

Reaching Through the Schoolhouse Gate: Students' Eroding First Amendment Rights in a Cyber-Speech World

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I. INTRODUCTION

Forty years ago, the Supreme Court resoundingly affirmed that young people attending public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹ The unmistakable implication of *Tinker v. Des Moines Independent Community School District* was that students showed up at the schoolhouse possessing the full benefits of the First Amendment; the only question was how much of that bundle of rights they were forced to check at the gate.

Recent developments in the law of online speech, however, are rattling the certainty of that assumption. In the view of at least some federal judges, students do not enjoy—anywhere, anytime—the same right to comment on school events as ordinary citizens. Rather, so long as the impact of students' words may foreseeably reach school grounds, courts are increasingly willing to tolerate school punishment for the content of online speech that would enjoy full First Amendment protection if written by anyone not enrolled in school. Once First Amendment rights are lost, they seldom are recovered because people who cannot speak cannot arouse support. The loss often is incremental, with each descending stair step becoming “the new normal,” and so this latest incursion on young people's rights must be viewed in the larger context of decades of dangerous retrenchment.

Over the last 20 years, the federal courts have substantially eroded the First Amendment protection of students' speech in the public schools, exhibiting a growing reluctance to second-guess even the most irrational disciplinary overreactions. As a result, student publications in many schools operate under a “zero tolerance” regime for dissent or controversy. Even a mention that students might be gay, get pregnant, or need information about sexually transmitted diseases can bring reprisals, and cost journalism instructors their jobs.

When confronted with censorship, students have always been able to take their messages off campus to enjoy the greater freedom that comes with self-publishing. Self-publishing has allowed young writers to address sensitive social issues candidly, and to vent their criticism of school personnel and programs. This speech can have real value—not just for the writer, and not just for the student audience, but for adults who

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¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

seek an inside glimpse into what young people are thinking, even if it may be uncomfortable reading, and we would all be poorer if it were lost. Yesterday, self-publishing meant starting an “underground newspaper.” Today, it means creating a website.

The law of online speech is still evolving, and the relatively few cases testing the limits of school authority over students’ homemade web pages have arisen not from traditional journalism, but from attacks on school personnel posted on blogs, discussion boards, or social networking sites. There is, however, just one First Amendment. Because it is impossible to craft an intelligible First Amendment standard that places “bad” speech on one side of the line and “good” speech on the other, a ruling that administrators may punish writings with no physical connection to school casts an ominous shadow over all speech, including legitimate journalism and whistleblower activity.

It is hard not to empathize with burdened school principals who see disrespectful websites and blog entries as undermining their ability to keep order. But when students engage in injury-causing behavior off-campus, there are ample off-campus remedies: those victimized may contact the parents, sue for defamation or invasion of privacy, and in extreme cases alert the police. If the speech is itself not injurious—that is, if it merely causes a bothersome level of chatter at the school—there are effective ways to respond that are not directed to the content of the message (*i.e.*, punishing those who will not stop looking at MySpace during class). The First Amendment requires exhausting those remedies first.

The creep of government regulatory authority into students’ off-campus expression should concern anyone who values the free exchange of ideas on the internet. Some of the recent First Amendment jurisprudence views speech on the internet as qualitatively different from that in print, because of its ease of worldwide access, justifying greater regulatory leeway to prevent harm. This may sound familiar. It was only three decades ago that in *FCC v. Pacifica Foundation* (the “seven dirty words” case),² the Supreme Court determined that over-the-air broadcasting is so much more intrusive and accessible to youth than the printed word that the government may restrict speech that is merely “indecent” rather than legally obscene. If we are not vigilant, what happens to student speech today could impact all online speech tomorrow.

II. STUDENT SPEECH RIGHTS IN THE PRE-CYBERSPACE ERA

A. “STUDENTS ARE PERSONS...”

To begin with first principles, the Supreme Court recognized in *Tinker* that “students are persons under our Constitution,” so that—even on school grounds during the school day—administrators may restrict student speech only if such speech “materially and substantially disrupts the work and discipline of the school.”³ In that instance, three students’ display of black armbands in silent support of a cease-fire between the United States and North Vietnam was held to be protected speech, even though the protest provoked sometimes-heated responses from other students. Justice Fortas’s opinion emphasized that, in analyzing students’ First Amendment rights, the government’s enhanced disciplinary powers at school were to be considered in “light of the special characteristics of the school environment” and the need to maintain order during the school day.⁴

² 438 U.S. 726 (1978).

³ *Tinker*, 393 U.S. at 513.

⁴ *Id.* at 506.

While *Tinker* often is cited as a landmark in recognizing that the First Amendment applies to students even while under school supervision, the decision was not a break from the Court's jurisprudence but a natural progression from it. The decision expressly relied on the Court's earlier First Amendment ruling in *West Virginia State Board of Education v. Barnette* that students could not be compelled to forsake their religious opposition to swearing allegiance to the American flag.⁵ In *Barnette*, school officials claimed that the state's interest in promoting "national unity" overrode the rights of the individual students to refuse to recite the Pledge of Allegiance. In one of the most famous passages in all of constitutional jurisprudence, Justice Fortas decisively established the paramount right of all citizens—including children—not to be coerced to espouse beliefs dictated by their government: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁶

Tinker stands as the high-water mark for student First Amendment rights, and it was not long before the Burger and Rehnquist Courts began chipping away at it. In 1986, the Court decided in *Bethel School District No. 403 v. Fraser* that, even in the absence of a substantial disruption, a school did not violate the First Amendment by punishing a student for "offensively lewd and indecent speech" when he used a string of sexual double-entendres while addressing a student assembly.⁷ Chief Justice Burger's opinion emphasized the "captive" nature of the audience—attendance was mandatory—and the interest of the school in disowning the speaker's message: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."⁸ Concurring in the result, Justice Brennan wrote separately to emphasize that the unique setting of the assembly heightened the state's interest, and that a different setting—even elsewhere in the school—might have yielded a different outcome. Citing the Court's decision in *Cohen v. California*, the case of a young war protester who was found to have a protected right to wear a "Fuck the Draft" jacket in public areas of a courthouse, Brennan observed: "If [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate[.]"⁹

The affiliation between school and message was likewise pivotal to the last of the troika of landmark student speech decisions, *Hazelwood School District v. Kuhlmeier*.¹⁰ In that case, a St. Louis-area high school principal ordered the removal of articles from the Hazelwood East High School *Spectrum* in which teenagers discussed their perspective on divorce, pregnancy, and other social issues. His primary justification was that the student authors failed to effectively disguise the identities

⁵ 319 U.S. 624 (1943).

