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Emily Gold Waldman

*Elisabeth Haub School of Law at Pace University*

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# BADMOUTHING AUTHORITY: HOSTILE SPEECH ABOUT SCHOOL OFFICIALS AND THE LIMITS OF SCHOOL RESTRICTIONS

Emily Gold Waldman\*

Whether schools can regulate their students' off-campus speech has emerged as one of the most pressing and thorny legal issues involving student speech rights. Recent studies indicate that ninety-three percent of middle-school and high-school-age students use the Internet, that the vast majority of students with online access use social networking technologies like e-mail, texting, and Facebook, and that nearly sixty percent of the students who use social networking discuss school-related topics online.<sup>1</sup> Not surprisingly, the increasing prevalence of digital communication among students has given rise to many new conflicts regarding schools' authority over such speech. As courts continue to chart differing courses in response to such controversies, many commentators have proposed approaches for evaluating schools' jurisdiction over students' off-campus speech.<sup>2</sup> So far, however, there has been little critical focus

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\* Associate Professor of Law, Pace University School of Law. J.D., Harvard Law School, 2002; B.A., Yale University, 1999. I thank the participants of the Fifth Annual Labor & Employment Law Colloquium for their very helpful comments on this paper. I also thank Michelle Ross for her excellent research assistance.

<sup>1</sup> PEW RESEARCH CTR., SOCIAL MEDIA & MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 4 (2010), available at [http://pewinternet.org/~media/files/Reports/2010/PIP\\_Social\\_Media\\_and\\_Young\\_Adults\\_Report\\_Final\\_with\\_toplines.pdf](http://pewinternet.org/~media/files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf) (stating that 93% of teens ages 12–17 “go online,” and that over the past ten years, individuals aged 12–29 have consistently been the group most likely to do so); NAT’L SCH. BDS. ASS’N, CREATING & CONNECTING: RESEARCH AND GUIDELINES ON ONLINE SOCIAL—AND EDUCATIONAL—NETWORKING 1–2 (2007) (stating that 96% of students with online access report using social networking technologies and that 59% of those who do so “talk about . . . education-related topics online”).

<sup>2</sup> See, e.g., Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243 (2001) (arguing that schools should have jurisdiction over off-campus speech only when students purposefully access content using school computers); Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835 (2008) (proposing a set of principles that courts should consider when analyzing whether a school can regulate off-campus speech); Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher’s Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 NEB. L. REV. 630 (2009) (arguing that schools have considerable power to regulate off-campus speech under *Tinker v. Des Moines Independent County School District*, 393 U.S. 503 (1969)); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123

on the fact that a large number of these cases are arising in one very specific category: student speech that is hostile toward school officials. Indeed, that has been the context of *all* of the student Internet speech cases that have reached the circuit court level so far.<sup>3</sup>

Of course, student speech that attacks or disparages school officials is not a new phenomenon. Even apart from the Internet, student speech that is hostile toward school officials can implicate several of the most profound and competing concerns underlying student speech jurisprudence. On the one hand, speech that attacks a teacher or administrator has the potential—depending on its content and tone—to severely upset its target, with spillover effects on the larger school community. Such a result directly implicates the Supreme Court’s primary justification for reducing students’ First Amendment rights: avoiding substantial disruptions to the learning environment. On the other hand, giving school officials broad power to censor speech that personally attacks them raises particular questions about the suppression of student dissent. This, too, is a central concern of student speech jurisprudence. As the Supreme Court stated in its very first student speech case, *Tinker v. Des Moines Independent County School District*, “state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.”<sup>4</sup>

That much of this speech is now occurring on the Internet heightens the considerations on both sides. Through the Internet, students are able to engage in particularly effective verbal attacks on school officials, both in substance and in ease and speed of delivery.<sup>5</sup> Psychological research suggests, moreover, that such attacks may be harsher in tone than those expressed through more conventional means, given the potential for dis-inhibition raised by the Internet.<sup>6</sup> Yet restricting such speech raises the specter of limitless school authority, to the point where students cannot express frustration or disagreement with what is happening at school even when they use their own computer at home. How, then, are schools and courts navigating this balance—and how should they? What are the limitations on a school district’s ability to restrict hostile student speech about school officials, both on- and off-campus? Conversely,

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(arguing that schools may be entitled to punish off-campus speech when it causes a material disruption, but that they should generally exercise restraint); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008) (arguing that schools have very limited jurisdiction over off-campus speech and should instead promote responsible media use through student education).

<sup>3</sup> There are currently four such cases. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *reh’g en banc granted and vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010); *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *reh’g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007). This Article discusses each of them in detail.

<sup>4</sup> *Tinker*, 393 U.S. at 511.

<sup>5</sup> See *infra* text accompanying notes 389–405.

<sup>6</sup> See *infra* text accompanying notes 387–99.

what are the legal and educational risks of a school district's decision *not* to respond to such speech?

These questions raise issues of both law and educational psychology, and this Article engages them at both levels, ultimately trying to weave them together in its proposed approach. The Article's first two parts discuss the extent to which schools can legally restrict hostile student speech about school officials, should they choose to do so. Part I examines how courts have traditionally approached hostile student speech about school officials when it occurs at school, and Part II then considers how courts have been analyzing the issue when it moves off campus. In the course of this discussion, the Article identifies three key categories of such speech: (1) speech that arguably threatens toward a school official; (2) speech that is primarily vulgar about a school official; and (3) the most complex category: speech that, while expressing non-threatening hostility toward a school official, also expresses a substantive viewpoint about that official's behavior. Part I shows that courts are quite consistent in recognizing schools' authority to restrict all three categories of negative speech about school officials when it occurs on-campus—even though they are not always clear or consistent as to why. By contrast, Part II shows that courts are tremendously conflicted about what to do when such speech originates beyond the school, particularly with respect to the latter two categories. Indeed, on February 4, 2010, two different Third Circuit panels issued such divergent opinions in remarkably similar cases involving students who had created fake MySpace profiles for school officials that the court ultimately reheard the cases en banc on June 3, 2010.<sup>7</sup>

Having surveyed the landscape regarding schools' potential liability if they *do* act to restrict students' hostile speech about school officials, the Article then looks at the issue from the opposite perspective: the limitations on schools' ability to *refrain* from acting in the face of student speech that is hostile toward school officials. It initially considers this issue from a legal standpoint, in two different respects: Part III.A analyzes the extent to which state anti-bullying laws require schools to take action against speech that can be considered "bullying" toward school officials, and Part III.B considers whether school officials—who are, after all, school district employees—might in certain circumstances be able to sue their school districts for failing to protect them from students' hostile speech. Part IV then considers the issue from a psychological standpoint, evaluating whether there are risks to the effective functioning of a school when students' verbal hostility toward school officials goes unchecked. Taken together, these parts of the Article indicate that school districts

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<sup>7</sup> Compare *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), with *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010). On April 9, 2010, the Third Circuit vacated both decisions, granted both petitions for rehearing en banc, and set an oral argument date of June 3, 2010 for both cases. See *Layshock v. Hermitage Sch. Dist.*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010). As of this Article's writing, both cases are still pending.

are unlikely to face liability for declining to restrict students' verbal attacks on school officials, particularly when those attacks originate off-campus, but that some such speech can nonetheless undermine the efficacy of the school environment.

After discussing the legal and educational constraints on schools' abilities both to act and not to act in response to students' negative speech about school officials, this Article attempts in Part V to weave together the relevant concerns into a standard that preserves students' ability to express dissenting views about school policies and issues while giving schools the authority to restrict student speech that is primarily threatening or harassing. This section concludes that the on-campus/off-campus distinction, while important, should be less central to the analysis than the content of the speech itself.

### I. ON-CAMPUS HOSTILE SPEECH ABOUT SCHOOL OFFICIALS

The Supreme Court has decided four student speech cases: *Tinker v. Des Moines Independent County School District*,<sup>8</sup> *Bethel School District v. Fraser*,<sup>9</sup> *Hazelwood School District v. Kuhlmeier*,<sup>10</sup> and *Morse v. Frederick*.<sup>11</sup> None, however, specifically involved speech attacking school officials. In analyzing conflicts over such speech, therefore, the lower courts have necessarily had to draw on and extrapolate from the Supreme Court's general student speech framework. As such, before turning directly to these lower court cases, it is helpful to set out the Court's student speech framework and the concerns that animate it.

The Supreme Court's student speech jurisprudence grows out of a central tension, one that is directly relevant to the issue of hostile speech about school authorities: public schools are the institutions charged with maintaining our democratic system, and yet the schools themselves largely do not function as democracies with respect to their students.<sup>12</sup> As Anne Proffitt Dupre has written:

[T]he school, together with parents, has the important mission of educating each generation of new citizens so they will have the tools necessary to preserve and protect those tenets of democracy upon which the United States was founded . . . . To gain a serious understanding of the civic virtue that is necessary for self-government takes a concentrated discipline of mind. Teachers attempting to instruct their students about this subject (along with algebra and geography) need to maintain some form of order so

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<sup>8</sup> 393 U.S. 503 (1969).

<sup>9</sup> 478 U.S. 675 (1986).

<sup>10</sup> 484 U.S. 260 (1988).

<sup>11</sup> 551 U.S. 393 (2007).

<sup>12</sup> ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 2 (2009).

that learning can occur. Thus, the paradox inherent in the issue of school speech surfaces: The state (in the form of the public school) takes away some liberty of the individual student in order to preserve the liberty of a nation.<sup>13</sup>

This tension, and the question of how best to resolve it, fits into a broader debate about the role of public schools—and, by extension, school officials—in our society. Dupre has elsewhere framed that debate in stark terms: “Are public schools ‘good’ or ‘bad’? Are teachers the adversary or the ally of the students they teach?”<sup>14</sup> Dupre suggests that the answers to these questions largely map on to the division between those who view schools as agents of social reproduction (i.e., as institutions designed to “inculcate students with society’s traditions and values”) and those who view them as agents of social reconstruction (i.e., as institutions designed “to facilitate the students in their attempts to construct a new social order”).<sup>15</sup> Political scientist Amy Gutmann has discussed this division in somewhat similar terms, although she rejects what she deems a “dichotomous choice” between “[g]iv[ing] children liberty or giv[ing] them virtue.”<sup>16</sup> Arguing that “conscious social reproduction is the primary ideal of democratic education,”<sup>17</sup> she asserts that students “must learn not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens.”<sup>18</sup> Ultimately, Gutmann suggests, the core political purpose of public schools is dual: “inculcating character and teaching moral reasoning . . . .”<sup>19</sup> Other scholars attach less significance to the inculcative role of public schools. Richard Roe, for instance, argues that instead of the “inculcation of values” model, public schools should be structured around a “conceptual-development model,” which “views the educational mission of schools to be development of students’ knowledge in conjunction with their cognitive capacities.”<sup>20</sup>

The way in which one conceives of the public schools’ institutional role necessarily informs one’s view of the extent to which students’ constitutional rights—in particular, their free speech rights—should be recognized at school. Indeed, as this Article later discusses, the inculcative model of public schools connects up with one of the two major rationales for limiting student speech rights: the notion that student

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<sup>13</sup> *Id.*

<sup>14</sup> Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 70 (1996).

<sup>15</sup> *Id.* at 53.

<sup>16</sup> AMY GUTMANN, *DEMOCRATIC EDUCATION* 36 (1999).

<sup>17</sup> *Id.* at 45.

<sup>18</sup> *Id.* at 51.

<sup>19</sup> *Id.*

<sup>20</sup> Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1275–76 (1991).

speech restrictions can themselves legitimately educate students about the line between appropriate and inappropriate expression.<sup>21</sup>

From its very first foray into the issue of student speech rights—*Tinker v. Des Moines Independent County School District*—the Supreme Court has acknowledged the tension between the democratic ideal of freedom of speech and schools' need to maintain an orderly learning environment.<sup>22</sup> *Tinker* involved a group of students who filed suit when their school district, having learned of the students' plan to wear black armbands to school in protest of the Vietnam War, enacted a no-armband rule.<sup>23</sup> In evaluating their claim, the Court was quick to set out both sides of the problem. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the *Tinker* Court stated.<sup>24</sup> "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."<sup>25</sup>

The *Tinker* Court then tried to strike a balance between these concerns. It held that the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was not enough to justify the school district's no-armband rule.<sup>26</sup> Rather, the school district had to show that the wearing of the armbands would either "substantially interfere with the work of the school or impinge upon the rights of other students."<sup>27</sup> Because the school district could not satisfy either prong of this test—it could not show that the armbands were likely to cause either a substantial disturbance or an invasion of others' rights—the students won.<sup>28</sup>

The *Tinker* decision did more than articulate the two-pronged test that has since been used in countless student speech cases. Underlying those two prongs was the first major rationale for limiting student speech rights: protection of other students and/or of the educational environment as a whole. To the extent that a student's speech genuinely threatens those interests, the Court indicated, the student's speech rights must give way to the larger institutional needs of the school.<sup>29</sup>

This protective rationale has since recurred in all of the Supreme Court's other student speech cases. In each of these cases, the Court ultimately declined to apply *Tinker*'s specific two-pronged test, due to various factual distinctions between *Tinker* and the cases at hand. But in upholding the speech restrictions in each of these cases, the Court still drew upon *Tinker*'s basic protective rationale. In *Fraser*, the Court's

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<sup>21</sup> See *infra* notes 333–35 and accompanying text.

<sup>22</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–09 (1969).

<sup>23</sup> *Id.* at 504.

<sup>24</sup> *Id.* at 506.

<sup>25</sup> *Id.* at 507.

<sup>26</sup> *Id.* at 509.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 514.

<sup>29</sup> *Id.* at 509.

second student speech case, the Court analyzed a high school's punishment of a student who had given a speech at a school assembly that was laced with sexual innuendo, ultimately holding that speech that was "vulgar and lewd" or "plainly offensive" could be restricted without resort to *Tinker*'s two-pronged test.<sup>30</sup> Noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case,"<sup>31</sup> the Court went on to suggest that other students required protection from this speech, describing it as "acutely insulting to teenage girl students" and stating that it "could well be seriously damaging to its less mature audience."<sup>32</sup> One year later, in *Hazelwood*, the Court upheld a high school's censorship of school newspaper articles recounting students' experiences with teen pregnancy and divorce, stating that schools needed only a "legitimate pedagogical" reason for censoring school-sponsored student speech, and deferring to the principal's protective concerns about preserving the student subjects' privacy and shielding younger students from "unsuitable" material.<sup>33</sup> Most recently, in *Morse*, the Court permitted schools to restrict speech that could reasonably be regarded as advocating illegal drug use, relying on the protection-based rationale that "[s]tudent speech celebrating illegal drug use . . . poses a particular challenge for school officials working to protect those entrusted to their care . . . ."<sup>34</sup>

In addition to the protective rationale—which, at least when articulated in broad terms, does not directly engage the debate over public schools' proper institutional role—*Fraser* and *Hazelwood* introduced a second rationale for restricting student speech. This rationale, which I have elsewhere termed the "educational" rationale,<sup>35</sup> lines up more closely with one particular conception of public schools: the inculcative, or "social reproduction" model. Essentially, this rationale asserts that restrictions on student speech can *themselves* serve an independent, valid educational function with respect to both the student speaker and other student listeners.<sup>36</sup> The *Fraser* Court, for example, upheld the punishment of the student speaker not only on the protective grounds that his "lewd" and "offensive" speech had insulted and possibly damaged other students, but also because the punishment conveyed an important lesson to the student body about proper forms of expression.<sup>37</sup> Indeed, the *Fraser* Court explicitly endorsed the inculcative model of public schools, citing with approval the statement of historians Charles and Mary Beard that "[p]ublic education . . . must inculcate the habits and manners of civility as values in themselves . . . ."<sup>38</sup> Society

<sup>30</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–86 (1986).

<sup>31</sup> *Id.* at 680.

<sup>32</sup> *Id.* at 683.

<sup>33</sup> *Hazelwood Sch. Bd. v. Kuhlmeier*, 484 U.S. 260, 270–76 (1988).

<sup>34</sup> *Morse v. Frederick*, 551 U.S. 393, 408–10 (2007).

<sup>35</sup> Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1121–22 (2010).

<sup>36</sup> See *Hazelwood*, 484 U.S. at 271–72; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>37</sup> *Fraser*, 478 U.S. at 683.

<sup>38</sup> *Id.* at 681.



has a “countervailing interest in teaching students the boundaries of socially appropriate behavior,”<sup>39</sup> the *Fraser* Court wrote. “[S]chools must teach by example the shared values of a civilized social order.”<sup>40</sup> The Court reasoned that the school was therefore entitled to punish this student in order to “make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”<sup>41</sup>

Similarly, in upholding the *Hazelwood* principal’s censorship of the school newspaper, the Court did not limit its reasoning to protective concerns about the welfare of the student subjects and other young student readers. Rather, it concluded that school officials were entitled to exercise significant control over school-sponsored speech in order to convey disapproval of speech that was “ungrammatical, poorly written, inadequately researched, biased or prejudiced, [or] vulgar or profane.”<sup>42</sup> In articulating this educational rationale, the Supreme Court has thus suggested that students’ free speech rights can be trumped not only by the need to protect the larger student body and the school as a whole, but also—depending on the circumstances—by the school’s legitimate interest in influencing the content of student speech, from both a pedagogical perspective (making sure that the speech is grammatical, well-written, and well-researched) and an inculcative perspective (ensuring that the speech is appropriate for civilized society).

It is helpful to identify and separate out the protective and educational rationales underlying the student speech framework, since courts frequently draw upon them—sometimes intertwining the two—when analyzing schools’ restrictions on student speech that is hostile toward school officials. Such speech can usefully be divided into three main categories: (1) speech that arguably threatens a school official; (2) speech that is largely vulgar with respect to a school official, without expressing a substantive opinion or viewpoint; and (3) speech that, while expressing non-threatening hostility (and perhaps even profanity) about a school official, is also expressing some sort of opinion.<sup>43</sup> In all three categories, students challenging restrictions on their hostile

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 683.

<sup>41</sup> *Id.* at 685–86.

<sup>42</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988).

<sup>43</sup> In using this categorization, I acknowledge that even the cases involving purely vulgar speech arguably at some level communicate an opinion. For example, in one of the cases discussed below, a student called an assistant principal a “dick” after the assistant principal confiscated his graham crackers; clearly, the student was expressing displeasure about what had just occurred. *Posthumus v. Bd. of Ed.*, 380 F. Supp. 2d 891 (W.D. Mich. 2005). That said, it is useful and relevant to distinguish between those students whose speech goes no further than to lash out at a school officials in vulgar terms, and those students who are actually expressing some sort of ascertainable, substantive opinion about a school policy or a particular school official. Indeed, Justice Alito identified a similar distinction in his *Morse v. Frederick* concurrence, where he endorsed the idea of prohibiting speech that advocated illegal drug use but also emphasized the importance of protecting student speech that could “plausibly be interpreted as commenting on any political or social issue.” *Morse v. Frederick*, 551 U.S. 393,

speech tend to lose—at least when the speech occurs at school, in comparison to the off-campus speech discussed in Part II—but the articulations and relative weights of the protective and educational rationales vary across the categories. The protective rationale is usually front and center in cases involving threatening speech, while the educational rationale assumes more prominence in cases of vulgar speech.<sup>44</sup> Finally, in cases involving speech that expresses a hostile opinion about a school official, courts sometimes rely on a rationale that blends protective and educational concerns, suggesting that “disrespectful” or “insubordinate” speech is inherently disruptive to the school atmosphere.<sup>45</sup>

### A. Threatening Speech

Courts are extremely unsympathetic to cases involving threatening language uttered at school about school officials. Student speakers in such cases invariably lose, either under the “true threat” doctrine (which holds that true threats are entirely unprotected by the First Amendment),<sup>46</sup> the protective rationale articulated in *Tinker*,<sup>47</sup> or, to a lesser extent, the educative rationale articulated in *Fraser*.<sup>48</sup> In *Lovell v. Poway Unified School District*,<sup>49</sup> for example, the Ninth Circuit held that a student who allegedly told a guidance counselor, “If you don’t give me this schedule change, I’m going to shoot you!” had uttered a true threat unprotected by the First Amendment.<sup>50</sup> The court specifically declined to discuss the Supreme Court’s student speech framework in analyzing the case, holding that such statements were simply unprotected in any forum.<sup>51</sup>

More commonly, however, courts invoke the “true threat” doctrine in conjunction with *Tinker*’s protective rationale (particularly as expressed in its “substantial disruption” prong<sup>52</sup>) to uphold this sort of discipline against student speakers. In *Demers*

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423 (2007) (Alito, J., concurring). For purposes of this Article, I have placed into the third category any hostile but non-threatening speech that can plausibly be interpreted as commenting on any political, social, or other *school-related* issue.

<sup>44</sup> See *infra* Part II.

<sup>45</sup> See *infra* Part I.C.

<sup>46</sup> See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

<sup>47</sup> See *supra* notes 22–29 and accompanying text.

<sup>48</sup> See *supra* notes 35–41 and accompanying text.

<sup>49</sup> 90 F.3d 367 (9th Cir. 1996).

<sup>50</sup> *Id.* at 369, 371.

<sup>51</sup> *Id.* at 371.

<sup>52</sup> Indeed, no court analyzing a student’s hostile speech about school officials has relied on *Tinker*’s “invasion of rights” prong. *Tinker* itself is ambiguous as to whether this prong applies to the rights of all members of the school community, or solely the rights of students. The Court’s first articulation of the standard suggested that it only applied to students. In explaining what was problematic about the school district’s armband ban, the Court stated:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of

*v. Leominster*,<sup>53</sup> for example, a district court upheld the suspension of an eighth-grader who handed a drawing to a teacher that depicted the superintendent with a gun pointed at his head and explosives at his feet, stating that the suspension was independently justified under either the “true threat” doctrine or *Tinker*’s substantial disruption test.<sup>54</sup> “It would have been unthinkable for the [school] officials not to have taken any action in this case. Given the difficulty in balancing safety concerns and free expression, . . . their actions were reasonable,” the court wrote.<sup>55</sup>

Similarly, in *Boim v. Fulton County School District*,<sup>56</sup> the Eleventh Circuit upheld the punishment of a high-schooler who had written the following entry in a school notebook:

As I walk to school from my sisters [sic] car my stomach ties it-self in nots [sic]. I have nervousness tingeling [sic] up and down my spine and my heart races. No one knows what is going to happen. I have the gun hidden in my pocket . . . . Constantly I can feel the gun in my pocket. 3rd peroid [sic], 4th, 5th then 6th peroid [sic] my time is comming [sic]. I enter the class room my face pale. My stomach has tied itself in so many knots its [sic] doubtful\_I will ever be able to untie them. Then he starts taking role [sic]. Yes, my math teacher. I lothe [sic] him with every bone in my body. Why? I don’t [sic] know. This is it. I stand up and pull the gun from my pocket. BANG the force blows him back and everyone in the class sits there in shock. BANG he falls

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petitioners’ interference, actual or nascent, with the schools’ work or of collision with the *rights of other students to be secure and to be let alone*. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or *the rights of other students*.

