Beyond the Schoolhouse Gates: Regulating Off-Campus Speech

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I. INTRODUCTION

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”1 The Supreme Court has recognized that school districts have competing concerns between ensuring order, discipline and safety for an optimal educational environment, and refraining from infringing on the free speech rights of students.2 While the Supreme Court has been able to strike a balance between legitimate educational objectives and First Amendment protections for student speech inside the schoolhouse gates, the same cannot be said about student speech made beyond the gates.

The uncertainty surrounding the ability of school districts to regulate speech beyond the gates has been exacerbated by the emergence of the internet,3 which has blurred the lines between what constitutes on-campus and off-campus speech.4 With ease, students can express their feelings and beliefs on personal blogs, webpages, or social networking websites.5 Although such speech may originate from home computers outside the gates, oftentimes it reaches an on-campus audience when it implicates school administrators or other students.6 Consequently, the internet has enabled off-campus student speech to crash through the schoolhouse gates and create chaos for school districts, students, and the court system.7

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5 Tabor, supra note 3, 562.
6 Ellison, supra note 2, at 810-11.
7 Id. at 811-13.
According to the First Amendment, “Congress shall make no law . . . abridging the freedom of speech.”\footnote{U.S. Const. amend. I.} However, notwithstanding this prohibition, the Supreme Court has consistently recognized some categories of student speech that are not protected by the First Amendment.\footnote{James Patrick, The Civility-Police: The Rising Need to Balance Students’ Rights of Off-Campus Speech Against the School’s Compelling Interests, 79 U. Cin. L. Rev., 855, 858 (2010).} Part II will discuss the case law that governs whether on-campus student speech is protected by the First Amendment or subject to punishment at school.

Part III will then discuss how the lower courts have struggled to apply the existing case law to speech that occurs outside the school gates,\footnote{STUDENT PRESS LAW CENTER, Supreme Court Will Not Hear Off-Campus Speech Cases, (Jan. 17, 2012), http://www.splc.org/news/newsflash.asp?id=2315.} resulting in a “state of total disarray” in the lower courts.\footnote{Ellison, supra note 2, at 821.} The problems faced by school districts as a result of this “disarray” conclude this paper in Part IV.

Earlier this year, the United States Supreme Court denied certiorari to hear three school district cases involving off-campus speech where students used the internet to make statements about school principals and another student.\footnote{STUDENT PRESS LAW CENTER, Supreme Court Will Not Hear Off-Campus Speech Cases, (Jan. 17, 2012), http://www.splc.org/news/newsflash.asp?id=2315.} The purpose of this paper is to demonstrate the need for guidance from the Supreme Court by exploring the problems caused from the uncertainty surrounding a school’s ability to regulate off-campus speech.

II. ON-CAMPUS STUDENT SPEECH PROTECTIONS

The Supreme Court has recognized that some forms of speech are harmful to society, and therefore, are not afforded protection under the First Amendment.\footnote{Patrick, supra note 9, at 858.} Such speech includes
fighting words, obscenity, incitement, and true threats.\textsuperscript{14} In the public school context, the Supreme Court has decided four cases dealing with students’ free speech rights under the First Amendment while on-campus.\textsuperscript{15} The Court developed a different standard in each case to determine whether the speech was entitled to First Amendment protection.\textsuperscript{16}

A. \textit{Tinker v. Des Moines Independent Community School District}

In \textit{Tinker}, a group of students chose to wear black armbands to school to protest the war in Vietnam.\textsuperscript{17} Upon learning of the plan to wear armbands, the principals of the Des Moines schools adopted a policy that “any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”\textsuperscript{18} A group of students were thereafter suspended under this policy.\textsuperscript{19} The students then brought suit against the school authorities for violating their First Amendment rights.\textsuperscript{20}

The Supreme Court began its opinion with the now infamous quote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{21} Recognizing that students have First Amendment rights both inside and outside of school, the Court held that student speech can only be punished if school authorities might reasonably expect it to cause “a substantial disruption of or material interference with school activities.”\textsuperscript{22} Finding that the student speech at issue did not create

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\textsuperscript{14} Ellison, \textit{supra} note 2, at 814.
\textsuperscript{15} Tabor, \textit{supra} note 3, at 564.
\textsuperscript{16} \textit{Id}.
\textsuperscript{17} \textit{Tinker}, 393 U.S. at 504.
\textsuperscript{18} \textit{Id}.
\textsuperscript{19} \textit{Id}.
\textsuperscript{20} \textit{Id.} at 504-05.
\textsuperscript{21} \textit{Id.} at 506.
\textsuperscript{22} \textit{Id.} at 514.
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either a substantial disruption or material interference with schoolwork or discipline, the Court held that the school’s actions violated the student’s First Amendment rights.  

