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STUDENT SPEECH ISSUES

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Abstract

With the good comes the bad; technology is no different. The Internet has given society wondrous advancements such as e-commerce, social networking, and instant access to volumes of information; that's the "good." The "bad" comes in many forms, one of which is wreaking havoc on school-age students nationwide: cyberbullying. Teenage students are using avenues such as instant messaging, MySpace, websites and web-blogs to bully other students, some having grave and deadly consequences.

To combat this growing problem, state legislators are taking bold moves by instituting new laws that require school districts to implement and enforce anti-cyberbullying policies. However, the legal guidance for constructing these policies is relatively minimal. School districts must use very specific language regarding what conduct may be regulated and, more particularly, the geographical bounds of the school's authority, so as to not impinge on the students' First Amendment right to freedom of speech and expression.

To ensure the policies will be enforceable in a courtroom, the school districts need to examine the existing jurisprudence regarding school speech issues. First, the ultimate authority created by Supreme Court precedent must be followed; unfortunately, the highest court in our country has only handed down four decisions regarding student speech. These four standards provide the brick and mortar with which school districts should construct the foundation of their anti-bullying policies. However, of the four existing standards, none of them address the issue of off-campus student speech and the extent of school officials' authority to regulate it. For law governing this aspect of the policies, school districts must turn to decisions handed down from state and federal appellate courts.

Various federal circuit appellate courts, namely the second and third circuits on the east coast, have tackled the issue of students being punished for speech created off-campus and outside of school hours. Some courts have maintained the First Amendment protection for off-campus speech, limiting the authority to school or school-sponsored activities. Other courts, though, have established standards that, if met, allow a school principal or district superintendent to suspend or expel students for websites or blogs created from their home computer. These courts have twisted and manipulated the existing Supreme Court precedent to create the seemingly logical and appropriate support for new standards.

Hopefully with the increasing number of off-campus student speech cases, the increased awareness of cyberbullying, and a split-decision from the Third Circuit Appellate Court, the Supreme Court will find the need to hand down a ruling on the issue. Until then, school districts must stick to the existing law; they must create policies that can protect students and their need for a safe learning environment, while respecting their right to free expression and not suffocating the creativity which may result from exercising that right.

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1

Cyberbullying: Schoolyard “Push and Shove” in the 21st Century

Everybody can picture the conventional schoolyard bully often stereotyped in classic teenage television shows and Hollywood flicks: a post-pubescent man-child ransacking classmates for lunch money after threatening them with atomic wedgies, “yellow swirlies,” and the all-time classic “noogie.”¹ This type of behavior has always been an unfortunate commonality in schools from generation to generation; however, once the final bell rang, signaling the end of the day, the Biffs and O’Doyles² of the world typically limited their bullying antics to inside the schoolhouse gates. What happens, though, when those limits are no longer abided by, and bullying is left to know no bounds?

With the advent of the Internet, online social networks, instant messaging, and text messages, bullying has taken on a new guise, more frightening and farther reaching than ever before. The school pranks of old—wedgies, swirlies, and noogies—have been replaced by

¹ A “yellow swirlie” is a bullying tactic in which the bully urinates in the toilet and then proceeds to hold another kid’s head in the toilet water as he flushes. A “noogie” is another tactic that involves the bully placing a kid in a headlock and then forcefully rubbing the top of the kid’s head with his knuckles.

² Biff Tannen is the chief antagonistic bully in Robert Zemeckis’ *Back to the Future* trilogy. The menacing O’Dolyes are the thug children that bully Adam Sandler throughout his 1995 comedy *Billy Madison*.

slanderous and hurtful comments on somebody's sexuality, unflattering or doctored pictures poking fun at one's appearance, or whole websites calling for the death of a classmate, teacher, administrator, etc. And each instance is not merely confined to the bully and the one being bullied, but instead shared with any third party who is willing to push a button or click a mouse.

What is Cyberbullying?

While placing an exact definition on such a relatively broad and all-encompassing concept is difficult, one definition offered for cyberbullying suggests any "bullying through email, instant messaging (IM), in a chat room, on a Web site, or through digital messages or images sent to a cellular phone."³

Also, both parties frequently involved in these cyberbullying incidences are adolescent teenagers, with a large portion occurring in the first several years of high school.⁴ Growing up in the "computer age," this demographic played the predominant role in the surge of Internet use by all Americans since the start of the new millennium.⁵ When you combine this increasing usage rate with teenagers being at the age where conventional "physical" bullying typically took place pre-Internet, cyber bullying is the logical resulting consequence.

Another important feature that characterizes cyberbullying is the sense of anonymity provided to both parties. In a positive sense, electronic communication can provide a "safe haven" for socially backwards introverts that typically avoid face-to-face social situations.

³ ROBIN M. KOWALSKI ET AL., CYBER BULLYING 1 (2008). However, this definition is even lacking as it does not account for social networking forums, such as MySpace, Facebook, and Twitter, which create another avenue for cyber bullying, unique and separate from ordinary websites.

⁴ National Crime Prevention Council, *Teens and Cyberbullying: Executive Summary of a Report on Research* (2007), available at <http://surfsafety.net/Cyberbullying-Exec%20Summary-FINAL.htm> (last visited Sep. 20, 2009). A national survey conducted by HarrisInteractive Market Research of 824 students ages 13-17 found that over 50% of students age 15-16 reported a cyber bullying incident in the past year, the highest percentage among all age groups.

⁵ Center for Digital Future at the Annenberg USC School, *The 2005 Digital Future Report* (2005), available at <http://www.digitalcenter.org> (last visited Sep. 20, 2009).

Instead, chat rooms and instant messaging allow these children to confidently approach, and make conversation with, individuals they otherwise would shy away from.⁶

To some, though, the idea of cyberbullying may be abstract and a hard concept to derive a definitive definition for. Instead, the best way of grasping the true idea and effects of cyberbullying is to look at specific, real-life examples; tragic examples that have resulted in the unnecessary and untimely deaths of teenage victims. Three particular names stick out when addressing the issue of cyberbullying. The stories of Ryan Halligan, Megan Meier, and Jeffrey Johnston show, first-hand, what can happen when instant messaging, MySpace, and other Internet applications are manipulated to bully others.

Ryan Halligan

On the morning of October 7, 2003, while on a business trip in Rochester, New York, John Halligan received a 6:00 A.M. phone call⁷ from his wife, Kelly, from their home in Essex Junction, Vermont. The news was devastating. Ryan Halligan, the couple's thirteen year old son, had committed suicide by hanging.⁸ After grieving the loss of his son, John Halligan began searching for the reasons behind his son's suicide. He eventually logged into his son's instant messaging name, hoping to gather information on the months and days leading up to Ryan's death. Possibly, the only thing more shocking and disheartening than Ryan's death was the cause found to be behind it.

⁶ KOWALSKI, *supra* note 3, at 8. The authors cite studies by D.W. Russel et al. (2003) and L. D. Roberts et al. (2000) that point to the propensity for socially inept adolescents to find confidence in communicating anonymously via electronic communication.

⁷ "Interviews: John Halligan," *Frontline* (2007), available at <<http://www.pbs.org/wgbh/pages/frontline/kidsonline/interviews/halligan.html>> (last visited Jan. 5, 2010).

⁸ Kevin Caruso, *Ryan Patrick Halligan Memorial*, available at <<http://www.http://www.suicide.org/memorials/ryan-patrick-halligan.html>> (last visited Jan 5, 2010).

Before the end of his seventh grade year, Ryan had several run-ins with bullying in school.⁹ As the school year neared a close, though, Ryan had supposedly befriended the long-time bully that had plagued him for nearly three years. Under the guise of a friend, the bully gained Ryan's trust. One night, Ryan revealed to his new "friend" an embarrassing story; the bully then twisted this story to start a rumor that Ryan was gay. This rumor followed Ryan, in-school and online, throughout the remainder of the school year, and well into the summer months. During that summer, another instance began brewing. Ryan used instant messaging to foster a relationship with a "popular girl"¹⁰ from school. At the start of his eighth-grade year that fall, Ryan approached his new girlfriend at school, only to be embarrassingly rejected¹¹ and humiliated before several schoolmates. Distraught and further depressed, Ryan began searching out websites¹² that contained material on suicide and started communicating, via the Internet, with a different boy who shared his interest in suicide, even encouraging Ryan to do so.¹³ Several weeks later, Ryan took his own life.

⁹ John Halligan, *Ryan's Story*, available at <<http://www.ryanpatrickhalligan.org/>> (last visited Jan. 6, 2010). In fifth grade, Ryan had several verbal run-ins with a specific kid and some of his friends. John and Kelly had Ryan see a therapist to help cope with the bullying; these sessions concluded at the end of his fifth grade year. The bullying continued from the same kid in sixth grade, but eventually escalated during his seventh grade year. On one occasion before Christmas that year, Ryan broke down in a "very tearful session at the kitchen table." Two months later, Ryan had an even more serious confrontation that became physical; the event seemed to boost Ryan's self-esteem though, as he said he "got a few good punches in and felt good he was able to stick up to the bully."

¹⁰ *Id.*

¹¹ *Id.* In front of her friends, Ryan's "new girlfriend" called him a "loser" and "didn't want anything to do with him." She went on to reveal the elaborate plot conjured up by her and her friends. At Ryan's expense, the girl made Ryan think she liked him, only so that he would reveal personal and intimate things about himself. She then copied and posted these details into other instant messages with her friends. What Ryan thought was a real relationship was nothing more than a joke to the "popular girl" and her friends.

¹² Death by Cyber-Bully, THE BOSTON GLOBE (2005), available at <http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/08/17/death_by_cyber_bully/> (last visited Sep. 20, 2009).

¹³ *Supra* note 8. At one point, Ryan actually told the boy urging his suicide that he, in fact, was going to commit the act. To this, the boy responded, "It's about fucking time."

Megan Meier

Another tragic incident caused by cyberbullying occurred on October 17, 2006, when thirteen year-old Megan Meier, of Dardenne-Prairie, Missouri, hanged herself in her bedroom closet.¹⁴ What, or in this case who, was the main culprit behind this tragic suicide? Josh Evans, a sixteen year-old from Florida who enjoyed playing the guitar and drums, and communicated with Megan via his MySpace profile.¹⁵ Unbeknownst to Megan though, Josh Evans was actually Lori Drew, a forty-seven year-old neighbor and mother of a former friend¹⁶ of Megan, who created the fake profile for the sole purpose of bullying Megan.¹⁷

Like Ryan Halligan, Megan Meier battled depression and other emotional obstacles at an early age.¹⁸ This took a positive swing, though, as Megan started her eighth-grade year at a new school, twenty pounds lighter, and as a member of the school volleyball team.¹⁹ Adding to the happiness was the new relationship struck up with a sixteen-year-old boy, Evans, who had sent her a friend request on MySpace. The relationship was completely virtual, as the two messaged back and forth on the website, but never communicated over the phone or in person.²⁰ The innocent flirting continued for a month until Sunday, October 15, 2006, when Josh sent Megan the following message: “I don’t like the way you treat your friends, and I don’t know if I want to

¹⁴ *Megan Taylor Meier—The Story* (2007) citing an article by Steven Pokin, posted in the St. Charles Journal on November 13, 2007, available at <<http://www.meganmeierfoundation.org/story/>> (last visited Jan. 10, 2010).

