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ARTICLES

“TINKERING” WITH THE FIRST AMENDMENT’S PROTECTION OF STUDENT SPEECH ON THE INTERNET

STEVEN M. PUISZIS*

II. INTRODUCTION

The Internet is a modern day Pandora’s box. It offers a forum “for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity.”¹ The Internet provides meaningful learning opportunities for educators and students unimaginable to earlier generations. However, the Internet also raises a host of concerns for school administrators and parents over its appropriate use because it can also be “a potent tool for distraction and fomenting disruption.”²

The Internet has brought to the classroom’s door a fundamental paradox confronting our legal and educational systems. Students using the Internet must be protected from inappropriate content, cyberbullying or predatory practices, while the First Amendment protects the rights of

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1. 47 U.S.C. § 230(a)(3) (2006).

2. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 222 (3d Cir. 2011) (en banc) (Jordan, J., concurring).

those who speak, write, or convey ideas or information over the Web.³ One of the Internet's unfortunate byproducts is that in today's digital era, school administrators are being called upon with increasing frequency to balance the use of Internet-based tools that enrich learning against the need to maintain order and a safe learning environment.

Balancing these competing concerns is a delicate and complex task. The task is delicate because the loss of First Amendment rights "even for minimal periods of time" constitutes irreparable injury.⁴ The task is complex because the First Amendment is potentially applicable to any writings, conduct or symbols so long as an "intent to convey a particular message" is conveyed, and the "likelihood is great that the message would be understood by those who viewed it."⁵

In its now famous *Tinker* decision,⁶ the Supreme Court observed that students do not shed their First Amendment rights when they enter the schoolhouse gate.⁷ *Tinker* also recognized the need to maintain an effective learning environment. Accordingly, the Court concluded that a student's First Amendment rights are not without limitation, and must be addressed in light of the "special characteristics of the school environment."⁸ Accordingly, the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings."⁹ The Court further explained that the nature of students' rights is determined by gauging "what is appropriate for children

3. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (explaining "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"); *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010) (observing "that First Amendment protections for speech extend fully to communications made through the medium of the internet").

4. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

5. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). See also *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005) (explaining a student's "desire to wear clothes she 'feel[s] good in' as opposed to her desire to 'express any particularized message'" did not constitute protected speech); *Brandt v. Bd. of Educ. of City of Chi.*, 480 F.3d 460, 465-66 (7th Cir. 2007) (holding a picture imprinted on a student's t-shirt was "no more expressive of an idea or opinion that the First Amendment might . . . protect than a young child's talentless infantile drawing which [the student's] design successfully mimics"). While recognizing that clothing might convey a protected message, the Seventh Circuit in *Brandt* explained that this particular shirt did not qualify: "Otherwise every T-shirt that was not all white with no design or words with not even the manufacturer's logo or the owner's name tag, would be protected by the First Amendment, and the school could not impose dress codes or require uniforms without violating the free speech of students." *Id.*

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

7. *Id.* at 506.

8. *Id.* at 506-07. See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

9. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

in school.”¹⁰

Nonetheless, school officials are not permitted to prohibit or discipline student speech or expressive activity simply because it may be provocative or controversial, the officials disagree with the student’s point of view, or the speech is crude or distasteful.¹¹ Indeed, one of the core functions of the First Amendment is to protect controversial speech.¹² As the Supreme Court explained: “If there is a bedrock principle underlying the First Amendment, it is the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”¹³

In a series of decisions addressing students’ First Amendment rights, the Supreme Court balanced these competing principles, and broadly outlined when a school can lawfully restrict or discipline a student’s speech or expressive activity that otherwise would be protected by the First Amendment. However, the Court has not addressed whether a school may discipline a student for “off-campus speech” or for statements made or symbols displayed over the Internet from the privacy of the student’s home.¹⁴ In *Morse v. Frederick*, the Court acknowledged that this has resulted in “some uncertainty as to when courts should apply school speech precedents.”¹⁵ While *Morse* did not purport to address a school district’s authority over off-campus speech, the Court in *Morse* did make clear that a school district’s authority extends beyond the bricks and mortar of the school itself and can be exercised in any “school context.”¹⁶

10. *Morse v. Fredrick*, 551 U.S. 393, 406 (2007) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995)).

11. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (invalidating the City of St. Paul’s Bias Motivated Crime Ordinance explaining “[c]ontent-based regulations are presumptively invalid,” and that the First Amendment prevents the prohibition of speech “because of disapproval of the ideas expressed”).

12. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (holding the First Amendment barred an intentional infliction of emotional distress claim brought by the father of a deceased Marine against an organization for picketing his son’s military funeral); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (explaining free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.”).

13. *Johnson*, 491 U.S. at 414; *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (observing “‘harassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (noting “courts have never embraced a categorical ‘harassment exception’ from First Amendment protection for speech that is within the ambit of federal anti-discrimination laws”).

14. *Doninger v. Neihoff (Doninger I)*, 527 F.3d 41, 48 (2d Cir. 2008).

15. *Morse*, 551 U.S. at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

16. *Id.* at 407-08.

The Internet has expanded schools' traditional boundaries and blurred when, where, and how today's students enter the schoolhouse gate. Indeed, there has been a proliferation of Web-based educational programs offered online to students of all ages.¹⁷ In today's digital era, with students participating in school activities via on-line learning programs, group web-page postings, instant messaging and other forms of electronic communication, a two-dimensional view of a school district's educational setting and limits of authority ignores modern reality.¹⁸ As one court aptly noted:

For better or for worse, wireless [I]nternet access, smart phones, tablet computers, social networking sites like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.¹⁹

Has the Internet literally (and legally) moved the schoolhouse gate to a student's home computer? While school administrators may view that to be the case, until the Supreme Court resolves the issue, lower courts and school officials must look for guidance from existing Supreme Court decisions involving the First Amendment generally, and its decisions specifically addressing student speech. Those decisions, however, involved fundamentally different forms of media and arose in a markedly different context.

Several federal circuits have concluded that *Tinker* can be applied to off-campus speech, and have applied it to a student's speech or expressive activities that occurred on the Internet.²⁰ However, that view of *Tinker's* scope of authority is not universally held. A number of lower courts have concluded that a student's Internet speech is fully protected by the First Amendment. As one district court concluded: "The mere fact that the Internet may be accessed at school does not authorize school

17. 77% of college presidents surveyed in 2011 reported that their schools offer online courses. Kim Parker, *The Digital Revolution and Higher Education*, PEW REVIEW RESEARCH CENTER (2011), available at <http://www.pewsocialtrends.org/2011/08/28/the-digital-revolution-and-highereducation/>.

18. *Doninger I*, 527 F.3d at 48-49. *Doninger I* reiterated that, "territoriality is not necessarily a useful concept in determining the limits of [school administrators'] authority." *Id.* at 49 (quoting *Thomas v. Bd. of Educ. of Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring)); *Layshock*, 650 F.3d at 216 (en banc) (acknowledging "*Tinker's* 'schoolhouse gate' is not constructed solely of bricks and mortar surrounding the schoolyard").

19. *Layshock*, 650 F.3d at 220-21 (Jordan J., concurring).

20. *Doninger I*, 527 F.3d at 48-50; *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60 (Hannibal)*, 647 F.3d 754, 766 (8th Cir. 2011); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 556, 573-74 (4th Cir. 2011).

officials to become censors of the World Wide Web.”²¹

Section II of this article discusses the dynamics of Internet speech and explains why the Internet provides a unique communication forum to students. Categories of unprotected speech are discussed in Section III followed by a survey of the Supreme Court’s First Amendment decisions involving student speech in Section IV. Sections III and IV set the stage for a discussion of the leading decisions addressing student speech on the Internet in Sections V and VI. Section V outlines the types of cases that lower courts have confronted, and Section VI addresses the circuit split that has arisen involving the First Amendment rights of students for their Internet speech.²² Because it appears unlikely that any new categories of unprotected speech will be recognized,²³ or that new restrictions on student speech will materialize,²⁴ this article takes the position in Section VII that the off-campus/on-campus distinction that has arisen in student First Amendment claims is unworkable for Internet speech. *Tinker* is broad enough to encompass student speech that occurs over the Internet.

Typically, decisions involving a *Tinker* analysis of student speech merely consider whether the speech resulted in a “substantial and material disruption,” or predictably could result in disruption, and if not, conclude that *Tinker* is inapplicable.²⁵ However, there is a second prong to *Tinker’s* analysis. *Tinker* applies not only to speech that materially disrupts the classroom or results in substantial disorder, but also to speech

21. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007), *aff’d*, 650 F.3d 205, 255 (3d Cir. 2011) (en banc) (addressing a phony MySpace profile of a school principal created by a student).

22. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 950 (3d Cir. 2011) (en banc) (Fisher J., dissenting) (stating our opinion today causes a split with the Second Circuit).

23. *See, e.g., Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (invalidating on First Amendment grounds a state law that prohibited the sale of violent video games to minors); *United States v. Stevens*, 130 S. Ct. 1577, 1585-86 (2010) (refusing to find depictions of animal cruelty as a new category of unprotected speech); *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (overturning on First Amendment grounds, the Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006), which made it a crime to falsely claim a person had received “any decoration or medal authorized by Congress for the Armed Force of the United States,” and rejecting the government’s contention that false statements receive no First Amendment protection). “[P]ersuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription” is required in order for the Court to conclude that a new category of speech is categorically unprotected by the First Amendment. *Brown*, 131 S. Ct. at 2734.

24. *See Morse v. Frederick*, 551 U.S. 393, 406 (2007) (Alito, J., concurring). Justices Alito and Kennedy concluded that the special characteristics of public schools do not necessarily justify any further restrictions on student speech and rejected the suggestion that school officials can “censor any student speech that interferes with a school’s ‘educational mission.’” *Id.*

25. *See, e.g., Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

that invades or collides with the “rights of others.”²⁶ Courts have generally ignored this second prong of *Tinker*, and only a handful of decisions address student speech that invades the rights of others.²⁷ As a result, several courts have observed that the precise boundaries of *Tinker*’s “rights of other’s” prong is unclear.²⁸ With the advent of student cyberbullying, *Tinker*’s second prong merits a fresh look. Section VII of this article outlines the appropriate boundaries for *Tinker*’s “rights of others” prong.

Because the Court’s analysis in *Tinker* applies to conduct “in class or out of it,” *Tinker* is broad enough to encompass Internet speech or activity that results in substantial disruption at the school under its first prong, or which targets a student or school official for harassment or bullying under *Tinker*’s second prong. As the Second Circuit’s decisions in *Doninger I* and *II* aptly demonstrate, a student’s Internet speech or activities outside a school can readily cause disruption within it.²⁹ When disruption within a school occurs, or predictably could occur, school officials should be able to act irrespective of where the speech allegedly took place without violating the First Amendment.³⁰

Students can collaborate to target another student for harassment

26. *Tinker*, 393 U.S. at 503 (Black, J., dissenting); *Trachtman v. Anker*, 563 F.2d 512, 516-20 (2d Cir. 1977); *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260 (1988).

27. *Harper v. Poway United Sch. Dist.*, 445 F.3d 1166, 1177-79 (9th Cir. 2006) (applying *Tinker*’s “interference with the rights of others” prong to uphold a school district’s authority to prevent a student from wearing a T-shirt that read: “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” on the front, and “HOMOSEXUALITY IS SHAMEFUL” written on the back). The Supreme Court in *Harper* granted the petition for a writ of certiorari but noted that the district court had entered final judgment and dismissed the claims for injunctive relief as moot. *Harper v. Poway United Sch. Dist.*, 549 U.S. 1262 (2007). The Court recalled that it had “previously dismissed interlocutory appeals from the denials of motions for temporary injunctions once the final judgment has been entered.” *Id.* Therefore, the Court held that vacatur of the judgment in *Harper* was proper to “clear the path for future relitigation of the issues between the parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.” *Id.* (quoting *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950))) (alterations in original). *See also Kowalski*, 652 F.3d at 573-74 (upholding a school’s right to discipline under *Tinker*’s second prong a student who created a webpage on MySpace.com entitled “S.A.S.H.” or “Students Against Sluts Herpes,” which singled out another student for bullying, harassment, and intimidation and invited other students to join).

28. *Saxe*, 240 F.3d at 211; *DeJohn*, 537 F.3d at 314.

29. *Doninger I*, 527 F.3d at 48 (affirming the denial of a preliminary injunction); *Doninger v. Neihoff (Doninger II)*, 642 F.3d 334 (2d Cir. 2011) (awarding qualified immunity to school officials against plaintiff’s § 1983 damages claim).

30. *See, e.g., Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 826-28 (7th Cir. 1998) (involving an underground paper that included an article providing instructions about how to hack into the school’s computer system).

or bullying in school as well as off school grounds.³¹ While teasing, name calling or “offensive” speech would not meet *Tinker’s* rights of others prong,³² when bullying, or harassing internet speech significantly hampers the targeted student’s educational performance or the student’s ability to safely interact with other students at school, the First Amendment does not render administrators powerless to intervene. School officials do not have the authority to become censors of the World Wide Web, but they need to be able to intervene when forces outside the school threaten to significantly hamper the learning environment within it.

II. THE DYNAMICS OF INTERNET SPEECH

The Supreme Court has “recognized that each medium of expression presents special First Amendment problems.”³³ Accordingly, to understand and meaningfully evaluate the types of First Amendment issues that have arisen involving student speech on the Internet, it is important to have a basic understanding of the dynamics of the modern Web. These dynamics are shaped by the technological and cultural context in which information is electronically posted on and distributed over the Web.

Much of today’s Internet teen activity involves the creation and consumption of “social media.” The term social media broadly describes the various ways that Internet users interact with one another online, and involves activities such as creating and commenting on blogs,³⁴ uploading and sharing user-generated content including video and photos, and communicating with friends through social networking sites such as MySpace or Facebook. Typically, when a new member joins a social networking site, he or she designs an online profile page, which provides information about the new member and allows him or her to communicate with other members through e-mail, instant messaging (IM), or elec-

31. See, e.g., *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010) (involving a video recorded by a group of students off campus in which they made derogatory and profane statements about a 13-year-old classmate which they subsequently posted on the Internet on YouTube); *Kowalski*, 652 F.3d at 567-78 (4th Cir. 2011) (involving the creation of a MySpace.com webpage called “S.A.S.H.” which plaintiff claimed stood for “Students Against Sluts Herpes” and was dedicated to ridiculing a fellow student).

32. *Tinker*, 393 U.S. at 509 (declaring, “[a]ny word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk.”) (citing *Terminiello v. Chicago*, 337 U.S. 14 (1949)).

33. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

34. *Layshock*, 650 F.3d at 218 n. 19 (stating, “[a] blog (a contraction of the term “web log”) is a type of website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video.” (quoting Wikipedia)).

tronic bulletin board postings.³⁵ A member's online profile can be open to all or access can be limited only to "friends" or "buddies."

Many courts have been slow to focus on the unique characteristics of the Internet, which distinguishes it from traditional modes of communication. Several traditional forms of communication, such as the print and broadcast media, are heavily regulated and expensive to use.³⁶ One of the attractive features of the Internet is that it permits free and unfettered discussion of issues, with practically no regulation or oversight.³⁷ Many individuals lack the resources to use print or broadcast media. The Internet on the other hand, is both easy and inexpensive to use.³⁸ YouTube, an Internet video website, nearly has eliminated "the cost of mass media distribution," and as a result, "offers its users unparalleled opportunities for free expression."³⁹

Historically, the flow of information with traditional forms of print and broadcast media was one dimensional, flowing from the speaker or writer to the listener or the reader. The Internet encourages the multidimensional flow of digital information between participants. Multiple forms of information, such as photos, video, music and messages can be readily transferred simultaneously on the Internet.

The spoken or printed word is capable of reaching a finite audience. Information posted on the Internet can reach a far larger audience potentially anywhere in the world. Moreover, social networking sites and web-based interactive services encourage the development of affinity groups sharing common interests. As a result, messages can be easily conveyed to persons sharing the same interests or points of view.⁴⁰ Ano-

35. See *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007) (explaining online "profiles" are "individual web pages on which members post photographs, videos and information about their lives and interests," and that once a profile has been created the new member "can extend 'friend invitations' to other members and communicate with her friends . . . via e-mail, instant messages or blogs").

36. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (explaining that "of all the forms of communication," broadcasting is the most heavily regulated and has received the least protection under the First Amendment).

37. 47 U.S.C. § 230(a)(4) (2006) (noting that the Internet has flourished "with a minimum of governmental regulation"); *Doe v. Geller*, 533 F. Supp. 2d 996, 1001 (N.D. Cal. 2008) (noting "YouTube doesn't actively monitor the content of the postings on its website").

38. *Reno*, 521 U.S. at 853 (declaring "[a]ny person or organization with a computer connected to the Internet can 'publish' information").

39. *Geller*, 533 F. Supp. 2d at 1001. The district court in *Geller* further noted that anyone with Internet access can sign up for a YouTube account and upload a video file to its servers, which allows the video to "be accessed and viewed anywhere in the world, all for free." *Id.*

40. *Doe v. Myspace, Inc.*, 474 F. Supp. 2d at 846. "The idea of online social networking is that members use their online profiles to become part of an online community of people with common interests." *Id.*

nymity is another feature of the Internet which makes it a preferred mode of communication for many who otherwise may be unwilling to express their views on controversial subject matters.

While T.V. and radio removes the spatial distance between the speaker and the listener, there are geographic limits to the reach of that media. The Internet similarly eliminates the distance between the person posting and viewing content on the Web, with one significant difference. The Internet has no geographic or territorial limits. Today any student with a computer can post information on the Internet that can be accessed anywhere in the world, almost instantaneously.⁴¹ There are no boundaries or limits to the flow of information on the Internet.⁴²

These features make the Internet a highly popular and effective means of communicating ideas and information. However, these same features also make negative comments far more damaging and anonymous messages or threats far more menacing when made over the Internet.