B. BETHEL SCHOOL DISTRICT NO. 403 V. FRASER

In Fraser, a high school student delivered a speech nominating a fellow student for an elective office at an assembly attended by approximately six hundred of his classmates. During the speech, the student used a graphic and explicit sexual metaphor, despite earlier warnings from two teachers not to give the speech. As a result, the student was suspended and his name was removed from the list of candidates for graduation speaker. Thereafter, the student filed suit against the school for violating his right to freedom of speech.

The Supreme Court in Fraser essentially created an exception to the rule set forth in Tinker by upholding the school’s sanctions even though the speech did not cause a material and substantial disruption. The Court held that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission.” Accordingly, the Court established a new standard: vulgar and lewd speech may be prohibited by schools because it is inconsistent with the “fundamental values” of public education.

C. HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER

Two years after the Supreme Court created an exception to Tinker in Fraser, the Court set forth a second exception in Kuhlmeier. In Kuhlmeier, the students were staff members of a

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23 Id.
25 Id.
26 Id.
27 Id.
28 Id. at 685.
29 Id.
30 Id.
school newspaper as part of a journalism class. The newspaper was funded by the school and supervised by a teacher. Prior to sending it press, the school principal removed two pages from an edition of the newspaper because he objected to two of the articles – one describing the experiences of pregnant high school students and the other describing the impact of divorce on students at school. Three of the student-members of the school newspaper brought suit, alleging a violation of their freedom of speech.

In deciding the case, the Supreme Court inquired whether the school newspaper was a public forum. The Court decided that it was not because “[s]chool officials did not evince either ‘by policy or by practice’ any intent to open the pages of [the newspaper] to ‘indiscriminate use’ by its student reporters and editors, or by the student body generally.” By concluding that the school newspaper was not a public forum, the Court allowed school officials to regulate the content of the paper in any reasonable manner. Accordingly, the Court created a new standard, allowing the regulation of student speech that bears the imprimatur of the school.

D. MORSE V. FREDERICK

The Supreme Court created yet another exception to Tinker in Morse v. Frederick. In Morse, a student attended a school-sanctioned and school-supervised event where he brought a banner reading “BONG HiTS 4 JESUS.” The principal demanded that the banner be taken down and when the student refused, she confiscated it and later suspended the student.
school superintendent and school board upheld the suspension, explaining that the banner appeared to advocate illegal drug use in violation of school policy. The student brought suit against the school, alleging that his First Amendment right to free speech had been violated.

The Supreme Court recognized that the state has a compelling interest in deterring drug use by students and “part of the school’s job is educating students about the dangers of illegal drug use.” Accordingly, the Court concluded that “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.” In Frederick’s case, the Court avoided the off-campus issue by stating that because the student was at a school-sanctioned and school-supervised event during school hours, he was “on campus.” Under the new standard set by the court, the principal’s actions were found not to violate the First Amendment because the student’s speech could be reasonably interpreted as promoting illegal drug use.

To summarize, the Supreme Court has created four standards that it uses to determine the outcome of on-campus student speech cases. In its analysis of a case, the Court begins with the standard set forth in Tinker. Under Tinker, schools can only regulate student speech reasonably calculated to cause a substantial disruption or material interference with school activities. Fraser then creates an exception by also allowing schools to regulate lewd, vulgar, or plainly offensive student speech without there being a reasonable expectation of disruption. Another exception was created by the Kuhlmeier Court, when it held that school officials may regulate student

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43 Id.
44 Id.
45 Id. at 395.
46 Id. at 393.
47 Id. at 400-01. “At the outset, we reject Frederick’s argument that this is not a school speech case …” Id. at 400. The Court noted that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents but not on these facts.” Id. at 401.
48 Id. at 410.
49 Patrick, supra note 9, at 864.
speech if it is reasonably perceived to bear the imprimatur of the school. Finally, *Morse* allows schools to regulate student speech that may reasonably be construed as promoting illegal drug use. Without guidance from the Supreme Court on how off-campus speech cases should be decided, the lower courts have attempted to rely on these decisions.\(^{50}\)

**III. OFF-CAMPUS SPEECH CASES: TO PUNISH OR NOT TO PUNISH?**

Lower courts have differed in their treatment of off-campus speech.\(^{51}\) The confusion surrounding the amount of First Amendment protection afforded to off-campus speech is especially acute with respect to the internet.\(^{52}\) Consequently, courts have established different methods for determining when student internet speech is subject to discipline.\(^{53}\) The following four cases serve as examples of how a few courts have addressed internet speech, and help to demonstrate how courts have arrived at divergent opinions.

