taken to Galvez Middle School by his brother. This is not exactly speech on campus or even speech directed at the campus.<sup>59</sup>

These cases frame any debate over student cyberspeech with the issue appearing to turn on, as noted in *Morse*, whether the speech occurs at school.<sup>60</sup> Unfortunately, this begs the question in the cyberspeech arena. What does “at school” mean? *Porter* seems to hold that just because the speech inadvertently comes on to school grounds, this does not mean it is student speech at school. In the case of cyberbullying directed at a student like Phoebe Prince, is a text sent to her

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55. *Id.*

56. *Id.*

57. *Id.* at 611-12.

58. *Id.* at 612.

59. *Id.* at 615.

60. See *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (discussing whether student speech is protected while at a school event).

phone which she views at school student speech “at school”? What if she accessed her Facebook account on a school computer only to find a hateful message? Is that student speech “at school”? Is it enough that a student simply throws the speech out into cyberspace from home without regard to where and how it might be accessed, and when it is accessed at school, does it then become student speech “at school”? Given this unsettled legal framework, is it any surprise that the administrators in the Phoebe Prince case may have been slow to act in disciplining the alleged cyberbullies for their texts and Facebook postings?

### III. Regulating Off-Campus Speech: Underground Newspapers<sup>61</sup>

Perhaps the closest historical analogy to web-based student Internet speech can be found in the off-campus newspaper cases which have been litigated since the mid-1960s. Notwithstanding *Porter*, a majority of these cases permit schools to regulate off-campus student speech when it is directed at school and comes on to school grounds or causes a disruption at school. Thus, in *Sullivan v. Houston Independent School District*,<sup>62</sup> a student was punished for an underground newspaper distributed off-campus, but at the entrance to the school which was then brought onto school grounds.<sup>63</sup> The student sued the school claiming that the punishment violated his First Amendment rights.<sup>64</sup> The Fifth Circuit found that the student flagrantly disregarded established school regulations, never having attempted to comply with a prior submission rule which was the product of an extensive and good-faith effort to formulate a valid student conduct code. Indeed, the court noted that the student had openly and repeatedly defied the principal’s request to submit the paper for review and instead

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61. Portions of these materials have been previously published in Thomas E. Wheeler, *Lessons from the Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 EDUC. L. REP. 227 (2007).

62. 475 F.2d 1071 (5th Cir. 1973).

63. *Id.* at 1074.

64. *Id.* at 1072.

resorted to profane epithets.<sup>65</sup> A key factor in this case was the finding that the papers were “distributed . . . off campus in a manner calculated to result in their presence on the campus.”<sup>66</sup> As a consequence, notwithstanding the fact that there was no disruption, the Fifth Circuit denied the student’s request for relief, noting that “[t]oday we merely recognize the right of school authorities to punish students for the flagrant disregard of established school regulations; we ask only that the student seeking equitable relief from allegedly unconstitutional actions by school officials come into court with clean hands.”<sup>67</sup>

In *Bystrom ex rel. Bystrom v. Fridley High School*,<sup>68</sup> several students distributed an unofficial newspaper, *Tour de Farce*, which they had written off of school grounds but distributed on campus.<sup>69</sup> Based on the content of some of the articles that encouraged vandalism at the school, the principal suspended some of the authors.<sup>70</sup> In dismissing the First Amendment challenge the Minnesota district court found that there was a substantial likelihood of material disruption surrounding the distribution of the papers satisfying the second prong of *Tinker*, that “*Tour de Farce* contains language that is more sexually explicit, indecent, and lewd than *Fraser’s* strictly metaphorical speech,” and that it advocated violence against the teachers.<sup>71</sup> Consequently, the discipline was

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65. *Id.* at 1075-76.

66. *Id.* at 1073.

67. *Id.* at 1077.

68. 686 F.Supp. 1387 (D. Minn. 1987).

69. *Id.* at 1389.

70. *Id.* at 1390.

71. *Id.* at 1393. See also *Baker v. Downey City Bd. of Educ.*, where students used obscene and vulgar language in an underground newspaper published off-campus and distributed to students just outside the main campus gate. 307 F. Supp. 517 (C.D. Cal. 1969). The school suspended them for ten (10) days and the students challenged the suspension under the First Amendment. *Id.* Although pre-*Fraser*, the court used the same profane/vulgar analysis to find that the school had the authority to punish the students for these newspapers that found their way on to campus. *Id.* In *Pangle v. Bend-Lapine Sch. Dist.*, a student wrote and distributed a newsletter on school grounds that included a list of acts that he “would like to see happen at school . . . to the people who ‘run’ it.” 10 P.3d 275, 277 (Or. Ct. App. 2000). The list described, in part, “feed[ing] snake bite antidote or Visine to someone, as well as [b]lowing things up and bomb threats.” *Id.* (internal citation omitted). He was disciplined for the newsletter and challenged that

upheld.

In contrast with these two cases is *Thomas v. Board of Education of Granville Central School District*.<sup>72</sup> In that case, several students modeled an off-campus newspaper on *National Lampoon* and included articles on “masturbation and prostitution,” among other things.<sup>73</sup> A teacher assisted in the efforts and advised the assistant principal of the general nature of the project but not the specifics.<sup>74</sup> The students were directed by the assistant principal not to offend or hurt others and to keep it off campus.<sup>75</sup> However, “the publication was stored, with [the teacher’s] permission, in his classroom closet. At the end of each school day, the students retrieved a number of copies and sold each one for twenty-five cents to classmates at Stewart’s, a store in Granville.”<sup>76</sup> Copies eventually made it onto campus and came to the attention of the school administration when a teacher confiscated a copy from a student.<sup>77</sup> Noting that “all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate,” the Second Circuit found no nexus with the school and thus no basis for disciplining the students.<sup>78</sup>

The most recent off-campus newspaper case involved a high school student who was expelled after his article about how to “hack” into the school’s computers was published in an underground newspaper.<sup>79</sup> In *Boucher v. School Board of the School District of Greenfield*, students published an

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discipline, in part, under the First Amendment. *Id.* at 277-78. The Oregon Court of Appeals treated this as school speech and applied the *Fraser* analysis rejecting the student’s argument that “the use of vulgar or threatening language not resulting in actual disruption is not subject to discipline.” *Id.* at 286.

72. 607 F.2d 1043 (2d Cir. 1979).

73. *Id.* at 1045.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1050.

79. *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 821 (7th Cir. 1998).

underground newspaper off campus entitled *The Last*.<sup>80</sup> “The inaugural issue . . . provocatively explained that *The Last* was intended to ‘ruffle a few feathers and jump-start some to action.’”<sup>81</sup> The June issue of *The Last* was distributed in bathrooms, lockers, and the cafeteria at Greenfield High School and contained an article, entitled *So You Want To Be A Hacker*, that purported to “tell everyone how to hack the school[']s gay ass computers.”<sup>82</sup>

Upon investigation the school determined that the author of the article was Mr. Boucher and suspended him pending expulsion for “endanger[ing] school property.”<sup>83</sup> Boucher challenged the discipline, contending that it violated his First Amendment rights.<sup>84</sup> Using the first prong of *Tinker*, the school argued that the article was not protected speech under the First Amendment because it disclosed restricted access codes in violation of Wisconsin’s computer crimes law.<sup>85</sup> The Seventh Circuit focused instead on the second factor in the *Tinker* test, whether the speech was disruptive. Boucher argued that because the newspaper was circulated, the school had to show “actual” harm to the school in order to punish him.<sup>86</sup> The Seventh Circuit rejected this argument: “The Court has indicated that in the case of student expression, the relevant test is whether school authorities ‘have reason to believe’ that the expression will be disruptive.”<sup>87</sup> The Seventh Circuit went on to note that:

[T]he article “does encourage activity which could be invasive and destructive to the School’s computer system and the information on it.” It is largely irrelevant that the article may not have actually (and in hindsight) provided as valuable advice as purported or that the information

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80. *Id.* at 822.

