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"Teachers, principals, legislators, and judges have been wrangling for decades in their attempts to find the right doctrinal formula for school speech."[2]

I. THE NEW AGE OF SOCIAL MEDIA

Social media is an integral part of modern society. People of all generations use social media as an online platform to share information and interact with known and unknown contacts.[3] There is an online resource for virtually every interest imaginable. People can share videos

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2. ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 2 (2009).

3. *See* Sana Rouis, Moez Limayem & Esmail Salehi-Sangari, *Impact of Facebook Usage on Students' Academic Achievement: Roles of Self-Regulation and Trust*, 9(3) ELEC. J. OF RES. IN EDUC. PSYCHOL. 961, 965 (2011), http://investigacion-psicopedagogica.org/revista/new/english/ContadorArticulo.php?620.

on YouTube,[4] post pictures on Pinterest,[5] and offer status updates on Twitter.[6] Professionals can network by displaying their resumes on LinkedIn[7] or through advertising their businesses on blogs.[8] Reddit is a social news site that permits users to comment on posted items.[9] The online dating industry is also a hot commodity. In 2012, over forty million people used websites such as eHarmony and Match.com.[10] And then there is Facebook—the world's largest social network.[11] Facebook alone has 1.4 billion members.[12]

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4. *See* YOUTUBE, http://www.youtube.com (last visited Sept. 20, 2013). In 2011, "YouTube ha[d] 490 million unique users who visit[ed] every month," and "generate[d] 92 billion page views per month." Jeff Bullas, *20 Stunning Social Media Statistics Plus Infographic*, JEFFBULLAS.COM (Sept. 2, 2011, 8:58 AM), http://www.jeffbullas.com/2011/09/02/20-stunning-social-media-statistics/. Furthermore, "[u]sers on YouTube spen[t] a total of 2.9 billion hours per month" on the site. *Id.*

5. *See* PINTEREST, https://pinterest.com/ (last visited Sept. 20, 2013). In May 2012, Pinterest was "the third most popular social network, behind Twitter and Facebook (in the U.S.)." Cara Pring, *99 New Social Media Stats for 2012*, THE SOCIAL SKINNY, (May 10, 2012), http://thesocialskinny.com/99-new-social-media-stats-for-2012/.

6. *See* TWITTER, https://twitter.com/ (last visited Sept. 20, 2013). On average, in 2011, Twitter handled 1.6 billion queries per day. Bullas, *supra* note 4. Additionally, in May 2011, there were approximately 190 Tweets posted per day, and roughly 500,000 users were added to the site. *Id.* Furthermore, in 2012, "65% of the world's top companies ha[d] an active Twitter profile." Pring, *supra* note 5.

7. *See* LINKEDIN, http://www.linkedin.com/ (last visited Sept. 20, 2013).

8. In 2012, "91% of experienced social marketers [saw] improved website traffic due to social media campaigns and 79% [were] generating more quality leads." Pring, *supra* note 5. Meanwhile, "23% of Fortune 500 companies ha[d] a public-facing corporate blog[,]" and "53% of small businesses [were] using social media." *Id.*

9. *See* REDDIT, http://www.reddit.com/ (last visited Sept. 20, 2013).

10. *See Online Dating Statistics*, STATISTIC BRAIN (June 18, 2013), http://www.statisticbrain.com/online-dating-statistics/.

11. *See* Ken Burbary, *Facebook Demographics Revisted – 2011 Statistics*, SOCIALMEDIA TODAY (March 7, 2011), http://socialmediatoday.com/kenburbary/276356/facebook-demographics-revisited-2011-statistics.

12. *See Social Networking Statistics*, STATISTIC BRAIN (Aug. 12, 2013), http://www.statisticbrain.com/social-networking-statistics/. An average Facebook user spends 15 hours and 33 minutes on Facebook per month. *Id.* Mark Zuckerberg launched Facebook in 2004 when he was a student at Harvard University. *See* Sid Yadav, *Facebook - The Complete Biography*, MASHABLE (Aug. 25, 2006), http://mashable.com/2006/08/25/facebook-profile/. Zuckerberg's audience was originally college students, and membership was restricted to students of Harvard University. One year later, Facebook expanded to twenty-one universities. Shortly thereafter, Facebook further expanded to permit high school students to access the social networking site. Now, virtually anyone—including companies—can create a Facebook profile. *Hits and Misses in Facebook's History*, THE ASSOCIATED PRESS (May 19, 2013 9:24 AM), http://bigstory.ap.org/article/hits-and-misses-facebooks-history-0.

A recent study examined the use of social networking websites and revealed that seventy-nine percent of American adults use the Internet, and fifty-nine percent of adult Internet users report that they use at least one type of social networking website.[13] Although adults have a clear presence in social media, teenagers and young adults largely dominate the industry.[14] A striking ninety-eight percent of individuals eighteen to twenty-four years old are connected to social media.[15]

Near constant connection to smart phones, iPads, and laptop computers has made social media accessible almost anytime and anywhere. The emergence of social media has created undeniable disruptions at schools—especially inside the classroom. Cyber speech raises legal issues relating to the forum of speech and the audience by which it is heard. Now more than ever, courts are faced with the question of whether school administrators can discipline students for their off-campus cyber speech.[16] There are no clear guidelines that dictate the extent to which school administrators may discipline students for such speech.[17] In fact, only a handful of circuit courts have weighed in on this issue.[18] Nevertheless, such decisions have "produced

13. *See* Keith N. Hampton et al., *Social Networking Sites and Our Lives*, PEW INTERNET & AMERICAN LIFE PROJECT, 3 (June 16, 2011), http://www.pewinternet.org/~/media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf.

14. *Social Networking Statistics*, STATISTIC BRAIN (Aug. 12, 2013) http://www.statisticbrain.com/social-networking-statistics/.

15. *Id.*; *see also* Amanda Lenhart et al., *Teens and Social Media*, PEW INTERNET & AMERICAN LIFE PROJECT, 25 (Dec. 19, 2007), http://www.pewinternet.org/~/media/Files/Reports/2007/PIP_Teens_Social_Media_Final.pdf.pdf (reporting that ninety-three percent of teens use the Internet).

16. *See* Heidi A. Katz & Colette L. McCarty, *Student Rights and Responsibilities*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 7.5, at 7-14 (2010), *available at* https://www.iicle.com/links/SchoolLawPSI10-Ch7-McCarty.pdf. ("The extent to which school officials may discipline or restrict off-campus 'speech' by students on the Internet consistent with the First Amendment has been a growing concern for the last decade.").

