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A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age

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INTRODUCTION

In the last decade, the federal appellate courts have grappled with the issue whether, and to what extent, school officials constitutionally may discipline students for their off-campus speech. Before 2015, three federal circuit courts had extended school authority to off-campus electronic speech by applying a vague test that allows school officials to reach far beyond the iconic "schoolhouse gate" referenced in the Supreme Court's 1969 landmark decision in *Tinker v. Des Moines Independent Community School District*.[1] Two other federal circuits had avoided the issue altogether by deciding the cases before them on other grounds.

In 2015, the Fifth Circuit Court of Appeals became the sixth circuit court to wrestle with the issue. In August 2015, the Fifth Circuit issued an *en banc* ruling in which multiple judges urged the Supreme Court to provide guidance regarding the scope of school discipline over students' off-campus speech.[2] When a petition for a writ of certiorari was filed in the Fifth Circuit case,[3] it seemed possible that the Supreme Court indeed would provide the guidance desperately needed by the lower courts. However, on February 29, 2016, just days after the unexpected death of Justice Antonin Scalia,[4] the Supreme Court denied the petition that had been filed in the Fifth Circuit case.[5] The eight-member Court thus missed an opportunity to address this important First Amendment issue.

This article reviews the varied approaches the federal circuits have taken regarding the scope of school officials' authority to discipline students for electronic speech that is created and distributed outside of school. The article then proposes an analytical framework that, building on Supreme Court precedent, protects students' free speech rights while preserving the ability of school officials to insure the safety and wellbeing of the school community.

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[1] 393 U.S. 503 (1969).

[2] Bell v. Itawamba Cty. Sch. Bd., 779 F.3d 379, 433 (5th Cir. 2015) (Prado, J., dissenting) ("I hope that the Supreme Court soon will give courts the necessary guidance to resolve these difficult cases"); 779 F.3d at 403 (Costa, J., Owen, J. and Higginson, J., concurring) ("[T]his court or the higher one will need to provide clear guidance for students, teachers and school administrators").

[3] *See* Petition for a Writ of Certiorari, Bell v. Itawamba Cty. Sch. Bd., No. 15-666, 2015 WL 7299351 (U.S.) (filed Nov. 17, 2015).

[4] Justice Scalia died unexpectedly on February 13, 2016. *See* Adam Liptak, *"Antonin Scalia, Justice on the Supreme Court, Dies at 79,"* N.Y. Times (Feb. 13, 2016) (available at http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r= 0) (last visited Sept. 24, 2016).

[5] Bell v. Itawamba Cty. Sch. Bd., 136 S.Ct. 1166 (2016).

Part I of this article examines the Supreme Court's student speech precedents, none of which involved student off-campus electronic speech. Part II of the article then reviews the decisions in which the circuit courts have sought to apply the Supreme Court's precedents to determine the scope of school authority over students' off-campus electronic speech. Part III examines the views of legal scholars on these issues and proposes a framework designed to both protect students' First Amendment rights and preserve the ability of school officials to ensure the safety and wellbeing of all individuals in the school community.

I. THE SUPREME COURT'S STUDENT SPEECH CASES.

A. The Supreme Court First Addresses the Scope of Students' First Amendment Speech Rights While at School.

The Supreme Court has decided four student speech cases.[6] Although none of the Supreme Court's student speech cases involved electronic off-campus speech, the decisions nonetheless provide an analytical framework that can be applied to student speech in the digital age.[7]

Forty-five years ago, the Supreme Court first addressed the issue of students' First Amendment rights while at school. In *Tinker v. Des Moines Independent Community School District,*[8]several students sued their local school district after they were suspended from school for wearing black armbands as a protest against the Vietnam War.[9] The Court found that the disciplinary measures had violated the students' First Amendment rights.[10]

In so holding, the Court affirmed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11] Yet the Court also recognized that First Amendment rights were to be applied "in light of the special characteristics of the school environment."[12] In the Court's view, the school setting involves countervailing considerations that must be balanced. On the one hand, as

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[6] Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

[7] *See* Part III, *infra.*

[8] 393 U.S. 503.

[9] *Id.* at 504. The plan to wear black armbands as a protest of the Vietnam War arose out of a meeting of adults and students held at the home of one of the plaintiffs in the case. This plan was communicated to the principals of the Des Moines school, who adopted a policy prohibiting the wearing of black armbands at school and authorizing the suspension of any student who refused to remove a black armband. *Id.* The plaintiffs in the case were aware of the newly-instituted policy before the day that they wore black armbands to school. *Id.* In accordance with the school policy, they were suspended until they returned to school without black armbands. *Id.*

[10] *Id.* at 514. The Court found that the act of wearing black armbands constituted symbolic speech that was entitled to First Amendment protection. *Id.* at 505-06.

[11] *Id.* at 506.

[12] *Id.*

institutions that "educat[e] the young for citizenship,"[13] schools should not act in a manner that would "strangle the free mind"[14] or otherwise "teach youth to discount important principles of our government"[15] such as the right to freedom of expression. On the other hand, the Court recognized the "comprehensive authority"[16] of school officials to maintain order at school. School officials must have the ability to "prescribe and control conduct in the schools."[17]

To balance these competing concerns, the Court held that school officials constitutionally may discipline students for speech that "materially and substantially disrupt[s] the work and discipline"[18] of school. The Court also explained that school officials need not wait for an actual disruption to occur at school, so long as school officials reasonably could forecast a future substantial disruption.[19] The Court cautioned that any such forecast could not be based on either "undifferentiated fear or apprehension"[20] or a "desire to avoid this discomfort and unpleasantness that always accompanies an unpopular viewpoint."[21]

On the facts before it, the Court found that school officials had acted not to avoid a substantial disruption at school, but simply to avoid discussion of the merits of the Vietnam War. The Court noted that the school policy had "singled out for prohibition"[22] the wearing of black armbands to protest the Vietnam War, not any other symbols that might be politically controversial.[23] The Court held that a ban on the expression of one particular position was not constitutionally permissible in the absence of any evidence that the ban was necessary to avoid substantial interference with the school setting.[24]

While articulating a "substantial interference" or "substantial disruption" standard by which to examine the constitutionality of school discipline, the decision in *Tinker* was not necessarily the model of clarity. First, the Court did not clearly define what constitutes the "work" or "discipline" of school. In addition, the Court did not clearly articulate the facts or factors that cause a disruption of the school environment to be "substantial" or "material."[25] The Court also indicated that discipline might be appropriate if a student's speech "intrude[d],"[26] "impinge[d],"[27]

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[13] *Id.* at 507.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 513.
[19] *Id.* at 514.
[20] *Id.* at 508.
[21] *Id.* at 509.
[22] *Id.* at 510.
[23] *Id.*
[24] *Id.*
[25] The Court used different terminology in different sections of the opinion, referring to both "substantial disorder" and a "material disrupt[ion of] classwork" as constitutionally permissible grounds for discipline. *Id.* at 513.
[26] *Id.* at 508.
[27] *Id.* at 509.

"inva[ded],"[28] or "collid[ed] with"[29] the rights of other students, although the Court did not illustrate when such a circumstance might occur.

In reviewing the specific facts, the Court noted that the plaintiffs' act of wearing armbands had not been accompanied by any "disorder or disturbance"[30] on the part of the plaintiffs. The Court also maintained that there had been no evidence presented that any class was disrupted by the wearing of the armbands.[31] The Court further stated: "[o]utside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises."[32]

Justice Hugo Black dissented from the decision in *Tinker*.[33] He principally took issue with the majority's conclusion that the students' symbolic speech had not interfered with schoolwork. While acknowledging that the wearing of black armbands had not prompted "obscene remarks or boisterous or loud disorder," Justice Black argued that school officials were justified in disciplining the students because their speech had "diverted" other students' attention from their classwork.[34] He opined that students could be disciplined for any speech that would cause other students to take their minds off of their schoolwork.[35] Any diversion from assigned classwork would be sufficient to allow school officials to regulate or discipline of student speech. Thus, the definition of a substantial disruption was a somewhat disputed issue among the members of the Court.

In addition to being somewhat vague about the contours of a substantial disruption, the decision in *Tinker* also was unclear as to the proper scope or definition of the "school environment,"[36] a highly relevant question when considering student speech in the digital age. While the Court did use the clear image of a physical location – the space located within the "schoolhouse gate"[37] – it also broadened the scope of the ruling beyond the four corners of a classroom. The Court stated that its ruling was not limited to "supervised or ordained discussion which takes places in the classroom,"[38] but that students retained their First Amendment rights, consistent standards articulated, to express an opinion whether "in the cafeteria, or on the playing field, or on the campus during the

[28] *Id.* at 513.
[29] *Id.*
[30] *Id.* at 508.
[31] *Id.* The majority stated that no class had been disrupted in spite of evidence apparently in the record that a mathematics class had been "wrecked" by an in-class dispute with one of the students wearing a black armband. *Id.* at 517 (Black, J., dissenting).
[32] *Id.* at 508.
[33] *Id.* at 515 (Black, J., dissenting).
[34] *Id.* at 518.
[35] *Id.* ("And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.").
[36] *Id.* at 506.
[37] *Id.*
[38] *Id.* at 512.

authorized hours."[39] Yet, in another sentence, the Court stated that school officials have authority to regulate student speech, whether it takes place "in class or out of it,"[40] if the speech creates a substantial interference or disruption.

Of course, the Court cannot be faulted for not anticipating the digital age when it decided *Tinker*. Yet, when the lower federal courts seek to determine the scope of school authority over student electronic speech that is created and distributed outside of school, some courts have resorted to reading the "tea leaves" of these particular statements in *Tinker* in an attempt to define what it means to be at school.

Although the Court in *Tinker* used both the words "interference" and "disruption" to describe the effect of student speech on the school environment, the standard articulated in *Tinker* has become known as the "substantial disruption" standard. Since *Tinker*, the Court has never explicitly outlined the contours of the substantial disruption standard or otherwise clearly defined the phrase "substantial disruption."[41]

B. The Court Determines That Students May Be Disciplined For Lewd or Obscene Speech That Is Uttered At School.

More than fifteen year after *Tinker,* the Court again addressed the issue of students' First Amendment rights. In *Bethel School District No. 403 v. Fraser*, a young man filed suit alleging that school officials had violated his First Amendment rights by disciplining him for giving a speech at a school assembly that had been replete with sexual metaphor.[42] The school had determined that the student's conduct violated the school's code of conduct, which used the language of *Tinker* in prohibiting any conduct that "materially and substantially interfere[d] with the educational process, including the use of obscene, profane language or gestures."[43] The student prevailed both at the trial court and appellate level; both courts found that the school's code of conduct was unconstitutionally vague and that the student's speech had not caused a substantial disruption at school as required by *Tinker*.[44] The Supreme Court reversed.[45]

The Court first distinguished the sexually-charged speech in *Fraser* from the black armbands of *Tinker*, stating that the students in *Tinker* had not "intrude[d] upon the work of the school[] or the rights of other students."[46] The Court then expanded upon *Tinker's* concept of the "work" of public schools, opining a "highly appropriate function of public school education [is] to prohibit the use of vulgar and offensive terms in

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[39] *Id.* at 512-13.
[40] *Id.* at 513.
[41] *See* Lisa Smith-Butler, *Walking the Regulatory Tightrope: Balancing Bullies' Free Speech Rights Against the Rights of the Rights of Victims to Be Left Alone When Regulating Off- Campus K-12 Student Cyberspeech,* 37 NOVA L. REV. 243, 303 (2013).
[42] 478 U.S. 675.
[43] *Id.* at 678.
[44] Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985).
[45] 478 U.S. 675.
[46] *Id.* at 680.

public discourse."[47] Noting that students' First Amendment rights are not "coextensive with the rights of adults in other settings," the Court found that students do not have the same freedom in terms of their choice of words when expressing their opinion.[48] While an adult in a public place has the right to choose lewd or obscene language to express a particular viewpoint, students are not permitted the "same latitude" when at school.[49] Rather, a student's "freedom to advocate unpopular and controversial views in schools and classrooms"[50] was tempered by "society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[51] Thus, the Court held that the First Amendment allows school officials to discipline students for lewd or obscene speech that "undermine[s] the school's basic educational mission."[52]

In concurring with the decision in *Fraser*, Justice Brennan made the significant point that the Court's decision was limited to lewd speech uttered at school. He stated that "had [the student] given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[53] In so stating, Justice Brennan affirmed the view of many lower courts that students can freely use lewd or obscene speech when not at school.[54]

In addition, Justice Brennan repeatedly invoked the substantial disruption standard of *Tinker*, characterizing both the language itself and its effect on the school environment as "disruptive."[55] Specifically, Justice Brennan stated that the school officials had sought to ensure that the assembly "proceed[ed] in an orderly manner"[56] and that the discipline had been imposed because the student's speech "disrupted the school's educational process."[57] Thus, according to Justice Brennan, the Court in *Fraser* had applied *Tinker's* substantial disruption standard.[58]

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[47] *Id.* at 682.

[48] *Id.* at 682-83.

[49] *Id.* at 682. Referring to its own 1971 decision in Cohen v. California, 403 U.S. 15 (1971), in which the Court struck down on First Amendment grounds the criminal conviction of an individual who wore a jacket bearing the words, "Fuck the Draft" in public, the Court noted that "'the First Amendment gives a high school student the classroom right to wear Tinker's armband but not Cohen's jacket.'" *Id.* at 682-83, quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).

[50] *Id.* at 681.

[51] *Id.*

[52] *Id.* at 685.

[53] *Id.* at 688, citing Cohen v. California, 403 U.S. 15 (1971).

[54] *See e.g.*, Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986) (holding that school could not discipline a student for "giving the finger" to a teacher he encountered in a restaurant parking lot, stating: "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").

[55] *Id.* at 682.

[56] *Id.* at 689.

[57] *Id.* at 688.

[58] Indeed, Justice Marshall dissented from the decision in *Fraser* on the ground that the school had not shown a "disruption of the educational process." *Id.* at 690.

C. The Supreme Court Finds That Schools May Exercise Editorial Control Over Student Speech That Appears In School-Sponsored Publications.

