Freedom of Speech in the Technological Age: Are Schools Regulating Social Media?

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I. INTRODUCTION

The internet, perhaps once viewed as the newest fad in technology, has left its mark on history by revolutionizing nearly every aspect of our lives. Indeed, a world without cyberspace would be catastrophic to the global economy, educational institutions, and our personal lives. The internet is unquestionably a valuable tool, having the ability to influence our society considerably; however, with great power comes great responsibility. Unfortunately, when internet-related issues arise, technology often wins the race to the finish line—leaving the law in a far distant second; the result is often arbitrary and inconsistent pigeonholing of technology-related issues in laws not designed nor contemplated for such matters. And none is more demonstrative then recent student-speech, social networking cases—which are exacerbating the clash between freedom of speech and school regulation.

Internet use in general is most prolific among students, with 95 percent of older teens going online[1]—and 63 percent doing so daily.[2] Moreover, nearly 70 percent of teens have a computer,[3] while cell phone ownership has become commonplace—with 75 percent of teens having one.[4] High internet usage among students is not uncommon or surprising, considering "[y]oung people are beginning to use the Internet with a greater frequency and at a younger age."[5] Recent studies also indicate that teenagers remain avid users of social networking websites, with 73 percent of internet using teens utilizing social media sites[6] and 37 percent sending private messages to friends.[7] Internet access through an abundance of mediums means that

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[1] Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, PEW INTERNET & AMERICAN LIFE PROJECT, 5 (Feb. 3, 2010), http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx.

[2] *Id.* at 7.

[3] *Id.* at 10.

[4] *Id.* at 4.

[5] Allison E. Hayes, Note, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247 (2010).

[6] Lenhart et al., *supra* note 1, at 17.

[7] *Id.* at 20.

comments that were private and off campus may not necessarily stay private and off campus[8]—creating a situation where schools need to balance their regulatory procedures against students' freedom of speech. This area, which is difficult to begin with, is now becoming more complicated by matters such as cyberbullying.[9]

Cyberbullying has become anything but antiquated, with a 2011 report showing that 88 percent of teens using social media have witnessed people being "cruel" on social networking sites—with 12 percent viewing cruel behavior "frequently."[10] Moreover, 15 percent of teens reported being harassed online within the past year,[11] and one out of every four teens have gotten in a "face-to-face argument or confrontation" as a result of a comment posted online.[12] Bullying on the playground is by no means a novel issue, but the alarming increase of serious occurrences is unquestionably correlated to the ease and detachment in which internet postings are made; indeed, of the teens witnessing cyberbullying, over two-thirds reported seeing others "joining in the harassment," and over 20 percent admitted to joining in themselves.[13] It is all fun and games until someone gets hurt; unfortunately, it has taken suicide to begin to shed light on the seriousness that internet speech and bullying create.[14] While anti-bullying initiatives have been a work in progress for many years (and are often proposed after catastrophes occurring on school grounds),[15] recent studies indicate that legislation has failed to curtail cyberbullying.

Part II of this Note states the pertinent parts of the First Amendment, which is a significant right that should only be succumbed or impeded by a

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[8] Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 619 (2011) ("In the pre-Internet age, courts were more easily able to rely on the geographic on-campus/off-campus division when analyzing schools' authority over off-campus speech.").

[9] Cyberbullying can be defined as "'the use of the Internet or other digital communication devices to insult or threaten someone.'" Bethan Noonan, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. CONTEMP. HEALTH L. & POL'Y 330, 333 (2011).

[10] Amanda Lenhart et al., *Teens, Kindness and Cruelty on Social Network Sites*, PEW INTERNET & AMERICAN LIFE PROJECT, 3 (Nov. 9, 2011), http://pewinternet.org/Reports/2011/Teens-and-social-media.aspx.

[11] *Id.*

[12] *Id.* at 4.

[13] *Id.* at 6.

[14] *See, e.g.,* Traci Tamura, *Guilty Verdicts in Case of MySpace User's Suicide*, CNN (Nov. 26, 2008), http://articles.cnn.com/2008-11-26/justice/internet.suicide_1_megan-meier-tina-meier-lori-drew?_s=PM:CRIME (describing a case of a 13 year old girl who committed suicide after being bullied online). *See also* Miranda Leitsinger, *$4.2 Million Settlement for Student Paralyzed by Bully*, U.S. NEWS (Apr. 19, 2012), http://usnews.msnbc.msn.com/_news/2012/04/19/11289813-42-million-settlement-for-student-paralyzed-by-bully?lite (finding that a 12 year old teenager was punched by a bully and paralyzed, despite reaching out to a school guidance counselor for help).

[15] *See, e.g,* David Crary, *Columbine School Shooting Spawned Effective Anti-Bullying Programs: Study*, HUFFINGTON POST (Mar. 3, 2010, 5:21 PM), http://www.huffingtonpost.com/2010/03/03/columbine-school-shooting_n_484700.html.

compelling government interest. Part III is a discussion of Supreme Court decisions concerning student speech, and a general introduction as to why those holdings have created inconsistencies by courts trying to interpret them. Part IV outlines a circuit split between the Second and Third Circuits, with precedent from the Second Circuit affording school districts more leeway in regulating "off-campus" speech; whereas the Third Circuit has adopted a more liberal approach, hesitant to extend a school district's jurisdiction in sanctioning student speech which did not occur on campus or materially interfered with pedagogical issues. Part V discusses public policy considerations as to why the Second Circuit has appeared to have adopted a more workable standard moving forward. Part VI is an in-depth discussion of a dissenting opinion in the Third Circuit, which has reasoning akin to that of the Second Circuit—and what I believe will eventually become the unambiguous standard (when inevitably revisited by the Supreme Court) applied across the nation. Finally, Part VII is a summary of where the law currently stands, and the considerations that will need to be evaluated when enacting legislation or otherwise creating new precedent in the future.

