For the past forty years, the courts have addressed whether students attending public schools “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹ The ubiquitous nature of online speech has refocused the debate over students’ protected speech at school into a question of whether school officials may discipline students for online speech published off-campus. The general rule is that students can be disciplined for activities that happen outside of school, if the school can prove the activities were disruptive or posed a danger, and that it was foreseeable the activities would find their way to campus. Critics of this rule argue that students are essentially living under a “zero tolerance” regime for dissent or controversy as they are subjected to disciplinary overreactions based on casual or joking online speech. Rather than punish students for online speech that is not injurious but just vexing, critics suggest that victims of off-campus behavior resort to off-campus remedies; for example, “those victimized may contact the parents, sue for defamation or invasion of privacy, and in extreme cases alert the police.”² Regardless of these criticisms, schools should have the right to punish student athletes and students involved in extracurricular activities, who hold themselves out as representatives of the school, for illegal behavior committed outside of school and for lewd speech when it may be materially disruptive to the school environment. Student athletes and students involved in extracurricular activities generally sign behavior agreements as a condition to involvement in the team or club which restrict their ability to engage in illegal or damaging behavior that could negatively reflect upon the school. Beyond that, student participation in athletics or other extracurricular activities is a privilege, not a right, and students cannot expect

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to publicly engage in illicit behavior or rude language off-campus without consequences.

Students may think that it is creepy for school officials to check up on students through social networking websites, but since speech and pictures are available to the public online, it is not unconstitutional.

In *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court recognized that “students are persons under the Constitution,” and said that school administrators could restrict student speech only if it “materially and substantially disrupts the work and discipline of the school.” In *Tinker*, the Court held that students’ display of black armbands in support of a cease-fire between the United States and North Vietnam was protected speech, despite the fact that the protest provoked heated responses from other students. The Court explained that when determining students’ 1st Amendment rights, the government’s disciplinary powers at school should be considered in “light of the special characteristics of the school environment” and the need to maintain order during the school day. *Tinker* may be considered the high-water mark for student 1st Amendment rights. A series of cases followed to refine the parameters of protected speech in or relating to schools. In *Morse v. Frederick*, the Court sanctioned the punishment of a student who stood directly across from his school, at a public gathering during school hours, where teachers provided supervision, and displayed a banner that read “Bong Hits 4 Jesus.” The Court said that *Morse* was a school speech case because the events “occurred during normal school hours” and at an event “sanctioned” by the school. The Court decided that the school did not violate the 1st Amendment because speech at a school sanctioned event that is reasonably interpreted as encouraging students to use illegal

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3 *Tinker*, 393 U.S. at 513.
4 *Id.* at 506.
drugs is not protected speech. Since *Morse*, courts have applied the same reasoning to speech interpreted as condoning dangerous and illegal activities. In regards to internet speech, courts generally have recognized that the off-campus speaker brought the website onto campus, for example, by using a school computer to publish the speech or show it off to other students, or that the student directed his speech at the school. In *Wisniewski v. Board of Education*, the Second Circuit held that it was constitutional for a school to discipline a student who used an instant messaging icon that was designed to look like a cartoon of his teacher being shot. Even though the student did not use school computers to create or send his message, and did not show the icon to anyone at school, the Court believed that it was reasonably foreseeable that the cartoon would come to the attention of school officials, and that if the icon was seen, it would “foreseeably create a risk of substantial disruption within the school environment.”

In *Doninger v. Niehoff*, the Second Circuit held that vulgar or offensive speech that an adult making a political statement might have a constitutional right to employ may legitimately give rise to disciplinary action by a school. Avery Doninger, the junior-class secretary at Lewis Mills High School, was involved in organizing a battle of the bands concert, called “Jamfest,” to be held at the school. When the school administration twice delayed the event, Doninger and three other students sent a mass e-mail which encouraged other students to contact the school and ask that the concert take place as scheduled. In a meeting later that day, the LMHS principal told Doninger that the e-mail was an inappropriate method to try to resolve the issue. When she went home, Doninger posted an entry on her Livejournal.com blog in which she called the administration “douchebags,” said that Jamfest was cancelled, and encouraged readers to call or

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6 *Morse* 127 S.Ct. at 2618.
7 *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007).
write the school administration “to piss [them] off more.” When the LMHS principal became aware of the post, she banned Doninger from running for senior-class secretary. In response, Doninger’s mother sued, claiming that the school had violated her daughter’s 1st Amendment rights. The goal of lawsuit was to require the school to hold new elections or to grant her daughter “the same title, honors, and obligations as those granted to the current secretary.” The district court denied Doninger’s motion, and the Second Circuit affirmed the ruling. The Second Circuit relied on its decision in Wisniewski, which held school sanctions of student expression constitutional if the expression “would foreseeably create a risk of substantial disruption within the school environment.” The Second Circuit reasoned that because potential disruptive effects of Doninger’s blog entry, like a sit-in to protest the cancelled Jamfest, were reasonably foreseeable, Doninger’s claim was unlikely to succeed on the merits.