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (emphasis added). The Court again referred to “the rights of other students” in subsequently articulating the standard. *Id.* at 509. The Court’s final two articulations of the standard, however, referred more generally to “invasion of the rights of others,” *id.* at 513, and intrusion in “the lives of others,” *id.* at 514. Even assuming *arguendo* that this prong could apply to school personnel, it is unclear what that would mean in the context of hostile speech. Courts have generally shied away from using the “rights of others” prong when analyzing school restrictions of hostile speech about other students, with the exception of a recent Ninth Circuit case. *See Harper v. Poway*, 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007); *see, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (discussing the hesitancy to apply the “rights of others” prong, given that “it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone”).

<sup>53</sup> 263 F. Supp. 2d 195 (D. Mass. 2003).

<sup>54</sup> *Id.* at 200–03.

<sup>55</sup> *Id.* at 203.

<sup>56</sup> 494 F.3d 978 (11th Cir. 2007).

to the floor and some one [sic] lets out an ear piercing scream.  
Shaking I put the gun in my pocket and run from the room . . .<sup>57</sup>

After this notebook was confiscated by an art teacher who had seen it being passed in class, it ended up in the hands of school officials, who conducted an investigation.<sup>58</sup> Although the student told these officials that the entry was simply creative fiction, she was ultimately suspended.<sup>59</sup> In ruling the punishment constitutional, the Eleventh Circuit relied on a hybrid “true threat”/*Tinker* analysis, holding both that the narrative could reasonably be construed as a threat of physical violence against the math teacher, and that in any event the speech was reasonably likely to cause a substantial disruption and could thus be restricted under *Tinker*.<sup>60</sup>

Even in cases where the threatening language about a school official cannot be taken seriously enough to trigger the “true threat” doctrine, courts still tend to rule for schools under the protective rationale, sometimes with support from the educational rationale as well. In *Bystrom v. Fridley High School*,<sup>61</sup> for instance, a group of students was suspended for distributing an unofficial newspaper at school that included an article about vandalism against the home of one of the school’s teachers.<sup>62</sup> The article stated, in relevant part, that “many students attending Fridley would like to claim responsibility for this act, and I can’t say that I blame them” and “I would like to say that we . . . find this act pretty damn funny.”<sup>63</sup> The district court subsequently upheld the student’s three-day suspension for, in the words of the assistant principal, “advocating violence against the homes of teachers.”<sup>64</sup> The court acknowledged that the article fell “far short of the standards by which adults could be punished for advocating violence,” but held that not only *Tinker*’s substantial disruption standard, but also *Fraser*’s inculcative rationale, justified the disruption.<sup>65</sup> Just as the *Fraser* Court had deferred to the school authorities’ decision that “maintaining order and discipline and proper inculcation of traditional social values required discipline of the student involved,” the court reasoned, so too would the Supreme Court defer to school authorities “with respect to their decision to discipline the plaintiff students for advocating violence against their teachers.”<sup>66</sup> Similarly, in *Wilson v. Hinsdale Elementary School District*,<sup>67</sup> an Illinois state court upheld the expulsion of a sixth-grader who had written

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<sup>57</sup> *Id.* at 980–81 (quoting *Boim v. Fulton Cnty. Sch. Dist.*, Nos. 1:05-cv-2836-MHS, 1:05-cv-3219-MHS, 2006 U.S. Dist. LEXIS 53129, at \*2 (N.D. Ga. July 31, 2007)) (alterations in original).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 981–82.

<sup>60</sup> *Id.* at 985.

<sup>61</sup> 686 F. Supp. 1387 (D. Minn. 1987).

<sup>62</sup> *Id.* at 1389–90.

<sup>63</sup> *Id.* at 1390.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1393.

<sup>66</sup> *Id.*

<sup>67</sup> 810 N.E.2d 637 (Ill. App. Ct. 2004).

a song about his pregnant science teacher entitled "Gonna Kill Mrs. Cox's Baby."<sup>68</sup> The court ruled that the student was unlikely to succeed in challenging his punishment, stating that "[t]hreats of violence in school are not permitted, serious or not."<sup>69</sup>

Most recently, a district court rejected the First Amendment claim of a fifth-grader who was suspended for six days after, in response to a classroom assignment to write a wish on a paper copy of an astronaut figure, he wrote "[b]low up the school with the teachers in it."<sup>70</sup> The court concluded that even assuming *arguendo* that the student intended the statement as a joke and lacked any ability to blow up the school, the drawing's threat of violence still created a risk of substantial disruption and could be punished under *Tinker*.<sup>71</sup>

Why are courts so consistent in ruling this way? Two related factors seem at play. First, most of these cases occurred after the April 20, 1999 massacre at Columbine High School, and courts have become acutely sensitive to the pressures that school officials face in trying to predict which students will engage in violence and in attempting to thoroughly investigate any potential risk. Indeed, almost all of the decisions above referred directly or implicitly to Columbine and other acts of school violence.<sup>72</sup> In essence, courts are disinclined to second-guess schools' "zero tolerance" attitude toward threats, even those that appear to be in jest. This attitude, indeed, extends to all school-related threats, not just those against school officials.<sup>73</sup>

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<sup>68</sup> *Id.* The lyrics were as follows:

Gonna Kill Mrs. Cox's Baby, gonna kill Mrs. Cox's baby. I don't care,  
I don't care. Gonna kill Mrs. Cox's baby, gonna kill Mrs. Cox's baby,  
(squeal), rock n' roll. I love Detroit, man. I'm done. We're done.

*Id.* at 639. The student (whose father, ironically, was an OB-GYN) stated that he wrote the song because "he was uncomfortable with Mrs. Cox's pregnancy and that he did not like the way that she taught." *Id.* at 640.

<sup>69</sup> *Id.* at 644. Because this case was filed under Illinois state law and brought on grounds that the expulsion was arbitrary and capricious, the court did not employ the Supreme Court's student speech framework for this case, but instead applied the Illinois standard for analyzing the reasonableness of school discipline. *See id.* at 642-43.

<sup>70</sup> *Cuff v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 417, 424 (S.D.N.Y. 2010).

<sup>71</sup> *Id.* at 422.

<sup>72</sup> *See, e.g., Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 981 (11th Cir. 2007) (stating that school administrators had been concerned about the notebook entry "in light of the massacre that occurred at Columbine High School" as well as more recent events of school violence); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) ("In light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."); *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 203 (D. Mass. 2003) (noting that the events at issue had occurred "in the wake of increased school violence across the country"); *Wilson v. Hinsdale Elementary Sch. Dist.*, 810 N.E.2d 637, 643 (Ill. App. Ct. 2004) ("Unfortunately, at this point in time we live in a society where horrific violence in the schools of our country is all too common.").

<sup>73</sup> *See, e.g., Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007) (upholding the constitutionality of suspension of student whose notebook described a plan to carry out a "Columbine-style attack" at the high school).

Second, in several of the cases, the courts took note of the emotional disturbances experienced by the school officials who were targeted in the hostile speech. In *Boim*, for instance, the Eleventh Circuit noted that the math teacher felt “shocked” and “threatened” by his student’s writings about how much she hated and wanted to kill him, adding that the teacher now felt “uncomfortable with the idea of having [her] in his class.”<sup>74</sup> Such distress is not limited to cases where the threat is particularly serious in nature. In *Bystrom*—where an unofficial student newspaper joked about the vandalism of one teacher’s home—the court noted that the teacher “left the school grounds altogether rather than face the students’ reaction to the article.”<sup>75</sup> Similarly, in *Wilson*, the pregnant Mrs. Cox of “Gonna Kill Mrs. Cox’s Baby” was described as “requir[ing] a day off of work to recuperate from her emotional distress, thereby depriving her pupils of her services for that day.”<sup>76</sup> Such responses reflect another aspect of the disruption caused by students’ threatening speech. As R. George Wright has argued, even “doubtful threats”—i.e., speech that “threaten[s] future violence at a specific target” but “lack[s] imminence” and seems unlikely to be carried out—“pose significant problems for students, teachers, and administrators” because it upsets targets and can have “long-term, distractive effects.”<sup>77</sup>

These considerations—particularly when set against the unsympathetic nature of threatening speech, even when those threats are attempts at humor—generally predispose courts to defer to school officials who decide to punish such speech.<sup>78</sup> The protective and educational rationales (and, when applicable, the “true threat” doctrine), in turn, provide the legal backing for doing so.

### *B. Vulgar Speech*

In the realm of cases involving on-campus hostile speech about school officials, there are very few reported decisions involving speech that is solely vulgar and does not express a substantive opinion. There are more such cases when the speech is off-campus, perhaps because students feel freer to speak in such terms about school officials once they are off school grounds.<sup>79</sup> (Additionally, it may be that when students *are* punished for on-campus vulgar speech, they are much less likely to sue

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<sup>74</sup> *Boim*, 494 F.3d at 981 (citation omitted).

<sup>75</sup> *Bystrom*, 686 F. Supp. at 1389–96.

<sup>76</sup> *Wilson*, 810 N.E.2d at 645.

<sup>77</sup> R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 682–84 (2009).

<sup>78</sup> See, e.g., *Demers ex rel. Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195, 203 (D. Mass. 2003) (noting that the court would “review . . . with deference, schools’ decisions in connection with the safety of their students even when freedom of expression is involved”).

<sup>79</sup> See, e.g., *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969) (the right of the students to wear their black armbands in protest off school grounds was specifically not questioned).

than when they are disciplined for their off-campus vulgar speech.) Interestingly, the two cases in which students have sued over being disciplined for such on-campus speech follow a very similar pattern.<sup>80</sup> In both, the courts upheld the student punishments on the grounds that the vulgar speech could be restricted under *Fraser*'s educational rationale. However, they also intertwined this educational rationale with a version of the protective rationale, suggesting that "insubordinate" speech of this sort necessarily disrupts the educational process as a whole, and can therefore arguably be restricted under *Tinker* as well. Yet both decisions ultimately stopped short of exploring the outer limits of this latter rationale.

In *Posthumus v. Board of Education*,<sup>81</sup> for instance, a graduating senior followed the assistant principal down the hall, calling him a "dick," after the assistant principal confiscated a package of graham crackers from him while he was waiting in line to enter a school assembly.<sup>82</sup> The dean of students later spoke with him about his "inappropriate behavior," at which point the student "became very agitated, used foul language [and] was very insulting."<sup>83</sup> The principal then intervened and suspended the student from school.<sup>84</sup> The district court upheld the punishment under *Fraser*'s educational rationale, writing:

The Court concludes that *Fraser* provides the appropriate framework for analyzing Posthumus' claim because Posthumus was disciplined for referring to Vanderstelt as a "dick"—a term widely considered to be lewd or vulgar and, especially when used towards a person in authority, disrespectful. *Fraser* teaches that judgments regarding what speech is appropriate in school matters should be left to the schools rather than the courts. . . . Moreover, Posthumus' speech did not concern a political issue or a matter of public concern, as in *Tinker*, but instead was directed at Posthumus' private grievance regarding Vanderstelt's confiscation of Posthumus' graham crackers.<sup>85</sup>

This reasoning makes sense. Although the court arguably characterized *Fraser* a bit too broadly—*Fraser* did not suggest that *all* judgments regarding "what speech is appropriate in school matters" should be left solely to the schools' discretion, but was specifically focused on speech that was lewd, vulgar, or plainly offensive<sup>86</sup>—the

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<sup>80</sup> See, e.g., *Requa v. Kent*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007) (student made obscene insinuations about his teacher); *Posthumus v. Bd. of Educ.*, 380 F. Supp. 2d 891 (W.D. Mich. 2005) (student used profane language).

<sup>81</sup> 380 F. Supp. 2d 891.

<sup>82</sup> *Id.* at 894–95.

<sup>83</sup> *Id.* at 895.

<sup>84</sup> *Id.* at 895–96.

<sup>85</sup> *Id.* at 901–02 (citations omitted).

<sup>86</sup> *Id.* at 901.

speech in question here would clearly fit into *Fraser*'s scope. Similarly, it was appropriate and consistent with *Fraser* to note the lack of any real political content to the student's speech, which the *Fraser* Court viewed as a key distinction from *Tinker*.

More concerning, however, was the *Posthumus* court's subsequent ambiguous discussion of whether *Tinker*'s protective rationale also justified the punishment. The student had argued that even assuming that calling the vice-principal a "dick" was vulgar and offensive, there was "no showing that his language disrupted the educational process, especially where used in the hallway and only to peers nearby."<sup>87</sup> It is not clear why the student bothered with this argument, since—as the court pointed out—*Fraser* allows schools to restrict student speech that is plainly offensive even in the absence of a substantial disruption that would meet the *Tinker* standard.<sup>88</sup> Nonetheless, the court went on to address this argument, writing:

[T]he Court rejects Posthumus' assertion that his speech did not disrupt the educational process. Insubordinate speech always interrupts the educational process because it is contrary to principles of civility and respect that are fundamental to a public school education. Failing to take action in response to such conduct would not only encourage the offending student to repeat the conduct, but also would serve to foster an attitude of disrespect towards teachers and staff.<sup>89</sup>

Thus, the court somewhat intertwined *Fraser* and *Tinker*, suggesting that any "insubordinate" speech is necessarily a threat to the functioning of the school as a whole and can thus be restricted under the combined forces of the educational and protective rationales. If the court, in using the word "insubordinate," meant only to refer to the type of speech at hand—i.e., calling a school official a vulgarity—then there is no real cause for concern. After all, such vulgar speech can already be restricted under *Fraser*. But if the court meant that *any* challenges to school officials' authority can also be restricted as a disruption to the educational process, that is more problematic, as I discuss in the next section, because some such speech also communicates substantive dissent. It is unlikely that the court meant to go this far.<sup>90</sup> That

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 902.

<sup>90</sup> Indeed, the court went on to note that the punishment had been rooted in the student handbook's rules against "failure to follow staff members' directions, talking back to a staff member, and the use of abusive or obscene language directed toward a staff member." *Id.* at 901. The court added that although these prohibitions "might conceivably reach some protected speech, the [handbook's] examples . . . clarify that the proscribed conduct is limited to threats of physical harm or other similar improper and unprotected conduct." *Id.* at 903 (emphasis added).



said, the court did not discuss what types of negative speech about school officials might indeed warrant protection, and the case indeed did not require it to do so.

Similarly, the court in *Requa v. Kent*<sup>91</sup> was largely able to steer clear of this issue. There, a high school junior surreptitiously videotaped one of his teachers at least twice while she was teaching a class.<sup>92</sup> The footage included several shots of her buttocks.<sup>93</sup> It also depicted a student standing behind her who was making faces, putting two fingers up behind her head (“rabbit ears”), and making pelvic thrusts toward her.<sup>94</sup> The student edited this footage into a video that included a song called “Ms. New Booty”; it was then posted to YouTube and MySpace.<sup>95</sup> A local television news channel subsequently discovered the video, and the student was suspended for having filmed the teacher in class in such a manner.<sup>96</sup> (The school district denied that it was punishing him for the off-campus behavior of posting the video on the web.)<sup>97</sup> The court upheld the discipline under a blend of *Fraser* and *Tinker*, stating both that the video “cannot be denominated as anything other than lewd and offensive and devoid of political or critical content”<sup>98</sup> and that the video could be considered materially disruptive because “[t]he ‘work and discipline of the school’ includes the maintenance of a civil and respectful atmosphere toward teachers and students alike—demeaning, derogatory, sexually suggestive behavior toward an unsuspecting teacher in a classroom poses a disruption of that mission whenever it occurs.”<sup>99</sup>

Thus, as in *Posthumus*, the *Requa* court invoked both the educational and protective rationales to uphold the punishment of a student’s vulgar speech about a school official, without making clear what it would have done had the speech been “demeaning” or “derogatory” but more political and less purely vulgar. In the cases that follow, however, the courts were more squarely confronted with that issue.

### *C. Hostile Speech That Also Expresses an Opinion*

The most complex category of on-campus hostile speech about school officials involves non-threatening speech that, while hostile, also communicates a substantive opinion. This is the one category where at least some students have prevailed in First Amendment claims. But even here, the majority have lost. In some cases, the students lost for relatively straightforward, convincing reasons: the speech occurred through a school-sponsored vehicle over which the school had more control under

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<sup>91</sup> 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

<sup>92</sup> *Id.* at 1274.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1274–75.

<sup>97</sup> *Id.* at 1276.

<sup>98</sup> *Id.* at 1279.

<sup>99</sup> *Id.* at 1280.

*Hazelwood*,<sup>100</sup> or the speech also included such significant vulgarity that it could be suppressed under *Fraser*.<sup>101</sup> But even in some cases where neither *Hazelwood* nor *Fraser* applied, the students still lost through a mixture of the protective and educational rationales. These cases represent the outgrowth of the justification tentatively explored by the *Posthumus* and *Requa* courts: the notion that insubordinate speech—i.e., speech that challenges school officials’ authority—is inherently disruptive.

In articulating this justification, courts sometimes so intertwine the protective and educational rationales that it is impossible to disentangle them. In *Wildman v. Marshalltown School District*,<sup>102</sup> for example, a high schooler on the sophomore basketball team became frustrated when she was not promoted to the varsity team.<sup>103</sup> She wrote a letter to her teammates “to find out what they thought of the situation and [varsity] Coach Rowles.”<sup>104</sup> The letter, which she distributed in the school’s locker room, included the following language:

Am I the only one who thinks that some of us should be playing Varsity or even JV? We as a team have to do something about this. I want to say something to Coach Rowles. I will not say anything to him without the whole teams [sic] support. He needs us next year and the year after and what if we aren’t there for him? It is time to give him back some of the bullshit that he has given us. We are a really great team and by the time we are seniors and we ALL have worked hard we are going to have an AWE-SOME season. We deserve better then [sic] what we have gotten. We now need to stand up for what we believe in!!!<sup>105</sup>

Both her coach and Coach Rowles soon found out about the letter, and demanded that she apologize to her teammates and to Coach Rowles, telling her that the letter was

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<sup>100</sup> See, e.g., *Poling v. Murphy*, 872 F.2d 757, 758–63 (6th Cir. 1989) (upholding constitutionality of suspension of student who delivered his speech at a student council assembly—joking about the assistant principal’s stutter and criticizing the administration’s “iron grip” on the school—because assembly was a school-sponsored event and the punishment was reasonably related to the legitimate pedagogical concern of teaching “[t]he art of stating one’s views without indulging in personalities and without unnecessarily hurting the feelings of others”).

<sup>101</sup> See, e.g., *Smith v. Mount Pleasant Pub. Sch.*, 285 F. Supp. 2d 987 (E.D. Mich. 2003) (upholding the constitutionality of the punishment of a student who read aloud to students sitting in the cafeteria a commentary that started by criticizing the school’s tardy policy but progressed to making extremely vulgar remarks about the principal’s sex life, calling her a “skank” and a “tramp”).

<sup>102</sup> 249 F.3d 768 (8th Cir. 2001).

<sup>103</sup> *Id.* at 769.

<sup>104</sup> *Id.* at 770.

<sup>105</sup> *Id.*

disrespectful.<sup>106</sup> When she refused to do so, they kicked her off the team.<sup>107</sup> The Eighth Circuit rejected her First Amendment claim in language that blended the protective and educational rationales, writing:

It is well within the parameters of school officials' authority to prohibit the public expression of vulgar and offensive comments and to teach civility and sensitivity in the expression of opinions . . . [The defendants] point to their interest in affording Wildman's teammates an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team . . . . We agree with the district court's conclusions that the letter did suggest, at the least, that the team unite in defiance of the coach . . . and that the actions taken by the coaches in response were reasonable. Moreover, coaches deserve a modicum of respect from athletes, particularly in an academic setting. . . . Wildman's letter, containing the word "bullshit" in relation to other language in it and motivated by her disappointment at not playing on the varsity team, constitutes insubordinate speech toward her coaches [and] called for an apology.<sup>108</sup>

The Eighth Circuit thus left unclear whether it was upholding the district's actions under the educational rationale (i.e., the student could be punished to teach the student and her teammates a lesson about civility, particularly given the student's refusal to apologize for using the word "bullshit") or the protective rationale (i.e., the student could be punished because she challenged the varsity coach's authority and therefore threatened to disrupt the team).<sup>109</sup>

Indeed, in a subsequent case raising similar facts, *Lowery v. Euverard*,<sup>110</sup> the Sixth Circuit acknowledged that the *Wildman* court had not specified whether its holding was based on *Tinker* or *Fraser*.<sup>111</sup> In *Lowery*, several students sued after being kicked off their high school football team.<sup>112</sup> The conflict began when these students—dissatisfied with their head coach, who allegedly "struck a player in the helmet, threw away college recruiting letters to disfavored players, humiliated and degraded players,

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 771–72.

<sup>109</sup> The court did not address the fact that the coach whom the letter criticized—Varsity Coach Rowles—was not even the coach of the student-plaintiff's current team.

<sup>110</sup> 497 F.3d 584 (6th Cir. 2007).

<sup>111</sup> *Id.* at 591 ("The [*Wildman* court] cited both *Tinker* and *Fraser* (which governs obscene speech), and did not specify which framework it was using.").

