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The First Amendment's Uneasy Application to the Schoolhouse and Beyond: Regulating Student Speech in the Age of Social Media

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I. Introduction

The First Amendment rights of students have often collided with a school's authority to discipline students and maintain order. Social networking has compounded the potential for conflict between individual liberty and promotion of effective school functions.

Social media is the predominant way that people interact with one another. People can share their personal information with the world by the click of a button. The various forms of Social Media applications allow users the means to chronicle every step they take, post pictures, and maintain long distance relationships with their loved ones. The proliferation of the Internet affords citizens the opportunity to speak their minds on issues from Government relations to the latest celebrity break-up.

Social media applications include many different outlets for people. Facebook is the most used social media network that allows people to share their opinions, photographs and lives with others. LinkedIn is another social media application where professionals can post their resumes and build their business connections. Twitter allows people and celebrities to voice their joys and grievances. The numbers of social media options are too numerous to list, but they all share one thing. A person's voice is capable of being heard by anyone with a computer or a smartphone.

Personal social media accounts can be created in seconds provided that the user has a valid e-mail address. People are not restricted in the use of their accounts. The United States Constitution grants Internet users the freedom to blog and tweet their thoughts to the world. A child who is old enough to operate a computer can create a social media account. Students are using social media to communicate with their peers on a regular basis. Teenagers today have a greater propensity to post their every move on-line, because it is "cool" and of course, "everyone is doing it". Facebook, Twitter and the like have not shown signs of stagnation. Posting a picture or complaining about too much homework on one of the many social media applications has become second nature to many people, in particular students. I do not have a Facebook account, but it amazes me how much time my friends spend checking and updating their Facebook pages. The fact remains that many students use social media to communicate every day, which is unlikely to slow down.

Social networking has become a dangerous tool that can lead to arrest and discipline. A Facebook post, a tweet or blog entry can show what a student is thinking regardless if the student does not mean what he writes. Social media does increase the likelihood that speech will reach school administrators, teachers, students and parents. Schools are monitoring the student's thoughts and punishing them as a result. This paper will illustrate the number of offenses committed by students from the benign to the dangerous hateful slander and how school administrators are reacting to these offenses.

II. How Social Media Gets Students into Trouble

Schools often attempt to extend their authority to discipline student behavior committed off-campus. Additionally, numerous tragic events have exacerbated the problem of more students getting into trouble for their off-campus speech. Most recently, the Newtown,

Connecticut shootings has many educators on high alert causing students First Amendment rights to be violated. Administrators often use the fact that messages posted on social media websites are within the school's authority to punish, because it substantially disrupts the classroom once that message reaches the school. Below, are examples where two students were disciplined for speech that was not delivered through social media channels.

Courtni Webb, a high school senior from San Francisco was suspended after writing a poem about the Newtown school shootings.[1] The poem was not posted on-line or read out loud in her class. Her teacher found the poem in her personal notebook and handed it to the principal.[2] Courtni maintains that she was expressing herself through poetry and did not mean to harm anyone. However, the school suspended Courtni pursuant to their school's zero tolerance policy. Under Tinker standard, Courtni's suspension would not have been upheld. Courtni's poem was her way of expressing her feelings about the Newtown tragedy. There was no substantial disruption of schoolwork or invasion of the rights of others. Due to the fact that her poem made it onto school property, her teachers felt that they had the authority to punish her. There was no disruption in the school, because the poem was placed in her personal journal and did not interfere with any school functions.

In Porter v. Ascension Parish School Board, a high school student was removed from school and was required to enroll into an alternative school when the school discovered his drawings depicting the school exploding. The student drew this picture two years earlier at home and left it in his closet. This drawing came to the attention of school administrators when his

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[1] Frank LoMonte is the Executive Director of the Student Press Law Center. The Student Press Law Center helps students use the law to protect their Constitutional rights. Mr. LoMonte posted an article where he describes instances of off-campus student speech.

[2] Frank LoMonte, Newtown shootings lead to nationwide wave of school discipline incidents, legitimate or not, SPLC, December 29, 2012, available at http://www.splc.org/wordpress/?p=4533.

younger brother accidentally brought the sketchpad to school.[3] The Court found that this drawing did not constitute student speech on school grounds. The drawing was created at home and the student did not intend to bring it to the school premises. The Court stated, "This is not exactly speech on-campus or even speech directed at the campus".[4] Here, the Court is looking at the totality of the circumstances. The school's authority to punish could not extend to the student's bedroom even though ultimately the "speech" did eventually make its way onto the campus.

The Porter Court held that the student's drawing was not a "true threat". "Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a "serious expression of an intent to cause a present or future harm."[5] In Porter, it was clear that the drawing was not meant to threaten anyone. It was not shown to anyone and was kept at home. The student's "drawing cannot be considered a true threat as it was not intentionally communicated, the state was without authority to sanction him for the message it contained".[6] However, was Courtni's poem a true threat? Under the guidelines expressed in Porter, her poem cannot be construed to be a threat. She did not publish it or show it to anyone with the intent to scare others. A school's authority to discipline a student's off-campus speech has to be limited to those situations that demonstrate a "true threat" where a reasonable person would become fearful.

