

# THE FIRST AMENDMENT IMPLICATIONS OF FACEBOOK, MYSPACE, AND OTHER ONLINE ACTIVITY OF STUDENTS IN PUBLIC HIGH SCHOOLS

BRANDON JAMES HOOVER\*

## I. INTRODUCTION

The protections of the First Amendment are some of the most basic and fundamental rights guaranteed to all Americans. These protections, however, are not absolute. Although some surveys show that as many as sixty-nine percent of Americans are aware of the First Amendment right to freedom of speech<sup>1</sup>, it is doubtful that nearly as many Americans are aware of the limitations that have been placed on this enumerated fundamental right. For example, obscene speech<sup>2</sup>, commercial speech<sup>3</sup>, indecent speech<sup>4</sup>, speech tending to incite violence or an imminent response<sup>5</sup>, and various other forms of speech are not given full constitutional protection. In addition, the free speech rights extended to high school students in public schools are not co-extensive with the rights of adults. In 1969, the Supreme Court held, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>6</sup> However, since the decision in *Tinker*, the United States Supreme Court has consistently reduced students’ First Amendment free speech rights. The Court appears to have created a web of tests to determine whether high school students’ First Amendment rights have been

---

\* Judicial Clerk for the West Virginia Supreme Court of Appeals, 21st Circuit; J.D., Ohio Northern University; B.S., Frostburg State University (Law & Society, Political Science, & Sociology). Special thanks to Professor C. Antoinette Clarke, Ohio Northern University.

<sup>1</sup> See Press Release, McCormick Foundation, Characters from “The Simpsons” More Well Known to Americans than Their First Amendment Freedoms, Survey Finds (March 1, 2006), <http://www.mccormicktribune.org/news/2006/pr030106.aspx> (last visited Apr. 4, 2009).

<sup>2</sup> See *Roth v. United States*, 354 U.S. 476 (1957) (holding obscenity enjoys no First Amendment protection).

<sup>3</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (holding that a regulation on commercial speech may be upheld if there is a substantial government interest, if the regulation directly advances that interest, and if the regulation is the least restrictive means to advance that interest).

<sup>4</sup> See *Cohen v. California*, 403 U.S. 15 (1971) (holding that the First Amendment protects an individual’s right to wear an indecent jacket with the wording “Fuck the Draft”); *but see FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that indecent speech may be regulated if it is being broadcast, because of the pervasiveness of broadcast media).

<sup>5</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that speech advocating criminal acts may be punished if the speech was intended to incite imminent lawless action and such speech was actually likely to produce the action).

<sup>6</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

violated, and these tests tend to limit First Amendment rights as opposed to expanding those rights.

However, with the emergence of social networking websites, a new problem has emerged as to how to balance a student's free speech rights online with the school's interest in maintaining an educational learning environment. Several lower courts have attempted to deal with this issue. The United States Supreme Court has yet to speak on the issue. This Paper will first discuss the emergence of social networking websites and their popularity with America's youth. Further, this Paper will discuss the basic legal framework for analyzing free speech rights of high school students. This Paper will next consider a sampling of lower court decisions where students were punished in school for online postings and use of social networking websites. This Paper will conclude with an analysis of these cases, and whether they fit within the basic framework already established. Further, this Paper will discuss the on-campus, off-campus dichotomy of speech. Finally, this Paper will discuss whether the Court's current trend is the best approach in balancing a student's free speech rights against the school's educational mission.

## II. THE EMERGENCE OF SOCIAL NETWORKING WEBSITES AND THEIR EFFECTS

Over the past several years, social networking websites have made their debut, and appear to be here to stay. Currently, there are hundreds of social networking websites—the largest and most popular of which being MySpace and Facebook. MySpace is the largest social networking website, and it proudly boasts over one hundred million users.<sup>7</sup> MySpace was created in 2003 by Tom Anderson and Chris DeWolf.<sup>8</sup> It has grown to be the second most popular website on the internet, second only to Yahoo.<sup>9</sup>

