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## Tinker Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech

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## **Cover Page Footnote**

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# *Tinker* Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech

Benjamin A. Holden\*

*Tinker v. Des Moines Independent Community School District, the seminal school speech case interpreting the First Amendment to the U.S. Constitution, was decided by the U.S. Supreme Court long before mobile devices and social media upended accepted norms governing how students behave at school. The new reality has brought with it new line-drawing challenges for public schools faced with the warring requirements of school discipline on the one hand, and the First Amendment on the other. The threshold unanswered question this Article presents is whether Tinker should give jurisdiction to public schools over student speech which originates off campus. But the more difficult task is this: Assuming Tinker does apply to off-campus speech, what legal test ought to govern, in light of the patchwork of inconsistent rules the federal courts employ. Building toward a novel theory to answer this question, this Article first summarizes the precedents delineating speech rights of students at public schools; then outlines the federal circuit conflict arising out of the off-campus student speech cases in the absence of Supreme Court guidance; and finally, proposes a new rule for when and how Tinker should be extended to off-campus speech, including cyberbullying.*

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## INTRODUCTION

The U.S. Supreme Court since October 2011 has at least four times denied certiorari in cases implicating the question: Can public primary and secondary schools<sup>1</sup> exert disciplinary authority

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<sup>1</sup> This Article does not address the applicability of the student speech/First Amendment Supreme Court cases discussed below to college students, a question the Supreme Court expressly left unanswered in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988) (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”). Therefore, the student speech precedents this Article discusses are presumed applicable only to primary and secondary schools. Note, however, that great conflict exists among the federal circuit courts, as well as among state courts, on whether *Hazelwood* is applicable in a college setting. See *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016) (denying First Amendment protection to a nursing student, and upholding administrators’ decision to require that students comply with professional fitness standards on or off campus); *O’Brien v. Welty*, 818 F.3d 920, 932–33 (9th Cir. 2016) (finding a colorable First Amendment claim brought by a university student-plaintiff, while expressly noting that the U.S. Court of Appeals for the Ninth Circuit distinguished *Hazelwood* in *Oyama v. University of Hawaii*, 813 F.3d 850 (9th Cir. 2015), and has declined to extend the pedagogical concerns analysis to university setting); *Oyama*, 813 F.3d at 856, 862, 868–74 (involving hybrid student-employee, wherein the U.S. Court of Appeals for the Ninth Circuit focused on the *Hazelwood* “imprimatur” of the school factor, discussed below, to find the student seeking professional certification failed to qualify for First Amendment protection where student’s stated views rendered him unfit to receive such certification on professional grounds); *Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012) (“Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one.”); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875–76 (11th Cir. 2011) (applying *Hazelwood* in a university setting); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285, 1289–93 (10th Cir. 2004) (rejecting a student’s First Amendment claim based on compelled use of expletives in acting class and holding that such speech “constitutes ‘school-sponsored speech’ and is thus governed by *Hazelwood*”); *Student Gov’t Ass’n v. Bd. of Trs.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“*Hazelwood* . . . is not applicable to college newspapers.”); see also *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007) (analyzing the First Amendment claims of a public college student who was also an employee of that college and noting: “The fact that the state could have attempted to assert its authority over Watts as a student, subject to the *Tinker* restrictions, does not prevent [the state] from asserting authority over him as an employee . . . .”); *Brown v. Li*, 308 F.3d 939, 943, 952 (9th Cir. 2002) (ruling that a graduate student who included foul, offensive language aimed at faculty in his thesis paper was not protected by the First Amendment); *Yeasin v. Univ. of Kan.*, 360 P.3d 423, 424 (Kan. Ct. App. 2015) (ruling that the University of Kansas had no authority to expel a student who made

consistent with the First Amendment over student cyberspeech<sup>2</sup> that: (1) originated off-campus, (2) made its way onto campus, and (3) at the time it was communicated, raised a reasonably foreseeable risk of material school disruption or interference with the learning of other students?<sup>3</sup> This Article suggests an answer to

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threatening remarks on Twitter); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 518 (Minn. 2012) (ruling that a mortuary science student who posted offensive material on Facebook was protected by the First Amendment, because considering Facebook posts to be of legitimate pedagogical concern would give Universities “wide-ranging authority to constrain offensive or controversial Internet activity”). *But see* Frank D. LoMonte, “*The Key Word Is Student*”: *Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 *FIRST AMEND. L. REV.* 305, 341 (2013); Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 *VT. L. REV.* 413, 423 (2012) (“[O]n a sliding scale, the speech restrictions allowed by universities fall somewhere between the stricter restrictions allowed by high schools and the significantly lighter restrictions allowed on the community at large.”).

<sup>2</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). Cyberspeech for purposes of this Article is speech emailed, texted, posted, tweeted, or otherwise communicated to a social media website such as Facebook, to a hosted or unhosted “chat room,” to the comment section of a news or information website, or directly to third parties via computer, cellular phone, iPad, game console, or other electronic communication device. This Article has constructed a composite definition of cyberspeech based on the many varying definitions and related cyberbullying concepts reviewed. The definition adopted here relies, in part, upon CORINNE DAVID-FERDON & MARCI FELDMAN HERTZ, U.S. DEP’T OF HEALTH & HUMAN SERVS., *ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR RESEARCHERS* 3 (2009), [http://www.cdc.gov/violenceprevention/pdf/electronic\\_aggression\\_researcher\\_brief-a.pdf](http://www.cdc.gov/violenceprevention/pdf/electronic_aggression_researcher_brief-a.pdf) [<https://perma.cc/GGX6-UMLM>] (employing the term “electronic aggression” rather than cyberbullying or cyberspeech); see also *For Teens & Tweens: Cyberbullying*, MONT. DEP’T OF JUSTICE, <https://dojmt.gov/safeinyourspace/for-teens-tweens-cyberbullying/> [<https://perma.cc/A8ZE-J3XV>] (last visited Jan. 10, 2018).

<sup>3</sup> See *Petition for a Writ of Certiorari*, *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016) (No. 15-666), 2015 WL 7299351, at \*i; *Petition for a Writ of Certiorari*, *Kowalski v. Berkeley Cty. Schs.*, 565 U.S. 1173 (2012) (No. 11-461), 2011 WL 4874091, at \*i; *Petition for a Writ of Certiorari*, *Blue Mountain Sch. Dist. v. Snyder*, 565 U.S. 1156 (2012) (No. 11-502), 2011 WL 5014761, at \*i; *Petition for a Writ of Certiorari*, *Doninger v. Niehoff*, 565 U.S. 976 (2011) (No. 11-113), 2011 WL 3151990, at \*i; see also *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (noting that the Supreme Court has not clearly opined on the authority of schools to regulate student off-campus speech), *cert. denied*, 565 U.S. 1156 (2012) (consolidating *Snyder* with *Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011), whereby the *Snyder-Layshock* single denial of certiorari might technically be considered denial on two cases, bringing total certiorari denials on

this pressing question, based on an analysis of the leading federal cases involving off-campus speech impacting the school environment, which increasingly involve cyberbullying. Scholars and public policy experts have posited various definitions of cyberbullying. Like traditional bullying, cyberbullying has been described as “intentional aggressive behavior . . . repeatedly [directed at] the same target.”<sup>4</sup> The Center for Disease Control and Prevention further characterized this form of “electronic aggression” as an “emerging public health problem.”<sup>5</sup> This Article adopts the plain-language definition scholars Sameer Hinduja and Justin W. Patchin use: cyberbullying is “willful and repeated harm inflicted through the use of computers, cell phones, or other electronic devices.”<sup>6</sup>

The issue was so new and unsettled that as of mid-July 2011, the federal circuit level courts had decided only four cases on the matter,<sup>7</sup> followed quickly by another in late July<sup>8</sup> and one on August 1st<sup>9</sup> of that year. Since then, just three additional federal appeals court decisions have addressed this issue.<sup>10</sup> The circuit

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cyberbullying since October 2011 to five); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), cert. denied, 565 U.S. 976 (2011); ARTHUR S. HAYES, *MASS MEDIA LAW: THE PRINTING PRESS TO THE INTERNET* 49 (2013) (noting the U.S. Supreme Court’s repeated declining of certiorari on this issue, “leaving school administrations to look to their state or federal district or appeals courts for guidance”).

<sup>4</sup> Raúl Navarro et al., *The Impact of Cyberbullying and Social Bullying on Optimism, Global and School-Related Happiness and Life Satisfaction Among [Ten to Twelve]-Year-Old Schoolchildren*, 10 APPLIED RES. QUALITY LIFE 15, 16 (2015).

<sup>5</sup> DAVID-FERDON & HERTZ, *supra* note 2, at 4 (asserting that, in short, this is “probably” an emerging problem, but that this question cannot be answered definitively and warrants further research).

<sup>6</sup> Sameer Hinduja & Justin W. Patchin, *Social Influences on Cyberbullying Behaviors Among Middle and High School Students*, 42 J. YOUTH ADOLESCENCE 711, 711 (2013).

<sup>7</sup> See Samuel Butler, IV, *The Summer of Clarity: What the Summer of 2011 Says About Student Speech Rights*, 22 KAN. J.L. & PUB. POL’Y 83, 84 (2012); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 592 n.3 (2011) (listing *Snyder*, *Layshock*, *Doninger*, and *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007), which are all discussed later in this Article). Waldman is cited in the leading off-campus speech case, *Snyder*, 650 F.3d at 942, 947.

<sup>8</sup> See *Kowalski*, 652 F.3d at 565–67. This case is discussed further in Section IV.D.

<sup>9</sup> See *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. # 60*, 647 F.3d 754, 754, 756–57 (8th Cir. 2011). This case is discussed further in Section IV.H.

<sup>10</sup> See *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064–65 (9th Cir. 2013); *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 773–74 (8th Cir.



courts are greatly conflicted in their treatment of student speakers, and the federal courts' application of the First Amendment to legally indistinguishable fact patterns often seems arbitrary. The U.S. Court of Appeals for the Third Circuit protects an eighth grader's right to craft a fake MySpace page to tell dozens of her classmates that her married principal is a bisexual sex addict with a small penis, whose child looks like a gorilla, and whose wife looks like a man.<sup>11</sup> But in the U.S. Court of Appeals for the Second Circuit, the First Amendment provides no relief for a high school senior class secretary candidate whose online blog refers to school administrators as "douchebags" for cancelling a school concert she helped plan.<sup>12</sup> Both decisions, and others discussed below, purport to apply *Tinker v. Des Moines Independent Community School District's* "material disruption" test<sup>13</sup> to off-campus student speech, but the approaches and results vary widely.<sup>14</sup> Reconciling these, and similar decisions, is impossible without a single, modern test that the courts can easily understand and apply.

This Article's purpose is to construct and apply such a test, which would be applicable only to disruptive off-campus speech *targeting students*.<sup>15</sup> The Supreme Court has been willing to restrict otherwise protected speech and expression to protect minors where such restrictions would clearly violate the First Amendment if those restrictions were aimed at the protection of adults.<sup>16</sup> The federal cases examining off-campus speech, while inconsistent in their reasoning, generally evince a greater willingness to relax First Amendment protections where the victim

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2012). Both these cases are discussed later in the Article; *see also* *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391, 393 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016).

<sup>11</sup> *See Snyder*, 650 F.3d at 920–21.

<sup>12</sup> *See Doninger v. Niehoff*, 642 F.3d 334, 339–40, 350–51 (2d Cir. 2011), *cert. denied*, 565 U.S. 976 (2011).

<sup>13</sup> *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

<sup>14</sup> *See infra* Part IV.

<sup>15</sup> *Cf. Ginsberg v. New York*, 390 U.S. 629, 636–39 (1968) (upholding a law that punishes adults for selling "girlie" magazines to minors, despite the challenge that such non-obscene materials enjoy First Amendment protection if sold to adults); *Prince v. Massachusetts*, 321 U.S. 158, 162–64, 170 (1944) (holding a child labor law banning street sales of religious publications by minor children did not violate the First Amendment).

<sup>16</sup> *See Ginsberg*, 390 U.S. at 636, 638; *Prince*, 321 U.S. at 166.

of the off-campus speech is a minor student.<sup>17</sup> This legal issue is particularly timely because of the explosion in the use of electronic communication devices and social media networks—and the attendant increase in cyberbullying—by students. These devices and networks do not respect or even acknowledge traditional physical schoolhouse boundaries, leaving government-run schools to apply rules of campus speech which never contemplated the new cyberspace reality.

The proposed new standard is a modern refinement of the seminal *Tinker* test, but with greater clarity in the age of the Internet. It should improve notice and predictability for students, teachers, parents, principals, and administrators as to what kinds of internet-based communications they can validly target and punish.

This Article is organized as follows: it first examines the foundational framework of Supreme Court cases where the student is speaking or expressing herself in school—the student speech cases.<sup>18</sup> Second, it reviews and summarizes each federal circuit’s leading cases on off-campus speech,<sup>19</sup> emphasizing the cyberbully cases. Third, this Article introduces and makes the argument for a uniform national standard, borrowing from the leading federal circuit opinions that offer guidance toward an emerging best-practice judicial trend. This trend is captured in the “*Tinker-Cyberbully Test*,” a proposed multi-part legal standard for courts to apply when reviewing public school discipline decisions against First Amendment scrutiny. Prior to this Article’s conclusion, the

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<sup>17</sup> Compare, e.g., *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (upholding the discipline of a high school senior who created a cruel website aimed at a fellow student against a First Amendment challenge), *cert. denied*, 565 U.S. 1173 (2012), with *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (finding that the discipline of a middle schooler who created a cruel website aimed at the school’s principal violated the First Amendment), *cert. denied*, 565 U.S. 1156 (2012).

<sup>18</sup> This Article does not address speech by minors that lacks any arguable connection to the school environment.

<sup>19</sup> Several state courts have also wrestled with the problem of off-campus speech and/or cyberbully speech. See, e.g., *People v. Marquan M.*, 19 N.E.3d 480, 485 (N.Y. 2014) (“Cyberbullying is not conceptually immune from government regulation, so we may assume . . . that the First Amendment permits the prohibition of cyberbullying directed at children, depending on how that activity is defined.”). Except where specifically noted for a narrow purpose, state court cases are not included in this discussion.

*Tinker*-Cyberbully Test is applied to six actual, representative cases.<sup>20</sup>

### I. CONTEXT: CYBERSPEECH AND OFF-CAMPUS SPEECH

Without context, the potential regulation of off-campus speech might be viewed as a legal issue separate and distinct from the administrative regulation of cyberbullying. Indeed, there remain fact patterns confronting the courts which involve off-campus speech or expression which have nothing to do with the Internet or cyberspeech.<sup>21</sup> But based on the leading teen-behavior research<sup>22</sup> and a review of the leading circuit cases,<sup>23</sup> it appears that increasingly, the regulation of cyberbullying and off-campus speech are inextricably linked. To be sure, a disruptive print newspaper or similar content can still be created off-campus then

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<sup>20</sup> This Article does not address constitutional limits on off-campus student speech giving rise to criminal sanctions, including criminal cyberbullying, harassment, hate crime, and similar prohibitions. This Article further does not address in detail the issue of financial liability for public schools when a student takes his or her own life despite notice to the school of cyberbullying, nor personal liability for teachers or school administrators who allegedly violate the First Amendment rights of student speakers under color of law or violations of Title IX for alleged failure of schools to protect students from gender-based cyberbullying. See 20 U.S.C. § 1681 (2012) (providing that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance”).

<sup>21</sup> See, e.g., *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 620 (5th Cir. 2004) (addressing a drawing made at home two years prior that inadvertently made its way to school by its author’s younger brother); see also *Lowery v. Euverard*, 497 F.3d 584, 585–86 (6th Cir. 2007) (discussing a petition to remove a high school coach that was “typed” by one player and eventually signed by eighteen players, although it is unclear whether any of the players’ relevant acts took place off campus).

<sup>22</sup> A seminal study on student use of teen social media released April 2015 found that ninety-two percent of teens—defined as ages thirteen to seventeen—report going online at least daily, more than half (fifty-six percent) go online several times a day, and about a quarter (twenty-four percent) self-report that they are on the Internet “almost constantly.” See AMANDA LENHART ET AL., PEW RESEARCH CTR., TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015: SMARTPHONES FACILITATE SHIFTS IN COMMUNICATION LANDSCAPE FOR TEENS 2 (2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> [<https://perma.cc/J72J-AUSM>].

<sup>23</sup> See, e.g., *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (discussing a student who was suspended for creating a fake web page claiming classmate had herpes and advanced a First Amendment defense to discipline), *cert. denied*, 565 U.S. 1173 (2012).

physically carried to campus,<sup>24</sup> and bullies still shout insults as they follow kids home from school.<sup>25</sup> But in the age of the Internet, it seems the law of off-campus speech regulation and the administrative law regulating cyberbullying have merged. Thus, this Article treats these two challenges as one—to the extent practical—in search of a single solution.

## II. METHODOLOGY

The methodology applied in researching this Article is to locate and review the leading federal circuit court off-campus student speech cases involving a First Amendment challenge to school administrative punishment; group those cases by precedential value within their respective federal circuits;<sup>26</sup> and glean from those decisions (along with their concurring and dissenting opinions) the most logical, broadly applicable, and sustainable policy precepts guiding the courts in the absence of U.S. Supreme Court precedent.

## III. MINORS & THE FIRST AMENDMENT

### A. *A Preface on Cyberbullying*

Cyberbullying frequently occurs among minors, likely because bullies can remain anonymous and more easily engage in cyberbullying as compared to traditional “schoolyard” bullying.<sup>27</sup> The Internet provides a “distancing effect” that often leads cyberbullies to do and say crueler things than a schoolyard bully.<sup>28</sup> A communication does not need to be made to a victim to

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<sup>24</sup> See, e.g., *Boucher v. Sch. Bd.*, 134 F.3d 821, 829 (7th Cir. 1998).

