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## School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Student's Online Speech

Samantha M. Levin

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# School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Student's Online Speech

## **Cover Page Footnote**

J.D. Candidate, 2011, Fordham University School of Law. I would like to thank Professor Abner Greene for his guidance, as well as my family and friends for their love and support. I would also like to thank the staff and editors of the Fordham Urban Law Journal.

**SCHOOL DISTRICTS AS WEATHERMEN: THE  
SCHOOL’S ABILITY TO REASONABLY  
FORECAST SUBSTANTIAL DISRUPTION TO THE  
SCHOOL ENVIRONMENT FROM STUDENTS’  
ONLINE SPEECH**

*Samantha M. Levin\**

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**INTRODUCTION**

In 2005, Justin Layshock (“Justin”), a seventeen-year-old senior at Hickory High School in Hermitage, Pennsylvania, went onto his grandmother’s computer, at his grandmother’s home, and created a fictitious pro-

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file on MySpace.com (“MySpace”<sup>1</sup>) of the principal of Hickory High School.<sup>2</sup> The profile characterized the principal as a drug-using alcoholic.<sup>3</sup> Justin was suspended for ten days.<sup>4</sup> Similarly, in 2007, J.S., a fourteen-year-old eighth grade student at Blue Mountain Middle School in Orwigsburg, Pennsylvania, logged onto her household computer and created a fictitious MySpace profile of her principal.<sup>5</sup> This profile characterized the principal as a bisexual sex addict.<sup>6</sup> J.S. was suspended for ten days.<sup>7</sup> Both students brought cases against their school districts. While the facts of both cases are almost identical, the Third Circuit issued opposite holdings, one in favor of the student and the other in favor of the school district.<sup>8</sup>

This intra-circuit split is likely due to a lack of guidance from the United States Supreme Court on the issue of when school officials may punish students for Internet speech created on a student’s home computer. The standard utilized in most student speech cases was established in *Tinker v. Des Moines Independent Community School District*,<sup>9</sup> a case decided in 1969, prior to the invention of the Internet. In *Tinker*, a group of students sued their school district after being suspended for wearing black armbands in protest of the Vietnam War.<sup>10</sup> The Supreme Court held that “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.”<sup>11</sup> In dicta, the Court further stated that a school may be able to punish student speech if, in the absence of a substantial disruption, the record demonstrates “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with

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1. MySpace is a popular social networking Internet site where users can share photos, music, personal interests, and the like with other Internet users. See MYSPACE, <http://www.myspace.com> (last visited Jan. 31, 2011).

2. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).

3. *See id.* The profile stated that the principal was “too drunk to remember” the date of his birthday, and stated that the principal had smoked a “big blunt” in the past month. *Id.*

4. *Id.* at 593.

5. *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290-91 (3d Cir. 2010), *reh’g en banc granted* No. 08-4138 (3d Cir. June 3, 2010).

6. *See id.* at 291.

7. *See id.* at 293.

8. Compare *Layshock*, 496 F. Supp. 2d at 606 (in favor of student), with *Snyder*, 593 F.3d at 308 (in favor of school district). These cases were reheard en banc and a Third Circuit opinion is pending.

9. 393 U.S. 503 (1969).

10. *See id.*

11. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

school activities.”<sup>12</sup> The standard established in *Tinker* is vague, in that courts are unclear as to when the test should apply and how much discretion should be given to a school official’s decision to discipline. In addition, having been established prior to Internet speech, the standard is outdated. Courts are now left with the difficult task of applying the already murky *Tinker* standard to the modern context of the Internet. More specifically, they must address this question: When does school discipline cross the line from merely punishing speech that the school disagrees with, to punishing speech that the school foresees would cause a substantial disruption to the school environment?

The Internet is a unique communication device, creating a dilemma for both the schools and the district courts that adjudicate speech cases involving the Internet. Unlike tangible forms of communication, such as newspapers, speech made on the Internet is boundary-less,<sup>13</sup> and pinpointing the location of its occurrence is not easily accomplished. Therefore, when speech occurs via the Internet and concerns a school official, it is often difficult to determine an applicable standard. In these cases, lower courts have struggled to apply the *Tinker* dicta.

In the cases utilizing *Tinker*, most courts have broken the inquiry down into two prongs. The first prong of the student speech inquiry asks whether the speech can be characterized as having occurred on or off campus. Student speech is afforded full First Amendment protection when it occurs off campus, but only limited First Amendment protection when it occurs on school grounds.<sup>14</sup> Examples of off campus speech include a drawing done by a student in his home with no intention of bringing the drawing to school,<sup>15</sup> and an underground newspaper sold off campus.<sup>16</sup> If the speech is off campus, and is therefore afforded full First Amendment protection, punishment by the school district for such speech is prohibited. If the speech is on campus, and therefore does not have complete First Amendment protection, the analysis continues to the second prong. The second prong of the student speech inquiry asks whether the on campus student speech has caused, or whether the school can reasonably forecast that it will cause, a substantial disruption to the school environment.

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12. *Id.* at 514.

13. See Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 357 (2003).

14. Benjamin F. Heidlage, *A Relational Approach to Schools’ Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 573-74 (2009).

15. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611 (5th Cir. 2004).

16. See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979).

While the above analysis may work for tangible speech that does not take place over the Internet and, therefore, has a pinpointed location, for cases involving Internet speech, the analysis is akin to trying to fit a round peg into a square hole. Traditionally, on campus speech included only speech that took place on school grounds during school hours.<sup>17</sup> Therefore, some lower courts have mischaracterized the Internet speech issue as one of geography, and in determining whether the speech occurred on or off campus, have focused on whether the speech was made over the student's computer, at the student's home.<sup>18</sup> Focusing on the location of the Internet speech is futile, given the distinct nature of online speech.<sup>19</sup>

This Note proposes a new standard for student speech cases involving Internet speech.<sup>20</sup> Due to the unique characteristics of the Internet, I suggest eliminating the first prong of the analysis that asks whether the speech is on or off campus, and concentrating instead on the impact of the online speech. The proposed standard would refine *Tinker's* forecast of the substantial disruption test by incorporating the factors of whether the likelihood of disruption is high and whether the type of disruption poses severe harm to the school environment. This Note will focus on whether and when a school district may discipline a student for creating a parody profile of a school official on an off campus computer when the speech does not disrupt the school environment.

Part I of this Note provides an historical summary of student speech and the First Amendment. Part I.A discusses the history of the First Amendment. Part I.B discusses the Supreme Court cases involving student speech. This Part provides a background for subsequent lower court decisions. Part II examines the current conflict in the lower courts and looks at how these courts have approached the issue of when schools may discipline speech where disruption did not result. This Part will analyze the approach taken by courts in cases dealing with tangible, off campus speech, such as newspaper speech, and in cases dealing with Internet speech. Part II.A analyzes non-Internet speech that does not have a substantial disruption on the school environment. Part II.B analyzes cases concerning online student speech. Part III argues that courts should shift their focus away from strict-

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17. Heidlage, *supra* note 14, at 573.

18. *See id.* at 574-75.

19. *See* discussion *infra* Part I.C.

20. This Note focuses on how a court should analyze the issue of whether a school can reasonably forecast substantial disruption. This issue is part of a larger debate as to whether student Internet speech conducted outside of school is afforded full First Amendment protection. For purposes of this Note, cases with proven disruption are set aside, although the task of setting aside such cases is not always easy, because the issue of whether disruption is substantial enough to warrant school discipline remains at play.

ly applying the *Tinker* standard, and toward the adoption of a new rule that is more applicable to cases involving the Internet. The new standard states that a school may punish a student for his or her speech only if the type of speech poses great harm to the school environment and the likelihood that such speech will result in substantial disruption is great. This proposed test sets a higher bar for schools in their ability to punish student speech, and therefore avoids a chilling effect on students' First Amendment right to free speech.

## I. THE FIRST AMENDMENT, THE INTERNET, AND THE SUPREME COURT'S LIMITED JURISPRUDENCE ON STUDENT SPEECH

### A. The First Amendment

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."<sup>21</sup> The heart of this Amendment has been described as the "ineluctable relationship between the free flow of information and a self-governing people."<sup>22</sup> Protection of free expression exists to encourage the free exchange and dissemination of ideas.<sup>23</sup> The benefits society reaps from the unrestricted flow of ideas outweigh the costs society endures by receiving deplorable ideas. Generally, courts have zealously guarded the right to free speech.

Nevertheless, this right is not absolute. For example, certain types of speech can be regulated if they are likely to inflict unacceptable harm. These narrow categories of unprotected speech include "fighting words,"<sup>24</sup> speech that incites others to imminent lawless action,<sup>25</sup> obscene speech,<sup>26</sup> defamatory speech,<sup>27</sup> and "true threats."<sup>28</sup>

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21. U.S. CONST. amend. I.

22. See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1047 (2d Cir. 1979).

23. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 724 (1971) ("Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

24. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942) (holding that speech directed at another that is likely to provoke violence is unprotected).

25. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[C]onstitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

26. See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

27. See, e.g., *Sullivan*, 376 U.S. at 279-80, 283 (1964) (awarding damages for defamation of public official if statement was made with actual malice).

### B. The Supreme Court's Jurisprudence on Student Speech

The Supreme Court has provided minimal guidance to lower courts regarding when a public school student's First Amendment right to free speech prevails.<sup>29</sup> The three decisions on this matter provide standards that cannot be properly applied to student online speech.<sup>30</sup> Nonetheless, an introduction to the Supreme Court precedent provides a useful backdrop to better understand the lower courts' attempts to analyze the issue of whether student online speech may be disciplined by the school.

In *Tinker*, a group of students in Des Moines, Iowa were suspended for wearing black arm bands to school to publicize their opposition to the Vietnam War. The students brought an action against the school district for violation of the First Amendment. In its majority opinion, the Supreme Court famously stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>31</sup> The Court held that prohibition of expression will not be justified 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.'"<sup>32</sup> However, the Court limited the school's right to discipline by stating that punishment must not be predicated merely on the desire "to avoid the discomfort and unpleasantness that always accompany an unpo-

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28. See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (stating that true threats are not constitutionally protected speech).