A. **WISNIEWSKI V. BOARD OF EDUCATION OF WOODSPORT CENTRAL SCHOOL DISTRICT**

In *Wisniewski*, an eighth grade student’s AOL instant messages contained an icon depicting a pistol firing at a person’s head with the words “Kill Mr. VanderMolen” underneath.\(^{54}\) The student used his parent’s home computer when instant messaging with classmates.\(^{55}\) One classmate brought the icon to the attention of the teacher and supplied him with a copy of it.\(^{56}\) After an investigation, the school suspended the student for a semester.\(^{57}\) Thereafter, the student brought suit, alleging that he was improperly disciplined in violation of his First Amendment right to free speech.\(^{58}\)

\(^{50}\) Tabor, *supra* note 3, at 564-65.
\(^{51}\) Ellison, *supra* note 2, 820.
\(^{52}\) *Id.*
\(^{53}\) Patrick, *supra* note 9, at 865.
\(^{55}\) *Id.*
\(^{56}\) *Id.*
\(^{57}\) *Id.* at 37.
\(^{58}\) *Id.*
The Court of Appeals for the Second Circuit held that the fact that the “creation and transmission of the IM icon occurred away from school property [did] not necessarily insulate [the student] from school discipline.” The Court applied the Tinker standard to determine that the icon was widely distributed and it was reasonably foreseeably that it would “materially and substantially disrupt the work and discipline of the school.” Accordingly, the Court upheld the student’s suspension for off-campus internet speech.

B. DONINGER v. NIEHOFF

In Doninger, a student posted a vulgar and inaccurate message about the cancellation of a school event on an independent, publicly accessible blog, encouraging others to “piss off” the superintendent. As a form of discipline, the principal disqualified the student from running for Senior Class Secretary. The student’s parents sued, alleging that her First Amendment rights had been violated. The District Court of Connecticut found that Doninger failed to establish a likelihood of success on the merits and therefore denied her motion for preliminary injunction.

On appeal, the Second Circuit determined that if Doninger’s language had occurred in a classroom, it would have fallen under Fraser. The Court found that the posting—in which she called school administrators “douchebags” and encouraged others to contact the superintendent “to piss her off more”—contained the sort of “plainly offensive” language that Fraser permits.

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59 Id. at 39.
60 Id.
61 Id. at 40.
63 Id. at 43.
64 Id. at 46-47.
65 Id. at 47.
66 Id.
schools to regulate. However, the Court was reluctant to apply the Fraser standard to Doninger’s off-campus speech.

Notwithstanding the potential applicability of Fraser, the Court applied the Wisniewski framework, finding that if it is reasonably foreseeable that off-campus internet speech will reach school authorities and create a risk of substantial disruption, then the off-campus speech is actually on-campus speech. The Wisniewski case allows such speech to be regulated under the Tinker standard. Accordingly, the Court upheld the school’s actions.

C. J.S. ex rel. Snyder v. Blue Mountain School District

In Snyder, an eighth grade student was suspended for creating a MySpace profile, making fun of her school principal. The profile was created on a home computer over the weekend. It did not identify the principal by name, school, or location, but it did contain his official photograph from the School District’s website. The profile contained adult language and sexually explicit content. Upon discovering the profile, the principal suspended the student for ten days and the parents filed suit against the school, alleging a First Amendment violation among other claims. The district court granted summary judgment for the school district, and the Third Circuit Court of Appeals affirmed.

Hearing the case en banc, the Third Circuit then vacated its prior judgment and held that the School District violated J.S.’s First Amendment free speech rights under Tinker. The Court

67 Id. at 49.
68 Id.
69 Id. at 50.
70 Id.
72 Id.
73 Id.
74 Id.
75 Id. at 923.
76 Id. at 915.
77 Id. at 931.
reasoned that “beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred.”