<sup>25</sup> See, e.g., *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1146 (9th Cir. 2016).

<sup>26</sup> Where no appellate court authority exists, special effort was made to locate and review well-reasoned district court opinions. A few particularly well-reasoned state court cases are discussed because they so closely framed the issue posed in this Article, because of the quality of the particular court’s analysis, or both.

<sup>27</sup> See, e.g., Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Student’s Free Speech Rights*, 33 VT. L. REV. 283, 287–88 (2008).

<sup>28</sup> Richard Donegan, *Bullying and Cyberbullying: History, Statistics, Law, Prevention and Analysis*, 3 ELON J. UNDERGRADUATE RES. COMM. 33, 34 (2012).

constitute cyberbullying.<sup>29</sup> A communication need only be *about* the victim.<sup>30</sup>

*B. The First Amendment and Minors Generally*

Speech in America is presumed protected by the First Amendment, unless some far greater constitutional or policy concern overrides this interest.<sup>31</sup> This principle, so inviolate when applied to adults, often yields to more paternalistic impulses when applied to minors.<sup>32</sup> The Supreme Court has noted: “The schoolroom is the first opportunity most citizens have to experience the power of government.”<sup>33</sup> However, minors are accorded only a portion of the First Amendment protections and liberties afforded to adults.<sup>34</sup> In fact, the U.S. Supreme Court has interpreted the U.S. Constitution over a series of cases to construct what is essentially a separate and distinct First Amendment for minors and schoolchildren in America.<sup>35</sup>

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<sup>29</sup> See BARBARA GUZZETTI & MELLINEE LESLEY, *HANDBOOK OF RESEARCH ON THE SOCIETAL IMPACT OF DIGITAL SCIENCE* 536–37, 542 (2015).

<sup>30</sup> See Raychelle Cassada Lohmann, *Cyberbullying Versus Traditional Bullying*, *PSYCHOLOGY TODAY* (May 14, 2012), <https://www.psychologytoday.com/blog/teen-angst/201205/cyberbullying-versus-traditional-bullying> [<https://perma.cc/9XKT-XVLR>].

<sup>31</sup> See *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”). Unprotected areas of speech are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

<sup>32</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 636 (1968) (“Because of the State’s exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.” (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966))).

<sup>33</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 385 (1985) (Stevens, J., concurring in part and dissenting in part).

<sup>34</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“The state’s authority over children’s activities is broader than over like actions of adults.”).

<sup>35</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (holding materials such as banners advocating illegal drug use can be banned and punished when displayed by students at school-related events, even if off-campus); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263, 271, 273 (1988) (upholding censorship that prevented a school newspaper bearing the imprimatur of school from including articles on pregnancy,

There appear to be two distinct, though related, categories of Supreme Court cases governing freedom of speech and expression of Americans who have not yet reached adulthood. The first group of cases involves the protection of minors, which might be called the “child protection cases.”<sup>36</sup> The second group arises where the minor is the actual speaker and attends a public elementary or high school, the so-called “student speech cases.”<sup>37</sup> The child protection cases include, without limitation, *Prince v. Massachusetts*,<sup>38</sup> *Ginsberg v. New York*,<sup>39</sup> *Erznoznik v. City of Jacksonville*,<sup>40</sup> and *Brown v. Entertainment Merchants Association*.<sup>41</sup> The leading student speech cases are *West Virginia Board of Education v. Barnette*,<sup>42</sup> *Tinker v. Des Moines Independent Community School*

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birth control, and divorce, so long as such censorship was based on some “legitimate pedagogical concerns”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78, 686 (1986) (holding lewd and sexually suggestive speech by student at a school assembly could be banned and punished with suspension despite a First Amendment challenge); *Prince*, 321 U.S. at 160–64, 170 (holding a child labor law banning street sales of religious publications by minor children did not violate the First Amendment).

<sup>36</sup> See generally *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (concerning state law restricting sale of violent video games to minors); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975) (considering appellee’s argument that, in interest of protecting minors, city ordinance does not violate First Amendment); *Ginsberg*, 390 U.S. 629 (concerning state law prohibiting sale of obscene material to minors under seventeen years of age); *Prince*, 321 U.S. 158 (concerning state child labor laws directed at minors selling religious material).

<sup>37</sup> See generally *Morse*, 551 U.S. 393 (concerning high school student’s off-campus speech online); *Hazelwood*, 484 U.S. 260 (concerning censorship of a high school newspaper); *Fraser*, 478 U.S. 675 (concerning sanctions against student for student’s language during nominating speech at high school assembly); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (concerning school district’s ban on wearing armbands to protest the “Vietnam hostilities” to school); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (concerning board of education’s resolution that state’s public schools obligate students to salute the flag or face action for insubordination).

<sup>38</sup> 321 U.S. 158 (holding a child labor law banning street sales of religious publications by minor children did not violate the First Amendment).

<sup>39</sup> 390 U.S. 629.

<sup>40</sup> 422 U.S. 205 (finding a Jacksonville ordinance criminalizing the showing of films with nudity if visible from a public area invalid, and rejecting that the rationale for such decision was protection of children).

<sup>41</sup> 131 S. Ct. at 2742 (holding a statute criminalizing the sale of violent video games to children void).

<sup>42</sup> 319 U.S. 624.

*District*,<sup>43</sup> *Hazelwood School District v. Kuhlmeier*,<sup>44</sup> *Bethel School District No. 403 v. Fraser*,<sup>45</sup> and *Morse v. Frederick*.<sup>46</sup>

For purposes of this analysis, the child protection cases are largely distinguishable from the student speech cases for two reasons. First, the student speech cases are adjudged to have taken place within the context of the school's broadly-defined educational mission—generally on school property or at least at school-sanctioned events.<sup>47</sup> Second, in the student speech cases, the speaker for First Amendment purposes is the student herself, not a parent, guardian, or merchant who is being regulated or banned from providing some speech or expression-related content to a minor.<sup>48</sup>

### C. *The First Amendment and the Child Protection Cases*

The U.S. Supreme Court found the protection of children is an “exigent interest” of the government, worthy of material adjustment of standard First Amendment protections American adults take for granted.<sup>49</sup> With mixed results, a number of cases have tested the authority of government—consistent with the First Amendment—to punish adults for: having children sell magazines after a government-imposed restriction,<sup>50</sup> exposing passerby children to lewd scenes from a drive-in movie,<sup>51</sup> selling lewd but

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<sup>43</sup> 393 U.S. 503 (1969).

<sup>44</sup> 484 U.S. 260 (1988).

<sup>45</sup> 478 U.S. 675 (1986).

<sup>46</sup> 551 U.S. 393 (2007).

<sup>47</sup> *See, e.g., id.* at 396.

<sup>48</sup> *See generally, e.g.,* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (regarding sale of video games to a minor); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (regarding, inter alia, showing of films to minors); *Ginsberg v. New York*, 390 U.S. 629 (1968) (regarding sale of obscene material to minors); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (regarding use of children to sell religious material).

<sup>49</sup> *See Ginsberg*, 390 U.S. at 636, 638 (“[W]e have recognized that even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’” (quoting *Prince*, 321 U.S. at 170)). The constitutional rights of adults are not automatically comparable to the constitutional rights of children. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339–42 (1985).

<sup>50</sup> *See Prince*, 321 U.S. at 170 (finding the statute valid).

<sup>51</sup> *See Erznoznik*, 422 U.S. at 211–12 (finding the statute prohibited showing films containing nudity where passersby may view them invalid).

not obscene material to kids,<sup>52</sup> or selling otherwise legal, but violent video games to kids.<sup>53</sup> The following subsections will provide a more complete analysis of these cases.

### 1. *Ginsberg v. New York*

The Supreme Court has long held that special circumstances and an exigent interest allow incursions into normal First Amendment-protected activity that would be anathema to such constitutional guarantees were the actor an adult.<sup>54</sup> Thus, in *Ginsberg v. New York*, the Supreme Court found that criminal penalties outlawing the sale of non-obscene “girlie” magazines to minors did not violate the First Amendment.<sup>55</sup>

The Court, after reviewing a New York statute outlawing the sale of sexually explicit material that could be legally sold to adults, concluded that it could not “say that the statute invade[d] the area of freedom of expression constitutionally secured to minors.”<sup>56</sup> The *Ginsberg* Court, in expressly rejecting an argument based upon the First Amendment rights of minors,<sup>57</sup> concluded that section 484-h of the New York Penal Code<sup>58</sup> did not violate the

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<sup>52</sup> See *Ginsberg*, 390 U.S. at 642–43 (finding the statute prohibiting selling lewd but not obscene materials to children valid and reasoning: “We therefore cannot say that § 484-h, in defining the obscenity of material on the basis of its appeal to minors under [seventeen], has no rational relation to the objective of safeguarding such minors from harm.”).

<sup>53</sup> See *Brown*, 131 S. Ct. at 2742 (finding the statute prohibiting otherwise legal, but violent video games to kids invalid because “as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime”).

<sup>54</sup> See *Ginsberg*, 390 U.S. at 640 (“The State also has an independent interest in the well-being of its youth.”); *Prince*, 321 U.S. at 170 (holding that a state prohibition on child sales of religious literature applied to boys under twelve and girls under eighteen did not violate the First Amendment).

<sup>55</sup> See *Ginsberg*, 390 U.S. at 643.

<sup>56</sup> *Id.* at 637.

<sup>57</sup> The court rejected First Amendment arguments advancing the speech or expression rights of minors based on *Meyer v. Nebraska*, 262 U.S. 390 (1923). See *id.* at 637; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 656 (1943) (citing *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)); *Pierce*, 268 U.S. at 534–35.

<sup>58</sup> Section 484-h of the New York Penal Code made it a crime “knowingly to sell . . . to a minor” under seventeen years of age: “(a) any picture . . . which depicts nudity . . .



First Amendment in that it “simply adjusts the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in term[s] [sic] of the sexual interests . . .’ of such minors.”<sup>59</sup> In reasoning that the “State . . . has an independent interest in the well-being of its youth,”<sup>60</sup> the Court noted that it is “altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children *special standards*, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.”<sup>61</sup>

## 2. *Prince v. Massachusetts*

The *Ginsberg* Court favorably cited *Prince v. Massachusetts* multiple times,<sup>62</sup> notably for the proposition that “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men.’”<sup>63</sup> While some contrary authority exists in this area,<sup>64</sup> the Court has also held that a ban on otherwise protected First Amendment activity, such as street newspaper sales by children, does not violate the First Amendment.<sup>65</sup>

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and which is harmful to minors,” and “(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors.” *Ginsberg*, 390 U.S. at 633 (alteration in original) (quoting N.Y. PENAL LAW § 484-h (1909) (current version at N.Y. PENAL LAW § 235.20 (McKinney 2017))).

<sup>59</sup> *Ginsberg*, 390 U.S. at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)).

<sup>60</sup> *Id.* at 640.

<sup>61</sup> *Id.* (emphasis added) (quoting *People v. Kahan*, 15 N.Y.2d 311, 312 (1965) (Fuld, J., concurring)).

<sup>62</sup> *Id.* at 638–39 (citing *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

<sup>63</sup> *Id.* at 640 (quoting *Prince*, 321 U.S. at 165).

<sup>64</sup> *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2735 (2011) (holding the California Act violated the First Amendment because it did “not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children”). The California ban on the sales of violent video games was struck down on the grounds that the law attempted to craft medium-specific rules to govern video games, which offended traditional First Amendment principles. *See id.* at 2742.

<sup>65</sup> *See Prince*, 321 U.S. at 170 (“[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.”).

### 3. *Erznoznik v. City of Jacksonville*

In *Erznoznik v. City of Jacksonville*, the U.S. Supreme Court employed content-discrimination analysis to invalidate a city ordinance outlawing the display of nudity in movies if visible from a public street, or “places where the offended viewer readily can avert his eyes,” such as those displayed in drive-in theaters.<sup>66</sup> The rationale, ultimately rejected by the Court, was the protection of children.<sup>67</sup> The statute failed because it made arbitrary content-based distinctions between non-obscene films with and without nudity.<sup>68</sup>

### 4. *Brown v. Entertainment Merchants Association*

In *Brown*, the Electronic Merchants Association—a trade group representing video game and software manufacturers—preemptively sued the State of California to challenge a law restricting the sale of violent video games to minors.<sup>69</sup> The State of California argued that *Ginsberg* should control its video game child protection statute,<sup>70</sup> and therefore, the court should uphold the statute based on the same “adjust the boundaries” theory.<sup>71</sup>

However, the Court rejected this argument, distinguishing *Ginsberg* on the theory that obscenity is a category of unprotected speech with a long history of regulation,<sup>72</sup> unlike exposure to depictions of violence.<sup>73</sup> The Court stated: “Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg* . . . .”<sup>74</sup> However, the Court left room for analogous “adjust the boundaries” arguments to protect

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<sup>66</sup> 422 U.S. 205, 212 (1975).

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* at 213–14.

<sup>69</sup> *See Brown*, 131 S. Ct. at 2732–33.

<sup>70</sup> *See id.* at 2735. California prohibited the sale or rental of “violent video games” to minors, and required that their packaging and labeling be labeled “18.” CAL. CIV. CODE §§ 1746.1–1746.2 (West 2017). The state statute, purporting to describe “violent video games,” imposed a civil fine of up to one thousand dollars for their illegal sale to minors. *See id.* § 1746.3.

<sup>71</sup> *See Brown*, 131 S. Ct. at 2735.

<sup>72</sup> *See id.* at 2735–36.

<sup>73</sup> *See id.* at 2735.

<sup>74</sup> *Id.*

children in areas where speech restrictions are based on tradition or “historical warrant.”<sup>75</sup>

In analyzing the California video game statute, the *Brown* Court relied upon its reasoning in *United States v. Stevens*, which it distinguished from *Ginsberg* because “[t]here was no American tradition of forbidding” depictions of animal cruelty, which the statute in *Stevens* aimed to forbid.<sup>76</sup> Instead, the *Brown* court reasoned that only those categories of speech with a “tradition of proscription” could be held to the more restrictive child-protection First Amendment standards advanced by *Ginsberg*.<sup>77</sup> The “historical warrant” or “American tradition of forbidding” obscenity justified the variable or “adjust[ed]” standard for children without running afoul of the First Amendment.<sup>78</sup> Hence, the *Brown* court rejected this argument because depictions of violence enjoy no such status as a historical exception to the First Amendment.<sup>79</sup>

#### *D. The First Amendment and the Student Speech Cases*

Five U.S. Supreme Court cases define the First Amendment rights and allowable governmental restrictions on public primary and secondary school students who attend kindergarten through twelfth grade. This Article refers to them as the student speech cases,<sup>80</sup> and discusses each below. Governments have long attempted to restrict the speech of students, and in fact, have frequently curtailed speech in schools that the First Amendment would clearly protect if uttered by adults elsewhere. These five cases, discussed in chronological order, with varying levels of discussion based on their impact and ongoing legal significance, are:

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<sup>75</sup> See *id.* at 2734–35.

<sup>76</sup> *Id.* at 2734; see *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (finding that a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty violates the First Amendment, because no historical warrant or tradition exists for banning *depiction* of such acts).

<sup>77</sup> *Brown*, 131 S. Ct. at 2734.

<sup>78</sup> *Id.* at 2734–35.

<sup>79</sup> *Id.* at 2736–37.

<sup>80</sup> See *supra* note 37 and accompanying text.

1. *West Virginia Board of Education v. Barnette*: No Forced Political Student Speech

In *West Virginia Board of Education v. Barnette*—the first major student speech case—members of the Jehovah’s Witnesses religious faith brought suit for a declaratory judgment on behalf of their children to invalidate a state law requiring that students recite the Pledge of Allegiance and salute the American flag.<sup>81</sup> The Court ruled that the government, acting through school districts, administrators, and teachers, cannot compel a student to make a political pledge with which the student disagrees.<sup>82</sup>

2. *Tinker*’s ‘Disruption’ Standard Governs Student Speech ‘in class or out of it’<sup>83</sup>

The second, and still most impactful, of the big five student speech cases is *Tinker v. Des Moines Independent Community School District*, in which the U.S. Supreme Court held: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students . . . . This has been the unmistakable holding of this Court for almost [fifty] years.”<sup>84</sup>

Handed down by the U.S. Supreme Court in 1969 during the Vietnam War, *Tinker* stands for the proposition that passive, non-disruptive, symbolic, political speech—such as wearing black armbands—is protected by the First Amendment, and cannot be banned or punished by the student’s local public school or by the government.<sup>85</sup> In *Tinker*, three Des Moines public schoolchildren

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<sup>81</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627–29 (1943).

<sup>82</sup> See *id.* at 642.

<sup>83</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>84</sup> *Id.* at 506 (“[T]his Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.” (first citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); then citing *Bartels v. Iowa*, 262 U.S. 404 (1923))).

<sup>85</sup> See *id.* at 504–06. Because the *Tinker* facts and holding arose in the context of a traditional local school district serving primary and secondary school students, the applicability of *Tinker*’s holding to public colleges remains open. See *supra* note 1 and accompanying text (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988)).

decided to fast for two days in December 1965 and wear black armbands to school to protest the Vietnam War.<sup>86</sup> School district officials became aware of the plan, and passed an administrative rule requiring schools to ask any student wearing such an armband to remove it.<sup>87</sup> The policy called for the suspension of any student who refused until the student returned to school without the armband.<sup>88</sup> The Court repeated the oft-quoted proposition that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>89</sup> In finding in favor of the students, the court left unprotected only such student-based speech that “*in class or out of it . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others.*”<sup>90</sup> This Article accepts the view of Judge (now Justice) Alito, who wrote that “[t]he precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear.”<sup>91</sup> Therefore, it is presumed that the “interference” prong is incorporated into the “substantial disturbance” concept for which *Tinker* is generally known. One could argue that subsequent cases in this area have vigorously enforced *Tinker*’s authority on behalf of student speakers who communicate passively and non-disruptively.<sup>92</sup> Federal courts widely interpret *Tinker* to imply a “reasonable likelihood” of disruption component, thus allowing schools to discipline students prior to the occurrence of actual disruption.<sup>93</sup>

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<sup>86</sup> See *Tinker*, 393 U.S. at 504.

