FAR FROM THE CLASSROOM, THE CAFETERIA, AND THE PLAYING FIELD: WHY SHOULD THE SCHOOL'S DISCIPLINARY ARM REACH SPEECH MADE IN A STUDENT'S BEDROOM?

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This article addresses whether public school administrators can and should, consistent with the First Amendment, discipline students for speech that occurs off campus. Does the school’s responsibility to maintain an appropriate learning environment by regulating students’ on-campus speech stretch beyond campus -- after school hours, outside school property, far away from school-sponsored activities, and into the privacy of grandmother’s house? Should school officials be charged with the responsibility of policing students’ off-campus speech?

The specific issue is whether the Supreme Court’s leading school speech case, *Tinker v. Des Moines Independent Community School District*¹ applies to off-campus speech, particularly internet social networking speech that is difficult to characterize by reference to geographical boundaries. The United States Court of Appeals for the Third Circuit placed this question squarely on the table in its recent *en banc* decisions in two factually similar cases, *JS ex rel Snyder v. Blue Mountain School District*² and *Layshock ex rel. Layshock v. Hermitage School District*.³ The court stated, “[w]e are asked whether school administrators can, consistent with the First Amendment, discipline students for speech that occurs off campus . . . Since *Tinker*, courts have struggled to strike a balance between safeguarding students’ First Amendment rights

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and protecting the authority of school administrators to maintain an appropriate learning environment.” Additionally, the United States Court of Appeals for the Second Circuit recently stated, “[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case.”

The current generation of school students communicates to an unprecedented extent via internet speech (Facebook, Twitter), and special questions arise as to whether schools can regulate this type of social networking speech. “Lower courts are struggling to apply pre-Internet legal standards to student speech on the Internet because of substantial doubt as to how far school administrators’ authority extends – or should extend – over student speech made off-campus that reaches the school environment.”

Even the Supreme Court has acknowledged that Tinker’s applicability is somewhat unclear, stating that “[t]here is some uncertainty at the outer boundaries as to when courts should

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5 Doninger v. Niehoff, 642 F.3d 334, 353 (2d Cir. 2011) (quoting Breyer, J., concurring in the judgment in part and dissenting in part) (noting that the law regarding student speech is often unclear, with various courts describing the governing standards as ‘complex and often difficult to apply’ in Morse v. Frederick, 551 U.S. 393, 430 (2007)).
6 Carolyn Joyce Mattus, Legal Update: Is it Really My Space?: Public Schools and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder v. Blue Mountain School District, 16 B.U.J. SCI. & TECH. L. 318, 321 (2010). As another commentator has indicated, “[p]ublic school officials are presented with a legal quandary when deciding whether to discipline a student for online activity. On one hand, if schools discipline students for speech that originated off campus on the student’s home computer, the school may be liable for a First Amendment violation. On the other hand, if a school does not take action against peer harassment or threats, and a serious incident results, the school may be liable under federal statutes like Title IX of the Education Amendments of 1972, or a state tort law for negligent supervision. Schools have relied on the latter concern to justify punishing or censoring student speech.” Harriet A. Hader, Note, Supervising Cyberspace: A Simple Threshold for the Public School Jurisdiction Over Students’ Online Activity, 50 B.C. L. REV. 1563, 1569 (2009).
apply school speech precedents”. In his concurring opinion in Morse v. Frederick, Justice Thomas wrote in 2007, “Today, the Court creates another exception. In doing so, we continue to distance ourselves from Tinker, but we neither overrule it nor offer an explanation of when it operates and when it does not.”

Some of the confusion stems from this passage in Tinker: “Conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of rights of others is, of course, not immunized by constitutional guarantee of freedom of speech.”

Taken in context, the Court’s language must certainly refer to speech that occurs outside the classroom itself but elsewhere on campus. Otherwise, the Court would not have taken care to mention the cafeteria and the playing field as examples of other places where a student’s disruptive speech could result in justifiable discipline by school authorities. This interpretation, however, is not perceived as “obvious” by some thoughtful jurists and legal analysts. Moreover, even if Tinker was limited

8 Id. at 418-19 (Thomas, J., concurring).
10 Tinker, 393 U.S. at 512-13.
11 For example, in referring to this passage from Tinker, Judge Fisher of the Third Circuit wrote “[b]ut it is unclear if ‘in class or out of it’ means to distinguish the classroom from the world beyond the schoolhouse gates, or if it simply means out of class but in the cafeteria, schoolyard, or other areas on school grounds.” J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., WL 2305973 at *21 (3d Cir. 2011) (Fisher, J., dissenting). Additionally, commentators have referred to a lack of direction as to when and how to apply the Tinker rationale. See, e.g., Note, Legal Update: Is it Really My Space?: Public School and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder v. Blue Mountain School District, 16 B.U. J. SCI. & TEC. L. 318, 319 (2010) (describing the vacated Third Circuit decisions as “two more cases in a long line of inconsistent and unpredictable decisions in both federal and state courts that should compel the Supreme Court to define the contours of First Amendment protection for student speech on the Internet”); See also, Emily Gold Waldman, Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions, 19 WM. & MARY BILL RTS. J. 591, 617-18 (2011); Lee Goldman, Student Speech and the First Amendment: A Comprehensive Approach, 63 FLA. L. REV. 395, 396 (2011); Brannon P. Denning and Molly C.
to on-campus speech in 1969, the advent of ubiquitous electronic forms of speech raises the legitimate question as to whether the Tinker rule can and should apply to that type of student speech.

The premise of this article is that Tinker should be restricted to on-campus speech and should not be extended to off-campus speech. On-campus speech should be defined as student speech that occurs in a school-supervised setting. The school’s authority to regulate students’ speech is based on fundamental considerations that are limited to school-supervised activities. The balance between the school’s authority and a person’s free speech rights is a sensitive one. On school grounds and at school-sponsored events, it is the school’s interests that predominate. The student’s rights are diminished in the school setting. Once the speaker moves off campus, however, the special circumstances that empower the school to suppress that student’s speech fall away. There appears to be no substantial justification for extending the regulatory power of the school far beyond the boundaries of the schoolyard.

Limiting Tinker to on-campus speech does not strip school officials of their ability to maintain order and discipline if a problem is caused by internet speech. If there is a disruption at school, the administration can still punish the students who cause a disruption while on campus even if the school cannot snuff out the external stimulus (the off-campus speech).

The other aspect of Tinker – speech that impinges on the rights of others -- has been largely ignored and would not be likely to serve as an independent basis for a school’s regulation of off-campus speech since it has almost never been applied, even to on-campus speech.

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Taylor, Morse v. Frederick and the Regulation of Student Cyberspeech, 35 Hastings Const. L. Q. 835, 837 (2008) (“Not surprisingly, the court decisions often mirror the confusion present in student speech cases generally”).
In Part I of this article, the question as to whether Tinker applies to off-campus speech will be examined against the backdrop of the United States Supreme Court’s four landmark school speech cases. Although the issue is framed solely in terms of Tinker’s applicability, the other three cases provide the Court’s own analysis of what Tinker’s scope is intended to be. Additionally, the cases describe the source and the underlying rationale behind the public school’s authority to regulate the conduct and speech of its students. While this rationale supports the school’s exercise of authority on campus, it does not justify a school’s extension of its disciplinary arm beyond the proverbial schoolyard walls. Indeed, to the extent that school administrators are eager to understand the boundaries and limitations on their obligations to oversee off-campus social networking speech, this article supports the view that the authority ends when the activities are not school-supervised.

Part II discusses the two 2011 opinions issued by the United States Court of Appeals for the Third Circuit and provides an analysis of these recent appellate decisions on the issue.

Part III addresses the distinction between on-campus and off-campus speech, including special problems posed by internet speech.

Part IV discusses the Tinker concept of speech that impinges on the rights of others and addresses whether that approach could be used effectively to regulate students’ internet speech.

Part V contains a discussion of the special problems posed by cyberbullying.

Part VI is the conclusion.

PART I: THE UNITED STATES SUPREME COURT’S FOUR LANDMARK SCHOOL SPEECH CASES AND THE RATIONALE FOR THE SCHOOL’S REGULATORY AUTHORITY

This section will briefly summarize the Supreme Court’s four well-known school speech cases with a focus on the Court’s articulation of the special considerations that support a public
school’s exercise of authority over student speech. The traditional test for a school’s regulation of a student’s on-campus speech was announced by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*¹² where the Court indicated that students do not shed their traditional first amendment rights when they enter the schoolhouse gates.¹³ Because of the school’s role in educating students, the school can permissibly regulate students’ on-campus speech if it materially and substantially disrupts school activities, if the school can reasonably forecast that it will do so, or if the speech impinges on the rights of another.¹⁴ In *Tinker*, the Court overturned a school’s refusal to permit students to wear armbands in protest of the Vietnam War, stating that the expression of antiwar views was done peacefully and that it did not cause a substantial and material disruption of school activities.¹⁵

In now-famous language, the Supreme Court emphasized the importance of the educational process and enunciated the test for when a school can regulate student speech:

> [t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or

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¹³ *Id.* at 506.
¹⁴ *Id.* at 509, 513.
¹⁵ *Id.* at 514.
invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (Citations omitted).

The Court elaborated on the important educational role of the school, and quoted its prior opinions in *Keyishian* and *Shelton*, stating, “[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . .” Both *Keyishian* and *Shelton*, however, involved the first amendment rights of faculty members, unlike *Tinker*. The “marketplace of ideas” concept came from a reference to the ideas of faculty, not students.

In *Keyishian*, faculty members challenged the university’s requirement that they sign a document stating they were not members of the Communist party. *Shelton* involved public school teachers and university faculty who were required to list every organization to which they belonged or gave money. In both cases, the Supreme Court held in favor of the teachers, not the school, indicating in *Shelton* that the school’s “comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers”.

These two cases, which involved teachers’
freedom of association, differed factually from *Tinker*, which involved students’ speech rights, as stated. Thus, by using *Shelton* and *Keyishian* to support its ruling in favor of the students in *Tinker*, the Supreme Court in 1969 expanded its view of the free speech rights within a school setting expressly to include the rights of students as well as faculty (albeit with limitations).