29. The First Amendment protects against prohibition of speech by government actors only. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (stating that in carrying out disciplinary functions, schools act as representatives of the State); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that the Fourteenth Amendment protects citizens "against the State itself and all of its creatures—Boards of Education not excepted").

30. See *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding a school may discipline a student when the student's speech advocates illegal drug use); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding lewd and vulgar student speech is not protected by First Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding school district violated students' First Amendment right to free speech when it suspended students for wearing black armbands to school in protest of Vietnam War). A fourth case concerning student speech was decided by the Supreme Court. However, the case is not relevant for purposes of this Note. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* concerned whether a school-sponsored newspaper was subject to a lower level of First Amendment protection. See *id.* at 262. This Note is not concerned with non-Internet speech that is demonstrably on campus or school sponsored.

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

32. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

pular viewpoint.”<sup>33</sup> Instead, the prohibition must be based on “the special characteristics of the school environment.”<sup>34</sup> The Court held that the students’ black arm bands neither created, nor posed a risk of, substantial disruption to the school environment.<sup>35</sup>

It is noteworthy that the Court referenced various factors that essentially define what constitutes a substantial disruption. The Court considered the fact that the expression was unaccompanied by any disorder or disturbance on the part of the students, the lack of evidence of petitioners’ interference with the school’s work, the fact that no class was interrupted, and the fact that no threats or acts of violence occurred on school grounds.<sup>36</sup> Due to the absence of the above factors, the Court found a lack of evidence to support the prediction of substantial disruption or material interference with the school’s activities.<sup>37</sup>

*Tinker* puts great emphasis on the special characteristics of a school.<sup>38</sup> While the Court did not limit its opinion to the confines of the classroom, the *Tinker* opinion deals only with on campus speech. Because the school’s dedication to its students does not end once the student leaves the classroom, the Court reasoned that a student’s rights continue to apply when he is in the cafeteria, on the playing field, or on campus during authorized hours.<sup>39</sup> However, the Court did not extend this reasoning outside of the schoolhouse gates. Due to the on campus limit of *Tinker*, the decision provides minimal guidance as to when or whether a student may be punished by a school for off campus speech.

The next student speech case that the Supreme Court decided was *Bethel School District No. 403 v. Fraser*.<sup>40</sup> In this case, a student was punished by his school for using a sexually explicit metaphor to discuss his friend’s candidacy for student counsel in a speech at a school assembly.<sup>41</sup> The Court balanced “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms” against “society’s countervailing interest in teaching students the boundaries of socially appropriate be-

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33. *Id.* “Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . .” *Id.* at 508.

34. *Id.* at 506.

35. *Id.* at 514.

36. *Id.* at 508.

37. *Id.* at 514.

38. *Id.* at 506.

39. *Id.* at 512-13.

40. 478 U.S. 675 (1986).

41. *See id.* at 677-78.

havior.”<sup>42</sup> The Court deviated from the *Tinker* test and implied that the mode of analysis set forth in *Tinker* is not absolute. Instead, the Court held that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms.”<sup>43</sup> Under this lewd and vulgar standard, the Court found that the First Amendment did not prohibit the school from disciplining a student’s sexually explicit speech at a school assembly.<sup>44</sup> The Court reasoned that the school stands in *loco parentis* to the students, and therefore has an obligation to protect students from such speech.<sup>45</sup>

In its analysis, the Court focused on the substance of the speech in conjunction with the location of its delivery. Unlike the armbands worn in *Tinker*, the inappropriate speech in *Fraser* was unrelated to any political position.<sup>46</sup> Moreover, the fact that such lewd and vulgar speech occurred at a high school assembly, toward “an unsuspecting audience of teenage students,” weighed in favor of the Bethel School District.<sup>47</sup>

The most recent Supreme Court case regarding student speech is *Morse v. Frederick*.<sup>48</sup> In this case, the Court upheld the school’s suspension of a student who held a banner during an off campus, school-sanctioned Olympic Torch viewing event that read “BONG HiTS 4 JESUS.”<sup>49</sup> The Court held that a school may discipline a student when the speech encourages illegal drug use, even if the speech does not cause a disruption and is not made in a school-sponsored medium.<sup>50</sup>

Once again, the Supreme Court put great emphasis on the fact that the school environment has special characteristics.<sup>51</sup> While the speech was technically off campus, it was made at a school-sponsored event, in the presence of school administrators and teachers.<sup>52</sup> The Court compared the facts of *Morse* to the *Fraser* facts, and noted that if *Fraser* had delivered his same speech outside of the school, in a public forum, it would have been

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42. *Id.* at 681.

43. *Id.* at 683.

44. *See id.* at 686.

45. *See id.* at 684.

46. *Id.* at 685. The fundamental values of a democratic society must include tolerance of opposing political views. *Id.* at 681.

47. *Id.* at 685 (“A high school assembly or classroom is no place for a sexually explicit monologue . . .”).

48. 551 U.S. 393 (2007).

49. *See id.* at 397.

50. *See id.*

51. *See id.* at 408.

52. *Id.* at 396-97.

protected.<sup>53</sup> The Court did not explicitly state that the holding was inapplicable to off campus speech.

While affirming the *Tinker* holding, the Supreme Court in *Fraser* and *Morse* appears to be establishing exceptions to the substantial disruption test, instead of further refining the test. The Court's approach has provided little, if any, guidance as to what constitutes a substantial disruption or a reasonable forecast of a substantial disruption. Therefore, the lower courts have no indication of whether and when schools have the authority to prohibit student online speech.

### C. The Internet

The Internet adds a complicated wrinkle to the student speech analysis because it is not a tangible medium like a school newspaper. Lorna E. Gillies stated in the article, *Addressing the "Cyberspace Fallacy": Targeting the Jurisdiction of an Electronic Consumer Contract*, that "[c]yberspace has been defined as 'an on-line community,'"<sup>54</sup> and has also been described "more crudely as 'neither here nor there.'"<sup>55</sup> Orin Kerr explains that from the viewpoint of virtual reality, the Internet is a separate space that is even governed by a separate set of legal rules.<sup>56</sup> From the viewpoint of physical reality, Kerr explains, the Internet is viewed as a means of communication.<sup>57</sup> Therefore, the Internet is both a separate space and a means of communication.

This split persona embodied by the Internet makes it difficult for lower courts to define the speech's specific location. The inability to define a specific location has made it difficult to decide whether to apply the *Tinker* holding, which requires speech to be "on campus" in order to have limited First Amendment protection, and therefore possibly be prohibited. But whether a student is posting speech on the Internet at school or from his or her home computer does not denote the location of the speech. This type of speech occurs neither on nor off campus. It is speech on the Internet. "It's not where you throw the grenade, it's where the grenade lands," said An-

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53. *See id.* at 405.

54. 16 INT'L. J.L. INFO. TECH. 242, 243 (2008) (citing Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 78-82 (1996); *A Brief History of the Internet*, INTERNET SOCIETY, <http://www.isoc.org/internet/history/brief.shtml>).

55. *Id.* (quoting Diana J. P. McKenzie, *Commerce on the Net: Surfing Through Cyberspace Without Getting Wet*, 14 J. MARSHALL J. COMPUTER & INFO. L. 247, 267 (1996)).

56. *See* Kerr, *supra* note 13.

57. *Id.* at 360.

thony Sanchez, a lawyer who represented the Hermitage School District.<sup>58</sup> Once courts are able to understand the boundary-less location of Internet speech, the applicability of *Tinker* becomes comprehensible.

Because the Internet is boundary-less, no communications technology of the twentieth century presents as much opportunity for uninhibited expression as does the Internet.<sup>59</sup> The far-reaching ability of the Internet significantly impacts the lives of students. Students utilize the Internet for both recreational and educational purposes.<sup>60</sup> For example, some teachers require Internet use in their classes by holding students accountable for materials distributed via email or utilizing various computerized educational programs.<sup>61</sup> Even if the Internet is not required in the classroom, it is an important educational device outside of the classroom.<sup>62</sup> With websites such as Wikipedia.org and Encyclopedia.com, students have instant access to a wealth of knowledge.

An example of students' recreational use of the Internet is social networking. Social networking sites have three unique attributes that make them more likely to have an impact on the school environment than tangible off campus speech: (1) the sites' functions are gathered together in one place; (2) the sites have millions of users and daily traffic; and (3) people have quick and convenient access to everything that is posted.<sup>63</sup> Facebook claims to have more than five hundred million active users, with fifty percent logging onto Facebook on any given day.<sup>64</sup> MySpace reports to have about seventy million users.<sup>65</sup> With the large amount of users on these social networking sites, information posted on the sites can spread like wild-

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58. Clifford M. Marks, *Free Speech in Question When Talking Out of School*, WALL ST. J., July 3, 2010, <http://online.wsj.com/article/SB10001424052748704525704575341353771603056.html>.

59. Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1137 (1996).

60. See Garner K. Weng, *Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet*, 20 HASTINGS COMM. & ENT. L.J. 751, 764-66 (1998). Weng describes how students use the Internet to socialize, conduct research, gather news, shop, and play games. *See id.* at 763-66. Teachers at many post-secondary schools, including law schools, are using the Internet to distribute information concerning classes and assignments and are also utilizing the Internet to communicate with and instruct students. *See id.* at 763-64.

61. *See id.* at 763.

62. *See id.*

63. Michael J. O'Connor, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse*, 11 U. PA. J. CONST. L. 459, 478 (2009).

64. *Press Room Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Dec. 19, 2010).

65. Dawn C. Chmielewski, *MySpace in Second Place Networking Site Continues to Lose Ground to Facebook*, STAR-LEDGER, June 18, 2009, at 29.

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fire. In addition, these sites allow people to post things that are “part diary, part photo album, with gossip, favorite music, pet peeves—sometimes even phone numbers and home addresses. And occasionally, revealing pictures.”<sup>66</sup> People can even post their current location.<sup>67</sup> In addition, users can see personal information about their friends, family, and even complete strangers.