17. *See id.*

18. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011) (holding that the school was authorized to discipline a student for off-campus speech that "interfered with the work and discipline of the school"); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 263 (3d Cir. 2010) (holding that the school violated a student's free speech rights when it disciplined the student for creating a fake MySpace profile of his principal); J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist., 593 F.3d 286, 302 (3d Cir. 2010) (holding that the school did not violate a student's free speech rights by disciplining the student for creating a vulgar, fake social media profile of the principal which depicted the principal as a pedophile); Doninger v. Niehoff, 527 F.3d 41, 53 (2d Cir. 2008) (holding that the school did not violate the First Amendment by not allowing a student to re-run for a class office after the student called school administrators

a welter of precedents reflecting divergent reasoning and less-than-predictable outcomes."[19]

Because legal issues involving technology and education are complex and unprecedented, it is only a matter of time until the United States Supreme Court addresses the question of when schools can discipline students for off-campus cyber speech. Until that time, however, school administrators are in a "flex" position left wondering whether disciplining a student for content on a social media website will violate the First Amendment. This Article charts new territory and addresses the extent to which school administrators can regulate students' off-campus cyber speech.

A. First Amendment Rights Collide with the Schoolhouse Gates—What Have Courts Decided and Where Do We Go from Here?

This Article begins with a brief overview of the Supreme Court rulings that provide the applicable body of law for determining when school administrators can restrict student speech. Part II of this Article addresses *Tinker v. Des Moines Independent Community School District*,"[20] which provides the "most quoted adage in school law literature . . . [that] students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[21] The Supreme Court's decision in *Tinker* defined the contours of student free speech within public schools. Part II also discusses the most transformative student speech cases following *Tinker*, including: *Bethel School District No. 403 v. Fraser*[22] and *Morse v. Frederick*.[23]

Part III examines the growing uncertainty among federal courts regarding the extent to which school authorities may discipline students for off-campus cyber speech. Parts IV and V attempt to clarify the various rulings and advocate recognition of a clear standard for school administrators to apply to off-campus cyber speech. Ultimately, this Article provides suggestions to school administrators in dealing with off-

"douchebags" on a social media website); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35–36 (2d Cir. 2007) (holding that the school did not violate the First Amendment for suspending a student after the student had circulated AOL instant messaging icons depicting the shooting of the student's English teacher).

19. Katz & McCarty, *supra* note 16, § 7.5 at 7-14.
20. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
21. Katz & McCarty, *supra* note 16, § 7.2 at 7-7 (quoting *Tinker*, 393 U.S. at 506).
22. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
23. Morse v. Frederick, 551 U.S. 393 (2007).

campus cyber speech that may—or may not—be actionable inside the schoolhouse gates.

B. Tinker v. Des Moines Independent Community School District

Freedom of speech is a fundamental right that our founding fathers explicitly included in the First Amendment of the United States Constitution.[24] The legal protections of the First Amendment are a critical component of democracy. Free speech supports the marketplace of ideas—the freedom to express conflicting ideas so that the truth will emerge.[25] Free speech allows people to criticize the government and each other, as well as to formulate their own ideas. Free speech encourages stability, neutrality, and restraint from tyranny, corruption, and ineptitude. It is designed in the hope that use of such freedom will "ultimately produce a more capable citizenry."[26] Although the First Amendment protects the fundamental right to free speech, this right is not absolute in nature.[27] Free speech rights are subject to restrictions, and in limited circumstances, the prevention and punishment of speech is constitutional.[28]

The first Supreme Court case to apply the concept of free speech to the public school setting was *Tinker v. Des Moines Independent Community School District*, which emerged in the midst of the Vietnam War.[29] The case began when John F. Tinker, his friend Chris, and his sister Mary Beth created a plan to wear black armbands to school as a

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24. U.S. CONST. amend. I.

25. *See Tinker*, 393 U.S. at 512.

26. Cohen v. California, 403 U.S. 15, 24 (1971). The *Cohen* Court explained the hope as follows:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

27. *See generally*, Near v. Minnesota, 283 U.S. 697, 708 (1931).

28. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (noting that the public's interest in national security may at times entitle the government to curtail freedom of speech rights).

29. *Tinker*, 393 U.S. at 503.

symbol of their opposition to the War.[30] The students' intention was "to make their views [about the Vietnam War] known, and, by their example, to influence others to adopt them."[31] The school principal became aware of the students' plan and implemented a policy that forbade students from wearing an armband to school.[32] Nevertheless, the students proceeded with their plan and wore black armbands to school.[33] Their political expression was "silent, passive . . . [and] unaccompanied by any disorder or disturbance on the part of the [students]."[34] The school suspended the students and told them that they could not return to school until they removed their armbands.[35]

The students refused to remove their armbands and accepted the suspensions.[36] Subsequently, the students' fathers filed a complaint on their children's behalf in the U.S. District Court for the Southern District of Iowa.[37] The parents challenged the constitutionality of the school authorities' action and argued that the suspensions violated the students' First Amendment freedom of speech rights.[38] The district court dismissed the parents' complaint, and the parents appealed to the U.S. Court of Appeals for the Eighth Circuit.[39] The Eighth Circuit heard the case en banc and affirmed the district court's decision.[40]

The parents petitioned the Supreme Court for certiorari, and a writ of certiorari was granted.[41] The Supreme Court balanced the students' First Amendment rights against the Court's "repeated[] emphasi[s] [on] the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[42] The Court explained that disciplining a student for her expressive conduct is only permissible if the student's conduct is disruptive and

30. *Id.* at 504.

31. *Id.* at 514.

32. *Id.* at 504.

33. *Id.*

34. *Id.* at 508.

35. *Id.* at 504.

36. *Id.*

37. Tinker v. Des Moines Indep. Cmty. Sc. Dist., 258 F.Supp. 971 (S.D. Iowa 1966) rev'd, 393 U.S. 503 (1969).

38. *Id.* at 972.

39. *Id.* at 973.

40. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967) rev'd, 393 U.S. 503 (1969).

41. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 390 U.S. 942 (1968).

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

"intrudes upon the work of the schools or the rights of other students."[43] Based on this standard, the Court held that the students' conduct of wearing the armbands was "closely akin to 'pure speech' . . . [and was] entitled to comprehensive protection under the First Amendment."[44] The Court reasoned that only a few of the students wore armbands, and there was no evidence that "the work of the schools or any class was disrupted."[45] Because the school provided no evidence that the students' speech interfered with school order, the Court concluded that the school administrators' actions impinged on the students' right to express their opinions in violation of the First Amendment.[46]

Tinker teaches school authorities that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[47] However, *Tinker* also makes clear that school authorities may discipline students when their speech "*materially* and *substantially* interfere[s] with the requirements of appropriate discipline in the operation of the school."[48] To reach the level of "material" and "substantial" disruption, school officials' concerns about students' use of speech or expression must be based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[49]

The determination of whether a student's actions are disruptive is a "fact-intensive" analysis.[50] Thus, courts have reached varying conclusions as to what constitutes a substantial disruption at school. For example, in *B.W.A. v. Farmington R-7 School District*, the Eighth Circuit held that school administrators did not violate the First Amendment when they restricted a student from wearing a shirt with a Confederate flag on it because such clothing would reasonably result in classroom disruption.[51] However, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court permitted a school administrator to censor an article on teen pregnancy from a school newspaper because it

43. *Id.* at 508.