II. A NATURAL STARTING POINT: THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[16] Indeed, the most commonly litigated First Amendment issues are those relating to student speech.[17] One reason for the high number of student speech inquiries is because the Supreme Court has reached inconsistent results in the few cases it has decided, creating a lack of direction for lower courts to follow when trying to resolve similar issues.[18] The full array of First Amendment cases and their limitations have been interpreted and deciphered since the Amendment's introduction, and are beyond the scope of this Note.[19] While student speech issues may be among the most litigated First Amendment cases, the scope of conduct that schools are seeking to regulate is not new or extraneous, but merely an extension of the range of authority that is otherwise already permitted.[20]

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[16] U.S. CONST. amend. I.

[17] Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011).

[18] *Id.*

[19] This Note focuses solely on First Amendment implications of student speech and the overlap between school authority to sanction students for misconduct and freedom of speech protections.

[20] *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–21 (3d Cir. 2011) (holding that a student who created a fake MySpace profile of her principal and accused him of "fucking in [his] office, [and] hitting on students and their parents," as well as being a "sex addict [and] fagass," was punishable if the conduct occurred on campus—but not off-campus). For an argument of why this distinction is arbitrary and self-serving see *infra* Part IV.

III. SPARSE DECISIONS FROM THE HIGHEST COURT IN THE LAND

The Supreme Court has attempted to scrutinize freedom of speech in schools primarily through four cases, dating back as early as the 1960s.[21] As will become evident, the standard of protection that the First Amendment provides to school children remains relatively uncertain today.

A. Initiating Student Speech Regulation: The Tinker *Material and Substantial Standard*

Against the backdrop of the First Amendment, the Supreme Court, in 1969, laid the foundation for future student speech cases in *Tinker v. Des Moines Independent Community School District*.[22] In *Tinker*, several students were suspended after refusing to remove black armbands which were being worn in protest of the Vietnam War.[23] The Court held that the school could not prohibit students from wearing armbands—or punish them for refusing to comply—unless wearing them "'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.'"[24] Moreover, the Court held that an "undifferentiated fear or apprehension of disturbance" would not be sufficient to warrant an intrusion upon students' rights to freedom of expression.[25]

While the Court in *Tinker* believed the armbands would not materially and substantially interfere or impinge upon the work of the school, or the rights of other students,[26] the Court did acknowledge that a student could be sanctioned by the school for out of class misconduct:

> [C]onduct 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 the rights of others is, of course, not immunized by the constitutional guarantee of

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[21] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that there needed to be a material and substantial disruption in the school environment before a school could regulate student conduct); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that school districts need to balance the right of freedom of speech with compelling social interests); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that school districts can regulate student speech when reasonably related to a pedagogical concern); Morse v. Frederick, 551 U.S. 393 (2007) (holding that the deterrence of illegal drug use was a compelling government interest, and thus capable of regulation by school districts).

[22] 393 U.S. 503 (1969).

[23] *Id.* at 504.

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

[25] *Id.* at 508.

[26] *Id.* at 509.

freedom of speech.[27]

The *Tinker* test of material and substantial interference has become the starting place for virtually every student speech case.[28]

B. *The Court's First Exception:* Bethel's *Private Freedom and Societal Interests Balancing Test*

Nearly fifteen years later, the Court decided its second student speech case: *Bethel School District v. Fraser*.[29] In *Fraser*, a high school student was giving a speech (primarily to fourteen year olds) nominating a fellow student for a position in the student government at a school-sponsored assembly.[30] Throughout the entire speech, the student used an elaborate and graphic sexual metaphor, after being warned by several teachers not to give the speech because it was "inappropriate" and would likely result in "severe consequences."[31] At least one teacher claimed it was necessary to forego a portion of scheduled class to discuss the speech; as a result, the school suspended the student for three days and prevented him from being able to speak at graduation.[32] The Court upheld the school's sanction, finding that the "freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior"; the Court further stated that "[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."[33]

Consistent with *Tinker*,[34] *Fraser* reaffirmed the notion that "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[35] Indeed, the determination of what types of speech in a classroom or at a school event are considered appropriate rests with the school district.[36] Furthermore, "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must

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[27] *Id.* at 513. To be sanctioned, the misconduct must "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 514.

[28] Hayes, *supra* note 5, at 252.

[29] 478 U.S. 675 (1986).

[30] *Id.* at 677.

[31] *Id.* at 677–78.

[32] *Id.* at 678.

[33] *Id.* at 681.

[34] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[35] 478 U.S. at 682.

[36] *Id.* at 683.

teach by example the shared values of a civilized social order."[37] Since schools are encouraged and often tasked to teach ethics in addition to the traditional reading, writing, and arithmetic, it makes sense that schools be afforded discretion to sanction students—especially considering that school administrators are usually in a better position than federal courts to make those decisions.[38] Moreover, "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[39]

C. *A Second Exception:* Hazelwood's *Regulation of an Integral Part of a School's Educational Function*

The Court created another exception to the *Tinker* standard two years later in *Hazelwood School District v. Kuhlmeier*.[40] In *Hazelwood*, a principal removed two articles from a student-run newspaper, finding that one story concerning student pregnancy at the school would be degrading to current pregnant students, as well as the references to sexual activity and birth control being inappropriate to younger students; another article was removed because it appeared to target certain students whose parents were getting a divorce, out of a concern that information was being released without consent.[41] The Court found that "school officials were entitled to regulate the contents of [the school newspaper] in any reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case."[42]

Hazelwood recognized that since the student newspaper was part of the school curriculum, the school needed to have more discretion than a paper that was not part of the curriculum or supported by school funds: "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[43] Certainly this is consistent with

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[37] *Id.* Historians have articulated that the role and purpose of the public school system is to "'prepare pupils for citizenship in the Republic . . . .It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Id.* at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[38] Since schools are closer to the situation, have firsthand knowledge and experience, and can more aptly determine a necessary or proper sanction, they would be more effective at preventing future misconduct.

[39] *Fraser*, 478 U.S. at 683. *See also* Waldman, *supra* note 8, at 634–35 ("In the past decade, the vast majority of states have passed anti-bullying laws, which generally take the form of requiring school districts to adopt anti-bullying policies . . . .[M]any of them have been recently amended to include cyber-bullying.").

[40] 484 U.S. 260 (1988).

[41] *Id.* at 263.

[42] *Id.* at 270 (internal citations omitted).

[43] *Id.* at 273.