<sup>112</sup> *Id.* at 585.

used inappropriate language, and required a year-round conditioning program in violation of high school rules”—decided to write a petition seeking the coach’s replacement.<sup>113</sup> Their plan was to present the petition, which stated “I hate Coach Euvar[d] [sic] and I don’t want to play for him,” to the principal after football season had ended.<sup>114</sup> Eighteen teammates signed the petition, which the coach quickly learned about through word of mouth.<sup>115</sup> The coaching staff then called in all of the players for questioning about whether they had signed the petition and whether they wanted to play football with Coach Euverard as their coach.<sup>116</sup> When the three organizers of the petition refused to be interviewed individually, but said that they would only meet with the coach as a group, they were dismissed from the team.<sup>117</sup> A fourth player was dismissed after, in response to the question of whether he wanted to play football with Euverard as the head coach, he said no, but that he did want to play football for his high school.<sup>118</sup> Players who apologized for having signed the petition were allowed to stay on the team.<sup>119</sup>

In their subsequent First Amendment suit, the dismissed players alleged that their case was distinguishable from *Wildman* because their speech included no profanity.<sup>120</sup> The Sixth Circuit, however, held that the speech could be punished purely under *Tinker*’s protective rationale.<sup>121</sup> “Even if the *Wildman* letter had not contained obscenity, the suggestion that the team unite in defiance of the coach would still have been insubordinate,” the *Lowery* court wrote.<sup>122</sup> “Likewise, the instant petition constituted a direct challenge to Coach Euverard’s authority. . . . Based on the circumstances, it was reasonable for Defendants to believe that the petition would disrupt the team, by eroding Euverard’s authority and dividing players into opposing camps.”<sup>123</sup> Thus, *Tinker*’s “substantial disruption” prong justified the school’s actions. The court also emphasized—as had the *Wildman* court—that the student speakers were only kicked off an athletic team, rather than suspended from school, noting that the “[p]laintiffs’ regular education has not been impeded, and, significantly, *they are free to continue their campaign to have Euverard fired*. What they are *not* free to do is continue to play football for him while actively working to undermine his authority.”<sup>124</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* The spelling of the coach’s name was actually “Euverard.”

<sup>115</sup> *Id.* at 586.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 591.

<sup>121</sup> *Id.* (noting that by challenging the coach’s authority, the players were causing a disruption which met the *Tinker* standard).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 591, 596.

<sup>124</sup> *Id.* at 600.

The Eighth and Sixth Circuits' suggestions in *Wildman* and *Lowery*, respectively, that the First Amendment would have protected these students from outright suspension is encouraging, although as I have discussed elsewhere, the notion that the free speech inquiry should be ratcheted down when the punishment relates only to an extracurricular activity still raises real concerns.<sup>125</sup> In any event, the view that challenges to school officials' authority are inherently disruptive is not limited to situations where the sole punishment is removal from an extracurricular activity. In *Acevedo v. Sklarz*,<sup>126</sup> for instance, a high school student was suspended after challenging the actions of a policeman who was arresting another student in the school hallway.<sup>127</sup> The student believed that the policeman was using excessive force on his classmate and began to document the incident with his video camera, allegedly stating "Hey, you better watch out, man. I got this on tape. You better watch, you better watch out, bro. You're about to punch him."<sup>128</sup> The vice principal then ordered the student to put his camera away.<sup>129</sup> The student loudly responded, "He's about to punch this kid right there. I got the right to record this," but ultimately put the camera away.<sup>130</sup> The vice principal ordered him to go to the principal's office; the student responded "for what?"<sup>131</sup> and, according to the school district, engaged in further shouting on his way to the office and once he was there.<sup>132</sup> (The student denied this.)<sup>133</sup> He was then suspended for insubordination.<sup>134</sup>

In response to the student's subsequent First Amendment claim, the school district moved for summary judgment, arguing that the student had caused a substantial disruption by yelling in the hallway during an already volatile situation and making false accusations against a police officer.<sup>135</sup> The student denied that he had caused a substantial disruption.<sup>136</sup> Despite what would seem to be a factual dispute warranting trial, the district court granted summary judgment to the school.<sup>137</sup> Even construing

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<sup>125</sup> Waldman, *supra* note 35, at 1129–35.

<sup>126</sup> 553 F. Supp. 2d 164 (D. Conn. 2008) (arguing that defendants did not violate defendant's constitutional rights).

<sup>127</sup> *Id.* at 167–70.

<sup>128</sup> Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgement at 2, *Acevedo*, 553 F. Supp. 2d 164 (No. 3:06 Civ. 931).

<sup>129</sup> *Id.* at 2–3; *see also* Defendants' Memorandum in Support of Motion for Summary Judgment at 5, *Acevedo*, 553 F. Supp. 2d 164 (No. 3:06 Civ. 931).

<sup>130</sup> Plaintiff's Memorandum, *supra* note 128, at 2.

<sup>131</sup> *Id.* at 3.

<sup>132</sup> Defendant's Memorandum, *supra* note 129, at 5–6.

<sup>133</sup> Plaintiff's Memorandum, *supra* note 128, at 3.

<sup>134</sup> *Id.*

<sup>135</sup> *Acevedo v. Sklarz*, 553 F. Supp. 2d 164, 170 (D. Conn. 2008); Defendant's Memorandum, *supra* note 129, at 5.

<sup>136</sup> *Acevedo*, 553 F. Supp. 2d at 169.

<sup>137</sup> *Id.* (explaining that the court orally granted the school district's motion for summary judgment on *Acevedo*'s First Amendment claim, and denying *Acevedo*'s motion for reconsideration of this ruling).

all of the disputed facts in favor of the student, the court wrote, *Tinker* justified his suspension.<sup>138</sup> The court reasoned that the vice-principal was justified in believing that the student's conduct "was materially interfering with her efforts to regain order in the hallways during a very hectic and incident-filled day."<sup>139</sup> The court then added:

[I]nsubordinate speech towards school officials is generally not recognized as protected under the First Amendment. . . . [The plaintiff's] rights to exercise his freedom of speech were not unlimited when he was on school grounds and he was certainly expected to maintain a level of decorum and dignity in his interactions with school officials that he failed to display . . . . The tone of his voice and argumentative stature against [the vice-principal] could foster an atmosphere of disrespect toward school officials that certainly disrupts the educational process and interferes with the need for maintaining an appropriate level of discipline in public schools.<sup>140</sup>

Thus, as in *Wildman* and *Lowery* (and, to some extent, *Posthumus* and *Requa*), the *Acevedo* court suggested that *Tinker*'s "substantial disruption" prong not only encompasses situations involving an actual or threatened physical disruption, but also includes more theoretical disruptions to a school's atmosphere. Such reasoning endorses the migration of *Fraser*'s inculcative emphasis—that public education should inculcate the "fundamental values of 'habits and manners of civility'"<sup>141</sup>—into *Tinker*'s original focus on protection. Indeed, this blended rationale holds that the educational mission of the schools involves teaching students to behave civilly, which includes treating school officials respectfully; therefore, hostile student speech about school officials is inherently disruptive.

The risk of the blended rationale is that it can justify overly restrictive limitations that suppress legitimate student dissent. In *Lowery*, for instance, the court essentially said that *any* challenge to the coach's authority would disrupt the team.<sup>142</sup> That the petitioning students had important criticisms about their coach, including player mistreatment, was trumped by the court's concerns about maintaining the coach's authority and team cohesion. Similarly, the *Acevedo* court devoted little attention to the fact that the student was raising a serious concern about possible excessive force against a fellow student, instead upholding the student's suspension because his lack of

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<sup>138</sup> *Id.* at 170.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (internal citations omitted).

<sup>141</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>142</sup> *Lowery v. Euverard*, 497 F.3d 584, 594 (6th Cir. 2007) ("The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. Thus, attacking the authority of the coach necessarily undermines his ability to lead the team.").

decorum could foster an “atmosphere of disrespect,” even if he had not caused any real disruption in the hallway.<sup>143</sup>

Such results stem from two analytical flaws in the blended rationale. First, it is true that *Fraser* stated that “schools must teach by example the shared values of a civilized social order.”<sup>144</sup> But it is not at all clear that *Fraser*’s educational rationale—which was articulated in the context of a case involving non-political, lewd speech—should alone form the basis of a substantial disruption argument under *Tinker*. Allowing schools to restrict any speech that disrupts their educational mission of promoting “civility” represents a significant dilution of the *Tinker* standard. Indeed, Justice Alito recently rejected a similar argument in his *Morse v. Frederick* concurrence.<sup>145</sup> There, in response to the school district’s argument that its punishment of a student for displaying a “BONG HiTS 4 JESUS” banner was justified under *Tinker* because the banner disrupted the school’s “educational mission” of opposing drug use, Justice Alito wrote:

This argument can easily be manipulated in dangerous ways, and I would reject it for such abuse occurs. . . . During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The “educational mission” argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.<sup>146</sup>

Relatedly, even assuming *arguendo* that the educational rationale could provide the foundation for a substantial disruption argument under *Tinker*, it is still not clear that the educational rationale itself always justifies restricting student speech that is hostile about school officials. As discussed above, a fundamental premise of the educational rationale is that schools should be inculcating students in “the habits and manners of civility” *in order to prepare them for citizenship*.<sup>147</sup> In that regard, asking a student to apologize for using the word “bullshit” at school in connection with a

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<sup>143</sup> *Acevedo*, 553 F. Supp. 2d at 170.

<sup>144</sup> *Fraser*, 478 U.S. at 683.

<sup>145</sup> *Morse v. Frederick*, 551 U.S. 393, 422–23 (2007) (Alito, J., concurring).

<sup>146</sup> *Id.* at 423.

<sup>147</sup> See *Fraser*, 478 U.S. at 681.

school official is hard to challenge. But the broader suggestions in *Wildman*, *Lowery*, and *Acevedo* that students should refrain from challenging authority are more problematic. In each of these cases, the student-plaintiff believed that an authority figure was engaging in unfair or inappropriate behavior and protested it through non-violent, standard methods like circulating a petition or videotaping alleged misconduct. In simply labeling this behavior “insubordinate,” these courts adopted an inappropriately cabined view of the educational rationale, failing to consider that these students were challenging authority in ways that our society accepts and even sometimes expects of our citizens. Indeed, in endorsing an inculcative model of public education, Amy Gutmann elaborated on this very concept:

[C]hildren will eventually need the capacity for rational deliberation to make hard choices in situations where habits and authorities do not supply clear or consistent guidance. These two facts about our lives—that we disagree about what is good and that we face hard choices as individuals even when we agree as a group—are the basis for an argument that primary education should be both exemplary and didactic. Children must learn not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens.<sup>148</sup>

Thus, although “[t]he authority of school officials does not depend upon the consent of the students,” as the *Lowery* court stated,<sup>149</sup> that does not mean student challenges to authority should automatically be dismissed as indecorous or disruptive to the educational process. Indeed, depending on the circumstances, they can be *a part of* that process.

This is true even when, as in *Wildman* and *Lowery*, the challenge is to a coach. The *Lowery* court stated that “attacking the authority of the coach necessarily undermines his ability to lead the team.”<sup>150</sup> Public school sports teams, however, have a purpose that goes beyond winning games, important and meaningful as that goal typically is. They are part of the broad educational programming that is offered to students. As such, silencing student dissent in favor of an exclusive focus on team success and unity is inappropriate. There may be situations in which a challenge to a coach’s authority causes such a significant disruption to the team that the only option is to remove the dissenting student, but simply *presuming* such disruption is insufficiently speech-protective. Similarly unconvincing was the *Lowery* court’s attempted analogy between high school football players and government employees. The *Lowery* court

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<sup>148</sup> GUTMANN, *supra* note 16, at 51.

<sup>149</sup> *Lowery v. Euverard*, 497 F.3d. 584, 588 (6th Cir. 2007).

<sup>150</sup> *Id.* at 594.



accurately noted that there is no constitutional right to participate in school extracurricular activities, just as there is no constitutional right to a government job.<sup>151</sup> The court thus suggested that the Supreme Court's *Pickering/Connick* framework—which applies to the free speech claims of government employees—was relevant here.<sup>152</sup> Under that framework, a government employee punished for his speech cannot prevail if the government can show that the speech was likely to undermine workplace efficiency and effectiveness.<sup>153</sup> The court suggested that a similar approach should govern student speech about coaches:

High school football coaches, as well as government employers, have a need to maintain order and discipline. Requiring coaches to tolerate attacks on their authority would effectively strip them of their ability to lead. . . .

The key to understanding *Connick* and the instant case is that neither case is fundamentally about the right to express one's opinion, but rather the ability of the government to set restrictions on voluntary programs it administers. . . .

. . . .  
. . . Clearly, the Supreme Court would reject out of hand the argument that a government employee has a First Amendment right to attempt to have his or her employer fired. It would make little sense, legal or otherwise, to confer an analogous right upon high school student athletes.<sup>154</sup>

The problem with this analogy is that even though both government jobs and school extracurricular activities are “voluntary,” the government employer/employee relationship is profoundly different from the school district/student relationship. School districts are charged with educating their students and preparing them for citizenship. Government employers have no such inculcative responsibilities with respect to their employees, who are fully-formed adults hired to perform a job. As such, challenges to authority in the two contexts raise very different considerations, and courts should keep these two legal frameworks separate.

Fortunately, some courts have been more willing to recognize the First Amendment interests implicated in these sorts of cases. In *Scoville v. Board of Education*,<sup>155</sup> for instance, the Seventh Circuit ruled—shortly after *Tinker* was decided—that students

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<sup>151</sup> *Id.* at 600.

<sup>152</sup> *Id.* at 596–97.

<sup>153</sup> *See, e.g.,* *Garcetti v. Ceballos*, 547 U.S. 410, 417–19 (2006) (citing *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)) (summarizing the framework).

<sup>154</sup> *Lowery*, 497 F.3d at 599–600.

<sup>155</sup> 425 F.2d 10 (7th Cir. 1970).

could not be punished for their on-campus distribution of a student newspaper that included criticism of school officials, such as:

Our senior dean seems to feel that the only duty of a dean or parent is to be the administrator of some type of punishment. . . . [An] interesting statement that he makes is "Therefore let us not cheat our children, our precious gifts from God, by neglecting to discipline them!" It is my opinion that a statement such as this is the product of a sick mind. Our senior dean because of his position of authority over a large group of young adults poses a threat to our community.<sup>156</sup>

Although the district court, pre-*Tinker*, had dismissed the students' First Amendment claim on grounds that the speech was likely to result in students' disregard of "legitimate administrative regulations necessary to orderly maintenance of a public high school system,"<sup>157</sup> the Seventh Circuit reversed that decision under *Tinker*'s newly-announced standard.<sup>158</sup> The court stated that the speech was not likely to cause a substantial disruption, adding that society had an interest in the "production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled."<sup>159</sup>

Some recent decisions have expressed similar solicitude for student challenges to authority. In the 2006 case of *Pinard v. Clatskanie School District*,<sup>160</sup> the Ninth Circuit ruled in favor of a group of students who were suspended from the high school basketball team for signing a petition that stated as follows:

[We] would like to formally request the immediate resignation of Coach Jeff Baughman. As a team we no longer feel comfortable playing for him as a coach. He has made derogative [sic] remarks, made players uncomfortable playing for him, and is not leading the team in the right direction. We feel that as a team and as individuals we would be better off if we were to finish the season with a replacement coach.<sup>161</sup>

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<sup>156</sup> *Id.* at 16.

<sup>157</sup> *Scoville v. Bd. of Educ.*, 286 F. Supp. 988, 992 (N.D. Ill. 1968).

<sup>158</sup> *Scoville*, 425 F.2d at 15.

<sup>159</sup> *Id.* at 14.

<sup>160</sup> 467 F.3d 755 (9th Cir. 2006).

<sup>161</sup> *Id.* at 760–61 (alteration in original). According to the plaintiffs, the coach was verbally abusive and intimidating. One student stated, for example, that the coach had hit his arms and called him a "fucking pussy." *Id.* at 760. Another student reported that the coach had told the team, "I can fuck with your minds in so many ways you won't know which way is up, and don't think I can't. I'll make your lives a living hell." *Id.* They further stated that after one game, the coach had actually told the players that if they wanted him to quit, they should tell him, and he would resign. *Id.* Their petition came in response. *Id.*

The students presented the coach with the petition on the morning of a day when the team had a game.<sup>162</sup> The coach immediately shared the petition with the principal, who then met with the players.<sup>163</sup> At this meeting, the players were told that they could choose whether to play in the game that night, and almost all of them decided not to play “to demonstrate their resolve and sincerity concerning the petition.”<sup>164</sup> According to them, they were not warned of any consequences that might result from choosing the second option.<sup>165</sup> Later that day, the coach decided not to coach the game, but the players were not informed of this decision and so they carried out their boycott.<sup>166</sup> The next day, the principal announced that all of the players who had refused to play in last night’s game would be permanently suspended from the team.<sup>167</sup> The Ninth Circuit concluded that if this punishment were solely for the boycott, it could be upheld under *Tinker*’s “substantial disruption” prong, because the boycott had caused disruption in terms of the last-minute need for replacement players.<sup>168</sup> However, if the punishment was “wholly or partly in retaliation” for the petition, it violated the First Amendment.<sup>169</sup> The court added that the “defendants’ suspension of the plaintiffs would lead ordinary student athletes in the plaintiffs’ position to refrain from complaining about an abusive coach in order to remain on the team.”<sup>170</sup> *Pinard* thus rejected the view that the petition itself, by challenging the coach’s authority, substantially disrupted the team.

A similar concern for student dissent permeated a New Jersey district court’s recent decision in *DePinto v. Bayonne Board of Education*,<sup>171</sup> although the hostility in that case was directed toward a school policy rather than a particular school official. There, in response to a mandatory uniform policy, two fifth graders wore buttons to school that stated “No School Uniforms” over a slashed red circle that contained a photograph of the Hitler Youth.<sup>172</sup> The school told the students that they would be

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<sup>162</sup> *Id.* at 761.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 761–62.

<sup>165</sup> *Id.* at 761.

<sup>166</sup> *Id.* at 762.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 769–70.

<sup>169</sup> *Id.* at 770–71.

<sup>170</sup> *Id.* at 771. The court thus remanded the case to the district court to determine “whether, viewing the evidence in the light most favorable to the plaintiffs, the record would permit a jury to infer that [the principal] punished the plaintiffs not simply for boycotting the game but also (or only) in retaliation for their having complained about Baughman and requested his resignation in the first place.” *Id.* The district court ultimately concluded that the plaintiffs had made this showing, and that the case should therefore proceed to trial. *Pinard v. Clatskanie Sch. Dist.*, No. 03-172-HA, 2008 U.S. Dist. LEXIS 10539 (D. Or. Feb. 12, 2008). Ironically, Coach Baughman is apparently now the high school principal. See CLATSKANIE MIDDLE/HIGH SCH., <http://www.csd.k12.or.us/taxonomy/term/9> (last visited Feb. 18, 2011).

<sup>171</sup> 514 F. Supp. 2d 633 (D.N.J. 2007).

<sup>172</sup> *Id.* at 636.

suspended if they wore the buttons again, and the students then filed suit.<sup>173</sup> In ruling in the students' favor, the court stated that faculty, parents, and students might find the buttons offensive, insulting, or distasteful, but that they could not be prohibited because there was insufficient evidence that they would disrupt the educative process.<sup>174</sup> The court left open, however, how it would have ruled had the defendants argued that the buttons were calling the school administrators Nazis, explaining that such an argument might have "dictate[d] a different analysis" but that the defendants had not raised the issue.<sup>175</sup> The court's ultimate stance on the question of hostile speech about *school officials*, therefore, remains unclear.

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As the above discussion shows, although cases involving students' on-campus hostile speech about school officials have a very common outcome—the students generally lose—there are ambiguities and inconsistencies brewing beneath the surface. Indeed, there are numerous ways that hostility toward school officials, depending on how it is expressed, can arguably be disruptive: it can make school officials fearful for their safety; it can cause them emotional distress that harms their job performance; it can cause an immediate, physical disruption; it can use language that sets a bad example for other students; it can foster disrespect for school officials; and it can call school officials' authority into question. Courts have not fully thought through which of these types of disruption rise to the level of justifying speech restrictions on either the protective or educational rationales.<sup>176</sup> Broad statements that "insubordinate" speech is unprotected do little to clarify the matter.

The rise of the Internet, and the resulting explosion of student speech cases in that setting, has further complicated matters. As I discuss in this next section, the already tough question of when schools should be able to restrict students' hostile speech about school authorities becomes considerably more complicated when it intersects with a question that is equally, if not more, difficult: what power do schools have over students' off-campus speech?

## II. OFF-CAMPUS HOSTILE SPEECH ABOUT SCHOOL OFFICIALS

While the Supreme Court's student speech framework does not directly address the question of students' hostile speech toward school officials, it says even less about whether schools should have any power over students' off-campus speech. None of

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 644–45, 650.

<sup>175</sup> *Id.* at 645 n.8.

<sup>176</sup> *Cf. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 674 (7th Cir. 2008) (asking, in the context of a school's restriction on one student's anti-gay T-shirt, "what is 'substantial disruption'? Must it amount to 'disorder or disturbance'? Must classwork be disrupted and if so how severely?").

the Court's four student speech cases involved off-campus speech, and the Court has only briefly—and ambiguously—touched on the issue in passing. That reference came in the introductory portion of *Hazelwood*, where the Court stated:

We have . . . recognized that the First Amendment rights of students in the 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.” 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 of school*.<sup>177</sup>

The *Hazelwood* Court thus left unclear whether it was specifically limiting schools' authority over students' off-campus speech, or simply contrasting school authority over student speech to government authority over adult speech. Moreover, this brief discussion left entirely open the question of what constitutes “speech outside of school”—a question made much more complicated by the rise of the Internet, which undermines the notion of a physical on-campus/off-campus division. Of course, it is not surprising that *Hazelwood* did not contemplate that issue: not only did the facts there not involve off-campus speech, but the decision was issued in 1988.<sup>178</sup>

To be sure, students' off-campus speech did not originate with the Internet, and there are some pre-Internet lower court cases addressing schools' authority over off-campus speech. A few, as discussed below, even involve speech about school officials.<sup>179</sup> But the issue has exploded in the digital age, given the prevalence of this

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<sup>177</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (emphasis added) (internal citations omitted)); *see also Morse v. Frederick*, 551 U.S. 393, 405–06 (2007) (stating that *Hazelwood* “acknowledged that schools may regulate some speech ‘even though the government could not censor similar speech outside the school’”).

