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“YOU’RE ONLY ASKING FOR TROUBLE”: THE CONSTITUTIONAL LIMITS AND COLLATERAL CONSEQUENCES OF CENSORING YOUTH ONLINE SPEECH

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“YOU’RE ONLY ASKING FOR TROUBLE”: THE CONSTITUTIONAL LIMITS AND COLLATERAL CONSEQUENCES OF CENSORING YOUTH ONLINE SPEECH,
by Robert Quackenbush¹

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More than 1.3 billion people worldwide use the internet. Many of them “rely on the tools of cyberspace to help [them] make, maintain, and rekindle friendships; find places to live, work, eat, and travel; exchange views on topics ranging from terrorism to patriotism, and enlighten [them]selves on subjects from ‘aardvarks to Zoroastrianism.'”² Some people use the internet to express themselves, in the form of self-created websites, moderated message boards, and online social networks. Some of these people are public school students. And, sometimes, students express themselves in online forums about the people who they spend the most time with and around: teachers, principals, and other students. Unfortunately, many school officials have begun to regulate their students’ online speech, made away from campus, as if the speech was made in the classroom. As a result, courts have been forced to confront the issue of whether, and under what circumstances, public schools are empowered to reach beyond the schoolhouse gates to punish students for online expression, even though the speech would not otherwise be actionable against a non-student, or even a high school dropout. This Article seeks to explain the ways in which courts have addressed these issues, particularly whether and when a school may exercise its coercive power over online student speech originating off of campus, to evaluate the proposed reforms and apply them to pending litigation in a federal district court.

Part I describes the facts of an ongoing case in Florida, where a student, Katherine Evans, criticized her teacher on Facebook.com and was suspended by the school, even though the student’s speech originated from her own home. Part II surveys the Supreme Court’s student speech precedents and lower court applications of those precedents as applied to student underground newspapers and student insults of teachers made off-campus. Part II will also apply the principles in those cases to the facts pertaining to Katherine Evans. Part III explores the various approaches used by court evaluating punishments arising from student online speech and evaluates proposed reforms. Part IV applies the relevant case law and approaches to the facts in the case of Katherine Evans and attempts to predict the outcome of that case given the various approaches used by the courts. Part V concludes by describing the collateral consequences of the more speech-restrictive approaches, particularly focusing on the impact on parental authority, perceptions of teacher professionalism, and the likely chill on student speech.

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I. The Case of Katherine Evans

Katherine Evans is currently a sophomore at the University of Florida, but all of the facts relevant to her case occurred during her senior year at Pembroke Pines Charter High School in Broward County, Florida.

In the grand scope of student conduct, the facts as reported could not be more ordinary. Apparently, the story begins with a student, Katherine Evans, who was unhappy with her Advanced Placement English teacher, Sarah E. Phelps, allegedly for ignoring the student’s pleas for help with assignments and for the teacher’s “brusque reproach when [Evans] missed class to attend a school blood drive.”

In response, Evans turned to the forum-of-choice for a vast number of tech-savvy teenagers: the online social network, Facebook. On the Friday night before Veterans’ Day weekend, Evans logged on to her account from her home computer, created a Facebook “group” and invited her Facebook “friends” to join. Evans named the group “Ms. Sarah Phelps is the worst teacher I’ve ever met!” Under the description of the group, Evans wrote, “To those students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred.”

Evans’ Facebook group created featured a picture of her teacher taken from a prior year’s school yearbook. The group was “open,” meaning “[a]nyone [could] join and invite others to join.” So, the group and its contents were conceivably viewable by any person with a Facebook account, not just those people who were within Evans’ immediate social network. Evans also included the school’s address under the section entitled “Contact Info.”

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4 Gentile, supra note 3.

5 “The social networking sites most popular among teenagers are MySpace and Facebook. The sites share many characteristics. Both sites enable users to create profiles containing information about themselves for other users to view. Users may communicate by sending private messages or posting public comments on other users’ profiles. In addition, users may create or join groups focusing on particular interests, or invite other users to attend events. MySpace and Facebook differ in other respects, however. MySpace permits users to personalize their profiles’ color scheme, background, and music. While Facebook does not offer these features, it enables users to upload photos easily and to ‘tag’ - or identify - other users in the photos, which can be accessed from the tagged users’ profiles. Users commonly have hundreds of photos of themselves posted on Facebook. In addition, profiles describe users’ most recent Facebook activity such as adding a new friend, posting a comment on a friend’s profile, or changing information in their profile. Essentially, MySpace and Facebook provide teenagers an opportunity to post on the Internet the types of speech previously reserved for evening phone conversations or weekend get-togethers with their circle of friends.” Kara D. Williams, Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights, 76 U. Cin. L. Rev. 707, 708 (2008).


7 Complaint, supra note 6, at 1.

8 Complaint, supra note 6, at 7, Exhibit A.

9 Complaint, supra note 6, at 7, Exhibit A.
Several students joined the group and left messages on the group’s “Wall,” which would be visible to anyone viewing the group. However, the messages left were supportive of the teacher, not Evans.

The first student responded around 12:30 a.m. Saturday morning, writing:

wow katie,
the only reason i joined this group is tell [sic] you how wrong you are.
ms. phelps is one of the most amazing teachers ive [sic] ever had, and theres [sic] plenty of people who agree with me. whatever your reasons for hating her are, they’re probably very immature, and more importantly, probably your own fault. clearly, you can’t handle a heavy workload, one which requires REAL thinking, and if that is the case you probably should not be taking AP classes, [sic]
so i would love to hear how you justify calling her the “worst” teacher, besides the fact that you can’t suck up to her and get your A…?10

A second student joined the group and, around 3:20 a.m. the same morning, wrote:

Seriously, was this group necessary, katie? & putting up the school’s information, really? You’re only asking for trouble with this “group” of yours. You may think she’s a terrible teacher, but you could never imagine how much she’s taught me, [student named deleted by author], & all her other students who are looking at this group in disgust.11

A third student wrote the following, around 3:30 a.m. Saturday morning:

ok sooo here’s the deal.
i think that you created this group b/c phelps is the only teacher that won’t give you a good grade for having your lips against their ass. she expects you to work, and yea her class might be crazy and she might do weird things but all those weird things remember what synecdoche is in your ENC1101 class almost 6 months later….
so quit bitching and just suck it up! not everything in life is easy….
by the way I LOVE MS. PHELPS!!!!

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10 Complaint, supra note 6, at 7, Exhibit A.
11 Complaint, supra note 6, at 7, Exhibit A.
This was the last reported posting on this Facebook group.\textsuperscript{12}

Evans asserts that she deleted the entire Facebook group and its contents two days later. School was closed on Monday for the federal holiday. Accordingly, Evans alleges that the group “was not seen by the teacher while it was on Facebook” and did not disrupt school activities.\textsuperscript{13}

Evans’ complaint alleges more than two months passed before the school’s principal, Peter Bayer, acted to discipline Evans over the contents of her Facebook group.\textsuperscript{14} Accusing her of violating the school board’s policy against “cyber bullying” and harassment, Bayer suspended Evans for three days and removed her from her Advanced Placement classes.\textsuperscript{15} Evans subsequently graduated from the school and started classes at the University of Florida.

Joining with counsel from the American Civil Liberties Union of Florida, Evans filed suit against Bayer pursuant to 42 U.S.C. § 1983,\textsuperscript{16} in the United States District Court for the Southern District of Florida. Evans claims that the suspension violated her federal constitutional rights under the First and Fourteenth Amendments, seeks declaratory and injunctive relief in the form of “redaction or expungement of her disciplinary record on this matter.”\textsuperscript{17}

Although school officials mostly avoided responding to the publicity surrounding to the lawsuit in the press,\textsuperscript{18} at least one school official has publicly supported the principal’s actions. According to Pamela Brown, assistant director for the Broward County School District who oversees expulsions, “You can express an opinion on whether someone is a good teacher. But when you start inviting people to say that they hate a teacher, that crosses a line.”\textsuperscript{19}

Invoking the specter of school-related violence, Brown added, “We don’t want teachers to work in fear, looking over their shoulders when they walk to their cars after school.”\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{12} Complaint, supra note 6, at 7, Exhibit A.
  \item \textsuperscript{13} Complaint, supra note 6, at 3.
  \item \textsuperscript{14} Complaint, supra note 6.
  \item \textsuperscript{16} “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...” 42 U.S.C. § 1983.
  \item \textsuperscript{17} Complaint, supra note 6, at 1.
  \item \textsuperscript{18} Gentile, supra note 3.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} \textit{Id}.
\end{itemize}
Howard Simon, executive director of the ACLU of Florida, fired back: “Since when did criticism of a teacher morph into assault? If Katie Evans said what she said over burgers with her friends at the mall, there is no question that it would be protected by free speech.”

Notwithstanding the hyperbole lobbed in the press, Principal Bayer responded to the federal complaint with a motion to dismiss on the grounds of qualified immunity. In support of this defense, Bayer asserts that the case law pertaining to student online speech is in such a state of disarray and inconsistency that Evans’ free speech rights in this context, even if they existed and were violated, were not clearly established and thus Bayer’s discretionary decision to suspend Evans cannot be questioned in court.

In footnotes, Bayer’s motion to dismiss disputed Evans’ allegations that she voluntarily removed the Facebook posting. Further, he disputed both that Bayer did not learn of the posting until after it had been removed and that he did not act to suspend Evans until several weeks after the posting’s deletion.

Bayer’s motion to dismiss also asserts that Evans’ speech was “defamatory on its face and gives rise to a cause of action for defamation per se by the teacher,” that the speech was “directed at” the teacher, and that the mere potential for disruption would have been sufficient for the school to discipline Evans.

Evans’ reply to the motion to dismiss staked out a broad legal claim: “when speech does not threaten a school official, materially disrupt the educational process, or advocate illegal activity, the speech is absolutely protected.” The brief argues that Evans’ speech was entirely off-campus and thus subject to strict scrutiny, not the more speech-restrictive standard for school speech. As to qualified immunity, Evans alleges that “no reasonable principal could believe that Ms. Evans’ Facebook group would materially or substantially affect the educational process, thus her punishment violated her clearly established rights.”

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21 Id.

22 Defendant’s Motion to Dismiss at 3, Evans v. Bayer, Case 0:08-cv-61952-JAL (S.D.Fl. March 2, 2009).

23 Defendant’s Motion to Dismiss, supra note 22, at 3.

24 Defendant’s Motion to Dismiss, supra note 22, at 2, note 1.

25 Defendant’s Motion to Dismiss, supra note 22, at 8.

26 Plaintiff’s Response and Memorandum of Law in Opposition to Defendant’s Motion to Dismiss at 3, Evans v. Bayer, Case 0:08-cv-61952-JAL (S.D.Fl. March 13, 2009) (herein “Plaintiff’s Response”).

27 Plaintiff’s Response, supra note 26, at 5.

28 Plaintiff’s Response, supra note 26, at 12.
Clearly, several preliminary issues must be resolved in Evans’ favor before ever reaching the merits of her free speech claim, such as the issue of qualified immunity. In order to focus on Evans’ substantive First Amendment claim, the author assumes arguendo that Evans will prevail on those preliminary issues.

II. The “Student Speech” Cases

Since the inception of the public school experiment in this country, courts have generally deferred to the schools’ expertise in sustaining punishments for student speech or conduct which was considered improper, such as calling one’s teacher “Old Tom Seaver” or even alerting authorities that the school was a fire trap.

Of course, times have changed. In 1943, West Virginia State Board of Education v. Barnette, the United States Supreme Court held that public schools are state actors under the Fourteenth Amendment, and therefore schools must honor the First Amendment rights of their students. Specifically, Barnette held that schools may not punish students, who were Jehovah’s Witnesses, for refusing to salute the American flag during the Pledge of Allegiance.

Barnette recognized the “delicate and highly discretionary” educational functions of the public schools, but the Court ultimately relied upon limited government theory by forcing school boards to act within the bounds of the First Amendment. In doing so, Justice Jackson’s majority doubted “whether [President] Lincoln would have thought that the strength of government to maintain itself would be vindicated by our confirming power of the state to expel a handful of children from school.”

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29 See Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 822 (2009) (qualified immunity inquiry turns on objective legal reasonableness of government official’s action, assessed in light of legal rules that were clearly established at time it was taken).


32 319 U.S. 624 (1943).

