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### **STICKS AND STONES: STUDENT FREE SPEECH IN THE INTERNET ERA**

On March 18, 2007, a 14-year old Blue Mountain Middle School student and her friend created a MySpace profile page pretending to be their school's principal.<sup>1</sup> The students created the entirety of the website during non-school hours on one of their home computers.<sup>2</sup> The page featured a picture of the principal, and made several disturbing comments about him, calling him a sex addict and pedophile.<sup>3</sup> A general buzz about the site filtered through the school, and it was finally brought to the attention of the principal by students and faculty.<sup>4</sup> The principal had MySpace remove the site from the internet, and gave the student a 10-day suspension for her conduct.<sup>5</sup> Instead of appealing the discipline to the school superintendant, the student, through her parents, sued the school district, the superintendant, and the principal for violation her First Amendment rights.<sup>6</sup> Among other allegations, the complaint alleged, "the Constitution prohibits the school district from disciplining a student for *out-of-school conduct* that does not cause a disruption of classes or school administration."<sup>7</sup>

J.S. ex rel. Snyder v. Blue Mountain School District is just one in a hodgepodge of district court cases addressing First Amendment rights as they relate to off-campus conduct by students on the internet. These cases try to force the current Supreme Court student free-speech jurisprudence to sets of facts and circumstances unlike anything dealt with by the Supreme Court. As it is, the Court's established framework sets out at least four different tests, with little guidance as to how or when one should be applied instead of another.<sup>8</sup> In fact, Justice Thomas in his concurring opinion in Morse v. Frederick recognized, "our jurisprudence now says that students have a right to speak in schools except when they don't."<sup>9</sup> Throwing in an added

wrinkle to these cases, that the conduct in question occurred off campus, makes this issue even more difficult for courts, school districts, and students to decipher.

This article will set out the four seminal Supreme Court cases on student free speech, including Tinker v. Des Moines Independent School District, Bethel School District NO. 403 v. Fraser, Hazelwood School District v. Kuhlmeier, and Morse v. Frederick. It will then look at the application of these cases in a cacophony district court cases addressing the issue of whether school districts may discipline students for internet speech created entirely off-campus and during non-school hours. Finally, it will argue that school districts may not discipline obscene or offensive speech created by students off-campus unless said speech rises to the level of an objective threat of harm to students, faculty, or other school employees.

The foundation of student free-speech cases came in 1969 when the Supreme Court decided Tinker v. Des Moines Independent Community School District. In this case, two of the Tinker children, along with their friend Christopher Eckhardt, sued the school district for violation of their First Amendment rights after they were suspended for wearing black armbands to school in silent protest of the Vietnam War.<sup>10</sup> The school board argued that the policy prohibiting the armbands was reasonable in order to prevent disturbance of school discipline; an argument with which the district and appellate courts agreed.<sup>11</sup>

However, the Supreme Court reversed famously stating, “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>12</sup> Specifically, the court stated that the wearing of armbands was “akin to ‘pure speech’” and was “entitled to comprehensive protection under the First Amendment.”<sup>13</sup> The Court held that school officials may only prohibit student speech if it is able to show that the

speech would materially and substantially interfere with “appropriate discipline in the operation of the school” or intrude on the rights of other students.<sup>14</sup>

Here, the Court found the record lacked any evidence that the school board had reason to believe the wearing of armbands would cause a substantial disruption or interfere with the rights of others.<sup>15</sup> Instead, the Court opined that the school policy was based on school officials’ desire to avoid any controversy that may have accompanied opposition to the Vietnam War.<sup>16</sup> The Court further stated that school officials must be able to justify their actions based on “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>17</sup>

Almost 20 years later, the Court had another opportunity to rule on the issue of student speech in Bethel School District NO. 403 v. Fraser. In this case, a student, Matthew Fraser, delivered a nomination speech in favor of electing a fellow student as a candidate for student office.<sup>18</sup> He gave the speech as part of a school-sponsored, voluntary student assembly on self-government.<sup>19</sup> The speech referred to the student candidate “in terms of an elaborate, graphic, and explicit sexual metaphor.”<sup>20</sup> In response to the speech some of the students cheered and displayed graphic gestures simulating activities in Fraser’s speech, others seemed embarrassed by it, and at least one teacher had to interrupt classes to discuss the speech with her class.<sup>21</sup> The school’s assistant principal determined Fraser’s speech violated a school disciplinary rule prohibiting the use of obscene language in school.<sup>22</sup> As a result, she suspended Fraser for three days, and removed his name from the list of potential candidates for graduation speaker.<sup>23</sup>

