Constitutional Law - Revising the Application of Tinker and Fraser in the Age of the Internet - J.S. Ex Rel. Snyder v. Blue Mountain School District, 650 F.3D 915 (3D Cir. 2011)

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Since the *Tinker v. Des Moines Independent Community School District* decision, the Internet has significantly impacted the ways that schools and students exchange information. School and home have long been considered separate entities, whereby students enjoy an extended veil of physical privacy shielding them once they leave school grounds. With the continual development of communication technology, especially social media, such a veil no longer shrouds students in an all-protective manner.
In *J.S. ex rel. Snyder v. Blue Mountain School District*, the United States Court of Appeals for the Third Circuit confronted the issue of whether speech, which occurred completely outside of the school, could be subject to either the *Tinker* or *Bethel School District No. 403 v. Fraser* restrictions on school speech. The court provided a thorough analysis, but failed to differentiate between the continually-accessible nature of online speech as opposed to standard forms of speech, such as the spoken word or physical documents. Given the challenges schools face in terms of regulating student speech that has the capacity to reach into the classroom, courts need to develop a more defined test than either *Tinker* or Fraser currently offer.

The *Snyder* incident began on Sunday, March 18, 2007 when J.S., an eighth-grade student at the Blue Mountain Middle School, used her home computer to create a fake MySpace profile for her school’s principal, James McGonigle, in retaliation for him disciplining J.S. for two recent uniform violations. The profile did not identify McGonigle by name, but included his official photograph from the school website, his occupation, and a reference to his wife’s name, who works as a guidance counselor at the same school. The structure of the profane-ridden profile suggested

unexceptionalists believe that proper analogies can be drawn between cyberspace and territorial legal rules. *Id.*


7 *Snyder*, 650 F.3d at 927-28 (discussing general rule laid out in *Tinker* and exception detailed in *Fraser*). The majority ultimately held that the *Tinker* exception did not apply because there was no reasonable fear of a substantial disruption, based on the “nonsensical” nature of the MySpace profile. *Id.* at 929-30. A MySpace profile is a social networking website that can be viewed by anyone who either types the proper Internet address or searches a term contained within the profile. *Id.* at 920-21. J.S. made the profile “private” on Monday, March 19, 2007, the day after she created it, after several students mentioned the profile to her in school. *Id.* The majority also determined that the *Fraser* exception should not come into play because “Fraser does not apply to off-campus speech.” *Id.* at 932.

8 See Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 870 (2010) (“The Internet obscures the boundary between on-campus and off-campus speech, leaving schools and courts to grapple with how to treat the ‘grey area’ created by the vast amount of online speech created off-campus that is accessed on-campus and affects students at school”), see also Interview with Hon. Thomas I. Vanaskie, *supra* note 3 (questioning whether where profile is created is relevant factor to evaluate).

9 See Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 153 (noting various approaches courts have adopted in dealing with internet-based speech). The three approaches all involve applying *Tinker* in different respects. *Id.* The first approach applies *Tinker’s* substantial disruption test only if the speech is viewed on campus, while the second approach applies the test in all circumstances. *Id.* The third approach treats all off-campus student speech as protected generally. *Id.*

10 *Snyder*, 650 F.3d at 920 (discussing factual background of case). The uniform violations occurred in December 2006 and February 2007, a few months before J.S. created the profile. *Id.*

11 *Id.* at 920-21 (noting contents of MySpace page). Moreover, it identified McGonigle as a
that McGonigle had sex in his office; that he was sexually attracted to
students and their parents; that he engaged in various types of sexual
activity, possibly even bestiality; and the profile ridiculed his son’s
appearance. The profile was initially fully accessible to anyone with the
Internet URL or who found it through a basic Internet search, but the page
was made “private” after several students approached J.S. at school on
Monday, March 19. Thereafter, twenty-two students from that school
district could view the full profile, but it could never be accessed from
school computers because there is no access to MySpace.

On Tuesday, March 20, McGonigle became aware of the profile
when a student brought it to his attention; McGonigle asked the student to
find out who created the profile. That student later reported J.S. as the
creator, and on Wednesday, March 21, the student provided McGonigle

b bisexual individual and called his wife the “FRAINTRAIN,” in an apparent sexual reference. Id. at
McGonigle’s wife, Debra Frain, is a guidance counselor at the school. Id. at 921.