⁶ *Id.* at 642. In a less-celebrated passage, the Court directly confronted the school's contention that schoolchildren occupy a lesser First Amendment status that must yield to the state's paramount interest in instilling fundamental values: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

⁷ 478 U.S. 675, 685 (1986).

⁸ *Id.* at 684.

⁹ *Id.* at 688 (Brennan, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

¹⁰ 484 U.S. 260 (1988).

of teens who agreed to discuss their pregnancies anonymously, and that they neglected to seek rebuttal from a divorced father who was unflatteringly portrayed. Three *Spectrum* staff members sued, alleging the censorship violated their First Amendment rights. The Supreme Court rejected their challenge. The Court forged a distinction between publications that had by rule or by historical practice been maintained as a public forum for the expression of student opinion, versus non-forum newspapers that functioned as, in effect, the official “voice” of the school, or that might reasonably be so perceived by readers. In a non-forum paper, the Court held, administrators may overrule students’ editorial decisions so long as the decision is “reasonably related to legitimate pedagogical concerns.”¹¹ Significantly, the *Kuhlmeier* Court fell back on the justification recognized in *Tinker*—“the special characteristics of the school environment”—and elaborated: “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”¹²

An instructive line can be drawn between the speech in *Barnette* and *Tinker*, which was unmistakably that of the individual students alone, versus that in *Fraser* and *Kuhlmeier*, in which the speech could, in the Court’s view, be ascribed to the school. Only in the latter instance has the Supreme Court ever permitted the state’s interest in keeping order to override that of the speaker, and in the absence of those special circumstances, *Tinker* continues to supply the default standard.¹³

B. BEFORE THE WEB: A BRIGHT(ER) JURISDICTIONAL LINE

In the pre-internet era, courts generally had no difficulty concluding that school officials could not constitutionally punish off-campus publications, even if copies were brought onto campus. For instance, in *Thomas v. Board of Education, Granville Central School District*,¹⁴ the Second Circuit reversed a school’s decision to suspend the editors of an off-campus student newspaper, *Hard Times*, who were punished because their humor publication contained lewd drawings and language. Though there were some physical ties to campus—some articles were written or typed at school, and copies were stored in a closet at school—these minimal contacts did not transform *Hard Times* into “school speech” and give school officials broad regulatory leeway over it: “[O]ur 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.”¹⁵ Because school administrators had “ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith,” the *Thomas* court held, “their actions must be

¹¹ *Id.* at 273.

¹² *Id.* at 266 (internal citation omitted).

¹³ See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211-14 (3rd Cir. 2001) (Alito, J.) (explaining *Tinker* exceptions recognized in *Fraser* and in *Kuhlmeier*, and concluding, “Speech falling outside of these (*Fraser* and *Kuhlmeier*) categories is subject to *Tinker*’s general rule: it may be regulated only if it would substantially disrupt school”); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) (“[F]or all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school.”).

¹⁴ 607 F.2d 1043 (2d Cir. 1979).

¹⁵ *Id.* at 1052.

evaluated by the principles that bind government officials in the public arena.”¹⁶ The court was wary of letting schools regulate off-campus speech that might find its way onto campus only fortuitously:

It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*, the inspiration for *Hard Times*, at a neighboring newsstand and lends it to a school friend.¹⁷

Similarly, the court in *Shanley v. Northeast Independent School District*¹⁸ ruled that the First Amendment precluded punishing five high school students for the content of an underground newspaper they created off-campus and distributed after-hours on school grounds.¹⁹

Once a student has purposefully brought writings created off-campus into the schoolhouse during the school day, the rules change. Courts generally have had no difficulty concluding that schools may, under the *Tinker* standard, police independently created writings that are circulated or displayed during class time.²⁰ This includes authority to require that “underground” publications be reviewed by an administrator for substantially disruptive content before they may be distributed on campus during the school day, although the review must be circumscribed in scope and duration to avoid its abuse as a “pocket veto.”²¹

¹⁶ *Id.* at 1050.

¹⁷ *Id.* at 1051.

¹⁸ 462 F.2d 960 (5th Cir. 1972).

¹⁹ See also *Bystrom v. Fridley High Sch., Indep. Sch. Dist.*, 822 F.2d 747 (8th Cir. 1987). In *Bystrom*, the Eighth Circuit held that it was not categorically unconstitutional for a high school to require prior administrative review of a publication to be distributed on school grounds, but then added this caution: “The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable.” *Id.* at 750.

²⁰ Compare *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (student’s First Amendment rights were violated when he was disciplined for two-year-old homemade drawing depicting violent siege at his school, which his brother brought onto campus without his knowledge) with *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007) (no First Amendment violation in disciplining student for violent journal entry written off-campus that described a dream about killing a specific teacher, where the student brought the notebook containing the poem to class and was caught passing the book to a classmate).

²¹ See, e.g., *Bystrom*, *supra* note 19; *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972) (“Given the necessity for discipline and orderly processes in the high schools, it is not at all unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution.”); see also *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971) (striking down overbroad prior-review policy but indicating that narrowly tailored policy with brief deadline within which reviewer can act would be constitutional); *Baughman v. Freiemuth*, 478 F.2d 1345 (4th Cir. 1973) (same). A requirement of prior review before a publication may be distributed is recognized as a form of prior restraint. See, e.g., *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 298 (E.D. Pa. 1991) (“To be sure, these paragraphs [establishing mandatory prior review of ‘nonschool written materials’] form a system of prior restraint on students’ protected, personal first amendment speech.”). Prior restraint is the most noxious and disfavored of incursions on the First Amendment, to be tolerated only in the most extreme circumstances. See *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (noting that the First Amendment’s primary purpose is to prevent “previous restraints upon publications” by the government).

III. DISCIPLINARY AUTHORITY JUMPS THE SCHOOLHOUSE GATE: *MORSE V. FREDERICK*

The Supreme Court had the opportunity in 2007 to categorically determine whether school disciplinary power could reach off-campus conduct at an event that, unlike a field trip, was not an official school function. Instead, in *Morse v. Frederick*,²² which is often referred to as the “Bong Hits 4 Jesus” case because of the message written on the banner that was the subject of the case, the Court fashioned a narrow, fact-specific exception to *Tinker* where speech at a “school sanctioned” event is reasonably interpreted as encouraging students to use illegal drugs.