While these sites have privacy settings, one can still access information even with the privacy settings in place. On Facebook, the default privacy settings allow anyone who attends the user’s school or is in the user’s network to view his or her posts.<sup>68</sup> Networks include major cities and major universities.<sup>69</sup> Therefore, a user’s information is potentially available to every person in the city in which he or she is living, and every person who is currently attending or attended his or her university.<sup>70</sup> Even if the settings are restricted, a user’s friends have access.<sup>71</sup> Therefore, an inappropriate description of a school official can rapidly become the talk of the school.

Facebook also created the “newsfeed” feature, which lists a user’s actions on a friend’s homepage, almost like a public announcement.<sup>72</sup> As a result, when a student writes on someone’s Facebook wall that the principal is an alcoholic, not only does the person on whose wall it was written see this information,<sup>73</sup> but all of the student’s friends on Facebook see it as well. Despite the instant access of the newsfeed feature, users complain that they want access to more information, and at a faster rate.<sup>74</sup> MySpace<sup>75</sup> and Twitter<sup>76</sup> have implemented newsfeed features as well.

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66. Pete Williams, *MySpace, Facebook Attract Online Predators*, MSNBC (Feb. 3, 2006), [http://www.msnbc.msn.com/id/11165576/ns/nightly\\_news/](http://www.msnbc.msn.com/id/11165576/ns/nightly_news/).

67. J.D. Bierdsdorfer, *Q & A: Crowding Out on Facebook*, N.Y. TIMES (Dec. 31, 2008, 8:29 AM), <http://gadgetwise.blogs.nytimes.com/2008/12/31/qa-crowding-out-on-facebook/>.

68. O’Connor, *supra* note 63.

69. *Id.*

70. *Id.* at 478-79 (“When you post a picture you later regret, it is probably not comforting that it was ‘only’ available to the Philadelphia major metropolitan area or every Penn State student and alum.”).

71. *Id.* at 479.

72. *Id.* at 480. When a user changes his or her profile picture, updates his or her status, or writes a message on a friend’s wall, this information is posted on the newsfeed. *Id.*

73. The “wall” is a place to share content with other facebook users. See Help Center, FACEBOOK, <http://www.facebook.com/help/?faq=13153&tq> (last visited Feb. 27, 2011).

74. Nick O’Neill, *Facebook Needs a Faster Newsfeed*, ALL FACEBOOK: THE UNOFFICIAL FACEBOOK RESOURCE (Mar. 26, 2008, 5:18 PM), <http://www.allfacebook.com/facebook-needs-a-faster-newsfeed-2008-03>.

75. Robin Wauters, *MySpace Launches New Set of APIs With Google, OneRiot and Groovy*, TECHCRUNCH (Dec. 9, 2009), <http://techcrunch.com/2009/12/09/myspace-realtime-api-google-oneriot-groovy/> (discussing how when a MySpace user posts content from

Due to the unique characteristics of the Internet and its far-reaching influence on the everyday lives of students, online speech is more likely to have a wider impact on the school environment than, for example, speech in an underground newspaper. Therefore, courts are hesitant to find that school officials are unable to discipline a student for online speech under the First Amendment simply because the speech was not “on campus” in the traditional sense.<sup>77</sup> The Supreme Court has not decided a student speech case concerning online speech, leaving lower courts with no guidance on how to address this inquiry.

## II. LOWER COURTS’ ATTEMPTS TO ADDRESS WHETHER SCHOOL REASONABLY FORECASTED SUBSTANTIAL DISRUPTION<sup>78</sup>

Given the Supreme Court’s lack of direction on the school speech matter, the lower courts’ decisions lack any sense of uniformity. Lower courts deciding whether a reasonably foreseeable risk of substantial disruption exists have examined several factors, including the connection between the speech and the school, predictions of disruption, and the content of the speech.

I begin this section with a discussion of cases concerning non-Internet speech and examine whether the evidence in the cases supports a finding of a reasonable forecast of substantial disruption to the school environment. When the student posts the speech using an off campus computer, such Internet speech is not on campus in the traditional sense. Therefore, while not the main subject of this Note, non-Internet speech provides a helpful backdrop when first analyzing student Internet speech. Next, this Part will discuss student Internet speech created on an off campus computer. Due to the advent of the Internet, lower court opinions have shifted away from a bright line standard according to which off campus speech is afforded full First Amendment protection, to a broader approach not limited by the phys-

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another site, it can go directly to his or her MySpace activity stream, creating a link back to the third-party site).

76. *Streaming API Documentation*, TWITTER, [http://dev.twitter.com/pages/streaming\\_api](http://dev.twitter.com/pages/streaming_api) (last visited Feb. 27, 2011) (stating that there are three ways to stream information). The Twitter newsfeed feature allows Twitter users to view public statuses from multiple users on one page. *Id.*

77. *See, e.g., J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (2002) (finding student speech made over a home computer constituted on campus speech because circulation of the speech on school grounds was inevitable).

78. This Note will not be focusing on proven substantial disruption. Rather, this Note will focus on school officials’ reasonable forecast of substantial disruption when no such disruption has actually occurred. However, evidence of disruption to the school environment may be a factor in determining whether a reasonable risk of substantial disruption exists.

ical characteristics of the speech. Under this approach, lower court opinions have made speech more susceptible to prohibition.

### A. Non-Internet Speech and Whether School Reasonably Forecasted Substantial Disruption

While the purpose of this Note is to determine when a school district may discipline student speech that was made over the Internet, outside of school, the lower court cases dealing with non-Internet speech are a helpful backdrop for understanding newer cases dealing with online speech. The lower courts appear to be migrating away from a strict standard where off campus speech is afforded full First Amendment protection and therefore can never be disciplined, to *Tinker's* dicta where speech may be disciplined, regardless of where the speech takes place, if it poses a reasonably foreseeable risk of substantial disruption to the school environment.<sup>79</sup> In determining whether a school district was reasonable in forecasting a substantial disruption, lower courts consider the intent of the speaker and whether actual disruption resulted. Nonetheless, the lower courts' jurisprudence is disjointed as a result of an unclear and outdated standard for student speech cases.

#### 1. On Campus

In *Chandler v. McMinnville School District*,<sup>80</sup> the Ninth Circuit found that the passive expression of an opinion on a button did not pose a risk of substantial disruption to the school environment. In this case, two students wore buttons to school in support of a teacher strike.<sup>81</sup> The vice principal ordered the students to remove the buttons and suspended them for the remainder of the school day.<sup>82</sup> The court found that the speech was not vulgar, lewd, obscene, or plainly offensive, and therefore could not be analyzed under *Fraser*.<sup>83</sup> Therefore, the court applied *Tinker's* dicta, requiring school officials to justify their decision to discipline by showing "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."<sup>84</sup> The court noted that the First Amendment does not require school officials to wait

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79. I argue in this Note that the location of the speech is irrelevant. The impact of the speech is what should be at issue.

80. 978 F.2d 524 (9th Cir. 1992).

81. *Id.* at 526.

82. *Id.*

83. *See id.* at 530.

84. *Id.* at 529 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

until disruption actually occurs because they in fact “have a duty to prevent the occurrence of disturbances.”<sup>85</sup> In deciding whether the evidence showed a reasonable forecast of substantial disruption, the court considered whether the speech was inherently disruptive and the fact that the speech was directed at school faculty.<sup>86</sup> The court found that while the buttons displaying the word “scab” could be “interpreted as insulting, disrespectful or even threatening,” such a passive expression is not the same as “those activities which inherently distract students and break down the regimentation of the classroom.”<sup>87</sup> The Court therefore held that the district court erred in dismissing the complaint.<sup>88</sup>

In contrast, in *B.W.A. v. Farmington R-7 School District*,<sup>89</sup> the Eighth Circuit found that a school’s ban of clothing that displayed the Confederate flag was constitutionally permissible. In that case, two students were suspended from school for wearing clothing that displayed the Confederate flag.<sup>90</sup> In analyzing whether it was reasonable for the school officials to suspect material and substantial disruption, the court focused on evidence of actual disruptions related to the Confederate flag or race.<sup>91</sup> These disruptions included an ongoing spat between Farmington High School and neighboring Festus High School, in which two Farmington basketball players allegedly used racial slurs against two black Festus players in connection with the display of the Confederate flag outside the locker rooms, a white student urinated on a black student, causing the black student to withdraw from the school, and numerous other racial slurs were used and swastikas drawn at the school.<sup>92</sup> Based on these incidents, the court found that the risk of substantial disruption related to the Confederate flag was reasonably foreseeable.<sup>93</sup>

While the Eighth Circuit focused on evidence of actual disruption in the *B.W.A.* case, the Fifth Circuit noted in *A.M. v. Cash*<sup>94</sup> that *Tinker* does not require a showing of past disruption to prove a reasonable forecast of substantial disruption. In this case, two girls were suspended for bringing bags decorated with the Confederate flag to school. The court found that the

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85. *Id.* (citing *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir.1973)).

86. *Id.* at 531.

87. *Id.* at 530-31 (citing *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966)).

88. *Id.* at 531.

89. 554 F.3d 734 (8th Cir. 2009).

90. *See id.* at 736.

91. *See id.* at 739-40.

92. *Id.* at 739.

93. *See id.* at 741.

94. 585 F.3d 214 (5th Cir. 2009).

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“racial tension and hostility at the school justified defendants’ ban on visible displays of the Confederate flag” at school.<sup>95</sup>

The most recent case concerning on campus student speech that did not result in substantial disruption is *DeFabio v. East Hampton Union Free School District*.<sup>96</sup> In this case, a rumor spread through East Hampton High School that Daniel DeFabio, a tenth grade student at the school, made a comment to a friend concerning another student’s ethnic background.<sup>97</sup> DeFabio allegedly stated, “one down, forty thousand to go.”<sup>98</sup> The student community acted antagonistically toward DeFabio after the rumor spread.<sup>99</sup> DeFabio’s mother asked the principal if DeFabio could read a declaration of his innocence over the school’s public address system, or in the alternative, read the statement during a school assembly or have the school distribute the statement to the students in written form.<sup>100</sup> The principal denied all the requests due to the risk that any statement could ignite the current tensions in the school.<sup>101</sup>

The court applied the *Tinker* standard, asking whether “the record . . . demonstrate[s] . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”<sup>102</sup> In applying the *Tinker* standard, the court noted that the Supreme Court’s focus in *Tinker* was not on the actual content of the speech but rather the “extent to which the speech would be accompanied by ‘disorder or disturbance.’”<sup>103</sup> To determine whether the School District could forecast disruption, the court considered the fact that actual disruption had already occurred.<sup>104</sup> The police were assigned to protect Daniel’s home, Daniel had received death threats, and he had admitted that he was scared to return to school.<sup>105</sup> Therefore, the court found that it was not arbitrary or irrational for the School District to forecast a substantial disruption of the school environment if Daniel’s speech were allowed.<sup>106</sup>

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95. *Id.* at 224.