¹⁵ *Id.*

¹⁶ *Id.* That summer, Megan had decided to end her friendship with Lori Drew’s daughter.

¹⁷ Christopher Maag, “A Hoax Turned Fatal Draws Anger but No Charges,” THE NEW YORK TIMES (Nov. 28, 2007), available at <http://www.nytimes.com/2007/11/28/us/28hoax.html?_r=2&oref=slogin> (last visited Jan. 10, 2010).

¹⁸ *Supra* note 14. Several of Megan’s obstacles included being a “heavy child [who] for years had tried to lose weight,” depression, attention deficit disorder, and talks of suicide. In the third grade, Megan started seeing a therapist and did so up until her death.

¹⁹ *Id.*

²⁰ *Id.*

be friends with you anymore.”²¹ An argument ensued for nearly an hour, filled with insults and name-calling. The following day, Megan returned home to find the messages getting worse. Not only was Josh sending hateful messages, but his “friends” were also joining in on the verbal bullying.²² According to Ron, Megan’s father, the last message his daughter saw before retreating to her room to take her life, was from Josh; it read: “Everybody in O’Fallon knows how you are. You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you.”²³

In the grief-stricken aftermath of Megan’s suicide, the Meiers learned of the “hoax” profile and Lori Drew’s involvement. Despite the anger and rage brewing inside of the Meiers family, they declined to publicly comment on the case²⁴ for more than a year, as the F.B.I. launched a full-scale investigation, after which, in U.S. District Court, Drew was charged with,

²¹ *Supra* note 17.

²² *Supra* note 14. Tina called Megan that evening to ask if she had signed off of MySpace yet, to which Megan responded, “No, Mom. They are all being so mean.” Fifteen minutes later, a crying Megan called her mother back, explaining that people were posting bulletins (surveys) on MySpace entitled “Megan Meier is a slut” and “Megan Meier is fat.”

²³ *Id.*

²⁴ *Id.* The initial case stemmed from an incident involving a foosball table. The Meier’s had been storing a foosball table for Drew, a surprise Christmas gift for Drew’s daughter. Upon learning of Drew’s involvement, the Meiers returned home and proceeded to use an ax and sledgehammer to demolish the table. Tina and Ron then placed the pieces in Drew’s driveway and spray-painted “Merry Christmas” on the pile. Drew subsequently filed a complaint.

and convicted of, computer fraud.²⁵ Drew appealed the decision and, in the summer of 2009, was acquitted of all charges.²⁶

Jeffrey Johnston

The suicide note read:

“Hello Friends, I'm just writing to tell you all I won't be in school anymore. I decided to commit suicide because my life is too hard...It's just difficult to explain...I hope none of you miss me...I'm really sorry.”²⁷

More disheartening than the note itself was the date it was written, May 2, 2005, nearly two months before Jeffrey Johnston, a fifteen-year-old student in Cape Coral, Florida, hanged himself in his bedroom closet on the morning of June 29, 2005. The note was found by his mother, Diane, several weeks later in the "Trash" folder on his computer.²⁸ One of the contributing factors to his life being "too hard" was the relentless bullying he endured for the three years preceding his death.

Before the start of his seventh-grade year at Trafalgar Middle School, Jeff was described as a “well-liked, straight-A student”²⁹ with a “wide circle of friends.”³⁰ That fall, however, the

²⁵ Jennifer Steinhauer, “Verdict in MySpace Suicide Case,” THE NEW YORK TIMES (Nov. 28, 2008), *available at* <<http://www.nytimes.com/2008/11/27/us/27myspace.html>> (last visited Jan 10, 2010). Drew was convicted of “three misdemeanor charges of computer fraud.” More specifically, “the jury found Ms. Drew guilty of accessing a computer without authorization on three occasions, a reference to the fraudulent postings on MySpace in the name of Josh Evans.”

²⁶ Kim Zetter, “Judge Acquits Lori Drew in Cyberbullying Case, Overrules Jury,” *Wired: Threat Level* (Jul. 2, 2009), *available at* <http://www.wired.com/threatlevel/2009/07/drew_court/> (last visited Jan 10, 2010).

²⁷ *Jeffrey Johnston Story*, Polk County Public School, citing original article in *Ladies Home Journal* magazine, published March 2006, *available at* <http://www.polk-fl.net/parents/generalinformation/documents/bullying_JeffreyJohnstonStory.pdf> (last visited Jan 10, 2010).

²⁸ *Id.*

²⁹ Juju Chang, et al., “Mom's Campaign for Florida Anti-Bully Law Finally Pays Off”, *ABCNews.com* (May 2, 2008), *available at* <<http://abcnews.go.com/GMA/story?id=4774894&page=1>> (last visited Jan 11, 2010).

³⁰ *Supra* note 27.

bullying began,³¹ leaving Jeffrey crying to his mother and begging her to help. Diane pursued every avenue she could, but was only able to lessen, not eradicate, the bullying for the remainder of the year. The following year, the bullying returned, this time stretching far beyond the classroom and into cyberspace.³² Despite Jeff's reporting the instance to school officials, Robert Roemmick, the kid identified as the bully, could not be punished as there was no evidence of bullying on the school premises. The once cheery "honor student...with a passion for reading"³³ now wore all-black clothes, and became "introverted and obsessed about his appearance."³⁴

When their eighth-grade year concluded, Jeff and Robert attended separate high schools, helping to curb the bullying and reincarnate the "old" Jeff. His freshman year of high school seemed to go well, according to Diane; he seemed "happy again."³⁵ But after returning home from a trip to Disney World in May of that year, Jeff reverted back to the depressed kid from middle school. Then, without warning, Jeff's body was found on that fateful Wednesday morning, hanging lifeless in his closet. Later, Roemmick admitted to bullying³⁶ Jeff over the Internet and offered Diane Johnston an apology, but remained justified in his actions.

³¹ *Supra* note 27. Jeffrey recalled this kid, later identified as Roemmick, "started trashing [him] at school, cursing [him] out under his breath, and telling everyone [he] was gay." Roemmick started "passing notes that ridiculed [Jeff] and spreading rumors that Jeff had supposedly made derogatory comments about other students." Soon, many of his friends turned against him, including his girlfriend. Roemmick also used instant messages to ridicule Jeff.

³² *Id.* An unknown person (presumably the bully) hacked into a website created by Jeff and his friends, and posted "vicious comments", including calling Jeff "fat and ugly" and saying that he "laughed at his friends behind their backs." The bully openly shared his thoughts on his own web-blog, writing, "Jeff is a fagget [sic]. He needs to die...it seems everythime [sic] i write on the computer i build up rage."

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Supra* note 29. Roemmick stated, "We would write, 'Oh, look what Jeff did today. How weird is he? He is creepy, he is a stalker.'" Roemmick also called Jeff names via the Internet, which were then shared with, and dispersed to, other students.

Anti-Bullying Legislation Gone Wild

The tragic stories of Ryan, Megan, and Jeff caused, and still are causing, a wave to sweep over state legislatures all across the United States. Anti-bullying bills requiring schools to take a more proactive approach towards stemming bullying activity are cropping up, one after the other. In 2006, South Carolina and Idaho enacted cyberbullying prevention legislation.³⁷ Over the next two years, from 2007 through 2008, seventeen more states³⁸ followed suit. Vermont recently upped the penalty for a cyberbullying offense, adding a \$500 fine to the penalties already in place by the bully prevention law enacted shortly after Ryan Halligan's death.³⁹ The state is also currently tackling with a proposed bill that would extend the reach of school administrators to off-campus activity involving bullying of its students.⁴⁰

These anti-cyberbullying laws are not strictly occurring at the state level either, as federal legislators are taking up the cause and getting involved. On April 2, 2009, Representative Linda Sanchez (D-Calif.) introduced the Megan Meier Cyberbullying Prevention Act.⁴¹ This act would criminalize cyberbullying, making it a federal offense subject to federal prosecution and

³⁷ *Enacted Cyberbullying Legislation*, National Conference of State Legislatures (current through 2008), available at <<http://www.ncsl.org/IssuesResearch/Education/CyberbullyingStateLegislation/tabid/12903/Default.aspx>> (last visited Feb. 2, 2010). South Carolina passed the Safe School Climate Act, which required school district to create policies that helped prevent bullying activities, which included those by "electronic communication." In Idaho, House Bill No. 750 provided school board superintendents with the power to suspend student for "student harassment, intimidation or bullying." Also, the bill encompasses bullying activities that occur "through the use of land line, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer."

³⁸ *Id.* These states include Arkansas, California, Delaware, Florida, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Washington.

³⁹ *State Laws and Policies*, Cyber Bully Alert (8 Oct. 2008), available at <<http://www.cyberbullyalert.com/blog/2008/10/cyber-bullying-state-laws-and-policies/>> (last visited Feb. 2, 2010).

⁴⁰ Peter Hirschfeld, "Bullying law may infringe rights," RUTLAND HERALD (6 Feb. 2010), available at <<http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20100206/NEWS04/2060362/>> (last visited Feb. 2, 2010).

⁴¹ *H.R. 1966: Megan Meier Cyberbullying Prevention Act*, Govtrack.us, available at <<http://www.govtrack.us/congress/bill.xpd?bill=h111-1966>> (last visited Feb. 2, 2010).

penalties.⁴² The last activity concerning the bill came on September 30, 2009, when subcommittee hearings were held to discuss the proposed bill.⁴³ Despite still being in the early stages of the lawmaking process, this bill would have significant implications on the First Amendment freedoms of students, and potentially extend the authority of school officials from the schoolhouse gates to the students' bedrooms.

Unless and until this federal law is passed though, state laws govern. The increasing problem with many of the state cyberbullying laws is that legislators are merely demanding that school boards create and implement school district policies that conform to the existing laws, without providing clear guidance on what needs to be incorporated into them. Some of the state laws provide relatively specific guidelines for what constitutes cyberbullying, the location of the acts, and an incorporation of existing Supreme Court precedent.⁴⁴ Other states, however, only provide generalities and ambiguous language regarding what constitutes cyberbullying. Rhode Island merely expanded student discipline codes to incorporate “electronic communications; [this] includes a computer, telephone, cellular telephone, text-messaging device and personal data assistance devices.”⁴⁵ Minnesota amended its anti-bullying statutes to include a requirement that school boards produce a written policy regarding bullying in general, more specifically

⁴² *Supra* note 41. The summary of the bill offered by Govtrack.us reads as follows: “Amends the federal criminal code to impose criminal penalties on anyone who transmits in interstate or foreign commerce a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behavior.”