Supreme Court precedent that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[44]

D. The Final Exception: Morse *Measures to Prevent Illegal Drug Use*

After a nearly twenty year hiatus, the Court decided its most recent student speech case in 2007: *Morse v. Frederick*.[45] In *Morse*, an Alaska school permitted students to leave class to attend an event where the Olympic torch would be carried through town (considered to be a school-sanctioned and school-supervised event).[46] During the event, one student refused to take down a large banner promoting illegal drug use after a request by the principal.[47] The student had unfurled a 14-foot banner which stated "BONG HiTS 4 JESUS," and was subsequently suspended for ten days for encouraging illegal drug use—a violation of school policy.[48] Relying on *Fraser*, the student's banner was considered "speech or action [intruding] upon the work of the school[]."[49]

Acknowledging *Tinker*[50] and reverting back to the material and substantial disruption in the school environment inquiry, the holding in *Morse* turned in part on the deterrence aspect of drug use by schoolchildren being an "important . . . [and] perhaps compelling government interest,"[51] noting that:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.[52]

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[44] *Id.*

[45] 551 U.S. 393 (2007).

[46] *Id.* at 397.

[47] *Id.* at 396.

[48] *Id.* at 397–98.

[49] *Id.* at 399 (internal quotation marks omitted).

[50] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

[51] *Morse*, 551 U.S. at 407 (internal quotation marks omitted).

[52] *Id.* (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661—62 (1995).

Moreover, Congress has expressly declared that a school has an obligation to educate students about drugs and their adverse consequences—and has provided billions of dollars to school districts for drug prevention programs.[53] Despite congressional intent and governmental interests, *Morse* was a 5-4 decision, "suggesting that the current state of the law is ambivalent at best."[54] Yet, even the dissent determined that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting."[55] As a result of inconsistent and indecisive precedent, the *Morse* decision was highly anticipated—interested parties hoped a clearer test would be established, as the framework of the holdings of *Tinker*, *Fraser*, and *Hazelwood* was unworkable at best.[56] The decision in *Morse*, however, limited itself to drug-related cases, which ultimately generated more questions than it did answers.[57]

IV. TRYING TO PUT A SQUARE PEG INTO A ROUND HOLE: WHY THE INTERNET MUDDIES THE WATER FOR STUDENT SPEECH CASES

After a brief summary and analysis of Supreme Court student speech precedent, it is not surprising to learn that circuit courts are split in interpreting and applying the rules from *Tinker*, *Fraser*, *Hazelwood*, and *Morse* to the internet. Indeed, flipping a coin to determine all forthcoming First Amendment cases interpreting student speech would produce less uncertainty than the current standard.[58] Yet, federal courts are charged with the task of putting together a puzzle from unworkable pieces. The recent clash between the Second and Third Circuits demonstrate the lack of

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[53] *Id.* at 408.

[54] Hayes, *supra* note 5, at 253–54.

[55] *Morse*, 551 U.S. at 439 (Stevens, J., dissenting).

[56] Melinda C. Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 356 (2007).

[57] *See* Hayes, *supra* note 5, at 255. The Supreme Court's standard can be summarized as follows:

> Students retain free speech rights in public schools as long as their speech does not amount to a "true threat", does not create a material and substantial disruption of school activities, or that school officials can reasonably forecast as creating a substantial disruption, unless the student's speech was vulgar, lewd, or undermined the school's basic educational mission, or unless the speech is of an offensively sexual suggestive nature, or unless the speech is school sponsored and school officials' actions are reasonably related to legitimate pedagogical concerns, or unless the speech might reasonably be understood as bearing the imprimatur of the school itself, or unless the speech advocates illegal drug use.

Id.

[58] Additionally, a "call it in the air" test would save attorney's fees and transaction costs; considering the best prediction of how nearly any student speech case would end would be a "who knows," perhaps this is the most reasonable alternative until the Court finally creates a workable standard.

clarity set by Supreme Court precedent.

A. The Second Circuit Court of Appeals

1. Wisniewski*: Off-campus Speech can be Sanctioned*

One case decided by the Second Circuit to determine whether off-campus speech was susceptible to school sanctions is *Wisniewski v. Board of Education*.[59] In *Wisniewski*, an eighth grade student was using AOL Instant Messaging[60] on his parents' home computer, communicating with his friends and other classmates.[61] The student created an icon for his account, which was a drawing of a pistol shooting a bullet into a person's head, with dots splattering to represent blood, and with the words "Kill Mr. VanderMolen," the student's English teacher.[62] The icon was created (and subsequently displayed for three weeks) after the school had warned that it would not tolerate threats made by students; at least fifteen people saw the icon (some of whom were classmates in Mr. VanderMolen's English class).[63]

A student informed Mr. VanderMolen of the icon and supplied him with a copy, which was then turned over to the principal; distressed by the information, Mr. VanderMolen asked and was allowed to no longer teach that particular English class.[64] As a result of the incident, the school suspended the student for five days, reported the event to the local police (who, after an investigation and evaluation by a psychologist, closed the case), and, after a superintendent's hearing, the student was further suspended for the remainder of the semester—during which time he enrolled in an alternative education program.[65] The court, noting that school officials have broad authority to sanction student speech, found that even if the icon constituted an expression of opinion, it nevertheless "crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[66]

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[59] 494 F.3d 34 (2d Cir. 2007).

[60] Instant messaging through AOL (with a similar function on social networking sites like Facebook), allows real time messages to be transmitted to other friends (or a group of friends)—permitting a rapid exchange of text to transpire. Some networking sites (like AOL) permit the sender of an instant message to have an "icon" associated with his or her name, which is often created by the sender and serves as an identifier of that person (icons are often optional, and generally serve as a fun and playful identifier).

[61] *Wisniewski*, 494 F.3d at 35–36.

[62] *Id.* at 36.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 36–37.

[66] *Id.* at 38–39.