96. 623 F.3d 71 (2d Cir. 2010).

97. *See id.* at 74.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* While this case does not concern school discipline, the analysis utilized by the Second Circuit is appropriate for purposes of this Note.

102. *Id.* at 78 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

103. *Id.* (quoting *Tinker*, 393 U.S. at 508).

104. *See id.* at 79.

105. *Id.*

106. *Id.* at 82.

## 2. *Off Campus*

One of the first cases after *Tinker* to address off campus speech that did not result in substantial disruption was *Thomas v. Board of Education*.<sup>107</sup> In that case, four students in Granville Junior-Senior High School in upstate New York produced a satirical publication, addressed to the school community, containing articles concerning masturbation and prostitution.<sup>108</sup> The publication was sold to classmates at the end of each school day at a store in Granville.<sup>109</sup> After the Board of Education president learned of the paper from her son, she presented it to the school principal and the students were disciplined.<sup>110</sup> The Second Circuit adopted a strict standard that focused primarily on the location of the speech.<sup>111</sup> The court stated: “Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”<sup>112</sup>

This strict standard was rationalized by the court under a test which balanced the individual’s First Amendment right against the school’s interest in maintaining an appropriate discipline in the operation of the school.<sup>113</sup> The individual’s interest includes avoiding a chilling effect on speech.<sup>114</sup> The court reasoned that this country was built on the premise that expression must flourish and that this right applies to students.<sup>115</sup> Therefore, the Second Circuit found that any speech that took place off campus could not be disciplined by the school.

While the court utilized a strict standard of no punishment for off campus speech, it did make mention of the substantial disruption test in its rejection of Judge Newman’s concurring opinion, which stated that school officials may regulate allegedly “indecent” expression by students in the general community.<sup>116</sup> The court recognized that there could be a situation in which students incite “substantial disruption within the school from

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107. 607 F.2d 1043 (2d Cir. 1979).

108. *Id.* at 1045.

109. *Id.*

110. *Id.* at 1046.

111. *See id.* at 1050 (stating that the on campus activities were *de minimis* and therefore properly deemed off campus).

112. *Id.*

113. *See id.* at 1049.

114. *See id.* at 1047, 1049 (stating that at the heart of the First Amendment is the inescapable relationship between the uninhibited flow of information and a self-governing people).

115. *See id.* at 1049 (stating that nowhere is unrestrained expression more vital than in our nation’s schools).

116. *See id.* at 1053 n.18.

some remote locale.”<sup>117</sup> Nevertheless, the court did not address this scenario because no such disruption occurred in the case.<sup>118</sup>

The Second Circuit indirectly defined the substantial disruption test by rejecting the possibility of discipline when the school can foresee that speech will reach school grounds, without resulting in any actual disruption.<sup>119</sup> The court supported the opinion that distribution of speech inside the school does not amount to a substantial disruption, noting that an off campus publication criticizing the school itself will inevitably reach campus.<sup>120</sup> The court noted that this standard “invites school officials ‘to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views.’”<sup>121</sup> Therefore, if courts adopted such a standard, a school could essentially punish a student for watching an X-rated film at home or for purchasing a dirty magazine at a local store.<sup>122</sup>

Similarly, in *Porter v. Ascension Parish School Board*,<sup>123</sup> the Fifth Circuit found that a student could not be disciplined for speech that took place off campus, even though it was directed at the school principal.<sup>124</sup> In this case, a student drew a picture in his house of his school under siege, with obscene remarks regarding his principal and a brick being thrown at the principal.<sup>125</sup> Two years later, the picture was brought to school by the student’s brother and shown to his bus driver.<sup>126</sup> The Fifth Circuit stated that the speech was “not on campus or even speech directed at the campus” because the drawing was completed at home, stored for two years, and not intended by the student to be brought into school.<sup>127</sup>

While the Second and Fifth Circuits did not adopt the substantial disruption standard established in *Tinker*, the Seventh Circuit utilized this test in *Boucher v. School Board*.<sup>128</sup> In this case, a junior at Greenfield High School near Milwaukee wrote a piece in an underground newspaper created

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117. *Id.* at 1052 n.17.

118. *Id.* (finding no substantial disruption because school officials did not take action for six full days and only punished the students because the school board believed the publication was “morally offensive, indecent, and obscene,” not because of fear of disruption).

119. *See id.* at 1053 n.18 (stating that schools’ power to punish students for indecent expression is denied when they seek to punish off campus expression “simply because they reasonably foresee that in-school distribution may result”).

120. *See id.*

121. *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 26 (1971)).

122. *See id.*

123. 393 F.3d 608 (5th Cir. 2004).

124. *See id.* at 618.

125. *See id.* at 611.

126. *See id.*

127. *Id.* at 615.

128. 134 F.3d 821 (7th Cir. 1998).

by students of Greenfield, in which he described how to hack into the school's computers.<sup>129</sup> The underground newspaper, entitled *The Last*, was distributed on campus.<sup>130</sup> The court in this case found that "[u]nder existing case law . . . a reasonable forecast of disruption is all that would be required of the [School] Board" to make discipline appropriate.<sup>131</sup> In analyzing whether the School Board reasonably forecasted a substantial disruption resulting from the newspaper article, the court found that speech instructing students how to hack into a school computer was a "call to action."<sup>132</sup> The court found that it was reasonable for the School Board to forecast a risk of substantial disruption when the speech was a call for action.<sup>133</sup>

In 2008, the Sixth Circuit decided *Lowery v. Euverard*,<sup>134</sup> which involved off campus student speech that did not result in a substantial disruption. In this case, four students on the Jefferson County High School football team in Tennessee created a petition that stated: "I hate Coach Euvarad [sic] and I don't want to play for him."<sup>135</sup> Eighteen players signed the petition.<sup>136</sup> The four students who created and distributed the petition were kicked off the team.<sup>137</sup>

Plaintiffs argued that defendants were not entitled to summary judgment because the petition did not substantially disrupt the team. Nevertheless, the Sixth Circuit noted that "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* 'require certainty that disruption will occur.'"<sup>138</sup> To require a showing of actual disruption would put school officials between the "proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation. Such a rule is not required by *Tinker*, and would be disastrous public policy . . ." <sup>139</sup> Therefore, the court considered whether the speech posed a reasonably foreseeable risk of substantial disruption to the school environment.<sup>140</sup>

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129. *See id.* at 822.

130. *Id.* at 829.

131. *Id.* at 828.

132. *Id.*

133. *See id.*

134. 497 F.3d 584 (6th Cir. 2007).

135. *Id.* at 585.

136. *Id.* at 586.

137. *Id.*

138. *Id.* at 591-92 (quoting *Pinard v. Clatskanie Sch. Dist.*, 6J, 467 F.3d 755, 767 (9th Cir. 2006)).

139. *Id.* at 596.

140. *See id.* at 593.

To determine whether it was reasonable for the school district to forecast a risk of substantial disturbance to the school environment under *Tinker*, the court considered the fact that the speech could break apart the team.<sup>141</sup> The court found that empirical data was not needed,<sup>142</sup> a common-sense conclusion that there could reasonably be a substantial disruption would suffice.<sup>143</sup>

Plaintiffs further argued that the petition was not disruptive because they did not intend to present it to school officials until after the football season.<sup>144</sup> However, the court found the intent of the speaker to be irrelevant for purposes of determining whether the expression posed a risk of substantial disruption.

## **B. Online Student Speech and Reasonable Forecast of Substantial Disruption<sup>145</sup>**

### *I. Cases in Favor of the School*

The most recent case involving student online speech where the court held in favor of the school district is *J.S. ex rel. H.S. v. Bethlehem Area School District*.<sup>146</sup> In that case, an eighth grade student created a website entitled “Teacher Sux,” on his home computer.<sup>147</sup> This website consisted of multiple web pages that made derogatory comments about the student’s algebra teacher and the principal of his school.<sup>148</sup> The student was expelled.<sup>149</sup>

Rejecting plaintiff’s argument that *Tinker* should be read narrowly to require an actual disruption, the court utilized the reasonable fear of disruption analysis.<sup>150</sup> Under this analysis, the court stated that “while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required for a school district to punish student speech.”<sup>151</sup> The court considered the actual disruption to the entire school

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141. *See id.* (stating that abstract concepts like team morale and unity are not susceptible to quantifiable measurement but have a large impact on a team).

142. *See id.* at 594.

143. *See id.*

144. *Id.* at 604.

145. This section will focus on the potential effect of Internet speech and not on the location where the speech is made.

146. 807 A.2d 847 (2002).

147. *See id.* at 850-51.

148. *Id.* at 851.

149. *Id.* at 853.

150. *See id.* at 856.

151. *Id.* at 868.

community, including the students, teachers, and parents.<sup>152</sup> The court found that the “most significant disruption caused by the posting of the website . . . was [the] direct and indirect impact of the emotional and physical injuries” to the teacher who was the target of the speech.<sup>153</sup> The teacher was unable to complete the school year and, due to stress and anxiety, took a medical leave of absence the following year.<sup>154</sup> The teacher’s absence for over twenty days at the end of the school year required the use of three substitute teachers.<sup>155</sup> The court found that the use of multiple substitute teachers “unquestionably disrupted the delivery of instruction to the students and adversely impacted the education environment.”<sup>156</sup>

In addition, “[c]ertain students expressed anxiety about the website and for their safety. Students visited counselors.”<sup>157</sup> The atmosphere of the school was described “as if a student had died.”<sup>158</sup> Parents also voiced concern for school safety and questioned the adequacy of the substitute teachers’ instruction.<sup>159</sup> In sum, the court found that “the web site created disorder and significantly and adversely impacted the delivery of instruction.”<sup>160</sup>

In *LaVine v. Blaine School District*,<sup>161</sup> James LaVine, an eleventh grade student at Blaine High School in Minnesota, wrote a poem about entering the school and shooting twenty-eight people dead.<sup>162</sup> James handed the poem to his English teacher for her opinion.<sup>163</sup> Several months earlier, a student had shot and killed two students and injured twenty-five others at a high school in Portland, Oregon.<sup>164</sup> James’s school imposed an emergency expulsion, believing that his presence posed a threat or danger to himself, other students, or school personnel.<sup>165</sup>

In this case, the Ninth Circuit discerned three areas of student speech and their governing standards. According to the court: “(1) vulgar, lewd, obscene and plainly offensive speech is governed by *Fraser*; (2) school-

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152. *See id.* at 869.

