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Tinkering with Student Speech in the Age of Social Media

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TINKERING WITH STUDENT SPEECH IN THE AGE OF SOCIAL MEDIA

by

Lola A. Burnham

B.A., Eastern Illinois University, 1983

M.A., Eastern Illinois University, 2006

A Dissertation

Submitted in Partial Fulfillment of the Requirements for the
Doctor of Philosophy Degree

College of Mass Communication and Media Arts

The Graduate School

Southern Illinois University Carbondale

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DISSERTATION APPROVAL

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A Dissertation Submitted in Partial

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for the Degree of

Doctor of Philosophy

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March 26, 2018

AN ABSTRACT OF THE DISSERTATION OF

LOLA A. BURNHAM, for the Doctor of Philosophy degree in MASS COMMUNICATION AND MEDIA ARTS, presented on MARCH 26, 2018, at Southern Illinois University Carbondale.

TITLE: TINKERING WITH STUDENT SPEECH IN THE AGE OF SOCIAL MEDIA

MAJOR PROFESSOR: William Freivogel

This dissertation investigates the issue of public junior high and high school students who are punished at school for their online speech that they created when they were off-campus. Specifically, it examines the issue of when students are punished at school for online speech that criticizes teachers and administrators, rather than the issue of student-on-student cyberbullying. Because the United States Supreme Court has not yet accepted any case that involves off-campus online student speech, this dissertation summarizes and analyzes federal appellate court decisions in such cases.

Appellate courts in six federal circuits have heard and ruled in cases involving students' off-campus online speech. This dissertation examines the precedent those courts have applied to outline the circumstances under which the courts find for the student or school officials. Because court decisions depend on the application of precedential case law, this dissertation includes a thorough examination of those major Supreme Court student speech precedents: *West Virginia State Board of Education v. Barnette*, *Tinker v. Des Moines Independent Community School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*.

This research project also examines how legal analysts are currently interpreting the issue of school punishment of off-campus online speech to determine how they recommend courts proceed in such cases. Through review of both precedent and law review articles, it examines two branches of legal thought that underlie the issue: what role courts see schools playing in the

education of students as citizens and how far courts are willing to go in extending schools' "in loco parentis" role to off-campus speech. It also reports on societal issues underlying student speech on social media: how social media users can create "community" online and how teens spend their time online.

Because legal research carries with it the tradition of offering guidance to judges on how to rule in a particular area, this dissertation concludes with a proposal for how courts, including the U.S. Supreme Court, should rule in cases involving student speech that is critical of school officials or school policy to grant students complete First Amendment protection for all off-campus online speech that does not threaten the school community with violence or libel anyone, whether school official or student.

DEDICATION

I dedicate this work:

To my parents, Charles E. and Lola V. Burnham, my first teachers, who set me on this path so long ago;

To my children, Thomas, Joseph, Matthew and Sarah, my first and best beloved students, whom I have watched in wonder grow to be amazing adults, despite my many mistakes;
and

To my students through the years, especially the student journalists at The Daily Eastern News, who inspire me every day with their commitment to and enthusiasm for the work that they do.

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I would also like to thank my other professors at SIU, each of whom added to my trove of knowledge, and the college’s graduate office for the long-distance help required by a part-time graduate student.

Thank you to my colleagues in the Journalism Department at Eastern Illinois University, but especially to Sally Renaud, my chair, colleague and dear, dear friend, who, among other things, drove me to and from school each day for eight long months when I couldn’t drive.

It takes a village to raise a child but also to get one woman through graduate school, a divorce, and a devastating broken leg and ankle. I must acknowledge the moral support, meals, rides to and from surgeons’ offices and physical therapy appointments, and just plain fun of my stalwart friend, Kathryn Stewart, who never once doubted I could do this, and the general cheerleading, sympathetic ear, and sage advice of my college chum Marcel Pacatte.

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CHAPTER 1

INTRODUCTION

Social Media as the “Modern Public Square”

In striking down a North Carolina law that barred convicted sex offenders from using social media, the U.S. Supreme Court in June 2017 acknowledged social media as the “modern public square,” and Justice Anthony M. Kennedy’s majority opinion said that denying people — even convicted sex offenders — access to it was “a prohibition unprecedented in the scope of First Amendment speech.”¹ Kennedy’s opinion gets to the heart of the issue when trying to reconcile any perceived differences between physical space (in his term “spatial”) and virtual space.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example is that a street or a park is a quintessential forum for the exercise of First Amendment rights. ... Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet” in general [citation omitted], and social media in particular.²

Kennedy runs through a quick sampling of the various kinds of social media used in America: Facebook, where “users can debate religion and politics with their friends and neighbors or share vacation photos”; LinkedIn, where “users can look for work, advertise for employees, or review tips on entrepreneurship”; and Twitter, where “users can petition their

¹ *Packingham v. North Carolina*, 582 U.S. ____ (2017) (slip op, at 8).

² *Id.* at 4-5.

elected representatives and otherwise engage with them in a direct manner.”³ He notes that all 50 of the nation’s governors and most members of Congress have Twitter accounts to share their views on political issues and hear from their constituents; “[i]n short, social media users employ these websites to engage in a wide array of protected First Amendment activity.”⁴

North Carolina’s statute barred convicted sex offenders from accessing any “commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.”⁵ The statute outlined four criteria that the website would have to meet: 1) it is “operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site”; 2) it “[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges”; 3) it “[a]llows users to create Web pages or personal profiles that contain information such as” the user’s name or nickname, photographs, and other personal information, and provides links to other people’s profiles; and 4) it “[p]rovides users or visitors ... mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.”⁶ The Court noted that these criteria would effectively bar convicted sex offenders from all sorts of websites beyond what are commonly thought of as social media. A sex offender could not, for example, post reviews on Amazon.com or comments on a newspaper’s website because a child might also use those sites.⁷

Kennedy said the state did not meet the burden of showing that the statute must be so broad to prevent sex offenders from using social media to find victims. He noted that the Court’s

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.* at 1.

⁶ *Id.* at 1-2.

⁷ *Id.* at 7.

holding did not prevent the state from enacting a more specific law that did not infringe protected speech in its attempt to prevent sexual abuse of children.⁸ However, he made clear that denying sex offenders who had served their sentences any access to any social media would “prevent the user from engaging in the legitimate exercise of First Amendment rights,” including those that might offer “legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.”⁹

Importantly, Kennedy noted that because the “Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimension and vast potential to alter how we think, express ourselves, and define who we want to be”.¹⁰ “This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.”¹¹

The Internet as the “New Marketplace of Ideas”

Twenty years before the *Packingham* case, the Supreme Court had reason to grapple with how far the First Amendment reached into cyberspace when considering whether parts of the 1996 Communications Decency Act that aimed at keeping indecent or obscene online speech away from children were constitutional or unconstitutional. Although the central issue of that case, *Reno v. American Civil Liberties Union*,¹² has little to do with student-generated speech, Justice John Paul Stevens’ majority opinion discussion of First Amendment rights on the Internet does, particularly when considering the question of whether school officials can reach beyond

⁸ *Id.*

⁹ *Id.* at 8.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Reno v. ACLU*, 521 U.S. 844 (1997).

“the schoolhouse gate”¹³ to punish student speech that occurs online and off school grounds. As in the *Packingham* opinion, Stevens lists the forms of communication, such as email, listservs, newsgroups, and chat rooms, then available on the Internet.¹⁴ He then notes cyberspace as a “unique medium [...] located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”¹⁵ Noting that the government had taken medium-specific factors, such as the scarcity of frequencies, into account when it began regulating the broadcast industry,¹⁶ Stevens wrote that those limiting factors were not present on the Internet and, thus, the government had little reason to regulate “the vast democratic forums of the Internet” in the way that it had regulated broadcasting.¹⁷

Later, again noting the “relatively unlimited, low-cost capacity for communication of all kinds” on the Internet, with its “traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue,”¹⁸ Stevens pointed out that the Internet makes avenues for free speech in the United States — such as the public speaker in the town square and the political pamphleteer — even more available to all: “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and news groups, the same individual can become a pamphleteer.”¹⁹

¹³ *Tinker v. Des Moines Indep. Cmty. Sch. District*, 393 U.S. 503, 506 (1969).

¹⁴ *Reno*, 521 U.S. at 851

¹⁵ *Id.*

¹⁶ *Id.* at 868.

¹⁷ *Id.*

¹⁸ *Id.* at 870.

¹⁹ *Id.*

The government asserted that its efforts to protect children through regulating the Internet would also serve its interest in “fostering the growth of the Internet.”²⁰ Stevens rejected that argument:

The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.²¹

Problem and Scope of Study

In these two cases, the Supreme Court has spoken of the Internet as the “modern public square” and the “new marketplace of ideas” and as having “vast democratic forums” open to all at relatively low cost. A person can speak on the Internet without needing access to a broadcast license for a radio or television station or to a printing press for a newspaper or magazine or even a flier or pamphlet. In its 9-0 *Reno* decision, the Court has spoken firmly of the need to protect online speech from government interference, stating that any government regulation would interfere with the free exchange of ideas in the marketplace of ideas. In its 8-0 *Packingham* decision, the Court has spoken of the need to keep the Internet open and available to all people so that their First Amendment rights would not be infringed. Despite these strong statements promoting online speech as protected and necessary to citizens’ expression, however, the Court has yet to say whether the online speech rights of public school students can be limited or are as robust as those of adults and whether schools can punish students for online speech that would otherwise be protected if it occurred offline.

²⁰ *Id.* at 885.

²¹ *Id.*

The area of case law that governs student online speech is riven with inconsistencies. The Supreme Court has not accepted any student online speech case thus far, and U.S. appellate circuits cannot agree on a uniform method to weigh students' free speech rights against the competing interests of school authorities to maintain order to carry out the educational mission. As case law stands right now, students more often than not end up on the losing side when school authorities seek to punish their off-campus but online speech. Of the 12 appellate circuits that hear these kinds of cases,²² six have not heard cases involving student online speech. Of the six that have (the Second, Third, Fourth, Fifth, Eighth and Ninth), five have gone against the student involved. On the heels of the *Packingham* case, it is clear the Supreme Court recognizes that online speech falls under First Amendment protection and that access to social media in order to exercise First Amendment rights is also essential for all American citizens. Whether the Court will be willing to extend those rights to junior high and high school students is an unknown quantity, as are six of the appellate circuits. Additionally, five appellate courts have proven to be accommodating to schools that wish to punish students for off-campus online speech.

Thus, this study. It involved researching the appellate decisions that involved student online speech and studying relevant precedents and law review articles to attempt to divine a way forward for courts to weigh students' First Amendment rights against the needs of schools to maintain order and the educational mission. Other questions also needed to be explored and answered, though at first blush they may seem to have nothing to do with a legal issue.

²² The United States' 94 district, or trial-level, courts are organized into 12 circuits, and the circuit courts hear appeals from the district courts within their geographic jurisdiction. An unnumbered 13th circuit houses the appellate court for the Federal Circuit, which is not bound by geography but hears only particular types of cases from all over the United States.

This dissertation is divided into nine chapters. Chapter 1 introduces the problem along with two Supreme Court rulings that might prove beneficial to the student cause. Chapter 2 discusses the methodology employed to undertake the legal research needed to explore and understand the legal issues surrounding student online speech. Chapter 3 is a discussion of whether and how virtual communities can be created online that offer people the same benefits that physical communities offer, necessary background to further discuss whether social media have become, as the Supreme Court opined, the modern public square. Chapter 4 is a discussion of how teenagers use social media and how they behave online. It includes a discussion of privacy issues involving teens, as studies have shown that one of teens' concerns is keeping their posts away from prying adult eyes while at the same time having really very little idea of how to manage privacy settings. Chapter 5 gives the history of the major student speech cases on which the Supreme Court has ruled. Chapter 6 contains a literature review of legal journal articles that show what lawyers and law students think of the issues surrounding student speech and examines the methods they propose to guide the courts. Chapter 7 looks at Supreme Court majority opinions, concurring opinions and dissenting opinions to consider the question of what schools' roles are in children's lives. Chapter 8 explores the U.S. appellate circuit court cases that have involved student online speech for a full understanding of the how lower courts are ruling absent Supreme Court guidance. Finally, Chapter 9 offers conclusions and discusses possible avenues for further research.

CHAPTER 2

LEGAL RESEARCH METHODS

This qualitative study of how U.S. courts are treating junior high and high school students' online or digital speech that is created off school grounds but is punished at school was aimed at attempting to determine a federal legal standard that could be applied to such speech. Qualitative legal research attempts to analyze how courts are ruling on an issue and why they are ruling the way they do. Absent a U.S. Supreme Court ruling on this issue, lower courts have tended to weigh students' speech rights against the competing need of a school to maintain order using a few different methods, but no one method has emerged as the go-to way of handling these cases, which have increased as social media have become so ubiquitous in the daily lives of U.S. teenagers.

Digital/online speech was defined to include postings on social media or Internet websites, email, blogging, texting, and instant messaging. To limit the scope of the study, the research was originally planned to examine only cases involving junior high or high school students' speech that was focused on school officials or policies. Therefore, it did not examine speech involving college students or what is commonly referred to as "cyberbullying," or student-on-student harassment. However, one cyberbullying case was studied, as it is the only off-campus online student speech case that has thus far been ruled on in one appellate circuit.

Traditional legal research can take many forms, depending on what the research is to be used for. However, a basic method is to: 1) identify the facts involved; 2) identify the legal issues to be researched; 3) identify the primary sources of the law involved; 4) research the issue, using

both primary and secondary sources; and 5) come up with a solution to the legal problem.¹ But in order to identify the facts involved, the actual cases involving student online speech needed to be identified first.

Primary sources used in legal research are the law itself: constitutions, statutes, administrative rules, and court opinions. Court opinions are referred to as common law or case law. Sarah Redfield explains that although the two terms are sometimes used interchangeably, they do not mean the same thing: “The term, ‘common law,’ refers to law created by the courts in the absence of enacted law. ... In contrast, the term, ‘case law,’ is broader, referring to written decisions of courts applying common law and also applying or interpreting constitutional or enacted law.”² Legal researchers read case law because court opinions “interpret and apply statutes and regulations, develop the common law, and provide significant constitutional interpretation.”³ Court opinions become case law through being used as precedent in future, similar cases. The United States’ system of law is dependent on precedent, hewing to the doctrine of *stare decisis* (“let the decision stand”). Higher courts’ precedents are mandatory authorities that lower courts in their jurisdictions must follow on cases with similar facts and issues of law as the precedent. Redfield notes that “[t]he value of a case lies in its use as precedent; a decided case is considered primary authority for a similar case that arises later.”⁴ A precedent from another court outside a court’s jurisdiction may be used as a persuasive authority in that a judge’s reasoning may persuade another judge to follow it. The doctrine of *stare decisis*

¹ J. MYRON JACOBSTEIN & ROY M. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 504 (2nd ed. 1981).

² SARAH E. REDFIELD, THINKING LIKE A LAWYER 32 (2002).

³ *Id.*

⁴ *Id.* at 33.

offers three advantages to the American judicial system.⁵ It “promotes a sense of stability to our law,” which is “essential if there is to be public confidence in the judicial system.”⁶ Second, it “provides some predictability to the outcome of the case.”⁷ Finally, it “ensures fairness by the court,” meaning that “individuals will be treated the same way given a certain set of facts.”⁸ However, when facts in a new case differ from previous cases, a court will not follow a previous ruling. And, Roberts and Schlueter note, “In some cases, even where the legally significant facts are identical, the court for policy reasons may not follow the precedent. This has the positive effect of adding flexibility to our law when the needs of society change.”⁹ Roberts and Schlueter note that *stare decisis* is “important to the legal researcher because it highlights the emphasis on case law to the American legal system.”¹⁰

Court opinions are essential to the legal researcher, who will use them to identify facts in a case and will examine them to see the reasoning behind the court’s holding. Equally essential are secondary sources. In legal research, secondary sources are such things as legal dictionaries and encyclopedias, case reporters, treatises, and law review articles. Treatises and law review articles never carry mandatory authority, but they may have persuasive authority with a court. Indeed, “occasionally courts view this material as highly persuasive, particularly when the author is an authority in the field.”¹¹ Treatises and law review articles benefit the legal researcher in two ways: to “provide citations to primary sources” and to “describe, explain, and analyze a

⁵ BONITA K. ROBERTS & LINDA L. SCHLUETER, LEGAL RESEARCH GUIDE: PATTERNS AND PRACTICE 4 (1986).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ COLLEEN K. PAUWELS, LINDA K. FARISS & KEITH BUCKLEY, LEGAL RESEARCH: TRADITIONAL SOURCES, NEW TECHNOLOGIES 9 (1999).

particular area of the law. This can be especially important when beginning research on an unfamiliar topic.”¹² In addition, law review articles provide “commentary on the history and development of the law or a critique of the current state of a particular area of the law” and can offer “theory on how the law should develop.”¹³ Most legal research methods textbooks recommend that researchers read through the list of citations in a primary source and follow up with those to see if any of them are useful as factual background or legal interpretations. But, whether a researcher begins with primary or secondary sources, “either will lead you to the other” through their citation lists.¹⁴

Traditionally, legal researchers would consult case digests and reporters to find primary sources. The digest system began to be used in the late 1800s, based on the classification system set up by Harvard law school dean Christopher Langdell, which spread from Harvard to other law schools.¹⁵ M.H. Hoeflich wrote that, thanks to Langdell’s classification system, “professors at the newly invigorated university law schools could claim to take a place in their laboratories — law libraries — searching out the imperishable truths of legal science just as their colleagues in chemistry, biology, or physics were doing for their respective sciences.”¹⁶ With the advent of online legal databases, however, today’s researcher is freed from Langdell’s system, though multiple texts recommend learning how to use it. Bast and Pyle note that with computer-assisted legal research, the researcher constructs her own index rather than being tied to print indexing.¹⁷ However, they caution that the success of a computer-assisted search depends on the researcher’s

¹² *Id.* at 39.

¹³ *Id.* at 44.

¹⁴ Redfield, *supra* note 2 at 115.

¹⁵ Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 285-87 (2001).

¹⁶ M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 96 (1986), quoted in Bast & Pyle, *supra* note 15 at 287.

¹⁷ Bast & Pyle, *supra* note 15 at 292.

being precise with choice of keywords but not so precise as to eliminate too many possible primary and secondary sources.¹⁸ Recall the traditional research method outlined at the beginning of this chapter. Bast and Pyle outline a slightly different method for computer-assisted legal research. Initially, the researcher will analyze the facts but then will identify keywords that will be used to search for primary sources.¹⁹ From those primary sources, the researcher will then identify a legal principle.²⁰ They caution that some researchers will then be satisfied and never move beyond a factual basis for their legal principle rather than taking the time to see how the principle fits into the larger framework of that area of law.²¹

One other method of legal research needs to be explained, that of Shepardizing a case. Frank S. Shepard was a law-book salesman in Chicago in the 1870s who observed that lawyers would write notes in the margins of their court reports but could not easily keep track of whether a court's holding in a particular case was still current or had been "reversed or overruled or modified."²² "[S]ome way to link published opinions to subsequent court action in the same case, or in other cases dealing with the same issues, had to be found."²³ Shepard began printing gummed stickers "whenever one Illinois case modified a previous case," and he sold those stickers to lawyers to put in their *Illinois Reports*.²⁴ When he died in 1900, his gummed stickers gave way to pamphlets and then books that "link[ed] the citations of cases to the citations of later cases that affected them."²⁵ Grossman reports that nearly a century later, Shepard's citations had

¹⁸ *Id.*

¹⁹ *Id.* at 297.

²⁰ *Id.*

²¹ *Id.*

²² GEORGE S. GROSSMAN, *LEGAL RESEARCH: HISTORICAL FOUNDATIONS OF THE ELECTRONIC AGE* 67 (1994).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

spread from Illinois to all state and federal court reporters because “the assumption was made that anytime one case is cited by another, the link is worth noting.”²⁶

Shepard’s citations make it easy for legal researchers to keep track of how precedential cases are cited, followed, distinguished or criticized in other cases. Today, Shepardizing a case can be accomplished by clicking a button. For example, for this study, the researcher used the LexisNexis Academic database available to her through Booth Library at Eastern Illinois University. Shepardizing the landmark *Tinker* case turned up nearly 7,000 citations in November 2017. A Shepard citation list is subdivided into different categories, depending on the case being researched: prior history; subsequent appellate history; citing decisions, which are further divided by court jurisdictional divisions at the federal and state levels; annotated statutes; law reviews and periodicals; briefs; motions; and pleadings. This researcher found Shepardizing most helpful in following cases through to their most updated outcome and in seeing when those cases were cited in judicial opinions. However, the *Tinker* list of citations turned up more than 3,400 law review and periodical articles that referenced *Tinker* in some fashion. To find secondary sources, the researcher relied on a mix of keyword searches in LexisNexis Academic and the more traditional reading of citations in various printed cases and articles to make sure that the *Tinker* references applied to student speech and not to some other set of legal facts. For example, *Tinker* is often cited in such cases as those involving special education programs, disciplining of students who caused a disruption at school, and teachers who allege they were fired because of their political views.

Work on this research project began with the already-known *Tinker* case and the other cases identified in Chapter 4. The researcher was also familiar with several more-recent cases

²⁶ *Id.*

that deal specifically with student online speech from following them through news reports. Thus, research began by Shepardizing those cases and following their citations to still other cases. Yet more student speech cases were discovered through reading law review articles. Thus, a mix of computer-assisted research methods and traditional legal research methods, particularly relying on secondary sources to point the way to new information, were used to identify the cases that formed the foundation of this study.

Philip Kissam categorized scholarly legal research into six purposes that may overlap. The three that are pertinent to this study are: 1) legal analysis, “to reduce, separate, and break down cases, statutes and other legal materials into separate elements”; 2) legal synthesis, “to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules”; and 3) doctrinal resolution, which “includes advising courts or clients on how legal doctrine should be applied to specific cases ... suggesting resolution of conflicts between the decisions of different courts, and criticizing judicial opinions because of their inconsistency with general doctrine or their failure to promote policy values.”²⁷ Indeed, this study relied on the first two purposes to guide thinking about the primary and secondary sources during the research phase and then relied on the third to guide thinking during the writing phase.

Edward Rubin contends that “the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decision-makers. ...[T]he point of an article about a judicial decision is usually to remonstrate with the judge for the conclusion reached and the rationale adopted.”²⁸ Rubin states that even when an author agrees with a judge’s decision, the ensuing article is usually still prescriptive:

²⁷ Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 230-35 (1988).

²⁸ Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-48 (1988).

“The point is then to recommend the same course of action to other decision-makers, or to encourage the original decision-maker to keep up the good work.”²⁹ Rubin points out that “[t]his prescriptive voice distinguishes legal scholarship from most other academic fields. The natural sciences and the social sciences characteristically adopt a descriptive stance, while literary critics adopt an interpretive one. Only moral philosophers seem to share the legal scholar’s penchant for explicit prescription.”³⁰

There is relatively little academic writing that simply explicates the meaning of a judicial decision. More typically, the interpretation of meaning is used to criticize a decision that relies upon a differing interpretation. This can be a powerful criticism in a legal culture where texts serve as the basis of judicial authority. But the general stance of legal scholarship, as opposed to practitioner literature, is to prescribe an alternative decision to the judge, not to explore the meaning of a legal text as a final, inherently valid expression of the law.³¹

This type of legal scholarship is based on “norms, instrumentalism, or authority,” but “the normative one is by far the most important one,” Rubin writes, adding that “[t]he prescriptions of contemporary legal scholarship are predominantly based on policy arguments — beliefs about the way society should be organized or operated.”³²

This research project took the approach that Kissam and Rubin describe. Using the mix of computer-assisted and traditional legal research methods, primary sources of case law at the U.S. Supreme Court and U.S. appellate circuit levels were found and analyzed. When needed for background understanding, cases at the level of U.S. district courts were also examined. Because online student speech is a relatively new area of law, secondary sources of law review articles were read and analyzed to improve understanding of the issues involved and to try to come up

²⁹ *Id.* at 1848.

³⁰ *Id.*

³¹ *Id.* at 1849.

³² *Id.* at 1851.

with a prescription for how courts should be handling student online speech. The literature review relied heavily upon law review articles.

Legal issues were not the only matters to be considered in this project. To ground the discussion of students' online speech rights, the researcher studied the opinions of experts in the area of social media and how teenagers create virtual communities on the Internet, using the virtual "public sphere"³³ to maintain and enhance their real-time, face-to-face interactions and to work through the issues they are facing at home and school. That research is presented in Chapters 3 and 4 to help readers develop an understanding of these issues.

The legal research questions that this study considered and answered were:

RQ1: Do the federal appellate courts recognize more free speech protection for students engaged in off-campus online speech as on-campus in-person speech?

RQ2: Do the statements of the U.S. Supreme Court in student speech cases suggest the Court will recognize broad rights for off-campus online student speech?

RQ3: Are the statements of the U.S. Supreme Court on the character of the Internet as a modern public square relevant to the way it should view off-campus online speech?

The answers to these questions are reported and considered in the pages that follow. The findings are then used to help the researcher devise a prescriptive approach to how student online speech cases should be handled.

³³ The term, as used by sociologist Jürgen Habermas to define a place where people could gather to debate public issues, is explored in a section titled "Social Media as Public Sphere" in Chapter 3 and again in Chapter 9's conclusions.

CHAPTER 3

IMAGINING AND DEFINING “COMMUNITY” ONLINE

How to define “community” is a question that sociologists, media theorists, and others have tried to answer for years. How to define community in the era of virtual realms, cyberspace and networked publics can be seen merely as a continuation of the earlier attempts to wrestle toward some kind of a definition that is applicable in all senses and circumstances. There will be disagreements about how to define “cyberspace” and just how akin to the physical world it is. Yet considering the idea of “community” in its various contexts may result in some guidelines to frame discussion of the online environment. An analogous discussion would be when a journalism professor reviews the characteristics of news with her students. Students can agree on certain questions that journalists should ask to help identify the news elements (who, what, when, where, why, how) and certain characteristics — timeliness, prominence, impact, and proximity, to name a few — but in the end, the particulars of the story and the reporter’s individual news judgment will guide coverage and lead to the defining of the characteristics in terms of that one story. Journalists can agree on a general framework for determining news values, but reporting is as much art as it is science, and in the art lies the distinctive touch that a journalist can bring to bear on a story. In much the same way, considering that “community” is a human construct — that is, an imagined entity, to borrow a term from Benedict Anderson¹ — the people who study human behavior (whether online or off) can discuss and eventually agree on some commonalities in the ways they consider community.

In fact, the news characteristic of “proximity” may be a good place to start to look at “community.” Journalists agree that news consumers are more interested in an event that is

¹ BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (2006).

happening in their own town — the community to which they have a physical proximity — than they are in the next town over, but they are also more interested in the next town over than they are in a city far away — unless, that is, they can be made to feel a psychological proximity to the news event in the faraway city. When journalists find a way to make their audience feel some connection to the story happening farther away, they create a psychological proximity to the story, and the audience will be interested in it. In the same way, community can be looked at as both close physically — proximate — or close psychologically; sometimes it might even be both at the same time, the virtual world reflecting or extending the physical world. The paragraphs that follow will examine some of the leading ideas about and definitions of community through the past thirty-some years, since Benedict Anderson in 1983 first promulgated his theory of nations as imagined political communities: “[A]ll communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined. Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined.”² If one agrees with that statement, then it is but a small step to agreeing that a group of people networked together through social media can also be an imagined community. What counts is not whether they have ever met in real life or how close or far they are to each other in the geographical world. What counts is whether they can imagine themselves to have a connection and that the connection is strong enough to bind them into a community.

Anderson conceived of the nation being imagined in three ways: as *limited* (with “finite, if elastic, boundaries”), as *sovereign* (free), and as *a community* (“the nation is always conceived as a deep, horizontal comradeship”).³ In discussing this, Howard Rheingold wrote, “Anderson points out that nations and, by extension, communities are imagined in the sense that a given

² *Id.* at 6.

³ *Id.* at 7.

nation exists by virtue of a common acceptance in the minds of the population that it exists. Nations must exist in the minds of its [sic] citizens in order to exist at all.”⁴ Why then may not users of social network sites imagine their virtual communities into existence? Rheingold firmly believed that virtual communities were real. He described his participation in an early computer conferencing system called WELL (Whole Earth ‘Lectronic Link) and noted the various ways he and others could use it: to gather information, to share knowledge, to play games, to follow news events, to seek and give emotional support. Through daily interaction with his fellow WELL members (he estimated he spent at least two hours a day online), he came to know them as surely as if they had lived nearby and interacted with each other in real life.⁵

Not only do I inhabit my virtual communities; to the degree that I carry around their conversations in my head and begin to mix it up with them in real life, my virtual communities also inhabit my life. I’ve been colonized; my sense of family at the most fundamental level has been virtualized.⁶

Rheingold defined virtual communities as “social aggregations that emerge from the Net when enough people carry on those public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace.”⁷ He traced the idea that communities would be a natural offshoot of online communication to 1968 when J.C.R. Licklider and Robert Taylor, who were research directors for the Advanced Research Projects Agency (ARPA) wrote, “What will on-line interactive communities be like? In most fields they will consist of geographically separated members, sometimes grouped in small clusters and sometimes working individually. They will be communities not of common location, but of common interest.”⁸

⁴ HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 64 (1993).

⁵ *Id.* at 1.

⁶ *Id.* at 10.

⁷ *Id.* at 5.

⁸ Cited in RHEINGOLD at 24.

That idea was taken up Jason Ohler, who began to research computer conferencing systems in 1990 (pre-Internet, as he notes) when he noticed that participants kept referring to the system as a “community.”⁹ In fact, Ohler said that computer conferencing “gave digital community its first real breath of life” by making possible “many-to-many communication.”¹⁰ Computer conferencing allowed participants to define the purpose and spirit of the groups they belonged to and “allowed them to gather in ways that reminded us of communities.”¹¹

Sociologist Barry Wellman outlined a history of community by identifying three forms: something he called “solidary,” neighborhoods, and personal.¹² The solidary community came first, pre-industrial and agriculture-based, heavily reliant upon people in proximity to each other sharing responsibility and interest: “place based, intensely local, and personal.”¹³ Next, during the industrial era, came neighborhoods. Still heavily local and personal but no longer isolated, neighborhoods were found within larger gatherings of people, such as cities. Life and work were no longer intertwined as they were in agriculture.¹⁴ Finally came the post-industrial personal networks, which Wellman described as occurring when improved transportation allowed people to leave their traditional geographic locations behind and, because of communication technology, “each of us began to build our own personal communities based on our own personal network.”¹⁵ While Wellman’s three types were idealized versions of community and their realities would not have been so neatly delineated, they persist in the collective consciousness because they “serve as emotional archetypes in that they capture some fundamental idea of what community provides

⁹ JASON B. OHLER, DIGITAL COMMUNITY DIGITAL CITIZEN 37 (2010).

¹⁰ *Id.*

¹¹ *Id.*

¹² Cited in OHLER at 37.

¹³ *Id.*

¹⁴ Cited in OHLER at 38.

¹⁵ *Id.*

the human experience.”¹⁶

Ohler calls for schools to educate students in media literacy and ethical behavior so they can participate responsibly in three kinds of community: local, global and digital. He defines local as “people who can communicate directly with each other without too much effort” who are “geographically immediate and often personally meaningful”: families, classrooms, schools, neighborhoods and towns.¹⁷ Global is defined simply as anything beyond local — “a much broader social and environmental setting than we can immediately perceive”: state and country, for example.¹⁸ Lastly, he defines digital community as groups “primarily sustained through electronic rather than geographic proximity” and gathered “by choice rather than due to geographic default.”¹⁹

In tracing the history of sociologists’ attempt to define “community,” Mary Chayko said it generally comes down to one of two ways: “either ‘territorially,’ to depict a grouping of people relating to one another within a specific geographical area, or ‘emotionally,’ to depict the sense of belonging to such a group.”²⁰ Chayko’s emotional connection is the same as the psychological proximity of the journalist. Chayko further defines community as requiring at least three people who “become socially connected in a generally structured or patterned way, develop a collective identity and purpose, and share a [...] ‘sense’ of belonging to a social entity.”²¹ She very definitely believes in the possibility of virtual communities being formed, though she prefers the term “sociomental” or “portable” community because it removes the implication in the term

¹⁶ OHLER at 39.

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 41.