Fraser appealed the discipline to the school board, where the hearing officer affirmed the discipline received.<sup>24</sup> Fraser, through his father, brought an action in district court alleging a violation of his First Amendment right to freedom of speech.<sup>25</sup> The district court held in favor of

Fraser, and after an appeal by the school district, the Court of Appeals for the Ninth Circuit affirmed.<sup>26</sup> In fact, the court of appeals held that Fraser's speech was indistinguishable from the speech in Tinker, and explicitly rejected the school district's contention that the educational process was disrupted by the speech.<sup>27</sup>

The Supreme Court reversed the decision noting a "marked distinction" between the wearing of armbands as a political message and the sexually explicit content of Fraser's speech.<sup>28</sup> The Court held that the First Amendment does not prohibit school officials from barring the use of vulgar and lewd speech if said speech "would undermine the school's basic educational mission."<sup>29</sup> According to the Court, one of the "basic educational missions" of schools is the teaching of civility and socially appropriate behavior.<sup>30</sup> The Court further stated that the State would not have been able to prohibit such speech by adults; however, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>31</sup> Perhaps most important was the Court's failure to apply the material and substantial disruption standard from Tinker, and instead it focused only on the offensive nature of the speech and the possible damage it could do to such an immature and captive audience.<sup>32</sup>

Only two years after Fraser, the Court decided Hazelwood School District v. Kuhlmeier. In this case, three former students sued school officials for violation of their First Amendment rights after the school principal deleted two pages of articles from the school newspaper.<sup>33</sup> The subjects of the offending articles included experiences with pregnancy by students in the school and the effects of divorce on the lives of students.<sup>34</sup> Here the Court found in favor of school officials holding that "educators do not offend the First Amendment by exercising editorial control over . . . student speech in school-sponsored . . . activities so long as their actions are

reasonably related to legitimate pedagogical concerns.”<sup>35</sup> Again, the Court differentiated this case from Tinker stating, “we conclude that the standard articulated in Tinker . . . need not also be the standard for determining when a school may refuse to lend its name and resources . . .” to student speech.<sup>36</sup>

Finally, in 2007, the Court carved out yet another exception to Tinker in Morse v. Frederick. As the Olympic Torch passed Juneau-Douglas High School, students of the school looked on as part of a school-sponsored class trip.<sup>37</sup> With national news media watching, Joseph Frederick and his friends displayed a 14-foot banner with the words, “BONG HiTS 4 JESUS.”<sup>38</sup> Principal Morse ordered the banner be taken down, and all but Frederick complied.<sup>39</sup> School board policy specifically prohibited “any assembly or public expression . . . that advocated the use of substances that are illegal to minors.”<sup>40</sup> For violation of this policy and failure to abide by Principal Morse’s demand to take down the banner, Frederick was suspended for 10 days.<sup>41</sup>

After losing his appeal to the school board, Frederick filed suit in district court.<sup>42</sup> While the district court found for the school board, the Ninth Circuit reversed, holding the school board failed to demonstrate Frederick’s speech caused a risk of substantial disruption.<sup>43</sup> The Supreme Court reversed, and again emphasized that the test set forth in Tinker is not the only basis for controlling student expression.<sup>44</sup> Instead of looking at the risk of substantial disruption as the Ninth Circuit did, the Court determined public schools have a compelling interest in deterring student drug use.<sup>45</sup> As such, the Court held school officials do not violate the First Amendment by prohibiting student speech that is reasonably viewed as promoting illegal drug use.<sup>46</sup>

As seen in the cases described above, the Supreme Court began its student free-speech jurisprudence by giving wide latitude to student expression in public schools; however, the Court has slowly chipped away at Tinker by adding exceptions for lewd and vulgar speech; school-

sponsored speech reasonably related to legitimate pedagogical concerns; and speech that promotes illegal drug use.<sup>47</sup> The issue becomes even more muddled when discussing students' off-campus behavior on the internet. In 2005, 74% of students ages 8 to 18 had access to the internet in their homes, up from 47% in 1999.<sup>48</sup> In a typical day, students spend over one hour using the computer for recreational purposes (1:02).<sup>49</sup> Increased access to the internet has led to new opportunities for teens to socially interact with one another.<sup>50</sup> Unfortunately, the results are not always positive. In 2006, 43% of students, ages 13 to 17, reported that they were victims of cyberbullying during the past year.<sup>51</sup> Cyberbullying occurs when one uses the internet, a cell phone, or other electronic device to create content intended to harm, harass, or embarrass another.<sup>52</sup> Bullying in any form can have lasting affects on the victim's grades, relationships, and self-esteem, only now the bully can reach a global audience while hiding behind his computer.<sup>53</sup> The question still remains, who is responsible for punishing such behavior?