Just two years after the *Fraser* decision, the Court again issued a significant decision in the arena of students' First Amendment rights. In *Hazelwood School District v. Kuhlmeier*,[59] the Court held that school officials could "exercise[e] editorial control"[60] over the contents of a school newspaper prepared by high school students as part of a journalism course. The students filed suit after the school principal deleted two stories from the newspaper.[61] The Eighth Circuit Court of Appeals had held that the school newspaper constituted a public forum and that school officials could not censor the contents of the paper in the absence of a substantial disruption under *Tinker*.[62] The Court reversed. First, the Court found that the school newspaper was not a public forum, but was a vehicle for students to learn and apply skills gained in a journalism course that existed as part of the school's curriculum.[63] The Court held that the pedagogical goal of producing the school newspaper distinguished it from a public forum such that school officials had not "relinquish[ed] school control over that activity."[64]

The Court's determination that the school newspaper was not a public forum was significant because, in the Court's view, the remaining issue was only whether school officials had exercised their rights to regulate the content of the newspaper in a "reasonable manner."[65] The question of the reasonableness, the Court stated, was the standard by which the case was to be decided, not the substantial disruption standard established in *Tinker*.[66] The Court characterized *Tinker* as a case involving "[t]he question whether the First Amendment requires a school to tolerate particular student speech."[67] The Court then contrasted *Kuhlmeier* as a case involving "the question whether the First Amendment requires a school affirmatively to promote particular speech."[68] Finding that *Tinker* was factually distinguishable, the Court then explicitly created a separate constitutionally-permissible category of regulation over student speech. It described this category as control over "school-sponsored publications, theatrical productions, and other expressive activities that students,

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[59] 484 U.S. 260 (1988).
[60] *Id.* at 273.
[61] *Id.* at 263. The two stories involved topics of teen pregnancy and divorce. *Id.*
[62] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986).
[63] *Id.* at 269-70.
[64] *Id.* at 270.
[65] *Id.*
[66] *Id.* The Court in *Kuhlmeier* also characterized *Tinker* as delineating the ability of school officials "to silence a student's personal expression that happens to occur on school premises." *Id.* at 271.
[67] *Id.* at 270.
[68] *Id.* at 270-71. The Court made clear that the *Tinker* did not apply, stating its conclusion "that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Id.* at 272-73.

parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[69] In this "second form of student expression," the Court granted school officials great discretion, finding that school officials do not violate the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns."[70]

As he had done in *Fraser*, Justice Brennan again wrote a separate opinion, although in *Kuhlmeier* he dissented from the decision.[71] Joined by Justices Marshall and Blackmun, Justice Brennan sharply criticized the majority's decision to "abandon[] *Tinker*"[72] and in favor of the creation of a second category of permissible regulation over student speech. He argued that the majority's decision to divide student speech into "incidental" and "school-sponsored" expression had no basis in precedent.

In so arguing, Justice Brennan discussed *Fraser* at length, asserting that, just two years earlier in *Fraser*, the Court had "faithfully applied *Tinker*."[73] The majority in *Kuhlmeier* addressed that contention in a footnote, disagreeing with Justice Brennan that the decision in *Fraser* had been grounded in *Tinker's* substantial disruption standard.[74] Justice Brennan, however, argued that *Tinker* granted school officials sufficient authority to regulate student expression that would interfere with a school's pedagogical or curricular goals.[75]

In doing so, Justice Brennan employed an expansive definition of the phrase "material disruption," stating that school officials could censor student expression appearing in a school newspaper if the content contained "poor grammar, writing or research because to reward such expression would 'materially disrupt' the newspaper's curricular purpose."[76] He distinguished such constitutionally-permissible censorship from censorship that was designed to shield the newspaper's readers (the audience) or the newspaper's sponsor (the school) from the effect of the expression. Citing evidence from the record, Justice Brennan concluded that, on the facts before the Court, it was clear that school officials had acted to shield the audience from material that they deemed to be "too sensitive" or "unsuitable" for the audience of student-readers. That form of censorship, he determined, was unconstitutional.

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[69] *Id.* at 271.
[70] *Id.* at 273.
[71] *Id.* at 277-91 (Brennan, J., Marshall, J., Blackmun, J., dissenting).
[72] *Id.* at 282.
[73] *Id.*
[74] *Id.* at 271, n. 4, quoting *Fraser*, 393 U.S. at 513 (The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly rather than on any propensity of the speech to "materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others.").
[75] *Id.* at 283-84. The majority interpreted *Tinker's* reference to speech that invaded the rights of other students as referring to speech of one student regarding another student that could give rise to tort liability on the part of the school. *Id.* at 273 n.5.
[76] *Id.* at 284.

D. The Court Allows School Officials To Discipline Students For On-Campus Speech That Promotes Illegal Drug Use.

After the decision in *Kuhlmeier*, it was nearly twenty years before the Court decided another student speech case. In a 2007 decision, *Morse v. Frederick*, the Court ruled that school officials may constitutionally regulate student speech that reasonably is perceived as promoting illegal drug use.[77] In *Morse*, school officials had allowed students to leave school grounds during school hours, although supervised by school employees, in order to watch the 2002 Olympic Torch Relay pass by on the street. While standing on the sidewalk, a group of students unfurled a homemade banner displaying the message "BONG HiTS 4 JESUS."[78] When the school principal saw the banner, she directed the students to take it down, and all except one student complied.[79] The principal confiscated the banner and suspended the student for displaying a message that promoted illegal drug use, a message that violated school policy prohibiting such advocacy of illegal drug use.[80] He then brought suit, alleging a violation of his First Amendment rights.[81]

The lower courts were divided; the federal district court granted summary judgment in favor of the school on the ground that the principal had reasonably interpreted the banner as promoting illegal drug use in contravention of the school's drug abuse prevention policy.[82] The Ninth Circuit Court of Appeals reversed, finding that school officials had been unable to establish that the student's speech materially disrupted the school environment.[83]

The Court reversed the Ninth Circuit, holding that the discipline had been constitutionally imposed.[84] In so holding, the Court first addressed the student's argument that the case was not a "school speech case" because the student was not on school grounds.[85] The Court summarily rejected that argument, stating that the student could not "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."[86] Although the Court found that the particular facts of the case fell squarely within the student speech cases, the Court did acknowledge that "there is some uncertainty at the outer boundaries as to when the courts should apply school speech precedents."[87]

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[77] 551 U.S. 393 (2007).

[78] *Id.* A photograph of the banner being displayed can be found at https://reedsmassmedia.wordpress.com/2010/09/10/morse-v-frederick-bong-hits-4-jesus/ (last visited Sept. 28, 2016).

[79] 551 U.S. at 398.

[80] *Id.*

[81] *Id.* at 399.

[82] Frederick v. Morse, 2003 WL 25274689 (D. Alaska, May 29, 2003).

[83] Frederick v. Morse, 493 F.3d 1114 (9th Cir. 2006).

[84] 551 U.S. 393.

[85] 551 U.S. at 400.

[86] *Id.* at 401.

[87] *Id.*, citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (5th Cir.

Having disposed with the student's argument that his speech was beyond the authority of school officials, the Court next turned to the issue whether school officials had acted within constitutional limits. The Court again affirmed that students do not lose their First Amendment rights at school, but noted that the "nature of those rights is what is appropriate for children in school."[88] Returning the debate that had taken place twenty years earlier between the Justices who decided both *Fraser* and *Kuhlmeier*, the Court in *Morse* noted that. While the "mode of analysis employed in *Fraser* [wa]s not entirely clear,"[89] it could discern two important principles from the decision. First, due to the "special characteristics of the school environment," the First Amendment rights of students may be regulated in ways that would not be constitutional if imposed upon either adults or students in other settings.[90] The Court thus affirmed Justice Brennan's conclusion that the student in *Fraser* could not have been disciplined by school officials had he given the speech outside of the "school context."[91] Second, notwithstanding Justice Brennan's concurrence in *Fraser* and later dissent in *Kuhlmeier*, the Court in *Morse* found that, in *Fraser*, it had not "conduct[ed] the 'substantial disruption' analysis prescribed by *Tinker*."[92] Thus, the Court made clear that *Fraser* had established a content-based category of unprotected student speech under which lewd or indecent speech uttered at school is subject to discipline.

The Court in *Morse* also reviewed its decision in *Kuhlmeier* and reaffirmed that school officials do not violate the First Amendment by exercising control over student speech expressed in school-sponsored activities as long as the regulation is "reasonably related to legitimate pedagogical concerns."[93] Further, the Court interpreted the decision in *Kuhlmeier* to be consistent with *Fraser* in two important respects. First, school officials have the ability to regulate student speech at school in ways although they "could not censor similar speech outside the school."[94] Second, the substantial disruption standard of *Tinker* "is not the only basis for restricting student speech."[95]

Having concluded that the Court's precedents allowed for the creation of certain categories of regulated student speech, the Court then created an additional content-based category by allowing restrictions on student speech that could reasonably be interpreted as promoting illegal drug use.[96]

2004).

[88] Id. at 406.

[89] *Id.* at 404.

[90] *Id.* at 404-05.

[91] *Id.* at 405.

[92] *Id.*, citing *Kuhlmeier*, 484 U.S. at 271, n. 4 (the majority in *Kuhlmeier* voices disagreement with Justice Brennan in terms of the analysis conducted in *Fraser*).

[93] *Id.* at 405.

[94] *Id.* at 406.

[95] *Id.*

[96] *Id.* at 408. Justice Thomas concurred in the result, writing separately to argue that *Tinker* is unconstitutional because the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."

Justice Alito concurred in the Court's decision in *Morse*, but added a significant note of caution. Specifically, Justice Alito wrote separately to reject the argument made by school officials that they were entitled to restrict any student speech that "interferes with a school's educational mission."[97] Justice Alito wisely recognized the dangerousness of such a position, since any particular school's educational mission could be defined – and re-defined – to fit the political, social or moral views of particular administrators.[98] He emphasized that the Court's ruling in favor of school officials was not premised on authority to regulate student speech that interfered with an educational mission but, rather, on the specific and special characteristics of the school setting. On the facts before the Court, the "threat to the physical safety of students"[99] was an important characteristic of the school environment that had been implicated by the student's arguably pro-drug use banner. Employing language that is particularly on-point when one considers the threats of violence such as school shootings, Justice Alito stated:

> School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.[100]

Justice Alito concluded that, in cases involving threats of violence, school officials "must have greater authority to intervene."[101] He specifically cited *Tinker's* substantial disruption standard as providing authority for school officials to intervene "before actual violence erupts."[102]

Id. at 410-11. This argument is firmly grounded in the physicality of being at school, where school officials are deemed to be standing *in loco parentis* when children are at school. *Id.* at 419. Thus, under Justice Thomas's interpretation of the First Amendment, school officials should have no ability to regulate student speech that occurs outside of school, where the children's parents have the ability to control and discipline them.

[97] *Id.* at 423, quoting Brief of the Petitioners and Amicus Curiae.

[98] *Id.*

[99] *Id.* at 424.

[100] *Id.*

[101] *Id.* at 425.

[102] *Id.*

II. THE CIRCUIT COURTS ENTER THE DIGITAL AGE.

A. The Second Circuit Establishes A "Reasonable Foreseeability" Test.

Less than two weeks after the Supreme Court decided *Morse*, a case involving student speech appearing on a crudely-made, hand-painted sign, the Second Circuit Court of Appeals decided a case involving student speech using an entirely different mode of communication – an electronic "instant message" (IM) distributed via the Internet.[103] Thus, only days after the decision in *Morse*, the lower federal courts embarked on the difficult task of applying the Supreme Court's "twentieth century" student speech cases to the predominant "twenty-first century" mode of communication – speech that is created and distributed electronically.

In *Wisniewski v. Board of Education of the Weedsport Central School District*,[104] the parents of an eighth-grade student sued after their son was disciplined for transmitting to other students an instant message (IM) icon with a drawing depicting the shooting of the student's English teacher. The student argued that, because he created and distributed the IM outside of school, his speech was beyond the authority of school officials.[105] The Second Circuit rejected that argument, holding that school officials did have the authority over the student's off-campus speech because it was "reasonably foreseeable that the IM icon would come to the attention of school authorities"[106] or "reach"[107] the school property. The Second Circuit then applied the *Tinker* test and determined that school officials had reasonably forecast a substantial disruption.

The Second Circuit first examined the question whether the student's speech constituted a "true threat" under the Supreme Court's decision in *Watts v. United States*.[108] In *Watts*, the Court held that a federal statute criminalizing threats against the President of the United States required the government to establish that the speech constituted a "true threat."[109] The Second Circuit concluded that it need not consider whether to apply *Watts* because, in its view, *Tinker's* substantial disruption standard granted school officials "significantly broader authority to sanction student speech than the *Watts* standard allows."[110] Irrespective of the true threat analysis, student speech that advocated violence against a teacher had the potential to materially and substantially disrupt the school environment.[111]

However, the three-judge panel in *Wisniewski* struggled with the proper test to determine whether *Tinker* applied to student speech created

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[103] Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).
[104] *Id.*
[105] *Id.* at 39 (the creation of the IM message outside of school did not "insulate [the student] from discipline").
[106] *Id.* at 38.
[107] *Id.* at 39.
[108] 394 U.S. 705 (1969).
[109] *Id.* at 37-38.
[110] *Id.* at 38.
[111] *Id.* at 39.

and distributed outside of school. The "panel [was] divided"[112] about whether, in the case of off-campus speech, school officials were required to make any additional showing about the speech's connection to the school environment or whether that issue was unnecessary in light of the fact that the speech had be viewed by school officials. While noting the panel's disagreement, the Second Circuit held that, on the specific facts before it, it was "reasonably foreseeable that the IM icon would come to the attention of school authorities,"[113] thus providing authority for school officials to discipline the student under *Tinker*. The requirement of reasonable foreseeability – "both of communication to school authorities… and the risk of substantial disruption"[114] – was satisfied because of the threatening content of the IM icon and its "extensive distribution"[115] to fifteen other students.

Thus, *Wisniewski* established a "threshold"[116] test that school officials must satisfy before the *Tinker* analysis is undertaken. This threshold test requires school officials to demonstrate "reasonable foreseeability" that a student's off-campus speech would come to the attention of school authorities.

In March 2008, the Supreme Court denied a petition for a writ of certiorari that had been filed in in *Wisniewski*.[117]

In a case decided one year later, the Second Circuit again applied its "reasonable foreseeability" test to determine whether school officials could exercise authority over a student's electronic off-campus speech. In *Doninger v. Niehoff*,[118] a student who was a member of student government was disciplined after she posted a message on a publicly accessible blog that contained misleading information and derogatory language about an upcoming school event, a "battle of the bands" concert.[119] The student erroneously told the school community that the concert had been cancelled "due to douchebags in central office"[120] and urged students and parents to flood the school's administrative offices with complaints via email or telephone, with the expressed goal of "piss[ing] [school officials] off more."[121] Due to the student's efforts, school administrators did receive a deluge of complaints from students and parents, which caused school administrators to spend significant time both in scheduling the concert and correcting misinformation distributed by the student.[122]

Some days after the incident, the student's blog posting was

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[112] *Id.*
[113] *Id.*
[114] *Id.* at 40.
[115] *Id.* at 39.
[116] Wynar v. Douglas County Sch. Dist., 782 F.3d 1062 (9th Cir. 2013) (characterizing the Second Circuit's decision as establishing a "threshold test").
[117] Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 552 U.S. 1296 (2008).
[118] 527 F.3d 41 (2d Cir. 2008).
[119] *Id.*
[120] *Id.* at 45.
[121] *Id.*
[122] *Id.* at 46.

brought to the attention of the school superintendent, whose adult son found the posting on the Internet.[123] At the time, school officials took no action; however, approximately three weeks later, when the student took steps to accept a nomination to serve as Senior Class Secretary, the school principal determined that the student should be prohibited from running for that office as discipline for her speech.[124]

The student's mother then sued. The federal district court denied the plaintiff's motion for a preliminary injunction, finding that the plaintiff had not demonstrated a sufficient likelihood of success on the merits,[125] and the plaintiff appealed to the Second Circuit.