The MySpace social networking website is only available for persons who are over the age of fourteen.<sup>10</sup> All MySpace users under the age of sixteen have their profiles set to private which means that only persons they choose to allow to view their page may do so. Aside from the profiles of those under the age of sixteen, MySpace profiles are readily viewable by anyone, unless the user specifically sets his or her page to a private status.<sup>11</sup>

Facebook was created by Mark Zuckerberg<sup>12</sup> and currently boasts a membership of nearly one hundred million users.<sup>13</sup> Facebook is a social

<sup>7</sup> Pete Cashmore, *MySpace Hits 100 Million Accounts*, MASHABLE, Aug. 9, 2006, <http://mashable.com/2006/08/09/myspace-hits-100-million-accounts/> (last visited Apr. 4, 2009).

<sup>8</sup> Elizabeth P. Stedman, *MySpace, But Whose Responsibility? Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363, 367 (2007).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* However, because no verification procedures exist, persons of any age can create a profile by entering a fictitious date.

<sup>11</sup> Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 98 (2006).

<sup>12</sup> *Id.* at 97.

<sup>13</sup> *Facebook by the Numbers*, FAST COMPANY, Dec. 19, 2007, available at [http://www.fastcompany.com/magazine/115/open\\_features-hacker-dropout-ceo-facebook-numbers.html](http://www.fastcompany.com/magazine/115/open_features-hacker-dropout-ceo-facebook-numbers.html) (last visited Apr. 4, 2009).

networking website that is made up of networks. Currently, over forty-seven thousand networks, consisting of schools, colleges, workplaces, and other areas, exist.<sup>14</sup> Additionally, Facebook is the sixth most trafficked website in America, and is the largest photo sharing website online, with over six million pictures being uploaded on a daily basis.<sup>15</sup> Further, over thirty billion Facebook pages are viewed each month.<sup>16</sup>

Facebook is set up so that profiles can only be readily viewed by persons within the same network. For example, a student who is a member of the Frostburg State University network can view the profile of anyone else in that network who has not set their profile to a private setting. However, should someone from another institution, such as Salisbury University, wish to view the profile of someone in the Frostburg network, a “friend” request must be sent, whereby the member of the Frostburg network could choose whether to allow the other person to view her page or not. Facebook pages can include extensive information about a person, if the user chooses to post it. For example, a Facebook page can contain the name, address, email address, academic information, birth date, political views, sexual orientation, relationship status, and pictures of the profile holder, as well as other information.<sup>17</sup> Facebook does not restrict access by age, but rather, eligibility is based on network status.

Because of the popularity and easy access to these social networking sites, many students are familiar with them, and have their own pages. These social networking sites, as well as online blogs and personal web pages, in some instances, have begun to create disruptions within the school setting. Certain students have even been suspended from school for information displayed on their personal social networking website pages that they created at home. Some of these instances have been raised as violations of the students’ First Amendment rights. A sampling of these cases will be highlighted in subsequent sections of this Paper.

### III. FRAMEWORK FOR ANALYZING FREE SPEECH RIGHTS OF STUDENTS

#### A. *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

##### 1. *Factual and Procedural Background*

The Court’s first opportunity to consider the applicability of the First Amendment protections to school students was presented in *Tinker v. Des Moines Independent Community School District*.<sup>18</sup> In *Tinker*, a group of citizens voiced their objections to the ongoing hostilities in Vietnam by wearing black armbands through the 1965 Christmas season.<sup>19</sup> School

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Usha Munukutla-Parker, *Unsolicited Commercial Email, Privacy Concerns Related to Social Network Services, Online Protection of Children, and Cyberbullying*, 2 ISJLP 627, 635 (2006).

<sup>18</sup> 393 U.S. 503.