The responsibilities of school administrators to monitor and maintain the health and security of their students and faculty do not involve just poems, letters, or drawings that a student physically brings into the classroom as demonstrated in the aforementioned cases. Students can now be disciplined for their words and actions committed off-campus grounds and posted on the

[3] Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004).
[4] Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004).
[5] Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004).
[6] Id. at 618.

Internet. Social media gets students into trouble in particular when the speech references threats, violence and harassing language. It is difficult to argue that the speech sent through a social media website could not reach the student body or its target audience. A drawing displaying a teacher being shot or a school exploding goes from being a personal expression of anger in one's journal to becoming a threat that does create concern when uploaded to a Facebook page. This day and age has seen too many tragedies. If in the Porter case, the student posted his drawing online instead of keeping it in a closet, his disciplinary action may have been upheld, because it could be argued that the student meant to threaten others.

Students are being disciplined for their speech that is deemed threatening, but schools cannot enforce a code of conduct that is overbroad and vague. Social media has broadened the risk of disciplinary actions being upheld and limiting students First Amendment rights. Posting a "joke" on your Facebook page can lead to discipline when that purported joke creates more fear than laughs.

In J.S. v. Bethlehem Area School District, a student was expelled after he created an off-campus website named "Teacher Sux" which contained threatening and derogatory comments about his math teacher and principal.[7] The school board concluded the student violated the district's Student Code of Conduct by making threatening and harassing comments, and showing disrespect toward a teacher. For example, the student wrote " 'Why Should [Mrs. Fulmer] die? . . . give me $ 20 to help pay for the hitman' constituted a threat to a teacher and was perceived by Mrs. Fulmer and others as a threat'." [8] The court stated "it is evident that the courts have allowed school officials to discipline students for conduct occurring off of school premises

[7] J.S. ex rel. HAS. v. Bethlehem Area Sch. Dist., 757 A.2d 412 at 417 (Pa. Commw. Ct. 2000) aff'd, 569 Pa. 638, 807 A.2d 847 (2002)
[8] Id.

where it is established that the conduct materially and substantially interferes with the educational process." [9]

The court analyzed this issue using the standard set in Tinker which provides that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the First Amendment."[10] The court found that the effect of this website was damaging to Mrs. Fulmer who could not complete the academic year was suffered physical and emotional distress as a result of the student's off-campus action. This website was viewed and could be viewed by other students, teachers and parents.[11] Therefore, this student's constitutional rights were not violated, because the damaging effect on the teacher justified expulsion.

This case illustrates an extreme case where punishment is justified, because the student's speech spewed threats. The teacher in this case feared for her life regardless if the comments were made in jest. Even though the Court did not view these statements as a serious threat, but the court determined the site did disrupt the Bethlehem Area School District environment to justify expelling the student. Despite the fact that the website was created off school grounds, the court found there was a "sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[12] This case demonstrates that there needs to be a substantial disruption to the school and that there be a link between the off-campus activity to the school grounds to amount to proper school discipline that does not violate constitutional rights.

Recently, Montclair University suspended a graduate student who made fun of a female

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[9] Id. at 421.
[10] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 at 513 (1969).
[11] J.S. v. Bethlehem Area School District, 757 A.2d 412 at 421.
[12] Id. at 664.

classmates weight in comments he wrote under a YouTube video. First, the university issued the student a no contact order, which forbade him from speaking to the student and refrained him from discussing or referring to her on social media networks. The student did not comply with the school's no contact order, because he mentioned her name while joking about the incident in a Facebook group he believed was private. As a result, the university suspended the student for one semester. This student appealed the punishment as a violation of his free speech rights. The university attempted to argue that their decision to punish the student was justified under New Jersey's anti-bullying law, however the student's comments did not constitute bullying under the statute. The student's suspension was overturned.[13]

This matter did not go before a court, however if this issue was assessed under the Tinker substantial disruption standard then the punishment most likely would not have been upheld. Did this student's speech cause a substantial disruption, or interfere with the rights of others? I do not know how these Facebook posts about this specific student affected her, but as woman who has battled with weight and faced my share of comments I can certainly understand her pain. However, the big difference here is that the comments that I received were not posted for others to see. This young woman had disparaging remarks made about her that I know are extremely personal and hurtful. Her rights as a student and a person were interfered with, yet are permissible without repercussions to the authors of those hurtful words. The line between speech that is constitutional and speech that is punishable is often blurred. Nonetheless, analysis under the Tinker standard would not have demonstrated that disruption of school activities occurred. Here, the student's off-campus speech rights were violated, but what happens to the rights of others when those free speech rights disparage them.

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[13] Kelly Heyboer, Weehawken grad student is free to go back to MSU, The Jersey Journal, Jan. 19, 2013, at 10.