After the decision in *Wisniewski*, it appears that a school district can sanction student speech occurring completely off campus.[67] Indeed, "[t]he fact that [the student's] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."[68] The court found that under the circumstances, the school was permitted to sanction the student, whether or not the student intended for the IM icon to be communicated to students and school authorities, and regardless of whether a substantial disruption was intended.[69] Moreover, the court reaffirmed the holding in *Wood v. Strickland*,[70] "mindful that '[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.'"[71]

2. Doninger*: Articulation of the Reasonably Foreseeable Standard*

While a relatively conservative foundation was laid by *Wisniewski* in the Second Circuit, *Doninger v. Niehoff*[72] sought to elaborate on its prior reasoning and establish an unequivocal precedent moving forward. In *Doninger*, a high school junior was both on the student council and serving as class secretary; she was required to maintain eligibility standards created by the school district to retain the positions.[73] During the scheduling of an

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[67] *See* James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 871 (2010) ("*Wisniewski* does not address which traditional student speech tests are applicable to off-campus speech, but it does imply that a school district can punish student off-campus speech under *Tinker*'s substantial disruption and material interference test.").

[68] *Wisniewski*, 494 F.3d at 39. *See also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (recognizing that off-campus conduct can create disruption in school that is both foreseeable and substantial).

[69] *Wisniewski*, 494 F.3d at 40.

[70] 420 U.S. 308, 326 (1975).

[71] *Wisniewski*, 494 F.3d at 40. *See also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 517 (1969) (Black, J., dissenting) (finding it a myth to say that everyone has a constitutional right to say whatever he or she pleases, wherever he or she pleases, and whenever he or she pleases; moreover, "the rights of free speech and assembly 'do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time'" (quoting Cox v. Louisiana, 379 U.S. 536, 554 (1965))).

[72] 642 F.3d 334 (2d Cir. 2011).

[73] *Id.* at 339. The pertinent part of the school district's policy was stated as follows:

> All students elected to student offices, or who represent their schools in extracurricular activities, shall have and maintain good citizenship records. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the schools for a period of time recommended by the student's principal, but in no case, except when approved by the board of education, shall the time exceed twelve calendar months.

Id.

event called "Jamfest,"[74] the principal informed the student council that the original date would need to be changed (or alternatively, have the event moved from the auditorium to the cafeteria) due to scheduling conflicts.[75] Upset over their options, members of the student council, lead by Doninger, went to the school's computer lab to send a mass email to students, parents, and others, urging them to call and email the office to complain about the change to Jamfest. This resulted in an influx of telephone calls and emails, and required the principal to alter her planned in-service training day.[76]

Later that night, Doninger posted on her blog that "jamfest is cancelled due to douchebags in [the] central office," and that she would support anyone wanting to "call [the superintendent] to piss her off more"—this resulted in several other students posting comments to the blog, one of which referred to the superintendent as "a dirty whore."[77] The next day, Doninger stated that students were "pretty upset" and "fired up," and that a group of students were planning a sit-in.[78] As a result of the Jamfest controversy, both the principal and superintendent were forced to miss or arrive late at various meetings and seminars, as well as deal with "riled up" students.[79] After the principal learned of the blog post, she called Doninger to her office and requested that she show the blog to her mother, apologize to the superintendent, and withdraw from running for senior class secretary—as her actions were deemed inappropriate for a class officer.[80] After complying with the first two requests, Doninger and her mother subsequently visited a local television news station to protest the "sanction."[81] They created and disseminated vote for Doninger t-shirts at a school assembly, and encouraged people to write-in Doninger's name for senior class secretary.[82] Despite Doninger winning the nomination as a write-in candidate, the position was awarded to the second highest voted

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[74] "Jamfest" is a school sponsored, annual battle-of-the-bands concert; the event is planned and run by student council. *Id.*

[75] *Id.* at 339.

[76] *Id.* at 339–40 (stating that the mass email was in violation of school email policy, which prohibited "[a]ccess of the internet or e-mail using accounts other than those provided by the district for school purposes.").

[77] *Id.* at 340–41.

[78] *Doninger,* 642 F.3d at 341.

[79] *Id.*

[80] *Id.* at 342.The principal later stated that "she felt that the blog post failed to demonstrate good citizenship," and that it "violated the principles governing student officers set out in the student handbook that Doninger had signed." *Id.* Doninger's name was not allowed to appear on the election ballot and she was not allowed to give a campaign speech—but she was not otherwise disciplined. *Id.*

[81] At school, at least one student was disruptive in class—yelling for students to watch the news featuring the Doninger segment—with the disruption resulting in another student being sent to the office for discipline. *Id.* at 342.

[82] *Id.* The principal requested that students remove their Team Doninger t-shirts, because she found the shirts were "disruptive," "set a bad example," and that "would have caused a disruption." *Id.* at 343.

candidate.[83]

The Court noted that the "Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like [Doninger's], does not occur on school grounds or at a school-sponsored event."[84] However, Second Circuit precedent states that "[s]chool authorities ought to be accorded some latitude to regulate student activity that affects matter[s] of legitimate concern to the school community, and territoriality is not necessarily a useful concept in determining the limit of their authority."[85] The Court found that "*Tinker* itself provides 'substantial grounds' for the school officials here 'to have concluded [they] had legitimate justification under the law for acting as [they] did." and "that it was reasonably foreseeable that Doninger's post would reach school property and have disruptive consequences there."[86] Indeed, *Tinker* did not articulate intent as being an element for a claim or defense; all that was required was that "it was reasonably foreseeable 'that the speech would come on to campus and thus come to the attention of school authorities.'"[87]

B. The Third Circuit Court of Appeals

1. Layshock*: A Bold Distinction between on and off-campus Activity*

The Third Circuit recently decided two similar student speech cases, the first being *Layshock v. Hermitage School District*.[88] Layshock, a seventeen-year old senior, decided to create a "parody profile" of his principal while at his grandmother's house during non-school hours.[89] The student used a picture of his principal that was posted on the school district's website,[90] and uploaded it to the "fake" profile on MySpace.[91] In

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[83] *Id.* at 343.

[84] *Doninger*, 642 F.3d at 346. *See also* Patrick, *supra* note 66, at 865 ("While . . . internet speech is protected by the First Amendment, the law is unsettled regarding the amount of protection afforded to off-campus student internet speech. As a result of this uncertainty, courts have established different methods for determining when student internet speech is subject to a school's disciplinary regime."). *See, e.g.,* Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) (applying a "place of reception standard"); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (applying a "sufficient nexus" test—between off-campus speech and potential connections to school); Evans v. Bayer, 684 F. Supp. 2d 1365, 1372–73 (S.D. Fla. 2010) (applying a hybrid approach).