As the Supreme Court made clear in *Tinker*, schools do not have absolute authority to repress students’ speech because “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views”. Thus, *Tinker* characterized the school environment as a place where speech (including student speech) is valued, and *Tinker* acknowledged, but did not emphasize, the school’s supervisory and educational authority to regulate or suppress speech and to maintain order.

Scholars have identified various rationales underlying the school’s special role in policing students’ speech: 1) the protective rationale (schools must protect students from offensive, harmful, or dangerous influences and must also safeguard the educational environment as a whole); 2) the educational rationale (“restrictions on student speech can themselves serve an independent, valid educational function” because punishment teaches a lesson about civility, and additionally, school-sponsored speech must be overseen to be grammatically correct, not profane, and unbiased); and 3) the inculcative rationale (similar to the educational rationale, based on the idea that schools “inculcate students with society’s traditions and values”).

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23 Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 596 (2011) (citing *Tinker*, 393 U.S. at 509 where the Court indicated that the larger institutional needs of the school outweigh the student’s speech rights).
24 *Id.* at 597-98.
25 *Id.* at 595 (citing Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 70 (1996)).
Without necessarily labeling them, the Supreme Court has referred to these various concepts in its student speech opinions.

After Tinker, the Supreme Court decided three additional school speech cases. All four decisions allowing schools to regulate student speech in various circumstances share an important basis or assumption – that is, the speech occurs on-campus (Tinker, Fraser) or in a school-sponsored publication bearing the imprimatur of the school (Kuhlmeier) or during school hours at a school-approved event attended by the school’s students (Morse). Taken as a whole, these cases illustrated that “school speech” is speech made by students in a school-supervised setting. It is this notion of the school-supervised setting that should be the first step in the analysis in every case. The schools are permitted to suppress expression and discipline students for certain types of on-campus speech even if there is no material and substantial disruption of school activities and no showing that the speech impinged on the rights of another, as would be required under strict Tinker analysis. Consequently, Schools can prohibit speech that would otherwise be protected under the first amendment if it occurred in a public forum away from the schoolyard. The three post-Tinker cases illustrate the strength of the school’s regulatory role.

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26 After Tinker, the Supreme Court also stated that in certain circumstances, a school can regulate speech even without a showing of substantial disruption or invasion of the rights of others. One instance is if the message is perceived to be school-sponsored and contrary to the school’s curriculum and mission. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Schools may suppress students’ on-campus speech if it is vulgar and obscene, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) or if it promotes illegal drug use, Morse v. Frederick, 551 U.S. 393 (2007).

27 Morse v. Frederick, 551 U.S. 393, 404-05, 127 S. Ct. 2618, 2626-27, 168 L. Ed. 2d 290 (2007), stating that “Fraser's holding demonstrates that ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.’ Id., at 682, 106 S.Ct. 3159. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. See Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); Fraser, supra, at 682-683, 106 S.Ct. 3159. In school, however, Fraser's First Amendment rights were circumscribed ‘in light of the special characteristics of the school environment.' Tinker, supra, at 506, 89 S.Ct. 733.”
Looking at the Court’s articulation of the “special characteristics of the school environment”, one sees that in *Bethel School Dist. No. 403 v. Fraser*, the underlying concern was that “[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students”. The school’s protective role justified the suppression of speech deemed too lewd and vulgar for sensitive young listeners. Therefore, the school district did not violate a student’s first amendment rights when it disciplined him for making a nominating speech for a candidate in school elections when the speech contained blatant sexual references and was delivered during a school assembly.

In *Hazelwood School District v. Kuhlmeier*, the issue was whether the school district acted reasonably by suppressing an article in the student newspaper that divulged details about pregnant students or whether the students’ right to free expression protected their editorial control over the newspaper’s contents. Holding in favor of the school district, the Supreme Court indicated that the school administrators had a special interest in school-sponsored activities, and the Court also characterized the school newspaper “as part of the school curriculum”. The Court based the school’s regulatory authority on its control over the

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28 In all three cases, the Supreme Court upheld the school’s decision to discipline the student and regulate the speech. This regulatory authority was described in *Morse* and *Fraser*: “[S]chool boards have the authority to determine ‘what manner of speech in the classroom or in school assembly is inappropriate.’ *Morse* v. *Frederick*, 551 U.S. 393, 404-05, 127 S. Ct. 2618, 2626-27, 168 L. Ed. 2d 290 (2007), quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683. *Cf. Fraser*, 478 U.S. at 689 (Brennan, J., concurring in judgment) (“In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser’s] speech because they disagreed with the views he sought to express”).


30 *Id.; see also Waldman*, supra note 23, and the protective role.


33 *Id.*, 484 U.S. at 271.
curriculum, which would be indicative of the educational rationale, described above. Stating that “[e]ducators are entitled to exercise greater control over” these forms of student expression (referring to the newspaper or other speech that would bear the imprimatur of the school), the Court permitted regulation because it was “reasonably related to legitimate pedagogical concerns.”

In *Morse v. Frederick*, its most recent school speech decision, the Supreme Court concluded that school officials did not violate the student’s (Frederick’s) first amendment rights by confiscating his banner reading “BONG HiTS 4 JESUS” and suspending him from school. The Court described at great length the “special consideration” underlying the school’s action, that is, its responsibility to educate students about the dangers of illegal drug use. Thus, the Court carefully tied the school’s exercise of its regulatory arm in suppressing the speech to its special responsibility of educating its students about a particularly dangerous, harmful, illegal activity (drug use). In addition, the educator’s protective role – shielding the students from extremely harmful influences – was also crucial in the Court’s analysis. “Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” Additionally, in *Morse*, the Supreme Court was careful to limit its holding to the specific situation, i.e. the banner was displayed during school hours at a school-approved event, and it was done in the presence of

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34 *See supra* nn. 18 & 24.
35 *Kuhlmeier*, 484 U.S. at 272-73.
37 *Morse*, 551 U.S. at 407-08.
38 The “special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse.” *Morse*, 551 U.S. at 408.
39 *Id.*
other students, teachers, and the principal of the school.\textsuperscript{40} Thus, the Court did not abandon the important consideration that the speech was characterized as school speech even though it was not literally on the school grounds in a strictly geographic sense; it did occur during a school-supervised activity.

In addition to the three aforementioned special considerations (protective, educational, and inculcative), another rationale has also been referenced by the Supreme Court as one possible justification for the school’s supervisory authority over students. In his concurring opinion in \textit{Morse}, Justice Thomas traced the school’s responsibility to the early doctrine of \textit{in loco parentis}.\textsuperscript{41} “Through the legal doctrine of \textit{in loco parentis}, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order. Rooted in the English common law, \textit{in loco parentis} originally governed the legal rights and obligations of tutors and private schools,” wrote Justice Thomas.\textsuperscript{42} Delving into the original application of the doctrine to American schools, he quoted an 1837 state court opinion where the doctrine was applied to public schools: “‘One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits .... The teacher is the substitute of the parent; ... and in the

\footnotesize{\textsuperscript{40} Id. at 397.}
\footnotesize{\textsuperscript{41} Morse v. Frederick, 551 U.S. 393, 413-14, 127 S. Ct. 2618, 2631-32, 168 L. Ed. 2d 290 (2007) (Thomas, J. concurring).}
\footnotesize{\textsuperscript{42} Id. (citing 1 W. Blackstone, Commentaries on the Laws of England 441 (1765)) (‘[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then \textit{in loco parentis}, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed’).}
exercise of these delegated duties, is invested with his power.”

Not all the Justices agreed with Thomas’s reliance on the doctrine of in loco parentis to explain the public school’s heightened role in regulating students’ speech. Noting that the doctrine applied to private schools, Justice Alito objected to its application to public schools. “When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority-including their authority to determine what their children may say and hear-to public school authorities.”

Justice Alito continued in Morse that “any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting.” He identified the special characteristic in Morse as “the threat to the physical safety of students”, indicating that because they are

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44 Morse, 551 U.S. at 424 (2007) (Alito, J., concurring, joined by Kennedy, J.). In an earlier school case (although not a student speech case), the Court had stated that “unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians . . . .” Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-55, 115 S. Ct. 2386, 2391, 132 L. Ed. 2d 564 (1995). The Court in Vernonia clearly acknowledged that the doctrine of in loco parentis pertained to private, not public, schools. Rather than being viewed as substitute parents, public school officials are to be treated as state actors for purposes of the Due Process and Free Speech Clauses, stated the Court. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-55, 115 S. Ct. 2386, 2391, 132 L. Ed. 2d 564 (1995) (quoting New Jersey v. T.L.O., 469 U.S. 325, 336, 105 S.Ct. 733, 740, 83 L. Ed. 2d 720 (1985) (“In T.L.O. we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints.”). Nonetheless, the Court emphasized that the nature of the public school’s power is “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” Vernonia, 515 U.S. at 654-55.
45 Morse, 551 U.S. at 424 (Alito, J., concurring, joined by Kennedy, J.).
compelled to attend school, students are exposed to dangers that they might otherwise avoid.\textsuperscript{46} Thus, Justice Alito’s emphasis was on the school’s protective role.

In summary, the Supreme Court has made it clear that schools may regulate several types of student speech when that speech occurs on campus or at school-sponsored events because of the special circumstances that exist in the school setting. When the speech occurs off campus, however, it is not clear when or why a public school could suppress speech or discipline the student speaker. The Supreme Court has not announced a test for the regulation of such non-school speech.

**PART II: RECENT WORDS FROM THE APPELLATE BENCH: THE THIRD CIRCUIT’S VIEW ON WHETHER TINKER APPLIES TO OFF-CAMPUS SPEECH**

Several federal appellate courts have recently addressed whether *Tinker* should apply to off-campus internet speech, making the question especially timely. This section of the article will discuss twin opinions from the United States Court of Appeals for the Third Circuit, sitting *en banc*. The panel was seriously divided as to whether *Tinker* should apply to off-campus speech, and the court’s opinions invite clarification from the Supreme Court on this question.\textsuperscript{47}

\textsuperscript{46} “School attendance can expose students to threats to their physical safety that they would not otherwise face.” *Morse*, 551 U.S. at 424 (Alito, J., concurring, joined by Kennedy, J.).