<sup>178</sup> *See Hazelwood*, 484 U.S. 260. Indeed, of the four Supreme Court student speech cases, only *Morse* was decided in the Internet age, and it studiously avoided any discussion of the off-campus issue. *See Morse*, 551 U.S. at 401 (“There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.”). Many commentators were disappointed that *Morse* did not address this issue. *See, e.g.,* Denning & Taylor, *supra* note 2, at 837 (“*Morse*’s peculiar facts offered the Court the opportunity to provide some guidance to school officials, and an opportunity for it to clarify the scope of both students’ First Amendment rights and school officials’ authority to regulate speech. Unfortunately, *Morse*’s self-conscious minimalism raises more questions than it answers, especially for student cyberspeech.”); Papandrea, *supra* note 2, at 1028–29 (“Last year, the Supreme Court missed an opportunity to determine whether public schools have authority to restrict student speech that occurs off school grounds. . . . The Court’s refusal to address *Frederick*’s argument was unfortunate.”).

<sup>179</sup> *See, e.g.,* *Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979) (involving a teacher); *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986) (involving a principal).

method of communication as well as its ability to so easily transcend clear territorial lines. The late 1990s ushered in a wave of student Internet speech cases that seems only to be growing, and a significant portion of them involve negative speech about teachers, principals, and the like.<sup>180</sup> As such, courts are often first formulating their approach to the general off-campus speech issue in the specific context of hostile speech about school officials. Indeed, that has been the type of speech at issue in all four cases (two in the Second Circuit,<sup>181</sup> two in the Third Circuit<sup>182</sup>) that have been decided at the circuit court level.

In the pre-Internet age, courts were more easily able to rely on the geographic on-campus/off-campus division when analyzing schools' authority over off-campus speech. This is illustrated, in fact, by their treatment of off-campus hostility toward school officials. In the well-known case of *Thomas v. Board of Education*,<sup>183</sup> the Second Circuit held in 1979 that a school could not punish students for their off-campus distribution of a satirical newspaper that included articles mocking teachers.<sup>184</sup> In so doing, the court relied upon the off-campus location of the speech, writing that "our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself."<sup>185</sup> The court added that although it could envision a case where students' off-campus speech incited a substantial disruption at school, it did not need to address that hypothetical situation here.<sup>186</sup>

Similarly, in 1986 a Maine District Court held unconstitutional the suspension of a student who had given a teacher the finger when he encountered him in a restaurant parking lot, emphasizing the off-campus nature of the speech.<sup>187</sup> Like the Second Circuit, the court held out the possibility that such speech could have been punished if it were substantially disruptive.<sup>188</sup> It concluded, however, that the facts here did not rise to that level, colorfully writing:

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<sup>180</sup> See, e.g., *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

<sup>181</sup> *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Wisniewski*, 494 F.3d at 34.

<sup>182</sup> *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted and vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

<sup>183</sup> 607 F.2d 1043 (2d Cir. 1979).

<sup>184</sup> *Id.* The decision did not indicate what these articles actually said, but just stated that the publication included "articles pasquinading school lunches, cheerleaders, classmates, and teachers." *Id.* at 1045.

<sup>185</sup> *Id.* at 1052.

<sup>186</sup> *Id.* at 1052 n.17.

<sup>187</sup> *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986).

<sup>188</sup> See *id.* at 1441 (noting that the conduct was "too attenuated to support discipline against [the student] for violating the rule prohibiting vulgar or discourteous conduct toward a teacher").

It is argued that this weakening of the resolve of the teaching staff to enforce appropriate discipline in the school constitutes a sufficient adverse effect . . . to deprive the gesture of its protected status . . . . The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy. I know the prophecy implied in their testimony will not be fulfilled. I think that they know that, too.<sup>189</sup>

The recent wave of Internet hostility toward school officials, however, is harder to downplay, given the frequent harshness—even cruelty—of its tone. Indeed, considered collectively, the body of off-campus speech cases about school officials is significantly more vulgar and less communicative of a substantive opinion than the body of on-campus cases discussed above.<sup>190</sup> An examination of these cases, sorted into the same three categories used above, illustrates this point. It further shows that while courts continue to be fairly consistent in upholding schools' authority to restrict threatening speech, even when it originates off-campus, they are far more divided over how to treat vulgar speech and other hostile speech once it moves off campus.

#### *A. Threatening Speech*

Just as courts are unsympathetic toward on-campus threatening speech about school officials, so too are they unsympathetic to such speech when it originates off campus. However, rather than drawing upon both the protective and educational rationales in their analyses, courts here tend to rely mainly on *Tinker*'s protective justification, focusing on whether the speech was reasonably likely to reach school and cause a substantial disruption there.

In *J.S. v. Bethlehem School District*,<sup>191</sup> for example, the Pennsylvania Supreme Court upheld the constitutionality of a school's suspension of an eighth grader who created a website called "Teacher Sux."<sup>192</sup> The website included vulgar commentary

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<sup>189</sup> *Id.* at 1441 n.4 (internal citations omitted). The court also rejected the notion that the gesture of "giving the finger" was tantamount to uttering "fighting words" that are unprotected by the First Amendment. *Id.* at 1441–42. By contrast, a Pennsylvania district court ruled that calling a teacher a "prick" upon encountering him at a parking lot on a Sunday evening did qualify as fighting words. *Fenton v. Stear*, 423 F. Supp. 767, 771 (W.D. Pa. 1976).

<sup>190</sup> Part IV discusses some psychological explanations for why this commentary is so much harsher in tone.

<sup>191</sup> 807 A.2d 847 (Pa. 2002).

<sup>192</sup> *Id.* at 851.

about the middle school principal and an algebra teacher at the school.<sup>193</sup> It also included a page about the algebra teacher entitled “Why Should She Die?”; the page asked the reader to “[t]ake a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman.”<sup>194</sup> (This diagram also attacked the teacher’s appearance and included 136 repetitions of the statement “F \_\_ You Mrs. Fulmer. You are A B \_\_. You Are A Stupid B \_\_.”)<sup>195</sup> A linked page featured a drawing of the teacher “with her head cut off and blood dripping from her neck.”<sup>196</sup> The student showed the website to another student while at school, and word then spread from students to faculty.<sup>197</sup> Ultimately, the police department pursued the matter, and although no charges were filed against the student, the school district expelled him.<sup>198</sup> Meanwhile, after viewing the website, the algebra teacher suffered significant emotional distress (including loss of appetite, loss of sleep, loss of weight, headaches, short-term memory loss, an inability to leave the house, and an overall loss of sense of well-being).<sup>199</sup> She went on medication and took a medical leave for the rest of the school year, requiring the usage of three substitute teachers.<sup>200</sup>

In analyzing the constitutionality of this speech restriction, the *Bethlehem* court began by holding that the website did not amount to a true threat because, although highly offensive, it did not reflect a serious intent to do harm.<sup>201</sup> It held, however, that the school could nonetheless punish it under the Supreme Court’s school speech framework.<sup>202</sup> First, the court concluded that there was a sufficient nexus between the website and the school campus for it to be considered on-campus speech, because the website’s focus was on school personnel, its target audience was students and others connected with the school district, and it was accessed at school by the student-creator himself.<sup>203</sup> The court implied that even had the student-creator not accessed the website at school, it still might well have reached the same conclusion, stating 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.”<sup>204</sup> The court went on to conclude that the punishment was

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<sup>193</sup> *Id.* For example, the website indicated (in profane terms) that the principal had slept with the principal of another school, and called the algebra teacher a bitch and compared her to Hitler. *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* The comments about her appearance were connected to a photo of her, and included “Is it a rug, or God’s Mistake?” (apparently in reference to her hair), “Puke Green Eyes,” “Zit!” and “Hideous smile.” *Id.* at 851 n.4.

<sup>196</sup> *Id.* at 851.

<sup>197</sup> *Id.* at 851–52.

<sup>198</sup> *Id.* at 852–53.

<sup>199</sup> *Id.* at 852.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 859.

<sup>202</sup> *Id.* at 869.

<sup>203</sup> *Id.* at 865.

<sup>204</sup> *Id.* at 865 n.12.



justified under *Tinker* because the website “disrupted the entire school community.”<sup>205</sup> The court explained:

The most significant disruption caused by the posting of the web site to the school environment was the direct and indirect impact of the emotional and physical injuries to Mrs. Fulmer. . . .

Students were also adversely impacted. Certain students expressed anxiety about the web site and for *their safety* . . . . [A]mong the staff and students, there was a feeling of helplessness and low morale. The atmosphere of the entire school community was described as that as if a student had died.<sup>206</sup>

The court also briefly suggested that the punishment could be justified under *Fraser*’s educational rationale, but abandoned that discussion for its *Tinker* analysis.<sup>207</sup>

The Second Circuit conducted a similar analysis in *Wisniewski v. Board of Education*,<sup>208</sup> the first circuit court decision addressing school authority over student Internet speech. There, the court upheld the long-term suspension of an eighth-grader who created an AOL Instant Messenger icon that stated “Kill Mr. VanderMolen” and depicted a pistol firing a bullet at a person’s head, above which were dots that looked like spattered blood.<sup>209</sup> (The icon came to the attention of school authorities when one of the student’s classmates told Mr. VanderMolen about it.)<sup>210</sup> The court skipped over the “true threat” analysis, instead concluding that the punishment could be upheld under *Tinker* because it was reasonably foreseeable that the icon would come to the attention of school authorities and create a substantial disruption at school.<sup>211</sup> Unlike the *Bethlehem* court, the Second Circuit did not describe in detail any actual disruption nor explain exactly why a substantial disruption was foreseeable, other than to state that Mr. VanderMolen was “distressed” to learn about the icon, and asked and was allowed to stop teaching the student’s English class.<sup>212</sup> But its basic holding—that off-campus speech could be punished if it was reasonably likely to reach school grounds and cause a disruption there—was the same as in *Bethlehem*.

The one threatening speech case that came out the other way—*Porter v. Ascension Parish School Board*<sup>213</sup>—actually followed a similar analytical approach as well.

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<sup>205</sup> *Id.* at 869.

<sup>206</sup> *Id.* (emphasis added).

<sup>207</sup> *Id.* at 867–68.

<sup>208</sup> 494 F.3d 34 (2d Cir. 2007).

<sup>209</sup> *Id.* at 36.

<sup>210</sup> *Id.* at 36. Mr. VanderMolen, an English teacher, passed the information on to the high school and middle school principals, who then brought in the local police. *Id.*

<sup>211</sup> *Id.* at 37–39.

<sup>212</sup> *Id.* at 36.

<sup>213</sup> 393 F.3d 608 (5th Cir. 2004).

There, while at home, a high-school student drew a sketch of his high school under attack; the sketch also included a disparaging remark about the principal and a depiction of a brick being hurled at him.<sup>214</sup> Two years later, the sketchpad containing the drawing was inadvertently brought to school by the student's younger brother and ended up being seen by school authorities, who initiated a disciplinary proceeding.<sup>215</sup> The Fifth Circuit concluded that punishing the student for the drawing was unconstitutional, stating that it was not a true threat and not reasonably likely to reach school grounds, given that he had stored it off-campus and never publicized it.<sup>216</sup>

Taken together, these cases indicate that students raising First Amendment challenges to school restrictions on their off-campus threatening speech about school officials are likely to fail, particularly when the speech is communicated via the Internet. The "reasonably likely to reach the school and cause a substantial disturbance there" standard is becoming the dominant test for school authority over off-campus speech,<sup>217</sup> and the above cases suggest that at least when it comes to threatening speech, courts tend to interpret both parts of that standard—first, the likelihood that the speech will reach school; and second, that it will cause a substantial disruption there—broadly. As to the first part of the test, the *Wisniewski* court held that the fact that the student had sent messages with the IM icon to fellow classmates—along with the "potentially threatening content" of the icon itself—made the risk that the icon would come to the attention of school authorities "at least foreseeable . . . if not inevitable."<sup>218</sup> That the student had not himself sent any messages with this icon while on campus, nor brought a depiction of the icon to the school grounds, was apparently deemed irrelevant. Similarly, the *Bethlehem* court went out of its way to suggest that once threatening speech is placed on the Internet and is therefore *accessible* at school—even if the student speaker himself does not access it—it might still fall within the school's jurisdiction.<sup>219</sup> As to the test's second part, these decisions echoed the conclusion in the on-campus

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<sup>214</sup> *Id.* at 611.

<sup>215</sup> *Id.* at 611–12.

<sup>216</sup> *Id.* at 620. The court ruled, however, that the high school principal was still entitled to qualified immunity because "a reasonable school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate student speech reaches beyond the confines of the campus." *Id.*

<sup>217</sup> This standard is being used not only in cases involving off-campus speech about school officials, but also in cases involving other off-campus speech. *See, e.g.,* *Mardis v. Hannibal Pub. Sch. Dist.*, 684 F. Supp. 2d 1114 (E.D. Mo. 2010) (holding that the school district could punish student for his statements during an instant messenger chat that he was going to kill certain classmates both because such speech constituted a true threat and because it caused a substantial disruption to the school); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (holding unconstitutional school district's suspension of student for creating a website called "Satan's web page," which included a list of "people I wish would die," because the speech did not cause any disruption at school).

<sup>218</sup> *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39–40 (2d Cir. 2007).

<sup>219</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 n.12 (Pa. 2002).

cases discussed above that *any* threatening language about school officials—even if in attempted humor—can be considered substantially disruptive.

### *B. Vulgar Speech*

In comparison with the above cases involving threatening speech, the on-campus/off-campus distinction becomes much more significant in cases involving vulgar speech about school officials. Here, off-campus speakers have a decent chance of prevailing, even though students uttering vulgar speech about school officials on school grounds invariably lose.

Why do off-campus vulgar speakers fare so much better than on-campus vulgar speakers? Recall that the on-campus vulgar speakers lost through a mixture of the educational and protective rationales, with the courts holding that vulgar speech about school officials on school grounds could be restricted both under *Fraser* (i.e., schools can prohibit such speech to teach students that “vulgar speech and lewd conduct” is wholly inconsistent with the “fundamental values of public education”) and perhaps under *Tinker* as well (i.e., schools can prohibit such speech because it disrupts the educational atmosphere).<sup>220</sup> Courts are much less persuaded by these rationales, however, once the vulgar speech moves off campus. First, courts have shied away from applying the educational rationale to off-campus speech, regardless of whether it was foreseeable that the speech would reach school grounds.<sup>221</sup> Second, although courts have indeed relied on the protective rationale when analyzing students’ off-campus speech—as illustrated by the above discussion of off-campus threatening speech—they are often skeptical of schools’ attempts to justify restricting off-campus vulgar speech on that basis.

It is understandable why courts have been unpersuaded that the educational rationale should extend to off-campus speech, even though they are willing to so extend the protective rationale. As Mary-Rose Papandrea has written, if *Fraser* were extended to off-campus speech, schools “could restrict any indecent speech by a student, anywhere . . . without any additional showing. The idea that schools could regulate offensive speech on the Internet without showing any harm to the school

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<sup>220</sup> See, e.g., *Requa v. Kent*, 492 F. Supp. 2d 1272, 1279–80 (W.D. Wash. 2007); *Posthumus v. Bd. of Educ.*, 380 F. Supp. 2d 891, 901–02 (W.D. Mich. 2005).

<sup>221</sup> Some courts have stated that *Fraser* does not apply to off-campus speech. See, e.g., *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 261–63 (3d Cir. 2010) (indicating that the only constitutional basis for punishing a student’s off-campus speech is *Tinker*), *reh’g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (ruling that an off-campus Facebook group did not “undermine the ‘fundamental values’ of a school education”). Others have avoided reaching the issue. See, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 49–50 (2d Cir. 2008) (“It is not clear, however, that *Fraser* applies to off-campus speech [because] the *Tinker* standard has been adequately established here. We therefore need not decide whether other standards may apply”); *Bethlehem*, 807 A.2d at 868.

would give school officials almost limitless authority to police their students' expression."<sup>222</sup> By contrast, the way in which courts have adapted the protective rationale to the off-campus context—in requiring a showing that the speech was reasonably likely to reach school grounds and cause a substantial disruption there<sup>223</sup>—is more limited and connected to the school's realm of authority. As such, it makes sense that courts have shied away from holding that the educational rationale can apply to off-campus speech, but have embraced the protective rationale in that context.

What is striking, however, is courts' frequent unwillingness to find the protective rationale *satisfied* by off-campus vulgar speech about school officials. As Part I discussed, courts often deploy the protective rationale in cases involving on-campus vulgar speech, holding that such speech fosters an atmosphere of disrespect that disrupts the educational process as a whole.<sup>224</sup> (Indeed, some courts apply such reasoning even when the speech is *not* vulgar, but simply expresses a negative viewpoint, as in *Lowery*.<sup>225</sup>) Yet courts often abandon that rationale in cases involving off-campus vulgar speech that foreseeably made its way to campus, even when that speech is far more vulgar and hurtful than the types of on-campus speech they were willing to consider disruptive. Indeed, as discussed further in Part V, there is a trend toward overuse of this rationale with respect to some on-campus speech and underuse of it with respect to some off-campus speech.

In *Killion v. Franklin Regional School District*,<sup>226</sup> for instance, a high school student compiled a very vulgar "Top Ten" list about the school's athletic director.<sup>227</sup> Number two on the list was "[b]ecause of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade" and number one was "[e]ven if it wasn't for his gut, it would still take a magnifying glass and extensive searching to find it."<sup>228</sup> Apparently, the student had created similar lists in the past and was warned that he would be punished for bringing another such list to school.<sup>229</sup> Nonetheless, he e-mailed the list to several of his fellow classmates, one of whom did bring the list to school.<sup>230</sup> Copies of the list soon ended up in the high school teachers' lounge as well as the middle school, and when school administrators found out about it, they suspended the student (who admitted to creating the list) for ten days.<sup>231</sup> The district court, however, struck down the suspension, holding that although *Tinker* was applicable here, the

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<sup>222</sup> Papandrea, *supra* note 2, at 1070.

<sup>223</sup> See, e.g., *Wisniewski*, 494 F.3d 34; *Bethlehem*, 807 A.2d 847.

<sup>224</sup> *Requa*, 492 F. Supp. 2d at 1280; *Posthumus*, 380 F. Supp. 2d at 901.

<sup>225</sup> See *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007).

<sup>226</sup> 136 F. Supp. 2d 446 (W.D. Pa. 2001).

<sup>227</sup> *Id.* at 448.

<sup>228</sup> *Id.* at 448 n.1. Other items on the list included "[t]he girls at the 900 #s keep hanging up on him," "he has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time," and "he's just not getting any." *Id.*

<sup>229</sup> *Id.* at 448.

<sup>230</sup> *Id.* at 448–49.

<sup>231</sup> *Id.*

speech did not cause a substantial disruption.<sup>232</sup> The court acknowledged the school district's evidence that the speech was upsetting to the athletic director and made it hard for him to do his job, as well as its argument that the speech undermined school discipline and order, but found that these results did not rise to the level of a substantial disruption.<sup>233</sup> The court added that the athletic director had not needed to take a leave of absence, and that there was no evidence that "teachers were incapable of teaching or controlling their classes" because of the list.<sup>234</sup> Other district courts have come out the same way.<sup>235</sup>

Most recently, the Third Circuit reached a similar conclusion in *Layshock v. Hermitage School District*,<sup>236</sup> which involved an extremely vulgar fake MySpace profile that a high school senior created (while using his grandmother's computer) about his principal.<sup>237</sup> The student created the profile by providing "bogus answers" to survey questions that were supposed to assist someone in creating his profile.<sup>238</sup> For example, in response to the "tell me about yourself" questions, the student wrote the following:

**Birthday:** too drunk to remember  
**Are you a health freak:** big steroid freak  
**In the past month have you smoked:** big blunt  
**In the past month have you been on pills:** big pills  
**In the past month have you gone Skinny Dipping:** big lake,  
not big dick . . .  
**Ever been Beaten up:** big fag  
**Ever Shoplifted:** big bag of kmart  
**Number of Drugs I have taken:** big<sup>239</sup>

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<sup>232</sup> *Id.* at 455–56.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 455.

<sup>235</sup> See, e.g., *Flaherty v. Keystone Oaks*, 247 F. Supp. 2d 698 (W.D. Pa. 2003) (ruling that a school policy allowing an administrator to punish a student for "Internet Messages on a website message board" was unconstitutionally overbroad because the policy was not limited to speech that causes, or is likely to cause, a substantial disruption with school operations as set forth in *Tinker*); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (finding that the student's web page critical of his high school was protected speech because it did not "substantially interfere with school discipline."). But see *Barnett v. Tipton Cnty. Bd. of Educ.*, 601 F. Supp. 2d 980 (W.D. Tenn. 2009) (holding, without much discussion, that school could constitutionally punish students for creating fake Internet profiles for a teacher and administrator).

<sup>236</sup> 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

<sup>237</sup> *Id.* at 252.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 252–53 (emphasis added) (internal citation omitted).

The “big” motif was apparently based on the principal’s large size.<sup>240</sup> (It is interesting to note the thematic similarities between this website and the *Killion* “Top Ten” list.)<sup>241</sup> The profile also featured a photograph of the principal that the student had copied and pasted from the school district website.<sup>242</sup> The student provided fellow classmates with access to the profile, and word about it “spread like wildfire”; the student himself even logged onto the profile at school to show it to classmates.<sup>243</sup> Three students subsequently created fake profiles about the principal that were even more vulgar.<sup>244</sup> The principal ultimately found out about all of the fake profiles from his own daughter, who attended eleventh grade at the same school.<sup>245</sup> He found them to be “‘degrading,’ ‘demeaning,’ ‘demoralizing,’ and ‘shocking,’” and he contacted the police.<sup>246</sup> Although no criminal charges were ever filed, the student was suspended from school and subsequently brought a First Amendment claim.<sup>247</sup>

The Third Circuit ruled in the student’s favor, holding that neither *Tinker* nor *Fraser* justified the punishment here.<sup>248</sup> The court first stated that *Fraser*’s educational rationale was inapplicable to speech that was originally created off campus.<sup>249</sup> Its discussion of why *Tinker*’s “substantial disruption” standard was not met was slightly more ambiguous, since the school district had apparently emphasized *Fraser* in its appeal.<sup>250</sup> To the extent that the *Layshock* court did address the protective rationale, though, its brief discussion seemed skeptical that this justification could be satisfied by off-campus vulgar speech that was not threatening. For example, it stated that there was “no comparison between the impact of the conduct [in *Bethlehem*, the “Teacher Sux” case] and the impact of the conduct here.”<sup>251</sup>

But courts’ unwillingness to find the protective rationale satisfied by off-campus speech is not unanimous. In fact, on the very same day that the Third Circuit’s *Layshock* decision came out, February 4, 2010, a different Third Circuit panel came out the opposite way in a strikingly similar case. That case, *J.S. v. Blue Mountain School*

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<sup>240</sup> *Id.* at 252.