33 It is worth noting that the salute at issue in Barnette was the “stiff-arm” salute, whereby “the saluter [ ] keep[s] the right hand raised with palm turned up” while reciting the Pledge of Allegiance. Id. at 628-29. Groups such as the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women’s Clubs objected to the previous incarnation of the salute as being “too much like Hitler’s.” Id. The National Headquarters of the United States Flag Association disagreed with this characterization and insisted that the salute, as modified, was not like the “Nazi-Fascist” salute because that salute requires the right palm to be faced downwards, whereas the Pledge’s salute mandated that the palm be turned upwards. Id.

34 Id. at 636-37.

35 Id. at 637.

36 Id. at 636-37.

37 Id. at 636.
Barnette, though, is best understood as delineating the constitutional limits on speech which the government compels an individual to perform; free speech is a different game altogether. That said, Barnette was the opening salvo in the Supreme Court’s attempt to define the boundaries of the First Amendment within the school. Since then, the Court has only ruled on four student speech cases, which, together, create a general rule with three exceptions, explored below.

a. The Supreme Court’s Student Speech Cases

In December of 1965, three students and their parents together decided to publicize their opposition to the war in Vietnam through a silent, symbolic act: the students would wear black armbands to school. Despite the school’s warning that such action would result in the students’ suspension, the students wore the armbands to school. They were subsequently suspended from school.

In Tinker v. De Moines Independent Community School District, the Supreme Court invalidated these students’ punishments as unconstitutional violations of their First Amendment rights. The Court began with the now-famous maxim that “[n]either students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” After all, “state-operated schools may not be enclaves of totalitarianism” with regard to student speech rights. These rights, however, must be “applied in light of the special characteristics of the school environment,” which emphasize order. In balancing the students’ interest in free speech against the state’s education imperatives, the Court held that schools may not regulate student speech unless it would materially and substantially interfere with the school’s function or violate the rights of others.

Applying these principles to the facts of the case, the Court concluded:

[The students] neither interrupted school activities nor sought to intrude in the school affairs of the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

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38 See Id. at 636-37.


40 Tinker, 393 U.S. at 506.

41 Id. at 511; see also id (“School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under the 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”).

42 Id. at 506.

43 Id. at 513.
Thus, where schools are motivated to suppress speech only by an “undifferentiated fear of apprehension of disturbance”\textsuperscript{44} or by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,”\textsuperscript{45} the Constitution bars the school from acting to regulate that speech.

However, just as in other areas of law, the landmark case which establishes a broad constitutional protection often becomes so riddled with exceptions and re-interpretations as to render that precedent to the status of a mere relic.\textsuperscript{46} Although \textit{Tinker} is still the leading case in issues of student speech, schools often rely on the subsequent exceptions to the \textit{Tinker} rule to punish students in the absence of a substantial disruption.

The first such exception came nearly twenty years after \textit{Tinker} in \textit{Bethel School District No. 403 v. Fraser}.\textsuperscript{47} There, a student gave a speech at a school-sponsored assembly in support of his friend’s candidacy for a student government position. The speech, though, was phrased in an elaborate sexual metaphor.\textsuperscript{48} During the speech, several students hooted and yelled, others made graphic gestures of a sexual nature, some students appeared to be confused, and at least one teacher stated that she needed to take class time to address the student’s speech at the assembly.\textsuperscript{49}

\begin{itemize}
  \item \textsuperscript{44} \textit{Id.} at 508; \textit{see also} id (“Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk”).
  \item \textsuperscript{45} \textit{Tinker} at 509.
  \item \textsuperscript{46} \textit{Compare} \textit{Roe v. Wade}, 410 U.S. 113, 163 (1973) (state may not regulate access to abortion providers while patient is in first trimester of pregnancy), \textit{with} \textit{Planned Parenthood v. Casey}, 505 U.S. 833, 846 (1992) (prior to fetal viability, state may not impose an “undue burden” on women seeking an abortion); \textit{also}, \textit{compare Brown v. Board of Education of Topeka}, 347 U.S. 483, 495 (1954) (“\textit{Brown I}”) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”), \textit{with Brown v. Board of Education of Topeka}, 349 U.S. 294, 301 (1955) (“\textit{Brown II}”) (schools need only comply with \textit{Brown I} “with all deliberate speed”), \textit{and Parents Involved in Community Schools v. Seattle School District No.1}, 551 U.S. 701, 127 S.Ct. 2738, 2768 (2007) (Roberts, C.J.) (“For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way ‘to achieve a system of determining admission to the public schools on a nonracial basis,’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race”) (\textit{citing Brown II}, 349 U.S. at 300-01).
  \item \textsuperscript{47} 478 U.S. 675 (1986).
  \item \textsuperscript{48} \textit{Id}, 478 U.S. at 678.
  \item \textsuperscript{49} \textit{Id.} at 678.
\end{itemize}
In response, the school’s principal suspended the offending student and removed his name from the list of student candidates to speak at graduation.\(^{50}\)

The Supreme Court upheld the school’s punishment, holding that the First Amendment does not restrain the school from punishing a student’s “vulgar and lewd speech” that “would undermine the school’s basic educational mission.”\(^{51}\) The Court recognized the school’s mission to instill “fundamental values of habits and manners of civility essential to a democratic society.”\(^{52}\) In so doing, the Court noted that the rights of students within the public schools “are not automatically coextensive with the rights of adults in others settings,”\(^{53}\) and also emphasized the nonpolitical nature of the speech, explaining that “[a] high school assembly is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”\(^{54}\) So, even though the facts indicate at least some level of disruption as a result of the speech, the Court instead carved out a narrow exception to \emph{Tinker}: lewd speech given in front of a “captive audience”\(^{55}\) of students at a school-sponsored assembly may be punishable, even if it does not pose a risk of “material disruption” or invasion of the rights of others.

In his concurring opinion, Justice Brennan agreed that “in light of the discretion school officials have to teach high school student how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances, that [the student]’s remarks exceeded permissible limits.”\(^{56}\)

However, Justice Brennan also explained that \emph{Fraser}’s holding is distinctly limited to on-campus or school-sponsored activities: “If [the student] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court’s opinion does not suggest otherwise.” Justice Brennan emphasized that the Supreme Court’s precedents bar censorship of student speech “used in public debate outside of the school environment.”\(^{57}\) The limitations described by Justice Brennan should obviously take center stage in student online speech cases, as will be described below.

\(^{50}\) \textit{Id.}.

\(^{51}\) \textit{Id.} at 681, 685 (internal citations omitted).

\(^{52}\) \textit{Id.} at 681.

\(^{53}\) \textit{Id.} at 682.

\(^{54}\) \textit{Id.} at 685.

\(^{55}\) \textit{Id.} at 684.

\(^{56}\) \textit{Id.} at 687-688 (Brennan, J., concurring).

\(^{57}\) \textit{Id.} at 688 (Brennan, J., concurring) (italics added), \textit{citing Cohen v. California}, 403 U.S. 15 (1971). This reasoning was parroted by the majority in the Court’s next student speech case; \textit{see also Hazelwood School District v. Kuhlmeier}, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school”) (citing \emph{Fraser}, 478 U.S. at 685)(italics added).
Only two years after Fraser, the Court carved out another exception to Tinker, holding that schools may censor student speech occurring in school-sponsored expressive activities, so long as the censorship is reasonably related to some legitimate pedagogical concern.\(^{58}\) In Hazelwood School District v. Kuhlmeier, the Court confronted a case where students challenged a principal’s decision to remove student-created articles, which dealt with the issues of divorce and teen pregnancy, from the school’s student newspaper.\(^{59}\) In declining to apply the Tinker test for disruption or invasion of the rights of others, the Court instead created another categorical exception to Tinker, reasoning that since the school newspaper was created in the school’s journalism class, and since schools have nearly plenary power to shape the curriculum, schools should be able to dictate the speech within its course materials.\(^{60}\)

The Court seemed particularly concerned that the student-generated newspaper bore the school’s imprimatur, or seal of approval. In such a situation, the school is empowered to control the content of its own speech by censoring the student speech therein.\(^{61}\) So long as a legitimate pedagogical purpose is served by regulating the student speech in school-sponsored forums, then schools may exercise its editorial discretion without engaging in a “disruption” inquiry under Tinker.\(^{62}\)

The most recent categorical Tinker exception came in Morse v. Frederick\(^ {63}\) and concerned “speech that can reasonably be regarded as encouraging illegal drug use.”\(^ {64}\) There, the Court upheld the suspension of student who, “while at a school-sanctioned and school-supervised event” to watch the Olympic Torch procession through their town, unfurled a 14-foot banner which read “BONG HiTS 4 JESUS” in view of the other students in attendance.\(^ {65}\)

Unlike the previous student speech cases, the Court here first addressed a threshold issue of whether to apply the student speech precedents to speech which occurred off of school grounds, admitting that “[t]here is some uncertainty at the outer boundaries as to when court should apply school-speech precedents.”\(^ {66}\) However, the Court easily concluded that the school’s authority

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\(^{59}\) Id. at 263-64.  
\(^{60}\) Id. at 271-73.  
\(^{61}\) Id. at 271.  
\(^{62}\) Id. at 273.  
\(^{63}\) Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618 (2007).  
\(^{64}\) Id. at 2622.  
\(^{65}\) Id. at 2622.  
\(^{66}\) Id. at 2624, citing Porter v. Ascencion Parish School Bd., 393 F.3d 608, 615, n.22 (5th Cir. 2004).
indeed reaches beyond the schoolhouse gate to include school-sanctioned and school-supervised events, and this was such an event.\textsuperscript{67}

Moving beyond the jurisdictional threshold, while the Ninth Circuit Court of Appeals below found in the student’s favor because the school did not demonstrate that his speech gave rise to a “risk of substantial disruption,”\textsuperscript{68} the Supreme Court decided that such disruption is not a prerequisite for punishing student speech which advocated drug use. The Court relied upon its cases involving the Fourth Amendment in the schools to conclude that part of the school’s educational mission is to deter illegal drug use.\textsuperscript{69} In furtherance of that mission, schools may regulate speech which a principal reasonably regards as advocating drug use. Although the Court admitted that the underlying message of the banner was “cryptic,” it nonetheless deferred to the principal’s opinion that the banner advocated drug use because “that interpretation is clearly a reasonable one.”\textsuperscript{70}

The concurring opinion of Justice Alito, joined by Justice Kennedy, attempted to act as a firewall against even further \textit{Tinker} exceptions, writing:

\begin{quote}
As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.
\end{quote}

As will be explored below, notwithstanding Justice Alito’s admonition not to apply this case beyond the drug speech context, some courts have extended \textit{Morse} to include student speech concerning violence directed at other students or school officials.\textsuperscript{71}

\begin{thebibliography}{99}
\bibitem{67} \textit{Id.} (event was during normal school hours, sanctioned by the principal, and supervised by teachers). However, internet speech by students, especially if created off-campus, directly implicates this threshold question, unlike the other school speech precedents of the Supreme Court.
\bibitem{68} 439 F.3d 1114, 1121-23 (9th Cir. 2006).
\bibitem{70} \textit{Id.} at 2624; \textit{see also id.} at 2625 (“At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: ‘[T]ake bong hits ...’ -a message equivalent, as Morse explained in her declaration, to ‘smoke marijuana’ or ‘use an illegal drug.’ Alternatively, the phrase could be viewed as celebrating drug use - ‘bong hits [are a good thing],’ or ‘[w]e take bong hits’- and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion”).
\bibitem{71} \textit{See, e.g., Ponce v. Socorro Independent School District}, 508 F.3d 765 (5th Cir. 2007).
\end{thebibliography}
To summarize the Supreme Court’s student speech precedents, as then Circuit Judge Alito wrote in 2001: “Under Fraser, a school may categorically prohibit lewd, vulgar or profane language. Under [Kuhlmeier], a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school’s own speech) on the basis of any legitimate pedagogical concern.”\textsuperscript{72} Also, under Morse, schools may prohibit student speech reasonably believed to advocate drug use. “Speech falling outside of these categories is subject to Tinker’s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.”\textsuperscript{73}

Lower courts have not consistently applied Tinker and its progeny, especially where the speech at issue originated off-campus. Because the Supreme Court has never confronted a case of school discipline for a student’s truly off-campus speech, lower courts have devised several approaches for determining whether speech is on-campus (subject to Tinker and its progeny) or off-campus (subject to full First Amendment protections).

b. Student Speech in the Lower Courts

Not surprisingly, when searching for the most appropriate lower court decisions to apply to online speech cases such as Evans’, some of the best analogs come in the form of underground student newspapers which were created off-campus but which nonetheless become targeted by schools.