In *Morse*, a 5-4 majority of the Court held that a school did not violate the First Amendment in punishing a student who, at a public gathering during school hours where teachers provided supervision, stood directly across from the school and displayed a banner that the student later claimed was a nonsensical ploy for attention. Writing for the majority, Chief Justice Roberts expressly rejected the argument that *Morse* “[wa]s not a school speech case,” noting that the events “occurred during normal school hours” and at an activity “sanctioned” by the school.²³ Even in *Morse*, the Court emphasized that the speech was made at a school activity, echoing the point Justice Brennan made in *Fraser*: “Fraser’s First Amendment rights were circumscribed” while at school, but had he “delivered the same speech in a public forum outside the school context, it would have been protected.”²⁴

Justices Alito and Kennedy supplied the decisive votes to create a majority, and their concurrence makes plain that *Morse* does not provide an unrestrained license for policing off-campus expression: “I join the opinion of the Court on the understanding that . . . it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use[.]”²⁵ Justice Alito went on to explain that the First Amendment would not tolerate a standard under which a school could censor speech merely because, in the judgment of administrators, it interfered with the school’s self-defined “educational mission,” a standard fraught with potential for mischief.²⁶ *Morse* can be read narrowly, for the unremarkable proposition that when students are acting under school supervision, as they are on a field trip, they are speaking “at school,” or more broadly, to say that speech physically off school grounds that is directed at the school equals speech “at” school. The Alito concurrence plainly counsels in favor of a limited reading, but a few courts have regarded *Morse* as a broad license to extend school authority beyond school boundaries.

The limiting Alito construction notwithstanding, *Morse* almost immediately began being cited for the proposition that students no longer enjoy refuge in the First Amendment for any speech reasonably, or even unreasonably, interpreted as condoning *anything* dangerous and illegal—specifically, violence. Courts have always been

²² *Morse v. Frederick*, 127 S.Ct. 2618 (2007).

²³ *Id.* at 2624. The event in this case involved attendance at the torch relay for the 2002 Winter Olympic Games.

²⁴ *Id.* at 2626-27.

²⁵ *Id.* at 2636 (Alito, J., concurring).

²⁶ “The opinion of the Court does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission.’ . . . This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The ‘educational mission’ of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.” *Id.* at 2637 (Alito, J., concurring).

hesitant to second-guess the disciplinary decisions of school administrators, but never more so than when administrators are responding to perceived threats against students or school personnel.²⁷ Hence, in one of the earliest applications of *Morse*, the Fifth Circuit found no constitutional violation in a Texas principal's decision to remove a high school sophomore from school and transfer him to a disciplinary alternative school in response to a violent fantasy story written in a notebook the student was carrying in his school backpack.²⁸ The opinion expressly cited the infamous April 1999 killings of 12 students and a teacher at Colorado's Columbine High School, and the somewhat less well-known March 1998 slaying of four middle-school students and a teacher in Jonesboro, Arkansas, by a pair of shooters aged 11 and 13. It concluded: "School administrators must be permitted to act quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."²⁹

IV. COURTS STRUGGLE WITH SCHOOL AUTHORITY OVER CYBER-SPEECH

A. JURISDICTIONAL LINES BLUR WHERE SPEECH INVOLVES VIOLENCE

Anxiety over school violence has prompted a number of courts to relax the geographical barriers to school discipline where students use electronic communications to share thoughts interpreted as signaling violent tendencies. While "true threats" lie outside the purview of the First Amendment,³⁰ these cases entail something noticeably less than concrete and imminent danger—speech that in the world outside of school would normally be protected.

In some instances, courts have found sufficient nexus with the school by showing that the off-campus speaker actually "brought" the website onto campus, such as by using a school computer to show the site to others. In one such case, *J.S. v. Bethlehem Area School District* ("Bethlehem"),³¹ the Pennsylvania Supreme Court held that a school did not violate the First Amendment by expelling an eighth-grade student for creating a web page that profanely enumerated the reasons his teacher should die and solicited donations for a hit-man. The court emphasized both the severity of the impact on the targeted teacher—she was so traumatized that she went on antidepressants, was unable to complete the school year, and did not return for the following year—and that the student creator used school computers at least once to show the site to a classmate, and told others at school about the site. While the court looked at other factors indicating that the student directed his speech at the school—the audience was a "specific audience of students and others connected with this particular School District" and school officials "were the subjects of the site"—it appears that the student's actual dissemination of the speech on school grounds was essential to

²⁷ See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001) (finding no First Amendment violation in school's expulsion of student with troubled personal history who showed his teacher a violent poem, even though he was diagnosed as not being dangerous: "We review . . . with deference, schools' decisions in connection with the safety of their students even when freedom of expression is involved. . . . School officials have a difficult task in balancing safety concerns against chilling free expression.")

²⁸ *Ponce v. Socorro*, 508 F.3d 765, 768 (5th Cir. 2007).

²⁹ *Id.* at 772.

³⁰ *Watts v. United States*, 394 U.S. 705, 707 (1969).

³¹ 807 A.2d 803 (Pa. 2002).

the outcome. The court framed the standard this way: “[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”

In other cases, no physical nexus with the school has been required. Rather, these courts have permitted school discipline on the theory that online speech is capable of reaching school, and foreseeably likely to do so, or that the impact of the speech is anticipated to be felt at school. For instance, in *Wisniewski v. Board of Education*,³² the Second Circuit found no impediment to disciplining a student for his use of an instant messaging icon designed to look like a cartoon of his teacher being shot. The student, Aaron Wisniewski, did not use school computers to create or send his message, and there was no evidence that he showed the icon to anyone at school or that he intended for his classmates to do so. Nevertheless, the court found that it was reasonably foreseeable that the caricature would come to the attention of the teacher and of school officials, and that if seen, it would “foreseeably create a risk of substantial disruption within the school environment.”³³

It is unsurprising that courts hesitate to second-guess disciplinary decisions where school officials are responding to what they say were credible threats of bodily harm. Nevertheless, the leap made in *Wisniewski* to reach the court’s desired outcome ought not to be made casually. *Wisniewski* may mean that digital speech off campus is punishable under the same standards as on-campus speech because, owing to the pervasiveness of electronic communications, *the speech itself* is capable of entering the school. What is missing in this standard is any requirement that the speaker intend that the message be viewed at school, or that he do anything on campus to call attention to the speech; indeed, the court said Wisniewski’s intent was immaterial.³⁴ Importantly, the *Wisniewski* case did not involve content posted on an unsecured website, where anyone with an internet connection could view it, but rather an electronic text message. Wisniewski’s teacher could not stumble onto his message with a Google search; the message could not reach the teacher unless one of its recipients forwarded or printed it. This means that the speaker is charged with anticipating that his message will be shown, without his authorization, to people with whom he never intended to communicate. That legal standard would be dangerously open-ended enough, but the alternative way to read *Wisniewski*—that online speech is punishable as on-campus speech because the *effects* of the speech will be felt on campus—is even more perilous, for that rationale can apply equally to all speech, online or not. If this latter reading of *Wisniewski* prevails, then it is no exaggeration to say that students never—at any time and in any medium—have First Amendment rights coextensive with those of adults.