¹⁹ *Id.*

²⁰ MARY CHAYKO, *CONNECTING: HOW WE FORM SOCIAL BONDS AND COMMUNITIES IN THE INTERNET AGE* 40 (2002).

²¹ *Id.*

“virtual” that what happens online is somehow not real.²² She later dropped her requirement that three people be involved for a community to be formed. The ingredients required to make a community in sociomental space are simply two or more people (the social aspect) and “some degree of technological mediation ... to facilitate the connection and give us the opportunity to know of one another, which is the mental aspect.”²³ And while she objects to the term “virtual,” she has no such compunction against using geographic terms to describe sociomental *space*: “I find it useful to consider sociomental space as a ‘place’ in which groups of people who may be physically separated create connections, bonds, communities, and entire social worlds. To do this mental maps of these social worlds are created, then constantly used and updated.”²⁴ She says people have long used mental maps to help map their physical and social environments, so they map not only space (whether physical or imagined) but also such things as relationships, past interactions with other people, and people’s characteristics.²⁵ Mental maps are highly individualized and personal, and each person in a community builds a mental map that is a representation of that community’s sociomental space, which she calls the “cognitive analog to physical space.”²⁶ Online communities, or “communities of the mind,” produce sociomental connections, or “mental networks,” that are real to the people in the communities and provide them with “a sense of structure, identity, purpose, and belonging.”²⁷ In using the term sociomental, Chayko also hopes to make clear that the “social world ... is neither synonymous

²² MARY CHAYKO, *PORTABLE COMMUNITIES: THE SOCIAL DYNAMICS OF ONLINE AND MOBILE CONNECTEDNESS* (2008).

²³ *Id.* at 10-11.

²⁴ *Id.* at 23.

²⁵ *Id.*

²⁶ *Id.* at 22.

²⁷ CHAYKO, *supra* note 20 at 40.

with nor directly analogous to the physical world.”²⁸ And finally, she defines community as “a set of people who share a special kind of identity and culture and regular, patterned social interaction”²⁹ that is “generally founded on common interests, goals, and values.”³⁰

In the traditional definition of community, people who live in close geographic proximity to each other interact with each other and offer each other support. The same is true of virtual communities, whether called virtual, online, sociomental or portable. As Rheingold noted, a person’s tie to another person in a geographic community does not end just because the other person happens to be traveling away from the geographic community, say, on vacation. Because of the emotional and psychological connections built between the community members, the strength of those connections will maintain the community even during a member’s absence. The people quoted here agree that the same is true of the ties made in virtual communities. As Rheingold put it, “The question of community is central to realms beyond the abstract network of [computer-mediated communication] technology.”³¹ Ohler notes that community will be created as long as “the innate desire of humans to congregate in groups in ways that serve everyone’s needs individually and collectively” continues.³² And Malcolm Parks, while calling community a “notoriously slippery” thing to define, noted these characteristics as most relevant for the formation of a community on a social network site or other form of computer-mediated communication: “engaging in shared rituals, social regulation, and collective action through patterned interaction and the creation of relational linkages among members that promote

²⁸ *Id.* at 30.

²⁹ *Id.* at 6.

³⁰ *Id.* at 27.

³¹ RHEINGOLD, *supra* note 4 at 12.

³² OHLER *supra* note 9 at 35.

emotional bonds, a sense of belonging, and a sense of identification with the community.”³³

Kathy Richardson wrote, “The communities of social media may be virtual, but the emotional impact of the communication may be all too real. It is, after all, the communication that is the real component of the virtual village.”³⁴ That thought resonates with Chayko, who notes that the social connections made online “can be vivid, strong, reciprocal, and intimate. In short, we form real, consequential social bonds with people we have never met face-to-face.”³⁵

To sum, whatever definition of community one would adopt for the physical, geographic world, that definition can be adopted for the virtual, portable, sociomental “world,” for the “space” that we occupy when we go online. People use geographic descriptors for a reason when talking about the online realm. The descriptors help to connect what happens in the virtual world of cyberspace with what happens in the physical world. People carry those interactions with them when they turn off their computers or set down their smartphones. The journalism professor from the beginning of this section can use Facebook to stay in touch with her students when they have graduated and left the university. She can follow them on Twitter or contact them through email both individually and collectively through an alumni listserv. When she has something immediate to communicate, she can send texts to them on their mobile phones. In short, it is possible for people to stay present in each other’s lives even when physically separated by distance. The professor can maintain whatever level of closeness she wishes to with her students long after they leave the university, if they maintain a presence in the virtual world.

³³ Malcom R. Parks, *Social Network Sites as Virtual Communities* in A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 111 (Zizi Papacharissi, ed. Routledge 2011).

³⁴ Kathy Richardson, *Front-Stage and Back-Stage Kantian Ethics: Promoting Truth and Trust in Social Media Communication* in SOCIAL MEDIA AND THE VALUE OF TRUTH 13 (Berrin Beasley & Mitchell Haney, eds. Lexington Books 2013).

³⁵ CHAYKO, *supra* note 22, at 3.

The professor can participate in the milestones of their lives, even if her only experience of those milestones (engagements, weddings, births, graduate school graduations) is through the computer-mediated communication offered through social networks.

Defining Place and Space

Chayko noted the various technologies that can be used to maintain connections between people in a community: from old-fashioned letters and landlines to computers, mobile phones, and tablets. Yet, she said, something more is required to bring community to mind: “[W]e seem to need to imagine the community as situated in some kind of space. An understanding of the process by which we cognitively create such spaces is critical to understanding portability in social connectedness.”³⁶ She explained that in sociomental or portable communities, the environment in which those communities exist, while imagined, cannot be imagined by a single person.³⁷ A social network or community needs at least two people to exist. A solitary person, no matter how active his or her imagination, cannot create a sociomental community solo.

This is the “place” where one might “go” when one’s mind focuses on, thinks about, and understands things “in concert” with at least one other person — where a sense of proximity with another person might come to feel especially strong, or where a distant loved one might feel or seem to be “near.”³⁸

The spatial metaphor works in reverse, too, as Chayko noted that in interview after interview, people told her that they felt “physically ‘lost’ when out of touch technologically,” a feeling that comes because “[p]ortable technologies anchor us in space and give us such a definite sense of place” and “because it is so important to us to be cognitively connected; to feel firmly ‘in’ a

³⁶ CHAYKO, *supra* note 22, at 22.

³⁷ CHAYKO, *supra* note 20, at 32.

³⁸ *Id.*

sociomental space, mentally anchored ‘in’ our portable communities.”³⁹ Just what that virtual place or sociomental space or portable community looks like will vary depending on a person’s mental maps and point of view. That is different from the mental maps people carry of their communities in the physical world. In the physical world, people will share certain markers with the other members of their community: how the desks are arranged in the classroom, how many blocks they must walk to reach the park. But, as the virtual, sociomental space is imagined, each individual in the community will imagine it differently. As Rheingold said, “Point of view, along with identity, is one of the great variables in cyberspace. Different people in cyberspace look at their virtual communities through differently shaped keyholes.”⁴⁰

Susan Barnes uses the terms “space” and “place” in her description of how computer technology is involved in creating the space where computer-mediated human interaction occurs: “The combination of the visual computer screen and the transactional nature of e-mail creates a set of conditions that enables people transform the void of a computer network into a perceived place of human interaction.”⁴¹ Despite that, Barnes believes that space is only part of the equation. Mediated communication takes place over time as well as over an imagined space.⁴² Rheingold also speaks of how networked communication allows people to “build social relationships across barriers of space and time.”⁴³ And Steven Jones believes the Internet is biased toward time, despite the moniker of cyberspace: “The Internet, if it is appropriate to call it any kind of space at all, is less some kind of futuristic ‘cyberspace’ and more a discontinuous

³⁹ CHAYKO, *supra* note 22, at 124.

⁴⁰ RHEINGOLD, *supra* note 4, at 63.

⁴¹ SUSAN BARNES, ONLINE CONNECTIONS: INTERNET INTERPERSONAL RELATIONSHIPS 8 (2001).

⁴² *Id.* at 10.

⁴³ RHEINGOLD, *supra* note 4, at 7.

narrative space.”⁴⁴ Jones wants to see more attention paid to the narratives created through computer-mediated communication because they reflect the virtual communities to which they belong:

Narratives are not, of course, communities, though they may be artifacts of community and may represent a good portion of what communities do to maintain and reproduce themselves over time. Narratives may imagine communities and we may imagine ourselves to be a part of a community based on our reading of a narrative.⁴⁵

Consideration of time and narrative means that consideration must be paid to Anderson’s notion of simultaneity: the notion that although a citizen of a nation cannot possibly meet every other citizen of the nation, he can imagine that they exist at the same time that he exists.⁴⁶ Nations, bounded as they are by other nations, are not moving through space but are moving through time.⁴⁷ Chayko thinks of simultaneity as two people who are separated physically going through the same experience (for example, watching a television program) at the same time.⁴⁸ The people will feel that they went through the experience together even though they experienced it in two separate locations. Paddy Scannell notes that broadcast media create the possibility for people to be “in two places at once, or two times at once.”⁴⁹ A person watching a television program will be seated in his own physical living room, but his mind will be where the TV program is taking place, whether that place is real or fictional. Scannell noted that public events take place in two places at once, thanks to broadcast technology: the physical place where

⁴⁴ Steven G. Jones, *The Internet and Its Social Landscape*, in *VIRTUAL CULTURE: IDENTITY AND COMMUNICATION IN CYBERSOCIETY* 15 (Steven G. Jones ed. Sage, 1998).

⁴⁵ *Id.*

⁴⁶ ANDERSON, *supra* note 1, at 26.

⁴⁷ *Id.* at 24.

⁴⁸ CHAYKO, *supra* note 22, at 29.

⁴⁹ PADDY SCANNELL, *RADIO, TELEVISION AND MODERN LIFE: A PHENOMENOLOGICAL APPROACH* 91 (1996).

the event is occurring and the place where it is being watched.⁵⁰ Though he was writing of pre-Internet days, the principle that applies to broadcast is also applicable to the Internet thanks to live-streaming or video reports posted on news organizations' websites.

In its own context (its own time and place) any event creates and sustains its own being, its own world. In its extended, relayed, mediated form it simultaneously enters into other worlds and their ways of being. The event is thus "doubled": there is the event-in-situ, and (at the same time) the event-as-broadcast, the former being embedded in the latter. It is not that broadcasting creates the event that it transmits, but that in broadcasting the event it creates a new event — the event as broadcast.⁵¹

Broadcasting becomes a mediator between the actual event and the place where it is seen, imbuing public events with "a degree of phenomenal complexity they did not hitherto possess, and this has consequences for the character of the events themselves."⁵² Computer-mediated communication is, by its very nature, situated in two (or more) sites at the same time. When someone emails a colleague, the initial email and any ensuing back-and-forth replies all take place in both offices. If someone posts a picture of her dog eating a carrot on Facebook and 23 people comment and another 88 "like" the post, that communication has taken place in as many as 112 different places, across virtual space and real time. Let's say the original post was made at 8 p.m., and the last person comments at 7 a.m. the next day. That conversation about a dog has taken place over an 11-hour period, and yet no one had to sit there for 11 hours. The person who posted the photo might have gone to sleep at midnight. Meanwhile, friends who were awake through the night or simply in a different time zone could comment or like at any time. Or perhaps someone who does not get on Facebook frequently doesn't discover the conversation until days later, leading it to resurface in the news feed of anyone who commented or liked in the

⁵⁰ *Id.* at 76.

⁵¹ *Id.* at 79-80.

⁵² *Id.*

first place. And that is just for an inconsequential photo of a dog. Imagine how much more important a post in a cancer support group would be.

Rheingold cited Ray Oldenburg's description in his 1991 book *The Great Good Place* of three essential places in people's lives: where they live, where they work, and where they go for fun ("conviviality," as Oldenburg put it). Facebook, Twitter and other social networking sites represent the "third space" where people go for fun, what Oldenburg called "the power of informal public life."⁵³ Chayko builds on that, noting that today's portable devices allow people to access their third space any time.⁵⁴ For example, an employee can be sitting at his office desk and when he wants to take a break from work, he can log onto Facebook or Twitter or pick up his phone to play a mobile game. Many such games have chat features, and the man may encounter a note from a friend when he logs in. In those few moments, though the man is physically present in his second space, his work space, in his mind, in his virtual life, he is in his third space. Chayko would approve of the man's use of his third space to relieve boredom at work: "Regardless of how satisfying home and work may be, most of us want our lives to consist of something more."⁵⁵

Most teens embrace social media because it offers them a way to hang out with their friends even when they cannot leave their physical homes. Whether their travel is limited by parental rules or unavailable transportation, if they can be in their bedrooms yet still be online with their friends, that satisfies their need to be social. As danah boyd points out, social media often are "the only 'public' spaces in which teens can easily congregate with large groups of

⁵³ Oldenburg cited in RHEINGOLD, *supra* note 4, at 25.

⁵⁴ CHAYKO, *supra* note 22, at 70-71.

⁵⁵ *Id.* at 71.

their peers. More significantly, teens can gather in them while still physically stuck at home.”⁵⁶ Boyd notes, “Teens are looking for a place of their own to make sense of the world beyond their bedrooms.”⁵⁷ If they can do that without actually leaving their bedrooms, so much the better. Yet this hanging out online can lead to teens’ being punished at school if their online, off-campus speech is deemed by school officials to cause a disruption at school.

Social Media as Public Sphere

Recognizing the term “the public sphere” is essential to any discussion of speech rights in cyberspace. As used by sociologist Jürgen Habermas, the term comes from the German word *Öffentlichkeit*, which he defined as “a realm of our social life in which something approaching public opinion can be formed” with access guaranteed to everyone.⁵⁸ The notion of a public sphere grew from the tradition of salons and coffee houses in the 18th century where people would gather to read and discuss events of the day. In much the same way, people today can “gather” on social media. In fact, social media today are much more accessible than the salons and coffee houses of old because while those were ideally open to everyone, in actuality they were really only open to people who could afford the time to read and participate in them, which usually meant men of means. Habermas recognized this shortcoming but did not let it negate the ideal of the public sphere as a place where people could gather to discuss public issues.

James Finlayson explains that, to Habermas: “The public sphere is a space where subjects participate as equals in rational discussion in pursuit of truth and the common good. As ideas, openness, inclusiveness, equality, and freedom were beyond reproach.”⁵⁹ While not directly

⁵⁶ DANAH BOYD, *IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 21 (2014).

⁵⁷ *Id.* at 5.

⁵⁸ Jürgen Habermas, *The Public Sphere: An Encyclopedia Article* in *CRITICAL THEORY AND SOCIETY: A READER* 136 (Stephen Bronner and Douglas Kellner, eds. Routledge 1989).

⁵⁹ JAMES FINLAYSON, *HABERMAS: A VERY SHORT INTRODUCTION* 12 (2005).

analogous to social media posts and tweets filled with selfies and videos of cats, the ideal of the public sphere has a role to play in social media of the modern era. Indeed, one need only look at the social activism that followed the school shooting in Parkland, Florida, in February 2018 to see the uses to which teens can put social media in service of a cause. Harnessing the power and reach of social media platforms, teen survivors organized a “March for Our Lives” in Washington, D.C., on the one-month anniversary of the shooting.

Writing in *The New York Times* in March 2018, Kevin Roose, whose column covers technology, business, and culture, noted the flaws of social media, including how scrolling through a Twitter feed can make a person feel “anxious, twitchy, a little world weary.”⁶⁰ Those flaws stem from the market-based model used by social media platforms, whose intent is to make money through advertising aimed at users. Habermas identified that same flaw as contributing to the decline of the public sphere in the 19th and 20th centuries, as mass-circulation newspapers and magazines turned from serving the public interest through news coverage and opinion sections to generating profits for owners and shareholders, “from a journalism of conviction to one of commerce.”⁶¹ Newspapers rose to prominence as purveyors of public opinion, Habermas writes, yet for a while “remained an institution of the public itself, effective in the manner of a mediator and intensifier of public discussion, no longer a mere organ for the spreading of news but not yet the medium of a consumer culture.”⁶² In much the same way, social media’s roots as connectors of humans have given way to the capitalistic drive to profit. Roose writes that the market requires social media platforms to keep growing: “Facebook can’t stop monetizing our

⁶⁰ Kevin Roose, Column, *Can Social Media Be Saved?*, N.Y. TIMES, Mar. 28, 2018, *available at*: <https://www.nytimes.com/2018/03/28/technology/social-media-privacy.html>.

⁶¹ Habermas, *supra* note 1 at 140.

⁶² *Id.*

personal data for the same reason that Starbucks can't stop selling coffee — it's the heart of the enterprise.”⁶³

Despite the public sphere's shortcomings in reality, Habermas maintains the optimistic view that the public sphere remains a laudable goal for the good that it could do. As Finlayson writes, “The ideal of a universally accessible, voluntary association of private people, coming together as equals to engage in unconstrained debate in the pursuit of truth and the common good was Utopian to be sure, but it was a Utopia that was, and still is, worth pursuing.”⁶⁴ That promise could still be fulfilled by social media, despite concerns about privacy and data collection, despite trolls who invade comment sections, despite the sharing of articles masquerading as objective news reports that in reality are either opinion pieces or just plain false.

Roose writes:

The original dream of social media — producing healthy discussions, unlocking new forms of creativity, connecting people to others with similar interests — shouldn't be discarded because of the failures of the current market leaders. And lots of important things still happen on even the most flawed networks. The West Virginia teachers' strike and last weekend's March for Our Lives, for example, were largely organized on Facebook and Twitter.⁶⁵

This seems to be the view of social media and the Internet taken by the Supreme Court in its *Reno* and *Packingham* opinions, which will receive further discussion in Chapter 9.

The Problem of Simultaneity

The idea that speech can take place in two places at once and, while occurring in real time, can also extend for days could prove problematic for high school and junior high students who take to social media to voice complaints about their teachers and school administrators.

⁶³ Roose, *supra* note 3.

⁶⁴ Finlayson, *supra* note 2, at 12-13.

⁶⁵ Roose, *supra* note 3.

Simultaneity could be used by school officials to strengthen their claims that students' social media speech should be punishable at school. The U.S. Supreme Court has so far denied review to all such student speech cases that have petitioned for certiorari, and absent the high court's guidance, lower courts at all levels have been left to examine off-campus speech with only the Supreme Court's opinions in the four major student speech cases it has ruled on since the late 1960s. Most courts have since decided that the *Tinker v. Des Moines Independent Community School District*⁶⁶ opinion does indeed apply to such off-campus social media speech as long as school officials can show that the speech caused a disruption on campus. This study looks only at student speech that is directed at school authorities, not at student-on-student cyberbullying, which is increasingly punishable at school if schools write anti-cyberbullying rules into their student conduct codes. The *Tinker* opinion said that students and teachers do not surrender their First Amendment rights when they enter school grounds as long as their speech does not cause a material and substantial disruption at school or does not infringe on the rights of other students. Through the years, *Tinker* has mostly been applied to students who wear T-shirts with political statements on them to school or to students who want to have a religious group at school. Yet, in recent years, more and more students are being punished at school for social media speech, even when they created the speech while off-campus.

In its 2015 ruling in *Bell v. Itawamba County School Board*,⁶⁷ the Fifth Circuit Court of Appeals upheld the suspension of a student rapper from Mississippi, for writing a rap song accusing two teachers of sexually harassing female students. Bell posted the song on Facebook, was called into the school office and told that the song could get him in trouble, went home that

⁶⁶ *Tinker v. De Moines Indep. Cmty. Sch. District*, 393 U.S. 503 (1969).

⁶⁷ *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015).

day, tweaked the song and posted a more polished video on YouTube.⁶⁸ He *wanted* people connected to the school to see the video and hear his words.⁶⁹ The Fifth Circuit applied *Tinker*, agreeing with school officials that the mere fact of recording a song with threatening lyrics was enough for school officials to forecast a serious disruption and pointing out in its opinion that the student aimed the speech at school.⁷⁰ Note that the court agreed that disrupting two teachers' peace of mind was enough a disruption to meet the "substantial" threshold. Here is a sample of Bell's lyrics:

Heard you textin number 25 / you want to get it on /
white dude, guess you got a thing for them yellow bones /
looking down girls shirts / drool running down your mouth /
you fucking with the wrong one / going to get a pistol down your mouth / Boww⁷¹

If the courts start paying attention to media theory or some savvy lawyer figures this out and makes an argument that speech can exist in two places at once, that could complicate things going forward. Most courts seem all too willing to punish student speech these days, especially when the student speech is rude, crude and/or disrespectful. Absent a Supreme Court ruling, all it would take to increase the likelihood teens would be punished at school for their online speech would be for some lower courts to begin persuading each other that simultaneity could be applied when trying to determine the nexus between the student speech and the school. As in the *Bell* case above, if the school can show that the speech was aimed at students or at personnel at the school, courts are more likely to uphold a student's punishment for that speech.

Additionally, if courts begin to pay attention to the presence of virtual communities as being as real as physical, geographic communities, that might also hurt students. If a lawyer

⁶⁸ *Id.* at 383.

⁶⁹ *Id.* at 386.

⁷⁰ *Id.* at 398.

⁷¹ *Id.* at 384.

could show that the student's online community was aware of a tweet or a Facebook post or a fake profile or a website, it would probably be that much easier to show a connection, the nexus, between the off-campus speech and the campus inside the schoolhouse gate. However, the Supreme Court's 2017 opinion in *Packingham v. North Carolina* might offset these possible troubles by strengthening claims that social media are the new public sphere and that speech created in that public sphere, especially when on an issue of public interest, is deserving of First Amendment protection. After all, if the Court sees a First Amendment right to participate in social media, it is not a stretch to see that the First Amendment would protect some of that speech from school officials' interference.

The frustrating thing about such incidents is that if the student expressed criticism in a letter to the editor of the local newspaper, that speech would absolutely be protected by the First Amendment. Of course, the local paper is probably not going to allow the kind of language in a letter to the editor that gets students in trouble. But students should have the right to protest what they perceive to be poor treatment at school or bad school policies, and the language that they use to give voice to that protest should not matter. As the 1971 Supreme Court opinion in *Cohen v. California* said, "For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."⁷² If a student is walking home from school and sends out a rude tweet because he is angry at the school principal, that tweet should not be punishable at school, no matter what language the student used, unless he libeled or threatened the principal or his words were determined to be fighting words or an incitement to violence that spurred his fellow students to

⁷² *Cohen v. California*, 403 U.S. 15, 25 (1971).

take some sort of unlawful action. Courts should be restrained in punishing students. We don't want to teach a generation of students that they can be punished for criticizing those in power.

The Increasing Intertwining of Physical and Virtual Spaces

The realms of physical and virtual spaces are increasingly intertwined in most people's minds, and that could be troubling in student speech cases. A person can disconnect from his virtual community. In fact, Chayko sees that as a plus, noting that "[p]ortable communities generally have low 'entry and exit costs'; compared to face-to-face communities, they are relatively easy to become part of and to leave."⁷³ It is much harder to pull up stakes and move to a new geographic community or to change your physical environment. But while a student could deactivate a Twitter account or make a Facebook account completely private, he would have a much harder time finding a new school if he is suspended for tweeting something rude or crude about his principal. And setting a Facebook profile to private doesn't guarantee privacy, of course. In one of the earliest cases included in this study of online speech being punished at school, the principal only found out about a fake MySpace profile when another student told him about it, and the profile only made its way onto campus because the principal asked that student to print out a copy and bring it to school. So, even though the student who created the profile thought it was going to be a private joke among his friends, the privacy protections he put in place did not hold. The friend who took the profile to school probably violated the social rules of the virtual community. Boyd notes that teens contend with this kind of "collapsed context" all the time.⁷⁴ Though they try to imagine their invisible audience, things outside their control can happen. For example, a supposed friend can rat them out to the principal. Boyd writes more circumspectly on this issue when she says, "Defining and controlling boundaries around public

⁷³ CHAYKO, *supra* note 22, at 94.

⁷⁴ boyd, *supra* note 56, at 31.

and private can be quite difficult in a networked society, particularly when someone is motivated to publicize something that is seemingly private.”⁷⁵ Another friend may come across a post long after it was made, when the context under which it was made has either changed or is no longer uppermost in everyone’s mind, and that friend may take offense because the post has been separated from its context. A parent or other adult may see a post and not understand the context under which it has been made. Any number of things can get between a teen and his intended, imagined audience. Boyd notes that teens’ “sense of context is shaped — but not cleanly defined — by setting, time, and audience.”⁷⁶ And Richardson writes that “social media by their nature blur distinctions between private and public behavior, raising issues about the understanding of appropriate disclosures within the communication and social environment.”⁷⁷

Another positive to the intertwining of physical and virtual spaces is that people literally can take their virtual communities with them wherever they go (as long as they have access to wi-fi). As Chayko writes, “Online social networks are very effective at helping us bridge distances, because the pathways in these networks are always available, always ‘open.’”⁷⁸ And boyd points out that “the bounding forces of networked publics are less constrained by geography and temporal collocation than unmediated publics.”⁷⁹

A downside to this intertwining would be the further blurring of the lines between public and private spaces. Even in a social media profile, users have to monitor what their privacy settings are and manage them according to how much privacy they want. Social media sites

⁷⁵ danah boyd, *Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications* in NETWORKED SELF 52 (Zizi Papacharissi, ed. Routledge, 2011).

⁷⁶ BOYD, *supra* note 56, at 41.

⁷⁷ RICHARDSON, *supra* note 34, at 10.

⁷⁸ CHAYKO, *supra* note 22, at 90.

⁷⁹ boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life* in IDENTITY, AND DIGITAL MEDIA 126 (D. Buckingham, ed., MIT Press 2008).

encourage people to share, share, share, leading many parents to worry that their teens are oversharing information that is being picked up by marketing firms. Meanwhile, teens are worried that their parents or a friend's parents or a school official will have access to their sites. Parents want their teens to be protected from exploitation; teens want to be protected from surveillance by those whom they see as having power over them.

CHAPTER 4

TEENS' SOCIAL MEDIA HABITS AND USES

Differences and Similarities in Teens' and Adults' Social Media Use

Privacy concern is not the only area where teens' and their parents' social media desires and expectations differ. But their online behavior is similar in many ways. Case in point: While more teens than adults report playing games online through their smartphones, computers or game consoles, adults also report playing games. In December 2015, Pew Internet Research reported that 49 percent of American adults play video games and a full 10 percent identify themselves as “gamers.”¹ And while 50 percent of men reported that they play video games, nearly as many women (48 percent) said they play games, too.² Compare that to teens: 72 percent of teens play video games on a computer, game console or mobile device.³ The difference between the genders is more pronounced in teens than it is among adults: 84 percent of teen boys play video games, while 59 percent of teen girls play.⁴

Mary Chayko says teens' use of social media — or “portable communities,” as she calls them — is not so different from that of adults.⁵ She likens teens' checking of their social networking site profiles and home pages throughout the day to adults' repeated checking of emails.⁶ When writing about today's youth as the first generation to grow up so closely connected to a computer-mediated world, where many things are experienced in some way as extensions of our connected selves (look at footage of any news event to see how many people

¹ MAEVE DUGGAN, Pew Internet Research, GAMING AND GAMERS (2015).

² *Id.*

³ AMANDA LENHART, Pew Research Center, TEENS, SOCIAL MEDIA AND TECHNOLOGY OVERVIEW (2015).

⁴ *Id.*

⁵ MARY CHAYKO, PORTABLE COMMUNITIES: THE SOCIAL DYNAMICS OF ONLINE AND MOBILE CONNECTEDNESS 163 (2008).

⁶ *Id.*

are more intent on recording what's happening on their mobile phones than on watching it with their own eyes — it seems many are more intent on recording the event for others to experience second-hand rather than experiencing it themselves first-hand), researchers must also think about and write about today's parents as the first generation to figure out how to help their children navigate that world. While teens are navigating the public spaces that social media afford them, their parents are also learning to do the same, with the added responsibility of monitoring their children's online life and making sure they are being both safe and responsible. A Pew report on American adults' social media usage between 2005 and 2015 shows that 65 percent of American adults are now using social networking sites, up from just 7 percent in 2005, when Pew began tracking it.⁷ If looking only at American adults who identify themselves as Internet users, that number shoots to 76 percent.⁸ How do teens and adults use social media? As of September 2014, of American adults who use social media:

- 71 percent use Facebook;
- 28 percent use Pinterest;
- 28 percent use LinkedIn;
- 26 percent use Instagram; and
- 23 percent use Twitter.⁹

As of April 2015, 92 percent of American teens aged 13-17 reported going online daily with 24 percent of those saying they are online “almost constantly.”¹⁰ Of the teens who use social media:

⁷ ANDREW PERRIN, Pew Research Center, SOCIAL MEDIA USAGE 2005 – 2015 (2015).

⁸ *Id.*

⁹ MONICA ANDERSON & ANDREA CAUMONT, Pew Research Center, HOW SOCIAL MEDIA IS RESHAPING NEWS (2014).

¹⁰ LENHART, *supra* note 2.

- 71 percent use Facebook (the same percentage as adults);
- 52 percent use Instagram;
- 41 percent use Snapchat;
- 33 percent use Twitter;
- 33 percent use Google+;
- 24 percent use Vine;
- 14 percent use Tumblr; and
- 11 percent use some other social media site.¹¹

And while smartphones have enabled teens' connectivity,¹² the phones themselves are not the draw, researchers say.¹³ In fact, the smartphones of today are the landlines of yesterday, but teens can use them anywhere instead of being tethered to the phone in the family room or kitchen.¹⁴ Indeed, Herring and others note that the technology is merely the means for youth (and adults) to stay connected to their social circles. For teens, whose movements may be restricted by lack of transportation, parental rules, or city curfew and loitering ordinances, the social space of a social networking site replaces the "hangout" of yesteryear: the soda shop or the shopping mall.¹⁵ Boyd writes:

Teens' preoccupation with their friends dovetails with their desire to enter the public spaces that are freely accessible to adults. Their ability to access public spaces for sociable purposes is a critical component of the coming

¹¹ *Id.*

¹² *Id.*

¹³ See S.C. Herring, *Questioning the Digital Divide: Technological Exoticism and Adult Constructions of Online Youth Identity* in *YOUTH, IDENTITY, AND DIGITAL MEDIA* 71-92 (David Buckingham, ed., The MIT Press, 2008). See also DANAH BOYD, *IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* (2014).

¹⁴ HERRING, *supra* note 13, at 77.

¹⁵ HERRING, *supra* note 13, at 77. See also Boyd, *supra* note 13.

of age process, and yet many of the public spaces where adults gather — bars, clubs, and restaurants — are inaccessible to teens.¹⁶

Likewise, adults tied to the home because of parenting duties or to the workplace use social media to connect with their friends.

That connecting involves the activities that people, of whatever age, would do in face-to-face social settings: gossip, tell jokes, look at each other's photos, share stories and events of the day, ask for information, play games, seek moral support, and flirt or otherwise advance romantic relationships. In other words, social media enable people to be a part of each other's lives even if they are not present physically. As Chayko puts it, "In this fairly constant (if intermittent) stream of text messages, IMs, photos and other short communications, often made without having anything special or particular to say, we are given to sense others' presence and we can assume that our own presence is being sensed in return."¹⁷ Teens face the added tasks when using social media of managing their public identities and pushing the boundaries of their social world — tasks their parents worked out in the face-to-face situations or the long telephone conversations of their own youth. Indeed, Livingstone points out that computer-mediated communication offers teens a bit of a safety net by giving them "a means of managing, or avoiding, the potentially embarrassing challenges of face-to-face conversation and so of retaining control."¹⁸ When teens using social media begin to feel that they are losing control, they can end the conversation by logging off or muting their phones.¹⁹

¹⁶ BOYD, *supra* note 13, at 18.

¹⁷ CHAYKO, *supra* note 5, at 117.

¹⁸ Sonia Livingstone, *Children's Privacy Online: Experimenting with Boundaries Within and Beyond the Family* in COMPUTERS, PHONES, AND THE INTERNET: DOMESTICATING INFORMATION TECHNOLOGY 133 (R. Kraut, M. Brynin & S. Kiesler, eds., Oxford, 2006).

