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The Trouble with Tinker: An Examination of Student Free Speech Rights in the Digital Age

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Cover Page Footnote
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THE TROUBLE WITH *TINKER*: AN EXAMINATION OF STUDENT FREE SPEECH RIGHTS IN THE DIGITAL AGE

Allison N. Sweeney*

ABSTRACT

The boundaries of the schoolyard were once clearly delineated by the physical grounds of the school. In those days, it was relatively easy to determine what sort of student behavior fell within an educator's purview, and what lay beyond the school's control. Technological developments have all but erased these confines and extended the boundaries of the school environment somewhat infinitely, as the internet and social media allow students to interact seemingly everywhere and at all times. As these physical boundaries of the schoolyard have disappeared, so too has the certainty with which an educator might supervise a student's behavior.

Because smartphones, tablets, and computers abound, the ways in which students are able to communicate have changed dramatically in the new millennium, but the law governing the free speech rights of students in American public schools has not kept pace. Current law allows educators to punish student speakers when their in-school speech disrupts the school environment, or is

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likely to do so—but it is not clear that this same standard should apply to student speech that is posted online away from school, or whether a school should be able to punish off-campus online student speech at all. Because the Supreme Court of the United States has not yet spoken on the issue, and in the absence of a better standard, the courts that have addressed the issue of problematic off-campus online student speech have applied this standard that bases a school's ability to punish the speaker on the (potential) disruptiveness of his or her speech.

This Note explores that which the First Amendment guarantees to adult citizens and the ways in which these guarantees differ for public school students in school, as governed by four major Supreme Court decisions in the past fifty years. This Note then examines the recent cases in which courts have applied this precedent to off-campus online student speech for which the speakers were punished by their schools, and analyzes the ways in which the application of the same standard in these cases has led to drastically different outcomes. Ultimately, this Note contends that educators must be able to supervise student online activities to some extent, and proposes a new standard by which a public school would be able to punish a student for his or her off-campus online speech only if that speech was actually of concern to the school, and if that speech interfered with the rights of others in the school community.

INTRODUCTION

The advent of the internet and its associated technologies has changed American life in countless ways. It has entirely reshaped how we interact and communicate, which is evident perhaps nowhere more clearly than in American high schools. The internet is a tool, but as with any such helpful device, problems arise when it is mishandled. As parents and educators attempt to teach

children responsible ways to relate to the world around them, they are navigating the uncharted waters of the digital age, which can be particularly tricky in a society that so values its freedom of speech. The internet has changed the teenage social landscape, and adults are still learning to recognize when it is necessary to intervene, and how best to do so.

A recent tragedy highlights many of the facets of the debate over whether schools should be able to regulate student speech that is posted online away from campus. On February 14, 2018, Nikolas Cruz entered his former high school in Parkland, Florida[1]—from which he had been expelled[2]—and fired more than one hundred bullets from his semiautomatic rifle[3] in six minutes.[4] He is accused of murdering seventeen students and employees of Marjory Stoneman Douglas High School in that time.[5] Only adding to the terrible circumstances of these horrific events is that someone with the username 'Nikolas Cruz' had posted an eerie message in the comments of a YouTube[6] video only five months earlier: "I'm going to be a professional school shooter."[7] Though

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1 Patricia Mazzei & Alan Blinder, *Parkland 911 Calls Are Released: 'Someone's Shooting Up the School,'* N.Y. TIMES (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/us/florida-school-shooting-911-calls.html [https://perma.cc/LYU7-RVAD].

2 Brianna Sacks, *This Is What We Know About Nikolas Cruz, The Florida High School Shooting Suspect*, BUZZFEED (Feb. 16, 2018, 4:44 PM), https://www.buzzfeed.com/briannasacks/florida-school-shooting-suspect?utm_term=.xkZYG0KlyD#.obNyaOBrN4 [https://perma.cc/4GQP-KHKM].

3 Audra D.S. Burch, Frances Robles & Patricia Mazzei, *Florida Agency Investigated Nikolas Cruz After Violent Social Media Posts*, N.Y. TIMES (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/us/nikolas-cruz-florida-shooting.html [https://perma.cc/5WFR-KSMM].

4 Mazzei & Blinder, *supra* note 1.

5 *Id.*

6 YouTube is a video site where one "goes to watch user-generated videos." Diana Graber & Cynthia Lieberman, *A CyberWise Guide to 10 Apps Teens Love*, CYBERWISE, http://docs.wixstatic.com/ugd/f6bccd_69e0700c50ee46f4ae6747069e2270d1.pdf [https://perma.cc/5ESX-KB46] (last visited Nov. 6, 2018). YouTube "is now the second largest search engine after Google (who also owns it). Min[imum] age of use [is] 18. Those from 13-17 must have a parent or guardian's permission to sign up." *Id.*

7 Therese Apel, *'Nikolas Cruz' YouTube Comment Brings FBI to Bail Bondsman's Door*, USA TODAY (Feb. 15, 2018, 1:35 PM), https://www.usatoday.com/story/news/nation-now/2018/02/15/florida-school-shooting-nikolas-cruz-youtube-comment-bail-bondsman/341236002/ [https://perma.cc/BAC4-MPHD].

the owner of the video reported this to the Federal Bureau of Investigations at the time, there was little evidence for detectives to use in their investigation, as "there was no particular information about the particular time, location, or further identifiers about the person who posted the comment."[8] Assuming this comment was in fact posted by the same Nikolas Cruz indicted for the murders in Parkland,[9] his high school likely could have acted on such speech had the school known about it while he was still a student there, despite the fact that he posted it online away from campus.[10]

At present, off-campus online student speech is generally punishable if it is reasonably forecast to cause or actually does cause a substantial disruption of the school environment.[11] Though courts do not necessarily agree about what sort of speech is foreseeably or actually disruptive on the whole,[12] threatening speech is generally considered disruptive, and therefore punishable.[13] Not all violent speech is necessarily threatening, but if a school became aware of this same post from one of its students, it seems reasonable to interpret the post as a threat directed towards the speaker's classmates, and subsequently, it would be reasonable to punish the speaker. Notwithstanding a

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8 Adam Goldman & Patricia Mazzei, *YouTube Comment Seen as Early Warning in Shooting Left Little for F.B.I. to Investigate*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/politics/nikolas-cruz-youtube-comment-fbi.html [https://perma.cc/692Q-C44S].

9 Alan Blinder, *Florida Will Seek Execution of Nikolas Cruz in Parkland Shooting Trial*, N.Y. TIMES (Mar. 13, 2018), https://www.nytimes.com/2018/03/13/us/nikolas-cruz-death-penalty.html [https://perma.cc/6J6P-UAXM].

10 *See generally infra* Section II.C.1.a (discussing standards governing school punishment of violent/threatening off-campus online student speech).

11 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 390–91 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016); *see also infra* Part II (discussing the current standard governing off-campus online student speech). This Note analyzes the First Amendment rights of American public school students only, as the rights of private school students, or students in public universities are not necessarily the same as those of public school students. Any discussion of "schools," "school officials," or "students" in this Note refers to public schools, their students, and faculty unless otherwise noted.

12 *See generally infra* Part II.

13 This is true of threatening speech in general, as well as threatening speech analyzed under the *Tinker* standard in a school setting. *See infra* Section II.C.1.a (discussing standards governing school punishment of violent/threatening off-campus online student speech).

general right to free speech in the United States, this is exactly the sort of speech that a school must be able to regulate, not only to maintain order in its classrooms, but also to protect its students from imminent danger.[14]

Had the school identified and acted on this comment, seventeen lives might have been saved. Unfortunately, this tragedy was not prevented and many of the young survivors have since become staunch advocates for stricter gun control.[15] Imagine a student who survived a school shooting such as this posting to her Facebook page from home a month after the carnage, encouraging her classmates to walk out of class in organized protest to advocate for gun control reform. Inciting her classmates to act in this way is likely foreseeably disruptive of the school environment,[16] and therefore likely subjects the speaker to punishment at school. Ours is a society in which a post expressing the speaker's desire to orchestrate a "professional" school shooting[17] is punishable on the same level as a post advocating for peaceful protest and political change. It is unfathomable that a student attempting to peacefully change a world with which she disagrees faces the same risk of school discipline as another student threatening to murder his classmates. Though a school must have some ability to maintain order in its halls, students, too, must have some right to speak,[18] for as student participants in the Civil Rights Movement, Vietnam War

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14 *See infra* Section III.A.

15 *See* Maggie Astor, *'Let Us Have a Childhood': On the Road with the Parkland Activists*, N.Y. TIMES (Aug. 15, 2018), https://www.nytimes.com/2018/08/15/us/politics/parkland-students-voting.html [https://perma.cc/SXV3-9KG7]; Julie Turkewitz & Vivian Yee, *With Grief and Hope, Florida Students Take Gun Control Fight on the Road*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/us/parkland-students-shooting-florida.html?module=inline [https://perma.cc/JZH4-YFEY].

16 *See infra* Section II.C.1.b (discussing off-campus online student speech that harasses others, especially *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008), in which a student's blog post encouraged her classmates to call the "douchebags in the central office" to "piss [them] off"); *see also* Morse v. Frederick, 551 U.S. 393, 434–35 (2007) (Stevens, J., dissenting) (indicating that the attempt to persuade other students to action is an important consideration. "It is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.").

17 Goldman & Mazzei, *supra* note 8.

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

protests, and more recently, March For Our Lives, have proven, the youth always has something to say.[19] As George Washington once noted, should "the freedom of Speech [] be taken away . . . dumb, and silent we may be led, like sheep, to the Slaughter."[20] This idea is particularly poignant, and all the more salient, when applied to the speech of young gun-control advocates who survived a school shooting and are attempting to peacefully effect change in their society.

The standard governing school punishment of off-campus online speech cannot be based solely on whether the speech is likely to disrupt or actually does disrupt the school environment, because this standard is too inconsistently applied, and does not account for the realities of our interconnected modern world.[21] Rather, in deciding whether a school can constitutionally punish a student's social media post, there are many factors a court must consider.[22]

Prior to the advent of the internet, a school's ability to punish a student's speech rested on the context in which the student spoke, because speech made in the context of the school environment or school activities was a matter of school concern.[23] Generally speaking, this meant that student speech outside of the school context was beyond the school's punitive reach.[24] However, the

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[19] *See* Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018), http://time.com/longform/never-again-movement/ [https://perma.cc/3QW5-SKRA]; Maggie Astor, *7 Times in History When Students Turned to Activism*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/us/student-protest-movements.html [https://perma.cc/5WUH-ESHU]; Erin Blakemore, *Youth in Revolt: Five Powerful Movements Fueled by Young Activists*, NAT'L GEOGRAPHIC (Mar. 23, 2018), https://news.nationalgeographic.com/2018/03/youth-activism-young-protesters-historic-movements/ [https://perma.cc/52J4-AYC4].

[20] Jacob Lindenbaum, *National Gazette*, GEORGE WASHINGTON'S MOUNT VERNON, http://www.mountvernon.org/digital-encyclopedia/article/national-gazette/ [https://perma.cc/KW59-XRNC] (last visited Nov. 6, 2018).

[21] *See generally infra* Section II.C (discussing case law concerning schools punishing students for off-campus online posts).

[22] *See generally infra* Section II.C (discussing case law concerning schools punishing students for off-campus online posts).

[23] *See generally infra* Sections II.B.1–II.B.4 (discussing student school speech First Amendment case law, including *Tinker*, *Fraser*, *Hazelwood, and Morse*).

[24] *See generally infra* Sections II.B.1–II.B.4 (discussing student school speech First Amendment case law, including *Tinker*, *Fraser*, *Hazelwood, and Morse*).

internet allows students to reach each other at all times with unprecedented ease,[25] and consequently, the lines designating speech as made in a school context have become increasingly less clear.[26] Though a student might post something online from home, his peers might read that post at school. On the other hand, his peers might read something he posts at school when they get home. Because of the prevalence of mobile phones, tablets, and computers,[27] and the resulting ease with which students can reach each other seemingly anytime or anywhere, the location of the speaker is less indicative than ever of the speech's relation to the school.

As the speaker's location is in many instances no longer any help in determining whether the student speech is a matter of school concern, a school may look to the character of the speaker's intended audience.[28] Depending on the content of the post, a post that is entirely public may necessitate more school involvement than a post whose audience is limited to the speaker's close friends or family.[29] It is unlikely that not a single member of the school community would see a student's post, as surely many of his "friends"[30] online are his classmates. Reaching an audience of

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[25] *See* Jon Henley, *Teenagers and Technology: 'I'd Rather Give Up My Kidney Than My Phone*,*'* THE GUARDIAN (July 16, 2010, 3:00 PM), https://www.theguardian.com/lifeandstyle/2010/jul/16/teenagers-mobiles-facebook-social-networking [https://perma.cc/NND8-ULFJ].

[26] *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Sup. Ct. Pa. 2002) (noting that "the advent of the Internet has complicated analysis of restrictions of speech"); *see also infra* Sections II.B.1–II.B.4 (discussing student speech First Amendment case law, including *Tinker*, *Fraser*, *Hazelwood,* and *Morse*); *see also infra* Section II.C (discussing student off-campus online speech First Amendment case law).

[27] Amanda Lenhart, *Teens, Social Media & Technology Overview 2015: A Majority of American Teens Report Access to a Computer, Game Console, Smartphone and a Tablet*, PEW RESEARCH CENTER (Apr. 9, 2015), http://www.pewinternet.org/2015/04/09/a-majority-of-american-teens-report-access-to-a-computer-game-console-smartphone-and-a-tablet/ [https://perma.cc/FJ9M-26G9].

[28] *See infra* Section II.C.3 (discussing case law concerning the privacy or publicity of students' off-campus online posts and the schools' ability to punish those posts).

[29] *See infra* Section II.C.3 (discussing case law concerning the privacy or publicity of students' off-campus online posts and the schools' ability to punish those posts).