12 Id. at 920-21. In the “About me” section of the profile, J.S. included the following paragraph:

HELLO CHILDREN[.] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick
PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal’s [sic] to be just like me. I know, I know, you’re all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who [ni] I care for so much)[.] For those who want to be my friend, and aren’t in my school[.] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN

Id. at 921 (alterations in original). The profile also included in its interest section: “detention,
being a tight ass, riding the train, 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. at 920.

13 Snyder, 650 F.3d at 921 (outlining when profile was openly available and when it was
made “private”). When a MySpace page is made “private,” it can only be viewed by those who
are given access by the profile’s creator. Id.

14 Id. (noting “no Blue Mountain student was ever able to view the profile from school”). See generally Amanda Lenhart, Teens, Cell Phones and Texting, PEW RESEARCH CENTER INTERNET & AMERICAN LIFE PROJECT, available at http://pewresearch.org/pubs/1572/teens-cell-
phones-text-messages (last visited February 18, 2012) (discussing wide-ranging use of cell
phones among teens). According to recent research, twenty-seven percent of teenagers use their
“multi-purpose” mobile phones to access the internet. Id. Moreover, twenty-three percent access
social networking sites, such as MySpace, by using their cell phones and other mobile devices.
Id. Although the Snyder court stated that “no Blue Mountain student” accessed the profile from
school, the court did not discuss the use of mobile phones on campus and was only referring to
access via school-owned computers. 650 F.3d at 921.

15 Snyder, 650 F.3d at 921 (reviewing McGonigle’s initial response to the profile).
McGonigle attempted to access the profile, but was unable to do so despite contacting MySpace
directly. Id.
with a printout of the profile that subsequently McGonigle showed to Superintendent Joyce Romberger, Director of Technology Susan Schneider-Morgan, and guidance counselors Michelle Guers and Debra Frain. On Thursday, March 22, McGonigle and Guers jointly met with J.S. to discuss the profile, which she initially denied creating, but later admitted to her involvement. The school suspended J.S. for ten days, which included her being barred from all school dances, and McGonigle also contacted MySpace to have the profile removed. J.S. appealed the suspension to the superintendent, but the request was denied.

As a result of the MySpace profile, the school district claimed that there were several incidents of both in-class and out-of-class disruptions that required corrective actions by teachers, and resulted in several counselors modifying their normal schedules. J.S., through her parents, filed a 42 U.S.C. § 1983 action in the United States District Court for the Middle District of Pennsylvania alleging violation of J.S.’s First Amendment rights. At the close of discovery, both parties moved for

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16 Id. (discussing who McGonigle consulted about profile). After meeting with these various school administrators and counselors, McGonigle determined the profile was a “Level Four Infraction under the Disciplinary Code of Blue Mountain Middle School” because it involved false accusations about a staff member and also violated copyright laws by unlawfully using his photograph from the school’s website. Id.

17 Id. at 922 (noting parties involved in initial meeting with J.S.). Although a second student, K.L., was also involved in making the profile and disciplined by the school, K.L. was not part of the 42 U.S.C. § 1983 action initiated by J.S. through her parents. Id. at 923.

18 Id. at 922.

19 Id. at 923.

20 Snyder, 650 F.3d at 922-23 (outlining profile’s effect on school activities). As evidence of the disruption, the school noted that two teachers approached McGonigle to discuss disruptions to their class due to J.S.’s posting of the profile. Id. First, Randy Nunemacher, a math teacher, stated that on one occasion he had to stop class for about five minutes when a group of roughly six students were discussing the profile. Id. at 922. On another occasion, Nunemacher had to tell two students to stop discussing the profile in class. Id. at 922-23. Although these disruptions were caused by the profile, Nunemacher stated that they were not unusual based on the normal interruptions that occur in his classes. Id. at 923. Angela Werner, another teacher, said she was approached by a group of girls about the profile, but that it was during independent work time, so the class was not disrupted. Id. Concerning the guidance counselors, Frain had to cancel several appointments to supervise a testing period that was originally assigned to Guers. Id. The change was necessary to facilitate the meeting between J.S., K.L., the parents, McGonigle, and Guers. Id.