44. *Id.* at 505–06.

45. *Id.* at 508.

46. *Id.* at 514.

47. *Id.* at 506.

48. *Id.* at 509 (emphasis added) (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).

49. *Id.*; *see also* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 628 (2002) (discussing *Tinker* and how it currently applies to schools' ability to regulate student speech).

50. Miller, *supra* note 49, at 635.

51. B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 741 (8th Cir. 2009).

determined that the administrator's actions were reasonable in the interest of time constraints and in the protection of the privacy rights of those mentioned in the article.[52] Over the last several decades, numerous other courts have addressed student conduct to determine whether it reaches the level of substantial disruption.[53]

C. *Departing from the Disruptive Effect Analysis—Bethel School District No. 403 v. Fraser*

For almost twenty years, *Tinker* was the "primary authority governing the scope of free expression in the schools."[54] However, in 1986 in *Bethel School District No. 403 v. Fraser*, the Supreme Court distinguished its protective position with regard to speech as witnessed in *Tinker*.[55]

In *Fraser*, a student gave a speech at a school assembly nominating another student for a student office position.[56] His speech was sexually explicit, and in the speech, he encouraged his fellow classmates to vote for his friend in the upcoming election.[57] The assistant principal of the school then notified the student that his speech violated the school's "disruptive-conduct rule," which prohibited conduct that "substantially interfere[d] with the educational process."[58] As a result, the assistant principal suspended the student for three days and announced that the student would not be considered as a possible candidate for graduation speaker at the school's commencement ceremonies.[59]

The student's father filed a suit on his son's behalf, alleging that the school's disciplinary actions violated his son's First Amendment right to

52. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262–63, 274–76 (1988).

53. *See, e.g.*, Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008) (holding that symptoms of "substantial disruption" are proven "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, [or] an upsurge in truancy"); Jenkins v. La. State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975) (holding that students' speech amounted to "substantial interference" when the students were going around the campus loudly beckoning fellow students to organize and rally); Guzick v. Drebus, 431 F.2d 594, 600 (6th Cir. 1970) (holding that wearing anti-war demonstration buttons and distributing pamphlets amounted to substantial disruption).

54. RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:3, at 350 (2004).

55. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

56. *Id.* at 677.

57. *Id.* at 677–78.

58. *Id.* at 678.

59. *Id.*

freedom of speech and the Due Process Clause of the Fourteenth Amendment.[60] The U.S. District Court for the Western District of Washington agreed with the father, awarded the student monetary relief, and "enjoined the School District from preventing [the student] from speaking at the commencement ceremonies."[61] The School District appealed, and the U.S. Court of Appeals for the Ninth Circuit subsequently affirmed.[62]

Following its grant of certiorari, the Supreme Court first noted the "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech in this case."[63] The Supreme Court then stressed "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[64] The *Fraser* Court held that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission."[65] Thus, the Court reversed and remanded the lower court's decision, and upheld the disciplinary action taken against the student.[66] The Court reasoned that the student's speech was inappropriate for the audience of young students and that it was "wholly inconsistent with the 'fundamental values' of public school education."[67] Two important points can be discerned from the Court's holding in *Fraser*. First, had Fraser delivered the speech off-campus, he

60. *Id.* at 679.

61. *Id.* at 675–76.

62. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985) rev'd, 478 U.S. 675 (1986).

63. *Fraser*, 478 U.S. at 680.

64. *Id.* at 682. *See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (noting that students' speech rights are not the same as the rights of adults and, therefore, the rights of students must be applied "in light of the special characteristics of the school environment").

65. *Fraser*, 478 U.S. at 685.

66. *Id.* at 686–87.

67. *Id.* at 685–86. Another Supreme Court case supports this idea that the school stands in a special relationship to students when it comes to the harmful influences of society, such as illegal drugs. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 836 (2002) (allowing suspicionless drug tests to be conducted in public schools). It follows that schools have greater flexibility to proscribe speech when they deem it contrary to educational interests—the old *in loco parentis* principle. This rationale also lies behind the decision in *Morse v. Frederick*. *See* Morse v. Frederick, 551 U.S. 393, 409–10 (2007) (upholding a school's decision to discipline a student for displaying a banner advocating drug use at a school-sanctioned event).

would have been protected, but, because he acted on the school's campus, his speech was not protected. Second, *Fraser* established that the *Tinker* substantial disruption analysis is not absolute.[68]

The Supreme Court's decision in *Fraser* is a triumph for school administrators.[69] *Fraser* emphasizes "the importance of permitting the expression of a variety of viewpoints in the schools," yet simultaneously broadens the deference owed to school administrators in making disciplinary decisions.[70] Writing for the majority of the Court, Chief Justice Burger "deferred to the school authorities' conclusory determination that Fraser's speech seriously disrupted the school's educational activities."[71]

D. Testing the Limits of Tinker and Fraser—Student Off-Campus Speech

From *Tinker* and *Fraser* emerged two standards that are the bedrock of school law decisions.[72] Although courts "pay[] homage to the legacy of *Tinker* [and *Fraser*],"[73] it "is not completely clear whether [*Tinker* and] *Fraser* appl[y] to off-campus student speech."[74] "Some courts have drawn a distinction between student conduct that occurs on or off campus in determining whether school officials may take action against the student."[75] Other courts have found that misconduct that occurs

68. *See Fraser*, 478 U.S. at 680.

69. Applying *Fraser*, lower courts have held that school officials may prohibit students from wearing t-shirts that display vulgar messages, "even if the messages were political, or the substance of the message conveyed was one supported by the school." SCHNEIDER, *supra* note 54, § 2:3 at 353. The standard set forth in *Fraser* "will generally allow school officials to restrict vulgar, lewd, or plainly offensive speech." *Id.* § 2:3 at 360.

70. S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 131 (1995).

71. *Id.*

72. SCHNEIDER, *supra* note 54, § 2:3 at 359–61.

73. Miller, *supra* note 49, at 636.

74. SCHNEIDER, *supra* note 54, § 2:3 at 222 (Supp. 2012) (citing Doninger v. Niehoff, 642 F.3d 334, 347–48 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 449 (2011) ("[T]he applicability of *Fraser* to plainly offensive off-campus student speech is uncertain . . . .")). *But see* Layshock *ex. rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011), *cert denied*, 132 S. Ct. 1097 (2012) (en banc) (concluding that *Fraser* does not apply to student's off-campus speech); J.S. *ex. rel.* Snyder v. Blue Mt. Sch. Dist., 650 F.3d 915, 932 n.12 (3d Cir. 2011), *cert denied*, 132 S. Ct. 1097 (2012) (en banc) ("*Fraser* does not apply to off-campus speech.").