Internet and social media usage has virtually exploded over the past decade. Last year, the Internet had 239,893,600 users in the United States or 77.3% of all persons living in America.⁴³ In 2009, ninety three percent (93%) of American teens used the Internet. Seventy three percent (73%) of those teens used the Internet to access online social networking sites, sixty two percent (62%) used the Internet to obtain news or information about current events, forty eight percent (48%) used the Internet to make an on-line purchase and thirty eight percent (38%) shared something which they created on-line.⁴⁴ Facebook claims to have more than 800 million active users.⁴⁵ If Facebook were a country it would be the third largest nation in the world.⁴⁶

41. *J.S.*, 650 F.3d at 940 (Smith, J., concurring) (commenting on the “everywhere at once” nature of the Internet).

42. David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996). “Global computer based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility – and legitimacy – of laws based on geographic boundaries.” *Id.* Reno, 521 U.S. at 853-54 (noting when a provider posts information on its website, it is available “wherever Internet users live”).

43. *United States of America Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS (Feb. 14, 2012), <http://www.internetworldstats.com/am/us.htm>.

44. *Trend Data for Teens*, PEW INTERNET & AMERICAN LIFE PROJECT (May 2011), <http://pewinternet.org/Static-Pages/Trend-Data-for-Teens/Online-Activities-Total.aspx>.

45. *Statistics*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22>.

46. Socialnomics, *Social Media Statistics 2011: Amazing Facts About Internet Use (VIDEO)*, HUFFINGTON POST (June 8, 2011), http://www.huffingtonpost.com/2011/06/08/social-media-statistics-2011_n_873116.html.

Before discussing decisions that have addressed the interplay of the First Amendment and student speech on the Internet, the following section of this article briefly reviews the Supreme Court's decisions involving categories of speech that are not protected by the First Amendment. The article then turns to the Supreme Court's decisions addressing student speech. This discussion will bring into focus the guideposts that school officials have to navigate when addressing students' use of the Internet and social media.

III. CATEGORIES OF SPEECH NOT PROTECTED BY THE FIRST AMENDMENT

The First Amendment's protection does not extend to certain well-defined and narrowly limited categories of speech that can be regulated because of their "constitutionally proscribable content."⁴⁷ These exceptions are based on the notion that certain categories of speech have so little social value that any benefit they could produce clearly would be outweighed "by the social interest in order and morality."⁴⁸ When a student's speech or expressive activity fits within one of the categories outlined below, the First Amendment generally offers no protection.⁴⁹ As a result, speech or expressive activity can be prohibited and a student can be disciplined without running afoul of the First Amendment, irrespective of whether the speech occurs within the school setting or outside the schoolhouse gate.

However, the Supreme Court also has explained that merely because the following categories of speech may be proscribed does not make them "invisible to the Constitution," or provide a basis to discriminate based on the identity of the speaker, the topic, or the viewpoint expressed.⁵⁰ Attempts to regulate speech based on its content still are presumptively invalid, even for categories of unprotected speech.⁵¹ As the Court explained, while a government can proscribe obscenity, "it could not prohibit only those legally obscene works that contain criticism of the government."⁵²

47. *R.A.V.*, 505 U.S. at 383.

48. *Chaplinsky v. New Hampshire*, 315 U.S. 565, 572 (1942).

49. *Hannibal*, 647 F.3d at 764-65 (applying the "true threats" exception to a student's off-campus instant messages to another student about obtaining a gun and shooting other students).

50. *R.A.V.*, 505 U.S. at 383.

51. *Id.* at 383-84.

52. *Id.* at 391-92 (invalidating an ordinance that prohibited the display of a "symbol" that a person knew of or had reason to know would arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" because the ordinance imposed special prohibitions on speakers who expressed views on certain disfavored topics while permitting displays "containing abusive invective" so long as they were not directed at those topics).

A. TRUE THREATS

In *Watts v. United States*, the petitioner participated in a public rally against police brutality. In a discussion group, he complained about his draft classification and having to report for a military physical and stated: “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.” The Supreme Court in *Watts* held that while threats of violence are not protected speech, the petitioner’s statement was “political hyperbole” and not a “true threat.” Therefore, his statement fell under the penumbra of the First Amendment, and he could not be prosecuted for threatening the President.⁵³

True threats “encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁵⁴ Whether a student “intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a ‘true threat.’”⁵⁵

An objective approach is taken when evaluating whether the alleged threat should be treated “as a serious expression of an intent to cause a present or future harm.”⁵⁶ However, a split in the circuits has developed as to which viewpoint the statement should be interpreted, the speaker or the recipient; in other words, “what a person making the statement should have reasonably foreseen or what a reasonable person receiving the statement would believe.”⁵⁷

The Seventh Circuit evaluates “not what the [speaker] intended but whether the recipient could reasonably have regarded the [speaker’s] statement as a threat.”⁵⁸ The Second, Fourth and Eighth Circuits simi-

53. *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam).

54. *Virginia v. Black*, 538 U.S. 343, 359 (2003). See also *Hannibal*, 647 F.3d at 764-65 (applying the “true threat” test to instant messages from one student at home to another student in which he discussed getting a gun and shooting other students at school).

55. *Porter*, 393 F.3d at 617.

56. *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc). See also *Riehm v. Engelking*, 538 F.3d 952, 962 (8th Cir. 2008) (holding a student’s essay that “expressed in graphic terms a plan to kill [his teacher] and himself” constituted a true threat); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 772 (5th Cir. 2007) (concluding a student’s diary describing his orders to a pseudo-Nazi group harming homosexuals and colored people and then committing a “Columbine shooting” attack at his high school was not protected speech given its “violent and disturbing content”); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984-85 (11th Cir. 2007) (holding a student’s story written in a notebook about a dream of shooting her math teacher was “reasonably construed as a threat of physical violence and was not protected by the First Amendment).

57. *United States v. Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997).

58. *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d at 622.

larly evaluate the statement from the viewpoint of the recipient.⁵⁹ The First, Sixth, Ninth and Tenth Circuits evaluate the statement from the viewpoint of the speaker.⁶⁰

The Eighth Circuit has recognized that debate over the proper viewpoint from which to evaluate a purported threat is “largely academic because in the vast majority of cases the outcome will be the same under both tests.”⁶¹ The outcome will differ only in rare instances “when the recipient suffers from some unique sensitivity,” and that sensitivity is unknown to the speaker.⁶²

Factors that courts have used in evaluating whether a statement constitutes a true threat include: a) whether the statement was conditional; b) whether the statement was communicated directly to the alleged target; c) whether the person making the statement had a history of making threats to the person who was targeted by the statement; and d) if there was any reason to believe the maker of the statement had a propensity toward violence.⁶³

B. FIGHTING WORDS

Fighting words originally were defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of peace.”⁶⁴ In *Chaplinski v. New Hampshire*, a Jehovah’s Witness called a governmental official “a God damned racketeer” and “a damned Fascist.” The Supreme Court concluded that those statements qualified as “fighting words,” and therefore, were not protected under the First Amendment.⁶⁵

The “fighting words” exception was limited by the Court’s subsequent decision in *Cohen v. California*,⁶⁶ where the defendant was convicted of disturbing the peace for wearing a jacket in a courthouse bearing the words “Fuck the Draft.” The Court concluded that the State could not make “the simple public display . . . of this single four-letter expletive a criminal offense.”⁶⁷ The Court explained that “[w]hile the four letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it

59. *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994); *United States v. Marsonet*, 484 F.2d 1356, 1358 (4th Cir. 1973); *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d at 622.

60. *Fulmer*, 108 F.3d at 1491; *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996); *United States v. Welch*, 745 F.2d 614, 629 (10th Cir. 1984).

61. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d at 623.

62. *Id.*

63. *Id.*

64. *Chaplinsky*, 315 U.S. at 572.

65. *Id.* at 573.

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

67. *Id.* at 26.

was not ‘directed to the person of the hearer.’” In the Court’s view, “[n]o individual actually or likely to be present could reasonably have regarded the words on [Cohen’s] jacket as a direct personal insult.”⁶⁸ However, as explained below in “Subsection IV B”, a school could bar a student from wearing Cohen’s jacket in school.

The Seventh Circuit explained that subsequent Supreme Court decisions have narrowed *Chaplinsky’s* original definition of fighting words so that the exception is limited to only those words or phrases that tend to provoke an immediate breach of the peace.⁶⁹ Accordingly, speech that merely offends, rouses anger, or causes emotional harm or psychic trauma does not constitute fighting words and is protected by the First Amendment.⁷⁰ To qualify as fighting words the speech must be of a personally insulting nature and be directed at a particular person or group.⁷¹ However “an actual disturbance is not required for the doctrine to apply.”⁷²

In *Zamecnik v. Indian Prairie School District No. 204*, the Seventh Circuit concluded that a t-shirt worn by a high school student bearing the phrase, “Be Happy, Not Gay” did not constitute fighting words. The court viewed the phrase as “only tepidly negative.”⁷³ Judge Posner in

68. *Id.* at 20 (quoting *Cantwell v. Connecticut*, 310 U.S. 309 (1940)).

69. *Purtell v. Mason*, 527 F.3d 615, 623-24 (7th Cir. 2008) (citing *Johnson*, 491 U.S. at 409 (confining fighting words to those “likely to provoke the average person to retaliation, and thereby causing a breach of the peace”); *NAACP v. Claiborne Co.*, 458 U.S. 886, 927 (1982) (explaining fighting words as “those that provoke immediate violence”); *Terminiello*, 337 U.S. at 4 (holding speech is protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . [t]here is no room under our Constitution for a more restrictive view”).

70. *Purtell*, 527 F.3d at 624-25 (citing *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (involving a proposed march by the National Socialist Party of America wearing Nazi uniforms and carrying Nazi flags with swastikas through Skokie, Illinois which “had a large Jewish population and was home to many Holocaust survivors”).

71. *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973).

72. *Purtell*, 527 F.3d at 625 (holding plaintiff calling his father-in-law a “fat son-of-a-bitch,” a coward by clucking like a chicken, and repeatedly telling him “fuck you” constituted fighting words (citing *Gower v. Vercler*, 377 F.3d 661, 670 (7th Cir. 2004))).

73. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876-77 (7th Cir. 2011). In *Nuxoll v. Indian Prairie Sch. Dist. No. 204*, the Court directed that a preliminary injunction be entered that would permit students to wear a “Be Happy Not Gay” t-shirt during school hours. 523 F.3d 668 (7th Cir. 2008). The Seventh Circuit in *Zamecnik* held a school that “permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality.” 636 F.3d at 876. However, *Harper* upheld a school district’s authority to prevent a student from attending school wearing a t-shirt that read: “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” on the front, and: “HOMOSEXUALITY IS SHAMEFUL” on the back. 445 F.3d 1166 (9th Cir. 2006). Unlike *Zamecnik*, the year before the school district in *Harper* had experienced an altercation resulting in the suspension of students who wore t-shirts displaying derogatory remarks about homosexuals during a “Straight-Pride Day.” *Id.* at 1171-73. However, *Harper*

Zamecnik, wistfully discussed “an expansive interpretation of the ‘fighting words’ doctrine when the speech in question is that of students,”⁷⁴ because it would enhance the ability of school officials to address challenging speech.

Various courts have recognized that grammar and high school students, by reason of their lack of maturity, are more likely to impulsively respond to statements or threats that an adult would ignore.⁷⁵ The Supreme Court also has explained “a school must be able to take into account the emotional maturity of the intended audience.”⁷⁶ Whether a specific communication is protected by the First Amendment “always requires some consideration of both its content and its context.”⁷⁷ So, there is no reason why the age of the recipient⁷⁸ cannot be considered when evaluating whether a student’s speech constituted fighting words.⁷⁹

C. SPEECH THAT INCITES IMMINENT LAWLESS ACTION

Brandenburg v. Ohio involved a criminal conviction for certain racist and anti-Semitic remarks made at a Ku Klux Klan rally calling for “revengeance.” In overturning that conviction, the Supreme Court held that the First Amendment protects the advocacy of illegal or unlawful action unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁸⁰

did not base its decision on *Tinker’s* substantial disruption test. Its holding was based on *Tinker’s* “invading the rights of others” prong. *Id.* at 1177.

74. *Zamecnik*, 636 F.3d at 876.

75. *See, e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) (stating “scientific and sociological studies . . . tend to confirm [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. . . . These qualities often result in impetuous and ill-considered actions and decisions. . . . Adolescents are overrepresented statistically in virtually every category of reckless behavior . . . [and] juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (quotation marks omitted).

76. *Kuhlmeier*, 484 U.S. at 272.

77. *New York v. Ferber*, 458 U.S. 747, 778 (1982). Justice Holmes also observed, “[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

78. *Svedberg v. Stamness*, 525 N.W.2d 678, 684 (N.D. 1994) (holding “it is proper to consider the age of the addressee” when determining if certain statements qualified as fighting words).

79. *See, e.g.*, *DeJohn*, 537 F.3d at 315. “Certain speech, however, which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students.” *Id.* (emphasis in original).

80. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam).

D. OBSCENITY

Obscenity has long been held to fall outside the purview of the First Amendment. For years the Supreme Court struggled to define obscenity in a way that did not impermissibly burden protected speech. In *Miller v. California*,⁸¹ the Court settled on a three-part test for determining whether material is obscene and thus unprotected:

(a) whether ‘the average person applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;⁸² and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁸³

The Supreme Court has rejected attempts to expand the obscenity exception to include violent speech,⁸⁴ or to “whatever a legislature finds shocking.”⁸⁵ It only applies to depictions of “sexual conduct.”

E. CHILD PORNOGRAPHY

A related and overlapping category of proscribable speech is child pornography, which involves “sexually explicit visual portrayals of children.”⁸⁶ The Supreme Court affords less protection to child pornography than it does to obscenity because the test for obscenity does not involve the compelling interest of preventing the sexual exploitation of children.⁸⁷ Accordingly, statutes that prohibit any child pornography, even when the material does not meet the test for obscenity, and statutes that criminalize the possession of child pornography, even in situations when an adult’s possession of obscene material could not be criminalized, have

81. *Miller v. California*, 413 U.S. 15 (1973).

82. See *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 2011 WL 3501698, at *7-8 (N.D. Ind. Aug. 10, 2011) (holding photos of 15 and 16-year-old high school girls posing with phallic-shaped rainbow colored lollipops and toy tridents, which they posted on their MySpace and Facebook pages did not meet the test for obscene speech under state law, and therefore, the students were immune from school discipline under the First Amendment because the photos did not result in substantial disruption at their school).

83. *Miller v. California*, 413 U.S. 15, 24 (1973).

84. *Winters v. New York*, 333 U.S. 507, 514-19 (1948) (invalidating a New York statute that forbade “collections of stories ‘so massed as to become vehicles for inciting violent and depraved crimes against the person’”). In *Brown*, 131 S.Ct. at 2734, the Court explained that *Winters* “made clear that violence is not part of obscenity that the Constitution permits to be regulated.”

85. *Brown*, 131 S. Ct. at 2734.

86. *United States v. Williams*, 553 U.S. 285, 288 (2008); *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 158 U.S. 747 (1982). See also 18 U.S.C. § 2256(8) (2006) (defining child pornography as a “visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct”).

87. *Ferber*, 158 U.S. at 761.

withstood First Amendment challenges.⁸⁸

Child pornography can involve “actual or simulated” sexual acts, but to constitute simulated child pornography, the conduct depicted must create a “realistic impression of an actual sexual act.”⁸⁹ As a result, photos that fifteen and sixteen year old high school students posted on their MySpace and Facebook pages posing with rainbow colored phallic-shaped lollipops and toy tridents did not constitute child pornography and were protected by the First Amendment.⁹⁰

F. OFFERS TO ENGAGE IN ILLEGAL ACTIVITY

“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”⁹¹ This exception is based upon the rationale that these types of offers, “have no sound value, and thus, like obscenity, enjoy no First Amendment protection.”⁹² A distinction has been recognized between the “abstract advocacy of illegality” addressed in *Brandenburg* and proposals to engage in illegal activity upon which criminal laws like solicitation, pandering and conspiracy are based.⁹³

G. FRAUD AND PERJURY

Two other categories of unprotected speech involve fraudulent statements⁹⁴ and perjury.⁹⁵ The Supreme Court long ago recognized “[t]he First Amendment does not shield fraud.”⁹⁶ The power of government to protect its citizens from fraud has “always been recognized in this country and is firmly established.”⁹⁷ This includes fraudulent appeals “made in the name of charity and religion.”⁹⁸ Perjury statutes have consistently withstood constitutional challenge because they are necessary to

88. *Williams*, 553 U.S. at 288.

89. *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1080 (4th Cir. 2006).

90. *Smith-Green Cmty. Sch. Corp.*, 2011 WL 3501698, at *7-8.

91. *Williams*, 553 U.S. at 297 (citing *Pittsburg Press Co. v. Pittsburg Comm’n on Human Relations*, 413 U.S. 376, 388 (1973)); *Gibboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

92. *Williams*, 553 U.S. at 297.

93. *Id.* at 298-99.

94. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

95. *United States v. Grayson*, 438 U.S. 41, 54 (1978) (noting the “unquestioned constitutionality of perjury statutes”).

96. *Telemarketing Assocs.*, 538 U.S. at 612 (citing *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948)).

97. *Donaldson*, 333 U.S. at 190.

98. *Telemarketing Assocs.*, 538 U.S. at 612 (citing *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164 (1939)).

preserve the integrity of our legal system.⁹⁹

Both fraud and perjury require a false statement to be actionable, which suggests that false statements should enjoy no First Amendment protection. Indeed, the Supreme Court in a number of decisions suggested that to be the case.¹⁰⁰ However, in *United States v. Alvarez*,¹⁰¹ which invalidated on First Amendment grounds the Stolen Valor Act,¹⁰² the Supreme Court rejected the government's contention that false statements are categorically unprotected by the First Amendment.¹⁰³

A plurality of the Court in *Alvarez* rejected the government's contention "that false statements, as a general rule, are beyond constitutional protection,"¹⁰⁴ explaining that statements appearing in some of the Court's prior decisions about the lack of First Amendment protection for "false statements" arose in "cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."¹⁰⁵ The plurality in *Alvarez* further noted that even with defamation and fraud, "falsity alone" will not take speech outside the protection of the First Amend-

99. *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (explaining perjury statutes are necessary "[t]o uphold the integrity of our trial system," and therefore, "the constitutionality of perjury statutes is unquestioned").

100. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("[f]alse statements of fact are particularly valueless [because] they interfere with the truth seeking function of the marketplace of ideas"); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact"); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection"); *BE & K Constr. Co v. NLRB*, 536 U.S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake"); *Bill Johnson's Rest., Inc., v. NLRB*, 461 U.S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech"); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements").

101. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

102. 18 U.S.C. § 704(b) (making it a crime to falsely claim a person had been awarded "any decoration or medal authorized by Congress for the Armed Forces of the United States").

103. *Alvarez*, 132 S. Ct. at 2545 (observing "[t]he Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection").

104. *Id.* at 2544-45 (explaining "isolated statements in some [of the Court's] earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection").

105. *Id.* at 2545.

ment; rather, “a knowing or reckless falsehood,”¹⁰⁶ is required, a point on which the dissenting Justices in *Alvarez* agreed.¹⁰⁷

Additionally, five Justices in *Alvarez*—the three who dissented,¹⁰⁸ and the two who concurred in the judgment¹⁰⁹—agreed “there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, social sciences, the arts and other matters of public concern would present such a threat.”¹¹⁰ Thus, false statements do enjoy a measure of constitutional protection. One factor animating the Supreme Court’s decision in *Alvarez* was the recognition “that some false statements are inevitable if there is to be open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”¹¹¹

IV. THE SUPREME COURT’S DECISIONS INVOLVING STUDENT SPEECH

Assuming that a student’s speech or expressive activity falls outside of one of the above categories of unprotected speech, school officials still

106. *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) (prohibiting a public official from obtaining a damages recovery for defamation unless a statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not”)); *Garrison*, 379 U.S. at 73 (explaining “[e]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood”); *Telemarketing Assocs.*, 538 U.S. at 620 (“False statement alone does not subject a fundraiser to fraud liability”).

107. *Alvarez*, 132 S. Ct. at 2563 (Alito, J., dissenting) (“Thus, in order to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity. . . . This same requirement applies when public officials and figures seek to recover for the tort of intentional infliction of emotional distress. . . . And we have imposed ‘[e]xacting proof requirements’ in other contexts as well when necessary to ensure that truthful speech is not chilled”) (citations omitted).

108. *Id.* at 2256. Justices Scalia and Thomas joined in Justice Alito’s dissenting opinion in *Alvarez*. *Id.*

109. *Id.* at 2551. Justices Breyer and Kagan agreed that the Stolen Valor Act violated the First Amendment, but chose not to base their “conclusion on a strict categorical analysis.” Instead they applied “intermediate scrutiny,” or “proportionality review,” which examines “the fit between statutory ends and means” in order “to determine whether the statute works speech-related harm that is out of proportion to its justification.” Under that approach they found the Act violated the First Amendment concluding “the Government could achieve its legitimate objectives through less restrictive ways.” *Id.*

110. *Id.* at 2564 (Alito, J., dissenting); *id.* at 2552 (Breyer, J., concurring).

111. *Id.* at 2544 (citing *Sullivan*, 376 U.S. at 271 (“Th[e] erroneous statement is inevitable in free debate”).

may prohibit that speech or subject the student to discipline without violating the First Amendment under the following circumstances:

A. SPEECH THAT SUBSTANTIALLY DISRUPTS THE
SCHOOL OR INVADES THE RIGHTS OF OTHERS

In *Tinker v. Des Moines Independent Community School District*, students who wore black armbands to protest of the Vietnam War were suspended until they returned to school without them.¹¹² The students' protest was described by the Court as "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."¹¹³ The students claimed the school district's discipline violated their First Amendment rights. The Supreme Court concluded that the students engaged in "political speech" by wearing the armbands for the purpose of expressing their view about the war.

The Supreme Court in *Tinker* held that school officials may discipline students when their speech or expressive activity results in "material and substantial interference with school work or discipline" or when it interferes with the rights of others.¹¹⁴ The Court explained that if there were "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school authorities, then disciplinary measures can be imposed."¹¹⁵

The Court in *Tinker* observed that no material disruption had occurred at the school, and noted the school district had failed to present any facts that might have reasonably led school officials to predict that a disruption of school activities was likely to occur. Thus, *Tinker* held that the imposition of student discipline under those circumstances violated

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

113. *Id.* at 508. Three years before *Tinker* was decided, the Fifth Circuit simultaneously announced two decisions addressing a student's right to wear a "freedom button" at school. *Burnside v. Byars* upheld a student's right to wear a button inscribed with the phrase "One Man One Vote," but also recognized that school disciplinary regulations are "essential in maintaining order and discipline on school property" and those that "measurably contribute to the maintenance of order and decorum within the educational system" are reasonable. 363 F.2d 744, 748 (5th Cir. 1996). Because wearing the buttons did not result in any disturbance in *Burnside*, the school's regulation forbidding the buttons violated the students' First Amendment rights. However, in *Blackwell v. Issaquena Cnty. Bd. of Educ.*, the school board provided evidence which showed that students who wore the freedom buttons "conducted themselves in a disorderly manner, disrespected classroom procedure, interfered with the proper decorum and discipline of the school and disturbed other students who did not wish to participate in the wearing of the buttons." 363 F.3d 749, 753 (5th Cir. 1966). Under the circumstances, the court in *Blackwell* held the school district could ban the buttons on school property without violating the First Amendment. The distinguishing factor between *Burnside* and *Blackwell* was the evidence of disruption caused by the students' conduct. These decisions heavily influenced the Court's holding in *Tinker*.

114. *Tinker*, 393 U.S. at 511.

115. *Id.* at 514.

the students' First Amendment rights.¹¹⁶

Tinker did not require that a student's speech involve a matter of public concern before the protection of the First Amendment can be invoked. In *Lowry v. Watson Chapel School District*, the Eighth Circuit addressed a student protest of a school dress code.¹¹⁷ The students in *Lowry*, just as in *Tinker*, wore black armbands in silent protest of the school policy and, just as in *Tinker*, the wearing of the arm bands did not result in any disruption at their school.¹¹⁸ The court in *Lowry* held it was constitutionally immaterial whether students "protest national foreign policy or local school board policy."¹¹⁹ *Lowry* held the discipline violated the students' First Amendment rights.

Tinker explained that its "substantial disruption" analysis should be applied to student conduct that occurs "in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or [invades] the rights of others."¹²⁰ However, a student's First Amendment rights cannot be restricted under *Tinker* merely because school administrators wish to avoid a controversy nor may school officials base a restriction on an unsubstantiated fear of disruption.¹²¹ "While there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required" to meet *Tinker's* substantial disruption test.¹²² Where a school district has experienced threats, confrontations or altercations between students in the past, courts generally have upheld a district's forecast of disruption under *Tinker*.¹²³

116. *Id.* See also *Guiles v. Marineau*, 461 F.3d 320, 330 (2d Cir. 2006) (concluding a student's discipline for wearing a t-shirt critical of George W. Bush violated the First Amendment where the record reflected the student had worn the shirt many times and it had never caused any disruption); *Chandler v. McMinnville Sch. Dist.*, 978 F.3d 524, 530 (9th Cir. 1992) (holding a school district that punished students for wearing "SCAB" buttons during a teacher's strike to protect the use of replacement teachers violated the First Amendment because it failed to prove the buttons were "inherently disruptive").

117. *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752 (8th Cir. 2008).

118. *Id.* at 758.

119. *Id.* at 759-60.

120. *Tinker*, 393 U.S. at 513.

121. *Id.* at 509.

122. *J.S. v Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002) (citation omitted and collecting cases). See also *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 822 (Minn. Ct. App. 2011) (holding substantial disruption was established by evidence establishing that the University contacted police to investigate a mortuary science student's Facebook postings referencing a "Death List" and wanting to stab someone, and had to respond to the concerns of the program's donors over the student's conduct and the professionalism of the University's program).

123. See, e.g., *DeFabio v. East Hampton Union Free Sch. Dist.*, 623 F.3d 71, 79 (2d Cir. 2010) (holding a student's mere presence in the school would likely result in a material and substantial disruption in light of threats to kill him and bomb his home); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (upholding a student's

So long as school officials “have reason to believe” that a student’s expression will be disruptive, *Tinker’s* standard is met.¹²⁴ *Tinker* does not require that school officials wait until some actual disruption occurs before they can act.¹²⁵ However, school officials must be ready to present proof of the relevant facts on which their forecast of disruption was based.¹²⁶ For example, *Boucher v. School Board of Greenfield* involved a student’s article, which explained how to “hack” into the school computers. The school district presented testimony from computer experts it had retained to perform diagnostic testing on the school’s computers following publication of the article. The experts’ diagnostic testing revealed signs of tampering, and the school district changed all of the passwords mentioned in the article. While the tampering which the experts found could not be tied directly to the article, the Seventh Circuit held the evidence was sufficient to meet *Tinker’s* substantial disruption standard.

Words or phrases are not considered offensive and cannot be banned under *Tinker* simply because they are synonymous with provocative or offensive terms or symbols. In one notable decision, the Third Circuit held a school district violated a student’s First Amendment rights by banning a Jeff Foxworthy t-shirt listing the top 10 reasons a person might be a “redneck sports fan,” even though the district could ban dis-

suspension for drawing a confederate flag in class because the school district had experienced a series of prior incidents related to displays of the confederate flag). Other circuits have upheld a school district’s right to ban displays of the confederate flag on student’s clothing in light of prior racial violence, threats and tensions. See *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010). *Scott v. School Bd. of Alachua Cnty.* upheld a ban of the Confederate symbols on school grounds not only under *Tinker’s* substantial disruption test but also as vulgar and offensive speech under *Fraser*. *Scott*, 324 F.3d 1246 (11th Cir. 2003) (per curiam). The Sixth Circuit declined to follow that approach, and concluded that displays of Confederate flags may only be regulated by satisfying the *Tinker* standard. See *Barr*, 538 F.3d at 569 n.7; *Spiva*, 625 F.3d at 325 n.6.

124. *Boucher*, 134 F.3d at 827-28 (rejecting the argument that school officials must show “actual harm” before they can act); *Nuxoll*, 523 F.3d at 673 (rejecting the contention that a school must prove that “serious consequences *in fact* will ensue” and holding “[i]t is enough for the school to present ‘facts which might reasonably lead school officials to forecast substantial disruption’”) (emphasis in original).

125. *Nuxoll*, 523 F.3d at 673; see also *Doninger I*, 527 F.3d at 51 (declaring “[t]he question is not whether there has been actual disruption, but whether school officials ‘might reasonably portend disruption’ from the student expression at issue” (citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001))); *Lowery v. Euverard*, 497 F.3d 584, 591-92 (6th Cir. 2007) (stating, “*Tinker* does not require school officials to wait until the horse has left the barn before closing the door . . . [i]t does not require certainty, only that the forecast of substantial disruption be reasonable”).

126. *Boucher*, 134 F.3d at 827-28 (overturning a preliminary injunction and upholding a high school student’s expulsion for writing an article in an underground school newspaper published off campus explaining how to hack into the school’s computers).

plays of the Confederate flag under *Tinker*.¹²⁷ The court noted there was no reason to believe the terms “redneck” and “hick” that appeared on the shirt might cause a disturbance.¹²⁸ The court explained:

Where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to [a] well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others. . . . Most commonly the prior speech will have carried an offensive or provocative meaning and the similar speech will have a similar meaning.¹²⁹

The court ultimately concluded the term “redneck” was not sufficiently related to words and symbols that were associated with prior racial hostilities at the school and there was no reason to believe the shirt would disrupt school functions.

1. *The Influence of Justice Black’s Dissent in Tinker*

Justice Hugo Black wrote a powerful dissent in *Tinker*, the echoes of which can be heard in the Court’s subsequent First Amendment decisions addressing student speech.¹³⁰ In his view, the mission of public schools is “to give students the opportunity to learn,” and given their age, children “need to learn, not teach.”¹³¹ Despite the absence of “obscene remarks” or “loud disorder,” he concluded the wearing of the black arm-bands “did exactly what the elected school officials and principals foresaw they would, that is, took their minds off their class work and diverted their thoughts about the highly emotional subject of the Vietnam war.”¹³²

Justice Black was highly critical of the Court “arrogat[ing] to itself, rather than to the State’s elected officials charged with running the schools, the decision as to which disciplinary regulations are ‘reasonable.’”¹³³ He explained that school discipline “is an integral and important part of training our children to be good citizens” and concluded that *Tinker* undermined the ability of school officials to impart that

127. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 254-59 (3d Cir. 2002).

128. *Id.* at 257.

129. *Id.*

130. *See Kuhlmeier*, 484 U.S. at 271 n.4 (observing “the *Fraser* Court cites as ‘especially relevant’ a portion of Justice Black’s dissenting opinion in *Tinker* ‘disclaim[ing] any purpose . . . to hold that the Federal Constitution compels teachers, parents and elected school official to surrender control of the American public school system to public school students,’” and then noting “[o]f course Justice Black’s observations are equally relevant to the instant case”).

131. *Tinker*, 393 U.S. at 523 (Black, J., dissenting).

132. *Id.* at 518 (Black, J., dissenting).

133. *Id.* at 517 (Black, J., dissenting).

training.¹³⁴

2. Does Tinker Apply to Elementary Schools?

In *Morgan v. Swanson*, the Fifth Circuit addressed whether qualified immunity should be awarded to several grammar school principals for their actions in restricting their students' distribution of written materials to classmates while in school.¹³⁵ *Morgan* granted qualified immunity to those school officials in part "because *Tinker's* applicability in elementary schools has never been clearly established."¹³⁶

The Court in *Morgan* explained that "[n]either the Supreme Court nor this Court has expressly extended *Tinker*-based speech rights into the elementary-school setting," and further observed that both the Third and Seventh Circuits have expressed doubts "whether and to what extent" *Tinker's* protection applies to student speech in public elementary schools.¹³⁷

The Third Circuit has observed: "[t]here can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students."¹³⁸ Accordingly, the younger the student the more control a school official can exercise over student speech.¹³⁹ And on this age continuum, "at a certain point, a school child is so young that it might reasonably be presumed the First Amendment does not protect the kind of speech at issue here."¹⁴⁰

134. *Id.* at 524 Justice Black concluded that *Tinker* "subjects all public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest students." *Id.* at 525.

135. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011); *see also* *Baxter by Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 738 (7th Cir. 1995) (awarding qualified immunity to school officials who prohibited an elementary school student from wearing t-shirts saying "Unfair Grades," "Racism," and "I Hate Lost Creek" (the grammar school in question) explaining "given the indications in *Fraser* and *Kuhlmeier* that *age* is a relevant factor in accessing the extent of a student's free speech rights in school in addition to the dearth of case law in the lower federal courts, we are unable to conclude that the . . . right [defendant] is alleged to have violated was 'clearly established'") (emphasis in original).

136. *Morgan*, 659 F.3d at 384.

137. *Id.* at 377 n.72.

138. *Walker-Serrano v. Leonard*, 325 F.3d 412, 416-17 (3d Cir. 2003). *See also* *S.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 423 (3d Cir. 2003) (holding "a school's authority to control student speech in an elementary setting is undoubtedly greater than in a high school setting").

139. *Waltz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 276 (3d Cir. 2003) (explaining "the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise"); *Zamecnik*, 636 F.3d at 876 (holding "the younger the children, the more latitude school authorities have in limiting expression").

140. *Walker-Serrano*, 325 F.3d at 417; *see also* *Brandt*, 480 F.3d at 466 (declaring "we have our doubts whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders").

B. VULGAR, LEWD OR INDECENT SPEECH OCCURRING IN SCHOOL

Bethel School District No. 403 v. Fraser involved a speech made at a high school assembly by a student who nominated a fellow classmate for elective office.¹⁴¹ The student's nominating speech was riddled with sexual innuendos describing the fellow classmate as "firm in his pants," a "man who takes his point and pounds it in," and would "go to the very end—even the climax."¹⁴² While the speech did not meet the test for obscenity,¹⁴³ the "pervasive sexual innuendo" of the speech "was plainly offensive to both teachers and students."¹⁴⁴ *Fraser* rejected the student's argument that his suspension violated the First Amendment and held that student speech, which is vulgar, lewd or plainly offensive, is not protected by the First Amendment.¹⁴⁵

Fraser recognized that a school need not tolerate speech or expressive activity that would undermine its "basic educational mission,"¹⁴⁶ and since one of the purposes of public education is to "prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility."¹⁴⁷ The Court explained these fundamental values "must also take into account consideration of the sensibilities of others," and the "freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."¹⁴⁸ The *Fraser* Court concluded that vulgarity is "wholly inconsistent with the 'fundamental values' of public school education,"¹⁴⁹ and that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."¹⁵⁰ The Court observed, "the First Amendment gives a high school student the classroom right to wear *Tinker's* armband, but not *Cohen's* jacket."¹⁵¹

The Court subsequently explained the type of "plainly offensive" speech prohibited by *Fraser* does not encompass speech that might fit under "some definition of 'offensive' . . . since much political and religious

141. *Fraser*, 478 U.S. at 675.

142. *Id.* at 687 (Brennan, J., concurring).

143. *Id.* at 688 (Brennan, J., concurring).

144. *Id.* at 683.

145. *Id.* at 685.

146. *Id.*

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

148. *Id.*

149. *Id.* at 685-86.

150. *Id.* at 683.