<sup>241</sup> *See supra* notes 227–31 and accompanying text.

<sup>242</sup> *Layshock*, 593 F.3d at 252.

<sup>243</sup> *Id.* at 253.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 253–54.

<sup>248</sup> *Id.* at 260–63.

<sup>249</sup> *Id.* at 261 n.16.

<sup>250</sup> *Id.* at 259–61 & nn.15–16. The school district apparently argued that because the student had accessed the website at school (and had initially “entered” the school district’s website when he copied the principal’s photograph from it), this was an on-campus speech case triggering the traditional student speech framework. Brief of Appellee at 9, *Layshock*, 593 F.3d 249 (Nos. 07-4465, 07-4555).

<sup>251</sup> *Layshock*, 593 F.3d at 261 n.17.

*District*,<sup>252</sup> also involved a fake MySpace profile about a school principal, this one created by an eighth-grader in consultation with her friend.<sup>253</sup> As in *Layshock*, this profile featured a photograph of the principal that was copied and pasted from the school district website.<sup>254</sup> The profile's theme was largely sexual, both implying that the principal was a pedophile and otherwise commenting about his sex life.<sup>255</sup> The profile itself stated "HELLO CHILDREN yes. [I]t's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL," and listed as among the principal's habits, "riding the fraintain . . . [and] fucking in my office [ ] [H]itting on students and their parents," and watching "the playboy channel on directv."<sup>256</sup>

The profile was initially publicly accessible; after numerous students saw the website and approached its student-creators to talk about it, the creators changed its setting to "private."<sup>257</sup> They then granted access to the profile to approximately twenty-two other students.<sup>258</sup> One student subsequently informed the principal about the profile, and also told him who had created it.<sup>259</sup> The principal then confronted the student and her friend, telling them that he was "very upset and very angry, hurt, and [he] c[ould]n't understand why [they] did this to [him] and [his] family."<sup>260</sup> The profile also caused the principal to suffer stress-related health problems.<sup>261</sup> He suspended the student-creators for ten days and considered pressing criminal charges, but ultimately did not do so.<sup>262</sup> When the two students returned to school from their suspension, students welcomed them back with confetti and decorations on their lockers that stated "congratulations."<sup>263</sup> The student-creator of the website (though apparently not her collaborator) later filed suit, challenging the suspension as violative of the First Amendment.<sup>264</sup>

<sup>252</sup> 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted and vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

<sup>253</sup> *Id.* at 290–91.

<sup>254</sup> *Id.* at 291.

<sup>255</sup> *See id.* For example, the URL for the page was <http://www.myspace.com/kidsrockmybed>. *Id.*

<sup>256</sup> *Id.* The profile also included lewd comments about the principal's wife, Debra Frain, a guidance counselor at the same school. For example, it stated, "I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN." *Id.* It added "fainttrain—it's a slow ride but you'll get there eventually." *Id.* at 291 n.2.

<sup>257</sup> *Id.* at 292.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 293 (alterations in original).

<sup>261</sup> *Id.* at 294.

<sup>262</sup> *Id.* at 293. The police officer apparently told him that any criminal harassment charges would likely be dropped. *Id.*

<sup>263</sup> *Id.* at 294.

<sup>264</sup> *Id.* at 294–95.

This time, the Third Circuit ruled in the school district's favor, holding that the suspension was constitutional under *Tinker*'s protective rationale.<sup>265</sup> The court noted that the website had not only caused minor inconveniences (i.e., students talking about it in class; administrators having to attend meetings to figure out how to address it), but that it was reasonably foreseeable that the website would cause substantial disruption.<sup>266</sup> The court stated that the website was likely to make students and parents question the principal's "character and fitness," and that the principal had described a "severe deterioration in discipline in the Middle School, and particularly among the eighth graders following the publication of the profile and the punishment" of the student-creators.<sup>267</sup> The court added that "student speech that is critical of school officials is protected and not something we wish to censor generally," but concluded that the speech here was so vulgar, reckless, and damaging that the principal needed the right to regulate it.<sup>268</sup> In a footnote, the court acknowledged the same-day issuance of *Layshock*, but attempted to distinguish it on grounds that the school district had not really pursued the *Tinker* argument there.<sup>269</sup> However, the two cases had such similar facts, and such divergent results, that it is not surprising that the Third Circuit ultimately reheard them en banc on June 3, 2010.<sup>270</sup>

Nor is it surprising that, as a general matter, courts have not yet reached consensus as to whether schools can regulate students' off-campus vulgar speech about school officials. The on-campus vulgar speech cases, while alluding to a protective rationale for restricting such speech, were able to mainly rely on the educational rationale for doing so.<sup>271</sup> As such, they never fully conceptualized the disruption caused by such speech, simply suggesting in broad terms that it would lead to a disrespectful atmosphere. Now that courts are being forced to consider this issue—given their unwillingness to rely on the educational rationale in the off-campus context, leaving the protective rationale as the only option—they are struggling to determine how to characterize and measure the disruption caused by this sort of speech. A similar challenge underlies the next category of cases: those involving off-campus speech that is hostile about school officials but also conveys a substantive opinion.

### *C. Hostile Speech That Also Expresses an Opinion*

As this Article discussed in Part I.C, even when it comes to *on-campus* speech, courts have not fully resolved how to treat student expression that is hostile toward

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<sup>265</sup> *Id.* at 302–03.

<sup>266</sup> *Id.* at 299–301.

<sup>267</sup> *Id.* at 300.

<sup>268</sup> *Id.* at 302.

<sup>269</sup> *Id.* at 302–03 n.11.

<sup>270</sup> As of the writing of this Article, new decisions in the two cases have not yet been issued. Recordings of the en banc oral arguments in the two cases can be found at <http://www.ca3.uscourts.gov/oralargument/audio/07-4465LayshockvHermitageSD-EnBanc.wma>; <http://www.ca3.uscourts.gov/oralargument/audio/08-4138JSvBlueMountainSD-EnBanc.wma>.

<sup>271</sup> See *supra* Part I.



school authorities but also expresses an opinion. Although the majority have suggested that restricting such speech can be justified under the educational rationale,<sup>272</sup> the protective rationale,<sup>273</sup> or a blend of the two,<sup>274</sup> others have hesitated to go in that direction. Courts are likewise divided when such speech originates off-campus. But—as with off-campus vulgar speech—the student speakers here have a decent chance of prevailing.

So far, there are no off-campus speech cases that express substantive dissent on the level of, for example, *Pinard*, where the students circulated a well-written petition explaining their concerns about their basketball coach. Rather, the cases generally involve more unfocused hostility that stops short of vulgarity. In *Dwyer v. Oceanport School District*,<sup>275</sup> for instance, an eighth grader created a website about his middle school, Maple Place School, which he entitled “I hate Maple Place.”<sup>276</sup> The website included comments like “The worst teacher is Mrs. Hirshfield because she has a short temper [,] The Principal, Dr. Amato, is not your friend and is a dictator,” and “Make stickers that say ‘I HATE MAPLE PLACE.’”<sup>277</sup> The website also included some arguably political comments, like “[w]ear political t-shirts to annoy the teachers” and “[s]tart protests, they aren’t illegal,” but did not make clear what the student was actually complaining about.<sup>278</sup> The website was publicly accessible—in fact, various visitors posted vulgar comments about school personnel on it—and after school administrators found out about it, they suspended the student.<sup>279</sup> The court concluded, however, that this punishment violated the First Amendment, writing that the content was not threatening, student himself had not made vulgar comments about any school officials, and that the school had not been able to identify any disruption caused by the website.<sup>280</sup> The court added that although the school district argued that Mrs. Hirshfield was very upset by the comments about her, those comments were “innocuous” and that she had not required a leave of absence.<sup>281</sup>

Similarly, a Florida district court recently issued a preliminary ruling in favor of a high school senior who created a Facebook page entitled “Ms. Sarah Phelps is the worst teacher I’ve ever met.”<sup>282</sup> The page included the following introduction: “Ms. Sarah Phelps is the worst teacher I’ve ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane

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<sup>272</sup> See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

<sup>273</sup> See, e.g., *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>274</sup> See, e.g., *Requa v. Kent*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

<sup>275</sup> No. 03-6005 (D.N.J. Mar. 31, 2005).

<sup>276</sup> *Id.* at 1.

<sup>277</sup> *Id.* at 2.

<sup>278</sup> See *id.*

<sup>279</sup> *Id.* at 1, 3–5.

<sup>280</sup> *Id.* at 14, 18–19.

<sup>281</sup> *Id.* at 19.

<sup>282</sup> *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1377 (S.D. Fla. 2010).

antics: here is the place to express your feelings of hatred.”<sup>283</sup> The student took the Facebook page down after two days, but the principal subsequently found out about it and suspended her on grounds that it constituted cyber-bullying.<sup>284</sup> The court ruled that her subsequent lawsuit could survive a motion to dismiss, concluding that the student’s speech was unlikely to cause substantial disruption.<sup>285</sup>

Ironically, the one off-campus speech case that came closest to involving an expression of substantive dissent—*Doninger v. Niehoff*<sup>286</sup>—ended up coming out in favor of the school. There, a high school junior became frustrated about difficulties in scheduling a school “battle-of-the-bands” event called “Jamfest.”<sup>287</sup> She and several other student council members sent an e-mail from the school computer lab to community members advising them of the situation, and that night, she posted a message about the matter on her publicly accessible livejournal.com blog.<sup>288</sup> Her blog post stated that “jamfest is cancelled due to douchebags in central office,” and then encouraged people to contact the school principal about the situation to “piss her off more,” reproducing the e-mail that the student council members had sent that morning.<sup>289</sup> The following morning, the principal and superintendent received phone calls and e-mail messages about Jamfest, and the scheduling problem was quickly resolved.<sup>290</sup> Several days later, however, the superintendent’s adult son came across the blog posting, and the principal ended up punishing the student for it by prohibiting her from running for senior class secretary.<sup>291</sup>

The Second Circuit affirmed the district court’s denial of the student’s motion for a preliminary injunction, holding that *Tinker* permitted this sanction because it was reasonably foreseeable that the blog posting would come to the attention of school authorities and that it foreseeably created a risk of substantial disruption.<sup>292</sup> In describing this disruption, the court stated that the blog posting was likely to make it more difficult to resolve the scheduling controversy and to divert “administrators and teachers . . . from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest’s purported cancellation.”<sup>293</sup> The court also suggested, citing *Lowery*, that because the student had only been punished by disqualification from student council office, it was sufficient that her posting threatened to disrupt the proper functioning of student government, which was supposed to work

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<sup>283</sup> *Id.* at 1367.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1374.

<sup>286</sup> 527 F.3d 41 (2d Cir. 2008).

<sup>287</sup> *Id.* at 44–45.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 45.

<sup>290</sup> *Id.* at 45–46.

<sup>291</sup> *Id.* at 46.

<sup>292</sup> *Id.* at 50.

<sup>293</sup> *Id.* at 51–52.

cooperatively with the administration.<sup>294</sup> The court added that “we have no occasion to consider whether a different, more serious consequence . . . would raise constitutional concerns.”<sup>295</sup> As the case has moved forward, the parties have continued to argue over the disruption issue, with the student arguing that she was really punished because of the posting’s uncivil language about school administrators, rather than because of any potential disruption at school.<sup>296</sup>

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As the above discussion shows, questions about the nature of disruption caused by hostile speech about school officials—never fully resolved in the on-campus setting—have bubbled to the surface now that so much of this speech is happening off-campus and on-line. Many commentators have considered the above off-campus cases in the context of proposing a general approach to schools’ jurisdiction over students’ Internet speech<sup>297</sup> or cyber-bullying.<sup>298</sup> But focusing on students’ hostile speech about school

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<sup>294</sup> *Id.* at 52 (citing *Lowery v. Euverard*, 497 F.3d 584, 600 (6th Cir. 2007)).

<sup>295</sup> *Id.* at 53.

<sup>296</sup> *Id.* at 219–20.

<sup>297</sup> See, e.g., Calvert, *supra* note 2, at 285–86 (arguing that schools should have jurisdiction over students’ Internet speech “only when a student ‘brings’ his or her home-created Web site onto campus, either by downloading it on a school-controlled computer or by encouraging other students to do so”); Denning & Taylor, *supra* note 2, at 879–86 (offering a “suggested framework for courts facing student cyberspeech issues,” with seven guiding principles for courts: (1) recognizing that minors possess First Amendment rights with respect to their off-campus speech; (2) acknowledging that technology “[B]lurs [O]n-[C]ampus/[O]ff-[C]ampus [B]oundaries . . . [but] cannot eliminate them *altogether*,” (3) beginning with an assessment of the expressive activity itself, *i.e.*, whether it is potentially covered by *Tinker*, *Fraser*, *Hazelwood*, or *Morse*; (4) looking at the actions of the student speaker in order to determine whether the cyberspeech should count as on-campus speech; (5) not letting schools punish speech simply because it is offensive; (6) not diluting *Tinker*’s “disruption” standard; and (7) perhaps adopting a different standard that gives schools more leeway to restrict possible threats); Papandrea, *supra* note 2, at 1090–1102 (arguing that “schools should have very little authority to restrict student speech in the digital media,” and “must instead become more tolerant of speech that they do not like and focus more on educating their students to use digital media responsibly”); Benjamin F. Heidlage, Note, *A Relational Approach to Schools’ Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 594 (2009) (arguing that in determining whether schools have jurisdiction over students’ off-campus speech, courts should use a “relational approach”: “[i]f the youth was speaking as a student, the student-speech standard—the doctrinal tests developed by the Court in the *Tinker* line of cases—applies. . . . If, however, the youth was speaking outside that role and instead was speaking as a general citizen, then the full First Amendment protections apply”); Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students’ Online Activity*, 50 B.C. L. REV. 1563, 1594 (2009) (arguing that schools should “have jurisdiction to regulate only speech that occurs when the school has assumed control and supervision over the student who is speaking”).

<sup>298</sup> See, e.g., Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now*

officials in particular—and analyzing the off-campus cases involving such speech alongside the analogous on-campus cases—adds an important, missing piece to the discussion. It brings into focus the common substantive concern underlying these two lines of cases: how do we preserve students’ ability to dissent from authority while still maintaining a safe and effective educational environment? The on-campus/off-campus distinction, while relevant, cannot alone satisfactorily answer this question. Indeed, Parts I and II indicate, as I argue further below, that some on-campus speakers have received insufficient protection while some off-campus speakers have received too much protection.

Furthermore, a comprehensive approach to this question requires more than assessing the current legal limitations on schools’ power to restrict students’ hostile speech about school officials—the analysis collectively provided by Parts I and II. It also requires considering the issue from the opposite perspective: what are the constraints on schools’ ability *not* to act in the face of such speech? In other words, what legal and educational risks does a school face simply by doing nothing when a student engages in hostile speech about a school official? Considering the issue from this angle is important for two reasons. As an initial matter, the above discussion only indicates when schools *can* act, not when they *must* or *should* act. Any guidance that it provides, therefore, is necessarily incomplete. More importantly, I argue that there is an important connection between the two perspectives. An understanding of the risks of *not* responding to certain types of hostile speech about school officials should inform courts’ conclusions about when schools *can* act, by sharpening their assessment of when and how such speech is disruptive in the first place.

### III. LEGAL CONSTRAINTS ON SCHOOLS’ INACTION IN RESPONSE TO HOSTILE SPEECH ABOUT SCHOOL OFFICIALS

The most common way for conflicts over schools’ responses to students’ hostile speech about school officials to end up in court is through the path illustrated in Parts I and II: the school punishes the speech, and the student-speaker then brings a section 1983 lawsuit alleging that the school district violated his First Amendment rights. There is also, however, another way for schools to end up as defendants in

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*Resolve*, 7 FIRST AMEND. L. REV. 210, 250–52 (2009) (arguing that schools generally lack jurisdiction over cyber-bullying, particularly because “aggrieved students and school personnel already have civil law remedies, such as libel suits, for off-campus speech that causes them harm”); Doering, *supra* note 2, at 670–74 (arguing that all cyber-bullying cases should be analyzed under the *Tinker* framework); Jessica Moy, Note, *Beyond ‘The Schoolhouse Gates’ and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment after Morse v. Frederick*, 37 HASTINGS CONST. L.Q. 565, 583–590 (2010) (arguing that courts should either hold that cyber-bullying does not constitute “speech” under the First Amendment, or that they should use *Tinker*’s “invasion of rights” prong in order to address “the delicate balance of rights presented by cyberbullying and cyberharassment cases”).

such conflicts, particularly where the speech is threatening or otherwise severely harassing: the school does not respond forcefully and ends up getting sued by the school official. In fact, there are two potential sources of liability here: first, the anti-bullying laws that many states have recently passed, some of which explicitly contemplate school personnel (rather than just students) as possible victims,<sup>299</sup> and second, the “hostile work environment” theory of employer liability under Title VII, the Equal Protection clause, and analogous state statutes.<sup>300</sup>

Of course, school districts cannot be held liable for failing to restrict speech that is in fact protected by the First Amendment. As the above discussion has shown, however, some such speech is unprotected, either because it falls outside of First Amendment protection altogether (as in the case of true threats) or because it can be restricted pursuant to the Supreme Court’s student speech framework. In those situations—i.e., where the school is free to restrict the speech should it choose to do so—there is no constitutional bar to holding schools liable for a failure to act. That said, as I discuss below, currently the scope of potential liability for a school district’s failure to respond to hostile speech about a school official is very narrow.

#### *A. Anti-Bullying Legislation*

In the past decade, the vast majority of states have passed anti-bullying laws, which generally take the form of requiring school districts to adopt anti-bullying policies.<sup>301</sup> These laws vary in several important respects, including their definitions

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<sup>299</sup> See, ARK. CODE ANN. § 6-18-514(3)(a) (2010); CAL. EDUC. CODE § 48900.4 (West 2010); DEL. CODE ANN. tit. 14, § 4112D(1) (2010); FLA. STAT. § 1006.147(2) (2010); KAN. STAT. ANN. § 72-8256(a)(1)(A)(i) (2010); MISS. CODE ANN. § 37-11-67(1)(a) (2010); N.C. GEN. STAT. § 115C-407.15(b) (2010); UTAH CODE ANN. § 53A-11a-102(1)(a)(i)(A) (2010).

<sup>300</sup> See *infra* Part III.B (discussing “hostile work environment” claims).

<sup>301</sup> At present, 45 states—all but Hawaii, Michigan, Montana, North Dakota, and South Dakota—have passed such laws. See ALA. CODE §§ 16-28B-1 to -9 (2010); ALASKA STAT. § 14.33.200 (2010); ARIZ. REV. STAT. ANN. § 15-341(37) (2010); ARK. CODE ANN. § 6-18-514 (2010); CAL. EDUC. CODE § 48900.4 (West 2010); COLO. REV. STAT. § 22-32-109.1 (2010); CONN. GEN. STAT. § 10-222d (2010); DEL. CODE ANN. tit. 14, § 4112D (2010); FLA. STAT. § 1006.147 (2010); GA. CODE ANN. § 20-2-751.4 (2010); IDAHO CODE ANN. § 18-917A (2010); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (2010); IND. CODE ANN. §§ 20-33-8-0.2, 28-33-8-13.5 to -15 (2010); IOWA CODE § 280.28; KAN. STAT. ANN. § 72-8256 (2010); KY. REV. STAT. ANN. § 525.080(1)(C) (West 2010); LA. REV. STAT. ANN. § 416.13 (2010); 20-A ME. REV. STAT. tit. 20-A, § 1001(15) (2010); MD. CODE ANN. EDUC. § 7-424.1 (West 2010); MASS. GEN. LAWS ch. 71, § 37O (2010); MINN. STAT. § 121A.0695 (2010); MISS. CODE ANN. § 37-11-67 (2010); MO. REV. STAT. § 160.775 (2010); NEB. REV. STAT. § 79-2,137 (2010); NEV. REV. STAT. § 388.135 (2010); N.H. REV. STAT. ANN. §§ 193-F:2 to -F:10 (2010); N.J. STAT. ANN. § 18A:37-15 (West 2010); N.M. CODE R. § 6.12.7 (LexisNexis 2010); N.Y. STAT. LAW §§ 10-18 (McKinney 2010); N.C. GEN. STAT. § 115C-407.15 (2010); OHIO REV. CODE ANN. § 3313.666 (West 2010); OKLA. ST. tit. 70, § 24-100.4 (2010); OR. REV. STAT. § 339.356 (2010); 24 PA. STAT. ANN. § 13-1303.1-A (West 2010); R.I. GEN. LAWS § 16-21-26 (2010); S.C. CODE ANN. § 59-63-140 (2010); TENN. CODE ANN. § 49-6-1016

of bullying and their purported scope (in particular, whether they attempt to reach off-campus behavior); indeed, many of them have been recently amended to include cyberbullying.<sup>302</sup> A comprehensive comparison of these laws is beyond the scope of this Article. What is particularly relevant for purposes of this Article, however, is that although most of these laws define bullying in a way that only contemplates students as victims, the laws in eight of these states—Arkansas,<sup>303</sup> California,<sup>304</sup> Delaware,<sup>305</sup> Florida,<sup>306</sup> Kansas,<sup>307</sup> Mississippi,<sup>308</sup> North Carolina,<sup>309</sup> and Utah<sup>310</sup>—also explicitly contemplate school personnel as possible victims.