To be sure, the Supreme Court’s constitutional analysis in *Kuhlmeier* is deeply flawed, but like it or not, *Kuhlmeier* is the law. And by applying “public forum” analysis to school speech, *Kuhlmeier* roots school officials’ disciplinary authority squarely in geography. As the real-estate pros say, location matters. Public forum analysis is all about the government’s ability to control the way that the space it owns—the park, the sidewalk, the courthouse lobby—is used for expressive conduct. Outside the school context, no one would seriously suggest that government may regulate lawful speech off government property based on the way people might react to it on government

³² 494 F.3d 34 (2d Cir. 2007).

³³ *Id.* at 39-40.

³⁴ *Id.* at 40.

property. The state may reasonably regulate the time, place and manner of speech *on* government property, not *affecting* government property.

We would not in any other context permit the punishment of legal off-campus activity—and recall that in *Wisniewski*, the police investigated and found no unlawful conduct—based solely on its impact on persons on-campus. We would not permit the principal to discipline a student who cheats on his girlfriend and callously breaks off their relationship, even though the girlfriend comes to school sobbing and the breakup distracts her and those around her from their studies. We would not permit the principal to punish an 18-year-old beauty queen who poses scantily clad for a swimsuit magazine, even though the magazine is the talk of the school and students cannot stop discussing it during class time. If we would not countenance state interference in these contexts, then surely we cannot afford speech a uniquely *lesser*-protected status.

B. DISCIPLINARY POLICIES WITHOUT GEOGRAPHICAL LIMITS ARE FATALLY OVERBROAD

In several recent instances, students have brought facial challenges to disciplinary policies purporting to penalize all “disruptive” or “abusive” speech, regardless of where the speech is uttered and whether it physically makes its way onto campus. Courts evaluating disciplinary policies that lack any geographic nexus with the school have had little difficulty recognizing the policies as unconstitutional, because they are not sufficiently tailored to minimize impact on legitimately protected speech.

In *Killion v. Franklin Regional School District*,³⁵ a student was suspended from school for making crass comments about the school’s athletic director—including crude remarks about the size of his genitals—in an email circulated to several classmates. A copy of the email was left in a teacher lounge, but the message otherwise had no physical connection to the school or school events. The court held that the school district’s policy penalizing “verbal/written abuse of a staff member” was unconstitutionally vague and overbroad, because it was neither limited to instances in which the conduct caused or threatened a substantial disruption, nor geographically limited to school premises.³⁶

In *Flaherty v. Keystone Oaks School District*,³⁷ a different judge in the Western District reaffirmed *Killion* in the case of a high school student disciplined for using an online message board to transmit vulgar trash-talk, including insults about a student athlete and his mother, in discussing a school volleyball rivalry. The school took the position that it could punish the student because he brought “shame” and “embarrassment” to the volleyball program and the school with his comments. The court disagreed. The court found that a school handbook policy prohibiting “[i]nappropriate language” and “verbal abuse” toward school employees or students was overbroad and vague, “because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity.”³⁸

³⁵ 136 F. Supp. 2d 446 (W.D. Pa. 2001).

³⁶ *Id.* at 459.

³⁷ 247 F. Supp. 2d 698 (W.D. Pa. 2003).

³⁸ *Id.* at 706. See also *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000). In *Emmett*, high school administrators suspended a student who had created a website with “mock obituaries” of his classmates. The District Court enjoined the suspension, finding that the speech in question had no connection to any “class or school project” or was in any way “school-sponsored.” Indeed, while “the intended audience was undoubtedly connected to” the high school, “the speech was entirely outside of the school’s supervision or control.” *Id.* at 1089.

Although these cases arise out of First Amendment challenges, their reasoning is grounded in fundamental notions of due process—namely, that the government may not punish conduct without giving reasonable notice of what is prohibited. A student cannot be expected to live her life looking over her shoulder and wondering whether her statements about conditions at her school might get back to those at school and prompt a reaction.

V. DUELING VIEWS OF “SUBSTANTIAL DISRUPTION” VIA ONLINE SPEECH

A. DONINGER AND BLUE MOUNTAIN: *TINKER* STRETCHED TO THE BREAKING POINT

Whether perceived or real, threats of violence against the school community present the trickiest interplay of First Amendment freedoms versus legitimate public safety interests. But when the speech presents opinions that are merely insulting or belittling of school personnel, with no undercurrent of violence, the school cannot invoke “public safety” to validate a disciplinary decision. These latter types of cases are the most foreboding for legitimate journalism, and for the rights of journalists and commentators to frankly criticize school officials. Although *Tinker*’s requirement that the school demonstrate actual or foreseeable disruption should guard against the worst overreaching by errant officials, that protection is often more illusory than real, because of the leeway that courts afford schools in determining when a student’s conduct is “disruptive.”

The most egregious reach by a court seeking to rationalize school discipline of purely off-campus speech came in the case of a Connecticut high-school junior who used a personal blog to seek public support for her side in a dispute with school administrators. The student, Avery Doninger, was a class officer who became frustrated in negotiating with her principal over the scheduling of a battle-of-the-bands concert. Doninger created a publicly accessible entry on the blogging site LiveJournal.com in which she used a coarse word (“douchebags”) to refer to administrators and asked those who supported her position to email and phone the administrators to rally support for the concert. Her principal responded by declaring Doninger ineligible to seek senior-class office and by refusing to seat her when her classmates elected her anyway, and later by banning Doninger and her supporters from wearing T-shirt messages protesting her treatment.

The case initially came to district court on Doninger’s petition for an injunction to permit her to reclaim her student office pending trial. The district court denied the petition, finding no First Amendment violation on two bases: first, that Doninger’s off-campus blog posting was punishable as “lewd” speech under the *Fraser* standard even though it took place far outside *Fraser*’s “captive audience” context, and second, that holding class office was a privilege and not a right, and that school officials were free to revoke the privilege if the student failed to demonstrate “good citizenship.”³⁹

The Second Circuit affirmed denial of the injunction, but on a different rationale.⁴⁰ The appeals court questioned whether *Fraser* could legitimately apply to off-campus speech, and instead decided the case under the *Tinker* standard, finding Doninger’s speech to be substantially disruptive. The court relied on evidence that Doninger’s blog entry was misleading, because a portion of the blog, which both the district and

³⁹ *Doninger v. Niehoff* (“*Doninger I*”), 514 F. Supp. 2d 199 (D. Conn. 2007).