153. *Id.*

154. *Id.* at 852.

155. *Id.* at 869.

156. *Id.* at 853.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. 257 F.3d 981 (9th Cir. 2001).

162. *Id.* at 983.

163. *Id.* at 984.

164. *Id.* at 984 n.2.

165. *Id.* at 985, 986 n.3.

sponsored speech is governed by *Hazelwood*; and (3) speech that falls into neither of these categories is governed by *Tinker*.<sup>166</sup> The court found that James's poem fell under the third category because it was not vulgar, lewd, or obscene, nor was it sponsored by the school. In noting that *Tinker* does not require school officials to wait until disruption actually occurs before taking action, the court adopted *Tinker*'s dicta, which states that discipline against a student for his or her speech does not violate the First Amendment when the evidence shows that the school reasonably forecasted a substantial disruption resulting from the speech.<sup>167</sup> In fact, the court noted that *Tinker* does not require certainty that disruption will even occur; rather, "the existence of facts which might reasonably lead school officials to forecast substantial disruption" is sufficient.<sup>168</sup>

In its analysis of whether the school district showed facts that a reasonable forecast of substantial disruption existed, the court looked at the totality of the relevant facts. The court looked not only to James's actions but also "to all of the circumstances confronting the school officials that might reasonably portend disruption."<sup>169</sup> It reasoned that school officials knew facts that in isolation would probably not have warranted a response, but that in combination might give school officials a reasonable basis for taking action.<sup>170</sup> James had had previous suicidal intentions, had recently broken up with his girlfriend (whom he was reportedly stalking), had several disciplinary problems in the past, and had been absent from school for three days prior to handing in the poem.<sup>171</sup> The poem itself "was filled with imagery of violent death and suicide."<sup>172</sup> The court found that at the extreme it could be interpreted as a warning of the shooting of James's fellow students, and at a minimum as "a cry for help from a troubled teenager contemplating a suicide."<sup>173</sup> Considering James's history, the content of the poem itself, and the occurrence of actual school shootings, the court held that "these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities—specifically, that James was intending to inflict injury upon himself or others."<sup>174</sup>

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166. *Id.* at 988-89.

167. *Id.* at 989.

168. *Id.* (citing *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973)).

169. *Id.*

170. *See id.*

171. *Id.* at 989-90.

172. *Id.* at 990.

173. *Id.* (internal quotation marks omitted).

174. *Id.*

In 2007, the Second Circuit also came down in favor of the school district in *Wisniewski v. Board of Education*.<sup>175</sup> An eighth grade student at Weedsport Middle School in upstate New York used AOL Instant Messaging (“IM”) software on his parents’ home computer.<sup>176</sup> The student’s AOL IM icon, which serves as an identifier of the sender, was a small drawing of a pistol firing a bullet at a person’s head with the words “Kill Mr. Vander-Molen,” the student’s English teacher.<sup>177</sup> The student sent IM messages displaying the icon to approximately fifteen people.<sup>178</sup> When the school learned about the icon, it suspended the student for five days.<sup>179</sup> In addition, the English teacher requested to stop teaching the student’s class.<sup>180</sup>

The court quickly dismissed the fact that the student posted the messages from an off campus location, stating that the court has recognized that “off-campus conduct can create a foreseeable risk of substantial disruption within a school.”<sup>181</sup> To determine whether a substantial risk of disruption was foreseeable, the court first analyzed the risk that the speech would come to the attention of school authorities, and, second, whether it was reasonable for the school officials to predict a substantial disruption to the school environment.<sup>182</sup> The court was in agreement that it was reasonably foreseeable that the IM icon would come to the attention of school authorities.<sup>183</sup> In addition, the court found that the “threatening content of the icon,” the “extensive distribution” of the content (fifteen people), and the time period for which the speech was distributed (three weeks) all made the risk “foreseeable to a reasonable person.”<sup>184</sup> Regarding whether it was reasonable for the school officials to predict a substantial disruption to the school environment, the panel was divided as to whether the fact that the speech actually did reach the campus obviates any analysis of whether such a disruption was foreseeable.<sup>185</sup> Nonetheless, the court found there to be no doubt that once made known to the teacher and other school officials, the icon “would foreseeably create a risk of substantial disruption within the school environment.”<sup>186</sup> In conclusion, the court held that the IM icon crosses “the

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175. 494 F.3d 34 (2d Cir. 2007).

176. *Id.* at 35.

177. *Id.* at 36.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 39 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979)).

182. *See id.* at 39-40.

183. *See id.* at 39.

184. *Id.* at 39-40.

185. *Id.* at 40 n.4.

186. *Id.* at 40.

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boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school.’”<sup>187</sup>

In 2008, the Second Circuit again decided in favor of a school district. In *Doninger v. Niehoff*,<sup>188</sup> Avery Doninger, a student at Lewis Mills High School, brought a case against her school’s administration after she was prohibited from running for Senior Class Secretary. After the school administration cancelled the battle-of-the-bands performance entitled “Jamfest,” Doninger posted a message on her publicly accessible blog that stated, “Jamfest is cancelled due to douchebags in central office . . . [a]nd here is a letter my mom sent to Paula [Schwartz] and cc’d Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. im [sic] down.”<sup>189</sup> After the blog post, the school administration received numerous phone calls and email messages about Jamfest.<sup>190</sup> During the two days following the post, school administrators Schwartz and Niehoff missed or arrived late to several school-related activities.<sup>191</sup>

Noting that the Supreme Court has yet to address the scope of a school’s authority to regulate speech that does not occur on school grounds or at a school-sponsored event, the court nonetheless found that such speech may be disciplined when the conduct “would foreseeably create a risk of substantial disruption within the school environment.”<sup>192</sup> As a background to help decide the novel issue of online speech, the court applied some of the reasoning from *Thomas*. The Second Circuit noted the “need to draw a clear line between student activity that ‘affects matters of legitimate concern to the school community,’ and activity that does not.”<sup>193</sup> In addition, the court used Judge Newman’s concurrence in *Thomas* arguing that “territoriality is not necessarily a useful concept in determining the limit of

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187. *Id.* at 38-39 (quoting *Morse v. Frederick*, 551 U.S. 393, 401 (2007)).

188. 527 F.3d 41 (2d Cir. 2008).

189. *Id.* at 45.

190. *See id.* at 44. Importantly, before the blog post, four student council members went on a school computer and sent out a mass email requesting that the recipients contact the district superintendent, Paula Schwartz, to urge that Jamfest be held as scheduled. *See id.* The school administration received an overwhelming number of telephone calls and emails from people concerning Jamfest. *See id.*

191. *Id.* at 46.

192. *Id.* at 48 (citing *Wisniewski*, 494 F.3d at 40). It is noteworthy that the court rejected the *Fraser* test because it is not clear whether *Fraser* applies to off campus speech. *See id.* at 49-50.

193. *Id.* at 48 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (1979)).

[school administrators'] authority."<sup>194</sup> With these two points in mind, the court then discussed the foreseeable risk of substantial disruption standard.

Utilizing the *Wisniewski* framework to determine whether the speech would foreseeably create a risk of substantial disruption, the Second Circuit again began by considering whether it was foreseeable that the off campus expression would reach campus.<sup>195</sup> When analyzing this first prong of the analysis, the court considered the student's intent, the content of the speech, and the fact that the speech did reach school administrators.<sup>196</sup> In this case, Doninger's intent was specifically "to encourage her fellow students to read and respond," the speech directly pertained to school events, and school administrators Schwartz and Niehoff saw the blog post.<sup>197</sup> Therefore, the court concluded that it was foreseeable that the off campus speech would reach campus.<sup>198</sup>

The court further found that the blog post "'foreseeably create[d] a risk of substantial disruption within the school environment.'"<sup>199</sup> In analyzing the foreseeable risk prong, the court considered three factors: the language of the speech, the fact that the speech was misleading, and the type of discipline imposed.<sup>200</sup> In terms of the language of the speech, Doninger's post included vulgar and "potentially incendiary language," which the court determined to be evidence of a potential risk of disruption.<sup>201</sup> For the second factor of misleading speech, which the court found to be the most significant, the court directed its attention to Doninger's post, which falsely stated that Jamfest had been cancelled, while in reality the school administration had offered the possibility of rescheduling the event.<sup>202</sup> The court found that Doninger disseminated this false information in order to direct more calls and emails to the school administration.<sup>203</sup> Given these circumstances, the court found that the speech "posed a substantial risk that [the school] administrators . . . would be diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest's purported cancelation."<sup>204</sup>

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194. *Id.* at 48-49 (citing *Thomas*, 607 F.2d at 1058 n.13).

195. *See id.* at 50.

196. *See id.*

197. *See id.*

198. *See id.*

199. *Id.* (alteration in original) (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)).

200. *See id.* at 50-52.

201. *See id.* at 51.

202. *See id.*

203. *See id.*

204. *Id.* at 51-52.