The Second Circuit first noted that the Supreme Court had not yet addressed the "scope of a school's authority"[126] over student off-campus speech. Relying on its earlier decision in *Wisniewski*, the court then articulated two, slightly different "foreseeability tests" to determine the scope of school authority over off-campus speech. First, the court stated that a student may be disciplined for off-campus speech that "'would foreseeably create a risk of substantial disruption within the school environment' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[127] Later in the opinion, the court stated that school discipline is permissible when "it [is] reasonably foreseeable that the [speech will] come to the attention of school authorities and that it would create a risk of substantial disruption."[128]

The court did not explain whether the two articulations – authority over off-campus speech that either "reach[es] campus" or "come[s] to the attention of school authorities" – are in fact the same measure or test. Compounding the confusion, the Second Circuit applied both articulations to the facts of the case. The court first stated that "it was reasonably foreseeable that [the blog posting] would reach school property."[129] Later in the same paragraph, the court stated that "it was reasonably foreseeable that … school administrators would be aware of [the blog posting]."[130] Based on these two, slightly different articulations, the Second Circuit concluded that school officials had authority over the student's off-campus speech.

The Second Circuit then concluded that school officials had correctly applied *Tinker*.[131] The court did not find that an actual substantial disruption had occurred at school, only that the student's speech had created a foreseeable risk of a future disruption. The court cited three reasons for this finding.[132] First, the court found that the student's use of "plainly offensive" language – such as calling school officials

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[123] *Id.*
[124] *Id.*
[125] 514 F. Supp. 2d 199 (D. Conn. 2007).
[126] 527 F.3d at 48.
[127] *Id.*
[128] *Id.* at 50.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 50.
[132] *Id.* at 50-52.

"douchebags" – inflamed the controversy rather than resolving it.[133] Second, the student's misleading characterization of the controversy had led to a "deluge of calls or emails" that caused school officials to "miss or be late to school-related activities" and could have caused further disruption had it continued.[134] Third, the court found that the student's position in student government leader warranted discipline.[135]

After the Second Circuit affirmed the district court's denial of plaintiffs' motion for a preliminary injunction, the case continued to be litigated in the federal courts. In January 2009, the federal district court granted the defendants' motions for summary judgment and dismissed the case.[136] The Second Circuit affirmed in part and reversed in part the grant of summary judgment.[137] The Supreme Court then denied the student's petition for a writ of certiorari.[138]

B. The Third Circuit Avoids The Scope of Authority Issue, But Members Of The Court Have Strong Differences Of Opinion.

Shortly after the Second Circuit issued its decision in *Doninger*, the Third Circuit began to wrestle with the scope of school authority over student off-campus electronic speech.[139] In 2011, the Third Circuit, sitting *en banc*, decided two student off-campus speech cases that had remarkably similar facts. However, the Third Circuit's twin decisions did not clarify the constitutional limits of school officials' authority to discipline students for off-campus electronic speech. To the contrary, the decisions revealed a deep divide among the judges on the issue.

In the first case, *Layshock v. Hermitage School District*,[140] a high school senior, Justin Layshock, used his grandmother's home computer to create a "parody profile" of the school principal that Justin then posted on MySpace.com.[141] The parody profile contained numerous outlandish statements purportedly written by the principal.[142] In creating the profile, Justin copied a photograph of the principal from the district's website,

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[133] *Id.* at 50-51.
[134] *Id.* at 51.
[135] *Id.* at 52.
[136] Doninger v. Niehoff, 594 F. Supp. 211 (D. Conn. 2009).
[137] Doninger v. Niehoff, 643 F.3d 334 (2d Cir. 2011).
[138] Doninger v. Niehoff, 132 S.Ct. 499 (2011).
[139] Layshock *ex. rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011); J.S. *ex. rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 656 (3d Cir. 2011).
[140] 650 F.3d 205.
[141] *Id.* at 208-09.
[142] *Id.* at 208. The parody profile included the following statements, among others:

> In the past month have you been on pills: big pills
> In the past month have you gone Skinny Dipping: big lake, not big dick
> In the past month have you Stolen Anything: big keg
> Ever been drunk: big number of times
> Ever been called a Tease: big whore
> Ever been Beaten up: big fag
> Ever Shoplifted: big bag of kmart
> Number of Drugs I have taken: big.

which he then pasted into the parody profile.[143] In addition, there was some evidence that Justin had accessed the profile on a school computer and shown it to a few students during school hours.[144] After Justin first posted his profile, other students created and posted at least three additional profiles of the principal, all of which were more vulgar than Justin's parody profile.[145]

A few days after the first profile was posted, the principal learned of the profile's existence from his daughter.[146] Finding all of the profiles to be "'degrading' and 'shocking,'"[147] the principal asked the school to commence an investigation, which ultimately identified Justin as the creator of the first profile.[148] The district disciplined Justin for violating the school code of conduct, including prohibitions on the use of obscene language.[149] Justin was given a 10-day suspension, sent to an alternative education program for the remainder of his senior year, banned from all extracurricular activities and prohibited from attending his graduation ceremony.[150]

Justin and his parents sued.[151] The federal district court granted summary judgment in Justin's favor on a First Amendment claim.[152] A three-judge panel of the Third Circuit then affirmed.[153] The court found discipline was not warranted under *Fraser* because no lewd or obscene language had been used at school.[154] The court also determined that the school had not presented evidence of any substantial disruption sufficient to allow discipline under *Tinker*.[155] However, the panel opinion was vacated pending a rehearing of the case by the Third Circuit sitting *en banc*.[156]

In June 2011, the Third Circuit issued it *en banc* decision in which it unanimously affirmed the district court's grant of summary judgment in favor of Justin.[157] The Third Circuit framed the issue presented in the case as follows:

> We are asked to determine if a school district can punish a student for expressive conduct that originated outside of the schoolhouse, did not disturb the school environment and

[143] *Id.* at 208-09.
[144] *Id.* at 209.
[145] *Id.* at 208.
[146] *Id.*
[147] *Id.* at 209.
[148] *Id.*
[149] *Id.* at 209-10.
[150] *Id.* at 210.
[151] *Id.*
[152] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).
[153] 593 F.3d 249 (3d Cir. 2010).
[154] *Id.* at 263.
[155] *Id.* at 260-61. The Third Circuit noted that the school district had not disputed on appeal the district court's finding that it had failed to provide sufficient evidence of a substantial disruption as would be necessary to constitutionally discipline a student under *Tinker*. *Id.*
[156] 593 F.3d 249.
[157] 650 F.3d 205.

> was not related to any school sponsored event. We hold that, under these circumstances, the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline.[158]

At the outset, the Third Circuit noted that, on appeal, the school district had abandoned any argument that its discipline of Justin was constitutional under *Tinker*.[159] Rather than relying on *Tinker*, the school district argued that its discipline of Justin was constitutional under *Fraser*.[160] The school district acknowledged that *Fraser* was limited to the use of lewd and obscene language at school; however, the district argued that Justin's act of entering the district's website to cut and paste the principal's picture constituted an entry into school property sufficient to treat the profile as on-campus speech.[161] The school district also argued that it was "reasonably foreseeable" that the profile would come to the attention of school authorities, thus employing the language of *Doninger*.[162] In making this argument, the school district sought to broaden the scope of school authority to include discipline under *Fraser* for any off-campus lewd or offensive speech so long as it could be reasonably foreseen that the lewd speech would come to the attention of school authorities.

The Third Circuit rejected this argument.[163] It distinguished *Doninger* specifically on the ground that the Second Circuit had applied the foreseeability test to determine scope of authority to discipline a student for substantially disruptive speech under *Tinker*.[164] In addition, the Third Circuit was quite clear that it had discussed *Doninger* only because the district raised the argument and, importantly, that it did not necessarily endorse the Second Circuit's position, stating: "[I]n citing *Doninger*, we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there."[165] Ultimately the Third Circuit concluded that *Fraser* clearly applied only to the of lewd or obscene speech uttered at school and that school officials had no authority to impose discipline for a student's lewd speech created and posted electronically outside of school.[166]

While the *en banc* decision in *Layshock* was unanimous, the judges of the Third Circuit clearly did not agree on the scope of authority question. That disagreement was apparent in the second student speech opinion that the court issued simultaneously with the *Layshock* decision.[167]

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[158] *Id.* at 207.

[159] *Id.* at 214. In granting summary judgment in favor of Justin, the district court had stated that the school district could not establish a "nexus" between the parody profile and any substantial disruption at school. *Layshock*, 496 F. Supp. 2d at 600.

[160] *Id.*

[161] *Id.* at 214 & 216.

[162] *Id.*

[163] *Id.* at 219.

[164] *Id.* at 217-18.

[165] *Id.* at 218.

[166] *Id.* at 219.

[167] J.S. *ex. rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

In the second case, *J.S. ex. rel. Snyder v. Blue Mountain School District*,[168] the court ruled 8-6 in favor of the student, although five of the eight judges who comprised the majority joined in a separate concurring opinion.[169]

In *Snyder*, as in *Layshock*, the student – identified as J.S. – had created an obscenity-laced fake profile of the school principal that J.S. then posted on MySpace.[170] The profile was created outside of school and, although it was briefly publicly available, J.S. changed the accessibility of the profile to "private," thus limiting access to about twenty-two other students who were friends on MySpace.[171] The principal learned of the profile from another student and, due to the private setting in MySpace, was able to review its contents only after asking that student to print out a copy of the profile and bring it to school.[172] After reviewing the profile, the principal and other school officials disciplined J.S.[173]

She and her parents then sued, claiming a violation of her First Amendment rights.[174] Unlike the *Layshock* case, the federal district court determined that the school's discipline of J.S. had been unconstitutional under *Fraser* because the speech, although lewd and vulgar, could not be considered "on-campus" speech.[175] A three-judge panel of the Third Circuit first affirmed the district court's ruling, then vacated the decision pending a rehearing *en banc*.[176] After additional briefing and oral argument, a narrow majority of the Third Circuit reversed the lower court's ruling on the First Amendment issue and remanded the case to the lower court for further proceedings.[177]

The majority in *Snyder* avoided the central issue whether school officials have authority to discipline students for off-campus speech, stating that it would "assume, with deciding, that *Tinker* applies to [off-campus] speech."[178] In other words, the court treated the student's speech as on-campus speech contemplated in *Tinker*. The majority did note the student's argument that school officials' ability to discipline students was

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[168] *Id.*

[169] *Id.* at 936 (Smith, J., McKee, C.J., Sloviter, J., Fuentes, J. and Hardiman, J., concurring).

[170] *Id.* at 920-21. The profile was written as if it described the life of a "bi-sexual Alabama middle school principal named 'M-Hoe.'" *Id.* at 920. The profile listed the fictious principal's interests as: "'detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.'" *Id.*

[171] *Id.* at 921.

[172] *Id.*

[173] *Id.* at 922.

[174] J.S. *ex. rel.* Snyder v. Blue Mountain Sch. Dist, No. 3:07cv585, 2008 WL 4279517 at *3 (M.D. Pa., Sept. 11, 2008).

[175] *Id.* at *7-8. The federal district court distinguished the district court's decision in *Layshock*, which had found no constitutional basis for discipline, on the ground that the profile created by J.S. "much more vulgar and offensive." *Id.* at *8.

[176] J.S. *ex. rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010).

[177] 650 F.3d 915. The court did affirm the district court's judgments that the district's policies were not void for vagueness and that the defendants did not violate any Fourteenth Amendment substantive due process rights *Id.* at 920.

[178] *Id.* at 926.

limited to the schoolhouse and acknowledged that the argument had "some appeal," but deemed it unnecessary to reach the issue in order to decide in the student's favor.[179] Rather, the majority found that, even assuming that *Tinker* applied, the district had not presented any evidence of a substantial disruption that would warrant the discipline imposed on J.S.[180] The majority also determined that the lower court had erred in applying *Fraser* to the student's speech, stating that "*Fraser's* 'lewdness' standard [could not] be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours."[181]

Judge D. Brooks Smith wrote a concurring opinion, joined by four other judges, in which he directly addressed the scope of authority question avoided by the majority.[182] Judge Smith gave a clear "No" answer to the scope of authority question, stating that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."[183] Using the Supreme Court's own language, Judge Smith concluded that *Tinker's* holding "is expressly grounded in 'the special characteristics of the school environment'"[184] and grants limited authority to "'prescribe and control conduct in the schools.'"[185] He predicted dire consequences if the authority granted to school officials under *Tinker* was extended too far, stating:

> Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves – so long as it causes a substantial disruption at school. … Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.[186]

As Judge Smith framed the issue, the difficult question was not whether

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[179] *Id.* at 926, n.3.
[180] *Id.* at 928.
[181] *Id.* at 932.
[182] *Id.* at 936.
[183] *Id.*
[184] *Id.* at 937, quoting *Tinker*, 393 U.S. at 506.
[185] *Id.* at 937, quoting *Tinker*, 393 U.S. at 507. Judge Smith argued that, in *Morse*, Justice Alito himself had recognized that *Tinker* did not extend to off-campus speech, noting Justice Alito's statement that "*Tinker* allows schools to regulate 'in-school student speech … in a way that would not be constitutional in other settings.'" *Id.* at 938, quoting *Morse*, 551 U.S. at 422 (Alito, J., concurring).
[186] *Id.* at 939.

Tinker could extend to "off-campus" speech but the test to determine whether speech has occurred "on" or "off" campus.[187] Using the example of a student who might email a teacher from home, Judge Smith opined that speech by a student that is "intentionally directed towards a school" would be considered "on-campus" speech and thus subject to the authority of school officials.[188]

Yet Judge Smith soundly rejected the Second Circuit's foreseeability test, stating that "a bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters."[189] He rejected the notion that truly off-campus speech somehow "mutate[s]" into on-campus speech by reaching the campus.[190] As to the fake profile created by J.S., Judge Smith determined that the profile did not constitute on-campus speech that was subject to discipline under *Tinker*.[191]

As stated above, the Third Circuit was highly divided in the *Snyder* case. Six of the fourteen judges dissented from the decision to affirm the lower court's ruling on the First Amendment issue.[192] The dissenting judges applied *Tinker* to the student's speech, arguing that school officials could have reasonably forecasted a future disruption due to the student's speech.[193] In particular, the dissenting judges forcefully argued that "personal and harmful attacks on educators and school officials" are always disruptive to the school community.[194] A great deal of the dissenting opinion was devoted specifically to outlining reasons why students ought to be subject to discipline for "off-campus hostile and offensive student internet speech that is directed at school officials."[195] And the dissenters also opined that school authority should extend to speech created by students outside of school due to the "near-constant student access to social networking sites on and off campus."[196]

Indeed, in the view of some Third Circuit judges, the two decisions in *Layshock* and *Snyder* were "competing opinions"[197] that had created uncertainty on the scope of authority issue.[198] Judge Kent A. Jordan wrote a concurring opinion in *Layshock* specifically to assert his strong view that, under *Tinker*, school officials could exercise authority over a

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[187] *Id.* at 940.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* Among the facts demonstrating that the speech was entirely off-campus was that it had been created outside of school, had not been sent by the student to any school employee, had been accessible only to a limited number of individuals due to the "private setting in MySpace, and that school computers blocked access to MySpace. *Id.*
[192] *Id.* at 941.
[193] *Id.* at 945.
[194] *Id.* at 946.
[195] *Id.* at 950.
[196] *Id.* at 951-52.
[197] *Id.* at 220 (Jordan, J., Vanaskie, J., concurring).
[198] For a detailed discussion of the disagreement among the Third Circuit judges, including a tabular description of the judges' position in Snyder, see Black, *supra* note **Error! Bookmark not defined.**, at 541.

student's off-campus speech.[199] Judge Jordan used somewhat strong language to criticize two of the opinions in *Snyder*. He criticized the majority in *Snyder* for failing to address the scope of authority question and simply "assuming" that *Tinker* applied.[200] Judge Smith's position was criticized on the ground that the "'off-campus versus on-campus' distinction is artificial and untenable in the world we live in today."[201]

Judge Jordan found that the "omnipresence"[202] of speech communicated via "wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter"[203] renders any rule based on "physical boundaries of a school campus"[204] unworkable. Judge Jordan advocated that school officials be given broad authority to "forecast how poisonous accusations lobbed over the internet are likely to play out within the school community"[205] and to impose discipline whenever school officials might reasonable forecast a disruption. Although he did make note of the Supreme Court's reference to an "uncertainty at the outer boundaries"[206] of what constitutes speech subject to school authority, Judge Jordan made no effort to define that outer boundary or otherwise articulate a limitation on the scope of the authority of school officials.