Shortly after Tinker, the case of Sullivan v. Houston Independent School District\textsuperscript{74} encountered a situation where students moved to enjoin their school from suspending them for publishing an underground newspaper, printed and distributed entirely off-campus. The newspaper criticized school officials for harassing and physically threatening students and school policy for issuing a confusing dress code, refusing to allow students to wear American flag lapel pins as a show of patriotism, failing to allow students to raise money for global hunger relief but simultaneously compelling them to raise funds for school beautification.\textsuperscript{75} Teachers reported minor disruptions implicating the underground newspaper, mostly in the form of confiscating copies which other students had brought into class.\textsuperscript{76}

The district court began by explaining that, under Tinker, producers of underground newspapers should not be held responsible for a school disruption when their newspaper was actually brought onto campus by “other students, who are lacking in self-control.”\textsuperscript{77} In so doing, the


\textsuperscript{73} Id.

\textsuperscript{74} 307 F.Supp. 1328 (S.D. Texas 1969).

\textsuperscript{75} Id. at 1332.

\textsuperscript{76} Id. at 1334.

\textsuperscript{77} Id. 1340.
court debated whether *Tinker* should even be applicable to “off-campus activities.” To quote at length:

It is not clear whether the law allows a school to discipline a student for his behavior during free time away from the campus. In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.

Arguably, misconduct by students during non-school hours and away from school premises could, in certain situations, have such a lasting effect on other students that disruption could result during the next school day. Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This court considers even this power to be questionable.

This analysis seemed to suggest a willingness to discard *Tinker* and instead grant full and complete First Amendment rights to students acting beyond the schoolhouse gates. Instead, notwithstanding its doubts about the school’s authority to regulate students’ off-campus speech, this court applied *Tinker*, albeit a more speech-protective version of *Tinker* than later courts would use. The court rejected the school’s assertion that the newspaper created “turmoil,” especially since the students distributed the newspapers off-campus and not during school hours and since they specifically encouraged students not to take the newspaper into school with them. Further, in concluding that no disruption occurred and that the punishment amounted to viewpoint discrimination, the court explained that “the students were disciplined because school officials disliked [the newspaper]’s contents. The Constitution prohibits such action.”

Similarly, the Fifth Circuit in *Shanley v. Northeast Independent School District* ruled that a school could not punish a student whose underground newspaper caused no disturbance and

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78 *Id.* at 1340.
79 *Id.* at 1340-41 (internal citations omitted).
80 *Id.* at 1336.
81 *Id.* at 1342.
82 *Id.*
83 462 F.2d 960 (5th Cir. 1972).
where it was entirely produced and distributed off-campus. However, this court did an end run around the threshold issue, whether the speech was on-campus and thus subject to *Tinker*. It reasoned that since a school’s authority to discipline students for off-campus speech cannot be greater than its authority to regulate on-campus speech, 84 and since a school can only punish on-campus speech which causes substantial disruption or a reasonable forecast of disruption, 85 it analyzed the facts under *Tinker* to conclude that, without evidence of any disruption, the school could not regulate the student’s speech regardless of whether it was on-campus or off-campus. 86

Although *Shanley* avoided ruling on the on-campus/off-campus issue, the court lent its support in dicta to a jurisdictional approach to the question:

> [W]e have never had occasion to discuss the constitutional propriety of applying a school regulation directly to offcampus conduct. We do note, however, that it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts. For example, the now proverbial “fire” might be constitutionally yelled on the street corner, but not within the theater; or a march down the middle of a street might be protected activity, while a march down the hallway of a building might not. By the same token, it is not at all unusual in our system that different authorities have responsibility only for their own bailiwicks. An offense against one authority that it perpetrated within the jurisdiction of another authority is usually punishable only by the authority in whose jurisdiction the offense took place. 87

Moreover, the court seemed particularly galled at the school board’s attempted grab of power from the students’ parents. The first paragraph of the opinion read:

> It should have come as a shock to the parents of five high school seniors in the Northeast Independent School District of San Antonio, Texas, that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment. 88

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84 *Id.* at 968.
85 *Id.* at 970.
86 *Id.* at 975.
87 *Id.* at 974.
88 *Id.* at 964; see also *id.* at 966 (characterizing the school board’s attempted punishment as a “bootstrap transmogrification into Super-Parent”).
In sum, as in *Sullivan, Shanley* applied *Tinker* to off-campus speech but was unwilling to entertain the school board’s assertions of disruption without a basis in fact, particularly for such a “vanilla-flavored” newspaper like the one at issue.

In a remarkable case from the Second Circuit, *Thomas v. Board of Ed., Granville Central School District* directly addressed the threshold jurisdictional issue and held that, since the students’ underground newspaper was created and distributed off campus, the students were entitled to the full constitutional protections available to adults in normal life, not the more restrictive *Tinker* standard.

There, the court concluded that the newspaper’s contacts with the school – asking occasional grammar and content advice from a teacher, occasional use of a school typewriter, and storing copies in a teacher’s classroom closet – were “scant and insignificant” and constitutionally *de minimis*. As the court explained:

> [Because] school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.

Without a significant nexus to the school, then, the newspaper constituted off-campus speech subject only to constitutional limitations on incitement, fighting words, indecency, libel, defamation, and, specific to this case, the adjudication of First Amendment claims by a neutral, detached magistrate.

However, not all courts have provided so much protection for underground student newspapers. In *Boucher v. School Board of the School Dist. of Greenfield*, the Seventh Circuit ruled against

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89 *Id.* at 964.

90 607 F.2d 1043 (2d Cir. 1979).

91 *Id.* at 1050; *see also id.* at 1044-45 (“[O]ur willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government. Where, as in the instant case, school officials bring their punitive power to bear on the publication and distribution of a newspaper off the school grounds, that power must be cabined within the rigorous confines of the First Amendment, the ultimate safeguard of popular democracy”); *see also id.* at 1057 (Newman, J., concurring)(“[T]he First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket”).

92 *Id.* at 1045.

93 *Id.* at 1050.

94 *Thomas* at 1050; *see also Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (“because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint”).

95 134 F.3d 821 (7th Cir. 1998).
a student who was expelled when his underground newspaper was actually distributed on-campus and advocated and instructed students how to hack into the school’s computer system from the on-campus computer lab. Since the newspaper was actually distributed on-campus, the court skipped over the jurisdictional threshold and applied Tinker. Although there was no actual disruption, the school and the court both relied upon the language in Tinker and Kuhlmeier allowing a school to punish speech upon a school official’s reasonable belief that it will cause disruption.

Obviously, then, the key facts which distinguish Boucher from the other underground newspaper cases are the on-campus distribution and the advocacy of on-campus action; the first fact conferred jurisdiction to the school, and the second allowed for a finding that disruption to the school was reasonably foreseeable. As we will see, these distinguishing factors become central in cases involving online student speech.

Besides underground newspapers, pre-internet case law provides other analogs to student internet speech, such as offensive speech delivered to teachers by students off campus.

One such case occurred in Pennsylvania, a veritable hotbed of student speech litigation. In Fenton v. Spear, the federal court for the Western District of Pennsylvania upheld the punishment of a student who called his teacher “a prick” in a shopping mall parking lot on a Sunday in front of other students. As the court wrote, “[t]o countenance such student conduct even in a public place without imposing sanction could lead to devastating consequences in the school.”

However, the court’s logic in arriving at that conclusion is deeply and transparently flawed internally inconsistent. The facts would suggest that, since the speech was made in front of other students, the school might argue that Tinker should apply (skipping the jurisdictional question) and that, under Tinker, the school could punish the student based upon its reasonable forecast that the speech would cause a substantial disruption. Yet, the district court never cited Tinker in its opinion.

Remarkably, however, the court grounded the school’s authority to punish the student in very Tinker-esque language: that the speech “involved a violation of the right of the teacher” by committing the misdemeanor of harassment. However, the court immediately followed that conclusion by admitting that the student’s insult “could possibly be deemed de minimus by a
state criminal court or civil court.”

Put another way, the court concluded that the teacher’s right was invaded, but not any right recognized by the criminal or civil law of Pennsylvania. This obvious logical contradiction removes the justification for punishing the student, if indeed his off-campus speech could ever be actionable. It also removes the justification for placing precedential value on this poorly-reasoned opinion.

Even worse, though, the court also concluded that the school could act because the student’s insult amounted “fighting words,” a category of speech not protected by the First Amendment. This conclusion is offensive to teachers. As Justice Brennan artfully described, the “fighting words” exception to the First Amendment is limited to situations when the speaker’s words were an unambiguous “invitation to exchange fisticuffs.” If this court believes that a fleeting insult from this adolescent would result in the teacher raining blows upon the student, then the court clearly has a very low opinion of teachers’ professionalism. This problem will be discussed at length below, but it suffices to say that this conclusion is yet another reason to refrain from applying Fenton elsewhere.

One off-campus-insult case, though, gets it right. In Klein v. Smith, the federal district court in Maine invalidated the suspension of a student who gave his teacher “the finger” while in a restaurant parking lot after school hours. Noting that the student speech did not occur on school premises or any school-associated activity, the court concluded that any possible connection between the gesture and a disruption at school was “far too attenuated to support discipline” against the student. Especially in light of the absence of other students to witness the insult, it was particularly unlikely that it could lead to disruption within the school unless initiated by the teacher.

Notably, Klein also rejected the school’s argument that the student speech amounted to “fighting words.” After reviewing testimony from multiple school officials who reported being similarly insulted by students in the past without violence ensuing, the court wrote: “The Court can only conclude, contrary to what might be its reflexive, uninformed judgment, that ‘the finger,’ at least when used against a universe of teachers, is not likely to provoke a violent response.”

100 Id. at 771, citing 18 C.P.S.A. § 312 (defining a de minimus [sic] infraction which cannot be prosecuted) (italics in original).

101 Fenton, 423 F.Supp. at 771.

102 See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).


105 Id. at 1441.

106 Id. at 1442, FN 3; see also id. at 1442, note 4 (“The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy. I know that the prophecy implied in their testimony will not be fulfilled. I think that they know that, too”).
Courts, of course, have been more willing to find sufficient connection where the student speech at issue portends a more substantial harm, such as school-related violence. Especially after *Morse*, there might be a greater justification to clamp down on off-campus student speech about school violence even without a reasonable forecast that the speech will lead to disruption. Analyzing the violence-related speech cases in the *Morse* framework, though, is also an effective way to contain the violence and drug-related student speech cases, to prevent them from infecting other areas of the off-campus student speech jurisprudence.

A good example of this phenomenon is a post-*Morse* opinion from the Fifth Circuit, *Ponce v. Socorro Independent School District*. There, the facts describe a high school student who kept a notebook which contained his “pseudo-Nazi” fantasies of perpetrating a Columbine-style attack on his school and committing other brutal acts against students, particularly students of color and homosexuals. The student brought the notebook to school, and, upon learning of its existence from one of the student’s classmates, the principal confiscated it.  

The court upheld the school’s suspension of the student, holding that, according to the logic in *Morse*, school administrators need not evaluate the potential for disruption caused by speech which threatens the school; “it is per se unprotected because of the scope of the harm it potentially foments.” In arriving at this school violence-related exception to *Tinker*, the court tracked Justice Alito’s reasoning in *Morse* which justified the drug-advocacy exception as being grounded around the grave danger “to the physical safety of students arising from the school environment.” The court concluded by stating its new rule: “[W]hen a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling ‘fire’ in crowded theater, and such specific threatening speech to a school or its population is unprotected by the First Amendment.”

However disrespectfully the *Ponce* court treated Justice Alito’s admonition that *Morse*’s drug advocacy exception to *Tinker* not be further extended, this additional *Tinker* exception is a way to contain violence-related student speech cases and prevent their reasoning from being applied in other, more innocuous contexts, such as to the facts in *Evans*.

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107 *Ponce*, 508 F.3d at 766.
108 *Id.* at 769.
109 *Id.* at 770, citing *Morse*, 127 S.Ct. at 2638 (Alito, J., concurring).
110 *Id.* at 772, citing *Schneck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.).
111 See, e.g., *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001) (pre-*Morse*, upholding expulsion of student who brought a violent poem about committing a massacre in his school on the grounds that, in light of the student’s troubled academic and home situations and in the totality of the circumstances, school officials could reasonably forecast a risk of substantial disruption). There, the only real disruption would likely be caused by school officials in reacting to the student speech, not actually from the student. Thus, analyzing the facts in *LaVine* under the *Morse-Ponce per se* rule placing student speech related to school violence beyond First Amendment protection, a court could permit punishment of the student’s speech without coming to the disingenuous conclusion that a risk of disruption existed due to the teachers’ reaction to the speech.
One other case involving student speech originating off-campus is worth describing. In *Latour v. Riverside Beaver School District*, the court granted an injunction preventing a school from expelling a student who recorded and sold several rap songs, completely off-campus, which contained some violent imagery directed at certain students. The court determined that the songs were not a proscribable “true threat” and since it did not credit the school’s assertion of substantial disruption under *Tinker*.

