Freedom of Speech for Students in the Digital Era: The Time for an Update

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Bullying is recognized as a widespread and often neglected problem in schools, and as a result states and school districts have attempted to approach it head-on.[1] With Montana signing its anti-bullying bill to law this past April, all states have now enacted legislation to address bullying in schools.[2] An example of one such law is Illinois's Bullying Prevention statute, which states:

> The General Assembly finds that a safe and civil school environment is necessary for students to learn and achieve and that bullying causes physical, psychological, and emotional harm to students and interferes with students' ability to learn and participate in school activities . . . No student shall be subjected to bullying . . . through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment.[3]

The statute acknowledges that bullying can come in different forms, however, as this article will highlight, schools face much difficulty when it comes to disciplining students for cyber-speech that occurs outside of school, without the use of its equipment.

This article will first consider Supreme Court jurisprudence regarding on-campus student speech in public schools generally. It will then examine different approaches that various federal courts of appeals have utilized for reviewing school discipline relating to

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[1] See U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement (SCS) to the National Crime Victimization Survey (NCVS), 2011 (2014). http://nces.ed.gov/programs/crimeindicators/crimeindicators2013/ind_11.asp. In 2011, about 28% of students aged 12-14 reported being bullied at school while 9% reported being cyber-bullied anywhere during the school year. 40% of students bullied at school reported it to an adult, whereas 26% reported cyber-bullying to an adult.

[2] Great Falls Tribune, *Gov. Bullock signs Montana anti-bullying bill into law*, http://www.greatfallstribune.com/story/news/local/2015/04/21/gov-bullock-signs-montana-anti-bullying-bill-law/26145567/ (last visited May 13, 2015).

[3] See 105 I.L.C.S. 5/27-23.7 (2014).

off-campus student speech. The "substantial disruption" standard developed by the Supreme Court in *Tinker v. Des Moines Independent Community School District*[4], as well as other subsequent Supreme Court decisions, have shaped permissible school disciplinary authority to date; however, there is much uncertainty as to how far schools can stretch this authority into the off-campus realm without violating a student's constitutional rights. Without guidance from the Supreme Court, various federal courts of appeals have implemented independent approaches to resolve this complex matter.

After considering various approaches utilized to date, this article will demonstrate why it is necessary for the Supreme Court to weigh in on the issue. In light of the evident need for direction in analyzing whether schools exceed their authority by disciplining students for their off-campus conduct, the Supreme Court should update the traditional *Tinker* standard to make it more contemporary.

Freedom of Speech: On-Campus Rights and Restrictions

This section reviews students' fundamental right to freedom of speech and expression in public schools, and considers a trilogy of cases that refine the scope of a school's general authority to prohibit certain types of on-campus speech.

By its express terms, the First Amendment prohibits government actors from impairing the free speech rights of the public. Under the Free Speech Clause of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech."[5] Through the Due Process Clause of the Fourteenth Amendment, the Free Speech Clause applies to state government actors as well.[6] Public schools, and their officials, act as

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[4] See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[5] U.S. Const. amend. I.
[6] U.S. Const. amend. XIV.

agents of the state and thus are subject to these same First Amendment limitations.

Generally, laws restricting speech are split into two categories: content-based and content-neutral.[7] Content-based restrictions focus on the message conveyed (i.e., overthrowing government), whereas content-neutral, also known as "time, place, or manner restrictions," focus on limiting the availability of particular means of communication.[8] The Supreme Court addressed time, place, or manner restrictions when it decided *Tinker*, a landmark case concerning student speech rights. [9]

A Broad Pronouncement for Student Speech Rights: The *Tinker* Standard

In *Tinker*, a school suspended students for wearing black armbands in demonstration of their objection to the Vietnam War, an act that was in violation of school policy.[10] The Supreme Court established that school officials do not possess absolute authority over their students when it famously declared that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11]

However, the Court acknowledged that students do not enjoy an absolute right to constitutionally protected expression.[12] The Court developed and applied the "substantial disruption" standard, whereby it determined that a school may restrict student speech or expression that would either "materially or substantially interfer[e]" with the operation of

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[7] See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983).
[8] *Id.* at 190–93, 200.
[9] See generally *Tinker*, 393 U.S. at 503.
[10] *Id*. at 504.
[11] *Id.* at 506.
[12] *Id*.; See generally: *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

the school or "collid[e] with the rights of others."[13] The Court noted that a school's "undifferentiated fear" or "apprehension of disturbance," however, was insufficient to overcome a student's First Amendment rights.[14] Because the school could not demonstrate any facts that reasonably could lead school authorities to forecast substantial disruption of or material interference with school activities, the Supreme Could held that the school violated its students' First Amendment rights.[15]