The Supreme Court denied petitions for writs of certiorari that had been filed in both *Snyder* and *Layshock*.[207]

C. The Fourth and Eighth Circuits Adopt the Second Circuit's "Reasonable Foreseeability" Test.

In a decision issued just one month after the Third Circuit's fractured rulings in *Layshock* and *Snyder*, the Fourth Circuit continued to complicate the scope of authority issue in a case that involved cyberbullying.[208] A high school student, Kara Kowalski, had created a discussion group webpage entitled "S.A.S.H.," which other students recognized as an acronym for the phrase "Students Against Shay's Herpes," where "Shay" referred to another student at school.[209] Kowalski then invited about 100 members of the school community to join the group.[210] Approximately two dozen high school students did join the group and many of them posted derogatory comments and photographs of Shay, the target of the webpage.[211] School officials were unaware of the page

[199] *Id.* at 219 (Jordan, J., Vanaskie, J., concurring).
[200] *Id.* at 220.
[201] *Id.* at 220, citing *Snyder*, 650 F.3d at 947-48 & n.4 (Fisher, J., dissenting).
[202] *Id.* at 221.
[203] *Id.* at 220.
[204] *Id.* at 221.
[205] *Id.* at 222.
[206] *Id.* at 220 n.2.
[207] Blue Mountain Sch. Dist. v. Snyder, 132 S.Ct. 1097 (2012).
[208] Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011).
[209] *Id.* at 567.
[210] *Id.*
[211] *Id.* at 568. One student posted photographs of Shay. *Id.* On one photograph he drew red dots on the girl's face to simulate herpes. *Id.* In another photograph of Shay, he

until it was brought to their attention by Shay's parents.[212]

After conducting an investigation, school officials determined that the student had violated the school's written bullying and harassment policy and punished her by, among other things, issuing a 90-day social suspension and prohibiting her from participating on the cheerleading squad for the remainder of the school year.[213]

The student then sued both the school district and several school officials, asserting both First Amendment and Due Process claims.[214] After the federal district court dismissed all claims,[215] the student appealed, claiming that "school administrators had no power to discipline her"[216] because her speech had been created and distributed off-campus. Citing the Second Circuit's decision in *Doninger*, school officials argued that school officials had authority over the student's speech because it was foreseeable that it would "reach the school."[217] The Fourth Circuit affirmed the district court's ruling, finding that school officials did have authority over the student's speech and that the discipline had comported with *Tinker*.

However, the rationale behind the Fourth Circuit's determination on the scope of authority issue was somewhat unclear. In addressing the scope of authority question, the Fourth Circuit stated:

> There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.[218]

The Fourth Circuit's use of the word "nexus" has led some courts and commentators to conclude that, on the scope of authority issue, the Fourth Circuit had created a different test than the foreseeability test articulated in *Doninger*.[219] This so-called "nexus" test apparently examines

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added a caption that read "portrait of a whore." *Id.*

[212] *Id.*

[213] *Id.* at 568-69.

[214] *Id.* at 567.

[215] *Id.*

[216] *Id.* at 570-71.

[217] *Id.* at 571.

[218] *Id.* at 573.

[219] Wynar, *supra* note 116, at 1068; Margaret A. Hazel, *Student Cyber-Speech After Kowalski v. Berkeley County Schools*, 63 S.C. L. REV. 1081, 1087 (2012) (describing *Kowalski* as adopting a "sufficient nexus approach"); Daniel Marcus-Toll, *Tinker Gone Viral:Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395 (2014); Mary Noe, *Sticks and Stones Will Break My Bones But Whether Words Harm Will Be Decided By A Judge*, 88 N.Y. STATE BAR J. 39, 40 (Jan. 2016). *But see* Black, *supra* note **Error! Bookmark not defined.**, at 551 ("The Second, Fourth, and Eighth Circuits all considered the question of the reasonable foreseeability that a student's off-campus speech would reach the school

the strength of the connection between the speech and school.[220] And yet nowhere in the opinion did the Fourth Circuit say either that it disagreed with the *Doninger* test or that it was crafting a different test on the scope of authority issue. Also absent is any discussion of the facts or factors by which a sufficient nexus could be established in student speech cases generally or in the specific case itself. Thus, if the Fourth Circuit had intended to adopt a "nexus" test for off-campus speech that differed from *Doninger*, it failed to define that test.[221]

In fact, rather than rejecting the reasoning of *Doninger*, the Fourth Circuit discussed *Doninger* at length and actually applied the foreseeability test to the facts before it.[222] The opinion includes a lengthy paragraph in which the court described *Doninger* and quoted the Second Circuit's conclusion that discipline is appropriate when "it [i]s … foreseeable that the off-campus expression might … reach campus."[223] The Fourth Circuit also applied the reasonable foreseeability test to the facts before it, finding that "it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices…."[224] Thus, it is fair to conclude that the Fourth Circuit applied the *Doninger* foreseeability test rather than creating a new and different "nexus" test.

The Supreme Court denied a petition for a writ of certiorari that had been filed in *Kowalski*.[225]

In a case decided just one month after *Kowalski*, the Eighth Circuit also relied upon the Second Circuit's foreseeability test in holding that school officials had authority over a student's off-campus expression that threatened a school shooting. In *D.J.M. v. Hannibal Public School District No. 60*,[226] the Eighth Circuit relied on the Second Circuit's decision in *Wisniewski* to find that authority over a student's off-campus speech exists when it is "reasonably foreseeable" that the student's speech would "come to the attention of school authorities."[227] One year later, the Eighth Circuit relied on both *Doninger* and *Kowalski* as support for its application of a foreseeability test, finding that school officials had authority to discipline students for racist speech posted on the Internet because the speech "could reasonably be expected to reach the school or impact the school environment."[228]

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before extending *Tinker* to off-campus speech.").

[220] J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638, 667-68 (2002).

[221] Toll, *supra*, note 219, at 3431.

[222] 652 F.3d at 574.

[223] *Id,* (quoting *Doninger*, 527 F.3d at 48, quoting *Wisniewski*, 494 F.3d at 40).

[224] *Id.*

[225] Kowalski v. Berkley Cty. Sch., 132 S.Ct.1095 (2012).

[226] 647 F.3d 754 (8th Cir. 2011).

[227] *Id.* at 765-766.

[228] S.J.W. *ex. rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012).

D. The Ninth Circuit Declines To Adopt Any Of The Previously Articulated Tests.

In 2013, the Ninth Circuit became the fifth federal circuit to address the scope of authority issue in the context of students' off-campus electronic speech. In *Wynar v. Douglas County School District*,[229] the Ninth Circuit held that school officials had authority to discipline a student who, from his home, had sent "a string of increasingly violent and threatening instant messages … bragging about his weapons, threatening to shoot specific classmates, intimating that he would 'take out' other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre."[230]

In addressing the scope of authority issue, the Ninth Circuit reviewed all of the earlier decisions of its "sister circuits,"[231] including the decisions in *Kowalski*, *Lee's Summit*, *Wiesniewski*, *Snyder* and a 2004 decision of the Fifth Circuit involving student off-campus speech that was not communicated electronically.[232] The Ninth Circuit noted that, in *Doninger*, *Kowalski* and *Lee's Summit*, the courts had devised "additional threshold test[s]"[233] as prerequisite to the application of *Tinker's* substantial disruption standard. In the Ninth Circuit's view, each case had created different threshold tests.[234] The Ninth Circuit interpreted *Kowalski* as establishing a "nexus" test[235] and *Lee's Summit* as establishing a test requiring that the speech be "'reasonably foreseeable [to] will reach the school community.'"[236] Citing *Wiesniewski* (not *Doninger*), the Ninth Circuit asserted that the Second Circuit's threshold test was not clear, but that it permitted school discipline where "it is reasonably foreseeable that speech meeting the *Tinker* test will wind up at school …."[237] Finally, the Ninth Circuit noted that the Third and Fifth Circuits had "left open the question whether *Tinker* applies to off-campus speech."[238]

In the end, the Ninth Circuit declined to adopt any of the positions of its sister circuits. The court noted the difficulty of articulating "a global

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[229] 728 F.3d 1062 (9th Cir. 2013).

[230] *Id.* at 1064-65.

[231] *Id.* at 1067.

[232] In *Porter*, the Fifth Circuit case held that school officials had no authority to discipline a student who had drawn a picture depicting violence at school, which came to the attention of school officials two years after its creation, when the student's younger brother discovered the picture at home and took it to school. 393 F.3d at 620.

[233] 728 F.3d at 1068.

[234] *Id.* at 1068-69.

[235] *Id.* at 1068.

[236] *Id.* at 1068.

[237] *Id.* at 1068-69. It seems incorrect for the Ninth Circuit to have relied on the opinion in *Wiesniewski* when the later opinion in *Doninger* expands on the Second Circuit's view of the scope of authority issue. 527 F.3d 41. However, it may be that the Ninth Circuit chose to use *Wiesniewski* because that case, like the one before the Ninth Circuit, involved a threat of violence.

[238] *Id.* at 1069.

standard for a myriad of circumstances involving off-campus speech."[239] It also expressed "reluctan[ce] to … craft a one-size-fits-all approach."[240] Rather, the court relied on the content of the student's speech, stating that, "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech" that would cause a substantial disruption.[241] The court then affirmed the trial court's determination that school officials had not violated the student's First Amendment rights, noting that "it is an understatement that the specter of a school shooting" could cause a substantial disruption at school.[242]

Importantly, the Ninth Circuit also analyzed the student's speech under the "rights of others" prong that the Supreme Court had articulated in *Tinker*.[243] The Ninth Circuit did note that this standard is little used by the federal circuit courts, but also held that it was quite an apt standard to apply to speech that threatened a school shooting.[244] The court stated: "[w]hatever the scope of the "rights of other students to be secure and to be let alone," *Tinker,* 393 U.S. at 508, 89 S.Ct. 773, without doubt the threat of a school shooting impinges on those rights."[245]

E. The Fifth Circuit Creates A New Test On The Scope of Authority Issue.

In 2015, the Fifth Circuit Court of Appeals became the sixth circuit court to grapple with the scope of authority issue in the context of student off-campus electronic speech. The court's *en banc* decision in *Bell v. Itawamba County School Board*,[246] in which sixteen members of the Fifth Circuit authored eight different opinions, epitomizes the deep divisions among the circuit courts on this issue.

The student's speech in *Bell* was a rap song recorded outside of school and posted on the Facebook page of Taylor Bell, a student at Itawamba Agricultural High School who recorded the song under the name "T-Bizzle."[247] The rap song, which was riddled with vulgar and obscene language, accused two of the high school's athletic coaches of sexually harassing female students.[248] The two coaches were easily identified from the lyrics of the rap song.[249] In addition to accusing the two coaches of sexual harassment, some lyrics referred to acts of violence against the coaches, as follows:

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[239] 728 F.3d at 1069.
[240] *Id.*
[241] *Id.*
[242] *Id.* at 1070. The Ninth Circuit also invoked Tinker's language referring to the "rights of other students to be secure and let alone." *Id.*, quoting *Tinker*, 393 U.S. at 508.
[243] *Id.* at 1071-72.
[244] *Id.* at 1072.
[245] *Id.*
[246] 799 F.3d 379 (5th Cir. 2015).
[247] *Id.* at 383-84.
[248] *Id.* at 383.
[249] *Id.*

- "Run up on T-Bizzle/I'm gonna hit you with my rueger;"[250]
- "You fucking with the wrong one/going to get a pistol down your mouth;"[251] and
- "Middle fingers up if you want to cap that nigga/middle fingers up/he get no mercy, nigga."[252]

The day after Mr. Bell posted the rap recording to his Facebook page, one of the coaches learned about the song from his wife, listened to the song while at school, and immediately informed the school's principal.[253] The school district's superintendent also was informed.[254] The next school day, the principal and superintendent, along with the school district's outside counsel, questioned Mr. Bell about the recording, but took no action.[255]

Due to inclement weather, school was closed for four consecutive school days.[256] During that time, Mr. Bell created a new version of the recording and uploaded it to YouTube. When Mr. Bell returned to school following the four-day break, he was informed at midday that he was suspended pending a disciplinary hearing; however, he was permitted to remain at school for the remainder of the school day so that he could take the school bus home.[257]

Approximately two weeks later, a disciplinary hearing was held.[258] Mr. Bell appeared before the disciplinary committee and stated that he had created the rap song to bring awareness to the issue of alleged harassment by the coaches and that he had not intended to make any threats of violence against the school coaches, although he acknowledged that the words of the rap song could be construed as a threat.[259] Following the hearing, the disciplinary committee determined that it could not conclusively find that the Mr. Bell's song constituted a threat to teachers,[260] but that his speech had constituted harassment or intimidation of teachers in violation of school policy.[261] The disciplinary committee recommended that the school board impose several sanctions, including placement in the county's alternative school for the remainder of the grading period.[262]

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[250] *Id.* at 384. The court noted that the word "rueger" referred to a firearm manufactured by Sturm, Ruger & Co. *Id.* at 385.

[251] *Id.*

[252] *Id.* at 385. The court noted that the word "cap" is slang for "shoot." *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.* at 386.

