Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 19 *Volume XIX*
Number 2 *Volume XIX Book 2*

Article 5

2008

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Cover Page Footnote

I would like to thank Professor Abner Greene for his insightful comments and for supervising the drafting of this Note. I would also like to thank Professor James Fleming for introducing me to constitutional law in general and First Amendment law specifically.

When The Schoolhouse Gate Extends Online: Student Free Speech in the Internet Age

David J. Fryman*

INTRODUCTION

Since the United States Supreme Court decided *Tinker v. Des Moines Independent Community School District*[1] in 1969, courts have applied a unique free speech standard to students in public schools. While famously declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[2] the Court added that student speech that "materially disrupts classwork or involves substantial disorder" is subject to discipline.[3] *Tinker* did not intend to apply a material disruption standard to speech generally. Subsequent opinions make clear that the standard is unique to students in public schools.[4] To apply *Tinker*, then, courts must first resolve the "threshold issue" of whether the speech occurred inside or outside of school.[5] Traditionally, this was a simple task. Although some courts struggled with "underground newspapers" prepared off-campus and later brought into school,[6] the analysis still focused primarily on the in-school activity. Student Internet speech renders this threshold question more difficult. As Internet use continues to grow in popularity among school-aged adolescents, courts are

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

2 *Id.* at 506.

3 *Id.* at 513.

4 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("[T]he First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986))).

5 J.S. *ex. rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002)

6 *See, e.g.*, Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998); Bystrom v. Fridley High Sch., 822 F.2d 747 (8th Cir. 1987); Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979); *see also infra* Part II.A.

called upon to determine whether web activity may constitute on-campus speech for First Amendment purposes. In other words, can the schoolhouse gate extend online?

Digital technology, particularly the Internet, permeates almost every aspect of the modern adolescent's life.[7] Eighty-seven percent of young adults between ages twelve and seventeen use the Internet regularly.[8] Ninety-three percent have used it at some point.[9] Of middle- and high-school aged adolescents who use the Internet, more than half use online social networking websites,[10] such as MySpace[11] and Facebook.[12] Studies show that almost half of social-network users log in to the network at least once a day.[13] Notably, adolescents use the Internet most frequently at home or at school.[14] They often use the Internet to publish original material as well.[15] Weblog software, such as Blogger,[16] makes it easy for anybody to create and maintain a regularly updated website featuring a wide variety of content.

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7 *See The Deleting Online Predators Act of 2006: Hearing on H.R. 5319 Before the Subcomm. on Telecomm. and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. (2006) (statement of Amanda Lenhart, Senior Research Specialist, Pew Internet & American Life Project).

8 *Id.*

9 *Id.*

10 AMANDA LENHART & MARY MADDEN, PEW INTERNET AND AMERICAN LIFE PROJECT, SOCIAL NETWORKING WEBSITE AND TEENS: AN OVERVIEW 1 (Jan. 3, 2007), http://www.pewinternet.org/pdfs/PIP_SNS_Data_Memo_Jan_2007.pdf; *see also* Dana Boyd, *Why Youth [Heart] Social Network Sites: The Role of Networked Publics in Teenage Social Life*, *in* YOUTH, IDENTITY, AND DIGITAL MEDIA 119, 123 (David Buckingham ed., 2008) ("Social network sites are based around profiles . . . which offer[] a description of each member. . . . [T]he social network site profile also contains comments from other members, and a public list of the people that one identifies as Friends within the network.").

11 MySpace, http://www.myspace.com.

12 Facebook, http://www.facebook.com.

13 LENHART & MADDEN, *supra* note 10, at 2.

14 *Id.* at 4–5.

15 *See* Student Press Law Center, SPLC Cyberguide: A Legal Manual for Online Publishers of Independent Student Websites, http://splc.org/legalresearch.asp?id=13.

16 Blogger, http://www.blogger.com.

The near universal access and use of the Internet among school-aged adolescents coupled with the tremendous ease of creating original expression and distributing that expression makes the legal question addressed in this Note a crucial one. When Justice Fortas spoke for the Court in *Tinker*, he undoubtedly did not envision school authorities censoring what students say to each other outside of school in local hangouts. Today, however, what students say to each other outside school is often broadcast online and may thereby end up on campus. As the Supreme Court of Pennsylvania noted, "*Tinker*'s simple armband . . . has been replaced by [a] complex multimedia web site, accessible to fellow students, teachers, and the world."[17]

This Note examines how courts have struggled to apply the traditional student speech precedents to online speech. Part I summarizes the Supreme Court's jurisprudence regarding student speech rights. Part II discusses how courts have applied these cases when the speech at issue originates off-campus. Part III argues that the analytical approach used in *J.S. ex rel H.S. v. Bethlehem Area School District*[18] and *Layshock v. Hermitage School District*[19] appropriately balances student free speech and the necessary disciplinary functions of school authorities.

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17 J.S. *ex. rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002).

18 *J.S.*, 807 A.2d 847.

19 Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007), *appeal denied*, 2007 WL 3120192 (W.D. Pa. Oct. 23, 2007).

I. RESTRICTING STUDENT SPEECH: THE SEMINAL CASES

A. Tinker v. Des Moines Independent Community School District[20]

In December 1965, a group of students in Des Moines, Iowa decided to protest the Vietnam War "by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve." [21] The principals of the local schools learned of the plan and adopted a policy requiring any student wearing an armband to school to remove it or face suspension.[22] Three students nevertheless wore the armbands to school and were suspended.[23] They brought suit under 42 U.S.C. § 1983 for an injunction against the policy and for nominal damages.[24] The Supreme Court held that the First Amendment protected the students' conduct, famously declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25]

The speech at issue in *Tinker* was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[26] There was no evidence that the students' protest interfered in any way with the rights of other students.[27] The District Court, though, concluded that the school authorities behaved reasonably in suspending the students because they *feared* it would cause a disturbance.[28] The Supreme Court responded that

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[20] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see generally* Aaron Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 120–43 (2003) (carefully examining the facts at issue in *Tinker*, including a close reading of the District Court and Court of Appeals decisions).

[21] *Tinker*, 393 U.S. at 504.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 506.

[26] *Id.* at 508.

[27] *Id.*

[28] *Id.*

"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[29]

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.[30]

The Court emphasized that "state-operated schools may not be enclaves of totalitarianism" and students must be permitted to express views that run counter to what is "officially approved."[31] Students are free to express their opinions, however controversial, so long as they do so "without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."[32] Student conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment and thus may be restricted by school authorities.[33]

B. From Fraser *to* Morse

The Court continued its effort to apply the First Amendment "in light of the special characteristics of the school environment"[34] in *Bethel School District No. 402 v. Fraser*[35] and *Hazelwood School District v. Kuhlmeier*,[36] two cases in which the Court carved out exceptions to *Tinker*'s material disruption analysis.