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

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

<sup>89</sup> *Id.* at 506.

<sup>90</sup> *Id.* at 513 (emphasis added).

<sup>91</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

<sup>92</sup> See generally *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014) (upholding school district’s demand that students remove apparel displaying the American flag because students doing so regularly sparked fights with other students); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013) (upholding school district’s demand that student remove apparel displaying the Confederate flag because of the unique racial tensions between black and white students in that district); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008) (upholding a viewpoint neutral and content neutral dress code).

<sup>93</sup> See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (holding first, the First Amendment “does not require school officials

3. *Bethel School District No. 403 v. Fraser*: School “Within Its Permissible Authority” When Sanctioning Lewd Speech

*Bethel School District No. 403 v. Fraser*,<sup>94</sup> the third major student speech case, was handed down in 1986—two years before *Hazelwood*. In *Bethel*, a student speaker, while nominating another student for elective office at the school, repeatedly used lewd and sexually suggestive language, generally attached to some double meaning.<sup>95</sup> The court found that the language at issue was “an elaborate, graphic, and explicit sexual metaphor.”<sup>96</sup>

Chief Justice Warren Burger, who wrote the majority opinion, stated the issue simply: “We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.”<sup>97</sup> The Court concluded that it does not.<sup>98</sup> In reversing the Ninth Circuit Court of Appeals, the U.S. Supreme Court restated *Tinker*, and distinguished an expansive, erroneous reading of that case from a more appropriate and accurate one: “[I]n *Tinker*, this Court was careful to note that the case did ‘not concern speech or action that intrudes upon the work of the schools or the rights of other students.’”<sup>99</sup> The *Fraser* Court concluded that exposure to lewd and indecent speech did indeed impinge on the rights of other student listeners, holding “that [a school district] acted entirely within its permissible authority in imposing

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to wait until disruption actually occurs before they may act. ‘In fact, they have a duty to prevent the occurrence of disturbances,’” and that second, “*Tinker* does not require certainty that disruption will occur, ‘but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption’” (internal citation omitted) (quoting *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973)); see also *Tinker*, 393 U.S. at 514 (discussing school district’s burden to “demonstrate any facts which might reasonably have led school authorities to *forecast* substantial disruption” (emphasis added)).

<sup>94</sup> 478 U.S. 675 (1986).

<sup>95</sup> See *id.* at 677–80.

<sup>96</sup> *Id.* at 677–78.

<sup>97</sup> *Id.* at 677.

<sup>98</sup> See *id.* at 680.

<sup>99</sup> *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

sanctions upon [a student speaker] in response to his offensively lewd and indecent speech.”<sup>100</sup>

But *Fraser* should be read narrowly for many reasons. First, according to Justice Brennan’s concurrence, its holding is limited to high school assemblies.<sup>101</sup> Second, its holding technically only applies to “disruptive language” at such assemblies.<sup>102</sup> Third, *Fraser* has been criticized for use of the term “captive audience” to describe the student assembly, without providing clear definition or guidance for lower courts.<sup>103</sup>

#### 4. *Hazelwood*’s ‘Tolerate’ Versus ‘Promote’ Student Speech Distinction

*Tinker* was substantially modified in 1988 by the fourth of the five major student speech cases, *Hazelwood School District v. Kuhlmeier*.<sup>104</sup> *Hazelwood* made the constitutionally significant distinction between *Tinker*-governed student speech, which the First Amendment requires government schools to “tolerate,” versus speech that implies a government-school endorsement, such as the content of a public school newspaper.<sup>105</sup> The case centered on a public school-sponsored student newspaper called “Spectrum.”<sup>106</sup> Three former high school students who were staffers on “Spectrum” sued the school district and school officials, alleging that the principal’s decision to censor two pages based on content

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<sup>100</sup> *Id.* at 685.

<sup>101</sup> *See id.* at 689 (Brennan, J., concurring) (“Thus, the Court’s holding concerns only the authority that school officials have to restrict a high school student’s use of disruptive language in a speech given to a high school assembly.”).

<sup>102</sup> *Id.*

<sup>103</sup> *See, e.g.,* Erica Salkin, *Are Public School Students “Captive Audiences?” How an Unsupported Term in Fraser Created a “Mischievous Phrase” in Educational Speech Law*, 20 COMM. L. & POL’Y 35, 35–37 (2015).

<sup>104</sup> 484 U.S. 260 (1988).

<sup>105</sup> *See id.* at 270–71 (“[T]he question that we addressed in *Tinker* . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”).

<sup>106</sup> *See id.* at 262.

violated their First Amendment rights.<sup>107</sup> The principal cut an article describing school students' experiences with pregnancy, and another article discussing the impact of divorce on students at the school.<sup>108</sup> The principal objected to the pregnancy story because the pregnant students—although not named—“might be identifi[ed] from the [con]text” and because he “believed that the article’s references to sexual activity and birth control were inappropriate for some of the younger students.”<sup>109</sup> The U.S. Supreme Court upheld the censorship decision because it was based upon “legitimate pedagogical concerns” for the students at Hazelwood East.<sup>110</sup> The *Hazelwood* Court made no *Tinker*-style inquiry into whether publication of the censored content would have been disruptive or interfered with the rights of other students.<sup>111</sup>

*Hazelwood* also stands for the proposition that the First Amendment will not protect student speech that appears to carry the school’s endorsement—that is, speech which “might reasonably [be] perceive[d] to bear the imprimatur of the school.”<sup>112</sup> The specific examples the Court used in *Hazelwood* justifying censorship were “school-sponsored publications, theatrical productions, and other expressive activities.”<sup>113</sup> The Third Circuit rejected a version of this theory in *Layshock ex rel. Layshock v. Hermitage School District*.<sup>114</sup> The school in *Layshock* theorized that a student, by cut-and-paste copying his principal’s photo from the district’s website, gave rise to a trespass as if he had “broken into the principal’s office or a teacher’s desk.”<sup>115</sup> A strict reading of the *Hazelwood* “imprimatur” rationale gives the school the discretion to regulate and ban “expressive activities that students, parents, and members of the public might reasonably

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<sup>107</sup> See *id.*; see also *id.* at 273 (articulating the “legitimate pedagogical concerns” test, moving the boundary of limits on student speech rights).

<sup>108</sup> See *id.* at 263.

<sup>109</sup> See *id.*

<sup>110</sup> *Id.* at 273.

<sup>111</sup> See generally *id.* at 270–73.

<sup>112</sup> *Id.* at 271.

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

<sup>114</sup> 650 F.3d 205 (3d Cir. 2011).

<sup>115</sup> *Id.* at 215.



perceive to bear the imprimatur of the school.”<sup>116</sup> The “imprimatur,” or brand of the school, would surely not be associated with a fake web page or Facebook parody of another student, unless the cyberbully both used the school computer or network, and say, the school logo.

While *Tinker* and *Hazelwood* are widely accepted as the “bookends” of student-speech law, the three other student speech cases also merit consideration and discussion.

#### 5. *Morse v. Frederick*: Opening the Door to Regulation of Off-Campus Speech

Since 1988, the U.S. Supreme Court has only once tackled a pure student speech case: *Morse v. Frederick*,<sup>117</sup> the fifth and final major case in this area. While the *Morse* case is generally known for the proposition that public schools may constitutionally regulate and ban on-campus speech advocating illegal drug use, it also stretches the boundaries of the meaning of “on-campus.”<sup>118</sup> Yet, that splintered and multi-voiced decision seems to have provided more questions than answers.<sup>119</sup> In *Morse*, the Court found that the unfurling of a fourteen-foot banner, bearing the words “BONG HiTS 4 JESUS,” by a student at a school-related activity was unprotected speech.<sup>120</sup> But the holding in *Morse* may merely be the framing, rather than the resolution, of the real question: In the wake of *Morse* and under the shadow of *Tinker*, what are the practical rules governing school administrators’

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<sup>116</sup> See *id.* at 213 (quoting *Hazelwood*, 484 U.S. at 271).

<sup>117</sup> 551 U.S. 393 (2007).

<sup>118</sup> See *id.* at 400–01, 408–10.

<sup>119</sup> See Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 380 n.152 (2007) (“However, the Court’s opinion also noted that ‘[t]he five separate opinions in *Morse* illustrate the plethora of approaches that may be taken in this murky area of law.’” (alteration in original) (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 604 (W.D. Pa. 2007))); see also Joyce Dindo, Note, *The Various Interpretations of Morse v. Frederick: Just a Drug Exception or a Retraction of Student Free Speech Rights?*, 37 CAP. U. L. REV. 201, 237 (2008) (“As one court described it, ‘[t]he five separate opinions in *Morse* illustrate the complexity and diversity of approaches to this evolving area of law.’” (quoting *Layshock*, 496 F. Supp. 2d at 595)).

<sup>120</sup> *Morse*, 551 U.S. at 397 (“[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”).

ability to limit and punish student speech? What is the true meaning of *Morse*? Is the holding's literal language the limit of the new constitutional ground the Court has plowed—that is, that student speech can be regulated and punished if it can “reasonably be regarded as encouraging illegal drug use”?<sup>121</sup> The case includes a jurisprudential history lesson on the law of students and minors in Justice Clarence Thomas' concurrence,<sup>122</sup> as well as Justice Alito's broadside concurrence aimed directly at a theory advanced by *Morse*'s counsel and the U.S. government: that the First Amendment allows public school officials to censor any student speech that “interferes with a school's ‘educational mission.’”<sup>123</sup> Note well that Justice Alito has long been troubled by the potential overreach of the government's interpretation of *Tinker*, particularly the “interference” prong that has received far less attention than the “disturbance” prong of *Tinker*'s holding.<sup>124</sup>

The full decision in *Morse* also contains a hair-splittingly cautious opinion by Justice Breyer, who concurred in part and dissented in part, because he believed that granting qualified immunity to the principal, school, and district could resolve the case without reaching the underlying First Amendment question.<sup>125</sup> The bottom line is that six justices, based on their various *Morse* opinions, support a reading of the First Amendment which allows school districts to ban the advocacy of illegal drug use, so long as this conclusion is not extended to mean schools can ban *any*

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<sup>121</sup> *Id.* See generally Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1 (2008); Charles Chulack, *The First Amendment Does Not Require Schools to Tolerate Student Expression that Contributes to the Dangers of Illegal Drug Use: Morse v. Frederick*, 46 DUQ. L. REV. 521 (2008).

<sup>122</sup> See *Morse*, 551 U.S. at 410–22 (Thomas, J., concurring).

<sup>123</sup> *Id.* at 422–25 (Alito, J., concurring) (quoting that case's Brief for Petitioners).

<sup>124</sup> See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J., writing for the Majority) (“The precise scope of *Tinker*'s ‘interference with the rights of others’ language is unclear . . .”).

<sup>125</sup> See *Morse*, 551 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) (advocating a simple matter-of-law finding that the behavior of the school district in *Morse* did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known,” therefore giving rise to the winning defense of qualified immunity, thus barring Frederick's First Amendment lawsuit (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

behavior which interferes with the school's mission.<sup>126</sup> This limitation, which Justice Alito expressly demanded as a condition for his concurring vote, in some ways recasts and restates the "legitimate pedagogical concern" limitation of *Hazelwood*.<sup>127</sup>

#### *E. Summary of Student Speech Cases*

Nearly fifty years after it was handed down, *Tinker* is still the primary controlling law in the area of government regulation of student speech. The four other cases discussed above are best understood as exceptions to *Tinker*. *Hazelwood* means a student's speech rights are limited if it appears he or she is speaking for the school. *Barnette* held that students have the right *not* to avow social/political beliefs with which they disagree. *Fraser* stands for the proposition that students have no right to make lewd or indecent comments at school gatherings of captive student audiences. Finally, the rule of *Morse* may be merely that student speech is unprotected if it advocates illegal drug use.

### IV. FEDERAL CIRCUIT ANALYSIS: THE CONSTITUTIONAL LIMITATIONS ON PUBLIC SCHOOLS' ABILITY TO REGULATE OFF-CAMPUS CYBERSPEECH

Against this backdrop, a series of recent circuit court cases, and a smattering of federal district and state appellate court opinions, provide the most authoritative guidance for American jurists on the off-campus speech question. Moreover, these cases provide a blueprint of options available to the Supreme Court, should it eventually decide the internet-era boundaries of school jurisdiction over disruptive off-campus speech.<sup>128</sup>

#### *A. First Circuit: No Controlling Appellate Authority*

Research revealed no controlling internet era First Circuit authority balancing the First Amendment against the disciplinary

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<sup>126</sup> See *id.* at 401, 410–22 (Thomas, J., concurring), 422–25 (Alito, J., concurring), 425–33 (Breyer, J., concurring in part and dissenting in part).

<sup>127</sup> See *id.* at 423 (Alito, J., concurring) (criticizing the "interfere[nce] with a school's 'educational mission'" standard and stating flatly that his concurring vote is premised upon the assumption that the full court rejects this concept (citation omitted)).

<sup>128</sup> See generally HAYES, *supra* note 3, at 49.

jurisdiction of public schools for off-campus activity. A LEXIS First-Circuit search of the words “*Tinker v. Des Moines*,” and a separate search of the numeric citation of *Tinker*, each returned sixteen cases since the year 2000.<sup>129</sup> None of these cases were related to off-campus cyberspeech.<sup>130</sup> The single relevant decision from within the First Circuit to off-campus speech involved an internet-related dispute between a public high school and the leader of a student group.<sup>131</sup> In *Bowler v. Hudson*, a conservative student leader at a so-called “First Amendment School[]” was initially allowed to display a poster on school grounds listing an internet address from an affiliated national student group that featured links to savage beheadings as a means of opposing radical Islamic terrorism.<sup>132</sup> School officials ordered the student leader to remove the internet address from the poster once the nature of the content on the national group’s website came to their attention.<sup>133</sup> Former and current students of the school sued, and the district court found that the First Amendment protected the student’s right to display the poster with the internet address.<sup>134</sup> The court analogized the removal of the internet address—which could only be viewed off-campus because students’ ability to access the sites

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<sup>129</sup> The last search was conducted July 29, 2016.

<sup>130</sup> See generally *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002); *Pollack v. Reg’l Sch. Unit 75*, No. 2:13-cv-109-NT, 2017 U.S. Dist. LEXIS 64611 (D. Me. Apr. 28, 2017); *E.T. v. Bureau of Special Educ. Appeals of the Div. of Admin. Law Appeals*, 169 F. Supp. 3d 221 (D. Mass. 2016); *Berry v. RSU 13 Sch. Bd.*, 2:15-cv-00146-JAW, 2016 U.S. Dist. LEXIS 23903 (D. Me. Feb. 24, 2016); *Davidson v. City of Cranston*, 42 F. Supp. 3d 325 (D.R.I. 2014); *Pollack v. Reg’l Sch. Unit 75*, 12 F. Supp. 3d 173 (D. Me. 2014); *Griswold v. Driscoll*, 625 F. Supp. 2d 49 (D. Mass. 2009); *Campbell v. Hooksett Sch. Dist.*, No. 07-cv-275-JL, 2008 U.S. Dist. LEXIS 10917 (D. N.H. Jan. 31, 2008); *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168 (D. Mass. 2007); *Garcia v. Sanchez*, No. 02-1646 (ADC), 2007 U.S. Dist. LEXIS 102320 (D.P.R. Aug. 15, 2007); *Governor Wentworth Reg’l Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410 (D.N.H. 2006); *Cole v. Me. Sch. Admin. Dist. No. 1*, 350 F. Supp. 2d 143 (D. Me. 2004); *S. Boston Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388 (D. Mass. 2003); *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328 (D. Mass. 2003); *Comfort v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209 (D. Mass. 2003); *Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195 (D. Mass. 2003); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).

<sup>131</sup> See *Bowler*, 514 F. Supp. 2d at 172–75.

<sup>132</sup> See *id.* at 172–73.

<sup>133</sup> See *id.* at 174–75.

<sup>134</sup> See *id.* at 171, 179–80.

themselves were blocked by school computers—to removal of books from a library, ultimately finding that the two cases were not akin to one another.<sup>135</sup>

One other non-internet case bears mention. The First Circuit upheld a suspension of a student who brought a First Amendment challenge following off-campus creation and on-campus distribution of a written “Shit List” of derogatory comments and descriptions by students about students.<sup>136</sup> The *Donovan v. Ritchie* court, unlike the panel in the Fifth Circuit case of *Porter v. Ascension Parish School Board* discussed below, did not take note of the distinction between off-campus (potentially) inadvertent transportation of offensive material versus intentional or foreseeable transmission.<sup>137</sup>

#### *B. Second Circuit: ‘Reasonably Foreseeable Risk’ Test for Off-Campus Speech*

The Second Circuit’s general rule is that public schools can regulate off-campus cyberspeech under *Tinker* if there is “a reasonably foreseeable risk that [it] would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school.’”<sup>138</sup>

In *Doninger v. Niehoff*, the Second Circuit rejected a student-plaintiffs’ argument “that off campus speech could not be the subject of school discipline.”<sup>139</sup> The court viewed the student’s

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<sup>135</sup> See *id.* at 180.