¹⁹ *Id.*

As far as other differences, adults use social media in ways that teens perhaps do not: to share political views, to check and share news, for online dating, and for online learning. This study can only offer conjecture on this point because no readings turned up any researchers asking teens about those kinds of activities. In a survey for its Internet and American Life Project, the Pew Research Center reported in October 2012 that 66 percent of the American adults who used social networking sites like Facebook or Twitter engaged in at least one of eight civic or political activities Pew had identified on social media (such things as posting links to political stories, following a politician or public official, or encouraging others to take political action, to name just three).²⁰ Indeed, “[t]he use of social media is becoming a feature of political and civic engagement for many Americans,” Pew reported.²¹ Pew found that those who identified as having strong ideological ties to either political party were more likely to engage in such activities. For example, where 34 percent of Americans said they have posted their own thoughts or comments on political or social issues, that number rose to 42 percent for people who identified as liberal Democrats and 41 percent for conservative Republicans.²² As far as news sharing goes, 50 percent of adult social media users said they share or repost news stories, images or videos, and 46 percent discuss news events.²³ Among news consumers using Facebook, 73 percent said they followed entertainment news through the social networking site.²⁴ That was by far the largest category of news followed on Facebook. Some others were: 57 percent, sports; 55 percent, national government and politics; 51 percent, crime; and 46 percent

²⁰ LEE RAINIE ET AL., Pew Research Center, SOCIAL MEDIA AND POLITICAL ENGAGEMENT (2012).

²¹ *Id.*

²² *Id.*

²³ ANDERSON & CAUMONT, *supra* note 9.

²⁴ *Id.*

health and medicine.²⁵ Online dating lags considerably behind other social network sites, but a Pew report from February 2016 said 12 percent of American adults in 2015 had used an online dating site, up from 9 percent in 2013.²⁶ Nine percent had used a mobile dating app, compared to just 3 percent in 2013. And the growth is even greater in two age groups. Those 18-24 had nearly tripled from 10 percent in 2013 to 27 percent in 2015, and those 55-64 had doubled from 6 percent in 2013 to 12 percent in 2015.²⁷

Although teens might not be using online dating sites, that does not mean they are not using social media to advance their romantic interests. A Pew Research Institute report on “Teens, Technology and Romantic Relationships” from October 2015 notes that “the digital realm is one part of a broader universe in which teens meet, date and break up with romantic partners. Online spaces are used infrequently for meeting romantic partners, but play a major role in how teens flirt, woo and communicate with potential and current flames.”²⁸ While 57 percent of teens, aged 13-17, have reported making friends with someone online, only 8 percent have ever met a romantic partner online, and most of those met through Facebook.²⁹ And while most teen romances do not start online, social media plays a definite role in advancing romantic relationships begun in the offline world: Half of teens have friended someone on Facebook or another social networking site to “let them know they are interested,” and 47 percent “have

²⁵ *Id.*

²⁶ AARON SMITH, Pew Research Center, 15% OF AMERICAN ADULTS HAVE USED ONLINE DATING SITES OR MOBILE DATING APPS (2016).

²⁷ *Id.*

²⁸ AMANDA LENHART ET AL, Pew Research Center, TEENS, TECHNOLOGY AND ROMANTIC RELATIONSHIPS (2015).

²⁹ *Id.*

expressed their attraction by liking, commenting or otherwise interacting with that person on social media.”³⁰

Some researchers have noted that while differences do exist in young people’s access to the Internet and, thus, social media, it may not be as cut-and-dried as looking at the “haves and have-nots.”³¹ Reporting the results of a 2004 research project in the U.K., Livingstone and Helsper reported that 74 percent of young people aged 9-19 had access to the Internet at home and 92 percent had access to it at school. Forty-one percent of children reported that they used the Internet daily with another 42 percent using it weekly. Another 13 percent said they used the Internet less than once a week, and 3 percent said they never used the Internet at all, which Livingstone and Helsper noted is in line with the number of non-users in northern Europe and the United States.³² Comparing the children’s use of the Internet with their parents’ use, Lenhart and Helsper found that school access seemed to be an equalizing factor for young people; a full 22 percent of the parents in the study never used the Internet.³³ Livingstone and Helsper worry that because of school access, the drive to expand Internet access in homes throughout the U.K. might lag, thus perpetuating the advantage that children from families with greater income will have. They wrote:

It appears that, although children from different backgrounds make equivalent use of the internet if they have equivalent access, existing inequalities in access have important consequences. Children and young people with home access tend to have spent more years online, to use the internet more often, to spend more time online per day and to have higher levels of online skills and self-efficacy.³⁴

³⁰ *Id.*

³¹ See Sonia Livingstone & Ellen Helsper, *Gradations in Digital Inclusion: Children, Young People and the Digital Divide*, 9 NEW MEDIA & SOCIETY, 671-696 (2007). See also LENHART, *supra* note 10.

³² LIVINGSTONE & HELSPER, *supra* note 31, at 675.

³³ *Id.*

³⁴ *Id.* at 678.

In the United States, Pew reported, as noted above, that 92 percent of teens aged 13-17 report going online daily and attributed that increase to the rise of mobile devices.³⁵ The Pew study reported “gaps in access to technology which fall along socio-economic, racial and ethnic lines.”³⁶ The study asked participants whether they “have or have access to” a smartphone, basic cell phone, desk or laptop computer, tablet, and game console. Of three groups identified, 85 percent of African-American teens reported having access to a smartphone, while 71 percent of white and Hispanic teens reported having access.³⁷ Overall, 73 percent of teens reporting having access to a smartphone, with 15 percent reporting they had access to a basic cell phone, and another 12 percent reporting they had no access to a cell phone. Only 8 percent of African-American teens had no phone, compared to 12 percent of whites and 14 percent of Hispanics.³⁸ The numbers are different when looking at household income instead of race or ethnicity: 17 percent of teens from households with less than \$30,000 annual income reported having no cell phone, and 18 percent of teens from households with between \$30,000 and \$49,999 annual income reported having no cell phone.³⁹ By contrast, 12 percent of teens from households earning between \$50,000 and \$74,999 annually reporting having no cell phone, and only 9 percent of teens from households earning \$75,000 or more reported having no cell phone.⁴⁰ When the question becomes that of access to a laptop or desktop computer or a tablet, lower-income households again lag behind higher income households.⁴¹

³⁵ LENHART, *supra* note 10.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Livingstone and Helsper reported that boys and older teens in their study used the Internet more frequently than girls and younger children, and that was reflected in the fact that they access to the Internet in more places than girls, including being more likely to have Internet access in their bedrooms.⁴² In the United States, a study done of 18- and 19-year-old first-year writing program students at the University of Illinois revealed differences in usage of the Internet based on gender.⁴³ Hargittai and Hsieh divided social network site (SNS) users into four groups: Dabblers, who use only one SNS and only use it sometimes; Samplers, who use more than one SNS but not very often; Devotees, who are active users on one SNS; and Omnivores, who are active on more than one SNS. The only real demographic difference they found was that women were more likely than men to use social network sites, but they attributed that to the fact that more of the female students were Omnivores, meaning they used multiple social network sites and used them with more regularity than the male students.⁴⁴ Overall, Hargittai and Hsieh found that 9.2 percent of the students in their study were Dabblers, 4.4 percent were Samplers, 32.9 percent were Devotees and 45.3 percent were Omnivores. Another 12.1 percent of the students reported that they did not use social networking sites.⁴⁵ Hargittai and Hsieh reported “no sharp contrast” involving racial backgrounds.⁴⁶

The Pew Research Center reported found gender differences in usage of social media. Teen girls tended to use text messaging, “visual social media platforms” like Instagram and online pinboards like Pinterest, while teen boys tended to use console and video game playing

⁴² LIVINGSTONE & HELSPER, *supra* note 31, at 678.

⁴³ Eszter Hargittai & Yu-li Patrick Hsieh, *From Dabblers to Omnivores: A Typology of Social Network Site Usage* in A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES, 146-168 (Zizi Papacharissi, ed., Routledge 2011).

⁴⁴ *Id.* at 156.

⁴⁵ *Id.* at 155-56.

⁴⁶ *Id.* at 156.

online.⁴⁷ Lenhart wrote: “Teenage girls use social media sites and platforms — particularly visually-oriented ones — for sharing more than their male counterparts do. For their parts, boys are more likely than girls to own gaming consoles and play video games.”⁴⁸ Besides Facebook, a comparison of three visually oriented sites shows that 61 percent of teen girls used Instagram, compared to 44 percent of teen boys; 51 percent of teen girls used Snapchat, compared to 31 percent of teen boys; and 33 percent of teen girls used Pinterest, compared to 11 percent of teen boys.⁴⁹

Livingstone and Helsper found age differences in how young people in the U.K. used the Internet. They reported that most 9- to 11-year-olds played games, used it for school, or used it to make a drawing or story, while 12- to 17-year-olds reported using it for school work, to visit exam revision sites, to play games, or to download music, and 18- to 19-year-olds used it to download music, get information not related to school, and to send or receive emails.⁵⁰

Social, Cultural, and Psychological Effects of Social Media on Teens

A common meme shows a photo of young people walking along in a group with their phones out and their faces turned to the phones, not to each other or their surroundings. Several versions make the rounds, but the gist is, “This is the real zombie apocalypse.” As connected as young people today are to their social networks, it does often seem that their online lives are negatively affecting their offline, real-world lives.

But danah boyd would counter that teens are not using their cell phones to escape reality but instead are using them to stay connected to what’s real for them: their relationships with their

⁴⁷ LENHART, *supra* note 10.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ LIVINGSTONE & HELSPER, *supra* note 31, at 681.

friends.⁵¹ And Mary Chayko notes that, “Younger people who have grown up with technology constantly at their sides do not seem to make the same distinctions among the ‘zones’ of work, home, and leisure” and thus see nothing wrong with keeping their smartphones handy.⁵² And while mobile devices can be used in public to keep strangers from striking up a conversation, to signal to others that we are not approachable, that connection to a social network site can just as easily help maintain friendships struck up on the slimmest of foundations.⁵³ This contradiction between appearance and reality is at the heart of the social, cultural and psychological effects social media are having on young people today.

Writing about the interviews she conducted with 166 teens in 18 states from 2005-2012, boyd identified their main motivation as social.⁵⁴ She noted that the teens she met turned to social media to fulfill a need for social time with friends that they could not fulfill in any other way. Limited by their parents’ fears of danger, by their distance from public spaces, or by their lack of transportation, the teens were “desperate” for a way to spend more time with their friends,⁵⁵ and they found it online: “[B]ecause of a variety of social and cultural factors, social media has become an important public space where teens can gather and socialize broadly with peers in an informal way.”⁵⁶ Teens’ “addiction” to social media is nothing more than a new manifestation of what teens have always wanted: more time with their friends away from their

⁵¹ BOYD, *supra* note 13, at 202.

⁵² CHAYKO, *supra* note 5, at 134.

⁵³ Nicole B. Ellison et al, *Social Network Sites and Society: Current Trends and Future Possibilities*, 16 INTERACTIONS MAGAZINE, 6, 7 (2009).

⁵⁴ BOYD, *supra* note 13, at 18.

⁵⁵ *Id.* at 200-201.

⁵⁶ *Id.* at 5.

parents' watchful eyes: "Most teens aren't addicted to social media; if anything, they're addicted to each other."⁵⁷

Ellison, Lampe and Steinfield couch their discussion of social media in terms of social capital, a theory that allows researchers to articulate the benefits people get from their relationships.⁵⁸ Citing Robert Putnam, they describe two kinds of social capital: (1) bonding social capital that comes from close friends and family, the people we turn to in real life, the offline world, for emotional, physical and financial support, and (2) bridging social capital, or "weak ties," to other people: work colleagues, classmates, friends of friends, other acquaintances.⁵⁹ In the days before social media, it was much harder to maintain those "weak ties." We might have thought it would be good to maintain an acquaintance because the person might prove useful to us in the future, but the effort it took proved to be too much work for the mere possibility of some future payoff.⁶⁰ But social media have made maintaining those acquaintances much easier: "The latent connection can be digitally reconstituted at any time, should the need or desire arise."⁶¹ In their study, they found that "intensive use" of Facebook brought students "higher levels of social capital, especially bridging social capital."⁶² The social network site made it easier for students to maintain ties to people whom they might otherwise lose track of.

Ellison, Lampe, Steinfield and Vitak also reported the results of a 2006 study at Michigan State University in which students reported that they used Facebook mainly to either keep in touch with old friends or to "check out" someone they had met socially in the real world and not

⁵⁷ *Id.* at 80.

⁵⁸ ELLISON ET AL., *supra* note 50, at 7.

⁵⁹ *Id.*

⁶⁰ *Id.* at 6-7.

⁶¹ *Id.* at 7.

⁶² *Id.*

to meet new people or find people to date.⁶³ A later study corroborated those results. Bridging social capital requires merely an acquaintance, a connection, between two people to start. What may begin as “check[ing] out” after a single face-to-face meeting can become an enduring Facebook “friend”ship. Ellison, Lampe, Steinfield and Vitak write:

Research on proximity has long suggested that proximity between two individuals increases the chances that a relationship will form. ... Facebook extends these proximity based social processes in two ways. First, it allows those who formed a relationship through physical proximity, but subsequently lost that proximity, to maintain the relationship. High school students moving to college, people shifting jobs, or families moving are all examples of this. Second, Facebook can reinforce relationships formed through proximity that would be too ephemeral to survive otherwise. For example, two students who meet through a class may connect for the duration of the class because of the forced proximity. However, when that proximity is removed, the relationship may not survive the sudden increased cost of maintenance. Facebook makes it easy to keep lightweight contact with each other even when the benefits of proximity are no longer available.⁶⁴

In that way, social capital is stored against the future need. The relationship can be maintained with little effort. Social network sites allow people to determine how much effort to put into maintaining an acquaintance and then make it easy to carry out that effort. Direct messaging someone is an example of an active effort to stay in touch, and liking someone’s post is a passive way to stay in touch.⁶⁵

As teens engage in social media, they will become more adept at managing the weak ties as well as the strong. Social media offer them just one more alternative way to negotiate how to deal with other people. They interact face-to-face (in proximity) with friends at school, and social networking sites and text messaging enable them to extend that proximate interaction into

⁶³ Nicole Ellison et al, *With a Little Help from my Friends: How Social Network Sites Affect Social Capital Processes* in A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 124, 132 (Zizi Papacharissi, ed., Routledge 2011).

⁶⁴ *Id.* at 137.

⁶⁵ ELLISON ET AL, *supra* note 50, at 7.

the virtual world. Boyd notes: “When teens engage with networked media, they’re trying to take control of their lives and their relationship to society. In doing so, they begin to understand how people relate to one another and how information flows between people.”⁶⁶ Teens’ participation in social media is evidence of their desire to participate in public life.⁶⁷ People connect on social media for many reasons, and preserving bridging capital may be one of them. Indeed, maintaining the weakness of the weak tie may also be a motivating factor in Facebook relationships. Debatin, Lovejoy, Horn and Hughes wrote that Facebook friend status “could be used to maintain a ritualized distance from people, while at the same time affirming some sort of social relationship.”⁶⁸ They related the story of “Anne,” who demarcated a “decisive distinction between *real* friends she hung out with and *mere* Facebook friends, with whom she had limited contact” (emphasis added).⁶⁹ As one student put it in the Debatin interviews: “It is like socializing without being social.”⁷⁰

While much has been made of how self-representations on social media are not true representations of the self, but rather carefully constructed images of the self, some recent research would contradict that. Teens have admitted sharing false information about themselves on social networking sites but only because they are trying to maintain some kind of privacy against intrusions they don’t believe the site administrators or visitors need to know: age, hometown, etc., or to hide something else, such as posting as though they are straight when, in fact, they are gay or lesbian.⁷¹ Boyd notes that teens “don’t see social media as a virtual space in

⁶⁶ BOYD, *supra* note 13, at 93.

⁶⁷ *Id.* at 202.

⁶⁸ Bernhard Debatin et al, *Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences*, 15 JOURNAL OF COMPUTER-MEDIATED COMMUNICATION 83, 97 (2009).

⁶⁹ *Id.*

⁷⁰ *Id.* at 95.

⁷¹ See LIVINGSTONE, *supra* note 18. Also see BOYD, *supra* note 13.

which they must choose to be themselves or create an alternate ego.”⁷² In other words, their identity online can be in flux because they are teenagers whose identity really is in flux, being not yet fully formed.

One final thing to keep in mind about how teens present themselves on social networking sites, from boyd: “What teens do online cannot be separated from their broader desires and interests, attitudes and values. [...] Teens’ engagement with social media and other technologies is a way of engaging with the broader world.”⁷³ If, as Chayko argues, teens do not maintain different zones to compartmentalize themselves for home, work, school, and social life, then social network sites really do become what sociologist Ray Oldenburg calls “third spaces” — a portable place that floats between home and workplace where people can relax and “socialize with minimal obligations or social entanglements.”⁷⁴ These third spaces can be kept separate or be integrated, and because they are “sociomental” (Chayko’s term for “virtual”), people can pay attention to each space separately or multitask with an in-person conversation, a Facebook chat, a Twitter feed and an Instagram or Snapchat story.

Privacy Concerns

Privacy is one area where the teen’s online behavior could hurt himself or herself. Lapses in judgment regarding privacy will directly affect the teen. Invasion of privacy is “part of the Facebook reality” through such incidents as the hacking of accounts and sharing of photos that embarrass the subject.⁷⁵ Victims tend to take two approaches to cope with privacy invasion: 1) they tighten their privacy settings and 2) they “integrate and transform the incidents into a

⁷² BOYD, *supra* note 13, at 46-7.

⁷³ *Id.* at 202.

⁷⁴ Oldenburg cited in CHAYKO, *supra* note 5, at 69.

⁷⁵ See DEBATIN ET AL, *supra* note 63.

meaningful and ultimately unthreatening context.”⁷⁶ Facebook is such an integral part of people’s lives, and its benefits so far outweigh privacy concerns, however, that most people do not think about giving up their account to prevent further privacy incursions.⁷⁷ Debatin and his fellow researchers found that even when the students they interviewed acknowledged that Facebook’s news feed helped to spread rumors and gossip, they saw this as a side effect that was part of the cost of tapping into Facebook’s ability to “enhance social connectedness.”⁷⁸

Butler, McCann and Thomas did a study where they combined a 25-question survey about users’ awareness of Facebook’s privacy policy with content analysis of their Facebook profiles. Although the results are not generalizable because of the small sample size, the researchers found that, “Overall, it seems users care more about making an identity for themselves on the social networking site than managing who can view that identity.”⁷⁹ Only 14 percent of the 235 people who responded to the survey said they had read the latest privacy policy changes at the time.⁸⁰ Another 17 percent said they had read the privacy policy “but only when I first created my account.”⁸¹ A full 29 percent said they had never read Facebook’s privacy policy, and another 12 percent said not only had they not read it, they did not even know where to find it.⁸² The researchers caution that “[s]ocial networking sites are purposely created so users can divulge personal information in order to connect with others. The problem is that as a society, users tend to overshare information, whether knowingly or unknowingly. This

⁷⁶ *Id.* at 99-100.

⁷⁷ *Id.* at 101.

⁷⁸ *Id.*

⁷⁹ Elizabeth Butler et al, *Privacy Setting Awareness on Facebook and Its Effect on User-Posted Content*, 14 HUMAN COMMUNICATION 39, 46 (2011).

⁸⁰ *Id.* at 44-5.

⁸¹ *Id.* at 51.

⁸² *Id.*

overshare could potentially lead to trouble both personally and professionally.⁸³ Of course, even when teens do know about the privacy policy of whatever social networking site they're one, they cannot always control their information once it's posted. Someone can share it or screen shot it and post it somewhere else. In addition, they cannot always control how others, including parents, interpret what they post.

For many teens, the focus of privacy concerns is that they want to escape parental or educational system scrutiny.⁸⁴ Boyd says that the teens she interviewed do care about privacy:

When teens — and, for that matter, most adults — seek privacy, they do so in relation to those who hold power over them. Unlike privacy advocates and more politically conscious adults, teens aren't typically concerned with governments and corporations. Instead, they're trying to avoid surveillance from parents, teachers, and other immediate authority figures in their lives. They want the right to be ignored by the people who they see as being “in their business.”⁸⁵

Social media carry with them the added catch that most conversations on them are “public by default, private by effort.”⁸⁶ Facebook's default privacy setting is “public” unless users go to the trouble of changing that to “friends.” But even if someone sets his profile to “friends” only, a friend can share or re-post what is intended to be kept within a small network of friends.

While teens may tend to think of privacy in terms of avoiding their parents or other authority figures, parents, for their part, are concerned about their teens oversharing information that is then picked up and used by marketers and advertisers.⁸⁷ Teens, who spent \$208.8 billion in 2012, are a huge target for marketers and advertisers. Feng and Xie used data from a Teens

⁸³ BUTLER ET AL, *supra* note 74, at 44.

⁸⁴ See LIVINGSTONE, *supra* note 18. See BOYD, *supra* note 13.

⁸⁵ BOYD, *supra* note 13, at 56.

⁸⁶ *Id.* at 61.

⁸⁷ Yang Feng & Wenjing Xie, *Teens' Concern for Privacy When Using Social Networking Sites: An Analysis of Socialization Agents and Relationships with Privacy-Protecting Behaviors*, 33 COMPUTERS IN HUMAN BEHAVIOR 153, 159 (2014).

and Privacy Survey by Princeton Survey Research to examine teens' level of social networking site use, their parents' level of privacy concern about online data and marketing, the teens' level of privacy concern about online data collection, teens' implementation of privacy-setting strategies, and teens' Facebook profile visibility with the aim of looking at the influence of "two socialization agents: parental mediation and SNS usage."⁸⁸

Feng and Xie found that there is a positive relationship between parents' and teens' concern over privacy. When the parents talked to their children about their concerns, children became more aware of privacy issues; this kind of parental involvement is called "active mediation."⁸⁹ The other type of parental involvement is "restrictive mediation" and consists of parents' controlling their children's media use through the setting of rules.⁹⁰ Their analysis also showed that teens had adopted several privacy-protection strategies. Among the results, teens tried to control access to what they posted, with 76 percent having deleted people from their friends' list, and 57 percent having blocked people from their profiles.⁹¹ Teens had also tried to alter content to protect their privacy: 62 percent had deleted or edited something they had previously posted, 53 percent had deleted comments others made about them, and 58 percent had untagged themselves in photos.⁹² Feng and Xie call for education programs for both parents/guardians and children.

Daniel Solove notes that notions of privacy have not evolved to keep pace with the technological frontier: "Traditionally privacy is viewed in a binary way, dividing the world into two distinct realms, the public and the private. If a person is in a public place, she cannot expect

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 160.

⁹² *Id.*

privacy.”⁹³ Social media, however, blur those realms. A student can be sitting in the private space of her bedroom at home, tweeting or posting online and thereby straddling the private and public realms at the same time. The physical place where she is sitting, her bedroom, may lull her into a sense that her posts are as protected as she is in her private environment. And, as noted above, students may take steps to try to extend their privacy into the online world by setting their account to restrict who can see what they post, but all it takes is one friend who shares something without permission, and their “private” posts are laid bare for others to see. Solove notes, “Privacy is a complicated set of norms, expectations, and desires that goes far beyond the simplistic notion that if you’re in public, you have no privacy.”⁹⁴ Modern technology challenges the public-private divide, and the indistinct division challenges students’ freedom to speak at will online when what they are speaking about is their school.

⁹³ DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 163 (2007).

⁹⁴ *Id.* at 166.

CHAPTER 5

MAJOR SUPREME COURT OPINIONS ON STUDENT SPEECH

Prelude to *Tinker*: *West Virginia v. Barnette*

In tracing the development of free speech rights of students in the United States, one must begin a little further back than the Supreme Court's landmark 1969 *Tinker*¹ decision. Twenty-six years earlier, in *West Virginia State Board of Education v. Barnette*,² the Court held that schools could not compel students to salute the American flag because doing so violated the First and Fourteenth amendments. So, the *Barnette* decision can be looked at as the first that recognized that the speech rights afforded to adults extended to children; here, specifically, the right not to be compelled by a government authority to speak. In rendering that decision, the Court overturned its 1940 decision in *Minersville School District v. Gobitis*,³ which had held that students could be compelled to salute the flag and could be expelled for refusing to do so. The law being challenged in *Barnette* was actually amended by the West Virginia legislature in response to the Court's ruling in *Gobitis*⁴ and declared a refusal to salute the flag "an act of insubordination" punishable by expulsion.⁵ Once the student was expelled, he could be declared an unlawful truant, and his parents or guardian fined and/or jailed.⁶ The Barnettes, who were Jehovah's Witnesses, argued that their religion's interpretation of the Bible forbade saluting or pledging allegiance to any flag.⁷ The majority opinion in *Barnette* raised three points that are important to this study's discussion of student speech rights.

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

² *West Virginia v. Barnette*, 319 U.S. 624 (1943).

³ *Minersville School District v. Gobitis*, 310 U.S. 585 (1940).

⁴ *Barnette*, 319 U.S. at 625.

⁵ *Id.* at 626.

⁶ *Id.* at 629.

⁷ *Id.* at 643, Black and Douglas, JJ., concurring.

First, and especially pertinent as a prelude to *Tinker*, the Court noted that saluting the flag is a “form of utterance” and the symbolism behind the flag “is a primitive but effective way of communicating ideas.”⁸ Justice Robert Jackson, writing for the majority, said, “The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”⁹ Black armbands, a traditional symbol of mourning, were worn by the three students suspended from school in the *Tinker* case as emblems to symbolize opposition to U.S. involvement in the Vietnam War. As such, they could be considered an effective, recognizable way to communicate the students’ protest against the war. Second, and equally pertinent to *Tinker*, the Court in *Barnette* noted that the Barnette children’s refusal to salute the flag was peaceable and did not infringe on anyone else’s rights. In this, one can hear the echo of what would become *Tinker*’s two requirements for student speech to be protected from school interference: both the more well-known requirement that the speech not cause a disruption of the school environment and the lesser-known requirement that the speech not infringe on the rights of other students. In *Barnette*, the Court reasoned:

The freedom asserted by these appellees [the Barnettes] does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual.¹⁰

The reference to authority leads to the third point raised in the *Barnette* opinion that applies to much of what will be discussed in the section on online student speech, where the cases examined involve students speaking out, usually rudely, against school authority, whether in the

⁸ *Id.* at 632.

⁹ *Id.*

¹⁰ *Id.* at 630.

form of an administrator, a teacher, or a rule or policy. In *Barnette*, the Court warns against overreach by local government authorities, particularly when that overreach infringes constitutional rights:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. ... Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account.¹¹

It is this overreach that leads to many of the court cases involving student online speech today as administrators and faculty stung by student criticism — again, often expressed in crude and uncivil language — seek to shut down those students’ very public voices. It is also that overreach that leads school administrators to censor student newspapers using the *Hazelwood*¹² ruling as justification.

Before turning attention to contemporary issues involving students’ online speech, however, an examination of the Supreme Court’s four major student speech cases is necessary. What will be seen is that a remarkably strong foundation was set by the *Tinker* decision in 1969, but that foundation has been limited by the subsequent decisions in *Bethel v. Fraser*¹³ in 1986, *Hazelwood v. Kuhlmeier* in 1988, and *Morse v. Frederick*¹⁴ in 2007.

Tinker v. Des Moines Independent Community School District

Writing about the *Gobitis* and *Barnette* cases as the foundations of *Tinker*, Dan L. Johnston, who represented the students in the *Tinker* case, noted that in *Barnette*, the Court

¹¹ *Id.* at 637.

¹² *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

¹³ *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

¹⁴ *Morse v. Frederick*, 551 U.S. 393 (2007).

completely changed its reasoning in overturning *Gobitis* as precedent and thus changed the question to be considered in that line of student speech cases: “Where Justice Frankfurter had framed the dispute in *Gobitis* as one between the consciences of the minority and the authority of the state to legislate and regulate to achieve loyalty and patriotism, Justice Jackson frames the dispute as one between individual conscience and the will of the majority.”¹⁵ That line of reasoning was continued in *Tinker*.

Johnston maintains that *Tinker* was not new law — that it reaffirmed earlier rulings in favor of student speech rights.¹⁶ Yet *Tinker* has become the foundation of most, if not all, student speech cases since, because of the Supreme Court’s declaration that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁷ In *Tinker*, the Court specified that “students in school as well as out of school are ‘persons’ under our Constitution”¹⁸ and said that the right to freedom of expression applies anywhere on campus during school hours so long as the expression occurs “without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”¹⁹

Johnston summarized the events leading up to the *Tinker* case thus: The Tinker and Eckhardt families were active anti-war protesters who heard of a movement to wear black armbands to support Senator Robert Kennedy’s call to extend the temporary Christmas-time truce in Vietnam in 1965. At about the same time, an editorial appeared in the student newspaper

¹⁵ Dan L. Johnston, *Freedom of Speech: A Casualty of War*, in DEFENDING THE FIRST: COMMENTARY ON FIRST AMENDMENT ISSUES AND CASES 45, 48 (Joseph Russomanno ed., Erlbaum Associates 2005).

¹⁶ *Id.* at 46.

¹⁷ *Tinker*, 393 U.S. at 506.

¹⁸ *Id.* at 511.

¹⁹ *Id.* at 509.

endorsing the attempt, but school officials, hearing that some students might actually wear armbands, rapidly prohibited them and said students who did come to school wearing armbands would be asked to take them off or go home. Just before Christmas break, Mary Beth and John Tinker and Christopher Eckhardt (along with two younger Tinkers who were not parties to the suit) wore armbands to school and were sent home. They did not return to school until after Christmas break. The Tinkers and Eckhardts asked the Iowa Civil Liberties Union for help, and when a divided school board upheld the school officials' action, the case was launched.²⁰

Johnston reported that Chief Justice Warren wanted the Supreme Court to rule for the students simply on the fact that other political symbols were allowed in school when the armbands were prohibited, but Justice White "argued for a broader First Amendment holding, and his position prevailed."²¹ Indeed, the Court noted that the school district's prohibition of symbols of protest applied only to the armbands expressing opposition to the Vietnam War, not to buttons worn in support of national political campaigns or to the wearing of the Iron Cross, a Nazi symbol.²² The Court called the armband protest "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment"²³ and further declared that singling out one kind of expression focused on one kind of opinion, when others had been allowed, was impermissible under the Constitution.²⁴

The Court cited its earlier opinion in *Barnette* to point out that the First and Fourteenth amendments apply to students and that schools have a duty to allow free expression of political speech to further students' education in how to participate in civic life. The schools'

²⁰ Johnston, *supra* note 15, at 49-50.

²¹ *Id.* at 56.

²² *Id.* at 510-511.

²³ *Id.* at 505-506.

²⁴ *Id.* at 511.

responsibility to “educat[e] the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”²⁵ And although school officials do have authority to curtail student speech when that speech “intrudes upon the work of the schools or the rights of other students,”²⁶ they do not have authority to squelch speech merely “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁷ For his part, Johnston noted that the First and Fourteenth amendments were each “products of specific political climates” — the First, as part of the Bill of Rights, demanded by state representatives to protect the people from the government overreach they had suffered at the hands of the English king, and the Fourteenth in response to state and local governments’ failure to safeguard the rights of American citizens that led up to and followed the Civil War.²⁸ “By their strict language, neither the Bill of Rights nor the Fourteenth Amendment so much give rights to people as do they proscribe actions of the governments that had violated those rights in the recent experience of their enactments,” he wrote.²⁹ He sees the school’s disciplining of the children and the federal district and circuit courts’ failure to uphold their rights as evidence of “the fragility of the rule of law in times of war.”³⁰ And he has harsh words for federal judges who uphold disciplining students for speech that should be protected by

Tinker:

To be sure, three decades of federal judges appointed by conservative presidents have resulted in decisions that are not consistent with the opinions about the role of the First Amendment in public schools

²⁵ *Id.* at 507.

²⁶ *Id.* at 508.

²⁷ *Id.* at 509.

²⁸ Johnston, *supra* note 15, at 50.

²⁹ *Id.*

³⁰ *Id.* at 51.

expressed so eloquently by Mr. Justice Fortas in *Tinker*. Ironically, conservatives who complained that judges appointed during the Roosevelt-Truman-Eisenhower era were not sufficiently respectful of stare decisis — that pre-New Deal decisions should be followed not necessarily because they were right, but because they established precedential law — now support the decisions of conservative judges who fail to apply *Tinker* to comparable factual claims.³¹

Chipping away at *Tinker*: *Fraser* and *Hazelwood*

High school students came away from *Tinker* with a clearly defined right to exercise their freedom of expression even during school hours as long as they did not cause a disruption of the school or infringe any other students' rights. But two cases in the 1980s would begin to curtail that freedom.