[260] *Id.* The school board's attorney sent a letter to Mr. Bell's mother informing her that the disciplinary committee had found "the issue of whether or not lyrics published by Taylor Bell constituted threats to school district teachers was vague." *Id.*

[261] *Id.*

[262] *Id.*

Mr. Bell appealed the committee's decision to the school board, which reviewed the matter and determined that Mr. Bell had not only harassed or intimated school employees, but that he also had made threats against them.[263] The school board thus accepted the disciplinary committee's recommendation.[264]

Immediately thereafter, Mr. Bell and his mother filed suit.[265] Initially the Bells sought a preliminary injunction to enjoin the implementation of the school board's disciplinary sanctions;[266] however, the federal district court denied the motion as moot because Mr. Bell's placement at the alternative school had ended.[267] Later, the federal district granted the school board's motion for summary judgment, finding that Mr. Bell's rap song had "in fact caused a material and substantial disruption at school" and also that school officials had reasonably forecast that a substantial disruption could take place at school.[268]

The Bells then appealed to the Fifth Circuit.[269] In December 2014, a three-judge panel of the Fifth Circuit reversed the district court, finding that the school board had violated Mr. Bell's First Amendment rights by disciplining him for his off-campus speech.[270] The decision was a 2-1 ruling, with Judge Rhesa Barksdale writing a vigorous dissent.[271] In February 2015, the Fifth Circuit granted the school board's petition for a rehearing *en banc* and vacated the earlier opinion pending additional briefing and oral argument before the *en banc* panel.[272] Oral argument was heard before the *en banc* panel on May 12, 2015.[273]

The *en banc* panel of the Fifth Circuit issued its opinion in August 2015.[274] The court affirmed the district court's grant of summary judgment in favor of the school board, finding that the board had not violated Mr. Bell's First Amendment rights.[275] However, the *en banc* panel of the Fifth Circuit was highly divided. Of the twelve judges in the majority, six judges either authored or joined in separately written concurring opinions.[276] Four judges dissented from the decision, and each of the dissenting judges wrote a separate dissenting opinion.[277]

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[263] *Id.* at 387.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.* at 388.
[268] Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834 (N.D. Miss. 2012).
[269] 799 F.3d at 388. Although Mr. Bell and his mother had asserted claims in addition to an allegation violation of First Amendment rights, the Bells appealed only the district court's grant of summary judgment in favor of the school board as to Mr. Bell's First Amendment claim. *Id.*
[270] Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014).
[271] *Id.* at 304 (Barksdale, J., dissenting).
[272] Bell v. Itawamba Cty. Sch. Bd., 782 F.3d 712 (5th Cir. 2015).
[273] *See* Docket Sheet for Bell v. Itawamba Cty. Sch. Bd., No. 12-60264 (5th Cir.) (noting that oral argument was held on May 12, 2015).
[274] 799 F.3d 379.
[275] *Id.*
[276] *Id.*
[277] *Id.*

The majority opinion[278] began by reviewing the Supreme Court's four student speech cases, ultimately concluding that the constitutionality of discipline imposed on Mr. Bell properly should be analyzed under *Tinker* rather than any of the other school speech cases.[279]

On the scope of authority issue, the majority opinion in *Bell* asserted that five of six circuit courts to address the issue had determined that "under certain circumstances, *Tinker* applies to speech which originated, and was disseminated, off-campus."[280] In tallying up the circuit courts that had extended *Tinker* to off-campus speech, the majority in *Bell* included the Ninth Circuit's decision in *Wynar* notwithstanding the Ninth Circuit's express reluctance to adopt any of the threshold tests of the other circuit and the Ninth Circuit's refusal to fashion its own test under which students' off-campus electronic speech generally would be subject to school authority.[281] The majority also included its own circuit as one that favored extending *Tinker* to off-campus speech even though the Fifth Circuit had not yet addressed the issue.[282] Additionally, two of the three prior Fifth Circuit cases on the issue had found in favor of the students on the ground that school authority did not extend to speech created off-campus.[283] The only pro-school Fifth Circuit decision cited by the majority was decided in 1973, decades before the Supreme Court decided *Fraser*, *Kuhlmeier* or *Morse* and, of course, before the widespread use of electronic communications.[284]

Although counting all but the Third Circuit as having concluded that *Tinker* can apply to off-campus speech,[285] the majority opinion did note that the circuit courts had taken "varied approaches"[286] to the issue. The majority expressly declined either to "adopt or reject approaches advocated by other circuits"[287] or to "adopt any rigid standard"[288] with regard to the scope of authority issue; rather, it fashioned a test entirely limited to the facts before it. The majority held that *Tinker* applies to a

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[278] The majority opinion was written by Judge Barksdale, who had dissented from the decision in the original panel opinion in the case. 774 F.3d at 304 (Barksdale, J., dissenting).

[279] *Id.* at 392.

[280] *Id.* at 393.

[281] *Id.* at 394. For the Ninth Circuit's refusal to adopt tests fashioned by other courts or to draft its own, generally applicable test, *see Wynar*, 728 F.3d at 1068-69.

[282] *Id.* at 393-94.

[283] *Porter*, 393 F.3d 608; Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972). In *Shanley*, the Fifth Circuit held that school officials did not have authority to discipline students for the distribution of a newspaper created outside of school and distributed "near but outside the school premises." *Id.* at 964. The Fifth Circuit did apply *Tinker* in determining that the distribution of the newspaper had not caused a substantial disruption at school; however, the court also emphasized the out-of-school nature of the students' conduct. *Id.*

[284] *See* Sullivan v. Houston Indep. Sch. Dist., 475 F.3d 1071 (5th Cir. 1973) (holding that the First Amendment did not protect the conduct of students who stood just outside an entrance to school campus selling an underground newspaper to other students who were entering campus).

[285] *Id.* at 393-94.

[286] *Id.* at 395.

[287] 799 F.3d at 396.

[288] *Id.*

student's off-campus speech when (a) "a student intentionally directs [speech] at the school community;" and (b) the speech is "reasonably understood by school officials to threaten, harass, and intimidate a teacher."[289]

Those two circumstances only addressed the preliminary question whether school officials had the authority to examine the student's speech under the *Tinker* substantial disruption standard.[290] Thus, in order to answer the penultimate question whether the conduct of officials had violated Mr. Bell's First Amendment rights, the majority considered whether his speech either had caused a substantial disruption or could have been reasonably forecast to cause a substantial disruption.[291] On that question, the majority concluded that school officials could have reasonably foreseen that Mr. Bell's rap song would cause a future substantial disruption had he not been disciplined.[292]

As noted above, there were multiple concurring and dissenting opinions written in *Bell*. Several judges who concurred in the decision wrote concurring opinions in an apparent effort to limit the scope of the majority decision.[293] For example, Judge E. Grady Jolly wrote a separate concurring opinion in which he stated that he would have decided the case "in the simplest way … by saying as little as possible."[294] Judge Jolly would have adopted a more limited rule focused solely on threats of violence, as follows:

> Student speech is unprotected by the First Amendment and is subject to school discipline when that speech contains an actual threat to kill or physically harm personnel and/or students of the school; which actual threat is connected to the school environment; and which actual threat is communicated to the school, or its students, or its personnel.[295]

Thus, Judge Jolly would not have addressed off-campus student speech that could be construed harassing or intimidating a teacher.

Judge Jennifer Walker Elrod wrote a concurring opinion that also focused only on threats of physical violence.[296] She opined that the majority opinion did not make *Tinker* applicable to off-campus student speech of a non-threatening nature "even if some school administrators might consider such speech offensive, harassing or disruptive."[297] Indeed, Judge Walker quoted from Judge Smith's concurring opinion in the Third

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[289] *Id.*
[290] *Id.*
[291] *Id.* at 397.
[292] *Id.* at 398-400.
[293] *Id.* at 400 (Jolly, J., concurring); *Id.* at 401 (Walker Elrod, J., Jones, J., concurring).
[294] *Id.* at 401 (Jolly, J., concurring).
[295] *Id.*
[296] *Id.* at 401 (Walker Elrod, J., Jones, J., concurring).
[297] *Id.* at 402.

Circuit's decision in *Snyder*, where Judge Smith warned that "broad off-campus application of *Tinker* 'would create a precedent with ominous implications.'"[298] Casting the majority opinion in *Bell* as one that avoided such ominous implications by "sensibly" limiting the scope of school authority to student speech that "contained threats of physical violence," Judge Walker concurred in the result.[299]

Finally, Judge Gregg Costa wrote a concurring opinion,[300] joined by two other members of the panel, in which he emphasized the need for guidance from the Supreme Court on the scope of authority issue, stating:

> Broader questions raised by off-campus speech will be left for another day. That day is coming soon, however, and this court or the higher one will need to provide clear guidance for students, teachers, and school administrators that balances students' First Amendment rights that *Tinker* rightly recognized with the vital need to foster a school environment conducive to learning. That task will not be easy in light of the pervasive use of social media among students and the disruptive effect on learning that such speech can have when it is directed at fellow students and educators.[301]

Four judges of the *en banc* panel dissented from the decision in *Bell*, and each judge wrote a separate dissenting opinion.[302] Judge James L. Dennis, who had written the majority opinion in the original panel decision that was vacated pending *en banc* review,[303] wrote a scathing dissent in which he accused the majority of committing "several serious and unfortunate constitutional errors."[304] In sharp words, he accused the majority of gutting students' First Amendment rights:

> [T]he majority opinion obliterates the historically significant distinction between the household and the schoolyard by permitting a school policy to supplant parental authority over the propriety of a child's expressive activities on the Internet outside of school, expanding schools' censorial authority from the campus and the teacher's classroom to the home and the child's bedroom.[305]

In sharp contrast to the approach taken by the majority, Judge Dennis's analysis of the issue began not with the question whether Mr. Bell's

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[298] *Id.*
[299] *Id.*
[300] *Id.* (Costa, J., Owen, J., Higginson, J., concurring).
[301] *Id.* at 403.
[302] *Id.* (Dennis, J, Graves, J., Prado, J., dissenting); *Id.* at 433 (Prado, J., dissenting); *Id.* at 435 (Haynes, J., dissenting); *Id.* (Graves, J., dissenting).
[303] 774 F.3d 280.
[304] *Id.* at 406.
[305] *Id.* at 404.

speech was "student" speech or not but whether his speech was entitled to First Amendment protection generally.[306] In other words, Judge Dennis first treated Mr. Bell a citizen, not a student.[307] Characterizing Mr. Bell's rap song as speech on an issue of public concern, specifically alleged sexual harassment of female students, Judge Dennis opined that Mr. Bell's speech was speech that "'occupie[d] the highest rung of hierarchy of First Amendment values and [thus] … entitled to special protection.'"[308] Citing Supreme Court precedent,[309] Judge Dennis opined that the vulgar and violent words used in the song did not alter the conclusion that the song addressed a matter of public concern, even if Mr. Bell's words "f[e]ll short of the School Board's aesthetic preferences for socio-political commentary …."[310]

Judge Dennis next criticized the majority's two-part test for determining whether Mr. Bell's rap song was student speech subject to the disciplinary power of school authorities. As to the first part of the test, the requirement that a student must have "intentionally directed" speech at the school community, Judge Dennis noted that such a requirement would eviscerate the First Amendment by punishing the speaker for attempting to communicate his or her message to others.[311] In other words, a student could avoid satisfying this requirement of "intentional direction" only if the student communicated so privately that his or her message would not be seen by many in school community.

As to the second part of the majority's test – that the speech would be reasonably understood to constitute threatening, harassing or intimidating language toward a teacher, Judge Dennis decried the use of "content-based" and "vague" language as a means to determine First Amendment protection.[312] He concluded that the "majority opinion's failure to define 'threatening,' 'harassing,' or 'intimidating'" language made its articulated test constitutionally unworkable.[313] Judge Dennis also

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[306] *Id.* at 406-12.

[307] Indeed, Judge Dennis criticized the majority for "simply assuming that all children speak "*qua* students," *Id.* at 425, and for otherwise assuming that "minors' constitutional rights *outside of school* are somehow qualified if they coincidentally are enrolled in a public school." *Id.* (emphasis in original).

[308] *Id.* at 406, quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

[309] Judge Dennis reviewed at length the Supreme Court's decision in Snyder v. Phelps, 562 U.S. 443 (2011), in which the Court found that the First Amendment prohibited the imposition of tort liability against the Westboro Baptist Church, a fringe group that had picketed the funerals of American soldiers killed in the line of duty. *Id.* at 448. At such funerals, picketers had displayed signs that read, among other things, "Thank God for Dead Soldiers," "Thank God for IEDs, and "God Hates the USA/Thank God for 9/11." *Id.* at 449. The Court held that such speech was protected under the First Amendment because the picketers had been commenting on matters of public concern. *Id.* at 451. Such speech is protected by the First Amendment even if it is "upsetting," "arouses contempt," or expressed an idea that society finds to be "offensive or disagreeable." *Id.* at 458.

[310] 799 F.3d at 409.

[311] 799 F.3d at 411.

[312] *Id.* at 413-16.

[313] *Id.* at 416.

opined that this vague language would impermissibly define First Amendment protection according to the potential reactions of listeners.[314] He categorically rejected any test of free speech that would rely on the listener's idiosyncratic interpretation of the speech as harassing or intimidating.[315] Judge Dennis expressed concern that the constitutional infirmities of such vague language were further "exacerbated by the facts that the *Tinker* [substantial disruption] standard itself could be viewed as somewhat vague."[316] In Judge Dennis's view, these "various layers of vagueness" would impermissibly restrict students' First Amendment protections.[317]

Judge Dennis made no attempt to fashion an alternative test to govern the scope of authority over students' off-campus speech. Rather, he simply criticized the majority's decision to apply *Tinker* to the off-campus speech at issue in the case, finding that the *Tinker* standard had been created only for the purpose of allowing school officials to "counteract the consequences of speech that actually occurs within the school environment."[318] He also criticized the extension of school authority to student off-campus speech as an unwarranted intrusion into parents' rights to control the upbringing of their children.[319] Finally, Judge Dennis concluded that, even if school officials had the authority to discipline Mr. Bell for his off-campus speech, they had violated his First Amendment rights because the facts did not demonstrate either an actual substantial disruption at school or a reasonable forecast of a substantial disruption.[320]

Judge Edward C. Prado also wrote a dissenting opinion in *Bell*.[321] The main thrust of Judge Prado's opinion was the "hope that the Supreme Court will soon give courts the necessary guidance to resolve these difficult cases."[322] He noted that Mr. Bell's speech did not fit into "currently established, narrow categories of unprotected speech"[323] previously articulated by the Supreme Court. Judge Prado briefly reviewed some of the existing circuit court decisions addressing student off-campus electronic speech, before concluding that the majority opinion had "appear[ed] to depart from the other, already divided circuits in yet another direction."[324] Judge Prado then stated that he "would wait for the Supreme Court to act before exempting a new category of speech from

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[314] *Id.*
[315] *Id.* at 421.
[316] *Id.* at 418.
[317] *Id.* at 419.
[318] *Id.* at 425.
[319] *Id.* at 426, quoting *Morse*, 551 U.S. at 424 (Alito, J., concurring) ("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").
[320] *Id.* at 427-31.
[321] *Id.* at 433-35.
[322] *Id.*
[323] *Id.* at 434. He also stated that the issue of students' off-campus electronic speech was a "poor fit" within current First Amendment jurisprudence. *Id.* at 433.
[324] *Id.* at 433-34.