<sup>136</sup> See *Donovan v. Ritchie*, 68 F.3d 14, 15–16 (1st Cir. 1995).

<sup>137</sup> Compare *id.* at 18 (noting briefly students’ defense to their principal that the act occurred off-campus, but analyzing that issue no further), with *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 617–18 (5th Cir. 2004) (noting the fact that student’s drawing at issue was introduced to the school accidentally). See generally *infra* Section IV.E for further discussion of *Porter*.

<sup>138</sup> *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007) (quoting *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).

<sup>139</sup> 642 F.3d 334, 346 (2d Cir. 2011) (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045–46 (2d Cir. 1979)) (rejecting plaintiff’s argument, which relied on the proposition that the Second Circuit and U.S. Supreme Court placed off-campus speech beyond the jurisdiction of school officials), *cert. denied*, 565 U.S. 976 (2011); see also *Boucher v. Sch. Bd.*, 134 F.3d 821, 828 (7th Cir. 1998) (discussing a student-speaker who unsuccessfully cited *Thomas* for the proposition that schools lack jurisdiction in all cases over off-campus speech).

argument as overstating the holding of *Thomas v. Board of Education*, a seminal 1979 Second Circuit case standing for the proposition that student speech explicitly created and kept off campus should not be subject to school discipline.<sup>140</sup> But foreshadowing the *Tinker*-related problems the Internet would bring, the *Thomas* court went on to say in dictum that it could “envision a case in which a group of students incites substantial disruption within the school from some remote locale.”<sup>141</sup>

The speculation of the *Thomas* court in the fast-evolving world of online communications was validated in *Wisniewski v. Board of Education*.<sup>142</sup> In *Wisniewski*, a public-school student used an instant messaging program to communicate with fellow students from his home computer.<sup>143</sup> For a three-week period, whenever he sent an instant message, that message was accompanied by a crudely drawn icon depicting one of his teachers being shot in the head, with text below reading “Kill Mr. VanderMolen.”<sup>144</sup> Eventually, the student’s instant messages and the icon came to the attention of school officials, which led to a criminal investigation and required “special attention” of school officials—among other facets of “disruption” found by the court.<sup>145</sup>

The *Wisniewski* court cited *Morse* and *Thomas*, among others, in determining that “[t]he fact that [the] creation and transmission of the IM icon occurred away from school property does not necessarily insulate [the student] from school discipline.”<sup>146</sup> Where the icon’s off-campus display “pose[d] a *reasonably foreseeable risk* that [it] would come to the attention of school authorities and . . . ‘*materially and substantially disrupt the work and discipline* of the school,’” the student’s suspension for this display did not run afoul of the First Amendment.<sup>147</sup> The court applied the *Tinker* standard because it was “reasonably foreseeable that the IM

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<sup>140</sup> See *Doninger*, 642 F.3d at 346–47.

<sup>141</sup> *Thomas*, 607 F.2d at 1052 n.17.

<sup>142</sup> 494 F.3d 34.

<sup>143</sup> See *id.* at 35–36.

<sup>144</sup> *Id.* at 36.

<sup>145</sup> *Id.* at 36–37.

<sup>146</sup> *Id.* at 39.

<sup>147</sup> *Id.* at 38–39 (emphasis added) (quoting *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).

icon would come to the attention of school authorities” and that it would “create a risk of substantial disruption.”<sup>148</sup> The fact that the student did not create the icon on school property did not “insulate him from school discipline.”<sup>149</sup>

Under *Tinker*, schools must have “a specific and significant fear of disruption, not just some remote apprehension of disturbance.”<sup>150</sup> School officials do not need to wait until a disruption occurs.<sup>151</sup> The majority in *Wisniewski* noted that one judge on their panel would hold that courts should only uphold school discipline of a student “for off-campus expression that is likely to cause a disruption on campus only if it was foreseeable to a reasonable adult.”<sup>152</sup>

The foreseeability “perspective” question is not the most significant new issue highlighted by the *Wisniewski* opinion. The court’s decision also noted its disagreement with other circuit courts on the question of whether the criminal law “true threat” due process standard should apply to school suspensions and expulsions.<sup>153</sup> The *Wisniewski* court decided that students did not have the right to hold school administrators to the same proof standard as law enforcement officials in *Watts v. United States*.<sup>154</sup> Therefore, unlike in *Watts*, a principal may punish a student simply by finding a reasonable likelihood of disruption under *Tinker*, as contrasted with the requirement to prove the student subjectively intended to threaten someone—or was at least reckless in communicating a message that might have been interpreted as a threat.<sup>155</sup> This later approach, which again, conflicts sharply with

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<sup>148</sup> *Id.* at 39–40.

<sup>149</sup> *Id.* at 39.

<sup>150</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001).

<sup>151</sup> *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

<sup>152</sup> *Wisniewski*, 494 F.3d at 39 n.4 (emphasis added).

<sup>153</sup> *See id.* at 38.

<sup>154</sup> *See Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (articulating true threat standard allowing criminal punishment only where a reasonable recipient of the speech would find that speech to be a serious expression of an intent to harm).

<sup>155</sup> *See Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (holding that threatening statements are analyzed not from the perspective of the alleged victim, but by the intent of the maker of the alleged threat, and that to support a criminal conviction, the mindset of the speaker must be proven to evince a “true threat” which requires a certain level of mens rea or intent greater than negligence).

the Second Circuit's *Wisniewski* analysis, holds schools to the true threat standard of *Watts*, and has been adopted by both the Eighth and Ninth Circuits.<sup>156</sup>

Thus arises the “*Wisniewski*” problem: If the student's ridiculous juvenile humor has elements of parody cloaked in violence and there is no proof that he was *not* joking, can the school nonetheless punish him consistent with the First Amendment? Is the mere inclusion of the word “kill” enough where no reasonable adult would find the threat of violence? What if the police find that the student was joking and the threat was not legitimate, as was the case in the actual *Wisniewski* case?<sup>157</sup>

The same court heard the case of Avery Doninger, a high school student involved in the planning of a student concert called “Jamfest,” which was postponed due to an adult's scheduling conflict that came up after the event date had been set.<sup>158</sup> When the school administrators suggested postponement, Ms. Doninger objected and launched an internet-based campaign to rally students to convince administrators to reverse the decision.<sup>159</sup> When administrators refused, she referred to them in her blog as “douchebags,” and a campaign among fellow students continued to protest the decision,<sup>160</sup> for which she received a reprimand and disqualification from running for student office.<sup>161</sup> The *Doninger* court interpreted the *Thomas* dicta as “suggesting that such behavior, simply not present in the case before it, might

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<sup>156</sup> See *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 621–32 (8th Cir. 2002) (en banc); *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371–73 (9th Cir. 1996).

<sup>157</sup> See *Wisniewski*, 494 F.3d at 36 (“[A] police investigator who interviewed Aaron concluded that the icon was meant as a joke, that Aaron fully understood the severity of what he had done, and that Aaron posed no real threat to VanderMolen or to any other school official. A pending criminal case was then closed. Aaron was also evaluated by a psychologist, who also found that Aaron had no violent intent, posed no actual threat, and made the icon as a joke.”).

<sup>158</sup> See *Doninger v. Niehoff*, 642 F.3d 334, 339 (2d Cir. 2011), *cert. denied*, 565 U.S. 976 (2011).

<sup>159</sup> See *id.* at 339–40.

<sup>160</sup> See *id.* at 340–41.

<sup>161</sup> See *id.* at 342. The student in the *Doninger* case also eventually led a student protest that consisted of wearing shirts stating “Team Avery” or “RIP Democracy” to the assembly for the election from which she was disqualified. See *id.* at 343.



appropriately be disciplined.”<sup>162</sup> As a result, the *Doninger* court held that the student was not entitled to protection under the First Amendment.<sup>163</sup>

### C. Third Circuit: Tinker Reaches Off-Campus Speech

The Third Circuit analyzes school jurisdiction over off-campus cyberbullying as a multi-part test, which sequentially applies the precedents from the major student speech cases.<sup>164</sup> If the student speech is vulgar, lewd, and plainly offensive, it can be banned and is controlled by the teaching of *Bethel School District No. 403 v. Fraser*.<sup>165</sup> Second, if a reasonable person would believe the student speech is made by or endorsed by the school, this “legitimate pedagogical concern” allows the school to ban the speech under *Hazelwood School District v. Kuhlmeier*.<sup>166</sup> Third, if the student speech advocates illegal drug use, it can be banned under *Morse v. Frederick*.<sup>167</sup> If the fact pattern cannot extend to fit any of these scenarios, *Tinker* controls and the student prevails, unless the school can demonstrate that school administrators could reasonably *forecast* either: (1) “that the students’ activities would materially and substantially disrupt the work and discipline of the school”<sup>168</sup> or (2) “material interference with school activities.”<sup>169</sup> The court was disciplined in applying this approach, and was not swayed by the outrageousness of the *J.S. ex. rel. Snyder v. Blue Mountain School District* facts: To wit, an eighth grade school child is protected by the First Amendment after building a faux web-page ascribed to her principal, which insults him, his wife, his son, and lampoons his sexuality.<sup>170</sup> In finding for the student, the Third Circuit noted that J.S. “took specific steps to make the profile ‘private’” and that the principal’s investigation of the

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<sup>162</sup> *Id.* at 347.

<sup>163</sup> *See id.* at 357.

<sup>164</sup> *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925–27 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012).

<sup>165</sup> *See id.* at 927.

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

<sup>167</sup> *See id.*

<sup>168</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>169</sup> *Id.* at 514; *accord Snyder*, 650 F.3d at 926.

<sup>170</sup> *See Snyder*, 650 F.3d at 920–21.

matter, not the web page itself, created any “disruption” related to the incident.<sup>171</sup>

The Third Circuit was busy on July 13, 2011, handing down not just *Snyder*, but also *Layshock*—employing similar reasoning to the difficult questions surrounding the ability of school administrators to punish cyberbullying.<sup>172</sup> This Article treats *Layshock* summarily and analyzes *Snyder* in detail, which has richer facts, and appears to be the more nuanced and well-reasoned of the two cyberbullying cases.<sup>173</sup> In *Snyder*, middle school student J.S. created a parody MySpace<sup>174</sup> website which purported to be the profile of her principal McGonigle, though it did not identify him by name.<sup>175</sup> J.S. used McGonigle’s official school website photo, and created a mock announcement which satirically listed “M-Hoe[‘s]” general interests as: “detention, being a tight ass, riding the fraintain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, [and] hitting on students and their parents.”<sup>176</sup> J.S. initially denied

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<sup>171</sup> *Id.* at 930–31.

<sup>172</sup> *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc).

<sup>173</sup> The same Third Circuit en banc panel that splintered in *Snyder* on June 13, 2011, reached a unanimous fourteen-to-zero decision in *Layshock*, due apparently to the factual differences in the cases. A concurrence in *Layshock*, written by Judge Jordan and joined by Judge Vanaskie, reinforced the still-unresolved question of *Tinker*’s applicability to off-campus speech: “Unlike the fractured decision in [*Snyder*], we have reached a united resolution in this case, but there remains an issue of high importance on which we are evidently not agreed and which I note now, lest there be any misperception that it has been resolved by either [*Snyder*] or our decision here. The issue is whether the Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District*, can be applicable to off-campus speech. I believe it can, and no ruling coming out today is to the contrary.” *Layshock*, 650 F.3d at 219–20 (Jordan, J., concurring) (citation omitted).

<sup>174</sup> MySpace is a “[s]ocial networking site that allows its users to create webpages to interact with other users. Users of the service are able to create blogs, upload videos and photos, and design profiles to showcase their interests. *MySpace*, BUSINESSDICTIONARY, <http://www.businessdictionary.com/definition/Myspace.html> [https://perma.cc/N2B6-XA35] (last visited Oct. 24, 2017).

<sup>175</sup> See *Snyder*, 650 F.3d at 929.

<sup>176</sup> *Id.* at 920. The school principal’s wife, Debra Frain, worked at the school as a guidance counselor and is the subject of several of the comedic insults posted on the Internet by J.S. See *id.* at 941 (Fisher, J., dissenting).

involvement, but eventually admitted authorship of the online parody, and the school suspended her for ten days.<sup>177</sup>

In its *de novo* review of the district court's grant of the school's motion for summary judgment, the Third Circuit applied a checklist from the student speech precedents, including substantial school disruption, interference with the rights of others, and lewd/vulgar speech.<sup>178</sup> The *Snyder* majority opinion cited *Hustler Magazine v. Falwell*,<sup>179</sup> and earlier concluded that the profile "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did."<sup>180</sup> The court also found no substantial disruption.<sup>181</sup> A few teachers fielded student queries about the website, and one counselor lost twenty or thirty minutes when forced to sit in on a parent meeting related to the MySpace page.<sup>182</sup> The court held that the speech was protected by the First Amendment,<sup>183</sup> though this conclusion does not settle the matter of school jurisdiction over cyberbullies in the circuit.

Weighing the student's First Amendment rights against the alleged school disruption, the Third Circuit voted thirteen-to-six for the conclusion that the school lacked the authority to punish *this particular* student speech.<sup>184</sup> It is noteworthy that five of the circuit's judges signed on to the majority's conclusion, but not its reasoning.<sup>185</sup> The concurrence, written by Judge D. Brooks Smith and signed by Chief Judge Theodore McKee and three others, opined that *Tinker* does not reach off-campus speech at all.<sup>186</sup> The

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<sup>177</sup> See *id.* at 922.

<sup>178</sup> See *id.* at 926–27, 931 n.9.

<sup>179</sup> See *id.* at 931 n.9 (citing and summarizing the U.S. Supreme Court's reasoning in *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988), which "[h]eld that a libel claim cannot survive where no reasonable observer can understand the statements to be describing actual facts or events").

<sup>180</sup> *Id.* at 929.

<sup>181</sup> See *id.* at 928.

<sup>182</sup> See *id.* at 923.

<sup>183</sup> See *id.* at 931.

<sup>184</sup> See *id.* at 936.

<sup>185</sup> See *id.* at 936–41.

<sup>186</sup> See *id.* at 936 (Smith, J., concurring) ("I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects

dissent, signed by six Third Circuit judges, would have upheld J.S.'s suspension, granting her no First Amendment protection under *Tinker* because, as a factual matter, J.S.'s behavior *did in fact* disrupt her school with "vulgar, obscene, and personal language" directed at school officials.<sup>187</sup> But more to the point of this Article and the overall cyberbullying debate, the dissent found that jurisdiction over such student speech *does* rest with the school under *Tinker*, just as the eight-judge majority opinion did.<sup>188</sup> Judge D. Michael Fisher, disagreeing pointedly with the *Snyder* majority's factual conclusion that J.S.'s words did not create a substantial disruption, noted in the dissent that the "Supreme Court has only briefly and ambiguously considered whether schools have the authority to regulate student off-campus speech."<sup>189</sup> Thus the six-vote dissent in *Snyder*, coupled with the eight votes for the majority, likely form the most societally and judicially important conclusion of *Snyder*. That conclusion is this: With the U.S. Supreme Court silent on the matter, fourteen of the nineteen Third Circuit judges—which this Article argues is the court with the broadest, most in-depth and credible treatment of the problem—hold that schools in the internet era *do* have the authority under *Tinker* to regulate off-campus cyberbullying speech.<sup>190</sup>

A recent post-script to *Snyder* comes from the federal district court for the Middle District of Pennsylvania, which found on October 5, 2017, that a junior varsity cheerleader was protected by the First Amendment against her high school's attempts to discipline her for a social media photo in which she "and a friend h[eld] up their middle fingers with the [caption:] 'fuck school fuck softball fuck cheer fuck everything.'"<sup>191</sup> It is noteworthy that the Middle District Court of Pennsylvania read the *Snyder* Third

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students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.").

<sup>187</sup> See *id.* at 936–41.

<sup>188</sup> See *id.* at 943 (Fisher, J., dissenting) ("I believe that the rule adopted by the Supreme Court in *Tinker* should determine the outcome of this case.").

<sup>189</sup> *Id.* at 942 (citing Waldman, *supra* note 7, at 617–18).

<sup>190</sup> See generally *Snyder*, 650 F.3d 915 (noting agreement between the majority and dissent as to applying *Tinker*); *supra* notes 178–89 and accompanying text (noting same).

<sup>191</sup> See B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., No. 3:17-CV-1734, 2017 U.S. Dist. LEXIS 165177, at \*1, \*2–3 (M.D. Pa. Oct. 5, 2017).

Circuit decision to mean public schools lack the authority to punish off-campus speech if the punishment is based solely on the so-called *Fraser* exception, which allows schools to punish “lewd or profane” speech.<sup>192</sup>

*D. Fourth Circuit: The Kowalski Test: ‘Nexus’ to ‘School’s Pedagogical Interests’*

In the Fourth Circuit, the standard governing a public school’s ability to regulate or punish off-campus cyberbullying is: The First Amendment does not bar public school discipline or regulation where the “nexus” between the student’s speech and the “[s]chool’s pedagogical interests [is] sufficiently strong to justify the action taken by school officials.”<sup>193</sup>

In *Kowalski v. Berkeley County Schools*, Kara Kowalski, a high school senior in Berkeley County, West Virginia, created a website called “S.A.S.H.” from home that was dedicated to ridiculing a fellow student, Shay N.<sup>194</sup> Ms. Kowalski claimed the initials of the site stood for “Students Against Sluts Herpes,” although a classmate who participated in the cyberbullying admitted that the letters stood for “Students Against Shay’s Herpes.”<sup>195</sup> Kowalski invited one-hundred people to join the MySpace group, and two dozen fellow students “joined” the electronic group, which allowed large groups of users to post pictures and make comments.<sup>196</sup> The court found as a factual matter that Kara Kowalski’s principal motive in creating the MySpace page was ridiculing the fellow student.<sup>197</sup> School administrators imposed a ten-day suspension and a ninety-day “social suspension” on Kowalski, later reduced after complaints from her parents, to a five-day suspension with a

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<sup>192</sup> See *id.* at \*7; see also *Snyder* 650 F.3d at 932 (“The School District’s argument fails at the outset because *Fraser* does not apply to off-campus speech.”). The Author notes that the *Snyder* opinion allows for an alternate reading, given that *Fraser* distinguishes punishable lewd student speech from speech outside of the school context. See *id.* at \*6. A fair reading of the term “school context” could include school-related social media speech, in the Author’s opinion. See *id.* at \*6–7.