[30] When two people are "friends" with or "followers" of each other on a social media platform, they can see each other's posted content and interact with each other's social media pages, subject to alterations in standard privacy settings that each user controls for his own profile. For example, if A is "friends" with B on Facebook, A and B have access

some kind is arguably the main purpose of posting online at all. While there is of course generally some public aspect to anything posted on the internet, the speaker may make efforts to keep his speech confined to a small audience. Perhaps the speech generates considerable interaction[31] from peers at the speaker's school, or it might be that the speech is of no consequence to the school community at all. The makeup of the audience can help a school distinguish between these two situations, but is not necessarily determinative of a school's ability to get involved.[32]

A school must therefore also consider what the student's social media post actually means when determining its relation to the school.[33] Deciphering student posts is no easy task, as the significance, or seriousness, of speech on social media is not always immediately clear. For example, if one student posts about funeral arrangements for a loved one on Facebook,[34] and another student "likes" that post,[35] the student who "liked" the post is

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to each other's content on Facebook, subject to privacy settings either user might set to restrict the other's access to his content. *See* Carolyn Abram, *What It Means To Be Friends on Facebook,* DUMMIES, https://www.dummies.com/social-media/facebook/what-it-means-to-be-friends-on-facebook/ [https://perma.cc/2554-RMR7] (last visited Jan. 26, 2019); *Friending*, FACEBOOK, https://www.facebook.com/help/1540345696275090/?helpref=hc_fnav [https://perma.cc/HQ9T-3FQ7] (last visited Jan. 26, 2019); *see also Follower*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/follower [https://perma.cc/TMD6-RAG6] (last visited Jan. 26, 2019) (defining a "follower" as "one who subscribes to a feed especially on social media").

[31] Meaning other students comment on, "like," or similarly "react" to the post. *See generally infra* note 35 for further discussion of what it might actually mean to "like" a post on social media.

[32] *See infra* Section II.C.3 (discussing case law concerning the privacy or publicity of students' off-campus online posts and schools' ability to punish those posts).

[33] *See infra* Sections II.C.1–II.C.2 (discussing the nature and subject of students' off-campus online posts and schools' ability to punish those posts).

[34] Facebook is a social networking platform "that promotes and facilitates interaction between friends, family, and colleagues." *Facebook*, TECHOPEDIA, https://www.techopedia.com/definition/4941/facebook [https://perma.cc/BD7Q-8AMA] (last visited Nov. 6, 2018). Its features include "customized profile, privacy, and security, friend list management, photo album management, interactive chat, fan pages, classmates and coworker search engines." *Id.*

[35] When a user "likes" a social media post, the caption of that post will read, e.g., "John Doe likes this." To "like" a post is to express an interest in some aspect of the post, or of the post as a whole. There is no way to indicate what a "like" means expressly unless the user comments to illustrate his thoughts. Some platforms, e.g., Facebook,

probably not indicating that she is excited about the funeral or that fact that the friend's loved one has died. Rather, she might be showing support of the bereaved friend in a difficult time, or she might be indicating that she will attend the funeral service. Likewise, if a student posts a photo of a shotgun on Facebook, and another student "likes" that photo, this interaction does not necessarily mean the two students are planning an act of violence; it might be that the two students share a mutual affection for hunting. The same can be said of the student who posts favorite song lyrics on social media, and those lyrics happen to be violent. While it is possible that this post may concern the school, it just as easily may be the student's preferred avenue for expressing an appreciation of a specific artist or sentiment.[36] Without further explanation from the student, a school could not be sure what exactly his post meant beyond his expressed interest in the song, particularly because he is not the original author of the lyrics. These are but a few examples illustrating the possible ambiguity of communications made through social media, highlighting yet another challenge schools face in determining whether to punish a student's off-campus online speech.

As educators and parents strive to understand and traverse both the perilous and the positive aspects of a digital social world that did not exist when they were children, the most glaring question of all arises: what role should schools play in regulating students' online behavior? Schools and courts cannot continue to stretch a

allow a user to assign a happy face, sad face, or angry face (each its own emoji, deemed a "reaction"), to a post as an alternative to the "thumbs up" emoji associated with a "like." Other platforms, like Instagram, allow a user only to press a heart icon to express interest, or to comment on the photo posted.

[36] *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 397 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016) (deciding a student's rap video posted to YouTube and Facebook concerned the school); *see also* Elonis v. U.S., 135 S. Ct. 2001, 2002 (2015) (examining the seemingly threatening rap lyrics that a man posted to Facebook, and deciding that it was error to instruct the jury "that the Government need prove only that a reasonable person would regard Elonis's communications as threats . . . [because] [f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state."). Though *Elonis* involves an adult speaker and not a student, the analysis illustrates that the meaning of a social media post can be ambiguous.

fifty-year-old standard[37] to fit speech that it was never meant to encompass. In advocating for an update to the standard, this Note will investigate this issue in four parts. Part I of this Note will explore current controversies in the ongoing struggle to balance a student's free speech rights regarding speech posted online from off campus against a public school's need to maintain order and civility in its environment. Part II will delve into the current legal standard governing cases in which a school punished a student for his off-campus online speech, and examine the different facets of student posts that courts have considered in determining a school's ability to punish its student for said off-campus online speech. Part III will analyze the costs and benefits of the judiciary's current approach as explained in Part II. Finally, Part IV will recommend an altered legal standard that aims to encompass off-campus online student speech that is truly of school concern, while protecting that off-campus online speech that allows students to engage with the world as they grow, learn, and become contributing members of society. The proposed standard, when applied, would lead to more consistent outcomes across courts than the current standard does at present.

I. THE INTERNET IS HERE TO STAY

Though the internet allows us to communicate with each other more easily than ever before, that communication is seemingly endless, for "when we connect to the Internet, we do not enter a separate space. Networked interactions are embedded in real life . . . the digital and the physical are enmeshed. We cannot 'log out.'"[38] The effects of our incessant connectivity are not confined to the internet as "life online bleeds into life offline and vice versa."[39] In fact, in the nearly fifty years since it was invented to

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[37] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see also infra* Sections II.A–II.B.

[38] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 20 (Harvard Univ. Press 2014).

[39] *Id.*

aid in military communications,[40] the internet has become such an integral part of American existence that ninety-two percent of teenagers go online daily.[41] Forty-five percent of teenagers are online "almost constantly,"[42] and nearly nine out of ten teens report accessing the internet multiple times per day.[43]

The omnipresence of cell phones, and particularly smartphones, facilitates this hyperconnectivity, ensuring teens are rarely far away from an internet connection. Ninety-five percent of teens have access to a smartphone,[44] and ninety-one percent of teens "go online from mobile devices at least occasionally."[45] Given this hyper-ability to connect, it is not surprising that the average American teen consumes media for nine hours daily, excluding media consumed for school or homework purposes.[46] Their media consumption includes "watching TV, movies, and online videos; playing video, computer, and mobile games; using social media; using the Internet; reading; and listening to music."[47] Nearly half of teens "spend their free time [after school] on social

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40 Ben Tarnoff, *How the Internet Was Invented*, THE GUARDIAN (July 15, 2016, 7:00 AM), https://www.theguardian.com/technology/2016/jul/15/how-the-internet-was-invented-1976-arpa-kahn-cerf [https://perma.cc/A5ZQ-SJRV].

41 Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (Apr. 9, 2015), http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/ [https://perma.cc/P3BL-FY2M]. Teenagers in this report are defined as those ages 13–17. *Id.*

42 Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RESEARCH CENTER (May 31, 2018), http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/ [https://perma.cc/BDU3-Z4HM] (noting that "some 45% of teens say they use the internet 'almost constantly,' a figure that has nearly doubled from the 24% who said this in the 2014–2015 survey"). Teenagers in this report are defined as those ages 13–17. *Id.*

43 *Id.*

44 *Id.*

45 Lenhart, *supra* note 41.

46 Vicky Rideout, *The Common Sense Census: Media Use by Tweens and Teens*, COMMON SENSE MEDIA, INC. 14–15 (2015), https://www.commonsensemedia.org/sites/default/files/uploads/research/census_executivesummary.pdf [https://perma.cc/GM24-FWHG]. "A majority of teens (57 percent) spend more than four hours per day with screen media. (The non-screen portion of young people's media use includes listening to music and reading print.)" *Id*. at 15.

47 *Id.* at 15.

media or texting with friends,"[48] and seventy-one percent of teens frequent more than one social media site.[49]

Surely excessive internet usage, as excessive use of anything, can have adverse health effects on the user.[50] However, the impact of internet usage on children and teens is of particular concern, as they are now developing the habits that they will carry with them through life.[51] While about thirty-one percent of teens believe that social media and the like have a positive effect on people their age, about twenty-four percent feel the effect is negative, and another forty-five percent feel the effect is neither positive nor negative.[52]

In comparison, nearly two-thirds of teachers find that their students' connectivity has improved their ability not only to multi-task effectively, but also to locate information quickly and efficiently.[53] One teacher observed that the media available to students have improved the way students collaborate, noting that students "communicate with their peers a lot through texting, plan events and generally are more engaged with the world."[54] Some teachers have found that "their students' use of media has broadened their horizons by exposing them to diverse viewpoints

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48 *How Teens Spend Their After-School Hours*, BARNA GROUP (Aug. 29, 2017), https://www.barna.com/research/teens-spend-school-hours/ [https://perma.cc/SC7B-LPE6]. This statistic is for the 13–17 age group. *Id.*

49 *February 2016: Teens' Social Media Use: How They Connect & What It Means for Health*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, OFFICE OF ADOLESCENT HEALTH, https://www.hhs.gov/ash/oah/news/e-updates/february-2016-teens-social-media-use/index.html [https://perma.cc/H39F-JKA2] (last visited Nov. 6, 2018).

50 Rosalyn Carson-DeWitt, *What Is Internet Addiction?*, EVERYDAY HEALTH (Oct. 6, 2015), https://www.everydayhealth.com/internet-addiction/guide/ [https://perma.cc/P8Z7-JLW5].

51 *See Children and Technology: Creating Healthy Eating and Living Habits*, MAXLIVING (May 4, 2018), https://maxliving.com/healthy-articles/children-and-technology [https://perma.cc/F6LG-VHAU].

52 Anderson & Jiang, *supra* note 42.

53 *Children, Teens, and Entertainment Media: The View from the Classroom, In Some Areas, Teachers Are More Likely To Say That Entertainment Media Have Helped Rather Than Hurt Their Students Academically*, COMMON SENSE MEDIA, INC. (Nov. 1, 2012), https://www.commonsensemedia.org/research/children-teens-and-entertainment-media-the-view-from-the-classroom/key-finding-4%3A—some-media-helping-to-improve-performance [https://perma.cc/24DD-KQHX].

54 *Id.*

and experiences."[55] They feel "social awareness flourishes with students being aware of worldwide issues through YouTube and Facebook."[56]

Overall, however, teachers feel entertainment media have had more of a negative than a positive effect on the social development of their students in general.[57] Many teachers believe that "their students' use of entertainment media has hurt their academic performance,"[58] citing downticks in students' attention spans, writing skills, and quality of homework.[59] In addition, teachers worry about students' critical thinking skills and ability to communicate face to face.[60] Other areas of social development that teachers feel are negatively affected in this way include ideas about gender relations, attitudes towards authority figures like parents and teachers, sexualization, and an increase in both anti-social and

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[55] *Children, Teens, and Entertainment Media: The View from the Classroom, Some Teachers See a Positive Effect of Media on Children's Social Development*, COMMON SENSE MEDIA, INC. (Nov. 1, 2012), https://www.commonsensemedia.org/research/children-teens-and-entertainment-media-the-view-from-the-classroom/key-finding-7%3A-positive-effects-to-social-development [https://perma.cc/B343-HS43].

[56] *Id.*

[57] *Id.*

[58] *Children, Teens, and Entertainment Media: The View from the Classroom, Many Teachers Think Their Students' Use of Entertainment Media Has Hurt Their Academic Performance*, COMMON SENSE MEDIA, INC. (Nov. 1, 2012), https://www.commonsensemedia.org/research/children-teens-and-entertainment-media-the-view-from-the-classroom/key-finding-1%3A-media-use-impacts-academic-performance [https://perma.cc/C6XM-CJ57]. "Entertainment media was defined as the TV shows, music, video games, texting, iPods, cell phone games, social networking sites, apps, computer programs, online videos, and websites students use for fun." *Id.*

[59] *Id.*

[60] *Id.* Teachers felt that social media was hurting their students' face-to-face communication skills in 2012, and at the time, forty-nine percent of teens felt that their "favorite way to communicate with friends" was in-person (compared to seven percent of teens who then favored communicating via social media). *Id.*; Victoria Rideout & Michael B. Robb, *Social Media, Social Life: Teens Reveal Their Experiences*, COMMON SENSE MEDIA, INC. 5 (2018), https://www.commonsensemedia.org/sites/default/files/uploads/research/2018_cs_socialmediasociallife_fullreport-final-release_2_lowres.pdf [https://perma.cc/ZJ6K-GTH9]. Six years later, only thirty-two percent of teens prefer to communicate with friends in-person, and sixteen percent now favor communication via social media. *Id.*

aggressive behaviors, such as being mean or acting violently towards others.[61]

Though they are often described as "glued" to the devices that connect them to each other, even teens are not oblivious to the effects of their constant connectivity. Fifty-four percent of teens feel that social media "often distracts [them] when [they] should be paying attention to the people [they are] with," and forty-two percent feel that the time they devote to social media has detracted from the time they "could be spending with friends in person."[62] Additionally, teens occasionally experience frustration with their friends' and parents' attachment to their electronic devices,[63] and nearly forty-five percent wish they could sometimes disconnect from their digital lives.[64] Though it is impossible to separate fully the digital from the physical world, there is a disconnect between the two in that almost one third of teenage social media users admit to flirting with someone online "that they wouldn't have flirted with in person," and similarly confess that "they've said something bad about someone online that they wouldn't have said in person."[65] In many ways, the digital world is a social scene with rules, norms, and etiquette all its own.[66] But so, too, is the school

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61 *Children, Teens, and Entertainment Media: The View from the Classroom, Many Teachers Think Their Students' Use of Entertainment Media Has Had a Negative Effect on Key Aspects of Their Social Development*, COMMON SENSE MEDIA, INC. (Nov. 1, 2012), https://www.commonsensemedia.org/research/children-teens-and-entertainment-media-the-view-from-the-classroom/key-finding-5%3A-negative-effects-to-social-development [https://perma.cc/C2EW-4B42].

62 Rideout & Robb, *supra* note 60, at 5.

63 *Social Media, Social Life: How Teens View Their Digital Lives—Some Teens Wish They Could Disconnect More Often—And That the People Around Them Would, Too*, COMMON SENSE MEDIA, INC. (June 26, 2012), https://www.commonsensemedia.org/research/social-media-social-life-how-teens-view-their-digital-lives/key-finding-4%3A-teens-wish-they-could-disconnect-more-often [https://perma.cc/A2XX-CBAJ].

64 *Id.*

65 *Social Media, Social Life: How Teens View Their Digital Lives—Most Teens Prefer Face-to-Face Communication, and Many of Them Think Using Social Media Can Interfere With That*, COMMON SENSE MEDIA, INC. (June 26, 2012), https://www.commonsensemedia.org/research/social-media-social-life-how-teens-view-their-digital-lives/key-finding-3%3A-most-teens-prefer-face-to-face-communication [https://perma.cc/6JYP-VVD4].