First Exception: Vulgar or Lewd Speech or Conduct

Tinker remained the primary authority governing the scope of free expression in public schools until 1986 when the Supreme Court decided *Bethel School District No. 403 v. Fraser*.[16] In *Fraser*, a school suspended a student for using "elaborate, graphic, and explicit sexual metaphor" during a speech he gave at a school-sponsored assembly.[17] The *Fraser* Court established its first exception to the substantial disruption test developed under *Tinker* when it held that a school may restrict vulgar or lewd student speech conducted on-campus because it was inconsistent with the "fundamental values" of public school education.[18] The Court focused on the role of public schools as "inculcat[ors of] fundamental values" and found it appropriate to grant school officials authority to prohibit student speech that was detrimental to the school's "basic educational mission."[19] In applying this exception to *Tinker*, the Supreme Court

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[13] *Tinker*, 393 U.S. at 513.
[14] *Id.* at 508.
[15] *Id.* at 514.
[16] See Ronna Greff Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation*, 1 Education Law § 2.3 (2014); See *Fraser*, 478 U.S. 675 (1986).
[17] *Fraser*, 478 U.S. at 677–78.
[18] *Id.* at 685.
[19] *Id.* at 681, 685.

determined that the school did not violate the student's First Amendment rights.[20]

Second Exception: School-Sponsored Speech

Two years after *Fraser*, in *Hazelwood Independent School District v. Kuhlmeier*, the Supreme Court addressed the scope of First Amendment protection for school-sponsored speech.[21] In *Kuhlmeier*, the principal objected to and deleted two articles authored and submitted by students for publication in the school newspaper.[22] The *Kuhlmeier* Court distinguished the personal student speech involved in *Tinker* and *Fraser* and established a new, separate test for school-sponsored vehicles for student expression (i.e., school newspapers or theatrical productions).[23] The Supreme Court held that school authorities may exercise editorial control over the style and content of student speech in school-sponsored activities, or speech that "members of the public might reasonably perceive to bear the imprimatur of the school" as long as the school restrictions are "reasonably related to legitimate pedagogical concerns."[24] Because the school reasonably exercised its control over its published content, it did not violate the student's rights.[25]

Third Exception: Speech Encouraging Illegal Drug Use

In the last case of the trilogy, the Supreme Court further refined the scope of student speech in the K-12 public school context by establishing another exception to *Tinker's* substantial disruption standard. In *Morse v. Frederick*, the school suspended a student for displaying a fourteen-foot banner at a school-sponsored event that stated,

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[20] *Id.* at 686–87.
[21] See Ronna Greff Schneider, 1 Education Law § 2.3 (2014); See *Hazelwood*, 484 U.S. 260 (1988).
[22] *Hazelwood*, 484 U.S. at 263–64
[23] *Id.* at 272–73.
[24] *Id.* at 281, 272–73.
[25] *Id.* at 276– 277.

"BONG HiTS 4 JESUS."[26] Relying on the state's interest in deterring drug use and *Tinker's* special notion of the school environment, the *Morse* Court held that school officials may restrict student expression that they reasonably regard as encouraging illegal drug use.[27] Although the speech in question did not physically occur on school grounds since it occurred across the street from campus, the *Morse* Court reasoned that because the student was standing among fellow students, during normal school hours, at an event sanctioned and monitored by school officials, the student could not claim that his speech was completely off campus and therefore protected.[28]

In light of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, the Supreme Court provided guidance for lower courts to determine whether a school exceeded its permissible authority in disciplining its students for on-campus speech; however, none of these cases involved speech that occurred strictly off-campus, solely through the use of the Internet. Without any particular guidance for this type of speech, federal courts of appeals have implemented independent and dissimilar threshold tests.