In 1986, the Supreme Court ruled in *Bethel School District v. Fraser* that schools could regulate student language that was “offensively lewd and indecent speech,”³² which had no claim to First Amendment protection in the protected setting of a school. In the *Fraser* case, Bethel High School student Matthew Fraser used sexual innuendo in a speech nominating a fellow student for student vice president at an assembly of some 600 students. It was reported that teachers and some students were embarrassed by the speech; other students apparently mimicked the acts described in it. The speech, quoted in Justice Brennan's concurring opinion, follows:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally — he succeeds.

Jeff is a man who will go to the very end — even the climax, for each and every one of you.

³¹ *Id.* at 58.

³² *Fraser*, 478 U.S. at 685.

So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.³³

The day after the speech, Fraser was called into the assistant principal's office and informed that he would be suspended for three days and have his name removed from the roster of possible speakers at the high school graduation ceremony for violating a school rule that said, "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."³⁴ Fraser asked for a review of his punishment, and the school's hearing officer found his speech to be "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly."³⁵ Fraser served two days of his three-day suspension. Though his name was removed from the roster of candidates for graduation speaker, he was elected by write-in vote by his fellow students. Meanwhile, he and his father sued the school district, alleging that his First Amendment right to free speech had been violated.

The U.S. District Court and the Court of Appeals both ruled that the school's punishment violated Fraser's First and Fourteenth amendment rights. As Justice Marshall noted in his dissent, "The District Court and Court of Appeals conscientiously applied *Tinker* [citation omitted], and concluded that the School District had not demonstrated any disruption of the educational process."³⁶ However, the Supreme Court reversed and found that the First Amendment did not protect Fraser's speech. Chief Justice Burger, writing the majority (7–2) opinion, said there was a "marked distinction" between the political message sent by *Tinker's*

³³ *Id.* at 687, Brennan, J., concurring.

³⁴ *Id.*

³⁵ *Id.* at 678-679.

³⁶ *Id.* at 690, Marshall, J., dissenting.

armbands and the “lewd and obscene speech” in *Fraser’s* nominating statement.³⁷ Burger cited *FCC v. Pacifica Foundation*³⁸ as precedent that the Court had “recognized an interest in protecting minors from exposure to vulgar and offensive spoken language”³⁹ and said that Fraser’s speech fell under that category. Burger noted that schools are the place to teach children how to behave civilly when participating in civic life:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. [...] The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.⁴⁰

Finally, the Court held that the school district acted within its authority to punish Fraser because the punishment was directed at his lewd speech, not a political message:

Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.⁴¹

In 2001, Fraser was interviewed by David Hudson of the Freedom Forum. In that interview, Fraser, then a debate coach at Stanford University, said the Supreme Court’s ruling in his case “effectively overruled *Tinker*”: “*Tinker* may still be good law de jure, but it has been de

³⁷ *Id.* at 680.

³⁸ *FCC v. Pacifica*, 438 U.S. 726 (1978).

³⁹ *Fraser*, 478 U.S. at 685.

⁴⁰ *Id.* at 683.

⁴¹ *Id.* at 685.

facto obliterated.”⁴² But William Coats, the lawyer who represented the school district, disagreed with that assessment. He told Hudson, “Schools should be able to prohibit vulgar and lewd speech in a school speech. This type of speech is inherently disruptive. But certainly, speech before a student assembly should not resemble speech in a pool hall, tavern or even the boys’ locker room.”⁴³ Fraser disagreed: “Public schools are setting a general tone of authority and control. They are teaching students to obey authority without question. And in a democracy, that is a very dangerous thing to do.”⁴⁴

The second Supreme Court ruling from the 1980s requires students to obey authority, if the authority is in the form of a principal or teacher who has prior review of a student newspaper that bears “the imprimatur of the school.”⁴⁵ In its 1988 ruling in *Hazelwood School District v. Kuhlmeier*, the Court dealt a blow to free speech and press rights of student journalists. In *Hazelwood*, the principal at Hazelwood East High School in Saint Louis County, Missouri, pulled two pages from the Spectrum, the high school’s student newspaper, because of stories dealing with teen pregnancy and the impact of divorce on students. The principal was concerned that the pregnant students would be identified despite the use of fake names and that, dwelling as it did on issues of sexual activity and birth control, the article was “inappropriate” for younger readers.⁴⁶ He was concerned that the story on divorce used a student’s real name when the student was making complaints about her father, unaware that the teacher who advised the Journalism II class that produced the newspaper had removed the student’s name from the story.

⁴² David Hudson, *Matthew Fraser Speaks Out on 15-Year-Old Supreme Court Free-Speech Decision*, First Amendment Center, April 17, 2001, <http://www.newseuminstitute.org/2001/04/17/matthew-fraser-speaks-out-on-15-year-old-supreme-court-free-speech-decision/> (last visited March 4, 2018).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Hazelwood*, 484 U.S. at 271.

⁴⁶ *Id.* at 263.

The principal also thought that the student’s parents should have been given a chance to respond in the article.⁴⁷ Because he did not think there was time to make changes to the articles and still get the paper out before the end of the school year, the principal pulled the two pages that contained the stories, along with several other stories that appeared on those pages. The student editors sued, alleging that their First Amendment rights had been violated.

The District Court found for the school, holding that the principal’s actions were justified. The Court of Appeals for the Eighth Circuit reversed, in part because it held that although the newspaper was a part of the school’s curriculum, it was also a public forum “intended to be and operated as a conduit for student viewpoint.”⁴⁸ As a public forum, the newspaper was protected from censorship except when necessary to prevent *Tinker*’s “material and substantial interference with school work or discipline ... or the rights of others.”⁴⁹

The Supreme Court reversed. While *Tinker* explicitly noted that First Amendment protections do extend to children, the Court cited the *Fraser* case, particularly its holdings that student rights “are not automatically coextensive with the rights of adults in other settings” and that school boards have the right to determine “what manner of speech in the classroom or in the school assembly is inappropriate.”⁵⁰ In finding that the newspaper was produced as part of a newspaper class and was under the control of the journalism teacher in almost all aspects — selecting the newspaper editors, deciding both the number of pages in each edition and the publication dates, assigning stories, reviewing quotes, and editing stories, among other things — the Court held that the student newspaper was not a forum for public expression. Reading the board policy that governed the student newspaper, the Court also found that “school officials

⁴⁷ *Id.*

⁴⁸ *Id.* at 265.

⁴⁹ *Id.*

⁵⁰ *Id.* at 267-267.

retained ultimate control over what constituted ‘responsible journalism’ in a school-sponsored newspaper.”⁵¹ The Court said that *Tinker*’s requirement for a school “to tolerate particular student speech [...] is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”⁵²

The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.⁵³

The Court held that school officials can exercise greater control over such student expression as newspapers and theatrical performances because of their need to make sure the school’s educational mission is carried out, to protect students from exposure to material that is beyond their maturity, and to ensure that an individual student’s views are not believed by the public to be representative of the school’s views.⁵⁴

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.⁵⁵

⁵¹ *Id.* at 269.

⁵² *Id.* at 270-271.

⁵³ *Id.* at 271.

⁵⁴ *Id.*

⁵⁵ *Id.* at 272-273.

Justice William J. Brennan Jr. dissented, joined by Justice Thurgood Marshall and Justice Harry Blackmun, saying the principal violated the First Amendment by censoring the articles because they did not disrupt class work or infringe anyone's rights.⁵⁶ Pointing out that some student speech does disrupt the school's mission, using Matthew Fraser's speech as one example, Brennan said that other student speech "frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's."⁵⁷ Brennan charged that the majority opinion "offer[ed] no more than an obscure tangle of three excuses to afford educators 'greater control' over school-sponsored speech than the *Tinker* test would permit."⁵⁸ Those were: the need to control curriculum, a "pedagogical interest" in shielding students from inappropriate material, and the need to "dissociate itself from student expression."⁵⁹ *Tinker* would allow a teacher to "constitutionally 'censor' poor grammar, writing, or research" because allowing such things in the newspaper would 'materially disrupt[t]' the newspaper's curricular purpose."⁶⁰ But censoring a newspaper to eliminate material deemed inappropriate would not serve "the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."⁶¹ Brennan also warned, "The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."⁶²

⁵⁶ *Id.* at 278, Brennan, Marshall, and Blackmun, JJ., dissenting.

⁵⁷ *Id.* at 279.

⁵⁸ *Id.* at 282.

⁵⁹ *Id.* at 282-283.

⁶⁰ *Id.* at 283.

⁶¹ *Id.* at 284.

⁶² *Id.* at 288.

Tinker Moves Off Campus: Morse v. Frederick

In 2007, the Supreme Court extended *Tinker*'s reach beyond the schoolhouse gate to apply it to student speech that occurred off campus but at a school-sponsored event. *Morse v. Frederick* began in January 2002 when high school senior Joseph Frederick and some friends held up a 14-foot banner that stated "BONG HiTS 4 JESUS" as the Olympic torch passed by their school in Juneau, Alaska. Frederick was across the street from school property when he committed the speech that was punished. His banner was confiscated, and Principal Deborah Morse suspended him for 10 days for what she believed was speech encouraging illegal drug use.⁶³ The school superintendent upheld the suspension, as did the school board. The superintendent was careful to explain that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs."⁶⁴ Frederick filed suit, alleging that his First Amendment rights had been violated. The U.S. District Court ruled against Frederick, but the Court of Appeals reversed, finding that the school did not show that Frederick's speech posed the threat of substantial disruption.⁶⁵ The Supreme Court ruled that Frederick's rights were not violated and that Principal Morse acted properly because, while Frederick was not on school property, the event was classified as "an approved social event or class trip" and the school district's rules expressly stated that students were subject to school conduct rules at such events.⁶⁶ While Frederick said the phrase "Bong Hits 4 Jesus" was nonsense aimed only at getting the television cameras to train on him,⁶⁷ Principal Morse interpreted it as a pro-marijuana banner advocating drug use. The Supreme

⁶³ *Morse v. Frederick*, 551 U.S. at 398.

⁶⁴ *Id.*

⁶⁵ *Id.* at 399.

⁶⁶ *Id.* at 401.

⁶⁷ *Id.*

Court ruled 5–4 that the First Amendment does not protect speech aimed at promoting illegal drug use, and the majority had no doubt that the banner was doing that: “Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.”⁶⁸

The Court’s opinion, written by Chief Justice John Roberts, cited *Tinker*, *Fraser* and *Hazelwood*. Roberts outlined “two basic principles” from *Fraser* that apply in *Morse*: 1) that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”;⁶⁹ and 2) “that the mode of analysis set forth in *Tinker* is not absolute”: “Whatever approach *Fraser* employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*.”⁷⁰ Specifically noting that *Hazelwood* (which is referred to in the opinion as *Kuhlmeier*) does not control the Bong Hits case because no one would reasonably believe that Frederick’s banner was school-sanctioned, Roberts nonetheless said that *Hazelwood* “acknowledged that schools may regulate some speech ‘even though the government could not censor similar speech outside the school’ [...] And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.”⁷¹ Roberts noted that Congress has made anti-drug education part of all schools’ educational mission.⁷² Combining the “special characteristics of the school environment” as noted in *Tinker* with the federal government’s requirement that schools educate students about drug use “allows schools to restrict student expression that they reasonably regard as promoting drug use.”⁷³

⁶⁸ *Id.* at 402.

⁶⁹ *Id.* at 404-405.

⁷⁰ *Id.* at 405.

⁷¹ *Id.* at 405-406.

⁷² *Id.* at 408.

⁷³ *Id.*

Roberts stopped short of adopting a broader rule advocated by the school “that Frederick’s speech is proscribable because it is plainly ‘offensive’ as the term is used in *Fraser*” because he saw that as being too far-reaching in that “much political and religious speech might be perceived as offensive to some” and the Court could proscribe Frederick’s speech simply because it was promoting drug use.⁷⁴

In a dissent, however, Justice John Paul Stevens stated that he believed Frederick’s statement that the banner was nonsense and not meant to promote drug use.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school’s decision to punish Frederick for expressing a view with which it disagreed.⁷⁵

Stevens was joined by Justices Ruth Bader Ginsburg and David Souter in his dissent. The dissent argued that “censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification” for infringing First Amendment rights.⁷⁶ Additionally, Stevens said that punishing someone for advocating something in speech is only permissible when it is likely that action will occur.⁷⁷ Such was not the case with Frederick’s banner. He offered a caution for where the *Morse* ruling would lead:

Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message

⁷⁴ *Id.* at 409.

⁷⁵ *Id.* at 435, Stevens, Souter, and Ginsburg, JJ., dissenting.

⁷⁶ *Id.* at 436.

⁷⁷ *Id.*

can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.⁷⁸

As Stevens worried about how far the Court was stretching schools' ability to punish student speech when it had to work so hard to "divine its hidden meaning,"⁷⁹ Justice Samuel Alito, joined by Justice Anthony Kennedy, said he joined the opinion of the Court only on the understanding that the ruling applies only to speech "that a reasonable observer would interpret as advocating illegal drug use" and that it does not support restrictions of "speech that can plausibly be interpreted as commenting on any political or social issue," including issues involving drug policy or laws.⁸⁰ Further, he noted that the Court's opinion does not permit school officials "to censor *any* student speech that interferes with a school's 'educational mission'"⁸¹ [emphasis added]. Alito's warning:

This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The 'educational mission' of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.⁸²

While Alito did note that some speech could be curtailed if it was based on the "special characteristic of the school setting"; to wit, if it was a "threat to the physical safety of students,"⁸³ he also noted that giving school officials such wide latitude to regulate speech under an all-encompassing "educational mission" umbrella would endanger student speech. Harking back to *Tinker*, he gave the example of a school district that decided its mission was to support

⁷⁸ *Id.* at 444.

⁷⁹ *Id.*

⁸⁰ *Id.* at 422, Alito and Kennedy, JJ., concurring.

⁸¹ *Id.* at 423.

⁸² *Id.*

⁸³ *Id.* at 424.

U.S. soldiers in time of war and therefore suppressed all speech, including the students' black armbands, that could be seen as not supporting the soldiers. Vice versa, the school could decide that its educational mission was to promote world peace and therefore it could suppress all speech that supported soldiers.⁸⁴ Alito noted, "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment."⁸⁵

From the Schoolhouse Gate to Cyberspace

What the Supreme Court gave students in 1969 in the form of *Tinker*'s strong declaration that they did not shed their constitutional rights — including their right to free speech — at the schoolhouse gate has been steadily curtailed in the intervening decades. Carving out exceptions that allow for censorship and/or punishment at school through *Fraser* for lewd speech and through *Hazelwood* for school-sponsored speech, the Court walked back First Amendment protection for student speech at school. Then its ruling in *Morse*, albeit for speech at a school-sponsored event, opened the door to making off-campus speech subject to discipline at school. Lower courts' rulings in online student speech cases have shown that it is but a small jump from *Morse* to cyberspace's off-campus speech. The Court has denied certiorari for three student online speech cases that are among those that will be discussed in-depth in Chapter 8, thus giving lower courts leeway to rule in whatever way they interpret the four precedents given in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*.

⁸⁴ *Id.*

⁸⁵ *Id.*

CHAPTER 6

LEGAL SCHOLARS' VIEWS OF OFF-CAMPUS ONLINE STUDENT SPEECH

A Call for Supreme Court Guidance

For years, the call has been the same. Legal scholars may differ on the approach the Supreme Court should take with off-campus online student speech, but on one thing they agree: The Supreme Court needs to act. After explaining the four (at that time) appellate circuit decisions involving such speech, Clay Calvert concluded:

The only items here, in fact, that seem readily clear at this stage are that: 1) the U.S. Supreme Court needs, very soon, to hear a case that directly deals with this issues, thus adding, in the process, a critical fifth decision to its current quartet of rulings affecting student free-expression rights; and 2) creating a clear, coherent and concise jurisdictional test that not only is workable but also strikes a proper balance between the First Amendment speech rights of off-campus minors and the need of schools to function smoothly and effectively as educational institutions will be a prodigious and staggering task.¹

That article was published in 2009, about a year after the Supreme Court had denied certiorari to *Wisniewski v. Board of Education of Weedsport Central School District*,² a Second Circuit case involving eighth-grader Aaron Wisniewski, who was suspended after using a drawing of a gun firing a bullet at a man's head with blood spatter above and the words "Kill Mr. VanderMolen" below as his AOL instant messaging icon.³ VanderMolen was Aaron's English teacher. Years later, writing about a case from the Fifth Circuit in which a high school student was suspended for posting a performance of an original rap song about coaches sexually harassing female

¹ Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue that the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 250-51 (2009).

² *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007).

³ *Id.* at 36.

students at school, Katherine Geddes wrote that the appellate judges misapplied the *Tinker*⁴ precedent: “While both the Internet and the prevalence of school violence legitimately support the majority’s holding, the court’s final decision suggests that the time has come for the Supreme Court to review and clarify *Tinker*’s application to this new breed of student speech.”⁵ That refrain is sounded again and again in law review articles dealing with off-campus online speech. The Supreme Court, which has not accepted a student speech case since its 2007 *Morse v. Frederick*⁶ decision, needs to update its jurisprudence for the age of the Internet and social media.

Calvert noted that lower courts “have generally protected the student expression” in off-campus encounters between students “engaged in much more primitive forms of speech” toward teachers and other students.⁷ He criticized the Second Circuit’s *Wisniewski* decision as “a rather primitive ‘if-then’ formula: If it is reasonably foreseeable that student speech created off campus will come to the attention of school authorities, then school authorities may exert disciplinary authority over it.”⁸ Calvert cautioned that using that standard for when school officials may punish or censor students’ off-campus online speech means that students will most likely be punished at school because of three reasons: “tattletale students,” “curious teachers/administrators,” and “in-school buzz/discussion.”⁹ In other words, there will always be talk about outrageous online speech among the school’s denizens, meaning that it is “reasonably foreseeable” that any online speech will come to the attention of school authorities.

⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁵ Katherine E. Geddes, *Casenote: Why Bell Tolls a Review of Tinker’s Application to Off-Campus Online Student Speech*, 69 SMU L. REV. 275, 281 (2016).

⁶ *Morse v. Frederick*, 551 U.S. 393 (2007).

⁷ Calvert, *supra* note 1, at 223.

⁸ *Id.* at 228.

⁹ *Id.* at 235-36.

“Everywhere at Once”

An unsigned article in the February 2012 Harvard Law Review, covering the Third Circuit’s en banc decision in the rehearing of *J.S. ex rel. Snyder v. Blue Mountain School District*,¹⁰ noted that a judge in a concurring opinion “would have expressly held that *Tinker* does not apply to off-campus speech.”¹¹ The judge noted the “‘everywhere at once’ nature of the internet,” and, thus, that “the determination of what should qualify as off-campus speech could not turn simply on the location of the speaker.”¹²

It is precisely this “everywhere at once” quality of the internet that highlights the need to resolve the constitutional issue in this case. Because the internet blurs the line between students’ school and home lives, there is a significant risk that lower protections for on-campus speech might seep into all areas of students’ lives, with significant potential consequences for their First Amendment rights.¹³

The article noted that when courts use the *Tinker* standard to determine whether off-campus online speech either creates an actual substantial disruption or gives school officials reason to believe there will be a substantial disruption, the facts of each case must be taken into account, and because the facts of each case can differ widely, “students will have almost no basis on which to predict whether their speech would fall within *Tinker*’s ambit,”¹⁴ leading to a chilling effect on students’ free speech. The article points out that students are “particularly vulnerable” to this because school disciplinary proceedings “can be arbitrary and unfair” and “[s]chool officials may cultivate reputations as strict disciplinarians to head off problems.”¹⁵ The article

¹⁰ *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011) (en banc).

¹¹ *Id.* at 936.

¹² *Recent Case: First Amendment – Student Speech – Third Circuit Applies Tinker to Off-Campus Student Speech – J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011) (en banc), 125 Harv. L. Rev. 1064, 1067-68.

¹³ *Id.* at 1068.

¹⁴ *Id.* at 1070.

¹⁵ *Id.*

urges that *Tinker* be applied only to on-campus speech unless a student's off-campus online speech "intentionally targeted" the school, leaving other problematic student speech, such as libelous statements or true threats, subject to the same constraints as speech by an adult that falls outside First Amendment protection.¹⁶

Also noting the danger to students of having protection for their off-campus online speech hanging on *Tinker*, Andrew Kloster wrote that "even good precedent in student-friendly circuits is difficult to rely on."¹⁷ Kloster was writing after the Supreme Court denied certiorari to two cases, the aforementioned *J.S. ex rel. Snyder* and *Kowalski v. Berkeley County Schools*.¹⁸ Kloster identified three approaches courts could use in deciding whether or how to apply *Tinker* in off-campus online student speech cases. First, as five Third Circuit judges wrote in a concurring opinion in *Snyder*, courts could decide that *Tinker* does not apply to off-campus speech, period: "This approach notes that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large. ... Under this approach, the regulatory arm of the school stops at the schoolhouse gate."¹⁹ Yet, as Kloster also notes, this approach runs into the difficulty of determining whether the speech is on-campus or off-campus. Echoing the problem of simultaneity discussed in Chapter 3, Kloster asks, "Is it where the author is sitting when he or she writes, where the speech is heard, where the internet servers are located, where the speech is accessed, or some combination of these factors? These are not insurmountable problems, but they are real."²⁰

¹⁶ *Id.* at 1071.

¹⁷ Andrew R. Kloster, *Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students' Rights*, 81 UMKC L. REV. 617, 620 (2013).

¹⁸ *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).

¹⁹ Kloster, *supra* note 17, at 620-21.

²⁰ *Id.* at 621.

Kloster's other approaches are: second, that courts could apply *Tinker* "to any speech, whether on or off campus, that causes a school official to 'reasonably anticipate substantial disruption' in school"²¹ as the Eighth Circuit held in *D.J.M. v. Hannibal Public School District No. 60*²²; and, third, that courts could apply the hybrid approach used by the Second Circuit in *Doninger v. Niehoff*²³ that begins with speech that officials could "reasonably anticipate" to cause substantial disruption but adds the requirement that the speech be intentionally targeted at the school.²⁴ However, he calls the Eighth Circuit's decision "a startlingly broad interpretation of the authority of school officials to regulate expression, and truly turns the famous 'schoolhouse gate' quote on its head — school regulations do not stop at the schoolhouse gate; they follow you home!"²⁵ Under the Second Circuit's *Doninger* decision, a student's off-campus online speech could "only be regulated when the student knew or should have known that the conduct would reach school grounds."²⁶ Kloster says each of these approaches is problematic, but those problems could be eradicated if three things fall into place: 1) the Supreme Court establishes "[b]right lines," 2) school policies are written to establish "explicit First Amendment guarantees," and 3) school officials undergo "a change in culture."²⁷

Aaron Hersh also believes that courts should apply *Tinker* when examining efforts by school officials to punish students for their off-campus online speech, identifying "three conceptual categories on which courts should rely: (1) expression meant to bully and harass students; (2) expression meant to protest school policy; and (3) expression meant to mock school

²¹ *Id.*

²² *D.J.M. v. Hannibal Public School District No. 60*, 647 F.3d 754 (8th Cir. 2011).

²³ *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

²⁴ See Kloster, *supra* note 17, at 622.

²⁵ *Id.* at 621.

²⁶ *Id.* at 622.

²⁷ *Id.* at 633.

officials.”²⁸ Administrators have “wide latitude in regulating student conduct” but “do not enjoy unbridled discretion in regulating students’ expression inside or outside of the school environment.”²⁹ Hersh notes, however, that the “line dividing appropriate regulation on the one hand and impermissible interference with students’ free expression rights on the other is ambiguous, leaving school administrators with little guidance.”³⁰ The Internet provides students with “access to the marketplace of ideas,” he writes, but he notes that some students use the Internet “to express themselves for less than transcendent or virtuous purposes.”³¹ Hence, the student speech cases dealt with in this study. Hersh calls the Second Circuit’s *Doninger* decision “misguided” but looks with approval on the Fourth Circuit’s *Kowalski* decision because it picked up on *Tinker*’s second, often-overlooked standard for when student speech can be punished at school: when it infringes on the rights of others.³² Yet, he, too, calls out the various circuit decisions for their lack of agreement, which contributes to a chilling effect on students. That chilling effect, in turn, has consequences for democratic society.

[M]any students may choose not to express themselves for fear of punishment or may limit the content of their expression in ways that alter its meaning. Surely, some “low value” expression will be chilled, but there remains a significant risk that students will avoid expressing views on political, religious, social, artistic, or community issues — expression that is central to the First Amendment’s free expression provisions. Such a chilling effect undermines students’ ability to participate in the marketplace of ideas — which is an essential element of the public school system — and it also threatens to retard the development of students’ political and social engagement. This chilling effect thus directly harms not only the students who seek to express their opinions, ideas, and

²⁸ Aaron J. Hersh, *Note: Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students’ First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309, 1314 (2013).

²⁹ *Id.* at 1314-15.

³⁰ *Id.*

³¹ *Id.* at 1317.

³² *Id.* at 1327, 1332.

beliefs, but it also undermines the very principles the First Amendment is meant to protect.³³

Hersh would give the most leeway to school officials and courts to punish student speech that is aimed at bullying another student, but he would require speech aimed at school officials or school policy to cause a substantial disruption before it could be punished. Speech aimed at school policy would receive the highest protection “because such expression is ‘at the core of what the First Amendment is designed to protect.’”³⁴ School officials who find themselves the target of student speech, even immature, vulgar speech, should be limited in being able to punish students for such speech because students are “relatively powerless.”³⁵ And he, too, notes that off-campus online student speech that is “actively pernicious” is subject to the same rules that other such speech is when created by an adult: libel laws, fighting words, incitement and true threat doctrines and laws.³⁶

Threats

True threats would be one of two categories of students’ off-campus online speech that Christopher Edmunds would make subject to school authority.³⁷ The other would be speech that causes a substantial disruption at school. Edmunds takes apart the Fifth Circuit majority’s analysis in *Bell v. Itawamba County School Board*³⁸ because he identifies four problems with it. The two most pertinent to this discussion are: 1) that the court “sidestepped the ‘true threat’ framework and inexplicably supplanted the longstanding ‘substantial disruption’ test with a

³³ *Id.* at 1333-34.

³⁴ *Id.* at 1348.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Christopher F. Edmunds, *Recent Development: The “Tinker-Bell” Framework: The Fifth Circuit Places Facebook Inside the Schoolhouse Gate in Bell v. Itawamba County School Board*, 90 TUL. L. REV. 1017 (2016).

³⁸ *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Circ. 2015) (en banc).

vague, new ‘threatening, harassing, and intimidating’ test that lacks any basis in precedent,” and 2) “failed to balance the social value of Bell’s speech against the interests of the school.”³⁹ Bell wrote a rap song to draw attention to allegations that two coaches at his school were sexually harassing girls. As many rappers do, he used violent imagery in his lyrics, including references to gun violence and telling the coaches that they should watch their backs. Edmunds notes that rap music “is often a form of ‘political expression’ and a ‘genre in which hyperbolic and violent language is commonly used in order to convey emotion and meaning — not to make real threats of violence.’”⁴⁰

Edmunds singles out a dissent in *Bell*, written by Judge Graves. Graves said *Tinker* should not apply to off-campus speech and came up with a two-part test, which he called the “*Tinker-Bell*” standard, “whereby, in addition to the ‘substantial disruption’ test, a school must ‘demonstrate a sufficient nexus between the speech and the school’s pedagogical interests.’”⁴¹ Edmunds recommends combining Graves’ *Tinker-Bell* test with a true-threat analysis as a “more useful vehicle for determining whether to allow schools to regulate purely off-campus speech.”⁴²

Katherine Geddes also takes issue with the Fifth Circuit’s ruling in *Bell*. She argues that the majority opinion in the en banc rehearing created “a broad and vague exception” with its “threatening, harassing, or intimidating” category of speech.⁴³ She notes that the court began its analysis from the point of view of the school rather than the student, “set[ting] itself up to improperly apply *Tinker* to Bell’s speech.”⁴⁴

³⁹ Edmunds, *supra* note 37, at 1026.

⁴⁰ *Id.* at 1029.

⁴¹ *Id.* at 1025-26.

⁴² *Id.* at 1030.

⁴³ Geddes, *supra* note 5, at 280.

⁴⁴ *Id.* at 279.

And although the majority follows some sister circuits by applying *Tinker* to Bell's rap song, *Tinker*'s historical context suggests that the case was not meant to apply to off-campus online speech. Instead, "*Tinker*'s holding is expressly grounded in the 'characteristics of the school environment,'" which is notably absent in Bell's case. Thus, it is inappropriate to apply *Tinker* to speech that inherently lacks those special educational qualities.⁴⁵

Geddes notes that just because a speaker is a student does not mean that *Tinker* must apply to that speaker's off-campus online speech; however, given the lack of guidance from the Supreme Court, she foresees that *Tinker* will continue to be misapplied to off-campus student speech simply because it takes place online.⁴⁶

Aleah Jones also believes that *Tinker* should not apply to off-campus student speech, but the ambiguity arising from the Supreme Court's silence on the issue "has allowed public schools to use the 'material and substantial interference' rule as a justification to invade their students' privacy and punish them for speech originating off-campus."⁴⁷ It is clear from Jones' article that she is a First Amendment absolutist, disagreeing as she does with all of the Supreme Court precedent following its 1969 *Tinker* ruling: *Bethel School District No. 403 v. Fraser*,⁴⁸ *Hazelwood School District v. Kuhlmeier*,⁴⁹ and *Morse v. Frederick*.⁵⁰

What is most concerning about these decisions is their passing consideration of the actual or projected impact of the speech at the school, instead focusing on the Court's subjective perception of the speech. What is shocking, offensive, or indecorous to courts may very likely be commonplace to high-school students, and what is commonplace is less likely to disrupt the school environment. Because judges and justices are far closer in age to the administrators, courts have tended to interpret speech similarly to teachers and administrators. However, since *Tinker* hinges on student reactions, *Tinker* requires that student perceptions be

⁴⁵ *Id.*

⁴⁶ *Id.* at 280.

⁴⁷ Aleah Jones, *Schools, Speech, and Smartphones: Online Speech and the Evolution of the Tinker Standard*, 15 DUKE L. & TECH. REV. 155 (2017).

⁴⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

⁴⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 U.S. 560 (1988).

⁵⁰ *Morse v. Frederick*, 551 U.S. 393 (2007).

considered. ... The above cases have therefore twisted *Tinker* into a license to punish speech that is not materially disruptive, but merely offensive to judicial and administrative sensibilities.⁵¹

Jones takes issue with the various appellate circuits' handling of student speech cases: *Doninger*, *Kowalski*, and *Bell*. Even in an incident of cyberbullying, Jones would require schools to take a hands-off approach, asking readers to imagine if the school tried to punish a student for bullying that took place in person somewhere off school grounds: "Allowing the school such power would be to give the school the right to reach into the private lives of their students. ... After all, in this hypothetical circumstance, the bully was acting outside her capacity as a student."⁵² Off-campus online speech that crosses a line can be punished in other ways, by other means, whether civil or criminal. The Fourth Circuit's *Kowalski* ruling, with its "sufficient nexus" test of finding a connection between the off-campus online speech and a school's pedagogical interests, "once again allows *Tinker* to apply wherever it can punish."⁵³ The Fifth Circuit, in its *Bell* decision, "apparently believed that public-school attendees are always acting in the capacity of students whenever they create any speech that might be related to school, the students or faculty, or their feeling about the institution itself."⁵⁴

When a child enrolled in public school returns home for the day, are they still a "student"? If not, their speech can hardly be termed "student speech." It is true that the school day takes up much of a student's time, and is where the majority of their relationships are formed (though the online world has even changed this; students can form close relationships with people they may never meet in person). However, the school's influence surely must end somewhere. It would be unheard of for a school to punish a student for not following a school dress code when that student was at home on a Saturday. Digital verbal speech, however, has been

⁵¹ Jones, *supra* note 47, at 159.

⁵² *Id.* at 162.

⁵³ *Id.* at 162.