⁴³ *Id.*

⁴⁴ *Supra* note 37. Pennsylvania House Bill 1067 specifically defines the act with a list of criteria, including “occur[ing] in a school setting” and “substantially disrupting the orderly operation of the school.” While some other wording remains open to interpretation, such as the act being “severe, persistent, or persuasive”, the act does define “school setting” as, “in the school, on school grounds, in school vehicles, at a designated bus stop or at any activity sponsored, supervised or sanctioned by the school.”

⁴⁵ *Id.*

cyberbullying.⁴⁶ Like Minnesota, Oregon also now requires school districts to address the issue of cyberbullying, through the adoption of preventative policies.⁴⁷

By leaving school boards on their own to enforce these laws, policies are being created that may impinge upon students' First Amendment rights, specifically with regards to off-campus school speech. Students are being punished for conduct performed on their own time, outside of school, outside of school-sponsored activities, and on their own personal equipment.⁴⁸ Moreover, such an approach threatens to create a patchwork of inconsistent laws that directly impinge upon free speech. To create a legally acceptable policy regarding off-campus speech, School district must first look at the Supreme Court decisions governing student speech issues. From there, the school districts must observe how their individual states have interpreted the Supreme Court rulings to establish their own state law regarding students' rights and their ability to express themselves, both on and off campus. The next two chapters provide just that: a look into the current jurisprudence surrounding the First Amendment with regards to student speech and the authority offered schools for punishing students for disobedience and insubordination.

⁴⁶ *Supra* note 36. The amendment states that, "Each school board shall adopt a written policy prohibiting intimidation and bullying of any student. The policy shall address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use."

⁴⁷ *Id.* Oregon House Bill 2637 amends ORS 339.356 to read, "Each school district shall adopt a policy prohibiting harassment, intimidation or bullying and prohibiting cyberbullying..." The bill does provide some suggestions for inclusion in the policies, but the school district is, nonetheless, left on its own to create these potentially complicated and involved policies.

⁴⁸ See *Layshock ex rel. Layshock v. Hermitage School Dist.*, 593 F.3d 249, C.A.3 (Pa.), 2010 and *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286, C.A.3 (Pa.), 2010.

2

The “Big Four”: Supreme Court Case Law for School Speech

Since 1789 when the first Supreme Court took the bench under Chief Justice John Jay,⁴⁹ the Court has handed down only four decisions that directly address the First Amendment rights of students, specifically the freedom of speech and expression while in a school setting. The “Big Four” cases for school speech are as follows: *Tinker v. Des Moines Ind. Community Sch. Dist.*,⁵⁰ *Bethel Sch. Dist. No. 403 v. Fraser*,⁵¹ *Hazelwood Sch. Dist. v. Kuhlmeier*,⁵² and *Morse v. Frederick*.⁵³ Because of this limited amount of guidance, lower courts rely heavily on these four cases, continuously scrutinizing, adapting and stretching them as precedents for modern-day issues. The following is a brief discussion of each individual case and the resulting legal ramifications of each decision.

⁴⁹ “The History of the Court”, *The Supreme Court Historical Society*, available at <http://www.supremecourt.gov/history/supremecourthistory_history_history.htm> (last visited Sept. 5, 2009).

⁵⁰ 393 U.S. 503 (1969).

⁵¹ 478 U.S. 675 (1986).

⁵² 484 U.S. 260 (1988).

⁵³ 551 U.S. 393 (2007).

Vietnam and Black Armbands

As tensions ran high over the controversial intervention of the United States government in Vietnam, protesters peacefully gathered in Des Moines, Iowa to strategize how they would protest the war. John F. Tinker, 15, his younger sister, Mary Beth Tinker, 13, and Christopher Eckhardt, 16, were all in attendance that evening when the group decided to wear black armbands and fast on particular days throughout the Christmas season, starting December 16, 1965.⁵⁴

Two days prior to the intended start of the protest, school officials in the Des Moines School District were told of the planned protest and immediately passed a district-wide policy forbidding armbands to be worn in the school; violators were to be suspended until they returned without the armband.⁵⁵ Consequently, when Mary Beth Tinker and Christopher Eckhardt wore their armbands on December 16, 1965, they were suspended. The next day, John Tinker followed suit and was also suspended.⁵⁶ The three children did not return to school until the planned protest was concluded on January 2, 1966.

The initial complaint filed in the United States District Court by the fathers of the children was dismissed,⁵⁷ despite a contradicting decision several months earlier from the Fifth Circuit Court of Appeals involving similar issues and circumstances.⁵⁸ Plaintiffs' appeal to the

⁵⁴ *Tinker*, 393 U.S. at 504.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 258 F. Supp. 971, 973 (S.D. Iowa 1966). The Court held that, "...actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline. School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court."

⁵⁸ *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966). Against a regulation instituted by the principal of a Mississippi high school, children wore "freedom buttons" to school and were subsequently suspended. The Court

Eighth Circuit Court of Appeals was also denied.⁵⁹ As a possible result of the split decision in the Eighth Circuit, as well as conflicting decisions in the appellate courts, the Supreme Court granted certiorari.

Freedom of speech and expression are rights guaranteed by the First Amendment of the Constitution. In his majority opinion, Justice Abe Fortas wrote that these rights are not relinquished by students merely upon entrance of the “schoolhouse gates.”⁶⁰ The wearing of armbands was a “silent, passive expression of opinion, unaccompanied by any disorder or disturbance”⁶¹ that was likened to “pure speech,”⁶² a concept awarded the highest protection under the First Amendment. The Court stated that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble.”⁶³ Thus, mere fear is not a justifiable reason to strip students of their First Amendment rights to peacefully and passively express themselves while in school.

ruled in favor of the students, stating, “School officials cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment where the exercise of such rights in the school buildings and school rooms does not materially and substantially interfere with requirements of appropriate discipline in the operation of the school.”

⁵⁹ 383 F.2d 988 (8th Cir. 1967). The eight appellate justices were equally split on the decision, leading to the affirmation of the District Court’s ruling but producing no majority opinion.

⁶⁰ *Tinker*, 393 U.S. at 506.

⁶¹ *Id.* at 508.

⁶² *Id.* at 505.

⁶³ *Id.* at 508-09. In rejecting the District Court’s conclusion, the Court went on to say that, “Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”

School officials cannot suppress the opinions of students merely out of disagreement. The Court recognized the captive nature of students, and thus, the need to ensure that “state-sponsored school[s] [do] not become enclaves of totalitarianism,” as “school officials do not possess absolute authority over their students.”⁶⁴ The Court also went so far as to cite a previous opinion that compared this attempt by schools to control student expression to early Spartan governments’ attempts to “foster a homogenous people” through the creation of “ideal citizens.”⁶⁵ Instead, the classroom must remain a “market place for ideas”⁶⁶ to ensure that American citizens have been exposed to the breadth of information, ideas, and opinions that would allow for a better educated, increasingly diverse, and more valuable citizenry.

As such, the Court, through a 7-2 decision, adopted the standard used in *Burnside*⁶⁷, in that no regulation, policy, or similar attempt to restrict or prohibit the freedom of speech or expression of a student would be upheld as constitutional, unless it could be proven that said expression or speech had “materially and substantially interfered with the requirements of appropriate discipline in the operation of school.”⁶⁸ This was an important and revolutionary decision in terms of school speech, as it provided the Supreme Court’s first evidentiary standard requiring proof of disruption before school officials could limit the First Amendment rights of their students.

⁶⁴ *Tinker*, 393 U.S. at 511.

⁶⁵ *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). Justice James Clark McReynolds discussed the submergence of Spartan boys at a young age to produce a citizen whose ideals and opinions were in conformity with the State. He suggested that no “Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.”

⁶⁶ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁶⁷ *Supra* note 58.

⁶⁸ *Tinker*, 393 U.S. at 509.

Justices Hugo Black and John Harlan wrote separate dissenting opinions regarding the *Tinker* decision. While Justice Black’s opinion depicted a strong disagreement with the majority, Justice Harlan’s was slightly softer. Harlan recognized the need to protect students’ freedom of speech, while still enabling school officials with the “widest authority”⁶⁹ in operating their school in a structured and disciplined manner. A two-prong burden of proof,⁷⁰ Harlan argued, should also be shifted onto the student, as opposed to the school officials as was declared the standard in the majority opinion.

While this “material and substantial” disruption standard has been the baseline for school speech issues since 1969, several exceptions have been carved out by the Supreme Court. The most recent three of the “Big Four” cases all center on instances in which school officials may regulate, and potentially punish students for, certain types of speech and expression.

Lewd, Indecent, and Offensive Speech

When Matthew Fraser, a Bethel High School senior, stepped to the podium on April 26, 1983, at a school assembly to nominate a friend for school office, he never could have foreseen what would come of it. Fraser littered his six-sentence nominating speech with sexual innuendos that referred to the candidate as a man who was “firm in his pants”, “takes his point and pounds it in”, and “will go to the very end—even the climax.”⁷¹ The following day, Fraser was charged with violating the school’s conduct code⁷² and suspended for three days; subsequently, he was

⁶⁹ *Tinker*, 393 U.S. at 526.

⁷⁰ *Id.* at 526. Justice Harlan gave the example of students having to prove that school officials attempted to “prohibit the expression of an unpopular point of view” while also providing evidence of “expression of the dominant opinion” being allowed.

⁷¹ *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356, at 1357 (9th Cir. 1985).

⁷² *Id.* at 1357. The official language of the code mimicked the standard set in *Tinker*, as it defined disruptive conduct as, “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”

denied permission to speak at graduation, despite being voted into that position by his fellow classmates.

Upon filing a civil rights action in the United States District Court for the Western District of Washington, a declaratory judgment was issued in favor of Fraser.⁷³ In the school district's appeal to the United States Court of Appeals for the Ninth Circuit, a 2-1 decision affirmed the District Court ruling; the majority opinion stated that the school failed to meet the evidentiary standard established in *Tinker* as they were unable to prove the speech "substantially disrupted or materially interfered in any way with the educational process."⁷⁴ Fraser's apparent success was short-lived, however, as on July 7, 1986, the Supreme Court reversed the Ninth Circuit's decision, finding in favor of the Bethel School District; Chief Justice Warrant Burger delivered the majority opinion.⁷⁵ The Court made a distinction between the constitutional rights enjoyed by students in school and the same rights enjoyed by their adult counterparts outside the schoolhouse gates.⁷⁶ The Court also recognized that a distinction must be made between the political expression embraced in *Tinker* and the lewd and sexual content uttered by Fraser.⁷⁷ An equilibrium must be reached between allowing students the "freedom to advocate unpopular and

⁷³ *Fraser*, 478 U.S. at 1356.

⁷⁴ *Id.* at 1359. The only evidence of disruption cited by the school district was testimony in which a school counselor described seeing one student "simulate masturbation" and two other students "simulating the sexual intercourse movement with hips."