81. *Id.*

82. *Id.* (quotations omitted).

83. *Id.* at 823.

84. *Id.*

85. *Id.* at 825.

86. *Id.* at 828.

87. *Id.* at 827.

disclosed may not have been as secret as represented; on the facts before us a reader might reasonably take the article at face value.<sup>88</sup>

Boucher also argued that he should not be punished because he wrote the article off school grounds.<sup>89</sup> The Seventh Circuit rejected this argument for two reasons. First, it noted that “the article was in fact distributed on campus” and thus it did not matter where it was actually written.<sup>90</sup> Second, the court noted that “the article advocates on-campus activity” which gave a sufficient nexus to the school to permit it to regulate the speech.<sup>91</sup>

#### IV. Cyberharassment in the Courts

It is interesting to note that since the advent of the Internet, the vast majority of cyberspeech cases involve not student/student harassment as in the Phoebe Prince case, but instead involve student/administrator harassment. This may be because most of this activity is directed at school administrators, or perhaps simply that administrators are more likely to act when their own ox is gored.

In reviewing the propriety of the student’s suspension the Pennsylvania Supreme Court stated:

However, while the freedom of speech is rightfully cherished, it is also clear that this right of free speech “is not absolute at all times and under all circumstances.” For example, certain types of speech can be regulated if they are likely to inflict unacceptable harm. These narrow categories of unprotected speech include “fighting words,” speech that incites others to imminent lawless action, obscenity, certain types

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88. *Id.* at 828.

89. *Id.*

90. *Id.* at 829.

91. *Id.*

of defamatory speech, and “true threats.”<sup>92</sup>

The first prong of the *Tinker* test seems to adapt well to the Internet context as it simply looks to the message being communicated and analyzes whether it is protected speech.<sup>93</sup> This analysis really does not vary with the mode of the speech. Whether a student writes “I am against the Vietnam War,” shouts it as a slogan at a protest, wears it on her arm, or posts it on a website, the message remains the same. For First Amendment purposes much student cyberspeech would be protected as long as it is not disruptive and does not fall into one of several categories, such as “true threats,” that the Supreme Court has recognized as being unprotected.

In *J.S. ex rel. H.S.*, the school argued that the student’s website was not protected speech as it constituted a “true threat” in that it contained the teacher’s severed head and a solicitation for funds to hire a hit man.<sup>94</sup> The Pennsylvania Supreme Court rejected this argument, finding that the website did not constitute a “true threat” because it was not sent to the teacher and indeed was designed specifically to preclude access by teachers and administrators.<sup>95</sup> As a consequence the court noted, “we conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody.”<sup>96</sup> As will be discussed later in this article, *J.S. ex rel. H.S.* notwithstanding, most courts have found such comments to constitute true threats. Under *Tinker*, if the statement is a true threat then it is not protected free speech, regardless of whether it is uttered in school, in a poem at home, or in cyberspace.<sup>97</sup>

Since the *J.S. ex rel. H.S.* court found that the speech was

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92. *Id.* at 854 (internal citation omitted).

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

94. *J.S. ex rel. H.S.*, 807 A.2d at 856-57.

95. *Id.* at 859 (emphasis added).

96. *Id.*

97. *Id.* at 856.

not a “true threat,” it determined that the cyberspeech was protected by the First Amendment under the first prong of *Tinker*.<sup>98</sup> However, under the second prong of *Tinker*, a school may still restrict student speech if it can show that the speech is likely to create a substantial or material disruption at school.<sup>99</sup> The primary factor in this analysis whether there is a nexus between the cyberspeech and a potential impact at school. “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”<sup>100</sup>

In *J.S. ex rel. H.S.* the court squarely addressed the on-campus/off-campus distinction that the *Morse* court sidestepped and resolved the issue in the school’s favor:

We find there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus. While there is no dispute that the web site was created off-campus, the record clearly reflects that the off-campus website was accessed by J.S. at school and was shown to a fellow student. . . . Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District; Mrs. Fulmer and Mr. Kartsotis were the subjects of the site. Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring the circulation of the web page on school property. We hold that where speech that is aimed at a specific school and/or its personnel is brought onto school campus or accessed at school by its originator, the speech will be considered on-campus

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98. *Id.* at 860.

99. *Id.* at 861-62.

100. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citation omitted).

speech.<sup>101</sup>

The court further noted that:

While the fact that J.S. personally accessed his website on school grounds is a strong factor in our assessment, we do not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.<sup>102</sup>

The *J.S. ex rel. H.S.* approach has the benefit of creating a bright-line test for administrators and students. If the website is accessed by students at school then the speech will be deemed to have taken place on-campus and the school may regulate it. The danger this presents for students, acknowledged in footnote 12 of the opinion, is that once a website is created and placed on the Internet the creator cannot control who accesses it and where they do so. Thus, even if the creator did not intend the website to be accessed at school and even if she actually takes steps to prevent it, if someone does access it at school, then the student is at risk. Given the nature of the unrestricted speech and the potential for harm, this seems to be a reasonable balance of the respective interests.

Once a nexus with the school has been established, the second prong of *Tinker* requires that, prior to regulation, a school must demonstrate actual or potential disruption to the educational process posed by the speech.<sup>103</sup> This is based on a recognition that a school has a “compelling interest in having an undisrupted school session conducive to the students’

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101. *J.S. ex rel H.S.*, 807 A.2d at 865.

102. *Id.* at 865 n.12.

103. *Id.* at 861 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

learning.”<sup>104</sup> Thus, a school may regulate student speech if “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities” are present.<sup>105</sup> Moreover, *Tinker* does not require school officials to wait until disruption actually occurs before they may act. “In fact, they have a duty to prevent the occurrence of disturbances.’ Forecasting disruption is unmistakably difficult to do. *Tinker* does not require certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.”<sup>106</sup>

Subsequent litigation over student websites gives some guidance as to the degree of disruption that must be demonstrated prior to regulation. At one end of the spectrum are cases like *Beussink ex rel. Beussink v. Woodland R-IV School District*,<sup>107</sup> which involved a relatively mild off-campus website that contained unflattering comments about the school’s principal. Using *Tinker*, the court found that the speech was protected and that the school could not demonstrate any disruption due to the website, thus overturning the suspension on First Amendment grounds.<sup>108</sup>

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104. *Grayned v. City of Rockland*, 408 U.S. 104, 119 (1972).

105. *Tinker*, 393 U.S. at 514.

106. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (internal citation omitted).

107. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

108. *Id.* See also *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F.Supp.2d 698 (W.D. Pa. 2003). Student made several postings, including one from school, that could fairly be characterized as a routine trash-talking about another school’s volleyball team and players. *Id.* at 700-01. The court made short work of this case but used a different type of analysis. Rather than looking at disruption and related *Tinker* issues, the court overturned the discipline on overbreadth grounds noting that the discipline policy itself was overbroad as it did not “geographically limit a school official’s authority to discipline expressions that occur on school premises or at school related activities, thus providing unrestricted power to school officials.” *Id.* at 705. See also *Coy ex rel. Coy v. Bd. of Educ. of the North Canton City Sch.*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). Middle school student created a website for his skateboarding group that was maintained on his home computer. *Id.* at 795. The website was not obscene *per se* but had some insulting sentences about several fellow students and was accessed at school. *Id.* The district discovered the website and suspended the student for the comments about fellow students. *Id.* at 796. The court refused to grant the school summary judgment on the student’s First Amendment claims finding that it was not

Toward the middle of the spectrum is the case of *Mahaffey ex rel. Mahaffey v. Aldrich*,<sup>109</sup> in which the student created a website “for laughs,” because he was bored and “wanted something to do.” The website was entitled “Satan’s web page” and contained statements such as:

SATAN’S MISSION FOR YOU THIS WEEK:  
 Stab someone for no reason then set them on fire  
 throw them off of a cliff, watch them suffer and  
 with their last breath, just before everything  
 goes black, spit on their face. Killing people is  
 wrong don’t do It. unless Im there to watch. —  
 Or just go to Detroit. Hell is right in the middle.  
 Drop by and say hi.

PS: NOW THAT YOU’VE READ MY WEB PAGE  
 PLEASE DON’T GO KILLING PEOPLE AND

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inappropriate for a student to visit his own website which was not clearly obscene. *Id.* at 801. *See also* *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001). Student compiled a “Top Ten” list about the athletic director referring to him as fat, impugning his masculinity, and deriding the size of his genitals. *Id.* at 448. The top ten list was sent off-campus in an e-mail but copies were later found in the teachers’ lounge and elsewhere around school. *Id.* 448-49. Notwithstanding the fact that the e-mail did make its way onto school grounds, the court sided with the student: “Given the out of school creation of the list, absent evidence that [the student] was responsible for bringing the list on school grounds, and absent disruption, . . . [the school] could not, without violating the First Amendment, suspend [the student] for the mere creation of the . . . Top Ten list.” *Id.* at 458. *See also* *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000). Student created a website on his home computer entitled the “Unofficial Kentlake High Home Page.” *Id.* at 1089. The website was highly critical of the school’s administration and had two mock obituaries with visitors encouraged to vote for the next one to “die.” *Id.* The local media discovered the site and characterized it as a Columbine type “hit list.” *Id.* The student was suspended and sued the school alleging a violation of his First Amendment rights. *Id.* The school lost as the district court found that the speech took place entirely off of school grounds and the school was unable to demonstrate any specific evidence of disruption caused by the site nor that it was a true threat and thus unprotected: “The defendant, however, has presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.” *Id.* at 1090.

109. 236 F. Supp. 2d 779, 781 (E.D. Mich. 2002).

STUFF THEN BLAMING IT ON ME. OK?<sup>110</sup>

Despite the offensive nature of the speech, the only nexus with the school with respect to the creation of the site was a statement by the student that some of the website creation “may have” taken place on school computers.<sup>111</sup> The school also could not demonstrate any actual or potential disruption.<sup>112</sup> As a consequence, “Defendants’ regulation of Plaintiff’s speech on the website without any proof of disruption to the school or on campus activity in the creation of the website was a violation of Plaintiff’s First Amendment rights.”<sup>113</sup>

At the far end of the spectrum permitting discipline are cases like *J.S. ex rel. H.S. v. Bethlehem Area School District*.<sup>114</sup> Although the Pennsylvania Supreme Court found that the comments on the website did not constitute a “true threat” and therefore were protected speech,<sup>115</sup> the court upheld the student’s expulsion nevertheless because the school successfully demonstrated that the website had the potential for and did in fact create a substantial disruption at school.<sup>116</sup> This determination was based primarily on the fact that, after viewing the website, the math teacher singled out on the site missed the rest of the year due to anxiety and fear.<sup>117</sup>

The web site posted by J.S. in this case disrupted the entire school community—teachers, students and parents. The most significant disruption caused by the positing of the web site to the school environment was direct and indirect impact of the emotional and physical injuries to Mrs. Fulmer. . . . Mrs. Fulmer was unable to complete the school year and took a medical leave of absence for the next year. Mrs. Fulmer’s

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110. *Id.* at 782.

111. *Id.* at 784.

112. *Id.* at 785.

113. *Id.* at 786.

114. 807 A.2d 847 (W.D. Pa. 2007).

115. *Id.* at 867.

116. *Id.* at 869.

117. *Id.*

absence for over twenty days at the end of the school year necessitated the use of three substitute teachers that unquestionably disrupted the delivery of instruction to students and adversely impacted the education environment.<sup>118</sup>

Taking these cases together, they seem to create a useful basic framework for analyzing Internet-based student free speech claims. Applying the *Tinker* analysis, assuming some form of nexus with the campus, a school may regulate electronic speech if “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities” are present.<sup>119</sup> The categories most likely to apply to student Internet speech are usually “obscenity, certain types of defamatory speech, and true threats.”<sup>120</sup> Of these, in this post-Columbine world, the most significant area of concern would be threats.

However, some writers have suggested that this type of framework goes too far in permitting schools to punish students for cyberspeech, particularly in the student/student harassment cases. For example, one writer notes that “[p]resently, there is a risk that students’ First Amendment rights will be infringed because courts are placing too much emphasis on the Columbine tragedy without considering the well-known adage, ‘kids will be kids.’”<sup>121</sup> The problem, of course, is that while kids will be kids, schools are required to attempt to mold them into adults, and in doing so, federal law requires schools to respond to and remedy inappropriate harassing behavior. For example, the Supreme Court in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*<sup>122</sup> held that, under Title IX, schools that are aware of peer sexual

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118. *Id.*

119. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

120. *J.S. ex rel. H.S.*, 807 A.2d at 854 (internal citation omitted).

121. Sandy S. Li, *The Need for a New Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 66-67 (2005).

122. 526 U.S. 629, 646-47 (1999).

harassment and fail to adequately respond to it will be liable for that harassment. Similarly, the United States Department of Education's Office of Civil Rights (OCR) considers peer hostile environment racial harassment to be a violation of Title VI.<sup>123</sup> In an October 26, 2010 "Dear Colleague" letter, OCR took the position that, under Title IX, schools are required to regulate harassing cyberspeech regardless of whether it comes on to school grounds or not.<sup>124</sup> Other courts have also recognized a cause of action for disability-based harassment as well.<sup>125</sup> In addition to these federal laws, as noted in a recent report by the Education Commission of the States, many states have adopted statutes requiring schools to develop effective anti-bullying policies.<sup>126</sup>

The other problem is that while "kids will [indeed] be kids," it leads to precisely the type of harassment that led to the Phoebe Prince suicide.<sup>127</sup>

#### V. The Third Circuit *Layshock/J.S. ex rel. H.S.* Disconnect

Just as it would seem from the preceding section that the courts are approaching some type of consensus regarding the regulation of student cyberspeech, on February 4, 2010, the Third Circuit handed down two decisions in cases with almost identical facts but which had dramatically different results.

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123. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994). See *Bryant v. Ind. Sch. Dist.* No. 1-38, 334 F.3d 928 (10th Cir. 2003); *Williams v. Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL 1286306 (E.D. Mich. Mar. 30, 2010).

124. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ., Office for Civil Rights, to Education Colleagues (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

125. *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005).

126. See Jennifer Dounay, State Anti-bullying Statutes, EDUCATION COMMISSION OF THE STATES (April 2005), <http://www.ecs.org/clearinghouse/60/41/6041.doc>.