\textsuperscript{47} In *J.S. ex rel. Snyder*, eight of the fourteen judges sitting *en banc* joined the majority opinion written by Judge Chagares. Joining in the majority were Chief Judge McKee and Judges Sloviter, Ambro, Fuentes, Smith, Hardiman, and Grennaway, Jr. The majority dodged the ultimate issue by stating, “The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.’s (social networking) speech in this case.” *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 08-4138, 2011 WL 2305973, at *7 (3d Cir. June 13, 2011) (emphasis added). Interestingly, five of those eight judges also joined in a separate concurrence written by Judge Smith, stating: “I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.” *J.S.*, 2011 WL 2305973, at *16 (Smith, J. concurring) (emphasis added). Finally, the remaining six of the fourteen judges dissented.
The court of appeals issued opinions on June 13, 2011 in two strikingly similar cases involving students who were disciplined for creating fake MySpace profiles of their school principals. 48

A. Layshock ex rel. Layshock v. Hermitage School District:

At his grandmother’s house after school, Justin Layshock created a fake profile of his school principal on MySpace by using the principal’s photograph from the school’s website and fabricating several rude comments about the principal’s interests and activities.49 The fake profile was based on a theme of “big”, listing things such as “big steroid freak”, “big whore”, “big fag”, “number of drugs I have taken: big” and so forth.50 As punishment for creating this profile, the student was suspended for ten days, placed in an Alternative Education Program, banned from extracurricular activities, and precluded from participating in his graduation ceremony.51 His parents brought an action alleging that his first amendment rights had been violated by the school district. The district court found that the school district failed to establish a sufficient nexus between Justin's speech and a substantial disruption of the school environment,”52 and that the school’s disciplinary actions violated his first amendment rights.

50 Id.
51 Id. at *3.
The Court of Appeals affirmed the district court’s grant of summary judgment in favor of the Layshocks.\textsuperscript{53}

On appeal, the school district had argued that its disciplinary arm extended to Justin’s MySpace speech because there was a nexus between the on-line profile and the school. The nexus argument was based on the fact that Justin entered the school’s website and appropriated the picture. He also aimed his comments at the principal and the school community and it was foreseeable that the profile would reach the school, claimed the school district.\textsuperscript{54} On rehearing, the Third Circuit held that since the expressive conduct “originated outside of the schoolhouse, did not disturb the school environment and was not related to any school sponsored event . . . the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline”.\textsuperscript{55}

The appellate court stated that since there was no proof of a substantial disruption of school activities, the \textit{Tinker} test was not met.\textsuperscript{56} The school argued that even if \textit{Tinker} did not apply, its disciplinary action against Justin was appropriate based on the Supreme Court’s holding in \textit{Fraser} that a school could discipline a student for making a lewd and vulgar speech in

\textsuperscript{54}Layshock \textit{ex rel.} Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), reh’g en banc granted, opinion vacated (Apr. 9, 2010), \textit{on reh’g en banc}, No. 07-4465, 2011 WL 2305970 (3d Cir. June 13, 2011).
\textsuperscript{56}Layshock \textit{ex rel.} Layshock v. Hermitage Sch. Dist., No. 07-4465, 2011 WL 2305970, at *1 (3d Cir. June 13, 2011). The court stated, “[w]e realize, of course, that it is now well established that \textit{Tinker}’s “schoolhouse gate” is not constructed solely of the bricks and mortar surrounding the school yard. Nevertheless, the concept of the “school yard” is not without boundaries and the reach of school authorities is not without limits.” Layshock \textit{ex rel.} Layshock v. Hermitage Sch. Dist., No. 07-4465, 2011 WL 2305970, at *8 (3d Cir. June 13, 2011).
a school assembly in front of vulnerable young listeners. The Third Circuit disagreed, stating that Fraser is inapplicable to off-campus speech because the Supreme Court itself was careful to note that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”57 Therefore, lewd and vulgar speech that a student makes while away from school cannot be suppressed by school authorities on the basis of Fraser.

Since Fraser did not apply and Tinker was not triggered based on these facts (because the School District conceded that Justin’s fake profile did not cause substantial disruption at school), the court of appeals held, “we do not think that the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.”58 The court added, “[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.”59

The opinion also noted that the special nature of the school environment justifies the school’s exercise of discipline on campus, but that the same justification does not exist outside the schoolhouse gates. In embracing the Tinker rationale, the Third Circuit stated that the Supreme Court “recognized that the unique nature of the school environment had to be part of any First Amendment inquiry” and “affirm[ed] the comprehensive authority of the States and of

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57 Layshock ex rel. Layshock, 2011 WL 2305970, at *11 (quoting Morse v. Frederick, 551 U.S. 393, 404 (2007) (citations omitted)).
school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”

In holding that Justin’s act of obtaining the principal’s photograph from his school’s website did not amount to entering school grounds, the court characterized Justin’s speech as “off-campus”. Since there was no disruption of school activities, the court did not have to decide whether Tinker would actually have applied to this particular instance of off-campus speech.

B. JS ex rel. Snyder:

At her home on a Sunday evening, J.S. and her friend K.L. used the Snyders’ computer to create a fake MySpace profile of their school principal, describing his general interests 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…” The profile also stated, “HELLO CHILDREN[.] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.]” The next day, J.S. made the profile “private” and granted access only to about twenty-two of her fellow students. Because the School District’s computers blocked access to MySpace on campus, no one was able to view the on-line profile at school, but the principal heard about the

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profile and requested that a print-out be brought to him. Insulted and furious, the principal called a meeting with the parents and two students. After that, the principal suspended J.S. for ten days and contacted MySpace directly to have the profile removed. J.S. and her parents sued the school district, alleging among other things that the suspension violated J.S.’s first amendment rights. The District Court granted summary judgment in favor of the School District on this claim, and the Snyders appealed.

The Third Circuit wrestled with whether the case should be decided under the Tinker standard, ultimately using the Tinker analysis without expressly holding that it was applicable to off-campus speech. Not claiming that the MySpace profile had caused a substantial and material disruption of school activities, the Blue Mountain School District argued instead that it was not necessary to wait until an actual disturbance occurred. The school district contended that it could reasonably forecast that substantial disruption would occur, thus satisfying the Tinker test. The Third Circuit concluded that the Blue Mountain School District’s forecast of a disruption was not reasonable, noting that on-campus access to MySpace was restricted and, moreover, the MySpace profile was so obviously a joke that no one would take it seriously enough to cause a substantial disruption of school activities. In so holding, the court referenced

68 See supra n. 47, where the divided vote is described.
71 “[T]he profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.” *J.S.*
the Supreme Court’s admonition that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”

The court also addressed the fact that the fake profile was created at the student’s home on the weekend rather than at school or during school hours. Warning that the school’s disciplinary arm should not be used to quash off-campus expression, Judge Smith wrote:

“Applying Tinker to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students’ expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.” He continued very powerfully, “Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student’s classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if Tinker were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.”

The Third Circuit considered, but rejected, the argument that one of the Supreme Court’s exceptions to Tinker should apply (with the Fraser exception allowing schools to regulate speech

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74 J.S. ex rel. Snyder, 2011 WL 2305973, at *18 (Smith, J. concurring.) Judge Smith stated, “Tinker, for example, authorizes schools to suppress political speech—speech ‘at the core of what the First Amendment is designed to protect,’ Morse, 551 U.S. at 403—if it substantially disrupts school activities. See 393 U.S. at 513.”
that is lewd, vulgar, and plainly offensive being the most pertinent). Referencing Justice Alito’s concurring opinion in Morse, the Third Circuit emphasized the narrowness of the Tinker exceptions and the limitations on the role of school authorities. Elaborating in the concurring opinion, Judge Smith wrote:

Courts agree that Fraser, Kuhlmeier, and Morse apply solely to on-campus speech (I use the phrase “on-campus speech” as shorthand for speech communicated at school or, though not on school grounds, at a school-sanctioned event, see Morse, 551 U.S. at 400–01). Indeed, the Supreme Court has expressly recognized that Fraser does not extend “outside the school context,” id. at 405 (citing Cohen), and three justices have observed (without objection from the other six) that speech promoting illegal drug use, even if proscribable in a public school, would “unquestionably” be protected if uttered elsewhere, id. at 434 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting). Lower courts, however, are divided on whether Tinker’s substantial-disruption test governs students’ off-campus expression.

Further emphasizing that Fraser is inapplicable to off-campus speech, the court stated, “[t]he School District argues that although J.S.’s speech occurred off campus, it was justified in disciplining her because it was “lewd, vulgar, and offensive [and] had an effect on the school and the educational mission of the District [but] the argument fails at the outset because Fraser does not apply to off-campus speech.” The court referred to Chief Justice Roberts’s analysis of Fraser in the majority opinion in Morse, and stated “[t]hus, under the Supreme Court's precedent, the Fraser exception to Tinker does not apply here. In other words, Fraser's

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77 “Justice Alito also noted that the Morse decision ‘does 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.’ This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs.” J.S. ex rel. Snyder, WL 2305973, at *8 (quoting Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J. concurring)).
“lewdness” standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours.”

The Third Circuit went ahead and applied the Tinker standard to J.S.’s speech (acknowledging that the speech was “off-campus”) but declined to hold definitively that Tinker does apply to such off-campus expression. In so doing, the court stated, “[t]he Supreme Court established a basic framework for assessing student free speech claims in Tinker, and we will assume, without deciding, that Tinker applies to J.S.’s (social networking) speech in this case.” Applying the Tinker test, the court held that because there was no material disruption or reasonable forecast of a disruption of school activities, the Blue Mountain School District exceeded the bounds of its authority by disciplining J.S. for her internet speech. Since the

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81 See supra n. 47, quoting the majority opinion in J.S.
83 J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., No. 08-4138, 2011 WL 2305973, at *7 (3d Cir. June 13, 2011). The dissent claimed that this decision created a split with the United States Court of Appeals for the Second Circuit because that court had held that “off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption of the classroom environment.” J.S. ex rel. Snyder, 2011 WL 2305973, at *28 (Fisher, J., dissenting). The majority, however, disagreed with the suggestion that a circuit split resulted: “We disagree, largely because the dissent has overstated our sister circuit's law. . . Further, the facts of the cases cited by the dissent in support of its proposition that we have created a circuit split differ considerably from the facts presented in this case. See, e.g., Doninger v. Niehoff, 527 F.3d 41, 50–51 (2d Cir. 2008); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35 (2d Cir. 2007) (involving a student “sharing with friends via the Internet a small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed”). Accordingly, we do not perceive any circuit split and will continue to decide each case on its individual facts.” J.S. ex rel. Snyder, 2011 WL 2305973, n. 8 at *1.
Third Circuit expressly declined to hold that *Tinker* applies to off-campus speech, the question now begs to be answered. Does *Tinker* extend beyond the schoolyard and into the private space of students when they speak about the school, school officials, or fellow students?