⁷⁵ *Id.* at 675-676.

⁷⁶ *Id.* at 682-684. The constitutional rights enjoyed by students while in attendance at schools were deemed to not be "automatically coextensive with the rights of adults in other settings," a distinction made in *New Jersey vs. T.L.O.*, 469 U.S. 325 (1985). The "captive nature" of students and the "in loco parentis" status of school officials and authorities leads to the logical conclusion that school officials must be empowered with appropriate censorship to protect students, not from opposing viewpoints, but socially unacceptable behavior that students should not be involuntarily subjected to and does not contribute to the overall betterment of the student.

⁷⁷ *Id.* at 680. The Ninth Circuit erred in not giving this distinction more weights; instead, they merely applied the *Tinker* standard as if the two forms of expression were of similar ilk.

controversial views in schools and classrooms” and the state’s need to ensure that students leaving their schools are indoctrinated with the “boundaries of socially appropriate behavior.”⁷⁸ Our nation’s very own legislative process was cited as an example in which the participants, i.e. legislators, engage themselves in politically charged debates, while adhering to rules of decorum that make certain that said participants are not offended in the process. This prohibition of offensive conduct and speech throughout the political process is necessary to ensure that it remains political, instead of becoming personal. Schools require this prohibition to ensure that, both academically and socially, the “basic educational mission”⁷⁹ of the school is administered properly.

The dissenting opinions offered by Justices Thurgood Marshall and John Paul Stevens sought to raise an interesting point worth noting. Justice Marshall recognized the School District’s inability to provide sufficient evidence of disruption to meet the *Tinker* standard,⁸⁰ a standard that Marshall felt was the sole necessity for the issue at hand. Justice Stevens, however, took this one step farther, noting that because the school failed to prove a disruption occurred, Fraser was not in violation of the school’s “Disciplinary Conduct” rule.⁸¹ Stevens also questioned whether Fraser, himself, being a student who converses regularly with his fellow students that were in attendance, would have a better understanding of what said students would

⁷⁸ *Fraser*, 478 U.S. at 681.

⁷⁹ *Id.* at 685.

⁸⁰ *Id.* at 690. Justice Marshall “recognize[d] that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school’s educational mission; nevertheless, where speech is involved, we may not unquestioningly accept a teacher’s or administrator’s assertion that certain pure speech interfered with education.”

⁸¹ *Id.* at 691-693. The “Disciplinary Conduct” rule “outlawed” conduct that “disrupted or interfered with the educational process.” As the school was unable to provide evidence of such disruption, the conclusion must be made that the speech was not ultimately disruptive of the educational process.

find “offensive.”⁸² Ultimately, both Justices cite the need of disruption for regulation to occur. Without disruption, the acts and utterances are merely a free flow of words and ideas that, while possibly not contributing to the educational process, are in no way hindering it; thus, non-disruptive pure speech should not be censored.

As a result of this decision, school district officials were given authority to punish students for uttering or expressing “offensively lewd and indecent speech” while at school. This provided a more detailed, yet still slightly broad and ambiguous,⁸³ instance of allowable censorship than *Tinker*. In essence though, school administrators are still able to utilize *Tinker* for instances in which a student’s speech is unable to pass the *Fraser* test, yet still can be proven to have a disruptive effect on the school’s learning environment.

To Publish, Or Not To Publish—That is the Question

Three years after *Fraser*, the Supreme Court was again asked to determine the ability of school administrators to censor their students’ speech⁸⁴: Can a high school principal remove certain articles from the school newspaper that is written and published by the students of a journalism class? With a fairly one-sided 6-3 decision,⁸⁵ the Court ruled in favor of the school

⁸² *Fraser*, 478 U.S. at 692. This raises the interesting issue of the “standard” being used by school officials to determine whether material is “lewd, indecent, and offensive” to the student body. As Stevens noted, who would know better what language is offensive to the student body? Nine judges that “are at least two generations and [potentially] 3,000 miles away from the scene of the crime? School officials who may be from a generation that thought Clark Gable’s, “Frankly, my dear, I don’t give a damn” was shockingly offensive (Stevens used this example at the beginning of his opinion? Or the students themselves who are more conscious of the contemporary meanings and usage of certain words once thought to be “offensive”, but no longer carrying the same connotation in modern discourse?

⁸³ The terms “offensively lewd and indecent” can still be open to interpretation, requiring previous case law to determine whether specific words, acts, or expressions are included; in the event precedent does not exist for that specific speech, or a similar type, a court may be required to interpret.

⁸⁴ *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁸⁵ *Id.* at 261.

district, further empowering school officials by adding another instance in which they can censor student speech.

The Journalism II class at Hazelwood East High School was the proud producer of the tri-weekly school newspaper *Spectrum*. *Spectrum* was entirely funded by the Hazelwood School Board, including printing expenses, books, and other needed supplies. Standard procedure for the production of the newspaper was for the students to write the articles, the Journalism II teacher to provide the first round of editing, and then the principal to provide a final review and authorization for publication.⁸⁶

In the May 13, 1983 issue of *Spectrum*, two articles were set to dominate the headlines: an article on teen pregnancy and an article centering on divorce. The former had specific interviews with then-pregnant students at Hazelwood East. Despite the use of false names to protect the interviewees' identities, the Hazelwood East school principal, Robert Reynolds, was concerned that the identities of these students could be determined nonetheless and feared for the social ridicule that may follow; consequently, he objected to the article. Also, Principal Reynolds felt that certain topics covered in the article were not appropriate for some of the younger freshman and the students' younger siblings that could potentially read a copy of the paper. The second article had comments from an identified student⁸⁷ on her parents' divorce. Feeling the parents' had a right of response and/or right of refusal of publication, Principal Reynolds also objected to this article. His objections ultimately led to the subsequent removal of

⁸⁶ *Hazelwood*, 484 U.S. at 262-263.

⁸⁷ *Id.* at 263. The newspaper advisor subsequently removed the name of the identified student in the divorce article, a removal alleged to be unbeknownst to the principal upon making the decision to censor the article.

the two articles from the final published version of the newspaper, along with four other articles that were located on the same two pages as the deleted articles.⁸⁸

The deletion of these articles prompted students in the Journalism II class to file a complaint in the United States District Court for the Eastern District of Missouri, alleging a First Amendment violation. The District Court ruled in favor of the school district.⁸⁹ The reasoning used by the court to support their decision was built around a “substantial and reasonable basis” foundation for decisions made by officials who restrict student speech during “activities that are ‘an integral part of the school’s educational function.’”⁹⁰ Principal Reynolds was deemed to have had a substantial and reasonable basis for all of his decisions, from the identification of the pregnant students characterized in the article to the need of Hazelwood East High School to disassociate it from the articles to ensure no impression of any endorsement of the sexual nature and “norms of the subject.”⁹¹

On appeal to the Eight Circuit Court of Appeals, the students prevailed. The Eight Circuit identified *Spectrum* as a “public forum” because of its intent to be “operate[d] as a conduit for student viewpoint.”⁹² Being designated as such, the *Tinker* standard was the appropriate precedent to apply, allowing for regulation of student speech only if a “substantial and material disruption”⁹³ would have resulted. Since no such disruption could be proven to

⁸⁸ *Hazelwood*, 484 U.S. at 262-264. The four other articles were concerned with the topics of teenage marriage, runaways, juvenile delinquents, and “a general article on teen pregnancy.” The principal testified that the only reason for removing these articles was because of their location on the same page as the controversial articles; no objections were raised concerning the content of these articles.

⁸⁹ 607 F.Supp. 1450 (D.C.Mo. 1985)

⁹⁰ *Hazelwood*, 484 U.S. at 264, (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979).

⁹¹ *Id.* at 265.

⁹² *Id.*

⁹³ *Tinker*, 393 U.S. at 511.

have been a foreseeable consequence, the Eight Circuit ruled that a First Amendment violation had occurred.

In a five-to-three decision delivered by Justice Byron White, the Supreme Court reversed the appellate court's decision, delivering another blow to student speech and expression and creating yet another exception to the *Tinker* standard. First, the opinion dealt with the appellate court's designation of *Spectrum* as a public forum. Justice White opined that schools do not share the same characteristics of "streets, parks, and other traditional public forums"⁹⁴ that are typically used as arenas for citizens to express their thoughts, ideas, feelings or emotions on issues. Unlike these traditional public forums, schools are charged with a much greater responsibility: imputing on the country's youth a high-quality intellectual, emotional, and social education. As such, public schools are only qualified as public forums when "school officials have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"⁹⁵ Without this "opening" by the school authorities, school remains beyond the reach of a "public forum" designation and within the reach of school officials to regulate the student speech implored therein, by students, faculty, or others.⁹⁶ The Hazelwood School Board policy and practice concerning *Spectrum* made it abundantly clear that the newspaper publication was an integral part of the day-to-day Journalism II curriculum.⁹⁷ The publication was thus reserved

⁹⁴ *Hazelwood*, 484 U.S. at 568.

⁹⁵ *Id.* citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983).

⁹⁶ *Id.* at 568.

⁹⁷ *Id.* at 568-569. Hazelwood School Board Policy 348.51 stated that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." Also, *Spectrum*'s publication process operated in accordance with an ordinary class: students were given grades based on performance, lessons regarding "deadline pressure", "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and other journalistic teaching were provided, and the teacher had ultimate control over topic assignments, position assignments, publication dates, etc.

by the school as an instrument for teaching journalism, through conceptual learning and real-life experience, not as a public forum for student journalistic expression; the newspaper was a teaching tool, not a real newspaper.

Having established that *Spectrum* was not a public forum, the Supreme Court then addressed the regulatory powers of school officials during school-sponsored activities (in this case, a newspaper publication). School-sponsored activities are “characterized as part of the school curriculum,”⁹⁸ providing an accompanying lesson that teaches specific knowledge, attributes, or abilities to the participating students; these lessons may range from broad character traits such as leadership and responsibility, to subject specific lessons, such as the journalistic lessons taught through *Spectrum*. To ensure the students receive the correct lesson of the activity, school teachers and officials must be afforded wider latitude in regulating student speech. Speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences”⁹⁹ must be curbed to not only protect the educational mission of the school, but also to “disassociate” the school from any such speech and any mistaken assumption of endorsement by the school. Ultimately, the Supreme Court concluded that educators are allowed to regulate the “style and content” of student speech in the context of student-sponsored activities when said regulation is “related to legitimate pedagogical concerns.”¹⁰⁰

⁹⁸ *Hazelwood*, 484 U.S. at 570.

⁹⁹ *Id.* The issue of audience maturity was cited by Principal Reynolds as a reason for deleting the teen pregnancy article. White further opines that, “a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”

¹⁰⁰ *Id.* at 571.