127. Li, *supra* note 125, at 67.

## A. Layshock ex rel. Layshock v. Hermitage School District

In *Layshock ex rel. Layshock v. Hermitage School District*,<sup>128</sup> Justin Layshock, a senior at Hickory High School, created a fake profile of his principal, Eric Trosch, on MySpace.com, using his grandmother's off-campus computer during non-school hours.<sup>129</sup> Although no school resources were used to create the profile, Layshock copied, without permission, a photograph of Mr. Trosch from the school's website and used it in the profile.<sup>130</sup> In addition to the usual juvenile sexual comments, the parody stated that the principal was a drunk and contained comments that he had stolen a "big keg," that he was "too drunk to remember" the date of his birthday, and that he smoked marijuana and used other drugs.<sup>131</sup> Principal Trosch testified that he "believed all of the profiles were 'degrading,' 'demeaning,' 'demoralizing,' and 'shocking.'"<sup>132</sup>

Layshock told a few friends about the profile but eventually "word of the profile 'spread like wildfire' and soon reached most, if not all, of Hickory High's student body."<sup>133</sup> Following Layshock's initial profile "three other students also posted unflattering profiles of Trosch on MySpace. Each of those profiles was more vulgar and more offensive than Justin's. . . . On December 15, Justin used a computer in his Spanish classroom to access his MySpace profile of Trosch. He also showed it to other classmates . . . ."<sup>134</sup>

Principal Trosch discovered the profiles but was initially unable to block student access because "the Technology Coordinator[] was on vacation . . . . Instead, student use of computers was limited to labs or the library where it could be supervised."<sup>135</sup> Computer access was limited for more than a

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128. 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, opinion vacated* by No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

129. *Layshock ex rel. Layshock*, 593 F.3d at 252.

130. *Id.*

131. *Id.*

132. *Id.* at 253.

133. *Id.*

134. *Id.*

135. *Id.*

week “and computer programming classes were cancelled.”<sup>136</sup> School administrators eventually learned that Layshock was behind the profile and he was given a “ten-day, out-of-school suspension,” banned from extra-curricular activities, placed in the alternative education program, and was not allowed to attend graduation ceremonies.<sup>137</sup>

Layshock and his parents sued the school, arguing that the punishment violated his First Amendment rights and their Fourteenth Amendment rights.<sup>138</sup> The district court granted Layshock summary judgment on his First Amendment claim, finding that the school had violated his rights, and granted the school summary judgment on the parents’ Fourteenth Amendment claims.<sup>139</sup> The parties cross-appealed the decisions.<sup>140</sup>

The Third Circuit began its analysis by reviewing the *Tinker/Bethel/Hazelwood* trilogy and stating that, under this framework, “it is important to note that the district court found that the District could not ‘establish[] a sufficient nexus between Justin’s speech and a substantial disruption of the school environment[,]’ and the School District[] does not challenge that finding on appeal.”<sup>141</sup> Instead, the school focused its argument on appeal on the *Fraser/Morse* lewd and vulgar standard because it believed the case was an on-campus speech case.<sup>142</sup> In support of this, the school noted that the speech started on school grounds when Layshock “stole” the picture of Principal Trosch and ended on school grounds when Layshock accessed the site in Spanish class and showed it to his friends.<sup>143</sup> The school argued that, because the profile was on-campus speech that was lewd and vulgar and ran contrary to the school’s basic educational mission, under *Fraser/Morse* the school could regulate the speech.<sup>144</sup>

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136. *Id.*

137. *Id.* at 254.

138. *Id.* at 252.

139. *Id.*

140. *Id.* at 255.

141. *Id.* at 258-59 (citations omitted).

142. *Id.* at 261.

143. *See id.* at 259.

144. *Id.*

The Third Circuit panel decision seems to have misunderstood this argument and confused the *Fraser/Morse* analysis with the *Tinker* substantial disruption standard. As discussed earlier, under *Fraser/Morse* a school may regulate lewd or vulgar on-campus speech regardless of disruption: “The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission.”<sup>145</sup> Nevertheless, the *Layshock* panel seems to have rested its decision on the fact that the school could not show substantial disruption:

Moreover, when pressed at oral argument, counsel for the School District conceded that the District was relying solely on the fact that Justin created the profile of Trosch. We have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.<sup>146</sup>

This statement is simply incorrect and ignores the *Fraser/Morse* framework as well as *Tinker* itself.

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

146. *Layshock ex rel. Layshock*, 593 F.3d at 263. This concession is troubling, since it appears that there was indeed significant disruption as a consequence of the profile. As the district court noted: “However, Defendants presented considerable evidence that Plaintiff’s website caused actual disruption of the day-to-day operation of Hickory High School from December 12 through December 21, 2005. Justin’s parody of [the principal], as well as the other parodies of unknown origin, were accessed incessantly by students at Hickory High School, which in turn caused the school to shut down its computer system to student use from December 16 through December 21, 2005. The lack of access to the computer system caused the cancellation of several classes and interfered with students’ ability to use the computers for their school-intended purposes. During this period of time Frank Gingras, the school district’s technology coordinator, was required to devote approximately 25% of his time to dealing with the disruption caused by the profiles at www.myspace.com. This time was consumed by attempts to block the numerous addresses from which students were attempting to access the profiles on school computers, as well as efforts to install additional firewall protections on the school’s computer system.” *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 412 F. Supp. 2d 502, 508 (W.D. Pa. 2006).

To the extent that the panel in *Layshock* even considered the *Fraser/Morse* framework, it seems to ignore the fact that Layshock himself admitted accessing the website at school and showing it to several friends. This despite the fact that the panel opinion itself notes that “[o]n December 15, Justin used a computer in his Spanish classroom to access his MySpace profile of Trosch. He also showed it to other classmates . . . .”<sup>147</sup> It is difficult to understand, given this statement, how the panel could then conclude that “[t]here is no evidence that Justin engaged in any lewd or profane speech while in school.”<sup>148</sup> In fact this statement seems to run contrary to the caption of one section of the panel opinion: “The District can not Punish Justin Merely because his Speech Reached inside the School.”<sup>149</sup> It seems as if the panel assumed that accessing a website Layshock himself created and showing it to other students is not “speech.” If so, this position makes no sense given the Supreme Court’s broad view of speech, written, spoken, and expressive.

This flawed assumption appears to underlie the panel’s decision to treat this case as an off-campus speech case which drove its resolution of the matter: “[T]he District is not empowered to punish his out of school expressive conduct under the circumstances here.”<sup>150</sup>

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 they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother’s computer while at his grandmother’s house

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147. *Layshock*, 593 F.3d at 253.

148. *Id.* at 260 (quoting *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599-600 (W.D. Pa. 2007)).

149. *Layshock*, 593 F.3d at 260.

150. *Id.* at 263.

would create just such a precedent . . . .<sup>151</sup>

The fact that the panel opted to treat the case as an off-campus speech case, ignoring the fact that Layshock accessed the site at school and showed it to his friends, undermines the opinion and is likely one of the reasons that rehearing was granted and the opinion was vacated.

B. *J.S. ex rel. Snyder v. Blue Mountain School District*

In *J.S. ex rel. Snyder v. Blue Mountain School District*,<sup>152</sup> J.S., a female eighth grader at Blue Mountain Middle School, created a fake profile of her principal, James McGonigle, on MySpace.com using her parents' computer. The URL for the profile was <http://www.myspace.com/kidsrockmybed>.<sup>153</sup> Although no school resources were used to create the profile, J.S. did copy, without permission, a photograph of Mr. McGonigle from the school's website and used it in the fake profile.<sup>154</sup> According to the court's description:

[S]he created from her home computer a MySpace.com Internet profile featuring her principal, James McGonigle. The profile did not state McGonigle's name, but included his photograph from the website of Blue Mountain School District (the "School District"), as well as profanity-laced statements insinuating that he was a sex addict and pedophile.<sup>155</sup>

Gems from this profile noted in the court's decision include:

[A] self-portrayal of a middle school principal named "m-hoe=]." The profile's owner described

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151. *Id.* at 260.