⁴⁰ *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

appellate courts took out of context, asserted that a final decision had been made to cancel the concert, when in fact there was a chance it would be held, as it ultimately was. In the Second Circuit's view, that transmittal of misleading information created a foreseeable risk that administrators would have to waste time quelling protests from students incensed by the "cancellation." The court ignored evidence that disruption of school was not cited as the basis when the school disciplined the student—the only justification given was the use of disrespectful language. The court also glossed over the fact that three weeks elapsed between the blog posting and the discipline with no sign of unruly student reaction to the "cancellation." In the court's view, *Tinker* permits not merely preemptive action to stop a potential disruption, but after-the-fact punishment of a potential disruption that never came to pass.

The case returned to district court on the school officials' motion for summary judgment. The court granted judgment for the defendants on Doninger's main First Amendment claim, leaving only a subsidiary claim arising from the ban on pro-Doninger T-shirts at a school function. The court recognized that the facts were in dispute as to whether the discipline truly was based on disruption of the school or the use of crude language, but concluded that in either case, First Amendment law was not clearly settled that the discipline was unlawful. Because they violated no clearly established legal right, Doninger's principal and superintendent were entitled to qualified immunity, meaning they could not be compelled to pay damages.

Both the district and appellate courts emphasized that the outcome was driven by the unique nature of the discipline—stripping the student of elective office but not removing her from classes or otherwise depriving her of a constitutionally protected interest. This provides a future speaker the opportunity to challenge a suspension or expulsion as distinct from Avery Doninger's punishment. But in the process, it does violence to the law of First Amendment retaliation, for it has never been the law that retaliation for the content of speech is lawful so long as the speaker is not deprived of a constitutional entitlement. Rather, retaliation for engaging in protected speech is unlawful if the retaliatory act would be sufficient to deter a reasonable person from speaking again—an analysis that none of the *Doninger* rulings bothered to conduct.⁴¹

A few months after the Second Circuit handed down *Doninger*, a district court in Pennsylvania fashioned a makeshift First Amendment standard to uphold a middle school's punishment of a student who, angry over being punished for a dress-code violation, created a mock MySpace profile ridiculing her principal.⁴² The profile was a wildly exaggerated mockery of a typical social networking page, in which the principal, who was pictured but not named, bragged about being a pedophile who had sex in his office. As in *Doninger*, no school resources or time were used, and there was no evidence that the student displayed the contents of the web page on school grounds; in fact, MySpace was inaccessible on school computers. The sum total of the profile's impact on school decorum was one teacher's testimony that he twice had to quiet his class at the start of the day to silence talking about the website, and more generalized testimony about a "buzz" among students indicating they had viewed the site. Nevertheless, the court in *J.S. v. Blue Mountain School District* ("*Blue Mountain*")

⁴¹ See, e.g., *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[T]he proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (harassment for exercising the right of free speech not actionable if it was "unlikely to deter a person of ordinary firmness from that exercise").

⁴² *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

held that the website was sanctionable under a legal analysis that borrowed elements from *Tinker*, *Morse*, and *Fraser*. Even conceding that no substantial disruption occurred, the court found that a school may lawfully punish “vulgar, lewd, and potentially illegal speech that had an effect on campus.”⁴³

The *Blue Mountain* ruling heavily emphasized the ease with which the internet empowers students to transmit messages, suggesting that the availability of online communications makes established First Amendment standards obsolete: “Today, students are connected to each other through email, instant messaging, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting ‘send.’ . . . Off-campus speech can become on-campus speech with the click of a mouse.”⁴⁴ This perception that digital media are uniquely dangerous, and that their dangerousness calls for relaxing the burden on government to justify limiting speech, pervades the rulings in *Blue Mountain*, *Bethlehem*, *Wisniewski*, and *Doninger*. Fortunately, this casualness about First Amendment standards is not universally accepted.

B. DISCUSSION DOES NOT EQUAL DISRUPTION: LAYSHOCK

In *Layshock v. Hermitage School District*,⁴⁵ a district court confronted a high school student’s claim that his school violated his First Amendment rights by suspending him for an off-campus MySpace page that, like the page in the *Blue Mountain* case, used vulgar language to ridicule the school principal. The court did not linger over the propriety of school authority over online speech, simply observing that it was the state’s burden to show a sufficient “nexus” with the school—and indicating that a substantial disruption of school orderliness could supply that nexus. The court applied the *Tinker* standard, finding that the parody page merely caused curiosity and discussion on campus, not true disruption: “The actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action.”⁴⁶

The school argued for application of the *Fraser* “lewd speech” standard, contending that Justin Layshock’s parody profile—in which the “principal” purported to describe himself as a “big whore” and a “big hard-ass”—was punishable by virtue of its accessibility on campus. The court categorically rejected extending *Fraser* to off-campus speech: “[B]ecause *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that Justin engaged in any lewd or profane speech while in school.”⁴⁷

Significantly, the *Layshock* court took care to examine the basis for the punishment, and had no difficulty concluding that the suspension was imposed purely for the content of the student’s speech, and not for any non-speech disruptive conduct on campus. Thus, the school could not justify its actions by claiming that the discipline was for on-campus misconduct, such as Layshock’s admitted use of a school computer to show the profile to several classmates during a Spanish class. The court properly

⁴³ *Id.* at *6.

⁴⁴ *Id.* at *17.

⁴⁵ 496 F. Supp. 2d 587 (W.D. Pa. 2007). The case is on appeal to the Third U.S. Circuit Court of Appeals, Docket Nos. 07-4465 and 07-4555.

⁴⁶ *Id.* at 600.

⁴⁷ *Id.* at 599-600.

recognized that contention as a post-hoc attempt to decouple Layshock's punishment from the content of his message.