Justice William J. Brennan, Jr. offered a lengthy dissenting opinion, in which Justices Thurgood Marshall and Harry Blackmun joined.¹⁰¹ Brennan argued that the Hazelwood School Board breached its promise to the Journalism II class to “not restrict free expression or diverse viewpoints within the rules of responsible journalism”¹⁰² regarding *Spectrum*’s publication. While the divorce article may have presented potentially irresponsible journalism,¹⁰³ the deletion of the other five articles did not have merit when matched with the school board’s vow. Brennan suggested that Principal Reynolds deleted the articles merely because the articles “frustrate[d] the school’s legitimate pedagogical purposes merely by expressing a message that conflicts with the school’s, without directly interfering with the school’s expression of its message.”¹⁰⁴ Furthermore, the dissent points out the lack of pedagogical concern for teaching journalism students the need for sometimes publishing unpopular viewpoints or controversial news that could upset certain people both upstream and downstream in the publication process.¹⁰⁵

The other significant issue highlighted in Brennan’s dissent was the erroneous and unjust means with which the Supreme Court allowed Principal Reynolds to “camouflage [his] viewpoint discrimination as the ‘mere’ protection of students from sensitive topics.”¹⁰⁶ The viewpoint discrimination is further evidenced by the school board’s broad means for

¹⁰¹ *Hazelwood*, 484 U.S. at 573.

¹⁰² *Id.* citing App. 22 (Board Policy 348.51).

¹⁰³ *Id.* at 566. The record did not show any indication of the divorced parents being given a chance to comment on the article or the comments of their child. One could argue this lack of fairness does not represent “responsible journalism”, and thus allows the school board to exercise regulation.

¹⁰⁴ *Id.* at 574.

¹⁰⁵ *Id.* at 577.

¹⁰⁶ *Id.* at 579. Principal Reynolds admitted to not having an issue with the topics on principle. Also, he had no contextual problems with the “squeal law” article that openly discussed “teenage sexuality,” “the use of contraceptives by teenagers,” and “teenage pregnancy,” all potentially on equal moral ground with teenage pregnancy.

disassociating itself from any message conveyed by the newspaper that could be attributed to the school. This concern provides the major synapse for allowing greater regulation of student speech during school-sponsored activities. The school board, however, had ample means for disassociation that were not as broad as deleting two full pages of articles from the newspaper.¹⁰⁷ Ultimately, Brennan, Marshall, and Blacklum felt the Court erred in extending the regulatory powers of school administrators by failing to appropriately apply the *Tinker* standard, resulting in an unexpected lesson for the Journalism II class; a lesson that “teach[es] youth to discount important principles of our government as mere platitudes.”¹⁰⁸

The end result of *Hazelwood* was the further extension of school officials’ reach into the expressive rights of its students during school-sponsored activities. Any speech that could be linked to preserving the pedagogical concerns and messages of the school, regardless of the disruptive status of the speech, could now be restricted if the setting was a bona-fide school-sponsored trip, activity, or event. This expansive decision was the final Supreme Court ruling on student speech for nearly fifteen years until one cold afternoon in Juneau, Alaska in 2002.

W.W.J.S.—What Would Jesus Smoke?

Whether or not Jesus Christ would condone smoking a bong full of marijuana in his name is a question for theologians, not judges, lawyers, and legal scholars; however, whether or not a sixteen year-old student can unveil a sign reading “BONG HiTS 4 JESUS” during an approved

¹⁰⁷ *Hazelwood*, 484 U.S. at 579-580. Brennan suggests the school board could have published a disclaimer with each newspaper edition that expressed the separation between the views of the newspaper and those of the school administrators. Or, Principal Reynolds could have rearranged the layout of the paper to allow the publication of the four, uncontested articles; this change would not have required much time and surely could have been completed by the deadline. Instead, Reynolds used a paper shredder to destroy the two pages before returning the final approved copy.

¹⁰⁸ *Id.* at 580, citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, at 637 (1943).

“class trip”¹⁰⁹ did become a legal issue on January 24, 2002. On that date, the Olympic Torch Relay paraded through Alaska’s capital, passing directly in front of Juneau-Douglas High School. The high school’s principal, Deborah Morse, allowed the students to leave class to attend the parade, while under the supervision of staff members also in attendance. As the torch passed in front of Joseph Frederick, a Juneau-Douglas senior, he and several friends unraveled a fourteen-foot banner that bore the aforementioned “BONG HiTS” message. Upon seeing the banner, Morse took immediate action and demanded the students relinquish the banner; when Frederick refused, she took the banner and ultimately suspended him for ten days.¹¹⁰

The student filed suit and the ensuing procedural steps mimicked those of *Hazelwood*. The Juneau School District Board of Education¹¹¹ and the District Court both upheld the actions of Morse. On appeal, the Ninth Circuit Appellate Court ruled in Frederick’s favor,¹¹² finding his First Amendment rights were violated. The Supreme Court reversed by a five-four decision; Chief Justice John Roberts delivered the majority opinion.

First, Chief Justice Roberts established that Frederick was participating in a school-sponsored activity,¹¹³ while recognizing the existence of “uncertainty at the outer boundaries”¹¹⁴

¹⁰⁹ *Morse*, 551 U.S. at 393.

¹¹⁰ *Id.* at 396-398. Morse’s reasoning for confiscating the banner was that she read the message as “encouraging illegal drug use, in violation of established school policy.”

¹¹¹ *Id.* at 398-399. The school district superintendent qualified the suspension has not a disagreement with Frederick’s message, but for insubordination of School Board Policy No. 5520 that disallows “public expression that...advocates the used of substances that are illegal to minors...” He further noted the “common-sense” connotation of the term “bong hits” as referring to smoking marijuana, an illegal substance.

¹¹² *Id.* at 399-400. Relying on *Tinker*, the appellate judges gave little weight to the “school-sponsored” setting of the incident, and instead focused on the school’s lack of demonstration of a “risk of substantial disruption” by Frederick’s banner.

¹¹³ *Id.* at 400-401. Each procedural level, from the school board up through to the appellate court, agreed that Frederick’s banner was a matter of school speech; Roberts agrees with the superintendent who stated that Frederick can’t “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” *App. to Pet. for Cert.* 63a.

of existing school speech jurisprudence. From there, Chief Justice Roberts analyzed the message conveyed by Frederick's banner. The term "bong hits" would undoubtedly be recognized as a reference to smoking marijuana. Roberts then proposed two possible interpretations of the banner as a whole that indicate promotion of illegal drug use: "[Take] bong hits," a direct suggestion to smoke marijuana, and "bong hits [are a good thing]" or "[we take] bong hits," both celebratory messages towards marijuana use.¹¹⁵ When pressed to offer an explanation for the banner, Frederick merely described it as "meaningless and funny" and a futile attempt to get on television. Roberts distinguished this as Frederick's motive, not an interpretation of the message conveyed by his banner.¹¹⁶ This led to the establishment of Frederick's banner as illegal drug advocacy, raising the question as to whether school officials' authority extends to regulating student speech that promotes illegal drug use. The Supreme Court answered "yes" to this question, providing the following as support.

Because of the increased threat of illegal drug use and the surging number of teen drug users, schools are charged with the responsibility of both educating their students on the negative effects of drug use and fostering an environment intolerant of illegal drugs. This certainly prohibits any promotion or advocacy of illegal drug use. The United States government spends millions of dollars each year supporting this message, through educational programs such as Drug Abuse Resistance Education (D.A.R.E.). One of the requirements for receiving these funds is to ensure that each program "convey[s] a clear and consistent message that...the illegal use of

¹¹⁴ *Morse*, 551 U.S. at 401, citing *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 615, n.22 (5th Cir. 2004). The Fifth Circuit Court of Appeals found that a drawing brought to school two years after creation, by the creator's younger brother, did not constitute in-school student speech. The drawing was done at home, with no intent of ever bringing it on school premises.

¹¹⁵ *Id.* at 402.

¹¹⁶ *Id.*

drugs [is] wrong and harmful.”¹¹⁷ Schools would be hard pressed to convey such a vital message if its students were allowed to disregard school policy and display pro-drug messages in the presence of fellow peers and school administrators. Tolerating such disobedience would undermine the school’s credibility and present a serious challenge to instilling in its student’s the dangers of illegal drug use. Thus, Roberts concluded that for school officials to effectively discourage illegal drug use, they must be afforded wider latitude in regulating student speech that can be interpreted as illegal drug advocacy.¹¹⁸

While the vote was finalized at five to four, the opinions were anything but clear cut. Justice Clarence Thomas filed his own concurring opinion; Justice Samuel Alito filed a separate concurring opinion in which Justice Anthony Kennedy joined; Justice Stephen Breyer filed an opinion concurring in part and dissenting in part; and Justice John Paul Stevens filed the dissenting opinion, in which Justices David Souter and Ruth Bader Ginsberg joined.¹¹⁹ Justice Thomas’ opinion, however, was more a diatribe on the overextension of First Amendment protection to student speech. It discounted¹²⁰ *Tinker* all together and provided no real insight into the future path of student speech protection. Also, Justice Breyer’s opinion stated that the Court should have merely decided on Morse’s entitlement to qualified immunity and not address the issue of First Amendment protection.¹²¹ Breyer did, however, provide some insight into his

¹¹⁷ *Morse*, 551 U.S. at 408, citing 20 U.S.C. § 7114(d)(6). This is the requirement for receiving funds under the Safe and Drug-Free Schools and Communities Act of 1994.

¹¹⁸ *Id.* at 403-409.

¹¹⁹ *Id.* at 395.

¹²⁰ *Id.* at 410. In the second paragraph of Thomas’ opinion, he wrote, “In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public school.” On *Tinker*, Thomas suggests that “[It] affected a sea change in students’ speech rights, extending them well beyond traditional bounds,” and, “the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would so.”

¹²¹ *Id.* at 425.

thoughts on the issue of student speech protection.¹²² Furthermore, the dissent rests on the majority's incorrect interpretation of Frederick's message; instead of seeing it as a poor, nonsensical attempt to gain television coverage as Frederick explained, the majority wove together an alternate meaning involving illegal drug use advocacy.¹²³ The remaining opinion, Justice Alito's concurrence, does include discussion on the protections that should or should not be afforded to student speech.

Although short in length, Justice Alito's "swing-vote" opinion has significant meaning and proves just how close the case was to falling in the opposite direction, in favor of Frederick. Immediately, Alito qualified his concurrence with the majority's opinion by highlighting the two basic understandings upon which he relied. First, the decision strictly allows school officials to regulate pro-drug messages and cannot be extrapolated to include regulation of a different subject matter. Second, the decision cannot be interrupted to allow regulation of messages expressed as "comment[ary] on any political or social issue."¹²⁴ Alito recognized the dangers in allotting school officials the broad authority to "censor any student speech that interferes with a school's 'educational mission,' and the "dangerous manipulation" that could result.¹²⁵ While school officials do possess a quasi-*in loco parentis* status, they are not complete substitutes for

¹²² *Morse*, 551 U.S. at 426-428. Justice Breyer recognized the "host of serious concerns" that could arise from the ruling, including the possibility of "further viewpoint-based restrictions." However, Breyer also acknowledges the need for school authorities to possess a "degree of flexible authority to respond to disciplinary challenges." The extension of the court's role in regulating student speech could foster increased litigation, turning the "judge's chambers into the principal's office."