Although some of these eight statutes only protect school personnel from threats to their *physical* safety or property,<sup>311</sup> others include broader prohibitions that sweep in a somewhat wider (though still limited) swath of hostile speech about school officials. For example, Delaware’s anti-bullying law requires each school district to adopt anti-bullying policies and includes in its definition of bullying

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(2010); TEX. EDUC. CODE ANN. §§ 25.0342; 37.001 (West 2010); UTAH CODE ANN. §§ 53A-11a-201 to -301 (West 2010); VT. STAT. ANN. tit. 16, § 165 (2010); VA. CODE ANN. § 22.1-279.6 (2010); WASH. REV. CODE § 28A.300.285 (2010); W. VA. CODE ANN. § 18-2C-3 (2010); WIS. STAT. § 118.46 (2010); WYO. STAT. ANN. § 21-4-314 (2010).

<sup>302</sup> See FLA. STAT. § 1006.147(2)(c) (2010); GA. CODE ANN. § 20-2-751.4(a) (2010); IDAHO CODE ANN. § 18-917A(2) (2010); KAN. STAT. ANN. § 72-8256(a)(4)(B) (2010); KY. REV. STAT. ANN. § 525.080(1)(C) (West 2010); MASS. GEN. LAWS Ch. 71, § 37O (2010); MINN. STAT. § 121A.0695 (2010); NEV. REV. STAT. § 388.135 (2010); N.C. GEN. STAT. § 115C-407.15(a) (2010); OR. REV. STAT. § 339.356(2)(b) (2010); VA. CODE ANN. § 22.1-279.6A (2010); WASH. REV. CODE § 28A.300.285(2) (2010).

<sup>303</sup> ARK. CODE ANN. § 6-18-514(3)(A) (2010).

<sup>304</sup> CAL. EDUC. CODE § 48900.4 (West 2010).

<sup>305</sup> DEL. CODE ANN. tit. 14, § 4112D(a) (2010).

<sup>306</sup> FLA. STAT. § 1006.147(2) (2010).

<sup>307</sup> KAN. STAT. ANN. § 72-8256(a)(1)(A)(i) (2010).

<sup>308</sup> MISS. CODE ANN. § 37-11-67(1)(a) (2010).

<sup>309</sup> N.C. GEN. STAT. § 115C-407.15(a)(1) (2010).

<sup>310</sup> UTAH CODE ANN. § 53A-11a-102(1)(a)(i)(A) (West 2010).

<sup>311</sup> See, e.g., MISS. CODE ANN. § 37-11-67(1)(a) (2010) (defining “bullying or harassing behavior” as “any pattern of gestures or written, electronic or verbal communications, or any physical act or any threatening communication . . . [that] [p]laces a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or property”; the statute goes on to further protect students—but not school employees—from behavior that “[c]reates or is certain to create a hostile environment by substantially interfering with . . . [their] educational performance, opportunities or benefits”); N.C. GEN. STAT. § 115C-407.15(a) (2010) (similarly defining “bullying or harassing behavior” as a pattern of gestures or communications that “[p]laces a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or her property,” and further protecting students—but not school employees—from behavior that substantially interferes with or impairs their educational performance, opportunities, or benefits); UTAH CODE ANN. § 53A-11a-102(1)(a) (West 2010) (defining bullying as an act that has one of a number of enumerated physical effects or that “is done for the purpose of placing a school employee or student in fear of” physical harm or harm to his property).

[a]ny intentional written, electronic, verbal or physical act or actions against another student, school volunteer or school employee that a reasonable person under the circumstances should know will have the effect of [p]lacing a student, school volunteer or school employee in reasonable fear of substantial harm to his or her *emotional* or physical well-being or substantial damage to his or her property.<sup>312</sup>

The law only requires school districts to prohibit bullying on school grounds or by use of school district technology, but one of its provisions implies that school districts can go farther with respect to cyber-bullying if they so choose.<sup>313</sup> The definitions of bullying in the Kansas and Arkansas statutes are similar. Included in Kansas's definition of bullying is

any intentional written, verbal, electronic or physical act or threat that is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student or staff member that a reasonable person, under the circumstances, knows or should know will have the effect of [h]arming a student or staff member, whether physically or *mentally*.<sup>314</sup>

Arkansas, in turn, defines bullying as “the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against . . . [a] public school employee” that creates a “clear and present danger” of, among other things, a substantial interference with the public school employee’s role in education or a hostile educational environment for that employee.<sup>315</sup>

These laws have clearly tried to balance the competing considerations of preserving students’ freedom of expression and prohibiting speech that is truly damaging and disruptive to school officials and the educational process. Indeed, their stringent definitions of bullying line up quite consistently with the protective rationale, as I discuss further in Part V. That said, the chances that a school official would be able to successfully sue under these statutes are small. That is because although the laws do

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<sup>312</sup> DEL. CODE ANN. tit. 14, § 4112D(a)(1) (2010) (emphasis added).

<sup>313</sup> *Id.* § 4112D(b)(2), (f) (stating that each school district must “at a minimum” establish a policy that prohibits “bullying of any person on school property or at school functions or by use of data or computer software that is accessed through a computer, computer system, computer network or other electronic technology of a school district,” and adding that “the physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action by the school district . . . initiated under this section provided there is sufficient school nexus”).

<sup>314</sup> KAN. STAT. ANN. § 72-8256(a)(1)(A) (2010) (emphasis added).

<sup>315</sup> ARK. CODE ANN. § 6-18-514(a)(1)(3)(A) (2010).

require school districts to prohibit such speech, they do not explicitly create a private right of action whereby the targets of such speech can sue school districts over a failure to respond.<sup>316</sup> Indeed, some of the anti-bullying laws explicitly disclaim the notion of a private cause of action. For example, Utah's law includes a provision stating that it "does not create or alter tort liability."<sup>317</sup> With regard to the anti-bullying statutes that say nothing about the issue, at least one such statute—Arkansas's anti-bullying law—has already been interpreted not to create a private right of action.<sup>318</sup>

These statutes are still very new, however, and it is indeed possible that some of them will be interpreted as containing an implied private right of action. In fact, the Michigan Supreme Court recently held that teachers have standing to sue their school board for failing to comply with the statutory duty to expel students who have physically assaulted them,<sup>319</sup> although the court left open the question of whether the teachers could actually bring a cause of action for damages.<sup>320</sup> The court concluded that the teachers had standing because

[the statute's] legislative history specifically contemplates that the statute is intended to not only make the general school environment safer but additionally to specifically protect *teachers* from assault and to assist them in more effectively performing their jobs. . . . Thus, teachers who work in a public school have a significant interest distinct from that of the general public in the enforcement of MCL 380.1311a(1).<sup>321</sup>

Other courts may adopt similar reasoning with respect to anti-bullying statutes, and hold that in certain circumstances, bullying victims are entitled to bring private causes of action against their school districts for inaction.

That said, it is important to note that the above-described anti-bullying statutes are distinguishable from the Michigan physical assault statute in an important respect; they do not prescribe a particular punishment for students who commit the prohibited conduct, but simply require school districts to develop anti-bullying policies that describe the consequences of engaging in the prohibited behavior.<sup>322</sup> Additionally, these

<sup>316</sup> See, e.g., ARK. CODE ANN. § 6-18-514 (West 2010); DEL. CODE ANN. tit. 14, § 4112D (West 2010); KAN. STAT. ANN. § 72-8256 (2010).

<sup>317</sup> UTAH CODE ANN. § 53A-11a-402(2) (West 2010).

<sup>318</sup> See *Wolfe v. Fayetteville Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1023 (W.D. Ark. 2009).

<sup>319</sup> *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, No. 138401, 2010 Mich. LEXIS 1657 at \*1–2 (Mich. Sup. Ct. July 31, 2010).

<sup>320</sup> *Id.* at \*4, \*43–46.

<sup>321</sup> *Id.* at \*41–42.

<sup>322</sup> The California statute, in fact, does not require any consequences at all, but simply states that a superintendent or principal "may" suspend or recommend for expulsion a student who engages in "sufficiently severe . . . harassment, threats, or intimidation . . . against school district personnel or pupils." CAL. EDUC. CODE § 48900.4 (West 2010).



statutes generally include significant flexibility as to what those consequences should be. For example, the Delaware statute simply provides that each school district's anti-bullying policy must include "an identification of an appropriate range of consequences for bullying."<sup>323</sup> Similarly, the Arkansas anti-bullying law states that a school district's anti-bullying policy "shall . . . [s]tate the consequences for engaging in the prohibited conduct, which may vary depending on the age or grade of the student involved. . . ."<sup>324</sup> Thus, a claim brought under these statutes would need to identify the nature of the statutory non-compliance, as compared to the case brought under the Michigan statute, where there was clear non-compliance with the prescribed penalty of expulsion. In short, while there is some potential for claims to be brought under these statutes, it is undeveloped at present, and seems limited.

### B. "Hostile Work Environment" Claims

A school official aggrieved by his school district's failure to respond to hostile student speech about him can also frame his grievance as a "hostile work environment" claim against his school district employer. Such claims face very significant challenges, but have some potential for success.

The "hostile work environment" theory of employment discrimination was first recognized by the Supreme Court in the context of Title VII, which prohibits employment discrimination based on an "individual's race, color, religion, sex, or national origin. . . ."<sup>325</sup> The Supreme Court has held that if an employee is subjected to harassment on the basis of one of these protected characteristics, and if that harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," then "Title VII is violated."<sup>326</sup> In addition to bringing hostile work environment claims under Title VII, school district employees can also bring analogous claims under section 1983 (alleging an Equal Protection violation) and/or under any applicable state laws.<sup>327</sup>

Within the past decade, a handful of teachers have brought hostile work environment claims against their school districts for failing to adequately address students' hostile speech about them, with limited success.<sup>328</sup> Courts have in theory endorsed the

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<sup>323</sup> DEL. CODE ANN. tit. 14, § 4112D(b)(2)(h) (2010).

<sup>324</sup> ARK. CODE ANN. § 6-18-514(b) (2010).

<sup>325</sup> 42 U.S.C. §§ 2000e-2(a)(1) (2006).

<sup>326</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>327</sup> See *Das v. Consol. Sch. Dist.*, 369 F. App'x 186 (2d Cir. 2010); *Owen v. L'Anse Area Sch.*, No. 2:00-CV-71, 2001 U.S. Dist. LEXIS 19287 (W.D. Mich. Nov. 14, 2001).

<sup>328</sup> See, e.g., *Das*, 369 F. App'x 186 (affirming summary judgment dismissal of teacher's Title VII and section 1983 hostile work environment claims); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002) (affirming summary judgment dismissal of teacher's section 1983 hostile work environment claim), *cert. denied*, 537 U.S. 974 (2002); *Mongelli*

viability of such claims, but there are three main hurdles to prevailing: (1) demonstrating that the student hostile speech in question was based upon a protected characteristic; (2) demonstrating that the speech was so severe and pervasive as to create an abusive work environment for the school official; and (3) demonstrating that the school district should be held liable for the creation of that abusive work environment, even though the perpetrator was a student rather than a school district employee.

As an initial matter, any employee attempting to bring a hostile work environment claim under Title VII must show that he was harassed on the basis of a protected characteristic, given that Title VII does not set forth “a general civility code for the American workplace.”<sup>329</sup> In the reported cases involving this sort of claim, that

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v. Red Clay Consol. Sch. Dist., 491 F. Supp. 2d 467 (D. Del. 2007) (dismissing teacher’s Title VII and section 1983 hostile work environment claims on summary judgment); Plaza-Torres v. Rey, 376 F. Supp. 2d 171 (D.P.R. 2005) (holding that teacher’s Title VII hostile work environment claim could survive summary judgment); Lovell v. Comsewogue Sch. Dist., No. CV 01 9750JO, 2005 WL 1398102 (S.D.N.Y. June 15, 2005) (holding that teacher’s Section 1983 hostile work environment claim could survive summary judgment); Seils v. Rochester City Sch. Dist., 192 F. Supp. 2d 100 (W.D.N.Y. 2002) (dismissing teacher’s Title VII hostile work environment claim), *aff’d*, 99 F. App’x 350 (2d Cir. 2004), *cert. denied*, 544 U.S. 920 (2005); *Owen*, 2001 U.S. Dist. LEXIS 19287 (holding that teacher’s Title VII and Michigan Civil Rights Act hostile work environment claims could survive summary judgment); *Peries v. N.Y.C. Bd. of Educ.*, No. 97 CV 7109, 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001) (holding that teacher’s Title VII hostile work environment claim could survive summary judgment); *see also* Heather Shana Banchek, Note, *Overcoming a Hostile Work Environment: Recognizing School District Liability for Student-on-Teacher Sexual Harassment under Title VII and Title IX*, 55 CLEV. ST. L. REV. 577, 598 (2007); Richard D. Shane, Note, *Teachers as Sexual Harassment Victims: The Inequitable Protections of Title VII in Public Schools*, 61 FLA. L. REV. 355, 365 (2009).

<sup>329</sup> *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998). If the school official is claiming that he was harassed on the basis of a characteristic not covered by Title VII, such as sexual orientation, he can still bring a Section 1983 claim alleging an Equal Protection claim. *See, e.g., Schroeder*, 282 F.3d at 950. Such claims, however, must meet particularly stringent requirements for success. As the Seventh Circuit there explained,

In order to establish an equal protection violation, *Schroeder* must show that the defendants: (1) treated him differently from others who were similarly situated, (2) intentionally treated him differently because of his membership in the class to which he belonged (*i.e.*, homosexuals), and (3) because homosexuals do not enjoy any heightened protection under the Constitution, that the discriminatory intent was not rationally related to a legitimate state interest.

*Id.* at 950–51 (internal citations omitted). In other words, the school official must show that in failing to respond to students’ harassment of him, the school district “defendants ‘acted either intentionally or with deliberate indifference’ to his complaints of harassment because of his homosexuality.” *Id.* at 951 (quoting *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996)). If the defendants can show that they did not deny the official “equal protection on account of his sexual orientation, or that they had a ‘rational basis’ for doing so,” the school official loses. *Id.*

requirement was not an obstacle for the plaintiff school officials, who were able to show such a link. In *Peries v. New York City Board of Education*,<sup>330</sup> for instance, the plaintiff teacher alleged that students had subjected him to a hostile work environment because of his “national origin and race,” repeatedly calling him names like “fucking Hindu,” “Indian shit,” and “Gandhi” and saying “Hindu, go home. You don’t belong here.”<sup>331</sup> Similarly, in *Mongelli v. Red Clay Consolidated School District*,<sup>332</sup> the plaintiff teacher alleged that she had been sexually harassed by a student who made comments like “Your 36Ds are hard” “Do you have sex?”; and “Who do you have sex with?” made sexual gestures toward her, and repeatedly grabbed her forcefully.<sup>333</sup> In some of the cases described in Parts I and II, it is fairly easy to imagine how the targeted school official could connect the hostile student speech to a protected characteristic. For example, in *Requa*, the teacher whose buttocks were secretly videotaped and edited into a recording with a soundtrack of “Ms. New Booty”<sup>334</sup> could likely claim that the student’s behavior toward her was connected to her gender; so, too, could the Ms. Cox of “Gonna Kill Ms. Cox’s Baby.”<sup>335</sup> However, in other cases, that showing would be harder to make. For example, it would be very difficult for the school administrators in *Doninger v. Niehoff* to show that they were called “douchebags” because of any protected characteristic.

Even if a plaintiff school official can show a connection between the student hostility and a protected characteristic, he then must show that the student speech rose to the level of being truly severe and pervasive.<sup>336</sup> This is the requirement that has felled countless “hostile work environment” plaintiffs, and that is also true in several of the reported cases here.<sup>337</sup> In *Mongelli*, for instance, the teacher subjected to explicit sexual comments as well as unwelcome gestures and touching still lost on summary judgment, on grounds that the student’s behavior was not severe enough to cross the threshold into abusiveness.<sup>338</sup> It is likely that most of the cases described in Parts I and II would similarly fail to meet that standard. For example, although the *Posthumus* court upheld the constitutionality of the school district’s decision to punish a high school senior for calling the assistant principal a “dick,”<sup>339</sup> it is extremely unlikely that, had the school district instead decided to ignore the incident, the assistant principal would have had a valid hostile work environment claim. It is also unlikely that any of the school officials in the non-threatening, non-vulgar cases would be able to

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<sup>330</sup> No. 97 CV 7109, 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

<sup>331</sup> *Id.* at \*1–2.

<sup>332</sup> 491 F. Supp. 2d 467 (D. Del. 2007).

<sup>333</sup> *Id.* at 472.

<sup>334</sup> See *Requa v. Kent*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

<sup>335</sup> See *Wilson v. Hinsdale Elementary Sch. Dist.*, 810 N.E.2d 637 (Ill. App. Ct. 2004).

<sup>336</sup> See *Das v. Consol. Sch. Dist.*, 365 F. App’x 186, 189–90 (2d Cir. 2010).

<sup>337</sup> See *id.* at 190; *Mongelli*, 491 F. Supp. 2d at 481.

<sup>338</sup> *Mongelli*, 491 F. Supp. 2d at 481.

<sup>339</sup> See *Posthumus v. Bd. of Educ.*, 380 F. Supp. 2d 891 (W.D. Mich. 2005).

characterize the hostile speech about them as actionable harassment. Although the teachers in *Dwyer* and *Evans* may not have liked hearing that the student speakers considered them the worst teachers in the school,<sup>340</sup> for instance, it would be hard for them to prove that this was genuinely abusive.

Moreover, school employees potentially face two additional hurdles in showing that a student's hostile speech was sufficiently abusive to hold the school district liable for a failure to respond. First, a court may hold that because of the special characteristics of the student in question, the bar for "abusiveness" should be set even higher. That was the district court's conclusion in *Mongelli*, where the student-harasser was a special education student with developmental disabilities.<sup>341</sup> The court concluded that although it was not willing to "'immunize' schools from liability for harassment of a teacher by a special education student, no matter what the circumstances. . . . the requisite threshold of abuse will necessarily be higher than with students lacking developmental disabilities."<sup>342</sup> This approach roughly tracks the Supreme Court's statement that the harassment inquiry "requires careful consideration of the social context in which particular behavior occurs."<sup>343</sup> Relatedly, in bringing a claim based on student-perpetrated harassment, school officials may have difficulty convincing a court of the seriousness of the issue. In *Schroeder v. Hamilton School District*,<sup>344</sup> for instance, the Seventh Circuit downplayed the significance of this form of harassment in schools:

[I]n a school setting, the well-being of students, not teachers, must be the primary concern of school administrators. Not only are schools primarily for the benefit of students, but it is also clear that children between the ages of 6 and 14 are much more vulnerable to intimidation and mockery than teachers with advanced degrees and 20 years of experience. Likewise, with this vulnerability in mind, school administrators must be particularly steadfast in addressing and preventing any form of verbal or physical harassment/abuse directed at their students. They must also be cautious about using police tactics to deal with nonviolent harassment of a teacher by students, even if that harassment is offensive and cruel.<sup>345</sup>

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<sup>340</sup> See *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1377 (S.D. Fla. 2010); *Dwyer v. Oceanport Sch. Dist.*, No. 03-6005, at 2 (D.N.J. Mar. 31, 2005).

<sup>341</sup> *Mongelli*, 491 F. Supp. 2d. at 467.

<sup>342</sup> *Id.* at 478; see also Shane, *supra* note 328, at 370–72 (discussing *Mongelli*); David Thompson, Note, *Teachers' Sexual Harassment Claims Based on Student Conduct: Do Special Education Teachers Waive Their Right to a Harassment-Free Workplace?*, 42 IND. L. REV. 475, 488, 494–99 (2009) (discussing *Mongelli*).

<sup>343</sup> *Oncala v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998).

<sup>344</sup> 282 F.3d 946 (7th Cir. 2002).

<sup>345</sup> *Id.* at 952–53 (internal citations omitted); see also *Peries v. N.Y.C. Bd. of Educ.*, No. 97 CV 7109, 2001 WL 1328921, \*6 (E.D.N.Y. Aug. 6, 2001) ("There are, of course, distinctions

Thus, the showing of requisite severity, which is already a major obstacle to winning a hostile work environment case, may be even more challenging in the context of student-perpetrated harassment against a school employee. That said, in some cases of this type, the plaintiffs have survived summary judgment. In *Peries*, for instance, the district court let the case go forward on grounds that the “on-going name-calling, mimicking, and other abuse” that the teacher allegedly experienced for five years might have created a sufficiently hostile environment;<sup>346</sup> indeed, the teacher reported suffering from depression and considering suicide as a result.<sup>347</sup> Similarly, in *Plaza-Torres v. Rey*,<sup>348</sup> the district court denied summary judgment where a teacher alleged that she had been forced to resign due to continuous sexual harassment by one of her students.<sup>349</sup>

Finally, even after a showing of severe harassment by a student based on a protected characteristic, a school official still must show that it is appropriate to hold the *school district* liable in order to prevail. Typically, a Title VII hostile work environment lawsuit stems from the conduct of other employees—either a supervisory employee (giving rise to presumptive liability on the employer’s part) or a colleague (where a negligence standard is typically used).<sup>350</sup> The Supreme Court has not specifically addressed whether employers can also be held liable for a hostile work environment created by third parties, such as customers or clients. Lower courts, however, have generally recognized the viability of third-party harasser claims, stating—as does the Equal Employment Opportunity Commission (EEOC)—that the employer can be legally responsible for the actions of a third-party harasser if the employer knew or should have known about the harassment and failed to take reasonable corrective or

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between student-on-student harassment and student-on-teacher harassment, the most important of which is that a victim student has no disciplinary authority over the harassing student, while a victim teacher wields at least nominal disciplinary authority. It is therefore conceivable that school officials would owe a greater duty of protection to powerless students than to teachers.”).

<sup>346</sup> *Peries*, 2001 WL 1328921 at \*6.

<sup>347</sup> *Id.* at \*2. The court also noted that both Dr. Peries and his psychiatrist had stated that “the harassment by the students has caused intense psychological, emotional, and physical problems for the plaintiff, including depression, contemplated suicide, and pain.” *Id.*

<sup>348</sup> 376 F. Supp. 2d 171 (D.P.R. 2005).

<sup>349</sup> *Id.* at 184.