[85] Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring).

[86] *Doninger*, 642 F.3d at 348 (quoting Doninger v. Niehoff, 514 F. Supp. 2d 199, 202 (D. Conn 2007)) (principally, "that the language Doninger employed (asking others to call the 'douchebags' in the central office to 'piss [them] off more') was 'potentially disruptive of efforts to resolve the ongoing controversy,'" and "that in the midst of this controversy, Doninger's blog post conveyed the 'at best misleading and at wors[t] false' information that Jamfest had been cancelled in [Doninger's] effort to solicit more calls and emails to [the superintendent].").

[87] *Id.* at 350 (quoting Doninger v. Niehoff, 594 F. Supp. 2d 211, 222 (D. Conn 2009).

[88] 650 F.3d 205 (3d Cir. 2011).

[89] *Id.* at 207.

[90] *Id.*at 207–08.

[91] MySpace (like Facebook) is a social-networking website that "allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and

creating the profile, Layshock gave "bogus" answers to survey questions,[92] with most answers having a theme of "big," as the principal was a large man.[93] Layshock afforded access to the profile to his friends, and "[n]ot surprisingly, word of the profile 'spread like wildfire' and soon reached most, if not all, of [the high school's] student body."[94] The principal learned of the profile from his daughter, and subsequently learned that three additional unflattering profiles were created, "each . . . more vulgar and more offensive than [Layshock's]."[95] Concerned for his reputation, the principal was interested in pressing criminal charges (however, no charges were ever filed) and discussed whether the profile constituted harassment or defamation.[96]

Layshock had also used a computer at school to access the profile and show it to classmates. After learning that MySpace was accessible on school computers, and that it was unable to block the site because the school's technology coordinator was currently on vacation, "the school . . . control[led] students' computer access by limiting the students' use of computers to computer labs or the library where internet access could be supervised."[97] On at least one occasion, students congregated around a computer and were giggling, requiring a teacher to break things up and shut the computer down.[98] After the school first learned of the profile, no disciplinary action was taken;[99] however, the school district subsequently suspended Layshock for ten days, placed him in the alternative education program, banned him from extracurricular activities, and he was not allowed to participate in the graduation ceremony.[100]

The district court found that the school district could not "establish[] a sufficient nexus between [Layshock's] speech and a substantial disruption

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information about their lives and interests." Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007).

[92] Survey questions are often optional inquiries asked by the website to share the user's interests, likes, and dislikes to other members.

[93] *Layshock*, 650 F.3d at 208. For example, some profile questions were answered as follows: being "too drunk to remember" his birthday, being a "big steroid freak," smoking "big blunt[s]" and taking "big pills" within the past month, going skinny dipping and "not [having a] big dick," stealing "big keg[s]" and being drunk a "big number of times," shoplifting a "big bag of kmart," as well as listing the principal as being "[t]ransgender." *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 209.

[97] *Id.*

[98] *Id.*

[99] *Layshock*, 650 F.3d at 209.

[100] *Id.* at 209–10 ("This infraction is a violation of the Hermitage School District Discipline Code: Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; [and] Computer Policy violations (use of school pictures without authorization).").

of the school environment."[101] However, the school district argued in its appeal that:

> [A] sufficient nexus exists between [Layshock's] creation and distribution of the vulgar and defamatory profile of [the Principal] and the School District to permit the School District to regulate this conduct. The "speech" initially began on-campus: [Layshock] entered school property, the School District web site, and misappropriated a picture of the Principal. The "speech" was aimed at the School District community and the Principal and was accessed on campus by [Layshock]. It was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.[102]

While acknowledging *Tinker* and *Morse*, the Court ultimately found it would be "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."[103] The court concluded by appearing to apply the *Tinker* standard, stating "we have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school" activities.[104]

2. Blue Mountain*: Reeling in the Substantial Disruption Standard*

In an eerily similar case, *J.S. v. Blue Mountain School District*,[105] the Third Circuit was faced with another "parody profile," MySpace-principal case. J.S., an eighth grade honor roll student who was recently disciplined for dress code violations (otherwise never disciplined), created a MySpace profile of the principal; the profile was created at home and on J.S.'s parents' computer.[106] Similar to *Layshock*, the profile contained the principal's photograph as posted on the School District's website.[107] The principal was portrayed—and named "M-Hoe"—as a bisexual Alabama middle school principal, whose interests included: "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, [and] hitting on

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[101] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).
[102] *Layshock*, 650 F.3d at 214.
[103] *Id.* at 216.
[104] *Id.* at 219.
[105] 650 F.3d 915 (3d Cir. 2011).
[106] *Id.* at 920.
[107] *Id.* The profile did not mention the principal's name, school, or location.

students and their parents."[108] Moreover, the profile further stated in an "About me" section:

> HELLO CHILDREN[.] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend . . . I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN.…[109]

While J.S. intended the profile to be a "joke," the profile could initially be viewed by anyone; J.S., however, made the profile private "after several students approached her at school to comment on the profile. While private, approximately twenty-two students had access to the profile.[110] The principal learned of the profile from a student, who later printed out the profile and gave it to him.[111] After showing the profile to the superintendent, the IT department, and two guidance counselors (one of which was the principal's wife and also referenced in the profile), the principal attempted to determine who created the profile and have it removed. MySpace refused to do so without a court order.[112] The principal met with J.S. and her mother, and J.S. was subsequently suspended for ten days, as well as being prohibited from attending school dances. The profile was also removed.[113] The principal also filed a formal police report, but "local police referred [the principal] to the state police, who informed him that he could press harassment charges, but that the charges would likely be dropped"; no charges were filed.[114]

J.S. appealed the suspension, and the school district alleged that the profile disrupted school in the following ways: general "rumblings" in the school (including several disruptions in class, causing teachers to stop talking and eventually raise their voices—taking up approximately six