75. SCHNEIDER, *supra* note 54, § 2:3 at 210 (Supp. 2012); *see also* James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus*

outside of the school setting is not out of the reach of schools' disciplinary authority.[76]

For example, in *Morse v. Frederick*, the Supreme Court grappled with whether it was within the school's authority to discipline a student for speech that occurred off-campus, but at a school-sponsored event.[77] In *Morse*, students and adults gathered across the street from the school premises to watch the Olympic torch pass by their school.[78] As the torch went by, the students unrolled a banner that read, "BONG HiTS 4 JESUS."[79] The school principal was at the event and ordered the students to put away the banner.[80] Fredrick refused to follow the principal's instructions.[81] As a result, the principal took the banner from Fredrick and subsequently suspended him for ten days.[82]

Frederick filed suit in the U.S. District Court for the District of Alaska and argued that the principal's action of suspending him and confiscating his banner violated his First Amendment right to freedom of speech.[83] Specifically, Fredrick argued that the school could not suspend him for speech that occurred off the school's premises.[84] The district court granted summary judgment for the school, and Fredrick appealed to the Ninth Circuit.[85] On appeal, the Ninth Circuit reversed the district court's decision.[86]

The Ninth Circuit noted that although Frederick was off campus when the incident occurred, he was at a school-authorized activity.[87] Nevertheless, the Ninth Circuit's decision hinged on its finding that Fredrick's display of the banner did not cause a substantial disruption,

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Internet Speech Against the School's Compelling Interests, 79 U. CIN. L. REV. 855, 864–65 (2010).

76. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 396 (2007). Lower courts have "held that school authorities [can] restrict vulgar student personal speech either because the manner of expression [is] inappropriate or because disruption could be reasonably forecast given the manner or content . . . of the expression." SCHNEIDER, *supra* note 54, § 2:3 at 360.

77. *Morse*, 551 U.S. at 396.

78. *Id.* at 397.

79. *Id.*

80. *Id.* at 398.

81. *Id.*

82. *Id.*

83. Frederick v. Morse, No. 02-008-CV, 2003 U.S. Dist. LEXIS 27270, at *4.

84. *Id.* at *15–16.

85. *Id.* at *25.

86. Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006).

87. *Id.*

and therefore the school's discipline was unconstitutional.[88] In sum, the Ninth Circuit found no disruption, and thus no basis for discipline.[89]

The Supreme Court granted certiorari.[90] Finding in favor of the school, the Supreme Court reasoned that it had the authority to discipline Frederick without violating the First Amendment.[91] The Supreme Court found that even though Fredrick's action occurred off-campus, it took place during school hours and at an approved school event, where the school's rules applied to students' conduct.[92] Because of the nexus between the conduct and the school setting, the Court noted that a student's off-campus activity is not necessarily a haven from school discipline.[93]

The Court also applied *Tinker* to the case, finding that when student speech is reasonably construed as promoting illegal drug use, school officials may conclude that it will "materially and substantially disrupt the work and discipline of the school."[94] The Court stated that "[t]he 'special characteristics of the school environment' . . . and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[95] The Court noted the warnings from *Tinker*, cautioning school administrators that they cannot prohibit student speech because of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[96] However, it stated, "[t]he danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy . . . extends well beyond an abstract desire to avoid controversy."[97]

Thus, *Morse* extended the reach of *Tinker* to off-campus school-sponsored events that are supervised by school authorities. The Court relied on the nexus between the student's off-campus conduct and the school setting. The Supreme Court's decision in *Morse* supports the proposition that in certain scenarios, the reasonable likelihood that a

88. *Id.* at 1123.

89. *Id.*

90. Morse v. Frederick, 551 U.S. 393, 400 (2007).

91. *Id.* at 397.

92. *Id.* at 400–01.

93. *Id.*

94. *Id.* at 403, 410 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

95. *Id.* at 408.

96. *Id.* (citing *Tinker*, 393 U.S. at 508).

97. *Id.* at 408–09.

student's conduct will cause a disruption with the school's educational mission is enough to warrant discipline.[98]

In contrast to *Morse*, in *Klein v. Smith*, the U.S. District Court for the District of Maine held that the school did not provide sufficient facts to support a nexus between the student's off-campus conduct and the school setting.[99] There, a student, Jason Klein, was driven to an off-campus restaurant where he saw his teacher, Mr. Clark, inside his car parked in front of the restaurant.[100] Klein extended his middle finger toward his teacher and then exited the vehicle.[101] When Klein returned to school, the administration suspended him for ten days "pursuant to a school rule that provides that students will be suspended for 'vulgar or extremely inappropriate language or conduct directed to a staff member.'"[102] Immediately after Klein's suspension, he filed a motion for a temporary restraining order to enjoin the school from suspending him until the court reviewed the merits of the school's action.[103] The district court granted Klein's temporary restraining order and after a full briefing on the matter, issued a permanent injunction against the school's disciplinary suspension.[104]

The district court held that the school's discipline violated Klein's First Amendment right to freedom of expression.[105] The court reasoned that Klein's conduct of "giving the finger" to his teacher was "far too attenuated" from the school grounds to support the school's position that Klein violated the rule prohibiting discourteous conduct toward a teacher.[106] In a footnote, Judge Gene Carter explained that Klein's action would not cause a substantial disruption at school because the teacher's "professional integrity, personal mental resolve, and individual character [is] not going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy."[107]

98. *See id.* at 403–04.
99. Klein v. Smith, 635 F. Supp. 1440, 1441–42 (D. Me. 1986).
100. *Id.* at 1440.
101. *Id.* at 1441.
102. *Id.*
103. *Id.*
104. *Id.* at 1441–42.
105. *Id.*
106. *Id.*
107. *Id.* at 1441 n.4.

II. "WHEN IT COMES TO STUDENT CYBER-SPEECH, THE LOWER COURTS ARE IN COMPLETE DISARRAY . . . ."[108]

Many scholars and federal courts apply the tests set forth in *Tinker*, *Fraser*, and other off-campus decisions—but there is no Supreme Court authority on this issue.[109]

School teachers and authorities have a difficult job, and an important one. They must act—or not act—on the spot when students misbehave. The rise of social media has complicated their jobs. The First Amendment does not require school authorities to tolerate expressions that cause a substantial disruption in school.[110] But where do teachers draw the line with online speech? "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his [or] her actions there to the same extent that they can control that child when he [or] she participates in school sponsored activities."[111] On the other hand, in most cases, students post comments to their social media accounts after school hours, and the posts carry over into the school—either physically on phones, or verbally through the gossip mill.

Online chatter easily influences students' behavior in class. Yet, teachers are rightfully hesitant to discipline students––cautious that taking action might result in a lawsuit. Teachers need guidance on when they can and cannot constitutionally discipline a student for online speech.

Although the Supreme Court has issued decisions and provided guidelines on the extent to which school authorities may discipline

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108. Kenneth R. Pike, Comment, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 990.