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29 *Id.*
30 *Id.* (citing Terminiello v. Chicago, 337 U.S. 1 (1949)).
31 *Id.* at 511.
32 *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
33 *Id.*
34 *Id.* at 506.
35 Bethel Sch. Dist. No. 402 v. Fraser, 478 U.S. 675 (1986).
36 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

More recently, in *Morse v. Frederick*,[37] the Court held that students may be disciplined for advocating drug use.[38]

Mathew Fraser, a student at Bethel High School, delivered a speech nominating a fellow student for a student government position at a school-sponsored assembly. In the speech, he "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[39] A school disciplinary rule provided that "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[40] The school determined that Fraser's speech violated this rule; accordingly, he was suspended for three days and his name removed from a list of candidates to speak at graduation.[41]

The Court emphasized "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[42] This is partially due to the school's unique function, which is to "inculcate the habits and manners of civility."[43] It is appropriate, then, for a school to determine that the essential lessons of civility cannot be taught in an atmosphere where lewd, indecent, or offensive speech takes place.[44] Considering the offensive nature of Fraser's speech,[45] the Court determined that the school was within its rights to punish it.[46]

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

38 *Id.* at 2623–29.

39 *Fraser*, 478 U.S. at 677–78.

40 *Id.* at 678.

41 *Id.*

42 *Id.* at 682.

43 *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). *But cf.* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (criticizing "[t]he desire of the Legislature to foster a homogeneous people with American ideals").

44 *Fraser*, 478 U.S. at 683.

45 *Id.* ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person.").

46 *Id.* at 685.

The Court has since expressed ambivalence regarding *Fraser*'s analysis[47] and a more thorough discussion of the case is beyond the scope of this Note. In *Morse*, the Court gleaned two basic principles from *Fraser*: First, "that 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings' . . . [and] second, . . . that the mode of analysis set forth in *Tinker* is not absolute."[48]

Hazelwood School District v. Kuhlmeier addressed a school newspaper published as part of a journalism class.[49] The school's principal objected to two of the articles set to appear in the next issue.[50] One described students' experiences with pregnancy; the other discussed the impact of divorce on students at school.[51] Following its decision in *Fraser*, the Court noted that "[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 school."[52] The Court distinguished *Tinker* by noting that *Tinker* addressed whether a school must tolerate particular student speech, whereas here the issue was whether a school must affirmatively promote particular student speech.[53] Regarding this second form of student speech, the Court held that schools may "exercis[e] editorial control over the style and content . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[54]

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47 *See* Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007) ("The mode of analysis employed in *Fraser* is not entirely clear.").

48 *Id.* at 2626–27.

49 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

50 *Id.* at 263.

51 *Id.*

52 *Id.* at 266 (quoting Bethel Sch. Dist. No. 402 v. Fraser, 478 U.S. 675, 685 (1986)).

53 *Id.* at 270–71. In evaluating whether the newspaper constituted school-sponsored speech, the Court noted that the newspaper was written and edited by students in a journalism class which was paid for by the Board of Education, and for which the students received academic credit. *Id.* at 262–63, 268.

54 *Id.* at 273. The Court suggested that a school may censor offensive student speech in a school-sponsored publication in the same way that it may censor "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* at 271–72.

More recently, in *Morse v. Frederick*, the Supreme Court brought *Tinker*, *Fraser*, and *Kuhlmeier* to bear on a case involving a student displaying a banner bearing the phrase: "BONG HiTS 4 JESUS."[55] Joseph Frederick unfurled the banner across the street from the school as students gathered to watch the Olympic torch relay pass through the city.[56] When Frederick failed to take down the banner at Principal Morse's request, he was suspended for ten days.[57] Morse later explained her decision, saying she told Frederick to remove the banner because it "encouraged illegal drug use."[58] The Court reasoned that the banner may, in fact, "reasonably [be] regarded as promoting illegal drug use," and thus held that the school did not violate Frederick's First Amendment rights by confiscating it.[59]

In dicta, the Court emphasized the unique role of public education and what that means for students' rights.[60] For example, the Court noted that, in the Fourth Amendment context, the nature of students' rights "is what is appropriate for children in school."[61] Accordingly, "some easing of the restrictions" regarding searches

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[55] Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007). Although the Court noted that *Kuhlmeier* did not control, it considered the case "instructive" because it "acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school.'" *Id.* at 2627 (quoting *Kuhlmeier*, 484 U.S. at 266). Strictly speaking, the Court's holding in *Morse* is best understood as a categorical exception to *Tinker*.

[56] *Id.* at 2622. The Court rejected Frederick's argument that this was not a school speech case, on grounds the event occurred during school hours and was sanctioned by Morse "as an approved social event." *Id.* at 2624. It acknowledged that "[t]here is some uncertainty . . . as to when courts should apply school-speech precedents," but this case was clear. *Id.*

[57] *Id.* at 2622.

[58] *Id.* at 2622–23. The school superintendent upheld the principal's decision, explaining that the phrase "bong hits" typically refers to "a means of smoking marijuana." *Id.* at 2623.

[59] *Id.* at 2622.

[60] *Id.* at 2627.

[61] *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).

is required.[62] This difference of standard apparently stems from "the schools' custodial and tutelary responsibility for children."[63]

The *Morse* Court had occasion to offer guidance on the issue of off-campus speech.[64] Frederick argued that the school lacked authority to discipline him because his speech occurred off school property.[65] The Court, however, did not address this issue in detail. It stated, without much discussion, that the event was a school-sanctioned activity and thus, should be analyzed under the traditional student-speech cases.[66]

II. RESTRICTING SPEECH ORIGINATING OFF-CAMPUS

A. Off-Campus Speech Generally

Recall the Supreme Court's famous pronouncement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[67] What happens when the speech originates outside the schoolhouse gate but nonetheless causes the kind of disruption that, had it occurred on-campus, could be regulated under *Tinker*? The lack of a Supreme Court decision on this point makes this a difficult question, and courts struggle to determine the off-campus reach of school authority. In this section this Note surveys a number of cases dealing with the regulation of off-campus speech. This Note demonstrates that courts lack a consistent doctrinal analysis for

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62 *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).

63 *Id.* at 2628 (quoting *Vernonia*, 515 U.S. at 656); *see also id.* at 2638 (Alito, J., concurring) (basing the unique public school free-speech standards "on some special characteristic of the school setting" which "in this case was the threat to the physical safety of students").

64 *See* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age* 22 (B.C. Legal Stud. Res. Paper No. 149, 2008), *available at* http://ssrn.com/abstract=1112789.