In the digital era, many young adults document their lives online and rely on social networking sites to facilitate everyday communication; as a result, students, parents, schools and the courts are divided over whether such public, off-campus speech is protected under the 1st Amendment.

For example, the American Civil Liberties Union (ACLU) filed a federal lawsuit on behalf of two sophomores against their Indiana school district because the girls were punished for posting sexually suggestive pictures on MySpace.com during summer vacation. The students took pictures of themselves wearing lingerie and pretending to lick a penis-shaped lollipop at a sleepover and posted them on their MySpace pages. The girls set their MySpace privacy

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9 Id.
10 Id.
11 Id.
controls so that only users designated as friends could view their pages. None of the pictures made any reference to the school. When Churubusco High School Principal Austin Couch became aware of the pictures, which he said were copied and shared with school officials, he suspended the students from all extracurricular activities for the academic year; he later reduced their punishment to 25 percent of fall semester activities after the girls completed three counseling sessions and apologized to the coaches board. In its complaint, the ACLU argued that Churubusco High School violated the students’ free speech rights when it prohibited them from participating in extracurricular activities for a joke that did not involve the school. The ACLU said the district humiliated the girls when it required them to apologize to the all-male coaches’ board and to undergo counseling after the photos were circulated at school. Erik Weber, the attorney for the school district, said the principal was simply enforcing the school’s athletic code, which allows him to ban from school activities any student-athlete whose behavior inside or outside of school “creates a disruptive influence on the discipline, good order, moral or education environment at Churubusco High School.”

The ACLU responded that while the students’ behavior could be considered immature, it had zero impact on the school environment. The goal of the lawsuit is to force the school district to expunge all references to the incident from its records and to prohibit the school from taking similar action in the future.

Martha McCarthy, a professor of educational law and policy at Indiana University, believes that while courts have upheld policies similar to the Churubusco athletic code, in light of advances in technology, the Supreme Court will have to re-address the issue of whether schools should be allowed to punish students for out-of-school behavior. Some legal experts say

that “in this digital era, schools must accept that students will engage in some questionable behavior in cyberspace and during off hours.”

John Palfrey, a Harvard University law professor and co-director of the Berkman Center for Internet and Society, argues that for young people, there is no real distinction between online life and offline life. Palfrey added that “privacy on social networking sites is an illusion, even if strict privacy controls are set.”

Ultimately, Palfrey believes that schools have a right to regulate students’ online behavior, and said that “the fact that it took place in cyberspace instead of in a classroom doesn’t mean you don’t enforce the rule.”

In another case, Justin Layshock, a 17-year-old senior at Hickory High School in Pennsylvania, used his grandmother’s computer to create a fake MySpace profile of his high school principal, Eric Trosch. When school officials found the profile page, the Hermitage School District suspended Layshock for 10 days, ordered him to finish high school in an alternative education program, banned him from all extracurricular activities, and prohibited him from participating in his graduation ceremony. Layshock and his parents sued the school district, and claimed that the school district’s punishment violated Layshock’s right to expression under the 1st Amendment, and his parents’ substantive due process rights under the 14th Amendment.

The district court granted Layshock summary judgment on his 1st Amendment claim, but decided in favor of the school district on his parents’ due process claim. Both parties appealed the ruling. The Third Circuit Court of Appeals affirmed the district court’s judgment. The Court said that allowing the school to punish Layshock for conduct he engaged in using a computer at his grandmother’s house just because his speech reached into the school would “create an unseemly

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13 Wilson, Charles. “Teens sue over punishment for racy MySpace pics.”
14 Id.
15 Id.
and dangerous precedent,” and violated his guarantee to free expression.\textsuperscript{16} The Court agreed with the district court that Layshock’s parents did not show that their liberty interest was infringed by the school district’s violation of their son’s 1\textsuperscript{st} Amendment right to expression.\textsuperscript{17}

The \textit{Chicago Sun-Times} ran an article earlier this year about a student at Oak Forest High School, Justin Bird, who was suspended for five days after he created a fan page on Facebook.com from his home computer. Bird, a sophomore, referred to his teacher in derogatory terms and invited students who “had a bad experience or plain disliked” the teacher to join the group.\textsuperscript{18} Bird kept the group page active for five days until he became nervous about the potential for a reprimand by school officials. The day after he took down the fan page, the dean suspended Bird. When asked about the case, Ed Yohnka, spokesman for the ACLU of Illinois, said that it was unclear whether the school had the authority to suspend Bird. Yohnka said that more and more often, school officials try to extend the scope of their authority outside of school, and that punishment for out-of-school behavior is based on whether the behavior causes a disruption to school activities. Referring to a recent case in Florida, Yohnka said that “absent of some kind of threat, it’s not clear what authority a school district has to punish a student using his own resources, in his own home and on his own time.”\textsuperscript{19} The Florida case involved former high school student Katherine Evans, who sued her then principal at Pembroke Pines Charter High School. When she was a senior, Evans used her home computer to create a Facebook fan page called “Ms. Sarah Phelps is the worst teacher I’ve ever had.” Evans took the page down