109. The Supreme Court considered whether to grant certiorari review of *Layshock ex rel. Layshock v. Hermitage Sch. Dist.* (*Layshock II*), 593 F.3d 249 (3d Cir. 2010), *J.S. ex rel. Snyder v. Blue Mt. Sch. Dist.* (*J.S. II*), 593 F.3d 286 (3d Cir. 2010), and *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011). However, on January 17, 2012, the Supreme Court denied the opportunity to hear any of the cases, leaving the issue unresolved and left to simmer in the lower courts. *See Tuesday, January 17, 2012, Certiorari—Summary Dispositions*, SUPREME COURT OF THE UNITED STATES 3, 12 (Jan. 17, 2012), http://www.supremecourt.gov/orders/courtorders/011712zor.pdf. Similarly, the Supreme Court also denied certiorari in *Doninger v. Niehoff*. *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), *cert. denied*, 132 S. Ct. 499 (2011).

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

111. Brian Wassom, *Social Media and Student Discipline In Public Schools*, WASSOM.COM (Aug. 17, 2011), http://www.wassom.com/social-media-and-student-discipline-in-public-schools.html (quoting *Layshock II*, 593 F.3d at 260).

students for off-campus conduct, the Court has not yet examined whether school administrators may discipline students for off-campus social media speech. The dilemma that courts face is clear and is further highlighted by the wave of lower court decisions that involve students' use of off-campus social media. The discussion that follows analyzes several of these recent decisions.

A. The Third Circuit's Interpretation of Student Cyber Speech

Courts that have considered the issues surrounding First Amendment speech rights of public school students have taken dramatically conflicting approaches in evaluating whether school administrators may discipline students for such off-campus cyber speech. The extent of this problem is illustrated by two 2010 decisions issued by the U.S. Court of Appeals for the Third Circuit: *Layshock ex rel. Layshock v. Hermitage School District* (*Layshock II*)[112] and *J.S. ex rel. Snyder v. Blue Mountain School District* (*J.S. II*).[113] Both decisions dealt with students who published speech on the Internet using private off-campus computers, and both were decided on February 4, 2010 by the Third Circuit.[114]

In *Layshock II*, the Third Circuit applied *Tinker* and held that the school unconstitutionally disciplined a student who posted a fake Internet profile because there was no nexus between the off-campus speech and the school.[115] In contrast, in *J.S. II*, the Third Circuit applied a different test and held that the school could discipline a student for off-campus speech occurring on a fictitious MySpace profile because it was likely to create a substantial disruption in the classroom.[116] From these decisions—issued on the same day—emerged two different standards within the Third Circuit for determining whether off-campus speech is actionable.[117] Because the Third Circuit panels in *Layshock II* and *J.S. II*

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

113. J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. II*), 593 F.3d 286 (3d Cir. 2010).

114. *See id.* at 290; *Layschock II*, 593 F.3d at 251–52.

115. *Layshock II*, 593 F.3d at 263.

116. *J.S. II*, 593 F.3d at 303.

117. This Article will refer to the standards as the "nexus" standard and the "substantial disruption" standard.

applied two conflicting standards, the Third Circuit reviewed both cases *en banc* on June 13, 2011.[118]

1. *The "Nexus" Requirement—Layshock ex rel. Layshock v. Hermitage School District (Layshock II)*

In *Layshock II*, the Third Circuit held that school officials violated a student's First Amendment free speech rights by disciplining him for creating a fake Internet "profile" of his principal on a social networking website.[119] The case began "when Justin Layshock used his grandmother's computer to access [MySpace,] a popular social networking [I]nternet web site where he created a fake [I]nternet 'profile' of his high school principal."[120] On the fake profile, Layshock posted a survey of questions and answers about the principal's likes and dislikes.[121] Layshock crafted all of the principal's answers to use the word "big" because the principal was "apparently a large man."[122] A synopsis of the fake profile appears below:

> 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
> In the past month have you Stolen Anything: big keg[.][123]

Layshock's friends and most of the school's student body viewed the profile.[124] Eventually, the teachers found out about Layshock's profile and parent meetings ensued.[125] Layshock apologized to the principal for creating the profile, and the school informed Layshock that an informal hearing about the profile he created was to be held.[126] Afterward, the

118. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist. (*Layshock III*), 650 F.3d 205, 205 (3d Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. III*), 650 F.3d 915, 915 (3d Cir. 2011).

119. *Layshock II*, 593 F.3d at 252.

120. *Id.* "MySpace is a popular social-networking website that 'allows its members to create online profiles, which are individual web pages on which members post photographs, videos, and information about their lives and interests.'" *Id.* (quoting Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007) (internal quotation omitted)).

121. *Layshock II*, 593 F.3d at 252–53.

122. *Id.* at 252.

123. *Id.*

124. *Id.* at 253.

125. *Id.* at 253–54.

126. *Id.* at 254.

school district found Layshock guilty of violating the school's discipline code.[127] As a result, the school suspended Layshock for ten days, banned him from participating in extracurricular activities, and prevented him from participating in his graduation ceremony.[128]

Layshock's parents filed a complaint in the U.S. District Court for the Western District of Pennsylvania.[129] The district court denied the Layshocks' request for a temporary restraining order and ruled that a jury trial was necessary to determine damages and attorney's fees.[130] "The parties subsequently filed a joint motion in which they stipulated to damages and requested entry of final judgment while preserving all appellate issues pertaining to liability. The district court then entered a consent judgment, and this appeal and cross-appeal followed."[131]

The district court held, and the Third Circuit affirmed, that the profile Layshock created did not create a disruption under the standard set forth in *Tinker*.[132] The district court explained that the case involved speech that "began with purely out-of-school conduct which subsequently carried over into the school setting."[133] The court then discussed *Morse v. Frederick*, and held that *Morse* was not the controlling law in this matter because *Morse* involved school-related speech, whereas this case involved off-campus speech.[134] The court explained that because this case involved off-campus speech, "the school must demonstrate an appropriate nexus" between the student's off-campus speech and the school.[135] Relying on *Tinker*, the court held that the school impermissibly disciplined Layshock because the school district did "not establish[] a sufficient nexus between [Layshock's] speech and a substantial disruption of the school environment."[136]

The Third Circuit affirmed, holding that because the expressive conduct occurred beyond the schoolhouse gates and did not cause a disruption, the school district was "not empowered to punish his out of

127. *Id.*

128. *Id.*

129. *See* Layshock v. Hermitage Sch. Dist. (*Layshock I*), 496 F. Supp. 2d 587 (W.D. Pa. 2007).

130. *Id.* at 594.

131. *Layshock II*, 593 F.3d at 255.

132. *Layshock I*, 496 F. Supp. 2d at 600–01.

133. *Id.* at 595.

134. *Id.*

135. *Id.* at 599.

136. *Id.* at 600.

school expressive conduct under the circumstances here."[137] In support of its decision, the Third Circuit stated that "[a]llowing the District to punish [Layshock] for conduct he engaged in using his grandmother's computer while at his grandmother's house would create [an unseemly and dangerous] precedent."[138] Thus, the Third Circuit's reliance on *Tinker* defines the outer boundaries of First Amendment protections of off-campus cyber speech.