65 *Morse*, 127 S. Ct. at 2624.

66 *Id.*; Papandrea, *supra* note 64, at 23 (suggesting that the Court's "tremendous deference" to the school's interpretation here indicates an erosion of student speech rights).

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

establishing the borders of school authority over off-campus speech, which is only made worse in the online-speech context.

A word on methodology is in order. This Note's author's interest in the cases discussed in this and the following sections lies in how they address (or avoid) the jurisdictional question of what constitutes on-campus speech. Thus, in discussing these cases, this Note focuses (sometimes exclusively) on their treatment of the jurisdictional question rather than on their holdings. If a court concludes that the speech is on-campus, how it then applies *Tinker* or *Fraser* certainly influences the debate. This point is addressed further in Part III. Nonetheless, the more important issue for the purposes of this Note is how to determine the boundaries of the schoolhouse gate.

In *Klein v. Smith*,[68] the court addressed the issue of whether a student may be disciplined for making a vulgar gesture to a teacher outside of school and after school hours.[69] The student was suspended for ten days after the incident under a rule providing disciplinary measures for "vulgar or extremely inappropriate language or conduct directed to a staff member."[70] The court reasoned that Klein's speech was sufficiently off-campus for purposes of *Tinker* and that his suspension violated his First Amendment rights.[71]

> The conduct in question occurred in a restaurant parking lot, far removed from any school premises or facilities, at a time when the teacher, Clark, was not associated in any way with his duties as a teacher. The student was not engaged in any school activity or associated in any way with school premises or his role as a student. Any possible

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[68] Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).

[69] *Id.* at 1440. Defendant argued that "Plaintiff's gesture had no . . . expressive content and is, therefore, not 'speech' entitled to First Amendment protection." *Id.* at 1441 n.2. The court rejected this argument. *Id.*

[70] *Id.* at 1441.

[71] *Id.* at 1442.

> connection between his act of "giving the finger" to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities is . . . *far too attenuated to support discipline against Klein* for violating the rule prohibiting vulgar or discourteous conduct toward a teacher.[72]

The court does not present any sweeping standards or rules for determining what level of involvement with school activity was necessary to render Klein's gesture punishable. The factors considered in the above-quoted passage merely suggest that this was not a close call. Importantly though, the court's jurisdictional analysis suggests that the mere fact that Klein's gesture occurred outside the physical property of the school did not automatically protect him from school discipline.[73]

In *Thomas v. Board of Education, Granville Center School District*,[74] the Second Circuit stated that although educators "must be accorded substantial discretion" to execute their responsibilities, their "authority does not reach beyond the schoolhouse gate."[75] The speech at issue was a satirical newspaper, entitled *Hard Times*, that was published and distributed off school grounds, but addressed to the school community.[76] It featured articles "pasquinading school lunches, cheerleaders, classmates, and teachers."[77] Articles on masturbation and prostitution were also included.[78] When *Hard Times* surfaced in the school, a teacher confiscated it and presented it to the principal, who, in consultation

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[72] *Id.* at 1441 (emphasis added). The court also noted that the gesture did not constitute "fighting words." *Id.* at 1442.

[73] The court emphasized that the restaurant parking lot was far from school and that the activity was not associated with school premises. *Id.* The court had the opportunity to draw a bright-line rule, stating that since the conduct occurred outside of school property, the school had no right to discipline Klein; it refrained from doing so.

[74] Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979).

[75] *Id.* at 1044–45.

[76] *Id.* at 1045.

[77] *Id.*

[78] *Id.*

with the superintendent and the Board of Education, imposed a number of penalties on the students involved.[79]

In analyzing whether the publication constituted on-campus speech, the court observed that it was neither printed in school nor sold in school.[80] Although "a few articles were transcribed on school typewriters, and . . . the finished product was secretly and unobtrusively stored in a teacher's closet," the court emphasized that it "was conceived, executed, and distributed outside the school."[81] Any on-campus activity was therefore de minimis.[82] The court stressed that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith,"[83] their "power must be cabined within the rigorous confines of the First Amendment."[84]

In *Bystrom v. Fridley High School*,[85] the Eighth Circuit opined on the status of an "underground newspaper."[86] Here, students distributed a publication on school grounds that school officials deemed violative of a number of policies.[87] Specifically, school policy prohibited "pervasively indecent or vulgar" writings and writings "that invade the privacy of another."[88] The court ultimately upheld the constitutionality of the school policies, holding that the school was within its rights to discipline the offending students.[89] In dicta, however, the court offered a caveat that will prove crucial for this Note's purposes:

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79 *Id.* at 1045–46. The penalties included: (1) a five-day suspension; (2) segregation from others during study hall; (3) loss of student privileges; and (4) inclusion of suspension letters in the students' files. *Id.* at 1046.

80 *Id.* at 1050.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* at 1045.

85 Bystrom v. Fridley High Sch., 822 F.2d 747 (8th Cir. 1987).

86 *Id.* at 749.

87 *Id.*

88 *Id.* at 750.

89 *Id.* at 755.

> Only distribution "on school property" is at issue here. 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.[90]

In *Boucher v. School Board of Greenfield*,[91] the Seventh Circuit declined to follow *Thomas* and the *Bystrom* dicta.[92] The "underground newspaper" at issue was entitled *The Last*.[93] Its inaugural issue "provocatively explained that [it] was intended to 'ruffle a few feathers.'"[94] The issue distributed on June 4, 1997 included an article entitled, *So You Want to Be A Hacker*, which provided detailed instructions on how to break into the school computer network.[95] Although written pseudonymously, it was soon determined that the author was Justin Boucher, a student at Greenfield High School.[96] Boucher was suspended and the School Board subsequently voted to expel him.[97]

Boucher argued, inter alia, that "school officials' authority over off-campus expression is much more limited than it is over expression on school grounds[,]" citing *Bystrom* and *Thomas*.[98] The court dismissed the reference to *Bystrom* as "merely dictum."[99] Regarding *Thomas*, the court suggested that the Second Circuit's holding was based on the fact that the speech at issue

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90 *Id.* at 750.
91 Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821 (7th Cir. 1998).
92 *Id.* at 828.
93 *Id.* at 822.
94 *Id.*
95 *Id.*
96 *Id.* at 823.
97 *Id.*
98 *Id.* at 828.
99 *Id.* at 829.