151. *Id.* at 682 (quoting *Thomas*, 607 F.2d at 1057 (Newman, J., concurring)). Judge Newman also observed in *Thomas*: "Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar." *Thomas*, 607 F.2d at 1057 (Newman, J., concurring).

speech might be perceived as offensive to some.”¹⁵² The Second Circuit highlighted this point when it observed that lower courts treat *Fraser*’s plainly offensive speech “synonymously with and as part and parcel of speech that is lewd, vulgar and indecent—meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity.”¹⁵³ Accordingly, buttons bearing the word “scab” that students wore during a teacher’s strike,¹⁵⁴ and buttons with a picture of Hitler Youth that students wore to protest a dress code policy have been held not to constitute vulgar or plainly offensive speech under *Fraser*.¹⁵⁵

However, school districts’ attempts to ban students from wearing breast cancer awareness bracelets bearing the slogan “I [heart] Boobies! (Keep A Breast)” have yielded conflicting results in the district courts. One district court rejected the argument that the phrase “I [heart] Boobies! (Keep A Breast)” could be interpreted as a double entendre, concluding that the message on the bracelet was not “vulgar” speech because it had no inherent sexual connotation and arose in the context of a national breast cancer awareness campaign.¹⁵⁶ Another district court disagreed with that conclusion, noting the bracelets employ “hints of vulgarity and sexuality to attract attention and provoke a conversation, a ploy that is effective for its target audience of immature middle school students.”¹⁵⁷ While recognizing the bracelets promote a worthy social cause, the court also concluded it was “reasonable” for school officials in a middle-school context to conclude the phrase “was vulgar and inconsistent with their goal of fostering respectful discourse.”¹⁵⁸

Fraser addressed student speech that took place on school property at a school assembly, and did not involve off-campus speech. Justice Brennan, in his concurring opinion in *Fraser* observed: “If [the] respon-

152. *Morse*, 551 U.S. at 409; *Guiles*, 461 F.3d at 328 (stating, “[w]hat is plainly offensive for purposes of *Fraser* must therefore be narrower than the dictionary definition”).

153. *Guiles*, 461 F.3d at 328; *Saxe*, 240 F.3d at 213 (finding *Fraser* permits a school to prohibit words that “offend for the same reason that obscenity offends”).

154. *Chandler*, 978 F.3d at 530 (observing in the context of a motion to dismiss that the word ‘scab’ is not “considered *per se* vulgar, evil, obscene or plainly offensive”).

155. *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 645 (D.N.J. 2007) (noting that the image on the buttons could be interpreted as insulting or thought to be in poor taste but was not lewd, vulgar or plainly offensive as required by *Fraser*).

156. *H. v. Eastern Area Sch. Dist.*, 2011 WL 1376141, at *11-12 (E.D. Pa. April 12, 2011).

157. *K.J. ex rel. Braun v. Sauk Prairie Sch. Dist.*, No 11-cv-622-bcc, slip op. at 15 (W.D. Wisc. Feb 6, 2012).

158. *Id.* at 17. While both district courts applied a reasonableness standard, the district court in *K.J.* took a context-specific approach, recognizing that school officials are afforded wider latitude in limiting the expression of younger students and observed, “[c]oncern about the age-appropriateness of speech is particularly relevant in matters of human sexuality, especially in a middle school atmosphere.” *Id.* at 18.

dent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”¹⁵⁹

Nonetheless, the circuits have taken various approaches to *Fraser*'s application to student speech on the Internet. The Second Circuit observed: “It is not clear that *Fraser* applies to off-campus speech,”¹⁶⁰ while the Third Circuit has held that *Fraser* only applies to speech or activities that occur at school.¹⁶¹ The Fourth Circuit suggested “a court could determine that speech originated outside the schoolhouse gate but directed at persons in school and received by and acted on by them” constituted in-school speech. “In that case . . . its regulation would be permissible not only under *Tinker*, but also as vulgar and lewd in-school speech under *Fraser*.”¹⁶²

C. SPEECH IN SCHOOL-SPONSORED ACTIVITIES

Hazelwood School District v. Kuhlmeier involved a high school principal's removal of two articles from a school newspaper that dealt with teen pregnancy and the impact of divorce on teenagers.¹⁶³ The newspa-

159. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring). Subsequently, the Court in *Morse v. Frederick* echoed Justice Brennan's view explaining: “[h]ad *Fraser* delivered the same speech in a public forum outside of the school context, it would have been protected.” *Morse*, 551 U.S. at 405.

160. *Doninger I*, 527 F.3d at 49. The Second Circuit in *Doninger I* noted that the Supreme Court's opinion in *Fraser* quoted Judge Newman's concurring opinion from *Thomas. Id.* at 48. One of the points made by Judge Newman in *Thomas* was: “School authorities ought to be accorded some latitude to regulate student activity that affects [a] matter of legitimate concern to the school community and territoriality is not necessarily a useful concept in determining the limit of that authority.” *Thomas*, 607 F.2d at 1058. Ultimately, Judge Newman suggested that, “[a] prudent application of the foreseeability concept, informed by First Amendment considerations,” was the appropriate approach to take in this context. *Id.* The *Doninger I* court did not resolve the issue, choosing instead to base its holding on *Tinker* and the framework it outlined in its earlier *Wisniewski* opinion, which held that *Tinker*'s test can be applied to a student's off-campus or Internet speech when it is “reasonably foreseeable that the speech would reach school property.” *Doninger I*, 527 F.3d at 50.

161. *Layshock*, 650 F.3d at 216. (“It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent it can control that child when he/she participates in school sponsored activities”); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 456-57 (W.D. Pa. 2001) (explaining students cannot be punished for lewd and obscene speech occurring off school grounds “absent exceptional circumstances”); *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799-800 (N.D. Ohio 2002) (rejecting the application of *Fraser* because plaintiff did not compel other students to view his web site and his “expressive activity was the private viewing of his own website”).

162. *Kowalski*, 652 F.3d at 573 (involving a student's creation of a webpage, which served as a platform for other students to direct verbal attacks or cyberbullying on a particular classmate).

163. *Kuhlmeier*, 484 U.S. at 260.

per was produced as part of the school's journalism class. The Supreme Court in *Kuhlmeier* rejected the student's claim that the editorial censorship of the school paper violated the First Amendment. The Court concluded that schools do not violate the First Amendment when exercising editorial control over the style and content of student speech in school-sponsored activities, so long as their actions are "reasonably related to legitimate pedagogical concerns."¹⁶⁴ The Court in *Kuhlmeier* reiterated: "A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government "could not censor similar speech outside the school."¹⁶⁵

The Court in *Kuhlmeier* explained this exception applies not only to school sponsored publications, but also to "theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school," and which "may fairly be characterized as part of the school curriculum."¹⁶⁶ The Tenth Circuit applied this exception to a valedictorian's speech at a high school graduation.¹⁶⁷

The potential for the public's misperception that speech is sponsored by a school district should not be a permissible basis to restrict student speech under *Kuhlmeier*.¹⁶⁸ As the Seventh Circuit explained:

[The school district] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship . . . Public belief that the government *is* partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker . . . schools may explain that they do not endorse speech by permitting it.¹⁶⁹

While *Kuhlmeier* involves one aspect of student speech, the rationale underlying the Court's holding more aptly fits within the so-called "government speech doctrine,"¹⁷⁰ which recognizes that the government's

164. *Id.* at 273.

165. *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

166. *Id.* at 270-71.

167. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009). *But see Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1336-37 (11th Cir. 2001) (holding a student's speech at graduation did not fall under *Kuhlmeier*'s exception).

168. *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993) (overturning a school district's rule which prohibited handing out religious materials on school grounds).

169. *Id.* at 1299-1300.

170. *See, e.g., Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007) (noting "it is well established that the government can make content-based distinctions when it subsidizes speech").

own speech is generally exempt from First Amendment scrutiny.¹⁷¹ The government “is ‘entitled to say what it wishes,’ and to select the views that it wants to express.”¹⁷²

D. SPEECH ADVOCATING DRUG USE

In *Morse v. Frederik*, a school district organized a gathering of students to view the Olympic torch passing the street on which the school was located.¹⁷³ There a student unfurled a banner bearing the phrase: “BONG HiTS 4 Jesus.” The student was suspended for 10 days, and challenged his suspension arguing that the district could not suspend him for his off-campus speech. The Supreme Court summarily rejected that contention noting that the student’s misconduct occurred during school hours, at a school-approved event thereby making the district’s rules on student conduct applicable. The Court observed that teachers were present and charged with supervising the students, the high-school band and cheerleaders performed, and the plaintiff, who was standing across the street from his school, directed the banner towards the school making it visible to most students. In light of this factual backdrop, the Court concluded: “There is some uncertainty as to when courts should apply school-speech precedents, but not on these facts.”¹⁷⁴

Morse is remarkable not for its holding, but for the Court’s discussion of its prior decisions involving student speech and the efforts made to limit the opinion’s reach. The Court in *Morse* explained that its prior decisions in *Fraser* and *Kuhlmeier* demonstrate “that the rule of *Tinker* is not the only basis for restricting student speech.”¹⁷⁵ The Court observed that *Kuhlmeier* was inapplicable because the student banner did not bear “the school’s imprimatur” like the school newspaper in *Kuhlmeier*.¹⁷⁶ The Court in *Morse* also rejected the school district’s suggestion that “public school officials [may] censor any student’s speech

171. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (explaining “when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors, but instead encourage[s] a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University’s own speech, which is controlled by different principles”).

172. *See, e.g., Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467-68 (2009) (quoting *Rosenberger*, 515 U.S. at 833).

173. *Morse*, 551 U.S. at 393.

174. *Id.* at 401 (citation omitted).

175. *Id.* at 406.

176. *Id.*

that interferes with a school's 'educational mission.'"¹⁷⁷ In a concurring opinion, several justices explained that *Morse* provides no support for any restriction of student speech that arguably comments on political or social issues.¹⁷⁸

1. *Does Morse Expand a School's Authority to Protect Students?*

Morse clearly permits schools to address speech that can be reasonably construed as advocating drug use. Several circuits, however, have interpreted Justice Alito's concurrence as expanding a school district's authority to address threatening speech.

Justice Alito's concurring opinion in *Morse* explained that any alteration of the First Amendment's application to public schools has to "be based on some special characteristic of the school's setting" and the "special characteristic" that was relevant in *Morse* was "the threat of physical safety to the students."¹⁷⁹ He observed that mandatory "school attendance can expose students to threats to their physical safety that they would not otherwise face," and that "in most cases *Tinker's* 'substantial disruption' standard permits school officials to step in before actual violence erupts."¹⁸⁰

The Third Circuit in *J.S. v. Blue Mountain School District*, observed that Justice Alito's concurrence in *Morse* "emphasizes the narrowness of the Court's holding," and noted that he "only joined the Court's opinion 'on the understanding that the opinion does not hold the special characteristics of public schools necessarily justify any other speech restrictions.'"¹⁸¹

The Fifth Circuit in *Ponce v. Socorro Independent School District*,¹⁸² however, interpreted the gloss from Justice Alito's concurring opinion as granting school officials greater authority to address threatening speech in order to protect students from potential violence or harm. In *Ponce*, the Fifth Circuit observed: "[I]mportantly, Justice Alito's concurring opinion goes on to expand with further clarity why some harms are in fact so great in the school setting that *requiring a school administrator to evaluate their disruptive potential is unnecessary*."¹⁸³ The Fifth Circuit explained: "Speech advocating a harm that is demonstrably grave and

177. *Id.* at 423 (Alito, J., concurring). See also *Guiles*, 461 F.3d at 330 (holding "[t]he phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern").

178. *Morse*, 551 U.S. at 422-25 (Alito J., concurring).

179. *Id.* at 424 (Alito J., concurring).

180. *Id.* at 425.

181. *J.S.*, 650 F.3d at 927.

182. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007).

183. *Id.* at 770 (emphasis added).

which derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected.”¹⁸⁴ Based on Justice Alito’s concurrence in *Morse*, the Fifth Circuit concluded that if “school administrators are permitted to prohibit school speech that advocates illegal drug use because illegal drug use presents a grave and in many ways unique threat to the physical safety of students, ‘then it defies logical extrapolation to hold high school administrators to a strict standard with respect to speech that gravely and uniquely threatens violence . . . to the school population as a whole.’”¹⁸⁵

The Eleventh Circuit in *Boim v. Fulton County School District* similarly appears to have endorsed the view that *Morse* grants school administrators greater discretion when addressing student speech threatening the safety of its students.¹⁸⁶ The court in *Boim* noted: “Recently in *Morse*, the Supreme Court broadly held that ‘[t]he special characteristics of the school environment and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.’ That same rationale applies equally, if not more, strongly to speech reasonably construed as a threat of student violence.”¹⁸⁷

The Fifth Circuit’s rationale is based on the conclusion that “*Tinker* will not always allow school officials to respond to threats of violence appropriately.”¹⁸⁸ So, the Fifth Circuit mined Justice Alito’s concurrence looking for that authority and did so by concluding that it is the controlling opinion in *Morse*.¹⁸⁹ However, the Seventh Circuit has rejected the suggestion that Justice Alito’s concurrence is controlling. The Seventh Circuit observed that “Justices Alito and Kennedy . . . joined the majority opinion not just the decision, and by doing so they made it a majority opinion and not merely, as the plaintiff believes (as does the Fifth Circuit), a plurality opinion.”¹⁹⁰ In the Seventh Circuit’s view, “[t]he concurring Justices wanted to emphasize that in allowing a school to forbid speech that encourages the use of illegal drugs, the Court was not giving schools carte blanche to regulate student speech. And they were expressing their own view of the permissible scope of such

184. *Id.*

185. *Id.* at 771-72.

186. *Boim*, 494 F.3d at 984 (citation omitted). *Boim* involved the expulsion of a high school student who wrote a story in her notebook about a dream of taking a gun to school and shooting her math teacher. The court in *Boim* concluded that there was no First Amendment right allowing a student to make statements that could be perceived as a threat of student violence “while on school property during the school day.” *Id.*

187. *Id.*

188. *Ponce*, 508 F.3d at 770.

189. *Id.* at 768; *Morgan*, 659 F.3d at 374 n.46.

190. *Nuxoll*, 523 F.3d at 673.

regulation.”¹⁹¹

Thus, the lens through which Justice Alito’s concurring opinion is examined alters one’s view of the scope of *Morse*’s reach. The Third and Seventh Circuits view *Morse* as announcing a relatively narrow holding addressing speech that advocates drug use, whereas the Fifth and Eleventh Circuits read the decision expansively as granting schools greater authority than permitted under *Tinker* to address violent or threatening speech.

Practically speaking, however, courts are less likely to second guess the decisions of school administrators when threatening speech is involved because “true threats” are not protected speech.¹⁹² Even when a student’s speech or expressive activities may not technically meet all of the elements of the true threat exception, courts have not hesitated to find school officials had a reasonable basis to predict disruption was likely to occur once knowledge of the threatening speech began to spread around the school.¹⁹³ The Eighth Circuit recently observed: “The First Amendment did not require the District to wait and see whether D.J.M.’s talk about taking a gun to school and shooting certain students would be carried out.”¹⁹⁴

V. THE FIRST AMENDMENT AND INTERNET STUDENT SPEECH

Students’ Internet activities raise particularly difficult First Amendment issues for school administrators. While the First Amendment’s protective cloak does not cover “[c]asual chit-chat between two persons or otherwise confined to a small social group,”¹⁹⁵ it does encompass any medium or form of expression “including music, pictures, films, photographs, paintings, drawings, engravings, prints and sculptures,”¹⁹⁶ which express “ideas, narratives, concepts, images, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform,

191. *Id.*

192. See Section III A and notes 53 - 63. The Fifth Circuit in *Ponce* noted that the student’s diary at issue was “much more characteristic of threat speech, which the Supreme Court has held that the government may proscribe without offending the First Amendment.” 508 F.3d at 772, n.4 (citing *Watts v. United States*, 394 U.S. 705 (1969)).

193. See, e.g., *LaVine*, 257 F.3d at 981 (upholding a student’s expulsion over a graphic and violent poem about killing his classmates).

194. *Hannibal*, 647 F.3d at 764.

195. *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188 (6th Cir. 1995) (same).

196. *ETW Corp. v. Jirek Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)); *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) (holding “erotic photographs in ‘provocative magazines’” enjoy First Amendment protection). Even violent video games have qualified for First Amendment protection. *Brown*, 131 S. Ct. 2729, 2733.

edify or entertain.”¹⁹⁷ Student Internet speech or activity also “raises the metaphysical question of where [a student’s] speech occurred when [the student] used the Internet as the medium.”¹⁹⁸ One of the Internet’s features is that it removes the spatial distance between the person posting content on the Web and the person viewing that content.

Internet-based student speech decisions have involved a myriad of fact patterns, and a wide variety of social media. Lower courts have addressed the creation of phony MySpace profiles of school officials;¹⁹⁹ the creation of social networking groups to criticize a teacher or bully a fellow student;²⁰⁰ a student’s web page containing crude and vulgar language;²⁰¹ a web page with mock obituaries of other students;²⁰² a web page with a list of classmates who the web site creator wished would die;²⁰³ a web page that gave a list of reasons why a teacher should die and solicited donations to pay for a “hit man;”²⁰⁴ e-mail or instant messages (IM) between students that belittled school administrators;²⁰⁵ or threatened to harm fellow students;²⁰⁶ the use of an instant messaging (IM) icon depicting a teacher being shot;²⁰⁷ a slide show posted on YouTube dramatizing the murder of a teacher;²⁰⁸ “trash talking” on website message boards;²⁰⁹ cyberbullying via a YouTube video;²¹⁰ provoca-

197. *Swank*, 898 F.2d at 1251 (noting that idle chit-chat “is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of speech that is protected by the First Amendment”). To the extent that idle chit-chat is protected, Judge Posner explained in *Swank* that its protection lies in “the due process clause, along with other harmless liberties.” *Id.*

198. *Kowalski*, 652 F.3d at 573.

199. *Layshock*, 650 F.3d at 205; *J.S.*, 650 F.3d at 195.

200. *Evans v. Baker*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (involving the creation of a Facebook group titled: “Ms. Sarah Phelps is the worst teacher I ever met,” intended to allow students to voice their dislike of their teacher); *Kowalski*, 652 F.3d at 573 (addressing a group web page criticizing another student which provides a glimpse into cyberbullying).

201. *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799 (N.D. Ohio 2002); *Beusink*, 30 F. Supp. 2d at 1180.

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

203. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002).

204. *Bethlehem Area Sch. Dist.*, 807 A.2d at 851.

205. *Killion*, 136 F. Supp. 2d at 446 (involving a “top ten” list denigrating a school athletic director that was emailed to friends and was printed and brought to school).

206. *Hannibal*, 647 F.3d at 763-65.

207. *Wisniewski v. Board of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

208. *O.Z. v. Bd. of Trustees*, 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008).

209. *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 704-06 (W.D. Pa. 2003) (involving student discipline for “trash talking” on a website message board regarding an upcoming volleyball game).