66 *See generally* Jessica Contrera, *13, Right Now*, WASHINGTON POST (May 25, 2016), http://www.washingtonpost.com/sf/style/2016/05/25/13-right-now-this-is-what-its-like-

environment its own entity in need of unique rules and government, and at present, a "widespread lack of literacy about matters related to the Internet"[67] makes it difficult to reconcile the digital lives of students with the school's own administration.

Though each state defines its schools differently,[68] public schools in the United States are generally those that are operated by the state and funded by public money.[69] The Fourteenth Amendment, "as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."[70] Though public school boards of education have "important, delicate, and highly discretionary functions" in "educating the youth for citizenship," the Fourteenth Amendment protects citizens against those running public schools, as these administrators in their official roles act in the name of the state.[71]

Although the Fourteenth Amendment protects the constitutional rights of school children, the Supreme Court has noted that those rights may not correspond exactly to the rights of an adult American citizen, as constitutional protections must be "applied in light of the special characteristics of the school environment."[72] Children have much to learn in not only academic endeavors, but also about social conventions, and schools attempt to inculcate students with the tools they will need to be well-informed, functioning members of society upon graduation. Therefore, the Court has recognized that while students cannot be subjected to only those ideas that are state-approved,[73] there is an incontestable "need for affirming the comprehensive authority of

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to-grow-up-in-the-age-of-likes-lols-and-longing/?utm_term=.a6e18bc84d57 [https://perma.cc/KK97-3GPK] (exploring what it's like to be a teenage girl these days).

67 CITRON, *supra* note 38, at 20.

68 Kyle Zinth, *What Is a Public School? Examples and Definitions*, EDUCATION COMMISSION OF THE STATES (Sept. 2005), http://www.ecs.org/clearinghouse/64/13/6413.pdf [https://perma.cc/TEB6-T4PT].

69 *See generally id.*

70 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

71 *See id.* at 507, 509; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

72 *Tinker*, 393 U.S. at 507.

73 *Id.* at 511.

the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools."[74]

In helping to shape the citizens of the future, schools have recognized that "teenagers need guidance navigating the challenges of having an online presence."[75] And, in fact, schools nationwide are educating students and parents alike about "online safety and digital responsibility," an endeavor which need not deprive children of enjoyment of their online culture.[76] Rather, civics lessons in many schools now aim to teach the "fundamentals of digital citizenship,"[77] and focus on the "various ways online activities deepen civic engagement, political and cultural participation, and public conversation."[78]

However, despite these necessary lessons in digital citizenship, and given the need to balance the rights of students with the rights of schools, tensions are understandably high where schools attempt to regulate student speech, and the debate has only become more contentious as schools try to regulate students' online activity. Though schools retain the ability to govern their hallways, online student speech can only be restricted to a certain extent, particularly considering the importance of an online presence to a modern teenager. For "free speech promotes 'democracy in the widest possible sense, not merely at the level of governance, or at the level of deliberation, but at the level of culture, where we interact, create, build communities and build ourselves.' Online speech is crucial for self-government and cultural engagement."[79] We cannot hope, nor should we try, to deprive our students of these opportunities. We can, however, balance the rights of the schools against the rights of the students, and allow schools to show their students that by using the internet responsibly, students

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74 *Id.* at 507.

75 CITRON, *supra* note 38, at 227.

76 *See id.* at 247–48 (discussing journalist Julia Angwin's approach to "active engagement in her kids' online lives").

77 *Id.* at 227.

78 *Id.* at 194.

79 *Id.* (citing Professor Jack Balkin).

can raise their voices to help better themselves and their communities.

II. FREE SPEECH REIGNS—TO AN EXTENT: A DISSECTION OF CURRENT DOCTRINE

A. The First Amendment Guarantees Free Speech to Adults Within Limits

The First Amendment to the Constitution of the United States provides, "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[80] Though the language of the First Amendment may seem clear, its application is not always simple.[81] Since the ratification of the Bill of Rights over 225 years ago,[82] the Supreme Court of the United States has wrestled with the issues that arise when free speech is guaranteed to a society.[83] While our country has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[84] the need for uninhibited discussion must be balanced against Government interests in regulating certain kinds of speech. Therefore, rather than an absolute protection of any and all kinds of speech, "the First Amendment has been interpreted as an

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80 U.S. CONST. amend. I.

81 *See generally What Does Free Speech Mean?*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does [https://perma.cc/FEB8-SY73] (last visited Nov. 6, 2018) (explaining what freedom of speech generally encompasses, and what it does not).

82 *Bill of Rights of the United States of America (1791)*, BILL OF RIGHTS INST., http://www.billofrightsinstitute.org/founding-documents/bill-of-rights/ [https://perma.cc/KZG3-VLSF] (last visited Nov. 6, 2018).

83 *See generally What Does Free Speech Mean?*, *supra* note 82 (explaining what freedom of speech generally encompasses, and what it does not); *see also* Lata Nott, *Is Your Speech Protected by the First Amendment?*, NEWSEUM INST., http://www.newseuminstitute.org/first-amendment-center/primers/basics/ [https://perma.cc/8MJC-FHH5] (last visited Nov. 6, 2018) (dissecting whether a given issue might raise First Amendment claims with a basic guide).

84 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

instruction to treat rules limiting speech with a high level of suspicion."[85]

The Supreme Court has emphasized that "at the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern,"[86] and in doing so has distinguished that which must be protected by the First Amendment from that which cannot be. To begin, "if there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[87]

In this vein, the Supreme Court has decided that freedom of speech includes, but is not necessarily limited to, the right to speak symbolically in protest (as, for example, one does when burning the American Flag[88] or wearing a symbolic article of clothing in protest, like an armband),[89] the right to use offensive words in a political message,[90] and the right to refrain from speaking altogether.[91] As a country we allow more speech than is desirable to some people, because living with the consequences of that sometimes unwanted speech is preferable to allowing the government to decide categorically which ideas are permissible topics of discussion and which are not.[92]

Still, the Court has found that the First Amendment does not protect certain speech,[93] and in fact "permits restrictions upon the content of speech in a few limited areas, which are of such slight

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85 CITRON, *supra* note 38, at 199.

86 Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988).

87 Texas v. Johnson, 491 U.S. 397, 414 (1989).

88 United States v. Eichman, 496 U.S. 310 (1990); *Johnson*, 491 U.S. at 397.

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

90 Cohen v. California, 403 U.S. 15 (1971).

91 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

92 *See* CITRON, *supra* note 38, at 199–200.

93 Virginia v. Black, 538 U.S. 343, 358 (2003) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)) (discussing that the "protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution"). *See generally* Nott, *supra* note 83 (dissecting whether a given issue might raise First Amendment claims with a basic guide).

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."[94] Unprotected categories of speech include that which communicates a true threat,[95] incites harmful action,[96] or that involves the production and distribution of obscene materials.[97]

B. Constitutional Rights of Children Are Not Necessarily the Same as Those of Adults

In its exploration of the scope of First Amendment protection, the Supreme Court has encountered several problems concerning free speech in public schools.[98] Whether in school or out of school, students "are 'persons' under our Constitution," and "are possessed of fundamental rights which the State must respect . . . ."[99] Public school officials who seek to punish student speech do so as state actors[100] on behalf of the United States government,[101] and any such punishment may therefore run afoul of the First Amendment.[102] Nonetheless, the Court has recognized that because

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94 *Black*, 538 U.S. at 358–59 (internal citations omitted).

95 *Id.* at 359. The Court explains that the "First Amendment permits a state to ban 'true threats,' *e.g.*, *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L.Ed.2d 664 (per curiam), which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." *Id.* at 344.

96 Schenck v. United States, 249 U.S. 47 (1919).

97 Roth v. United States, 354 U.S. 476 (1957).

98 *See supra* note 11 (explaining that this Note analyzes the First Amendment rights of American public school students only).

99 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

100 *See id.* at 507, 509; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

101 Morse v. Frederick, 551 U.S. 393, 424 (2007) (asserting that "[w]hen public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents.") (Alito, J., concurring); *see also Tinker*, 393 U.S. at 507 (noting that the Court has said "the Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."); *id.* at 509 (stipulating that "in order for the State *in the person of school officials* to justify prohibition of a particular expression . . . ") (emphasis added).

102 *See Tinker*, 393 U.S. at 509 (explaining that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able

of the important role educators play in raising the next generation of American citizens, there is a need to uphold the "comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[103] The Supreme Court has addressed this tension multiple times over the last fifty years, and has ultimately determined that while neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the school house gate,"[104] "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[105]

The Supreme Court has decided four cases in the past fifty years that help strike the balance between the free speech rights of students and the need for educators to maintain order in schools.[106] *Tinker v. Des Moines Independent Community School District* set forth the standard on which the other three subsequent decisions expand, stipulating that a school may punish a student's self-expression where that expression "materially and substantially" disrupts the "operation of the school" or "collid[es] with the rights of others."[107] Building on this idea, the Court found in *Fraser* that schools may punish student speech that "undermine[s] the school's basic educational mission" in its vulgarity or lewdness.[108] Similarly, the *Hazelwood* Court decided that school officials can constitutionally preside in an editorial capacity over expressive student speech in school-sponsored activities if their edits are

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to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.") (internal citations omitted).

103 *Id.* at 507.

104 *Id.* at 506.

105 *Fraser*, 478 U.S. at 682.

106 *See* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see infra* Sections II.B.1–II.B.4 (discussing each of these cases in turn).

107 393 U.S. at 513 (internal citations omitted).

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

"reasonably related to legitimate pedagogical concerns."[109] Finally, the Court determined that a school's ability to apply these standards cannot be constricted by the physical bounds of the schoolyard, and found that student code of conduct rules apply during "school-sanctioned activities," such as field trips.[110] This determination allowed the Court to find that schools need not "tolerate at school events student expression"[111] that "they reasonably regard as promoting illegal drug use."[112] This Part examines the Court's reasoning in each of these cases in depth below.

1. *Tinker*

Current law governing the regulation of public-school student speech stems from one landmark Supreme Court decision. In *Tinker v. Des Moines Independent Community School District*, the Court evaluated the contentious school punishment of a few high school students who were suspended for wearing black armbands to school in protest of the Vietnam War.[113] The school argued a need to quell the student speech because armbands protesting such a controversial war might cause disruption among the students, and decided that the suspensions would last until the protesting students returned to school without their armbands.[114] Finding the school's justification for punishment reasonable, the District Court dismissed the students' complaint.[115] The equally divided Court of Appeals for the Eighth Circuit affirmed the decision en banc on appeal, and the Supreme Court of the United States granted certiorari.[116]

In its analysis of the issue, the Supreme Court emphasized that wearing such armbands in protest is "closely akin to 'pure speech,' which, [it has] repeatedly held, is entitled to comprehensive

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109 *Hazelwood Sch. Dist.*, 484 U.S. at 273.
110 *Morse*, 551 U.S. at 400–01.
111 *Id.* at 410.
112 *Id.* at 408 (citing *Tinker*, 393 U.S. at 506).
113 393 U.S. 503 (1969).
114 *Id.* at 504.
115 *Id.* at 504–05.
116 *Id.* at 505.

protection under the First Amendment."[117] Asserting, however, that First Amendment rights in schools must be "applied in light of the special characteristics of the school environment,"[118] the Court employed a balancing test to address the tensions that emerge where student speech conflicts with school policy.[119] *Tinker* stipulates that a student may express his opinion "if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[120] The Court expounded on this standard, noting that student conduct " . . . in class or out of it, which for any reason—whether it seems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantees of freedom of speech."[121] The Court was careful to emphasize that though a school may punish speech that it reasonably forecasts to be or deems actually substantially disruptive,[122] it must be "able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[123]

Notably, the school did not prohibit students from wearing political or controversial symbols of any kind all together, but only these specific armbands.[124] The Court stated that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[125] The armbands caused "discussion outside of the classroom,"[126] but because the protesting students "neither interrupted school activities nor sought to intrude in the school

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117 *Id.* at 505–06.
118 *Id.* at 506.
119 *Id.* at 507.
120 *Id.* at 513 (internal citations omitted).
121 *Id.* at 513. This will hereinafter be referred to as the "*Tinker* standard."
122 *Id.* at 514.
123 *Id.* at 509.
124 *Id.* at 510–11.
125 *Id.* at 511.
126 *Id.* at 514.

affairs or the lives of others,"[127] the Court concluded that the school could not Constitutionally prohibit the protesting students' speech.[128] The Court has taken up the issue in more detail since deciding *Tinker* in 1969, but the *Tinker* test[129] has served as a helpful signpost in cases involving the free speech rights of students.

2. *Fraser*

Expanding on *Tinker*, the Supreme Court noted in *Bethel School District v. Fraser*[130] that the objective of public education is to "inculcat[e] [in students the] fundamental values necessary to the maintenance of a democratic political system."[131] And because the classroom is a "marketplace of ideas,"[132] these fundamental values "must, of course, include tolerance of divergent political and religious views."[133] However, the freedom to espouse "unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[134] To teach students the bounds of appropriate social interaction in our society involves teaching them what sort of language is appropriate for students to use when communicating with their peers at school.[135]

The controversy in *Fraser* arose when a high school student addressed his classmates at an assembly in a speech nominating a

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127 *Id.*

128 *Id.*

129 In summary, the *Tinker* test, or *Tinker* standard, is the aforementioned principle that was first articulated in *Tinker v. Des Moines Independent Community School District*, which provides that a student has a right to express his ideas at school, but only if he does so without significantly disrupting the school environment or infringing on the rights of his classmates in that environment. Student speech that is significantly disruptive of the school environment or infringes on the rights of his classmates is not protected by the First Amendment, and is subject to constitutional punishment by the school. *Id.* at 513–14; *see supra* notes 122–23 and accompanying text.

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

131 *Id.* at 681 (internal citations omitted).

132 *Tinker*, 393 U.S. at 739.

133 *Fraser*, 478 U.S. at 681.

134 *Id.*

135 *Id.* at 683.

friend for elected student office. Students were required to either attend the speech or report to study hall.[136] Throughout his speech, the speaker used an "elaborate, graphic, and explicit sexual metaphor"[137] that two teachers with whom he had previously discussed the speech had warned him not to use.[138] The school felt that given the captive audience, the relative age and maturity of the audience members, and the audience reaction, such sexual language was not appropriate, and that the speech violated the school rule prohibiting disruptive, obscene behavior.[139] The speaker was suspended for three days, and removed from the list of candidates for commencement speaker at graduation.[140] The student appealed his punishment to the school board, who affirmed the school's decision, at which point the student brought suit in District Court for violation of his First Amendment rights.[141] Though the District Court ruled in favor of the school and the Court of Appeals affirmed the decision,[142] the Supreme Court granted certiorari.[143]

The Court ultimately decided that "the First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the

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136 *Id.* at 677.