"lacked the potential to disrupt school activities."[100] The *Thomas* Court declined to consider a hypothetical case "in which a group of students incites substantial disruption within the school from some remote locale" because, on the facts before it, "there was simply no threat or forecast of material and substantial disruption within the school."[101] The Seventh Circuit similarly limited its holding to the specific facts of the case.[102]

B. Internet Speech and the Search for a New Standard

This section discusses a number of recent cases and scholarly articles that struggle with the First Amendment rights of middle- and high school students on the Internet. As mentioned in the Introduction, the pervasive quality of the Internet makes this issue much more difficult than the underground newspaper cases surveyed above. In those cases, courts could at least take for granted that on-campus speech was speech either originating on or brought onto school property. In the online context, speech originating in the privacy of one's home is automatically brought into the school by the mere fact that modern classrooms and school libraries provide Internet access. One option for courts is to simply apply the school-speech standards across the board for all student online speech on the rationale that any blog, Facebook profile, or MySpace page are, by their nature, accessible on campus. Courts are rightly resistant to such a sweeping limitation of student speech rights.[103] On the other hand, online speech can have the same disruptive effect inside the school walls as the on-campus speech

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[100] *Id.* at 828.

[101] Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979). As we see in the following sections, this is precisely the scenario that the online speech cases present.

[102] *Boucher*, 124 F.3d at 829 (noting that since the article was in fact brought on campus, the court need not consider the hypothetical situation envisioned in *Thomas*). The court added that the article advocated on-campus activity. *Id.*

[103] *See* Layshock v. Hermitage, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007), *appeal denied*, 2007 WL 3120192 (W.D. Pa. Oct. 23, 2007) ("The mere fact that the [I]nternet may be accessed at school does not authorize school officials to become censors of the world-wide web.").

that is typically unprotected. It is reasonable, then, to afford schools at least some discretion to discipline students for truly disruptive speech, even if that speech originates online, from a home computer. The difficult issue is, of course, where to draw the line.

The off-campus speech cases[104] discussed above provide little more than confusion and ambivalence. The *Klein* court merely presented a list of factors, concluding that the relationship between the speech at issue and school activity was "far too attenuated to support discipline."[105] The court's failure to draw a bright line or explain what degree of association with the school would have permitted its disciplinary measures renders it of little help to future courts. The court in *Thomas* is more helpful in this regard in that it plainly states that school officials' "authority does not reach beyond the schoolhouse gate."[106] This seems to imply that when the activity takes place largely off-campus, it is subject to full First Amendment protection. Yet, the court subtly resisted this inference by declining to consider whether a school may discipline students for "incit[ing] substantial disruption . . . from some remote locale,"[107] i.e. the Internet.

The *Bystrom* court's statement in dicta is more helpful but still not conclusive. It suggested that if the school asserted "authority to govern or punish what students say, write, or publish . . . outside the school building and grounds," it would raise "quite different issues."[108] In the cases discussed below, courts wrestle these very issues.[109]

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[104] "Off-campus" is used here loosely, recognizing that the extent to which the speech occurred off- or on-campus was the very issue in these cases.

[105] Klein v. Smith, 635 F. Supp. 1440, 1441 (D. Me. 1986); *see supra* note 72 and accompanying text.

[106] *Thomas*, 607 F.2d at 1044–45; *see supra* note 75 and accompanying text.

[107] *Id.* at 1052 n.17; *see supra* note 101 and accompanying text.

[108] Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987); *see supra* note 86 and accompanying text.

[109] The case law on this issue is presented chronologically, rather than attempting to group the cases as more restrictive or less restrictive.

When Brandon Beussink was a student at Woodland High School, he created a website from his home computer that was "highly critical" of the school administration.[110] The site used "vulgar language" and contained a hyperlink to the school's official website.[111] Another student showed the website to a teacher, who then informed the principal.[112] The principal suspended Beussink for five days and later increased it to ten days.[113] He testified that "he made the decision to discipline Beussink *immediately* upon viewing the homepage . . . before he knew whether any other students had seen or even had knowledge of [it]."[114] Although the court stressed the off-campus nature of Beussink's website,[115] it applied *Tinker*'s material and substantial interference test, stating that "Beussink's homepage did not materially and substantially interfere with school discipline."[116] The court did not address whether the website could be considered off-campus speech and, thus subject to full First Amendment protection.[117]

In *Emmett v. Kent School District No. 415*,[118] Nick Emmett, a student at Kentlake High School posted a website entitled the "Unofficial Kentlake High Home Page."[119] The website contained "mock obituaries" of fellow students and had a feature allowing

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[110] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). The court emphasized that Beussink did not use school facilities or resources to create the site. It was created with his home computer, not during school hours. *Id.*

[111] *Id.* at 1177 n.1. There was no hyperlink from the school's page back to Beussink's page. *Id.*

[112] *Id.* at 1177–78. The court noted Beussink did not give out the internet address of his homepage to the fellow student who displayed it for the teacher. *Id.* at 1178.

[113] *Id.* at 1179.

[114] *Id.* at 1178.

[115] *Id.* at 1177.

[116] *Id.* at 1182.

[117] Most likely, since the website did not cause the kind of interference that would subject it to discipline under *Tinker*, the court declined to charter new territory regarding the boundaries of in-school speech.

[118] Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

[119] *Id.* at 1089. The court observed that the site was created at home without the use of school resources. *Id.*

visitors to vote on who would "die" next.[120] The website was featured on an evening television news story, which characterized the site as promoting a "hit list."[121] The next day, the school principal placed Emmett on "emergency expulsion for intimidation, harassment, [and] disruption to the educational process."[122] The court distinguished the case from both *Fraser* and *Kuhlmeier*, emphasizing that Emmett's website was far removed from any school activity:

> Plaintiff's speech was not at a school assembly, as in *Fraser*, and was not in a school-sponsored newspaper, as in *Kuhlmeier*. It was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control.[123]

The court, accordingly, held for Emmett, enjoining the school from enforcing its suspension.[124]

David Hudson argues that *Emmett* properly dismissed the school's arguments for discipline on grounds that the school lacked supervision or control over the speech.[125] "Speech on a website should be no different than if a student had a conversation with other students off-campus about a school administrator."[126]

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120 *Id.*

121 *Id.* The phrase "hit list" appeared nowhere on the website. *Id.*

122 *Id.* The emergency expulsion was subsequently reduced to five days. *Id.*

123 *Id.* at 1090. Interestingly, the court could have analyzed this case under *Kuhlmeier* because the website's title, "Unofficial Kentlake High Home Page," could "reasonably [be] perceive[d] to bear the imprimatur of the school." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

124 *Emmett*, 92 F. Supp. 2d at 1090.