In the “true threat” analysis, the court determined that the rap songs, although containing violent language, were “just rhymes” and “metaphors.” Further, the student rapper never directly communicated the songs to his “targets,” for lack of a better word. Moreover, the student rapper’s targets never themselves felt threatened, and his history revealed no violent tendencies. Considering those factors, the court held that the rap songs were not a proscribable true threat.

Turning to the “substantial interference” test, although the court indicated that the speech occurred entirely off-campus, it nonetheless applied *Tinker*, without explaining its rationale. Notably, however, the court discussed disruptions caused by other students who protested the school’s act of expelling the student-rapper by wearing t-shirts stating “Free Accident” and the absence at school of some of the “targets” of the songs; it held that such disruptions were obviously in response to the conduct of school officials and other students, not to the speech of the student rapper. As such, the court enjoined the school from expelling the student.

However, in the years since the internet has become as ubiquitous as it is now, a handful of opinions have been rendered with regard to student speech on the internet which originates outside of school. Not surprisingly, the lower courts have devised several different standards that predictably produce unpredictable results.

### III. Various approaches to youth online speech cases

Nearly every court that encounters a student speech claim first asks whether that speech occurred on-campus or off-campus. However, courts have approached this threshold question in at least three different ways, and the choice to apply one formulation over another can be outcome-determinative.

#### a. Territorial

One such approach of determining whether the speech was on-campus and subject to school discipline can be called the territorial approach, which asks whether the speech is physically on-campus. Courts using the territorial approach “consider whether the student-speaker used school computers or servers to create, print, or view the expression, or whether they or other students

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113 *Id.* at *2-3*.


115 *Id.*; see also *id* (even if those disruptions could be attributed to the student rapper, they were not substantial enough to be actionable under *Tinker*).
brought hard copies of the material onto the school’s campus.”

This approach should be familiar, as it largely mirrors the analysis used in the underground student newspaper cases.

In fact, the first reported case involving student internet speech, *Beussink v. Woodland R-IV School District*, used the territorial approach. There, the court invalidated the suspension of a student who had created a website on his home computer which criticized school officials using vulgar language. One of Beussink’s former friends accessed the site at school and told school officials about its existence. The court appeared to rely on this scant on-campus presence of the speech in order hold the speech to be on-campus and subject to *Tinker*’s substantial disruption test, even though the court recognized that Beussink did not actually give the website’s address to any student, even his former friend who snitched on him.

After answering that threshold question, the court went on to hold that the suspension was improper because the principal’s “own testimony indicates he disciplined Beussink because he was upset by the content of the homepage.” In other words, the principal’s action was not based on a finding of substantial disruption or a reasonable forecast thereof, but upon disagreement with the viewpoint of the site’s contents. In so ruling, the court explained: “Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.”

Further, in a conclusion which speaks volumes about the absurdity of asking whether off-campus speech is actually on-campus for legal fiction’s sake, the court ordered the school district “enjoined from restricting Beussink’s use of his home computer.”

In a similar case, *Emmett v. Kent School District No. 415*, a student was suspended for posting mock obituaries of his friends on his personal website which allowed visitors “to vote on who would ‘die’ next – that is, who would be the subject of the next mock obituary.” The mock obituaries were clearly tongue-in-cheek. Nonetheless, the student’s website was featured on the local evening news and was described as a “hit list” of potential victims. It was in this manner

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118 Id. at 1177-78.
119 Id. at 1180.
120 Id. at 1180; *see also* id. at 1182 (“Indeed, it is provocative and challenging speech, like Beussink’s, which is most in need of protection of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose”).
121 Id. at 1182.
123 Id. at 1089.
that the speech was brought to campus; the student had no part in bringing his website to the attention of his peers or school officials.\textsuperscript{124}

However, unlike \textit{Beussink}, this court did not hold the “mock obituaries” to be on-campus speech simply because a third-party brought the speech onto campus. Indeed, the mere fact that “the intended audience was undoubtedly connected” to the school was inconsequential to the on-campus analysis, since “the speech was entirely outside of the school’s supervision or control.”\textsuperscript{125}

So, without a student speech precedent to apply, the court appeared to apply a version of the “true threat” analysis, concluding that the mock obituaries were not proscribable as a true threat under the First Amendment. The court ruled that the absence of evidence of a true threat, “combined with the above findings regarding the out-of-school nature of the speech,” weighed in favor of granting Emmett’s temporary restraining order.\textsuperscript{126}

Similarly, \textit{Killion v. Franklin Regional School District}\textsuperscript{127} involved an objectionable email mocking faculty members which was printed and brought to school by a friend of the creator, not by the creator himself. However, \textit{Killion} reached the opposite conclusion as \textit{Emmett} on the threshold issue, holding that since the speech was physically on-campus, regardless of how it got there, it was subject to \textit{Tinker}. The court also seemed willing to apply \textit{Tinker} even had the speech never reached the school at all,\textsuperscript{128} distinguishing it from \textit{Beussink} or \textit{Emmett}.

Applying \textit{Tinker}, the court noted the absence of any real disruption as a result of the email being brought to school. Moreover, similar to the accusation made by Evans, the court credited the one-week lag time between the email being brought to campus and school officials learning about it, all without any disruption occurring. The court concluded:

\begin{quote}
Given the out of school creation of the list, absent evidence that [Killion] was responsible for bringing the list on school grounds, and absent disruption… we hold as in \textit{Klein} and \textit{Thomas}, that [the school] could not, without violating the First Amendment, suspend [Killion] for the mere creation” of the email which insulted faculty.\textsuperscript{129}
\end{quote}

\textsuperscript{124} \textit{Id.} 1089-1090.

\textsuperscript{125} \textit{Id.} at 1090; \textit{see also id} (in discussing \textit{Fraser}, asserting that speech out of school is subject to greater protection than in-school speech)(\textit{citing Fraser}, 478 U.S. at 688)(Brennan, J., concurring).

\textsuperscript{126} \textit{Id.}


\textsuperscript{128} \textit{Id.} at 454-55 (\textit{citing multiple cases for the proposition that “[c]ourts have applied the \textit{Tinker} analysis where off-campus speech makes its way to the campus, even if by some other student”}; \textit{see also id} at 455 (“[t]he overwhelming weight of authority has analyzed student speech [whether on or off campus] in accordance with \textit{Tinker}”).

\textsuperscript{129} \textit{Id.} at 458.
Confusingly, even though the court ruled that the email was on-campus for the purposes of subjecting it to *Tinker*, the court considered its out-of-school creation as a mitigating factor under the material disruption test.

A federal district court in Ohio took yet another approach to the threshold question. In *Coy v. Board of Ed. of the North Canton City Schools*, the court held that *Tinker* applied in reviewing the suspension of a student who accessed his personal website at school during class. The student’s personal website, created entirely off-campus, featured a section called “losers,” in which three other students were pictured and belittled. In concluding that *Tinker* applied, the court emphasized that the act of accessing the website at school, not the creation of the site, was the only conduct of the student subject to the school’s authority. So, the content of the site is immaterial and the fact that Coy created it is equally irrelevant, according to the court. In denying summary judgment for both parties, the court framed the issue in anticipation of the jury trial: “whether the defendants were motivated by the website’s content or, as [the school] claim[s], motivated solely by the accessing of an unapproved site.”

*Coy*, then, stands for the proposition that a student’s speech mocking another student in an online forum, or so-called cyberbullying, is only punishable if his viewing of the speech at school causes a substantial disruption or a reasonable risk thereof. The creation of the speech is not punishable by the school. Off-campus chatter about a student website, even if that chatter came onto campus, cannot be the basis of a “substantial disruption” unless the site was actually viewed at school and that viewing itself caused the disruption. This decision recognizes that *Coy*, when off-campus, is entitled to full free speech protections and that the only basis for punishing him is his act of accessing the unauthorized website.

Yet another case flatly rejected the notion that schools can regulate students’ speech when they are beyond the school’s physical authority. In *Flaherty v. Keystone Oaks School District*, a high school volleyball player posted four entries on an internet message board. In them, he engaged in some mildly lewd “trash talk” to a player on a rival school’s volleyball team, including insulting the art teacher at his own school. Flaherty’s volleyball coach thought that the posting were “an embarrassment to [his] team and to [his] other players,” and the student was punished under the terms of the school’s student code of conduct.

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130 205 F.Supp.2d 791 (N.D. Oh. 2002).

131 *Id.* at 795; see also *id* (court also noted that the website also contained “two pictures of the boys giving the ‘finger,’” some profanity, and a depressingly high number of spelling and grammatical errors”).

132 *Id.* at 800-01.


134 *Id.* at 701; see also *id* (“PS Bemis [Bemis is Pat Bemis, a student at Baldwin High School and on their volleyball team] from Baldwin; you’re no good and your mom [Pat Bemis’ mother is an art teacher at KOSD] is a bad art teacher”); *id.* (“P.S. My dog can teach art better than Bemis’ mom”).

135 *Id.* at 706 (type of punishment not specified).
The court struck broadly against the school’s action, holding “the Student Handbook policies at issue to be unconstitutionally overbroad and vague because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity.”\textsuperscript{136} As to overbreadth,\textsuperscript{137} the court analyzed the student conduct policies and concluded that they were “overreaching in that they are not linked within the text to any geographical limitations.”\textsuperscript{138} Thus, in order to avoid constitutional infirmity, the conduct code must only be enforceable in school and at school-sponsored activities.\textsuperscript{139} The court did not engage in a detailed analysis, but simply took it as a given, as an obvious assumption, the schools cannot regulate their students’ speech at all times, in all places.

There must be a point at which the student is beyond the school’s reach. Coy and Flaherty recognize this fact.

Of course, not all courts using the territorial approach invalidate punishments for online student speech. In Requa v. Kent School District No. 415,\textsuperscript{140} a high school junior secretly videotaped his teacher during class and used that raw footage to create a video which lampooned his teacher’s hygiene and organization habits. In a segment called “Caution Booty Ahead,” the video featured several shots of the teacher’s buttocks, accompanied by a song titled “Ms. New Booty.”\textsuperscript{141} Several of the in-class portions of the video include clips of mild student misconduct, such as making faces, giving the teacher “rabbit ears” and “making pelvic thrusts in [the teacher’s] general direction” when she wasn’t looking.\textsuperscript{142}

Naturally, the student posted this video on YouTube.com. He also posted a link to this video on his personal MySpace.com profile, making it viewable to his friends. Even more naturally, this YouTube video was the feature of a local television news story; school officials were informed of the video’s existence when a news reporter asked administration if they wanted to comment. After an investigation to find the source of the video, school officials eventually suspended Gregory Requa, the video’s creator.\textsuperscript{143}

\begin{footnotes}{
\item[136] Id. (italics added).
\item[137] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (“the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep” in order to be found unconstitutionally overbroad).
\item[138] Flaherty, 247 F.Supp.2d at 705-06.
\item[139] Id. at 706.
\item[140] 492 F.Supp.2d 1272 (W.D. Wa. 2007).
\item[141] Id. at 1274. Thankfully, the court cleared up any confusion by taking “judicial notice that ‘booty’ is a common slang term for buttocks.” Id.
\item[142] Id.
\item[143] Id. at 1274-75.
}
In addressing the threshold issue, the court relied upon the in-class taping and the disruptions that the taping appeared to have caused in the classroom; the court was not punishing the student for its creation per se, but only that the creation of the video took place in class and caused disruptions. The in-class taping was an “inextricable part of the activity which comprise[d] the ‘speech’ of the completed video and, in singling out that discreet portion of the ‘speech’ for punishment, [school officials] have localized the sanctionable behavior to the area which their authority has been upheld by the Supreme Court.”144 So, similar to Coy, the court concluded that the in-class activities are the only parts of the video punishable by the school.