21 Id. at 920, 923 (delimiting outset of procedural history). See generally 42 U.S.C. § 1983 (2006). The statute states in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper
summary judgment, and the court granted the motion in favor of the school
district, with the district court relying on Morse v. Frederick\(^{22}\) and Fraser,
while also acknowledging that Tinker is less applicable due to the out-of-
school nature of the speech.\(^{23}\) The Court of Appeals for the Third Circuit
heard the parents’ appeal and affirmed the lower court decision, holding
that the Tinker substantial disruption test applied because McGonigle
reasonably forecasted a substantial disruption based solely on the contents
of the profile.\(^{24}\) The United States Court of Appeals for the Third Circuit
voted to re hear the case en banc, thereby vacating previous Third Circuit
review and holding.\(^{25}\)

Starting with the 1943 seminal decision in West Virginia State
Board of Education v. Barnette,\(^{26}\) there have been a long series of cases
that have specifically dealt with the issue of a student’s right to free speech.\(^{27}\)
While Barnette dealt exclusively with school compelling speech,

\(\text{id.}\) The original claim included McGonigle and Superintendent Romberger, however, the two
were dropped from the suit via stipulation on January 7, 2008. Snyder, 650 F.3d at 923.
Moreover, the original claim alleged that the school’s policies were vague and overly broad, and
that the school had violated J.S.’s parents’ Fourteenth Amendment rights by disciplining her
when she was not under the supervision of school administrators or teachers. id. at 920.

\(^{22}\) 551 U.S. 393 (2007).

\(^{23}\) Snyder, 650 F.3d at 923-24 (noting findings and decision of lower court). The district
court held there was a sufficient connection between the off-campus speech and the on-campus
disruption based on the intended subject matter (the principal in his role as such), the intended
audience, the paper copy brought to McGonigle, the use of McGonigle’s picture from the school
website, the retributive reasons for creating the profile, J.S.’s original denial of creation, the
disruption to some school activity, and the viewing of the profile at the school by McGonigle. id.
Concerning the claim of an overly vague regulation, the court found the policy was sufficiently
narrow to include only the school grounds and school-related activities. id. Lastly, as to the
parents’ Fourteenth Amendment claim, the court found the punishment warranted, given that
Pennsylvania state law allows punishment of students when they are under the control of school
administrators or teachers, which applied in this case. id.

\(^{24}\) J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301-02 (3d Cir.) (noting
potential impact of profile’s language enough to forecast a Tinker substantial disruption), reh’g en
banc granted, vacated, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010). The
Third Circuit further affirmed the lower court on the overly vague nature of the school code and
the parents’ Fourteenth Amendment challenge. id. at 290.

\(^{25}\) See McCarthy, supra note 2, at 10.

\(^{26}\) 319 U.S. 624 (1943).

\(^{27}\) See, e.g., Morse v. Frederick, 551 U.S. 393, 397 (2007) (holding school’s confiscation of
banner at school event was not First Amendment violation); Hazelwood Sch. Dist. v. Kuhlmeier
484 U.S. 260, 273 (1988) (holding school may regulate school-sponsored speech for “legitimate
Tinker was the first case to determine when a school overextends its authority in suppressing student speech. In Tinker, three students were suspended when they wore black armbands into school to protest the Vietnam War; however, other students were free to wear other political symbols, including one associated with Nazism. In that case, the United States Supreme Court developed a constraint on a school’s authority to limit student speech, requiring a “substantial and material” disruption to the school’s mission, or reasonable forecast thereof, before the speech in question could be banned. The Court further held that “out of class” speech is also subject to the material disruption standard.

Seventeen years passed before the Court modified the Tinker standard, making the Fraser decision the first major exception to the “substantial disruption” principle. The defendant in Fraser gave a speech at a school assembly attended by many younger students, where he used pedagogical concerns’); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (contrasting vulgar and lewd student speech with typical protected speech in the school environment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (protecting students’ free speech rights where no substantial disruption to school activities reasonably predicted); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007) (holding student’s out-of-school speech may cause reasonable forecast of substantial disruption within school). The Tinker opinion eloquently summarized fifty years of precedent when it stated, “It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker, 393 U.S. at 506.

28 Barnette, 319 U.S. at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”) (emphasis added); Tinker, 393 U.S. at 509 (“[W]here there is no finding and no showing that engaging in the forbidden [speech] would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966))); see also S. Elizabeth Wilborn, Teaching the New Three Rs—Repression, Rights and Respect: A Primer of Student Speech Activities, 37 B.C. L. REV. 119, 130 (1995) (“Both Barnette and Tinker provide strong support to the proposition that student speech activity is entitled to robust First Amendment protection.”).