<sup>193</sup> *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012).

<sup>194</sup> See *id.* at 567.

<sup>195</sup> *Id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 576.

ninety-day social suspension.<sup>198</sup> The social suspension banned Kowalski from “school events in which she was not a direct participant.”<sup>199</sup> Kowalski responded by suing the school and various officials, claiming, among other things, that the First Amendment and the student speech cases prohibit discipline of students where that speech is not connected to “school-related activity.”<sup>200</sup> She argued that her speech was “private out-of-school speech.”<sup>201</sup>

The Fourth Circuit rejected Kowalski’s arguments, framing the issue as follows: “The question thus presented is whether Kowalski’s activity fell within the outer boundaries of the high school’s legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.”<sup>202</sup> The court concluded that it did.<sup>203</sup>

#### *E. Fifth Circuit: Tinker Reaches Off-Campus Speech*

The Fifth Circuit has recently held that *Tinker* applies to off-campus speech, in the case of a foul-language rap song posted to Facebook.<sup>204</sup> The court in *Bell v. Itawamba County School Board*, sitting en banc, reinforced the notion that it would impose an intent standard on off-campus communications which school officials believe may disrupt campus activities.<sup>205</sup> The Fifth Circuit relied heavily upon the reasoning of its 2004 opinion in the non-internet case *Porter v. Ascension Parish School Board*.<sup>206</sup> In *Porter*, a student drew a crude sketch of his school under siege by a gasoline truck tanker, replete with racial epithets, a missile launcher, and a depiction of a brick being thrown at the school principal.<sup>207</sup> The student, Adam Porter, then fourteen years old, showed the “siege”

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<sup>198</sup> *Id.* at 569.

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

<sup>200</sup> *Id.* at 567.

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

<sup>202</sup> *Id.* at 571.

<sup>203</sup> *See id.* at 574.

<sup>204</sup> *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016).

<sup>205</sup> *See id.* at 391, 396.

<sup>206</sup> *See id.* at 394–96 (discussing *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004)).

<sup>207</sup> *See* 393 F.3d at 611.

drawing to his mother, younger brother, and one other person in his home, and the drawing was then placed in a closet.<sup>208</sup> The pad apparently remained there for two years until Adam's younger brother, rummaging through the closet to find something to draw on, found the pad and used one of its other pages to draw a sketch of a llama.<sup>209</sup> While riding a school bus, the brother showed the sketchpad with the llama to a fellow student who flipped through the pad and spotted Adam's "siege" drawing, gave the pad to the bus driver, and said "Miss Diane, look, they're going to blow up [our school]."<sup>210</sup>

Adam was subsequently threatened with expulsion and sent to alternative school.<sup>211</sup> He eventually returned to his former high school, but dropped out.<sup>212</sup> On his behalf, his mother sued the school and the local school district, alleging, among other claims, violation of Adam's First Amendment rights under the U.S. Constitution.<sup>213</sup> The trial court granted summary judgment for the district and other defendants.<sup>214</sup> Porter appealed, and the Fifth Circuit found in his favor on the First Amendment claim.<sup>215</sup> The court's reasoning was simple, elegant, and instructive for courts now deciding cases in the social media era.

The Fifth Circuit concluded that Adam did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment: "Because Adam's drawing cannot be considered a true threat as it was not intentionally communicated, the state was without authority to sanction him for the message it contained."<sup>216</sup> The court noted that

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<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* at 612.

<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See id.* at 613.

<sup>215</sup> *See id.* at 625 (disagreeing with district court's finding concerning the First Amendment, but affirming on the alternate ground that only the challenge to summary judgment as it pertained to the principal was maintained, and the principal was entitled to qualified immunity).

<sup>216</sup> *Id.* at 618. Scholars have roundly criticized the U.S. Supreme Court's analysis in the true-threat context for its lack of guidance to lower courts. *See, e.g.,* W. Wat Hopkins, *Cross Burning Revisited: What the Supreme Court Should Have Done in Virginia v.*

the fact that “the introduction of the drawing to [the high school] was wholly accidental and unconnected with Adam’s earlier display of the drawing to members of his household is undisputed.”<sup>217</sup> The court concluded that private writings enjoy the protection of the First Amendment, and losing such protection requires “something more than their accidental and unintentional exposure to public scrutiny.”<sup>218</sup> The language of the Fifth Circuit on its face, then leaves open the possibility—indeed the likelihood—that private writings *intentionally* exposed to public scrutiny would lose their private character, and thus their presumed First Amendment protection.<sup>219</sup> But the rule from the case, which might be called the *Porter* Rule, is that offensive speech *inadvertently* transmitted to the school environment is beyond the reach of school administrative discipline.

The *Bell* court adopted the same “intent” reasoning: “*Porter* instructs that a speaker’s intent matters when determining whether the off-campus speech being addressed is subject to *Tinker*. A speaker’s intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*’s school-speech standard to that speech.”<sup>220</sup>

#### F. Sixth Circuit: Lowery Rule Leaves Anti-Coach Petitions Unprotected

In the Sixth Circuit, the law of school jurisdiction over off-campus speech is unsettled. Shortly before the Second Circuit’s decision in *Doninger*, the Sixth Circuit handed down *Lowery v. Euverard*, a non-internet case of off-campus student speech transmitted into the school environment.<sup>221</sup> In *Lowery*, a group of football players signed a petition calling for the firing of their

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Black and *Why It Didn’t*, 26 HASTINGS COMM. & ENT. L.J. 269, 314 (2004); John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*, 8 TEX. J. WOMEN & L. 207, 212–13 (1999).

<sup>217</sup> *Porter*, 393 F.3d at 617.

<sup>218</sup> *Id.* at 617–18.

<sup>219</sup> *See id.*

<sup>220</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 395 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016).

<sup>221</sup> *See* 497 F.3d 584, 585–86 (6th Cir. 2007).



football coach.<sup>222</sup> The players intended to hold the petition until after the season, when Lowery, and perhaps others, would give it to the school principal in an attempt to get the coach replaced as head coach of the football team.<sup>223</sup> The *Lowery* Court notes that a player “typed” the petition and that eighteen players “eventually signed” it, although the court is silent on whether these acts took place on campus or off.<sup>224</sup> When the coach discovered the petition, he called the players in one by one and asked whether they were aware of the petition, whether they’d signed it, and whether they wanted to play football under the current coach.<sup>225</sup> Those who answered “no” to the third question, and refused to apologize if they signed, were dismissed from the team.<sup>226</sup> The Sixth Circuit concluded that the school did not violate the players’ First Amendment rights.<sup>227</sup> In rejecting the students’ First Amendment claim, the court noted that the players were free to continue trying to have the coach fired, but not as team members “actively working to undermine his authority.”<sup>228</sup>

*G. Seventh Circuit: District Court Presumes Tinker’s Reach in Teen Sexual Photos Posting Case*

In the Seventh Circuit, the law of school jurisdiction over off-campus speech, including cyberbullying speech, is unclear.<sup>229</sup> The

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<sup>222</sup> *Id.* at 585–86. The opinion is silent on where the petition was drafted. *See generally id.* What is clear is that the *Tinker* analysis employed by the *Lowery* court did not rely on any presumption that the petition and player signings were done *on campus*. *See generally id.* (failing to examine whether the speech occurred on or off campus at all). Thus, the Sixth Circuit’s analysis turns solely on the presumption of potential substantial disruption, and does not require as a condition precedent for discipline that the student speech have been uttered on-campus or at a school event. *See generally id.* (speaking neither of location on or off campus).

<sup>223</sup> *See id.*

<sup>224</sup> *See generally id.*

<sup>225</sup> *Id.* at 586.

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* at 600–01.

<sup>228</sup> *Id.* at 600 (employing a *Tinker*-style disruption analysis).

<sup>229</sup> While research revealed no Seventh Circuit cases opining specifically on the post-*Tinker* standard to be applied to off-campus speech transported to campus, the plaintiff in *Boucher v. School Board* tried unsuccessfully to make the argument for an off-campus analysis. *See* 134 F.3d 821, 829 (7th Cir. 1998). The *Boucher* court, however, found that because the underground newspaper at issue in the case was in fact distributed on campus and advocated behavior on campus, the off-campus analysis was unnecessary. *Id.*

circuit—employing somewhat circular reasoning—found that off-campus speech deemed to be within the jurisdiction of school officials is de facto on-campus speech.<sup>230</sup> This approach avoids any need to construct an analytical framework to determine when and under what circumstance, absent intentional physical transport onto the campus, such speech which originates off campus is subject to school jurisdiction. Research revealed no Seventh Circuit appellate cases adjudicating a public school district’s reach to off-campus speech.

Still, one case from within the district provides some insight into what the Seventh Circuit might do with a cyberbullying matter of first impression.<sup>231</sup> In *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, an Indiana district court found that a school district violated the First Amendment rights of two students who “posed for some raunchy photos which they later posted online.”<sup>232</sup> The photos, taken in a private home at a teen slumber party, were posted on social media websites Facebook, MySpace, and Photo Bucket, and eventually came to the attention of the school officials, who suspended the two students from participating in certain school activities.<sup>233</sup> The teenage girls in the photos used a lollipop to mimic sex organs, simulated sex between the pajama-clad participants, and posted a photo with the accompanying words: “Wanna suck on my cock.”<sup>234</sup>

After laying out the facts, Judge Philip P. Simon, Chief District Judge for the Northern District of Indiana, reasoned through an

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<sup>230</sup> See *id.* In looking to the Seventh Circuit for direction in the absence of its own Eleventh Circuit’s guidance, the U.S. District Court for the Southern District of Florida reasoned that *Boucher* is part of a “line of early cases that have determined that student speech concerns are implicated when speech published off-campus is brought on-campus.” *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1371 (S.D. Fla. 2010). The case does not inquire into the method of transportation or the intent of the author of the speech. See generally *id.*

<sup>231</sup> See generally *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 774–85 (N.D. Ind. 2011) (discussing First Amendment concerns and applying *Tinker*’s “substantial disruption” analysis, while resorting to Third Circuit precedent *J.S. Snyder*, which the *B.V.* court determined to “assume[] without deciding that *Tinker* applied to the student’s off-campus” speech).

<sup>232</sup> *Id.* at 771, 790.

<sup>233</sup> See *id.* at 771–74.

<sup>234</sup> *Id.* at 772.

extensive First Amendment analysis, noting: “The Supreme Court has not considered whether *Tinker* applies to expressive conduct taking place off school grounds and not during a school activity and has in fact noted that ‘[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.’”<sup>235</sup> The *B.V.* court, following what it took to be the national trend, assumed that *Tinker* applies to off-campus speech, making it theoretically possible for the school to punish or ban the lewd behavior.<sup>236</sup> In fact, however, the court found the girls’ silly faux-sex slumber party photos and posts were non-profane expressions of “crude humor,” and were thus protectable expression “within the ambit of the First Amendment.”<sup>237</sup> Judge Simon wrote: “Ridiculousness and inappropriateness are often the very foundation of humor. The provocative context of these young girls horsing around with objects representing sex organs was intended to contribute to the humorous effect in the minds of the intended teenage audience.”<sup>238</sup> Analysts reviewing *B.V.* should take care to note that the student in the case may have won the battle but lost the war. The court clearly found that the school had jurisdiction over the off-campus speech,<sup>239</sup> and such a presumption is now a given among most federal courts.<sup>240</sup> The *B.V.* court left little doubt that, on the appropriate facts, it could uphold a school suspension based on off-campus cyberspeech.<sup>241</sup>

#### *H. Eighth Circuit: Clear Support for School Discipline of Off-Campus Speech*

In the Eighth Circuit, public primary and secondary schools clearly have administrative jurisdiction over off-campus

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<sup>235</sup> *Id.* at 781 (quoting *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (alteration in original)).

<sup>236</sup> *See id.* at 781 (“In the present context, I will also assume without deciding that *Tinker* applies, because even under its contextual narrowing of the right of free speech, I conclude that the school officials violated the First Amendment rights of plaintiffs T.V. and M.K.”).

<sup>237</sup> *Id.* at 776.

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

<sup>239</sup> *See id.* at 781 (applying the *Tinker* standard).

<sup>240</sup> *See generally infra* Part V and accompanying text (discussing the application of *Tinker* among the Federal Circuit Courts of Appeal).

<sup>241</sup> *See B.V.*, 807 F. Supp. 2d at 771–81.

cyberbullying. Two very different cases illustrate the views of the circuit. In *D.J.M. ex rel. D.M. v. Hannibal Public School District # 60*, a minor sent instant messages to a fellow student about bringing a gun to school, and about specific students and the types of students he would like to shoot.<sup>242</sup> Reviewing only administrative action by the school, the Eighth Circuit discussed *Tinker* and its progeny, and noted:

In none of these cases was the [Supreme] Court faced with a situation where the First Amendment question arose from school discipline exercised in response to student threats of violence or for conduct outside of school or a school sanctioned event. Such cases have been brought in the lower courts, however, and the courts of appeal have taken differing approaches in resolving them.<sup>243</sup>

D.J.M. argued to the court that his speech was not “student speech” because it was made online and outside the school environment.<sup>244</sup> The court rejected this argument and upheld the suspension.<sup>245</sup>

A year later, the Eighth Circuit heard *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School District*,<sup>246</sup> a more traditional cyberbullying case. In *Wilson*, twin brothers set up a sexually explicit and racist blog which, according to the court, was “targeted at” the district’s high school.<sup>247</sup> In rejecting the First Amendment challenge to the 180-day suspension brought by S.J.W.’s parents on behalf of their minor children, the Eighth Circuit considered and rejected the students’ argument that “all off-campus speech is protected and cannot be the subject of school discipline, even if the speech is directed at the school or specified students.”<sup>248</sup>

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<sup>242</sup> See 647 F.3d 754, 756 (8th Cir. 2011).

<sup>243</sup> *Id.* at 761.

<sup>244</sup> *Id.* at 760 (“He also argues that his speech was not student speech because it was online outside of school.”).

<sup>245</sup> *Id.* at 765.

<sup>246</sup> 696 F.3d 771 (8th Cir. 2012).

<sup>247</sup> *Id.* at 775.

<sup>248</sup> *Id.* at 776.

I. *Ninth Circuit: The Wynar Rule: Off-Campus Speech Punishable*

In the Ninth Circuit, off-campus messages are subject to public school administrative jurisdiction and punishment. In *Wynar v. Douglas County School District*,<sup>249</sup> the Ninth Circuit found no First Amendment violation in the school's discipline of a student following "increasingly violent and threatening" internet-transmitted MySpace chat messages.<sup>250</sup> These messages, for example, discussed raping girls' dead bodies, hero worship of Adolph Hitler, and details of who to shoot and kill first on a "hit list" of students.<sup>251</sup> The student, Landon Wynar, complained online that the Virginia Tech mass killer got too much notoriety for his killing spree.<sup>252</sup> "[T]hat stupid kid from vtech. he didnt do shit and got a record. i bet i could get 50+ people / and not one bullet would be wasted."<sup>253</sup> The *Wynar* court, noting the lack of Supreme Court guidance, directly addressed the question of whether the First Amendment protects students from school discipline for off-campus speech.<sup>254</sup> To answer this question, the court said it would "look to our circuit precedent and to our sister circuits for guidance."<sup>255</sup> The court then engaged in a detailed analysis which expressly adopted *Tinker's* "disruption or interference" standard, before concluding that the First Amendment does *not* insulate students from discipline for disruptive off-campus speech, or speech which interferes with the rights of other students.<sup>256</sup>

In a 2016 case, the Ninth Circuit clarified that off-campus speech jurisdiction is not premised upon the risk of violence. In a well-reasoned decision based on facts *not* involving cyberspeech, the Ninth Circuit in *C.R. ex rel. Rainville v. Eugene School District 4J*, analyzed the leading off-campus speech cases from the Fourth, Fifth, and Eighth Circuits to hold that student-to-student verbal sexual harassment which occurred "several hundred feet" from

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<sup>249</sup> 728 F.3d 1062 (9th Cir. 2013).

<sup>250</sup> *See id.* at 1064–65, 1067–72.

<sup>251</sup> *See id.* at 1065–66.

<sup>252</sup> *See id.* at 1066.

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

<sup>254</sup> *See id.* at 1067.

<sup>255</sup> *Id.*

<sup>256</sup> *See id.* at 1067–72.

campus is indeed subject to school regulation under *Tinker*.<sup>257</sup> The court employed a nexus-to-school/foreseeability analysis developed by the Fourth Circuit in *Kowalski*.<sup>258</sup> Thus, although this Article relies heavily upon the premise that in the internet era, much of the off-campus *Tinker* analysis becomes conflated with a discussion of cyberbullying, the facts and reality of traditional bullying remain a concern for schools and the courts.