In the course of rejecting Requa’s request for a temporary restraining order, the court explained that, while criticism in the video of the teacher’s hygiene and organization could arguably be political in nature, the portions involving the “rabbit ears,” pelvic thrusts, and the teacher’s buttocks “constitutes a material and substantial disruption to the work and discipline of the school… [T]he First Amendment does not extend its coverage to disruptive, in-class activity of this nature.”145

b. Second Circuit’s “reasonably foreseeable”/”directed at” approach

In opposition to the territorial approach is the “directed” and “foreseeable” approaches endorsed by the Second Circuit and select district courts. This would permit the conclusion that online student speech is on-campus “whenever the student has directed his speech to campus, or when it is reasonably foreseeable that the speech will come to the attention of school authorities.”146

This expansive approach was first announced by the Second Circuit in Wisniewski v. Board of Education of the Weedsport Central School District.147 There, an eighth-grade student created a computer-generated “drawing of a pistol firing a bullet at a person’s head, above which were dots representing splattered blood. Beneath the drawing appeared the words ‘Kill Mr. VanderMolen,’” referring to the Wisniewski’s English teacher. Via the internet, Wisniewski transmitted this image to 15 of his friends over a three-week period; the image was sent to others in the form of an icon used by his instant messaging program.148 The violent image only came to

144 Id. at 1280.
145 Id. at 1280-81.
146 Papandrea, supra note 113, at 1059.
147 494 F.3d 34 (2d Cir. 2007).
148 “Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called ‘buddies’ in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a ‘buddy list’ who happen to be on-line at the same time. Different IM programs use different notations for indicating which members of a user's ‘buddy list’ are on-line at any one time. Text sent to and from a ‘buddy’ remains on the computer screen during the entire exchange of messages between any two users of the IM program. The AOL IM program, like many others, permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two ‘buddies,’ and each can copy the icon of the other and transmit it to any other ‘buddy’ during an IM exchange.” Id. at 35-36.
school officials’ attention when another student, one of Wisniewski’s ‘buddies,’ told VanderMolen about the icon’s existence and later provided him with a printed copy of the icon. As a result, the school suspended Wisniewski for five days and permitted VanderMolen to no longer teach Wisniewski’s entire class.\textsuperscript{149}

The Second Circuit upheld the suspension. The court began its analysis with the \textit{Tinker} formulation used in \textit{Morse}: “that student expression may not be suppressed unless school officials reasonably conclude that it will ‘materially and substantially disrupt the work and discipline of the school.’”\textsuperscript{150} From there, the court concluded:

\begin{quote}
[O]n the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.\textsuperscript{151}
\end{quote}

No explanation was given for the court’s remarkable conclusion that the icon would inevitably come to the attention of school officials, notwithstanding the fact that it actually did. Just as troubling, though, is the court’s conclusion that there was “no doubt” that a foreseeable risk of substantial disruption existed simply because school officials knew of the icon’s existence. This strained formulation of \textit{Tinker} allows the reaction of school officials, reasoned or not, to be considered as part of the forecasted disruption. As a result, VanderMolen’s request to no longer teach Wisniewski’s entire class, which is ethically gray at best, could serve as the “disruption” to justify punishment.

As one commentator wrote about another student speech case largely dictated by the overreaction of a teacher:

\begin{quote}
This is an incredibly problematic conclusion, of course, not only because the speech that allegedly hindered the educational process originated off-campus and never called for disruptions on campus, but because it suggests that a single teacher's arguably thin-skull, personal reaction to commentary posted on an outside Web site
\end{quote}

\begin{flushright}
\textsuperscript{149} \textit{Id.} at 36.
\end{flushright}

\begin{flushright}
\textsuperscript{150} \textit{Id.} at 38, \textit{citing Morse}, 127 S.Ct. at 2625 (\textit{quoting Tinker}, 393 U.S. at 513).
\end{flushright}

\begin{flushright}
\textsuperscript{151} \textit{Id.} at 39-40; see also O.Z. \textit{v. Board of Trustees of the Long Beach Unified School District}, 2008 WL 4396895 (C.D.Cal.)\textit{(applying Wisniewski} in upholding the punishment of student whose video slideshow was posted on YouTube, possibly by a third party, which depicted an apparent fantasy of stabbing one of the student’s teachers to death, concluding that “although O.Z. created the slide show off-campus, it created a foreseeable risk of disruption within the school”).
\end{flushright}
dictates and controls what constitutes a disruption of the educational process inside a school. This is tantamount to a heckler's veto – the speaker's rights were trampled by the audience's reaction.\textsuperscript{152}

Although parts of Wisniewski suggest that its holding should be limited to student internet speech about school violence,\textsuperscript{153} it has been extended to include garden-variety insults lobbed at school officials. In \textit{Doninger v. Niehoff}, the Second Circuit applied Wisniewski in upholding the punishment of a student who called her administration “douchebags” in an online forum.\textsuperscript{154}

More specifically, the student, Doninger, was upset because of a conflict between student government and school administration over a planned event called “Jamfest,” a battle-of-the-bands concert. In response, Doninger used a school computer to email other students and outsiders about the possible cancellation of the event. Her email encouraged recipients to complain to the district superintendent and to forward the email “to as many people as you can.”\textsuperscript{155} As a result, school officials received a flood of calls concerned about Jamfest’s fate. Upset with Doninger for resorting to mass email instead of negotiation with school officials, the school’s principal requested that Doninger send a clarifying email to correct the information about possible cancellation, which the principal called inaccurate.\textsuperscript{156}

Instead of sending that clarifying email, Doninger posted a message on her publicly accessible blog at livejournal.com. The message read:

\begin{quote}
jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, she got pissed off and decided to just cancel the whole thing all together. anddd [sic] so
\end{quote}

\textsuperscript{152} Clay Calvert, \textit{Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground}, 7 B. U. J. Sci. & Tech. L. 243, 250 (2001); \textit{see also Saxe}, 240 F.3d at 209 (Alito, C.J.) (explaining that government may not prohibit student speech based solely on the emotive impact that its offensive content may have on a listener); \textit{M.K. v. Three Rivers Local School District}, No.107CV1011 (S.D.Oh. 2007) (in granting student request for temporary restraining order, rejected school’s allegation of a substantial disruption from student’s parody Facebook profile of principal calling him a “pedophile” based solely upon “decreased morale among the teachers, the loss of valuable administrative time of the matter, and teachers’ uneasiness and anxiety about being the target of similar attacks by students”).

\textsuperscript{153} \textit{See Wisniewski}, 494 F.3d at 38 (“[w]ith respect to school officials’ authority to discipline a student’s expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in \textit{Tinker}…”) (italics added).

\textsuperscript{154} 527 F.3d 41, 50 (2d Cir. 2008).

\textsuperscript{155} \textit{Id.} at 44.

\textsuperscript{156} \textit{Id.} at 45.
basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th.
andd [sic]..here is the letter we sent out to parents.157

Doninger’s blog entry concluded by encouraging recipients to call the district superintended “to piss her off more.” Some students posted replies on Doninger’s blog, “including one in which the author referred to Ms. Schwartz as a ‘dirty whore.’” Despite the controversy, Jamfest went on as scheduled; school officials did not learn of Doninger’s posting until after the concert.158 When school officials did learn of the post, they ultimately punished Doninger by not allowing her to run for Senior Class Secretary.

Addressing the threshold question by applying Wisniewski, the Second Circuit agreed with the district court’s finding that Doninger’s "posting, although created off-campus, 'was purposely designed by [Doninger] to come onto the campus.’”159 Since the posting directly concerned events at the school and since students actually did read and respond to it, the court held that “it was reasonably foreseeable that other [ ] students would view the blog and that school administrators would become aware of it.”160

After passing the threshold question, the court turned to Wisniewski’s requirement that the posting “foreseeably create a risk of substantial disruption within the school environment.”161 In so concluding, the court relied mostly upon the “plainly offensive” and “potentially disruptive” nature of the speech, as well as on its inaccurate and misleading content concerning the fate of Jamfest, concluding that such language was not productive in resolving the dispute between student government and school administration.162

However, the expansive scope of the Second Circuit’s formulation of the threshold question seems particularly misplaced when measured against the free speech standard used in a far more security-sensitive environment: the United States military. While it should come as no surprise that free speech rights are less robust in public schools and in the military due to the special circumstances attendant to those institutions, most would expect that the military would have less tolerance for speech inconsistent with its mission as opposed to public schools, simply because the need for uniformity is more pressing in matters of national security. However, the military free speech standard incorporates safeguards not present in the “reasonably foreseeable”/“directed at” test for school speech in the Second Circuit.

157 Id.
158 Id. at 45-46.
159 Id. at 50, quoting Doninger v. Niehoff, 514 F.Supp.2d 199, 216 (D.Conn. 2007).
160 Id., quoting Doninger, 514 F.Supp.2d at 217.
161 Id., quoting Wisniewski, 494 F.3d at 40.
162 Id. at 50-51.
In *United States v. Wilcox*,¹⁶³ the U.S. Court of Appeals for the Armed Forces reviewed the conviction by court-martial of a soldier accused of violating Article 134 of the Uniform Code of Military Justice.¹⁶⁴ The soldier was accused of creating a personal online profile in which he identified himself as an Army paratrooper, quoted a well-known white supremacist, identified himself as a “Pro-White” activist, encouraged an undercover Army investigator to “read various anarchist websites and books,” and invited the investigator to attend a white supremacist rock concert.¹⁶⁵

The court held that the evidence against the soldier was legally insufficient to sustain the conviction for “acts prejudicial to good order and discipline.”¹⁶⁶ In so doing, the court first described the narrowing construction placed on Article 134 to save it from constitutional infirmity, stating that Article 134 “does not reach conduct that is only *indirectly or remotely* prejudicial to good order and discipline.”¹⁶⁷ Also, there must be “a *direct and palpable connection* between speech and the military mission or military environment” to sustain an Article 134 conviction under the theories of “prejudice of good order and discipline” and “service discrediting.”¹⁶⁸ Even where a direct and palpable connection is present, military courts must engage in a balancing test to “determine whether criminalization of that speech is justified despite First Amendment concerns.” In applying that balancing test, the court “must weigh the gravity of the effect of the speech, discounted by the improbability of its effectiveness on the audience the speaker sought to reach, to determine whether the conviction is warranted.”¹⁶⁹

The analysis in *Wilcox*, though, did not even reach the balancing test since the court held that there was insufficient evidence that the online speech had a direct and palpable effect on the military mission or military environment. In particular, the court stated that “it was pure speculation that the racist views propounded on the Internet by a single person purporting to be a paratrooper either were viewed or would be viewed by other service-members or would be perceived by the public as an expression of Army or military policy.”¹⁷⁰

The military speech standard does not permit the same inferential leaps permitted by the Second Circuit’s standard for restricting online student speech. Thus, unlike the Second Circuit

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¹⁶⁴ 10 U.S.C.A. § 934, Art. 134 (“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court”).


¹⁶⁶ *Id.* at 447.

¹⁶⁷ *Id.* (italics added, citation omitted).

¹⁶⁸ *Id.* at 448-49 (italics added).

¹⁶⁹ *Id.* at 449.

¹⁷⁰ *Id.* at 450-51.
approach for public schools, the military speech standard does not merely defer to officials’ assertions that such speech could compromise the military mission; actual evidence is needed.

So, the military must make a finding of actual harm supported by actual evidence in order to suppress speech, but a school official may suppress student online speech simply by telling a court that, in its expertise, it believes that it was foreseeable that the speech would reach the school and that the speech would disrupt classes. Something is terribly wrong this scenario. The Second Circuit’s approach is far too deferential to school administrators and gives them far too much discretion to discriminate on the basis of viewpoint. Further absurdities will result if courts follow the Second Circuit’s lead; these will be discussed in Part V.

c. Pennsylvania’s functional/nexus approach

The third approach to the threshold question combines some elements of the two previous approaches, and it asks whether the speech at issue has a sufficient nexus or connection with the school to support school action, or whether there is a connection between the speech and a school function.

One case that illustrates this approach involves student conduct, not speech. In *D.O.F. v. Lewisburg Area School District Board of School Directors*,171 the school expelled a student who was caught smoking marijuana on the school’s playground at 10:30p.m., about 90 minutes after a school-sponsored band performance on campus. On review, the court noted that “a school district’s rulemaking authority is limited to that which is expressly or by necessary implication granted by the General Assembly.”172 Since the Pennsylvania Public School Code expressly limited the school’s authority over the students to include school hours and school activities,173 the court concluded that D.O.F. could not be punished by the school because of the lack of connection between his drug use, at that time and place, and any school function. Another Pennsylvania case referred to this as a “functional” test.174

Applying *D.O.F.*, the court in *Layshock v. Hermitage School District* held that, “on this threshold ‘jurisdictional’ question the Court will not defer to the conclusions of school administrators.”175

There, the student in question created a parody profile of his principal on Myspace, including a picture of the principal taken from the school’s website as well as “silly” and “crude” questions and answers purportedly written by the principal.176 The profile was created entirely off campus.