29 Tinker, 393 U.S. at 510-11 (discussing armbands as only controversial symbol banned).

30 Id. at 509 (noting standard of review requiring material and substantial disruption).

31 Id. at 513 (“But 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.”). Courts have been willing to apply the Tinker standard to speech that occurs outside of the school if there is a reasonable forecast that the speech will cause a substantial, in-school disruption. See I.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930-31 (3d Cir. 2011) (applying Tinker standard to out-of-school speech); Wisniewski, 494 F.3d at 38-39 (holding Tinker substantial disruption applies to off-campus speech); see also Tomai, supra note 4, at 119-20 (discussing blurring of in-school and out-of-school speech standard for Fraser exception as well).

sexual innuendos as part of a nomination speech and was subsequently suspended for his conduct.\textsuperscript{33} Although creating an exception to \textit{Tinker}, Justice Brennan’s concurrence limited its application to on-campus speech.\textsuperscript{34} Recently, the \textit{Morse} case, which involved speech that advocated the use of “bong hits,” reaffirmed the principal illustrated in Justice Brennan’s concurrence, noting that \textit{Fraser}’s application is limited to on-campus speech only.\textsuperscript{35}

Despite the holdings of \textit{Fraser} and \textit{Morse}, several circuits now face new challenges when cases arise from speech that occurs over the Internet.\textsuperscript{36} In \textit{Wisniewski v. Board of Education of Weedsport Central School District},\textsuperscript{37} the United States Court of Appeals for the Second Circuit confronted a case of Internet speech that reached campus only by the request of school officials.\textsuperscript{38} The court held that it was “reasonably

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\item \textsuperscript{33} \textit{Id.} at 677-78. The speech itself contained several references to the nominee’s firmness “in his pants,” the fact he “drives hard, pushing and pushing until finally—he succeeds,” and twice mentioned words linked to sexual climax. \textit{Id.} at 687 (Brennan, J., concurring).
\item \textsuperscript{34} \textit{Id.} at 688 (Brennan, J., concurring) (“If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”); see also \textit{Tuneski, supra} note 9, at 161 (stating \textit{Fraser} does not “suggest that schools have authority to reach beyond campus”).
\item \textsuperscript{35} See \textit{Morse v. Frederick}, 551 U.S. 393, 405 (2007) (“Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”). As \textit{Morse} notes, the \textit{Fraser} exception relies upon the in-school nature of the speech, coupled with the necessary mission of a school to inculcate values that support proper public discourse. \textit{Id.} Although \textit{Morse} created a new exception based on the advocacy of illegal drug use at a school-sponsored event, its rule is fairly narrow. \textit{Id.} at 409-10. Justice Robert’s majority opinion in \textit{Morse}, citing \textit{Cohen v. California}, 403 U.S. 15 (1971), affirmed that a student’s rights outside of a school is equal to those of adults. \textit{Morse}, 551 U.S. at 405; see also \textit{Layshock v. Hermitage Sch. Dist.}, 650 F.3d 205, 216 (3d Cir. 2011) (“It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.”). After discussing the reach of \textit{Morse} and \textit{Fraser}, the Third Circuit in \textit{Layshock} read both cases to be limited to on-campus speech. \textit{Id.}; cf. Sean R. Nuttall, Note, \textit{Rethinking the Narrative on Judicial Deference in Student Speech Cases}, 83 N.Y.U. L. REV. 1282, 1317 n.185 (2008) (noting Justice Alito’s concurrence in \textit{Morse} as more expansive than Chief Justice Robert’s majority opinion).
\item \textsuperscript{36} See \textit{Tuneski, supra} note 9, at 153-58 (discussing various approaches taken by lower courts in applying \textit{Tinker} to Internet speech). \textit{Tuneski} outlines three approaches that have been developed to deal with \textit{Tinker} in off-campus settings. \textit{Id.} at 153. First, some courts have determined that if the speech, even if created outside of school, is accessed from a school computer, it falls into \textit{Tinker} and the school can therefore ban the speech if it creates a substantial disturbance. \textit{Id.} at 153-54. A second view regards Internet websites created out-of-school as totally independent entities and disregards whether they can be accessed or not. \textit{Id.} at 154-55. A third variation disregards the location and merely applies \textit{Tinker}, regardless of whether the speech ever enters the physical campus. \textit{Id.} at 155-56.
\item \textsuperscript{37} 494 F.3d 34 (2d Cir. 2007).
\item \textsuperscript{38} \textit{Id.} at 39 (holding transmission of teacher’s picture away from school property does not insulate student from discipline). In \textit{Wisniewski}, the school suspended the student after discovering that he had created an AOL Instant Messaging (“IM”) icon that depicted Philip
\end{itemize}
foreseeable” the speech would come to the school’s attention; therefore, the forecast of a substantial disruption by school officials was proper once they became aware of the speech. The Wisniewski court interpreted the Tinker decision broadly, holding that it be reasonably foreseeable that the speech could arrive on campus, regardless of where the speech occurred, who was able to view it, and from where. Moreover, there is a division among district and circuit courts regarding the application of Tinker to off-campus speech generally, calling into doubt whether the material and substantial disruption test should even apply. The Snyder court opened its analysis by noting that courts have given wide authority to teachers and school administrators when it comes to the role of public schools in forwarding their educational mission, but that the authority is not “boundless.”