137 *Id.* at 678. The speaker's address read as follows: "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be." *Id.* at 687 (Brennan, J., concurring) (internal citations omitted).

138 *Id.* at 678.

139 *Id.* at 677–78.

140 *Id.* at 678.

141 *Id.* at 678–79.

142 The District Court held that "the school's sanctions violated the First Amendment, that the school's disruptive-conduct rule was unconstitutionally vague and overbroad, and that the removal of [the student's] name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 675. The student was awarded monetary relief and the school was prevented from keeping him from speaking at commencement. The Court of Appeals affirmed. *Id.*

143 *Id.* at 677.

school's basic educational mission."[144] While the First Amendment allows adults to use profanity or otherwise offensive language to express political messages,[145] "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[146] and a school may therefore constitutionally ban "lewd, indecent, or offensive speech," as undermining "the essential lessons of civil, mature conduct" that the school wishes to teach its students.[147]

3. *Hazelwood*

As a school may distance itself from student speech it deems to undermine its educational mission,[148] so too may it distance itself from student speech with which it does not wish to be associated as an educational institution.[149] Following *Fraser*, the Court clarified that a school's obligation to tolerate certain student speech (as per the *Tinker* standard)[150] does not obligate a school to actively promote certain student speech.[151] While *Tinker* addresses an "educator's ability to silence a student's personal expression that happens to occur on the school premises," the idea of promotion concerns an "educator's 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."[152]

In *Hazelwood School District v. Kuhlmeier*,[153] the Court concluded that the "standard articulated in *Tinker* for determining when a school may punish student expression[154] need not also be

144 *Id.* at 685.
145 *Id.* at 682.
146 *Id.*
147 *Id.* at 683.
148 *Id.* at 675.
149 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
150 *Id.* at 270.
151 *Id.*
152 *Id*. at 271.
153 484 U.S. 260, 273 (1988).
154 *See supra* notes 114, 130 and accompanying text.

the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[155]

This issue arose when a principal censored portions of a school newspaper shortly before its publication. The student journalists who contributed to the paper did so as part of a journalism class,[156] and every edition of the paper was edited and reviewed by both the teacher of the class and the school principal.[157] The final edition of the paper that school year was set to include an article about teen pregnancy at Hazelwood East high school, and an article about the effect of divorce on students at the high school,[158] but the principal was concerned about the content of the articles in relation to the audience.[159] Because it was late April, the principal "believed there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent."[160] Rather than print no newspaper at all, the principal chose to redact the two controversial articles from the final edition of the school's newspaper before publication.[161] Thereafter, the students brought suit in District Court for violation of their First Amendment rights, and the District Court found that no such violation had occurred.[162] The Court of Appeals for the

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155 484 U.S. at 272–73.

156 *Id.* at 262, 268.

157 *Id.* at 263, 269.

158 *Id.* at 263.

159 *Id.* at 264. "[Principal] Reynolds was concerned that, although the pregnancy story used false names 'to keep the identity of these girls a secret,' the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father 'wasn't spending enough time with my mom, my sister and I' prior to the divorce, 'was always out of town on business or out late playing cards with the guys,' and 'always argued about everything' with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that [the teacher of the journalism class] had deleted the student's name from the final version of the article." *Id.* at 263 (internal citations omitted).

160 *Id.* at 263–64.

161 *Id.* at 264.

162 *Id.*

Eighth Circuit reversed and the Supreme Court granted certiorari.[163]

Fraser allows for a school to "disassociate itself" from student speech that is "wholly inconsistent with the fundamental values of public school education,"[164] and *Hazelwood* expands on this idea to permit a school, "in its capacity as publisher of a school newspaper or producer of a school play" to reject student "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[165] That is to say, the First Amendment does not prevent educators from "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[166]

4. *Morse*

The regulation of the student speech at issue in *Tinker*, *Fraser*, and *Hazelwood* stems from the need for a school to manage the school environment and other educational concerns.[167] Significantly, the speech at issue in all three of those cases occurred on school grounds.[168] The school environment is not strictly limited to the school grounds, however, and accordingly, "there is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[169] The Court addressed this question at least in part in deciding *Morse v. Frederick.*[170]

The dispute in *Morse* stems from a school-sanctioned event in which students attended the Olympic Torch Relay (the "Relay")

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163 *Id.* at 265–66.

164 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (internal citations omitted).

165 *Hazelwood*, 484 U.S. at 271.

166 *Id.* at 273.

167 *See* discussion *supra* Sections II.B.1–II.B.3.

168 *See* discussion *supra* Sections II.B.1–II.B.3.

169 Morse v. Frederick, 551 U.S. 393, 401 (2007) (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (2004)).

170 *Id.*

passing through their town of Juneau, Alaska in 2002.[171] Students were permitted to attend the Relay as it passed down a street adjacent to the school, and were supervised by school faculty throughout the event.[172] A group of students, apparently enticed by the press that was covering the event, unfurled a large banner that read "BONG HiTS 4 [sic] JESUS" in lettering clearly visible from the other side of the road.[173] The school principal immediately asked the students to take down the banner because she feared it promoted illegal drug use, and she confiscated it when all but one student complied.[174] The noncompliant student was suspended for ten days and when his suspension was upheld on appeal to the superintendent, the student filed suit alleging his First Amendment rights had been violated.[175] The District Court found in favor of the school, but the Ninth Circuit Court of Appeals reversed.[176]

Having granted certiorari, the Supreme Court determined that an "approved social event or class trip" that was sanctioned by the principal, supervised by school faculty, and that took place during normal school hours was a "school-sanctioned activity," to which the school's student code of conduct rules applied.[177] The Court also found that the "'special characteristics of the school environment,' and governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[178] Consequently, the Court held that "the First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[179] Despite having elaborated on the boundaries of the schoolyard in this way, however, the Supreme Court has yet to delineate where schools are to draw the line in relation to student

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171 *Id.* at 397.
172 *Id.*
173 *Id.*
174 *Id.* at 398.
175 *Id.* at 398–99.
176 *Id.* at 399.
177 *Id.* at 400–01.
178 *Id.* at 408 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
179 *Id.* at 410.

speech that is posted online from outside of school and after school hours.[180]

C. An Uncertain Standard Governs Off-Campus Online Student Speech

In the Internet Age, balancing student free speech rights and the need for school officials to maintain order in schools has become more difficult.[181] While it is not disputed that online posts are speech that is entitled to First Amendment protection,[182] "the advent of the Internet has complicated analysis of restrictions on speech,"[183] and of restrictions on student speech in particular. Schools may regulate student online speech that is posted on campus or using campus resources per the *Tinker* standard and its progeny.[184] But having denied certiorari to *Bell v. Itawamba County School Board*,[185] the Supreme Court has not decided whether *Tinker* applies to student speech that is posted online from off campus, or even whether there exists a relationship between off-campus online speech and the school at all.[186] However, of the six circuits to have addressed this issue, five have held that *Tinker* does apply in such instances.[187] In the "other of the six circuits [to have addressed the question] (the third circuit), there is an intra-circuit split."[188]

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[180] The Court most recently declined to hear a case of this nature by denying *certiorari* to Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

[181] *See* discussion *infra* Sections II.C.1–II.C.3.

[182] Nott, *supra* note 94; *see generally* Robert Corn-Revere, *Internet & First Amendment Overview*, NEWSEUM INST., http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/ [https://perma.cc/E2WU-EUDN] (last visited Nov. 6, 2018).

[183] J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 863–64 (Sup. Ct. Pa. 2002).

[184] *See supra* Sections II.A–II.B.

[185] *See supra* note 181 and accompanying text.

[186] Section II.C discusses cases arising from student speech that was posted online from off campus, away from any school-sponsored event, and with the use of no school resources, and that was subsequently punished in some way by the speakers' schools.

[187] Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 393 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016). The "remainder of the circuits (first, sixth, seventh, tenth, eleventh, D.C.) do not appear to have addressed this issue." *Id.* at 394.

[188] *Id.* at 393.

Though *Tinker* has generally been applied to off-campus online student speech by courts that have addressed the matter,[189] there is no consensus as to what sort of online student speech can be reasonably deemed to be foreseeably or actually disruptive of the school environment such that the school may constitutionally punish the speaker. That is, once *Tinker* is applied, there is no standard governing what sort of off-campus online speech is reasonably forecast as or is actually disruptive of a school environment. In the absence of a standard, and because the disciplinary decisions of school officials are owed deference to some extent,[190] courts generally consider the totality of the circumstances of the off-campus online student speech in each case when evaluating the school's ability to punish the speaker. Factors that courts have considered in these evaluations include:

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[189] *Id.* For example, the Second Circuit allows schools to punish off-campus online student speech under *Tinker*'s test of forecasted substantial disruption "at least when it [is] similarly foreseeable that the off-campus expression might also reach campus." Doninger v. Niehoff*,* 527 F.3d 41, 48 (2d Cir. 2008) (internal citations omitted). Similarly, "the general rule [of the Eighth Circuit] is that off-campus statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment **and** are so egregious as to pose a serious safety risk or other substantial disruption in that environment." Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842, 856 (D. Minn. 2015) (2011) (emphasis in original) (internal citations omitted). The Fifth Circuit dictates that "*Tinker* governs our analysis . . . when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated and was disseminated, off-campus without the use of school resources." *Bell*, 799 F.3d at 396.

[190] *See Bell*, 799 F.3d at 393 (noting "the paramount need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community" [without fearing litigation]); *see also* Wynar v. Douglas Cty. Sch. Bd., 728 F.3d 1062, 1070 (9th Cir. 2013) (stating "we look to all of the circumstances confronting the school officials that might reasonably portend disruption"); *id.* at 1072 (noting that the court's responsibility "is not to parse the wisdom of [the school's] actions, but to determine whether they were constitutional."); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist*.,* 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008) (stating that "we are mindful that it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.") (internal citations omitted); *Bell*, 799 F.3d at 398, (observing "that courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions.") (internal citations omitted).

> The nature and content of the speech, the objective and subjective seriousness of the speech, and the severity of the possible consequences should the speaker take action; the relationship of the speech to the school, the intent of the speaker to disseminate, or keep private, the speech, and the nature, and severity, of the school's response in disciplining the student; whether the speaker expressly identified an educator or student by name or reference, and past incidents arising out of similar speech; the manner in which the speech reached the school community; the intent of the school in disciplining the student; and the occurrence of other in-school disturbances, including administrative disturbances involving the speaker, such as 'school officials having to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place,' brought about 'because of the need to manage' concerns over the speech.[191]

These factors are many and varied, for as Judge D. Brooks Smith of the Third Circuit notes, were the standard to "turn solely on where the speaker was sitting when the speech was originally uttered," that standard "would fail to accommodate the somewhat 'everywhere at once' nature of the Internet,"[192] and further, would fail to contemplate the "special characteristics of the school environment."[193] Many of these factors are intertwined, and must be evaluated as such. The entangled nature of some factors often complicates the analysis of the student speech at issue and leads to less predictable outcomes of seemingly similar cases. Accordingly,

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191 *Bell*, 799 F.3d at 398 (internal citations omitted).

192 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

193 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see also Bell*, 799 F.3d at 396 (noting that "in holding *Tinker* applies to the off-campus speech in this instance, because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits"); *Wynar*, 728 F.3d at 1069 (stipulating that "a student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach.").

determining the reasonableness of discipline based on forecasted or actual substantial disruption resulting from online student speech is more of an art than a science, and the courts' considerations are worth organizing into analytical categories to explore further in-depth.

1. Nature of Post

The nature of the post examined is an important consideration in many cases.[194] That is, in considering whether the school can punish the student expression at issue, many courts weigh heavily the character of the student speech, considering, for example, whether the post was meant to be artistic, funny, harassing, satirical, political, violent, or threatening.[195] The analysis of the nature of the speech may overlap with other factors the courts consider, but is an important factor in and of itself.

a) Violent/Threatening Speech

The First Amendment categorically does not protect true threats.[196] This means that those statements by which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"[197] are not entitled to First Amendment protection. A true threat is not negated by the fact that the speaker does not intend to carry out his threat,[198] as "a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur."[199]

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194 *See* discussion *infra* Section II.C.1.

195 *See* discussion *infra* Section II.C.1.

196 David L. Hudson, Jr. & Rebecca DeVerter, *Online Speech*, NEWSEUM INST. (Mar. 2008), http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/k-12-public-school-student-expression/cyberspeech/ [https://perma.cc/WW47-VT9Y]; *see generally* Watts v. United States, 394 U.S. 705 (1969).

197 Virginia v. Black, 538 U.S. 343, 359 (2003) (citing *Watts*, 394 U.S. at 708) (noting that "political hyperbole is not a true threat") (internal citations omitted).

198 *Id.* at 360.

199 *Id.* (internal citations omitted). Note that "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to

Some courts choose to evaluate a violent or threatening off-campus online student post by this true threat First Amendment standard,[200] but other courts feel that "school officials have significantly broader authority to sanction student speech than the [true threat] standard allows."[201]

Though aware of "the need to draw a clear line between student activity that 'affects matter of legitimate concern to the school community,' and activity that does not,"[202] the Second Circuit allows a school to punish a student's off-campus online speech 'when this conduct would foreseeably create a risk of substantial disruption within the school environment,' at least when it [is] similarly foreseeable that the off-campus expression might also reach campus."[203] In *Wisniewski v. Board of Education*,[204] the court examined an icon displayed next to a student's name on his AOL Instant Messenger account[205] that depicted a drawing of his teacher being shot with the words "Kill Mr. VanderMolen" written beneath, and that was visible to at least fifteen of his "buddies"[206] online for three weeks.[207] Both the

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a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.*

200 Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

201 *Id.* at 38.

202 Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979)).

203 *Id.* at 48 (quoting *Wisniewski*, 494 F.3d at 40).

204 *Wisniewski*, 494 F.3d at 34.

205 AOL Instant Messenger was a computer software that allowed its users to exchange messages in real time over the Internet with their "buddies" (i.e., those with whom one had connected on the application). *See id.* at 35.

206 *See infra* note 206 (describing AOL Instant Messenger).