III. Putting School Regulation of Student Speech into Historical Context

Freedom of speech is the "right to express one's thoughts and opinions without governmental restrictions, as guaranteed by the First Amendment."[14] Since its inception, free speech rights have evolved from giving citizens the right to speak up against tyranny to freedom to express an opinion. "At the outset we reject the view that freedom of speech . . . as protected by the First . . ., are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment".[15] The Supreme Court states that not all speech is constitutionally protected. It is this discretion that leads us to this dilemma of determining when can a school properly discipline students' for speech conducted off of campus grounds.

In Tinker, the Supreme Court stated that the "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16] The Supreme Court extended the student's constitutional rights in an environment that did not exist before. In Tinker, students were suspended for wearing armbands to school protesting the Vietnam War.[17]

The court established the Tinker standard, which states that "conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[18] The court

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[14] Black's Law Dictionary 735 (9th ed. 2009).
[15] Konigsberg v. State Bar of Cal., 366 U.S. 36 at 49 S. Ct. 997, 1002, 6 L. Ed. 2d 105 (1961)
[16] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 at 506.
[17] Id. at 503.
[18] Id. at 513.

further noted that the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not enough to suppress speech rights.[19] The Tinker standard fails to give guidance when it applies to Internet speech. Tinker may seem clear, but it is ambiguous because schools have disciplined students' for speech even when this standard was not met.

Tinker's substantial disruption test is not the only standard that permits school administrations to restrict or punish student speech. In Fraser, a student was suspended when he gave a speech in which he "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor".[20] In Fraser, the Court stated that "the schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[21] This Court upheld the student's suspension, because even though he is afforded First Amendment protections, those rights are not absolute. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[22]

Schools have the responsibility of monitoring students and teaching values that are respectful and promote order. Here, the Court upheld the schools decision to and ruled that indecent speech can be punished. The indecent speech occurred on-campus in Fraser. This link between the indecent speech and disruption to the school environment is direct. Fraser did not focus on this kind of student speech committed outside of the school gates. However, Justice Brennan in his concurring opinion did acknowledge that "if respondent had given the same speech outside of the

[19] Id. at 509.
[20] Bethel School District No. 403 v. Fraser, 478 U.S. 675 at 678 (1986).
[21] Id. at 683.
[22] Id.

school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[23] Twenty-seven years later and students' are being disciplined for their vulgar speech off-campus irrespective of what Justice Brennan stated in his concurrence.

In Hazelwood, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns".[24] Here, students attempted to publish articles on teenage pregnancy and other adult content in the school sponsored newspaper. "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order."[25] Schools have an obligation to monitor student speech that is inappropriate for the benefit of all the students.

In summary, the Supreme Court has held that schools have the authority to discipline on student speech that occurs on school grounds. The courts have not been as clear in determining when schools can discipline students for speech that occurs off-campus, in particular when the speech falls within a gray area that is neither threatening or vulgar that is within reach of the schoolhouse gates.

IV. Application of Precedent to Treat Students' Off-campus Speech

Several schools have disciplined their students for off-campus speech that the administration deemed disruptive to the institution and student body. For example, Catawba Valley Community

[23] Id. at 688.
[24] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 at 273.
[25] Id. at 272.

College (CVCC) suspended a student for posting the following message on his person Facebook page. "Did anyone else get a bunch of credit card spam in the CVCC inbox today? So, did CVCC sell our names to banks or did Higher One? I think we should register CVCC's address with every porn site known man. Anyone know any good viruses to send them?"[26] CVCC suspended this student for his Facebook post, because "the college evaluated this message as a potential threat to our email system, computer network, and out students."[27] In addition, in a letter from the college to the student, the school explained that they have many high school students who are minors and that his posting violated the school conduct policy. The school modified the disciplinary decision by taking on-line classes, to be blocked from CVCC's social media network and to publicly express his regret for his poor choice of words.[28] This student's suspension was reversed contingent on his satisfying the school's requirements. The school expressed that this Facebook post was a "potential threat".

This punishment, however, fails the Tinker standard. The student's post failed to disrupt classwork or invade the rights of others. Instead, it was an expression of opinion and frustration with the number of emails he received from a creditor. He neither disrespected nor threatened the school. His First Amendment rights were violated and he was silenced. This matter shows how ambiguous and discretionary rules can lead to constitutional violations.

Another student was disciplined by his community college for sending e-mails inviting his classmates to join him in taking a class at a different college. Later, that student was placed on disciplinary probation and prohibited from emailing his fellow students. This student was denied his due process rights and found guilty of "hazing, obstruction or disruption of teaching,

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[26] Letter from CVCC Vice President of Student and Technology Services to Marc Bechtol (October 14, 2011) (on file with The Foundation for Individual Rights in Education).
[27] Id.
[28] Id.

disorderly conduct, and failure to comply with directions of a college official".[29] However, the school later dismissed the allegations. Students cannot be disciplined for online speech that the school simply disagrees with and does not offend or target others.