2. *The "Substantial Disruption" Requirement—J.S. ex rel. Snyder v. Blue Mountain School District (J.S. II)*

On the same day that the Third Circuit issued *Layshock II*, a separate panel on the same court issued a contradictory opinion, based on similar facts, in *J.S. ex rel. Snyder v. Blue Mountain School District*.[139] In *J.S. II*, J.S., an eighth grader, created a fictitious MySpace profile from her home computer.[140] The MySpace profile featured the school's principal, including his photograph and "profanity-laced statements insinuating that he was a sex addict and pedophile."[141] After the principal discovered the profile, he met with the school's superintendent and director of technology, and together they determined that J.S.'s profile violated the School District's Acceptable Use Policy.[142] The principal claimed that the "imposter profile" was a level-four infraction under the school's discipline code.[143] After meeting with J.S., the principal suspended her for ten days and threatened legal action.[144]

Subsequently, J.S. and her parents filed a complaint against the school district in the U. S. District Court for the Middle District of Pennsylvania, alleging that the ten-day suspension violated J.S.'s First Amendment free speech rights.[145] The district court determined that the discipline was unconstitutional under *Tinker* because it did not

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

138. *Id.* at 260.

139. J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. II*), 593 F.3d 286 (3d Cir. 2010).

140. *Id.* at 291.

141. *Id.* at 290. A synopsis of the "interests" section on the fictitious profile read as follows: "[g]eneral detention. being a tight ass. riding the fraintrain. spending time with my child (who looks like a gorilla). baseball. my golden pen. fucking in my office. hitting on students and their parents." *Id.* at 291.

142. *Id.* at 292.

143. *Id.* at 293.

144. *Id.*

145. J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. I*), No. 3:07-CV-585, 2008 U.S. Dist. LEXIS 72685, at *2–3 (M.D. Pa. Sept. 11, 2008).

substantially and materially disrupt the school.[146] The court distinguished the facts of the two cases by stating, "[i]n the instant case, the speech is not political [as in *Tinker*]; rather, it was vulgar and offensive statement ascribed to the school principal. Therefore, we must look further into the case law to determine the standard we must use."[147] As such, by applying a different standard, the district court held that the school's suspension of J.S. did not violate her First Amendment rights because "the lewd and vulgar off-campus speech had an effect on-campus."[148]

On appeal, the Third Circuit affirmed the district court's decision, albeit under a different analysis, and held that the profile, "though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*."[149] The Third Circuit did not first consider whether the off-campus speech came on to the school's campus.[150] The court reasoned that J.S.'s profile created a reasonable possibility of a future disruption due to the sexually explicit content of the speech, and because the profile was posted online, it constituted "a public means of humiliating [the principal]."[151]

The Third Circuit's finding of a substantial disruption turned on the fact that the off-campus speech was posted on the Internet.[152] The court reasoned that "due to the technological advances of the Internet," the profile that J.S. created "could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days."[153] Although the actual disruption was nonexistent, or minimal at best, the court reasoned that the substantial likelihood for future disruption was inevitable "especially in light of the inherent potential of the Internet to allow rapid dissemination of information."[154] In sum, the court concluded that the off-campus speech created or reasonably threatened to create a substantial disruption within the school, and therefore, the school district could discipline J.S., regardless of the fact that the speech occurred off-campus.[155]

146. *Id.* at *12.
147. *Id.*
148. *Id.* at *22.
149. *J.S. II*, 593 F.3d at 298.
150. *Id.*
151. *Id.* at 300.
152. *Id.* at 300–01.
153. *Id.*
154. *Id.* at 301.
155. *Id.*

In a strong partial dissent, Judge Chagares argued that the school impermissibly suspended J.S. "for speech that took place outside the schoolhouse gates, during non-school hours, and that indisputably caused no substantial disruption in school."[156] Judge Chagares explained that he "believe[d] that this holding vests school officials with dangerously overbroad censorship discretion."[157] Judge Chagares reasoned that just because J.S. published the profile online, it was impermissible to assume that the profile would create a substantial disruption inside the schoolhouse gates.[158] To the contrary, Judge Chagares opined that J.S.'s speech "caused no substantial disruption in school."[159] Judge Chagares accused the majority of misinterpreting the necessary balance between students' First Amendment rights and school administrators' need to maintain a proper learning environment.[160] He went on to state that "the majority attempts to overcome this considerable hurdle by adopting the standard put forth by several of our sister courts of appeals, which allows schools to meet the *Tinker* test by showing that a substantial disruption was 'reasonably foreseeable.'"[161] Judge Chagares argued that the majority's position was contrary to the *Tinker* test.[162] Even under that test, the facts do not reasonably support a forecast of disruption because "J.S. did not even intend for the speech to reach the school—in fact, she took specific steps to make the profile 'private' so that only her friends could access it."[163]

In sum, *Layshock II* and *J.S. II* applied different variations of the *Tinker* standard and reached opposite conclusions on seemingly similar facts. These decisions, published by the Third Circuit on the same day, are perfect examples of the clear misunderstanding of which standard applies when evaluating students' off-campus cyber speech. Because of the contradictory outcomes in *Layshock II* and *J.S. II*, the Third Circuit vacated both rulings and granted an en banc rehearing.[164]

156. *Id.* at 308.

157. *Id.*

158. *Id.* at 317.

159. *Id.* at 308.

160. *Id.* at 311.

161. *Id.* at 313 (citing Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008)).

162. *Id.*

163. *Id.* at 316.

164. *See* J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. III*), 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist. (*Layshock III*), 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

3. The Third Circuit's En Banc Review of Layshock II and J.S. II

On review, the Third Circuit relied on *Tinker* in finding that the School District's actions in *J.S. III* violated J.S.'s First Amendment rights.[165] In *Tinker*, the Supreme Court held that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[166] Based on the facts in the record here, the Third Circuit distinguished the "undifferentiated fear or apprehension of disturbance" from "a reasonable forecast [of] a substantial disruption or material interference."[167] The court held that because the profile was created as a joke, and it was unlikely to be taken seriously, it did not create a reasonable forecast of a substantial disruption.[168] Moreover, the court held that the evidence supported J.S.'s assertion that she did not intend for the speech to reach the school because she took steps to make the profile "private" so that only her friends could access it.[169]

The Third Circuit's en banc ruling affirmed that the Supreme Court has never "allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school."[170] In the end, in both *J.S. III* and *Layshock III*, the Third Circuit held that the school administration could not discipline off-campus speech.[171]

The discussion of *Layshock* and *J.S.* sets forth the clear dichotomy among circuit courts applying *Tinker* to off-campus cyber speech. The cases demonstrate that courts are struggling to determine how *Tinker* applies to off-campus speech. Whereas *Layshock III* focuses on the "nexus" between off-campus speech and the schoolhouse gates, *J.S. III* follows the logic and letter of *Tinker* and analyzes whether the off-campus speech created a foreseeable "substantial disruption."