210. *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1098 (involving a video posted on YouTube in which a group of students collectively ganged up on a 13-year-old classmate by making derogatory, sexual and defamatory statements about her); *Kowalski*, 652 F.3d

tive photos posted on students' Facebook pages;²¹¹ threatening Facebook postings²¹² and messages disseminated on publicly accessible blogs targeting school administrators.²¹³ For the most part, the students worked online from home, although their intended audience generally was other students from their school.

A number of district courts, while sympathetic to a school district's need to maintain a safe and orderly learning environment, nevertheless enjoined student discipline for Internet speech or statements made on social networking websites originating from the student's home.²¹⁴ In several instances, the courts concluded that the speech did not involve a "true threat,"²¹⁵ or was not lewd,²¹⁶ or that it was lewd speech but occurred off campus,²¹⁷ or that a school's concern over a potential disruption was overblown.²¹⁸ While a few of these decisions can be explained

at 567-68 (addressing a group web page on MySpace which targeted a classmate for abuse and ridicule).

211. *Smith-Green Cmty. Sch. Corp.*, 2011 WL 3501698, at *1-2 (involving photos of 15 and 16-year-old high-school girls posing with rainbow-colored, phallic-shaped lollipops and toy tridents).

212. *Tatro*, 800 N.W.2d at 822 (addressing a University student's Facebook postings which referenced a "Death List" and wanting to "stab" someone).

213. *Doninger I*, 527 F.3d at 48.

214. *See, e.g., Beussink*, 30 F. Supp. 2d at 1180; *Emmett*, 92 F. Supp. 2d at 1090; *Killion*, 136 F. Supp. 2d at 458.

215. *Emmett*, 92 F. Supp. 2d at 1090 (involving a student-created web page with mock obituaries of other students that allowed visitors to vote on who should be the next to "die" and have their obituary posted on the site). The obituaries in *Emmett* were written tongue-in-cheek and were inspired by a creative writing class in which students were assigned to write their own obituaries. The court concluded that no evidence was presented that the mock obituaries and voting on the site were intended to threaten anyone or that anyone actually felt threatened. *See also Mahaffey*, 236 F. Supp. 2d at 785-86 (granting summary judgment on plaintiff's First Amendment claim stemming from a one semester suspension from school for creating a web site titled "Satan's web page" which listed "people I wish would die"). The website also contained "SATAN'S MISSION FOR YOU THIS WEEK" and stated: "Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. Unless [sic] Im [sic] there to watch. Or just go Detroit. Hell is right in the middle. Drop by and say hi. PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?" *Id.* at 782. The district court in *Mahaffey* concluded, "a reasonable person in Plaintiff's place would not foresee that the statement on [his] website would be interpreted as a serious expression of an intent to harm or kill anyone on the website." *Id.* at 786.

216. *Coy*, 205 F. Supp. 2d at 799 (describing a student's web page as "crude" but noting that it did not have the "elaborate, graphic and explicit sexual metaphor[s]' at issue in *Fraser*").

217. *See, e.g., Layshock*, 496 F. Supp. 2d at 599; *Coy*, 205 F. Supp. 2d at 799-800; *Killion*, 136 F. Supp. 2d at 456-57.

218. *Beussink*, 30 F. Supp. 2d at 1180 (enjoining a student's suspension for creating a web page critical of his high school using crude and vulgar language where the evidence

by a failure of proof,²¹⁹ or by a disagreement over the proper test for determining whether a statement qualifies as a “true threat,”²²⁰ the reasoning of several of the decisions is difficult to reconcile,²²¹ and as explained in the next section of this article, a split in the circuits has developed.²²²

While these district court decisions are too numerous to comprehensively discuss, one point bears mentioning. Several of the decisions that found a First Amendment violation for disciplining a student’s Internet activities²²³ were based on the Second Circuit’s decision in *Thomas v. Board of Education*.²²⁴ Thomas held that school officials violated the First Amendment when they disciplined high school students for an underground newspaper that was primarily published and distributed off campus and had “minimal” contacts with the school.²²⁵ An important, but frequently overlooked point about *Thomas* is that the school district viewed the underground paper as meeting the test for obscenity, which meant it did not fall under the shield of the First Amendment.²²⁶ The Second Circuit disagreed with the school district’s argument on that issue. Moreover, Judge Newman, in his concurring opinion, explained that the school authorities in *Thomas* “disclaimed any interest in disciplining students for activity [o]ff school property and the students . . .

revealed the suspension was imposed not based on any fear of disruption but because the school principal was upset over the content of the web page).

219. *Layshock*, 496 F. Supp. 2d at 600-01 (concluding “there is no evidence from which at reasonable jury could conclude this incident caused a material and substantial disruption of school operations”); *Killion*, 136 F. Supp. 2d at 455 (noting “defendants failed to adduce any evidence of actual disruption”); *Latour v. Riverside Beaver Sch. Dist.*, 2005 WL 2106562, at *2 (W.D. Pa. Aug. 24, 2005) (enjoining a student’s expulsion in light of a school official’s testimony that the student’s violent rap songs did not cause any disruptions prior to his expulsion).

220. See *Mahaffey*, 236 F. Supp. 2d at 785-86 (noting a conflict in the federal circuits and explaining the Sixth Circuit’s true threat test is whether “a reasonable person would foresee that [a] statement would be interpreted by those to whom [it was communicated] as a serious expression of an intention to inflict bodily harm).

221. One district court after surveying the law on this issue concluded: “[W]hen it comes to student cyber-speech, the lower courts are in complete disarray handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent controlling legal principles.” *Doninger v. Neihoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir. 2011).

222. *J.S.*, 650 F.3d at 950 (Fisher J., dissenting) (explaining the Third Circuit’s *en banc* decision creates a split with the Second Circuit).

223. See *Killion*, 136 F. Supp. 2d at 457; *Coy*, 205 F. Supp. 2d at 799.

224. *Thomas*, 607 F.2d at 1043.

225. *Id.* at 1045, 1050 (holding school officials exceeded the scope of their authority and violated the First Amendment for disciplining students for an “off-campus publication” modeled on the *National Lampoon* containing articles on masturbation and prostitution and having minimal contacts with the school).

226. *Id.* at 1051-52.

demanded, but [had] not yet exercised, the right to distribute their publication [o]n school property.”²²⁷ In other words, the school authorities “thought the on-campus activity was significant” but the Second Circuit in *Thomas* again disagreed with the school authorities on that point.²²⁸

Subsequently, the Second Circuit restricted the scope of *Thomas*’ holding in several decisions addressing students’ use of the Internet and social media. *Wisniewski v. Board of Education*²²⁹ involved a student’s First Amendment challenge to his speech that occurred off-campus. The student was disciplined for “instant messages” that he sent to classmates from his home, which included an icon depicting a teacher being shot. The Second Circuit in *Wisniewski* held that *Tinker* could be applied to the student’s speech despite the fact that it occurred away from school property.²³⁰ The *Wisniewski* court recalled that in *Thomas* it specifically had envisioned a case in which a group of students incited “substantial disruption within the school from some remote locale.”²³¹ In *Doninger v. Neihoff*, the Second Circuit subsequently rejected the suggestion that *Thomas* “clearly established that off-campus speech-related conduct may never be the basis for discipline by school officials.”²³²

Since the Second Circuit’s holding in *Thomas* provides the doctrinal foundation for a number of district court decisions finding a First Amendment violation involving student speech, those decisions have to be examined in light of the Second Circuit’s subsequent decisions in *Wisniewski* and *Doninger*. For example, in *O.Z. v. Board of Trustees*,²³³ the district court addressed a student’s First Amendment claim involving a YouTube slide show the student created which depicted the murder of a school-teacher. In *O.Z.*, school officials became aware of the slide show only after the teacher ran a Google search on her name and found it on YouTube. Although the slide show was created off-campus, because it reached the teacher and the school principal, the district court applied *Wisniewski* and concluded that the slide show “created a foreseeable risk of disruption within the school.”²³⁴

VI. THE CIRCUITS’ VARIOUS APPROACHES TO INTERNET SPEECH

This section discusses the leading federal appellate circuit decisions that have addressed the First Amendment rights of students involving

227. *Id.* at 1053 (Newman J., concurring) (alteration in original).

228. *Id.* at 1054 (Newman, J., concurring).

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

230. *Id.* at 39.

231. *Id.* (quoting *Thomas*, 607 F.2d at 1052 n.17); see also *Doninger II*, 642 F.3d at 347.

232. *Doninger II*, 642 F.3d at 347 (citing *Wisniewski*, 494 F.3d at 39).

233. *O.Z.*, 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008).

234. *Id.* at *4.

their use of the Internet. It highlights the circuit split that has developed regarding Internet speech.

A. SECOND CIRCUIT

*Wisniewski v. Board of Education of Weedsport Central School District*²³⁵ involved the instant messages (IMs) of an eighth-grade student sent from his computer at home to the home computers of other students on his buddy list. The particular instant messaging program allowed users to create an avatar or icon that could be displayed on the computer screens of those exchanging IMs. The icon identified the person sending or receiving a message. The particular icon involved in *Wisniewski* was a crude drawing of a pistol firing a bullet at a person's head with dots of splattered blood. Beneath the icon appeared the statement: "Kill Mr. VanderMolen," who was the student's English teacher. The student sent instant messages with this icon to 15 members of his buddy list over a three-week period. The icon was never sent electronically to any school official. However, the icon eventually came to the attention of other students, one of whom informed Mr. VanderMolen about it and later provided him with a copy.²³⁶ The student subsequently was suspended for one semester, and his parents sued claiming the suspension violated the First Amendment.

The Second Circuit affirmed summary judgment for the district finding no First Amendment violation. The court in *Wisniewski* chose not to base its decision on whether the icon constituted a "true threat" under *Watts*. Rather, the court based its holding on *Tinker's* substantial disruption test.²³⁷ The Second Circuit held "it was reasonably foreseeable that the icon would come to the attention of school authorities and the teacher whom the icon depicted being shot" given the threatening content of the icon and the extensive distribution of it, which encompassed "15 recipients, including some of [the student's] classmates, during a three week circulation period."²³⁸ The court further explained that once the icon was "made known to the teacher and other school officials, [it] would create a risk of substantial disruption within the school environment."²³⁹ In the Second Circuit's view, it made no difference whether or not the student "intended his icon to be communicated to school authorities or, if communicated, to cause a substantial disruption."²⁴⁰

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

236. *Id.* at 35-36.

237. *Id.* at 37-38.

238. *Id.* at 39-40.

239. *Id.* at 40.

240. *Id.* The Fourth Circuit recently followed the Second Circuit's reasonable foreseeability approach in its *Hannibal* decision addressing Internet messages between two students where one student indicated he would borrow a .357 Magnum and shoot other

Doninger v. Neihoff addressed a student's statements made on her publicly accessible blog hosted by livejournal.com, which inaccurately reported that an annual battle of the bands held at the school had been cancelled. The student's message referred to school officials as "douche bags," and encouraged others to write or call the school district's superintendent "to piss her off more." School administrators received a number of phone calls, e-mails and personal visits from students. For several days the school administrators had to deal with the resulting controversy. Ultimately, the school refused to allow the plaintiff to run for senior class office or to take office after winning a plurality of votes as a write-in candidate.

The Second Circuit in *Doninger* explained: "a student may be disciplined for expressive conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach [the] campus."²⁴¹ Because the student's postings resulted in a deluge of phone calls and e-mails from upset students, which required the attention of the school administrators for several days, this was held sufficient to meet *Tinker's* substantial disruption test.

B. THIRD CIRCUIT

In a pair of *en banc* decisions addressing phony MySpace profiles of school principals, the Third Circuit held that the students' Internet speech was protected by the First Amendment and that school officials were powerless to discipline the students despite the disturbing content of the profiles created by the students.²⁴² In both cases, the students used an actual photo of the principal in creating the phony profile, which was cut and pasted from the school district's website.

J.S. v. Blue Mountain School District involved an eighth grade student who created a fake MySpace profile of her school principal, identified as "a bisexual Alabama middle school principal named 'M-Hoe.'"²⁴³ While J.S. claimed the profile was intended to be a joke between herself and her friends, she created it after the principal had twice disciplined

students. While the Fourth Circuit held the statements constituted a true threat and were not protected speech under the First Amendment, *Hannibal*, 647 F.3d at 764-65, it also applied *Tinker* as an alternative basis to uphold the student discipline. The court concluded, "it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment." *Id.* at 766.

241. *Doninger I*, 527 F.3d at 48 (quoting *Wisniewski*, 494 F.3d at 40).

242. *J.S.*, 650 F.3d at 920.

243. *Id.* at 920.

her for dress code violations.²⁴⁴ The profile was filled with “crude content and vulgar language,” and was laced with “profanity and shameful personal attacks aimed at the principal and his family.”²⁴⁵ The URL for the profile ended with the phrase “kidsrockmybed.”²⁴⁶

Initially, the profile could be viewed by anyone with access to the Internet.²⁴⁷ However, after several students approached J.S. at school the next day to tell her that they thought the profile was funny, she marked it “private,” which limited access of the profile to students who were her MySpace friends. Two days after the profile was created, a student who had seen the profile told the principal about it and, at the principal’s request, provided a printout of the profile to him.

J.S. initially denied any involvement with the profile but eventually admitted her role in creating it. The school district concluded the profile violated its disciplinary code and suspended J.S. for ten days. The principal contacted MySpace and was able to have the profile taken down. The principal also contacted the police about possibly pressing criminal charges. While J.S. and her mother were called to the police station to discuss the profile, no criminal charges were ever pursued.

The student’s parents challenged her suspension arguing the First Amendment prevented the district from disciplining their daughter for writing the vulgar and offensive statements about her principal. The district court entered summary judgment in favor of the school district by essentially combining *Fraser and Morse’s* standards.²⁴⁸ The district court held the student’s “vulgar, lewd and potentially illegal speech . . . had an effect on campus,” and concluded the school district did not violate the First Amendment in punishing J.S. for it.²⁴⁹

A panel of the Third Circuit initially affirmed the district court, concluding that while the profile was created off-campus, *Tinker* was applicable because of its potential to cause substantial disruption at the

244. *Id.*

245. *Id.* The profile listed the principal’s interests as “riding the fraintain, spending time with my child (who looks like a gorilla) . . . fucking in my office, hitting on students and their parents.” *Id.* at 920. The profile described the principal as a “sex addict,” and as a “fagass put in the world with a small dick, Principal” and stated that he loved “children, sex (any kind) . . . and my darling wife who looks like a man (who satisfies my needs) MYFRAINTRAIN.” *Id.* at 921. The profile’s references to “faintain” were to the principal’s wife, Debra Frain who worked as a guidance counselor at the school. *J.S.*, 650 F.3d at 921, 923.

246. *Id.* at 941 (Fisher J., concurring) (the URL was <http://www.myspace.com/kidsrockmybed>).

247. One district court has observed that, “MySpace.com is the most visited web site in the United States.” *MySpace*, 474 F. Supp. 2d at 845.

248. *J.S.*, 650 F.3d at 923.

249. *J.S.*, 2008 WL 4279517, *aff’d in part, rev’d in part*, 650 F.3d 915.

school.²⁵⁰ The panel concluded the student profile demonstrated “a reasonable possibility of future disruption” because it made offensive “insinuation[s] that strike at the heart of the [principal’s] fitness to serve in the capacity of a middle school principal.”²⁵¹ The panel recognized that *Tinker* also permits schools to regulate student speech when it invades the rights of others, but noted that it did not have to address that issue since it already had determined that the student speech “presented a reasonable threat of substantial disruption” to the school.²⁵²

Because the panel’s decision in *J.S.* ostensibly conflicted with another panel decision issued the same day in *Layshock v. Hermitage School District*,²⁵³ the Third Circuit granted rehearing en banc, and reversed the district court in *J.S.* in an eight-to-six ruling.²⁵⁴

The majority in *J.S.* assumed without deciding that *Tinker* applied to the student’s speech. It concluded that plaintiff’s speech did not cause a substantial disruption in school.²⁵⁵ While recognizing that a “School District need not prove with certainty that substantial disruption will occur,”²⁵⁶ the court concluded the facts did not support the conclusion “that a forecast of substantial disruption was reasonable” under the circumstances.²⁵⁷ The majority compared the school district’s evidence of disruption in *J.S.*—general rumblings around the school about the profile, a few instances of students talking in class about it, and some school officials having to rearrange their schedules—with the record in *Tinker* and found it similarly lacking, “despite the unfortunate humiliation” which the profile caused the principal.²⁵⁸

The court summarily rejected the district’s argument that substantial disruption was likely to occur because the profile would engender “suspicions among the school community about the [principal’s] character because of [its] references to his engaging in sexual misconduct.” The

250. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 301 (3d Cir. 2010), *rehearing en banc granted and opinion vacated*, 2010 LEXIS 7342 (3d Cir. April 9, 2010) (“off-campus speech that causes or reasonably threatens to cause substantial disruption of or a material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*”).

251. *Id.* at 302.

252. *Id.* at 301 n.9.

253. *Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3d Cir. 2010), *reh’g en banc granted and opinion vacated*, (3d Cir. June 13, 2011).

254. *J.S.*, 650 F.3d at 920, 941.

255. *Id.* at 928 (noting “the School District’s counsel conceded this point at oral argument”).

256. *Id.* (citing *Doninger I*, 527 F.3d at 51; *Lowery*, 497 F.3d at 591-92; *LaVine*, 257 F.3d at 989).

257. *Id.* at 928. The court in *J.S.* reiterated “*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of a disturbance.” *Id.* at 926 (quoting *Saxe*, 240 F.3d at 211).

258. *Id.* at 929-30.

court did so by noting “[t]he profile was so outrageous that no one could have taken it seriously.”²⁵⁹ However, the court also recognized “that the vulgar and offensive speech such as that employed in this case—even made in jest—could damage the careers of teachers and administrators.”²⁶⁰

The court in *J.S.* readily concluded that *Fraser* was inapplicable because *Fraser* does not apply to off-campus speech.²⁶¹ The fact that a printed copy of the profile was brought to school at the principal’s request did not transform the student’s “off-campus speech into school speech.”²⁶² While recognizing that *Tinker* also addressed speech that invades the rights of others, the court limited the application of *Tinker*’s second prong to students, noting, “if that portion of *Tinker* is broadly construed, an assertion of virtually any rights could transcend and eviscerate the protections of the First Amendment.”²⁶³ However, *Tinker* itself explained that neither students, nor teachers shed their constitutional rights in our public schools.²⁶⁴ Thus, as explained in Section VII of this article, both students and teachers should be able to invoke the protection of *Tinker*’s rights of others prong.