172 *Id.* at 33.

173 See 24 P.S. § 5-510 (defining a “temporal” test of school authority).


175 *Id.* at 599 (W.D. Pa. 2007); see also id (“[i]regardless of whether the source of the school’s authority is based on timing, function, context or interference with its operations, it is incumbent upon the school to establish that it had the authority to punish the student”).

176 “Justin’s answers to the questions, which appeared to be by and about Trosch, centered on the theme of ‘big.’ The answers ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other. For example, in response to the question ‘in the past month have you smoked?’, the profile says ‘big
However, the student twice accessed the website from school and told other students about it, some of whom also viewed the profile from school.  

These in-school contacts would seem allow the school to punish the profile’s creator under the territorial approach to the threshold question, but the court soundly rejected that contention:

The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.

Relying on *Thomas* and *D.O.F.*, the court noted that the school must “demonstrate an appropriate nexus” to school activities in order to punish off-campus speech. While the court acknowledged that there was a “buzz” on campus about the principal’s purported presence on Myspace, it noted that “the School District [was] unable to connect the alleged disruption to [Layshock]’s conduct insofar as there were three other profiles of [the principal] that were available on myspace.com during the same time frame.” In addition to these “gaps in the causation link,” the court opined that the “buzz” on campus was more likely caused by the frantic actions of administrators seeking to block access to the sites on the schools’ computers, not by the parody profile itself.

In the alternative, the court applied *Tinker* and held that the “substantial disruption” standard was not met, to wit, “no classes were cancelled, no widespread disorder occurred, [and] there was no violence.” More to the point, however, the court explained that the school was not empowered to punish the student if his speech was not slanderous and did not create a substantial disruption. School punishment cannot be the fallback position where a school official believes his or her reputation has been smeared yet cannot state a cause of action in tort.

In response to a question regarding alcohol use, the profile says ‘big keg behind my desk.’ In response to the question, ‘ever been beaten up?’, the profile says ‘big fag.’ The answer to the question ‘in the past month have you gone on a date?’ is ‘big hard-on.’ The profile also refers to Trosch as a ‘big steroid freak’ and ‘big whore.’ The profile also reflected that Trosch was ‘too drunk to remember’ the date of his birthday.” *Id.* at 591.

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177 Id. at 591-92.

178 Id. at 597.

179 Id. at 600.

180 *Id., citing Latour*, 2005 WL 2106562 at *2 (distinguishing between disruption caused by student’s lyrics and that caused by student reaction to administrators’ decision to punish student).

181 *Id.* at 603 (“[E]ven assuming arguendo that the profile was slanderous, the dispositive question here is whether the School District had authority to impose its own punishment on Justin. The School cannot usurp the judicial system’s role in resolving tort actions for alleged slander occurring outside of school. On the other hand, the School District need not demonstrate that the profile was slanderous if it created a substantial disruption in school operations”).
However, yet another Pennsylvania case produced a different result even though it had very similar facts as *Layshock*. The student in *Snyder v. Blue Mountain School District*\(^{182}\) also created a parody profile of his principal on Myspace. However, the speech provided on this profile was more inflammatory than that in *Layshock*, including so-called admissions that the principal was a “sex addict” and a “dick head.”\(^{183}\) After reviewing the student speech precedents, particularly *Fenton* and *Klein*, the court ruled that the school had met the threshold requirement of a sufficient nexus:

The facts that we are presented with establish much more of a connection between the off-campus action and on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website.\(^{184}\)

Then, since the speech was filled with indecent, lewd language, the court applied *Fraser* to uphold the school’s punishment of the student.\(^{185}\)

The contradictions between the results in *Layshock* and *Snyder* seem to be the nearly inevitable result of an ad hoc application of a “functional” or “nexus” test that lacks clear standards and benchmarks.

The Supreme Court of Pennsylvania, however, invented its own “nexus” test in the case of *J.S. v. Bethlehem Area School District*, holding that “where speech aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”\(^{186}\) The court further noted, in dicta, that it would “not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech,

\(^{182}\) 2008 WL 4279517 (M.D. Pa.).

\(^{183}\) “The profile described its subject as a forty year old, married, bisexual man living in Alabama. His interests were described as: ‘detention, being a tight ass, riding the train, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.’ It also indicated that he likes television and mainly watches ‘the playboy channel on directv, OH YEAH BITCH!’ (emphasis in original). A statement on the profile has the heading ‘HELLO CHILDREN.’ It reads: yes. It's your oh so wonderful, hairy, expressionless, sex addict, fa [sic] ass, put on this world with a small dick PRINCIPAL Rave come to myspace so I can pervert the minds of other principals to be just like me. I know, I know, you're all thrilled. Another reason I came to myspace is because I am keeping an eye on you students who I care for so much) For those who want to be my friend, and aren't in my school, I love children, sex (any kind), dogs long walks on the beach, tv, being a dick head and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN so please feel free to add me, message me whatever.’ The address or ‘url’ for the profile includes the phrase ‘kids rock my bed.’” *Id.* at *1* (internal citations omitted).

\(^{184}\) *Id.* at *7.

\(^{185}\) *Id.* at *6.

where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.”

In determining that a sufficient nexus existed for the student’s online speech to be punished, the court relied heavily upon the fact that J.S. himself accessed the site at school, that he showed it to a fellow student, and that the speech was aimed at the specific audience of students and others at that school.

Nevertheless, in light of the varying approaches to the threshold question and the different applications of those approaches, some clarity from the Supreme Court would be useful. Several commentators have proposed reforms to the standard used to evaluate aspects of student online speech, described below. If implemented, at least one of the proposals would have devastating collateral consequences, explored in Part V.

d. Proposals going forward

One commentator persuasively reasoned that applying *Tinker* to all student speech “gives schools far too much authority to restrict juvenile speech rights.” When schools become aware of troubling online student speech, she suggests that school officials “should resist their impulse to punish such speech and instead use the incident as an opportunity to teach important lessons about digital speech.”

While we should hope that such an approach would actually serve to reduce the level of bullying, it would require teachers to treat such online speech as nothing but a series of teachable moments, a difficult task if students know that their online speech is only limited by a criminal or civil standard instead of the *Tinker* standard. Especially in light of the not unreal threat of school shootings, schools should at least feel empowered to intervene if a student’s online speech threatens or advocates school violence, even if these “warning signs” fall short of the constitutional “true threat” standard. That commentator’s approach might work in a world where the only threat which would result from a school’s inaction would be hurt feelings and bruised egos; sadly, the result of inaction could be much greater as it regards school violence.

Fear of school violence, however, should not be some magical incantation invoked by administrators to punish students, blotting their records and soiling their reputation. Schools that act on online student threats of violence should be limited to non-punitive measures, such as compulsory counseling, unless the threats violate the criminal or civil law.

Another commentator has suggested creating a standard that is consistent with *Tinker* yet, unlike the other approaches, “is workable in the context of student Internet speech” and deals directly

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187 *Id.* at 668, note 12.

188 *Id.* at 667-68.


190 *Id.* at 1099.
with student postings on social networking sites such as Facebook and Myspace.  This standard first distinguishes between student postings which are made on “public” profiles, viewable by anyone with an account with that given social networking site, and “private” profiles, which are “visible only to users’ friends[,] those whom the users have specifically permitted to access their profile.”

For online speech to public profiles, that commentator suggests three elements to a workable Tinker standard. First, courts should never apply Fraser or Kuhlmeier to internet speech because the problems of the captive audience and school imprimatur, respectively, are not present on the internet. Second, postings on social networking sites should only be considered on-campus if they are created from a school computer; merely aiming the speech at the school or accessing the profile from school should be insufficient to consider the speech on-campus. Third, there should be a presumption that student online speech is protected by the First Amendment.

Postings on private profiles should, according to that commentator, only be subject to the true threat constitutional analysis, which is itself a component of Tinker’s “right of others” prong. So, the fact that a posting was made to a private profile, and thus viewable to a self-selecting audience, should be used as a factor in evaluating whether a reasonable speaker or a reasonable listener would consider the speech to be truly threatening.

This standard is close to ideal since it preserves Tinker as the touchstone for all student speech but it recognizes both that students have full First Amendment rights when acting outside of school and that online media is so uniquely pervasive for young people that mere access of the speech at school should not give the school the authority to regulate the speech.

A third approach, however, is particularly harmful and warrants censure. After describing many of the problems with applying the school speech precedents to incidents of so-called cyberbullying and cyberharassment, this commentator suggested that “in the Internet context, an additional exception to traditional student speech precedent should be made for student

191  Williams, supra note 5, at 721.

192  Id. at 726.

193  Id. at 726-728.

194  See Virginia v. Black, 538 U.S. 343, 359-360 (2003) (“True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat”) (internal citations and quotations omitted).

195  See United States v. Dinwiddie 76 F.3d 913, 925 (8th Cir. 1996) (“whether the recipient of the alleged threat could reasonably conclude that it expresses “a determination or intent to injure presently or in the future”) (internal citation omitted).

196  See also Coy, 205 F.Supp.2d at 800-01 (only the act of accessing the speech on campus and the reactions it caused are subject to Tinker; the creation and content of the speech is not subject to sanction by the school).
cyberspeech that, like the drug related speech in *Morse*, threatens to harm students and interfere with the educational objectives of the public school system."  

Beginning with the threshold question, that commentator proposed a sweeping interpretation of *Morse*’s narrow holding that the “BONG HiTS” banner should be considered on-campus because it was unfurled at a school-supervised, school-sanctioned event, suggesting that “the Supreme Court effectively extended the reach of the school’s authority to discipline based on the close connection between the setting in which the speech occurred and the school itself.”

Moreover, that commentator assumes a paternalistic posture concerning student internet speech, claiming that it is not valued under the First Amendment because “teens are using emails, instant messages and blogs as tools for cruelty, [and] teenagers are routinely turning to technology as a way to tease, gossip and fight with one another.” This statement completely ignores the useful pre-internet analogs for student speech provided by the underground newspaper cases. Clearly, much of the speech in those underground newspapers lacked political value, but it did not lessen the protection afforded to it simply because the speaker or writer also happened to be a public school student. Young people are nonetheless “persons” under the Constitution, and the fact that their concerns and the subject of their speech do not resonate with that commentator in no way alters this reality.

Paternalism and intellectual laziness aside, this commentator “does serious violence” to *Morse*, particularly the concurring opinion by Justice Alito which limited the scope of the opinion’s holding. Justice Alito could not have been more clear in limiting *Morse* to its drug-related facts and that he and Justice Kennedy “do[ ] not endorse the broad argument ... that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission’” and, more specifically, “do[ ] not endorse any further extension.”

Although the Fifth Circuit in *Ponce* did extend *Morse* to include speech advocating or suggesting a probability of school violence, an extension whose logic this author can grudgingly accept notwithstanding Justice Alito’s categorical admonition, that commentator cannot compare the voluminous judicial findings about the special harm of drug use and school violence on the

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198 *Id.* at 166 (internal quotation marks omitted).

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

200 *See Morse*, 127 S.Ct. at 2644 (Stevens, J., dissenting).

201 *See id.* at 2638 (Alito, J., concurring); *but see Nuxoll v. Indian Prairie School District #204*, 523 F.3d 668, 673 (7th Cir. 2008) (Posner, J.) (Justice Alito’s concurrence in *Morse* was not “controlling” since he and Justice Kennedy joined the opinion, not just the decision, and by so doing made it a majority opinion rather than a plurality opinion).

“physical safety of students”\textsuperscript{203} with the utter lack of such judicial findings concerning the mostly emotional and psychological effects of bullying. The author does not intend to minimize the real harm caused by bullying, but it is beyond the barrier of “physical safety” described in Justice Alito’s concurrence.\textsuperscript{204}

In sum, the categorical exemption from \textit{Tinker} suggested by that commentator for so-called cyberbullying and cyberharassment is a field too far, jurisprudentially speaking. Practically, however, its effects, if implemented would be even more far reaching and devastating to parental rights, perceptions of teacher professionalism, and youth participation in open forums. The same could be said for the “reasonably foreseeable/targeted at” approaches to the threshold question, for its application would have similarly undesirable results.