165. *J.S. III*, 650 F.3d at 920.

166. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

167. *J.S. III*, 650 F.3d at 930.

168. *Id.* at 929–30.

169. *Id.* at 929.

170. *Id.* at 933.

171. *Id.* at 920; Layshock *ex rel.* Layshock v. Hermitage Sch. Dist. (*Layshock III*), 650 F.3d 205, 207 (3d Cir. 2011) (holding that "under these circumstances, the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline. . . . [and] that the school district's response to [Layshock's] conduct transcended the protection of free expression guaranteed by the First Amendment").

B. *Recent Rulings that Forbid School Administrators from Disciplining Off-Campus Speech*

Like the Third Circuit's en banc rulings in *Layshock III* and *J.S. III*, several recent rulings from other courts have also held that school administrators cannot discipline off-campus speech. For example, in *Evans v. Bayer*, the U.S. District Court for the Southern District of Florida held that Evans's speech fell "under the wide umbrella of protected speech."[172] In *Evans*, school administrators suspended Evans, a high school senior, for creating a Facebook group that expressed her dislike for a teacher, Ms. Phelps.[173] Evans titled the Facebook group "Ms. Sarah Phelps is the worst teacher I've ever met."[174] Evans created the Facebook group off-campus, from her home computer.[175] The court noted that Ms. Phelps never saw the Facebook group and that it did not create disruption at school.[176] Once the school caught wind of Evans's Facebook group and suspended her from school, Evans filed suit in the district court, asserting that the suspension violated her First Amendment rights.[177]

Like the Third Circuit, the court held that Evans's Facebook page was protected speech.[178] The court relied on *Tinker* and stated that "the key" in determining whether the school administrators could suspend Evans for her Facebook group depended on "whether the school administrators have a well-founded belief that a 'substantial' disruption will occur."[179] The court determined that no facts in the complaint established that the school had a well-founded expectation that Evans's Facebook group would create a disruption inside the school.[180] Evans's speech was merely an opinion about a teacher "that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior."[181]

More recently, in *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, the U.S. District Court for the Northern District of Indiana also

172. Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010).
173. *Id.* at 1367.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 1367–68.
178. *Id.* at 1377.
179. *Id.* at 1373.
180. *Id.*
181. *Id.* at 1374.

upheld student speech rights.[182] In this case, a group of 15 and 16-year-old girls were suspended from their school volleyball team for posting provocative photos of themselves on MySpace, Facebook, and Photo Bucket.[183] The photos were later given to school authorities, who suspended the girls from extra-curricular activities for the school year.[184] In suspending the students, the school relied on a policy in the Student Handbook that stated: "[i]f you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year."[185] The students, through their parents, filed suit alleging that the punishment violated their First Amendment rights of free speech.[186] In the words of Chief Judge Philip P. Simon, writing for the court:

> Let's be honest about it: the speech in this case doesn't exactly call to mind high-minded civic discourse about current events. And one could reasonably question the wisdom of making a federal case out of a 6–game suspension from a high school volleyball schedule. But for better or worse, that's what this case is about and it is now ripe for disposition.[187]

Ultimately, the court held that although the girls' photos were ridiculous and inappropriate, they were expressive and subject to First Amendment protection.[188]

Applying the *Tinker* substantial and material disruption test, the court reasoned that the girls' pictures did not substantially disrupt the work and discipline of the school setting.[189] Noting that an actual disruption is not required for school administrators to take action, the court reaffirmed that "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."[190] In this case, the court held that the girls' conduct did "not come close to meeting the *Tinker* standard."[191] Here, there was no disruption during any school activity and the students' conduct did not interfere with

182. T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 784–85 (N.D. Ind. 2011).

183. *Id.* at 771–72.

184. *Id.* at 773–74.

185. *Id.* at 773.

186. *Id.* at 771.

187. *Id.*

188. *Id.* at 775–76.

189. *Id.* at 784.

190. *Id.* at 782 (quoting Saxe v. State College Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001)).

191. *Id.* at 783.

schoolwork.[192] In sum, the court held that the facts in this case "can't be what the Supreme Court had in mind when it enunciated the 'substantial disruption' standard in *Tinker*. To find otherwise would be to read the word 'substantial' out of 'substantial disruption.'"[193]

C. *Recent Rulings that Allow School Administrators to Discipline Off-Campus Speech*

Notwithstanding the foregoing cases, several other courts have issued rulings that allow schools to discipline students for off-campus cyber speech. In these instances, the courts have found that there is a sufficient nexus between the speech and the schoolhouse gates.[194]

For example, in *Wisniewski v. Board of Education of Weedsport Central School District*, the U.S. Court of Appeals for the Second Circuit held that it was "reasonably foreseeable" that the student's AOL Instant Messenger icon depicting a pistol firing a bullet over a person's head would cross the schoolhouse gates because the icon included the words "Kill Mr. VanderMolen"—the student's teacher.[195] The court explained that there was, therefore, a sufficient nexus for the school to regulate the student's off-campus cyber speech.[196] As for *Tinker's* substantial disruption requirement, the court held that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."[197]

One year later, in *Doninger v. Niehoff*, the Second Circuit similarly held that a risk of substantial disruption created by a student's off-campus cyber speech was sufficient for the school to discipline the student.[198] In *Doninger*, students on the Student Council planned a school-sponsored battle-of-the-bands concert.[199] The school re-scheduled the event and as a result, the plaintiff, a student council member, sent an e-mail from her father's e-mail address urging parents to contact the school administrators regarding the rescheduling of the

192. *Id.*

193. *Id.* at 784.

194. *See* SCHNEIDER, *supra* note 54, § 2:26, at 608–09.

195. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35–37 (2d Cir. 2007).

196. *Id.* at 38–39.

197. *Id.* at 40.

198. Doninger v. Niehoff, 527 F.3d 41, 52–53 (2d Cir. 2008).

199. *Id.* at 44.

concert.[200] The plaintiff also posted a message on her publicly accessible blog.[201] On plaintiff's blog, she called school administrators "douchebags."[202] The school found out about the plaintiff's blog, and subsequently barred her from running for senior class secretary.[203] The plaintiff filed a lawsuit, alleging that the school violated her First Amendment freedom of speech rights.[204] The district court upheld the school's disciplinary conduct, concluding that a preliminary injunction was not warranted because the plaintiff "ha[d] failed to show a clear or substantial likelihood of success on the merits[.]"[205]

On appeal, the Second Circuit relied on *Tinker* and held that "it was objectively reasonable for school officials to conclude that [plaintiff's] behavior was potentially disruptive of student government functions . . . and that [plaintiff] was not free to engage in such behavior while serving as a class representative."[206] Accordingly, the Second Circuit affirmed the district court's holding.[207]

The U.S. Court of Appeals for the Fourth Circuit reached the same conclusion in *Kowalski v. Berkeley County Schools*, upholding the suspension of a student who engaged in off-campus online bullying.[208] In this case, Kowalski, a high school senior, created a MySpace group targeting a classmate named Shay.[209] Kowalski called the MySpace group "SASH," which stood for "Students Against Shay's Herpes."[210] Kowalski invited about 100 others to join the MySpace Group, and over two dozen students responded and did join.[211] Kowalski encouraged the group members to ridicule Shay on the MySpace page.[212] Students uploaded

200. *Id.* at 44.