A university student was disciplined for positing a message on Facebook calling a fellow student "a jerk and a fool". The student complained to the University about the comments made about him and the school responded by charging the student who posted the Facebook comment with harassment through "personal abuse". This student's speech rights were violated. The Disciplinary board held that his Facebook post did not violate the Universities school of conduct. This matter demonstrated that ambiguous and overbroad school code of conduct policies can be abused and include other speech as violations that are not.

In J.S. v. Blue Mt. School District, an eight-grade student was disciplined when she created a fake profile on MySpace of her school principal. J.S. created the profile on her parent's computer in their home.[30] The Court stated that the profile page contained crude and vulgar language directed at the principal and his family.[31] Defendant testified that she created the profile merely as a joke between herself and her friends.[32] The school responded to this student's act by suspending the student for ten days and prohibited Defendant from attending the school dance.[33] Mr. McGonigle was furious and even contemplated pressing charges against Defendant. State Police informed Mr. McGonigle that the charges would likely be dropped, but the State Police offered to bring in Defendant to let them know how serious this situation was.[34] The school

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[29] Victory at St. Louis Community College, January 29, 2008, http://thefire.org/article/8887.html
[30] J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915 at 920 (3d Cir. Pa. 2011).
[31] Id.
[32] Id. at 921.
[33] Id. at 922.
[34] Id.

district asserted that the MySpace profile caused disruption to the school, because there were "general 'rumblings' in the school regarding the profile" and two teachers advised the principal that students were discussing the profile.[35]

The substantial disruption standard developed by Tinker did not enumerate what actions would be considered disruption in the school. Here, the fact that the students were talking about the profile page during class time was enough for the School District to find that this qualified as a substantial disruption. It is not unusual for students to talk during class time, even one of the teachers here admitted that "talking in class was not a unique incident." [36]

The Court began its analysis of school regulation of student speech by "recognizing the 'comprehensive authority' of teachers and other public school officials".[37] The courts often defer to school administrators, because they are responsible for educating children and witnessing their behavior first hand.[38] However, "the First Amendment unquestionably protects the free speech rights of students in public school."[39] Nevertheless, "the constitutional rights of students in public schools 'are not automatically coextensive with the rights of adults on other settings'".[40]

Since Tinker, the Supreme Court has carved out exceptions to the regulating student speech that does not comply with the substantial disruption standard. As stated in the aforementioned paragraphs, the Supreme Court permitted a school to discipline a student for speech that a school finds to be "lewd, vulgar, indecent and plainly offensive."[41] Additionally,

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[35] J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915 at 922.
[36] Id. at 923.
[37] Id. at 925.
[38] Id. at 926.
[39] Id.
[40] Id. at 926 (quoting Fraser, 478 U.S. at 682).
[41] Id. at 927.

the Supreme Court allows school administrators to punish school-sponsored speech, "that a reasonable observer would view as the school's own speech."[42]

"J.S.'s speech did not cause a substantial disruption in the school."[43] Furthermore, the Court here refused to sustain J.S.'s punishment, because the school did not demonstrate that Defendant's actions "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[44] The school had to show that substantial disruption would have occurred, not that substantial disruption did actually occur. It is a high burden for schools to forecast what may cause disruption in the school in the future, but schools cannot just punish their students for posting messages that they disagree with or dislike.

Here, J.S. created the MySpace profile of her principal as a joke and the court acknowledged that she attempted to limit access of the profile to her friends. The principal's photograph was on the page, but his name and school were not listed.[45] The Court asserted that there is no question that the profile was vulgar, however the page "was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did."[46] Substantial disruption did not occur here when a few moments of talking about the profile occurred at the school. The Court did not apply this matter to Tinker, because an " 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression'."[47] Here, because the profile was unrealistic and unlikely to be mistaken for something that could be true about the principal, the court held that it could not be

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[42] Saxe v. State College Area School Dist. 240 F.3d 200 at 214 (3d Cir. 2011).
[43] J.S. v. Blue Mt. Sch. Dist., 650 F.3d at 928.
[44] Tinker, 393 U.S. at 514.
[45] J.S. v. Blue Mt. Sch. Dist., 650 F.3d at 929.
[46] Id.
[47] Id. (quoting Tinker, 393 U.S. at 508).

reasonably foreseeable to cause a substantial disruption.[48] If anything, it was the principals handling and response of the matter that worsened the problem rather than addressing it quietly.