¹²³ *Id.* at 433-448.

¹²⁴ *Id.* at 422. As an example of political or social commentary, Justice Alito provided the fitting example of "speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use,'" citing Justice Steven's dissent.

¹²⁵ *Id.* at 423.

parents, with the same absolute authority thereof.¹²⁶ Therefore, allowing regulation during certain “special circumstances”¹²⁷ is necessary, but also sits at the “far reaches of what the First Amendment permits.”¹²⁸

Student Speech Standards: A Brief Review

The hereinbefore described Supreme Court cases have resulted in the following four basic standards regarding school officials' authority to regulate student speech:

- *Tinker*: School officials may regulate speech that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of school.”¹²⁹
- *Fraser*: School officials may regulate speech that is “lewd, indecent, and offensive.”¹³⁰
- *Hazelwood*: School officials may regulate student speech that occurs during in-school activities when said regulation is “related to legitimate pedagogical concerns.”¹³¹
- *Morse*: School officials may regulate student speech that “promotes illegal drug use.”¹³²

¹²⁶ *Morse*, 551 U.S. at 424. Justice Alito wrote that, “It is a dangerous fiction to pretend that parents simply delegate their authority-including their authority to determine what their children may say and hear-to public school authorities.”

¹²⁷ *Id.* Certain situations in the school setting call for increased regulation by school officials and are appropriate times for bypassing First Amendment protection; Justice Alito considered the circumstances of this case to be one of those times. The “threat to the physical safety of students” created a “place of special danger” that required school officials to intervene.

¹²⁸ *Id.* at 425. The final sentence of Justice Alito’s opinion stated that, “[He] join[ed] the opinion of the Court with the understanding that the opinion does not endorse any further extension.”

¹²⁹ *Tinker*, 393 U.S. at 509.

¹³⁰ *Fraser*, 478 U.S. at 681.

¹³¹ *Hazelwood*, 484 U.S. at 571.

¹³² *Morse*, 551 U.S. at 402.

3

The Internet, MySpace, and Student Speech's Technological Speed Bump

At his customary Media Day press conference before the 2009 season, legendary football coach Joe Paterno admitted to not having “the slightest idea” about that “Twiddle-doo” or “Tweedle-doo” Internet phenomenon that is Twitter.¹³³ Paterno’s 44-year head-coaching career began just three years prior to *Tinker*. Both historically significant names share one common theme: an inability to embrace the technological advances made over the past half-century. *Tinker* was decided nearly thirty years before the Internet became a household word. *Fraser* and *Hazelwood* became precedent almost twenty years before social networks like Facebook, MySpace, and Twitter became everyday “addictions” for people of all ages.

The vehicles students are using to express themselves are continually changing, while the precedent governing them has remained relatively stagnant. How would the Supreme Court have ruled had Mary Beth Tinker, instead, been able to tweet about her displeasure for the Vietnam War and show her fellow students at school? Or what would the ruling have been had Matthew

¹³³ Adam Rittenberg, *Notes, quotes from Day 1 of media days* (2009), available at <http://espn.go.com/blog/bigten/post/_/id/2433/notes-quotes-from-day-1-of-media-days> (last visited Feb. 10, 2010).

Fraser been able to post his nomination speech on the nominee's Facebook wall, and students repeatedly viewed the wallpost in school, or outside for that matter? Students can now create websites, MySpace profiles, and personal blogs from the comfort of their own bedrooms-- bedrooms that lay far outside the schoolhouse gates and even farther from the authoritative reach of school officials. Instead of passing notes during class about the teacher nobody likes or the principal everyone mocks, students can wait until after school when they are off-campus. In short, students have effectively found a way to give *Fraser's* speech and write *Hazelwood's* articles without risking retaliation from school officials while still reaching the same target audience, if not more.

Unfortunately, the Supreme Court has yet to provide clear guidance on the First Amendment rights of school students when their speech is delivered off-campus, after school hours, and outside of any school sponsored activity. Instead, the general standard formed in *Tinker*, along with the specifics of *Fraser*, *Hazelwood*, and *Morse*, are the authoritative case law upon which district and appellate courts must rely to make their decisions. These lower courts are left to fit a square peg into a round hole; the underlying themes of current precedent still apply, yet some small corners need to be shaped, molded, and carved out to fit the present, technologically-dominated times.

Students Pass the First Tests

Several of the earliest cases involving off-campus student speech issues were resounding successes for students' protection of their First Amendment rights outside the schoolhouse gates. Various state and appellate courts recognized the limitations of school authorities to punish students for off-campus speech and the lack of Supreme Court precedent authorizing such actions.

In 1998, a Missouri District Court favored Woodland High School junior Brandon Beussink and his right to create and maintain a homepage that was critical of the high school's officials.¹³⁴ Beussink was suspended for ten days after school officials became aware of his homepage, which used "vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage."¹³⁵ As a result of his suspension, Beussink failed all second semester classes that year.¹³⁶ The District Court, which was convened to rule on a petition for injunctive relief regarding the effect of Beussink's suspension on his grades, appropriately applied the *Tinker* standard. Noting the off-campus nature¹³⁷ of the speech, the Court found the suspension to be unjustified¹³⁸ and granted Beussink's petition.

At the start of the new millennium, two off-campus student speech cases arose in Washington, both of which inevitably fell in favor of the students. In North Thurston County, the Superior Court overturned the suspension of a Timberline High School junior, Karl Beidler, for creating a website that depicted his principal having sex with Homer Simpson.¹³⁹ At the

¹³⁴ Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998).

¹³⁵ *Id.* at 1177.

¹³⁶ *Id.* at 1179-1180. The policy controlling unexcused absences in the Woodland School District requires a grade level reduction in every class for each unexcused absence over 10 days. Having 8.5 unexcused absences before the incident, Beussink's total reached 18.5 day after adding in the 10 day suspension. Accordingly, each of Beussink's grades was dropped 8.5 grade levels, resulting in a failing grade for each class.

¹³⁷ *Id.* at 1177. No evidence was provided to suggest Beussink used "school facilities or school resources" while creating his homepage. Instead, it was created at his personal residence, outside of school hours, and with software found on the Internet.

¹³⁸ *Id.* at 1180. The principal at Woodland High School, Mr. Yancy Poorman, stated that he was "upset that the message had found its way into his school's classrooms" and suspended Beussink "because he was upset by the content of the homepage." Poorman provided no evidence, though, that suggested a "fear of disruption or interference with school discipline." *Tinker* does not allow for content-based regulation unless that fear exists.

¹³⁹ Mike Hiestand and Mark Goodman, *Internet Forces Courts to Wrestle With Private, Off-Campus Student Speech, The First Amendment and the Media* (citing *Beidler v. North Thurston County (Wash.) School District*, No. 99-2-00236-6 (Thurston County Super. Ct. July 18, 2000(unpublished)), available at <http://www.mediainstitute.org/ONLINE/FAM2001/Online_P.html> (last visited Feb. 10, 2010)). The court refused the application of *Hazelwood* or *Bethel*. Using *Tinker*, the court found no "evidence [to] show a material and substantial disruption of the work or

same time in the same state, Kent School District No. 415 (specifically Kentlake High School) was enjoined from suspending outstanding student-athlete Nick Emmett for creating a webpage that contained mock obituaries of several friends, along with commentary on the school's administration.¹⁴⁰

The following year on the opposite coast, another student-speech ruling¹⁴¹ arose out of the United States District Court of Western Pennsylvania. Zachariah Paul emailed the following "Top Ten" parody about Franklin Regional High School Athletic Director Robert Bozzuto to several friends:

- 10.) The School Store doesn't sell twink[i]es.
- 9.) He his constantly tripping over his own chins
- 8.) The girls at the 900 #'s keep hanging up on him.
- 7.) For him, becoming Franklin's "Athletic Director" was considered "moving up in the world."
- 6.) He has to use a pencil to type and make phone calls because his finger are unable to hit only one key at a time.
- 5.) As state in previous list, he's just not getting any.
- 4.) He is no longer allowed in any "All You Can Eat" restaurants.
- 3.) He has constant flashbacks of when he was in high school and the athletes used to pick on him, instead of him picking on the athletes.

discipline of the school,"; to address the off-campus nature of the speech, the court merely added, "...regardless of where the geographical limits of school authority may lie..."

¹⁴⁰ Emmett v. Kent School Dist. No. 415, 92 F.Supp.2d 1088 (W.D. Wash. 2000). Emmett's website contained a disclaimer informing viewers that the site was for strictly for "entertainment purposes only." Inspired by a writing assignment in-class, the website was created entirely off-campus and outside of any "class or school project," leaving it "entirely outside the of the school's supervision and control." The school district argued a growing need for school intervention in student speech that could conceivably be interpreted as threatening or harassing, specifically in light of the Columbine shooting; the district, though, could provide no evidence that the website "intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever."

¹⁴¹ Killion v. Franklin Regional School Dist., 136 F.Supp.2d 446 (W.D.Pa. 2001).

- 2.) Because of his extensive gut factor, the “man” hasn’t seen his own penis in over a decade.
- 1.) Even it is wasn’t for his gut, it would still take a magnifying glass and extensive searching to find it.¹⁴²

Another student rearranged the list and distributed copies on school grounds, some of which made their way to the high school’s teacher lounge.¹⁴³ Richard Plutto, the high school’s principal, punished Paul with a ten-day suspension, from both school and track activities.¹⁴⁴ By applying *Tinker*,¹⁴⁵ the District Court found no evidence of disruption, refused to accept the school district’s argument under *Fraser*,¹⁴⁶ and ruled in favor of Paul; to punish him for his off-campus expression would constitute a First Amendment violation.¹⁴⁷

Two more cases, *Mahaffey v. Aldrich*¹⁴⁸ and *Flaherty v. Keystone Oaks School District*,¹⁴⁹ were decided in 2002 and 2003, respectively, providing further protection for off-campus student speech. In *Mahaffey*, the United States Eastern District Court of Michigan ruled

¹⁴² *Killion*, 136 F.Supp.2d at 448. In part, the list stemmed from Paul’s disagreement with “various rules and regulations for members of the track team (of which he was a part)”. The list was written by Paul one day when he returned from school and emailed to his friends from his own home computer.

¹⁴³ *Id.* at 448-449.

¹⁴⁴ *Id.* at 449. The reasons given by Plutto for the suspension were that “the list contained offensive remarks about a school official, was found on school grounds, and that Paul admitted creating the list”; the certified letter issued to Paul’s mother cited “verbal/written abuse of a staff member” as the reasoning. At no time, though, did Plutto suggest the list caused, or had reason to cause, a disruption in the school.