VI. THE PERILS OF UNBRIDLED SCHOOL DISCRETION OVER ONLINE SPEECH

A. RUNAWAY GOVERNMENT AUTHORITY: THE FAILED EXPERIMENT OF KUHLMIEIER

Twenty years of experience with the *Kuhlmeier* standard has proven that, given largely unreviewable discretion to determine what content is hurtful to the school's educational mission, many school administrators will abuse that authority to refuse to publish anything they perceive as critical or controversial. This includes benign mentions of same-sex relationships between students,⁴⁸ acknowledgment that high-school girls have babies,⁴⁹ and disclosure of possible wrongdoing by school employees.⁵⁰ The brunt of censorship falls disproportionately on gays, religious minorities and other "outliers," for whom being a teenager in high school can already be a daily gamut of ostracism. When such students seek the empowerment of a voice in student media as an antidote to their alienation, they often are told by school authorities that their mere visible presence in a student publication is intolerable to the community.⁵¹ This noxious brand of censorship lends official sanction to the heckler's veto; for the students victimized by it, the impact is as palpable as a schoolyard beating.

Censorship of topical speech, even where it is sharply critical of school policies or school personnel, cheats the listening audience, including the adult audience, as well as the speaker. Some of the most important policy decisions facing America involve the effectiveness of our educational programs. If a student wishes to voice her opinion that abstinence-only sex education is ineffective, and that students are tuning out the lectures, that is potentially valuable information—for educators, policymakers, and parents. Sadly, in some school districts, publication of that student's opinion will be treated as a career-ending infraction for her journalism teacher.⁵²

⁴⁸ See, e.g., Kevin Wilson, *School Board Plans to Update Publication Policy*, CLOVIS NEWS J., June 25, 2008 (New Mexico school district decided to strip students of editorial control over publications in response to yearbook's publication of photo of same-sex couple as part of a spread about relationships).

⁴⁹ See, e.g., Kathleen Fitzgerald, *Principal Pulls Pregnancy Story from Texas Yearbook*, STUDENT PRESS LAW CENTER NEWS FLASH, Feb. 13, 2008 (Texas high school principal refused to distribute yearbook containing photo spread telling story of two teenage mothers who returned to school to complete their diplomas, claiming that the story "glamorized" unwed motherhood).

⁵⁰ See, e.g., Melanie Hicken, *She's Making Headlines*, ORANGE COUNTY REG., Aug. 8, 2008 (California teacher was stripped of high school newspaper adviser position "after allowing students to run several editorials criticizing dirty bathrooms, bugs in cafeteria food and teachers who were unavailable after class"); Steven Harmon, *Bill Makes it Safe to Protect Students' Free Speech Rights*, SAN JOSE MERCURY NEWS, Mar. 2, 2008 (discussing incident in which school board threatened closure of student newspaper in retaliation for articles critical of school); Eun Lee Koh, *Muckraking is Permitted, Student Journalists Learn, But Just a Bit*, N.Y. TIMES, Jan. 7, 2001 (New York high school principal forbade publication of an article criticizing the unsanitary conditions and lack of availability of bathrooms "until the tone was changed").

⁵¹ See, e.g., Claudia Lauer, *Students Fight to Write: Battle Begins After Principal Halts Paper with Gay Editorial*, MYRTLE BEACH SUN NEWS, Dec. 18, 2008 (principal would not permit students to distribute independently funded and produced newspaper on campus because it contained a front-page column criticizing California's anti-gay-marriage amendment with a photo of two openly gay male students holding hands).

⁵² See, e.g., Bruce Lieberman, *ACLU Sues District over Student Paper*, SAN DIEGO UNION-TRIBUNE, Nov. 12, 2008 (teacher's lawsuit alleges that high school principal killed journalism program and eliminated adviser position in retaliation for an article accurately reporting on a local controversy involving use

Those who oppose the censorship of student expression frequently find themselves shadow-boxing against mythical justifications. The first is the contention that schools are legally liable for the speech of students, so that administrative control is necessary to minimize exposure. In reality, there is no evidence that student publications are litigation-prone; indeed, there is not a single published appellate case holding a public high school liable for defamation, invasion of privacy, or other tortious injury inflicted by student media. To the contrary, in the very few student-media cases on record, all of which are at the college level, courts have been quite clear that schools incur *greater* risk of liability by interjecting themselves into editorial decisions.⁵³ The second myth is that, like journalists in the professional world, students must be answerable to an experienced editor (*i.e.*, the principal) so they can learn sound journalistic practices. But there is no “teaching” in the typical censorship case. A student learns nothing about journalistic standards by being told: “I am killing your story because I allow only coverage that is biased in favor of the school.”⁵⁴ As flimsy as these rationales are when applied to school-sponsored newspapers or broadcasts, they are of course wholly inapplicable to individual speech on social networking pages. There can be no pretense that schools’ interest in controlling that speech is based on anything other than its editorial content.

B. THE INTERNET DOES NOT JUSTIFY A NEW FIRST AMENDMENT RULEBOOK

Those who advocate for a greater government role in policing students’ online speech invariably come back to one assertion: as Judge Munley postulated in *Blue Mountain*, the internet is qualitatively different from other methods of communication, making traditional First Amendment jurisprudence a poor fit. Under this view, the ability of students to instantaneously reach a worldwide audience—including the entire school community at once—so magnifies the ability to do harm that greater restraints are justified. This contention misfires for several reasons.

First, as *Tinker* makes clear, school authority over student speech must be moored in the state’s interest in maintaining the orderly functioning of the school. Students have always had the ability to reach enough fellow students—through leaflets, posters or whisper campaigns—to create disorder within the school. The courts have not previously seen fit to relax the *Tinker* standard simply because, for instance, copiers and fax machines became more plentiful, or cellular telephones more ubiquitous. One’s right to display a yard sign endorsing a political candidate does not change just because the country road fronting the house is widened into an interstate highway. The ease with which the message can be successfully transmitted and received has never been the deciding factor in whether speech enjoys First Amendment protection.⁵⁵ The district court’s sly turn of phrase in *Doninger*—that online speech can enter the

of the school building as an emergency shelter, and an editorial criticizing abstinence-only sex education).

⁵³ See *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983) (university could not be held liable for allegedly defamatory article in student newspaper over which it exercised no editorial control); *McEvaddy v. City Univ. of N.Y.*, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995) (same); *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466 (Minn. Ct. App. 2005) (same).

⁵⁴ It goes without saying that professional newspaper editors are not allowed to review stories about themselves.

⁵⁵ If the ease of immediately reaching those capable of disrupting the school were a decisive consideration, that factor would weigh in favor of tighter regulation of the *lowest*-technology methods. Not every home has internet access, and not every student will stumble onto a website criticizing the principal, but every student will see a hand-drawn paper flyer taped to the school entryway.

campus “with the click of a mouse”—could just as easily be replaced by “the whirr of a fax machine,” or even “the scrape of a pair of sneakers.” Communication has been portable since the day cave paintings gave way to mastodon skins. Interestingly, no school has ever argued that school newspapers should be entitled to a higher level of First Amendment protection than that afforded to the *New York Times* on the grounds that it is far easier to reach a damagingly large audience in the *Times*.