**PART III: THE ON-CAMPUS VERSUS OFF-CAMPUS DISTINCTION**

“It is now well established that Tinker's “schoolhouse gate” is not constructed solely of the bricks and mortar surrounding the school yard. Nevertheless, the concept of the ‘school yard’ is not without boundaries and the reach of school authorities is not without limits.”

The attempt to figure out the physical boundaries and limitations on the school’s reach is a challenge that the Supreme Court has already addressed, in part. In *Tinker*, the Court took care to specify that student speech could be regulated not just in the classroom, but also in the cafeteria, on the playing field, or elsewhere on the campus during normal hours. In *Kuhlmeier*, the Court explained why the views expressed in the school newspaper were subject to the school’s regulatory arm. Moving away from the purely geographic notion of school speech, the Court indicated that speech that bears the imprimatur of the school and that relates to legitimate pedagogical concerns could be regulated by the school (school-sponsored speech). There was no issue in *Fraser* as to whether the student’s speech was on-campus. It clearly was, as the

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86 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268 (1988). Note that it was not necessary in *Kuhlmeier* to discuss whether the newspaper was physically on campus; it was.
offensive and vulgar remarks were made by a student during an election campaign assembly during school hours on school property to a student audience.87

In *Morse*, the most recent student speech case decided by the Supreme Court, the student (Frederick) had argued that he was outside the scope of the school’s authority because he was not inside the schoolhouse gate when he displayed his “BONG HiTS 4 JESUS” banner across the street from the school.88 However, the Supreme Court rejected Frederick’s claim. Rather than drawing a sharp dividing line at the school’s front door, the Court explained why Frederick’s expressive conduct was properly seen as school speech, stating that Frederick cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”89 Additionally, the dissent in *Morse* stated, “I take the Court’s point that the message on Frederick’s banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere.”90

The Second and Third Circuits have stated, “[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*.”91 If one takes a purely geographical approach, off-campus speech would be awarded full constitutional

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87 Bethel School District No 403 v. Fraser, 478 U.S. 675, 677 (1986). Twenty-one years later, Chief Justice Roberts expressly stated that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.” Morse v. Frederick, 551 U.S. 393, 404 (2007) (citations omitted).
88 Morse v. Frederick, 551 U.S. 393, 400 (2007).
89 Morse, 551 U.S. at 401.
90 Morse, 551 U.S. at 434-35 (Stevens, J. dissenting).
protection from regulation by school authorities. The school’s disciplinary authority to regulate students’ speech should cease to exist once the justification -- special educational considerations -- ceases to exist outside the school environment. The school environment, however, can include activities that occur outside the strict physical property lines of the schoolyard. Nonetheless, the speech must occur in a school-supervised context in order to justify the school’s intervention in the free expression of its students.

The Third Circuit recently stated its explicit view that three of the Supreme Court’s four student speech holdings (Fraser, Kuhlmeier, and Morse) are limited to on-campus speech. That pronouncement leaves open the major question that is the focus of this article: whether Tinker should apply to off-campus speech. In emphasizing how inappropriate it would be to extend Fraser to off-campus speech, the Third Circuit said that to do so “would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed ‘offensive’ by the prevailing authority. Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school

92 See Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004). This approach has also been applied to Internet speech as well. See, e.g. Mahaffey v. Aldrich, 236 F. Supp. 2d 799 (E.D. Mich. 2002) (holding that a personal webpage was not on school property and therefore the school-speech precedent does not apply).
93 Some First Amendment supporters advocate limiting the school officials’ authority, and urge the adoption of a strictly geographical approach to determining whether speech is on- or off-campus. Clay Calvert, Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground, 7 B.U. J. SCI. & TECH. L. 243, 245 (2001) (arguing that student speech should not be punished unless it physically makes its way to campus and causes a substantial disruption). Calvert suggests that “[t]he third arm of justice – the school’s own internal discipline system – must be reined in before First Amendment rights are needlessly sacrificed.” Id. at 287.
94 J.S. ex rel. Snyder, 2011 WL 2305973, at *17, (Smith, J. concurring).
authorities find the remark ‘offensive.’” The danger of extending the regulatory arm of the school too far is that it could lead to an unacceptable level of censorship and repression of free speech. Unless off-campus speech is defamatory, obscene, or otherwise unprotected, it would be a violation of the student’s first amendment rights for the school to discipline him or her.

It appears that when considering the free speech rights of students, the Supreme Court has not sought to extend the regulatory arm of the school beyond the classroom, the playing fields, or the cafeteria. Not even in dicta has the Court hinted at such a disciplinary or regulatory reach. Nor has the Court posited that a school’s mission of educating students reaches beyond the schoolhouse gates even in this day of distance-learning and internet-based teaching tools.

The question as to whether Tinker applies to off-campus speech (and the closely related question as to whether internet speech is “off campus”) should be examined thoughtfully. The appropriate answer, this article contends, is that Tinker applies only to on-campus speech (defined not by strict geographical boundaries, but rather, as speech that occurs at school-supervised activities) and should not be extended.

PART IV: THE SPECIAL PROBLEMS POSED BY INTERNET SPEECH

Technology has changed a great deal since 1969 (when Tinker was decided) and it is time for guidance on whether the school’s supervisory authority can and should extend to students’ internet speech. Internet speech presents tricky issues. Its use is pervasive. Internet messages

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97 According to the National Center for Missing & Exploited Children, 93 percent of teens ages 12 to 17 go online, and 1 in 3 teens has experienced online harassment.
reach a worldwide audience at every hour of the day and night via computer, hand held devices, and mobile phones. The act of “speaking” by internet cannot easily be defined by reference to a geographic locus. The identity of the speaker can be disguised and concealed, and the identity of recipients is often unanticipated and unknown. The creation of fake profiles, the issuance of threats (real and false), and the transmission of intimately private photographs and videos can all be achieved by clicking a few tiny buttons. It may be difficult to prove which messages were intended to reach a specific audience (for example, a school community on-campus).

Looking at whether schools can – or should – regulate students’ internet speech is a difficult question. If one looks at the underlying source of the school’s regulatory authority and reviews the policies and principles that give the school special authority to suppress students’ speech, the analysis becomes simpler. The school’s prerogative to supervise the education of students entrusted to its care pertains to school-supervised and school-sponsored activities. The balance between the students’ first amendment free speech rights and the school’s authority to make educational decisions is a delicate one. The balance tips in favor of school authorities, as previously stated, when the students are engaged in school activities. The special considerations

www.netsmartz.org/Safety/Statistics/ (last visited September 16, 2011); see also, John Bruner, What’s a “Like” Worth?, FORBES, Aug. 8, 2011, at 28 (stating that Facebook has 750 million users).

98 Students “talk” by using technology. (A teenager will say, “I talked with my friend Will last night”, meaning that they communicated by sending messages and posting things on each other’s Facebook walls without ever actually speaking aloud together.)

99 Bianco Prieto, Deputies: Jealous Teen Used Facebook in Plot, ORLANDO SENTINEL, Aug. 2, 2011, at A1, A9. Eighteen year old Israel Nieves is accused of murdering 19 year old Jason Rodriguez after Rodriguez dated Nieves’s former girlfriend. To lure Rodriguez to the murder location, Nieves created a fake email address to make a phony Facebook page and also created a fake phone number using an iPod Touch application to send phony text messages to Rodriguez while pretending to be a female named “Ty Ann”. When Rodriguez showed up to meet Ty Ann, he was shot on Feb. 2, 2011.

100 See supra text accompanying note 22.
that justify the school’s suppression of on-campus speech do not exist, however, outside of the school environment. The school’s authority fades as the activity moves off-campus because the speech is literally outside the scope of the school’s supervisory powers.

A. Characterizing Internet Speech as On-Campus or Off-Campus

The rapid changes in technology should not obscure the view of what student speech is and is not. The facts will have to be evaluated on a case-by-case basis to determine whether the expression should be characterized as school speech. In his recent concurrence in J.S. ex rel Snyder v. Blue Mountain School District, Judge Smith stated that the decision as to whether speech is on-campus or off clearly cannot be based on where the speaker sits. The point is well taken because of the omnipresence of internet speech. Perhaps, however, the analysis in the four Supreme Court school speech cases already provides sufficient guidance. A student’s expressive act of posting a comment on Facebook can be analyzed the same way that the Supreme Court has already analyzed wearing an armband, publishing a school-sponsored article, making an election speech, or displaying a large banner. The physical location of the speaker would be an important factor. If the expression itself occurs on campus, or is created using the school’s facilities, or in the company of students and teachers during normal school hours, or during other school-sponsored activities, then it would be treated as on-campus speech. The determination is not based merely on an examination of property lines and physical boundaries.

Characterizing the speech as on-campus or off-campus will necessitate a careful examination of the facts in each case. While the task may be tedious, it is no different from other careful factual distinctions that are made in all sorts of cases. The mere fact that an internet message is originally created in the privacy of a student’s home may not be dispositive.

\[^{101}\text{J.S. ex rel. Snyder v. Blue Mountain School District, No. 08-4138, 2011 WL 2305973, at *19 (Smith, J. concurring).}\]
students in *Tinker* did not make their armbands at school; they created them elsewhere and then wore them to school to express a political view. That expression took place in school. Frederick did not create his banner while standing on the sidewalk across from his school; he brought it and unfurled it there. He communicated and shared his previously written message there. With internet speech that was created by students off-campus, courts have looked at factors such as whether the School District blocked MySpace access on its school computers\(^\text{102}\), whether the speech was intentionally aimed at the school administration,\(^\text{103}\) and whether the speech actually came on campus.\(^\text{104}\)

Various analytical approaches have been suggested by courts and commentators alike, including the “geographic approach”,\(^\text{105}\) the “sufficient nexus” approach (i.e., there was a nexus between the off-campus speech and a disruption at school such that it is appropriate for the school to exercise its disciplinary role),\(^\text{106}\) the “reasonably foreseeable” approach (i.e., it was reasonably foreseeable that the speech would come on campus and have an impact on school


\(^{103}\) *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011); *J.S. ex rel. Snyder*, 2011 WL 2305973, at *19 (Smith, J., concurring)(“Speech intentionally directed towards a school is properly considered on-campus speech.”)