As student web content grows more crude and audacious, educators are looking for ways to push back. While school officials can block websites and punish students for unauthorized use of the internet at school,<sup>54</sup> many students are fighting the discipline they receive for websites created on their home computers outside of school hours. Without proper guidance from the Supreme Court, district courts have come to a multitude of conclusions, often times on similar facts. Perhaps the most divisive issue is whether schools can punish a student for content created off-campus. Courts have applied at least three different tests to determine whether the student's web activity is sufficiently related to the school in order for its discipline to hold. Of course, depending on which approach a court elects, a whole host of additional issues follow. Each approach will be discussed below including some of the attendant issues.

## TINKER SUBSTANTIAL DISRUPTION APPROACH:

First, the majority of courts apply a Tinker material and substantial disruption standard for whether the student's speech is sufficiently connected to the school.<sup>55</sup> While the court in Killion v. Franklin Regional School District noted, "school officials' authority over off-campus expression is much more limited than expression on school grounds," it concluded, "the overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with Tinker."<sup>56</sup> It does not follow that student speech occurring off-campus should be held to the same standard as on-campus speech if school officials' authority is more limited in the former instance. Applying the same standard to both types of speech creates absolutely no distinction between the two.

Advocates of the material and substantial disruption approach have quoted as support Justice Fortas's opinion in Tinker where he stated, "conduct by the student, *in class or out of it*, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized."<sup>57</sup> However, this position takes the quote out of context. Earlier in the same paragraph, the opinion is making sure future courts apply the principles of Tinker not only to in-class discussions, but to all student interactions when the student is "on the campus during authorized hours."<sup>58</sup> The phrase "in class or out of it" should not extend to times when the student is at home under his parents' supervision and control.

Applying the substantial disruption approach can also have varying results depending on how a court defines "substantial disruption." Most often courts apply substantial disruption to the operation of the school itself, and look to whether classes were cancelled or if there was wide-spread disorder, violence, or student discipline as a result of the speech.<sup>59</sup> Courts do not

require that school officials wait until a substantial disruption has occurred, and instead allow officials to take preventative measures if they have a “specific and significant fear of disruption.”<sup>60</sup> In Saxe v. State College Area School District, the court, in an opinion by now Justice Alito, indicated that a school must have a well-founded fear of disruption such as past incidents resulting from similar speech.<sup>61</sup>

While most courts define substantial disruption based on interference with school operations, the Seventh Circuit, in at least one instance, defined substantial disruption based on the psychological effects the student’s speech had on other students.<sup>62</sup> Basing its decision on the Supreme Court’s analyses in Morse and Fraser the court held, “if there is reason to think that a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of a substantial disruption—the school can forbid the speech.”<sup>63</sup> The facts in the case at issue involved on-campus speech; however, if it were extended to cases of off-campus internet speech it would certainly increase the number of cases the school board could potentially reach.

#### SUFFICIENT CONNECTION APPROACH:

The second approach is even more outlandish since it allows school officials to punish off-campus conduct, regardless of its disruptive nature, as long as there is some connection to the school.<sup>64</sup> In Snyder the court admitted that no disruption under Tinker occurred, but found that the facts created enough of a connection between the off-campus activity and the on-campus effects to uphold the discipline.<sup>65</sup> The facts the court provided in support of its finding included: the website addressed the school’s principal; the intended audience was the school; a paper copy of the website was brought to the school; the website was discussed in school; a picture of the



principal was displayed on the website; the website was created out of anger at the principal's punishment of the student for a previous dress code violation; and the student lied in school about her creation of the website.<sup>66</sup> The circumstances under which the court finds a connection to the school seem too attenuated and convenient considering the court was then able to apply the Fraser lewd and vulgar speech standard to uphold the discipline without ever having to apply the more stringent Tinker substantial disruption standard.<sup>67</sup>

Further, the use of Fraser's lewd and vulgar exception in cases of off-campus speech makes little sense considering the analysis in Fraser spends considerable time focusing on the fact that the speech was expressed to a captive audience.<sup>68</sup> In issues concerning internet speech the audience is certainly not captive. Even more compelling is Justice Brennan's concurrence in Fraser where he stated, "if respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."<sup>69</sup>