201. *Id.* at 45.

202. *Id.*

203. *Id.* at 46.

204. Doninger v. Niehoff, 514 F. Supp. 2d 199, 210 (D. Conn. 2007) aff'd, 527 F.3d 41 (2d Cir. 2008).

205. *Id.* at 219.

206. Doninger v. Niehoff, 642 F.3d 334, 351 (2d Cir. 2011). The Second Circuit was faced with a subsequent appeal three years later after the plaintiff had graduated from high school where she sought damages. The court held that the plaintiff was not entitled to damages and that defendants had qualified immunity. *See id.* at 344, 356–58.

207. *Id.* at 357.

208. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011).

209. *Id.* at 567–68.

210. *Id.* at 567.

211. *Id.*

212. *Id.*

pictures of Shay and posted hurtful messages.[213] As a result, school administrators suspended Kowalski from school and from the cheerleading team.[214]

Kowalski filed suit in the U.S. District Court for the Northern District of West Virginia alleging, among other things, that the school district erroneously suspended her for "private out-of-school speech" in violation of the First Amendment.[215] The district court granted summary judgment for the school district and held that it could suspend Kowalski for the content she posted on the Internet because it caused an in-school disruption.[216]

On appeal, Kowalski asserted that "[t]he Supreme Court ha[d] been consistently careful to limit intrusions on students' rights to conduct taking place on school property, at school functions, or while engaged in school-sponsored or school-sanctioned activity."[217] She argued that "no Supreme Court case addressing student speech has held that a school may punish students for speech away from school[;]" rather, "every Supreme Court case addressing student speech has taken pains to emphasize that, were the speech in question to occur away from school, it would be protected."[218]

The Fourth Circuit's ruling hinged on the determination of whether Kowalski's activity fell within the boundaries of the school's interest "in maintaining order in the school and protecting the well-being and educational rights of its students."[219] Relying on the nexus between Kowalski's off-campus speech and the classroom setting, as well as the *Tinker* substantial disruption test, the Fourth Circuit noted:

> Kowalski used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech which materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others.[220]

213. *Id.*
214. *Id.* at 569.
215. *Id.* at 567, 570.
216. *Id.*
217. *Id.* at 571.
218. *Id.*
219. *Id.*
220. *Id.* at 567 (citing Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (internal quotation mark omitted)).

The court paid careful attention to the subject matter of Kowalski's Internet activity—bullying another student.[221] As such, its ruling protects school administrators' actions because they "must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."[222] The court noted that there is certainly "a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate."[223] Nevertheless, the Fourth Circuit refrained from defining that limit in *Kowalski*. Clearly, courts continue to struggle "to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment."[224]

III. SCHOOL ADMINISTRATORS ARE LEFT IN LIMBO

Although off-campus cyber speech rulings apply facets of *Tinker*, the decisions leave school administrators wondering––how can they reconcile the inconsistent rulings? Courts are clearly conflicted as to how far the school's authority reaches to punish students' off-campus cyber speech. While courts continue to apply the "substantial disruption" *Tinker* test, the outcome under this test is inconsistent when applied to off-campus Internet speech. Sometimes the school district wins.[225] Sometimes the student wins.[226] Sometimes courts within the same circuit issue conflicting rulings.[227]

Until the Supreme Court addresses this issue, school administrators will remain rightfully hesitant to discipline students for their online content, wary of a lawsuit that may arise in the aftermath. Thus, school administrators are left uncertain of the scope of their authority.

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221. *Id.* at 572.

222. *Id.*

223. *Id.* at 573.

224. J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. III*), 650 F.3d 915, 926 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

225. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).

226. *See* T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011); Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

227. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist. (*Layshock II*), 593 F.3d 249 (3d Cir. 2010); J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist. (*J.S. II*), 593 F.3d 286 (3d Cir. 2010).

When the Supreme Court finally addresses this issue, it should make clear when students' off-campus online speech is intrusive enough to cause a "substantial disruption" inside schools. In applying the *Tinker* substantial disruption test to cyber speech, the Court will likely focus on the nexus between the off-campus online content and examine its effect inside the school. School authorities would be well served by a ruling that articulates what constitutes a *de minimis* disruption, where the school may not discipline a student, and what constitutes a substantial disruption that warrants discipline.

The lower courts seem to have come to a consensus that online speech that leads to bullying, harassment, physical fights, the inability to keep control in the classroom, and the inability to teach the curriculum, creates a substantial disruption in school and therefore the school may discipline the student for such online speech.[228] But, the effect of off-campus cyber speech is more far reaching than those "clear cut" instances. Students' online remarks have also lead to stress for the harassed student, missing school, suicide attempts, failing grades, withdrawal from school clubs and activities—and the list goes on. Should such circumstances constitute a substantial disruption? Or are they merely *de minimis*, and therefore outside the school administrators' disciplinary arm? Alas, we await a ruling from the Supreme Court for an answer.

IV. CONCLUSION––A WORD TO THE WISE

Because there are no clear parameters surrounding school administrators' authority to discipline students for off-campus online content, school systems should proceed carefully when dealing with students whose online content makes its way to the classroom. Nevertheless, schools cannot avoid the issue altogether because it is quite evident that social media is here to stay. Until the Supreme Court addresses this issue, the decisions illustrated in this Article should guide school authorities in disciplining students for their off-campus Internet speech.

School administrators should continue to act with caution when disciplining students for online content and should remain aware that many students are apt to challenge school authority in the courts. In the event that discipline leads to litigation, school administrators must be able to show that the students' online content caused, or could have

228. *See Kowalski*, 652 F.3d at 567; *Doninger*, 527 F.3d at 44; *Wisniewski*, 494 F.3d at 35.

reasonably caused, a substantial disruption at school. Although we do not know what exactly constitutes a substantial disruption, school administrators should protect themselves by creating a clear record that provides evidence of a nexus between the off-campus content and instances of disruption inside the school. While there are no hard and fast rules as to what constitutes a substantial disruption, this standard certainly requires more than the display of a student's impermissible off-campus conduct.

School administrators will also be well served to create social media policies and to distribute them to all students, faculty, and parents at the beginning of each school year. Such policies would benefit both students and educators by setting the expectations of the school. Social media policies that include constitutionally permissible restrictions would benefit school administrators and school districts in defending cyber speech lawsuits. Until the Supreme Court stakes its claim, school authorities should shape social media policies around the *Tinker* substantial disruption test.