Different Approaches Among Circuit Courts
Regarding Off-Campus Digital Student Speech

There is a split among federal courts of appeals with respect to whether, and under what circumstances, Tinker applies to off-campus student speech. This section considers the different approaches utilized by the Second, Third, Fourth, and Ninth Circuits. First, this section looks at the Second Circuit's test, which addresses whether it is reasonably foreseeable that a student's off-campus speech will reach school premises.[29]

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[26] *Morse*, 551 U.S. at 397–98.
[27] *Id.* at 408.
[28] *Id.* at 400-01.
[29] See *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

Next, this section examines the Third Circuit's approach, which does not utilize a threshold test and instead focuses on the speaker's intent.[30] Then, this section next considers the Fourth Circuit's test, which focuses on whether off-campus student speech has a sufficient nexus to a school's pedagogical interests.[31] Finally, this section will review the Ninth Circuit's test, which applies Tinker to off-campus student speech that presents an identifiable threat of school violence.[32]

The Second Circuit Approach: Reasonable Foreseeability

In *Doninger v. Niehoff*, the Second Circuit applied a threshold test that it developed in *Wisniewski v. Board of Education of the Weedsport Central School District*[33] to determine whether *Tinker* applied to off-campus student speech.[34] The school disciplined a student for writing a blog post containing vulgar language and misleading information about a supposed cancellation of a school event, which also encouraged other students to burden the school superintendent with complaints.[35]

In applying the threshold test established from *Wisniewski*, the *Doninger* Court determined: [1] the content of the student's speech directly pertained to school matters, [2] the student knew her classmates would likely view the blog post, and [3] that it was the student's specific intent to encourage her classmates to read and respond to her blog post, and that, in fact, several classmates did so.[36] After establishing that it was reasonably foreseeable that the student's off campus expression would reach school

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[30] See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011).
[31] See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011).
[32] See *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013).
[33] See generally *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).
[34] *Doninger*, 527 F.3d at 50.
[35] *Id.* at 43.
[36] *Id.* at 44, 48–50.

property, the court applied *Tinker's* substantial disruption standard and subsequently determined that the discipline imposed was appropriate due to the risk of disruption tied to the blog post's "plainly offensive" language and misleading information.[37] Thus, the student's rights were not violated.[38]

Third Circuit Approach: The Focus on the Speaker's Intent

In *J.S. ex rel. Snyder v. Blue Mountain School District*, the Third Circuit did not utilize a threshold test in determining whether *Tinker* applied to off-campus student speech, instead the *Snyder* Court assumed *Tinker's* applicability and emphasized that the student's intent should be the primary area of focus.[39] The student, an eighth-grader, created a fake profile of her school's principal on MySpace that ridiculed him and his family and implied that he was a pedophile.[40] Although the profile was initially publicly available, the student made the profile "private" the day after she created it, thereby limiting access only to people she invited.[41] Upon learning of the profile, the principal suspended the student for ten days. [42]

The *Snyder* Court noted that little disruption resulted from the post, that the School District's computers blocked access to the social network in question, and that the only image printout to make it on-campus was brought at the principal's express request.[43] For these reasons, the Third Circuit held that absent an express showing that the speaker both meant for her speech to reach the school and be taken seriously, the

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[37] *Id.* at 50–53.
[38] *Id.* at 53.
[39] *Snyder*, 650 F.3d at 930.
[40] *Id.* at 920–21.
[41] *Id.* at 921.
[42] *Id.* at 921–22.
[43] *Id.* at 929.

school regulation of off-campus student speech would not likely be valid.[44] Without such express showing made by the school, the Third Circuit held that the school violated the student's First Amendment rights.[45]

Fourth Circuit Approach: Sufficient Nexus Requirement

Unlike the approaches taken by the Second and Third Circuits, the Fourth Circuit primarily focused on the "nexus" between the student's off-campus speech and the school's pedagogical interests. In *Kowalski v. Berkeley County Schools*, the student, a high school senior, created a MySpace discussion on her home computer, which contained commentary and photography posted from about two dozen of her classmates that ridiculed a fellow classmate.[46] The next day, the targeted classmate's parents filed a harassment complaint with the school, and the targeted student did not attend class in order to avoid the students who participated in the online discussion.[47] The school suspended the student who created the profile for ten days, but later reduced it to five.[48]

After reviewing the school's disciplinary action, the *Kowalski* Court determined that regardless of where the student speech originated, the speech interfered with the school's interest in providing a safe learning environment.[49] The Fourth Circuit reasoned that the disciplined student could reasonably have expected that her off-campus speech would ultimately reach the school or otherwise impact the school environment given the

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[44] *Id.* at 930; See Daniel Marcus-Toll, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 Fordham L. Rev. 3395, 3423 (2014).
[45] *Snyder,* 650 F.3d at 935–36.
[46] *Kowalski*, 652 F.3d at 567–68.
[47] *Id.* at 568.
[48] *Id.* at 569.
[49] *Id.* at 573–74; Daniel Marcus-Toll, 82 Fordham L. Rev. at 3426.