¹⁴⁵ *Id.* at 455. With regards to the “off-campus” speech argument, the District Court found that “because the Bozzuto list was brought on campus, albeit by an unknown person, *Tinker* applies.” However, later in the opinion, the court reminds that “we cannot ignore the fact that the relevant speech...occurred within the confines of Paul’s home, far removed from any school premises or facilities. Further, Paul was not...associated in any way with his role as a student.”

¹⁴⁶ *Id.* at 456-458. The District Court contends that, “The First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us.”

¹⁴⁷ *Id.* at 458.

¹⁴⁸ *Mahaffey v. Aldrich*, 236 F.Supp.2d 779 (E.D.Mi. 2002)

¹⁴⁹ *Flaherty v. Keystone Oaks School Dist.*, 247 F.Supp.2d 698 (W.D.Pa. 2003).

that Joshua Mahaffey could not be suspended by Waterford Kettering High School for his contributions¹⁵⁰ to a website entitled, “Satan’s web site.” When the Court addressed the issue of the speech having occurred off-campus,¹⁵¹ the judges opined that, “Students...out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect.”¹⁵² The school district’s contention that circumstances¹⁵³ exist that allow them to punish off-campus speech was immediately rejected; even if the speech was found to be within the school’s authority, the judges found no existence of a disruption of the educational process necessary to satisfy *Tinker*.

Just two years after *Killion*, the Western District Court of Pennsylvania found itself involved in yet another off-campus school speech case in *Flaherty*. Jack Flaherty, Jr. posted three comments on a web-blog regarding an upcoming volleyball match, two from his home computer and one from a school computer.¹⁵⁴ Flaherty was punished according to the school policy, prompting Flaherty to file a complaint, contending the policy violated students’ First

¹⁵⁰ *Mahaffey*, 236 F.Supp.2d at 781-782. The website contained the following message written by Mahaffey: “This site has no purpose. It is here to say what is cool, and what sucks. For example, Music is cool. School sucks. If you are reading this you probably know me and Think Im evil, sick and twisted. Well, Some might call it evil. I like to call it__ well evil I guess. so what? If you don't know me you will see. I hope you enjoy the page.” Other sections of the site listed things such as “people I wish would die,” “people that are cool,” and “music I hate,” among others. The most disturbing portion of the website lay at the bottom and was entitled “SATANS MISSION FOR YOU THIS WEEK.” It read: “Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It. unless Im there to watch. __ Or just go to Detroit. Hell is right in the middle. Drop by and say hi.” A disclaimer-like sentence followed that asked kids to “not go killing people and stuff [after reading this] and then blame it on [him].”

¹⁵¹ *Id.* at 782. When questioned, Mahaffey admitted that the high school’s computers “may have been used to create the website.” However, the school did not commence any further investigation into this, nor did they provide any evidence to prove the communication was, in fact, created on-campus.

¹⁵² *Id.* at 783.

¹⁵³ *Id.* at 784. The school officials suggested this extension of their authority when the off-campus speech has “an effect on the discipline or general welfare of the school.”

¹⁵⁴ *Flaherty*, 247 F.Supp.2d at 701. The message written while at school read, “how bad is ko going to beat Baldwin. I predict a lashing and for Bemis to shed tears.”

Amendment rights; the court concurred. In a section discussing the geographical limitations of the policy, or lack thereof, the court found the policy to be “unconstitutionally overbroad and vague”¹⁵⁵ for not explicitly limiting the authority of school officials to the students’ conduct on school grounds or during school-sponsored activities. The case marked yet another victory for students’ right to be fully protected under the First Amendment when off the school’s campus, outside of school hours; however, the tide soon shifted back in favor of the school districts.

“They’ll Never Take...Our Freedom!”—Or Will They?

One of the first severe blows to the protection of off-campus speech came in 2002, again involving a school district¹⁵⁶ in Pennsylvania, a hot-spot for student-speech issues. As an eighthgrade student at Nitschmann Middle School, J.S. created a website that contained extremely derogatory, possibly even threatening, remarks towards several teachers, most notably Mrs. Kathleen Fulmer,¹⁵⁷ his algebra teacher, and Mr. A. Thomas Kartsotis, the school’s principal. Various school officials were subsequently made aware of the website and its contents. When Mrs. Fulmer was told of the website, she had a traumatic reaction,¹⁵⁸ resulting in her need to take the remainder of the school year off and apply for a medical leave for the

¹⁵⁵ *Flaherty*, 247 F.Supp.2d at 705. In their discussion, the judges cite specific testimony of Mr. Scott Hagy, Principal of Keystone Oak High School. Mr. Hagy stated that he was empowered to punish students for off-campus conduct when said conduct brought “disrespect, negative publicity, negative attention to [his] school and to [his] volleyball team.” Further, the volleyball coach expressed his ability to suspend or expel players for off-campus conduct “if [the conduct] is going to bring shame to the school or [his] program.”

¹⁵⁶ *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 569 Pa. 638, 807 A.2d 847 (Pa. 2002).

¹⁵⁷ *Id.* at 644-645. One webpage entitled “Why Fuller Should Be Fired” and contained demeaning reasons for which Mrs. Fuller should have been fired. Other webpages contained demeaning pictures, including one page had Mrs. Fulmer’s picture morph into that of Adolf Hitler’s; another page, entitled “Why Should She Die?”, asked readers to “give [him] \$20 to help pay for the hitman” and listed the following phrase 136 times: “Fuck you Mrs. Fulmer. You Are A Bitch. You Are A Stupid Bitch.”

¹⁵⁸ *Id.* at 646. The website left Mrs. Fulmer fearful of her life and suffering from “stress, anxiety, loss of appetite, loss of sleep, loss of weight, a general sense of loss of well being...short-term memory loss...and headaches.” Anti-anxiety medication and anti-depressants were required to quell the effects.

following year as well.¹⁵⁹ J.S. remained unpunished for his website for the remainder of the year; it was not until that summer that J.S. received a letter informing him of his suspension.¹⁶⁰

In regards to the geographical location of the speech, the Pennsylvania Supreme Court found that because J.S. accessed the website on a school computer, “the communication constituted on-campus speech that caused a material and substantial disruption of the school environment.”¹⁶¹ Furthermore, the court’s opinion goes on to “not rule out a holding that purely off-campus speech may nonetheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are satisfied.”¹⁶² The school district was able to prove a “sufficient nexus”¹⁶³ to qualify the website as “on-campus speech”. In applying *Tinker*, the court found a disruption material enough to satisfy the standard and, thus, justify the school’s punishment of J.S. in the context of First Amendment protection.¹⁶⁴

Expanding on the decision in *J.S.*, the United States Second Circuit Court of Appeals provided another ruling in 2007 that extended school officials’ reach off-campus. In 2001, Aaron Wisniewski, an eight grade student at Weedsport Middle School in New York, created an A.O.L. buddy icon that depicted a person being shot in the head by a pistol. Below the picture

¹⁵⁹ *J.S.*, 569 Pa. at 646.

¹⁶⁰ *Id.* at 647. The initial suspension was for three days, but later increased to ten days after a school board hearing. Towards the end of the summer, the school board voted to expel J.S.; he, however, was already enrolled in a separate school by that time.

¹⁶¹ *Id.* at 652.

¹⁶² *Id.* at 666.

¹⁶³ *Id.* at 667-668. Ultimately, a quasi standard was set that stated, “...Where speech is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator (as was the case with J.S.), the speech will be considered on-campus speech.” Regarding the question of a third-party, versus the originator, accessing the material on campus, the court suggests that “totality of the circumstances involved” must be considered; the originator, however, still “may run the risk” of having his/her speech qualified as on-campus and subjected to the standards of *Tinker*, *Fraser*, and *Hazelwood*.

¹⁶⁴ *Id.* at 675.

was the phrase “Kill Mr. VanderMolen,” referring to Aaron’s English teacher.¹⁶⁵ Another student who viewed the icon gave Mr. VanderMolen a copy, resulting in a five-day suspension (later increased to a full semester suspension after a school board hearing) for Aaron. Mr. VanderMolen was also permitted to not teach Aaron’s class for the remainder of the year.¹⁶⁶

The mere fact that Aaron created the icon at home, instead of on school grounds, did not “insulate him from school discipline.”¹⁶⁷ Aaron’s buddy icon constituted “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.’” Student speech that fell into this category was “provided no protection [by *Tinker*].”¹⁶⁸ This resulting standard provided serious danger to the First Amendment rights of students, as speech created off-campus could now be punished if a “reasonable person” would have foreseen the conduct making its way onto the school grounds, becoming apparent to school authorities, and causing a “material or substantial disruption” to the learning environment.¹⁶⁹ School principals and officials were essentially placed in the position of determining for each instant case what a “reasonable person” could foresee.

A final case that had very significant implications for student speech was also decided by the Second Circuit Appellate Court in May 2008.¹⁷⁰ At Lewis Mills High School in Burlington,

¹⁶⁵ *Wisniewski v. Board of Educ. of Weedsport Cent. School Dist.*, 494 F.3d 34 (2nd Cir. 2007).

¹⁶⁶ *Id.* at 36.

¹⁶⁷ *Id.* at 39.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 39-40.

¹⁷⁰ *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008).

Connecticut, Avery Doninger was the Junior Class Secretary.¹⁷¹ A disagreement arose between the Student Council (of which Doninger was a part) and the school district superintendent Paula Schwartz concerning the date of “Jamfest,” an “annual battle-of-the-bands concert that [the] Student Council members helped plan.”¹⁷² Doninger expressed her displeasure via an Internet blog from her home computer. On the blog, Doninger called the school officials “douchebags” and suggested readers email the school to “piss them off.”¹⁷³ When Karissa Neihoff, the school’s principal, and Schwartz saw the blog and its corresponding comments from other students, Neihoff demanded, among other things, Doninger withdraw her candidacy for Senior Class Secretary.¹⁷⁴ When Doninger refused, Neihoff refused to endorse her nomination, making her unable to have her name on the ballot; however, Doninger managed to win by write-in votes, but was not allowed to assume her position.¹⁷⁵

In discussing the First Amendment claim of Doninger, the appellate judges wrote that, “Territoriality is not necessarily a useful concept in determining the limit of [school administrators’] authority.”¹⁷⁶ Applying *Wisniewski*, which was set just six months earlier, the court determined it was “reasonably foreseeable” that Doninger’s blog posting would be transmitted on-campus and cause a disruption to the school setting.¹⁷⁷ Also, the court agreed

¹⁷¹ *Doninger*, 527 F.3d at 43.

¹⁷² *Id.* at 44.

¹⁷³ *Id.* at 45.

¹⁷⁴ *Id.* at 46.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 48-49, citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n. 13 (2d Cir. 1979).