\(^{104}\) *See Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2007)(where a student brought to campus a printout of another student’s Instant Message icon showing a gun pointing at his teacher’s head).

\(^{105}\) Some First Amendment supporters advocate limiting the school officials’ authority, and urge the adoption of a geographical approach to determining whether speech is on- or off- campus. These supporters argue, “The third arm of justice – the school’s own internal discipline system – must be reined in before First Amendment rights are needlessly sacrificed.” Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. Sci. & Tech. L. 243, 245 (2001) (arguing that student speech should not be punished unless it physically makes its way to campus and causes a substantial disruption). *See also* Stephanie Kuplinski, Note, “*Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*”, 71 OHIO ST. L.J. 611, 626 (2010).

activities); and the “intent” or “aimed at the school” approach (i.e. the student directed the remarks at school officials with the intent of having an impact on the school).

The United States Court of Appeals for the Second Circuit, for example, has avoided the strict geographical approach and has rejected the argument that off-campus speech cannot be the subject of school discipline. Doninger v. Niehoff involved a student who created an email message while on campus during school hours, using the school’s computer lab to access the email account of another student’s father. The mass email message was sent from the school’s computer lab via the father’s account to various parents, students, and others, urging them to contact the school to ask that a battle of the bands not be cancelled. That same night at home, student Avery Doninger posted a message on her publicly accessible blog (a non-school website), stating “jamfest is cancelled due to douchebags in central office.” She included the email she and others had sent from the school earlier, and also added, “and here is a letter my mom sent [to the school administration] . . . if you want to write something or call [the principal] to piss her off more.” The student was disciplined by the school for her off-campus blog post (which republished her on-campus email message) but was not disciplined for the original email. Her punishment was that she was not permitted to run for Senior Class Secretary. About a week later, when the election speeches were given at a school assembly, the principal prohibited Avery and some of her friends from wearing t-shirts emblazoned “Team Avery” and “Support LSM Freedom of Speech”.

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108 Id.
109 Id.
110 Id.
111 Doninger, 642 F.2d at 339-42.
112 Id.
113 Id. at 342.
Through her mother, Avery Doninger sued the school district, alleging among other things that her first amendment rights were violated by the school principal’s (1) refusal to allow her to run for class secretary as punishment for the blog posting, and (2) refusal to let her wear the t-shirt to the school assembly.\textsuperscript{114} The Second Circuit agreed with the district court that any alleged first amendment violation was “not clearly established”,\textsuperscript{115} and thus, the school principal was entitled to qualified immunity since it would not have been clear to a reasonable school official that her conduct (the act of disciplining the student) was unlawful in the situation.\textsuperscript{116} The court added nonetheless that it was objectively reasonable for school administrators to conclude that student Avery Doninger’s blog post would cause a material and substantial disruption of school activities so as to satisfy \textit{Tinker}.\textsuperscript{117} With regard to the application of \textit{Tinker}, the court quoted its earlier opinion in \textit{Doninger II}, stating, “the Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that, like Avery’s, does not occur on school grounds or at a school-sponsored event.”\textsuperscript{118}

The Second Circuit considered whether the off-campus speech was aimed at the school, and would foreseeably come on campus.\textsuperscript{119} Avery Doninger’s blog explicitly encouraged students and others to contact the school administration to protest the cancellation of Jamfest, so it was “aimed at” the school.\textsuperscript{120} Additionally, in \textit{Wisniewski v. Board of Education}, the Second Circuit expressly held that off-campus speech could be the basis of school discipline when a student’s violent and threatening off-campus instant message about killing a teacher “posed a

\textsuperscript{114} See 642 F.3d at 343-44 for the procedural history of \textit{Doninger} (I), (II), (III), and (IV).
\textsuperscript{115} Doninger v. Niehoff, 642 F.3d 334, 346 (2d Cir. 2011).
\textsuperscript{116} \textit{Id.} at 348-49. A full discussion of qualified immunity would be outside the scope of this article.
\textsuperscript{117} \textit{Id.} at 348-49.
\textsuperscript{118} \textit{Id. at} 346 (quoting Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008)).
\textsuperscript{119} \textit{Doninger}, 642 F.3d at 347-48; Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-39 (2d Cir. 2007).
\textsuperscript{120} \textit{Doninger}, 642 F.3d at 341.
reasonably foreseeable risk that [it] would come to the attention of school authorities and . . . materially and substantially disrupt the work and discipline of the school".\textsuperscript{121} While the student’s threatening message was horrifying, it is not at all clear that the proper means of addressing it was to invoke the school’s disciplinary rules. Off-campus speech can be regulated by other means, as noted.\textsuperscript{122}

Others argue that the better approach is to determine whether there was a sufficient “nexus” between the off-campus speech and a substantial disturbance on campus.\textsuperscript{123} The first step in the analysis would be to determine whether there is a sufficient nexus between the off-campus speech and a disruption at school. If not, the inquiry would end. If there is a sufficient nexus based on the particular facts of a given case, then the court would proceed to apply the \textit{Tinker} analysis as to whether the speech actually caused the material and substantial disruption of school activities, or whether the school reasonably could forecast that it would do so. In the \textit{Layshock} appeal, the school district did not argue that there was a nexus between the student’s off-campus creation of a fake MySpace profile and a substantial disruption on campus, so that question was not before the court.\textsuperscript{124}

These alternative tests such as the “foreseeability” approach and the “nexus” approach have been criticized as leading to vague and unpredictable results.\textsuperscript{125} For example, under the foreseeability test, which evaluates whether it was foreseeable that the speech might come on campus and cause a disruption, it is hard to know in advance how or when an internet message

\textsuperscript{121} Wisniewski, 494 F.3d at 38-39.
\textsuperscript{122} See infra note 189 and accompanying text.
\textsuperscript{124} Layshock \textit{ex rel. Layshock}, 2011 WL 2305970, at *7.
\textsuperscript{125} Harriet A. Hader, Note, \textit{Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students’ Online Activity}, 50 B.C.L. REV. 1563, 1600-1601 (2009).
might be printed out or brought on to the campus (in some form) by someone other than the student-speaker. The problem with vague standards is that neither school officials nor students know exactly what the rules are. “Until there is a simple and unambiguous limit on school authority over the Internet, students’ online speech may be substantially chilled.”

The appellate courts would welcome clarification from the Supreme Court as to whether Tinker does extend off-campus. The better argument is that when the speech itself does not occur during a school-supervised activity, it is considered to be off-campus, and the school’s disciplinary arm should not reach it. Tinker should not be extended to cover the creation of off-campus social networking messages.

**B. Disciplining The Students Who Disrupt Even If Those Who Speak Are Off-Campus**

Limiting Tinker to on-campus speech does not strip school officials of their ability to maintain order and discipline if a problem is caused by internet speech. Speech that takes place outside the school environment (perhaps at a student’s home on a weekend) should be beyond the school’s disciplinary reach, but if a disruption results on campus, that disruption itself can be suppressed and those involved can properly be disciplined.

126 Hader, supra note 125, at 1600.
127 Hader, supra note 125, at 1600.
128 Judge Fisher in J.S. wrote: “But with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment.” J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., No. 08-4138, 2011 WL 2305973 at *30 (3d Cir. June 13, 2011) (Fisher, J., dissenting). The discussion implies that schools will be powerless to redress the wrongs caused by malicious social networking speech if the speech is characterized as off-campus. If the speech is protected, then it is true that the speaker cannot be punished by the school. Nonetheless, those whose actions create the in-class disruption can still be punished. Additionally, if the expression is made on-campus, the speaker could also be disciplined by school authorities. The question is whether social networking speech should be liberally considered as on-campus speech due to its pervasiveness. Such a generalization should be avoided because it would very likely sweep in protected speech.
The school is not left powerless even if its disciplinary arm cannot reach off-campus. If actions or reactions occur on campus and cause a substantial disruption of school activities, those actions are certainly subject to school rules and policies. The students responsible for the disruptive activity on campus can be disciplined on campus. For example, if several students congregate around a computer terminal and then laugh derisively when the teacher attempts to conduct class, that behavior can be disciplined (although it is still questionable whether that would rise to the level of a Tinker “material and substantial disruption”). The act of disrupting school can still be punished, even when the disruption is merely the reaction (perhaps to a fake internet profile) and not the root cause (the creation of the profile off-campus) of a disturbance. Disruption is the effect and not the cause. Even if the underlying cause is outside the school’s scope of authority, the disruptive effect on campus properly falls within the school’s regulatory purview.

In the concurring opinion in Layshock, Judge Jordan wrote:

We cannot sidestep the central tension between good order and expressive rights by leaning on property lines. With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student.

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129 See Layshock ex rel. Layshock v. Hermitage Sch. Dist., No. 07-4465, 2011 WL 2305970, at *10 (3d Cir. June 13, 2011) where the Third Circuit observed that schools can still respond to the substantial disruption that the student’s out of school conduct caused.

130 Brannon P. Denning and Molly C. Taylor, Morse v. Frederick and the Regulation of Student Cyberspeech, 35 HASTINGS CONST. L. Q. 835, 884 (2008). These commentators suggest that perhaps Justin Layshock was punished more for the parodies that he inspired others to create than for his own internet posting. In other words, he was disciplined in part for the effect (of his speech) and not the speech itself.