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[108] *Id.*
[109] *Id.* at 921.
[110] *Id.*
[111] *Blue Mountain*, 650 F.3d at 921. This was the only known hard copy that was brought to school.
[112] *Id.* at 921.
[113] *Id.* at 922.
[114] *Id.*

minutes of class time); teachers being approached by students wanting to "report" the profile to the school; and disruptions to the guidance counselors (particularly the principal's wife), as she had to cancel counseling appointments to sit-in on meetings with J.S. and her mother, as well as meetings with the superintendent.[115] The Court concluded that the "School District violated J.S.'s First Amendment free speech rights when it suspended her for speech that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school."[116]

The Court began its analysis by acknowledging that "public schools' power over public school children [is] both 'custodial and tutelary,'"[117] and that school officials perform "important, delicate, and highly discretionary functions."[118] Indeed, "federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'"[119] Yet, public school authority is certainly not boundless; since *Tinker*, courts have struggled to find the proper balance between students' First Amendment rights and a school's right to maintain an appropriate learning environment.[120] The Third Circuit has taken the position that *Tinker* is the general rule, but subject to several narrow exceptions.[121] The burden to meet the *Tinker* standard rests on the school district; however, an "actual disruption" is not necessary to justify a restraint on student speech: a reasonable forecast of substantial disruption would be sufficient.[122]

V. ANALYSIS OF THE CIRCUIT SPLIT: WHY POLICY CONSIDERATIONS FAVOR THE SECOND CIRCUIT

The Second and Third Circuits—while agreeing on some student speech "factors"—have reached varying outcomes by interpreting Supreme Court precedent differently. Indeed, where you stand on an issue often depends on where you sit; liberals seated on the left side of the aisle and

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[115] *Id.* at 922–23.

[116] *Id.* at 925.

[117] *Blue Mountain,* 650 F.3d at 925–26 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)).

[118] *Id.* at 926 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) (internal citation omitted).

[119] *Id.* (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 864 (1982)). The court noted that federal courts must exercise restraint when issues fall within the purview of school officials. *Id.*

[120] *Id.*

[121] *Id.* at 927. The following are recognized exceptions to *Tinker* include: permitting a school to regulate lewd and vulgar speech which is plainly offensive in school (Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 685 (1986).); permitting schools to regulate school-sponsored speech based on any legitimate pedagogical concern (Hazelwood Sch. Dist. v. Kuhlemeier, 484 U.S. 260 (1988); and permitting schools to restrict student expression in regard to promoting illegal drug use (Morse v. Frederick, 551 U.S. 393, 396 (2007)).

[122] *Id.* at 928 (citting Doninger v. Niehoff, 527 F.3d 41, 51 (2nd Cir. 2008)).

conservatives on the right have historically been at odds based on principles of tradition and morals: state regulation and personal freedoms are no different. In fact, the Third Circuit—while discussing *Doninger*—expressly stated that "we do not suggest that we agree with [the Second Circuit's] conclusion that the student's out of school expressive conduct was not protected by the First Amendment there."[123] Both courts appear to use *Tinker*'s "material and substantial disruption" test as the starting point. However, inconsistent decisions will be forthcoming until the Supreme Court establishes guidelines and factors which articulate a clearer standard.

A. Abuse of Discretion Concerns

Some commentators' apprehension to the Second Circuit's holding stem from a fear of schools unilaterally[124] expanding the scope of conduct that they can regulate. The *Blue Mountain* decision expressed this concern, finding that a "significantly broaden[ed] school district[s]' authority over student speech . . . would vest school officials with dangerously overbroad censorship discretion."[125] An argument can certainly be made that giving school districts too much power and discretion to sanction students (even with a review board), creates the opportunity for unfettered decision making. However, when this concern is placed in the context of the duties of a school district, the fear of abuse subsides.

In its most rudimentary form, schools are charged with the responsibility of teaching our children and keeping them safe; the Supreme Court has acknowledged that "schools must teach . . . the shared values of a civilized social order."[126] If we feel comfortable giving schools the responsibility of educating and ensuring the safety of our children, what is the reasoning that schools will suddenly be out to get our children? If a parent believes a teacher or school district is not doing what is in the best interests of the child—why would they not remove the child from that situation[127] (putting aside issues of necessity or indigence)? The reality is,

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[123] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 218 (3d Cir. 2011).

[124] By unilaterally, I mean without an appropriate checks-and-balances system in place. Unless and until the Supreme Court decides otherwise, precedent in the Second Circuit will govern. This leaves little recourse for students and parents to protest a conceived "unjust" school sanction (other than possible appeals to a school board or superintendent—who is likely ironclad to the school's decision).

[125] *Blue Mountain*, 650 F.3d at 933.

[126] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

[127] Ultimately, parents will do whatever is best for their child. If a teacher is believed to be doing a poor job, parents can request to have the child removed to another classroom. So if a teacher (or school district) is not looking out for the best interests of the child, the child will be removed. From negative inference, we can assume that when a child is in a particular class or school district, the parents believe that the teacher and school district are adequate and are doing what is best for the child; otherwise, the parent would remove the child. Therefore, where does the argument come from that

most teachers are doing what they feel is best for their students—and while reasonable minds may differ about how to approach that agenda—the end result is there should be trust and confidence in the school to handle misconduct appropriately. Indeed, numerous decisions have concluded that school administrators are in the best position to monitor these types of issues—not capricious line drawing from the courts.

B. Options Are a Good Thing

Just because a school could sanction misconduct that occurred on social networking websites does not mean they will. It is probably not uncommon for teachers to have a mentality of being overworked and underpaid. With that being said, is it likely that a teacher would willingly use his or her valuable time to scour through comments posted by students on a social media site? Clearly, teachers and other school administrators have better things to do with their free time than review the internet chatter of adolescents. So what would be the actual affect of permitting schools to sanction students for internet misconduct?

From a practical perspective, only conduct which is (1) serious in nature, (2) brought to the attention of the school (likely by a concerned/upset student or parent), and (3) reasonably creates some disruption (or potential disruption) in the school setting—would ever be reported. After that initial reporting, do we not trust school administrators to do their job? Additionally, if a student or parent feels concerned enough to report an incident to the school, this is arguably a prima facie showing that it is affecting the educational process. The bottom line is that school officials are in the best position to regulate what disrupts classroom and school functions, and having discretion to tailor the sanction to the individualized misconduct will not result in a windfall of abuse, as school officials have (at least theoretically) the best interests of the students in mind.