207 *Wisniewski*, 494 F.3d at 36. After a classmate of the student on whose AOL Instant Messenger account the icon appeared brought the icon to the attention of the teacher depicted, the student was suspended for a week. *Id.* The police investigated the student, and ultimately found "that the icon was meant as a joke," and that the student "posed no real threat to VanderMolen or any other school official." *Id.* The student was assessed by a psychologist who reached a similar conclusion, and the criminal investigation of the student was closed. *Id.* The superintendent held a hearing regarding the student's long-term suspension, and the hearing officer decided that "the icon was threatening and should not have been understood as a joke." *Id.* Though the student had posted the icon from off-campus, the hearing officer "concluded that it was in violation of school rules and disrupted school operations by requiring special attention from school officials,

"potentially threatening content of the icon and the extensive distribution of it"[208] made it reasonably foreseeable that it would "come to the attention of school authorities and the teacher whom the icon depicted being shot."[209] The court further noted that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."[210]

The Eighth Circuit also addressed a First Amendment question arising "from school discipline exercised in response to student threats of violence" that were communicated online outside of school,[211] but were reported directly to the school.[212] In *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*, a student sent instant messages to a friend lamenting that he had been rejected by a peer he admired romantically, but that he would let her live if he were ever to shoot any of his classmates.[213] He then named specific students that he would "have to get rid of," along with groups of people that "would have to go" if he were to shoot his classmates.[214] This student indicated to his friend that he wanted "[their high school] to be known for something,"[215] and his alarmed friend alerted both a trusted adult and the school principal of these messages.[216] Though constitutionally schools cannot "reach out to discover, monitor, or punish any type of out of school speech . . . when a report is brought to them about a student threatening to shoot specific students at school . . . they have a

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replacement of the threatened teacher, and interviewing pupils during class time." *Id.* With the Board of Education's approval, the student was suspended for one semester. *Id.* at 37. The student thereafter brought suit in District Court against the superintendent and the Board of Education, alleging violation of his First Amendment rights. *Id.*

208 *Id.* at 39.

209 *Id.*

210 *Id.* at 40. The icon did, in fact, create a substantial disruption, "requiring special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time." *Id.* at 36.

211 D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 761 (8th Cir. 2011).

212 *Id*.

213 *Id.* at 758.

214 *Id.*

215 *Id.*

216 *Id.*

difficult and important choice to make about how to react consistent with the First Amendment."[217] In this case, the court found it reasonably foreseeable that the student's "threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment,"[218] noting that the student could anticipate that his messages would become known to other students, "since a reasonable person should be aware that electronic communications can now be easily forwarded."[219] In fact, once rumors spread about the messages in question,[220] "school officials had to spend considerable time dealing with [the safety] concerns [of parents and students], and ensuring that appropriate safety measures were in place"[221] at the school.[222]

The Ninth Circuit, in deciding *Wynar v. Douglas County School Board*, similarly examined a school's reaction in a case in which a student made threatening communications online from off campus to his friends, and those friends reported the messages to the school.[223] The court noted that students take to the internet to discuss all sorts of things "outside of the official school environment,"[224] and while schools "must take care not to

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217 *Id.* at 765 (internal citations omitted).

218 *Id.* at 766 (internal citations omitted).

219 *Id.* at 762.

220 *Id.* at 765.

221 *Id.* at 766.

222 Subsequent cases have further clarified the Eighth Circuit standard articulated in *Hannibal*. *See* S.J.W. *ex rel*. Wilson v. Lees Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (explaining "in *D.J.M. v. Hannibal Public School District #60*, we indicated that *Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting. 647 F.3d 754, 766 (8th Cir. 2011)"); *see also* Burge *ex rel*. Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1071 (D. Or. 2015) (citing Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068–69 (9th Cir. 2013)) (noting that "a number of our sister circuits have wrestled with the question of *Tinker*'s reach beyond the schoolyard. The Second, Fourth, and Eighth Circuits have concluded that *Tinker* applies to certain off-campus speech. These Circuits have imposed some additional threshold test before applying *Tinker* to speech that originates off campus. For example . . . the Eighth Circuit requires that it be 'reasonably foreseeable that the speech will reach the school community . . . '").

223 728 F.3d 1062 (9th Cir. 2013).

224 *Id.* at 1064.

overreact and to take into account the creative juices and often startling writings of the students,"[225] students do sometimes "communicat[e] electronically . . . about subjects that threaten the safety of the school environment."[226] Indeed, when a student sent to his friends from home "increasingly violent and threatening instant messages[227] . . . bragging about his weapons, threatening to shoot specific classmates, intimating that he would 'take out' other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre,"[228] they became so alarmed as to alert school officials.[229] The court found that in such cases the school must be able to balance student speech concerns against the need to "protect their students from credible threats of violence."[230] Certainly, "given the subject and addressees" of the messages, "it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have reasonably foreseeable to [the student] that his messages would reach campus."[231] To be sure, "the alarming nature of the messages prompted [the student's] friends to do exactly what we would hope any responsible student would do: report to school authorities,"[232] in the hopes that the school could help. This student's messages "threatened the student body as a whole and targeted specific students by name," not only representing the "quintessential harm to the rights of other students to be secure,"[233] but also leading to what could reasonably be forecast as substantial disruption of the school environment.[234]

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225 *Id.*

226 *Id.*

227 *See supra* note 206 (describing AOL Instant Messenger).

228 *Wynar*, 728 F.3d at 1071.

229 *Id.* at 1066.

230 *Id.* at 1070.

231 *Id.* at 1069.

232 *Id.*

233 *Id.* at 1072.

234 *Id.* at 1071. In this scenario, the school officials "reasonably could have predicted that they would have to spend considerable time dealing with parents' and students' concerns and ensuring that appropriate safety measures were in place." *Id.* (quoting D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir. 2011)) (internal citations omitted).

The Fifth Circuit's standard governing threatening off-campus online speech is more bright-line than those discussed *supra*, as it decided in *Bell v. Itawamba County School Board*,[235] that *Tinker* applies "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when the speech originated off campus."[236] In *Bell*, a student posted a video of himself using vulgar, profane language to rap about two named coaches at his high school, accusing the coaches of sexual misconduct with female students.[237] The lyrics included the admonitions, "betta [sic] watch your back," "I'm going to hit you with my [gun]," "going to get a pistol down your mouth," and "he['ll] get no mercy."[238] The video was posted to both Facebook and YouTube, and was accessible on both platforms to the public at large.[239] Though the student contended he intended neither that the coaches hear the rap nor understand it as a threat, he knew that his peers would hear it, as "students all have Facebook."[240] Even if he only wanted to raise awareness of the coaches alleged misconduct as he claimed,[241] "the manner in which he voiced his concern . . . must be taken seriously by school officials."[242] Because "threatening, harassing, and intimidating a teacher impedes, if not destroys the ability to teach," and because such behavior "disrupts, if not destroys the discipline necessary for an environment in which education can take place," it ultimately "disrupts, if not destroys, the very mission for which schools exist—to educate,"[243] and is reasonably forecast to cause a substantial disruption of the school environment.[244]

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235 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).
236 *Id.* at 379.
237 *Id.* at 384.
238 *Id.* at 384–85.
239 *Id.* at 385.
240 *Id.* at 386.
241 *Id.* at 398.
242 *Id.*
243 *Id.* at 399–400.
244 *Id.* at 400.

Assuming Tinker applies to off-campus online student speech, and because the speech at issue in each of the cases discussed above was reasonably forecast as substantially disruptive, the students' First Amendment rights were not violated when their schools punished them for their off-campus online speech. However, because ours is not a society that generally sanitizes speech, "the mere fact that someone might take offense to the content of the speech is not sufficient justification for prohibiting it."[245] Further, "not every off-hand reference to violence is a true threat unprotected by the First Amendment."[246] This distinction becomes particularly evident in comparing different sorts of violent student speech in the context of the school environment.[247]

In *Burge ex rel. Burge v. Colton School District 53*, the United States District Court for the District of Oregon analyzed violent comments a student made on his own Facebook page.[248] Initially, the student posted that he wanted to start a petition to get his teacher fired, as "she's the worst teacher ever."[249] After a friend asked why the student thought this, he responded "she's just a bitch haha . . . she needs to be shot."[250] Though the posts were visible for less than one day, as the student's mother, who monitored his Facebook account, had her son take them down,[251] a parent of other children in the school anonymously turned a print out of the posts into the principal six weeks later.[252] Following his three-and-one-half-day in-school suspension for his post, the student brought suit, alleging violation of his First Amendment rights.[253] The District Court analyzed the language of the posts against the Ninth Circuit decision in *Wynar v. Douglas County*

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245 Burge *ex rel.* Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1063 (D. Or. 2015) (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011)).

246 *Id.* at 1068.

247 *See* Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring) (noting that "schools can be places of special danger").

248 100 F. Supp. 3d 1057 (D. Or. 2015).

249 *Id.* at 1060.

250 *Id.*

251 *Id.*

252 *Id.* at 1061.

253 *Id*. at 1060–61.

School District[254] and found that "under *Wynar*, if [the student's] off-campus comments constitute an 'identifiable threat of school violence' and would substantially disrupt or materially interfere with school activities, then [the school] could discipline him without violating the First Amendment."[255] Because "the Ninth Circuit did not explain in *Wynar* what constitutes 'an identifiable threat of school violence,'" the district court looked to whether the school could reasonably foresee that the student's comments would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[256]

The student's comments did not have "any impact on classroom activities."[257] There was no "widespread whispering campaign [at school], and [the post] was not discussed by students at school or anywhere else."[258] In fact, in the six weeks before the comments were brought to the attention of the school, "no one talked about or otherwise acknowledged them,"[259] and the student continued to attend the class of the teacher he had posted about, in which there were "no disciplinary issues."[260] Further, unlike in *Wynar*, this student's comments "were not explicitly violent and graphic," he had no history of violent behavior, and had no access to weapons.[261] Even once the school became aware of the posts, its "conduct evidenced no fear of future substantial disruption or violence."[262] Given these circumstances, the District Court deduced that "no reasonable fact-finder could conclude that [the student's] Facebook comments were reasonably likely to cause the type of future substantial disruption required by *Tinker*" and the

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254 For discussion of Wynar v. Douglas Cty. Sch. Bd., 728 F.3d 1062 (9th Cir. 2013), see *supra* notes 224–35 and accompanying text.

255 *Burge*, 100 F. Supp. 3d at 1071.

256 *Id.* at 1071–72 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

257 *Id.* at 1072.

258 *Id.*

259 *Id.* at 1073.

260 *Id.*

261 *Id.*

262 *Id.*

school had therefore violated his First Amendment rights by suspending him.[263]

b) Harassing/Cyberbullying Speech

Many posts in the cases courts have examined are violent or threatening, but still many more harass or bully other students without being violent. In *Doninger v. Niehoff*, the Second Circuit examined a student government member's blog post that expressed discontent with the school's scheduling of an extra-curricular event (a concert),[264] and encouraged her peers to contact the "douchebags in central office" in order to express their grievances and "piss [them] off."[265] The student brought a suit claiming violation of her First Amendment rights after she was prevented from running for student government as a direct result of her post.[266] Though the blog entry was posted off campus, it "directly pertained to events"[267] at school, and by the student's own admission was meant "to encourage more people . . . to contact the administration."[268] The court concluded that because this post was "purposely designed by [the student] to come onto the campus,"[269] it was reasonably foreseeable that it would come to the attention of the administrators.[270] Further, the court found that due to the student's use of incendiary language, that she did not accurately inform her audience of issues surrounding the scheduling of the concert, and because rumors related to the post had "already begun to disrupt school activities," it was reasonably foreseeable that this post would lead to a substantial disruption of the school environment.[271]

Doninger addressed speech directed at school officials, but did not concern speech that one student posts about another. In *Kowalski v. Berkeley County Schools,* the Fourth Circuit addressed

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263 *Id.* at 1074.
264 Doninger v. Niehoff, 527 F.3d 41, 44 (2d Cir. 2008).
265 *Id.*
266 *Id.* at 46–47.
267 *Id.* at 50.
268 *Id.* at 45.
269 *Id.* at 50.
270 *Id.*
271 *Id.* at 50–51.

"a factual circumstance where student speech targeted classmates for verbal abuse,"[272] in which a student created a Myspace page[273] that featured posts and photographs insinuating another named student had herpes, and invited one hundred of her peers to access and edit the page, which some did.[274] In its analysis of the situation, the Fourth Circuit noted that "because, in *Tinker* the students' wearing of the armbands 'neither interrupted school activities nor sought to intrude in the school affairs or the lives of others,' there was 'no interference with work and no disorder' to justify regulation of the speech."[275] Therefore, "the language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."[276] The court further reasoned that though the student speaker posted this page from home, "she knew the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment," as she "also knew that . . . the fallout from her conduct and the speech within the [page] would be felt in the school itself."[277] Especially considering that the targeted student missed school to avoid her harassers,[278] this student's speech was "materially and substantially disruptive in that it interfered with the schools' work and collided with the rights of other students to be secure and to be let alone."[279]

In contrast to the off-campus online speech that courts have found reasonably forecast as substantially disruptive of the school

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272 Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 571 (4th Cir. 2011).

273 Myspace is a "social 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 and talents. Myspace has provided a place for users to meet new friends and keep in touch with people the world." *Myspace*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/Myspace.html [https://perma.cc/3WPD-YWV8] (last visited Nov. 6, 2018).

274 *Kowalski*, 652 F.3d at 567.

275 *Id.* at 572 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

276 *Id.* (citing DeJohn v. Temple Univ., 537 F.3d 301, 319–20 (3d Cir. 2008)).

277 *Id.* at 573.

278 *Id.* at 568.

279 *Id.* at 573–74 (citing *Tinker*, 393 U.S. at 508, 513) (internal citations omitted).

environment and therefore constitutionally punishable,[280] schools cannot, under *Tinker*, punish off-campus online speech that is not reasonably forecast to be or is not actually disruptive of the school environment.[281] Though the Third Circuit is divided as to whether *Tinker* applies to off-campus online student speech,[282] the court "assumed without deciding that *Tinker* applie[d]"[283] to the facts of *J.S. ex rel. Snyder v. Blue Mountain School District.*[284]

In *Snyder,* a student was suspended for creating a fake Myspace profile of her principal[285] that was obscene, nonsensical and though juvenile in nature, still deeply hurtful to the principal.[286] However, the court noted that the profile was indeed so crude that it was neither realistically attributed to the principal, nor accepted as true.[287] In determining the reasonableness of a forecasted substantial disruption of the school environment resulting from the profile, the court directly compared the facts of *Tinker* with the case at hand.[288] The *Snyder* court noted that despite the fact that *Tinker*'s armbands "took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War,"[289] the *Tinker* majority held that "'the record does not demonstrate *any facts* which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,' and thus that the school violated the students' First Amendment

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280 *See* discussion *supra* Section II.C.1.

281 *See* discussion *supra* Section II.C.

282 *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–20 (3d Cir. 2011).

283 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011).

284 *Id.*

285 *Id.* at 920.