First Amendment protection."[325] He did express concern over the potentially harmful impact that students' off-campus speech could have on the school community, but concluded that "the difficult issues of off-campus online speech will need to be addressed by the Supreme Court."[326]

Judge Catharina Haynes wrote a brief dissenting opinion in which she stated that she would have reversed the district court's grant of summary judgment and remanded the case for reasons stated in the majority opinion of the three-judge panel that had originally decided the case.[327]

Finally, Judge James E. Graves authored a dissenting opinion in which he proposed that a "modified *Tinker* standard"[328] be used in cases involving student off-campus speech. Judge Graves's test borrowed pieces and parts from the decisions of other circuits, principally the *Doninger* and *Kowalski* cases.[329] The test proposed by Judge Graves would allow school officials to discipline a student for off-campus speech if the school could (a) satisfy *Tinker's* substantial disruption standard (either an actual or reasonably forecasted disruption) and (b) "demonstrate a sufficient nexus between the speech and the school's pedagogical interests that would justify the school's discipline of the student."[330] Three non-exclusive factors could demonstrate a sufficient nexus. Those factors were: (a) "whether the speech could reasonably be expected to reach the school environment;"[331] (b) "whether the school's interest as trustee of student well-being"[332] outweighs parents' traditional role in disciplining their children for conduct outside of school;[333] and (c) "whether the predominant message of the student's speech is entitled to heightened protection."[334]

On November 17, 2015, Mr. Bell filed a petition for a writ of certiorari with the Supreme Court.[335] On February 29, 2016, the Supreme Court denied the petition.[336]

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[325] *Id.* Judge Prado did note that the Fifth Circuit previously had held that student speech threatening violence on the scale of "*mass, systematic school-shootings* in the style that has become painfully familiar in the United States" is not protected by the First Amendment. *Id.* (emphasis added), quoting Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 770-71 (5th Cir. 2007).

[326] *Id.* at 435.

[327] *Id.*, citing *Bell*, 774 F.3d at 290-303.

[328] 799 F.3d at 435.

[329] *Id.* at 436 & n. 2-6.

[330] *Id.*

[331] *Id.* & n.3, citing *Wisniewski*, 494 F.3d at 38-39; *Doninger*, 527 F.3d at 50; *D.J.M.*, 647 F.3d at 766.

[332] *Id.*

[333] As to this second factor, Judge Graves proposed that a court should give particular weight to evidence, experiential or otherwise, that indicated that certain forms of student off-campus speech had "a unique and proven adverse impact on students and the campus environment." *Id.* He specifically referenced the research on bullying that had been cited by the Fourth Circuit in *Kowalski* as an example of such evidence. *Id.* & n.6.

[334] *Id.*

[335] *See* Petition for a Writ of Certiorari, Bell v. Itawamba Cty. Sch. Bd., No. 15-666, 2015 WL 7299351 (U.S.) (filed Nov. 17, 2015).

[336] Bell v. Itawamba Cty. Sch. Bd., 136 S.Ct. 1166 (2016).

III. EXISTING PRECEDENTS PROVIDE THE FRAMEWORK TO ADDRESS STUDENTS' FIRST AMENDMENT RIGHTS IN THE DIGITAL AGE.

The splintered and disparate approaches taken by the federal circuit courts have resulted in scores of different opinions among scholars and educators about the proper framework to be applied to student off-campus electronic speech. Most commentators agree that students have the free speech rights of an ordinary citizen when not at school. Also a point of general agreement is that students have the right to a safe and secure learning environment uninterrupted by the speech of other students. How to accomplish those twin goals is a subject of much debate.

Although the scope of students' First Amendment rights regarding off-campus electronic speech is a thorny one, the Supreme Court's existing precedents, when considered together, largely provide the appropriate framework to balance students' constitutional rights against the authority of school officials to maintain an orderly and effective learning environment at school. In particular, the *Tinker* standards largely provide the appropriate framework to address students' free speech rights in the digital age.[337]

A. The Court Should Create A New Category Of Unprotected Student Speech: Speech That Threatens Death or Serious Bodily Harm To A Member Of The School Community.

Clearly the on-campus/off-campus distinction should not protect student speech that threatens serious physical harm to any member of the school community, whether the threat is akin to a Columbine-type shooting[338] or a specific threat made against a particular individual.[339] Students and school employees alike should be protected from threats of death or serious bodily harm. Thus, the First Amendment should not protect any student's off-campus electronic speech that a school official reasonably believes is a credible threat of death or serious bodily harm against either the school community in general or any member of the school community.

To date, the courts essentially have recognized and upheld this principle, although the legal reasoning they have employed to reach this conclusion has varied.[340] For example, in *Wisniewski*, the Second Circuit

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[337] There are scholars who have advocated that *Tinker* be abandoned completely. *See, e.g.*, R. George Wright, *Post-Tinker*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2014). Others have advocated that a different standard be created specifically for students' "technology-facilitated expression." Kathleen Conn, *The Third Circuit En Banc Decisions On Out-Of-School Student Speech: Analysis and Recommendations*, 270 EDUC. L. REP. 389, 406 (2011).

[338] *Wynar*, 728 F.3d 1062

[339] *Wisniewski*, 494 F.3d 34; *J.S.*, 569 Pa. at 667-68 (the student's off-campus speech included a drawing of a teacher with her head cut off and blood dripping from her neck, accompanied by a list of reason why she should die).

[340] *See* Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 599-

applied a threshold test premised on some "reasonable foreseeability" that speech would reach school a student's off-campus speech that threatened a teacher.[341] In *Wynar*, the Ninth Circuit employed no threshold test, but determined that a student's off-campus threats of a school shooting were not protected under *Tinker's* substantial disruption standard.[342] In *Bell*, the Fifth Circuit determined that *Tinker* would apply to student off-campus speech of a threatening nature if the student "intentionally directed" the speech at the school community.[343]

Thus, while these cases may have reached the correct conclusion,[344] the courts' varying approaches do not provide clear guidance for school officials.

The most suitable approach is to simply create an additional category of unprotected student speech. Since the Court decided *Tinker* in 1969, it has not hesitated to create additional categories of unprotected student speech. In at least two cases, the Court approved content-based restrictions on student speech. In *Fraser*, the Court ruled that lewd, indecent and offensive speech was not protected when uttered at school.[345] In *Morse*, the Court ruled that student speech that promotes illegal drug use is not protected.[346] Importantly, in deciding *Morse*, the Court took pains to clarify that, in *Fraser*, it had not applied *Tinker* but had created a separate category of unprotected student speech.[347] Thus, the Court in *Morse* approved of content-based restrictions on student speech if necessary to maintain order at school.

While these two content-based categories obviously were limited to the school environment, the rationale for creating these categories was broadly grounded in the "special dangers"[348] that can exist at school and the "special characteristics of the school environment."[349] Obviously a credible threat of death or serious bodily harm to members of the school community is one of those special dangers.[350] Students at school are a "captive audience"[351] since their attendance at school is mandatory.[352] As our nation's recent experience makes plain, students sometimes are captive victims of the deadly intentions of others.[353] In light of that grim reality,

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603 & 620-23 (hereainfter "Gold Waldman") (2011) (discussing the courts' varied rationales for imposing discipline on student speech that threatens school employees, whether the speech originated on-campus or off-campus).

[341] *Wisniewski*, 494 F.3d at 39.

[342] *Wynar*, 728 F.3d at 1069-70.

[343] *Bell*, 799 F.3d at 396.

[344] It is not clear that the correct decision was reached in *Bell*. *See, infra* at n. ___.

[345] *Fraser*, 478 U.S. at 685.

[346] *Morse*, 551 U.S. at 408.

[347] *See* Part I.D. *supra.*

[348] *Morse*, 551 U.S. at 424 (Alito, J., concurring).

[349] *Tinker*, 393 U.S. at 506.

[350] *See., e.g.*, Gold Waldman, *supra* note 340, at 603 (detailing the psychological effects experienced by school employees who were the targets of students' violent speech).

[351] *Fraser*, 478 U.S. at 684.

[352] Mo*rse*, 551 U.S. at 424 (Alito, J., concurring) ("School attendance can expose students to threats to their physical safety that they would not otherwise face.").

[353] *142 School Shootings since Sandy Hook Massacre in Newtown, Conn,* WASH.

school officials must be able to act whenever faced with a credible threat of serious bodily harm to any member of the school community.

The clearest means to give school officials the necessary authority is to create a new category of unprotected student speech. Student violent speech should not simply be folded into Tinker's substantial disruption standard, as was done in *Wynar.*[354] There are two advantages of de-linking the threats of violence from the substantial disruption standard. One is that it simply avoids the somewhat tortured linguistics of labelling a school shooting as "disruptive." School shootings are horrific events, not merely "disruptive."[355] Second, removing credible threats of violence from the definition of a "substantial disruption" also will allow the Court to separately describe the scope of a substantial disruption, thus giving valuable guidance to school officials as to that separate category of regulation over student speech.

Thus, the Court should find that student speech that school officials reasonably believe is a credible threat of death or serious bodily harm to any member of the school community is not protected under the First Amendment.[356] Such student speech is subject to discipline regardless where it was created or the means by which it was communicated to school officials.

If the Court were to create such a category of unprotected student speech, the Court should also clarify the contours of such a rule. In particular, the Court should find that the inquiry is not whether the student subjectively intended to threaten someone, but whether a reasonable school official could objectively interpret the language as a threat.[357]

On that issue, the Court must distinguish the student speech context

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POST (Oct. 1 2015) (available at http://www.washingtontimes.com/news/2015/oct/1/142-school-shootings-sandy-hook-massacre-newtown-c/) (last visited Sept. 27, 2016). Other information about school-associated violent deaths can be found at http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/savd.html (last visited Sept. 27, 2016).

[354] 728 F.2d at 1069.

[355] *Id.* at 1070 ("It is an understatement that the specter of a school shooting qualifies … under *Tinker*.").

[356] This is a different rule than that proposed by July Jolly in his concurring opinion in *Bell*. *See* Part II.E., *supra*. Judge Jolly proposed a three-element rule that required (a) an actual threat to kill or physically harm personnel or students; (b) which is connected to the school environment; and (c) is communicated to the school or its personnel or students. 799 F.3d at 401. Judge Jolly's rule contains limits that are not ideal. So, for example, if a student's threatening speech was communicated to someone who was not another student or school personnel, the third element would not be satisfied.

[357] *See J.S.*, 569 Pa. at 655-56. In *J.S.*, the student's off-campus speech included a picture of the teacher with her head cut off and blood dripping from her neck. The Pennsylvania Supreme Court held that the student's speech constituted a "true threat" that was not entitled to First Amendment protection. *Id.* In so holding, the court applied an objective reasonable person standard. *Id.* at 656, citing *Interest of A.S.*, 243 Wis. 2d 173 (2001). However, some scholars take the position that school officials must determine the student's subjective intent as part of a true threat analysis. *See, e.g.*, Mary Margaret Roark, *Elonis v. United States: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication*, 15 U. PITT. J. TECH. L. & POL'Y. 197, 217 (2015).

from its recent decision in *United States v. Elonis*[358] and the federal cases that have reached differing conclusions regarding the intent requirement in the context of a "true threat" analysis.[359] In *Elonis*, the Court addressed the issue whether criminal penalties could be imposed on an individual who published threatening statements on the Internet without proof that the defendant subjectively intended to make a threat.[360] The defendant in *Elonis*, an adult male, had written several posts on Facebook expressing a desire to harm others, including one post in which he stated: "I'm checking out and making a name for myself/Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined."[361] After being convicted of violating federal law that criminalized any communication transmitted in interstate commerce that contained "any threat to injure the person of another,"[362] the defendant appealed his conviction on the ground that the government was required to prove that he subjectively intended his postings to be threats.[363]

The Court reversed the defendant's conviction, finding that the trial court had erred in instructing the jury that it need consider only whether a reasonable person would regard the defendant's postings as threats.[364] The Court determined that the reasonable person standard should not be applied to a criminal statute, reasoning that the imposition of criminal sanctions requires some proof that the defendant was aware of his or wrong doing.[365]

By deciding the case on the more narrow issue whether the particular criminal statute required proof of a subjective intent to threaten, the Court avoided the constitutional question of the intent requirement needed to establish that speech constituted a true threat.[366] Justice Thomas authored a dissenting opinion in which he did consider the First Amendment question.[367] To demonstrate the need for an objective reasonable person standard, Justice Thomas invoked the circumstance of a school shooting, stating:

> [T]here is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat. For instance, a high-school student who sends a letter to his principal stating that he will massacre his classmates with a machine

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[358] 135 S.Ct. 2001 (2015).

[359] *See* John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J. LAW & PUB. POL'Y. 631, 652-56 (2016) (discussing the "subjective-versus-objective question" that has divided the federal courts in analyzing true threats).

[360] *Id.* at 2007.

[361] *Id.* at 2006.

[362] 18 U.S.C. § 875(c) (2012).

[363] 135 S.Ct. at 2007.

[364] *Id.* at 2012.

[365] *Id.*

[366] *See Bell*, 799 F.3d at 420-21 (Dennis, J., dissenting) (discussing *Elonis*).

[367] 135 S.Ct. at 2018 (Thomas, J., dissenting).

> gun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct.[368]

Indeed, threats to cause harm in the school environment do require a different analysis. Even if the Court correctly applied the subjective intent standard in *Elonis*, a case involving a criminal statute, the school setting is entirely different. First, any discipline meted out by school officials does not criminalize behavior or impose criminal penalties. Thus, the use of a reasonable person standard in terms of school discipline results in far less consequences than it does in the criminal context. Second, one can well imagine that many students whose speech is being considered as threatening will claim that subjectively they intended only to make a joke.[369] In some cases, establishing a student's subjective intent could be difficult. In light of the potential risks, the objective reasonable person standard should be applied.

School officials have the enormous responsibility to ensure that all students at school are safe and "secure."[370] In order to fulfill their responsibilities to all students who are compelled to attend school, the proper standard in the school context is whether school officials reasonably interpret the speech as a credible threat of death or serious bodily harm.