*J. Tenth Circuit: No Controlling Case Authority*

There is no controlling Tenth Circuit authority on the ability of schools to administratively punish off-campus speech. However, one unpublished decision from a district court within the Tenth Circuit is noteworthy because it reinforces the Fifth Circuit holding in *Porter*. In *D. G. v. Independent School District No. 11*, the U.S. District Court for the Northern District of Oklahoma, in an unpublished case, overturned the suspension of a student who wrote a poem containing such words as “Killing Mrs. [Teacher]” and “I hate this class it is hell.”<sup>259</sup> The poem was never communicated to the teacher and, based on the factual record, it appears the discovery of the poem was completely inadvertent.<sup>260</sup> The court’s approach was to first analyze the facts under a modified version of *Watts*—would a reasonable person believe the message would communicate a serious intent to harm?<sup>261</sup> Then, the court applied a standard *Tinker* analysis: was the speech materially disruptive?<sup>262</sup> The court answered both questions in the negative and ordered the student reinstated in school.<sup>263</sup>

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<sup>257</sup> See *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1147, 1152–55 (9th Cir. 2016).

<sup>258</sup> See *id.* at 1149–52 (citing *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012)).

<sup>259</sup> See No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at \*3, \*19 (N.D. Okla. Aug. 21, 2000).

<sup>260</sup> See *id.* at \*3–7.

<sup>261</sup> See *id.* at \*11–13.

<sup>262</sup> See *id.* at \*14–15.

<sup>263</sup> See *id.* at \*18–19.

*K. Eleventh Circuit: District Court Protects Student-Critic of Teacher*

There is no controlling Eleventh Circuit authority on the issue of school jurisdiction over off-campus speech. The federal district court in the Southern District of Florida, however, wrestled comprehensively with the special issues raised in the modern internet era in *Evans v. Bayer*.<sup>264</sup> In *Evans*, a student created a group on Facebook, a social networking website, entitled, “Ms. Sarah Phelps is the worst teacher I’ve ever met” and was disciplined.<sup>265</sup> The *Evans* court discussed the Seventh Circuit’s approach in *Boucher*, which construed off-campus speech as automatically converted to on-campus speech when it reaches campus and disrupts the campus environment.<sup>266</sup> Despite noting that this approach “is not as easily suited to intangible situations like the [I]nternet,” the *Evans* court nonetheless predicted that “ultimately some guise of it will control.”<sup>267</sup>

The *Evans* court found the speech was off-campus speech, but that “schools can discipline off-campus speech if it is unprotected speech.”<sup>268</sup> The student’s creation of the website was a non-disruptive, non-threatening opinion, and was not prohibited by any other free-speech exception—such as lewdness or advocacy of illegal action—and thus protectable under the First Amendment.<sup>269</sup>

*L. D.C. Circuit: No Controlling Appellate Authority*

There is no controlling D.C. Circuit authority on the ability of schools to administratively punish off-campus speech.

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<sup>264</sup> 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

<sup>265</sup> *Id.* at 1367.

<sup>266</sup> *See id.* at 1371 (citing *Boucher v. Sch. Bd.*, 134 F.3d 821, 829 (7th Cir. 1998)).

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

<sup>268</sup> *Id.* at 1372.

<sup>269</sup> *See id.* at 1374 (“Evans’s speech falls under the wide umbrella of protected speech. It was an opinion of a student 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. Therefore, the Court finds that Evans had a constitutional right.”)

*M. Summary of Federal Off-Campus Speech Cases*

In summary, there appears to be no controlling federal circuit court authority balancing the First Amendment against public school administrative discipline of off-campus cyberspeech in six of the twelve regional circuits: the First,<sup>270</sup> Sixth, Seventh, Tenth,<sup>271</sup> Eleventh, and the District of Columbia.<sup>272</sup> Lower courts in at least three of these six “silent” circuits—the Seventh, Tenth, and Eleventh—have heard cyberspeech cases in the absence of circuit guidance, and each of these district courts’ analyses appears to presume *Tinker*’s applicability to off-campus cyberspeech.<sup>273</sup> The other six regional circuits—the Second, Third, Fourth, Fifth, Eighth, and Ninth—have rendered detailed First Amendment-based appellate decisions on the question of public school jurisdiction over cyberbullies. Collectively, these circuits have produced at least ten opinions<sup>274</sup> which pit regulation of off-

<sup>270</sup> The First Circuit has authority for the proposition that public schools are limited in their ability to restrict information *leading* to potentially offensive cyberspeech, such as censoring a URL on an in-school club poster. *See* *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 178 (D. Mass. 2007).

<sup>271</sup> Although the Tenth Circuit Court of Appeals has yet to decide an off-campus cyberbully case on point, it heard and decided *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 36–39 (10th Cir. 2013), in which a student’s First Amendment challenge to a licensing scheme was turned away with language that implied strong deference to school district administrators. *See id.* at 36–39. The court ruled:

[T]he [school’s] policy imposes substantive constraints on official discretion that are constitutionally sufficient in the special context of a public school, where students enjoy free speech rights but not to the same extent as they would in the public square. Additionally, we note that our conclusion is consistent with the trend of decisions of our sibling circuits on this issue.

*Id.* at 43.

<sup>272</sup> *See* circuit-by-circuit analysis from en banc opinion in *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (en banc) (“The remainder of the circuits ([F]irst, [S]ixth, [S]eventh, [T]enth, [E]leventh, D.C.) do not appear to have addressed this issue.”), *cert. denied*, 136 S. Ct. 1166 (2016).

<sup>273</sup> *See generally* *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767 (N.D. Ind. 2011) (examining such a district court decision within the Seventh Circuit); *Evans*, 684 F. Supp. 2d 1365 (examining such a district court decision within the Eleventh Circuit); *D. G. v. Indep. Sch. Dist. No. 11*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. 2000) (examining such a district court decision from the Tenth Circuit).

<sup>274</sup> *See generally* *Bell*, 799 F.3d 379; *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013); *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. # 60*, 647 F.3d 754, 756 (8th



campus cyberspeech against the First Amendment. This Article now distills from these cases, together with particularly compelling federal district court opinions, the most fair, durable, and broadly applicable policy guidance in an attempt to formulate a national rule.

#### V. BEST-PRACTICE LEGAL CONCEPTS EMERGING FROM THE FEDERAL CASES

A half-dozen principles emerge as best-practice judicial concepts from the federal off-campus student speech cases.<sup>275</sup> Below, these factors are listed and discussed. Later, they are incorporated into the *Tinker*-Cyberbully Test.

COMEDY. First, parody, lampooning authority, and hyperbole will be protected if directed toward school administrators. *Snyder* and *Layshock* are the leading examples.<sup>276</sup> The rationale seems to be that adults are more mature and have more capacity to withstand caustic, comedic speech. Also, adult employees are present at school by choice, unlike students, whose attendance is compulsory. If the speech is merely narcissistic, harmless sexual exhibitionism, the student wins, not because the speech is approved by the school, but because such regulation is beyond the school's jurisdictional reach.<sup>277</sup>

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Cir. 2011); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011); *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007).

<sup>275</sup> As noted earlier, this Article attempts to rely upon federal circuit authority. Deviation from this methodology is justified and noted where a circuit lacks off-campus speech cases, or where a district court has released an opinion with particularly compelling reasoning in a case with a relevant fact pattern.

<sup>276</sup> See *Snyder*, 650 F.3d at 929, 933 (upholding First Amendment rights for MySpace page parodying a teacher); *Layshock*, 650 F.3d at 207–08 (upholding First Amendment rights for MySpace page parodying a principal). *But see Doninger*, 642 F.3d at 340, 351 (upholding ban on a would-be student office candidate from running because she called school administrators “douchebags” in a blog after they delayed a concert she helped plan), *cert. denied*, 565 U.S. 976 (2011).

<sup>277</sup> See, e.g., *B.V.*, 807 F. Supp. 2d at 784 (“I can conclude as a matter of law that the substantial disruption required by the *Tinker* test was not reasonably forecast.”).

DIRECT STUDENT BULLYING. Second, cruelty or vicious meanness aimed directly at a fellow student, or racist/sexist comments aimed at a target group, combined with affirmative transmission and disruption is typically unprotected speech. This is so even if the speech was transmitted from off-campus, and was only brought to the attention of students and campus officials via the Internet. *Wilson* and *Kowalski* are good examples.<sup>278</sup> If the speech is both comedic cruelty *and* directed at another student—i.e., Student’s Against Shay’s Herpes—the speech is more likely to be unprotected, particularly where other students are invited to join in on the cruelty.<sup>279</sup>

OPINION. Third, there appears to be a developing “opinion” privilege under the First Amendment allowing students to critique their administrators and teachers, so long as the student speech does not run afoul of some other prohibition.<sup>280</sup> If “Ms. Sarah Phelps is the worst teacher I’ve ever met”<sup>281</sup> is protected—and it should be—then it seems any legitimate critique of the performance of a teacher, administrator, school employee, school board member, or superintendent by a student also should be protected.<sup>282</sup> This analysis, however, puts *Doninger* outside what appears to be the majority trend in these cases.<sup>283</sup>

VIOLENT SPEECH/TRUE THREATS. Fourth, violent speech drafted off-campus but communicated to campus via the Internet, without more facts, will be de facto unprotected.<sup>284</sup> There are many examples, but representative among them are *D.J.M.* and *Wynar*.<sup>285</sup>

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<sup>278</sup> See generally *Wilson*, 696 F.3d 771 (analyzing suspension of students for creation of a blog containing racist and sexist comments about other students); *Kowalski*, 652 F.3d 565 (analyzing suspension of student for creating a webpage ridiculing another student), *cert. denied*, 565 U.S. 1173 (2012).

<sup>279</sup> See, e.g., *Kowalski*, 652 F.3d at 567–74.

<sup>280</sup> See, e.g., *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010).

<sup>281</sup> *Id.* at 1367.

<sup>282</sup> See *id.* at 1376–77.

<sup>283</sup> In *Doninger*, the court upheld a student’s ban from running for student office after she criticized the school administration on her blog. See *Doninger v. Niehoff*, 642 F.3d 334, 351 (2d Cir. 2011) (noting, however, that her criticism instigated on-campus disruptive activities, such as protests).

<sup>284</sup> See, e.g., *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–40 (2d Cir. 2007).

<sup>285</sup> See generally *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (holding no protection of speech regarding plans for a school shooting); *D.J.M. ex rel.*

These two cases include facts supporting not just administrative/school suspension, but also arrest and juvenile detention.<sup>286</sup>

The tougher student speech cases in the violent/threatening speech sub-arena are those with a mix of comedy and violence—sometimes complicated by a student’s legitimate First Amendment-protected opinion about the competence, skill, or allegedly improper behavior of a school employee.<sup>287</sup> The representative federal appellate case from this category is *Wisniewski*.<sup>288</sup> The U.S. Supreme Court has recently determined unequivocally that for a defendant to be convicted of the *crime* of communicating a true threat, the government must prove that the criminal defendant had some mens rea, or state of mind, bordering on or equal to intent to communicate the threat.<sup>289</sup> In *Elonis v. United States*, the Court found that allegedly threatening statements should be reviewed by courts, not from the perspective of the alleged victim, but by the intent of the defendant who communicated the alleged threat.<sup>290</sup> The Court stated that for a defendant who makes an alleged threat, “wrongdoing must be conscious to be criminal.”<sup>291</sup> The Court left open the question whether recklessness (as opposed to affirmatively intentional conduct) was a sufficient state of culpability to support a criminal

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D.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754 (8th Cir. 2011) (holding no protection of speech regarding threats for same).

<sup>286</sup> See *Wynar*, 728 F.3d at 1066; *D.M.*, 647 F.3d at 759.

<sup>287</sup> See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383–84, 391 (5th Cir. 2015) (en banc) (determining that there is no First Amendment protection for a violent online rap song with lyrics complaining about the sexual misconduct of a football coach), *cert. denied*, 136 S. Ct. 1166 (2016); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1374 (S.D. Fla. 2010) (finding “Ms. Sarah Phelps is the worst teacher I’ve ever met” online social media space was protected speech); *D. G. v. Indep. Sch. Dist. No. 11*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at \*3–4, \*13–19 (N.D. Okla. Aug. 21, 2000) (protecting a student poem with the words “Killing Mrs. [Teacher]” because there was no intent to transmit).

<sup>288</sup> See 494 F.3d at 38.

<sup>289</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015); see also *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (articulating true threat standard allowing criminal punishment only where a reasonable recipient of the speech would find that speech to be a serious expression of an intent to harm).

<sup>290</sup> See *Elonis*, 135 S. Ct. at 2012.

<sup>291</sup> *Id.* (quoting *Morisette v. United States*, 342 U.S. 246, 252 (1952)).

conviction, but was clear that mere negligence or accident is not enough.<sup>292</sup> Further, there is no controlling Supreme Court guidance on what standard ought to apply to such civil actions as student-initiated First Amendment lawsuits to fight an expulsion based on an alleged threat made via social media.<sup>293</sup>

SPORTS/COACHES. Fifth, if the student speech comes within the context of a team sport and substantially undermines the coach, the First Amendment will not protect such speech as advocacy to fire the coach while remaining on the team.<sup>294</sup> But the area of team sports as physical education may be unique, and should not be extended beyond this narrow body of law. The Sixth Circuit analysis in *Lowery* might lead to the flawed conclusion that a faculty newspaper advisor or debate club sponsor would also be allowed to dismiss a student from the club or newspaper for insubordination.<sup>295</sup> It should not, since the rationale behind the holding in *Lowery* goes directly to the unique nature of team sports.<sup>296</sup> Also, it is the Author's opinion that the facts and issue presented in *Bell v. Itawamba County School Board* underscore the point that where the student speech is directed at a coach in his *general capacity as a school employee*, rather than as a coach, the *Lowery* rule should not apply.<sup>297</sup> That is, coaches ought to be able to discipline players for disloyalty, including undermining the authority of the coach.<sup>298</sup> But if a non-athlete makes a claim against a coach which has nothing to do with the team, as was the case in *Bell*, the First Amendment ought to protect the student

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<sup>292</sup> See *id.* at 2012–13.

<sup>293</sup> See *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013).

<sup>294</sup> See generally *Lowery v. Euverard*, 497 F.3d at 584, 595–601 (6th Cir. 2007).

<sup>295</sup> See *Lowery*, 497 F.3d at 596, 600–01.

<sup>296</sup> *Id.* at 595 (“Mutual respect for the coach is an important ingredient of team chemistry.”).

<sup>297</sup> See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393, 399–400 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016). Note that *Bell* is closer to *Evans* than *Lowery*. See *id.* at 391, 393; *cf. Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1374 (S.D. Fla. 2010) (holding that student's social media post about her opinion on her teacher was protected speech). The student speaker in *Bell* was not a player who wanted the coach fired, but instead intended (with or without justification) to expose two adult school employees, who happened to be coaches, for allegedly acting sexually and improperly toward students. See *Bell*, 799 F.3d at 398. These facts are distinguishable from the player-initiated petition to fire the coach in *Lowery*. See *id.* at 391, 393.

<sup>298</sup> See *Lowery*, 497 F.3d at 594–96.

speech in the absence of some other policy rationale—such as protecting school employees from threats.<sup>299</sup> It should be inapplicable when the speech is a matter of public concern not related to the sport, such as student speech purporting to expose crime, fraud, or improper sexual acts of school employees.<sup>300</sup>

FORESEEABILITY/NEXUS TO SCHOOL. Sixth and finally, foreseeability—or the lack thereof—seems to be the most fundamental unifying concept among the off-campus speech cases. The First Amendment will protect speech characterized as a “wholly accidental” arrival onto school grounds.<sup>301</sup> There exists in the cases a continuum between foreseeability on the one hand, and inadvertent transmission of speech to campus on the other. That is, the closer the nexus between the speech and the school, the more likely the speech is unprotected—provided that it also falls within one of the school speech exceptions, such as *Tinker’s* material disruption test. The Fifth Circuit held the student artist of the “siege” scene in *Porter* is protected by the First Amendment because his brother brought the work to the school by accident.<sup>302</sup>

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<sup>299</sup> See *Bell*, 799 F.3d at 398–407 (showing how majority, concurring, and dissenting opinions divide along the rationale of whether the student speech at issue is primarily a threat from which school employees should be protected, or whistleblower speech of a student that is due protection under the First Amendment).

<sup>300</sup> See *id.* This argument was advanced on behalf of the student would-be whistleblower/rap artist in *Bell* but was rejected by the court. See *id.* at 400. The “*Tinker-Cyberbully Test*” advanced below at Section V.B. would protect the speech of the *known* student/rapper in *Bell*, because the speech is arguably a bona fide critique of the school’s propensity to allow sexual harassment of students by school employees. Cf. *id.* at 433–43 (Prado, J., dissenting). But see *id.* at 402–03 (Costa, J., concurring). Had Bell’s rap message been directed *anonymously* toward another *student*, it is the Author’s view that Bell would, and should, lose his anonymity protection under the First Amendment. See generally Benjamin A. Holden, *Unmasking the Teen Cyberbully: A First Amendment-Compliant Approach to Protecting Child Victims of Anonymous, School-Related Internet Harassment*, 51 Akron L. Rev. 1 (2017) (building upon this Article and proposing a legal standard for judicial orders requiring internet service providers to supply the internet protocol address of computers sending anonymous school-related cyberbullying messages to student victims called the “Cyberbully Unmasking Test”); see also McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995) (finding a constitutional right to anonymous speech implied in the First Amendment).

<sup>301</sup> *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004).