\textsuperscript{16} “School's punishment of student for creating fake Internet ‘profile’ of principal on home computer is unconstitutional,” \textit{Municipal Litigation Reporter} (03/15/2010) \href{http://www.straffordpub.com}{http://www.straffordpub.com}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} “Schools vs. social networking: Oak Forest student suspended for Facebook fan page,” \textit{ACLU Insider} (02/22/10). \href{http://www.acluil.org/blog/archives/2010/02/schools_vs_social_networking_o.shtml}{http://www.acluil.org/blog/archives/2010/02/schools_vs_social_networking_o.shtml}
\textsuperscript{19} \textit{Id.}
after several students posted comments defending the teacher. After Evans removed the group page, the principal became aware of the posting and suspended her for three days and removed her from Advanced Placement classes as punishment. The ACLU, on behalf of Evans, sued the principal for injunctive relief, to clear Evan’s record, and collect nominal damages. The principal moved to dismiss the case. In February 2010, U.S. Magistrate Judge Barry L. Garber denied the motion to dismiss. Judge Garber decided that “a student’s opinion about her teacher, when it was published off campus and did not create any disruption on campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior,” was protected speech.\(^\text{20}\) At the point where Evans was punished, there was no longer any threat of disruption, only the opportunity to punish. The ACLU perceives this to be an important victory because “it upholds the principle that the right to freedom of speech and expression in America does not depend on the technology used to convey opinions and ideas.”\(^\text{21}\)

In contrast, in Texas, drill team member Lindsey Wessel, was suspended for one performance and given eight demerits for content on her MySpace page that school officials deemed inappropriate. The Burleson High School principal defended the decision to punish Wessel; he pointed out that school districts across Texas enforce extracurricular codes of conduct for student-athletes and members of fine arts clubs or honor societies which hold students to a higher standard both on and off the field of play. Additionally, both Wessel and her parents signed a drill-team constitution before the season started. Similar to the other cases mentioned, the principal explained that school officials did not search MySpace.com for potentially


\(^\text{21}\) Id.
damaging information, but rather acted upon information that was presented to them by students who were concerned that the content was inappropriate and reflected poorly upon the drill team. Ultimately, the principal framed the incident as a life lesson and in a prepared statement said:

BISD will continue to expect students in extra-curricular activities to model exemplary behavior. We will also use this opportunity to inform students about the dangers and pitfalls associated with personal postings on social networking sites that may cause complications for them when applying for college, seeking references, employment or scholarship monies. It will be important for students to understand that they have little if any control of who has access to their postings once they release it to access friends.22

Similarly, in Minneapolis, school officials punished thirteen students at Eden Prairie High School when they discovered pictures of the students drinking on Facebook.com. The students were prohibited from participating in athletics or other extracurricular activities. The student athletes who were punished had signed a pledge not to drink as a condition of playing in the Minnesota State High School League.23

Schools should have the right to punish student athletes and students involved in extracurricular activities for illegal behavior committed outside of school and for lewd speech when it may be materially disruptive to the school environment. However, it would be ideal for school administrators to not have to be in the position to discipline students over inappropriate online expression. It would be advantageous for everyone in the community – students, parents, and educators – to organize programs to inform students about their right to, and limits of, protected speech under the 1st Amendment. Students should be reminded that their posts are

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public and be made aware that seemingly innocuous postings in the present could affect their future ability to be admitted to college or graduate school, or be hired for a job. Students who are aware of these consequences may filter themselves before the school needs to become involved. Another potential solution to keep students from representing the school in a negative light would be to ban all student athletes and students involved in extracurricular activities from participating in social networking websites. Such a policy might be unpopular, but courts generally recognize that students do not have a constitutional right to participate in extracurricular activities. Also, in *Pottawatomie County v. Earls*, the U.S. Supreme Court rejected a challenge to a public school that required all students who participated in extracurricular activities to submit to random drug testing.\(^{24}\) It would be unlikely for a court to find it unconstitutional for a public school to condition its students' participation in athletics or other extracurricular activities on the forfeiture of their 1st Amendment rights. Schools should educate students on the consequences of posting unfiltered content online, but ultimately should be allowed to discipline student athletes and students involved in extracurricular activities when their off-campus behavior reflects poorly upon the school.

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Works Cited


8. “School's punishment of student for creating fake Internet ‘profile’ of principal on home computer is unconstitutional,” Municipal Litigation Reporter (03/15/2010) http://www.straffordpub.com