152. 593 F.3d 286 (3d Cir. 2010) *reh'g en banc granted, opinion vacated* by No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

153. *J.S. ex rel. Snyder*, 593 F.3d at 291.

154. *Id.*

155. *Id.* at 290.

himself as a married bisexual forty-year-old man . . . . His “Interests” section read as follows: . . . “fucking in my office. hitting on students and their parents.” . . . Another section, entitled “About me” stated:

“HELLO CHILDREN

yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick

PRINCIPAL

I have come to myspace so i can pervert the minds of other principal’s to be just like me.<sup>156</sup>

J.S. discussed the site with several friends the day after she created it, and although it was originally a public site available to everyone, she later made it private, accessible only to those she allowed.<sup>157</sup> Unlike *Layshock*, there was no evidence that the site was ever accessed at school.<sup>158</sup> However, the website did create some minor disruption at school.<sup>159</sup>

J.S. was suspended for ten days and sued the school, alleging that her suspension for the off-campus website violated her First Amendment rights.<sup>160</sup>

The District Court acknowledged that J.S. created the profile at home, and determined that it did not substantially and materially disrupt school so as to satisfy the *Tinker* standard, although it did cause some disruption. However, the District Court ultimately held that, based on

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156. *Id.* at 291.

157. *See id.* at 292.

158. *See id.*

159. *See id.* at 293-94.

160. *See id.* at 294-95.

the facts of the case and “because the lewd and vulgar off-campus speech had an effect on-campus,” the School District did not violate J.S.’s First Amendment rights by disciplining her.<sup>161</sup>

The *J.S. ex rel. Snyder* panel began its analysis by noting that the *Fraser/Morse* framework was inapplicable<sup>162</sup> “[b]ecause the Middle School computers block access to MySpace, students could have viewed the profile only from an off-campus location.”<sup>163</sup> Thus, this case was not an on-campus speech case. The *J.S. ex rel. Snyder* panel then turned to the *Tinker* substantial disruption analysis.<sup>164</sup> However, this panel of the Third Circuit took a far different view of substantial disruption than the *Layshock* panel had. As noted earlier, it appears that the *Layshock* panel held that *Tinker* requires a showing that the profile actually “results in foreseeable and substantial disruption of school.”<sup>165</sup>

The *J.S. ex rel. Snyder* panel viewed the *Tinker* showing differently:

Yet, school authorities need not wait until a substantial disruption actually occurs in order to curb the offending speech if they are able to “demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities.”

...

Our sister courts of appeals offer further support for the notion that a school may meet its burden of showing a substantial disruption through its well-founded belief that future disruption will occur.<sup>166</sup>

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161. *Id.* at 295 (citation omitted).

162. *See id.* at 297-98.

163. *Id.* at 292.

164. *See id.* at 298.

165. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. 2010).

166. *J.S. ex rel. Snyder*, 593 F.3d at 298-99 (internal citation omitted).

Within this framework, the *J.S. ex rel Snyder* panel first looked to the three items of actual disruption that the school cited in favor of the discipline (loud classes, administrative resources used to investigate and discipline, and decorated lockers supporting the student) and found them wanting.<sup>167</sup> “[W]e would have no trouble concluding, as the District Court did, that these incidents did not amount to a substantial disruption of the Middle School sufficient to discipline the students for their speech.”<sup>168</sup> However, the *J.S. ex rel Snyder* panel did not stop there; it then looked to whether the site had the potential to cause disruption:

[T]he profile’s potential to cause a substantial disruption of the school was reasonably foreseeable. It is apparent that the underlying cause for McGonigle’s concern about the profile was its particularly disturbing content, not a petty desire to stifle speech critical of him, and we proceed with our analysis with this in mind. Therefore, we are sufficiently persuaded that the profile presented a reasonable possibility of a future disruption, which was preempted only by McGonigle’s expeditious investigation of the profile, which secured its quick removal, and his swift punishment of its creators.<sup>169</sup>

The *J.S. ex rel. Snyder* panel concluded that “based on the profile’s nature and its threat of substantial disruption of the Middle School, that the School District did not offend J.S.’s First Amendment free speech rights by punishing her for creating the profile.”<sup>170</sup>

The *J.S. ex rel. Snyder* panel recognized the apparent tension between its decision and the decision in *Layshock* handed down the same day and attempted to distinguish the cases based on the fact that, in *Layshock*, the school

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167. *Id.* at 309-10.

168. *Id.* at 299.

169. *Id.* at 300.

170. *Id.* at 303.

purportedly conceded the *Tinker* disruption test and could not meet the on-campus requirement of *Fraser/Morse*.<sup>171</sup> Nonetheless, recognizing the inherent tension in *J.S. ex rel. Snyder* and *Layshock*, Third Circuit granted requests for rehearing en banc in both cases on April 9, 2010.<sup>172</sup> Oral argument took place on June 3, 2010. As of the date of this article no decision has been rendered by the Third Circuit on these cases.<sup>173</sup>

## VI. Finding the “Magic Bullet”

Given the extremely unsettled state of the law in this area, is it any wonder that the school administrators in South Hadley were at somewhat of a loss with respect to how to deal with the situation? According to a Boston Globe report quoting South Hadley Superintendent Gus Sayer: “The kids have a way of communicating with each other without us knowing about it. . . . They really have their own world.”<sup>174</sup> He went on to say that “I think the principal did everything he could. . . . Everyone expects the schools to solve these problems, but we don’t have magic-bullet solutions to how kids behave.”<sup>175</sup> It is perhaps no surprise that the Prince family filed a complaint against the school which was eventually settled.<sup>176</sup>

When you have two panels of learned jurists releasing contrary opinions on similar facts on the same day, there is an obvious need for clarity in this area. While there is no “magic-bullet,” as the courts address these issues, there are three specific areas where clarification would help school

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171. *Id.* at 296-98.

172. *See id.*, *reh’g en banc granted, opinion vacated by* No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. 2010), *reh’g en banc granted, opinion vacated by* No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

173. Robson, *supra* note 15.

174. Schworm, *supra* note 9, at 2 (internal citation omitted).

175. *Id.* (internal citation omitted).

176. Andrea Canning et al., *Phoebe Prince’s Family Speaks Out as One Year Anniversary of Suicide Nears*, ABCNEWS.COM, Dec. 23, 2010, <http://abcnews.go.com/US/phoebe-princes-family-speaks-settling-lawsuit-school/story?id=12465543&page=2>.

administrators avoid tragedies like that of Phoebe Prince. First, school administrators need clarification on what constitutes on-campus speech under the *Fraser/Morse* framework. Second, school administrators need guidance on the application of the *Tinker* substantial disruption test and, more specifically, whether the “reasonably foreseeable” standard applies. Third, schools need to know if there is an alternative framework that may be more appropriate to apply to the sub-set of cyberbullying cases.

A. *On-campus Speech Under the Fraser/Morse Framework*

As noted earlier, one of the oddities of the *Layshock* decision is the panel’s failure to give due weight to the fact that “[o]n December 15, Justin used a computer in his Spanish classroom to access his MySpace profile of Trosch. He also showed it to other classmates . . . .”<sup>177</sup> Given this fact, just as in *Morse*, the case should have been a rather routine on-campus speech case requiring a rather formulaic application of the *Fraser* framework. Yet the panel chose not to do so and instead tried to create an artificial distinction to differentiate between the act of speaking (*i.e.* creating the website) and the act of accessing the website at school and showing it to friends.<sup>178</sup> The panel opinion apparently refers to the second as not being an act of speech, noting that the District could not punish Justin just because his speech reached inside the school.<sup>179</sup>

The artificial distinction in *Layshock* with respect to on-campus speech runs counter to *Morse*. In *Morse* the decision turned on the location of the speech. The Supreme Court held that the student unfurled his banner on-campus” at a school event.<sup>180</sup> Having reached that conclusion, the Supreme Court determined that *Fraser* applied and the school could restrict speech inconsistent with its educational mission.<sup>181</sup> The Supreme Court did not look to where the student created his

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177. *Layshock ex rel. Layshock*, 593 F.3d at 253.