In a scenario similar to what Judge Jordan described, “standing one foot outside school property” might still be viewed as “on campus”, but if the speaker were truly outside the scope of a school-supervised activity, then the speech would probably be protected. The school is nonetheless authorized to address actual or reasonably foreseeable disruption of its activities. Students who cause trouble on campus by disrupting the school can, and should, be punished by school authorities. As for punishing the off-campus speaker, justice can be meted out by others such as angry peers, upset parents, or police. This article takes the position that in Judge Jordan’s hypothetical, only the on-campus disruption can be suppressed by the school, not the off-campus speech itself. 132

It is unwise to suggest that the “on campus” nature of the speech should be defined by the “effects” that it has on-campus. The “effect” is the result of the speech, but is not the speech itself. The school cannot suppress the message itself or discipline the speaker himself or herself unless that speech was made in a school-supervised setting. The reason is that the special interests that schools have in educating students on campus (and the authority that comes with it) do not exist when the same student’s speech occurs outside the supervisory purview of the educators – either in a public forum or in the privacy of a grandmother’s house. 133

C. Schools Cannot Be Expected to Solve All Problems

Even when off-campus problems affect a student’s ability to concentrate, study, learn, and succeed in school, schools cannot be expected to solve all problems. The Eighth Circuit

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132 See supra note 75 and accompanying text.
133 See, e.g., “Accordingly, because the School District concedes that Justin's profile did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.” Layshock ex rel. Layshock v. Hermitage Sch. Dist., No. 07-4465, 2011 WL 2305970, at *8 (3d Cir. June 13, 2011).
observed that “teachers and administrators in today’s world are expected to undertake greater responsibilities than what the one-room schoolhouse teacher shouldered. Educators serve as surrogate parents, psychologists, social workers, and security guards, above and beyond their normal teaching responsibilities.”

Students may come to school hungry and distracted, so the school feeds them while they are on-campus but is not constrained to send dinners or weekend meals to students’ homes. Students may come to school upset by family crises, and the school provides counselors but does not send marriage therapists into the homes. School teachers are obligated by law to report suspected child abuse, but they are not expected to intervene and handle the abusive home situation themselves. Problems of abuse, hunger, and dysfunctional family relationships are left to the professionals who are trained and dedicated to solving them.

The duty of policing students’ internet speech and disciplining the speakers has become a burdensome extension of their authority for many school districts. Maybe school districts would be willing to have their “disciplinary wings” clipped so that they are not expected to extend their reach into the bedrooms of their pupils. If the Supreme Court were to hold that Tinker does not apply to off-campus speech, a collective sigh of relief might be heard from school administrators. It is important to add, however, that there are other legal and ethical concerns, constraints, and approaches that would still factor into the school district’s handling of off-campus speech. The first amendment test announced in Tinker is of paramount importance but is not the only approach to resolving whether the school can or should regulate social networking speech.

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134 Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 635 (8th Cir. 2002).
135 The prospect of being granted qualified immunity for their actions, which would shield school administrators against civil damages claims, is not a source of relief. The subject of qualified immunity in school speech cases is outside the scope of this article, but a good discussion can be found in the recent opinion by the Second Circuit in Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).
The line has to be drawn – what is a reasonable expectation for a school’s role with regard to policing students’ speech? The special considerations that explain a school’s obligation to police its students’ speech and conduct (or perhaps it is an opportunity, not an obligation) – i.e. the school’s mission to provide a well-grounded, safe, civil learning environment -- are not present outside the school environment. How far into the community can the school’s regulatory arm reach?

PART V: THE OTHER ASPECT OF TINKER – SPEECH THAT IMPINGES ON THE RIGHTS OF OTHERS

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court referred or alluded to the right of other students to be let alone several times in the majority opinion as well as in Justice Black’s dissent. In this section of the article, the history of the “right to be let alone” will be briefly discussed, followed by each reference to it in *Tinker*. Since the Court’s holding was based on the lack of a substantial and material disruption of school activities, there was apparently no need to evaluate whether the students’ expressive act of wearing armbands impinged on the rights of others.

As early as 1928, the phrase “right to be let alone” appeared in Supreme Court jurisprudence. Justice Brandeis used the phrase in his dissent in *Olmstead v. United States*, which involved the issue of government tapping of private phone lines during the Prohibition

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137 A related question is whether there should have been a separate analysis of this prong, given that it appears to be written as a part of an “either/or” test.
era. Justice Brandeis’s comments were made in the context of a discussion regarding the right that private citizens have to be protected against the government.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.139

Over seventy years later, in a case involving a conflict between an abortion provider and pro-life counselors, the United States Supreme Court placed this right to be let alone “onto the scales opposite the right to free speech.”140 The Court noted that the expression ‘right to be let alone’ was first coined by Justice Brandeis in 1928, who identified it as a right conferred by the Constitution as against the government.141 *Olmstead* and *Hill* shed light on what courts mean when they use this phrase.

The Court in *Tinker* referred to the rights of other students to be let alone.142 In the first of these references, the Court stated “[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.”143 In the same part of the discussion, the Court again opined on the rights of other students:

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139 *Id.* (emphasis added).
141 *Id.*
143 *Tinker*, 393 U.S. at 508.
In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.\textsuperscript{144}

In the passage where these two references were made, the Supreme Court cited no cases. Other than the Court’s usage of the phrase coined by Justice Brandeis, there seems to be very little indication as to what the source or scope of this right might be. Because the Court’s phrasing was similar to that of Justice Brandeis, it may be that the Court’s understanding of the source of this right is also similar to the \textit{Olmstead} view that the Constitution is the source of the right not to be bothered by others. The next reference in \textit{Tinker} to other students’ rights was supported by two cases. In a much-quoted passage of the opinion, the Court stated that a student may express his opinions “if he does so without ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school’ and \textit{without colliding with the rights of others}.”\textsuperscript{145} Continuing, the Court stated that “conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder \textit{or invasion of the rights of others} is, of course, not immunized by the constitutional guarantee of freedom of speech.”\textsuperscript{146}

The \textit{Burnside v. Byars} case, cited in \textit{Tinker} by the Supreme Court, involved students who were advocating the abolition of racial segregation in Mississippi by wearing ‘freedom buttons’ at school.\textsuperscript{147} The case dealt with the issue of student interference with the discipline and

\textsuperscript{144} \textit{Tinker}, 393 U.S. at 509.  
\textsuperscript{145} \textit{Tinker}, 393 U.S. at 512-13 (quoting \textit{Burnside v. Byars}, 363 F.2d 744, 749 (5th Cir. 1966) (emphasis added).  
\textsuperscript{146} \textit{Tinker}, 393 U.S. at 512-13 (referring to \textit{Blackwell v. Issaquena County Board of Education}, 363 F.2d 749 (5th Cir. 1966) (emphasis added).  
\textsuperscript{147} \textit{Burnside v. Byars}, 363 F.2d 744, 749 (5th Cir. 1966).
operation of a school, but did not make any detailed references to the issue of one student’s free speech colliding with another student’s right to be left alone. Therefore, since this section of the article seeks to describe the source of this right, Burnside sheds little light.

By contrast, the second case cited by Tinker in the excerpt above dealt precisely with the issue of other students’ rights. In Blackwell v. Issaquena County Board of Education, which was factually identical to Burnside except that the students wearing the buttons and promoting the end of segregation were much more disruptive, the Fifth Circuit held that there was a “collision with the rights of others”. This excerpt from Blackwell is a good example of a court’s recognition of when the line is crossed and the free speech argument fails to immunize students who are bullying other students.

Approximately 150 pupils came to school wearing the buttons . . . and accosted other students by pinning the buttons on them even though they did not ask for one. One of the students tried to put a button on a younger child who began crying. This activity created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline . . . [and] several students conducted themselves discourteously and displayed an attitude of hostility.

There was an unusual degree of commotion, boisterous conduct, *a collision with the rights of others*, an undermining of authority, and a lack of order, discipline and decorum.

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148 Id.
149 Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966).
150 Id. at 754.
151 Id. at 751-52, 754 (emphasis added); see also W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943). West Virginia State Board of Education, a case cited in Blackwell, involved students who refused to participate in the Pledge of Allegiance to the American Flag because of a strict religious belief against idolatry. The Supreme Court stated that Blackwell and West Virginia Board of Education bring into focus the scope, more so than the source, of a student’s right to be let alone. However, these cases may be said to be easy ones, in that the fact patterns which gave rise to these two suits seem to lie on opposite ends of the spectrum. In Blackwell, students were being physically accosted by other students who attempted to use ‘freedom of speech’ as a shield for their inappropriate conduct. In West Virginia Board of Education, students were simply refusing to place their hands over their hearts during the morning Pledge of Allegiance in the classroom. The more difficult cases may lie between the two.
In referring to a collision with the rights of others, the *Blackwell* court did not clarify which rights those might be, so the question is left open. Is it the right to be left alone? Is it the right to be educated in a safe environment? Is it both? Returning to the *Tinker* opinion, one sees that Justice Black’s dissent seems to connect a student’s right to be left in peace to a student’s right to education.\(^{152}\) Justice Black’s position was that the right infringed upon in *Tinker* was the right not to be distracted from pursuing an education.\(^{153}\)

In the three school speech cases that followed *Tinker*, the Supreme Court did not rely on the “impinges on the rights of others” analysis. Moreover, very few other courts have analyzed the “impinges on others’ rights” aspect of *Tinker* even though most have quoted it as part of the *Tinker* test.\(^{154}\) Additionally, Professor Emily Gold Waldman has noted that “no court analyzing

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\(^{153}\) *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. at 523-25 (Black, J., dissenting). Justice Black wrote:

> “Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.”

> “Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get.”

\(^{154}\) See, e.g., *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (Defendants may only punish Plaintiff for his speech on the website if that speech "substantially interfere[d] with the work of the school or impinge[ d] upon the rights of other students”); *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446, 453 (W.D. Pa. 2001) (student speech that does fall under *Hazelwood* or *Fraser* may be regulated only if it would substantially disrupt school
a student’s hostile speech about school officials has relied on Tinker’s ‘invasion of rights’ prong.”\textsuperscript{155} She correctly states that Tinker itself is ambiguous as to whether this prong applies to the rights of all members of the school community, or solely the rights of students.\textsuperscript{156}

One of the only courts to analyze this prong significantly was the Ninth Circuit in Harper v. Poway Unified School District.\textsuperscript{157} Harper, which involved the issue of harassment of gay students in California schools, touched on both the scope and source of the right to be left alone and indicated that the source of a gay student’s right to be free from harassment is derived from the California Educational Code, the California Constitution, and the United States Constitution.\textsuperscript{158} Although the Ninth Circuit’s decision was vacated by the Supreme Court and lacks precedential value, the analysis still sheds light on the meaning of the phrase “impinging on the rights of others”. A student, Harper, wore a t-shirt to school that read, “Be ashamed, our school embraced what God has condemned” and “Homosexuality is shameful ‘Romans 1:27’.”\textsuperscript{159} He was not suspended, but was isolated in a study hall for the remainder of the day.