VanderMolen, an English teacher, being shot in the head. Id. at 36. Fifteen students outside of the school viewed the icon and there was no evidence the icon was ever viewed from a school computer, aside from the requests of the teacher or administrators. Id. 39 Id. at 39-40. The court held that the icon created a reasonably foreseeable disruption because it was highly likely to come to the attention of the school: it involved a teacher, was explicitly violent, the student intended for it to reach other students, and it was in circulation for three weeks. Id. The court noted that once the school became aware of the icon depicting a teacher being shot in the head, it was reasonable in forecasting a substantial disruption. Id. at 40.

40 Id. at 40. (“These consequences [of communication to the school and the risk of a substantial disruption] permit school discipline, whether or not [the student] intended his IM icon to be communicated to school authorities, or, if communicated, to cause a substantial disruption.”). In Snyder, the court also noted that the judiciary must carefully balance the occasionally competing values of school administrators’ authority and students’ First Amendment rights. Snyder, 650 F.3d at 926-27 (discussing development of case law regarding student speech). See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (discussing Barnette decision); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding compulsory pledge of allegiance ceremony violated student’s First Amendment rights). The Snyder court also noted that the judiciary must carefully balance the occasionally competing values of school administrators’ authority and students’ First Amendment rights. Snyder, 650 F.3d at 926.
speech in *Tinker*, the court noted that First Amendment protections have been widely applied to student speech, regardless of the speech’s nature.\(^{43}\) Cases such as *Fraser*, *Hazelwood*, and *Morse* have carved out narrow exceptions to the general protection when student speech infringes on educational values and norms, such as protecting students from lewd speech or speech that promotes illegal activity.\(^{44}\) The court then went on to note that no “substantial disruption” occurred as a result of the speech; therefore, the analysis focused on the forecast of a “substantial disruption,” identical to the review the *Tinker* court engaged in forty years prior in the midst of the Vietnam War.\(^{45}\) In applying the *Tinker* framework, the *Snyder* court noted that the MySpace profile could only be accessed by a few students, lacked any identifying information about McGonigle, was inaccessible from school computers, and only arrived on school property in a printout format when McGonigle requested a student bring it to the school.\(^{46}\) Furthermore, the court determined that the profile was a “joke.”

\(^{43}\) See *Snyder*, 650 F.3d at 926-27 (discussing application of *Tinker* standard to student speech not political in nature); see also *Wilborn*, supra note 28, at 144 (“Neither the advocates nor the critics of the *Fraser/Hazelwood* analytical framework have adequately identified the central problem with a test that focuses on the effect of speech on a school’s curriculum or whether the speech activities might be attributed to the school: the test treats all student speech the same . . . .”).

\(^{44}\) *Snyder*, 650 F.3d at 927 (outlining three exceptions to student speech); Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675, 685 (1986) (not extending First Amendment protections to lewd, indecent, or plainly offensive speech); *Morse* v. *Frederick*, 551 U.S. 393, 396 (2007) (noting school’s interest in dissuading promotion of drug use during school-sponsored events). Although the *Snyder* court notes another exception created by *Hazelwood*, it was not relied upon in this case because there was no contention that the school “sponsored” the speech in any manner. *Snyder*, 650 F.3d at 927. Moreover, the court read the *Morse* decision in a narrow sense and relied heavily upon Justice Alito’s concurrence, which distinguished speech occurring in school from speech occurring outside of school. *Id.* (citing *Morse*, 551 U.S. at 424-25 (Alito, J., concurring)).