125 David Hudson, *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 MICH. ST. L. REV. 199, 221 (2000).

126 *Id.*

Aaron Caplan represented Emmett as a staff attorney for the American Civil Liberties Union of Washington.[127] He argued that schools lack jurisdiction to enforce off-campus behavior for the same reason that "[j]udges would never find speakers in summary contempt of court for disrespectful statements made outside the courtroom."[128] He further notes that "Internet technology is not unique in its ability to penetrate school walls"[129] and offers the following hypothetical situation:

> Imagine a student who writes a letter to the editor of the local newspaper, criticizing the principal in language sufficiently vulgar to justify punishment under [*Bethel v. Fraser*] if the letter had been read aloud at a school assembly. The school could not punish the student for expressing her views in the free press. This would be true even if the school library subscribes to the paper, the student knows about the subscription, and she tells friends where to find it in the school library's copy.[130]

Caplan concludes that "[t]he mere ability to access texts, sounds, or images from within a school does not transform them into on-campus speech."[131]

Professor Mary-Rose Papandrea identifies five justifications used to permit schools to restrict student-speech rights and argues that none of them logically extend to restricting student digital media.[132] The rationale used most frequently by courts is what Papandrea calls "the so-called 'special characteristics' of the elementary and secondary school environment."[133] Courts should defer to school administrators because "[t]he educational process

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127 Caplan, *supra* note 20, at 93 n.*.

128 *Id.* at 143.

129 *Id.* at 158.

130 *Id.*

131 *Id.* at 159.

132 Papandrea, *supra* note 64, at 38.

133 *Id.* at 45 ("[T]he Court has . . . tended to rest its student-speech decisions on the so-called 'special characteristics' of the elementary and secondary school environment.").

requires quiet and order, and school officials . . . generally have to make quick decisions about what to tolerate and what to condemn."[134] She argues that this justification has "little traction outside of the classroom setting."[135] She further notes that "[g]iving broad deference to school officials to punish student speech in the digital media would be tantamount to granting them authority to censor the speech of adolescents generally."[136]

In *Killion v. Franklin Regional School District*,[137] the court dealt not with a student website, but rather with a controversial e-mail that circulated around the school.[138] Plaintiff Zachariah Paul compiled an offensive "Top Ten" list about the school athletic director, Robert Bozzuto.[139] Paul composed the list "while at home after school hours" and e-mailed it to his friends "from his home computer."[140] Weeks later, copies of the "Bozzuto Top Ten list" were found in the teachers' lounge.[141] The school suspended Paul for ten days on grounds that "the list contained offensive remarks about a school official, was found on school grounds, and that Paul admitted creating the list."[142]

Plaintiffs argued "that a heightened standard applies because the speech at issue occurred off school grounds."[143] The court responded that it "need not resolve [t]his issue [because] [t]he overwhelming weight of authority has analyzed school speech (*whether on or off campus*) in accordance with *Tinker*."[144] This statement is as striking as it is inaccurate. As demonstrated above,

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134 *Id.*

135 *Id.* at 46.

136 *Id.*

137 Killion v. Franklin Regional Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001).

138 *Id.* at 448.

139 *Id.* The list contained derogatory references to Bozzuto's appearance and the size of his genitals. *Id.*

140 *Id.*

141 *Id.* at 448–49. The court noted that the e-mail was not distributed by Paul, but rather by another "undisclosed" student. *Id.* at 449.

142 *Id.*

143 *Id.* at 455.

144 *Id.* (emphasis added).

the *Klein* and *Thomas* courts both declined to apply *Tinker* because the speech at issue was off-campus.[145] The dicta in *Bystrom* stressed that the school's discipline was constitutional only because the newspaper was distributed on campus.[146] In *Emmett*, the court similarly refused to apply *Tinker* or *Kuhlmeier* because the website at issue was sufficiently distinct from school activity.[147] *Beussink* is the only case that applied *Tinker* even while stressing the off-campus nature of the speech at issue. Yet, its authority is not overwhelming by any measure. Perhaps the court's sweeping statement may be better understood in light of its holding that Paul's suspension was indeed unconstitutional because the school did not satisfy *Tinker*'s substantial disruption test.[148] The court added that the fact that the list was brought on campus, even though it was not brought by Paul, was further reason to apply *Tinker*.[149]

Of all the online student speech cases, *J.S. ex rel H.S. v. Bethlehem Area School District* provides the most extensive and detailed analysis of legal issues involved in disciplining students for speech originating off-campus.[150] Justin Swidler, referred to by the court as J.S.,[151] was an eighth grade student at Nitschmann Middle School.[152] He created a website entitled "Teacher Sux."[153] The site was made on his home computer and on his own time, not part of a school project or sponsored by the School District.[154] On the site, J.S. "made derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher, Mrs.

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145 *See supra* text accompanying notes 69–84.

146 *See supra* text accompanying notes 86–90.

147 *See supra* text accompanying notes 119–24.

148 *Killion*, 136 F. Supp. 2d at 455. Had the court wished to rule against the plaintiffs, one would expect a more nuanced discussion of the relevant case law.

149 *Id.*

150 Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 246–50.

151 *See id.* at 247 (referring to J.S. by his full name).

152 *J.S.*, 807 A.2d at 850.

153 *Id.* at 851.

154 *Id.* at 850.

Kathleen Fulmer and Nitschmann Middle School principal, Mr. A. Thomas Kartsotis."[155] The legally-minded middle schooler placed a disclaimer at the outset.[156] By entering the site, the visitor agreed that he or she was not a school staff member and that he or she would not tell any employees of the school about the site.[157]

The court discussed in great detail the many derogatory and profanity-laced references to teachers.[158] "The most striking web page," the court observed, regarded J.S.'s algebra teacher, Mrs. Fulmer.[159] The page's caption read, "Why Should She Die?" and directed the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman."[160] Students, faculty, and administrators eventually viewed the site and reported it to Principal Kartsotis.[161] The principal believed the threats to be serious and proceeded to contact police authorities and the Federal Bureau of Investigation.[162] Mrs. Fulmer testified that, as a result of viewing the website, she "suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well being."[163] Additionally, the website "had a demoralizing impact on the school community."[164] At the end of the school year, the School District sent a letter to J.S. and his parents, informing them that J.S. would be suspended.[165] The letter cited

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155 *Id.* at 851.

156 *Id.*

157 *Id.* at 851. Despite J.S.'s intentions, the disclaimer did not prevent access to the site, which was not password protected. *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 851–52. The court noted that J.S. had told other students about it. *Id.* at 852.

162 *Id.* at 852. The police confirmed the identity of J.S. but declined to file criminal charges. *Id.*

163 *Id.* Mrs. Fulmer was prescribed anti-anxiety and anti-depression medication and was unable to finish the school year. *Id.*

164 *Id.* Principal Kartsotis testified that the website's effect "was comparable to the death of a student or staff member." *Id.*

165 *Id.* The suspension was originally three days and then extended to ten days. Shortly thereafter, the school began expulsion proceedings. *Id.* By the time expulsions hearings were conducted, J.S.'s parents had enrolled him in another school. *Id.* at 853.

"threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal."[166]

The court first considered the School District's argument that J.S.'s statements constituted a "true threat," and thus would be unprotected even outside a school setting.[167] The court rejected this argument, finding that "the web site . . . was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm."[168]

Turning to a discussion of the seminal school free speech cases, the court noted that the school setting is sui generis.[169] Its "awesome charge" is to balance the constitutional rights of the student with the preservation of order and a proper educational environment.[170] The court recognized that applying the traditional doctrine to the Internet is far more complicated. "First, a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?"[171] It is this "threshold issue" that is at the core of all the cases discussed in this section.[172]

The court found that there was "a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[173] One can discern three distinct facts that the court considered in its discussion: (1) J.S. "facilitated the on-campus nature of the speech" by accessing the website at school and showing it to fellow students;[174] (2) the website targeted a school

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166 *Id.* at 852.
167 *Id.* at 856.
168 *Id.* at 859.
169 *Id.* at 855.
170 *Id.*
171 *Id.* at 864 ("*Tinker*'s simple armband . . . has been replaced by J.S.'s complex multimedia web site, accessible to fellow students, teachers, and the world.").
172 *Id.*
173 *Id.* at 865.
174 *Id.*

audience;[175] and (3) since the algebra teacher and principal were featured prominently on the site, "it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property."[176] The court summarized its holding as follows: "[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."[177] Having established that J.S.'s speech occurred on-campus for First Amendment purposes, the court then applied the traditional free-speech cases.[178] It concluded that "the web site created disorder and significantly and adversely impacted the delivery of instruction."[179] The school successfully demonstrated that the site "created an actual and substantial interference with the work of the school" to satisfy the Supreme Court standard under *Tinker*.[180]

Professor Clay Calvert argues that the *J.S.* court's application of *Tinker* is too broad.[181] Suppose a student's mother creates a website similar to the one created by J.S.:

> The site does not make any true threats of violence, but rather calls the teachers, among other things, "morons" who "clearly have no clue about teaching." The site includes photographs of certain teachers morphing into Adolph Hitler. The page, in other words, is very similar to some of the Web sites created today by minors off campus that attack school personnel.

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175 *Id*. *Compare id. with* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control.").

176 *J.S.*, 807 A.2d at 865.

177 *Id*.

178 *Id.* at 865–69.

179 *Id.* at 869.

180 *Id.*

181 Calvert, *supra* note 150, at 280–82.

> . . . .
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> Would the school be able to punish the mother for her speech? The answer, of course, is no.[182]

Calvert argues that just because the student spends a large part of his day on school grounds while his mother does not, should not afford schools additional jurisdiction.[183]

The *J.S.* decision should be considered side-by-side with *Layshock*, a case that applied a similar analysis but arrived at a different conclusion.[184] Plaintiff Justin Layshock created a parody profile of his high school principal, Eric Trosch,[185] using the website MySpace.[186] As the court explained, "MySpace has a template for user profiles, which allows website users to fill in background information and include answers to specific questions."[187] Layshock answered the questions, impersonating Principal Trosch.[188] The profile contained "nonsensical answers to silly questions" and "crude juvenile language."[189] When the profile was discovered, the school administrators unsuccessfully sought to block access to the site.[190] They also directed teachers to not permit students to use computers in the classroom.[191] After an informal hearing, Layshock was suspended for ten days.

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182 *Id.* at 281.

183 *Id.*

184 *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007), *appeal denied*, 2007 WL 3120192 (W.D. Pa. Oct. 23, 2007).

185 *Id.* at 591.

186 MySpace, http://myspace.com. The court described it as "a very popular Internet site where users can share photos, journals, personal interests, and the like with other users of the Internet." *Layshock*, 496 F. Supp. 2d at 591.

187 *Layshock*, 496 F. Supp. 2d at 591.

188 *Id.*

189 *Id.* At some later point, three other unflattering profiles of the principal appeared on MySpace, and the school admitted that it could not directly attribute which profile caused the cited disruption. *Id.* at 591, 593. Layshock, though, did admit to creating one MySpace profile. *Id.* at 591.

190 *Id.* at 592.

191 School officials then contacted MySpace directly and the profiles were disabled. *Id.*

The court observed that the profile was created outside of school and not during school hours.[192] Layshock, however, "engaged in some limited conduct related to the profile while in school," such as accessing the profile and showing it to classmates.[193] There was also evidence that it was viewed by other students in school, which caused disruption.[194] The school's technology coordinator testified that he "spent approximately 25% of his time that week on issues related to the profiles."[195]

Following *J.S.*, the court first addressed the difficult "threshold issue" of whether Layshock's speech occurred on campus.[196] "The mere fact that the [I]nternet may be accessed at school," the court reasoned, "does not authorize school officials to become censors of the world-wide web."[197] The court quoted approvingly from *Thomas*, noting that when "school officials venture[] out of the school yard and into the general community . . . their actions must be evaluated by the principles that bind government officials in the public arena."[198] The court noted, however, that *Thomas* did not address the scenario of students causing "substantial disruption" within the school by actions originating outside the school.[199] And this was the scenario at issue here.

The court then turned to the lengthy discussion of *J.S.*, which it acknowledged as "an analogous case."[200] Although it considered the case on point, it "respectfully reach[ed] a slightly different

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192 *Id.* at 591. Although the court stated that "[n]o school resources were used to create the profile," Layshock did use a photograph of Trosch that he copied from the school's website. *Id.*

193 *Id.* at 591.

194 *Id.* at 592. A teacher testified that he "observed students congregating and giggling in his computer lab class," while looking at Layshock's profile. *Id.*

195 *Id.* at 593.

196 *Id.* at 597.

197 *Id.* The court stressed that schools must share their supervisory responsibilities with "families, churches, community organizations and the judicial system." *Id.*

198 *Id.* at 598.

199 *Id.*

200 *Id.* at 601–02.

balance between student expression and school authority."[201] The school failed to "establish[] a sufficient nexus between Justin [Layshock]'s speech and a substantial disruption of the school environment."[202] The relationship between the off-campus conduct and any disruption in school was too attenuated for application of the *Tinker* test.[203]

It is important to recognize one analytical difference between *J.S.* and *Layshock*. *J.S.*'s "sufficient nexus" was between the off-campus activity and the school.[204] In *Layshock*, it was between the off-campus activity and the disruption.[205] This difference will be addressed in a later section.