\textsuperscript{155} Waldman, supra note 23, at 599 n.52.
\textsuperscript{156} Waldman, supra note 23, at 599 n.52.
\textsuperscript{158} Harper’s holding in regard to the source of a student’s right to be left alone is in the context of sexual orientation-based harassment and equal educational opportunity protected by California Statute, California Constitution and the United States Constitution. Harper, 445 F.3d at 1179; Cal. Educ. Code § 201(a)-(d). The dissent in Harper speculated as to whether the California Statute may be contrary to the First Amendment. Harper, 445 F.3d at 1179. The statutory provisions were enacted out of recognition on part of the state legislature of an ‘urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California public schools.’ Id.
\textsuperscript{159} Harper, 445 F.3d at 1171.
and subsequently brought suit against the school system for violation of his free speech rights. The court rejected Harper’s argument that “Tinker’s reference to the ‘rights of other students’ should be construed narrowly to involve only circumstances in which a student's right to be free from direct physical confrontation is infringed.”160 In making that argument, Harper relied on the Blackwell case161 cited in Tinker, and contended that “because the speakers in Blackwell ‘accosted other students by pinning the buttons on them even though they did not ask for one,’ a student must be physically accosted in order to have his rights infringed.”162

The Ninth Circuit looked at opinions from other circuit courts of appeal and disagreed with Harper’s argument.163 The court referenced the Tenth Circuit’s holding in West v. Derby Unified School District that displaying the Confederate flag might “interfere with the rights of other students to be secure and let alone” even though there was no physical attack and no students were hit by the flag.164 The Ninth Circuit held that Harper’s act of wearing a shirt bearing an anti-homosexual message impinged on the rights of the other students at school. The court stated, “[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”165 Referring to Tinker, the court stated that “being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.”166

160 Id. at 1177.
161 Blackwell v. Issaquena County Bd. of Ed., 363 F.2d 749, 751 (5th Cir.1966).
163 Harper, 445 F.3d at 1178.
164 West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000).
165 Harper, 445 F.3d at 1178.
166 Harper, 445 F.3d at 1178-79.
The Third Circuit very recently addressed this line of analysis in *J.S. ex rel Snyder.*\(^{167}\) The Blue Mountain School District had argued that that J.S.’s speech (the fake profile) infringed on the rights of another – the school principal, Mr. McGonigle.\(^{168}\) *Tinker* did not specify whether the phrase “rights of another” referred only to other students or whether the school administrators and teachers might also be included. The School District made the somewhat novel argument that J.S.’s MySpace profile defamed the principal and therefore impinged on his right to be free from defamation.\(^{169}\) The Third Circuit rejected this argument, stating that “[t]he School District seizes upon language in *Tinker* that is arguably dicta,” and concluded that because the profile was so obviously false, then as a matter of law “McGonigle could not succeed in his claim that the profile violated his right to be free from defamation.”\(^{170}\) There was no discussion as to whether the right to be free from defamation was the legal equivalent of the right to be let alone. The court did, however, opine that the relevant passage in *Tinker* should not be construed too broadly: “[I]f that portion of *Tinker* is broadly construed, an assertion of virtually any ‘rights’ could transcend and eviscerate the protections of the First Amendment.”\(^{171}\)

The invasion of rights theory has not been embraced by many courts, even in the “on-campus” speech cases. Although the language comes from *Tinker,* it has been

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characterized by at least one court as “arguably dicta”. Therefore, it is not likely to emerge as the governing standard on questions involving a school district’s attempts to regulate off-campus speech.

PART V: THE SPECIAL PROBLEM POSED BY CYBERBULLYING

Traditionally, schools have punished the playground bully and have established rules and policies for addressing bullying behavior that occurs at school. Electronic bullying is a new version of an age-old form of misbehaving, and arguably the school should punish the cyberbullier at school.

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174 Cyberbullying has been defined as “deliberate and repeated aggressive behaviors by an individual or group of individuals intended to humiliate, harm, and control another individual or group of individuals of lesser power or social status” involving “the intentional and repeated harm of others through the use of computers, cell phones, and other electronic devices.” Warren J. Blumenfeld & R.M. Cooper, LGBT and Allied Youth Responses to Cyberbullying: Policy Implications, INTERNATIONAL JOURNAL OF CRITICAL PEDAGOGY 114, 118-19 (2010). Almost every state has enacted a cyberbullying statute. For the most recent updates on state legislation, see the report of the Cyberbullying Research Center posted at www.cyberbullying.us. Massachusetts’s bullying statute, for example, defines cyberbullying: “Cyber-bullying, bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author or posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting
Cyberbullying presents a special challenge since the harassing messages can be all-pervasive and can haunt the victim 24 hours a day instead of reaching him only at school.\textsuperscript{175} Previously, a bullied student could find a safe haven at home or elsewhere off-campus during non-school hours, but that is no longer the case with cyberbullying reaching the victim by phone, texting, email, Facebook, youtube, and other social media no matter where he goes.\textsuperscript{176} In addition, unlike face-to-face bullying or actual verbal threats, internet communication is harder to characterize because of “the absence of contextual clues” that would be present in live interactions.\textsuperscript{177}

Recent school violence and the much-publicized suicides resulting from internet bullying have also drawn national attention to the problem.\textsuperscript{178} School officials are searching for ways to

\textsuperscript{175}Ted Maines, My Word: Bullying Must Stop Now, ORLANDO SENTINEL, March 13, 2011, at A20, stating “No longer confined to the schoolyard and hallways, bullying has gone 24/7 with unwanted teasing that takes place through social-networking websites and text messaging. For kids who are the targets of bullies, there’s simply no escape.”

\textsuperscript{176}Warren J. Blumenfeld & R.M. Cooper, LGBT and Allied Youth Responses to Cyberbullying: Policy Implications, 3 INTERNATIONAL JOURNAL OF CRITICAL PEDAGOGY 114, 119 (2010) (citing youth Internet Safety Surveys from 2000 and 2006 to show significantly increased rates of online bullying and online victimization).

\textsuperscript{177}See Brannon P. Denning and Molly C. Taylor, Morse v. Frederick and the Regulation of Student Cyberspeech, 35 HASTINGS CONST. L. Q. 835, 886 (2008) (“A different standard may be particularly appropriate for cyberspeech cases. The absence of contextual clues present in face-to-face speech and the anonymity of online speech can make it difficult to discern the speaker’s intent, and difficult to impute irony, humor, or lack of seriousness to the speaker.”)

make their campuses safer and to punish cyberbullying that affects their students. The U.S. Department of Education issued a “Dear Colleague” letter on October 26, 2010, reminding public school administrators of their obligation to address harassment and cyberbullying. The letter, which was sent by Secretary of Education Russlynn Ali to all public schools in the United States, indicated that a “school is responsible for addressing harassment incidents about which it knows or reasonably should have known.” The primary point was to alert school officials that some misconduct -- in addition to violating a school’s anti-bullying policy -- might also violate federal antidiscrimination laws, and the school must take into account whether the student’s harassing behavior also violates such federal laws. The letter directed the schools’ attention to harassment that is “sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.” (emphasis added). Thus, the directive was aimed at bullying behavior that affected students’ participation in school activities and referred specifically to steps that should be taken at school with regard to “the larger school community”. In language echoing Tinker, the letter mentioned “harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public

180 The letter was issued by Secretary of Education Russlynn Ali on October 26, 2010. http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague - 201010.html; see also Funding May Be at Risk Over School Bullying, ORLANDO SENTINEL, Oct. 27, 2010.
181 Id. at 2.
areas.” The Department of Education did not address conduct that might occur outside the school or off-campus. Limiting its scope to misconduct in the school environment, the letter emphasized the school’s protective role and its duty to educate students at school, stating that anti-bullying policies already indicate that schools appreciate their “important responsibility to maintain a safe learning environment for all students”.

In addition to the role that schools will play, there are other means of addressing the very real problems caused by hostile internet speech and cyberbullying. Researchers have suggested remedies that include self-monitoring, outside monitoring (parents or supervisors who check for abuse of technology), more reporting of cyberbullying incidents, enacting and enforcing laws and policies, peer leadership, and educating youth about the effects of cyberbullying. Another commentator, stating that traditional bullying statutes have not been effective in preventing bullying, suggested alternatives to cyberbullying legislation. Those alternatives include parental influence and awareness, parental-control software and online “security” controls, criminal penalties, tort liability, and changes in congressional legislation. There are websites that offer resources on how to combat bullying, such as those sponsored by the U.S. Department of Health & Human Services, Pacer’s National Center for Bullying Protection, the Gay, Lesbian and Straight Education Network, and the It Gets Better Project. Perhaps, too, some instances of

184 Id.
185 Id.
186 Id. at 1. See supra notes 23-25 and accompanying text.
cyberbullying can be characterized as unprotected speech (true threats, fighting words) and regulated without violating free speech rights. The question would still remain as to whether the public schools should be providing the disciplinary arm or whether it should fall to some other authority.

A. Speech Not Protected by the First Amendment: Cyberbullying as a “True Threat”?

If the cyberbullying meets the definition of a true threat, then it is unprotected speech and can be probably suppressed – regardless of whether it was on-campus or off-campus -- without offending the first amendment. The Supreme Court has defined “true threats” as “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”. 190 The Court added that “the speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’ 191 Addressing whether a Virginia cross burning statute was unconstitutional, the Supreme Court also elaborated: “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” 192

192 In Virginia v. Black, 538 U.S. 343, 360 (2003), the Court addressed the constitutionality of a Virginia cross burning statute.
Some instances of cyberbullying could satisfy the definition of “true threat”. Some hostile statements are intentionally posted to intimidate the targeted recipient. Ominous messages such as “I am going to hide under your bed with a knife and murder you” could meet the “true threat” definition. Since the speech would be unprotected speech in examples such as that one, the speaker’s first amendment rights would not be violated if he or she is disciplined for such threats. Whether the disciplinary arm should be that of the school, however, is still an important consideration. Unless the cyberspeech is “school speech”, there is no sufficient justification for the school to intervene.