C. An Easy Decision: Criminal Records v. School Sanctions

In *Blue Mountain*, the majority addressed what options the principal ultimately had if the school could not sanction students for internet posting. The court ultimately deflected to the criminal justice system to solve the problem.[128] However, this approach has two flaws. First, the principal reported it to the police, wanted to press charges, and, while there was

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school districts (otherwise adequate and properly educating and looking out for student safety) will suddenly want to arbitrarily sanction students for misbehavior? Either a school district is prudent or they are not—and if they are not, shame on the parents for not removing the child earlier (especially if it takes a "social networking sanction" to push parents over the edge).

[128] 650 F.3d at 922.

arguably enough evidence for a police investigation, the police essentially said they were not going to investigate it further.[129]

Additionally, accepting the fact that police could and would handle this type of claim, would we really want children potentially getting criminal records over something like social media postings? After all, if schools are protecting the interests of students—which perhaps results in some inkling of wanting children to go to college—does it not appear that colleges would be more likely to accept a student with a minor school suspension opposed to a criminal record? In most student speech cases decided in favor of the student, the courts made a distinction that if the conduct occurred in school it would clearly be punishable; yet, parents do not seem to want their children to be responsible adults and learn ethical principles outside of school (not to mention the fact that the misconduct disrupts or has the potential to disrupt the educational process). While students' First Amendment rights certainly should not be swept under the rug, the end result is that inappropriate and wrongful conduct is just as wrong in school as it is out of school.

If school administrators can reasonably articulate class or school functions which are substantially disrupted by out of school social media postings, it appears appropriate—under *Tinker*—to allow a school to discipline the student.[130] To be sure, if misconduct occurred in school and clearly fell within the school's authority to regulate, and the school refused to handle the incident through school policy and instead brought the problem to the criminal justice system, parents would be outraged that the school was not handling it. It is illogical that ill-advised conduct can be regulated and sanctioned on campus, but not off campus; moreover, when a protest over conduct "materially and substantially disrupting" the educational process is made—deference is given to judges, removed from the situation—rather than school administrators, who are dealing with the issue with firsthand knowledge and experience. If your child engaged in misconduct online, and was susceptible to either criminal sanctions or a school policy violation, which would you prefer?

VI. *BLUE MOUNTAIN*: PERSPECTIVE FROM THE DISSENT

It appears that if *Blue Mountain* had been decided in the Second Circuit, a judgment would have been rendered for the school district. Furthermore, if Judge Fisher had his way, there would be no circuit split.[131] According to the dissent, the majority's holding "severely undermines

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[129] *Id.*

[130] It appears that even the Third Circuit would agree with this statement; however, the discrepancy is in articulating what factors should be used in determining whether conduct "materially and substantially disrupts" the educational process.

[131] *Blue Mountain* was an 8–6 decision.

schools' authority to regulate students who 'materially and substantially disrupt the work and discipline of the school.'"[132] Moreover, the dissent feared that the decision left schools defenseless to prevent future attacks against teachers and school officials, as well as powerless to discipline students or to hold them accountable for their actions.[133] The dissent further claimed that none of the Supreme Court student speech cases were directly on point (implying *Tinker* would control as a general rule), and that the "Court has only briefly and ambiguously considered whether schools have the authority to regulate student off-campus speech."[134]

Under the standards set by *Tinker*, the dissent acknowledged that the record did not demonstrate "substantial disruption at the School," but claimed that "the profile's *potential* to cause disruption was reasonably foreseeable, and that [was] sufficient."[135] Indeed, an actual disruption need not occur if school authorities could "demonstrate . . . facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities."[136] Furthermore, a school need not tolerate student speech that is inconsistent with its "basic educational mission."[137] The *Blue Mountain* dissent found two forms of disruption foreseeable: if J.S. was not sanctioned for the MySpace profile, it would undermine the principal's (and the school district's) authority, and would also disrupt the operations of the classroom—or at least the duties of the principal and his wife, a guidance counselor at the same school.[138]

In support of this claim, the dissent referenced a case in which the principal was called a "dick." In that case, a district court held that the accusation interfered with the educational process, stating:

> Insubordinate speech always interrupts the educational process because it is contrary to principles of civility and respect that are fundamental to a public school education. Failing to take action in response to such conduct would not only encourage the offending student to repeat the conduct, but also would serve to foster an attitude of disrespect towards teachers and staff.[139]

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[132] *Blue Mountain*, 650 F.3d at 941 (Fisher, J., dissenting) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513 (1969)).

[133] *Id.*

[134] *Id.* at 942.

[135] *Id.* at 945 (citing *Tinker*, 393 U.S. at 514).

[136] *Tinker*, 393 U.S. at 514.

[137] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

[138] *Blue Mountain*, 650 F.3d at 945 (Fisher, J., dissenting).

[139] Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 902 (W.D. Mich. 2005). "J.S. did not only refer to her principal as a 'dick' but launched a vulgar attack on his character and accused him of sexual misconduct . . . [and] embarrassed, belittled, and possibly defamed [the principal]." *Blue Mountain,* 650 F.3d at 945 (Fisher, J., dissenting).