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In analyzing the second factor, the court also considered the fact that the disruption had already begun to occur.<sup>205</sup> In refuting Doninger's argument that *Tinker* is not satisfied because the controversy at the school may have resulted from the mass email created by the four student council members and not Doninger's blog post, the court utilized the Ninth Circuit's elaboration in *LaVine* that "[t]he question is not whether there has been actual disruption, but whether the school officials 'might reasonably portend disruption' from the student expression at issue."<sup>206</sup>

Lastly, the Court analyzed the third factor, namely, the relationship of the school's discipline to the student's extracurricular role as a student government leader.<sup>207</sup> The court noted that Doninger's conduct "risked not only the disruption of efforts to settle the Jamfest dispute, but also frustration of the proper operation of [the school's] student government."<sup>208</sup> The court found that Doninger's speech undermined the values that student government is designed to promote, such as teaching good citizenship.<sup>209</sup> Considering the cumulative effect of the three factors, the court held that Doninger's post "created a foreseeable risk of substantial disruption to the work and discipline of the school."<sup>210</sup>

The next case concerning student online speech, in which the court held in favor of the school district, was *Snyder v. Blue Mountain School District*.<sup>211</sup> J.S., an eighth grade honor student at Blue Mountain Middle School in Pennsylvania, created a parody profile about her principal on MySpace from her home computer.<sup>212</sup> J.S. was suspended from school for ten days.<sup>213</sup> The case is currently before the Third Circuit for a rehearing *en banc*. The court declined to decide whether a school official may discipline a student for lewd, vulgar, or offensive off campus speech that has an effect on campus because the speech falls under *Tinker*.<sup>214</sup>

While the court utilized the general rule established in *Tinker*, it collapsed the two-prong test utilized in both *Wisniewski*<sup>215</sup> and *Doninger*,<sup>216</sup>

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205. *See id.* at 52 (stating that Doninger herself testified that students were "all riled up" and that a sit-in was threatened).

206. *Id.* at 51 (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)).

207. *See id.* at 52.

208. *Id.*

209. *See id.* at 52.

210. *Id.* at 53.

211. 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted* No. 08-4138 (3d Cir. June 3, 2010).

212. *See id.* at 291. The profile referred to the principal as a "sex addict, fagass." *Id.*

213. *Id.* at 293.

214. *See id.* at 298.

215. *See* discussion *supra* Part II.B.1.

and instead simply analyzed whether the speech “created a significant threat of substantial disruption in the Middle School.”<sup>217</sup> Before delving into the facts of the case, the court noted that school officials may not limit student speech simply because of a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” but that school officials also need not wait until a substantial disruption actually occurs.<sup>218</sup> The court further refined the general *Tinker* standard by stating that “if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.”<sup>219</sup> Additionally, the court noted that off campus speech that “reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*.”<sup>220</sup> Considering these issues, the court defined the standard in this case to be a balance between the exception based on substantial disruption on the one hand, and the protected nature of off campus student speech on the other.<sup>221</sup>

In balancing the substantial disruption exception against the protected nature of student off campus speech, the court considered the speech’s content, the target of the speech, the student’s intent, access to the speech, the legality of the speech, and the actual disruption that resulted.<sup>222</sup> Due to the disturbing content of the speech, the court found the principal’s cause for discipline was not simply a “petty desire” to suppress speech that criticized him.<sup>223</sup> The court was very influenced by the potential harm that the speech posed to the principal, finding, for example, that the speech undermined the principal’s authority within the school.<sup>224</sup> The principal testified that he noticed a “severe deterioration in discipline in the Middle School,

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216. See discussion *supra* Part II.B.1. In these cases, the courts first determined whether the speech made its way onto campus due to its effect on the school, and then, only if this factor was satisfied, examined whether the school district, in punishing the student for his or her expression, infringed on the student’s First Amendment right. See *Snyder*, 593 F.3d at 298.

217. *Snyder*, 593 F.3d at 298.

218. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)) (internal quotation marks omitted).

219. *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2000)) (internal quotation marks omitted).

220. *Id.* at 301.

221. *Id.* at 299.

222. See *id.* at 300.

223. *Id.* The profile contained comments such as “kidsrockmybed,” and the listed interests included “fucking in my office,” “hitting on students and their parents,” and “mainly watch[ing] the playboy channel on directv.” *Id.* at 291.

224. *Id.* at 302.

especially among the eighth graders,” following the publication and punishment.<sup>225</sup> In addition, the court found that it was likely that parents would begin questioning the principal’s conduct.<sup>226</sup>

The court took into account the fact that J.S. directly targeted the principal when he misappropriated the principal’s photograph from the school’s website and inserted it into the fictitious MySpace profile.<sup>227</sup> J.S.’s intent was evidenced by the fact that she created the profile as a public means of humiliation in the context of the principal’s role, and before those who knew him in this context, and not merely as “a personal, private, or anonymous expression of frustration or anger.”<sup>228</sup> This made it reasonable for the school to predict a risk of substantial disruption.<sup>229</sup> In addition, J.S.’s intention to have the speech reach her school is evidenced by the fact that she only allowed Blue Mountain School students to view the profile.<sup>230</sup> The fact that the profile contained “potentially illegal” speech had no bearing on *Tinker*’s substantial disruption test.<sup>231</sup> The court noted that the potential impact of the profile’s language alone was enough.<sup>232</sup> Nonetheless, the court found that a principal may regulate student speech “rising to this level of vulgarity and containing such reckless and damaging information as to undermine the principal’s authority within the school, and potentially arouse suspicions among the school community about his character.”<sup>233</sup>

## 2. Cases in Favor of the Student

In *Beussink v. Woodland R-IV School District*,<sup>234</sup> a junior at Woodland High School created an Internet homepage from his home computer, which could be accessed by other Internet users. The homepage used vulgar language to criticize the teachers, principal, and the school’s own homepage.<sup>235</sup> It also invited readers to contact the school principal to share their opinions regarding the school, and contained a hyperlink directly to Woodland High School’s homepage.<sup>236</sup> The student was suspended for ten

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225. *Id.* at 294.

226. *See id.* at 301.

227. *See id.* at 300.

228. *Id.*

229. *Id.*

230. *See id.* at 300-01 (stating that at least twenty-two members of the school viewed the profile within days).

231. *Id.* at 301-02.

232. *See id.*

233. *Id.* at 302.

234. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

235. *See id.* at 1177.

236. *See id.*

days.<sup>237</sup> Utilizing the *Tinker* test, the court found that “[w]hile speech may be limited based upon a fear or projection of such disruption, that fear must be ‘reasonable’ and not an ‘undifferentiated fear’ of a disturbance.”<sup>238</sup> In this case, the principal’s own testimony indicated that he disciplined the student because he was upset by the content of the homepage, and not because of a fear of disruption or interference with school discipline.<sup>239</sup> The court held that “[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.”<sup>240</sup>

In a subsequent case, *Emmett v. Kent School District No. 415*,<sup>241</sup> a senior at Kentlake High School posted a web page on the Internet from his home computer. The web page was entitled “Unofficial Kentlake High Home Page,” and included commentary on the school’s administration and faculty, as well as a section containing mock obituaries, where viewers could vote on who should die next.<sup>242</sup> The student was first put on emergency expulsion, which was later modified to a five day suspension.<sup>243</sup> The student moved for a temporary restraining order against the Kent School District.<sup>244</sup> Applying the *Tinker* and *Fraser* standards, the court looked to the student’s intent, the content of the speech, and the actual disruption resulting from the speech.<sup>245</sup> Finding no evidence that the student “intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever,” the court enjoined the school from enforcing the short-term suspension.<sup>246</sup>

One year later, the Western District of Pennsylvania decided *Killion v. Franklin Regional School District*.<sup>247</sup> In this case, a student at Franklin Regional High School compiled a “Top Ten” list about the athletic director that contained, *inter alia*, statements about the director’s appearance, including the size of his genitals.<sup>248</sup> The student created the list on his home

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237. *See id.* at 1179.

238. *Id.* at 1180 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)).

239. *See id.*

240. *Id.*

241. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

242. *Id.* at 1089.

243. *Id.*

244. *Id.*

245. *See id.* at 1090.

246. *See id.*

247. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

248. *See id.* at 448.

computer and then emailed it to his friends.<sup>249</sup> After copies of the list were found in the school and in the school's teachers' lounge, the student was suspended for ten days.<sup>250</sup> The court analyzed the online speech under *Tinker's* general standard because the "overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."<sup>251</sup>

In response to the school district's argument that it found the list to be "rude, abusive and demeaning," the court noted that while a "mere desire to avoid discomfort or unpleasantness is not enough . . . if a school can point to a well founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."<sup>252</sup> Although the school argued that the student had created similar lists in the past, and had been warned that if he created such lists again he would be punished, it did not present any evidence that the student's earlier lists had caused a disruption.<sup>253</sup> Therefore, the court found that the events did "not support an expectation of disruption defense."<sup>254</sup>

It is noteworthy that the court declined to apply *Fraser's* lewd, vulgar, or profane test to off campus online speech.<sup>255</sup> In *Fraser*, Justice Brennan noted in his concurring opinion that if the student "gave the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."<sup>256</sup> Applying Justice Brennan's comment to the facts in the *Killion* case, the court found that while the top ten list contained multiple vulgarities,<sup>257</sup> the relevant speech occurred within the student's home and was not connected with any school activity.<sup>258</sup> Therefore, the court found that the suspension violated the First Amendment.<sup>259</sup>

The next case that held student online speech could not be disciplined as a result of the lack of evidence that a foreseeable risk of substantial disrup-

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249. *Id.*

250. *Id.* at 448-49.

251. *Id.* at 455.

252. *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2000)) (internal quotation marks omitted).

253. *See id.* at 455.

254. *Id.* at 456.

255. *See id.* at 456-57.

256. *Id.* at 456 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986)).

257. The site contained the statement: "[B]ecause of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade." *Id.* at 457.

258. *See id.* at 456.