\(^{45}\) *Snyder*, 650 F.3d at 928 (noting there is no dispute regarding a “substantial disruption” and analyzing forecast of a disruption) (citing *Tinker*, 393 U.S. at 514). The *Snyder* court summarized the holding of the *Tinker* case, noting that a review of those facts “fail[ed] to yield evidence that school authorities had reason to anticipate that the wearing of the armbands . . . would substantially interfere with the work of the school.” *Id.* at 928 (quoting *Tinker*, 393 U.S. at 509). The *Tinker* case arose during the Vietnam War when the United States had just committed 200,000 additional troops as part of Operation Rolling Thunder. *Id.* In his dissent, Justice Black outlined the contentious nature of the Vietnam War and how it had divided the country at that time. *Tinker*, 393 U.S. at 524 (Black, J., dissenting). Although there was a heated political environment, the Court held that the record failed to “demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514 (emphasis added).

\(^{46}\) *Snyder*, 650 F.3d at 929 (describing profile’s accessibility and content). The school also cited a string of cases where various circuit courts found a reasonable forecast of a disruption; however, the court differentiated the case at bar, noting the student in this case took steps to ensure the profile would not reach the school. *Id.* at 930-31 (“[The student] took specific steps to make the profile ‘private’ so that only her friends could access it. The fact that her friends happen
because it was so “juvenile” and “nonsensical” that it could not be—and, in
fact, was not—taken seriously by anyone.\footnote{47}

The Snyder court then turned to the Fraser exception to determine
whether the “lewd, vulgar and offensive” nature of the speech justified the
school in disciplining the student.\footnote{48} The court quickly disposed of this
argument, noting that Fraser has never been applied to off-campus
speech.\footnote{49} Although a physical copy did arrive on campus, the court blamed
McGonigle because he made the request to a student to bring a copy to him
for review.\footnote{50} Lastly, the court noted that allowing schools to punish
students for any speech deemed “offensive,” as long it was about
the school or a school official, would massively broaden Fraser.\footnote{51} Moreover,
allowing such action would deliver a serious blow to student speech
 occurring outside of the school, where it has the highest level of First
Amendment protection.\footnote{52}

The Tinker and Fraser frameworks were established well before
any notion of the Internet entered the court’s mind; however, given that
society has changed in some ways since those decisions, the applicable
frameworks must change as well.\footnote{53} In the Snyder decision, the majority
focused too heavily on where the speech occurred—schools need to have
broader authority in order to properly regulate potentially disruptive
speech.\footnote{54} Courts have struggled to determine whether Tinker even applies
to be Blue Mountain Middle School students is not surprising, and does not mean [the student’s]
speech targeted the school.”\footnote{47} Id. at 929-31 (noting contents were so outrageous as to make allegations contained therein
ridiculous). Although the school contended that the profile might have “aroused suspicions”
about McGonigle’s conduct, the court viewed the allegations contained in the profile as so
ridiculous that they could not be taken seriously. Id. at 930. Lastly, the court reasoned
that because the protest in Tinker raised a “highly emotional and controversial subject of the Vietnam
war,” which the speech in this case did not, the mere “humiliation” it caused McGonigle is not
sufficient to create a reasonable forecast of a disruption to the school’s mission. Id. at 929-31.

\footnote{48} Snyder, 650 F.3d at 932 (discussing whether the Fraser exception applies).

\footnote{49} Id. In discussing the inapplicability of the Fraser exception, the court reviewed Justice
Robert’s majority opinion in the Morse decision which relied upon the holding in Cohen v.
California, affirming “that a student’s free speech rights outside the school context are
coextensive with the rights of an adult.” Id. (citing Cohen v. California, 403 U.S. 15, 26 (1971)).

\footnote{50} Snyder, 650 F.3d at 932.

\footnote{51} Id. at 932-33 (discussing limited holding of Fraser and more recent cases applying same
standard).

\footnote{52} See id.

\footnote{53} See Tuneski, supra note 9, at 160-64 (discussing difficulty various courts have had
applying the Tinker standard to off-campus speech); Interview with Hon. Thomas I. Vanaskie,
supra note 3 (“I don’t think you can make [the inside-outside] distinction anymore. The point is
[the internet] is pervasive . . . To say that students didn’t use a class or school computer to create
the posting and nobody accessed within the school is [not relevant to the analysis].”).