Five members of the majority filed a concurring opinion in *J.S.* in which they expressed the view that *Tinker* does not apply to off-campus speech and “that the First Amendment protects students engaging in off-campus speech to the same extent it protects citizens in the community at large.”²⁶⁵ However, the concurring judges also recognized the difficulty in determining whether digital-age speech takes place on campus or off-campus, and concluded: “The answer plainly cannot turn solely on where the speaker is sitting when the speech was originally uttered.”²⁶⁶ The concurring judges in *J.S.* were willing to apply *Tinker* to a case where a student sends “a disruptive e-mail to school faculty from his home computer.” They explained: “Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech.”²⁶⁷ Parting ways with the Second Circuit, they observed

259. *J.S.*, 650 F.3d at 930.

260. *Id.* at 929 n.7.

261. *Id.* at 932. “*Fraser*’s lewdness standard cannot be extended to justify a school’s punishment of *J.S.* for [her] use of profane language outside the school, during non-school hours.” *Id.*

262. *Id.*

263. *Id.* at 931 n.9 (stating “[w]e are not aware of any decisions analyzing whether this language applies to anyone other than students”).

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

265. *J.S.*, 650 F.3d at 936 (Smith J., concurring).

266. *Id.* at 940.

267. A majority of the judges in the Third Circuit (the five concurring and six dissenting judges in *J.S.*) agreed that *Tinker* could be applied to at least some types of student speech on the Internet.

“speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus.”²⁶⁸

The dissent characterized the court’s holding as “severely undermining the authority of school officials to perform their jobs,” and accused the majority of failing to recognize the harmful effect that accusations of sexual misconduct would have on the principal and the school community.²⁶⁹ They noted that students and parents unfamiliar with the principal would have “serious questions” about his character and actions, and that school administrators would have to spend a considerable amount of time alleviating their concerns.²⁷⁰ Therefore, the profile’s potential to cause substantial disruption was reasonably foreseeable and that was sufficient under *Tinker*.

That the plaintiff did not intend the profile to reach the school was immaterial in the dissent’s view.²⁷¹ The dissent agreed that “[t]he line between ‘on-campus’ and ‘off-campus’ speech is not as clear as it once was” in part because “Internet use among teens is nearly universal.”²⁷² It observed that students today “carry cell phones with internet capabilities onto school grounds” which provide “near-constant student access to social networking sites.” The dissent concluded that the majority’s reasoning “that hostile and offensive online speech will not reach the school” was simply untenable.²⁷³

In *Layshock v. Hermitage School District*,²⁷⁴ a high-school senior created a “parody profile” of his principal, which he posted on MySpace. Among other things, the profile indicated that the principal smoked marijuana, was a drunk, and a “big steroid freak.”²⁷⁵ Plaintiff allowed other students to have access to the profile by listing them as friends on the MySpace profile page. The court noted that “word of the profile ‘spread like wildfire’ and soon reached most, if not all, of the [high school’s] student body, and three other fake profiles about the principal were found posted on MySpace.”²⁷⁶ The principal learned of one of these

268. *Id.*

269. *Id.* at 945. The dissent explained, “stating that the principal of a middle school has sex in his office and is a ‘sex addict’ who enjoys ‘hitting on children and their parents’ are serious allegations that cannot be taken lightly by any school official or by our Court.” *Id.* at 949.

270. *Id.* at 945-46.

271. *J.S.*, 650 F.3d at 951.

272. *Id.* at 951 (citing Amanda Lenhart, et al., *Teens and Mobile Phones*, PEW INTERNET (April 20, 2010), <http://pewinternet.org/Reports/2010/Teens-and-mobile-Phones.aspx>, for the proposition that 93 percent of teenagers use the internet and 61 percent use it daily”).

273. *Id.* (stating that, “66 percent of students receive a cell phone before the age of 14, and slightly less than 75 percent of high school students have a cell phone”).

274. *Layshock*, 650 F.3d at 205 (en banc).

275. *Id.* at 208.

276. *Id.*

other profiles from his daughter who was in the eleventh grade.²⁷⁷

The principal found the profiles were “degrading, demeaning, demoralizing and shocking.” He was also concerned about his reputation and complained to the local police.²⁷⁸ However, just as in *J.S.*, no criminal charges were ever filed over any of the profiles. The school district found that plaintiff’s creation of the fake profile violated its disciplinary code. The school district suspended plaintiff for ten days, placed him in an alternative education program at the high school for the remainder of the school year, banned him from participating in all extracurricular activities and from participating in his graduation ceremony.²⁷⁹

The plaintiff in *Layshock* challenged the school district’s disciplinary decision. The district court granted summary judgment in favor of the school officials but against the school district on plaintiff’s First Amendment claim. It ruled that the school district failed to “establish a substantial nexus between [the student’s] speech and a substantial disruption of the school environment.”²⁸⁰ It further concluded that the Court’s decision in *Fraser* did not permit schools to “punish lewd and profane off-campus speech,” and that there was “no evidence that [the student] engaged in any lewd or profane speech while in school.”²⁸¹

The Third Circuit began its *en banc* opinion by noting the school district did not argue, “that it could properly punish [the student] under *Tinker*.” Rather, the school district took the position that *Fraser* could be invoked because a sufficient nexus existed to regulate the speech. It pointed to the fact that the student had entered the school district’s web site to copy the principal’s picture, the speech was aimed at the school community and the profile had been accessed on campus by the plaintiff.²⁸²

The court found the district’s argument about plaintiff entering the district’s WEBSITE to copy the principal’s photo was “unpersuasive at best,” holding the Second Circuit’s reasoning in *Thomas* far more compelling because there “all but an insignificant amount of relevant activity . . . was designed to take place beyond the school house gate.”²⁸³ The *Layshock* court found the relationship between the student’s conduct and the school far more attenuated than in *Thomas*.

277. *Id.*

278. *Id.* at 209.

279. *Id.* at 210. The court in *Layshock* also noted that prior to creating the MySpace profile, plaintiff was classified as a “gifted student,” was the only student who was punished for the MySpace profiles and was the only student to apologize for his actions. *Layshock*, 650 F.3d at 210.

280. *Layshock*, 496 F. Supp. 2d at 600, *aff’d*, 650 F.3d at 205 (en banc).

281. *Id.* at 599-600.

282. *Layshock*, 650 F.3d at 214.

283. *Id.* at 215 (quoting *Thomas*, 607 F.2d at 1050).

While recognizing “Tinker’s ‘schoolhouse gate’ is not constructed solely of the bricks and mortar surrounding the school yard,” *Layshock* further observed, “the concept of the ‘school yard’ is not without boundaries and the reach of school authorities is not without limits.”²⁸⁴ The court sloughed off the school district’s remaining nexus arguments explaining, “schools may punish expressive conduct that occurs outside of the school, as if it occurred inside the ‘schoolhouse gate,’ under certain very limited circumstances, none of which are present here.”²⁸⁵

The Third Circuit in *Layshock* comes close to melding two conceptually distinct concepts in arriving at its holding—whether or not the Internet speech occurs on-campus or off, and whether or not substantial disruption occurred—when it observed:

We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because . . . the district court found that [the student’s] conduct did not disrupt the school, and the District does not appeal that finding. Thus, we need only hold that [the student’s] use of the District’s web site does not constitute entering the school, and that the District is not empowered to punish his out of school conduct under the circumstances here.²⁸⁶

A concurring opinion was filed in *Layshock* to clarify “whether school administrators can, consistent with the First Amendment, discipline students for speech that occurs off campus.”²⁸⁷ The concurring judges in *Layshock* wished to emphasize that *Tinker* can be applied to off-campus speech, and observed that “no ruling coming out today is to the contrary.”²⁸⁸ Recalling that the First Amendment does not permit a person to falsely shout fire in a theatre, the concurring judges noted “it is hard to see how words that may cause a pandemonium in a public school would be protected by the First Amendment simply because technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary.”²⁸⁹

The concurring judges in *Layshock* aptly observed that the on-campus/off-campus definitional exercise that occurs with Internet student speech claims “only obscures the effort to answer the central dilemma, which is to balance the need for order in our public schools with the respect for free speech.”²⁹⁰ They also posit:

284. *Id.* at 216.

285. *Id.* at 219.

286. *Id.*

287. *Id.* (Jordan J., concurring).

288. *Layshock*, 650 F.3d at 220 (referring to the Third Circuit’s en banc *Layshock* and *J.S.* decisions announced the same day).

289. *Id.* at 221-22 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

290. *Id.* at 221.

Just as society's interest in public safety surmounts any claim of right to raise a false fire alarm, by the same token, any claimed right to spread scurrilous falsehoods about school administrators may well be outweighed by society's legitimate interest in the orderly administration of public schools.²⁹¹

C. FOURTH CIRCUIT

In *Kowalski v. Berkley County Schools*, the Fourth Circuit held a student's web page, created from her home, which targeted a fellow student for harassment, could be addressed under *Tinker*.²⁹² The web page was titled "S.A.S.H" which stood for "Students Against Sluts Herpes." Plaintiff invited approximately 100 of her MySpace friends to join the group.²⁹³ The first classmate to join the group uploaded a photo of himself and another student holding a sign that read, "Shay has Herpes." Two additional photos were uploaded to the web page, one of which had a picture of the targeted student with a caption "portrait of a whore" added to it, and a second photo was edited to add red dots to the student's face to simulate herpes.²⁹⁴

The day after the web page was posted, the targeted student and her parents filed a harassment complaint with the school district concerning the discussion group. The targeted student did not attend school that day because she was uncomfortable being in classes with the students who posted comments about her on the web page.²⁹⁵ The school district concluded that plaintiff created a "hate web site" in violation of the district's policy on harassment, bullying and intimidation.²⁹⁶ The school district imposed a ten-day suspension and a ninety-day "social suspension." Plaintiff then claimed the school administrators violated her First Amendment rights by punishing her for speech that occurred outside the school.²⁹⁷

The Fourth Circuit in *Kowalski* rejected plaintiff's First Amendment argument, concluding that public schools have a "compelling interest" in

291. *Id.* at 222. The concurring judges in *Layshock* further added that they "do not subscribe to any implication that *Tinker* is inapplicable and that school officials would have been powerless to head off a substantial disruption." *Id.*

292. *Kowalski*, 652 F.3d at 572-73. The Court in *Kowalski* recognized: "There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gates. But . . . we are satisfied that the nexus of *Kowalski's* speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being." *Id.* at 573.

293. *Id.* at 567.

294. *Id.* at 568.

295. *Id.*

296. *Id.* at 569.

297. *Kowalski*, 652 F.3d at 570.

regulating speech that involves “student harassment and bullying.”²⁹⁸ The court found it was foreseeable that the comments posted on the web page “would reach the school via computers, smart phones and other electronic devices,” since most of the web page’s group members and the student targeted for the harassment were classmates at the high school.²⁹⁹

While recognizing that there was a limit to the scope of a school district’s interest “in the order, safety and well being of its students when the speech originates outside the schoolhouse gate,” the court in *Kowalski* held there was a sufficient “nexus between the offending speech and school’s pedagogical interests in carrying out their role as the trustees of the student body’s well being.”³⁰⁰ *Kowalski* is significant in that the Fourth Circuit recognized a school district’s authority to intervene under *Tinker* when the offending speech interferes with another student’s right to be left alone.³⁰¹

D. EIGHTH CIRCUIT

The Eighth Circuit in *D.J.M. v. Hannibal Public School District No. 60* applied the Second Circuit’s reasonable foreseeability approach to *Tinker*’s substantial disruption test.³⁰² *Hannibal*, like the Second Circuit’s decision in *Wisniewski*, involved a student’s instant messages. This time, however, it was the student’s messages, rather than an avatar which threatened the harm. The student’s instant messages in *Hannibal* were sent to another student and discussed borrowing a “357 magnum” from a friend and shooting members of some groups he did not like, which he described as “midget[s], fags and negro bitches.”³⁰³

While the court in *Hannibal* held those messages were “true threats,” and therefore, did not constitute protected speech,³⁰⁴ the court also held “it was reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption in

298. *Id.* at 572 (citing *DeJohn*, 537 F.3d at 319-20).

299. *Id.* at 574.

300. *Id.* at 573.

301. *Id.* at 572 (holding school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning).

302. *Hannibal*, 647 F.3d at 766.

303. *Id.* at 758.

304. *Id.* at 765 (holding there was no First Amendment violation because “school officials would have exposed the District to what reasonably appeared to them as a serious risk of harm to students and disruption of the school environment if no action had been taken in response to D.J.M.’s threatening instant messages which met the court’s test for true threats”).

school.”³⁰⁵

E. THE SPLIT IN THE CIRCUITS INVOLVING *TINKER* AND INTERNET SPEECH

The six dissenting judges in *J.S.* concluded that the court’s decision “causes a split with the Second Circuit.”³⁰⁶ The majority, however, disagreed with the dissent’s suggestion that a circuit split had resulted, arguing that the Second Circuit’s decisions in *Wisniewski* and *Doninger* were distinguishable on the facts and were based on the record presented in each case.³⁰⁷

Perhaps the *J.S.* majority’s view on the circuit split was influenced by its five concurring members who concluded that *Tinker* can be applied to student Internet speech that is “intentionally directed towards the school.”³⁰⁸ By applying that standard, the concurring judges in *J.S.* may have reached the same result in *Doninger*, because the student speech at issue in *Doninger* specifically targeted school officials for disruption.³⁰⁹ The instant messages at issue in *Wisniewski*, on the other hand, were not directed at the school; they were sent to the student’s classmates at their homes with no request that they be forwarded to the school or school officials.³¹⁰ Thus, it seems doubtful that the concurring judges in *J.S.* would have reached the same result in *Wisniewski*. It is also an open question whether the concurring judges in *J.S.* would have reached the same result as the Fourth Circuit in *Kowalski*, where the student speech involved a group web page which targeted another student, rather than the school itself, for harassment.³¹¹

The majority’s approach in *J.S.* also conflicts with the Second, Fourth and Eighth Circuits over the appropriate test to apply under *Tinker* for predicting future disruption stemming from student Internet speech. The Second Circuit adopted a reasonable foreseeability test in

305. *Id.* at 765-66. The court in *Hannibal* noted that school officials spent considerable time responding to calls from parents and students about a rumored hit list explaining what safety measures were in place. In the Court’s view, this was sufficient to establish substantial disruption under *Tinker*.

306. *J.S.*, 650 F.3d at 950 (Fisher, J. dissenting).

307. *Id.* at 931 n.8.

308. *Id.* at 940 (Smith, J., concurring) (explaining the concurring judges “would have no difficulty applying *Tinker* to a case where a student sent a disruptive email to school faculty from his home computer”).

309. *Doninger I*, 527 F.3d at 45 (noting the student encouraged others to contact the school district’s administrators).

310. *Wisniewski*, 494 F.3d at 35-36.

311. *Kowalski*, 652 F.3d at 574 (discussing “the targeted, defamatory nature of [the student’s] speech aimed at a fellow classmate”).

Wisniewski,³¹² which the Fourth Circuit applied in *Kowalski*,³¹³ and the Eighth Circuit followed in *Hannibal*.³¹⁴ The Third Circuit in *J.S.*, however, specifically rejected a foreseeability approach.³¹⁵ The concurring judges in *J.S.* observed that student speech which originates off-campus does not “mutate into on-campus speech simply because it foreseeably makes its way onto campus.”³¹⁶

The Seventh Circuit rejected the suggestion that a school district must prove that speech will cause “disorder or disturbance” unless it is suppressed. It explained that a school district is not “required to prove that unless the speech at issue is forbidden, serious consequences will *in fact* ensue . . . It is enough for the school to present ‘facts which might reasonably lead school officials to forecast substantial disruption.’”³¹⁷ The majority in *J.S.*, however, summarily rejected the information upon which the school district acted. By concluding that the student’s speech “was so outrageous that no one could have taken it seriously,”³¹⁸ the Third Circuit in *J.S.* substituted its judgment for that of the school administrators, and in the process appeared to require proof that substantial disruption would in fact occur.

VII. APPLYING *TINKER* TO INTERNET SPEECH

This section of the article discusses the proper scope of *Tinker’s* rights of others prong involving Internet speech. It also explains why the off-campus/on-campus distinction that has arisen involving the First Amendment rights of students is unworkable when it comes to Internet speech.

The application of *Tinker’s* rights of others prong is particularly im-

312. *Wisniewski*, 494 F.3d at 40 (holding “it was reasonably foreseeable that the IM icon would come to the attention of school authorities,” and that “there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption in the school environment”). See also *Doninger I*, 527 F.3d at 50 (noting the student’s internet posting created a risk of substantial disruption).

313. *Kowalski*, 652 F.3d at 574 (“it was foreseeable in this case that Kowalski’s conduct would reach the school via computers, smartphones, and other electronic devices”).

314. *Hannibal*, 647 F.3d at 765-66 (discussing *Wisniewski* and concluding that “it was reasonably foreseeable that [the student’s] threats about shooting other students would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment”).

315. *J.S.*, 650 F.3d at 626 (observing that “*Tinker* requires a specific and significant fear of disruption”) (quoting *Saxe*, 240 F.3d at 211).

316. *Id.* at 640 (Smith, J. concurring).

317. *Nuxol*, 523 F.3d at 673 (emphasis in original) (quoting *Boucher*, 134 F.3d at 827-28).