The court further stated in a footnote that student's increased access to the internet, at home and at school, "requires school administrators to be more concerned about speech created off campus . . . than they would have been in the past."<sup>70</sup> Maybe so; however, "the mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web."<sup>71</sup>

#### TRUE THREAT APPROACH:

The final, and most acceptable, approach to the issue of disciplining off-campus speech is to permit discipline only when the student's speech rises to the level of a "true threat."<sup>72</sup> The Court, in its student free-speech jurisprudence has not had the opportunity to decide how far

beyond the schoolhouse gate the hand of school officials can extend, because each of the four cases unquestionably occurred at school. While the Supreme Court upheld the school board's discipline in Morse, the Court recognized that "there is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents."<sup>73</sup> The facts in Morse did not support a finding on the issue because Frederick was across the street from school, during the school day, and under teacher supervision at a school-sponsored event.<sup>74</sup>

In Layshock v. Hermitage School District the court chose to follow the Tinker approach, however, its discussion of the proper reach of school districts is instructive here.<sup>75</sup> The court emphasized the vital role that public schools have in the lives of its students, while still recognizing that its reach is not unlimited.<sup>76</sup> "Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system."<sup>77</sup> A student's First Amendment rights may not be coextensive with those of adults; however, the school board is still an arm of the State, and when "school officials ventur[e] out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."<sup>78</sup> Thus, when a student creates a website off-campus with content school officials find questionable or offensive they should involve that student's parent(s) so that his or her parent(s) may take whatever action he or she see fit. Schools may stand *in loco parentis* while children are at school, but they are "not empowered to assume the character of *parens patriae*."<sup>79</sup>

This does not mean that school officials must sit idly by when a student creates a website threatening school property, school employees, or other students. Due to the incidence of school

shootings in the United States (as well as abroad), school officials must be vigilant in their attempts to secure the safety of their students and employees. Websites can be early indicators of a student's propensity for violence. If the school administration has an objectively reasonable belief that student's threats toward the school are real, then it should be able to take actions necessary to stop the violence before it starts. Courts take different approaches to this "true threat" analysis by looking either to the threat from the viewpoint of the speaker or from the viewpoint of the intended target;<sup>80</sup> the appropriateness of each approach shall not be discussed here.

Students throughout history have bullied other students, and this is no different today. Unfortunately, as students become more technologically savvy their ability to torment each other increases to their detriment. School officials are in a unique position to try to combat the incidence of cyberbullying among their students. However, when school authorities attempt to discipline students for internet content created wholly off-campus and outside of school hours they run the risk of trampling their students' First Amendment rights. While the Supreme Court has ruled on several cases in the arena of student free speech in schools, it has yet to touch on whether school officials can discipline students for content created off-campus. As a result, lower courts have applied at least three different approaches including, the Tinker substantial disruption approach, a sufficient connection approach, and the true threat analysis approach. The true threat analysis appears to be the most effective approach due to the off-campus nature of the student speech, and misapplication of Supreme Court precedent in support of the other approaches. Finally, safety of our children on the internet is a very serious issue. Teaching students to be responsible users of the internet rightfully falls on the shoulders of educators,

legislators, and parents; however, it must be done in such a way as to avoid violating students constitutional rights, whatever they may be.

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<sup>1</sup> J.S. ex rel. Snyder v. Blue Mountain School District, No. 3:07cv585, 2008 WL 4279517, at 1 (M.D.Pa. September 11, 2008).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id. at 1-2.

<sup>5</sup> Id. at 2.

<sup>6</sup> Id. at 3.

<sup>7</sup> Id. (emphasis added.)

<sup>8</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618 (2007)

<sup>9</sup> Morse, 127 S.Ct. at 2634.

<sup>10</sup> Tinker, 393 U.S. at 504.

<sup>11</sup> Id. at 505.

<sup>12</sup> Id. at 506.

<sup>13</sup> Id. at 505-06

<sup>14</sup> Id. at 513.

<sup>15</sup> Id. at 509.

<sup>16</sup> Id. at 509-10.

<sup>17</sup> Id.

<sup>18</sup> Fraser, 478 U.S. at 677-78.

<sup>19</sup> Id. at 677.

<sup>20</sup> Id. at 678.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id. at 679.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id. at 680.

<sup>29</sup> Id. at 685.