259. *See id.* at 458.

tion existed was *Layshock v. Hermitage School District*.<sup>260</sup> In this case, Justin Layshock (“Justin”), a senior at Hickory High School, created a parody profile of his school’s principal on MySpace.<sup>261</sup> Justin created the profile on his grandmother’s computer, at her home, during non-school hours.<sup>262</sup> The profile contained a picture of the principal that Justin had copied from the school’s website, and inappropriate descriptions of the principal.<sup>263</sup> During this time, three other parody profiles about the principal were created.<sup>264</sup> Justin was suspended for ten days.<sup>265</sup>

Noting that the mere fact that the Internet may be accessed at school does not suffice to authorize school officials to become “censors of the world-wide web,” the court rejected a geographical test for online speech.<sup>266</sup> The court stated that, in the same way that “[t]he reach of school administrators is not strictly limited to the school’s physical property . . . the mere presence of a student on school property does not trigger the school’s authority.”<sup>267</sup> Therefore, under *Tinker*, the court required the school to demonstrate a sufficient nexus between the speech and a fear of substantial disruption of the school environment.<sup>268</sup> The court held that the “substantial disruption” standard could not be met through a “fear of future disturbances.”<sup>269</sup> The court found no evidence of fear of future disturbances because of Justin’s immediate suspension and the fact that school was shut down for the holiday.<sup>270</sup> In addition, the court noted that the MySpace related sites had been successfully blocked from student access.<sup>271</sup> Due to the dearth in evidence of a substantial disruption or a fear of future disturbances, the court held that the “[s]chool’s right to maintain

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260. 496 F. Supp. 2d 587 (W.D. Pa. 2007).

261. *See id.* at 591.

262. *Id.*

263. *Id.* In response to the question, “in the past month have you smoked?” the profile says a “big blunt.” *Id.* In response to a question regarding alcohol use, the profile states “big keg behind my desk.” *Id.* The profile also states that the principal is “too drunk to remember” the date of his birthday and that the principal is a “big steroid freak.” *Id.*

264. *See id.*

265. *Id.* at 593.

266. *Id.* at 598 (“It is clear that the test for school authority is not geographical.”).

267. *Id.*

268. *Id.* While the court found that under *Fraser*, lewd, sexually provocative student speech may be banned without the need to prove that it would cause a substantial disruption to the school learning environment, the court concluded that *Fraser* applied only to on campus speech. *See id.* at 599.

269. *Id.* at 601.

270. *See id.*

271. *See id.*

an environment conducive to learning does not trump Justin's First Amendment right to freedom of expression."<sup>272</sup>

The most recent case finding that no reasonable fact finder could conclude that the speech was reasonably likely to cause substantial disruption is *J.C. v. Beverly Hills Unified School District*.<sup>273</sup> In this case, a student posted a video on YouTube<sup>274</sup> from her home computer.<sup>275</sup> The video displayed a group of students at a local restaurant making fun of another student.<sup>276</sup> In utilizing the risk of substantial disruption to the school standard, the court focused on whether there was any evidence of a history of disruptive verbal or physical altercations between the students involved in the video, or of similar student speech causing any type of disruption to the school environment.<sup>277</sup> The court found that the lack of evidence of a prior relationship between the students involved in the video did not support a prediction that a verbal or physical confrontation was likely to occur, and therefore rejected the school district's argument that there was a reasonable fear of disruption.<sup>278</sup> In addition, the court stated that "[e]ven in the absence of specific evidence about these particular students, Defendants could have supported their fear of a future substantial disruption with evidence that student speech similar to the YouTube video had resulted in violence or near violence at Beverly Vista in the past."<sup>279</sup> Because the record was silent in this regard, the court held that there was insufficient evidence to support the school's decision to discipline the student.<sup>280</sup>

### III. PROPOSED REFINEMENT

The current ad hoc approach to determining whether a school district can reasonably forecast substantial disruption to the school environment has resulted in unpredictable, and therefore unfair, decisions. Because social networking sites enable students to have wide access to information instantaneously, it will always be reasonably foreseeable that online student speech will affect the school.

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272. *Id.*

273. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

274. YouTube is a video sharing website on which users can upload and share videos. See YOUTUBE, [http://www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited Feb. 27, 2011).

275. See *J.C.*, 711 F. Supp. 2d at 1098.

276. *Id.* The student called the other student a "slut." *Id.* The video also contains profanity. *Id.*

277. See *id.* at 1116.

278. See *id.* at 1120.

279. *Id.*

280. See *id.* at 1121.

Judge Chagares, in his concurring opinion in *Snyder*, stated that “courts need to define ‘foreseeability’ in a way that is harmonious with *Tinker*.”<sup>281</sup> In *The Civil Rights Roots of Tinker’s Disruption Tests*, Kristi L. Bowman describes how the substantial disruption test was created to give greater protection to the student’s freedom of speech right.<sup>282</sup> Therefore, the purpose behind leaving the standard broad was to allow for flexibility to avoid a chilling effect on a student’s First Amendment right to free speech.<sup>283</sup> Nevertheless, such flexibility or vagueness has in practice had the opposite effect.<sup>284</sup> This chilling effect likely stems from the courts’ recognition of the school districts’ need to maintain order. A malleable interpretation of the term “reasonable” has allowed schools to meet this need by permitting them to act in advance of actual disruption and not requiring them to wait and see whether the speech produces the disruptive effect.<sup>285</sup> Therefore, I am proposing a higher standard for student speech cases that will better filter the protected speech from speech that should not be protected because it presents a reasonable risk of substantial disruption to the school environment.

To determine whether a forecast of substantial disruption is reasonable, a court should consider whether the likelihood of disruption is high and the type of disruption is one that poses great harm to the school environment. This proposed test is based on Chief Judge Learned Hand’s formula, set forth in *United States v. Carroll Towing Co.*<sup>286</sup> In *Carroll Towing*, an improperly secured barge drifted away from a pier and caused damage to other boats.<sup>287</sup> According to the Hand formula, an act is in breach of the duty of care if the burden of taking precautions is less than the probability of the loss, multiplied by the gravity of the loss.<sup>288</sup>

The Hand formula was applied to a First Amendment issue in *Dennis v. United States*,<sup>289</sup> a case in which defendants were convicted for conspiring to organize the Communist party to teach and advocate the overthrow of

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281. *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 316 (3d Cir. 2010) (Chagares, J., concurring in part, dissenting in part) (“[C]ourts must determine when an undifferentiated fear or apprehension of disturbance transforms into a reasonable forecast that a substantial disruption or material interference will occur.” (internal quotation marks omitted)), *reh’g en banc granted* No. 08-4138 (3d Cir. June 3, 2010).

282. 58 AM. U. L. REV. 1129, 1163 (2009).

283. *See id.* at 1159-60.

284. *See id.* at 1162 (arguing that the vagueness of *Tinker* has resulted in unfair decisions).

285. *See id.* at 1163.

286. 159 F.2d 169 (2d Cir. 1947).

287. *See id.* at 170-71.

288. *Id.* at 173.

289. 341 U.S. 494 (1951).

the United States government by force and violence, in violation of Section 3 of the Smith Act.<sup>290</sup> When *Dennis* was decided, case law allowed the government to prohibit speech that presented a “clear and present danger” that a substantial public evil would result from such speech.<sup>291</sup> Therefore, the question in *Dennis* was whether speech inciting the Communist Party to teach and advocate the overthrow of the United States government by force and violence presented a clear and present danger, thus allowing the government to prohibit such speech through legislation.<sup>292</sup> In determining whether such speech presented a clear and present danger in *Dennis*, the Court quoted Chief Judge Hand’s opinion, stating that the standard is whether “the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>293</sup> The *Dennis* Court stated that “[i]f the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.”<sup>294</sup>

While the foreseeable harm resulting from an overthrown government is certainly more severe than disruption to the school environment, Judge Hand’s test is nevertheless applicable to the school context. In *Dennis*, the concern was about the result of speech inciting people to overthrow the government.<sup>295</sup> In the school context, there is a parallel fear that disallowing school officials from prohibiting certain speech will result in a substantial disruption to the school environment. Therefore, the Hand formula can be used to determine whether the evidence supports a finding of a reasonable forecast of substantial disruption to the school environment.

Under the proposed standard, if the likelihood of disruption is low and the type of disruption is one that poses *de minimis* harm to the school, then the forecast of substantial disruption is not reasonable. Conversely, if the type of disruption poses great harm and the likelihood of disruption is high, the forecast of a substantial disruption is reasonable. In situations where the type of disruption poses little harm, even if there is a significant likelihood of such harm occurring, the harm does not rise to the level of substantial disruption which would allow a school to limit a student’s First

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290. See 18 U.S.C. § 2385 (2006).

291. See *Schenk v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

292. See *Dennis*, 341 U.S. at 497, 505, 508.

293. *Id.* at 510 (rejecting the contention that before the government may prohibit such speech, it must wait until the plan to overthrow the government is about to be executed).

294. *Id.* at 511.

295. See *id.* at 508-09 (stating that the purpose of the prohibiting statute was to protect the government from change by violence, revolution, and terrorism).

Amendment right to free speech. For the cases that are too close to call, courts should always err on the side of protecting free speech in order to avoid any chilling effect on a student's First Amendment right.

The difficult question arises when the type of harm is great but the likelihood of disruption is low, as in the case of a student posting a comment on his Facebook profile that he is going to kill everyone in the school. While death certainly poses great harm, the probability that a student will kill everyone in the school is very low.<sup>296</sup> Under the standard I am proposing, the forecast of substantial disruption would not be reasonable in this situation. While it is arguable that this outrageous speech about a massive school shooting should be prohibited, especially in the wake of other school shootings, there must be a judicial check on the school's ability to infringe a student's First Amendment right, and my proposed standard helps ensure there is no chilling effect on this right.

Cases concerning a student-created parody profile of a school administrator will almost always fall under the low risk of substantial disruption and *de minimis* harm category. While speech made over the Internet "can reach the entire student population at any time, in school, or out of school, which can lead to a quickly developing widespread disruption,"<sup>297</sup> the unique characteristics of the Internet, combined with the school's interest in maintaining order, do not give the school district a blank check to prohibit speech otherwise protected under the First Amendment. First, the underlying purpose of the First Amendment is to allow uninhibited commentary on the powers that be, including embarrassing information.<sup>298</sup> Therefore, Layshock's embarrassing comment about his principal, for example, is exactly the type of speech that the First Amendment is intended to protect. Second, a threat to the school's interest in maintaining a safe and encouraging learning environment is nonexistent when the likelihood that the speech will reach the school is low and the type of speech does not pose great harm to

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296. See *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 309 (3d Cir. 2010) (Chagares, J., concurring in part, dissenting in part) (stating that the profile's content was so ridiculous that no one could take it seriously and no one did), *reh'g en banc granted* No. 08-4138 (3d Cir. June 3, 2010). The odds that a child would die in school by homicide are no greater than one in one million. Marisa Reddy et al., *Evaluating Risk for Targeted Violence in Schools: Comparing Risk Assessment, Threat Assessment, and Other Approaches*, 38(2) PSYCHOL. SCH. 157, 159 (2001), available at [http://www.secretservice.gov/ntac/ntac\\_threat\\_postpress.pdf](http://www.secretservice.gov/ntac/ntac_threat_postpress.pdf).