¹⁷⁷ *Id.* at 50-51. The court implies Doninger’s use of “douchebag” and suggestion to send school officials emails or letters to “piss them off” was an “effort to recruit” that could potentially cause a disruption to the learning environment at the high school.

with Neihoff's ruling to not permit Doninger to take office as Senior Class Secretary.¹⁷⁸ All told, *Doninger* reinforced *Wisniewski*, and the authority allotted to school officials within the jurisdiction of the Second Circuit Court of Appeals.

Split Decision: J.S. Gets K.O.'d, While Layshock Survives

At the start of 2010, two student speech cases¹⁷⁹ with similar fact patterns were decided on the same day in the Third Circuit Court of Appeals--one in favor of the student, one in favor of the school district. This "split-decision" may possibly be the impetus for the Supreme Court to grant *certiorari* for one of the cases and finally hand down a decision on the authority schools have once students exit the schoolhouse gates. Both cases have petitions for *en banc* review pending in the Third Circuit.

Since the *Layshock* decision was first in time, it will be first in discussion. In mid-December of 2005, seventeen-year old Hickory High School senior Justin Layshock used his grandmother's computer to create an unflattering "parody profile" on MySpace of his principal, Eric Trosch.¹⁸⁰ During the same time period, three other fake profiles, "more vulgar and more

¹⁷⁸ *Doninger*, 527 F.3d at 52. In citing *Hazelwood*, the court reminded that "educators may exercise control over school-sponsored expressive activities 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" Doninger's actions could have potentially disrupted the operations of the Student Council and the means implored to settle disagreements with faculty and school officials.

¹⁷⁹ See *Layshock ex rel. Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286 (3d Cir. 2010).

¹⁸⁰ *Layshock*, 593 F.3d at 252-253. The fake profile, created during non-school hours, contained a picture of Trosch, copied and pasted from the school district's website. In the survey-question section of the profile, Layshock posted satirical answers incorporating the term "big", obviously meant to lampoon his sizeable principal. Some of the questions/answers were as follows:

Are you a health freak: big steroid freak
In the past month have you smoked: big blunt
In the past month have you gone Skinny Dipping: big lake, not big dick
Ever been called a Tease: big whore
Ever been Beaten up: big fag

offensive than Justin's,"¹⁸¹ were created by Hickory High students. When Trosch eventually learned of Layshock's possible involvement, Layshock and his mother met with the Hermitage School District Superintendent Karen Ionta and Co-Principal Chris Gill; during the meeting, Layshock admitted to authoring the profile but was not immediately punished.¹⁸² However, in early-January, a school board hearing was held regarding Layshock's conduct, and subsequently, a ten-day suspension was handed down.¹⁸³ A complaint of First Amendment abuse followed suit by Layshock's parents, resulting in argument before the Western District Court for the State of Pennsylvania; the District Court ultimately found in favor of Layshock, leading to the school district's appeal.¹⁸⁴

After being unable to forge the appropriate "nexus" between Layshock's conduct and a disruption of the school environment at the District Court level,¹⁸⁵ the school district revamped its approach by arguing the nexus was created when Layshock utilized the school's website for obtaining Trosch's picture and then accessed the profile on-campus.¹⁸⁶ The appellate court forcefully rejected this argument, vowing to "not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school."¹⁸⁷ Further,

¹⁸¹ *Layshock*, 593 F.3d at 253. Ultimately, Layshock was the only student to be punished, despite creating the least offensive and vulgar profile.

¹⁸² *Id.* at 254. Following the meeting and on his own accord, Layshock personally apologized to Trosch in his office. On January 4, 2006, Layshock also wrote a letter of apology to Trosch.

¹⁸³ *Id.* In addition to the suspension, Layshock was "(1) placed in the Alternative Education Program [the "ACE" program]...for the remainder of the 2005-2006 school year; (2) banned from all extracurricular activities, including Academic Games and foreign-language tutoring; and (3) not allowed to participate in his graduation ceremony."

¹⁸⁴ *Layshock*, 496 F.Supp.2d 587 (W.D.Pa. 2007).

¹⁸⁵ *Id.* at 600.

¹⁸⁶ *Layshock*, 593 F.3d. at 259. The district used the standard from *Wisniewski* and *Doninger*, stating that "It was reasonably foreseeable that the profile would come to the attention of the School district and the principal."

¹⁸⁷ *Id.* at 260. Furthermore, the court wrote, "It would be an 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

the school did not argue against the District Court’s ruling that no material disruption occurred as a result of the profile. This ultimately doomed the school district’s reliance on precedent¹⁸⁸ such as *J.S.* and *Wisniewski*, which all allowed punishment of off-campus speech, but only when the conduct actually caused a “material and substantial disruption.” Lacking the appropriate nexus and proof of disruption, the school district lost its appeal, chalking up another victory for student speech rights.

The victory seemed short-lived, though, as on the same day, the Third Circuit ruled in favor of the Blue Mountain School District in *J.S.*¹⁸⁹ The fact pattern was strikingly similar to that of *Layshock*. In 2007, two eighth-graders at Blue Mountain Middle School, referred to as J.S. and K.L., created a MySpace profile that featured a picture of school principal James McGonigle and contained unbecoming comments regarding his wife, his child, and his performance as school principal.¹⁹⁰ Another student at Blue Mountain Middle School notified

they can control that child when he/she participates in school sponsored activities. Allow the District to punish Justin conduct he engaged in using his grandmother’s computer while at his grandmother’s house would created just such a precedent...”

¹⁸⁸ *Layshock*, 593 F.3d at 262-263. The school district also cited *Doninger* in support, to which the appellate court distinguished by noting the punishment only consisted of not allowing a student to run for a student council office, not suspension. Also, the Court noted the Second Circuit “[had] no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.”

¹⁸⁹ *J.S.*, 593 F.3d 286 (3d Cir. 2010).

¹⁹⁰ *Id.* at 290-291. Much like *Layshock*, the students copied and pasted the principal’s picture from the school website. The profile, however, did not identify McGonigle, but instead portrayed him as a “married bisexual forty-year-old man, a Virgo, and a ‘[p]roud parent’ who lived in Alabama with his wife and child.” According to the profile, McGonigle’s interests were “general detention. being a tightass. riding the frainttrain (a sexual reference to his wife, Debra Frain). spending time with my child (who looks like a gorilla). baesball. my golden pen. fucking in my office. hitting on students and their parents.” The “About Me” section read, “HELLO CHILDREN. Yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINICPAL. I have come tomyspace so i can pervert the minds of other principal’s to be just like me....Another reason I came...I am keeping an eye on you students (who i care for so much). For those who want to be my friend, and aren’t in my school, 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.”

McGonigle of the profile and even provided him with a copy.¹⁹¹ After meetings with the school district’s Superintendent, Director of Technology, and two guidance counselors, including his wife, McGonigle suspended both students for ten days.¹⁹² On March 28, 2007, six days after the suspension was instituted, J.S. and her parents filed suit.¹⁹³ The District Court ultimately found in favor of the school district, permitting their regulation “because the lewd and vulgar off-campus speech had an effect on-campus.”¹⁹⁴ J.S. and her parents appealed.

Immediately, the court concluded that the profile fell within the bounds of the *Tinker* standard, irregardless of the location of the speech.¹⁹⁵ From there, the court addressed whether a significant enough disruption of the learning environment occurred as a result of the speech to allow for regulation under *Tinker*. Initially, the court found no instance of significant “actual disruption” caused by the profile; however, the court then threw a curveball. The profile had reasonably foreseeable potential to cause a disruption had McGonigle not taken such swift action, allowing his punishment of the two students to be justifiable.¹⁹⁶ Further, the “level of

¹⁹¹ *J.S.* 593 F.3d at 292. After the student, referred to as B, notified McGonigle, the principal asked B to find out who created the profile. The next day, B returned with information that J.S. had created the profile and made a hard copy, the only hard copy that was brought onto the school’s campus.

¹⁹² *Id.* at 293. J.S. did apologize to McGonigle in-person the day of the suspension, and also followed up with a written letter of apology.

¹⁹³ *Id.* at 294.

¹⁹⁴ *J.S. ex rel. Snyder v. Blue Mountain School District.*, (not reported in F.Supp.2d, 2008 WL 4279517) (M.D.Pa. 2008).

¹⁹⁵ *J.S.*, 593 F.3d at 298. The court refused to address the reach of school authority off-campus, stating, “We decline today to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus because [the profile]...is subject to regulation under *Tinker*.”

¹⁹⁶ *Id.* at 300-301. The court cited that twenty-two members at school had accessed the profile already, and many could undoubtedly show their parents. Parents that did not know McGonigle or interact with him regularly, might believe these accusations to be true and question his ability to hold the position of principal at Blue Mountain Middle School. Further, the court held that “off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*.”

vulgarity” and “reckless and damaging information” contained in the profile further strengthened Principal McGonigle’s need to reinforce his authority within the school and squash any chance of “potentially arous[ing] suspicions among the school community about his character.”¹⁹⁷

¹⁹⁷ *J.S.*, 593 F.3d at 302.

4 Conclusion

In the end, the geographical extent to which a school district's authority stretches, ironically, depends on the geographical location of that school district. The Second and Third Circuit Appellate Courts have both handed down rulings that allow for regulation of off-campus speech when a nexus can be created between said speech and an actual, or reasonably foreseeable, significant disruption of the school's learning environment. Other courts across the country, notably in Washington and Michigan, have decided to protect the rights of off-campus student speech by refusing to allow school officials to extend their authority beyond the bounds of school or school-sponsored activities. Unfortunately, these geographical inconsistencies will continue to prevail until the Supreme Court provides a definitive ruling on the issue. Until then, school districts in some states can punish off-campus speech, while school districts in other states cannot.

Meanwhile, schools and students in their charge are left to speculate as to what position to take regarding off-campus school speech. School districts must recognize the possibility of a lawsuit when initiating disciplinary proceedings against a student for off-campus speech. A mere one-day suspension of a student could escalate into a time-consuming legal battle that

stretches many years and costs the school district thousands of dollars. Furthermore, despite case law that may favor the school district, the outcome of any lawsuit is never certain. The suspension could easily be overturned by a slightly different fact pattern, a procedural technicality, or a reversal upon appeal to a higher court. Undoubtedly, our school districts, left blind by the Supreme Court, are placed in the extremely difficult situation of balancing their schools' order and discipline with their students' right to free speech and expression. Students, on the other hand, must recognize the possibility of being punished in school for creating a website or posting a blog off campus, after school hours. Students may be forced to choose between exercising their creativity and suffering the consequences, or suppressing their ingenuity and originality for the sake of a spot-free disciplinary record. This adverse effect is certainly not the intent of schools when handing down punishments, but an effect nonetheless.

Ultimately, the following question remains at the heart of this issue: Are we, as a society, willing to sacrifice some degree of our children's freedoms and creativity for greater order, discipline, and structure in our school system?

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