<sup>350</sup> The Supreme Court has explicitly adopted a standard by which employers are presumptively liable for supervisory harassment under Title VII, unless they can make out the affirmative defense that they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor. . . .”). The Supreme Court has not articulated a standard for co-worker harassment, but courts generally use negligence as the test. *See, e.g., Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998) (applying negligence theory under the Restatement (Second) of Agency).

preventive action.<sup>351</sup> The handful of courts to consider student-perpetrated harassment claims have analogized them to cases involving other third-party harassers, and have employed the same framework.<sup>352</sup> Although this is good news for school officials seeking to bring such claims (given that school districts had generally tried to argue that such claims should be entirely unavailable),<sup>353</sup> this extra requirement still imposes another significant obstacle to victory. Indeed, as implied by *Schroeder*, in analyzing whether a school district failed to take “reasonable” action in response to a school official’s complaints of student-perpetrated harassment, courts are likely to be fairly deferential to a school district’s determinations about how best to handle such a situation.

Moreover, this additional showing is likely to be a formidable obstacle in the event that a school official sues a school district for failing to respond to a student’s *off-campus* hostile speech about him, given schools’ lower level of control over that context. Indeed, the EEOC Guidelines specifically state that when evaluating whether to hold an employer responsible for the acts of non-employees, the Commission will consider the extent of the employer’s control over those individuals.<sup>354</sup> Thus, even in cases where a court concludes that the school district *could* punish a student’s off-campus speech if it so chose, it is very hard to imagine the court holding the school liable for declining to so extend its authority. This is particularly true given the current murkiness of First Amendment limitations on schools here, as described in Part II.

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In sum, school districts are unlikely to face significant legal risks by refraining from punishing students’ hostile speech about school officials. There is certainly some potential for liability, and the coming years will tell whether the anti-bullying statutes provide a new source of legal exposure. Overall, however, the legal risks of non-responsiveness to hostility against school officials are relatively small, particularly when the speech originates off campus.

That said, school districts’ concerns are obviously not limited to avoiding liability. Indeed, their fundamental mission is to provide a safe, effective learning environment for their students. As such, any consideration of the risks incurred by not responding to such speech must also take into account the educational implications of letting such speech go unchecked. The above-described hostile work environment cases, along with many of the cases described in Parts I and II, indicate that school officials frequently suffer emotional distress in response to students’ hostility toward them, and the following Part looks to psychological research for a fuller understanding of such distress.

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<sup>351</sup> See Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1372 (2009).

<sup>352</sup> See, e.g., *Mongelli v. Red Clay Consol. Sch. Dist.*, 491 F. Supp. 2d 467, 477 (D. Del. 2007); *Peries*, 2001 WL 1328921 at \*6.

<sup>353</sup> See, e.g., *Mongelli*, 491 F. Supp. 2d at 476.

<sup>354</sup> 29 C.F.R. 1604.11(e) (2009).

#### IV. EDUCATIONAL RISKS POSED BY A FAILURE TO RESPOND TO HOSTILE SPEECH ABOUT SCHOOL OFFICIALS

Given that protecting the school environment from disruption is one of the two main justifications for restricting students' hostile speech about school officials<sup>355</sup>—and indeed the only justification that courts have endorsed when it comes to off-campus speech<sup>356</sup>—it would be ideal to have psychological research that conclusively showed whether, when, and how such hostile speech is disruptive. Unfortunately, there is not a focused body of research on this particular subject. There is, however, enough research on the related topics of teacher stress and cyber-speech to point toward two relevant conclusions: first, students' verbal hostility toward school officials can sometimes cause real distress that disrupts the school environment; and second, communication over the Internet is frequently harsher and more abusive in tone than is in-person communication.

Several psychological studies suggest that students' verbal aggression toward teachers can be a source of significant stress for teachers. Three Belgian researchers recently published a paper entitled "School Violence and Teacher Professional Disengagement," in which they examined the effects of not only physical aggression toward teachers, but also "verbal victimization."<sup>357</sup> The authors summarized research indicating that "frequent student misbehaviour, repeated verbal victimization and high perceived violence could hurt teachers and lead to emotional exhaustion," causing "dissatisfaction, absenteeism, turnover and leaving teaching."<sup>358</sup> They ultimately concluded:

[T]he risk of physical victimization against teachers that is presented as a major threat by the media and the common wisdom about school violence is, in fact, extremely low, while other kinds of minor, repetitive behaviors, which are much less publicized, are much more frequent and have strong negative effects on teachers and teaching.

....

Results of the present study suggest that the negative emotional impact of some forms of school violence could be an important factor in teacher intention to leave, and that school support could be even more important for both emotional well-being and professional disengagement. Building a positive school climate may thus be a promising way to prevent teacher leaving.<sup>359</sup>

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<sup>355</sup> See *supra* notes 27–34 and accompanying text.

<sup>356</sup> See *supra* Part II.A.

<sup>357</sup> Benoit Galand et al., *School Violence and Teacher Professional Disengagement*, 77 BRIT. J. OF EDUC. PSYCHOL. 465, 469–70 (2007).

<sup>358</sup> *Id.* at 466 (citation omitted).

<sup>359</sup> *Id.* at 473–74 (internal citations omitted).

A recent study of teacher burn-out in Greece similarly found that the “most highly rated sources of stress refer to problems in interaction with students,” including “handling students with ‘difficult’ character . . . .”<sup>360</sup> An article by two educators at an American school for emotionally disturbed children likewise discussed the intense stress experienced by young teachers being sexually harassed by their students, stating that the teachers’ “reactions included detachment; shame; horror; uncertainty; demoralization; fear; feelings of being unappreciated, targeted, objectified; belittled, and victimized; sadness; anger; avoidance; feeling defeated; blame; separation; and attack . . . .”<sup>361</sup>

These descriptions are consistent with the emotional distress reported by school officials in many of the cases described above in Parts I, II and III. Indeed, the school officials in *Boim*,<sup>362</sup> *Bystrom*,<sup>363</sup> *Wilson*,<sup>364</sup> *Bethlehem*,<sup>365</sup> *Wisniewski*,<sup>366</sup> *Killion*,<sup>367</sup> *Layshock*,<sup>368</sup> *Blue Mountain*,<sup>369</sup> *Peries*,<sup>370</sup> *Schroeder*,<sup>371</sup> *Plaza-Torres*,<sup>372</sup>

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<sup>360</sup> A.-S. Antoniou et al., *Gender and Age Differences in Occupational Stress and Professional Burnout Between Primary and High-School Teachers in Greece*, 21 J. OF MANAGERIAL PSYCHOL. 682, 684 (2006).

<sup>361</sup> Suzanne Tochtermann & Fred Barnes, *Sexual Harassment in the Classroom: Teacher as Target*, 7 RECLAIMING CHILD. & YOUTH 21, 22 (1998).

<sup>362</sup> *Boim v. Fulton Cnty Sch. Dist.*, 494 F.3d 978, 981 (11th Cir. 2007) (stating that teacher felt “shocked” and “threatened” by student’s speech about him, and no longer felt comfortable having her in his class).

<sup>363</sup> *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1390 (D. Minn. 1987) (stating that teacher left school for the day after reading student newspaper article mocking the vandalism of his house).

<sup>364</sup> *Wilson v. Hinsdale Elementary Sch. Dist.*, 810 N.E.2d 637, 639, 645 (Ill. App. Ct. 2004) (stating that teacher experienced emotional distress from the “Gonna Kill Mrs. Cox’s Baby” song, and required a day off).

<sup>365</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852 (Pa. 2002) (describing teacher’s medical problems and need for a long-term leave after viewing the “Teacher Sux” website).

<sup>366</sup> *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007) (stating that teacher was distressed after viewing the “Kill Mr. VanderMolen” icon and stopped teaching his assigned class).

<sup>367</sup> *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455–56 (W.D. Pa. 2001) (stating that teacher was distressed after viewing the “Top Ten” list and had trouble performing his job).

<sup>368</sup> *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010) (describing principal’s distress after viewing fake MySpace profile), *reh’g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

<sup>369</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 293–94 (3d Cir. 2010) (similarly describing principal’s distress after viewing fake MySpace profile), *reh’g en banc granted and vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

<sup>370</sup> *Peries v. N.Y.C. Bd. of Educ.*, No. 97 CV 7109, 2001 WL 1328921 at \*2 (S.D.N.Y. Aug. 6, 2001) (discussing teacher’s depression and suicidal ideation as a result of student speech).

<sup>371</sup> *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 948–50 (7th Cir. 2002) (stating that after plaintiff teacher suffered anti-gay harassment from students and parents, ranging from being accused of having AIDS and being called a “faggot” to having his tires slashed, he experienced a nervous breakdown and left his job), *cert. denied*, 537 U.S. 974 (2002).

<sup>372</sup> *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 175 (D.P.R. 2005) (describing teacher’s



Owen,<sup>373</sup> and Lovell<sup>374</sup> all reported being very upset by the hostile student speech about them, some to the point of requiring psychiatric treatment. Additionally, as predicted by the Belgian study, in a significant number of these cases, that distress resulted in absenteeism (*Bystrom, Wilson, Wisniewski*) or even a long-term (if not permanent) departure from the school (*Bethlehem, Plaza-Torres, Owen, Schroeder, Lovell*), thus disrupting other students' education.

In addition to the tangible disruption triggered when a school official leaves or stops teaching a particular class, other types of disruption can result from hostile student speech that causes school officials to experience distress. Even if the school official remains at the school, "anxious, depressed or disengaged teachers are less able to sustain the academic engagement of their students," thus harming student motivation and behavior.<sup>375</sup> One researcher has also written that teacher stress can harm student-teacher relationships, and is particularly connected to the frequency of negative relationships.<sup>376</sup> She concluded:

The predictive value of teacher stress on negative relationships between teachers and students has important implications. Not only does teacher stress affect teachers' general attitude toward teaching, but also it is likely to influence the quality of their relationships with students. . . . [T]eacher stress may increase an inappropriate display of negative affect, which may become a general tone of interactions with students and is most likely to be perceived as adversarial by students.<sup>377</sup>

Given the connection between positive student-teacher relationships and school success,<sup>378</sup> this represents another way that the stress caused by hostile speech about a school official can have disruptive effects.

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allegation that the sexual harassment she experienced from one of her students was severe enough to force her to resign).

<sup>373</sup> Owen v. L'Anse Area Sch., No. 2:00-CV-71, 2001 U.S. Dist. LEXIS 19287, at \*8-9 (W.D. Mich. Nov. 14, 2001) (stating that teacher was diagnosed with Post-Traumatic Stress Disorder as a result of students' anti-Semitic harassment, which included marking the plaintiff's pictures with swastikas and uttering derogatory epithets about him, and that he felt compelled to resign).

<sup>374</sup> Lovell v. Comsewogue Sch. Dist., No. CV 01 7750JO, 2005 WL 1398102, at \*4 (E.D.N.Y. June 15, 2005) (stating that teacher was diagnosed with Post-Traumatic Stress Disorder after being verbally harassed by her students about her sexual orientation, and that she went out on "catastrophic leave" for the following school year).

<sup>375</sup> Galand, *supra* note 357, at 467.

<sup>376</sup> Jina S. Yoon, *Teacher Characteristics as Predictors of Teacher-Student Relationships: Stress, Negative Affect, and Self-Efficacy*, 30 SOC. BEHAV. & PERSONALITY 485 (2002).

<sup>377</sup> *Id.* at 491.

<sup>378</sup> *Id.* at 485.

Finally, in addition to the disruption caused when a school official's distress trickles down to students (either because the school official leaves school grounds or remains but is less effective), one recent psychological study also suggests that students may independently experience distress when they observe bullying, either because they are afraid that they too will be victimized, because it reminds them of previous instances in which they were victimized, and/or because they "experience a degree of cognitive dissonance resulting from the discrepancy between their desire to intervene and their lack of action."<sup>379</sup> Because this study focused specifically on students who witnessed the victimization of other *peers*,<sup>380</sup> it is not directly applicable to situations where students observe other students' hostility toward school officials. That said, its findings regarding this "bystander effect" may still be relevant, at least when the hostile speech is very severe. Indeed, the Pennsylvania Supreme Court noted in *J.S. v. Bethlehem* that some students became extremely scared and upset upon viewing the "Teacher Sux" website, which described and depicted the killing of an eighth grade teacher.<sup>381</sup>

The above psychological research did not focus on cyber-speech, which—as shown in Part II—is increasingly becoming a medium through which hostile sentiments about school officials are conveyed.<sup>382</sup> Given the pervasiveness of digital communication in the lives of most students,<sup>383</sup> it is not surprising that students are turning to the Internet to express such views. What is notable, however, is the generally harsher tone of such hostility, as compared to the on-campus cases described in Part I. Research on cyber-speech and adolescent brain development sheds light on this phenomenon.

Numerous researchers have pointed to the potential for people to speak with fewer inhibitions on the Internet. John Suler has identified numerous causes of the so-called

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<sup>379</sup> Ian Rivers et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 SCH. PSYCHOL. Q. 211, 220 (2009).

<sup>380</sup> See *id.* at 218.

<sup>381</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

<sup>382</sup> In addition to the anecdotal evidence provided by Part II, two recent small-scale studies support the conclusion that hostility about school officials is being communicated electronically. First, the National School Boards Association conducted a survey of approximately 1200 educators in 2006, and found that 35.6% responded "yes" to the question "Has the content of student postings on social networking web sites, such as MySpace.com, been disruptive to your school's learning environment?"; of those 35.6%, 25.9% reported that students had created fake websites for school officials. See NAT'L SCH. BOARDS ASSOC., 2006 TECHNOLOGY SURVEY RESULTS (2006), available at <http://us.vocuspr.com/Newsroom/ViewAttachment.aspx?SiteName=NSBANew&Entity=PRASSET&AttachmentType=F&EntityID=104280&AttachmentID=219f5c25-d9a1-44e1-b241-6c7bcf20212f>. Similarly, the author of a recent book on cyber-bullying conducted a survey of 107 school administrators in an upstate New York county, and found that 32% reported that at least one school official in their building had been the victim of youth-perpetrated cyber-bullying. See SAMUEL C. MCQUADE, III, ET AL., CYBERBULLYING: PROTECTING KIDS AND ADULTS FROM ONLINE BULLIES 63 (2009).

<sup>383</sup> See *supra* note 1 and accompanying text.

“online disinhibition effect,”<sup>384</sup> several of which seem particularly relevant to students’ on-line hostile speech about school officials. First, the Internet minimizes the status of authority figures.<sup>385</sup> As Suler explains, “[a]uthority figures express their status and power in their dress, body language, and in the trappings of their environmental settings. The absence of those cues in the text environments of cyberspace reduces the impact of their authority.”<sup>386</sup> As such, students feel far freer to denigrate and mock school officials on the Internet than they likely would at school.<sup>387</sup>

Second, the Internet enables a certain degree of anonymity, which also makes speakers feel more comfortable about expressing hostility.<sup>388</sup> In *Blue Mountain*, for instance, the student-creators of the fake MySpace profile about their principal did so anonymously, and were only caught when another student identified them.<sup>389</sup> Relatedly, Internet communication is invisible and asynchronous: students who are expressing hostility about school officials neither have to look at those officials nor immediately cope with their disapproving or hurt responses.<sup>390</sup>

Finally, Suler points to the phenomenon of “dissociative imagination,” whereby people create imaginary characters online and then view those characters as existing in a make-believe dimension, “relinquish[ing] their responsib[ility] for what happens in a make-believe play world that has nothing to do with reality.”<sup>391</sup> Although this effect is most obvious in fantasy game environments like Second Life, where users create alternate personas for *themselves*,<sup>392</sup> it also seems relevant to the cases in which students create fake profiles for school officials. There, too, although students are borrowing the school officials’ photos, they are ultimately creating imaginary characters for whom they may feel no actual responsibility. Indeed, it is interesting to note that in *Blue Mountain*, the student-creators did not identify their principal by name, school, or location, but instead used his picture and then described him as a “married bisexual” man who lived in Alabama.<sup>393</sup> (Their school was actually in Pennsylvania.)<sup>394</sup> Their sense that they were partially creating a fictional character, albeit one who was clearly

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<sup>384</sup> John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321 (2004).

<sup>385</sup> See *id.* at 324.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 322.

<sup>389</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 291–93 (3d Cir. 2010), *reh’g en banc granted and vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010). Indeed, the principal first tried to find out from MySpace who had created the website, but MySpace refused to provide the information without a court order. *Id.* at 292–93. Moreover, the student initially denied creating the profile when confronted by the principal. *Id.* at 293.

<sup>390</sup> Suler, *supra* note 384, at 323–24.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 324.

<sup>393</sup> *Blue Mountain*, 593 F.3d at 291.

<sup>394</sup> *Id.* at 290.

recognizable as their school principal, may have further increased these students' disinhibition as they added increasingly outlandish, vulgar comments to the profile.

In addition to online disinhibition, the Internet also enables another phenomenon that occurred in several of the Part II cases: that of "piling on," whereby readers of the on-line speech add their own comments that are often equally, if not more, aggressive.<sup>395</sup> In *Dwyer v. Oceanport School District*,<sup>396</sup> for instance, although the student's initial "I hate Maple Place" website included no profanity, several visitors left vulgar comments in the Guestbook, including referring to the principal as "a fat piece of crap" and one teacher as a "p\_\_sy."<sup>397</sup> Similarly, the fake Internet profile of the principal in *Layshock* was quickly followed by three even more vulgar profiles created by other students.<sup>398</sup>

Also shedding light on the topic of students' Internet speech is the recent scientific research on adolescent brain development, which indicates that brain maturation does not end in childhood but continues throughout adolescence.<sup>399</sup> This research suggests that as a general matter, typical adolescents are likely to have poorer impulse control than adults, and a greater appetite for risky or irresponsible behavior.<sup>400</sup>

These combined factors, along with the speed and ease of delivery that the Internet affords, have rapidly made cyber-bullying—which one recent work defines as using digital communication "to embarrass, harass, intimidate, threaten, or otherwise cause harm" to a targeted individual<sup>401</sup>—a growing concern with regard to speech about both fellow students and school personnel. To be sure, not all hostile Internet speech about school officials amounts to cyber-bullying, just as not all on-campus hostile speech rises to the level of traditional bullying or harassment. The speech in some of these cases, however—certainly *Bethlehem*, and arguably *Killion*, *Layshock*, and *Blue Mountain* as well—does meet the above definition. At the very least, the students in each of these cases seem to have intended to embarrass and harass the school officials in various ways, such as attacking their appearance (*Bethlehem*,<sup>402</sup> *Killion*,<sup>403</sup> *Layshock*,<sup>404</sup> and

<sup>395</sup> See MCQUADE, *supra* note 382, at 59.

<sup>396</sup> No. 03-6005 (D.N.J. Mar. 31, 2008).

<sup>397</sup> *Id.* at \*3.

<sup>398</sup> *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010), *reh'g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

<sup>399</sup> See, e.g., Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 110–11 (2009) ("[T]he normal attributes of the teen brain . . . [are] generally reflective more of normative developmental processes than of bad character.").

<sup>400</sup> *Id.* at 110.

<sup>401</sup> See MCQUADE, *supra* note 382, at ix.

<sup>402</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002) (describing student's various criticisms of teacher's face and hair).

<sup>403</sup> *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001) (recounting the student's comments about the athletic director's weight).

<sup>404</sup> *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 252–53 (3d Cir. 2010) (describing

*Blue Mountain*<sup>405</sup>), making crude comments about their sexuality or sex life (*Killion*,<sup>406</sup> *Layshock*,<sup>407</sup> and *Blue Mountain*<sup>408</sup>), and insinuating that they committed illegal activity (*Layshock*;<sup>409</sup> *Blue Mountain*<sup>410</sup>). *Bethlehem*, moreover, included language that had a threatening aspect.<sup>411</sup>

Although there is no research specifically analyzing the disruptive effects at school from hostile *Internet* speech about school officials, they seem likely to be relatively similar to the effects of hostile speech generally. Of course, if the targeted school official never learns of the speech, disruption is unlikely. Assuming, however, that the speech does make its way to school or the school official otherwise learns of it—as occurred in all of the cases described in Part II—it is difficult to see why the fact that the speech originated off-campus would result in a lower level of emotional distress on the part of the targeted teacher or administrator than had the speech originated on campus. (Indeed, to the extent that the characteristics of Internet communication make that speech even harsher in tone, the effects may correspondingly be more severe.) That does not mean that students should not still receive more protection for their off-campus speech; indeed, I endorse such a view in Part V. But the reason for that distinction is not that off-campus speech is inherently less disruptive. Indeed, it is worth noting the conclusion of one recent work that “for millions of youth there is no distinction between being on- or off-line, because they live simultaneously within the realm of cyberspace and physical space.”<sup>412</sup>

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the student’s comments about the principal’s weight), *reh’g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

<sup>405</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 291 (3d Cir. 2010) (describing the students’ descriptions of the principal as “hairy” and “expressionless”), *reh’g en banc granted and vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010). The fake profile also mocked the appearance of the principal’s child (stating that the child looked “like a gorilla”) and wife (stating that she looked “like a man”). *Id.*

<sup>406</sup> *Killion*, 136 F. Supp. 2d at 448 (recounting student’s comments that the athletic director called “girls at 900 #s,” was not “getting any,” and implying that he had a small penis).

<sup>407</sup> *Layshock*, 593 F.3d at 252–53 (describing student’s statements that principal was a “big whore” and a “big fag,” with a small penis).

<sup>408</sup> *Blue Mountain*, 593 F.3d at 291 (describing student’s statements that principal was having sex in his office, “riding [his wife] the fraintain,” loved “sex (any kind),” and was bisexual).

<sup>409</sup> *Layshock*, 593 F.3d at 252–53 (describing student’s allegations that principal took steroids, smoked pot, took other drugs, and had stolen items).

<sup>410</sup> *Blue Mountain*, 593 F.3d at 291 (describing students’ insinuations that the principal was a pedophile, such as by calling the profile “kids rock my bed”).

<sup>411</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002) (describing student’s statements about why the teacher should die, and his requests for money to pay a hitman).

<sup>412</sup> MCQUADE, *supra* note 382, at 48.