318. *Id.* at 930.

portant for combating cyberbullying among students.³¹⁹ Cyberbullying is a growing problem in our schools.³²⁰ Studies have demonstrated that cyberbullying can cause various psychosocial problems in students including anxiety, depression and in extreme cases, can lead to adolescent suicide.³²¹ Besides lowering the victim's self esteem, cyberbullying also can heighten the victim's insecurity, lead to increased absences and truancy, negatively impact his or her academic performance and lower achievement scores.³²² Noticeable drops in academic performance have been attributed to poorer concentration in class and heightened levels of frustration at school and home as a result of the bullying.³²³

Since an individual student is frequently the target of the bullying,³²⁴ at times it may be difficult for school officials to intervene because of difficulty in forecasting substantial disruption that would otherwise be required. The application of *Tinker's* rights of others prong would allow school officials to address bullying cyberspeech which impairs or threatens to impair a student's educational performance or the student's abil-

319. Many definitions of cyberbullying can be found in various state statutes or on the Internet. See Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (Feb. 2012), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf (indicating that forty-six states have anti-bullying laws, thirty-five of which include electronic harassment, and that forty-five states have laws mandating school bullying or cyberbullying policies, thirty-nine of which involve school sanctions). However it is defined, cyberbullying typically involves "the use of modern communication technology to embarrass, humiliate, threaten, or intimidate an individual." Glenn R. Stutzky, *Cyber Bullying Information*, INSTITUTE FOR PUBLIC POLICY & SOCIAL RESEARCH (2011), http://www.ippsr.msu.edu/Documents/Forums/2006_Mar_CYBER_BULLYING_INFORMATION_2006%20-%20Provided%20by%20Mr.%20Glenn%20Stutzky.pdf.

320. See U.S. DEP'T. OF EDUC., CRIME, VIOLENCE, DISCIPLINE AND SAFETY IN U.S. PUBLIC SCHOOLS 12 (May 2011), available at <http://nces.ed.gov/pubs2011/2011320.pdf> (indicating approximately nineteen percent of middle school administrators surveyed indicated that they had to deal with cyberbullying daily or at least once per week); Sameer Hinduja & Justin W. Patchin, *Cyberbullying Victimization*, CYBERBULLYING RESEARCH CENTER (2010), http://cyberbullying.us/2010_charts/cyberbullying_victim_2010.jpg (indicating that approximately twenty percent of students between the ages of ten and eighteen from a sample of 4441 students reported that they had been the victim of cyberbullying).

321. See, e.g., Robert S. Tokunaga, *Following You Home from School: A Critical Review and Synthesis of Research on Cyberbullying Victimization*, 26 COMPUTERS IN HUMAN BEHAVIOR 277, 281 (2010), available at http://icbtt.arizona.edu/sites/default/files/tokunaga_r_cyberbullying.pdf. See also *Price v. Scranton Sch. Dist.*, 2012 WL 37090, at *4 (M.D. Pa. Jan. 6, 2012) (observing plaintiffs' daughter who had been subjected to bullying by her classmates suffered "posttraumatic stress disorder, depression, and anxiety," was taking a prescription antidepressant, experienced nightmares, declining grades, social isolation and was unable to participate in extracurricular school activities).

322. *Price*, 2012 WL 37090, at *4.

323. *Id.*

324. Todd D. Erb, Note, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 274 (2008).

ity to interact with peers at school, even in the absence of predictable disruption at the school. Recognition of *Tinker's* rights of others prong also provides the means to address a student's threatening speech that targets other students or school officials which does not meet the elements of a "true threat." This approach would avoid having to stretch to find that authority to address threatening speech in Justice Alito's concurrence in *Morse*.³²⁵

A. SPEECH THAT INVADES THE RIGHTS OF OTHERS

Only a handful of decisions have discussed *Tinker's* rights of others prong since *Tinker* was decided over four decades ago.³²⁶ Several of the courts that have addressed *Tinker's* second prong observed that its scope is "unclear."³²⁷ There are several probable reasons for this conclusion. First, school districts have not raised the issue in the lower courts or on appeal. Second, mere name-calling, derogatory comments, and teasing are not actionable.³²⁸ By the same token, there is no constitutional right to be a bully, or to abuse or intimidate other students.³²⁹ Additionally, the disciplinary infractions may not have resulted in sanctions severe enough to trigger a court challenge. Finally, courts are reluctant to unnecessarily venture into the uncharted boundaries of harassing speech and the First Amendment.³³⁰ However, with school districts facing potential liability under Title IX for claims involving student-on-student harassment,³³¹ and with the growth of cyberbullying,³³² *Tinker's* rights of others prong takes on greater importance.

325. See the discussion in Section IV, D 1, and notes 159-171.

326. See, e.g., *Trachtman*, 563 F.2d at 516-20; *Kuhlmeier*, 795 F.2d at 1375; *Bystrom v. Fridley High Sch. Indian Sch. Dist.*, 822 F.3d 747, 752 (8th Cir. 1987); *Saxe*, 240 F.3d at 217; *Harper*, 445 F.3d at 1177-80; *Defoe*, 625 F.3d at 334.

327. *Saxe*, 240 F.3d at 217; *Harper*, 445 F.3d at 1178.

328. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

329. *Sypniewski*, 307 F.3d at 264.

330. *Zamecnik*, 636 F.3d at 877 (noting "the very real tension between antiharassment laws and the Constitution's guarantee of freedom of speech") (quoting *Saxe*, 240 F.3d at 209).

331. *Davis*, 526 U.S. at 646-47 (holding school boards can be held liable under Title IX for deliberate indifference to student-on-student harassment). The United States Department of Education has also taken the position that school districts can be held liable under Title IX for failing to discipline student "emails and web sites of a sexual nature." See also *Price*, 2012 WL 37090, at **6-8 (rejecting a school district's motion to dismiss a Title IX claim stemming from the bullying of plaintiff's daughter by a group of classmates even though school administrators punished several of the classmates and met with the parents of those students in an unsuccessful attempt to stop their harassment); U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, DEAR COLLEAGUE LETTER: BULLYING AND HARASSMENT 6 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf>.

332. See U. S. DEP'T OF EDUC., *supra* note 320, at 12.

The Eighth Circuit, in several early decisions, suggested that *Tinker's* second prong is limited to "tortious speech" such as libel, slander and intentional infliction of emotional distress.³³³ Those decisions, however, arose in the context of the type of information school officials could exercise editorial control over school-sponsored publications,³³⁴ and the Supreme Court in *Kuhlmeier* held that schools could exercise editorial control over school sponsored expressive activities so long as their decisions are "reasonably related to legitimate pedagogical concerns."³³⁵ As a result, the Supreme Court in *Kuhlmeier* did not address whether the Eighth Circuit "correctly construed *Tinker* as precluding school speech to avoid 'invad[ing] the rights of others,' except where that speech could result in tort liability to the school."³³⁶

Later decisions suggest the Eighth Circuit's "tort-liability" test for *Tinker's* rights of others prong is both over and under inclusive. The Supreme Court recently recognized that the First Amendment provides a defense to state-law claims of intentional infliction of emotional distress when the speech involves a matter of public concern.³³⁷ The Eighth Circuit's interpretation also would render school administrators powerless to address student speech that does not meet the technical requirements of a tort claim under their state's common law.³³⁸ School administrators are not trained legal professionals who have the background to accurately assess whether a student's speech is tortious in nature. More importantly, however, school administrators should be allowed to address student harassment and bullying on the internet even when it may not meet the elements of a common-law tort in order to maintain an atmosphere conducive to learning.

The Ninth Circuit in *Harper v. Poway Unified School District*,³³⁹ held that a school district could ban a student t-shirt that was highly critical of homosexuality³⁴⁰ under *Tinker's* rights of others prong.³⁴¹

333. *Bystrom*, 822 F.2d at 752; *Kuhlmeier*, 795 F.2d at 1376.

334. *Bystrom*, 822 F.2d at 752; *Kuhlmeier*, 795 F.2d at 1376.

335. *Kuhlmeier*, 484 U.S. at 273.

336. *Id.* at 273 n.5.

337. *Snyder*, 131 S. Ct. at 1219-20 (involving a tort claim brought by the father of a deceased Marine against members of a religious congregation who picketed his son's funeral).

338. *See, e.g., J.S.*, 650 F.3d at 931 n.5 (concluding even if *Tinker's* rights of others prong applied to student's fake MySpace profile of her school principal, it could not be invoked because "no reasonable person" would understand the profile to be describing "actual facts or events") (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988)).

339. *Harper*, 445 F.3d at 1166.

340. *Id.* at 1170-71 (involving a high school student "who was ordered not to wear a T-shirt to school that read, 'BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED' handwritten on the front, and 'HOMOSEXUALITY IS SHAMEFUL' handwritten on the back").

341. *Id.* at 1178.

The Ninth Circuit focused its decision on speech that strikes at “a core identifying characteristic” of students based on their membership in a minority group,³⁴² and limited its holding to “derogatory and injurious remarks directed at a student’s minority status such as race, religion and sexual orientation.”³⁴³ The Ninth Circuit’s rationale, however, seems to run headlong into the Supreme Court’s holding in *R.A.V.*, which held that viewpoint or content discrimination is not permitted even for categories of unprotected speech.³⁴⁴

The Supreme Court subsequently granted certiorari in *Harper* but observed that the district court had entered final judgment and dismissed the claims of injunctive relief as moot.³⁴⁵ Therefore, the Court vacated the judgment in *Harper* to “clea[r] the path for future relitigation of the issues between the parties and eliminate[d] a judgment, review of which was prevented through happenstance.”³⁴⁶ No other circuit has adopted a similar approach to *Tinker’s* rights of others prong. When the Seventh Circuit subsequently was presented with a similar First Amendment claim, it concluded a school that “permits advocacy of the rights of homosexual students cannot stifle criticism of homosexuality.”³⁴⁷ Thus, the Ninth Circuit’s interpretation of *Tinker’s* second prong rests on a questionable footing and fails to provide appropriate guidance.

Before outlining the proper scope of *Tinker’s* rights of other’s prong, it is worth identifying the types of speech that are not encompassed by this aspect of *Tinker*. Student speech on matters of public concern would not *generally* fall within the ambit of this aspect of *Tinker*. The Supreme Court has repeatedly held that “speech on ‘matters of public concern’ . . . is at the heart of the First Amendment’s protection.”³⁴⁸ Indeed, *Tinker* involved speech on a matter of public concern and upheld the wearing of black armbands in silent protest of the war in Vietnam because it had not resulted in any substantial disorder at school. Since *Tinker* expressly permitted this type of core political speech, speech on matters of public concern generally would not be prohibited under *Tinker’s* rights of others prong.

It is foreseeable that a student may claim that he was addressing a matter of public concern, rather than targeting another student for bul-

342. *Id.*

343. *Id.* at 1183. The Ninth Circuit also limited its holding to speech occurring in public elementary and high schools. *Id.*

344. *R.A.V.*, 505 U.S. at 383-84.

345. *Harper*, 549 U.S. at 1262.

346. *Id.* (quoting *Anderson*, 513 U.S. at 560 (per curiam)).

347. *Zamecnik*, 636 F.3d at 876.

348. *Snyder*, 131 S. Ct. at 1215 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (Powell, J., opinion) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

lying or harassment through his speech or expressive activities. Take for example, the situation addressed by the Fourth Circuit in *Kowalski*. The student could argue that her web page was meant to address the spread of herpes and other sexually transmitted diseases in high schools, which *is* a matter of public concern. In reality, however, the student in *Kowalski* was targeting a specific student for ridicule and harassment by other members of her social networking group. When a public-concern argument is raised by a student, school administrators will have to examine the point of the student's speech.³⁴⁹ Was it intended to bring a matter of public concern to light, or was the point to harass and ridicule another student?³⁵⁰ When the latter conclusion is reached, *Tinker's* rights of others prong can be invoked.

Speech that invades the rights of others does not necessarily have to result in substantial disruption before this exception can be invoked. The Court in *Tinker* discussed the rights of others prong as an alternative basis to impose student discipline. While speech that results in substantial disorder would by definition invade the rights of other students,³⁵¹ speech can materially hamper another student's educational performance without resulting in disorder at school. If substantial disruption was required before *Tinker's* rights of others prong could be invoked, there would have been no reason for the Court in *Tinker* to offer an alternative basis for permitting school districts to discipline student speech. The Court in *Tinker* explained, "conduct by a student, in class or out of it, which . . . involves substantial disorder *or* invasion of the rights of others is, of course, not immunized by the . . . guarantee of freedom of speech."³⁵²

The Supreme Court repeatedly has recognized that both within and outside the school context, "the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it;"³⁵³ thus, simply because one student finds another student's clothing or speech offensive is not a sufficient basis to invoke this prong of *Tinker*. By the same token, however, "students cannot hide behind the First Amendment to protect their right to abuse and intimidate other students at school."³⁵⁴ Trying to navigate these landmarks at times can be like

349. See, e.g., *Bivens v. Trent*, 591 F.3d 555, 561 (7th Cir. 2010); *Dambrot*, 55 F.3d at 1187 (addressing the "point" of a coach's locker room speech).

350. *Dun & Bradstreet*, 472 U.S. at 762 (holding information about a particular person's credit report "concerns no public issue").

351. *West*, 206 F.3d at 1366 ("based on recent past events, . . . School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and left alone").

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

353. *R.A.V.*, 505 U.S. at 414 (White, J., concurring).

354. *Sypniewski*, 307 F.3d at 264.

attempting to discern different shades of grey. The Seventh Circuit has observed that “[s]evere harassment . . . blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth.”³⁵⁵ While schools have a compelling interest to prevent harassment and bullying by their students,³⁵⁶ some forms of harassing speech are protected by the First Amendment.³⁵⁷

Thus, recognizing that limitations on students’ First Amendment rights have to take into account the special characteristics of the school environment,³⁵⁸ the appropriate trigger for *Tinker’s* rights of others prong is rooted in a student’s ability to safely attend school and effectively learn. Accordingly, when a student’s speech or expressive activity on the Internet is severe enough that it impairs (or predictably could impair) another student’s educational performance, the student’s ability to interact with his or her peers at school, or the student’s safety at school, the student’s educational rights have been invaded, and *Tinker’s* rights of others prong should be invoked.³⁵⁹

Parents send their children to public schools to obtain an education and expect that their children will be taught in a safe environment conducive to learning. Parents expect that school administrators will address factors that adversely influence their child’s ability to learn at school. When a student’s Internet activities target another student in a way that impairs the targeted classmate’s educational performance, or the student’s ability to interact with his or her classmates, school officials should be allowed to intercede under *Tinker* in order to maintain an atmosphere conducive to effective learning. Similarly, when a student’s Internet speech threatens the safety of another student or group of students at school, their right to learn in a safe environment has been invaded and *Tinker’s* second prong would permit school officials to address the threatening speech.

The Third Circuit in *J.S.* refused to apply *Tinker’s* rights of others prong to the fake MySpace profile of the school principal because of a concern that if it was broadly construed “an assertion of any rights could transcend and eviscerate the protections of the First Amendment.”³⁶⁰ The Third Circuit’s concern over the evisceration of the First Amendment in *J.S.* is misplaced; the student’s profile which indicated the princi-

355. *Zamecnik*, 636 F.3d at 877 (observing that school authorities are entitled to exercise their discretion when determining if speech has crossed over the line of “hurt feelings”).

356. *DeJohn*, 537 F.3d at 319-20.

357. *Saxe*, 240 F.3d at 211.

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

359. *Saxe*, 240 F.3d at 217.

360. *J.S.*, 650 F.3d at 931 n.9.

pal was a sex addict and a pedophile who enjoyed having sex in his office and hitting on students and their parents went far beyond mere name calling or rude commentary. A student can harass and bully teachers and staff as well as other students. There are no age limits with cyberbullying and no one is immune.³⁶¹ When the object of the cyberbullying is a member of the school community, the application of the First Amendment should not vary simply because the student changes the target of his harassment.

In order for schools to properly function, teachers must be able to effectively teach in a classroom and administrators must be able to efficiently run the operation of the school. To accomplish this work requires that schools cultivate an atmosphere conducive to ordered learning which requires that students learn to respect the views of their classmates as well as teachers and school officials. No one would suggest that the First Amendment permits a student to direct a vituperative or derogatory comment to a teacher while in school.³⁶² Admittedly, when the same remark is made over the Internet a slightly different dynamic is at work because work in the classroom is not immediately disrupted by the comment. But it nonetheless promotes a culture of disrespect at school that can hamper the learning environment and a teacher's ability to interact with the student and teach other students.³⁶³

Tinker's rights of others prong can be applied when teachers or staff are the target of the harassing speech. But, just as the "hurt feelings" a student might experience following another student's derogatory comments would not be sufficient to trigger *Tinker's* rights of others prong, neither would hurt feelings or mere derogatory comments be sufficient when the teacher is the target of the student's Internet speech. When a student's Internet speech is objectively severe enough that it impairs the learning environment in a classroom, the work of the school, or a teacher or staff member's ability to effectively teach or interact with students and/or parents, then *Tinker's* rights of others prong should be invoked.

Proponents of students' First Amendment rights argue that school administrators should not become censors of the Internet and that they

361. Bobbie Mixon, *Defining a Cyberbully*, NATIONAL SCIENCE FOUNDATION (Nov. 8, 2011), http://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=121847 (relating the story of a person who was cyberbullied at the age of 40).

362. *Thomas*, 607 F.2d at 1049 (stating, "our children could not be educated if school officials supervising pre-college students were without power to punish one who spoke out in class or who disrupted the quiet of the library or study hall").

363. *Posthumus v. Bd. of Educ. of the Mona Shores Pub. Sch.*, 380 F. Supp. 2d 891, 902 (W.D. Mich. 2005) (stating, "[i]nsubordinate speech . . . is contrary to the principles of civility and respect that are fundamental to a public school education. Failing to take action in response to such conduct would not only encourage the offending student to repeat the conduct but also would serve to foster an attitude of disrespect to teachers and staff).

are usurping the role of parents in disciplining students for their Internet speech. When a student's Internet speech is not directed at the school itself or a member of the school community, school officials would have no reason to intervene unless the Internet speech for some reason results in disruption at the school or foreseeably could result in substantial disruption. The appropriate line of demarcation between the disciplinary jurisdiction of parents and school administrators is whether the student's Internet speech targets the school itself, a school activity, another student, or a member of the school community. When the student's Internet speech targets his school, or a member of the school community, school officials have a legitimate reason to intervene; when the student's Internet speech does not target the school or a member of the school community, the regulation and discipline of the student's Internet speech would properly lie with the student's parents unless and until it results in school disruption.