In Fraser, the Court carved out an exception to Tinker in permitting a school to punish a student when the substantial disruption standard has not been met when the speech is lewd or vulgar. However, the Fraser exception does not apply to off-campus speech.[49] In Morse, the Court stated that "Had *Fraser* delivered the same speech in a public forum outside the school context, he would have been protected".[50] Therefore, the Court in Fraser and Blue Mountain School District cannot justify punishing a student for off-campus speech even if the speech is deemed to be vulgar. [51] "Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school sponsored or at a school sponsored event and that caused no substantial disruption at school."[52]

The Court asserted that to sustain the punishment of J.S. "would significantly broaden school district's authority over student speech and would vest school officials with dangerously overbroad censorship discretion."[53] Here, the Court stated its concern of school's overreaching its authority to discipline students. This case was not cut and dry. J.S.'s conduct was unquestionably vulgar and caused some mild disruption in the school when students talked about what happened. However, the school attempted to create a nexus between these student's off-campus speech and the school. So many school districts have attempted to punish off-campus speech when the incident fell in a gray area. This case shows that schools cannot violate a student's constitutional rights even when the speech is in poor taste.

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[48] Id. at 930.
[49] J.S. v. Blue Mt. Sch. Dist., 650 F.3d at 931.
[50] Morse v. Frederick, 551 U.S. 393 at 394 (2007).
[51] J.S. v. Blue Mt. Sch. Dist., 650 F.3d at 931.
[52] Id. at 933.
[53] Id.

Problems arise because a clear line has yet to be established. Schools cannot take the standards outlined in Tinker, Fraser and Hazelwood and apply it to all situations that occur inside and outside the schoolhouse gates. This "Big Brother" application of the court rules would lead to broad discretion that would encompass all and any speech that is deemed to cause a disruption. "The substantial disruption standard is a meaningful compromise, where school officials must make a compelling demonstration how off-campus speech interferes with life on-campus."[54] Other factors need to be present before schools can expand their reach outside of the school environment and discipline students for their speech regardless of how inappropriate the speech is.

V. Cyber bullying, As a Special Case

Cyber bullying requires that we as a society pay extra attention to holding people of all ages accountable for the images that they post online. Cyber bullying is a new word for an old practice. Before cyber bullying became a household word that has grown steadily in the age of technology and social media, there was the "bully". A bully is a "blustering browbeating person; especially**:** one habitually cruel to others who are weaker".[55] A student was once bullied at school in person prior to the boom of the Internet. Cyber bullying is defined as "the electronic posting of mean-spirited messages about a person (as a student) often done anonymously".[56] School bullies, say mean spirited words in person. "But it never lasts as long as it does now, online."[57] Cyber bullies can post words and images that stay online for all to see. "The Supreme

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[54] Daniel J. Solove, School Discipline for Off-Campus Speech and the First Amendment, Huffington Post, June 20, 2011, et al.
[55] "Bully." Merriam-Webster Online Dictionary. 2013. http://www.merriam-webster.com (2 Jan. 2013).
[56] "Cyber bullying." Merriam-Webster Online Dictionary. 2013. http://www.merriam-webster.com (2 Jan. 2013).
[57] Jan Hoffman, Online Bullies Pull Schools Into the Fray, N.Y. Times, June 27, 2010.

Court has not yet addressed online student speech."[58] Lower court "rulings have been contradictory", and there is no official rule addressing the schools authority to discipline cyber bullies off-campus speech.

Students no longer use the Internet as an educational tool. Cyber bullying is a new phenomenon added to the harassment and degradation of others. When a student became angry with a teacher or a fellow student, words were used to express that anger in person. A few years only a few people who were present in the room knew ago harassing comments. Now, technology has made it possible to bully a person from the comfort of their home for the world to see and comment on. It is established that schools can discipline students for speech made on-campus or when the off-campus speech is connected to the school grounds. Even though the Supreme Court has not addressed the issue of off-campus speech, the Appellate Courts have weighed in on the authority of schools that extends to off-campus dialogue.

In Kowalski, a student created a MySpace web page called "Students Against Sluts Herpes", that was created to harass a fellow student.[59] The victim of the website complained to the school who suspended Defendant for "harassment, bullying, and intimidation."[60] The Schools Code of Conduct clearly outlined what constitutes bullying and the consequences of such actions. Defendant argued that her constitutional rights were violated because her speech occurred privately off-campus.[61] The Supreme Court has ruled that "public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying".[62] Bullying is a growing

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[58] Id.
[59] Kowalski v. Berkeley County Sch., 652 F.3d 565 at 567 (4th Cir. W. Va. 2011).
[60] Id. at 569.
[61] Id.
[62] Kowalski v. Berkeley County Sch., 652 F.3d 565 at 572.

concern in our schools that has caused the victims of bullies to become depressed and withdrawn. Examples of bullying have sadly been shown in the Columbine tragedy and other recent school shootings. The Court stated that "schools have a duty to protect their students from harassment and bullying in the school environment."[63] The Court stated that Defendant's speech caused the disruption that Tinker held was not protected by the First Amendment.