⁵⁴ *Id.* at 165.

judged in *Bell* and the like cases as something over which a public school should have broader control.⁵⁵

Proposals to Modify *Tinker*'s Standard

Katherine Landfried zeroes in on both Bell's speech and the topic of his speech in arguing that courts should be applying a two-part threshold test that modifies *Tinker*'s disruption requirement because *Tinker* does not address technological changes in the age of the Internet.⁵⁶

The majority in *Bell* argue that student on-line speech is still subject to *Tinker*, as this off-campus speech can still make its way to campus and cause a disruption. However, *Tinker* and subsequent case law make a distinction that not all speech is immunized by a Constitutional guarantee of free speech while at school. To expand this reduced level of freedom to online activity outside the school essentially eliminates First Amendment rights indefinitely for students until high school commencement. This blasé trampling of First Amendment rights of students is not what was intended by the framers or by the established case law.⁵⁷

Landfried concedes that when school officials are confronted with what they believe to be an actual threat, they must be able to act quickly, but she calls for a "bright line" demarcation as to when *Tinker* applies and would limit it to "geographically on-campus speech or at school-sponsored events" so that it would follow the Supreme Court's original *Tinker* intent.⁵⁸ She proposes a two-part modified *Tinker* standard for courts to apply to restore stronger First Amendment freedom to students when they are off-campus and online.⁵⁹ She says that her standard "provides more opportunity for a student to freely express themselves without being susceptible to school authority twenty-four hours a day."⁶⁰

⁵⁵ *Id.*

⁵⁶ Katherine D. Landfried, Note: *Bell v. Itawamba County School Board: The Need for a Balance of Freedom and Authority*, 36 St. Louis U. Pub. L. Rev. 193 (2017).

⁵⁷ *Id.* at 209.

⁵⁸ *Id.* at 202-3 and 209-10.

⁵⁹ *Id.* at 209-10.

⁶⁰ *Id.*

First, the off-campus online speech would have to cause an actual, substantial disruption at school or pose or threaten a risk to school security.⁶¹ Then, if that threshold is cleared, the second part would require courts to look at the “subjective intent of the speaker,” which Landfried calls “vital” to protect students who are disseminating speech on matters of public concern, politics or religion, particularly when their “political speech is directed against the very individuals who seek to suppress that speech.”⁶² Applying her modified standard, she writes, would mean that the Itawamba school board would fail on both parts because Bell’s speech did not cause an actual disruption at school or carry an actual threat and it was on a matter of public concern.⁶³

Another scholar, Margaret Malloy, would create a standard that modifies a test laid out in Fifth Circuit Judge Jolly’s concurring opinion in *Bell*, limiting school interference in off-campus online student speech to speech that makes a threat.⁶⁴ Such a rule “would find school authority only where an actual threat of harm related to the school community is communicated to the community.”⁶⁵ She proposes a standard built around an “actual threat,” rather than a “true threat.” This would keep the matter in the school’s disciplinary system rather than kicking it into the criminal justice system. Judge Jolly’s proposed test would allow punishment of speech that “conveys a threat against school staff or students, where that threat is ‘connected to the school environment,’ and where the threat is communicated to the school or its community members.”⁶⁶ However, she notes that the judge’s test would have to be “refined” to clarify and define “actual

⁶¹ *Id.* at 210-11.

⁶² *Id.* at 212-13.

⁶³ *Id.* at 213-15.

⁶⁴ Margaret Malloy, *Note: Bell v. Itawamba County School Board: Testing the Limits of First Amendment Protection of Off-Campus Student Speech*, 2016 WIS. L. REV. 1251 (2016).

⁶⁵ *Id.* at 1253.

⁶⁶ *Id.* at 1261.

threat.”⁶⁷ She would like to see it as a civil tort built around a “reasonable person” standard, allowing the school administrator to stand as the reasonable person.⁶⁸ The second and third prongs of Judge Jolly’s test incorporate the “sufficient nexus” threshold test used by other courts.⁶⁹

Because the Jolly test only addresses threatening speech, it presumes that all other off-campus speech is protected. Yet it does not foreclose the Court from adopting a similar standard in other compelling circumstances — such as, perhaps, cyber-bullying. With this narrow exception, if off-campus speech caused a disruption on campus, that off-campus speech would remain protected. The school could choose to punish disruptive in-school behavior, but not protected off-campus speech.⁷⁰

Finally, Allison Martin outlines an intriguing proposal that would see the Supreme Court declare cyberspace to be an independent location. Then, speech that takes place there could be regulated accordingly, without the need to determine whether it is governed by case law that is based on where it originated or where it was read⁷¹: “The creation of cyberspace as an independent location would allow traditional free speech precedent to peacefully co-exist with a new framework for online speech.”⁷² Under such a proposal, courts would not need to “weigh factors such as where the speech was originally created, where it was later accessed, and how and when it ever permeated school grounds.”⁷³ Such a proposal would neatly sidestep issues with simultaneity.

⁶⁷ *Id.* at 1268-69.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1270.

⁷⁰ *Id.* at 1279.

⁷¹ Allison Martin, *Comment: Tinkering with the Parameters of Student Free Speech Rights for Online Expression: When Social Networking Sites Knock on the Schoolhouse Gate*, 43 SETON HALL L. REV. 773 (2013).

⁷² *Id.* at 788-89.

⁷³ *Id.*

She also would have schools and courts rely on established true threat doctrine, as true threats fall outside First Amendment protection.⁷⁴ Finally, she would limit school officials' ability to punish off-campus online student speech when it is aimed at an adult, unless it threatens violence or rises to a "reasonable foreseeability" of substantial disruption. She would, instead, remind faculty and staff that they can "pursue legal action for relief through the courts, under causes of action such as defamation and intentional infliction of emotional distress."⁷⁵

Need for Supreme Court Ruling is Clear

As evidenced by the various schools of thought in these articles, just a few of the hundreds that showed up in a search of a legal database when searching for *Tinker* and online speech, legal analysis of and opinions on whether and how off-campus online student speech should be subject to school authority are all over the place, but every scholar is able to make a solid case for his or her proposals. And so, this chapter ends where it began, with calls for the Supreme Court to grant certiorari to a student speech case that involves online speech created off campus that somehow makes its way onto school grounds. Federal district and appellate courts are in serious need of guidance in what standards to apply to such cases. School administrators are also in need of guidance (and limits) on what they can do about student speech that originates off campus on social media or websites. Most of all, students need to know just what might get them in hot water at school so they can make informed decisions about whether to complain about school on Twitter or Snapchat with their friends about their homeroom teacher or principal. As it stands right now, they have no assurance that their online speech will be protected by the First Amendment if it runs afoul of a school official.

⁷⁴ *Id.* at 794.

⁷⁵ *Id.* at 795.

CHAPTER 7

WHAT IS THE ROLE OF SCHOOLS IN A DEMOCRACY?

In Loco Parentis

Supreme Court Justice Clarence Thomas thinks the Court's *Tinker* ruling that says students and teachers do not shed their rights "at the schoolhouse gate" has no basis in the Constitution,¹ and that's partly because it weakened the idea of schools standing *in loco parentis* while children are at school. Thomas sees the *Fraser*, *Hazelwood*, and *Morse* rulings as steps toward restoring order in the schools, limiting as they do the strong statement of constitutional rights for students and teachers that *Tinker* gave.² Thomas urges the Court to return to the doctrine of *in loco parentis*, which means "in the place of a parent."³ In his concurring opinion in *Morse*, Thomas sets out a history of the doctrine as it had applied to schools since colonial days: "Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order."⁴ Thomas notes that the doctrine was enshrined as part of American law through the Kent Commentaries on American Law⁵ in the early 19th century, which said, "So the power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education."⁶ The doctrine was, however, "rooted in the English common law."⁷ Thomas runs through a history of

¹ See Thomas' concurring opinion in *Morse v. Frederick*, 551 U.S. 393 at 410 (2007).

² See Thomas' *Morse* concurrence, *supra* note 1. See Thomas' opinion, concurring in part and dissenting in part, in *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364 at 382 (2009).

³ MERRIAM WEBSTER'S DICTIONARY OF LAW 247 (1996).

⁴ *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring).

⁵ 2 J. KENT, COMMENTARIES ON AMERICAN LAW, *205, *206-*207, cited in Thomas' concurrence, *supra* note 5, at 413.

⁶ *Id.*

⁷ *Morse*, *supra* note 5 (Thomas, J., concurring).

case law at the state level in the 1800s and early 1900s. One example from an 1837 North Carolina Supreme Court ruling:

One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits. ... The teacher is the substitute of the parent; ... and in the exercise of these delegated duties, is invested with his power.⁸

Thomas states that “*in loco parentis* allowed schools to regulate student speech as well. Courts routinely preserved the rights of teachers to punish speech that the school or the teacher thought was contrary to the interests of the school and its educational goals.”⁹ He specifically points out a California Court of Appeal case from 1915 in which the court upheld a student’s punishment for giving a speech in front of the student body that criticized the safety of the school building. The court found that the speech “was intended to discredit and humiliate the board in the eyes of the students, and tended to impair the discipline of the school.”¹⁰ In fact, Thomas points out, “The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way. It merely limited the imposition of excessive physical punishment.”¹¹ *Tinker*, however, “effected a sea change in students’ speech rights, extending them well beyond traditional bounds.”¹²

Thomas believes *Tinker* “conflicted with the traditional understanding of the judiciary’s role in relation to public schooling, a role limited by *in loco parentis*.”¹³ He writes: “Perhaps for that reason, the Court has since scaled back *Tinker*’s standard, or rather set the standard aside on

⁸ State v. Pendergrass, 19 N.C. 365, 365-366 (1837). Cited in Thomas’ Morse concurrence, *supra* note 5, at 413-14.

⁹ Morse, *supra* note 5, at 414 (Thomas, J., concurring).

¹⁰ Morse, *supra* note 5, at 414 (Thomas, J., concurring).

¹¹ Morse, *supra* note 5, at 416 (Thomas, J., concurring).

¹² *Id.*

¹³ Morse, *supra* note 5, at 417 (Thomas, J., concurring).

an ad hoc basis.”¹⁴ He then runs through how *Fraser* and *Hazelwood* limited *Tinker*’s constitutional protections.¹⁵ That brings him to *Morse*.

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. [Citation omitted] I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don’t — a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.

In light of the history of American public education, it cannot seriously be suggested that the First Amendment “freedom of speech” encompasses a student’s right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools’ authority to make rules and to discipline students for violating those rules.¹⁶

He points out three elements regarding *in loco parentis* and student speech: (1) all school rules, including those governing student speech, were treated equally; (2) *in loco parentis* “imposed almost no limits on the types of rules that a school could set while students were in school”; and (3) “schools and teachers had tremendous discretion in imposing punishments for violations of those rules.”¹⁷

He then rather unrealistically states that parents have the freedom to choose whether to send their children to public schools or private schools or to home school them. “Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process,” he writes.¹⁸ In addition, if parents do not like the way a public school is run

¹⁴ *Id.*

¹⁵ *Morse*, *supra* note 5, at 417-18 (Thomas, J., concurring).

¹⁶ *Morse*, *supra* note 5, at 419 (Thomas, J., concurring).

¹⁷ *Id.*

¹⁸ *Morse*, *supra* note 5, at 420 (Thomas, J., concurring).

and they cannot persuade the school board to change its policies, they can “simply move.”¹⁹ This view reflects a disconnect from the economic reality that most parents’ “choice” of where to live is based on where they have jobs, that those jobs may or may not carry enough pay to cover the cost of private school tuition, that having those jobs would preclude parents from home schooling their children, and that they could not move to some other school district because of those jobs. In reality, only the most well-off parents have the choice of where to send their children for schooling.

Thomas’ criticism is summed up in this paragraph:

Tinker substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. Instead, it imposed a new and malleable standard: Schools could not inhibit student speech unless it “substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.” [Citation omitted] Inherent in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. [Citation omitted] Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.²⁰

Thomas ends by pointing out that he joins the majority opinion in *Morse* “because it erodes *Tinker*’s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.”²¹

In the later Supreme Court decision in *Safford Unified School Dist. #1 v. Redding*, Thomas writes a separate opinion that concurs in part and dissents in part.²² *Safford* involved a

¹⁹ *Morse*, *supra* note 5, at 419-20 (Thomas, J., concurring).

²⁰ *Morse*, *supra* note 5, at 420-21 (Thomas, J., concurring).

²¹ *Morse*, *supra* note 5, at 422 (Thomas, J., concurring).

²² *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364 at 382 (2009) (Thomas, J., concurring in part, dissenting in part).

claim by a student's mother that the strip search of her 13-year-old daughter, Savanna Redding, carried out because she was suspected of having concealed drugs in her undergarments, violated the Fourth Amendment's protection against unreasonable search. The Court held that the search was unjustified. Thomas' concurrence was with the granting of qualified immunity to the school officials to spare them from a monetary judgment for conducting the unjustified strip search. He dissented because of his belief that the strip search was justified and reasonable. Here, he cites his *Morse* concurrence in the opening paragraph of his *Safford* opinion:

The majority imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge. This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis* under which “the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.” [Citation omitted]²³

Thomas writes that the search was reasonable because “school officials searched where the pills could have been hidden.”²⁴ Later, he warns: “Redding would not have been the first person to conceal pills in her undergarments. ... Nor will she be the last after today's decision, which announces the safest place to secrete contraband in school.”²⁵ Thomas repeats his belief that decisions relating to discipline and safety should be left up to local school authorities because “[j]udges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment,”²⁶ adding that judges are wrong “to assume the responsibility for deciding which school rules are important enough to allow for invasive searches and which

²³ *Id.*

²⁴ *Id.* at 387.

²⁵ *Id.* at 390.

²⁶ *Id.* at 393.

rules are not.”²⁷ He later returns to the idea of restoring the *in loco parentis* doctrine — “the common-law view that parents delegate to teachers their authority to discipline and maintain order” and states that if it “were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have the authority to conduct the search at issue in this case.”²⁸ He adds that the Court has held that a parent can “authorize a third-party search of a child by consenting to such a search, even if the child denies his consent.”²⁹ It seems that children, in this view, have no right to control what happens to their bodies, no matter how invasive.

Thomas couches his belief that *in loco parentis* should be restored in the language of denying judicial overreach and restoring local control:

In the end, the task of implementing and amending public school policies is beyond this Court’s function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a constitutional imperative.³⁰

This sounds perfectly reasonable if divorced from knowledge of the facts at hand. If Thomas would allow the strip search of a 13-year-old girl by an assistant principal and a school nurse on the grounds of its being an issue of local control, one can only imagine what he would allow schools to do to students who speak up in ways school authorities do not agree with.

Thomas himself admits that returning to the *in loco parentis* standards of the 1800s “would find little support today.”³¹ To return to his *Morse* concurrence:

²⁷ *Id.* at 393-94.

²⁸ *Id.* at 399.

²⁹ *Id.* at 400.

³⁰ *Id.* at 402.

³¹ *Morse*, *supra* note 5, at 419. (Thomas, J., concurring).

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools today. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech.³²

Thomas a Lone Voice

Fortunately, it does not seem that Thomas' fellow Supreme Court justices give much weight to the idea of restoring *in loco parentis* as a doctrine for public schools in the 21st century. Though a search for cases involving this idea was not as extensive as searches for this study specifically regarding student speech, Thomas appears to be the only Supreme Court justice now on the bench who espouses the idea. In *Morse*, for example, Chief Justice John Roberts' majority opinion and Justice Samuel Alito's concurring opinion, joined by Justice Anthony Kennedy, predicate the Court's ruling against the student on the basis of protecting students in the school (or school-sponsored) environment from speech advocating drug use.³³ And even Justice John Paul Stevens' dissent, joined by Justice David Souter and Justice Ruth Bader Ginsburg, agreed with the majority's belief that the principal should not be held liable for infringing Frederick's speech by making him take down his banner; the dissent took issue with whether the "nonsense" banner was promoting drug use.³⁴

Alito's concurrence in *Morse* takes issue specifically with the idea of restoring *in loco parentis*, calling it a "dangerous fiction" and noting that most parents have no choice of where their children go to school.³⁵ He states that the majority opinion "correctly reaffirms" Tinker's

³² *Id.*

³³ See *Morse v. Frederick*, 551 U.S. 393 (2007). See *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., Kennedy, J., concurring).

³⁴ *Morse v. Frederick*, 551 U.S. 393, 444 (2007) (Stevens, Souter and Ginsburg, JJ., dissenting).

³⁵ *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., Kennedy, J., concurring).

“fundamental principle that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”³⁶

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students’ parents. It is a dangerous fiction to pretend that parents simply delegate their authority — including their authority to determine what their children may say and hear — to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.³⁷

Inculcating Democratic Values

Indeed, much of the Court’s rhetoric in student speech cases about the role of public schools revolves around the responsibility that schools have for teaching students about democracy and their role as citizens in their own governance. In its *Fraser* opinion, for example, the Court cites two historians, who stated that public education “must prepare pupils for citizenship in the Republic” and “inculcate the habits and manners of civility as values in themselves.”³⁸

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers — and indeed the older students — demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.³⁹

³⁶ *Id.* at 422.

³⁷ *Id.* at 424.

³⁸ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986), citing Beard and Beard, *New Basic History of the United States* 228 (1968).

³⁹ *Id.* at 683.

However, while they may serve as role models, schoolteachers and administrators are also agents of the state. In its 1985 ruling in *New Jersey v. T.L.O.*, the Court upheld a school search of a student's purse and said that school officials do not have to meet the same standards as need to be met for search warrants of adults. At the same time, however, the Court also tried to "strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."⁴⁰

Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. ... Such reasoning is in tension with contemporary reality and the teachings of the Court. We have held school officials subject to the commands of the First Amendment ... and the Due Process Clause of the Fourteenth Amendment. ... If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. [citations omitted]⁴¹

Going further back, to the first case covered in Chapter 5, *West Virginia State Board of Education v. Barnette*,⁴² the Court noted that school boards must perform their duties within the confines of the Bill of Rights: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁴³

In a dissent to the *Hazelwood* opinion, Justice William J. Brennan Jr., joined by Justice Thurgood Marshall and Justice Harry Blackmun, said public schools serve "vital national interests" in the role they play in students' lives: "The public school conveys to our young the

⁴⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

⁴¹ *Id.* at 336.

⁴² *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁴³ *Id.* at 637.

information and tools required not merely to survive in, but to contribute to, civilized society.”⁴⁴ He notes that the Court has given schools control over their day-to-day operations and decisions but has not “hesitated to intervene where their decisions run afoul of the Constitution.”⁴⁵ He rejects the majority’s rejection of *Tinker* in the case of the principal who censored the student newspaper that “conveys a moral position at odds with the school’s official stance [that] might subvert the administration’s legitimate inculcation of its own perception of community values.”⁴⁶ He sounds a warning that borrows from *Barnette*: “If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor ... the students or student organizations ... converting our public schools into ‘enclaves of totalitarianism’ that ‘strangle the free mind at its source.’”⁴⁷

Giving Students a Voice

Finally, to return to the source of Thomas’ consternation and other justices’ conviction, the *Tinker* opinion states that part of the reason students attend school is for “personal intercommunication” with other students, which in itself is “an important part of the educational process.”⁴⁸ Thus, one duty of public schools is to provide opportunities for the exchange of ideas. And, as long as that communication does not disrupt the school environment or infringe of the rights of other students, that exchange of ideas can take place anywhere on school grounds: in the classroom, on the playing field or in the school cafeteria.⁴⁹ The school cannot limit where

⁴⁴ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, Marshall, and Blackmun, JJ, dissenting).

⁴⁵ *Id.* at 278-79.

⁴⁶ *Id.* at 280.

⁴⁷ *Id.*

⁴⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

⁴⁹ *Id.* at 512-13.

students may speak: “Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.”⁵⁰

To let *Tinker* have the last word in this discussion:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁵¹

⁵⁰ *Id.* at 513.

⁵¹ *Id.* at 511.

CHAPTER 8

APPELLATE COURT DECISIONS ON ONLINE STUDENT SPEECH

Six U.S. Courts of Appeal circuits have heard and ruled on online speech cases involving students who created the speech when they were not on school grounds. As things stand now, how such speech is handled varies greatly (or slightly) from state to state, district to district, and circuit to circuit. And yet, the Supreme Court has not yet agreed to hear an online student speech case. As noted in Chapter 6, absent such Supreme Court guidance, and given lower courts' reliance on applying the *Tinker* standard, with its heavy emphasis on the individual facts of a case, students and school administrators do not know from one case to the next whether the speech will receive First Amendment protection or not. This chapter summarizes the most recent U.S. circuit court cases involving off-campus online student speech. To date, six circuits — the Second, Third, Fourth, Fifth, Eighth and Ninth — have ruled on a total of nine online student speech cases. All involve First Amendment issues because they are all based in speech. Five involve student expression, while three involve threatening speech.¹ One, from the Fourth Circuit, involves cyberbullying, and even though student-on-student cyberbullying was generally excluded from this study to limit its scope, the case is included here to offer as complete a picture of online student speech rulings at the appellate level as possible at the time of writing, but also because it is referenced so frequently in other court opinions. The cases are presented in chronological order within the circuit in which they were decided. Brief summaries of concurring and dissenting opinions are included within each case summary.

¹ Although the Fifth Circuit found that Taylor Bell's rap lyrics in *Bell v. Itawamba* were threatening, Bell has been included in the student expression category in this tally.

The First, Sixth, Seventh, 10th, 11th, and District of Columbia Circuit Courts have not heard any appeals involving off-campus online student speech as of this writing. As noted in Chapter 1, the Federal Circuit Court of Appeals does not hear these types of cases.

Second Circuit

*Wisniewski v. Board of Education of Weedsport Central School District*²

July 2007

Aaron Wisniewski was an eighth-grade student at Weedsport Middle School in upstate New York in April 2001 when he used a drawing of a person's head being shot by a gun with dots to represent blood spray above it and the words "Kill Mr. VanderMolen" below it as his icon on AOL Instant Messaging software on his parents' computer.³ He used this icon for approximately three weeks. At some point, a classmate learned of the icon and told the teacher, Mr. VanderMolen, about it and later gave him a printed copy. VanderMolen forwarded it to the principals at the middle school and high school. They contacted the local police, the school superintendent and Aaron's parents. Aaron admitted he had created the drawing and "expressed regret" when questioned by the principals.⁴ He was suspended for five days but was allowed to return, pending a superintendent's hearing. Mr. VanderMolen asked to stop teaching Aaron's class, and this request was granted.⁵

Meanwhile a police investigation was undertaken. The police concluded that Aaron meant the icon as a joke and posed no real threat to Mr. VanderMolen. A psychologist also

² *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007).

³ *Id.* at 35-36.

⁴ *Id.* at 36.

⁵ *Id.*

evaluated Aaron and came to the same conclusion as the police. No criminal charges were filed.⁶ At the superintendent's hearing in May, the designated hearing officer charged Aaron under a New York education law with "endangering the health and welfare of other students and staff at school."⁷ In June, the hearing officer found that the icon "was threatening and should not have been understood as a joke," and although its use took place outside school, she concluded that it "had disrupted school operations by requiring special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time."⁸ She recommended that Aaron be suspended for one semester to be served in an alternative school. The school board approved the suspension, which Aaron served in fall 2001, and then he returned to the school.⁹ His parents filed suit a year later, alleging, among other things, that Aaron's icon was not a true threat and was protected speech. The district court found that the icon was a true threat and thus outside First Amendment protection.¹⁰

The Second Circuit panel decided that the icon did not need to be measured against the standard set in *Watts v. United States*¹¹ because "we think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows."¹² The court said that *Tinker* was the appropriate First Amendment standard to gauge "school officials' authority

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 37.

¹⁰ *Id.*

¹¹ *Watts v. United States*, 394 U.S. 705 (1969), which involved a young man charged with making a threat against the president of the United States at a public rally opposing the Vietnam War in Washington, D.C. The Supreme Court ruled that *Watts'* speech was political hyperbole, not a true threat.

¹² *Id.* at 38.

to discipline a student's expression reasonably understood as urging violent conduct.”¹³ Judge Jon O. Newman wrote for the court:

Even if Aaron's transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of Tinker, we conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come up to the attention of school authorities and that it would “materially and substantially disrupt the work and discipline of the school.” For such conduct, Tinker affords no protection against school discipline.¹⁴

In affirming the district court's decision, the Second Circuit said it was “reasonably foreseeable” that the icon would reach the attention of school officials and that, once it did, it would cause a substantial disruption at school. “These consequences permit school discipline, whether or not Aaron intended his IM icon to be communicated to school authorities or, if communicated, to cause a substantial disruption.”¹⁵ Aaron's parents appealed to the U.S. Supreme Court, which denied certiorari.¹⁶

Doninger v. Niehoff

April 2011

The Second Circuit ruled in *Doninger v. Niehoff*¹⁷ that school officials had qualified immunity for their decision to bar student Avery Doninger from running for class secretary after she posted a blog entry on LiveJournal.com, complaining about something going on at school. Doninger was a junior at Lewis Mills High School in Burlington, Connecticut, when she posted a blog entry that erroneously stated that Jamfest, a battle of the bands competition at school, had been canceled “due to douchebags in central office” and asked people to write or call the

¹³ *Id.*

¹⁴ *Id.* at 38-9.

¹⁵ *Id.*

¹⁶ *Wisniewski v. Bd. of Educ.*, 552 U.S. 1296 (2008).

¹⁷ *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

superintendent and “piss her off more.”¹⁸ The competition was postponed, rather than canceled, because the faculty member who was going to run the sound board could not attend on the night it was originally scheduled.

The school principal and superintendent did not learn of the blog post until early May. Avery was not suspended from school but was barred from running for senior class secretary because the principal, Karissa Niehoff, thought that her conduct in writing the blog in the middle of a dispute “failed to demonstrate good citizenship, which was significant because Doninger was ‘acting as a class officer at the time that she created the blog,’ ... and because it violated the principles governing student officers set out in the student handbook that Doninger had signed.”¹⁹ Avery’s name was kept off the ballot for class secretary, and she was barred from speaking at a school assembly at which candidates were to give speeches.²⁰ Although the Second Circuit’s ruling focused on the issue of qualified immunity for the school officials, in granting that qualified immunity, it noted that Doninger’s First Amendment right to run for class office was not a clearly established right.

We do not reach the question whether school officials violated Doninger’s First Amendment rights by preventing her from running for Senior Class Secretary. We see no need to decide this question. We agree with the district court that any First Amendment right allegedly violated here was not clearly established.²¹

Additionally, the court noted that Avery’s punishment was limited to not being allowed to run for class office. Given that her role as class secretary was to keep lines of communication open between students and the administration, “it was not unreasonable for Niehoff to conclude

¹⁸ *Id.* at 340.

¹⁹ *Id.* at 342.

²⁰ *Id.*

²¹ *Id.* at 346.

that Doninger, by posting an incendiary blog post in the midst of an ongoing school controversy, had demonstrated her unwillingness properly to carry out this role.”²²

To be clear, we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students’ participation in extracurricular activities. Here, however, pursuant to *Tinker* and its progeny, it was objectively reasonable for school officials to conclude that Doninger’s behavior was potentially disruptive of student government functions (such as the organization of Jamfest) and that Doninger was not free to engage in such behavior while serving as a class representative — a representative charged with working with these very same school officials to carry out her responsibilities.²³

Doninger’s petition to the Supreme Court for certiorari was denied on October 31, 2011.²⁴

Third Circuit

*J.S. v. Blue Mountain School District*²⁵

June 2011

J.S. was an eighth-grader at Blue Mountain Middle School in 2007 when she and a friend, identified only as K.L., created a fake MySpace profile of principal James McGonigle on her parents’ computer at her home.²⁶ They did not use McGonigle’s real name but did use his photograph from the school’s website.²⁷ Judge Chagares, who wrote the majority opinion for the en banc Third Circuit, described the profile “as a self-portrayal of a bisexual Alabama middle school principal named ‘M-Hoe.’ The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at

²² *Id.* at 350-51.

²³ *Id.*

²⁴ *Doninger v. Niehoff*, 132 S. Ct. 499 (2011).

²⁵ *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc).

²⁶ *Id.* at 920.

²⁷ *Id.*

the principal and his family.”²⁸ However, Judge Chagares said the record shows that “the profile was so outrageous that no one took its content seriously.”²⁹ Because the school blocked access to MySpace, no student could view the profile at school. The two girls initially set the profile to “public” so anyone could view it, but the next day, J.S. set it to “private” so only 22 invited friends could see it.³⁰ One student, however, notified McGonigle of the profile; the principal asked the student to find out who created the profile and to print out a copy and bring it to him.³¹ Subsequently, McGonigle suspended J.S. and K.L. from school for 10 days.³²

J.S.’s parents sued the school district, alleging that her First Amendment rights and her right to due process had been violated. At issue was whether the speech created off-campus caused a material and substantial disruption on campus under *Tinker*. The school district alleged that the fake profile disrupted the school with: 1) “general rumblings in the school”; 2) two teachers told McGonigle that “students were discussing the profile in class”; and 3) a math teacher “experienced a disruption in his class when six or seven students were talking and discussing the profile” leading the teacher to ask three times for them to stop, raising his voice the third time; under questioning, he said students frequently talked in his class; 4) the math teacher reported that two students talked about the profile in his class on another day; 5) another teacher was approached by a group of girls to report the profile, but this did not disrupt her class because it occurred during independent work time.³³ The school district also alleged disruption to

²⁸ *Id.*

²⁹ *Id.* at 921.

³⁰ *Id.*

³¹ *Id.* The opinion notes that: “It is undisputed that the only printout of the profile that was ever brought to school was one brought at McGonigle’s specific request.”

³² *Id.* at 922.

³³ *Id.* at 922-23.

a guidance counselor who was also named in the profile.³⁴ The U.S. district judge upheld the suspension, saying that even if a substantial disruption did not occur, the profile’s “vulgar, lewd, and potentially illegal speech” was punishable under *Fraser*.³⁵ J.S.’s parents appealed to the Third Circuit.

The Third Circuit noted:

Since *Tinker*, courts have struggled to strike a balance between safeguarding students’ First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.

The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.³⁶

The Third Circuit said “[t]here is no dispute that J.S.’s speech did not cause a substantial disruption in the school.”³⁷ In its argument before the court, the school district alleged that a substantial disruption was reasonably foreseeable and, thus, J.S.’s punishment was sound.³⁸ The Third Circuit disagreed: “The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.’s profile.”³⁹ The court found 8-6 that the school district had violated J.S.’s First Amendment rights under *Tinker*. It also rejected the school district’s contention that *Fraser* would apply and could punish off-campus speech: “The School District’s argument fails at the outset because *Fraser* does not apply to off-campus speech.”⁴⁰

³⁴ *Id.* at 923.

³⁵ *Id.* at 923-24.

³⁶ *Id.* at 926.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 931.

⁴⁰ *Id.* at 932.

Concurring Opinion in *J.S. v. Blue Mountain*

Judge Smith wrote a concurring opinion, in which he was joined by four others. His opening salvo:

Because the school district suspended J.S. for speech that she engaged in at home on a Sunday evening, I fully agree with the majority’s conclusion that it violated J.S.’s First Amendment rights. I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.⁴¹

Allowing *Tinker* to apply to off-campus speech “would create a precedent of ominous implications” and would give schools authority over student speech “no matter where it takes place, when it occurs, or what subject matter it involves — so long as it causes a substantial disruption at school.”⁴² Smith acknowledges that determining where speech takes place “will not always be easy” and cannot always be based on where the speaker was when the speech occurred.⁴³ He writes, “Such a standard would fail to accommodate the ‘everywhere at once’ nature of the internet.”⁴⁴ If speech is intentionally directed toward the school, such as if a student sent an email to teachers from his home computer, then it would be “properly considered on-campus speech.”⁴⁵ In this case, though, he says it is quite clear that the speech took place off campus in J.S.’s home, and she did nothing to change that — she did not send the profile to anyone at school and took steps to limit who could see the profile and MySpace was blocked on computers on school grounds.⁴⁶

⁴¹ *Id.* at 936 (Smith, J., concurring).

⁴² *Id.* at 939.

⁴³ *Id.* at 940.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Dissenting Opinion in *J.S. v. Blue Mountain*

Judge Fisher, joined by five others, dissented, saying that the majority's ruling "severely undermines schools' authority to regulate students who 'materially and substantially disrupt the work and discipline of the school.'"⁴⁷ He takes the majority to task for "mak[ing] light of the harmful effects of J.S.'s speech and the serious nature of allegations of sexual misconduct. Broadcasting a personal attack against a school official and his family online to the school community ... undermines the authority of the school."⁴⁸ The *Tinker* standard would apply in this case, and that would mean that the court must see whether J.S.'s fake profile "created a significant threat of substantial disruption" at the school.⁴⁹ He said J.S.'s speech had "a reasonably foreseeable effect on the classroom environment" by causing a "diminution in respect for authority and a diversion of school resources" along with "foreseeable psychological harm" to the principal and the guidance counselor.⁵⁰

*Layshock v. Hermitage School District*⁵¹

June 2011

At the same time that the *J.S. v. Blue Mountain* case was making its way through the school and then the courts, a very similar case was shaping up in another part of Pennsylvania. Justin Layshock was a senior at Hickory High School in Hermitage, Pennsylvania, when he used a computer at his grandmother's house to create a fake MySpace profile of his school principal, Eric Trosch.⁵² Justin used Trosch's real name and a photo of him taken from a school website

⁴⁷ *Id.* at 941 (Fisher, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 943.