178. *Id.* at 259.

179. *Id.* at 260.

180. *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007).

181. *See generally id.*

banner (almost certainly off of school grounds). Instead the Supreme Court focused on where he unfurled it, in that case “on campus.”<sup>182</sup> Having found that the banner was unfurled at school (an act of speech), under *Morse* that is the end of the on-campus inquiry—the speech took place at school, *Fraser* applies, and a school may regulate speech inconsistent with its education mission regardless of disruption.<sup>183</sup>

Given the manner in which the Supreme Court handled the speech in *Morse*, the *Layshock* panel decision is incorrect. Under *Morse* the issue of where the speech was created is irrelevant. Instead, the key focus is on whether any of the speech took place or was accessed at school. Thus, in *Layshock*, the analysis should have been relatively simple. Layshock admitted that he accessed the website at school and showed it to classmates.<sup>184</sup> He metaphorically unfurled his banner at school by accessing the website and showing it to friends in exactly the same fashion as the student unfurled his banner in *Morse*. As a consequence, as in *Morse*, once there is evidence that the website was accessed at school: “The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as [undermining the school’s basic educational mission]. We hold that she may.”<sup>185</sup>

Thus, *Layshock* notwithstanding, it would seem clear that if school administrators have evidence that the harassing materials (texts, Facebook postings of other websites) have been accessed at school, the *Fraser/Morse* framework applies and the school has broad discretion to punish students for that speech regardless of the *Tinker* disruption standard. This is consistent with *J.S. ex rel. Snyder*, which notes that in the age of the worldwide web, “J.S.’s argument for a strict application of *Tinker*, limited to the physical boundaries of school campuses, is unavailing.”<sup>186</sup> Thus, as applied to the Phoebe

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182. *Id.* at 397.

183. *See generally id.*

184. *Layshock ex rel. Layshock*, 593 F.3d at 253.

185. *Morse*, 551 U.S. at 403 (parenthetical text inserted from Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675, 685 (1986)).

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

Prince case, once the South Hadley administrators had evidence that the speech was accessed at school, the administrators should have had the full panoply of disciplinary tools available to punish the cyberbullies regardless of where the speech was originally created.

B. *The “Reasonably Foreseeable” and “Substantial Disruption” Standards Under Tinker*

The second area of concern for school administrators that crops up in cyberbullying cases, where there is no evidence that the speech occurs on-campus and the *Tinker* framework applies, involves the application of the substantial disruption standard. The *Layshock* opinion appears to stand for the proposition that school administrators cannot regulate cyberspeech unless they can show actual disruption. The *J.S. ex rel. Snyder* opinion rejects this proposition, noting that “[o]ur sister courts of appeals offer further support for the notion that a school may meet its burden of showing a substantial disruption through its well-founded belief that future disruption will occur.”<sup>187</sup>

The *J.S. ex rel. Snyder* opinion certainly seems to have the better of the argument, with most cases recognizing that the substantial disruption standard is not limited to actual disruption, but instead applies where a school can show “a well-founded expectation of disruption.”<sup>188</sup> Thus, under this characterization of the *Tinker* framework, South Hadley administrators could have disciplined the cyberbullies for their speech if they could “demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities . . . .”<sup>189</sup>

This framework is helpful with incidents like Internet bomb threats and related activities, but how well does it apply to the Phoebe Prince situation where there is no dispute that the cyberspeech caused actual substantial disruption to her but

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187. *Id.* at 299.

188. *Id.* at 298 (internal citation omitted).

189. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

not to anyone else or to the school in general. This is an issue where guidance is sorely needed. While the reasonably foreseeable substantial disruption standard works well in some cases, it is not clear that disruption of one student's education is sufficient to meet this standard.

As noted earlier, according to District Attorney Scheibel, "[t]he investigation revealed relentless activity directed toward Phoebe, designed to humiliate her and to make it impossible for her to remain at school . . . . The bullying, for her, became intolerable."<sup>190</sup> This cyberharassment did not cause a substantial disruption to the school as a whole, but it utterly disrupted Phoebe Prince's educational environment. Is this enough?

C. *"Invasion of the Rights of Others" as a Basis for Regulation*

A close examination of *Tinker* does reveal one potential method for addressing the Phoebe Prince situation where the cyberspeech is directed at a single student and thus disrupts her educational environment but nothing else:

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or ***invasion of the rights of others*** is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>191</sup>

The Confederate Flag cases also seem to provide some support for the "invasion of the rights of others"<sup>192</sup> prong of *Tinker* although they have all been ultimately resolved on the substantial disruption prong. Thus for example, in *Barr v. Lafon*,<sup>193</sup> while the Sixth Circuit held that the school could ban a depiction of the Confederate Flag based on the potential for

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190. Goldman, *supra* note 1 (internal citation omitted).

191. *Tinker*, 393 U.S. at 513 (emphasis added).

192. *Id.*

193. 538 F.3d 554, 562 (6th Cir. 2008).

disruption due to racial conflict, the court also noted: “Unlike in *Tinker*, Plaintiffs-Appellants’ free-speech rights ‘colli[de] with the rights of other students to be secure and to be let alone.’”<sup>194</sup>

There is a significant downside to expanding the use of the “invasion of the rights of others” prong of *Tinker* to non-tort speech. Mediating the collision between one set of students’ free speech rights and a second set of students’ right to be left alone is frequently a tough line to navigate and can lead to a “heckler’s veto.” For example, in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204*,<sup>195</sup> a student was restricted from wearing a t-shirt with the slogan “Be Happy, Not Gay” based on the fact that it might offend certain LGBT students.<sup>196</sup> In a fascinating opinion exploring the boundaries of the substantial disruption standard and the fighting words doctrine, the Seventh Circuit ultimately held that “‘Be Happy, Not Gay’ is only tepidly negative; ‘derogatory’ or ‘demeaning’ seems too strong a characterization” and thus the school could not justify banning the t-shirt based on a “tendency to provoke such [homophobic] incidents, or for that matter to poison the educational atmosphere.”<sup>197</sup> Therefore the court held that the student was likely to succeed on the merits of his claim that the school would violate his First Amendment rights by preventing him from wearing his t-shirt.<sup>198</sup>

The only case to address this issue directly is an older Eighth Circuit case, *Bystrom ex rel. Bystrom v. Fridley High School Independent School District No. 14*,<sup>199</sup> where the court, citing *Tinker*, noted that “[t]he First Amendment rights of students do not extend to expression that ‘involves . . . invasion of the rights of others,’ and . . . we read this phrase as including only ‘that speech [which] could result in tort liability.’”<sup>200</sup> In *Harper v. Poway Unified School District*,<sup>201</sup> Judge Kozinski, in

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194. *Id.* at 568 (quoting *Tinker*, 393 U.S. at 508). *See also* Defoe *ex rel. Defoe v. Spiva*, 650 F. Supp. 2d 811, 820 (E.D. Tenn. 2009).

195. 523 F.3d 668 (7th Cir. 2008).

196. *Id.* at 676.