\section*{IV. What About Katherine Evans?}

Although none of the Supreme Court cases described above directly control the outcome of the Evans litigation, there is no dearth of law to apply. \textit{Latour}, for instance, provides a fine analog for analyzing the facts in \textit{Evans}. Just as Latour produced and promulgated his rap songs outside of school, Evans also promulgated her speech in a public forum. Neither Latour’s songs nor Evans’ Facebook posting constituted a “true threat.” Thus, as in \textit{Latour}, Evans’ speech can only be punished if it caused a substantial disruption, gave rise to a reasonable forecast thereof, or invaded the rights of another. While \textit{Evans} still requires significant fact-finding to conclude anything with certainty, it seems unlikely that her speech caused any more substantial disruptions than the mini-revolt at issue in \textit{Latour}.

Further, applying \textit{Klein} (the off-campus bird-flipping case), it is unimaginable that a court could hold Evans’ speech as being “fighting words,” especially since they were not directly communicated to her teacher. Also, if Klein’s gesture, which occurred off-campus after school hours, is held to be too attenuated to any in-school disruption, it also follows that Evans’ speech, made from her house on a Friday night, is similarly too attenuated to be actionable by the school.

Evans’ case seems even stronger when applying the underground newspaper cases to her facts. Those cases generally require the threshold jurisdictional question to be addressed. Applying the territorial approach to \textit{Evans}, keys threshold of material facts remain at issue and preclude a reliable prediction about how this threshold issue would be decided. Evans asserts that she posted the Facebook group on a Friday night and that it was deleted before the school opened again on the following Tuesday. If her assertions are credited by the court, then this would support the conclusion that Evans’ Facebook posting should be considered off-campus because neither she nor anyone else accessed the website from school.\textsuperscript{205} However, if a third-party brought a printed copy of the Facebook group’s content to school, this might be enough to consider the speech on-campus and subject to \textit{Tinker}.\textsuperscript{206} Principal Bayer, of course, denied these allegations in his first

\textsuperscript{203} \textit{Id.} at 2638 (italics added).

\textsuperscript{204} \textit{Cf.} For a notable example of so-called cyberbullying turned deadly, \textit{see Cronan, supra} note 197, at 149.

\textsuperscript{205} \textit{See Coy}, 205 F.Supp.2d at 800-01; \textit{Beussink}, 30 F.Supp.2d at 1180.

Clearly, these outstanding issues of fact will be the focal point for the federal district court in Evans if it chooses to use the territorial approach.

Unlike with the territorial test, if the Evans court applied the expansive, speech-restrictive "reasonably foreseeable"/"directed at" standard described in Wisniewski and Doninger, it is possible that, Bayer could conceivably be entitled to summary judgment, even with all of the facts remaining at issue. On the jurisdictional question, Bayer would argue that it was reasonably foreseeable that students or school officials would learn of her Facebook group, as they ultimately did, or simply that the speech was directed at the school. On the Tinker question, Bayer would have to argue that it was reasonably foreseeable that the Facebook posting actually would cause a substantial disruption or a reasonable forecast thereof. In the alternative, Bayer might be able to fulfill the Tinker standard by demonstrating that the Facebook group invaded the rights of Evans’ teacher, as Bayer’s motion to dismiss has suggested by calling Evans’ speech “defamatory per se.”

Turning to the Pennsylvania approach, since the nexus cases themselves seem to apply different tests and emphasize different facts, it is difficult to predict the result if the Evans court applied them to the threshold issue in her case. For example, Evans admits to have taken the photo of her teacher from the school’s yearbook. Using the fluid test under Layshock and Snyder, it is unclear whether this alone would be enough to establish a sufficient nexus between the speech and a school function, as those courts reached opposite conclusions on that fact. Additionally, Evans and Bayer disagree about whether the contents of the Facebook group were ever accessed at school. Regardless, though, Layshock on the one hand ruled that access at school by the originator and others did not establish a sufficient nexus to any disruption while Snyder and J.S. held that such access did create a sufficient nexus to school function. The nexus test, however, is more easily applied when using the test in J.S., regardless its merit, since it would most likely be held that Evans’ Facebook posting was indeed aimed at her school, thus passing the threshold under J.S.

Thus, since it is unclear which jurisdictional approach would be applied by the federal district court in Evans’ case and since extensive fact-finding must be completed, it is difficult to predict the outcome of the Evans litigation.

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207 Defendant’s Motion to Dismiss, supra note 22, at 2, note 1.
208 Defendant’s Motion to Dismiss, supra note 22, at 8.
209 Complaint, supra note 6, at 1.
210 Compare Snyder, 2008 WL 4279517 at *7, with Layshock, 496 F.Supp.2d at 599-601.
211 See Layshock, 496 F.Supp.2d at 601.
212 See Snyder, 2008 WL 4279517 at *7; J.S., 569 Pa. at 668.
213 See J.S., 569 Pa. at 668.
V. Lessons Learned: Power Grabs, Chills and Other Things

a. Impact on parental rights

Short of the limits imposed by civil and criminal law, parents alone possess the authority to discipline their children for their speech or conduct. Schools should understand that their choice to punish youth online speech is not solely directed at the student but is a brazen attack on parental authority and represents an unjustified governmental intrusion into the functioning of the family unit.

Of course, it is true that schools often see themselves as acting in place of the parent during school or school-related activities. In his concurring opinion in Morse, Justice Thomas noted that “the in loco parentis doctrine impose[s] almost no limits on the types of rules that a school could set while students were in school.”214

The same cannot be said when students are not in school and not at school-related activities. The court in Layshock ruled that, while “[p]ublic schools are vital institutions, [ ] their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families…”215

Likewise, Thomas explained that schools “are not empowered to assume the character of Parens patriae” after the student “leaves school each afternoon.”216 Such “bootstrap mongrification”217 is inappropriate, and unconstitutional.

Indeed, Barnette recognized an inherent contradiction between compulsory attendance laws and the inculcation of values which are foreign to the parents.218 Such contradictions are especially obvious in cases where the parents, in reaction to a school’s punishment for off-campus expression, actively support their children’s free speech rights beyond the schoolhouse gates.219

Judicial recognition of the limits of school power far predates Barnette. One hundred years ago, the Mississippi Supreme Court addressed the limits of the doctrine of in loco parentis in reviewing a public school’s rule that students must remain in their homes from 7 to 9 p.m. in

214 Morse, 127 S.Ct. at 2635 (Thomas, J., concurring) (emphasis added).

215 Layshock, 496 F.Supp.2d at 597.

216 Thomas, 607 F.2d at 1051.

217 Shanley, 462 F.2d at 965.


219 See, e.g., Tinker, 393 U.S. at 504 (students and their parents together decided that the children should wear black armbands), Shanley, 462 F.2d at 966-67 (“[o]bjecting to the school board’s bootstrap transmogrification into Super-Parent, the parents of the five affected students sought temporary and permanent injunctive relief as next-friends in the federal courts…”).
order to study. The court had little trouble in invalidating the rule as contrary to Mississippi law, stating:

Certainly a rule of the school, which invades the home and wrests from the parent his right to control his child around his own hearthstone, is inconsistent with any law that has yet governed the parent in this state, and the writer of this opinion dares hope that it will be inconsistent with any law that will ever operate here so long as liberty lasts, and children are taught to revere and look up to their parents. In the home the parental authority is and should be supreme, and it is a misguided zeal that attempts to wrest it from them.

In short, the court held that the school exceeded its statutory authority when it sought to regulate student conduct when they were out of school, as it would infringe upon parental prerogatives.

Importantly for Evans, the Florida state courts also recognize these limitations in modern times. In Kananjian v. School Board of Palm Beach County, the court recognized that a school’s duty of supervision pursuant to the doctrine of in loco parentis “does not extend to students while they are off school property and involved in activities that are unrelated to school.” There, a student who skipped class was the victim of a fatal car accident while she was supposed to be in class, and her parents sued the school board for negligence. The district court of appeal affirmed summary judgment for the school board, holding that the school owed no duty of supervision to the student who was not on campus and not involved in a school-related activity.

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220 Hobbs v. Germany, 49 So. 515, 516 (Miss. 1909).

221 Id. at 517; see also Dritt v. Snodgrass, 66 Mo. 286, 1877 WL 9240 *6 (Mo. 1877) (Norton, J., concurring) (“When the school room is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school, he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control. The directors, in prescribing the rule that scholars who attended a social party should be expelled from school, went beyond their power, and invaded the right of the parent to govern the conduct of his child, when solely under his charge”).

222 967 So.2d 259 (Fla. Dist. App. 2007).

223 Stetson University College of Law, Local Government Law Symposium, Tort Liability & Governmental Immunity, 37 Stetson L. Rev. 753, 754 (2008), citing Kananjian, 967 So.2d at 264; see also Fla. Stat. § 1003.31(2) (2005) (“The duty of supervision shall not extend to anyone other than students attending school and students authorized to participate in school-sponsored activities”); Rupp v. Bryant, 417 So.2d 658, 668 n. 26 (Fla. 1982) (“school also has no duty to supervise off-premises activities of students which are not school related”); Matallana v. Sch. Bd. of Miami-Dade County, 838 So.2d 1191, 1192 (Fla. Dist. App. 2003) (holding that the school had no duty to supervise at the time of an incident which occurred off school premises and was unrelated to any school activity); Gross v. Family Servs. Agency, Inc., 716 So.2d 337, 339 (Fla. Dist. App. 1998) (stating that schools generally have not been held to have a duty of supervision when injuries occurred off-campus while students have been involved in non-school related activities); D.O.F., 868 A.2d at 36 (school not permitted to act in loco parentis even where a student smoked marijuana on campus, since there was no nexus between that act and any educational function); Palella ex rel. Palella v. Ulmer, 518 N.Y.S.2d 91, 93 (N.Y.Sup.Ct.1987) (holding that the school board had no duty to supervise once truant student was beyond its lawful control).

224 Kananjian, 967 So.2d at 264.
Since schools have no duty of supervision when a student is off-campus and not performing school-sponsored activities, any attempt to regulate such off-campus speech is grounded on a whim, not the law.

Thus, when schools punish youth online speech, they shrink the parental zone of authority over their children and expand the government’s power to regulate private speech. To expand the school’s reach into the home is to reduce parental control over the child and allow schools to “stand in the shoes of the students’ parents.”225 Nevermind limited government; this is a power grab, plain and simple.

b. Impact on perception of teacher professionalism

Although there is no universal agreement about whether school teachers should be considered professionals, there is little doubt among the teachers that they possess most, if not all, of the attributes normally associated with professionalism.226 Teachers, then, are often dogged in defense of their status as professionals, particularly in light of movements towards standardized testing, restrictive curricula and decreased autonomy in the classroom.227

“Professionals are obligated to do whatever is best for the client, not what is easiest [or] most expedient.”228 So, they must be willing to endure at least some level of criticism from their clients or persons placed in their charge. However, when teachers are willing to permit their students to be suspended or otherwise punished as a result of speech mildly critical of their job performance, they act contrary to this core tenet of professionalism, to their own detriment. This is especially true when we compare teachers, in this regard, to two otherwise diametrically opposed professions: public defenders and police officers.

Public defenders and other court-appointed criminal defense attorneys are governed by their state’s code of professional responsibility. The Model Code of Professional Responsibility requires that attorneys, as officers of the court, “should not seek to be excused from undertaking

225  Morse, 127 S.Ct. at 2737 (Alito, J., concurring).

226  “Specific to education and professionalism, the National Board for Professional Teaching Standards has identified five core propositions: 1) teachers are committed to students and their learning, 2) teachers know the subjects they teach and how to teach those subjects to students, 3) teachers are responsible for managing and monitoring student learning, 4) teachers think systematically about their practice and learn from experience, and 5) teachers are members of learning communities.” Todd DeMitchell & Casey D. Cobb, Teachers: Their Union and Their Profession. A Tangled Relationship, 212 Ed. Law Rep. 1, *8 (2006), citing National Board of Professional Teaching Standards, What Teachers Should Know and Be Able to Do: The Five Core Propositions of the National Board. Site visited 3/18/09, available at http://www.nbpts.org/UserFiles/File/what_teachers.pdf.


228  Linda Darling-Hammond, Accountability for Professional Practice, 91 Teachers College Record 59, 67 (1989).
the representation except for compelling reasons.” Indeed, public defenders’ professional ethics require that they zealously represent their clients, even when their clients are accused of committing acts repugnant to the attorney’s personal ethics. There is only a narrowly defined class of reasons sufficient for a public defender to request withdrawal from representation. Obviously, then, a public defender cannot request withdrawal simply because his or her client is uncooperative, critical, or verbally abusive. As professionals, public defenders are expected to tolerate such criticism and non-cooperation and zealously represent their clients regardless.