⁵⁰ *Id.* at 947.

⁵¹ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc).

⁵² *Id.* at 207.

and did access the profile on a school computer on at least one occasion.⁵³ Justin's was just one of four fake profiles created on MySpace by Hickory High School students, all of which, the Third Circuit said, was "more vulgar and more offensive than Justin's."⁵⁴ Justin built his answers to the questions MySpace asked to get people started with their profiles around the word "big"; for example, "big steroid freak," "big blunt," "big whore" and "big fag." were among the answers.⁵⁵ The court notes that "word of the profile 'spread like wildfire' and soon reached most, if not all, of Hickory High's student body."⁵⁶ The school district tried repeatedly to shut down access to MySpace on school computers and finally limited all students to computer use only when they could be directly supervised. All computer programming classes for the week leading up to Christmas recess were canceled.⁵⁷ After he was caught, Justin voluntarily went on his own to apologize to Trosch.⁵⁸ Justin was suspended from school for 10 days, was placed in an alternative education program for the rest of the school year, was banned from extracurricular activities and was barred from participating in his graduation ceremony.⁵⁹ The Third Circuit writes, "Ironically, Justin, who created the least vulgar and offensive profile, and who was the only student to apologize for his behavior, was also the only student punished for the MySpace profiles."⁶⁰

Justin's parents filed suit, alleging that the punishment violated Justin's First Amendment right to free expression and that the school district's policies were overbroad and

⁵³ *Id.*

⁵⁴ *Id.* at 208.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 209.

⁵⁹ *Id.* at 210.

⁶⁰ *Id.*

unconstitutional. They also alleged that the school's action infringed on their rights as parents to raise and discipline their child.⁶¹

The parents eventually withdrew their request for a preliminary injunction when the school district agreed to let Justin return to school, participate in the Academic Games and attend his graduation.⁶² The district judge ruled in favor of Justin on his First Amendment claim, saying that the school district had not established a "sufficient nexus" between Justin's off-campus speech and an on-campus disruption and that any actual disruption as required by *Tinker* was "minimal."⁶³ Upon appeal, the school district did not try to claim that *Tinker* applied. Instead, it argued that a "sufficient nexus exists between Justin's creation and distribution of the vulgar and defamatory profile of Principal Trosch and the School District" because Justin "entered school property" by copying Trosch's picture from the school's website and because the speech was aimed at the school community.⁶⁴ The Third Circuit said the school district's attempt to establish "sufficient nexus" was "unpersuasive at best."⁶⁵ The Third Circuit upheld the district judge's ruling, saying that even though "Tinker's 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard," school officials' disciplinary reach is limited.⁶⁶

The court wrote:

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 that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the

⁶¹ *Id.*

⁶² *Id.* at 211.

⁶³ *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).

⁶⁴ *Layshock v. Hermitage Sch. Dist.*, *supra* note 50, at 214.

⁶⁵ *Id.* at 214-15.

⁶⁶ *Id.* at 216.

District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.⁶⁷

Concurring Opinion in *Layshock v. Hermitage*

Judge Jordan wrote a concurring opinion, joined by one other judge. The concurrence raised the same “issue of high importance” as the concurring opinion in *J.S. v Blue Mountain* raised: Does *Tinker* apply to off-campus speech cases?⁶⁸ Yet, unlike the *J.S.* concurrence, Jordan writes that *Tinker* should apply: “It is hard to see how words that may cause pandemonium in a public school would be protected by the First Amendment simply because the technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary.”⁶⁹

Fourth Circuit

*Kowalski v. Berkeley County Schools*⁷⁰

July 2011

This is the only case included in this study that involves student-on-student cyberbullying, instead of speech aimed at school officials, school policy or the school in general. In December 2005, Kara Kowalski was a senior at Musselman High School in Berkeley County, West Virginia, when she used her home computer to create a webpage on MySpace with the heading “S.A.S.H.,” which Kowalski said stood for “Students Against Sluts Herpes.”⁷¹ But another student, Ray Parsons, said it was really an acronym for “Students Against Shay’s Herpes,” referring to Shay N., another Musselman student, and who was the “main subject of

⁶⁷ *Id.*

⁶⁸ *Id.* at 220 (Jordan, J., concurring).

⁶⁹ *Id.* at 221.

⁷⁰ *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).

⁷¹ *Id.* at 567.

discussion on the webpage.”⁷² Kowalski invited about 100 people to join the group.⁷³ Parsons was the first student to join the group, using a school computer, and soon after uploaded a photo of himself and another student holding their noises with a sign that said “Shay Has Herpes.”⁷⁴ Kowalski responded with, “Ray you are soo funny!=)”⁷⁵ Other photos of Shay N. were uploaded, one drawn on to indicate she had herpes and the other with a sign that read “portrait of a whore.”⁷⁶ Within a few hours, Shay N.’s father called Ray Parsons on the telephone “and expressed his anger over the photographs.”⁷⁷ Parsons then called Kowalski, who tried to take down the page but couldn’t, so she renamed the page “Students Against Angry People.”⁷⁸

The next morning Shay and her parents went to the school to file a harassment complaint and provided the vice principal a printout of the page.⁷⁹ Shay went home with her parents, “feeling uncomfortable about sitting in class with students who had posted comments about her on the MySpace webpage.”⁸⁰ The school principal then contacted the district’s administration to see if it would be appropriate to initiate school discipline over the webpage. He was told it was.⁸¹ He and the vice principal talked to Parsons, who admitted posting the photos.⁸² Then they talked to Kowalski, who admitted setting up the website but denied making any comments or posting any photos.⁸³

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 568.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Kowalski was suspended from school for 10 days for setting up a “hate website” in violation of school policy against “harassment, bullying, and intimidation.”⁸⁴ In addition to the 10-day suspension, she was given a 90-day social suspension, which meant she could not attend any extracurricular events at which she was not a direct participant. She was also barred from attending the Charm Review to crown that year’s “Queen of Charm,” having received that crown herself the year before.⁸⁵ She was also not allowed to continue as a member of the cheerleading squad.⁸⁶ When her father asked school administrators to reduce or revoke her suspension, the assistant superintendent reduced her out-of-school suspension to five days but left the 90-day social suspension in place.⁸⁷ Kowalski then filed suit in November 2007, alleging that her First Amendment rights had been violated, among other things. The district court dismissed her First Amendment claim because she “failed to allege that she had been disciplined under the School District’s policy for engaging in speech protected by the First Amendment.”⁸⁸ Kowalski appealed her First Amendment and due process claims to the Fourth Circuit.

In its opinion, the Fourth Circuit said Kowalski claimed that “school administrators violated her free speech rights under the First Amendment by punishing her for speech that occurred outside the school” and that “because this case involved ‘off-campus, non-school related speech,’” administrators “had no power to discipline her.”⁸⁹ The school district, on the other hand, claimed that school officials “may regulate off-campus behavior insofar as the off-campus behavior creates a foreseeable risk of reaching school property and causing a substantial

⁸⁴ *Id.* at 568-69.

⁸⁵ *Id.* at 569.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 570.

⁸⁹ *Id.* at 570-71.

disruption to the work and discipline of the school,” citing *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).⁹⁰

The Fourth Circuit writes that although students have First Amendment rights at school, they “are not coextensive with those of adults.”⁹¹ The court is “confident that Kowalski’s speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection.”⁹² Referring to the things posted to the webpage, the court said, “This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about the ‘habits and manners of civility’ or of the ‘fundamental values necessary to the maintenance of a democratic political system,’” citing *Fraser*.⁹³

However, the court said Kowalski’s argument that her speech was off-campus and therefore should not be subject to school punishment and instead was protected by the First Amendment required the court to define where her speech occurred.

This argument, however, raises the metaphysical question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer’s keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.⁹⁴

The court acknowledged that “[t]here 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 gate” but then said because Kowalski’s speech had sufficient nexus to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 572-73.

⁹⁴ *Id.* at 573.

the school's pedagogical interests, they did not need to find that limit to rule in this case.⁹⁵ In affirming the district court's ruling, the Fourth Circuit wrote:

Kowalski asserts that the protections of free speech and due process somehow insulate her activities from school discipline because her activity was not sufficiently school-related to be subject to school discipline. Yet, every aspect of the webpage's design and implementation was school-related. Kowalski designed the website for "students," perhaps even against Shay N.; she sent it to students inviting them to join; and those who joined were mostly students, with Kowalski encouraging the commentary. The victim understood the attack as school-related, filing her complaint with school authorities.⁹⁶

Kowalski appealed to the U.S. Supreme Court, which denied certiorari in January 2012.⁹⁷

Fifth Circuit

Bell v. Itawamba County School Board

August 2015

The most recent likely contender for the Supreme Court was the case of a Mississippi teen rapper, who was suspended from high school in January 2011 for posting a self-produced rap music video titled "PSK the Truth Need to be Told" to Facebook and YouTube. Taylor Bell was a student at Itawamba Agricultural High School in Itawamba County, Mississippi, when he posted the song "containing threatening language against two high school teachers/coaches" which he intended "to reach the school community."⁹⁸ The video alleged "misconduct against female students by Coaches W. and R."⁹⁹ But the Supreme Court denied certiorari on Feb. 29, 2016.¹⁰⁰

⁹⁵ *Id.*

⁹⁶ *Id.* at 576.

⁹⁷ *Kowalski v. Berkeley County Schools*, 565 U.S. 1173 (2012).

⁹⁸ *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015) (en banc).

⁹⁹ *Id.* at 383.

¹⁰⁰ *Bell v. Itawamba County Sch. Bd.*, 136 S. Ct. 1166 (2016).

The Fifth Circuit re-heard Bell’s case en banc with all 15 judges present. When the majority decision was returned, three judges wrote concurring opinions and four wrote dissenting opinions. Those concurring and dissenting opinions are briefly summed up at the end of the following discussion of the majority opinion.

Judge Rhesa Hawkins Barksdale, writing the majority opinion, described the case’s central issue as “whether, consistent with the requirements of the First Amendment, off-campus speech directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating to a teacher satisfies the almost 50-year-old standard for restricting student speech, based on a reasonable forecast of a substantial disruption. . . . Because that standard is satisfied in this instance, the summary judgment [for the school district] is affirmed.”¹⁰¹

A sample of the lyrics:

Heard you textin number 25 / you want to get it on /
white dude, guess you got a thing for them yellow bones /
looking down girls shirts / drool running down your mouth /
you fucking with the wrong one / going to get a pistol down your mouth / Boww¹⁰²

Barksdale wrote: “At the very least, this incredibly profane and vulgar rap recording had at least four instances of threatening, harassing, and intimidating language against the two coaches.”¹⁰³

Additionally, a screenshot of Bell’s Facebook page shows that the profile, including this recording, was set to public so the public could view it and listen to it.¹⁰⁴ The next day, the wife of the Coach W. referred to in the song heard about it from a friend. The coach asked a student

¹⁰¹ Bell v. Itawamba, 799 F.3d at 383.

¹⁰² *Id.* at 384.

¹⁰³ *Id.* at 385.

¹⁰⁴ *Id.*

about the song and then listened to the song at school.¹⁰⁵ The coach told the principal, who told the superintendent. The next day, the principal, superintendent and a board attorney had a talk with Bell about the recording and then sent him home for the rest of the day. The next day, the school was closed by inclement weather. Bell used that time “to create a finalized version of the recording (adding commentary) and a picture slideshow), and uploaded it to YouTube for public viewing.”¹⁰⁶ At a disciplinary committee hearing, Bell said he had not notified school authorities about the coaches’ alleged behavior because he did not think the school would do anything about it.¹⁰⁷ “Near the end of the disciplinary-committee hearing, Bell explained again: he put the recording on Facebook and YouTube knowing it was open to public viewing; part of his motivation was to ‘increase awareness of the situation’; and, although he did not think the coaches would hear the recording and did not intend it to be a threat, he knew students would listen to it, later stating ‘students all have Facebook.’”¹⁰⁸

The next day, the school board’s attorney notified Bell’s mother by letter that while ““the issue of whether or not lyrics published by Taylor Bell constituted threats to school district teachers was vague,” the publication “constituted harassment and intimidation” against two teachers, and the recommended sentence was that Bell be put in the county’s alternative school for the remainder of the nine-week grading period.¹⁰⁹ Bell requested a hearing before the school board; at that hearing, the board found that there was nothing vague about the speech and found Bell “had not only harassed and intimidated the teachers, but had also threatened harm.”¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 386.

¹⁰⁹ *Id.* at 386.

¹¹⁰ *Id.* at 387.

Bell and his mother filed suit. After hearing testimony in the case and then learning that Bell's alternative school punishment would end the next day, the district judge ruled that whether to grant injunctive relief was moot and, so, denied the injunction. A later hearing granted summary judgment to the school board and denied summary judgment to Bell and his mother. In its ruling, the court held that the rap song harassed and threatened the teachers and school employees and concluded that the song "in fact caused a material and/or substantial disruption at school" and, further, that school officials had reason to believe the song would cause a disruption.¹¹¹

Bell appealed only the summary judgment against his First Amendment claim. A divided appellate panel held that the "school board violated Bell's First Amendment right by disciplining him based on the language in the rap recording."¹¹² That opinion was vacated and an en banc review was granted.¹¹³ Barksdale notes that the Fifth Circuit has extended the *Morse* exception to "certain threats of school violence" as Justice Alito referred to in his concurring opinion in *Morse*.¹¹⁴ Bell contended that "*Tinker* does not apply to off-campus speech, such as his rap recording; and, even if it does, *Tinker*'s 'substantial disruption' test is not satisfied."¹¹⁵ However, the Fifth Circuit held that *Tinker* does apply to off-campus speech and, given that, that "there is no genuine dispute of material fact precluding ruling, as a matter of law, that a school official reasonably could find Bell's rap recording threatened, harassed, and intimidated the two teachers; and a substantial disruption reasonably could have been forecast, as a matter of law."¹¹⁶

The Fifth Circuit evaluated Bell's speech in light of the four Supreme Court student speech cases and found that since Bell was not disciplined for lewd speech, *Fraser* did not apply;

¹¹¹ *Id.* at 388.

¹¹² *Id.*

¹¹³ *Id.* at 388-389.

¹¹⁴ *Id.* at 391.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

since no one claimed that his speech was sponsored by the school, *Hazelwood* did not apply; since Bell’s speech “does not advocate illegal drug use or portend a Columbine-like mass, systematic school-shooting,” *Morse* did not apply.¹¹⁷

And, as Justice Alito noted, when the type of violence threatened does not implicate “the special features of the school environment,” *Tinker*’s “substantial disruption” standard is the appropriate vehicle for analyzing such claims. [citation omitted] Although threats against, and harassment and intimidation of, teachers certainly pose a “grave ... threat to the physical safety” of members of the school community, [citation omitted], violence forecast by a student against a teacher does not reach the level of the above-described exceptions necessitating divergence from *Tinker*’s general rule. We therefore analyze Bell’s speech under *Tinker*.¹¹⁸

In answer to Bell’s claim that *Tinker* does not apply to off-campus speech, the Fifth Circuit opinion states that “[o]ver 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.”¹¹⁹

The Fifth Circuit looked to one of its own previous rulings for direction in *Bell*, its 2004 opinion in *Porter v. Ascension Parish School Board*.¹²⁰ In *Porter*, a boy was expelled after his younger brother took a sketchpad to school containing a two-year-old drawing the boy had made of the school under an armed attack. The Fifth Circuit held that the boy should not have been expelled because the drawing was two years old and he had “never intended for the drawing to reach the school, describing its introduction to the school community as ‘accidental and unintentional.’”¹²¹ The *Porter* case fell outside similar cases’ precedents because of the time lapse

¹¹⁷ *Id.* at 391-392.

¹¹⁸ *Id.* at 392.

¹¹⁹ *Id.*

¹²⁰ *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004).

¹²¹ *Id.* at 618, 620.

and the lack of intention to share the drawing at the school.¹²² Barksdale wrote, “*Porter* instructs that a speaker’s intent matters when determining whether the off-campus speech being addressed is subject to *Tinker*. A speaker’s intention that his speech reach the school community buttressed by his actions in bringing about that consequence, supports applying *Tinker*’s school-speech standard to that speech.”¹²³ Additionally, the “pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by Bell.”¹²⁴ Therefore, the Fifth Circuit held that *Tinker* does apply to off-campus speech when the speaker “intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.”¹²⁵ Barksdale’s opinion said “there is no genuine dispute” over whether Bell intended his rap song to reach the school: he did by his own admission post the video to Facebook, edit and upload a more polished version to YouTube even after being warned and talked to by school officials, and then tell the school disciplinary hearing that he knew people would listen to it and he hoped it would bring more awareness of the alleged harassment of students by the two coaches.¹²⁶ The opinion also states that there is no real dispute over whether Bell’s lyrics threatened the two coaches. The lyrics included imagery of a gun being put down the mouths and the trigger being pulled.¹²⁷

So, the Fifth Circuit said, the only question remaining under *Tinker* is whether Bell’s rap song caused an actual disruption or reasonably could have been seen as causing one, and promptly answered it by saying that given that “Bell’s conduct reasonably could have been

¹²² Bell v. Itawamba, 799 F.3d at 395.

¹²³ *Id.*

¹²⁴ *Id.* at 395-396.

¹²⁵ *Id.* at 396.

¹²⁶ *Id.*

¹²⁷ *Id.*

forecast to cause a substantial disruption,” so it did not need to find whether an actual disruption occurred.¹²⁸ And, to the coaches, the mere fact that they had been threatened and harassed could lead to a disruption in their lives and an impediment to their being able to teach effectively.

If there is to be education, such conduct cannot be permitted. In that regard, the real tragedy in this instance is that a high-school student thought he could, with impunity, direct speech at the school community which threatens, harasses, and intimidates teachers and, as a result, objected to being disciplined.¹²⁹

Once the court found that a disruption had occurred, it did not need to rule on whether Bell’s lyrics rose to the level of a true threat under *Watts*. The Fifth Circuit affirmed the lower court’s ruling. Bell appealed to the U.S. Supreme Court as noted at the beginning of this section and was denied certiorari.

Jolly Concurring Opinion in *Bell v. Itawamba*

Judge E. Grady Jolly, joined by two other judges, wrote a concurring opinion in which he noted that because the law is evolving just as the technological world is evolving, the court “should apply reasonable common sense in deciding these continually arising school speech and discipline cases.”¹³⁰ Jolly concurs in the majority opinion but writes that he would add this:

Student speech is unprotected by the First Amendment and is subject to school discipline when that speech contains an actual threat to kill or physically harm personnel and/or students of the school; which actual threat is connected to the school environment; and which actual threat is communicated to the school, or its students, or its personnel.¹³¹

Elrod Concurring Opinion in *Bell v. Itawamba*

Judge Jennifer Walker Elrod, joined by one other judge, wrote a concurring opinion in which she agreed with the “careful, well-reasoned majority opinion” that Bell’s rap was aimed at

¹²⁸ *Id.*

¹²⁹ *Id.* at 399-400.

¹³⁰ *Id.* at 400 (Jolly, J., concurring).

¹³¹ *Id.* at 401.

the school and contained violent threats.¹³² She would, however, join with the judges in the Third Circuit who said that “a broad off-campus application of *Tinker* ‘would create a precedent with ominous implications.’”¹³³ She thinks the majority opinion avoided that, though, by narrowly focusing only on Bell’s intention to direct the speech at the school and the fact that it contained threats of violence: “Because this cautious approach does not place public school officials in loco parentis or confer upon them a broad power to discipline non-threatening off-campus speech, I concur in full.”¹³⁴

Costa Concurring Opinion in *Bell v. Itawamba*

While Judge Costa notes the dissent’s concern with the fact that little attention was paid to the public concern of sexual harassment raised in Bell’s lyrics, he says that Bell’s problem was that he went too far “with its graphic discussion of violence against the coaches — goes well beyond blowing the whistle on the alleged harassment.”¹³⁵

Dennis Dissenting Opinion in *Bell v. Itawamba*

Judge James L. Dennis, joined by one judge in full and one judge in part, dissented. Dennis contends that Bell’s rap was entitled to First Amendment protection because it was “on a matter of public concern” and did not rise to the level of a substantial disruption of the school environment.¹³⁶

Dennis finds four major flaws with the majority opinion: 1) “the majority opinion erroneously fails to acknowledge that Bell’s rap song constitutes speech on ‘a matter of public concern’ and therefore ‘occupies the highest rung of the hierarchy of First Amendment values’”;

¹³² *Id.* at 401 (Elrod, J., concurring).

¹³³ *Id.* at 402.

¹³⁴ *Id.*

¹³⁵ *Id.* at 402 (Costa, J., concurring).

¹³⁶ *Id.* at 404.

2) “in drastically expanding the scope of schools’ authority to regulate students’ off-campus speech, the majority opinion disregards Supreme Court precedent establishing that minors are entitled to ‘significant’ First Amendment protection”; 3) the majority ignores the fact that *Tinker*’s substantial disruption standard applies only to the “special characteristics of the school environment” not the off-campus environment; and 4) the majority also “errs in its very application of the *Tinker* framework” because the record does not show that Bell’s speech caused a substantial disruption.¹³⁷

Judge Dennis sums up Bell’s rap lyrics thus: “Although the song does contain some violent lyrics, the song’s overall ‘content’ is indisputably a darkly sardonic but impassioned protest of two teachers’ alleged sexual misconduct, e.g., opining that Rainey is ‘a fool/30 years old fucking with students at the school.’ That Bell’s song may fall short of the School Board’s aesthetic preferences for socio-political commentary is not relevant to determining whether the rap song’s content addresses a matter of public concern.”¹³⁸ Dennis compared Bell’s lyrics to the offensive signs held by members of the Westboro Baptist Church when protesting at a U.S. military person’s funeral. In fact, Dennis noted that the U.S. Supreme Court has said in several cases that “listeners’ subjective opinions about speech cannot control whether speech addresses a matter of public concern or not.”¹³⁹ He cautions that “by refusing to recognize that Bell’s speech addresses a matter of public concern and is thereby entitled to ‘special protection’ against censorship, the majority opinion creates a precedent that effectively inoculates school officials against off-campus criticism by students.”¹⁴⁰

¹³⁷ *Id.* at 404-5.

¹³⁸ *Id.* at 409.

¹³⁹ *Id.* at 412.

¹⁴⁰ *Id.*

Prado Dissenting Opinion in *Bell v. Itawamba*

Judge Edward C. Prado, who joined with Dennis’ dissent in part, said he believes that “speech is presumptively protected by the First Amendment unless it fits within a specific category of unprotected speech — regardless of the subject matter of the speech” — regardless of whether it is private speech or on a matter of public concern.¹⁴¹ He also took issue with the majority opinion’s naming of a new speech category (threatening, harassing, intimidating speech): “Bell’s speech does not fit within the currently established, narrow categories of unprotected speech, and I would wait for the Supreme Court to act before exempting a new category of speech from First Amendment protection.”¹⁴² Additionally, Bell’s rap was “performed and broadcasted entirely off-campus, and the song described violence directed at individual teachers — not a Columbine-type mass school shooting. ... Further in the context of expressive rap music protesting the sexual misconduct of faculty members, no reasonable juror could conclude that Bell’s rap lyrics constituted a ‘true threat.’”¹⁴³ However, Prado said he does “share the majority opinion’s concern about the potentially harmful impact of off-campus online speech on the on-campus lives of students” and that “[u]ltimately, the difficult issues of off-campus online speech will need to be addressed by the Supreme Court.”¹⁴⁴

Haynes Dissenting Opinion in *Bell v. Itawamba*

Judge Haynes said he dissents from the majority’s “greatly and unnecessarily expand[ing] *Tinker* to the detriment of Bell’s First Amendment rights.”¹⁴⁵

¹⁴¹ *Id.* at 433 (Prado, J., dissenting).

¹⁴² *Id.* at 434.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 435.

¹⁴⁵ *Id.* at 435 (Haynes, J., dissenting).

Graves Dissenting Opinion in *Bell v. Itawamba*

Judge James E. Graves Jr. joined Dennis' dissent because his "view is that the *Tinker* framework was not intended to apply to off-campus speech. I recognize, however, that current technology serves to significantly blur the lines between on-campus and off-campus speech."¹⁴⁶ Because of that "undeniable reality," he would apply a modified *Tinker* standard to off-campus speech; his *Tinker-Bell* standard would start with *Tinker*'s substantial disruption test. Then it would include a nexus test similar to the Fourth Circuit's in *Kowalski*: it would require foreseeability of disruption and consideration of the speech's predominant message.¹⁴⁷

Graves lays out his *Tinker-Bell* test:

Before disciplining a student for off-campus speech, the school would have to: 1) provide evidence of an actual disruption or facts which "might reasonably have led school authorities to forecast a substantial disruption"; AND [his emphasis] "demonstrate a sufficient nexus between the speech and the school's pedagogical interests that would justify the school's discipline of the student."¹⁴⁸ Then Graves would "consider three non-exclusive factors": whether the speech "could reasonably be expected to reach the school environment" and "whether the school's interest as trustee of student well-being outweighs the interest of respecting the traditional parent role in disciplining a student for off-campus speech" and, finally, "whether the predominant message of the student's speech is entitled to heightened protection."¹⁴⁹ Using Graves' *Tinker-Bell* test in light of the focus of Bell's rap lyrics on an issue of public concern would not have allowed the school to discipline him.¹⁵⁰

¹⁴⁶ *Id.* at 435 (Graves, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 436.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Eighth Circuit

*D.J.M. v. Hannibal Public School District #60*¹⁵¹

August 2011

D.J.M. was a sophomore at Hannibal High School in Hannibal, Missouri, when he sent instant messages about “getting a gun and shooting some other students at school” to a fellow student, identified as “C.M.”¹⁵² He was home when he sent the messages. The student and an adult she told about the messages then reported them to the school principal. The principal, in turn, notified the police, who went to D.J.M.’s home that evening and questioned him before placing him in juvenile detention.¹⁵³ D.J.M. was suspended from school for ten days and later for the rest of the school year.¹⁵⁴ His parents appealed to the school board, but his suspension was upheld. The parents then sued the school district, claiming that D.J.M.’s First Amendment rights had been violated.

The district court found that D.J.M.’s speech “had been an unprotected true threat and alternatively that the District could properly discipline him for his speech because of its disruptive impact on the school environment.”¹⁵⁵ D.J.M. appealed, “assert[ing] that he had not intended to make any true threats and that his messages were not serious expressions of intent to harm.”¹⁵⁶ D.J.M. also argued that because he was at home when he sent the messages, they were not school speech and therefore outside the school district’s ability to punish.¹⁵⁷

¹⁵¹ *D.J.M. v. Hannibal Public School District #60*, 647 F.3d 754 (8th Cir. 2011).

¹⁵² *Id.* at 756.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 759.

¹⁵⁶ *Id.* at 760.

¹⁵⁷ *Id.*

The Eighth Circuit noted that none of the Supreme Court student speech precedents deals with true threats.¹⁵⁸ However, it had decided a student speech case involving a letter a male student wrote at home to his former girlfriend. The letter was later taken to school by the letter writer's friend (without the writer's knowledge) and given to the girl to whom it was addressed.¹⁵⁹ The letter referred to her as a "'bitch,' 'slut,' 'ass,' and a 'whore'" and used graphic language to describe what the writer would like to do to her.¹⁶⁰ The letter writer was suspended after a school administrator found out about it. "Since the letter contained true threats, expulsion of the student did not violate the First Amendment."¹⁶¹ In *Doe*, the Eighth Circuit defined "true threat" as "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another."¹⁶² Additionally, the speaker must "communicate[] the statement to the object of the purported threat *or to a third party*."¹⁶³

Both the district court and the Eighth Circuit considered that D.J.M had intended for his messages about shooting people to reach the intended victims because he communicated them to C.M. and should have known that they could easily be forwarded to someone else. The Eighth Circuit wrote:

Although D.J.M. did not communicate any threatening statements to the teenagers targeted in his messages, he intentionally communicated them to C.M., a third party. Since C.M. was a classmate of the targeted students, D.J.M. knew or at least should have known that the classmates he referenced could be told about his statements.¹⁶⁴

¹⁵⁸ *Id.*

¹⁵⁹ *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (en banc).

¹⁶⁰ *Id.* at 625.

¹⁶¹ D.J.M., *supra* note 150, at 761.

¹⁶² *Id.* at 762, citing *Doe*, *supra* note 158, at 624.

¹⁶³ *Id.*, emphasis added by Eighth Circuit in D.J.M.

¹⁶⁴ *Id.*

D.J.M. “assert[ed] that his instant messages were made in jest out of teenage frustration and in response to ‘goading’ by C.M.”¹⁶⁵ The Eighth Circuit found that D.J.M. had “mentioned suicide in connection with a potential school shooting,” that he had “identified a specific type of gun he could use and listed a number of specific individuals he planned to shoot.”¹⁶⁶ Additionally, he had written that he would “have to get rid of a few negro bitches” and another classmate would “be the first to die.”¹⁶⁷ He specifically named one girl he would kill while naming another he would allow to live.¹⁶⁸ “Combined with his admitted depression, his expressed access to weapons, and his statement that he wanted Hannibal ‘to be known for something,’ we find no genuine dispute of material fact regarding whether his speech could be reasonably understood as a true threat.”¹⁶⁹

True threats are not protected under the First Amendment, and here the District was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school. ... 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.¹⁷⁰

In addition to the true threat analysis, the Eighth Circuit also conducted a *Tinker* substantial disruption analysis. Citing *Wisniewski*,¹⁷¹ the court noted that “[t]he widespread use of instant messaging by students in and out of school presents new First Amendment challenges for school officials. ... School officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech,” but they must decide how to act, while still respecting

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 763.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 764.

¹⁷¹ *Wisniewski*, *supra* note 1.

the First Amendment, when a student makes a threat.¹⁷² The Eighth Circuit found that “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.”¹⁷³ And, in fact, disruption did occur as worried parents and students contacted the school to ask about safety measures and who was on the “hit list.”¹⁷⁴

In affirming the district court’s judgment, the Eighth Circuit noted that the Supreme Court has not yet heard a case involving violent student speech, and summed up the issues facing courts when students make threats of violence:

One of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment. School authorities as well as the courts are called on to protect free expression under the First Amendment in a variety of circumstances. ... These cases present difficult issues for courts required to protect First Amendment values while they must also be sensitive to the need for a safe school environment.¹⁷⁵

*S.J.W. v. Lee’s Summit R-7 School District*¹⁷⁶

October 2012

In December 2011, twin brothers Steven and Sean Wilson were juniors at Lee’s Summit North High School in Lee’s Summit, Missouri, when they created a website they called NorthPress, which included a blog the brothers said was to “discuss, satirize, and ‘vent’” about events at the school.¹⁷⁷ They registered the site through a Dutch domain server, which meant the U.S. computer users could not find it through a Google search, but anyone who had the URL

¹⁷² *Id.* at 765.

¹⁷³ *Id.* at 766.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 766-67.

¹⁷⁶ *S.J.W. v. Lee’s Summit R-7 School District*, 696 F.3d 771 (8th Cir. 2012).

¹⁷⁷ *Id.* at 773.

could access the site, which was not password-protected.¹⁷⁸ Between December 13 and 16, 2011, the brothers posted “a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name” to the blog.¹⁷⁹ The court noted that one of the Wilsons used a school computer on December 13 to upload some files for the website and someone used school computers on December 14 and 15 to access NorthPress, though the school district’s records do not identify whom that was and cannot tell whether the user(s) added content to the site or just accessed it.¹⁸⁰

The Wilsons said they only intended the website for sharing among their friends, and they told only five or six friends about it, but “whether by accident or intention, word spread quickly” and the “student body at large” learned about the site on December 16.¹⁸¹ High school administrators investigated and rapidly identified the Wilsons as the creators of the website. The brothers were suspended for ten days. The school district conducted a hearing, the Wilsons appealed, and the school district conducted a second hearing, at the end of which the Wilsons were suspended for 180 days, but they were allowed to enroll in another school during their suspensions.¹⁸² The Wilsons filed suit and asked for a preliminary injunction to end their suspensions.