The above psychological research does not provide a comprehensive answer to the question of what types of hostile speech about school officials are disruptive, and why. But it does indicate that, consistent with the anecdotal evidence from the cases discussed in Parts I, II, and III.B, certain instances of such speech can cause genuine, significant emotional distress to the targeted school officials, resulting in various forms of educational disruption. To that extent, it suggests that such responses should not simply be dismissed as idiosyncratic overreactions. Rather, the realistic potential for such responses—and resultant disruption to the educational environment—must be given serious consideration when formulating a standard regarding schools’ ability to restrict students’ hostile speech about school officials.

That said, not all hostile speech about school officials is likely to cause such distress, which is why it is so important to distinguish between the various categories of hostile speech, as opposed to generally labeling it “insubordinate.” Additionally, there is no research that sheds light on the *costs* of widespread suppression of students’ hostile speech about school officials, from either pedagogical or First Amendment perspectives. These considerations, too, must be taken into account when developing a comprehensive approach to this issue, the topic to which I now turn.

#### V. STRIKING A BALANCE: SEPARATING HARASSMENT FROM DISSENT

Schools faced with a student’s hostile speech about a school official are in a delicate position. Such speech simultaneously implicates several important interests: protecting students’ ability to express their opinions; preventing substantial disruptions to the school environment; and inculcating students in the “habits and manners of civility”<sup>413</sup> to prepare them for adult citizenship. These considerations do not, however, necessarily have to be in competition. Rather, courts and schools should strive to further all of them by focusing on what I argue should be the core concern when responding to this sort of speech: separating harassment from dissent.<sup>414</sup> This concern plays out differently depending on, first, whether the speech originates on- or off-campus, and second, the nature of the speech itself.

When a student utters hostile speech about a school official while on campus, it is appropriate and consistent with the Supreme Court’s student speech framework to

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<sup>413</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>414</sup> I have made a similar argument about how schools should approach student speech that is potentially hurtful to other students, although that argument was less specifically focused on the protection of *dissent*, a concern that is more applicable in the context of speech about authority figures. See Emily Gold Waldman, *A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious and Otherwise)*, 37 J. L. & EDUC. 463, 468–69 (2008) (arguing that student speech that is hurtful to other students should be divided into two categories: (1) speech that identifies and singles out particular students for attack; and (2) speech that expresses a general opinion without being directed at certain named or otherwise identified students, and that schools should receive far greater latitude to restrict the first category of speech).

evaluate whether it warrants restriction under either the protective or educational rationales. It is important, however, to consider what each of those justifications should actually mean in the context of hostile speech about teachers and administrators. As to the protective rationale, what types of disruption do we want to prevent? And as to the educational rationale, what are the values that we want schools to inculcate?

With regard to disruption, this Article has shown that courts tend to use this term loosely in the context of on-campus hostile speech about school officials, sometimes implying that any “disrespectful” or “insubordinate” speech is inherently disruptive and can therefore be restricted under the protective rationale.<sup>415</sup> Although it may be true that such speech typically causes some degree of disruption, it is important to keep in mind *Tinker*’s focus on “*substantial* disruption of or *material* interference with school activities,”<sup>416</sup> which implies a certain threshold requirement. Courts should generally deem this threshold satisfied when speech either threatens a school official or is so harassing that it is likely to interfere with a school official’s ability to do his job, either because that school official leaves school altogether or remains but with diminished effectiveness. The psychological research described in Part IV suggests that such responses may be more widespread than considering each instance in isolation would indicate, and that they can have damaging effects on schools’ functioning. Schools should be able to restrict speech that is likely to cause such a reaction, both to protect school officials as members of the school community themselves, and to protect students from the disruptive ramifications of such speech.

At the same time, no one likes to be criticized, and people have varying emotional coping mechanisms for responding to verbal hostility.<sup>417</sup> In order to prevent over-restriction under this rationale, courts should impose a requirement of objective reasonableness. That is, they should require that such speech be reasonably likely to cause significant emotional distress to a school official, or otherwise make it reasonably likely that his or her ability to perform his job will be impaired.<sup>418</sup>

Here, some of the anti-bullying laws described in Part III are instructive. For instance, Arkansas’s prohibition of speech that intentionally harasses, intimidates, humiliates, ridicules, defames, or threatens a public school employee, where such speech creates a clear and present danger of either substantially interfering with that employee’s role in education or creating a hostile environment for that employee,

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<sup>415</sup> See *supra* Part I.B.

<sup>416</sup> *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (emphasis added).

<sup>417</sup> See Melissa M. Mahady Wilton et al., *Emotional Regulation and Display in Classroom Victims of Bullying: Characteristic Expressions of Affect, Coping Styles and Relevant Contextual Factors*, 9 SOC. DEV. 226, 229 (2000).

<sup>418</sup> This test would certainly capture any student speech that is so abusive that—if the school district failed to respond to it—could provide the basis for a successful “hostile work environment” lawsuit against the school district. See *supra* Part III.B. However, it would not be limited to such speech, but would instead cover all speech that is reasonably likely to be distressing enough to impair the school official’s job performance and thereby disrupt other students’ education.

provides one such appropriately cabined standard.<sup>419</sup> Such a standard helps to capture what can be problematically disruptive about hostile speech regarding a school official, while excluding the lower-level disruption that will likely accompany any challenge to a school official's authority. It is thus consistent with *Tinker*'s admonition that

[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.<sup>420</sup>

Protecting the school from disruption, of course, is not the only rationale in schools' quivers when it comes to on-campus hostility about school officials. The educational rationale is also applicable here, at least in the context of lewd, vulgar, or plainly offensive speech (as in *Fraser*) or school-sponsored speech (as in *Hazelwood*).<sup>421</sup> It is on this basis that schools can legitimately prohibit vulgar speech that does not rise to the level of causing a substantial disruption, such as the profane comment in *Posthumus*.<sup>422</sup> The Supreme Court recently cautioned, however, against reading *Fraser*'s "plainly offensive" standard too broadly, explicitly declining to apply it to the student's "BONG HiTS 4 JESUS" poster in *Morse*.<sup>423</sup> "We think this stretches *Fraser* too far; that case should not be ready to encompass any speech that could fit under some definition of 'offensive,'"<sup>424</sup> the Court wrote. "After all, much political and religious speech might be perceived as offensive to some."<sup>425</sup> By the same token, non-school-sponsored speech that expresses hostility toward a school official, but does not do so in lewd, vulgar, or otherwise "plainly offensive" terms, should not be restricted under the educational rationale.

Indeed, a broad conception of schools' inculcative role suggests that such hostile speech has a legitimate, important place in the educational process, for several reasons. First, engaging in such dissenting speech can help prepare students to assume their role as adult citizens. Mary Sue Backus recently observed:

Although modeling of constitutional principles and giving students ample opportunity to "practice" their free speech rights may be difficult for schools, there is evidence that "high school students are especially likely to be socialized in ways that promote

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<sup>419</sup> ARK. CODE ANN. § 6-18-514 (West 2010).

<sup>420</sup> *Tinker*, 393 U.S. at 509.

<sup>421</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

<sup>422</sup> *Posthumus v. Bd. of Educ.*, 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005).

<sup>423</sup> *Morse v. Frederick*, 551 U.S. 393, 409 (2006).

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*



democracy and celebrate the rights and liberties of all Americans if they engage in an activity that serves as a manifestation of those rights in practice.”<sup>426</sup>

Additionally, *listening* to other students’ dissenting speech—and observing the way that school officials respond to it—can also be an educationally valuable experience that helps prepare students for citizenship. As Amy Gutmann has written, “[i]n the case of *Tinker*, the students were taught that a constitutional democracy respects—indeed even values—dissent and criticism of governmental action . . . . Teaching too much deference to authority is no less troubling on constitutional democratic grounds than teaching too little.”<sup>427</sup> Providing room for such speech is thus consistent with—indeed, required by—Gutmann’s conception of schools’ inculcative function.

Finally, there is always the potential that such criticism will actually yield educational improvements, perhaps by highlighting questionable behavior on the part of a school official. (Indeed, the concerns raised in *Lowery* about the coach’s alleged student mistreatment and violations of school rules arguably fell into this category.) For these reasons, public schools can best fulfill their inculcative roles by restricting speech that is vulgar about school officials and by generally exercising significant oversight over school-sponsored speech, but by otherwise allowing students to express dissenting views—even those that include hostility toward school officials—on school grounds. Such a balanced approach inculcates students in the “two sides to the same coin of democratic citizenship”<sup>428</sup>: freedom and responsibility.

Meanwhile, once such speech moves off campus, then public schools should have a more limited—but still important—role to play in policing it. Courts have rightly held the educational rationale inapplicable here.<sup>429</sup> Indeed, if public schools were permitted to restrict off-campus speech on this basis, they would essentially be acting as roving inspectors of decency, encroaching on familial and individual prerogatives to determine what type of lewd, vulgar, or offensive language is appropriate in non-school settings. By contrast, the protective rationale should be fully applicable to off-campus speech. The need to protect schools from such disruption does not depend on the origin of that disruption. Just as in the on-campus setting, the protective rationale should justify schools’ restrictions of student speech that is so severely harassing

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<sup>426</sup> Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 202 (2009) (quoting KENNETH DAUTRICH ET AL., *THE FUTURE OF THE FIRST AMENDMENT: DIGITAL MEDIA, CIVIC EDUCATION AND FREE EXPRESSION RIGHTS IN AMERICA’S HIGH SCHOOLS* 117 (2008)).

<sup>427</sup> Amy Gutmann, *What is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 527–28 (1997).

<sup>428</sup> *Id.* at 528.

<sup>429</sup> See, e.g., *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 260–61 (3d Cir. 2010), *reh’g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

toward school officials that it causes them significant emotional distress or undermines their ability to do their jobs. Some commentators have downplayed the potential for such responses, suggesting that if an educator suffers emotional distress from a student's off-campus speech, it is likely an unreasonable, idiosyncratic overreaction. For example, Brannon Denning and Molly Taylor characterize the algebra teacher in *Bethlehem*—who, as discussed above, suffered anxiety and depression after being the target of a student website that harshly attacked her appearance, said “Fuck you . . . you are a bitch” 136 times, graphically depicted her being murdered, and requested money to help pay for her assassination—as needing a “thicker skin.”<sup>430</sup> Mary-Rose Papandrea similarly describes her reaction as “unreasonable” and “thin-skinned.”<sup>431</sup> Jacob Tabor, in fact, argues that off-campus student speech that attacks school officials should never be considered disruptive enough to warrant school regulation.<sup>432</sup> Such arguments stem from legitimate and important concerns about suppressing student dissent.<sup>433</sup> But they do not sufficiently grapple with the emotional distress and resultant disruptions caused by some student speech, even if it originates off-campus. The appropriate way to prevent schools from over-restricting such speech is not by holding that they lack *any* jurisdiction over it, but rather by limiting their power to cases where the speech is reasonably likely to reach school grounds and cause a disruption there, using the strict definition of “disruption” outlined above.<sup>434</sup>

In sum, then, this Article's proposal would allow schools to restrict students' on-campus hostile speech about school officials under either the protective or educational rationales, provided that these rationales are interpreted narrowly in terms of what qualifies as either “disruptive” or “offensive.” Additionally, it would allow schools to

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<sup>430</sup> Denning & Taylor, *supra* note 2, at 885. Denning and Taylor did acknowledge that she was “undoubtedly upset,” but concluded that “her reaction was, to us, wholly out of proportion to the nature of the speech.” *Id.*

<sup>431</sup> Papandrea, *supra* note 2, at 1067 & n.325.

<sup>432</sup> Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 591–97 (2009).

<sup>433</sup> Tabor, for instance, argues:

It is natural that officials would seek to silence expression that is critical of them even if it is not harmful to students or disruptive. Because schools would act as both the “victim” of the speech and, in the first instance, as the judge of its permissibility as well as enforcer, student opposition to school policies and teachers would likely be greatly chilled.

*Id.* at 596. Papandrea further suggests that “[g]ranting young people free speech rights can also promote stability by providing an outlet for dissenters . . . . By calling school officials ‘douchebags’ or creating a video mocking a teacher, the students vent their frustrations with the authority figures in their lives.” Papandrea, *supra* note 2, at 1078.

<sup>434</sup> Indeed, although Denning and Taylor downplayed the emotional distress of the teacher in *Bethlehem*, they did assert that “[i]f the speech . . . is the source of ‘material and substantial disruption,’ then it seems unduly formalistic to immunize a student from punishment simply because she produced the speech off-campus.” Denning & Taylor, *supra* note 2, at 880.

restrict students' off-campus hostile speech about school officials under only the protective approach, with the same caveat about narrowly interpreting the term "disruptive" and the further requirement that the speech be reasonably likely to reach school grounds. Put into practice, this approach would help to guide courts and schools in separating hostile speech about school officials that essentially amounts to harassment from that speech which is more properly characterized as dissent. Indeed, revisiting the categories of speech discussed in this Article with this approach in mind helps illuminate where courts are striking the right balance, and where they are falling short.

This Article sorted students' hostile speech about school officials into six categories: on-campus threats;<sup>435</sup> on-campus vulgar speech;<sup>436</sup> on-campus hostile speech that also expresses an opinion;<sup>437</sup> off-campus threats;<sup>438</sup> off-campus vulgar speech;<sup>439</sup> and off-campus hostile speech that also expresses an opinion.<sup>440</sup> In four of these categories, courts are generally striking the right balance. But in two of them—on-campus hostile speech that expresses an opinion and off-campus vulgar speech—courts are sometimes engaging in questionable reasoning, resulting in too little protection in the former category and too much protection in the latter.

First, it is important to consider what courts are getting right. There are three categories—on-campus threats, on-campus vulgar speech, and off-campus threats—in which courts are generally and appropriately ruling against student speakers. Speech that threatens violence against any member of the school community, whether it originates on- or off-campus, is typically disruptive in ways that implicate the protective rationale. When such speech originates off-campus, courts must also consider whether the speech was reasonably likely to reach school grounds, and indeed, in the one case where this requirement was not met, the court ruled that the speech warranted protection.<sup>441</sup> On-campus vulgar speech, in turn, clearly implicates the educational rationale, as discussed above.<sup>442</sup> Thus, it is understandable that in all three of these categories, students almost invariably lose. Conversely, in the category of off-campus hostile speech that expresses an opinion, courts are generally (albeit not exclusively) ruling in favor of student speakers on appropriate grounds.<sup>443</sup> They are appropriately basing their decisions solely on the protective rationale, and the majority have gone on to conclude that such speech is not sufficiently disruptive to warrant restriction.<sup>444</sup>

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<sup>435</sup> See *supra* Part I.A.

<sup>436</sup> See *supra* Part I.B.

<sup>437</sup> See *supra* Part I.C.

<sup>438</sup> See *supra* Part II.A.

<sup>439</sup> See *supra* Part II.B.

<sup>440</sup> See *supra* Part II.C.

<sup>441</sup> *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617–18 (5th Cir. 2004). For further discussion of this case, see *supra* notes 213–16 and accompanying text.

<sup>442</sup> See *supra* Part I.B.

<sup>443</sup> See *supra* Part II.C.

<sup>444</sup> *Id.*

In the remaining two areas, however, courts are often failing to strike the right balance. Their decisions, taken collectively, have resulted in the under-protection of dissent and the over-protection of harassment. As to dissent, this Article demonstrated that courts have tended to uphold punishments of students who, on school grounds, utter speech that is hostile about school officials in the context of expressing a genuine opinion. This is true even when that speech is neither threatening, nor vulgar, nor sufficiently harassing to be reasonably likely to cause significant emotional distress to a school official or impair his job performance. Courts have upheld such speech restrictions under a blended rationale that incorporates aspects of the protective and educational rationales, without being entirely true to either. If such speech is not disruptive enough to warrant restriction under the protective rationale alone, and is not lewd, vulgar, or offensive enough to warrant restriction under the educational rationale alone, then it is unconvincing to simply blend the two and state that any disrespectful speech is inherently disruptive. Nor is it persuasive to suggest that the threshold requirement of disruptiveness or offensiveness should be ratcheted down when the only punishment is removal from an extracurricular activity, as in *Lowery*.<sup>445</sup> This approach runs the risk of squelching any criticisms or dissent from participants in that activity, for fear that their speech will be considered disruptive and result in their dismissal. Such trepidation is not unrealistic, given that this is precisely what happened in several of the cases discussed in this Article. In short, schools and courts should give students more room to engage in this speech at school.

By contrast, with regard to harassment, courts are often giving students too much room to utter vulgar comments about school officials outside of school grounds. This outcome typically stems from applying the protective rationale with insufficient force. In *Killion* and *Layshock*, for instance, the student engaged in extremely lewd and vulgar Internet speech about school administrators, focusing in both cases on the men's allegedly large sizes and small penises.<sup>446</sup> The speech included no substantive criticism or dissent about these officials' job performance, nor did it touch on any school policies or issues. Even if the school administration wanted to take the speech as constructive criticism, it is impossible to see what could be learned from it.<sup>447</sup> The

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<sup>445</sup> See *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). *Doninger* was the one decision to apply this rationale in the context of analogous off-campus speech; as a result, it was the one decision that ruled against a student who had been punished for her off-campus expression of an opinion. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 212–16 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

<sup>446</sup> *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 252–53 (3d Cir. 2010), *reh'g en banc granted and vacated*, No. 06-cv-00116, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448 (W.D. Pa. 2002).

<sup>447</sup> Ironically, the vulgar "Top Ten" list about the school athletic director in *Killion* was actually motivated by the student's anger about the "denial of a student parking permit and the imposition of various rules and regulations for members of the track team," of which he was a member. *Killion*, 136 F. Supp. 2d at 448. Had the student engaged in off-campus—or even on-campus—speech that focused on what he was actually upset about, this Article's approach would fully support protecting his speech.

sole purpose of the speech was evidently to ridicule and humiliate these men, and indeed, in both cases the men found the speech abusive and demeaning, arguably to the point of experiencing significant distress and/or impaired job performance. Moreover, there was no real dispute in either *Killion* or *Layshock* that this speech was likely to reach school grounds. (Indeed, in *Layshock*, the student *himself* accessed on school grounds the fake profile he had created about his principal.)<sup>448</sup> Nonetheless, the courts in both cases ruled that the schools' punishment of the speech was unconstitutional, downplaying any distress that the targeted officials suffered and suggesting that it could not have caused any real disruption.<sup>449</sup>

These conclusions, while likely motivated by an understandable desire to protect students' off-campus expression, failed to take into account the genuine emotional disturbances that such speech can cause. Indeed, the speech in these cases fell quite squarely on the "harassment" side of the harassment/dissent line that divides hostile speech about school officials. Courts should take more seriously schools' concerns about the disruptive effects of this sort of speech, even if the targeted official does not take a leave of absence as a result. Although it is true that school officials may sometimes be able to separately pursue civil or even criminal charges depending on the nature of such speech, that should not limit a school district's ability to promptly respond to speech that is reasonably likely to cause disruption at school.<sup>450</sup>

## CONCLUSION

The on-campus/off-campus distinction is certainly important when analyzing schools' authority over student speech. Indeed, this Article has argued that although

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<sup>448</sup> *Layshock*, 593 F.3d at 253.

<sup>449</sup> *Id.* at 258–59, 263; *Killion*, 136 F. Supp. 2d at 455–56.

<sup>450</sup> Clay Calvert has argued that because "aggrieved . . . school personnel already have civil law remedies" for responding to off-campus harassing speech about them—primarily, defamation lawsuits—schools should not have any jurisdiction over such speech. Calvert, *supra* note 2, at 250–53. (Indeed, he makes this argument with respect to all off-campus harassing speech, not just that which attacks school personnel.) Such an approach fails to take into account the school's own interest in responding quickly to such speech in order to limit its disruptive effect. For further discussion of this point, see Doering, *supra* note 2, at 672.

Moreover, although Calvert seems sanguine about the potential for successful defamation lawsuits here, Calvert, *supra* note 2, at 225, such lawsuits are likely to be quite difficult to win, at least in cases where the student's hostile speech essentially includes opinions and "rhetorical hyperbole" rather than statements that are likely to be taken as fact by the average reader. See, e.g., *Finkel v. Dauber*, 906 N.Y.S.2d 697, 702 (N.Y. App. Div. 2010) (dismissing, on summary judgment, plaintiff's defamation claim against fellow students who wrote on their Facebook group page that she was "seen fucking a horse" in Africa and acquired AIDS there, after which she "persisted to screw a baboon"; the court explained that "to be actionable, a statement of fact is required, and 'rhetorical hyperbole' or 'vigorous epithet' will not suffice . . . a reasonable reader, given the overall context of the posts, simply would not believe that the Plaintiff contracted AIDS by having sex with a horse or a baboon").

both the protective and educational rationales for speech restriction should be available in the on-campus context, the protective rationale is the only legitimate basis upon which schools can restrict students' off-campus speech. But that distinction alone cannot satisfactorily tell us when schools should be permitted to restrict students' hostile speech about school officials. Examining the content of that speech, with an eye toward protecting dissent while also protecting school officials from harassment, is crucial. The current state of the law, whereby off-campus vulgar speech generally receives more protection than on-campus expression of hostile opinions, is failing to strike the right balance.

The importance of separating harassment from dissent echoes Justice Alito's concurrence in *Morse v. Frederick*, where he provided the crucial fifth vote.<sup>451</sup> There, in explaining why he was joining the majority's conclusion that the school district could punish the student's "BONG HiTS 4 JESUS" poster, Justice Alito distinguished between speech "that a reasonable observer would interpret as advocating illegal drug use" and speech "that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medical use.'"<sup>452</sup> Just as it is appropriate to distinguish between student speech that advocates illegal drug use and student speech that expresses an opinion about drug policy, so too is it appropriate to distinguish between student speech that harasses a school official and student speech that criticizes that official's behavior. To be sure, this distinction can be fuzzy; in both cases, it is possible to think of student speech that straddles the line. Accordingly, this Article is not suggesting that the harassment/dissent distinction can or should function as a bright-line rule. Rather, it should be a guiding principle in analyzing whether hostile speech about a school official is sufficiently disruptive or offensive to warrant restriction. Focusing on this distinction will help schools and courts strike a better balance in their treatment of hostile speech about school officials, wherever such speech occurs.

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<sup>451</sup> *Morse v. Frederick*, 551 U.S. 393, 422 (2006) (Alito, J., concurring).

<sup>452</sup> *Id.* at 422 (quoting *id.* at 444, Stevens, J., dissenting).