Accordingly, the Court held that the only way for the School District’s actions to pass constitutional muster would be if J.S.’s speech could be prohibited under one of the exceptions to Tinker, like Fraser for “lewd, vulgar, and offensive” language. However, the Court refused to apply Fraser to off-campus speech that occurred during non-school hours. Consequently, the Court concluded that neither Tinker nor Fraser gave the School District the authority to punish J.S. for her off-campus speech.

D. Layshock ex rel. Layshock v. Hermitage School District

The facts of the Snyder and Layshock cases are quite similar. In both cases, the student used a home computer to create a fake MySpace profile for their school principal, each containing a picture of the principal. In both cases, the student gave access to the profile only to select friends. However, unlike in Snyder where the disruption was minimal, word of the profile in Layshock “spread like wildfire.” Both students sued their schools for violations of their First Amendment rights after being disciplined for their actions. In Snyder, the district court and the Third Circuit Court of Appeals found in favor of the school district. However, in Layshock, the district court and the Third Circuit Court of Appeals found in favor of the

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78 Id. at 929.
79 Id. at 931-32.
80 Id. at 932.
81 Id. at 933.
82 Id. at 915.
84 Snyder, 650 F.3d at 920; Layshock, 650 F.3d at 207-08.
85 Snyder, 650 F.3d at 921; Layshock, 650 F.3d at 208.
86 Snyder, 650 F.3d at 929.
87 Layshock, 650 F.3d at 208.
88 Snyder, 650 F.3d at 920; Layshock, 650 F.3d at 210.
89 Snyder, 650 F.3d at 933.
student. Both cases were heard en banc by the Third Circuit in order to resolve the diametrically opposed opinions.

In Layshock, a high school senior used his grandmother’s home computer during non-school hours to create a MySpace profile for his principal that included a picture of the principal. The profile featured information indicating that the principal was a drunk and took drugs, among other negative characteristics. The student restricted access to the profile by only allow select friends to see it, however, word of the profile “spread like wildfire” and reached most of the student body. The school suspended the senior and his parents sued claiming the school’s actions violated the First Amendment.

Because the school district did not dispute the district court’s finding that Tinker did not apply, the Court rested its decision on the Supreme Court’s analysis in Fraser. Interestingly, other courts, have declined to apply Fraser to off-campus speech cases.

IV. CONCLUSION

The confusion among lower courts in how to deal with a school’s regulation of off-campus student speech is especially apparent when one circuit reaches two diverging opinions on cases as similar as Snyder and Layshock. When that occurs, school districts have a hard time reconciling the decisions to determine what they can regulate. In order for schools to respond

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90 Layshock, 650 F.3d at 207.
91 Snyder, 650 F.3d at 915; Layshock, 650 F.3d at 205.
92 Layshock, 650 F.3d at 207-08.
93 Id. at 208.
94 Id.
95 Id. at 210.
96 Id. at 216.
97 See, Doninger, 527 F.3d 41, 43 (2008); Wisniewski 494 F.3d 34 (2008).
98 Ellison, supra note 2, at 833.
quickly and confidently to disciplinary problems, they must know the extent of their power.\textsuperscript{99} Furthermore, the plethora of lower court decisions relating to student internet speech, and off-campus speech in general, is indicative of the amount of time and money that is being expended to decipher the unsettled case law.\textsuperscript{100}

In addition to the schools and lower courts, students will also benefit from a clear test regarding off-campus speech.\textsuperscript{101} By developing such a test, the Supreme Court would be putting students on notice that certain less-protected forms of speech could make them subject to discipline, even if they originate off-campus.\textsuperscript{102}

Although the Supreme Court has provided relatively clear guidance on a school’s ability to regulate on-campus speech through \textit{Tinker}, \textit{Fraser}, \textit{Kuhlmeier}, and \textit{Morse}, it has failed to do the same for off-campus speech. Lower courts have attempted to utilize these same Supreme Court decisions in off-campus contexts, but have struggled to do so while reaching inconsistent opinions. With the growing prevalence of websites like Facebook, MySpace, YouTube, Twitter, and numerous others, the need for the Supreme Court to provide guidance on off-campus speech will become even more demanding. For the sake of schools, students, and the lower courts, the Supreme Court should grant certiorari on off-campus speech cases.

\textsuperscript{99} Id.  
\textsuperscript{100} Id.  
\textsuperscript{101} Id.  
\textsuperscript{102} Id.