297. Justin P. Markey, *Enough Tinkering With Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 152 (2007).

298. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.").

the school. With respect to parody profiles where the speech is likely a juvenile attempt at humor, the disruption likely to occur is a school official simply feeling embarrassed and angered. A school official does not have the right to prohibit speech simply because the speech embarrasses him. Therefore, the proposed standard raises the bar on the school's ability to reasonably forecast substantial disruption by allowing a finding of reasonableness only when the likelihood of disruption is high and the type of disruption is great, a point at which the school's interest is at its zenith. This higher standard will ensure that school officials are not overstepping their bounds in prohibiting speech protected by the First Amendment.

To better understand the appropriateness of the proposed standard, we must carefully balance the school's need to maintain an environment conducive to learning and the student's right to free speech. The proper exercise of the First Amendment has been characterized as the "hallmark of citizenship in [this] country."<sup>299</sup> Because the classroom prepares students for responsibility, civility, and maturity,<sup>300</sup> it should ideally embody the free speech rights of citizenship. According to constitutional scholar Erwin Chemerinsky, protection of student expression should not be viewed as being "in tension with the mission of schools," but rather as a "crucial part of educating students about the Constitution."<sup>301</sup> Chemerinsky notes that, in *Tinker*, Justice Fortas quoted an earlier opinion of Justice Brennan, which stressed that freedom of speech is especially important in schools: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'"<sup>302</sup>

Nonetheless, public schools are not traditional public fora.<sup>303</sup> A school has the unique duty to maintain control and protect students in the school environment.<sup>304</sup> The Court in *Tinker* found the school's interest in preserving order so important that, by itself, it was enough to outweigh the student's speech rights.<sup>305</sup> Unfortunately, given the history of school shoot-

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299. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 527 (9th Cir. 1992).

300. See Lisa M. Pisciotta, *Beyond Sticks & Stones: A First Amendment Framework for Educators who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 669 (2000) ("As courts attempt to draw this line in the context of student threats, they must remember that students are still learning and consequently need to grow into their constitutional rights.").

301. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 532 (2000) (describing inconsistent lower court opinions in the area of student free speech).

302. *Id.* at 531-32.

303. See *Chandler*, 978 F.2d at 527.

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

305. See Markey, *supra* note 297, at 135.

ings, there is a reasonable possibility of such shootings occurring again and the school needs to be able to prevent such harm before it is too late. Some observers have gone so far as to argue that after the school shootings in Columbine, Colorado, the threat of violence is so great that the need to preserve order has increased since *Tinker*.<sup>306</sup> “Web sites can be an early indication of a student’s violent inclinations” and provide a medium for spreading beliefs “quickly to like-minded or susceptible people.”<sup>307</sup> Nevertheless, as Judge Fisher noted in *LaVine*, “[j]ust as the Constitution does not allow the police to imprison all suspicious characters, schools cannot expel students just because they are ‘loners,’ [who] wear black and play video games.”<sup>308</sup> Therefore, it is not appropriate to find a reasonable forecast of substantial disruption if the type of harm poses a great risk but the likelihood of such harm is low.

Courts are the only check on schools violating students’ First Amendment right to free speech. If the proposed test is not adopted by courts, schools will be left unchecked in prohibiting speech with which they simply disagree, but which does not present a reasonably foreseeable risk of substantial disruption.

For example, in *Snyder*, a student created a parody profile of the principal that included fictitious information about the principal’s sexuality and illegal conduct.<sup>309</sup> This is a prime example of a school prohibiting speech that it simply disliked. Nonetheless, the Third Circuit, utilizing the forecast of substantial disruption standard, found that the school did not violate the First Amendment by suspending the student for such speech.<sup>310</sup> Under the proposed standard, such speech would be properly protected. The type of disruption that would occur from such a parody profile is the principal’s embarrassment, which is not a great harm. While it is arguable that the principal would lose the respect of students and, therefore, be unable to maintain order within the school, the likelihood of such a disruption is low because a reasonable student would not find such outrageous information to be true. Therefore, under the proposed standard, the school unreasonably forecasted substantial disruption in *Snyder*.

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306. See generally Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243 (2001) (arguing that fears about Internet technology and Columbine-like violence are suppressing off campus student expression).

307. *Emmett v. Kent*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

308. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001).

309. See *supra* notes 211-233 and accompanying text.

310. See *supra* notes 211-233 and accompanying text.

An additional example of the proposed test allowing for the appropriate outcome is *Doninger*.<sup>311</sup> In that case, the type of disruption posed great harm to the school environment because inciting others to write or call a school official diverts the school administrators from their core educational responsibilities, which in turn inhibits their ability to maintain order in the school. The likelihood that such disruption would occur was high because the act of calling or writing a school official is not illegal (unlike killing a school official), the speech was made over the Internet (which allows for many people to view the speech in a short period of time), and numerous people did in fact call the school officials. Therefore, under the proposed test, the school district reasonably forecasted a substantial disruption to the school environment.

Many courts have addressed the issue of whether punishment for online speech should be reserved to the parents of the student.<sup>312</sup> The court in *Thomas* discussed how the “custody, care and nurture” of the child reside first in the parents.<sup>313</sup> Still, courts have rejected this argument because schools maintain authority over their students acting in *loco parentis*.<sup>314</sup> During school hours, children are in the compulsory custody of the state-operated school system where the state’s power is “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”<sup>315</sup> In *Snyder*, the court further noted that courts have held that in certain circumstances, “the parental right to control the upbringing of a child must give way to a school’s ability to control curriculum and the school environment.”<sup>316</sup> The proposed standard only allows for school discipline in circumstances where the school’s ability to control the curriculum and school environment trumps a student’s free speech right.

It is important to note that while a school has another course of action, namely, initiating a libel lawsuit, such a suit is not the appropriate form of recovery for student speech cases. Libel covers only a small percentage of the cases concerning student speech. In addition, exaggerated false statements may not always be considered assertions of fact that can be “objec-

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311. See *supra* notes 188-210 and accompanying text.

312. See, e.g., *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 304 (3d Cir. 2010), *reh’g en banc granted* No. 08-4138 (3d Cir. June 3, 2010); *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1053 n.18 (2d Cir. 1979).

313. *Thomas*, 607 F.2d at 1053 n.18.

314. *Snyder*, 593 F.3d at 304.

315. *Id.* (quoting *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000)) (internal quotation marks omitted).

316. *Id.*

tively verified” in a court of law.<sup>317</sup> For example, the cases concerning parody profiles are narrow where it is clearly a juvenile humor attempt.<sup>318</sup> Therefore, cases concerning a parody profile of a school official are not appropriate libel cases.

In applying the proposed refinement of the forecast of substantial disruption standard established in *Tinker*, courts must conduct a *de novo* review. It is far too easy for a school district to claim that the likelihood and type of disruption to the school environment are high when in fact the school might have disciplined a student because of “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>319</sup> In addition, the school official’s grand claim of likely substantial disruption will occur too frequently, ruling out any reasonable argument for deference to the school official. In addition, school officials are in a position of power over the students. They have the unique ability to punish a person who expresses a criticism of the school board that might be embarrassing and upsetting. *De novo* review of the likelihood and type of disruption will ensure that school officials do not smuggle dislike of the content of the speech under the guise of a “fear of disruption.” Under a *de novo* review, the court must consider the circumstances and “need not choose between dueling sets of self-serving statements regarding the existence of disruption.”<sup>320</sup>

### CONCLUSION

Since *Tinker*, student speech has been a hotly debated issue. On one side of the issue are students who have the right to express themselves freely in a democratic society. On the other side are school officials who need to maintain order in the schools and an environment conducive to learning. The result is disjointed jurisprudence in the lower courts where judges are left with the task of balancing these competing important interests in an effort to combat any chilling effect on First Amendment rights.

Today, with the advent of the Internet and social networking sites, tackling the issue of student speech has become even more difficult. Student speech is no longer limited to underground newspapers or graffiti on the

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317. Kathleen Conn, *Cyberbullying and Other Student Misuses of Technology Affecting K-12 Public Schools: Will Public School Administrators be Held Responsible for the Consequences?*, 244 W. EDUC. L. REP. 479, 484 (2009) (citing *Draker v. Schrieber*, 271 S.W.3d 318, 321 (Tex. App. 2008)).

318. See, e.g., *Snyder*, 593 F.3d at 316 (Chagares, J., concurring in part, dissenting in part) (stating that profile’s content was so ridiculous that no one could take it seriously).

319. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

320. *Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007).

bathroom wall. Students are now able to broadcast their criticisms of the school establishment in a widely publicized forum. While this speech may not necessarily take place on school grounds, its effect can very well have a substantial effect on the school campus. Applying the *Tinker* standard, it seems clear that schools can regulate student Internet speech that poses a reasonably foreseeable risk of substantial disruption to the school environment.

Nonetheless, it is imperative that the judiciary fulfills its duty to act as a check on the schools. Courts must ensure that schools are not punishing students simply because the school disagrees with or dislikes the student speech, absent a reasonable forecast of substantial disruption to the school setting. Therefore, courts should adopt the proposed test, which allows a school to punish speech only if the likelihood of disruption is high and the type of disruption is one that poses great harm to the school environment. If courts do not adopt this standard, they will be allowing schools to impede on a student's First Amendment right, a right that ensures the free flow of information and dissemination of ideas. Education is a fundamental aspect of our society and school discipline is essential to providing an effective education.<sup>321</sup> Nonetheless, the protection of a student's right to free speech is particularly important during such an influential time in order to foster society's interest in the free flow of information.

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321. See O'Connor, *supra* note 63, at 484.