<sup>302</sup> See *id.*

Other cases seem to follow this approach.<sup>303</sup> Indeed, one factor cited in *Snyder* was the student's efforts to keep the offending web page "private."<sup>304</sup> Speech which is accidentally or inadvertently transmitted to a campus seems to place such speech in a category analogous to a password protected online Facebook page. The notion of "intent to communicate" seems to be a distinguishing touchstone, separating those speech fact patterns which judges find protected by the First Amendment from those which are unprotected. The concept that most rationally and logically balances the interests of student victims, with the rights of student speakers, and the obligations and responsibilities of school administrators, is the "nexus" analysis the *Kowalski* court employed.<sup>305</sup> The *Kowalski* court probed the link between the off-campus internet-based bullying speech of one student directed specifically at another, where a large number of fellow students were affirmatively invited to join in the cyberbullying.<sup>306</sup> The court concluded that despite the off-campus character of the speech, the communication nonetheless had a sufficient "nexus" to the "[s]chool's pedagogical interests" in keeping good order and protecting student victims.<sup>307</sup> This approach may be the best place to start in developing a flexible, widely applicable test to separate student speech which ought to be protected by the First Amendment from that which, as a matter of policy, the Supreme Court should allow schools to discipline. After all, neither the text of the First Amendment,<sup>308</sup> nor any subsequent case rendered by the Court contemplates the school-punishment-of-cyberbully paradigm. In the absence of facts that square up with a post-*Tinker* cyberbully student speech decision, linking the speech to the

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<sup>303</sup> See, e.g., *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1376–77 (S.D. Fla. 2010) (noting that post expressing student's dislike for her teacher was never seen by the teacher and removed before students returned to school following an extended weekend).

<sup>304</sup> See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012).

<sup>305</sup> See 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012).

<sup>306</sup> See *id.* at 567.

<sup>307</sup> *Id.* at 573.

<sup>308</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

school through a “nexus” test appears to be the most fair and logical point of departure articulated by any court decision researched for this Article.

## VI. TOWARD A NATIONAL STANDARD FOR OFF-CAMPUS CYBERBULLY SPEECH

Formulation of a fair and workable legal rule which might vie for consideration as a preferred approach in the adjudication of Cyberbully speech cases requires context. The majority of the underlying principles and assumptions of the student speech cases pre-date teens’ widespread use of the Internet as a primary means of communication.<sup>309</sup> Courts should begin with the premise that traditional boundaries of the “schoolhouse gate” are meaningless in 2016, and will become even more irrelevant in the future.<sup>310</sup>

### A. *The Need for a Constitutionally Valid Off-Campus Standard*

The U.S. Supreme Court has been silent on the question of whether schools have jurisdiction to regulate off-campus speech by students.<sup>311</sup> There are twelve regional federal circuits, each with its own court of appeals; however, there should not be twelve versions of the First Amendment. There have been repeated calls for

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<sup>309</sup> Note that the most recent student speech case decided by the U.S. Supreme Court was *Morse v. Frederick* in 2007—two years before Facebook supplanted MySpace as America’s dominant social media network. See 551 U.S. 393 (2007).

<sup>310</sup> This is not to suggest that the Supreme Court’s “basic principles” guiding analysis for application of the First Amendment to new media should be imperiled or even amended. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011). The *Tinker-Cyberbully* Test extends, rather than creates, a new basic principle. “And whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). It is the Author’s opinion that virtual teaching and virtual classrooms, already common at the college level, will make their way more frequently to the doorstep of home schooled and other public school children who are nonetheless under the jurisdiction of local school districts.

<sup>311</sup> See, e.g., *Kowalski*, 652 F.3d 565; J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012) (consolidated with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011)); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 565 U.S. 976 (2011); see also HAYES, *supra* note 3, at 49.

Supreme Court guidance,<sup>312</sup> but to no avail.<sup>313</sup> In this void, half of the federal circuits—the Second, Third, Fourth, Fifth, Eighth, and Ninth—have implicitly or explicitly concluded that off-campus speech *can* be regulated and/or banned by schools,<sup>314</sup> although the only consistent conclusion among the courts seems to be that student speech, which implies eventual violence by the speaker, is not protectable.<sup>315</sup> Research revealed no controlling appellate

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<sup>312</sup> See generally Waldman, *supra* note 7, at 617–18; S. Kate Fletcher, Note, *Constitutional Law—First Amendment—Social Media Rams the Tinker Schoolhouse Gate: A New Approach for Online Student Speech*, 35 U. ARK. LITTLE ROCK L. REV. 1113 (2013); Katherine Hokenson, Comment, *My Teacher Sux! [Censored]: Protecting Students’ Right to Free Speech on the Internet*, 28 J. MARSHALL J. COMPUTER & INFO. L. 385, 407–08 (2011) (analyzing controversies over students’ online criticism of school officials).

<sup>313</sup> See Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 208 (2007) (“[C]ases involving speech in the schools are overwhelmingly more common in the state and federal inferior courts than are cases dealing with . . . any of a host of other First Amendment subjects . . .”); see also HAYES, *supra* note 3, at 49; David L. Hudson Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621, 621 (2012); Aaron J. Hersh, Note, *Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students’ First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309 (2013). See generally Martha McCarthy, *Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?*, 83 MISS. L.J. 805, 805–06 (2014) (criticizing the Supreme Court for its failure to act on the growing cyberbully discord in the wake of *Tinker*).

<sup>314</sup> However, the Ninth Circuit in *Wynar v. Douglas County School District* sought guidance from the Third Circuit en banc opinion in *Snyder*, and concluded that “[t]he Third and Fifth Circuits have left open the question whether *Tinker* applies to off-campus speech.” 728 F.3d 1062, 1069 (9th Cir. 2013). This Article respectfully disagrees with this narrow reading of the cases in those two circuits, in light of the analyses of the Third Circuit’s *Snyder* opinion and the Fifth Circuit’s *Porter* opinion. The federal district court in *T.V. ex rel. B.V. v. Smith-Green Community School Corp.* took the same view as the Author on the Third Circuit’s assumption of *Tinker*’s applicability to cyberspeech. See 807 F. Supp. 2d 767, 781 (N.D. Ind. 2011). The *Snyder* dissent, signed by six Third Circuit appellate judges, also notes the *Snyder* majority’s “apparent adoption of the rule that off-campus student speech can rise to the level of a substantial disruption.” *Snyder*, 650 F.3d at 941 (Fisher, J., dissenting).

<sup>315</sup> See *Wynar*, 728 F.3d at 1074–75 (finding school discipline based on multiple threatening messages yielded no First Amendment violation); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. # 60*, 647 F.3d 754, 765 (8th Cir. 2011); see also *B.V.*, 807 F. Supp. 2d at 771–72, 790 (determining that sexually raunchy humor and photos are protected by First Amendment and that the school district violated students’ First Amendment rights by suspending them). Compare *Snyder*, 650 F.3d at 920 (ruling that the school violated a student’s First Amendment rights by suspending her for making a cruel parody of the school’s principal on a fake MySpace page), with *Kowalski*, 652 F.3d



authority from any circuit for the proposition that *Tinker* puts off-campus speech beyond the school's reach *as a matter of law*.<sup>316</sup> Some courts weighing the issue do not directly address the jurisdiction question, but instead presume it.<sup>317</sup> However, these inconsistent and conflicting results for the individual students involved stem from similar fact patterns in different courts. These courts appear to leap directly from *Tinker*, decided the year America first landed a man on the Moon, to this Brave New World in which student speech is instantaneously uttered, beamed into outer space, and returned to the eyes and ears of hundreds or even thousands of fellow students in the blink of an eye.

What is needed is a predictable, underlying legal test, based on the collective learning of the off-campus cyberspeech cases, but divorced from the peculiar facts of each case. Many of these cases have harsh, even disgusting language, sometimes interspersed with legitimate literary parody, social criticism, or critiques of the public school or its employees. If the government, as manifest in school authority, misbehaves, students deserve the right to speak and expose wrongdoing. Failing to acknowledge this concern would invite the evil of sedition, or punishment *by* government for criticism *of* government, into the schoolhouse gate. But the way the cases now arise from speech, to discipline, to courthouse, to resolution is arbitrary and inconsistent. Some cases appear to be exercises in gut instincts followed by random judicial conclusions.<sup>318</sup> The offensive language is tweeted, posted to

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at 567, 574–77 (ruling that the suspension a high schooler for creating MySpace page mocking a classmate for allegedly having herpes did not violate the constitution).

<sup>316</sup> However, as discussed above, the five-judge concurring opinion in *Snyder* takes the view that *Tinker* forbids school jurisdiction over off-campus speech as a matter of law, while joining with the eight judges who signed the majority opinion, which presumed that *Tinker* allowed school jurisdiction. See *Snyder*, 650 F.3d at 936 (Smith, J., concurring).

<sup>317</sup> See *B.V.*, 807 F. Supp. 2d at 781 (examplng such a district court decision within the Seventh Circuit); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370–71, 1376–77 (S.D. Fla. 2010) (examplng such a district court decision within the Eleventh Circuit); *D. G. v. Indep. Sch. Dist. No. 11*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at \*10–15 (N.D. Okla. Aug. 21, 2000) (examplng such a district court decision within the Tenth Circuit).

<sup>318</sup> See, e.g., *Kowalski*, 652 F.3d at 576–77 (ruling that cruel fake web pages are not protected by First Amendment); *Snyder*, 650 F.3d at 920 (ruling that cruel fake web pages are protected by First Amendment); *Doninger v. Niehoff*, 642 F.3d 334, 340–41, 351 (2d Cir. 2011) (ruling that mean blog posts are not protected by First Amendment),

Facebook, texted, or blogged to classmates, the language becomes a “thing” with other students, the principal finds out, the student is suspended, the parents sue, and the courts cite to *Tinker* and flip a coin. Violence or true threats always seem to trump First Amendment concerns, and this is as it should be. But what about everything else?

*B. The Tinker-Cyberbully Test*<sup>319</sup>

Employing *Tinker* with no eye toward the realities of modern internet speech and communications has led to inconsistent results among the federal circuits and the attendant lack of clear guidance for lower courts. Instead, courts should interpret the seminal school speech case in light of the best approaches by courts that have wrestled with the issues, until the Supreme Court settles the matter. What follows is the *Tinker-Cyberbully Test*, a proposed multi-part standard for courts to apply to off-campus speech, which in the social media era, is frequently cyberspeech:<sup>320</sup>

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*cert. denied*, 565 U.S. 976 (2011); *B.V.*, 807 F. Supp. 2d at 772, 790 (ruling that parody sex photos are protected by First Amendment).

<sup>319</sup> As discussed previously, all disruptive off-campus speech in the internet era is not cyberspeech. However, the fact patterns in the case law are strongly trending toward internet-based communications. Thus, the solution contemplated in this Article presumes off-campus speech problems are based in cyberspeech. It is obvious that on-campus cyberspeech—say, a mean text from a student in the cafeteria to a student in a classroom—is already clearly covered under *Tinker* and is not in need of a new, consistent legal solution.

<sup>320</sup> Such speech is assumed to be a product of the “social media” era. This Article places the start of the “social media era” around the year 2000, although an exact date is not a premise of this analysis. For background and context only, it is noteworthy that early social media sites were niche sites targeted to racial minorities: AsianAvenue.com, founded in 1997, BlackPlanet.com in 1999, and Hispanic-oriented MiGente.com in 2000. See Digital Trends Staff, *The History of Social Networking*, DIGITAL TRENDS (May 16, 2016), <http://www.digitaltrends.com/features/the-history-of-social-networking/> [https://perma.cc/6N3T-MB2N]. These niche sites were followed soon after by the now-ubiquitous general audience social media networks such as Friendster in 2002, LinkedIn and MySpace in 2003, and Facebook, which was launched in 2004, but finally opened to the general public in 2006. See *id.*; see also Jeff Burt, *Facebook at [Ten]: Highlights in the Social Networking Pioneer’s History*, EWEEK (Feb. 6, 2014), <http://www.eweek.com/cloud/slideshows/facebook-at-10-highlights-in-the-social-networking-pioneers-history.html> [https://perma.cc/2M36-M8LM] (discussing the evolution of Facebook).

(a) Was it *reasonably foreseeable* from the perspective of an objective adult that the student speech would reach<sup>321</sup> the campus environment? If no, stop. The speech is protected by the First Amendment.<sup>322</sup>

(b) Was the message contained in the student speech arguably a *bona fide* critique of the job performance or decisions of school employees,<sup>323</sup> the school itself, or an obvious *parody*?<sup>324</sup> If yes to any of these, stop. The speech is protected by the First Amendment,<sup>325</sup> and

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<sup>321</sup> The Fifth Circuit in *Porter*, and perhaps the Sixth in *Lowery*, analyzed speech created off-campus and physically transported back to campus. See discussion *supra* Sections IV.E–F. For purposes of this Article, the jurisdictional question of regulating off-campus speech which was physically transported to a campus is deemed legally indistinguishable from the question of jurisdiction over internet-originated cyberbullying.

<sup>322</sup> The school lacks “jurisdiction” because the speech is not school-related and beyond the reach of *Tinker*. See generally *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979); see also *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 618–19 (5th Cir. 2004).

<sup>323</sup> Commentators and courts both tend to distinguish between disparaging student speech which targets students, versus that which targets school employees, particularly if employee fitness is part of the disparagement. See *Snyder*, 650 F.3d at 920, 931 n.9; cf. *Kowalski*, 652 F.3d at 567. The rationales differ, but a consistent theme in the literature as well as the cases is that disruption is more likely when the victim is a child, who likely has less personal maturity and ability to withstand cruel jokes and teasing. See, e.g., Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 ST. LOUIS U. L.J. 531, 554 (2015).

<sup>324</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46, 47–48, 57 (1988) (finding First Amendment protection for the parody of a public figure preacher claiming he had sex with his mother in an outhouse). However, when dealing with schoolchildren and mean-spirited speech, particularly over the Internet, the vexing “parody problem” becomes more complicated. That is, where is the line between the *Layshock* and *Snyder* fake web pages claiming principals used steroids or “hit on” students, which the Third Circuit said nobody took seriously, versus the one in *Kowalski* which claimed a young woman had herpes? Compare *Snyder*, 650 F.3d at 920–21, with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207–09 (3d Cir. 2011); see also W. Wat Hopkins, *Snyder v. Phelps, Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMEND. L. REV. 149, 178–79 (2010) (“The [Court’s *Hustler*] opinion tells us almost nothing about whether the Constitution protects outrageous communications that are privately disseminated rather than displayed in the pages of a nationally distributed magazine . . . or whether it protects outrageous communications that are designed to hurt or embarrass private figures . . .” (quoting Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 615 (1990))).

<sup>325</sup> The Supreme Court has repeatedly held that a main purpose of a public school system is reinforcing the values of free thought, Democracy, and self-governance. See,

(c) Was the speech reasonably likely to (i) *substantially disrupt the student learning environment*<sup>326</sup> or (ii) *materially interfere with the ability of any other student to learn*?<sup>327</sup> If no to both, the speech is protected by the First Amendment. If yes to

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*e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” (alteration in original) (citations omitted) (first quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); then quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943))). The Third Circuit favorably cited *Keyishian* in a well-reasoned dissent by Judge D. Michael Fisher in a 2011 cyberbullying case, quoting this exact language and adding: “Schools should foster an environment of learning that is vital to the functioning of a democratic system and the maturation of a civic body.” *Snyder*, 650 F.3d at 944 (Fisher, J., dissenting).

<sup>326</sup> The issue of true threats is implied in the “disturbance” prong of the *Tinker-Cyberbully* Test. A factual finding by a school that a student’s expression can be “*reasonably understood as urging violent conduct*” is adequate to support a school suspension, expulsion, or other discipline. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (emphasis added). The Author urges courts to follow the reasoning of the Third Circuit in *Wisniewski* rather than that of the Eighth and Ninth Circuits, which would protect student speech employing such words as “kill” in messages if the school could not prove that: (1) the student subjectively either intended to make a threat or, perhaps, (2) that the student was reckless in communicating his message. *See* discussion *supra* Sections IV.H–I. This is bad policy; it strips away from school administrators any latitude in disciplining speech that is completely inappropriate in a school environment, but does not meet the constitutional criminal law requirements of *Watts* and *Elonis*. *See United States v. Elonis*, 135 S. Ct. 2001, 2012 (2015); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). That criminal due process standard now constitutionally required for adult criminal defendants goes too far to be applied to the review of school administrative discipline, and ought to yield to the overriding public interest in protecting the school environment. It should be noted, however, that adoption of the contrary approach—essentially giving students an affirmative defense if the school cannot prove adequate subjective intent—would leave the remaining parts of the “Cyberbully Unmasking Test” undisturbed and still of potential use to courts. *See supra* notes 299–300 and accompanying text.

<sup>327</sup> Further refinement of this test to directly address the issue of true threats versus childish jokes might include an affirmative defense for student speakers who have been “cleared” by police. Such an affirmative defense might reverse the decision in *Wisniewski*. *See* 494 F.3d at 36 (noting police investigator concluded that allegedly threatening speech was a “joke” and closed the criminal case against the student).

either, the speech is unprotected by the First Amendment and the school may discipline the student.

#### VII. APPLYING THE *TINKER*-CYBERBULLY TEST TO SIX REPRESENTATIVE CASES

A newly proposed legal standard to a developing problem is of no use if it has no practical application. It is of even less use if it thwarts expectations and leads to unexpected and inconsistent results. The section below applies the *Tinker*-Cyberbully Test to six<sup>328</sup> cases,<sup>329</sup> all of which were previously discussed in this Article. These cases were chosen for two reasons. First, they raise the broad array of issues confronted by modern schools, and eventually appellate courts. Second, their original (actual) judicial results highlight the random results delivered by federal courts, underscoring the conflict among the circuits and the need for a national standard for school discipline of off-campus cyberbully speech.