<sup>30</sup> Id. at 681.

<sup>31</sup> Id. at 682.

<sup>32</sup> Id. at 683-84.

<sup>33</sup> Kuhlmeier, 484 U.S. at 262.

<sup>34</sup> Id. at 263.

<sup>35</sup> Id. at 273.

<sup>36</sup> Id.

<sup>37</sup> Morse, 127 S.Ct. at 2622

<sup>38</sup> Id. at 2622, 2643.

<sup>39</sup> Id. at 2622.

<sup>40</sup> Id. at 2623.

<sup>41</sup> Id. at 2622-23

<sup>42</sup> Id. at 2623.

<sup>43</sup> Id.

<sup>44</sup> Id. at 2627.

<sup>45</sup> Id. at 2628-29.

<sup>46</sup> Id. at 2629.

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- <sup>47</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618 (2007)
- <sup>48</sup> Ulla G. Foehr, M.A., Victoria Rideout, M.A., and Donald F. Roberts, Ph.D., Generation M: Media in the Lives of 8-18 Year Olds, Kaiser Family Foundation, at 30, 38 (2005), <http://www.kff.org/entmedia/upload/Executive-Summary-Generation-M-Media-in-the-Lives-of-8-18-Year-olds.pdf>
- <sup>49</sup> Id. at 31.
- <sup>50</sup> Chris Moessner, Cyberbullying, Trends & Tudes, Vol. 6, Iss. 4, at 1 (April 2007).  
[http://www.harrisinteractive.com/news/newsletters/k12news/HI\\_TrendsTudes\\_2007\\_v06\\_i04.pdf](http://www.harrisinteractive.com/news/newsletters/k12news/HI_TrendsTudes_2007_v06_i04.pdf)
- <sup>51</sup> Id.
- <sup>52</sup> Id.
- <sup>53</sup> Id. at 2.
- <sup>54</sup> Township High School District 214, Student Internet AUP § 3.25 Network Facilities and Internet Access.  
<http://www.d214.org/parents/info/studentaup.php>
- <sup>55</sup> Killion v. Franklin Reg'l Sch. Dist., 136 F.Supp.2d 446 (W.D.Pa 2001); Mahaffey ex. rel. Mahaffey v. Aldrich, 236 F.Supp.2d 779 (E.D.Mich. 2002); Coy ex rel. Coy v. Board of Educ. of the North Canton City Sch., 205 F.Supp.2d 791 (N.D. Ohio 2002); and Layshock v. Hermitage Sch. Dist., 496 F.Supp.2d 587 (W.D.Pa 2007)
- <sup>56</sup> Killion, 136 F.Supp.2d at 454-55.
- <sup>57</sup> Tinker, 393 U.S. at 513. (emphasis added.); Shannon Doering, Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse, 87 Neb. L. Rev. 630, 643 (2009).
- <sup>58</sup> Tinker, 393 U.S. at 513.
- <sup>59</sup> Layshock, 496 F.Supp.2d at 600.
- <sup>60</sup> Id. at 597.
- <sup>61</sup> Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001).
- <sup>62</sup> Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 674 (7th Cir. 2008).
- <sup>63</sup> Id.
- <sup>64</sup> Snyder, No. 3:07cv585, 2008 WL 4279517 at 13 (relying on Fenton v. Stear, 324 F.Supp. 767 (W.D. Pa. 1976))
- <sup>65</sup> Id. at 14.
- <sup>66</sup> Id.
- <sup>67</sup> Id. at 12.
- <sup>68</sup> Fraser, 478 U.S. at 683-85
- <sup>69</sup> Id. at 688.
- <sup>70</sup> Snyder, No. 3:07cv585, 2008 WL 4279517 at 13 (footnote 5.)
- <sup>71</sup> Layshock, 496 F.Supp.2d at 597.
- <sup>72</sup> Emmett v. Kent Sch. Dist. NO. 415, F.Supp.2d 1088 (W.D. Wash. 2000)
- <sup>73</sup> Morse, 127 S.Ct. at 2624.
- <sup>74</sup> Id.
- <sup>75</sup> Layshock, 496 F.Supp.2d at 597.
- <sup>76</sup> Id.
- <sup>77</sup> Id.
- <sup>78</sup> Thomas v. Board of Educ., Granville Central Sch. Dist., 607 F.2d. 1043, 1052 (2d Cir. 1979)
- <sup>79</sup> Id. at 1051.
- <sup>80</sup> Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002); Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).