The Court also could provide guidance as to what constitutes a credible threat to cause death or serious bodily harm. The student's speech at issue in *Wynar* provides a good example of a credible threat. There the student frequently posted messages on social media that, over a period of months, grew ever more violent.[371] He specifically threatened to conduct a school shooting on April 20, the anniversary of the Columbine shooting.[372] He described the type of gun and ammunition that he would use, noting that he would "probly only kill the people I hate?/who hate me/then a few random to get the record?"[373] The student's speech alarmed the other students with whom he had shared his posts to such an extent that they contacted a school employee.[374] After viewing the student's online postings, the police were called and the student was taken into custody.[375]

In contrast, a recent federal district court case provides an example of speech that would not be viewed as a credible threat. In *Burge v. Colton School District*,[376] a middle school student who was disciplined for off-campus statements he had posted on social media filed suit alleging a violation of his First Amendment rights. The student's speech included statements that he wanted "start a petition to get [his teacher] fired,"[377]

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[368] *Id.*
[369] *See Wynar*, 728 F.3d at 1066.
[370] *Tinker*, 393 U.S. at 508 (students have a right "to be secure and to be let alone.").
[371] 728 F.3d at 1065.
[372] *Id.*
[373] *Id.*
[374] *Id.* at 1066.
[375] *Id.*
[376] 100 F. Supp. 3d 1057 (D. Ore. 2015).
[377] *Id.* at 1060.

that she was "the worst teacher ever,"[378] and that she was "just a bitch."[379] After a friend responded "XD HAHAHAHA!!,"[380] the student wrote "Ya haha she just needs to be shot."[381]

Although the student deleted the post within twenty-four hours after posting it, another student had printed out a copy of the post and, many weeks later, gave the printout to the school principal.[382] The principal then determined to suspend the student from school and thereafter the student filed suit.[383] The federal district court granted the student's motion for summary judgment, finding that the school district had violated the student's First Amendment rights.[384]

The court determined that the student's speech could not be construed as a true threat to school safety under either a subjective or an objective standard.[385] In so holding, the court noted that, after reading the printout, school officials did not question the student or his parents about access to guns, contact law enforcement, or seek a mental health evaluation of the student.[386] School officials also did not remove the student from the teacher's classroom.[387] Rather, the student simply was given a three-and-one-half day in-school suspension, which he served by sitting in an office at school.[388] Thus, the court determined that the conduct of school officials showed a lack of any reasonable belief that the speech constituted a credible threat.[389]

Given the serious issue of student threats of violence, it truly is unfortunate that the Supreme Court did not grant certiorari in *Bell*. First, the Court could have articulated a clear category of unprotected student off-campus speech. In addition, the Court could have outlined the contours of that category. Arguably the Fifth Circuit erred in concluding that Mr. Bell's rap song was a threat.[390] The majority in *Bell* determined that school personnel had been threatened even though, under the measures outlined in *Burge*, no credible threat of violence had been made. In *Bell*, school officials did not contact law enforcement.[391] On the first

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[378] *Id.*

[379] *Id.*

[380] *Id.* "XD" is a laughing emoticon. *See* http://slangit.com/meaning/xd (last visited Sept. 28, 2016).

[381] *Id.*

[382] *Id.* at 1061.

[383] *Id.*

[384] *Id.* at 1060. The district judge adopted the report and recommendation of a magistrate judge, who recommended that summary judgment be granted to the student on his First Amendment claim and that summary judgment be granted to the school district on a due process claim. *Id.*

[385] *Id.* at 1068-71.

[386] *Id.* at 1069.

[387] *Id.*

[388] *Id.* at 1064.

[389] *Id.*; *see also J.S.*, 569 Pa. at 656 (relevant factors in determining whether a statement is a credible threat include how the recipient or other listeners reacted to the threat, whether the threat was conditional, and whether the speaker had made similar statements in the past).

[390] 799 F.3d at 429 (Dennis, J. dissenting).

[391] *Id.*

day that they discussed the rap song with Mr. Bell, the school principal drove him home.[392] On the day that school officials suspended Mr. Bell, they allowed him to remain unattended in the school commons for the rest of day so that he could ride the bus home.[393] In addition, the disciplinary committee determined that any threat contained in the rap song was "vague."[394] These important facts from the case indicate that school officials did not interpret the rap song to be a credible threat of violence.

Had the Supreme Court granted certiorari in *Bell*, the Court could set constitutional guidelines for this important category of student speech. In this regard, the Court's decision to deny certiorari in *Bell* was a missed opportunity to clarify students' First Amendment rights in the digital age.

B. Tinker's "Rights of Others" Prong Should Apply to Student-on-Student Off-Campus Speech That Constitutes Bullying or Harassment.

The lower federal courts also need guidance as to the proper scope of authority over student off-campus speech that constitutes bullying or harassment. This is an issue that is of particular importance in the digital age, since bullying using electronic means, also known as cyberbullying, can be particularly vicious and harmful.[395] As to this form of student off-campus electronic speech, many scholars have advocated that the Supreme Court extend school authority under *Tinker's* "rights of others" prong.[396] Indeed, bullying or harassing speech seems to fit squarely within the rule expressed in *Tinker* that one student's speech should not interfere with the "rights of other students to be secure and to be let alone."[397] Due to the serious adverse consequences associated with student-on-student bullying and harassment, no First Amendment protection should be afforded to such speech, and school officials ought to have the authority to discipline students for such speech regardless whether the speech was created outside

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[392] *Id.*

[393] *Id.*

[394] *Id.* at 385.

[395] *Kowalski*, 652 F.3d at 572 (detailing the harmful effects of student-on-student bullying). Due to a variety of factors, particularly the distance between bully and victim that electronic communications provide, cyberbullying can be particularly vicious and harmful. *See* Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 653-54 (2011) (detailing the harmful effects of cyberbullying, particularly on adolescents); Gold Waldman, *supra* note 340, at 647-49 (detailing research on cyberspeech).

[396] *See, e.g.*, Martha McCarthy, *Student Expression That Collides with the Rights of Others: Should The Second Prong of Tinker Stand Alone?* 240 EDUC. L. REP. 1, 10 (2009) [*Student Expression*]; Martha McCarthy, *Cyberbullying Law and First Amendment Rulings: Can They Be Reconciled?* 83 MISS. L.J. 804, 828 (2014) [*Cyberbullying*]; Black, *supra* note **Error! Bookmark not defined.**, at 553; Jon G. Crawford, *When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to Tinker's Reach?* 45 URB. LAW. 235, 262 (2013) ("The Supreme Court should validate the use of the *Tinker* second prong analysis as an independent analytical tool to be used in student off-campus cyberspeech cases involving bullying and harassment."); Stacie A. Stewart, *A Trade-Off That Becomes A Rip-Off: When Schools Can't Regulate Cyberbullying*, 2013 B.Y.U. L. REV. 1645, 1660 (2013).

[397] *Id.* at 508.

of the school environment. I therefore join other scholars who advocate that *Tinker's* rights of others prong be applied to student-on-student bullying or harassing speech.

Tinker obviously was decided in an age where students did not harass or bully each other electronically; however, *Tinker's* rationale, namely that all students have to the right to be "let alone"[398] at school, applies to off-campus bullying or harassing speech because the effects of such speech are felt by the victim at school and impact the victim's educational rights. Thus, at the next opportunity, the Court should hold that, under *Tinker's* rights of others prong, a student who engages in speech that bullies or harasses another student in violation of state anti-bullying legislation has no First Amendment protection.[399] Due to the impact on the victim within the school environment, school officials are authorized to impose discipline regardless where such speech is created.

In this category of bullying or harassing speech, there is another issue that the Fifth Circuit's recent decision in *Bell* brings to the forefront. It is the issue whether student off-campus speech that targets a school employee is entitled to First Amendment protection. In *Bell*, the Fifth Circuit determined that school officials could discipline a student whose off-campus speech threatened, harassed and intimidated a teacher if the student intentionally directed the speech at the school community and school officials could reasonably forecast a substantial disruption.[400] And yet the majority in *Bell* stated, albeit in dicta, that a student's off-campus speech that threatens, harasses and intimidates a teacher arguably might always "portend[] a substantial disruption, making feasible a *per se* rule in that regard."[401] The majority in *Bell* thus suggested that off-campus student speech targeting a school official always is unprotected because the forecast of a substantial disruption is *per se* reasonable and thus assumed.

Thus, *Bell* reinvigorates a debate that had been prompted in part by the Third Circuit's decisions in *Layshock* and *Snyder*, two cases in which the students had created fake Internet profiles that ridiculed school administrators.[402] In *Snyder*, six judges dissented from the ruling in favor of the student primarily on the ground that the decision "left schools defenseless to protect teachers and school officials"[403] from malicious cyberattacks by students. Indeed, many scholars advocate that student off-campus speech that harasses a school employee should not be entitled to First Amendment protection.[404] Still others argue that school authority

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[398] *Tinker*, 393 U.S. at 508.

[399] An important issue, which is beyond the scope of this article, is how to define "bullying" or "harassment." Some scholars assert that anti-bullying statutes contain vague language that unconstitutionally restricts students' First Amendment rights. *See, e.g.*, John O. Hayward, *Anti-Cyberbullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 118 (2011).

[400] *Id.* at 396.

[401] *Id.* at 397.

[402] *Layshock*, 650 F.3d 205; *Snyder*, 650 F.3d 915.

[403] *Snyder*, 650 F.3d at 941.

[404] McCarthy, *Cyberbullying*, *supra* note 396, at 823 (suggesting that all student electronic expression could be deemed to be in-school speech in order to allow discipline for speech "directed towards school personnel and classmates"); Butler, *supra* note 41, at

should not be extended to off-campus electronic speech that targets school employees.[405] These scholars reason that, unlike students, the educational rights of school employees are not implicated by off-campus electronic speech that targets them.[406] In addition, school employees should be "equipped emotionally and intellectually" to handle disrespectful or harassing speech published by a student.[407] In addition, school employees have the ability to impose discipline if such harassing speech is repeated at school. They have the ability to pursue civil remedies against students whose off-campus speech is defamatory or libelous.

While student-on-student bullying or harassment should not be protected speech for the reasons stated above, student off-campus speech that arguably bullies or harasses a school employee should not be subject to school discipline.[408] Students have a First Amendment right to "express disrespect and disdain for their teachers,"[409] including expressing their views in vulgar terms if they wish.[410] Extending school authority to student off-campus speech that arguably bullies or harasses a school employee could impermissibly chill student speech. Students have the right to voice criticism of school policies, procedures and personnel. There is a real danger that school officials might "engag[e] in illegitimate censorship of speech critical of their own actions rather than imposing discipline to protect legitimate institutional interests."[411] School officials could overreach and violate a student's constitutionally protected right to express complaints about a teacher's competence, classroom demeanor or other

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302 ("Speech described as bullying, harassing, libelous, or threatening, it is directed at other students or school personnel, is not protected speech ….."); Stewart, *supra* note 396, at 1658 ("The decisions in Layshock and J.S. are a rip-off to students and parents because the bullying of school staff affects the ability of a school to provide a quality education.").

[405] Black, *supra* note **Error! Bookmark not defined.**, at 552-53 (disparagement of school personnel may have low disruptive impact); Christine Metteer Lorillard, *When Children's Rights" Collide:" Free Speech v. The Right to Be Let Alone In The Context of Off-Campus Cyberbullying,* 81 MISS. L.J. 189, 259 n.487 (2011) (distinguishing between student-on-student harassment and student-on-school employee harassment); Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 755 (2012)..

[406] Lorillard, *supra* note 405, at 259 n.287.

[407] *Id.*, quoting Harper v. Poway Unifed Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006).

[408] Analytically it is not clear that Tinker's rights of others prong does apply to harassing or bullying speech that targets a school employee. The Court did refer to speech that either "invad[es]," 393 U.S. at 513, or "collid[es] with," *Id.*, the rights of others without specifically who the "others" might be. However, in at least one portion of the opinion, the Court specifically referred only to the "rights of other students to be secure and to be let alone." *Id.* at 508. Thus, it is not clear the rights of others prong as expressed in *Tinker* applies to school employees. *See* Philip T.K. Daniel, *Bullying and Cyberbullying In Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-Harassment Legislation,* 268 EDUC. L. REP. 619, 632 (2011).

[409] *Bell*, 799 F.3d at 425 (Dennis, J., dissenting).

[410] *Klein*, 635 F. Supp. at 1442 (holding that school could not discipline a student for "giving the finger" to a teacher he encountered in a restaurant parking lot, stating: "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").

[411] McDonald, *supra* note 405, at 728.

qualities simply to assuage a co-worker's hurt feelings.[412]

The facts in *Bell* amply demonstrate this conundrum. If the arguably threatening lyrics of Mr. Bell's song are not considered, the remainder of the song clearly ridiculed the coaches' behavior ("drool running down your mouth"),[413] called them names ("pervert," "crazy" and "lame"),[414] and denigrated a spouse's appearance ("his wife ain't got no ti[tt]ies"),[415] among other comments. Yet Mr. Bell also made a significant and substantive complaint that the coaches were sexually harassing female students ("looking down girls shirts," "fucking with the students," "rubbing on the black girls ears in the gym").[416] Although the majority in *Bell* deemed these statements to be harassment and intimidation, one of the two coaches testified before the federal district court that he considered Mr. Bell's speech to be "just a rap song" and that any issue about the song would "probably just die down" if he did not draw attention to it.[417]

Was the song harassing and intimidating, as opposed to merely disrespectful? Does the issue turn on whether the targeted school employee is upset? What about the fact that the student sought to publicize inappropriate conduct by a school employee? Given all the potential that students' constitutionally protected rights to question and criticize the conduct of school officials could be improperly curtailed, the Court should not endorse a *per se* rule that students may be disciplined for off-campus speech that harasses or bullies a school employee based solely on content of the speech.[418]

Declining to extend authority over student off-campus speech that harasses or bullies a school employee does not leave school administrators without recourse. If the off-campus speech enters the school environment in such a way that a student either engages in lewd or indecent speech or causes a substantial disruption, then school officials have clear authority to impose discipline.[419] Indeed, school officials overwhelmingly prevail in cases that challenge the authority to discipline students for vulgar or disrespectful on-campus speech directed towards school employees.[420] That

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[412] There is also the additional question of how to define harassing or bullying speech in this context in such a way that students' free speech rights are not chilled. Only a handful of state anti-bullying statutes apply to school personnel. Gold Waldman, *supra* note 340, at 635.

[413] 799 F.3d at 384.

[414] *Id.*

[415] *Id.*

[416] *Id.*

[417] *Id.* at 429 (Dennis, J., dissenting).

[418] Extending authority to allow discipline for off-campus electronic speech that harasses or denigrates a teacher could encourage schools to engage in electronic surveillance of students' electronic communications. *See, e.g.*, Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE WESTERN RES. L. REV. 63 (2014).

[419] *Fraser*, 479 U.S. at 685; *Tinker*, 393 U.S. at 513. Student on-campus speech that upsets a "civil and respectful atmosphere towards teachers" constitutes a substantial disruption. Requa v. Kent, 492 F. Supp. 2d 1272, 1280 (W.D. Wash. 2007).

[420] Gold Waldman, *supra* note 340, at 617 (noting that students generally lose cases in which they challenged disciplinary action taken with respect to hostile or disrespectful

disciplinary authority would extend to any student who, although not the original author of the speech, repeats the contents of the off-campus speech because the second student has engaged in speech within the school environment.

In addition, any direct electronic communications between a student and a school employee should be deemed to be "in-school" speech. As Judge Smith correctly noted in his concurring opinion in *Snyder*, a different analysis should apply where a student "send[s] a disruptive email to school faculty from his home computer."[421] Students increasingly communicate electronically with school employees as part of their coursework. Those direct student-to-school communications are not out-of-school communications simply because the student is not physically at school. Rather, the student is acting "*qua* student"[422] and any speech in that context would be subject to discipline under the Supreme Court's existing precedents.[423] Specifically, electronic communications between a student and a school employee is speech that, per *Morse*, is uttered in a "school-sanctioned and school-supervised" setting.[424] If the speech is lewd, indecent or offensive, it is subject to discipline under *Fraser*. If it creates a substantial disruption – e.g., the student's speech is communicated to the entire class via email and causes a distraction – then it is subject to discipline under *Tinker*.

Finally, school officials and the targeted employee have other tools at their disposal. Although school may not be able to discipline the student purely on the basis of off-campus speech, school officials who become aware of such speech can inform the student that his or her speech has been seen by school officials and that the student will be subject to discipline if the speech impacts the school environment.[425] School officials also can bring the student's speech to the attention of the student's parents. Finally, if the particular school employee finds the speech to be libelous or defamatory, the employee could avail himself or herself of civil remedies.[426]

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speech directed to school employees).