During the three-day federal district court hearing into the preliminary injunction, the Wilsons testified that they meant the website “to be satirical rather than serious” and said December 16 was a regular school day without any disruption; they also suggested that any

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 773-74.

¹⁸² *Id.* at 774.

disruption that did occur was the result of the third student's post.¹⁸³ They also said the classes at their alternative school were not challenging and the school did not provide any honors classes; they also said they wanted to pursue careers in music or theater and needed to be in the Lee's Summit North band if they were to have a chance at college scholarships.¹⁸⁴ The school district, on the other hand, testified that the website caused "substantial disruption" on December 16, the day it was discovered by the student body at large and that the schools computers were used numerous times that day to access or attempt to access the website.¹⁸⁵ Teachers testified that teaching was difficult that day because students were distracted and upset by the website; at least two teachers testified that it was "one of the most or the most disrupted day of their teaching careers."¹⁸⁶ High school administrators "testified that local media arrived on campus and that parents contacted the school with concerns about safety, bullying, and discrimination" both on that day and many days after. The administrators also said they were concerned that: 1) the disruption would return and 2) the Wilsons might be in danger if they were allowed to return to school before their suspensions were served.¹⁸⁷

On March 22, the district court judge granted the Wilsons' motion for preliminary injunction, noting that there were no Eighth Circuit direct precedents to offer guidance in this situation but pointing to *Doe v. Pulaski County Special School District*¹⁸⁸ and *D.J.M. v. Hannibal Public School District #60*.¹⁸⁹ "Citing cases from other circuits, the District Court concluded, 'there does seem to be a distinct possibility that the defendants could be exonerated based on the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Doe*, *supra* note 158.

¹⁸⁹ *D.J.M.*, *supra* note 150.

discussion that I’ve mentioned and the cases that I have reviewed.”¹⁹⁰ The court found that “irreparable harm” would occur if the Wilsons were not able to try out for the band or attend honors classes at Lee’s Summit North.¹⁹¹ The Wilsons were allowed to return to school, and the Eighth Circuit denied the school district’s expedited motion for stay pending appeal of the preliminary injunction.

The Eighth Circuit notes that the district judge “evidently agreed that the third student’s post was the primary cause of the disturbance on December 16” but also noted that “at least one of the Wilsons’ posts about a female student ‘was part of the sensation of that day’ and concluded ‘[t]he greatest school wide problem apparently was created by several racist blogs, one of the worst of which was authored by the first twin.’”¹⁹²

On appeal, the school district argued, among other things, that “the preliminary injunction essentially forgave the Wilsons’ suspension — if the Wilsons graduate before the District Court reaches a final decision on the merits, which is likely, the School District will not be able to enforce the remainder of the suspension even if it prevails on the merits.”¹⁹³ In their turn, the Wilsons argued that “their posts on NorthPress were protected free speech for which the School District could not constitutionally punish them” and that the website did not cause “significant disruption” at the school, “maintain[ing] the third student’s post was the sole cause of any actual disruption.”¹⁹⁴ They also argued that the Communications Decency Act (CDA) “insulates them from punishment altogether.”¹⁹⁵

¹⁹⁰ S.J.W., *supra* note 175, at 775.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 776.

¹⁹⁵ *Id.* Section 230 of the Communications Decency Act exonerates website hosts from liability for the posting of content they did not create. If the disruption was caused by a third party’s post

The Eighth Circuit found that the district court's "findings do not support the relief granted" or "establish sufficient irreparable harm to the Wilsons" and held "that the Wilsons are unlikely to succeed on the merits under the relevant caselaw," thus concluding that the district court's preliminary injunction was not justified.¹⁹⁶ The Eighth Circuit vacated the preliminary injunction and remanded the case to the district court for "the unenviable task of fashioning a remedy several months after the entry of the injunction and the Wilsons' return to school."¹⁹⁷ The Wilsons sought an en banc rehearing, which was denied in November 2012.¹⁹⁸ Both the Wilsons and the school district eventually made a joint stipulation for dismissal with prejudice, and the case was dismissed from the federal court in the Western District of Missouri.¹⁹⁹

The Eighth Circuit, however, made some instructive comments regarding whether the Wilsons' off-campus online speech was subject to school punishment and regarding their claim of immunity because of the CDA.

On their claim that their speech cannot be regulated by the school, "[t]he Wilsons' success on the merits will depend on what standard the District Court applies," the Eighth Circuit wrote.²⁰⁰ The school district argues that *Tinker*'s substantial disruption standard applies, but the Wilsons "argue all off-campus speech is protected and cannot be the subject of school discipline, even if the speech is directed at the school or specified students."²⁰¹ However, the Wilsons also

and not by the Wilsons' posts, they would not be responsible for it because they did not create that post.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 780.

¹⁹⁸ *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 2012 U.S. App. LEXIS 24103 (8th Cir. Mo., Nov. 21, 2012).

¹⁹⁹ *S.J.W. v. Lee's Summit R-7 Sch. Dist.* (4:12-cv-00285-HFS) (W.D. Mo, Feb. 20, 2013). For the entire docket of proceedings in the District Court, see:

<https://www.courtlistener.com/docket/4300603/sjw-v-lees-summit-r-7-school-district/>

²⁰⁰ *S.J.W.*, *supra* note 175, at 776.

²⁰¹ *Id.*

argue that if *Tinker* does apply, “the speech was not directed at the school and did not create a substantial disruption.”²⁰² The Eighth Circuit noted that the district court judge found that the website “targeted” the high school.²⁰³ The court also cited its *D.J.M. v. Hannibal Public School District #60* opinion that said *Tinker* does apply to off-campus speech “where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.”²⁰⁴ It also cited *Doninger v. Niehoff*, *Kowalski v. Berkeley County Schools*, and *J.S. v. Blue Mountain School District*, all summarized above, as cases supporting the Eighth Circuit’s belief that *Tinker* would apply to the Wilsons’ off-campus online speech.

[W]e expect *Tinker* will apply here because the Wilsons’ speech was, in the District Court’s words “targeted at” Lee’s Summit North. The parties dispute the extent to which the Wilsons’ speech was “off-campus,” but the location from which the Wilsons spoke may be less important than the District Court’s finding that the posts were directed at Lee’s Summit North. ... Furthermore, unlike in *J.S.*, the District Court found that the NorthPress postings “caused considerable disturbance and disruption on Friday, the 16th. Under *Tinker*, speech which actually caused a substantial disruption to the educational environment is not protected by the First Amendment.”²⁰⁵

The Eighth Circuit declined to comment on whether the CDA “protects high school students from school discipline.”²⁰⁶ The Wilsons claimed that the third student’s post was responsible for any disruption at the high school, and they were merely the “providers of a computer service” and therefore not responsible for the post that caused the disruption. But the Eighth Circuit noted that the district court’s “findings do not support the Wilsons’ contention that the disruption stemmed exclusively from the third student’s post” and, instead, “expressly found

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 777.

²⁰⁵ *Id.* at 778.

²⁰⁶ *Id.* at 779.

that the Wilsons’ own posts contributed to the disruption. Thus, the CDA would not necessarily protect the Wilsons even if it applied.”²⁰⁷

Ninth Circuit

*Wynar v. Douglas County School District*²⁰⁸

August 2013

Landon Wynar was a sophomore at Douglas High school in Minden, Nevada, when he “engaged in a string of increasingly violent and threatening instant messages sent from home to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would ‘take out’ other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre.”²⁰⁹ Landon used instant messaging through MySpace to “communicate[] frequently with friends from school,” writing about such things as weapons and Hitler (“whom he once referred to as ‘our hero’”) and also statements like “[my parents] also don’t like me just like everyone at school” and “its ignore landon day everyday.”²¹⁰ As his sophomore year drew on, his messages “became increasingly violent and disturbing,” and he began to reference a school shooting to take place on April 20 (the court notes that is both Hitler’s birthday and the anniversary of the Columbine shooting).²¹¹ The court opinion quotes several of the messages. Three examples: 1) “its pretty simple / i have a sweet gun / my neighbor is giving me 500 rounds / dhs is gay / ive watched these kinds of movies so i know how NOT to go wrong / i just cant decide who will be on my hit list I and that’s totally deminted and it scares even my self” and 2) “and ill probly only kill the people i hate? who hate me / then a few random

²⁰⁷ *Id.*

²⁰⁸ *Wynar v. Douglas County School District*, 728 F.3d 1062 (9th Cir. 2013).

²⁰⁹ *Id.* at 1064-65.

²¹⁰ *Id.* at 1065.

²¹¹ *Id.*

to get the record” and 3) that stupid kid from vtech. he didnt do shit and got a record, i bet i could get 50+ people / and not one bullet would be wasted.”²¹²

His friends became alarmed, and two of them notified the football coach, who took them to talk to the school principal. Two police deputies interviewed the boys and looked at the message printouts and then questioned Landon in the principal’s office.²¹³ The police took him into custody and then school administrators met with him and asked him if he wanted his parents there, to which he replied that he did not.²¹⁴ Landon admitted writing the messages but claimed they were a “joke.”²¹⁵ He provided a statement, signed it, and then was suspended for ten days.²¹⁶ The school board charged Landon with violating a Nevada statute that “provides that a student will be deemed a habitual discipline problem if there is written evidence that the student threatened or extorted another pupil, teacher, or school employee.”²¹⁷ Under that law, a student who is declared a habitual discipline problem “must be suspended or expelled for at least a semester.”²¹⁸ Landon was represented by an attorney at the board hearing but did not call any witnesses; the board voted to expel him for 90 days.

Landon and his father sued the school district for violation of his constitutional rights, among other things.²¹⁹ As the facts were not in dispute, the district court denied Landon’s motion for summary judgment and granted summary judgment to the school district. The Ninth Circuit noted in its opinion holding that the school district did not violate Landon’s constitutional rights that the U.S. Supreme Court had not addressed “the applicability of its school speech cases to

²¹² *Id.*

²¹³ *Id.* 1066.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 1066-67.

speech originating off campus,” but it looked to the previous Supreme Court rulings on student speech, as well as its own precedent and precedent from other circuits.²²⁰ The Ninth Circuit used the *Tinker* standard to analyze Landon’s First Amendment claims.

Referring to its “most analogous precedent,” *LaVine v. Blaine School District*,²²¹ the Ninth Circuit noted that it involved a student who wrote a first-person poem about a school shooting and suicide and later took it to school to show to his English teacher.²²² The school expelled him on a “temporary, emergency basis,” and the Ninth Circuit upheld the suspension because, under *Tinker*, the school could “forecast substantial disruption of or material interference with school activities.”²²³

LaVine definitely did not say that the geographic origin of speech doesn’t matter, nor did it say that an individual’s free speech rights are diminished simply by virtue of being a student. Rather, it dealt with speech created off campus but brought to the school by the speaker. This is not a minor distinction. Our case presents another variation — off-campus communication among students involving a safety threat to the school environment and brought to the school’s attention by a fellow student, not the speaker. ... [T]he location of the speech can make a difference, but that does not mean that all off-campus speech is beyond the reach of school officials.²²⁴

The Ninth Circuit noted that it is difficult to “divine and impose a global standard for a myriad of circumstances involving off-campus speech. A student’s profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach.”²²⁵ However, “[g]iven the subject and addressees of Landon’s messages, it is hard to imagine how their nexus to the school could have been more direct; for

²²⁰ *Id.* at 1067.

²²¹ *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001).

²²² Wynar, *supra* note 208, at 1067.

²²³ *Id.*

²²⁴ *Id.* at 1068.

²²⁵ *Id.* at 1069.

the same reasons, it should have been reasonably foreseeable to Landon that his messages would reach campus.”²²⁶

The court said it was “reasonable” for the school district “to interpret the messages as a real risk and to forecast a substantial disruption.”²²⁷ Therefore, *Tinker*’s substantial disruption standard was satisfied. But the court also said *Tinker*’s second prong, that of speech that infringes on the rights of others, also applied:

Whatever the scope of the “rights of other students to be secure and to be let alone,” *Tinker*, 393 U.S. at 508, without doubt the threat of a school shooting impinges on those rights. Landon’s messages threatened the student body as a whole and targeted specific students by name. They represent the quintessential harm to the rights of other students to be secure.²²⁸

The Challenge for Courts and Schools

It is appropriate that the last case covered in this chapter happened to be *Wynar* because Circuit Judge M. Margaret McKeown penned a thoughtful, succinct summary of the central problem facing courts and schools in the age of electronic communication, social media and the Internet in the opening of the opinion she wrote for the Ninth Circuit case. In addition to having to balance students’ rights of free expression against school officials’ need to maintain an orderly learning environment, both courts and schools now have the added worry of keeping students safe from threats of violence. Of course, courts and schools have always had to worry about student safety, but the age of social media has grown alongside the age of school shootings. Concern about students being mean to each other and/or disrespectful to school officials now must also encompass the very real concern about students sliding over the edge into violence.

²²⁶ *Id.*

²²⁷ *Id.* at 1070.

²²⁸ *Id.* at 1072.

McKeown wrote that “[w]ith the advent of the Internet and in the wake of school shootings,” administrators now must balance the constitutional rights of their students against the possibility of threats of violence:

It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result. ... [T]he challenge for administrators is made all the more difficult because, outside of the school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials must take care not to overreact and to take into account the creative juices and often startling writings of the students.²²⁹

That challenge is also made all the more difficult by the silence of the U.S. Supreme Court. All the parties involved — students, parents, school officials, and judges — could use some help.

²²⁹ *Id.* at 1064.

CHAPTER 9

CONCLUSIONS

The study undertaken in this project was aimed at answering three research questions, outlined in Chapter 2, but repeated here:

RQ1: Do the federal appellate courts recognize more free speech protection for students engaged in off-campus online speech than on-campus in-person speech?

RQ2: Do the statements of the U.S. Supreme Court in student speech cases suggest the Court will recognize broad rights for off-campus online student speech?

RQ3: Are the statements of the U.S. Supreme Court on the character of the Internet as a modern public square relevant to the way it should view off-campus online speech?

The author's consideration of these questions follows:

RQ1: Appellate-Court Level of Protection for Off-Campus Online Student Speech

The researcher expected to see a higher level of protection for off-campus online speech given that *Tinker* should apply only to speech that takes place on campus and given that courts have been reluctant to put limits on student expression that takes place in the physical world off campus. For example, one 1986 ruling from the U.S. District Court for the District of Maine upheld the right of a student to flip his middle finger at one of his teachers in a restaurant parking lot.¹ The court granted a permanent injunction stopping the school from suspending student Jason Klein for ten days for “extend[ing] the middle finger of one hand” toward teacher Clyde Clark.² A school rule that students would be suspended for “vulgar or extremely inappropriate language or conduct directed to a staff member” did not apply because “[t]he conduct in question

¹ Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).

² *Id.*

occurred in a restaurant parking lot, far removed from any school premises or facility.”³

Additionally, Mr. Clark was not acting as a teacher at the time, and Klein was not acting as a student.⁴ The court noted: “Anyone would wish that responsible teachers could go about their lives in society without being subjected to Klein-like abuse. But the question becomes ultimately what should we be prepared to pay in terms of restriction of our freedom to obtain that particular security.”⁵ In a footnote, the judge noted the role parents have to play in situations involving bad behavior on the part of their children away from school: “Under ideal circumstances, the effective response to out-of-school misbehavior would be the swift application of that parental discipline which is here roundly deserved.”⁶

Unfortunately, appellate courts in this study generally applied the *Tinker* standard of “substantial disruption” of the school environment to off-campus online speech. Even where they specifically did not rule that *Tinker* applied, the courts assumed that it did, as the Third Circuit did in *J.S. v. Blue Mountain School District*, one of only two cases that favored students. (The other was *Layshock v. Hermitage*, also from the Third Circuit.) In cases that involved threats (real or imagined), the courts generally completed both a threat analysis and a *Tinker* disruption analysis and usually based their decisions on the outcome of the *Tinker* analysis.

Courts need to determine how they will decide the question of whether online speech is considered on-campus or off-campus based on where it originates or where it is seen or heard. The issue of simultaneity complicates that decision. The obvious worry is that if courts decide it does not matter where the speech was created, nothing will stop schools from being able to punish students for other off-campus speech that is not online. For example, under current case

³ *Id.* at 1441.

⁴ *Id.*

⁵ *Id.* at 1442.

⁶ *Id.*, n.4.

law, a student could write a letter to the editor complaining about a school policy. That speech is protected, even if someone reads the newspaper on campus. If courts decide that the defining factor of speech is where it is consumed, that policy could change. A teacher could bring the newspaper to school and share it in the faculty lounge, and, what has long been considered as protected free expression could become on-campus speech, and if it caused a disruption or if the students' opinion caused a teacher to feel intimidated, the student speaker could be punished at school.

Additionally, consider that these days, students are participating in protests against gun violence at schools and other issues. Under current case law, if a student takes a megaphone in the city park and protests against a school policy, that student could not be punished. Remember *Tinker's* admonition that students are "persons" under the Constitution in school and out of school. But if a friend records the protest and posts the video to Facebook or Twitter, would the protesting student's off-campus right to protest, protected to the same extent as an adult's under the First Amendment, be compromised by the other student's social media post? Or, if the protest takes place on a Saturday and students are talking about it Monday at school, would that off-campus speech then become on-campus for the purpose of punishment? Now imagine that same student protesting by posting a comment on Twitter or Snapchat. If someone makes a screenshot of the post and shares it on Monday via text to other students, and those students are looking at and talking about the text at school, the student's constitutionally protected right to protest could be threatened. Or, imagine that a student is angry about something that happens at school one day and, still angry at bedtime, posts a tweet calling a teacher a name and complaining about him. Some students will not see that tweet until the following morning, when the student might have already calmed down and moved on. But the tweet exists as fresh in the

minds of the people who have just seen it. They go to school and talk about it, a teacher overhears, and the student is reported to the administration and hit with a violation of the code of conduct prohibiting directing inappropriate language or conduct toward a teacher as Jason Klein was accused of. The only difference is that Jason Klein's speech occurred and was seen entirely off campus. With online speech, the speech may occur anywhere off campus, but courts seem willing to allow school officials to punish that speech at school if it makes its way onto campus in any way.

The only thing all the courts agreed upon was that the Supreme Court needs to grant certiorari to an online student speech case to give lower courts guidance on just what the rules will be. Yet in the absence of that guidance, five of the six appellate circuits that have heard online student speech cases have had no qualms about punishing students for their off-campus online speech. The content of the speech did not affect courts' willingness to allow schools to punish students' off-campus online speech. *Tinker*'s disruption standard was applied in every type of situation. Even threatening speech was tested under *Tinker* rather than under the *Watts v. United States* true threat analysis. Taylor Bell's rap lyrics, which were about a matter of public concern, were given no more protection than the threatening speech. The First Amendment protects parody, yet even the Third Circuit, which found for Justin Layshock, merely sidestepped the issue of whether *Tinker* applied because the school district did not raise the issue on appeal. The *Layshock* outcome rested on the court's decision that there was not a sufficient nexus between Layshock's speech and the school. And in the other case it decided in favor of the student, *J.S. v. Blue Mountain School District*, the Third Circuit assumed without deciding that *Tinker* applied.

That means, unfortunately, that it appears appellate courts would not recognize more protection for off-campus online speech that disrupts the school than on-campus speech. In fact, most appellate judges seem all too willing to allow school officials to reach into a student's home to punish speech that causes some kind of reaction — or even the possibility of a reaction — at school. That is a slippery slope that once begun could easily lead to squelching or punishing student speech anywhere, even when that speech airs a legitimate complaint about a school policy or school official.

RQ2: Anticipation of Supreme Court Treatment of Off-Campus Online Student Speech

The Supreme Court's statements thus far in student speech cases do suggest that the Court will recognize rights for off-campus online speech. However, that statement comes with a caveat because, as noted throughout this study, the Court has yet to rule on a case involving online student speech. However, in a case involving an adult man who posted threatening rap lyrics to Facebook, the Court ruled in favor the man, Anthony Elonis. Elonis' lyrics threatened his estranged wife, the police, the FBI, and patrons and employees at a park where he had been employed until he was fired for posting a picture of himself holding a toy knife to a co-worker's throat at a Halloween party and captioning it "I wish..."⁷ The Court overturned a Third Circuit ruling affirming the district court's finding that Elonis' speech was a true threat because the standard used to determine how likely it was he would carry through on the threats was too low.

An example of Elonis' lyrics (published to Facebook after changing his account name to Tone Dougie):

"Fold up your [protection-from-abuse order] and put it in your pocket
Is it thick enough to stop a bullet?
Try to enforce an Order
that was improperly granted in the first place

⁷ Elonis v. United States, 575 U.S. ____ (2015) (slip op.).

Me thinks the Judge needs an education
on true threat jurisprudence
And prison time'll add zeros to my settlement . . .
And if worse comes to worse
I've got enough explosives
to take care of the State Police and the Sheriff's Department.”⁸

Another post threatened that Elonis would shoot up a school if he could decide on which school, and he was visited by FBI agents following that post. That visit prompted him to post another rap:

“You know your s***’s ridiculous
when you have the FBI knockin’ at yo’ door
Little Agent lady stood so close
Took all the strength I had not to turn the b**** ghost Pull my knife, flick my wrist,
and slit her throat Leave her bleedin’ from her jugular in the arms of her partner
[laughter]
So the next time you knock, you best be serving a warrant
And bring yo’ SWAT and an explosives expert while you’re at it
Cause little did y’all know, I was strapped wit’ a bomb Why do you think it took me
so long to get dressed with no shoes on?
I was jus’ waitin’ for y’all to handcuff me and pat me down
Touch the detonator in my pocket and we’re all goin’ [BOOM!]
Are all the pieces comin’ together?
S***, I’m just a crazy sociopath
that gets off playin’ you stupid f***s like a fiddle
And if y’all didn’t hear, I’m gonna be famous
Cause I’m just an aspiring rapper who likes the attention
who happens to be under investigation for terrorism cause y’all think I’m ready to
turn the Valley into Fallujah
But I ain’t gonna tell you which bridge is gonna fall into which river or road
And if you really believe this s***
I’ll have some bridge rubble to sell you tomorrow [BOOM!][BOOM!][BOOM!]”⁹

A grand jury indicted Elonis for making threats, but he moved to dismiss because the indictment failed to “allege that he had intended to threaten anyone.”¹⁰ The district court judge denied Elonis’ motion, saying that “Third Circuit precedent required only that Elonis

⁸ *Id.* at 4.

⁹ *Id.* at 6.

¹⁰ *Id.*

‘intentionally made the communication, not that he intended to communicate a threat.’”¹¹ But Elonis said his rap lyrics were “emulat[ing] the rap lyrics of the well-known performer Eminem, some of which involve fantasies of killing his ex-wife.”¹² The instructions given to the jury did not include Elonis’ request that the jury be told that the government had to prove that Elonis intended to make a threat; instead, these instructions were given:

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.¹³

Elonis appealed his conviction on four of the five counts with which he had been charged, making the argument that the jury should have found that he intended to make a threat when speaking.¹⁴ The Third Circuit denied his appeal, holding that “intent” is only “the intent to communicate words the defendant understands, and that a reasonable person would view as a threat.”¹⁵

The Supreme Court ruled that neither Elonis nor the government had “identified any indication of a particular mental state requirement” in the law under which Elonis was charged.¹⁶ But the Court said that did not necessarily matter:

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.” *Morissette v. United States*, 342 U. S. 246, 250 (1952).¹⁷

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.* at 9.

¹⁷ *Id.*

In light of that, the Court overturned *Elonis*' conviction, saying, "The jury was instructed that the Government need prove only that a reasonable person would regard *Elonis*'s communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state."¹⁸

The *Elonis* case would be most directly analogous to student online speech cases that involved threats because it was ruling on the intent of the speaker.¹⁹ But given the Court's ruling, recognizing as it does that using violent imagery in song lyrics does not equate to the intention to carry out violent acts, it would seem that Taylor Bell would have received a favorable ruling on his rap lyrics that exposed sexual harassment by two coaches at his school. The school district, the district court and the Fifth Circuit court did not take into account Bell's statements that he did not intend to communicate a threat of violence and that he was merely using tried-and-true rap tropes in his lyrics, but those statements mirror *Elonis*' justifications for his violent lyrics.

The Court has made clear in several rulings that students do not have the exact rights as adults while in school, but it has also said that students do have rights outside school property and hours. That lends support to the idea that the Court would grant broad speech rights to students for their off-campus speech. However, its rulings in *Fraser*, *Hazelwood*, and *Morse* show that *Tinker*'s substantial disruption standard is not the only standard under which student speech can be restricted. If the speech is lewd and interferes with the civic education schools are undertaking (*Fraser*), it can be curtailed. If it is speech produced under the "imprimatur" of the

¹⁸ *Id.* at 16.

¹⁹ The comparison of student threatening speech to the *Elonis* case is admittedly imperfect because *Elonis* involved speech being criminally prosecuted, and the student speech cases in this study involved civil violations. However, the Supreme Court took *Elonis*' intent into account. The speaker's intent also would matter under the proposal made in this chapter that if a student's speech is determined to be a true threat, it would be prosecuted as such under *Watts*. Courts would not have the option to apply *Tinker* to student speech intending to communicate a credible threat against a student, school official or the school building itself.

school (*Hazelwood*), it can be curtailed. If it is speech that advocates illegal drug use or communicates some other danger to the school environment (*Morse*), it can be curtailed. Who is to say that the Court would not find it reasonable to carve out yet another exception to *Tinker* for speech that occurs off campus but, through the problem of simultaneity, makes its way onto campus, blurring the lines of what is truly off campus and what is on?

The Court's apparent rejection of Justice Thomas' argument to restore to schools the unfettered authority of *in loco parentis* does seem to indicate that it believes there are boundaries to what schools can or should control. It also shows that the Court is unwilling to give schools absolute power over conduct or speech that would best be left up to parents to punish. Other evidence to support a belief that the Court would protect students' off-campus online speech from school interference comes from concurring and dissenting opinions in two pre-social media cases. Although such opinions do not have the mandatory authority that the majority opinion carries, they do carry persuasive authority on lower court judges and sometimes in future Supreme Court opinions.

In *Bethel v. Fraser*, where the Court upheld Matthew Fraser's punishment for his lewd nominating speech, Justice William Brennan wrote a concurring opinion "to express my understanding of the breadth of the Court's holding."²⁰ Brennan took issue with the Court's characterization of Fraser's speech as "obscene," saying merely that it "exceeded permissible limits" on speech in the school environment because the school has a legitimate need to teach students about civil discourse while preventing disruption of the educational environment.²¹ Noting that the First Amendment protects speech that is not obscene, Brennan also noted that

²⁰ *Bethel v. Fraser*, 478 U.S. 675, 688 (1986). (Brennan, J., concurring.)

²¹ *Id.*

Fraser's speech "is far removed from the very narrow class of 'obscene' speech which the Court has held is not protected by the First Amendment."²²

The Court today reaffirms the unimpeachable proposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [citation omitted] If the respondent 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 [citation omitted]; the Court's opinion does not suggest otherwise.²³

Brennan continued in a footnote:

In the course of its opinion, the Court makes certain remarks concerning the authority of school officials to regulate student language in public schools. For example, the Court notes that "[nothing] in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions." [citation omitted] These statements obviously do not, and indeed given our prior precedents could not, refer to the government's authority generally to regulate the language used in public debate outside of the school environment.²⁴

Justice Thurgood Marshall dissented in *Fraser*, because the school district did not, in his view, demonstrate that Fraser's speech disrupted the school environment. Marshall recognized school officials' authority to determine what is and is not appropriate in their educational environments; however, "where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education."²⁵

Justice John Paul Stevens, in his dissent, noted the stir that the line "Frankly, my dear, I don't give a damn" made when actor Clark Gable delivered it in the movie "Gone With the Wind."²⁶ He also noted that the word "damn," which "shocked the Nation" when he was in high

²² *Id.*

²³ *Id.*

²⁴ *Id.*, n. 1.

²⁵ *Fraser*, *supra* note 20, at 690. (Marshall, J., dissenting.)

²⁶ *Fraser*, *supra* note 20, at 691. (Stevens, J., dissenting.)

school, was seen as “less offensive” in 1986.²⁷ Despite that, he recognized that school officials could regulate such speech in the classroom and “even in extracurricular activities that are sponsored by the school and *held on school premises* [emphasis added].²⁸ Clearly, there was no doubt in Justice Stevens’ mind that the schools cannot meddle in speech that occurs off school premises. Arguing that Fraser should not have been punished, Stevens concluded:

It seems fairly obvious that respondent’s speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if [Fraser’s] audience consisted almost entirely of young people with whom he conversed on a daily basis, can we — at this distance — confidently assert that he must have known that the school administration would punish him for delivering it?²⁹

In another of the landmark student speech cases, *Morse v. Frederick*, Justice Samuel Alito, joined by Justice Anthony Kennedy, concurred with the majority opinion that Joseph Frederick’s “BONG HiTS 4 JESUS” banner was punishable because it promoted illegal drug use. However, Alito noted:

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.” [citation omitted]³⁰

Alito carefully outlined the precedents under which student speech may be curtailed or punished:

1) when it occurs on campus and causes a substantial disruption under *Tinker*; 2) when it advocates illegal drug use under *Morse*; 3) when it is delivered in a lewd or vulgar manner as

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 696.

³⁰ *Morse v. Frederick*, 551 U.S. 393, 422 (2007). (Alito & Kennedy, JJ., concurring.)

part of a school program under *Fraser*; and 4) when it is “in essence the school’s own speech” appearing in a publication that is an official school organ” under *Hazelwood*.³¹ He reiterated: “I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.”³² Any restriction on student speech must be “based on some special characteristic of the school setting,” including as in *Morse*, “the threat to the physical safety of students.”³³ And while the government is usually prohibited from suppressing speech merely because it “presents a threat of violence ... due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*’s ‘substantial disruption’ standard permits school officials to step in before actual violence erupts.”³⁴ Alito’s concurrence has caught the attention of lower court judges, who frequently cite it as justification for punishing students for threatening under *Tinker* rather than relying on a *Watts* test.

Finally, remember Justice Stevens’ dissent, joined by Justice David Souter and Justice Ruth Bader Ginsburg: “In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students.”³⁵

Stevens pointed out “two cardinal First Amendment principles” that underlie First Amendment protections: 1) that “censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden

³¹ *Id.* at 423.

³² *Id.*

³³ *Id.* at 424.

³⁴ *Id.* at 425.

³⁵ *Morse v. Frederick*, *supra* note 30, at 435. (Stevens, Souter & Ginsburg, JJ., dissenting.)

of justification” and 2) that “punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke a harm that the government seeks to avoid.”³⁶ Stevens contended that the majority opinion in *Morse* “trivializes the two cardinal principles” and “invites stark viewpoint discrimination.”³⁷ As part of his opinion, Stevens discussed Frederick’s intent in unfurling the banner while TV cameras followed the progress of the Olympic torch as it passed by his school: “As Joseph Frederick repeatedly explained, he did not address the curious message — ‘BONG HiTS 4 JESUS’ — to his fellow students. He just wanted get the camera crews’ attention.”³⁸ Nothing contradicted Frederick’s statement, and Stevens wrote, “Frederick’s credible and uncontradicted explanation for the message — he just wanted to get on television — is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything.”³⁹ And while pointedly making fun of the majority’s position, Stevens also sounded a note of caution at where the line would be drawn over what speech school officials may and may not punish:

Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.⁴⁰

Alito’s concurrence speaks to that concern and attempts to delineate a stopping point: that the speech being proscribed in *Morse* can only be proscribed because it advocates illegal drug use. Lower courts have latched onto Alito’s language about speech that presents a danger to the

³⁶ *Id.* at 436.

³⁷ *Id.* at 437.

³⁸ *Id.* at 434.

³⁹ *Id.* at 444.

⁴⁰ *Id.*

physical safety of students or the school environment. So, even there, when a justice is trying to limit the scope of the Court's ruling, lower courts interpret the opinion in different ways, and, when it comes to student speech, regrettably have allowed school interference to proceed on the basis that the speech poses a danger to the school.