There is in fact no evidence that websites are such an efficient way of successfully reaching a sufficiently large audience to disrupt school that a new-and-different level of First Amendment solicitude is warranted. There are professionally trained journalists operating professionally designed blogs whose viewership numbers in the double digits. The implication that the online medium makes speech punishable in a way that verbal communication or a handwritten note would not be relies on the fanciful notion that teenagers’ social networking pages enjoy an audience the size of the “Drudge Report.” It is not enough to say that speech was “put on the internet” any more than it would be sufficient to say that speech was “put on a sign.” Some signs are illuminated in neon over Broadway, and others are planted in a front yard in the countryside. And so it is with the web.⁵⁶

The concern that online remarks about the principal could be viewed by a nationwide audience and could persist indefinitely in cyberspace is of no constitutional significance. That a viewer in Tacoma might form a negative impression of a principal in Tampa has no bearing on the school’s ability to maintain good order. If the principal is injured in his career ambitions, like landing that dream job in Tacoma, by factually false allegations, he can and should pursue a defamation action. But his career prospects are not the interests of the state, and they carry no weight in a *Tinker* analysis.

The pervasiveness of digital communications cuts against unbridled expansion of state authority, not in favor of it. To a greater and greater degree, young people live their lives online—they form and dissolve relationships, collaborate in playing games or creating works of art, and furnish the real-time minutiae of their daily lives for their friends to follow. The Pew Internet and American Life Project reports that more than half of all teenagers have created and posted content to the internet so that they could be considered “publishers.”⁵⁷ For this generation and those to come, to say that government can regulate their “electronic communication” is meaningless; there is no other communication. In short, while it is fashionable to assert that “the internet has changed everything” in American culture, the foundational rules of our Constitution remain. It is our view of the nature of speech, not the Constitution, that must change to keep pace with technology.

Consider the practical implications of a rule that off-campus speech is punishable if people on campus are reasonably likely to learn about the speech (*Wisniewski*) and if the speech causes school officials to expend any substantial amount of time responding to it (*Doninger*). Such a rule is inherently flawed because it lacks a limitation that only “wrongful” or “low-value” speech may be punished, and, indeed, it is impossible to create a “low value speech” standard that intelligibly constrains the

⁵⁶ In the *Wisniewski* case, the facts showed that 15 people received the instant message depicting the teacher being shot. *Wisniewski v. Bd. of Ed.*, 494 F.3d 34, 36 (2d Cir. 2007). In the *Blue Mountain* case, the student’s MySpace page spoofing her principal was, after briefly being available to any MySpace user who discovered it, placed on an invitation-only basis so that it was viewable only by 22 approved friends. *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *2 (M.D. Pa. Sept. 11, 2008).

⁵⁷ AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, TEEN CONTENT CREATORS AND CONSUMERS, (2005), available at http://www.pewinternet.org/pdfs/PIP_Teens_Content_Creation.pdf.

government's enforcement discretion. The problem is clear when you consider the student who addresses a state legislative committee at a public meeting to call attention to a safety hazard at her school. Although most would agree that the student's speech is of high value and is worthy of protection, she has engaged in speech that people at the school are reasonably likely to learn about (*Wisniewski*) and that is quite likely to require a response from school officials (*Doninger*). As a result, in the Second Circuit, she may have no First Amendment claim if she is vindictively punished by her principal. This illustrates why the analysis applicable to on-campus speech is such a poor fit for off-campus speech. When analyzing on-campus speech, the substantive merit of the speech is not decisive, because the *Tinker* line of cases speaks in terms of control over school premises while school business is being conducted. If the freshman algebra class decides that they will no longer answer questions about algebra because they wish to turn the class into a discussion group about recycling, they have said nothing wrongful—their speech beneficially addresses a matter of public concern—but they have disrupted class and can be punished. But if a student's off-campus website asks community members to contact the principal's office to urge the school to recycle, it should be beyond dispute that the website is protected speech even if the principal's email box is bombarded with messages. That we can no longer be confident of the answer exposes the fatal weakness in attempting to cram off-campus speech into an ill-fitting on-campus framework.

The notion that speech can be punishable merely because it “targets” a school audience is untenable. There is a meaningful difference between speech that is *about* the school and speech that is *intended to be read at* the school during school hours. It is one thing to say that a student who holds up a “Bong Hits” banner while surrounded by fellow students at a school-supervised outing across the street from school is purposefully addressing his speech to a school audience. It is quite another matter to assert that a blog posted in the evening on LiveJournal.com—the potential audience of which is comprised mostly of adults who never intend to set foot in the school—is “targeting” a school audience. To shut down speech that is theoretically accessible to the entire world to make sure that none of it reaches the sliver of the world that attends Avery Doninger's Lewis B. Mills High School is overbreadth writ large.

The Supreme Court has thus far regarded the internet with the same First Amendment solicitude as print publishing, and not the lesser status afforded to over-the-air broadcasting. Accordingly, the Court has resisted efforts to impose content-based controls in the name of protecting young viewers, finding congressional efforts unconstitutionally overbroad.⁵⁸ Though the Supreme Court has not yet had occasion to apply its online-speech jurisprudence in the school setting, Justice Alito's forceful concurrence in *Morse* suggests that he and concurring Justice Kennedy are prepared to venture outside the schoolhouse gate as far as the neighboring hillside, but no further. This should give pause to expansionists who believe *Wisniewski* and *Doninger* flung the gate wide open.

⁵⁸ See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down as vague and overbroad provisions of the Communications Decency Act prohibiting transmission of obscene or indecent communications to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18, because those provisions impinged on the rights of adults to send and receive indecent materials, with no showing that less-restrictive protective measures were unavailable or ineffective); *Ashcroft v. ACLU*, 542 U.S. 656, (2004) (upholding injunction against enforcement of Child Online Protection Act provision outlawing use of World Wide Web to transmit material “harmful to minors,” because provision burdened speech lawful between adults, and government failed to show that filtering or other less-restrictive alternatives were ineffective).