286 *Id.* The profile "contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family." *Id.* Notably, the principal's wife was a guidance counselor at the same school. *Id.* at 921.

287 *Id.* at 921. The court emphasized that, "though disturbing, the record indicates that the profile was so outrageous that no one took its content seriously." *Id.*

288 This is remarkable in that in most cases researched for this Note, the courts explained the facts of *Tinker* and used the *Tinker* standard and language, but did not directly compare those facts to the facts of the case at hand.

289 *Snyder*, 650 F.3d at 928 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 518 (1969) (Black, J., dissenting)).

rights"[290] by punishing the students' speech. Comparatively, "beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred" as a result of the student speech at issue in *Snyder*.[291] Accordingly, the Third Circuit decided that "if *Tinker*'s black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war—could not reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, neither can [the Myspace] profile, despite the unfortunate humiliation it caused" for the principal.[292]

2. Subject of Post

Though the nature of the online post in question is an important consideration, courts have also evaluated the subject of the post in their determination of reasonable forecast of or actual substantial disruption. Often courts will consider the nature and subject of the post in tandem, since the nature of the post and the subject of the post can often be tied (as, for example, when a post threatens someone who is the speaker's classmate).

The "special characteristics of the school environment"[293] may allow schools to regulate certain student speech in school that, if spoken outside of the school community would be protected by the First Amendment,[294] however, the "point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."[295]

Hence, the United States District Court for the District of Minnesota reasoned in *Sagehorn v. Independent School District*

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290 *Id.* at 929 (quoting *Tinker*, 393 U.S. at 514 (emphasis in original)).

291 *Id.* at 929.

292 *Id.* at 929–30.

293 *Tinker*, 393 U.S. at 506.

294 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 689 (1986) (noting that "if [the student] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate").

295 Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842, 855 (D. Minn. 2015) (citing Snyder v. Phelps, 562 U.S. 443 (2011)).

No. 728[296] that even if a student's off-campus online speech is "inappropriate, ill-advised, and offensive,"[297] a school may only punish the speech if it "is both (1) reasonably calculated to reach the school environment **and** (2) so egregious as to pose a serious safety risk or other substantial disruption in that environment."[298] The court further noted that "this is an extremely high bar," as courts have found this standard satisfied in only "the most violent and threatening forms of speech," "consistently declining to expand it to extremely offensive but nonviolent out-of-school speech."[299]

At issue in *Sagehorn* was an anonymous post on a website entitled "[High School Name] Confessions," that asked "did [a certain student] actually make out with [name of female teacher at the High School]?"[300] The student in question replied, "actually yes," which he later stated he intended as a joke.[301] A parent of another student at the high school soon contacted the school about the posts, and the student was suspended for "damag[ing] a teacher's reputation."[302] The court discussed that though some may interpret the phrase "make out" to connote sexual intercourse,[303] the term "is slang that certainly has varying meanings, including connotations not involving sexual intercourse."[304] In fact, nothing in either the question posted or the given response or "other allegations in the complaint suggest that [the student] was using the term to mean sexual intercourse."[305] Further, "even if the Court were to find that [the student's] post unambiguously referred to sexual intercourse, the content **actually attributable to [him]**—a response of 'actually yes'—is not nearly as graphic as the content

296 122 F. Supp. 3d 842 (D. Minn. 2015).
297 *Id.* at 855.
298 *Id.* at 857 (emphasis in original).
299 *Id.* (internal citations omitted).
300 *Id.* at 849.
301 *Id.*
302 *Id.*
303 *Id.* at 853.
304 *Id.* at 854.
305 *Id.*

courts have found obscene as a matter of law."[306] The court noted that "the fact that speech references teacher-on-student sexual conduct does not, *de facto*, make the speech likely to reach the school and cause a substantial disruption,"[307] and further, that even if the court "assumed, without deciding, that [the student's] post was intended to reach the school environment, there is no indication that any disruption was, in fact, caused by [the student's] post."[308] In the absence of such a disruption, *Tinker* does not allow the school to punish the student for his off-campus online speech.[309]

Similarly, the student speech at issue in *Snyder*[310] directly attacked the school principal and his wife, who was one of the school's guidance counselors.[311] The student who made the fake Myspace profile of the principal claimed it was meant "to be a joke between herself and her friends,"[312] and despite the fact that the profile personally attacked the principal, a guidance counselor, and their family in crude, vulgar, and profane manner,[313] the court found that the profile "was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did."[314] Accordingly, the court

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306 *Id.* at 854 (emphasis in original); *see also id.* at 854–55 (citing Rosario v. Clark Cty. Sch. Dist., 2013 WL 3679375 (D. Nev. July 3, 2013)) (discussing an example of a legally obscene student tweet).

307 *Id.* at 858.

308 *Id.* "Based on the allegations in the complaint, there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school, as a result of [the speaker's] posting of 'actually yes' on the Internet." *Id.* (internal citations omitted).

309 *Id.* at 859.

310 *See supra* notes 284–93 and accompanying text.

311 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–21 (3d Cir. 2011).

312 *Id.* at 921. *But see id.* at 948 n.5 (Fisher, J., dissenting) (opining, "even if [the speaker]'s intent were at issue, it is not so clear that the profile was intended to be a joke. While she at one point stated that the profile was created for comical reasons, [the speaker] also stated that she created the profile because she was 'mad' at [the principal] for disciplining her. She claimed [the principal] unnecessarily yelled at her for committing dress code violations. It is therefore fair to say that [the speaker] created the profile in retaliation.").

313 *Id.* at 920.

314 *Id.* at 929.

decided that the school violated the student's First Amendment rights by suspending her for speech that neither caused nor could have been forecast to cause a substantial disruption in school,[315] "despite the unfortunate humiliation it caused" for the principal.[316]

In contrast to the cases in this Section that involved student off-campus online speech targeting teachers,[317] the Fourth Circuit examined a case involving student off-campus online speech that attacked a classmate. In *Kowalski,* the court decided that a Myspace page on which the student speaker opened up for discussion unfounded rumors of another student's sexual history[318] was a "hate website"[319] "created for the purpose of inviting others to indulge in disruptive and hateful conduct which caused an in-school disruption."[320] The court determined that the "targeted, defamatory nature of [the speech], aimed at a fellow classmate" created an "'actual or nascent' substantial disruption in the school,"[321] and that "because [the] speech interfered with the work and discipline of the school," the speaker's First Amendment rights were not violated when she was punished for her speech.[322] In its decision, the court indicated that schools "have a duty to protect their students from harassment and bullying in the school environment,"[323] and further reasoned that unlike a situation in which "school authorities 'suppress speech on political and social issues based on disagreement with the viewpoint expressed,' school administrators must be able to prevent and punish

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315 *Id.* at 925.

316 *Id.* at 930.

317 *See generally id.*; Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842 (D. Minn. 2015).

318 *See supra* notes 273–80 and accompanying text.

319 Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 568 (4th Cir. 2011).

320 *Id.* at 567 (citations omitted).

321 *Id.* at 574 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969)).

322 *Id.* at 574.

323 *Id.* at 572 (Alito, J., concurring) (stipulating in full that, "just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment." (citing Morse v. Frederick, 551 U.S. 393 (2007))).

harassment and bullying in order to provide a safe school environment conducive to learning."[324]

Because educators must be able to maintain a safe environment for their students not only psychologically but also physically, speech that violently or threateningly targets specific teachers, students, or the school community as a whole is largely punishable by school authorities.[325]

3. Privacy or Publicity of Post

The standard governing school regulation of off-campus online student speech is in part so pliable because similar posts can have different meanings/effects based on the platform to which the student posts the content and the privacy settings the speaker chooses for her post, in addition to the nature and subject of the post as discussed above.[326] Many courts that have addressed the issue have not analyzed the social media platform to which the student speaker posted online from off campus, and whether a post reaches the school community is not necessarily demonstrative of its causing a substantial disruption at school.[327] However, some courts have considered the privacy settings or lack thereof these student speakers chose for the posts in question as a factor of a reasonable forecast of substantial disruption of the school environment.[328]

When the Third Circuit decided in *Synder*[329] that the fake Myspace profile of a school principal the student posted was not

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[324] *Id.*

[325] *See supra* Section II.C.1.a (discussing violent/threatening speech). This analysis is to a great extent inextricable from the analysis of violent/threatening speech discussed *supra* Section II.C.1.a, and is therefore not discussed at length in this Section, but is an important consideration of courts examining the subject of a student's online post.

[326] *See supra* Sections II.C.1–II.C.2.

[327] *See* Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842, 857 (D. Minn. 2015) (noting, "[t]he fact that a statement may have been reasonably calculated to reach a school audience is not sufficient: school officials must also show that the statements posed a substantial disruptive effect." (citing R.S. *ex rel.* S.S. v. Minnewaska Area Sch. Dist., 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012))).

[328] *See* discussion *infra* Section II.C.3.

[329] *See supra* notes 284–93 and accompanying text.

reasonably forecast as substantially disruptive,[330] it considered the steps that the speaker took to make the Myspace page available only to a limited audience.[331] The court weighed the fact that the speaker's post was at first viewable "in full by anyone who knew the URL (or address) or who otherwise found the profile by searching MySpace for a term it contained,"[332] against the fact that the day after the page's creation, the speaker "made the profile 'private' after several students approached her at school, generally to say that they thought the profile was funny."[333] The court reasoned that these actions evidenced that the speaker "did not even intend for the speech to reach the school—in fact, she took specific steps to make the profile 'private' so that only her friends could access it," and further, that "the fact that her friends happen to be [students of the same school] is not surprising, and does not mean that [her] speech targeted the school."[334]

While the *Snyder* court focused on how many people were excluded from the Myspace page targeting a principal, the *Kowalski* court emphasized the communal nature of a Myspace page attacking a student. The Fourth Circuit found in *Kowalski*[335] that a student-created Myspace page that "functioned as a platform for [the speaker] and her friends to direct verbal attacks towards [a] classmate"[336] was reasonably forecast as substantially disruptive.[337] The creator of the page invited approximately one hundred of her Myspace "friends"[338] to access the page, which allowed them to "respond to text, comments, and photographs in an interactive fashion," and eventually more than two dozen of her classmates did so.[339] The students involved with the Myspace page likely knew their speech would not be kept private, as the Court

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330 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 925 (3d Cir. 2011).

331 *Id.* at 921.

332 *Id.*

333 *Id.*

334 *Id.* at 930–31.

335 *See supra* notes 273–80 and accompanying text; *see also* notes 319–25 and accompanying text.

336 Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 572–73 (4th Cir. 2011).

337 *Id.* at 574.

338 *See supra* note 30 (explaining what it means to be a "friend" or "follower" of someone on social media).

339 *Kowalski*, 652 F.3d at 567.

noted that one student remarked, "wait til [the target of the speech] sees the page lol."[340] Given that both the participants in and the target of the page were students of the same high school,[341] the Court found it foreseeable that this "hate website"[342] would reach the school community "via computers, smartphones, and other electronic devices"[343] and "create a reasonably foreseeable substantial disruption there."[344]

The Second Circuit has similarly found that the publicity of a post can factor into a reasonable forecast of substantial disruption of the school.[345] In *Wisniewski*,[346] the court examined a post that threatened a teacher and that was visible to fifteen of the speaker's friends, some of whom were also his classmates, for three weeks,[347] and ultimately determined that such "excessive distribution" contributed to the reasonable foreseeability, if not inevitability, of the post causing substantial disruption in the school.[348]

Some courts consider not only the size of the speaker's audience in this regard, but also whether the speaker purposely directed his speech at the school when determining whether a forecast of substantial disruption was reasonable or if a disruption occurred. In deciding that a student's rap recording that threatened teachers disrupted the school environment,[349] the Fifth Circuit noted that the speech in *Bell*[350] "pertained directly to events occurring at school,"[351] and that the speaker "admitted he intended the speech to be public and reach members of the school

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340 *Id.* at 573. Note that "lol" is Internet shorthand for "laugh[ing] out loud." *Id.* at 568.

341 *Id.* at 573, 574, 576–77.

342 *Id.* at 568.

343 *Id.* at 574.

344 *Id.*

345 Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008); *see also* Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

346 *See supra* notes 205–11 and accompanying text.

347 *Wisniewski*, 494 F.3d at 36.

348 *Id.* at 39–40.

349 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 399–400 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

350 *See supra* notes 236–45 and accompanying text.

351 *Bell*, 799 F.3d at 398.

community, which is further evidenced by his posting the recording to Facebook and YouTube."[352] Likewise, the Second Circuit considered the fact that a speaker's blog post was "purposely designed by [the speaker] to come onto the campus,"[353] that the post "directly pertained to events at [the high school]," and that the speaker's "intent in writing it was specifically to encourage her fellow students to read and respond"[354] when it decided that a student's blog post was foreseeably substantially disruptive of the school environment.[355]

In summary, though the First Amendment guarantees free speech to American citizens, this right is not absolute, and is qualified in limited circumstances by legitimate government interests in speech restriction.[356] Consequently, the Supreme Court has found that a school may regulate student speech that is (1) foreseeably or actually substantially disruptive of the school environment or that invades the rights of others,[357] (2) offensive, indecent, or lewd,[358] (3) of pedagogical concern,[359] or (4) promotes the use of illegal drugs, even if the speech occurs off campus in a school-sponsored activity.[360]

The standard governing off-campus online student speech, however, is less straight-forward. Because no two student posts or the circumstances surrounding the posts are exactly alike, and because it is not definitively established that *Tinker* and its progeny[361] apply to these cases in the first place,[362] there are many

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352 *Id.* at 399.

353 Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

354 *Id.* at 50 (internal citations omitted).

355 *Id.* at 53.

356 *See* discussion *supra* Section I.A.

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

358 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

359 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

360 Morse v. Frederick, 551 U.S. 393, 401 (2007); *see also* discussion *supra* Section II.B (examining the *Tinker* standard and its progeny (*Fraser*, *Hazelwood*, and *Morse*, respectively)).

361 *See, Morse*, 551 U.S. 393; *Hazelwood*, 484 U.S. 260; *Fraser*, 474 U.S. 814.

362 *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 393 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016) (explaining that "of the six circuits to have addressed whether *Tinker* applies to off-campus speech, five . . . have held it does. (For the other of the six circuits (the third circuit), there is an intra-circuit split . . .) . . . [t]he remainder of the

factors to consider in determining whether a student's off-campus online speech could foreseeably cause or actually did cause a substantial disruption of the school environment. It may seem that courts vary widely in their considerations,[363] however, their evaluations are more easily compared by organizing them into analytical categories based the nature of the speech, the subject of the speech, and the privacy of the speech as discussed above in this Part. *Tinker*'s complicated application to these cases may have made sense at one time, but no longer accommodates the realities of the current nature, use, and presence of the internet in daily American life.