197. *Id.*

198. *Id.*

199. 822 F.2d 747 (8th Cir. 1987).

200. *Id.* at 752 (internal citation omitted).

201. 445 F.3d 1166 (9th Cir. 2006).

a dissenting opinion, also briefly noted this provision in *Tinker*:

*Tinker* does contain an additional ground for banning student speech, namely where it is an “invasion of the rights of others.” . . . The interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect.<sup>202</sup>

Even if the “invasion of the rights of others” prong of *Tinker* is limited, as *Bystrom* suggests, to tort-like actions, this would certainly seem to be fertile ground for school administrators wishing to utilize a school’s disciplinary code to punish the type of harassment directed towards Phoebe Prince.

Moreover, to the extent that the harassment of Phoebe Prince consisted of threats of violence towards her, it is highly likely that those threats would not have been protected under *Tinker*. As noted earlier, the first step in any First Amendment analysis is to consider whether the speech itself is protected.<sup>203</sup> Thus, with harassing or threatening cyberspeech, the initial inquiry is whether the speech itself is even protected. In *Watts v. United States*,<sup>204</sup> the Supreme Court recognized that threats of violence are generally not protected by the First Amendment.<sup>205</sup> In *Watts*, the Court noted that there may be some political or social value associated with threatening words in some circumstances;<sup>206</sup> however, the Court has also noted that the government has an overriding interest in “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur . . . .”<sup>207</sup> The issue then becomes

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202. *Id.* at 1197-98 (Kozinski, J., dissenting).

203. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

204. 394 U.S. 705 (1969).

205. *Id.* at 707-08.

206. *Id.* at 707.

207. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

distinguishing “[w]hat is a threat . . . from what is constitutionally protected speech.”<sup>208</sup>

Unfortunately, the Supreme Court in *Watts* declined to set out a test for determining what constitutes a “true threat” and the courts of appeals that have announced such a test fall into two camps. Courts agree on an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of intent to cause a present or future harm. However, their views diverge in determining from whose viewpoint the statement should be interpreted.<sup>209</sup> Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat,<sup>210</sup> whereas others ask how a reasonable person standing in the recipient’s shoes would view the alleged threat.<sup>211</sup> If a communication is deemed to be a “true threat,” then under *Tinker* the student may be punished without regard to First Amendment concerns.<sup>212</sup>

One of the first cases to address the true threat analysis in conjunction with a First Amendment challenge in the school context was the Ninth Circuit case of *Lovell ex rel. Lovell v. Poway Unified School District*.<sup>213</sup> In that case, a student threatened her guidance counselor, stating that she would shoot the counselor if her schedule was not changed.<sup>214</sup> The student was suspended for threatening her counselor and challenged the suspension as violative of her First Amendment rights.<sup>215</sup> The Ninth Circuit disagreed, noting that the hallmark of a true threat is whether the victim had reason to believe that the maker of the threat would follow through with it.<sup>216</sup> In reviewing the context of the speech, the Ninth Circuit

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208. *Watts*, 394 U.S. at 707.

209. Compare *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), with *United States v. Malik*, 16 F.3d 45 (2d Cir.), cert. denied, 513 U.S. 968 (1994).

210. *Planned Parenthood*, 290 F.3d at 1080.

211. *Malik*, 16 F.3d at 49.

212. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 856 (Pa. 2002).

213. 90 F.3d 367 (9th Cir. 1996).

214. *Id.* at 368.

215. See *id.* at 369-70.

216. See *id.* at 372.

held that the counselor did indeed have reason to believe the student might follow through, and therefore it was a true threat and not protected by the First Amendment.<sup>217</sup>

The Eighth Circuit case of *Doe ex rel. Doe v. Pulaski County Special School District*<sup>218</sup> provides an interesting backdrop for this discussion. In that case, “[f]rustrated by [a] breakup and upset that K.G. would not go out with him again, J.M. drafted two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder K.G.”<sup>219</sup> According to the student, the letters were not intended to be given to his former girlfriend but instead were intended to be put to music as part of a rap song.<sup>220</sup> The student told his ex-girlfriend about the letter, and she arranged to have a mutual friend obtain a copy.<sup>221</sup> The mutual friend took the letter without permission and gave it to the ex-girlfriend at school.<sup>222</sup> The ex-girlfriend read the letter with friends during gym class and one of them took it to the school resource officer who then advised administrators.<sup>223</sup> After investigating the situation the school expelled the author for one year under a school policy that read: “Students shall not, with the purpose of terrorizing another person, threaten to cause death or serious physical injury or substantial property damage to another person . . . .”<sup>224</sup>

The student challenged the expulsion, arguing that the letters were protected by the First Amendment.<sup>225</sup> The school responded that they were not protected because they constituted a “true threat.”<sup>226</sup> The Eighth Circuit first looked to the intent to communicate prong and the student’s argument that his letters were not a threat because he never intended to

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217. *See id.* at 372-73.

218. 306 F.3d 616 (8th Cir. 2002).

219. *Id.* at 619.

220. *See id.* at 619, 624.

221. *See id.* at 619.

222. *See id.* at 619-20.

223. *See id.* at 620.

224. *Id.* at 620 n.2.

225. *See id.*

226. *See id.*

communicate them to his ex-girlfriend.<sup>227</sup> The Eighth Circuit rejected this argument, noting as follows:

In determining whether a statement amounts to an unprotected threat, there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence. However, the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it. The requirement is satisfied if the speaker communicates the statement to the object of the purported threat *or* to a third party.<sup>228</sup>

In that case, the Eighth Circuit determined that, because the author allowed the mutual friend to see the letter knowing he would likely tell the ex-girlfriend and indeed actually told her about the letter himself, this conduct was sufficient to meet the intent to communicate prong of the true threat analysis.<sup>229</sup>

The Eighth Circuit then turned to the “reasonable recipient” analysis, which looks to whether the “recipient would have perceived the letter as a threat.”<sup>230</sup>

There is no question that the contents of the letter itself expressed an intent to harm K.G., and we disagree entirely, but respectfully, with the district court’s assessment that the words contained in it were only “arguably” threatening. The letter exhibited J.M.’s pronounced, contemptuous and depraved hate for K.G. J.M. referred to or described K.G. as a “bitch,” “slut,” “ass,” and a “whore” over 80 times in only four pages. He used the f-word no fewer than ninety

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227. *See id.* at 624.

228. *Id.* (internal citation omitted).

229. *See id.* at 624-25.

230. *Id.* at 625.

times and spoke frequently in the letter of his wish to sodomize, rape, and kill K.G. The most disturbing aspect of the letter, however, is J.M.'s warning in two passages, expressed in unconditional terms, that K.G. should not go to sleep because he would be lying under her bed waiting to kill her with a knife. Most, if not all, normal thirteen-year-old girls (and probably most reasonable adults) would be frightened by the message and tone of J.M.'s letter and would fear for their physical well-being if they received the same letter.<sup>231</sup>

The ex-girlfriend also testified that she was terrified and resorted to sleeping with the light on.<sup>232</sup> She also left school early when he was reinstated because she feared meeting him there.<sup>233</sup> As a consequence, the Eighth Circuit found that a reasonable recipient would have viewed the letters as a threat.<sup>234</sup> "As such, the letter amounted to a true threat, and the school's administrators and the school board did not violate J.M.'s First Amendment rights by initiating disciplinary action based on the letter's threatening content."<sup>235</sup>

Because the Eighth Circuit resolved the case on a "true threat" basis, finding that the speech was not protected under the first prong of *Tinker*, it did not reach the disruption element.<sup>236</sup> However, it should be noted that there was strong

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231. *Id.*

232. *Id.* at 626.