[421] 650 F.3d at 940.

[422] *Bell*, 799 F.3d at 389.

[423] *Morse*, 551 U.S. at 396.

[424] *Id.*; *see also* Susan Bendlin, *Far From the Classroom, the Cafeteria and the Playing Field: Why Should the School's Disciplinary Arm Reach Speech Made In A Student's Bedroom,* 48 WILLAMETTE L. REV. 195, 241 (2011) "The Supreme Court has already made it clear in Morse then when the activity was school-approved, attended by students, and supervised by school administrators and teacher, a student's speech could be regulated there even though he was literally standing off campus and not inside the schoolhouse gate.").

[425] *See* Ari Ezra Waldman, *Hostile Educational* Environments, 71 MD. L. REV. 705, 727 (2012). Indeed, school officials would have the opportunity to teach an important lesson about our democracy. *See* Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment – TISNF!*, 60 CASE WESTERN RES. L. REV. 153, 200 (2009).

[426] *See* Alexander Tuneski, *Online, Not Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 142 (2009) (discussing potential civil remedies); Backus, *supra* note 425 at 187 (noting that a school employee successfully sued a student and his parents for injuries resulting from the student's off-campus expression).

C. Tinker's Substantial Disruption Standard Should Apply to A Student's Off-Campus Speech Only When An Actual Disruption Has Occurred.

To date, with the exception of the Ninth Circuit's decision in *Wynar*, all of the circuit courts that have imposed discipline for students' off-campus electronic speech have imposed a threshold test must be satisfied before analyzing the speech under *Tinker*. In the Second, Fourth and Eighth Circuits, the threshold test is a "reasonable foreseeability" test.[427] The Fifth Circuit's recent decision in *Bell* set forth an "intentional direction" threshold test that is similar to the one proposed by Judge Smith in his concurring opinion in *Snyder*.[428] For the following reasons, none of these threshold tests should be adopted by the Court.

Some scholars have expressed approval of the Second Circuit's "reasonable foreseeability" test as appropriately balancing the First Amendment rights of students and the authority of school officials to maintain a proper school environment.[429] These scholars believe that a "two-tiered"[430] inquiry under which school officials must first determine the reasonable foreseeability that a student's speech would reach school is a "more conservative approach"[431] that provides greater protection to students' First Amendment rights, essentially because there is a threshold inquiry before *Tinker's* substantial disruption standard is applied.[432]

However, Judge Smith noted in *Snyder*, such a standard easily can be "stretched too far"[433] and thus "risk ensnaring any off-campus expression that happened to discuss school-related matters."[434] Most forms of digital speech, whether a public posting on the Internet[435] or a private text message sent to just one other person, can be preserved and later shown to others. Thus, it is hard to conceptualize any form of digital expression that could not somehow come to the attention of school officials. Indeed, it is surely true that the students in *Layshock* and *Snyder*

School boards would not incur any liability in an action filed by an employee who was the target of a student's off-campus speech if the Court were clear that such off-campus speech is protected under the First Amendment. Gold Waldman, *supra* note340, at 634.

[427] Although the *Kowalski* decision has been interpreted by some as creating a "nexus" test, the Fourth Circuit did not state that it was adopting a "nexus" test, nor did it outline the elements or factors that comprise such a test. *See* Part II.C., *supra*.

[428] 650 F.3d at 940.

[429] Black, *supra* note **Error! Bookmark not defined.**, at 551-52, citing Paul Easton, *Splitting the Difference: Layshock and J.S. Chart A Different Path on Student Speech Rights*, 53 B.C. L. REV. E-SUPP. 17 (2012).

[430] *Id.* at 551.

[431] *Id.* at 551-52.

[432] *Wynar*, 728 F.3d at 1068.

[433] *Snyder*, 650 F.3d at 940.

[434] *Id.; see also* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates In Cyberspace*, 7 FIRST. AM. L. REV. 210, 251 (2009) ("[A]n approach like that adopted by the Second Circuit that relies solely on whether it is reasonably foreseeable that the question in question will come to the attention of school authorities give schools sweeping off-campus jurisdictional power.").

[435] A Facebook post, for example.

did not foresee that the disparaging MySpace profiles they created would come to the attention of their school principals. If just one student shares what was intended to be a private communications, school officials will have become aware of the off-campus speech.[436] Thus, the reasonable foreseeability standard seems to provide very little protection to students.[437]

In addition, the type of student off-campus electronic speech that most likely would come to the attention of school authorities would be speech relating to school events or individuals. By providing such a low threshold for the imposition of school discipline, the reasonable foreseeability test unduly constricts students' ability to engage in free speech about an important and predominant aspect of their lives: school.[438] Students would have very limited First Amendment rights if, in speaking about school matters while not at school, they must restrict the audience to such an extent that it would be unreasonable for their speech would come to the attention of school authorities.

The "intentional direction" language used by the Fifth Circuit in *Bell* might, at first glance, appear to set a higher threshold because it would require some the student had directed speech into the school environment.[439] However, it suffers from essentially the same defects as the "reasonable foreseeability" test. Again, the threshold for imposition of authority is quite low if a student's "intentional direction" is determined by the extent to which the student spoke on a matter of interest to the school community and intended that other students would consider the speech.[440] As with the reasonable foreseeability test, it seems that students would essentially have no protection if they sought to speak about a matter in any way related to school and they wanted their speech to reach others.[441] In addition, the intentional direction test has the added difficulty

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[436] 650 F.3d at 921 (a student who was in the principal's office due to an "unrelated incident" told the principal about the parody profile).

[437] *See* Bendlin, *supra*, note 424, at 221-22 ("[U]nder the foreseeability test … it is hard to know in advance how or when an Internet message might be printed out or brought on to the campus (in some form) by someone other than the student-speaker. The problem with vague standards is that neither school officials nor students know exactly what the rules are.").

[438] Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment,* 85 INDIANA L.J. 1113, 1128 (2010) ("The Second Circuit's broad construction of the "reasonable foreseeability" test thus suggests that schools may possess jurisdiction over virtually all student Internet speech that relates to school issues and tries to galvanize student action").

[439] *See e.g.*, David A. Polsinelli, *Untangling the Web: A More Guided Approach To Student Speech on the Internet,* 54 S. TEXAS. L. REV. 779, 807-08 (2013); Lindsay J. Gower, *Blue Mountain School District v. J.S. ex rel. Snyder: Will the Supreme Court Provide Clarifications For Public School Officials Regarding Off-Campus Internet Speech?*64 ALA. L. REV. 709, 730 (2013) (arguing in favor of a "purposeful direction" standard as superior to a foreseeability test).

[440] *Bell*, 799 F.3d at 386 & 394 (finding that Mr. Bell intentionally directed his rap song at the school community, presumably because of his apparent admissions that he wanted to bring awareness to the coaches' conduct and he knew students would listen to the song.).

[441] *Id.* at 418 (Dennis, J., dissenting) (deeming the majority's intentional direction inquiry to be incurably ambiguous).

of asking school officials to determine the subjective "intent" of a student before imposing discipline.[442]

The better rule is to not have any threshold tests. With the exception of speech constituting threats of violence or student-on-student bullying, as discussed above,[443] school officials should authority to impose discipline only when the student's off-campus speech actually causes a substantial disruption at school. In other words, student speech, no matter where it is created, that causes an ***actual*** substantial disruption within the school environment should be subject to discipline.[444] If a student's speech actually disrupts the school environment, the student should not be shielded from discipline by the excuse that the speech was created off campus. Given the prevalence of electronic communications and easy access to such communications even in the school environment, the off-campus electronic nature of the communications should not be relevant to the inquiry. The issue should be solely whether the student's speech caused a substantial disruption in the school environment. Thus, *Tinker* should apply even without the necessity of some threshold test.

However, expressly applying *Tinker* to student off-campus electronic speech is not the end of the inquiry. If the Court applied *Tinker* to student off-campus speech, then the Court would need to define the word "substantial." In that regard, it is relevant that, even with evidence in *Tinker* that a mathematics class had been "practically 'wrecked' chiefly by disputes,"[445] the Court found no substantial disruption.[446] A substantial disruption should be something much more than "general rumblings"[447] among students, "minor inconveniences" to school personnel, or limited distractions from classwork.[448] Rather, a substantial disruption would require "boisterous conduct, interruption of classes, or [a] lack of order, discipline or decorum at the school."[449]

In addition to defining when a disruption is substantial, the Court also would have to address the issue of causation. In his concurring opinion in *Snyder*, Judge Smith indirectly raised this issue by describing a scenario in which student, outside of school hours, posted a defense of gay

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[442] Benjamin Ellison, *More Connection, Less Protection? Off-Campus Speech With On-Campus Impact,* 85 NOTRE DAME L. REV. 809, 836 (2010) ("Subjective intent can be difficult to determine").

[443] *See* Parts III.A. and III.B., *supra.*

[444] Bendlin, *supra* note 424, at 222.

[445] *Tinker*, 393 U.S. at 517 (Black, J., dissenting).

[446] *Id.* at 508 ("There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.").

[447] *Snyder*, 650 F.3d at 922.

[448] *Snyder*, 593 F.3d at 299.

[449] *Bell*, 774 F.3d at 296. School officials sometimes are wildly off-based in their own judgment that a substantial disruption has occurred as school *See, e.g.*, T.V. *ex. rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 784 (N.D. Ind. 2011) (the court ruled that a school district had violated the First Amendment rights of two high school students who posted provocative photos of themselves over the summer vacation, finding that "two complaints from parents and some petty sniping among a group of 15 and 16 year olds … can't be what the Supreme Court had in mind when it enunciated the 'substantial disruption' standard in *Tinker*.").

marriage on a blog to which other students had a negative reaction.[450] He hypothesized that classmates who opposed gay marriage might, in reacting to the speech, cause a substantial disruption at school.[451] Judge Smith determined that, if *Tinker* were to apply to off-campus electronic speech, the student who posted the blog entry could be subject to discipline.[452]

In Judge Smith's hypothetical, the student who posts the blog should not be subject to discipline simply because there is a failure of causation. Except in very limited circumstances,[453] speech that provokes a reaction in others who might show their disagreement by causing a disruption does not make the speaker responsible for the audience's actions. In the hypothetical posed by Judge Smith, the student in favor of gay marriage would not have caused a disruption. Rather, the students who would have voiced their opposition at school would be the cause of any substantial disruption.

Such a rule might be difficult to follow sometimes. Students might engage in off-campus, such as racist comments, that could provoke strong reactions.[454] However, in our democracy, even speech that many citizens would find "shabby, offensive, or even ugly" is entitled to First Amendment protection.[455] When faced with such speech, students could learn a valuable civics lesson about fundamental values of our democracy and the ways in which others have responded to hateful or disturbing language or conduct.[456] Such a result would be a valuable addition to our students' education.

D. As to a Forecast of a Substantial Disruption, School Officials Should Not Be Able To Discipline Students For Their Off-Campus Speech.

Finally, the Court also should determine that, as to off-campus speech, school officials may not impose discipline based on nothing more than a "reasonable forecast"[457] of a future substantial disruption. Again, this rule would be applicable only if the Court also determined that student off-campus electronic speech is not protected when (a) the speech is a credible threat of violence against any member of the school community;[458] or (b) it bullies or harasses another student.[459] With those two rules in place, student off-campus speech generally should not be

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[450] 650 F.3d at 939.
[451] *Id.*
[452] *Id.*
[453] While the Supreme Court in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) established that "fighting words" are not protected under the First Amendment because their effect on listeners, the Court's recent decision in Snyder v. Phelps, 562 U.S. 443 (2011) greatly limit the applicability of that doctrine.
[454] *Lee's Summit,* 696 F.3d 771.
[455] *Bell*, 799 F.3d at 426 (Dennis, J., dissenting)., quoting United States v. Playboy Entertainment Grp., 529 U.S. 803, 826 (2000).
[456] Backus, *supra* note 425, at 200.
[457] *Tinker*, 393 U.S. at 514.
[458] *See* Part III.A., *supra.*
[459] *See* Part III.B., *supra.*

subject to discipline based on a potential future disruption.[460]

School authority over off-campus speech should be limited to discipline for actual, not forecasted disruptions, because of the risk that school officials will overzealously predict disruptions. In his dissent in *Bell*, Judge Dennis aptly described the difficulty of forecasting future disruptions, stating:

> If this standard were applied off campus, how can a student or a student's parents know with any degree of certainty when off-campus online speech can be "forecasted" to cause a "substantial disruption"? Although *Tinker* is not a completely toothless standard, … its framework inherently requires guesswork about how a third-party school official will prophesize over the effect of speech.[461]

Judge Dennis is right. Students' constitutional right to speak freely when they are not at school should not be subject to second-guessing by a school official about the potential future impact on the school environment. Rather, other than violent or student-on-student bullying speech, school officials simply should not be able to impose discipline for off-campus speech without concrete evidence that the speech actually impacted the school environment. Constitutional rights should not depend on the extent to which a particular school official undertakes a crystal ball inquiry about the potential future effect of a student's off-campus speech.[462] Indeed, the vagueness of the standard would allow school officials to conjure up reasons why student off-campus speech that they find distasteful, perhaps because they do not like the language[463] or the images[464] that appear in the student's off-campus speech.

CONCLUSION

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[460] Denying school officials the authority to discipline students for off-campus electronic speech on the basis of a potential future disruption is not the same constitutional analysis as allowing school officials the authority to prohibit students from wearing clothing that displays or represents a point of view (e.g., the Confederate flag) in order to avoid future disruptions. S*ee* Dariano v. Morgan Hill Unif. Sch. Dist., 767 F.3d 764 (9th Cir. 2014) (determining that school officials could prohibit students from wearing clothing bearing the symbol of the American flag on Cinco de Mayo).

[461] *Bell*, 799 F.3d at 418-19.

[462] For a review of cases that address the reasonableness of a forecast of future substantial disruption caused by students' off-campus electronic speech, *see* Samantha M. Levin, *School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students' Online Speech,* 38 FORDHAM URB. L.J.859 (2011).

[463] *See Bell*, 799 F.3d at 429 (Dennis, J., dissenting) (noting that, in the preliminary-injunction hearing, the school board's lawyer characterized Mr. Bell's rap song as "filthy").

[464] T.V., 807 F. Supp. 2d at 783 (school district could not reasonably foresee a future disruption arising from sexually suggestive photos that had been posted by two high school students over summer vacation).

Both the lower federal courts and school officials need Supreme Court guidance on all of the important First Amendment considerations that are implicated by students' off-campus electronic speech. By denying certiorari in *Bell*, the Court missed an outstanding opportunity to provide that necessary guidance. Given the facts in *Bell*, the Court could have provided guidance regarding speech that arguably threatens violence in the school setting or arguably harasses or bullies others. The Court also could have clarified important aspects of *Tinker's* substantial disruption standard. While the decision not to grant certiorari in *Bell* represents a missed opportunity to clarify students' First Amendment rights in the digital age, the lower federal courts and school officials alike can hope that, in the near future, the Court will provide the needed guidance.