Wisniewski v. Board of Education of Weedsport Central School District[206] involved another eighth grader, Aaron Wisniewski, who created an offensive America Online ("AOL") Instant Messenger ("IM") "buddy icon."[207] The icon featured "a small drawing of a pistol firing a bullet at a person's head."[208] Beneath it appeared the words "Kill Mr. VanderMolen," the student's English teacher.[209] "Aaron sent IM messages displaying the icon to some 15 members of his IM 'buddy list.'"[210] The icon could be viewed by members of Wisniewski's buddy list, some of whom were students at the school, for three weeks.[211] During that time, another student informed VanderMolen of the offending icon, who

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201 *Id.* at 602.

202 *Id.* at 600. Note the similar phraseology used in *J.S. ex. rel. H.S. v. Bethlehem Area School District*, 807 A.2d 847, 865 (Pa. 2002). *See supra* note 174 and accompanying text.

203 *Layshock*, 496 F. Supp. 2d at 600.

204 *J.S.*, 807 A.2d at 851.

205 *Layshock*, 496 F. Supp. 2d at 600.

206 Wisniewski v. Bd. of Ed. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

207 *Id.* at 35–36. The court explained that a user's buddy icon, or "IM icon," is on display whenever the user sends or receives an instant message. *Id.*

208 *Id.* at 36.

209 *Id.*

210 *Id.*

211 *Id.*

in turn forwarded it to the principal.[212] Aaron was suspended for five days.[213]

The Second Circuit conceded that "some courts have assessed a student's statements concerning the killing of a school official . . . against the true 'threat' standard of *Watts*."[214] In this case, however, the court wished to go further. "School officials," it stated, "have significantly broader authority to sanction student speech than the *Watts* standard allows."[215] The *Tinker* standard applied here.[216] As to the issue of Aaron's off-campus conduct, the court said the following: "The fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."[217] Citing the hypothetical scenario envisioned by the same court in *Thomas*,[218] the court recognized that "off-campus conduct can create a foreseeable risk of substantial disruption within a school."[219] It found that indeed "it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot."[220]

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[212] *Id.*

[213] *Id.* The principal informed local police but an investigator concluded "that the icon was meant as a joke" and that "Aaron posed no real threat to VanderMolen." *Id.* Pending criminal charges were dropped. *Id.*

[214] *Id.* at 38; *see* Watts v. United States, 394 U.S. 705, 708 (1969) (holding that speech constituting a "true 'threat'" is unprotected by the First Amendment).

[215] *Wisniewski*, 494 F.3d at 38.

[216] *Id.*; *see also supra* Part I.A.

[217] *Wisniewski*, 494 F.3d at 39.

[218] Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incite substantial disruption within the school from some remote locale.").

[219] *Wisniewski*, 494 F.3d at 39.

[220] *Id.* The panel was divided as to whether the test is reasonable foreseeability or whether it is sufficient that, on the undisputed facts here, the icon reached school grounds. *Id.* For an application of *Wisniewski*, see *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

III. DISCUSSION

A. The Case for a "Sufficient Nexus" Standard

This section argues that that the *J.S.* and *Layshock* Courts offer the appropriate balance between free speech protection and "the special characteristics of the school environment."[221] The court in *Emmett*, declining to apply *Tinker* because the speech occurred without school supervision, fails to provide schools with adequate tools for disciplining truly materially and disruptive behavior. The *Wisniewski* Court's reasonable foreseeability test went too far in the other direction and would effectively subject all student online speech to the *Tinker* test. Any website, blog, Facebook or MySpace page, and even an e-mail can foreseeably be accessed on school grounds.

The United States Supreme Court may have avoided weighing in on the standard for what constitutes on-campus speech for First Amendment purposes. It has, however, been generous in explaining why student speech may be regulated more strictly than speech generally. In this area, the Court's dicta in its seminal student-speech cases may shed light on this difficult and thorny issue. In *Tinker*, the Court stated that student conduct that "materially disrupts classwork or involves substantial disorder" is not protected.[222] The First Amendment, the Court explained, must be applied "in light of the special characteristics of the school environment."[223] In *Fraser*, the Court elaborated further: schools may impart fundamental values that are "essential to a democratic society."[224] Student conduct that undermines a school's ability to conduct its legitimate function is problematic and may therefore be regulated under certain circumstances.[225] It is true that these

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

222 *Id.* at 513.

223 *Id.* at 506.

224 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

225 *See id.*

statements are dicta but they reflect the values underlying the Court's various modes of analysis.

Let us step back momentarily and ask why student speech should be subject to censorship at all; the Court answers in a clear voice. Schools have a state-recognized task, and conduct that fundamentally undermines that task is subject to a stricter level of scrutiny than the First Amendment generally permits. Some courts and commentators assume that the student speech restrictions stem from the special characteristics of the physical school grounds.[226] Based on the Supreme Court's characterization of public education in developing its doctrine, however, it appears that the special standard used to analyze student speech stems from the school's unique educational role. The question before courts in student online speech cases, then, is not whether to extend school authority to censor student speech beyond the school grounds, but whether it makes sense to limit that authority to the physical school grounds in the first place.

The facts of *J.S.* suggest the strongest argument for its approach. There, a middle-school student's off-campus activity indeed caused substantial and material disruption on campus. Had J.S.'s medium been the kind of underground newspaper at issue in *Thomas* and *Bystrom*, *Tinker* would apply when the newspaper was brought on campus. But here, J.S.'s speech was brought on campus by the very nature of its medium. The Internet made it immediately accessible from school computers and personal computers using school-supplied Internet access. The court, in struggling with this fact, articulated a standard that would allow the school to restrict speech like J.S.'s while still protecting speech that truly has nothing to do with school.

Calvert's argument that the *J.S.* Court's analysis would, if carried to its logical conclusion, punish the parent of a student who creates a similar website is flawed. It fails to appreciate that, even if a student is punished for off-campus behavior, the disciplinary

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226 *See supra* Part III.B.

measures available to the school are limited to school property. The school cannot punish a student *qua* citizen for any speech under *Tinker*! It may only punish him *qua* student, i.e. by suspension, denial of school privileges, etc. If a student can be punished only in his capacity as a student, then it is perfectly reasonable that the school cannot extend punishment to his mother, even for the identical speech.

The *Emmett* court's approach, advocated by Hudson and Caplan, fails to adequately address the dilemma faced by Nitschmann Middle School. The damage caused by J.S.'s website demonstrates that Internet speech is different than an off-campus conversation among classmates in a fundamental way. An off-campus conversation is not instantaneously broadcast inside the school walls. A more apt metaphor for Internet speech is an off-campus conversation in which all students, teachers, and administrators, are invited to listen simply by visiting a website. Internet speech is not private speech the way that a conversation between schoolmates is and, thus, should not be treated similarly under the law.