The vulgar and harassing comments are not allotted First Amendment protection merely because the website and speech occurred off-campus. This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about "habits and manners of civility" or the "fundamental values necessary to the maintenance of a democratic political system."[64] The Court also held that Defendant's speech on the MySpace webpage did reach the school, because a student accessed the website from a school computer during an after hours class.[65]

The Appellate Courts went even further to allow schools to regulate speech that is threatening. In Wisniewski v. Board of Education of Weedsport Central School District, the student in this case sent his friends via AOL instant messaging a post that depicted his teacher being shot and killed. The threatening message was brought to the teacher's attention and the student was punished. The student claimed that it was a joke and that he did not mean any harm.[66] Nonetheless, the student was suspended for a semester. Here, the Court held that Wisniewski's speech is not protected under Tinker, because his speech "crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and

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[63] Id.
[64] Id. at 573. (quoting Fraser, 478 U.S. at 681).
[65] Id. at 574.
[66] Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 at 36 (2d Cir. 2007).

substantially disrupt the work and discipline of the school'."[67] In Wisniewski, the Court held that a student's First Amendment rights are not protected when the online off-campus speech is used to threaten school personnel. In addition, the student had sent this threatening image to fifteen other students.[68] The off-campus speech is not protected when threats are used against others. Threats are serious and should not be disregarded based on where the threat was made. This is a case where the line between First Amendment rights and threats towards others is not gray. Schools do not overreach or expand their authority to discipline students when they make threatening and harassing comments that are used to incite others and cause disruption.

In J.C. v. Beverly Hills Unified School District, a student (Plaintiff) went to a restaurant with her friends and recorded a four -minute video on her personal device where the students were talking about a fellow student.[69] The students were calling the victim of the video a "slut" and used profane language during the making of the video.[70] The Plaintiff who recorded the video then posted the recording on the YouTube website.[71] Approximately, fifteen students saw the video the night it was posted.[72] Accordingly, the video came to the attention of the school that subsequently punished Plaintiff. Plaintiff argues that her First Amendment rights were violated when she was punished for making the YouTube video and posting it on the Internet.[73]

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[67] Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 at 39. (quoting Tinker, 393 U.S. at 513).
[68] Id. at 36.
[69] J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 at 1098 (C.D. Cal. 2010).
[70] Id.
[71] Id.
[72] Id.
[73] J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 at 1100.

The Court did not accept Plaintiff's argument that the school could not discipline her because the video was created off-campus.[74] The Court holds that the "geographic origin of the speech is not material."[75] The Second Circuit has held that "a sufficient nexus exists where it is 'reasonably foreseeable' that the speech would reach campus.[76] Here, the Court stated that if it were to adopt the Second Circuit's approach then the YouTube video is sufficiently connected to the school.[77] The Court analyzed that the video made its way onto the school grounds when the victim of the video made the school aware of the recording and that the video was viewed on school grounds.[78] The Internet makes it more possible that a nexus exists between off-campus and on-campus speech.[79] Lastly, the Court states that the "content of the video increases the foreseeability that the video would reach the school."[80] The students in the video called their classmate a 'slut,' 'spoiled,' and an 'ugly piece of shit'.[81] The Court notes that since these comments are so derogatory that it is no surprise that a parent would find out about it and report it to the school.[82] Therefore, the Court found that a link between the off-campus and on-campus speech existed.

However, the Court ruled that "there was no substantial disruption, or reasonably foreseeable risk of substantial disruption, of school activities as a result of the video, and thus, discipline of [J.C.] violated the First Amendment."[83] Consequently, Plaintiff's suspension was overruled and her constitutional rights were violated. "The Court accepts that C.C. was upset, even hysterical,

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[74] Id. at 1107.
[75] Id. at 1108.
[76] Id. at 1107.
[77] Id. at 1108.
[78] Id.
[79] Id.
[80] Id.
[81] Id.
[82] Id.
[83] J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 at 1108.

about the YouTube video, and that the School's only goal was to console C.C. and to resolve the situation as quickly as possible. Unfortunately for the School, good intentions do not suffice here."[84] This school's authority to punish a student for off-campus speech was not upheld and they could not regulate any speech that causes harm to another. "The Court is not aware of any authority . . . that extends the Tinker rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This Court declines to be the first."[85] This Court refused to consider the emotional harm that the victim of the video suffered.

This case may have been decided differently if the Kowalski court heard the matter. This video was posted for the general public to see. As in the Kowalski, the student was ridiculed and humiliated on the Internet. In Kowalski, the student violated the student code of conduct. Furthermore, the webpage was found to harass and bully a student. In J.C. v Beverly Hills, the Plaintiff is blatantly harassing and bullying a fellow student. This court has set a terrible precedence that allows students to post YouTube videos degrading their fellow classmates without being reprimanded. Perhaps this court would have decided differently if the school had a stronger and clearer code of conduct.