III. IS STUDENT SPEECH SUFFICIENTLY FREE?

A. School Regulation of Student Speech Allows Educators to Shape Adolescent Understanding of Appropriate Behavior

Some opponents of the jurisprudence surrounding *Tinker*'s application to off-campus online student speech argue not necessarily that *Tinker* is the wrong standard, but rather that schools should have no ability to control student speech that occurs outside of the school environment.[364] But to limit a school's ability to regulate student speech based on the physical boundaries of the schoolyard would be to ignore the "somewhat 'everywhere at once' nature of the internet"[365] and the realities of our hyper-connected digital world.

Even before the internet allowed for easy communication between individuals or to immeasurable audiences at all times of

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circuits . . . do not appear to have addressed this issue.") The Supreme Court of the United States denied certiorari to *Bell* in 2016. Bell v. Itawamba Cty. Sch. Bd., 136 S. Ct. 1166 (2016)).

363 *See supra* note 192 and accompanying text.

364 *E.g.*, J.S. *ex rel.* Synder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936–40 (3d Cir. 2011) (Smith, J., concurring) (arguing that *Tinker* should not apply to off-campus speech, as "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large," and that applying *Tinker* to off-campus speech "would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.").

365 *Id.* at 940 (Smith, J., concurring).

day and night, the Supreme Court had "clearly stated that the rights of free speech and assembly 'do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time.'"[366] In truth, no person carries with him into a Church, or a Synagogue, for example, or into "the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases."[367] It follows that a student has no absolute right to contravene school rules with his speech at school. The question is, then, whether a school should be able to extend its control over a student to his off-campus online speech.

Though students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[368] the Supreme Court recognizes the need for "comprehensive authority of the States and of school officials, consistent with fundamental conditional safeguards, to prescribe and control conduct in the schools."[369] This is a difficult, though absolutely necessary, balance to strike, and one that is only complicated by our increasingly-interconnected world. The courts that have addressed this issue do not all agree as to what sort of off-campus online speech is reasonably foreseen to be or is actually disruptive of the school environment,[370] but those that have applied *Tinker* to the speech at issue[371] have correctly determined that a school must have some role to play in the regulation of off-campus online student speech.

Usually, "when the 'First Amendment is implicated, the tie goes to the speaker.'"[372] However, because "the relationship

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366 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting) (citing Cox v. Louisiana, 379 U.S. 536, 554 (1965)).

367 *Id.* at 521–22 (Black, J., dissenting).

368 *Id.* at 506; *see also* discussion *supra* Sections II.A–II.B.

369 *Tinker*, 393 U.S. at 507.

370 *See generally supra* Part II.

371 *See supra* note 363 and accompanying text.

372 Morse v. Frederick, 551 U.S. 393, 445 (2007) (Stevens, J., dissenting) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 474 (2007)). In the original *Wisconsin Right to Life* opinion, the full sentence reads, "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." 551 U.S. at 474.

between schools and students 'is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults,' it might well be appropriate to tolerate some targeted viewpoint discrimination in th[e] unique setting [of the school]."[373] School officials stand *in loco parentis*[374] when students are entrusted to their care, and courts have therefore "upheld the right of schools to discipline students, to enforce rules, and to maintain order."[375] Like parents, school officials, "knowing that adolescents often test the boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish when a student has gone too far."[376] Authority figures like parents and teachers have always determined what sort of conduct is appropriate for children because, in many ways, adults help guide children through situations that they are not yet equipped to navigate themselves. As Justice Black noted, "taxpayers send children to school on the premise that at their age they need to learn, not teach."[377] Though their voices should be heard, schoolchildren are not necessarily ready to decide for themselves what sort of behavior is appropriate in a given setting. Regulating student online speech is not akin to prior restraint, but rather helps students learn "the boundaries of acceptable behavior"[378] from their mistakes.

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[373] *Morse*, 551 U.S. at 439 (Stevens, J., dissenting) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (citation omitted)).

[374] Meaning, "in the place of a parent." *In loco parentis*, BLACK'S LAW DICTIONARY, (5th ed. 2016). *See generally Morse*, 551 U.S. at 413–22 (Thomas, J., concurring) (discussing the doctrine of *in loco parentis* in the context of the history of American public schools). *But see id.* at 424 (Alito, J., concurring) (noting that "most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.").

[375] *Morse*, 551 U.S. at 413 (Thomas, J., concurring).

[376] *Id*. at 427 (Breyer, J., concurring).

[377] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting).

[378] *Morse*, 551 U.S. at 427 (Breyer, J., concurring).

B. But a Determination of Whether Speech Is Appropriate Cannot Depend Solely on the Reactions of the Listeners

While schools must have some ability to regulate off-campus online student speech,[379] the courts to have addressed the issue[380] have erred in applying *Tinker* to such speech. Not only is the *Tinker* substantial disruption assessment the incorrect standard by which to evaluate whether off-campus online student speech requires a school's intervention, but it also should not apply to this speech because courts cannot agree on how to consistently apply it.[381]

The *Tinker* substantial disruption standard should not govern off-campus online student speech because whether a school can regulate a student's post should not be based on the likelihood that the post will cause or actually does cause a substantial disruption of the school environment. To begin, the school environment is not necessarily at its base level disturbance-free. Even "[a]dults often say things that give rise to disruptions in public schools. Those who championed desegregation in the 1950s and 60s caused more than a minor disturbance in the southern schools."[382] If a classroom is to be the "marketplace of ideas"[383] that we cherish as Americans, we cannot attempt to snuff out discussions of uncomfortable social and political issues under the guise of necessarily quelling disturbance of the school environment.

What's more, "absence of evidence [of disturbance] is not evidence of absence [of disturbance]."[384] The *Tinker* Court held that because the speakers "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others," the school could not constitutionally punish their speech.[385] However,

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379 *See supra* Section III.A.

380 *See supra* note 363 and accompanying text.

381 *See* discussion *supra* Section II.C (examining the current standard (or lack thereof) governing school regulation of student speech posted online from off campus).

382 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

383 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).

384 *See* Fred Shapiro, *The Absence of Proof*, FREAKANOMICS (Sept. 29, 2011), http://freakonomics.com/2011/09/29/the-absence-of-proof/ [https://perma.cc/9SCW-3ZS4].

385 *Tinker*, 393 U.S. at 514.

in truth, "even a casual reading of the record shows that this armband did divert students' minds from their regular lessons," and that even if the school environment was not substantially disrupted, "the record overwhelmingly shows that the armbands did exactly what the [school] foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war."[386] This Note does not argue that *Tinker* was wrongly decided, but rather highlights the actual disturbance that resulted from the speech in *Tinker* to emphasize that a lack of substantial disruption does not equate to a serene learning environment. The *Tinker* standard, therefore, is not infallible.

In allowing a substantial disruption, or lack thereof, to dictate whether a school can punish a student's off-campus online speech, courts fail to address conduct that significantly disrupts the school environment of at least one student, if not of the student body en masse. It cannot be said that the free speech rights of one child outweigh another child's need for a safe learning environment, as school officials often intervene in student conflicts at school. In fact, the *Tinker* majority decreed that student conduct "in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder *or invasion of the rights of others* is, of course, not immunized by the constitutional guarantee of freedom of speech."[387] Though the Court explicitly recognized the "rights of other students to be secure and to be let alone,"[388] this prong of the *Tinker* standard is perplexingly largely overlooked by lower courts and seldom cited to justify the regulation of off-campus online student speech.[389]

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386 *Id*. at 518 (Black, J., dissenting); *see also Snyder*, 650 F.3d at 946 (Fisher, J., dissenting) (noting that "[t]he majority also overlooks the substantial disruptions to the classroom environment that follow from personal and harmful attacks on educators and school officials.").

387 *Tinker*, 393 U.S. at 513 (emphasis added).

388 *Id*. at 508.

389 *See generally supra* Section II.C (discussing the current standard (or lack thereof) governing school regulation of student speech posted online from off campus).

If school officials could not regulate student speech that disrupted a few other students' learning environments but caused no substantial disruption of the school, it would be challenging for school officials to regulate bullying in their halls. There is disagreement as to whether a school or a parent can best handle punishment of cyberbullying.[390] Yet, as an employee can complain of harassment or a hostile work environment to the human resources department of his company, so too should a student be able to lodge similar complaints to the authority common to both the student and his harasser: the school.[391] A victim of cyberbullying should not suffer in silence because the bully's off-campus online speech was not sufficiently disruptive of the school environment for the school to intervene.[392] A court should instead be able to find that a school is authorized to punish cyberbullying as conflicting with the rights of other students to be let alone.[393]

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[390] Although definitions vary, "cyber harassment is often understood to involve the intentional infliction of substantial emotional distress accomplished by online speech that is persistent enough to amount to a 'course of conduct' rather than an isolated incident." CITRON, *supra* note 38, at 3. Cyber harassment or bullying may also involve "threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks." *Id*.

[391] *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (explaining "as the [speaker] could anticipate, [the target of the off-campus online student speech] and her parents took the attack as having been made in the school context, as they went to the high school to lodge their complaint.").

[392] Note: regardless of a school's ability to punish certain off-campus online student speech, "[s]chools are increasingly involved in helping parents and students learn about online safety. Some school districts have adopted cyber bullying curricula to obtain federal funds earmarked for technology or to comply with state laws requiring 'character education' in public schools. Their impetus has ethical roots as well. As the Supreme Court has underscored, schools nurture the 'habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government.'" CITRON, *supra* note 38, at 248 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

[393] In *Kowalski*, the student who was the target of the off-campus online speech reported the harassment to the school (*Kowalski*, 652 F.3d at 573), then "left the school with her parents, as she did not want to attend classes that day, feeling uncomfortable about sitting in class with students who had posted comments about her on the MySpace webpage [at issue]." *Id.* at 568. Though this post clearly "colli[ded] with the rights of [this student] to be secure and to be let alone," *Tinker*, 393 U.S. at 508, the court mystifyingly concluded "that the school was authorized to discipline [the speaker] because her speech interfered with the work and discipline of the school," *Kowalski*, 652

Though it is possible a cyberbully might be punished under the *Tinker* substantial disruption standard,[394] courts have been unable to agree on what sort of cyber speech is substantially disruptive. As discussed in Part II, online student speech, as any other sort of speech, varies greatly by chosen platform,[395] topic, and audience. These variables, coupled with the lack of clarity surrounding *Tinker*'s applicability to off-campus online speech in the first place, leave schools to consider a great many factors and exercise a great deal of discretion in deciding whether to punish a student's off-campus online speech.[396]

Courts examine broad categories of similar factors, as organized and discussed in Part II of this Note, but do not necessarily each examine the exact same factors in every case. That courts do not agree on what sort of speech will be reasonably forecast as or actually disruptive of the school environment[397] when examining the speech at issue in these broad analytical categories indicates that the deciding legal test is impossibly subjective. So much of the standard lies within the judges' discretion that a student speaker cannot be certain of just what sort of off-campus online speech will subject him to constitutional school punishment, save for perhaps the certainty that violent and/or threatening speech seems to be somewhat more consistently regulated than other speech examined.[398] A student cannot know with any certainty whether his school can generally regulate his off-campus online speech, and thus might find that his best course of action is to refrain from speaking at all.[399] This standard,

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F.3d at 574, and did not address the rights-of-students-to-be-let-alone prong of the *Tinker* standard.

394 *See supra* note 394 and accompanying text.

395 It is worth noting that though chosen platform might seem to be its own category of evaluation for courts, this should not be the case, or a student could possibly be punished for posting something on Instagram, e.g., but not for posting the same thing on Twitter or Snapchat.

396 *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 398 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

397 *See generally supra* Part II.

398 *See generally supra* Section II.C.

399 The Vagueness Doctrine is a constitutional principle that requires "fair notice of what is punishable and what is not . . . [to] prevent arbitrary enforcement of the laws." Wex Legal Dictionary & Encyclopedia, *Vagueness Doctrine*, LEGAL INFORMATION

therefore, effectively chills off-campus online student speech and silences young American speakers.

While it is "a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases,"[400] it is also true that "[w]hen First Amendment rights are at stake, a rule that 'sweep[s] in a great variety of conduct under a general and indefinite characterization' may not leave 'too wide a discretion in its application,'"[401] as the *Tinker* standard does when applied to off-campus online student speech. Though *Tinker* in its original application remains good law, the vagueness of this rule as adapted and applied to modern off-campus online student speech simply cannot pass constitutional muster, because "our jurisprudence now says that students have a right to speak in schools except when they do not."[402]

Justice Clarence Thomas believes that *Tinker* itself is unconstitutional[403] because in his view, "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[404] This fundamentally cannot be the case, for while "the original idea of schools . . . was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders,"[405] it is also generally accepted that "the Nation has outworn the old-fashioned slogan that 'children are to be seen not

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INSTITUTE, https://www.law.cornell.edu/wex/vagueness_doctrine [https://perma.cc/KTQ4-3V8E] (last visited Nov. 6, 2018). A statute is "also void for vagueness if a legislature's delegation of authority to judges and/or administrators is so extensive that it would lead to arbitrary prosecutions." *Id.* Though generally applied towards criminal laws, the principles of the vagueness doctrine are just as relevant to the issue of school punishment of off-campus online student speech.

400 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting); *see also supra* Section II.A.

401 Morse v. Frederick, 551 U.S. 393, 440–41 (2007) (Stevens, J., dissenting) (citing Cantwell v. Connecticut*,* 310 U.S. 296, 308 (1940)).

402 *Id.* at 418 (Thomas, J., concurring).

403 *Id*. at 410.

404 *Id.* at 410–11. Thomas also observes that "[t]he *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment," Id. at 420, and argues that *Tinker* itself has no basis in the Constitution. *Id.* at 410–22.

405 *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

heard.'"[406] Today, "public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society."[407] To be sure, "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[408] To silence children absolutely cannot possibly be the best way to prepare them to become contributing members of civilized society. It is therefore necessary not only to maintain the First Amendment's general application to student speech in public school settings, but also to recognize that the First Amendment rights of a public-school student are subject to limitation, and in so doing protect a school's tutelary role in a student's life.

The four main authorities governing the regulation of student speech on school grounds or in school-sponsored activities are well-established law.[409] Though times have noticeably changed in the years since these cases were decided, this Note does not challenge the general applicability of this precedent to cases of in-school or school-sponsored student speech today. Rather, this Note disputes that *Tinker* and its progeny can or should be applied, unmodified, to cases of off-campus online student speech that arise in the context of our interconnected, social-media-obsessed world today. Courts have correctly recognized a school's need to be able to control its environment in painstakingly applying *Tinker* to off-campus online student speech.[410] However, because the *Tinker* standard does not accurately encompass the realities of the internet and its place in an American student's life, courts inadvertently conduct haphazard *Tinker* analyses in off-campus online student speech cases that result in unpredictable outcomes. Consequently, *Tinker* must be replaced as the governing standard in these cases.