Additionally, some forms of cyberbullying would not meet the definition of “true threat”. For example, when a student posted a web page request for donations to help pay for a hit man to kill his algebra teacher, it was held to be not a true threat because the website did not reflect a serious intent to inflict harm. The Pennsylvania Supreme Court stated in that case that although the website was “crude, highly offensive and perhaps misguided”, it was not a true threat. Other types of cruel and hurtful messages also fail to show a serious intent to inflict harm and are not true threats, e.g., students have posted comments on Facebook and sent

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193 See Doe v. Pulaski Cnty. Special Sch. Dist., 606 F.3d 616 (8th Cir. 2002)(reh’g en banc) where a student wrote such a threat in a letter. He styled his letter after a rap song and said that he would rape, sodomize, and murder his ex-girlfriend. Although there were factual questions as to whether the student intended to issue the threat and whether it was meant seriously, the Eighth Circuit, sitting en banc, concluded that it was a true threat. The court held that the student had “knowingly or intentionally communicated the statement” and that a reasonable recipient would have perceived it as a threat. Id. at 624-25. Although this section of this Article addresses cyberbullying and not threats made in a handwritten letter, the hostile and ominous language is illustrative of a true threat made by one student toward another student. The student’s first amendment rights were not violated by the school’s disciplinary actions. Id.


messages such as, “You are so fat and ugly, no boy will ever want you,” or “Why don’t you just kill yourself, you worthless lesbian?”197 These messages do not indicate that the speaker intends to attack or subject the target to bodily harm. They do not communicate an actionable threat. Nonetheless, through such cruel messages, harassers have targeted victims who have suffered in a variety of ways, including some who have committed suicide.198 Such hateful comments are not, however, true threats. Therefore, the narrow “true threat” approach to speech regulation will not provide a solution to much of the most pernicious cyberbullying.

B. Speech Not Protected by the First Amendment: Cyberbullying as “Fighting Words”?

Even if a student’s internet speech cannot be characterized as a “true threat”, it may be unprotected by the First Amendment if it falls into another narrow category of speech that can be regulated in certain circumstances. The Supreme Court has stated, “Certain well-defined and narrowly limited classes of speech” – among them “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words’” – may be prohibited by the government.199

“Fighting words” are those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”200 Citing Cohen v. California,201 the Court also described fighting words as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent

198 Bullying: A Special Report, PEOPLE MAGAZINE, October 18, 2010, at 56.
reaction.” The rationale is that the government is permitted to regulate speech that falls within these categories because the speech is “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” The Court narrowed this position in R.A.V., stating that “these areas of speech can be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the constitution.” As for the category of “fighting words”, i.e. words whose mere utterance entails a call to violence, the Court stated: “It is not true that fighting words have at most a ‘de minimis’ expressive content . . . or that their content is in all respects ‘worthless and undeserving of constitutional protection,’ . . . We have not said that they constitute ‘no part of the expression of ideas,’ but only that they constitute ‘no essential part of any exposition of ideas.’” Being careful to steer away from content discrimination, the Court emphasized that the government cannot regulate use of certain words based on hostility towards the underlying message expressed. It is the “noncontent” aspect of fighting words that can be proscribed or regulated. The Court clarified this “noncontent” aspect, stating:

In other words, the exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication. Fighting words are thus analogous to a noisy sound truck . . .

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204 R.A.V., 505 U.S. at 383 (emphasis in the original).
205 R.A.V., 505 U.S. at 384-85 (emphasis in original; citations omitted).
206 Content regulation could be explored in more depth, but is outside the scope of this article.
207 R.A.V., 505 U.S. at 386.
208 R.A.V., 505 U.S. at 386.
Given the narrow definition of “fighting words”, it may be very difficult to argue successfully that an instance of cyberbullying amounts to fighting words and can, therefore, be proscribed because it is outside the scope of first amendment protection. The determination will turn on the particular facts and the exact nature of the communication.

C. Will the Tinker Test Be Applied Effectively to Cyberbullying?

Based on this article’s premise that Tinker should only apply to school speech (to be defined as speech that occurs during school-supervised activities or “on-campus” in a loose sense), the particular facts of each case would determine whether the cyberspeech would be treated as “on-campus”. Considerations might be whether it was created using the school’s server or network, whether the speaker was sitting on campus at the time, whether the school allowed access to Facebook and other social networking sites on its campus, whether those sites were visited by students during school hours, whether the school had an applicable cell phone use policy, and so forth.

Assuming for purposes of argument that some cyberbullying would be characterized as on-campus speech, the Tinker test would pertain. The problem with applying the material and substantial disruption test from Tinker to cyberbullying is that the victim or target of the hateful speech is usually one individual. While that single individual’s life may be substantially disrupted, even destroyed, it is hard to imagine a situation where the cyberbullying of that one victim causes a material and substantial disruption of school activities. This analytical pitfall was also identified by Taylor and Denning in their article on cyberbullying: “[W]e think courts
should take care when considering whether speech directed at a single student or teacher could be ‘disruptive’ enough to warrant discipline by the schools”. 209

The little used prong of Tinker, that of impinging on the rights of others, may be more readily applied to cyberbullying than the more common “material and substantial disruption” aspect of Tinker. 210 That approach was suggested by one commentator, 211 but the more realistic assessment is that this line of argument is disfavored by the courts, and unless the Supreme Court embraces it again, it is not likely to be a winning argument. One of the only federal cases where the court relied on the “invasion of rights” approach was vacated by the Supreme Court, depriving it of precedential value. 212 Referring to the Ninth Circuit’s vacated Harper opinion, commentators stated:

[S]ome courts will be tempted by the enigmatic rights-of-other-students language from Tinker. Not only should the Supreme Court’s decision to vacate Harper give courts pause, there are serious difficulties with using that test to regulate student speech. Specifically, what are the ‘rights’ of public school students vis-à-vis the expressive activities of their classmates? A right not to be gossiped about? Criticized? Ridiculed? Federal law does obligate school (sic) to protect against certain types of harassment, but to convert that ambiguous language from Tinker into an anti-bullying exception stretches that language too far, and would offer administrators justification to punish student speech at least as broad as the ‘educational mission’ argument rejected in Morse. 213

Public outrage has increased in the past few years as highly publicized, tragic cases of cyberbullying and suicide have made the news. One such case occurred at Rutgers University in 2010 when a college student broadcast a livestream (using iChat) showing his roommate’s sexual encounter with another man in the college dormitory room. The humiliated roommate committed suicide after learning of the broadcast. The student who set up the livestream was arrested and charged with various criminal offenses such as invasion of privacy and tampering with evidence, but was not charged in connection with the death. (Commentators have noted that prosecutors in such cases would have a problem of proving causation, that is, that the broadcast itself was the cause of the suicide rather than the victim’s possible psychological problems or other issues). If the university were to punish the student for the on-campus speech that humiliated another student, then under Tinker, the school would have to show that

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214 iChat is like Skype in that it has video chatting capabilities, but it is more similar to AIM (AOL Instant Messenger). AIM and iChat are both instant messaging programs that have the capacity to add video chatting, but they do not work like an online phone as Skype does.

215 Tyler Clementi, Victim of Secret Dorm Sex Tape at Rutgers University, Commits Suicide, http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716 (lasted visited July 29, 2011). The news article explained that Dharun Ravi was the student's roommate. Ravi and another student, Molly Wei, were charged with two counts each of invasion of privacy according to this ABC News article which attributes the information to a written statement by New Jersey’s Middlesex County Prosecutor Bruce Kaplan. The following is a tweet from Ravi on September 19 (the date the encounter and livesteam occurred): "Roommate asked for the room till midnight. I went into molly's room and turned on my webcam. I saw him making out with a dude. Yay." On September 21, Ravi posted the following: "Anyone with iChat, I dare you to video chat me between the hours of 9:30 and 12. Yes it's happening again." See also Lisa W. Foderaro, Private Moment Made Public, Then a Fatal Jump, N.Y. TIMES, Sept. 29, 2010, http://www.nytimes.com/2010/09/30/nyregion/30suicide.html; Winnie Hu, Legal Debate Swirls Over Charges in a Student's Suicide, N.Y. TIMES, Oct. 1, 2010, http://www.nytimes.com/2010/10/02/nyregion/02suicide.html.


the livestream (or other broadcast) caused a material and substantial disruption of school activities, or a reasonable forecast of such disruption, or the speech must have impinged on the rights of another. Common sense would indicate that the roommate’s right to privacy in his dormitory room was impinged upon by the secret broadcast of his sexual activity. In the absence of relevant precedent applying this aspect of the *Tinker* case, however, a school might reasonably decide to pursue a more clearly established means of redressing the situation, and as Rutgers did in this case, refer the matter to the police.\(^{218}\)

**PART VI: CONCLUSION**

The question as to whether *Tinker* applies to off-campus speech (and the closely related question as to whether internet speech is “off campus”) should be examined thoughtfully. The appropriate answer, this article contends, is that *Tinker* applies only to school-supervised speech and should not be extended. When the reason for the rule ceases to exist, the rule too should cease to exist. Off-campus, the school has no responsibility to protect its students, inculcate good morals, or control the quality of their learning experiences. Similarly, off-campus, the school should have no responsibility to police students’ speech. The determination, however, should not be purely based on property lines or geographic reference points. The Supreme Court has already made it clear in *Morse* that when the activity was school-approved, attended by students, and supervised by school administrators and teachers, a student’s speech could be regulated there even though he was literally standing off-campus and not inside the schoolhouse gate.

\(^{218}\) See *supra* note 217.
The special considerations that justify and support the school’s regulatory arm – to protect students from danger, vulgarity, and harms such as drug use; to educate young people in a secure environment; to foster a dialogue involving many ideas; to offer a quality education based on a sound curriculum; to ensure the quality and appropriateness of school-sponsored speech; and to inculcate moral and civil values – simply do not exist outside the school’s domain. Therefore, the school’s authority to regulate what occurs off-campus and outside the scope of its supervision (including student speech) does not exist.