Suicides have been linked to Cyber bullying even though nothing definitive has been established. The suicide rate of teenagers who are victims of cyber bullies has grown over the past few years. The Cyber Bullying research Center found that one in five middle-school students have been victims of cyber bullying.[86] Tyler Clementi was an 18-year-old Rutgers University student who killed himself after discovering that his roommate, Dharun Ravi, had

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[84] Id. at 1122.
[85] Id. at 1123.
[86] Jan Hoffman, Online Bullies Pull Schools Into the Fray, N.Y. Times, June 27, 2010.

secretly recorded him. Tyler was in their dorm room engaged in a private moment with another man. Mr. Ravi recorded the private moment on the Internet and told his friends to watch the video. This young man had his personal life posted online without his knowledge, which devastated him to the point where he took his own life. Mr. Ravi was charged, prosecuted and found guilty of many counts including bias intimidation. What is baffling is that the jury did not find that Mr. Ravi intended to intimidate Tyler on the first night that he recorded him. Mr. Ravi was not acting like an immature kid. He was a college student who appeared to understand what he was doing. Mr. Ravi purposely and knowingly set up his webcam to record Tyler and then posted it online. This act is at the core of what intimidation and cyber bullying means. When a person invades another's personal life and uses it to harm them. Nonetheless, the jury concluded that Tyler had reason to believe that he was targeted because he was gay. As a result, "the jury found that Mr. Ravi had known Mr. Clementi would feel intimidated by his actions."[87] I am left to wonder if Mr. Ravi would have received the same media attention and if he would have faced the same prosecutorial charges if Tyler did not commit suicide. Based on the cases cited in this paper, it is unclear if Rutgers University would have had the authority to discipline Mr. Ravi or if he would have received the same punishment.

Tragically, Tyler is not the only young person to take their own lives when becoming victims of cyber bullies. It is so easy to attack and ridicule a person over a social media webpage. It is hard to believe that cyber bullying has grown even worse, because more and more teenagers mistake humor for criminal activity. Audrie Pott was a 15-year-old high school student who was assaulted by three boys at a party. Audrie was intoxicated and unconscious when the assault took place. As if this young girl did not suffer enough, one of the boys took a picture of the

[87] Id.

attack and circulated the photograph among Pott's classmates. Audrie wrote on her Facebook page that it was the "worst day ever," "The whole school knows," and "My life is like ruined now."[88] It is not easy being a teenager and trying to be accepted can be emotionally taxing on any child. I cannot imagine how Audrie felt the moment she saw that not only was she assaulted but that her attack was photographed and sent to her friends and classmates. Like Tyler, Audrie was a victim of cyber bullying. Cyber bullies are using their social media networks and computers to intimidate and threaten those in a weaker position. Cyber bullying has created this new power that is difficult to control or monitor.

Our community has lost another young life over something that could have been prevented. Social media does not come with a warning label. This paper is not meant to address the sexual assault that was committed, but the fact that the attack was posted online for the world to see. Are teenagers really incapable of understanding that it is unacceptable to post pictures of a girl who was assaulted? Tyler and Audrie were forced into a weak position and taken advantage of. Cyber bullies turned their lives and circumstances into a laughing matter. Cyber bullying is a special case, because it can happen anonymously to anyone.

VI. Towards a Meaningful Legislative Response to Cyber Bullying and Protecting Students' Off-Campus Speech

Cyber bullying is a growing epidemic. Technology makes it possible to record and post a video in mere seconds. Speech that is meant to harass and degrade others should not be protected when it substantially disrupts the school and invades the victim's rights. Schools certainly do overstep the boundaries of speech that is constitutionally permitted, but a better standard needs to be developed. Educators have a tremendous amount of responsibilities that

[88] Sasha Goldstein, Audrie Pott's family calls for 'serious consequences' for the 3 teen boys charged in the sexual assault that led to her suicide, New York Daily News, April 15, 2013.

continue to accumulate as new issues arise. The courts need to clearly decide what the schools can and should be doing to protect their students from offensive speech committed off-campus.

Furthermore, schools cannot be given these responsibilities without being provided the resources and funds to implement the new rules and policies. It is clear that students need to be instructed on how to use social media and what is appropriate. Parents certainly need to be proactive and monitor what their children do on the Internet, however not all parents are able or even capable of understanding the effects of social media. Schools need to work with parents to combat the problem of student harassment.

States have begun to take action since the growing number of children suicides occurring in our elementary and high schools. Bullying is no longer confined to a single moment or writing on the bathroom wall. Those forms of bullying and harassment can be washed off the walls, but the emotional toll that it puts on young victims does not easily disappear. Nevertheless, the Internet and information super highway makes it even easier to harass with a click of a button and that single moment lasts longer and reaches more people. As a result, states have passed laws requiring anti-bullying policies in the public school system.

The New Jersey Legislature passed the "Anti-Bullying Bill of Rights Act," which states that the definition of "harassment, intimidation or bullying" is to:

> provide that an incident must either substantially disrupt or interfere with the orderly operation of the school or the rights of other students; and to add additional criteria to the definition - the creation of a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.[89]

[89] N.J.S.A. 18A:37-13.2.