RQ3: Relevance of Supreme Court Statements on the Internet as Modern Public Square

The Supreme Court's statements in *Reno v. ACLU* and *Packingham v. North Carolina*, indicate that the Court has a wide-eyed belief in the virtue of the Internet as a space for public speech. Anyone who has read the online comments on a news article knows that the buffer of the computer or phone screen can loosen inhibitions on speech and civility. However, the Internet does have great power as a level playing field that anyone can enter. While this can strain the theory that in the marketplace of ideas, the good idea will prevail over the bad, we must remember that the Internet as a mode of public communication is still rather young. Only twenty years separate the *Reno* and *Packingham* rulings. In *Reno*, from 1997, the Court looked askance at government efforts to establish safe "zones" for children where they could be free from indecent or obscene material, reminding everyone that indecent speech does fall under First Amendment protection. It also took an important step in declaring that the Internet was not subject to the same strictures as the broadcasting medium, leaving it relatively free from regulation and closer to the status that has been afforded print media since colonial days. In *Packingham*, from 2017, the Court declared that social media are an important path to allow people, even convicted sex offenders, to exercise their First Amendment right to free speech and press. As with *Reno*, the Court was not saying that the Internet could not be regulated in some fashion, but any regulation would have to be consonant with constitutional rights. Narrow regulations could be written to limit children's exposure to obscenity online, and narrow

regulations could be written to limit convicted sex offenders from using the Internet to search for and cultivate victims.

Taken together, the Court's statements about the Internet as a new communication frontier in both *Reno* and *Packingham* lay a solid foundation for both unfettered freedom of expression online and recognition of the centrality of social media and the Internet to public debate and political thought in today's American society. The United States has a long tradition of tolerating less-than-admirable speech, including speech that is highly critical of public events and government actions. *Tinker* said that students have rights to free expression on school grounds outside class time, if they were in the cafeteria or on the playing fields, for example, and that schools had no right to control that speech if it did not disrupt the school discipline or infringe on someone else's rights. In the same way, the school cannot control every conversation in the locker room or at marching band practice. The Internet is a vast "place," limitless, in fact, and surely within that limitless space there is space for free speech for students.

If one looks at the Supreme Court's language concerning the place of the public square and the marketplace of ideas in combination with Habermas' language about the public sphere, one sees clear-cut statements of the importance of open and free discussion in social and civic life and of the solid First Amendment protections those discussions enjoy. Indeed, Habermas "argued that 'public discussion' should translate *voluntas* into *ratio* as the consensus concerning what is practically necessary in the general interest, produced in the open competition between individual arguments."⁴¹ *Voluntas* is Latin for "will" or, in some translations, "wish," and *ratio* is "thought." In other words, Habermas is calling for people to debate in the marketplace of ideas ("open competition between individual arguments") to clarify what they desire for the public

⁴¹ DAVID RASMUSSEN, *READING HABERMAS* 41 (1990), quoting JÜRGEN HABERMAS, *STRUKTURWANDEL DER ÖFFENTLICHKEIT* 95 (Neuwied and Berlin, Luchterhand, 1962).

good into solid thought, and, presumably, then from thought into action. This is in line with the Court's statements about the centrality of open participation in public, social life in the public square or marketplace of ideas. As Justice Kennedy wrote in *Packingham*: "Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind."⁴² Prohibiting access to that portal for anyone, even convicted sex offenders, "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and other exploring the vast realms of human thought and knowledge," Kennedy wrote.⁴³ This access and the interactions it leads to are essential avenues of communication for people, without which they are denied their right to participate in public life, both in the civic and social sense. If students' rights off campus are as strong under the First Amendment as an adult's, that means that their off-campus online speech should be subject to that same protection, regardless of where the speech is consumed.

A Prescription for the Courts in Cases Involving Threatening or Libelous Speech

Taking into account all the various opinions offered by legal scholars and methods outlined in court opinions, and in line with legal research that often prescribes how the author thinks courts should proceed, I would like to proffer my own suggestions for how courts should proceed with regulating (or not) off-campus online student speech. Note that this prescription has several parts.

1) Threats of violence. If a student uses any form of digital communication, whether a text, message, social media post, email or blog, to make a true threat against the school, a school official or other students, that threat must be dealt with swiftly. Students should face an

⁴² *Packingham v. North Carolina*, 582 U.S. ____, 8 (2017) (slip op.).

⁴³ *Id.*

immediate, temporary suspension while authorities investigate whether the student intended the speech as a threat or whether it is a bad attempt by a student at a joke gone wrong or satire that falls flat. If the police or state's attorney determines that the threat is a true threat, the speech is outside First Amendment protection, and the student should be tried under applicable state or federal law. As the 20th anniversary of the Columbine school shooting is approaching in 2019 and given the alarming frequency with which gun violence aimed at school occurs now, there is no wiggle room here. Students need to know that such speech will be taken seriously, investigated and then dealt with as needed.

Note that the police in *Wisniewski* did not think Aaron Wisniewski's speech posed a real threat. This would mean that Aaron's speech was not punishable at school. The fact that his teacher asked to be reassigned would not matter. If the speech was not threatening, it would not be under the school's oversight, even if it caused a disruption in school administrators' schedules as they had to deal with the speech, find a replacement teacher, meet with the student, parents and teachers, field phone calls from the public, etc. Those types of interruptions, while an inconvenience, do not rise to the level of *Tinker*'s substantial disruption threshold. Conversely, in *D.J.M. v. Hannibal Public School District*, police did place D.J.M. in juvenile detention, and both the federal district and appellate courts found that his messages were true threats against the school and specific students. Under this prescription, D.J.M. would be punished through the legal process and not through the school. Therefore, the Eighth Circuit's finding of a true threat would have been sufficient and would have negated the need to conduct a substantial disruption analysis under *Tinker*. In much the same way, the Ninth Circuit's ruling in *Wynar v. Douglas County School District* would not have needed the *Tinker* standard to analyze Landon Wynar's First Amendment claims, because true threats fall outside First Amendment protection.

2) Defamation. If a student creates a webpage or social media profile that mocks a school official and that speech defames the subject, then the subject of the speech should take action through existing libel laws to seek punishment of the student. Students must learn that while they are free to say whatever they want, they must then accept the consequences if their speech crosses into territory that falls outside First Amendment protection. One aspect that would have to be cleared up would be whether the subject of the alleged libel is considered a public official or public figure by virtue of his job. A school principal or school district superintendent would definitely be considered a public official, but what of a high school English teacher? What of a lunchroom worker? What of a janitor? Despite being on the public payroll, might some of those kinds of employees be considered private figures? Settling this issue will not be simple, of course, and a one-size-fits-all approach would not work. A teacher might be considered a private individual ordinarily, but what if he speaks out on public issues at school board meetings? What if she is an official in the teachers' union? What if he is a coach and frequently quoted in the local newspaper? These questions would have to be settled on a case-by-case basis, as they generally are now in any libel suit, so they are not insurmountable. But if a person's reputation is actually harmed by a student's Web posting, then the student should face the consequences through the legal system, not through the schools.

That said, if a person simply has hurt feelings or is embarrassed by some such posting, as in *J.S. v. Blue Mountain* or *Layshock v. Hermitage*, then the student should face no consequences at school. Judges frequently admonish school officials in these situations to develop a thicker skin, which admittedly can be hard to do, but which is vital so that the free flow of speech (even less-than-valuable speech) is not stunted. School officials should instead undertake education campaigns to turn bad speech into a life lesson. If a student has a legitimate gripe with someone

or something at school, school officials should try to discern what that is and work to eliminate it while at the same time working with the student to find more productive ways to bring grievances to light. Taylor Bell, for example, could have been counseled on how to bring a complaint against the coaches who were accused of sexually harassing students. But the school officials must also make sure that they treat student grievances seriously so that students will feel that established procedures allow their voice to be heard. Avery Doninger could have been taught how to constructively stir up public action without resorting to calling school officials douchebags. Schools should fulfill their duty to teach students how to be active citizens who participate constructively in public life by sparing the punishment and instead apply education.

In-School Suspension and Education to Combat Hateful Speech

Issues like true threats and libel, which fall outside First Amendment protection, are easy to decide, even for a First Amendment absolutist. The thornier issue is what to do with student speech such as that at issue in *S.J.W. v. Lee's Summit R-7 School District*. It is hard to defend students' freedom to create racist, sexist, homophobic or other hateful speech when the speaker is a teenager who may be a jerk or who may simply be clueless about how his words will be received. As part of their duty to educate students in ways to participate in the civic process, schools must also teach them how to be civil to others, and that is an issue that goes way beyond the scope of this project. Ethics education that includes empathy exercises would be a good place to start. My attitude toward this kind of online speech has changed over the years. People on the internet can be truly horrible creatures and say some incredibly vile things. It is understandable that those things would cause disruption on a campus if they were egregious enough. I would advocate for a temporary suspension in those instances, but rather than leaving the student free to go about at his leisure at home away from school for the length of his suspension, I would

implement an in-school suspension that would require participation in ethics education or service work or both, aimed at broadening the student's understanding of the people he has targeted with his hateful speech. This will require resources that are in short supply in many school districts in many states. But, for example, this might be something similar to when a defendant in court has to sit through victim impact statements. If the speaker were required to hear how his words affected people, that might be an effective lesson that would make him think twice the next time he contemplated engaging in racist or sexist or any other kind of discriminatory speech aimed at diminishing other people's social standing or feelings of worth.

Many legislative attempts to ban hate speech and schools' attempts to regulate speech through codes of conduct have been struck down by the courts. The process I am advocating here does not ban such speech, since that would surely face constitutional challenges. Instead, the process would attempt to educate students about the equality and inclusiveness Habermas believed was necessary to the successful operation of the public sphere. Perhaps this is a Utopian idea, but it is a Utopia, as Finlayson wrote, that is definitely worth pursuing.⁴⁴

All Other Off-Campus Speech Outside School Control

Besides the above exceptions for true threats, defamation and cyber bullying, I oppose any kind of school oversight of any other off-campus student speech, including online speech, under *Tinker*. My plan for handling true threats and libel through laws governing those two kinds of speech that fall outside First Amendment protection puts the onus for investigating and punishing such speech on the legal system. The risk to First Amendment freedoms for students off campus in the physical world is too great to allow schools to govern their speech off campus in the virtual world. Rather than have those freedoms curtailed in any way, I would simply not

⁴⁴ See JAMES FINLAYSON, *HABERMAS: A VERY SHORT INTRODUCTION* (2005) to read his take on Habermas' hopeful view of the public sphere, particularly pp. 10-15.

allow schools to punish off-campus online speech regardless of where or when it is created or consumed. This will undoubtedly allow speech that will create some kind of disruption, substantial or minor, at school because, of course, most student speech is consumed by other students. Students' friends and classmates follow them on social media and thus are their primary audience. And teenagers being teenagers, they will talk about what they see online when they are at school. *Tinker* already allows for speech that occurs on school grounds to be punished at school if it causes a substantial disruption or infringes on the rights of others. And school officials can already punish disruptive behavior that occurs on school grounds without having to concern themselves with the off-campus speech that caused or contributed to the disruptive behavior. Thus, there is no need for school regulation of off-campus speech. The danger that school officials would begin sliding down the slippery slope of increasing regulation of student speech is too great. We must not allow regulation that stifles the rights of students to participate in protests, to write letters to the editor, to launch flier campaigns, or to call their representatives and senators.

To emphasize: Since the Supreme Court in *Tinker* said students and teachers do not shed their constitutional rights at the schoolhouse gate, that means they have rights when they are outside the schoolhouse gate. And those rights must be protected, especially their right to freely express their ideas, and especially when those ideas are related to participation in the public sphere. Schools exist at least in part to show students how a democratic society operates and to help them find their role in that society. That important task cannot be accomplished if students learn that they must mind their P's and Q's if they do not want to be punished for what they have to say. And that means that school officials will undoubtedly have to put up with boisterous speech, with rough speech, with crude speech, with angry speech. Instead of focusing their

efforts on stamping out such speech and tamping down such feelings in the students under their guidance, school officials should focus on modeling for students the socially acceptable ways of voicing their criticisms. If school resources are tight and do not allow for additional educational programs in the curriculum, school officials could look for community volunteers to lead extracurricular activities and could stage assemblies and programs that involve students in civic life. These are positive ways to bring about the more civilized speech officials desire. The way to achieve that civilized speech is through education, not through punishment.

Areas for Further Study

Cyberspace as a Third Location, Distinct from the Physical World

Allison Martin's proposal to treat virtual space as a "location" separate from either the on-campus or off-campus domains deserves further study, especially if it appears that the Supreme Court might rule that off-campus online student speech can be regulated by school officials. For fear that such regulation might then spread to off-campus student speech in the physical world, and only for that reason, this is an idea that might offer a compromise between school officials and students. Depending on your point of view and on the way such a proposal was constructed, designating cyberspace as a third location — a buffer — between on-campus and off-campus could result in either a no man's land or a demilitarized zone. I do not wholeheartedly, full-speed-ahead endorse the idea because it could easily result in a no man's land with harsh regulations that would allow school officials to squelch any dissent among students at any time and any place. I could see it becoming a nightmare dystopia where students are not free from the school's reach even in summer since children are basically seen as students from about the age of 5 to graduation from high school around age 18. Whether that third space existed as a gentle buffer zone aimed at continuing to educate students about their role in society

or whether it were a harsh buffer aimed at limiting their speech and shutting down their independent thoughts could turn on the composition of the Supreme Court at the time the Court structured such a space in an opinion. But if regulation of student online speech is inevitable, this is an area worth exploring to see if a separate online location could be concretely defined to the satisfaction of courts and legislatures — and citizens, including students — so that a separate category of constitutional protection or limitation could be set up. This would deal with the problem of simultaneity in location because the basis for determining what kind of speech it was would be settled. It would be neither on-campus speech nor off-campus speech, nor even some hybrid combination of those. It would be, simply, “online speech.” Then the question of making rules or establishing constitutional protections for it based on where it was created or where it was consumed would be moot.

One problem that would remain, however, would be that of what to do when the time of the speech differs from creation to consumption. A statute of limitations, so to speak, would need to be decided so that online speech that disrupted the school environment could not be resurrected again and again with separate punishments for each incident whenever someone new consumed it at some distant future point. I would argue for allowing only one punishment per act of speech, rather than one punishment for each time that act of speech is rediscovered. Much like the guidelines that surround the republication of a libel, however, if the original speaker reposted his speech, this would be treated as a new incident and subject to school oversight. However, if another student shared, retweeted or reposted the offending speech, that student would be responsible for any incident arising from the new post. This is similar to the way an allegation of libelous speech is currently handled. When one news organization publishes a libelous statement, the libel is considered republished only if it is repeated in a future publication, whether a

publication by the original news organization or by a different news organization. This would allow for school regulation of student-on-student cyber bullying, as in *Kowalski v. Berkeley County Schools*, if one student or a group of students is targeting another.

However, if the Court designates online speech a separate location, I would add another limitation: that of intent. Modeled after the Supreme Court's ruling in the *Elonis* case, this intent requirement would mean that the speaker must intend for the speech to cause a disruption in the school environment, just as the Court said that *Elonis* could not be convicted for speech that others read as threatening if his intent was not to threaten. If a student did not intend for his speech to cause a disruption at school, a court would have to take that into account when determining whether the speech could be punished at school. Thus, if the student's intent was simply to state his opposition to a school policy or action, and his intention was not to cause trouble, that speech would be protected against school punishment. Additionally, if a student's post or tweet was merely intended to let off steam in a moment of anger, it could not be punished at school either. If, however, the student intended his online speech to stir up trouble at school and it did indeed disrupt the school, then it would be subject to school regulation. The intent requirement is essential because teenagers often speak hastily and angrily and may say something that is the thought of the moment and not anything concretely planned to cause trouble at school. This should have the effect of allowing most student online speech to fall outside the purview of the school, but it would allow for action when a student's online speech is aimed at causing a disruption at school. My reluctant allowance of school oversight of online speech intended to disrupt should not be read as giving schools *carte blanche* to claim any speech as a disruption simply because it intersects with the school. Bell's rap lyrics would be protected under this plan because, even though he aimed his speech at the student body, he

intended it only to make people aware of the situation at school. He did not intend for it to cause a disruption nor did it cause an actual disruption. Making two coaches who are accused of sexually harassing female students uncomfortable or worried should not be considered a substantial disruption. The disruption must rise to a level where school officials have real difficulty maintaining order in the school because of the speech. That did not happen in *Bell*. That did not happen in *Doninger*, despite the fact that the school administration office had to deal with an increased number of phone calls and emails for a few days.

Defining “Substantial” Disruption

One major flaw with a plan to declare cyberspace as a separate location, as well as with the original *Tinker* decision, is that the term “substantial” is subjective. An overly sensitive principal or teacher might think that two or three students laughing in a class is substantial. But that is a much different event than, say, the disruption that occurred in *S.J.W. v. Lee’s Summit*, when the racist posts on the Wilson brothers’ website did cause a serious disruption at school. Because the term is subjective, we are left with lower court rulings that sometimes side with overly sensitive adults and sometimes with teenagers. This means that students do not have any way of knowing, from one tweet to the next, just which online speech might get them in trouble with school officials. When the Supreme Court does finally accept an appeal involving online off-campus student speech, it would be helpful if the justices clarified or quantified just what is meant by “substantial” disruption. In the meantime, an area for further research would be to undertake a study of court precedent at various levels — state supreme courts and federal district and appellate courts — to catalogue the types of disruptions and anticipated disruptions school authorities claim occur because of student speech. A researcher could even attempt to determine

whether any patterns appear over time and whether those patterns are ongoing or cyclical. Do some rise and fade quickly, or do some have staying power, resonating with judges?

Composition of the Supreme Court

Because courts and scholars keep calling for Supreme Court guidance on the issue of student online speech, the composition of the Court, as noted above, will be important to the outcome. Thus, another area for future research would be to review justices' track records, dating back to their days on federal district or appellate benches to see how they have viewed speech issues involving the First Amendment. It would be important for the researcher to study their stances on student speech, of course, but it would also be instructive to study their view on speech by adults in whatever settings that speech occurs. Such a study would, of course, need to be updated each time a justice left or joined the high court.

Americans' Attitudes Toward Student Speech Rights

A final area for research would be a quantitative study of Americans' attitudes toward student speech rights. Although Pew Internet Research has included a few questions on related topics over the years, it would be fascinating to poll both adults and young people specifically about whether they think junior high and high school students should have the right to speak freely on campus, off campus or online, especially when that speech is critical of school authority, whether that authority is in the form of a policy or a teacher or administrator.

A Final Thought

The tendency toward authoritarianism that we are seeing in American government, including in the public schools, presents too big a danger to the future of our democratic experiment to allow school officials unfettered control over student speech. If children are raised to believe that school authorities can censor, limit and punish speech that is critical of or makes

fun of school policy or officials, they will grow up to be citizens who believe that government authorities can do the same. That would undermine one of the tenets of the American participatory system of government — that, as Justice William J. Brennan Jr. wrote in *New York Times Co. v. Sullivan*, we have “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴⁵ If the First Amendment is not to be rendered meaningless, that has to apply to school officials as well.

⁴⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

BIBLIOGRAPHY

- Anderson, B. (2006). *Imagined Communities*. London, UK: Verso.
- Anderson, M., & Caumont, A., Pew Research Center (2014). *How Social Media is Reshaping News*, www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/.
Last accessed 11-2-17.
- Barnes, S. (2001). *Online Connections: Internet Interpersonal Relationships*. Cresskill, NJ: Hampton Press Inc.
- Bast, C.M., & Pyle, R.C. (2001, Spring). Legal Research in the Computer Age: A Paradigm Shift? *Law Library Journal*, 93, 285-302.
- Beasley, B., & Haney, M. (2013). *Social Media and the Value of Truth*. Lanham, MD: Lexington Books.
- boyd, d. (2014). *It's Complicated: The Social Lives of Networked Teens*. New Haven: Yale University Press.
- boyd, d. (2011). Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications. In Z. Papacharissi (Ed.), *A Networked Self*. (pp. 39-58). New York, NY: Routledge.
- boyd, d. (2008). Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life. In D. Buckingham (Ed.), *Youth, Identity, and Digital Media*. (pp. 119-142). Cambridge, MA: The MIT Press.
- boyd, d., & Ellison, N.B. (2008). Social Network Sites: Definition, History, and Scholarship. *Journal of Computer-Mediated Communication* 13(1), 210-230.
- Buckingham, D., Ed. (2008). *Youth, Identity, and Digital Media*. Cambridge, MA: The MIT Press.

- Butler, E., McCann, C., & Thomas, J. (2011). Privacy Setting Awareness on Facebook and Its Effect on User-Posted Content. *Human Communication* 14(1), 39-55.
- Calvert, C. (2009, Spring). Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve. *First Amendment Law Review*, 7, 210-252.
- Chayko, M. (2008). *Portable Communities: The Social Dynamics of Online and Mobile Connectedness*. Albany, NY: State University of New York Press.
- Chayko, M. (2002). *Connecting: How We Form Social Bonds and Communities in the Internet Age*. Albany, NY: State University of New York.
- Debatin, B., Lovejoy, J.P., Horn, A.-K., & Hughes, B. (2009). Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences. *Journal of Computer-Mediated Communication*, 15, 83-108.
- Duggan, M. Pew Research Center (2015). Gaming and Gamers.
www.pewinternet.org/2015/12/15/gaming-and-gamers/. Last accessed 11-2-17.
- Edmunds, C.F. (2016). Recent Development: The “Tinker-Bell” Framework: The Fifth Circuit Places Facebook Inside the Schoolhouse Gate in *Bell v. Itawamba County School Board*. *Tulane Law Review*, 90, 1017-1030.
- Ellison, N.B., Lampe, C., Steinfield, C., & Vitak, J. (2011). With a Little Help from My Friends: How Social Network Sites Affect Social Capital Processes. In Z. Papacharissi (Ed.), *A Networked Self: Identity, Community, and Culture on Social Network Sites*. (pp. 124-145). New York, NY: Routledge.
- Ellison, N.B., Lampe, C., & Steinfield, C. (2009). Social Network Sites and Society: Current Trends and Future Possibilities. *Interactions Magazine* (16)1, 6-9.

- Feng, Y., & Xie, W. (2014). Teens' Concern for Privacy When Using Social Networking Sites: An Analysis of Socialization Agents and Relationships with Privacy-Protecting Behaviors. *Computers in Human Behavior* 33, 153-162.
- Finlayson, J.G. (2005). *Habermas: A Very Short Introduction*. Oxford, UK: Oxford University Press.
- Geddes, K.E. (2016, Winter). Casenote: Why Bell Tolls a Review of Tinker's Application to Off-Campus Online Student Speech. *SMU Law Review*, 69, 275-
- Grossman, G.S. (1994). *Legal Research: Historical Foundations of the Electronic Age*. New York: Oxford University Press.
- Habermas, J. (1989). The Public Sphere: An Encyclopedia Article. In S. Bronner & D. Kellner (Eds.), *Critical Theory and Society: A Reader*. (pp. 136-142). New York, NY: Routledge.
- Hargittai, E., & Hsieh, Y.P. (2011). From Dabblers to Omnivores: A Typology of Social Network Site Usage. In Z. Papacharissi (Ed.), *A Networked Self: Identity, Community, and Culture on Social Network Sites*. (pp. 146-168). New York, NY: Routledge.
- Harvard Law Review. (2012). Recent Case: First Amendment – Student Speech – Third Circuit Applies Tinker to Off-Campus Student Speech – J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3rd Cir. 2011) (en banc). *Harvard Law Review*, 125, 1064-1071.
- Herring, S.C. (2008). Questioning the Generational Divide: Technological Exoticism and Adult Constructions of Online Youth Identity. In D. Buckingham (Ed.), *Youth, Identity, and Digital Media*. (pp. 71-92). Cambridge, MA: The MIT Press.

- Hersh, A.J. (2013). Note: Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age. *Iowa Law Review*, 98, 1309-49.
- Hoeflich, M.H. (1986). Law & Geometry: Legal Science from Leibniz to Langdell. *American Journal of Legal History*, 30, 95-121.
- Hudson, D. (2001). Matthew Fraser Speaks Out on 15-Year-Old Supreme Court Free-Speech Decision. First Amendment Center. www.newseuminstitute.org/2001/04/17/matthew-fraser-speaks-out-on-15-year-old-supreme-court-free-speech-decision/. Last accessed 3-4-18.
- Jacobstein, J.M., & Mersky, R.M. (1981). *Fundamentals of Legal Research* (2nd ed.). Mineola, NY: The Foundation Press.
- Johnston, D. (2005). Freedom of Speech: A Casualty of War. In J. Russomanno (Ed.), *Defending the First: Commentary on First Amendment Issues and Cases*. Mahwah, NJ: Lawrence Erlbaum Associates.
- Jones, A. (2017). Schools, Speech, and Smartphones: Online Speech and the Evolution of the Tinker Standard. *Duke Law & Technology Review*, 15, 155-170.
- Jones, S. (Ed.) (1998). *Virtual Culture: Identity & Communication in Cybersociety*. London, UK: Sage.
- Jones, S. (1998). *The Internet and Its Social Landscape*. S. Jones (Ed.). London, UK: Sage.
- Kissam, P.C. (1988, April). The Evaluation of Legal Scholarship. *Washington Law Review*, 63, 221-255.
- Kloster, A.R. (2013, Spring). Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students' Rights. *UMKC Law Review*, 81, 617-633.

- Landfried, K.D. (2017). Note: Bell v. Itawamba County School Board: The Need for a Balance of Freedom and Authority. *Saint Louis University Public Law Review*, 36, 193-219.
- Lenhart, A. (2015). Teens, Social Media and Technology Overview 2015. Pew Research Center, www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/.
Last accessed 3-4-18.
- Lenhart, A., Anderson, M., and Smith, A. (2015). Teens, Technology and Romantic Relationships. Pew Research Center, <http://www.pewinternet.org/2015/10/01/teens-technology-and-romantic-relationships/>. Last accessed 3-4-18.
- Livingstone, S. (2006). Children's Privacy Online: Experimenting with Boundaries Within and Beyond the Family. In R. Kraut, M. Brynin, & S. Kiesler (Eds.), *Computers, Phones, and the Internet: Domesticating Information Technology*. (pp. 128-144). Oxford, UK: Oxford University Press.
- Livingstone, S., & Helsper, E. (2007). Gradations in Digital Inclusion: Children, Young People and the Digital Divide. *New Media & Society* (9)4, 671-696.
- Malloy, M. (2016). Note: Bell v. Itawamba County School Board: Testing the Limits of First Amendment Protection of Off-Campus Speech. *Wisconsin Law Review*, 2016, 1251-1281.
- Martin, A. (2013). Comment: Tinkering with the Parameters of Student Free Speech Rights for Online Expression: When Social Networking Sites Knock on the Schoolhouse Gate. *Seton Hall Law Review*, 43, 773-797.
- Ohler, J. (2010). *Digital Community Digital Citizen*. Thousand Oaks, CA: Corwin.
- Papacharissi, Z. (Ed.). (2011). *A Networked Self: Identity, Community and Culture on Social Network Sites*. New York, NY: Routledge.

- Parks, Malcom R. (2011). Social Network Sites as Virtual Communities. Z. Papacharissi (Ed.) *A Networked Self: Identity, Community and Culture on Social Network Sites*. (pp. 105-123) New York, NY: Routledge.
- Pauwels, C.K., Fariss, L.K., & Buckley, K. (1999). *Legal Research: Traditional Sources, New Technologies*. Bloomington, IN: Phi Delta Kappa Educational Foundation.
- Perrin, A. Pew Research Center (2015), *Overall Social Media Usage 2005 – 2015*, www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/. Last accessed 11-2-17.
- Rainie, L., Smith, A., Schlozman, K.L., Brady, H., & Verba, Sidney. Pew Research Center (2012), *Social Media and Political Engagement*, www.pewinternet.org/2012. Last accessed 11-2-17.
- Rasmussen, D. (1990). *Reading Habermas*. Cambridge, MA: Basil Blackwell Inc.
- Redfield, S.E. (2002). *Thinking Like a Lawyer*. Durham, NC: Carolina Academic Press.
- Rheingold, H. (1993). *The Virtual Community: Homesteading on the Electronic Frontier*. Reading, MA: Addison-Wesley Publishing Co.
- Richardson, K. (2013). Front-Stage and Back-Stage Kantian Ethics: Promoting Truth and Trust in Social Media Communication. B. Beasley and M. Haney (Eds.). *Social Media and the Value of Truth*. Lanham, MD: Lexington Books.
- Roberts, B.K., & Schlueter, L.L. (1986). *Legal Research Guide: Patterns and Practice*. Charlottesville, VA: The Michie Co.
- Roose, K. (2018). Can Social Media Be Saved? The New York Times, March 28, 2018. <https://www.nytimes.com/2018/03/28/technology/social-media-privacy.html>. Last accessed 4-9-18.

- Rubin, E.L. (1988, August). The Practice and Discourse of Legal Scholarship. *Michigan Law Review*, 86, 1835-1905.
- Scannell, P. (1996). *Radio, Television and Modern Life: A Phenomenological Approach*. Oxford, UK: Blackwell.
- Smith, A. Pew Research Center (2016), “15% of American Adults Have Used Online Dating Sites or Mobile Dating Apps,” www.pewinternet.org/2016/02/11/15-percent-of-american-adults-have-used-online-dating-sites-or-mobile-dating-apps/. Last accessed 11-2-17.
- Solove, D.J. (2007). *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet*. New Haven, CT: Yale University Press.
- Wood, L.P. (Ed.) (1996). *Merriam Webster’s Dictionary of Law*. Springfield, MA: Merriam-Webster, Inc.

Table of Cases

- Bell v. Itawamba County School Board, 799 F.3d 379 (5th Cir. 2015).
- Bell v. Itawamba County School Board, 136 S. Ct. 1166 (2016) (cert denied).
- Bethel School District v. Fraser, 478 U.S. 675 (1986).
- Cohen v. California, 403 U.S. 15 (1971).
- D.J.M. v. Hannibal Public School District No. 60, 647 F.3d 754 (8th Cir. 2011).
- Doe v. Pulaski County Special School District, 306 F.3d 616 (8th Cir. 2002) (en banc).
- Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).
- Elonis v. United States, 575 U.S. ____ (2015) (slip opinion).
- FCC v. Pacifica, 438 U.S. 726 (1978).

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1987).

J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3rd Cir. 2011) (en banc).

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

Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011).

LaVine v. Blaine School District, 257 F.3d 981 (9th Cir. 2001).

Layshock v. Hermitage School District, 494 F. Supp. 2d 587 (W.D. Pa. 2007).

Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2011) (en banc).

Minersville Sch. Dist. v. Gobitis, 310 U.S. 585 (1940).

Morissette v. United States, 342 U.S. 246 (1952).

Morse v. Frederick, 551 U.S. 393 (1986).

New Jersey v. T.L.O., 469 U.S. 325 (1985).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Packingham v. North Carolina, 582 U.S. ____ (2017) (slip opinion).

Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004).

Reno v. ACLU, 521 U.S. 844 (1997).

Safford Unified School Dist. #1 v. Redding, 557 U.S. 364 (2009).

S.J.W. v. Lee's Summit R-7 School District, (4:12-cv-0028-HFS) (W.D. Mo., Feb. 20, 2013).

S.J.W. v. Lee's Summit R-7 School District, 696 F.3d 771 (8th Cir. 2012).

S.J.W. v. Lee's Summit R-7 School District, 2012 U.S. App. LEXIS 24103 (8th Cir. Mo., Nov. 21, 2012) (rehearing denied).

State v. Pendergrass, 19 N.C. 365 (1837).

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

Watts v. United States, 394 U.S. 705 (1969).

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Wisniewski v. Board of Education of Weedsport Central School District, 494 F.3d 34 (2d Cir. 2007).

Wynar v. Douglas County School District, 728 F.3d 1062 (9th Cir. 2013).

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“The Assessment Plan: Math Lessons — Learning from our Students,” 2012, *TJMC Journal*, Small Programs Interest Group of the Association for Education in Journalism and Mass Communication. Accessible at: <http://aejmc.us/spig/2012/a-is-for-assessment-the-assessment-plan-math-lessons-learning-from-our-students/>

“Squeezing Blood from a College Newspaper,” Spring 2012, *Gateway Journalism Review*, Southern Illinois University School of Journalism, Carbondale, Ill.

“College Newspapers in the 21st Century: Nurturing a Passion for News is the Most Important Job Facing College Newspapers,” Spring 2011, *Gateway Journalism Review*, Carbondale, IL.

“Cases Test Limits of School’s Reach,” Spring 2010, *Adviser Update*, Dow Jones News Fund, Princeton, NJ.