webpage's name and that the majority of its members where all classmates.[50] Therefore, because the student's off-campus speech had a sufficiently strong nexus to the school's pedagogical interests, the school's punishment did not infringe on the disciplined student's First Amendment rights.[51]

Ninth Circuit Approach: An Identifiable Threat of School Violence

The Ninth Circuit expressly declined to adopt any of its sister-circuit threshold tests to determine whether Tinker applied, instead it explicitly held that the requirements for Tinker are satisfied when schools take disciplinary action in response to off-campus speech that creates an "identifiable threat of school violence."[52] In *Wynar v. Douglas County School District*, the school suspended a student for sending "increasingly violent" instant messages to classmates that threatened a school shooting.[53] When the events at issue occurred, the student had reportedly owned various weapons and ammunition and had discussed these possessions numerous times with his friends on the social website MySpace.[54] The court noted that the suspended student had described how he would kill several classmates and how he pegged a possible date to carry out his threats.[55]

Like the Fourth Circuit, the Ninth Circuit emphasized the school's interest in, and duty to provide for, student safety.[56] The *Wynar* Court held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to

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[50] *Kowalski*, 652 F.3d at 573; Daniel Marcus-Toll, 82 Fordham L. Rev. at 3427.
[51] *Kowalski*, 652 F.3d at 574.
[52] *Wynar*, 728 F.3d at 1069.
[53] *Id.* at 1064–66.
[54] *Id.*
[55] *Id.* at 1071.
[56] *Id.* at 1069–70; Daniel Marcus-Toll, 82 Fordham L. Rev. at 3427.

off-campus student speech that complies with *Tinker*.[57] Because the Ninth Circuit determined that the student's speech satisfied both prongs under *Tinker*, it held that the school's disciplinary action did not infringe on the student's First Amendment rights.[58]

The Necessity for Updating *Tinker* in Light of Off-Campus Digital Speech

The lower courts have approached this issue very differently without guidance from the Supreme Court.[59] In light of the evident need for direction for analyzing whether schools exceed their authority by disciplining students for their off-campus conduct, the Supreme Court should update the traditional *Tinker* standard to make it more contemporary. The Internet adds a complicated wrinkle to the student speech analysis because it is neither a tangible medium like a banner or a school newspaper, nor is it heard at a school assembly.[60] In recognition of schools attempting to assert some degree of control over cyber-speech that adversely affects the health of students, lower court opinions have shifted away from a bright line standard to a broader approach not limited by the physical characteristics of the speech itself.[61] Off-campus speech used to be afforded full First Amendment protection, but now lower court opinions have made speech more susceptible to prohibition.[62]

What makes this complicated area of the law more complex is the fact that speech conducted on the Internet is not on-campus in the traditional sense so *Tinker*, *Fraser*,

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[57] *Wynar*, 728 F.3d at 1069.
[58] *Id.* at 1070–72.
[59] Samantha M. Levin, *School Districts as Weatherman: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students' Online Speech*, 38 Fordham Urb. L.J. 859, 860 (2011).
[60] *Id.* at 867.
[61] *Id.* at 870.
[62] *Id.* at 870–71.

Hazelwood, and *Morse* seem almost irrelevant.[63] However, it does seem appropriate to apply the substantial disruption standard from *Tinker* to cyber-speech despite the fact that *Tinker* was decided before the advent of the Internet. But by doing so without a more uniform approach, the same facts would see different outcomes in different jurisdictions.

The issue with applying the traditional *Tinker* standard to cyber-speech is that there is generally always a foreseeable chance that it can reach and disrupt a school's campus due to the Internet's omnipresence, all it takes is a wireless connection. The Second Circuit's reasonable foreseeability approach is concerning for this reason, as it seems rather easy for a school to satisfy the threshold test developed in *Doninger*. The Fourth Circuit's approach on its own appears vague, as there is no guidance as to what pedagogical interests would permit jurisdiction. And while focusing on the intent for the speech to make it to campus is more of a bright-line approach, it is not clear what level of disruption would be necessary to justify student discipline. And further, the Ninth Circuit's identifiable threat of violence test seems more speech protective, however, it is devoid of guidance for how to address cyber-bullying since in many cases there is no threat of physical harm.

Conclusion

Because there is a clear and present issue of cyber-bullying in public schools the Supreme Court should address cyber-speech by updating *Tinker* through some combination of the aforementioned approaches. Each has its own strengths and weaknesses, but without guidance it will permit the application of these inconsistent approaches to continue. As speech evolves, so should its mode for analysis.

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[63] *Id.* at 870.