Let us be clear about what is at stake if the *Doninger* line of reasoning is allowed to prevail. Courts generally have held that where a student produces an off-campus publication for distribution on school premises during school time, it is not unconstitutional to require prior administrative review as a precondition to circulating the publication.⁵⁹ If speech about the school on a student's website occupies the same status as an underground newspaper because of the website's potential to be accessed at school, or to provoke a reaction at school, then there is no principled objection to prior administrative review before the website may be posted—or to discipline of a student who posts without prior review. That is the path down which the *Doninger* reasoning inexorably points us.⁶⁰

If administrators assert authority to pre-approve or punish students' speech about the school in their off-hours that has the potential of reaching school, commentary on social networking sites will be the least of the casualties. As we have seen, administrators frequently invoke "disruption" as a pretext to suppress speech that is merely factual and critical. Journalism, when practiced at its best, is meant to be provocative; that is, to cause people to talk. If anecdotal evidence that students talked during school hours about something they read equated to "disruption," then even the best journalism—in fact, especially the best journalism—would be subject to prior restraint and to disciplinary sanction.

Factual—and yes, critical—coverage of school affairs by student journalists has never been more important. Established media companies are in financial free-fall, slashing jobs and cutting news space, with education reporting among the unavoidable casualties. Recently in Minnesota, the story of a police inquiry into a teacher's text-message communications with students was broken by a professional newspaper as a result of reporting by high school journalists, who took the story to the local newspaper because the principal censored it from the student paper.⁶¹ If students are not free to report frankly on the goings-on in their schools, the community may never learn that "temporary" trailer classrooms have become permanent, that restrooms are dangerously unsanitary, or that campuses are prowled by gangs.

VII. CONCLUSION

The first generation of online First Amendment law has, regrettably, developed around a recurring fact pattern: a relatively unsympathetic student plaintiff challenging a relatively sympathetic principal's imposition of discipline for relatively frivolous speech. This fact pattern represents only a small fraction of the range of students'

⁵⁹ See *supra* note 21 and accompanying text.

⁶⁰ In the context of the professional media, courts have distinguished between government restraint of publication, which is virtually never permissible, versus government punishment of speech that proves to be unlawful. Thus, the state could not enjoin *The New York Times* from publishing editorial content alleged to be defamatory, but could enforce a civil judgment compelling the *Times* to pay damages for libelous content once published. *Tinker*, however, makes no distinction between a prior restraint on speech and an after-the-fact penalty—indeed, the Supreme Court's decision is directed not primarily to the students' punishment but to the constitutionality of the armband prohibition itself, a classic prior restraint. Thus, if *Tinker* permits the prior restraint of speech when substantial disruption is reasonably forecast, then a literal application of *Tinker* to online speech suggests that schools could not merely punish online speech that proved to be disruptive, but could prohibit entire categories of speech from ever coming into existence, on or off campus, based on a forecast of disruption.

⁶¹ Jim Hammerand, Christen Hildebrandt & Ben Jackson, *Police, District Investigate Teacher*, FARIBAULT DAILY NEWS, Dec. 10, 2008; Chris Ison, *Faribault's Student Journalists Fight Censorship*, MINNPOST, Dec. 16, 2008, available at http://www.minnpost.com/stories/2008/12/16/5303/faribaults_student_journalists_fight_censorship.

online expression, yet it is setting the standard for the more substantive speech in which students engage, and will increasingly engage, on blogs, on website bulletin boards, and on news sites both student and professional.

To the extent that student speech receives any attention in the adult world today, that attention is overwhelmingly negative, focusing on the handful of admittedly heartbreaking cases in which young people have abused websites and text-messaging to abuse their peers, at times with tragic consequences. But there is another student speech story to be told. Student journalists are high achievers, and study after study confirms the link between student journalism and improved school retention, higher standardized test scores and greater college readiness.⁶² When courts speak of the “special characteristics” of the school environment, their focus is on the captive listeners who may be exposed involuntarily to offensive speech. But it is because students are legally compelled to stay in school for the best hours of their day that we must proceed with extreme caution in letting schools punish their expression, let alone extending that disciplinary authority without boundary. And it is because student journalism is such a valuable outlet for expression that courts cannot be permitted to carelessly improvise new constitutional standards to catch the Aaron Wisniewskis of the world. The Supreme Court’s jurisprudence is clear, and technological innovation has not rendered it obsolete. If the publication of a student’s speech does not take place on school grounds, at a school function, or by means of school resources, then a school cannot punish the speaker without violating her First Amendment rights.

Censorship carries real human costs. While irresponsible accusations posted online can be hurtful, reputations can be injured as well by disciplinary overreactions. Justin Layshock’s principal can readily demonstrate to the next employer that, notwithstanding what the employer may have read on MySpace, he is not a “big steroid freak” whose hobbies include “smoking big blunts.” A student will have a much more difficult time clearing his name and pursuing a successful future if branded guilty of disrupting classes and sent to “alternative school,” as Justin Layshock originally was before his parents interceded and got his punishment reduced. Federal courts afford school disciplinary decisions a wide berth of discretion and require only minimal due process safeguards for a suspension of up to ten days, even though the suspension may leave a permanent scar.⁶³ The practical difficulty of overturning a disciplinary decision—with the principal as accuser, judge, jury, and executioner—and the lasting consequences of an unjust conviction, counsel strongly in favor of restraint.

Although it is understandable that courts empathize with school administrators and wish to afford them leeway to respond rapidly to danger signs, schools are not seeking latitude only in dangerous situations. Avery Doninger and Justin Layshock manifested no violent tendencies, and it was known before discipline was imposed that their speech caused no discernable disorder. Where there is no emergency, we must be governed by Justice Brennan’s caution: “Because First Amendment freedoms

⁶² See JACK DVORAK, NEWSPAPER ASSOCIATION OF AMERICA FOUNDATION, *HIGH SCHOOL JOURNALISM MATTERS: JOURNALISM STUDENT ACADEMIC PERFORMANCE IN THE 21ST CENTURY*, (2008), available at www.naaafoundation.org/upload/foundation_pdf/scholastic_report.pdf.

⁶³ In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court said public school students facing suspension have a due process right to be confronted with the charges against them and to present their account of the events, but that—at least with suspensions of 10 days or less—due process does not require a formal adversarial hearing. “We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.” *Id.* at 584.

need breathing space to survive, government may regulate in the area only with narrow specificity.”⁶⁴ That is to say, courts are getting it exactly backward: it is the student speaker, not the school, who is entitled to latitude. If the speaker must approach the First Amendment line with trepidation, knowing that the first toe to touch the line will be sliced off, then the speaker will stop a yard short of the boundary, and a good deal of protected speech will never be said. Unless school administrators are required to respect the breathing space that Justice Brennan saw was so vital—unless they are required to work within narrow and specific parameters constraining their power to punish—then valid, protected, non-disruptive speech will be lost.

⁶⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