Suppose a student makes a statement off-campus, in a conversation with a friend, that would be subject to discipline had it been uttered in the school cafeteria. The school rightly may not take action even if the controversial statement is discussed and repeated by others in school. If the student, though, repeated his statement in school and it caused material and substantial disruption, he or she would be subject to discipline. Online speech is analogous, not to a conversation between friends off-campus, but rather to a student repeating his statement in school. The website itself, which may be viewed by others on school property, is the original speech. When others access it at the school library, it is as though the student is speaking repeatedly. Indeed, this is one of the major attractions of expressing oneself online. It allows one's words and images to be viewed in their original format by a wide audience.

In this light, Professor Papandrea's notion of what constitutes the classroom setting is overly narrow. It fails to appreciate that speech originating off-campus, such as Internet speech, can disrupt

the order and discipline required of the classroom setting. She correctly points out that "digital speech is generally nowhere and everywhere at the same time."[227] To a large extent, then, limiting school authority to speech uttered within schools, as Papandrea urges,[228] is somewhat arbitrary. In today's wired culture, digital speech is equally capable of causing disruption.

The argument that the deference afforded to schools by *J.S.* and *Layshock* is "tantamount to granting them authority to censor the speech of adolescents generally"[229] is aimed at the wrong target. Obviously, expanding the boundaries of the school effectively allows for greater censorship. However, the school boundaries should not be determined by *how much* censorship is too much, but rather by what justifies that censorship. Online speech is sufficiently similar to speech taking place physically on-campus to warrant an analogous treatment under the law. If the fear is that juvenile speech is not sufficiently protected, the response should be to alter how *Tinker* and *Fraser* are applied. It is *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* that restrict student speech, not *J.S.* and *Layshock*. In the Internet Age, it seems increasingly arbitrary to grant schools authority to regulate certain speech but only if it physically occurs on campus.

Caplan's analogy to a judge finding somebody in contempt of court for offensive statements made outside the courtroom is imprecise.[230] Judges and schools regulate certain speech for fundamentally different reasons. In a courtroom it is indeed the physical location of the offending speech that warrants contempt. The same speech outside of court, no matter how offensive and inappropriate, could not have the same effect as the speech uttered ten feet before the judge. Regarding student Internet speech, this is simply not the case. Once again, consider the facts of *J.S.*

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227 Papandrea, *supra* note 64.

228 *Id.* at 47 ("[C]ourts should continue to declare that speech that lacks any sort of *physical* connection to the school should fall outside of its jurisdiction.") (emphasis added).

229 *Id.* at 46.

230 Caplan, *supra* note 20, at 143; *supra* text accompanying note 128.

Caplan's and Papandrea's insistence on limiting *Tinker* to speech physically uttered on school grounds would render schools impotent to deal with students like J.S. It is not difficult to imagine how students like J.S. could cause substantial and material disruption in school without uttering a word on school property. Suppose a tenth-grade student creates a website supporting his candidacy for school-wide office. On the site, he trashes his opponents with racist, anti-gay, anti-Semitic rhetoric. So long as he falls short of *Watts*'s "true threat" standard, according to Caplan, Papandrea, and *Emmett*, the school can do nothing to discipline him even if his vile remarks cause heated outbursts during class or worse, minority students to stay home out of fear.

B. A Suggested Analysis

The *J.S.* court considered three factors in determining whether the speech at issue was on-campus for purposes of applying *Tinker*: (1) whether J.S. accessed the site at school; (2) whether the site targeted a school audience; and (3) whether it was inevitable that the site would be circulated on school grounds.[231] J.S.'s website was about school, it was directed at his fellow students, and it was bound to end up on-campus. That, the court properly reasoned, is on-campus speech.

Layshock's discussion of a sufficient nexus between the online activity and the substantial and material disruption adds an important, albeit subtle, wrinkle to *J.S.*'s test. When speech physically occurs on campus, it is subject to *Tinker* and *Fraser*. According to *J.S.*, when online speech is sufficiently directed toward school, it may be considered on-campus speech.[232] *Layshock* adds an additional requirement.[233] When online speech is rendered on-campus by a sufficient nexus between it and the

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[231] J.S. *ex. rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002). Note the difference between *J.S.*'s inevitability and *Wisniewski*'s foreseeability. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

[232] *See J.S.*, 807 A.2d at 865.

[233] *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d at 597.

school, the entire online speech is not, *ipso facto*, subject to on-campus speech standards. The specific aspect of the speech that is linked to the material and substantial disruption must be sufficiently directed towards the school. Consider a student website that parodies the school gym teacher. Suppose, in the course of his parody, the student makes racist remarks, which in turn cause the kind of substantial disruption that could be regulated under *Tinker*. To discipline this student, the school would be required to demonstrate a sufficient nexus between his or her on-campus speech, i.e., the parody, and the disruption. Indeed, if the racist remarks are part of the parody, then the school would probably meet this burden. However, the court should be careful not to render an entire website on-campus speech merely because of one aspect. A student who writes one blog entry about the school baseball team should not be disciplined when he expresses admiration for Adolf Hitler in another. *Layshock* requires the school wishing to discipline the student to demonstrate a sufficient nexus between the on-campus nature of the speech and the alleged disruption.[234] Both *J.S.* and *Layshock's* tests are necessary to appropriately balance students' First Amendment rights with the unique requirements of the school setting.

It is not entirely clear that the *Layshock* Court consciously adjusted *J.S.*'s test in this way. It certainly did not do so explicitly. However, the purpose here is not to analyze these cases for their own sake, but rather with an eye toward developing a legal standard for online student speech. Based on this Note's author's reading of both *J.S.* and *Layshock*, the following analysis is suggested. First, courts should consider (a) whether the website in question was created or accessed by the author at school; and (b) whether the author encouraged fellow students to view the site. A student who makes no effort to disseminate his or her speech at school or among fellow students should not be held to student-

234 *Id.* at 599.

speech standards regarding First Amendment protection.[235] Second, the speech must target a school audience. Third, the particular speech to be analyzed under *Tinker* or *Fraser* must itself meet the first two requirements.

CONCLUSION

There is a clear tension between wanting to promote freedom of expression in schools and maintaining the discipline required for their educational responsibilities. A standard that properly balances students' rights with the unique setting of the school is required. In arguing for the analysis used in *J.S.* and *Layshock*, this Note's author does not purport to provide courts with a comprehensive standard with which to tackle the First Amendment issues in student online speech cases. Like any legal standard in constitutional law, the nuances must be ironed out over time as courts have the opportunity to consider a wide variety of factual circumstances. Rather, this Note's suggested analysis is offered as a starting place.

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[235] This incorporates *J.S.*'s discussion of whether the site would inevitably end up on campus. *See J.S.*, 807 A.2d at 865. It should be within a student's control to withhold his or her speech from school.