B. THE ON-CAMPUS/OFF-CAMPUS DISTINCTION IS UNTENABLE FOR
INTERNET SPEECH

Tinker's reference to students not shedding their constitutional rights when they enter the school house gate³⁶⁴ has led lower courts, by negative inference, to conclude that students enjoy the full protection of the First Amendment once they step away from school property. This has resulted in the on-campus/off-campus, or point-of-origin distinction that preoccupies most First Amendment decisions involving student speech on the Internet. A point-of-origin approach can be relevant to other mediums of expression, which are not inherently mobile, *e.g.*, handwritten material has to be physically delivered to school in order to be viewed on campus. That approach may also be relevant when it is argued that the manner in which the speech was delivered caused disruption.³⁶⁵ However, the unique nature of Internet speech renders the on-campus/off-campus distinction unworkable in today's digital age.

Students routinely use the Internet and social networking sites to reach beyond their home. Once information is posted online, it becomes available to anyone in the world with access to the Internet.³⁶⁶ Internet speech is inherently mobile. It travels to and with other students, and can be accessed wherever a student's laptop computer, tablet, or mobile

364. *Tinker*, 393 U.S. at 506-07.

365. *See, e.g.*, *Smith ex rel. Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987, 997 (E.D. Mich. 2003) (holding a student's conduct that involved loudly reading a letter about school personnel in the school cafeteria which referred to the principal as a "skank" and a "tramp" created disruption sufficient to apply *Tinker*).

366. *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011) (observing "the Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction").

phone with Internet access is located. Because students bring their mobile phones to school, a student's Internet speech reaches the school campus whenever a student with a mobile device enters the schoolhouse gate. Courts that simply focus on where the student was physically located when a message was typed or content was created are ignoring the inherently mobile nature of Internet speech. The tools of today's technology have rendered a school's physical property lines immaterial.

Where the speech itself, as opposed to the manner of its delivery, loses the protection of the First Amendment due to the potential for disruption it may cause, both the manner of its communication and its point of origin become immaterial. Even the strongest proponent of student speech would not suggest the First Amendment allows a student to falsely yell: "There's a bomb in the school cafeteria" during a school assembly. The result would not change if the student called the school with the same false message from home via his mobile phone. And, it would make no constitutional difference if the student used that same mobile phone, or a personal computer, to e-mail the message to the school principal or a group of other students from home. The location where the speech originates should not change the protection afforded by the First Amendment because the potential for disruption is the same in each instance.

The First Amendment also would not permit a student to proclaim in class that the school principal or another student is a "whore." Does the First Amendment permit a student to post the same statement on a web page or on a social networking site for all classmates, and the rest of the world for that matter, potentially to see while walking home from school? In both instances the targeted person's character and reputation has been disparaged. When the issue is whether the right of another has been invaded by a student's speech, the use of the Internet potentially would cause greater reputational harm than if the statement is made in school because the size of the audience on the Internet is far greater.

As one federal court of appeals aptly observed, the on-campus/off-campus distinction "raises the metaphysical question of where [the student] speech occurred when [the student] used the Internet as the medium" of expression.³⁶⁷ Is it where the student was located when the message was sent or the content created, or is it where the message is read or the content viewed, or is it both? The Internet eliminates the spatial distance between the person sending the message or posting the content and the party viewing it, which has led the concurring judges in *J.S.* to recognize that speech is "everywhere at once" on the Internet.³⁶⁸

367. *Kowalski*, 652 F.3d at 573.

368. *J.S.*, 650 F.3d at 940 (Smith, J., concurring).

Attempting to answer the metaphysical question of where Internet speech occurs is not only futile; it also shifts a court's focus away from where it belongs—to analyzing whether the Internet speech substantially disrupted the work or discipline of the school or invaded the rights of others. Several federal circuits have recently recognized that attempts to regulate speech that occurs over the Internet cannot turn simply on where the speaker was located when the message was sent.³⁶⁹ Where the subject of the student's Internet speech is the school itself, or another student, or a member of the school community, that alone should be sufficient to trigger the application of *Tinker*, *Fraser* and *Morse*.

To analogize Internet speech to other forms of student speech is inapt for another reason. The likelihood of a student's off-campus derogatory comment about a teacher or another student becoming public knowledge when spoken to a friend is minimal. However, when that same derogatory remark is posted on a web page, the Internet instantaneously makes that derogatory message available for anyone in the world to see.³⁷⁰ Voicing the comment on the Internet makes it far more likely that the comment will find its way back to the teacher or student. Thus, when the subject of the Internet speech is a teacher, a student or the school itself, it is simply a matter of time before the derogatory or harassing speech will find its way to school officials.³⁷¹ Since students carry mobile phones with Internet access, it is not simply reasonably foreseeable that a student's speech will reach the school—it is inevitable.

Support for discarding the on-campus/off-campus distinction for Internet student speech can also be gleaned from the Supreme Court's *Calder v. Jones* decision. *Calder* addressed an allegedly libelous article that was written in Florida by a writer who lived in Florida concerning the "activities of a California resident" whose career was centered in California.³⁷² The issue presented was whether California could exercise juris-

369. *Id.* at 940 (Smith, J., concurring); *Layshock*, 650 F.3d at 220-21 (Jordan, J., concurring); *Kowalski*, 652 F.3d at 573.

370. *Geller*, 533 F. Supp. 2d at 1001 (observing "anyone with access to the Internet can sign up for a YouTube account and upload any video file . . . so the file may be accessed and viewed anywhere in the world").

371. While the five concurring judges in *J.S.* expressed the view that *Tinker* does not apply to off-campus speech, *J.S.*, 650 F.3d at 936, they nonetheless "would have no difficulty applying *Tinker* to a case where a student sent a disruptive email to school faculty from his home computer. *J.S.*, 650 F.3d at 940. In their view, "regardless of its point of origin, speech intentionally directed towards a school is properly considered on-campus speech." *Id.* Therefore, it appears a majority of the Third Circuit would permit regulation of some student Internet speech. While not officially adopting the Second Circuit's reasonable foreseeability test, the view of the five concurring judges is at least consistent with the Second Circuit's view. It is reasonably foreseeable that Internet speech, which focuses on another student or a faculty member would reach the school.

372. *Calder v. Jones*, 465 U.S. 783 (1984).

diction over the writer for the alleged libelous article even though it was written in Florida. *Calder* adopted the so-called “effects test,” and held because the defendant’s conduct was aimed at a person in another state and caused its harm there, jurisdiction was proper. While the jurisdictional question *Calder* addressed is analytically distinct, conceptually the logic of the Court’s rationale generally can be applied here, given the nature of Internet speech.³⁷³

When a student purposefully directs his or her Internet speech at the school, another student, a teacher or staff member at the school, and its effects are felt in the school setting because a student’s safety, educational performance, or ability to interact with other students has been impaired, or a teacher or administrator’s ability to effectively work or interact with others at school has been hampered, that should be a sufficient nexus to invoke the two prongs of *Tinker*. *Tinker* spoke in terms of speech that interfered with the “work and discipline of the school,” and *Morse* recognized the authority of school officials to regulate student speech extends beyond the walls of the school itself.

1. *Have Elementary School Students Been Granted Broader First Amendment Rights Than Teachers?*

If the phony MySpace profile at issue in *J.S.* had been made by a teacher rather than a student, would the teacher have been immune from discipline under the First Amendment? This question is fair because while the First Amendment rights of public employees and public students are analytically distinct, they “are not mutually exclusive concepts.”³⁷⁴

The short answer to this question is no, the First Amendment would not protect a teacher in the hypothetical scenario based on the facts presented in *J.S.* The First Amendment allows public employees to

373. *Shrader*, 633 F.3d at 1244 (addressing allegedly tortious Internet postings and noting they may give rise to personal jurisdiction if they are specifically directed at “a forum state audience or otherwise make the forum state the focal point of the message”); *Tamburo v. Dworkin*, 601 F.3d 693, 707 (7th Cir. 2010) (explaining *Calder*’s “express aiming requirement” is met when internet messages “purposefully target” a person in his or her forum state with the goal of inflicting commercial or reputational harm there “even though their alleged defamatory or tortious statements were circulated more diffusely across the Internet”).

374. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 962 (9th Cir. 2011) (observing “[t]he very basis for understanding a *Pickering*-based analysis of teacher speech, whether in-class or out, is the Court’s recognition that teachers do not ‘relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work’”). *Id.* (quoting *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968)).

speak as private citizens on matters of public concern.³⁷⁵ However, when an employee is not speaking as a private citizen,³⁷⁶ or the employee's speech does not involve a matter of public concern,³⁷⁷ then it is not protected by the First Amendment.

Creating a phony MySpace profile of your boss is not part of a public employee's official duties, so the employee's "speech" likely would be able to jump the "private-citizen hurdle" of First Amendment employee speech claims. However, the defense flounders on the First Amendment's public-concern hurdle. The Third Circuit in *J.S.* concluded that the fake profile was created as a "joke," and that the profile was "so outrageous that no one could have taken it seriously and no one did."³⁷⁸ Therefore, if the profile was created by a public school employee, it could not be fairly characterized as speech addressing a matter of public concern. Ridiculing your boss on the Internet is not a form of protected speech.

Thus, at least on this issue, it appears that eighth grade students in the Third Circuit enjoy greater First Amendment protection than the teachers instructing them. This conclusion begs a practical question: if the role of public schools is to prepare students for meaningful future employment, what message does the holding in *J.S.* send students about how they should conduct themselves as they move into adulthood? Private-sector employers would not countenance the type of Internet speech involved in *J.S.*, and well-qualified individuals may abandon the educational profession if they cannot be protected from the outrageous Internet speech of students.

VIII. CONCLUSION

Internet student speech is an evolving area of First Amendment law producing decisions that are highly fact-specific. That trend will likely continue given the increasing popularity and sophistication of social media on the web. The recognition of *Tinker's* rights of others prong will lessen some of the tension found in decisions applying *Tinker* to student speech on the Internet.

375. *Connick v. Myers*, 461 U.S. 138, 143 (1983).

376. *Garcetti v. Cellabos*, 547 U.S. 410, 421 (2006) (explaining "when public employees make statements pursuant to their official duties, the employees are not speaking as [private] citizens for First Amendment purposes"). The *Garcetti* Court explained: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22.

377. *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (*per curiam*) (holding videos of an employee that were made while off duty engaging in sexually explicit activities did not involve a matter of public concern).

378. *J.S.*, 650 F.3d at 921, 930. The minor plaintiff was in eighth grade when she created the phony MySpace profile of the principal.

School officials should always address their response to Internet based student speech with great care because of the complexity of the First Amendment issues presented. However, a few general principles can be gleaned from the various court decisions discussed in this article.

First, a school district's position is strongest when it can demonstrate that a student's Internet posting communicated what a reasonable person would view to be a "true threat." True threats are not protected speech.³⁷⁹ The more outrageous or potentially dangerous the speech appears from an objective point of view,³⁸⁰ and/or the more potential disruption that can be demonstrated, the more likely it is that the discipline will be upheld. While courts may not be overly sympathetic to a school administrator's reaction to a boorish or disrespectful parody,³⁸¹ they will view threats of violence in a far more serious light. Judges are less likely to second-guess disciplinary decisions when the safety of students is involved.

Second, while there appears to be a trend towards applying *Tinker's* substantial disruption test to Internet speech, unless and until the on-campus/off-campus distinction has been discarded for Internet speech claims, a school district should establish, to the extent it can, that a student's Internet posting or speech was created, transmitted, brought to, or viewed at school. Historically, courts have applied *Tinker* to off-campus activity that was brought to the school by other students.³⁸² Courts that have enjoined a school district's disciplinary decisions for off-campus speech have made a point of mentioning the lack of any nexus between the student's speech and the school.³⁸³

Off-campus speech can find its way to school in any number of ways. Students can access another student's Internet speech and view it online at school via their cell phones, tablets or laptop computers. Schools

379. See, e.g., *Porter*, 393 F.3d at 616 (noting "speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm'").

380. *Boucher*, 134 F.3d at 827-28 (upholding a one-year expulsion of a high school student for writing an article in an underground school newspaper explaining how to hack into the school's computers); *Bethlehem Area Sch. Dist.*, 807 A.2d at 869 (upholding student expulsion for creating a website with a picture of a teacher with a severed head and soliciting funds for her execution).

381. *Killion*, 136 F. Supp. 2d at 455 (addressing a "Top 10" list about a school's athletic director which he created and emailed from his home computer to the home computers of several friends).

382. *Boucher*, 134 F.3d at 829 (denying plaintiff's preliminary injunction prohibiting his punishment for writing articles in an independent newspaper distributed at school); *Porter*, 393 F.3d at 615 n.22 (collecting cases).

383. *Layshock*, 496 F. Supp. 2d at 600 (concluding that defendants did not establish "a sufficient nexus" between a phony MySpace profile created by a student of his school principal and any disruption of the school environment).

should be prepared to provide courts with the number of students having this type of access to the Internet whenever possible. While school districts may purportedly block access to various social networking sites, they should nonetheless be prepared to demonstrate to a court how students could readily circumvent the school's Internet filters.³⁸⁴

The potential for disruption does not turn on the type or format of the student's speech. For example, *Wilson v. Hinsdale Elementary School 181*,³⁸⁵ upheld a 50-day suspension of a student for writing a song that contained lyrics about killing his pregnant teacher's baby. The student in *Wilson* burned the song to a CD, and gave two copies of the CD to other students who brought them to school and played the song for other students in the school's computer lab. What matters is the degree of actual disruption that the student's speech caused, or the foreseeability of potential disruption, and a district's ability to prove the level of disruption that occurred or the facts upon which the district based its forecast of future disruption.

Third, school districts have great leeway in regulating the use of their computers and the Internet at school. The ability of a district to establish that a student's offensive speech was accessed (or created in whole or in part) through the use of school computers or the school's computer network, which in turn violated the district's policies on computer and Internet use, should help to demonstrate a nexus to the school and increase the likelihood that a court will uphold the discipline.

Fourth, school districts should not overlook *Tinker's* rights of others prong in defending its disciplinary decisions. Districts should be prepared to present evidence concerning the emotional impact that an Internet posting had on its recipient,³⁸⁶ be it a teacher or a student. School districts should be prepared to demonstrate how a student's educational performance was hampered, or potentially could have been hampered, how the student's ability to interact with classmates at school was harmed, or how a teacher or administrator's ability to effectively function in the school environment was impaired. Schools should also be ready to present evidence about the amount of administrative time and expense that had to be spent in attempting to resolve the problem and

384. Running a "Google search" using the phrase "how to unblock Facebook" for example reveals a number of online tools available to students through which they can access the social networking site.

385. *Wilson v. Hinsdale Elementary Sch. Dist. 181*, 349 Ill. App. 3d 243 (2d Dist. 2004).

386. *Bethlehem Area Sch. Dist.*, 807 A.2d at 852 (noting that the teacher who was the object of a student's website began taking medication for anxiety and depression, was unable to return to school and was granted a medical leave the following year due to an inability to return to her teaching duties); *O.Z.*, 2008 WL 4396895, at *4 (observing the teacher who was the object of a YouTube slide show depicting her murder feared for her safety and became physically ill after watching the slide show).

the amount of classroom or instructional time lost as a result. Remember, judges are only human, and they invariably may take a harder look at discipline that seems out of proportion or an overreaction to a student's speech.

Fifth, students do not enjoy a constitutional right to participate in extracurricular activities. While it is no guarantee that discipline limited to extracurricular activities will withstand First Amendment scrutiny, to the extent that a school district's discipline involves a restriction on participation in extracurricular activities as in *Doninger*,³⁸⁷ it may have a better chance of being upheld if challenged. The doctrine "*de minimis non curat lex* (the law doesn't concern itself with trifles)" is applicable to First Amendment claims.³⁸⁸

Additionally, the younger the student, the more discretion will be afforded a district. Remember, students have to be thirteen or older to register on MySpace or Facebook under their respective terms of use.³⁸⁹

Finally, a school district's policies should be clearly spelled out on these issues. Policies that fail to provide an adequate warning that certain conduct is prohibited or that fail to contain adequately defined standards to prevent their arbitrary enforcement can be challenged on vagueness or overbreadth grounds under the First Amendment.³⁹⁰ For example, a student code of conduct that permitted discipline for any behavior judged by school officials "to be inappropriate in a school setting" was held unconstitutionally vague in *Coy v. Board of Education of North Canton City Schools*.³⁹¹ A school district should always carefully con-

387. See, e.g., *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 214 (D. Conn. 2007) (citing cases and secondary authorities). The Second Circuit in *Doninger* subsequently observed, "the district court correctly determined that it is of no small significance that the discipline here related to the [the student's] extracurricular role as a student government leader." *Doninger I*, 527 F.3d at 52. However, the Second Circuit considered the "relevance of this fact . . . in the context of *Tinker*," and explained that the student's actions risked "frustration of the proper operation of [the school's] student government and undermined the values that student government, as an extracurricular activity, is designed to promote." *Id.* The Second Circuit also noted in *Doninger I*, "we have no occasion to consider whether a different more serious consequence than disqualification for student office would raise constitutional concerns." *Id.* at 53. But see *Smith-Green Cmty. Sch. Corp.*, 2011 WL 3501698, at *10 (concluding a student cannot be punished with a ban from extracurricular activities for non-disruptive speech").

388. *Brandt*, 480 F.3d at 465 (citing *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); *United States v. Broomfield*, 417 F.3d 654, 656 (7th Cir. 2005); *Hessel v. O'Hearn*, 977 F.2d 299, 303-04 (7th Cir. 1992); *Linwood v. Bd. of Educ.*, 463 F.2d 763, 767-68 (7th Cir. 1972)).

389. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited June 8, 2012).

390. *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

391. *Coy*, 205 F. Supp. 2d at 802. See also *Flaherty*, 247 F. Supp. 2d at 704-06 (holding the school handbook policies were unconstitutionally vague because they prohibited a substantial amount of protected speech); *Killion*, 136 F. Supp. 2d at 458-59 (finding the school

sider all of its disciplinary options when addressing the appropriate course for responding to a student's online activities.

district's "Retaliatory Policy" unconstitutionally overboard and vague because it contained no "geographical and contextual" limitations and failed to define critical terms such as "abuse" and thereby could permit its arbitrary enforcement).