\footnote{54} See McCarthy, supra note 2, at 13 (“If the Third Circuit does uphold the students in both
of these cases, it may become more difficult for school authorities to control student Internet
to both regular and Internet speech that occurs off-campus, thereby developing inconsistent rulings regarding the standard. The location of Internet speech should not be a sole determining factor as to the application of *Tinker* or *Fraser*. Courts should draw on relevant factors from each analysis to determine if the school has a valid interest in regulating the speech and whether there is a substantial disruption or a reasonable forecast thereof. Such factors would include the intended target or subject matter of the speech; the threat of disruption to the school mission, including investigation into accusations; the use of school property, including Internet resources; and the nature of the speech and whether it is vulgar, offensive, libelous, or defamatory.

First, the intended target and subject matter of the speech are relevant factors given that schools have a direct interest in investigating expression that is critical of school personnel or hurtful toward classmates. Indeed, school policies have not kept pace with technological advances in this regard.

55. *Snyder*, 650 F.3d at 937 (Smith, J., concurring) ("Lower courts, however, are divided on whether *Tinker’s* substantial-disruption test governs students’ off-campus expression."); *see also Tomain*, *supra* note 4, at 122-28 (discussing difficulties court has with Internet speech).

56. Interview with Hon. Thomas I. Vanaskie, *supra* note 3 (noting location of Internet speech as off-campus is an illusory and irrelevant distinction).

57. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39-40 (2d Cir. 2007) ("We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school . . . as have other courts . . . ."); *McCarthy*, *supra* note 2, at 12 ("As noted, *Fraser* remains the most ambiguous of the Supreme Court’s student expression rulings, which has spawned a range of lower court interpretations."). The author notes that a case out of the United States Court of Appeals for the Sixth Circuit held *Fraser* to be applicable to speech that interferes with a school’s mission generally, but a panel from the Second Circuit viewed *Fraser* narrowly as dealing only with sexually explicit or profane speech. *See McCarthy*, *supra* note 2, at 3 n.12. Although it is unclear how and when *Fraser* and *Tinker* will be clarified, a broad view of *Fraser* would provide schools more leeway in terms of limiting speech that is vulgar, offensive, defamatory, or libelous. *See Interview with Hon. Thomas I. Vanaskie, supra* note 3 ("[The analysis of student speech] is all within the context of things that happen in the school and the school administration should have effective remedies available to it . . . . [I]t is in the student’s best interest to understand that there are lines that you cannot cross—that there is a point where satire no longer exists and it just becomes wrong conduct.").

58. *Snyder*, 650 F.3d at 929 (looking to the totality of circumstances surrounding the MySpace profile); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) ("The blog posting directly pertained to events at LMHS, and Avery’s intent in writing it was specifically ‘to encourage her fellow students to read and respond.’"); *Wisniewski*, 494 F.3d at 38-39 (applying *Tinker* standard). Interview with Hon. Thomas I. Vanaskie, *supra* note 3 ("If we are going to use *Tinker* as the test [targeting the principal in his capacity as such] goes to the question of whether there is potential for substantial disruption of the school atmosphere and discipline. The student is] undermining the authority of the principal.").
accusations made against an authority figure, as well as disciplining students when they attack a school official in that capacity.\textsuperscript{59} The intended target and subject matter affect the analysis of whether the student had intended for the speech to reach onto school grounds.\textsuperscript{60} However, this factor should be limited only to school-related activities, employees, or events, and would not include personal criticism of school officials in other, unofficial capacities.\textsuperscript{61} Branching off of that aspect is the second factor, which deals with the potential for a substantial disruption created by a school’s duty to investigate accusations made against teachers, administrators, or other school officials.\textsuperscript{62} Given that the vast majority of students communicate through the Internet, it behooves the school to take seriously any accusations made in such a popular and widespread forum, and to properly discipline the students making those accusations.\textsuperscript{63}

\textsuperscript{59} See Wisniewski, 494 F.3d at 39-40 (discussing foreseeability that icon of teacher being shot would come to attention of school officials); Doninger, 527 F.3d at 49-51 (noting Internet post encouraged students to contact school official to “piss her off”).

\textsuperscript{60} See Snyder, 650 F.3d at 915 at 940 (Smith, J., concurring) (“Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech.”); Doninger, 527 F.3d at 50 (“The blog posting directly pertained to events at LMHS, and [the student’s] intent in writing it was specifically ‘to encourage her fellow students to read and respond.’” (quoting Doninger v. Niehoff, 514 F. Supp. 2d 199, 206 (D. Conn. 2007))); see also Wisniewski, 494 F.3d at 59 (“We are in agreement, however, that, on the undisputed facts, it was reasonably foreseeable that the [AOL Instant Messaging] icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.”).