In addition, this New Jersey bill also requires that school administrators respond to harassment, intimidation, or bullying that occurs "off school grounds."[90] Therefore, states such as New Jersey are taking this serious issue into their own hands and passing laws that do violate students First Amendment rights. However, it is difficult to argue that what the legislature is doing is wrong. Students in the aforementioned cases who created YouTube videos that insulted a fellow student would have been in violation of New Jersey's Anti-bullying statute, because the legislature extended a school's arm to reach off-campus speech. New Jersey is walking a fine line here, because in the goal of combating bullying in public schools across this State, the First Amendment is becoming less important. The Legislature is essentially trying to protect students from their selves.

The New Jersey legislators applied the Tinker substantial disruption standard to this bill. However, what constitutes disruption that warrants discipline? There is no clear rule that outlines this issue. The lower courts have based their decisions relying on the three major cases that set the guidelines for addressing First Amendment student speech rights. Tinker, Fraser and Hazelwood helped set the stage for determining the schools authority to punish student speech. However, none of these cases or any other Supreme Court case guides the States or lower courts on off-campus speech.

Off-campus speech is still a gray area, which causes schools to wrongfully discipline students and violate their First Amendment rights. In Saxe v. State College Area School District, the majority held that a Pennsylvania school district's anti-bullying policy was unconstitutional, because it was boundless.[91] The Court states, "its strictures presumably apply whether the harassment occurs in a school sponsored assembly, in the classroom, in the hall between classes,

[90] Id.
[91] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 at 214.

or in a playground or athletic facility".[92] In Saxe, the majority found that the policy exceeded the limits set in Hazelwood, because "it also sweeps in private student speech that merely 'happens to occur on the school premises'."[93] The policy was considered overbroad, but it also "ignores Tinker' s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it".[94] The spirit behind this policy is admirable, however if a statute is going to pass constitutional muster then it must be specific. Tinker has not been overruled, as such First Amendment rights do not stop at the schoolhouse gates.

VII. A legal standard for the Courts that will work to counter the bullying problem without violating constitutional rights

I propose that courts expand the Tinker standard when matters arise regarding student relations. The two prongs of Tinker outline the foundation of the law that must be applied to student First Amendment cases. To uphold the schools decision to discipline a students offensive speech there should be a connection between the off-campus speech and the school. The two prongs of Tinker need to be supplemented with other requirements that will protect students from abuse and harassment, yet not infringe on First Amendment rights of others.

The legal standard that should be implemented to combat cyber bullying without invading on First Amendment rights is to list what specific acts are not permissible when directed at students or faculty. Hate speech, words used to degrade and humiliate students should not be afforded First Amendment protection. The offensive videos, words and pictures do not contribute to the marketplace of ideas. The students committing theses horrendous acts are using social media

[92] Id. at 216.
[93] Id. (quoting Hazelwood, 484 U.S. at 271).
[94] Id. at 217.

networks as tools to intimidate others. This form of reprehensible behavior cannot be justified and defended.

The new legal standard that should be added to Tinker should include student speech that causes the victim humiliation and distress. A student suffers emotionally when a reasonable person would feel that their reputations were ruined and are made to feel weak and intimidated. Audrie Pott's wrote on Facebook that her life was ruined when those photographs of her assaulted were posted for her classmates to see. People's feelings and emotions are not a science. A school should have the authority to punish and prevent the escalation of cyber bullying and other offenses committed off-campus for at least the duration of student's educational beginnings from elementary school through high school. Parents and guardians need to work with the schools to assist in the growth and development of their children. Schools across the United States have established a zero tolerance policy when dealing with bullying.

Students are punished when they bully others on school premises, but courts are undecided about the prospect of upholding school discipline of off-campus speech that amounts to cyber bullying. On-campus bullying and off-campus cyber bullying accomplishes the same goal, which is to tease and intimidate others. Nevertheless, cyber bullying has lasting effects, because it can be communicated to many more people throughout the school and community. We cannot let atrocious behavior hide behind the positive force of the Constitution.

VIII. Conclusion

Lower courts have not been guided by one rule that can consistently be applied across the board. Indeed, every case is different. Nonetheless, schools should regulate student speech in the age of social media even when it occurs outside the schoolhouse gates. Students are mercilessly terrorized over the Internet. This form of speech cannot take comfort in First

Amendment protection. Students who think that posting degrading comments of a student on social media website clearly needs some guidance. Our ancestors fought for First Amendment rights. People were risking their lives to be able to speak up against the atrocities of government officials. The First Amendment is meant to protect our words and thoughts. However, those words that are written to intimidate others cannot be afforded the same protections of those who spoke up for equal wages in the workplace.

Students are under a tremendous amount of pressure to fit in and find their place. The pressures of teenage mediocrity are exasperated with the fear that someone will begin to banter them on Facebook. Students cannot be sheltered forever and eventually people will have to take responsibility for their own actions, but until then our educators need to be able to monitor their students conduct on social media. Too many young children are committing suicide or suffering in other ways from the bulling they encounter online. The Internet does reach the schools campus and therefore should give schools the authority to discipline.