The Supreme Court, in any cyberbullying case granted certiorari to decide the off-campus speech issue, would do well to assist lower courts by sharpening the meaning of “disruption.”<sup>330</sup> That is, disruption of *whom* within the learning environment? This analysis takes the view that the initial rationale to protect students is best advanced by limiting *Tinker*’s disruption exception to disruption of student learning.<sup>331</sup> If the teachers are made uncomfortable in the faculty lounge by a blog suggesting that they do a poor job of teaching, they should have no ability to go on a witch hunt to find their detractors. Thus, part “(c)” of the *Tinker*-Cyberbully Test is written to intentionally insert the adjective “student” prior to “learning environment,” slightly modifying the *Tinker* standard as applied to the punishment or protection of off-

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<sup>328</sup> Two “violence” cases are combined and treated as a single case because their facts are legally indistinguishable for purposes of this analysis.

<sup>329</sup> See *infra* Sections VII.A–F. Other than the first three cases, which need no alteration, the facts may be altered slightly to allow application of the *Tinker*-Cyberbully Test.

<sup>330</sup> See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–15 (1969) (formulating the disruption test).

<sup>331</sup> See, e.g., *id.* at 512–14.

campus speech. This gives greater protection to student speakers, who would not be subject to expulsion or suspension from thin-skinned adults. But of course, student speech aimed at an adult could do so much damage that it actually *does* affect the students' learning environment. On such facts, the speaker would not be protected.

A. *Case 1: Doninger v. Niehoff*<sup>332</sup>: *Insulting Critique of School Authority*

Under the *Tinker*-Cyberbully Test, *Doninger* was incorrectly decided.<sup>333</sup> In *Doninger*, a student, Avery Doninger, wrote several entries in her publicly accessible blog detailing her ongoing negotiations with school administrators about the scheduling of a high school-sponsored concert called "Jamfest."<sup>334</sup> She called school officials "douchebags" and ignored repeated requests to stop criticizing school officials, ultimately leading a protest that consisted of having students wear shirts in support of Avery and/or free speech rights.<sup>335</sup> The Second Circuit concluded that the school was justified in disciplining Doninger and that her speech was unprotected by the First Amendment.<sup>336</sup>

Under the *Tinker*-Cyberbully Test, courts should reach the opposite result. First, though insulting, no reasonable person could have believed that school administrators were actual "douchebags."<sup>337</sup> And second, the insults hurled at her school authority figures were all cloaked in her unfavorable critique of their job performance.<sup>338</sup> Other scholarly commentaries have suggested that the *Doninger* case was incorrectly decided and/or

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<sup>332</sup> 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 565 U.S. 976 (2011).

<sup>333</sup> *See id.* at 358 (upholding school discipline of student for harsh critique of school officials' policy decision communicated via social media).

<sup>334</sup> *See id.* at 339–41.

<sup>335</sup> *See id.* at 340–44.

<sup>336</sup> *See id.* at 351, 358.

<sup>337</sup> *See id.* at 349 (discussing the possible disruptiveness of, *inter alia*, the term "douchebags" and the blog posts).

<sup>338</sup> *See id.* at 340–41. The clearest example of this critique defense reviewed for this Article is the district court case from the Southern District of Florida in which a student created a blog claiming her teacher was the "worst teacher I've ever met." *See Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1374 (S.D. Fla. 2010) (determining that the statement was protected under the First Amendment, just as the *Tinker*-Cyberbully Test would).

criticized its reasoning.<sup>339</sup> Applying the *Tinker*-Cyberbully Test, the student wins, reversing the result<sup>340</sup> in the actual case.<sup>341</sup>

*B. Case 2: Snyder v. Blue Mountain School District*<sup>342</sup>: *Cruel Parody of School Authority*

The Third Circuit found that J.S., the eighth-grade honor student who created a phony MySpace page to ridicule her principal in jest, engaged in First Amendment protected activity.<sup>343</sup> Although the phony web page—when viewed as a *bona fide* critique of government, or school administration—contained scant legitimate criticism of the principal, it did “complain” that the principal’s hobby is “detention.”<sup>344</sup> Her parody of her principal was vulgar, juvenile, and nonsensical according to the majority opinion from the Third Circuit<sup>345</sup> and “mean-spirited” as well as “insulting” according to the concurrence.<sup>346</sup> But because it was directed at an adult, the *Tinker*-Cyberbully Test—certainly not the exclusive remedy of an adult wronged by a child—would offer no remedy to her principal. The conclusion, both in the actual Third Circuit en banc case and under this new hypothetical standard, is

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<sup>339</sup> See, e.g., Allison E. Hayes, Note, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 271–84 (2010); see also Travis Miller, Note, *Doninger v. Niehoff: Taking Tinker Too Far*, 5 LIBERTY U. L. REV. 303, 321–29 (2011).

<sup>340</sup> See *Doninger*, 642 F.3d at 358.

<sup>341</sup> It should be well noted that courts tend to be much more forgiving of student-to-adult cyberbullying than taunts directed to students. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920–21 (3d Cir. 2011) (discussing student cyber-insults directed at an adult), *cert. denied*, 132 S. Ct. 1097 (2012); cf. *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (discussing student cyber-insults directed at another student), *cert. denied*, 132 S. Ct. 1095 (2012). The initial portion of Part “(c)” of the *Tinker*-Cyberbully Test should be read literally: Was the speech reasonably likely to substantially disrupt the *student* learning environment? Thus, a harsh or even profane critique of teachers, principals, and administrators, so frequently the subject of such disputes, would be presumptively disfavored as justification for discipline unless some student was impacted. The principal and teachers can avail themselves of the courts and seek other remedies if they are libeled or criminally harassed. Adults have greater access to the courts and the initial policy rationale of the exception left for *Tinker* was to protect students, not school employees.

<sup>342</sup> 650 F.3d 915.

<sup>343</sup> See *id.* at 933.

<sup>344</sup> See *id.* at 920–21.

<sup>345</sup> See *id.* at 929.

<sup>346</sup> *Id.* at 939 (Smith, J., concurring).

that the school lacks authority to punish this student speech, which is protected by the First Amendment.<sup>347</sup>

The student speaker in *Snyder* should win for three reasons, although none of them clear-cut. First, she has the parody defense, upon which the Third Circuit relied to dispose of the actual case.<sup>348</sup> Next, she has the disruption defense—that is, student learning was not *actually* impacted.<sup>349</sup> It appears that the parody only distracted administrators and even they, according to the court record, did not invest much time in the matter.<sup>350</sup> And third, she has the foreseeability defense, since she took steps to keep the offending web page private.<sup>351</sup> Applying the *Tinker*-Cyberbully Test, the student wins—the same result<sup>352</sup> as in the actual case.<sup>353</sup>

### C. Case 3: *Kowalski v. Berkeley County Schools*<sup>354</sup>: *Gratuitous Student Cyberbullying*

Kowalski was judged by the Fourth Circuit to be subject to discipline because it was reasonably foreseeable that the student's online speech would have such a close nexus to the school environment that it should be deemed virtual student speech.<sup>355</sup> Kara Kowalski, who tormented Shay N. with the false charge that

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<sup>347</sup> Note that the analysis under *Layshock* would be identical to that of *Snyder* due to the similarity of the facts. Compare *id.* at 920–23 (discussing student's creation of a fake social media profile of student's principal), with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207–10 (3d Cir. 2011) (discussing same).

<sup>348</sup> See *Snyder*, 650 F.3d at 929 (“Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.”).

<sup>349</sup> See *id.* at 928 (“There is no dispute that J.S.’s speech did not cause a substantial disruption in the school.”).

<sup>350</sup> See *id.* at 922–23.

<sup>351</sup> See *id.* at 928–29 (“The facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable.”); see also *id.* at 930.

<sup>352</sup> See *id.* at 933.

<sup>353</sup> Note that without steps to keep the web page private and with slightly more disruption as a matter of fact, the result could be reversed under the *Tinker*-Cyberbully Test.

<sup>354</sup> 652 F.3d 565 (4th Cir 2011), *cert. denied*, 565 U.S. 1173 (2012). The *Kowalski* court expressly addressed the “child protection” notion and derived the “Nexus to School’s Pedagogical Interests” test, which appears to be a web-era play upon *Hazelwood*’s “legitimate pedagogical interest” standard. See *id.* at 573; see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>355</sup> See *Kowalski*, 652 F.3d at 573; see also *supra* notes 305–08 and accompanying text.



the girl had herpes,<sup>356</sup> would also get no First Amendment protection under the *Tinker*-Cyberbully Test. The school prevailed in the actual case,<sup>357</sup> consistent with the result here. The school can easily make its concrete showing, demonstrating foreseeability in Kara Kowalski's decision to invite classmates to comment on the site.<sup>358</sup> Further, there was nothing redeeming or related to a critique of the school or administration in the subject speech.<sup>359</sup> The speech caused great harm to its victim, Shay N., which was clearly Ms. Kowalski's intent.<sup>360</sup> This case, like *Wilson*,<sup>361</sup> is an example of gratuitous student-to-student cyberbullying which is unworthy of the First Amendment's protection as a matter of policy. Applying the *Tinker*-Cyberbully Test, the school wins—the same result<sup>362</sup> as in the actual case.

*D. Case 4: Lowery v. Euverard: Written Anti-Coach Mutiny by Players Is Unprotected*

A fair and sensible cyberspeech test must allow coaches to avoid on-the-field mutiny, but protect political and socially important student speech. A coach's job in part is to teach, and one of the things a high school coach teaches is teamwork. Part "(b)" of the *Tinker*-Cyberbully Test—while requiring some unavoidable judicial discretion—takes care to modify the noun "criticism" with the adjective "*bona fide*."<sup>363</sup> A court moving toward the conclusion that there has been no bona fide critique in a specific case of student speech criticizing an employee-coach could take shelter under *Hazelwood*'s "imprimatur of the school"<sup>364</sup> umbrella. Thus, a finding that the criticism was illegitimate would support a finding that the school needs to teach teamwork and cohesion in team

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<sup>356</sup> See *Kowalski*, 652 F.3d at 567–68.

<sup>357</sup> See *id.* at 577.

<sup>358</sup> See *id.* at 567, 574.

<sup>359</sup> See generally *id.* at 567–69.

<sup>360</sup> See *id.* at 576 ("Kowalski's role . . . was particularly mean-spirited and hateful. The webpage called on classmates, in a pack, to target Shay N., knowing that it would be hurtful . . .").

<sup>361</sup> 696 F.3d 771, 773 (8th Cir. 2012) (discussing twin brothers who created sexually explicit and racist blog that targeted other school children to review the content).

<sup>362</sup> See *Kowalski*, 652 F.3d at 577.

<sup>363</sup> See *supra* Section VI.B.

<sup>364</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

sports, a legitimate pedagogical concern for student-athletes to be sure. If the coach is endangering the health or safety of players—but doing so only at private practices—a petition to fire that coach ought to be protected speech. This is a matter of evidentiary proof.<sup>365</sup> If, as was the case in *Lowery*,<sup>366</sup> the players simply do not “like” the coach due to personnel or tactical differences of opinion, such speech is materially disruptive to the learning environment on the sports field. Coaches have been kicking players off high school football teams for as long as there have been high school football teams. The *Tinker-Cyberbully Test* would not and should not disturb legitimate dismissals of insubordinate players. Thus, the school wins; the same result<sup>367</sup> occurs as in actual case.

*E. Case 5: D.M./Wynar: Two Cases of Violent Student Speech*<sup>368</sup>

These two cases are treated as one because they are legally indistinguishable. School administrators in both could find it reasonably foreseeable that specific threats of violence by a student could cause substantial disruption.<sup>369</sup> The speech in both cases would easily be removed from the realm of First Amendment protection—whether employing the Eighth and Ninth Circuit’s requirement that the school comply with the criminal law “true threat” intent-of-the-speaker<sup>370</sup> requirements of *Watts*—or the more school-deferential approach advocated by the Second Circuit in *Wisniewski*.<sup>371</sup> Either way, on extreme facts calling for specific acts of violence against specific fellow students, the *Tinker-Cyberbully Test* would allow administrative/school punishment of off-campus cyberbullying. The School wins; achieving the same result as in the actual cases.<sup>372</sup>

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<sup>365</sup> See *Lowery v. Euverard*, 497 F.3d 584, 594 (6th Cir. 2007).

<sup>366</sup> See generally *id.* at 585–86.

<sup>367</sup> See *id.* at 600–01.

<sup>368</sup> *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. # 60*, 647 F.3d 754 (8th Cir. 2011).

<sup>369</sup> See *Wynar*, 728 F.3d at 1065–66; *D.M.*, 647 F.3d at 765.

<sup>370</sup> See *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 621–27 (8th Cir. 2002) (en banc); *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371–73 (9th Cir. 1996).

<sup>371</sup> See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007).

<sup>372</sup> *Wynar*, 728 F.3d at 1075; *D.M.*, 647 F.3d at 767.

*F. Case 6: The Wisniewski Problem: Comic-Violent Speech*

Student speech comprised of both comedy and potential threats poses a particularly troublesome problem for courts. Given the toxic mix of immature bravado, anti-establishment machismo, and plain juvenile silliness found in the cases, it is often difficult to separate potentially dangerous student cyberspeech from that which is merely tasteless.<sup>373</sup> Beyond the larger question of *Tinker*'s reach to off-campus speech—the central question presented in this Article—is the related issue of whether administrative school discipline based on a student threat requires subjective intent to harm beyond mere negligence.<sup>374</sup> The *Tinker*-Cyberbully Test adopts what this Article will call the *Wisniewski* Rule, most clearly articulated by the Second Circuit.<sup>375</sup> The *Wisniewski* Rule rejects the criminal due process protections of *Watts*.<sup>376</sup> This result allows schools greater discretion despite law enforcement's independent determination that, for example, a student was only joking when making alleged threats, therefore giving school officials greater flexibility to impose administrative discipline, such as suspensions, in the interests of the practical realities of maintaining school order.<sup>377</sup> Applying the *Tinker*-Cyberbully Test to the *Wisniewski* facts results in the school discipline being upheld, which is the same result<sup>378</sup> as in the actual case.

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<sup>373</sup> See, e.g., *Wisniewski*, 494 F.3d at 36–37 (noting that police investigator concluded allegedly threatening speech was a “joke” although school took the threat seriously and suspended student).

<sup>374</sup> See *supra* Section IV.B.

<sup>375</sup> See *Wisniewski*, 494 F.3d at 38 (“[W]e think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows.”). Note that the Supreme Court offered greater specificity to the requirements of *Watts* in *Elonis*. See *Elonis v. United States*, 135 S. Ct. 2001, 2012–14 (2015) (holding that threatening statements are analyzed not from the perspective of the alleged victim, but by the intent of the maker of the alleged threat, and that to support a criminal conviction, the mindset of the speaker must be proven to evince a “true threat” requiring a level of mens rea or intent greater than negligence).

<sup>376</sup> See *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (articulating true threat standard allowing criminal punishment only where a reasonable recipient of the speech would find that speech to be a serious expression of an intent to harm).

<sup>377</sup> *Wisniewski*, 494 F.3d at 38.

<sup>378</sup> See *id.* at 39–40.

*G. Test Would Change One of Six Results, But Offer Predictability*

In summary, the *Tinker*-Cyberbully Test would likely allow a public school to punish the cyberbully in two-of-the-six cases analyzed immediately above.<sup>379</sup> Off-campus student speech would generally be protected if it harshly critiques adult employees or parodies authority. Student speech is unprotected if it is disruptive *and* aimed at another student, *or* if it is a “true threat” under the applicable local administrative standard, which may be lower than the constitutional criminal law standard.<sup>380</sup> The *Tinker*-Cyberbully Test would change the result in just one of the six cases above,<sup>381</sup> but offer greater predictability of result. The fundamental shift between the actual cases and their likely adjudication under this hypothetical new rule is that student speakers would virtually always win when their speech focused on a critique of the school or its employees, or when its arrival on campus was unforeseeable by a reasonable adult. The student would nearly always lose when the speech was an affirmative cruel bullying of a fellow student, particularly where classmates are invited to “publically” join in.

#### CONCLUSION

The question presented in this Article was whether primary and secondary schools can exert disciplinary authority consistent with the First Amendment over student cyberspeech that originates off-campus, makes its way “onto” campus, and at the time it was communicated, raised a reasonably foreseeable risk of material school disruption. A growing circuit conflict, and the lack of Supreme Court guidance in an age of widespread student use of social media, makes the question more urgent than ever. The Article first reviewed and analyzed the conflicting federal circuit court cases in the area, concluding that schools can, consistent with the First Amendment, discipline student off-campus speech—including cyberbullying, if based on appropriate facts. Then a new

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<sup>379</sup> See *supra* Sections VII.A–F.

<sup>380</sup> See *supra* Section VII.F (noting and discussing the *Wisniewski* Rule).

<sup>381</sup> See *supra* Section VII.A (applying the *Tinker*-Cyberbully Test to *Doninger* facts, and reaching a different result than in the actual case of *Doninger v. Niehoff*, 642 F.3d 334, 358 (2d Cir. 2011)).

legal standard for such discipline (or protection) of off-campus speech was proposed. The *Tinker*-Cyberbully Test urges the courts toward a moderate and realistic legal standard in light of the modern-day realities of cyberspace, where the twenty-first century student speaker now lives and communicates. Under the *Tinker*-Cyberbully Test, courts are offered a new, consistent standard for determining when *Tinker's* disruptive student speech paradigm should be extended to off-campus speakers, including cyberbullies. The test allows latitude for student speakers to critique their schools and the job performance of teachers, principals, and other school personnel. But where the student has allegedly made a "true threat," or has engaged in disruptive student-to-student cyberbullying, school administrators may discipline the student. The test does not magically solve the entire problem. But it would offer consistency and predictability among the federal circuit courts now in conflict, as well as offer clarity to students, parents, teachers, principals, and school districts.