\textsuperscript{61} See Morse v. Frederick, 551 U.S. 393, 405 (2007) (noting drug-related speech would be protected outside school environment); Interview with Hon. Thomas I. Vanaskie, supra note 3 (distinguishing being critical of a principal in his professional capacity rather than personal capacity).

\textsuperscript{62} See Snyder, 650 F.3d at 941 (Fisher, J., dissenting) (detailing accusations contained in MySpace profile). In Snyder, the principal stood accused of hitting on students and their parents, and having sex in his office. \textit{Id.} The dissent also noted that such accusations have a wider impact given that parents, other students, teachers, administrators, and the general public will all likely become aware of them. \textit{Id.} at 945-46. Such a disruption could reasonably cause a material and substantial disruption to the school’s mission. \textit{Id.} Also, J.S. did not make the profile “private” until several students approached her at school to speak with her about the profile. \textit{Id.} at 921; see also supra note 57 (noting context of school speech relevant to analysis). Judge Vanaskie further noted that the “substantial disruption” could come from a required investigation into the school official’s conduct. \textit{Id.} The judge used the example of Jerry Sandusky, the former Penn State coach charged with various child molestation and rape charges, as an instance of how a school needs to take all accusations against a teacher, administrator, or coach, seriously. \textit{Id.} Moreover, even if the accusations are baseless, one cannot evaluate them retrospectively, and must view the possible disruption from the eyes of an administrator at the outset of the investigation. \textit{Id.} See generally Lenhart supra note 14 (noting prevalence of Internet-capable cell phones in schools). The website could have been accessed via a student’s Internet-enabled cell phone without the use of a school computer, thereby entering the school. \textit{Id.}

\textsuperscript{63} See McCarthy, supra note 2, at 13 (“If the Third Circuit does uphold the students in both of these cases, it may become more difficult for school authorities to control student Internet expression that is critical of school personnel or hurtful toward classmates.”); supra note 57 (discussing school administration’s interest in disciplining offensive speech that involves school
The second two factors rely more heavily on Fraser, given that schools have an interest in regulating the use of their resources along with the nature of the speech in question.\textsuperscript{64} The third consideration should be the use of school resources, which could include a school website or email service.\textsuperscript{65} Although mere use of a school website might be a weaker factor than using its email service, the more exclusive the access to the site or technology, the more interest the school has in regulating its use.\textsuperscript{66} Lastly, a review of the nature of the speech would be warranted given that vulgar, accusatory, defamatory, or obscene speech—when directed specifically toward a coach, teacher, or administrator—raises the school’s interest in its regulation.\textsuperscript{67} Courts have looked to the nature of the speech and its
truthfulness, along with whether the student engages in any defamation concerning a school official’s reputation in the employment capacity.\textsuperscript{68}

On February 24, 2012, the \textit{Tinker} decision turned forty-two years old; on July 7, 2012, the \textit{Fraser} decision turns twenty-six years old. Every United States Supreme Court Justice involved in those two cases has either retired or is no longer living. Now is the time for a new generation of Justices, well versed in the complexity of the digital age, to take on the \textit{Snyder}, \textit{Wisniewski}, and \textit{Doninger} line of cases that have troubled the lower courts for nearly a decade. The Court must recognize today that the Internet is both a helpful and dangerous tool in forwarding a new generation of civil discourse for schools and students. Schools need the proper tools in order to shape and mold this new digital generation, while simultaneously protecting the sacred rights contained in the First Amendment. The factors outlined here provide the necessary regulations and protections in keeping with the spirit of the \textit{Barnette}, \textit{Tinker}, and \textit{Fraser} decisions.

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\textsuperscript{68} See \textit{Doninger}, 527 F.3d at 50-51 (“First, the language with which Avery chose to encourage others to contact the administration was not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy. Her chosen words—in essence, that others should call the ‘douchebags’ in the central office to ‘piss [them] off more’—were hardly conducive to cooperative conflict resolution.”). \textit{Snyder}, 650 F.3d at 945 (Fisher, J., dissenting) (noting offensive nature of speech linked to disruption). The dissent in \textit{Snyder} further reasoned that offensive speech has a broader impact in terms of interfering with a teacher, principal, guidance counselor, or other official’s ability to perform his or her job effectively. \textit{Id.} (“It was foreseeable that J.S.’s false accusations and malicious comments would disrupt [the principal’s] and [guidance counselor’s] ability to perform their jobs.”); see also note 62 and accompanying text.