The dissent also found that it was reasonably foreseeable that the MySpace accusations would be shared with parents and teachers, with the principal's character being questioned: "It is inevitable that as more students and parents learned of the profile, the School would experience disruption."[140] While some school administrators may have been familiar with the principal and would know that the MySpace page was untrue, other students and parents unfamiliar with the principal likely would have had serious questions about his fitness for the position.[141] As a result, "[p]arents would become concerned that their children were supervised by a man accused of having sex in his office, being a 'sex addict,' and 'hitting on' their children. It was reasonably foreseeable that school administrators would have to spend a substantial amount of time alleviating these concerns."[142]

In addition to a diminution in respect for authority, the MySpace page posed reasonably foreseeable harm to the principal and his wife's ability to perform their jobs.[143] Indeed, the principal admitted to being "distressed" after viewing the MySpace profile.[144] The dissent found that if the school failed to punish J.S., then it would be reasonably foreseeable that other students would decide to personally attack the principal and his wife—or even other members of the school.[145] Moreover, "[w]hat determines the permissibility of the School's response under the First Amendment is whether it was reasonable to foresee substantial disruption."[146] As expanded from *Morse*, "[s]chool administrators, not judges, are best positioned to assess the potential for harm in cases like this one, and we should be loath to substitute our judgments for theirs."[147] Indeed, a court does a disservice by treating sexual misconduct allegations lightly and condoning school districts for not sanctioning the misconduct.[148]

Finally, the dissent discussed *Wisniewski* and *Doninger*, noting that the Second Circuit held that off-campus speech that is hostile and offensive

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[140] *Blue Mountain,* 650 F.3d at 946 (Fisher, J., dissenting).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 947.

[144] *Id. See also* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 36 (2d Cir. 2007) (describing a teacher who became so distressed because of hostile student speech that he had to stop teaching); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852 (Pa. 2002), (describing a teacher who "suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well being" and ended up needing anti-anxiety/anti-depressant medication).

[145] *Blue Mountain,* 650 F.3d at 947 (Fisher, J., dissenting).

[146] *Id.* at 948.

[147] *Id.* (arguing that a court errs by telling "a school district how it should handle violations of its policy that are of as serious and grave a matter as false accusations of sexual misconduct.").

[148] *Id.* at 949 ("[S]tating that the principal of a middle school has sex in his office and is a 'sex addict' who enjoys 'hitting on children and their parents' are serious allegations that cannot be taken lightly by any school official or by our Court.").

can pose a "reasonably foreseeable threat of substantial disruption within the school."[149] Additionally, whether J.S. intended for the MySpace profile to reach the school was immaterial; it was obscene and harmful speech directed at the principal and his family, was disseminated to members of the school, and had unfounded accusations.[150] The majority's approach proved unworkable considering internet usage among teenagers is universal—especially, where social networking sites are one of the primary vehicles of social interaction.[151] The dissent stated that while the line between on-campus and off-campus speech has been muddied, found that:

> [W]ith 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. I fear that [the majority] has adopted a rule that will prove untenable.[152]

VII. CONCLUSION

Because there is a lack of guidance from Supreme Court precedent lower courts will continue to reach inconsistent decisions until an unambiguous standard is established as to what forms or content of student speech can ultimately be regulated by schools. Even though the Court decided *Morse* in 2007, its holding does nothing to solve the widening gap between technology-related issues and current student speech precedent. The once "material and substantial disruption" standard may have been an appropriate standard when created in the 1960s, but today has become so ambiguous in the way that courts around the country are interpreting it, that it could arguably be characterized as futile rhetoric.

Instead of allowing lower courts to incoherently decide student speech cases by pigeonholing internet and social networking speech into out-of-date and arbitrary precedent, the Supreme Court needs to decide a case that establishes whether the *Tinker* standard is what will continue to govern, and if so, provide factors or guidelines for lower courts to determine what can be construed as conduct that "materially and substantially" disrupts or reasonably forecasts a substantial disruption or interference with the proper

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[149] *Id.* at 950. *See supra* Part IV.A.

[150] *Blue Mountain,* 650 F.3d at 951 (Fisher, J., dissenting).

[151] *Id.*

[152] *Id.* at 951–52. The dissent also found that the majority tipped the balance struck by the Supreme Court, "thereby jeopardizing schools' ability to maintain an orderly learning environment while protecting teachers and school officials against harmful attacks." *Id.* at 952.

operation of public schools. Cynical commentators may point to the Tenth Amendment,[153] articulating that education falls under the control of state legislatures or local school boards. While this is a legitimate argument, the reality is that the Court has indirectly been playing a role—good or bad—in education for many years.[154] It can also be argued that local government and those closest to the problem are often in the best position to resolve it. While this is perhaps true, the standard of education provided to students (as well as the impact on teachers and school administrators) would become vastly different from state to state without proper guidance. More troubling would be the difficulty federal courts would be faced with when deciding procedural due process violations, where binding (and perhaps inconsistent) precedent is at odds with state or local school board intentions. The bottom line is that there needs to be some general framework established by the Supreme Court to create a starting point for state and local officials (as well as federal courts) to utilize.

It would appear that the decision in *Blue Mountain* would be a suitable fit for the Court to decide these issues. Moving forward, we need to be concerned with not only clearly articulating what constitutes a compelling government interest to succumb a student's right to free speech, but also the impact that cyberbullying and other commentary posted on social media networks have on our children. Moreover, if working in a school environment leaves no recourse, either through school policy or the criminal justice system, for teachers or school administrators to be able to protect themselves from personal, untrue, and hateful attacks—we can be sure that the number of well-intentioned candidates wishing to enter the public education sector will be significantly reduced.

As discussed in Part V and VI, the reasoning from the Second Circuit[155]—as well as the dissenting opinion from Judge Fisher in *Blue Mountain*[156]—is the analysis that the Court should consider when revisiting and expanding on *Tinker*, or alternatively, create a new standard altogether. It has been echoed throughout this Note that local school administrators are usually in a better position than federal courts to regulate what conduct substantially interferes with or creates a reasonable foreseeable risk of interfering with a legitimate, pedagogical concern. Small government

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[153] The Tenth Amendment is essentially a reservation of powers clause that affords states all powers not expressly enumerated to the federal government. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[154] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling the segregation of children in public schools in a landmark decision), and Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a public school's right to attain a diverse student body).

[155] *See supra* Part V and VI.

[156] J.S. v. Blue Mountain Sch. Dis., 650 F.3d 915 (3d Cir. 2011) (Fisher, J., dissenting).

usually translates to efficient government; however, state and local officials need to start with the same fundamental building blocks, and then mold and adapt them according to their needs—while affording school districts the flexibility to tailor student sanctions to misconduct as it arises, based on the totality of the circumstances. This process can only effectively begin once the Supreme Court revisits student speech precedent, and articulates a clear and workable standard that encompasses technological and internet related issues.