Similar professional ethics attend, in theory if not practice, to police officers. As a matter of constitutional law, the “fighting words” exception to the First Amendment is drawn more narrowly when those “fighting words” are directed at police officers, due to their dual role as state actors and trained professionals. Police officers are expected to “exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’”

In City of Houston v. Hill, the Supreme Court ruled that “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers” since “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” Notably, the Eleventh Circuit recognized that a police officer, “by virtue of his profession or training[, is] expected to absorb a certain amount of abuse without retaliating…” Also, the Ninth Circuit has ruled that “government officials in general, and police officers in

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229 EC 2-29 (emphasis added); see also id (“Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case”).

230 See D.R. 2-110 (“If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because: (1) His client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; (b) Personally seeks to pursue an illegal course of conduct; (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules; (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively; (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules; (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees; (2) His continued employment is likely to result in a violation of a Disciplinary Rule; (3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; (4) His mental or physical condition renders it difficult for him to carry out the employment effectively; (5) His client knowingly and freely assents to termination of his employment; (6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal”).


233 Id. at 462-63.

234 Lamar v. Banks, 684 F.2d 714, 718 n. 13 (11th Cir.1982).
particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows - or should know - that much.\textsuperscript{235}

One noteworthy example of this expectation of restraint can be found in a New York case, \textit{People v. Stephen}.\textsuperscript{236} There, the accusatory instrument read, in relevant part:

\begin{quote}
[Police Officer William McGill] states that he observed defendant in a store clutching his genital area with his hands and yelling at deponent, 'Fuck you,' 'If you were in jail, I'd fuck you, you'd be my bitch,' and deponent further states defendant followed deponent out into the street repeating the above statements and actions, as well as yelling 'If you didn't have that gun and badge, I'd kick your ass, I'd kill you,' and that a crowd of approximately 15-20 people gathered who joined the defendant yelling, 'Yeah, fuck the police.'\textsuperscript{237}
\end{quote}

The defendant was arrested for disorderly conduct,\textsuperscript{238} but the court dismissed the charge on First Amendment grounds and rejected the state’s contention that the speech at issue was proscribable as “fighting words.” In so reasoning, the court explained that “even if reasonable civilians might have been provoked into retaliatory action by defendant’s comments, one could expect that a trained police officer would remain calm (as he apparently did).”\textsuperscript{239}

Contrast that constitutionally mandated level of professionalism with that exhibited by the teachers in \textit{Wisniewski} and \textit{J.S.}, both of whom requested that they no longer be required to teach the student who used abusive language towards them. The teacher in \textit{Wisniewski} requested to stop teaching \textit{an entire class} of otherwise innocent students since it included the one student who created the violent instant messaging icon; remarkably, his request was granted.\textsuperscript{240}

In \textit{J.S.}, an eighth-grade student created a website that took aim at his teacher, Mrs. Fulmer. It included a page called “Why Fulmer Should Be Fired,” which demeaned her physical appearance, compared her to Hitler, called her a “bitch,” and included sophomoric but gruesome depictions of her decapitated head.\textsuperscript{241} The teacher’s reaction to the juvenile website can only be

\begin{footnotes}
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235 \textit{Duran v. City of Douglas}, 904 F.2d 1372, 1378 (9th Cir. 1989).


237 \textit{Stephen}, 153 Misc.2d at 383.

238 N.Y. P.L. § 240.20(1) (“A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he engages in fighting or in violent, tumultuous or threatening behavior”).

239 \textit{Stephen}, 153 Misc.2d at 388.

240 \textit{Wisniewski}, 494 F.3d at 36.

\end{footnotes}
described as extreme. According to the court, she suffered “stress, anxiety, loss of appetite, loss of sleep, loss of weight, [ ] a general sense of loss of well being,” short-term memory loss, social anxiety, and headaches. Consequently, she was granted medical leave which resulted in all of her classes being taught, or rather supervised, by multiple substitute teachers for the remainder of the school year.\textsuperscript{242}

Notwithstanding the particularly vicious nature of the speech aimed at the teacher in \textit{J.S.}, her reaction is completely incompatible with that of a professional teacher with an obligation to \textit{all} of her students, even the ill-mannered ones. Teachers, like public defenders, must be willing and \textit{able} to withstand criticism from their students, however inartfully stated, if they wish to be regarded as professionals. Indeed, the eighth-grade classroom is no place for a teacher with an “eggshell skull.”\textsuperscript{243}

Moreover, several jurisdictions have recognized that school teachers and principals are “public officials” under defamation law.\textsuperscript{244} The Supreme Court has recognized that speech concerning such public officials should be “uninhibited, robust and wide-open.”\textsuperscript{245} Especially relevant to online student speech critical of school officials, the Supreme Court has ruled that the internet is a public forum where there is “no basis for qualifying the level of First Amendment scrutiny.”\textsuperscript{246} It is remarkable, then, that school officials nonetheless persist in punishing online student speech critical of teachers, given that the criticism is aimed at public officials in a public forum, the categories entitled to the broadest speech protections under the First Amendment. As Justice Brennan stated in \textit{Kuhlmeier}’s dissent: “Just as the public on the street corner must, in the interest of fostering ‘enlightened opinion,’ tolerate speech that ‘tempt[s] [the listener] to throw [the speaker] off the street,’ public educators must accommodate some student expression even if it offends them or offers views or values that contradict those that the school wishes to inculcate.”\textsuperscript{247}

It is true that several courts have acknowledged that teachers, like public defenders and police officers, are able to perform their duties even in the face of criticism from members of the public. For instance, the court in \textit{Klein} opined:

\begin{quote}
The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual
\end{quote}

\textsuperscript{242} \textit{Id.} at 646.


\textsuperscript{244} For list of state court decisions splitting on the issue of whether school teachers and principals are “public officials” under defamation law, see Calvert, \textit{supra} note 152, at 249-250, n. 37.


\textsuperscript{246} \textit{Reno v. American Civil Liberties Union}, 521 U.S. 844, 870 (1997).

character are going to dissolve, willy-nilly, in the face of the digital posturing of the splenetic, bad-mannered little boy… I know that they know that, too.\footnote{\textit{Klein}, 635 F.Supp. at 1442, n. 4; \textit{see also Killion}, 136 F.Supp.2d at 455 (‘‘There is no evidence that teachers were incapable of teaching or controlling their classes because of the Bozzuto Top Ten list’").}

\textit{Klein}’s corollary is that perceptions of teacher professionalism will be negatively affected by speech-restrictive decisions by schools and courts. Thus, courts and schools alike must realize that protection for online student speech is not merely a First Amendment imperative; it is essential to preserving teacher professionalism, which in turn is an indispensable element of the inculcation of democratic values such as tolerance, even acceptance, of dissident viewpoints.

c. Chill on student speech

In addition to the impact on parental authority and teacher professionalism, speech-protective courts have noted that expression by young people is likely to be chilled when schools attempt to regulate off-campus expressive activities. “The First Amendment recognizes a danger in governmental action having a chilling effect on speech because it gives rise to self-censorship and diminishment of the marketplace of ideas. Free speech needs breathing room to serve its purpose.”\footnote{\textit{Caplan}, \textit{supra} note 243, at 148 (citing \textit{Gooding v. Wilson}, 405 U.S. 518, 522 [1972]).} The danger is especially acute as applied to young people. As noted in \textit{Shanley}:

One of the great concerns of our time is that our young people, disillusioned by our political processes, are disengaged from political participation. It is important that our young people become convinced that our Constitution is a living reality, not parchment preserved under glass… That [schools] 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.\footnote{\textit{Shanley}, 462 F.2d at 972-73, \textit{citing Barnette}, 319 U.S. at 637; \textit{see also Poling v. Murphy}, 872 F.2d 757, 766 (6th Cir.1989) (Merritt, J., dissenting) (‘‘If the school administration can silence a student criticizing it for being narrow minded and authoritarian, how can students engage in political dialogue with their educators about their education?’’).}

\textit{Shanley}’s concern that censorship of youth speech will retard democratic engagement is not obviated by the surge in youth volunteerism in the most recent presidential campaigns. When even mild criticism of teachers is met with government-sanctioned punishment, students will come to learn that free speech is like many other parts of the curriculum: inaccessible and disconnected from their experiences. That is not the kind of change students can believe in.

Moreover, this chill on student speech could also have consequences which are literally dangerous. As Justice Brandeis famously wrote: “Those who won our independence… [knew] that fear breeds repression; that repression breeds hate; that hate menaces stable government;
[and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.” 251 Indeed, one of the First Amendment’s most important functions is that of “safety valve,” as it allows students and others to channel their disputes into nonviolent words instead of violent acts. 252

Accordingly, schools must permit students to seek out a safe space to vent their frustrations, whether they be political, satirical, comical or sophomoric. If administrators are unwilling create such a safe space in schools, then they must cede online social forums to students so that they have at least some place to channel their creativity, free from the censure of school authorities.

Fortunately, not all students feel the chill when their school attempts to censor their off-campus speech. For example, Justin Redman was suspended for creating a parody school website which featured, among other things, a section labeling one 14-year old student as “the school slut.” 253 Redman sued the school on First Amendment grounds; a confidential settlement was reached and Redman returned to school. Although coming at a price, this student learned invaluable lessons. “He learned about his constitutional right of free speech and that the right is important enough to fight for in court. In addition, he learned that one can take on the authority of government - a public school district - and prevail.” 254

The victorious student in Emmett learned a similar lesson. "I've learned a lot about what rights I have as a student and a citizen . . . and what I have the right to say," the 18-year-old said. He added, "I've learned to stand up for myself." 255

Unfortunately, though, the emboldening lessons about the Bill of Rights and the system of checks and balances learned by Redman and Emmett will only be taught to students who have first had their rights unconstitutionally repressed by an overzealous, speech-repressive executive authority. “[U]nless more students are willing to stand up for themselves and the First Amendment in court – an often time-consuming and expensive proposition – schools… will continue to act in rash and unconstitutional fashion.” 256

It is particularly disheartening that public schools, as government entities censoring innocuous student speech, are taking such a direct hand in molding young adults into disengaged, apolitical


252 See Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger”).


254 Calvert, supra note 152, at 258.


256 Calvert, supra note 152, at 260.
actors, jaded about their rights and cynical about their ability to be heard. Clearly, this is not a role to which teachers should aspire. As described in The Students are Watching: Schools and the Moral Contract, a book read by scores of education graduate students:

It is true that teachers need to feel comfortable in order to serve children well, but how comfortable? We [teachers] are fallible, and should not pretend that we are anything else. But we ought to be aware of what we are doing. We have a profound moral contract with our students. We insist, under the law, that they become thoughtful, informed citizens. We must – for their benefit and ours – model such citizenship.  

VI. Conclusion

Although many school officials probably long for days before students had constant access to the world wide web, “[w]e cannot put the Internet genie back in the bottle.”

Nor should we want to do so. The internet is a “ubiquitous instrument that allows each bad idea to be met by a better idea,” as apparently was the case for Evans’ Facebook posting. Her speech slammed her teacher; the responding students slammed her idea. Evans invited dispute, and dispute came; this serves one of the First Amendment’s highest purposes. As Evans’ counsel explained in her Response in Opposition:

Students today socialize differently than students did in previous generations. For those of us who were students before the 1990’s, there was no internet widely accessible, much less social networking websites. Students in the pre-internet days spent their off-school time communicating about their teachers, and criticizing them, in their parents’ living room, at the mall, or outside while playing. Today, the internet and other technologies have changed the face of communication forever. Emails, text messaging, social networking sites, and even role playing games replace face to face in person conversation… Cyberspace is today’s students’ living room and speech therein deserves the same First Amendment protection.

Simply put, the consequences of punishing online student speech are not worth the cost to parental rights, teacher professionalism, and willingness to engage in free expression. Instead of


258 Wilcox, 66 M.J. at 462 (Baker, J., dissenting).

259 Id.


261 Plaintiff’s Response, supra note 26, at 15.
fearing inevitable change, school officials ought to embrace it. At least one court has recognized that the internet can be a powerful tool for connecting with students. In rejecting a First Amendment challenge by anti-abortion activists to an anti-noise ordinance, and thus denying their request to use a sound truck to blast its message into a nearby school, a district court in California opined that “it might be easier for [the activist] to reach the youth he wishes to target by using Facebook or Myspace.” Teachers, as education activists, might consider heeding the same advice.

\[262\] \textit{Klein v. City of Laguna Beach}, 2009 WL 162703*6 (C.D.Cal.).