233. *See id.*

234. *See id.*

235. *Id.* at 626-27. A similar result was reached by the Ninth Circuit in *LaVine ex rel. LaVine v. Blaine Sch. Dist.*, where a student wrote a poem which described in graphic terms his killing of twenty-eight (28) fellow students and his intent to either commit suicide or go on to kill more students. 257 F.3d 981, 983-84 (9th Cir. 2001). The student turned the poem in to his English teacher to get her thoughts on the poem. *Id.* at 984. The teacher turned the poem in to the vice principal and the student was eventually expelled for the poem. *Id.* at 984-86. The student challenged the expulsion. *See id.* at 986. The court noted that given the spate of recent school shootings "we cannot fault the school's response." *Id.* at 990.

236. *See Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622-24 (8th Cir. 2002).

disagreement as to whether these letters were a “true threat.”<sup>237</sup> As noted above, the district court did not believe that they were, nor did the initial Eighth Circuit panel hearing the case.<sup>238</sup> Moreover, four members of the Eighth Circuit dissented from the *en banc* decision, arguing that the letters were not a true threat because the student never intended to communicate the threat directly to the ex-girlfriend.<sup>239</sup> Because they found that the speech was protected under the first prong of *Tinker*, the dissenters in *Doe* then turned to the second prong. While citing the disruption standard, they chose instead to simply focus on what it felt was a disproportionate punishment: “The board’s draconian punishment is unprecedented among the school threat cases across the nation.”<sup>240</sup>

Because the dissenters focused on the magnitude of the punishment and not the ability to punish under the First Amendment it is difficult to tell if they found that the school had the power to restrict J.M.’s speech under the second prong of *Tinker*,<sup>241</sup> the “invasion of the rights of others” provision.

In *Doe*, even if the majority had found that the letters did not constitute a “true threat,” there is no doubt that these letters precluded the ex-girlfriend from receiving the benefits of a public education free from sexual harassment, a right guaranteed by Title IX.<sup>242</sup> Thus J.M.’s letters, even though they were protected speech under the first prong of *Tinker*, are still subject to restriction under the second prong of *Tinker* because they represent an invasion of the rights of others, and specifically ex-girlfriend’s right to attend school free of peer sexual harassment. Indeed, had the school not acted to resolve the situation, the school itself would be liable for that same peer sexual harassment under *Davis v. Monroe County Board of Education*.<sup>243</sup>

Utilizing this framework may provide school

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237. *Id.*

238. *See id.* at 619.

239. *See generally id.* at 627-36.

240. *Id.* at 635 (Heany, J., dissenting).

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

242. *See generally* 20 U.S.C. § 1681 (2010).

243. *See generally* 526 U.S. 629 (1999).

administrators with the “magic bullet” for responding to cyberharassment cases such as Phoebe Prince even where the speech is arguably protected under the first prong of *Tinker*.<sup>244</sup> Of course, in order to show an “invasion of the rights of others,” the school would have to show that the individual conduct arises to the level of actionable peer harassment under *Davis*. The standard in *Davis* is sufficiently high that this alone would likely prevent abuse by schools while at the same time permitting discipline where warranted and in order to protect the student that is the target of the harassment.<sup>245</sup>

This focus on the invasion of the rights of other students does not limit discipline to cases of sexual or racial harassment

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244. The need for such a framework is clear. See *Jones v. State*, 64 S.W.3d 728 (Ark. 2002) (Arkansas Supreme Court found that a rap song from one student to another that described the killing of the recipient and her family constituted a true threat). See also *In re A.S.*, 626 N.W.2d 712 (Wis. 2001). A 13 year old student told other students at a local youth center that he “was going to kill everyone at the middle school” and provided graphic details of how he was going to “make people suffer” and rape a classmate. *Id.* at 715. He challenged his conviction for disorderly conduct arguing that his speech was not a true threat, but was instead mere “trash talking” protected by the First Amendment. *Id.* at 716. The Wisconsin Supreme Court rejected this argument finding that “[u]nder the totality of the circumstances, a reasonable speaker in the position of A.S. would foresee that reasonable listeners would interpret his statements as serious expressions of an intent to intimidate or inflict bodily harm.” *Id.* at 720. But see *In re C.C.H.*, 651 N.W.2d 702 (S.D. 2002). South Dakota Supreme Court found that a student’s statement to a teacher that “he wanted to kill [B.C.]” was not a true threat. *Id.* at 704, 708. However, this case relied heavily on the original *Doe v. Pulaski* decision which was later reversed. *Id.* at 706-07. See *In re Douglas D.*, 626 N.W.2d 725 (Wis. 2001) (Wisconsin Supreme Court finding that story about a teacher’s head being cutoff was not a true threat).

245. *Davis*, 526 U.S. at 652-53 (noting that the “provision that the discrimination occur ‘under any education program or activity’ suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.”).

but can also extend to other protected categories such as disability or sexual orientation. For example, the Supreme Court, in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>246</sup> noted that the Title VII prohibition of discrimination “because of sex” protects men from sexual harassment by other men. Moreover, several courts have held that taunts of “queer” create an actionable hostile work environment and presumably would be viewed in the same way at school.<sup>247</sup>

Taking this approach and applying it to the type of cyberbullying that was directed towards Phoebe Prince seems a logical fit. For example, it is alleged that the bullies used Facebook to post messages that called Phoebe Prince a “slut,” as well as other messages that were so severe and pervasive that they made it impossible for her to attend school.<sup>248</sup> Presumably, if South Hadley were aware of these postings, it could have disciplined the students under the foregoing framework for invading her rights and impairing her ability to receive an education. Even if the students were to argue, as the student did in *Doe*, that these comments were not “directed” at Prince because they were just general Facebook postings, *Doe* stands for the proposition that the school administrators may treat them as directed to Phoebe Prince and discipline them for the postings nevertheless. The burden of course would be to demonstrate that the comments were sufficiently severe and pervasive to impair the students’ right to a public education under *Davis*. If such a showing can be made, then it is likely that the speech may be restricted under the *Tinker* “invasion of the right of others” language.

## VII. Conclusion

As the Phoebe Prince suicide demonstrates, the impact of cyberharassment on individual students can be both profound

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246. 523 U.S. 75, 82 (1998).

247. *See, e.g.*, *Whelan v. Albertson's, Inc.*, 879 P.2d 888, 891 (Or. Ct. App. 1994) (repeated taunts of “queer” and “Serge” in front of customers and co-workers).

248. Jessica Bennett, *From Lockers to Lockup*, NEWSWEEK, Oct. 3, 2010, <http://www.newsweek.com/2010/10/04/phoebe-prince-should-bullying-be-a-crime.html>.

and deadly. Unfortunately, the tools available to school administrators to deal with such speech are not yet fully formed. It is difficult to expect school administrators such as those in South Hadley to quickly and effectively respond to this type of harassment when their legal ability to do so rests in such murky waters. When two panels of the Third Circuit, on essentially the same facts, come to exactly opposite conclusions as to the ability of schools to discipline for this type of speech, how can we expect non-lawyer school administrators to navigate these waters?

It is clearly incumbent on the courts, particularly the *en banc* Third Circuit and eventually the Supreme Court, to cleanse these waters and give school administrators both the tools and guidance as to how to apply those tools to situations like the Phoebe Prince case. This is particularly so in the areas of the definition of “on campus” speech, the gravity and nature of the *Tinker* substantial disruption standard, and the application of the *Tinker* “invasion of the rights of others” prong. Until these waters are cleansed, the potential for tragedies such as the Phoebe Prince suicide remain.