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406 *Id.*

407 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988).

408 *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

409 *See supra* Sections II.A–II.B, discussing First Amendment caselaw generally, and *Tinker, Fraser*, *Hazelwood*, and *Morse*.

410 *See supra* Sections II.A–II.C.

IV. INSTEAD, TINKER WITH *TINKER*

Tinker cannot be the standard governing a school's ability to punish off-campus online student speech because it is too inconsistently applied. Instead, this Note advocates for a solution that leads to more predictable outcomes and proposes that the standard governing these cases should be a modified version of the *Tinker* test. Student speech that is posted online from off campus should be subject to punishment by school officials if that speech (1) touches and concerns the school community or a member of the school community, and if that speech (2) interferes with the rights of members of the school community "to be secure and to be let alone."[411] This is a two-pronged test, meaning that both elements of the test must be met if the student is to be constitutionally punished by the school for her off-campus online speech. Therefore, if the off-campus online speech in question does not touch and concern the school, school officials cannot punish the student for that speech. Likewise, even if the off-campus online speech touches and concerns the school, if it does not interfere with the rights of other members of the school community to be secure and let alone, the school cannot punish that speech.

The idea that speech should touch and concern the school to come under the school's jurisdiction springs from the property law principal that a covenant should touch and concern the benefitted or burdened land. In property law, a covenant touches and concerns the land if executing that covenant affects what happens on the land at issue.[412] In the same vein, student speech would touch and concern the school if that speech affects what happens at school. The school could use the three broad analytical categories discussed in Part II to determine whether the student's off-campus online speech touches and concerns the school. That is, the school could consider the (1) nature of the post, (2) subject of the post, and (3) audience of the post in making this decision. If in evaluating these three aspects of the post the school determines

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411 *Tinker*, 393 U.S. at 508.

412 Alan R. Romero, *Deciding Whether a Covenant Touches and Concerns the Land*, DUMMIES, http://www.dummies.com/education/law/deciding-whether-a-covenant-touches-and-concerns-the-relevant-land/ [https://perma.cc/RPE6-BH8B] (last visited Nov. 6, 2018).

that the post touches and concerns the school, the post would fall under the school's jurisdiction, and the school could then punish the speaker as if the speech had occurred at school if the school also finds that the speech interfered with the rights of others to be secure and let alone. No one of these three analytical categories would be determinative; rather, the schools would weigh all of the criteria considered in its evaluation. The schools would not be weighing these factors to determine whether the speech caused a reasonable forecast of or actual disturbance, as is the current practice, but rather weigh the factors to determine whether the speech touches and concerns the school community in the first place.

Further, the "general right of the individual to be let alone," is much "like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, [and] the right not to be defamed."[413] Underlying each of these individual rights is "in reality not the principle of private property, but that of an inviolate personality."[414] That is, every man has a right to be respected and secure in his person. This right may not be trespassed upon by a student asserting his freedom of speech. The standard that this Note proposes protects the rights of not only other students to be let alone, but all members of the school community, including faculty and staff. This ensures that a post maliciously attacking a teacher or other school official, for example, would not slip through the cracks because it did not interfere with the rights of other *students* to be let alone.

Moreover, off-campus online speech that touches and concerns the school community is not punishable simply because it also breaks a school rule. Rather, that post must touch and concern the school community *and* interfere with the rights of others to be let alone for the school to constitutionally punish it. This distinction allows the off-campus online student speech that is truly of the school's concern to fall under school authority, while acknowledging that the speaker was not in a school setting when

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413 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

414 *Id.*

he spoke. To permit the school to punish, in all cases, the student speaking online from off campus exactly as if she had spoken at school would be to install an authoritarian regime that exercises control over students in all places and at all times.[415] Instead, the proposed standard requires the student's off-campus online speech not only touch and concern the school community, but also interfere with the rights of others to be let alone if the school is to punish that speech to ensure that schools are only able to punish speech that is truly of pedagogical concern.

To illustrate the nuances of the proposed standard, consider this: if a student posted something online from off campus that mocked a student from another school, the speaker's school would examine the nature, subject, and audience of the post, and likely determine that the post did not touch and concern the school. The speaker therefore could not be punished by his school for that post. In contrast, if the speaker's post mocked a classmate or teacher at his own school, the school would likely determine that the post touched and concerned the school, and the post would fall under the school's jurisdiction. If the school then found that the post interfered with the rights of other members of the school community to be let alone, the school could punish the speaker as if he had spoken at school. If a student mocked a teacher by discussing her personal life,[416] for example, he could likely be

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[415] J.S. *ex rel.* Synder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936–40 (3d Cir. 2011) (Smith, J., concurring) (arguing that *Tinker* should not apply to off-campus speech, as "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large," and that applying *Tinker* to off-campus speech "would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.").

[416] *See generally* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011); *Snyder*, 650 F.3d at 930. Both cases involve fake Myspace profiles made of principals, and are good examples of personal attacks on teachers that are not well-reasoned, legitimate protests of those principal's policies or practices. This does not mean to suggest that certain speech is more legitimate than others; rather, that certain speech is appropriate to broadcast to a wide audience (e.g., speech protesting a school policy), and certain speech should be subject to punishment in order to teach children the boundaries of socially appropriate behavior. Mocking a teacher for no other reason than to do so interferes with his right to be let alone personally, and is not a legitimate challenge to his position as an authority figure (in which role he has less right to be let alone, because authority figures generally should not go unchecked in our society).

punished for violating her right to be let alone. But if that student had spoken out against a teacher's practice in an informed, reasoned way, that student would likely not be punished, assuming the school allows for the legitimate criticism of authority that is essential to a functioning democracy.

This Note directs those who might take issue with any given school punishment of an off-campus online student post to an idea from Justice Harlan's *Tinker* dissent. If the school can show that it punished the post only after it found that the post both (1) touched and concerned the school, and (2) interfered with the rights of other members of the school community to be secure and let alone, the student challenging the punishment would have "the burden of showing that a particular school measure was motivated by other than legitimate pedagogical concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion."[417]

Had the Marjory Stoneman Douglas High School known of Nikolas Cruz's post indicating his intent to become "a professional school shooter"[418] before the events of that fateful February day,[419] it might have applied this proposed standard to determine whether to take action against Cruz. In so doing, the school would first determine whether the post touched and concerned the school community by evaluating the nature, subject, and audience of the post. The post is clearly violent in nature, and reasonably understood as directed towards the school the speaker attended.[420] Additionally, the speaker made no attempts to conceal his message as he posted it in the public comments of a YouTube video.[421] Taking all three of these factors into consideration, the speaker's school could reasonably determine that his post falls into its jurisdiction, and would thus apply the second prong of the

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417 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

418 Apel, *supra* note 7.

419 Assuming he was still a student at this point. *See supra* notes 1–10 and accompanying text.

420 Or previously attended. This analysis assumes he was still a student at Marjory Stoneman Douglas High School at this point, which would be required for the school to punish him.

421 Apel, *supra* note 7.

proposed standard to his speech. The post interferes with the rights of other students to be alone in that it is reasonably understood to threaten the school community. Students are not free to learn in peace if they have reason to fear for their lives while at school. Because Cruz's off-campus online post touches and concerns the school community, it would fall within the school's jurisdiction. Additionally, the post interferes with the rights of other students and faculty to be let alone at school by instilling fear, and would therefore be subject to school punishment at the discretion of school administrators.

In contrast, consider a Parkland shooting survivor's hypothetical Facebook post encouraging classmates to walk out of class in support of gun reform under this Note's proposed standard. Suppose her post said "Walk out of class with me tomorrow to demand gun reform and make our schools safer places to learn #NationalSchoolWalkOut #MarchForOurLives #NeverAgain." Both the nature and the subject of her post are political, and as it encourages peer political action at school, it is targeted at her classmates. Assuming she has standard privacy settings on her Facebook page, only those she has allowed to be her Facebook "friends" can see her post.[422] Many of these "friends" are likely her classmates. Taking these factors together, this post touches and concerns the school community, placing it within the school's jurisdiction, as if it had been said on campus itself. The post is targeted at the student's classmates generally but identifies no individuals and is in no way disparaging to her classmates. The school would therefore not be able to find that this post interfered with the rights of any other students or faculty to be let alone, and

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422 *See* Staci D. Kramer, *I Tested Facebook's Default Privacy Settings. They're Worse than Zuckerberg Says.*, SYDNEY MORNING HERALD (Apr. 16, 2018, 1:13 PM), https://www.smh.com.au/business/companies/i-tested-facebooks-default-privacy-settings-theyre-worse-than-zuckerberg-says-20180414-p4z9m6.html [https://perma.cc/VTL2-34NQ]; Larry Magid, *Facebook Changes New User Default Privacy Setting to Friends Only--Adds Privacy Checkup*, FORBES (May 22, 2014, 9:00 AM), https://www.forbes.com/sites/larrymagid/2014/05/22/facebook-changes-default-privacy-setting-for-new-users/#61ba7b9459ac [https://perma.cc/T5SC-5SFN].

accordingly, the school could not punish this student for her off-campus online speech.[423]

The posts at issue in the Parkland example are perhaps more clear than much of what schools generally encounter. Still, this standard would hopefully lead to more consistent outcomes than the current use of *Tinker* in cases of First Amendment issues arising from school punishment of off-campus online student speech. For example, if applied to the *B.L. v. Mahanoy Area Sch. Dist.* case that is pending in the Middle District of Pennsylvania,[424] the outcome would be more predictable than speculating as to what a court may find to cause a substantial disruption of a school environment.[425] *Mahanoy* originated when a high school student, B.L., was removed from the junior varsity cheerleading squad for an image she sent to her friends via the social media application Snapchat[426] on the weekend,[427] which depicted herself and a friend brandishing their middle fingers at a convenience store.[428] Text that was superimposed on the photo read "fuck school fuck softball fuck cheer fuck everything,"[429] in contravention of a school rule that forbids cheerleaders from posting "negative information" about cheerleading on the internet. B.L. now challenges this school rule under the First Amendment,[430] and this Note now applies the proposed standard to her speech.

The nature of B.L.'s post is not immediately obvious. It is neither threatening nor violent. It is not political, and does not appear to by satirical. If anything, it is meant to be funny, or at

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423 Though the post might be disruptive of the school environment by encouraging the speaker's classmates to join her in walking out of class, substantial disruption is not a factor in the standard this Note proposes.

424 *B.L. v. Mahanoy Area Sch. Dist.*, ACLU OF PA., https://www.aclupa.org/our-work/legal/legaldocket/bl-v-mahanoy-area-sch-dist [https://perma.cc/KH3X-AKMU] (last visited Nov. 6, 2018).

425 As is required under the current *Tinker* standard. *See* discussion *supra* Part II.

426 The ACLU-PA explains, "Snapchat is a popular social media smartphone app that allows users to post images that are accessible on the platform only for short periods of time—ranging from one second to 24 hours—and are self-deleting." ACLU OF PA., *supra* note 424; *see also* Graber, *supra* note 6, for further explanation of Snapchat.

427 ACLU OF PA., *supra* note 424.

428 *Id.*

429 *Id.*

430 *Id.*

least an expression of teenage angst to which her friends, the recipients of the post, would surely relate. The subject of the post is clearly the speaker's school community, as she expresses exasperation with not only the school itself, but also two athletic teams that presumably represent the school. Her audience was limited to her Snapchat "friends," the majority of which are likely her classmates.[431] The combination of these factors indicates this off-campus online post touches and concerns the school community, and reasonably places it under the schools purview. However, it does not seem that this post interferes with the rights of other students to be let alone. The speaker names neither classmates nor teammates, and includes no details that would lead someone to interpret this post as threatening. One might argue that the post interferes with the rights of the school, the softball team, or the cheerleading squad to be left alone as entities, but to allow this argument to prevail would be to swallow the rule and allow for the suppression of many teenage opinions that rage against authority or an establishment. B.L.'s speech might be distasteful, and she may have violated a school rule by posting "negative information" about cheerleading online,[432] but as her post did not interfere with the rights of others to be let alone, the school should not be able to punish her for this off-campus online speech.

Because students posting online are not necessarily posting at school, their posts should not automatically be punishable by school authorities. However, there are off-campus online posts that are relevant to the school, and therefore need to be addressed by school officials. Though the requirement that the post touch and concern a member of the school community may seem too broad, the standard intends largely to cover those posts that purposely target other students or teachers at the school.[433] This proposed standard does not at all attempt to stifle general communications between students—schools exist to guide students through certain

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431 *Id.*

432 *Id.*

433 *See generally* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573–76 (4th Cir. 2011) (discussing the nexus of the speech to the school, that the family of the victim understood the attack to be in a school context, and that the school had an interest in preventing "copy-cat" behavior).

prescribed activities, and "among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process."[434] Instead, this proposed standard attempts to strike a reasonable, predictably-applied balance between a student's First Amendment rights against the need for a school to maintain order in its halls.

CONCLUSION

The *Tinker* standard was crafted in an era before the internet and social media revolutionized human interaction and communication. Though this standard remains good law as applied to in-school speech, it does not account for the realities of our interconnected world, and its application to off-campus online student speech therefore leads to unpredictable outcomes that serve neither students nor educators well.[435] Though the Supreme Court has yet to address this issue,[436] "[l]egal solutions need to be implemented sooner rather than later. The longer we wait, the harder it will be to transform conduct, attitudes, and behavior" on the subject.[437]

Currently, a school can punish an off-campus online student post if it is reasonably forecast to cause or actually does cause a substantial disruption of the school environment.[438] Instead, a school should be able to punish only those off-campus online student posts that (1) touch and concern the school community, *and* (2) interfere with the rights of other students and faculty to be secure and let alone. This proposed standard balances the need of a school to regulate off-campus online student speech that is truly of its concern, with the integrity of a student's right to express herself and make her voice heard. The yet uncharted waters of digital

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434 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).
435 *See* discussion *supra* Sections II.C, III.B.
436 *See supra* note 181 and accompanying text.
437 CITRON, *supra* note 38, at 28.
438 *See supra* Sections II.A–II.C.

citizenship[439] are tempestuous, but given the proper guidelines, students and educators can navigate them safely together.

[439] CITRON, *supra* note 38, at 194. "The Internet holds great promise for *digital citizenship*, by which I mean the various ways online activities deepen civic engagement, political and cultural participation, and public conversation." *Id.* (emphasis in original).