<sup>19</sup> *Id.* at 504.

officials became aware of this plan and in response, adopted a policy to prevent students from wearing armbands in school. The policy provided that any student wearing a black armband would be asked to remove it. Should the student refuse to do so, the student would be suspended until the student consented to return to school without the armband.<sup>20</sup> Despite their knowledge of this policy, the Tinker children and others wore black armbands to school and were suspended on December 16, 1965, and did not return until school started in January of 1966.<sup>21</sup> Their parents brought a suit on their behalf under 42 U.S.C. § 1983 alleging a violation of their children's constitutional rights, and sought nominal damages and an injunction against the school board.<sup>22</sup>

At trial, the District Court dismissed the complaint and held that the school authorities had acted in a constitutionally reasonable manner to prevent a disturbance in the school.<sup>23</sup> However, the court recognized that wearing an armband was symbolic speech that would fall under the free speech clause of the First Amendment.<sup>24</sup> The Court of Appeals, sitting en banc, upheld the decision of the District Court without issuing a written opinion.<sup>25</sup> This case was then appealed to the United States Supreme Court.

## 2. *Opinion of the Court*

Justice Fortas delivered the opinion of the Court which began with the famous lines that would emanate in all future decisions regarding First Amendment rights of high school students: "First Amendment rights . . . 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."<sup>26</sup> The Court then determined that this case presented a problem that "lies in the area where students in exercise of First Amendment Rights collide with the rules of the school authorities."<sup>27</sup> Specifically, the Court noted that this particular case did not involve "aggressive, disruptive action or even group demonstrations,"<sup>28</sup> nor did it "intrud[e] upon the work of the schools or the rights of other students."<sup>29</sup>

The Court determined that in order for a school to limit a student's constitutional rights, the school officials must have a more legitimate reason than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>30</sup> Rather, the Court determined that the appropriate focus is whether the student engaging in the conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."<sup>31</sup> In this particular

---

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 505.

<sup>24</sup> *Tinker*, 393 U.S. at 505.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 506.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 508.

<sup>29</sup> *Id.*

<sup>30</sup> *Tinker*, 393 U.S. at 509.

<sup>31</sup> *Id.*

case, the Court determined that the actions of the Tinker children and other petitioners did not cause substantial or material disruptions in the schools.<sup>32</sup>

## B. *BETHEL SCHOOL DISTRICT NO. 403 V. FRASER*

### 1. *Factual and Procedural Background*

The next opportunity the Court had to consider free speech rights of students in public high schools occurred in *Bethel School District No. 403 v. Fraser*.<sup>33</sup> In *Fraser*, a high school student delivered a speech to approximately six hundred students.<sup>34</sup> The speech involved nominating a classmate to serve as an elected student officer. Throughout his speech, Fraser referred to the student he was endorsing “in terms of an elaborate, graphic, and explicit sexual metaphor.”<sup>35</sup> The concurring opinion of Justice Blackmun provided a portion of the speech given by Fraser.<sup>36</sup> Pursuant to the following disciplinary rule—“Conduct which materially and substantially interferes with the educational process is prohibited; including the use of obscene, profane language, or gestures”<sup>37</sup>—Fraser was suspended from school for three days and was removed from the list of persons who were eligible to speak at commencement. Following his suspension, Fraser sought review of his punishment by the school board, and the board upheld his punishment.<sup>38</sup>

Fraser’s father subsequently brought suit on behalf of his son, alleging a violation of Fraser’s First Amendment rights pursuant to 42 U.S.C. § 1983.<sup>39</sup> The District Court held that the school had violated Fraser’s rights to free speech because the school’s rule was vague and overbroad.<sup>40</sup> The District Court issued an injunction forbidding the school from removing Fraser’s name from the list of graduation speakers.<sup>41</sup> On appeal, the Court of Appeals affirmed the decision of the District Court, holding that the speech was indistinguishable from Tinker’s armband, and likewise it did not have a disruptive effect on the school.<sup>42</sup> The United States Supreme Court, however, reversed the decision.

### 2. *Opinion of the Court*

Justice Burger delivered the opinion of the Court which recognized that “the undoubted freedom to advocate unpopular and controversial views in

---

<sup>32</sup> *Id.*

<sup>33</sup> 478 U.S. 675 (1986).

<sup>34</sup> *Id.* at 677.

<sup>35</sup> *Id.* at 678.

<sup>36</sup> *Id.* at 687 (“‘I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.’ ‘Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.’ ‘Jeff is a man who will go to the very end—even the climax, for each and every one of you.’ ‘So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.’”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 679.

<sup>39</sup> *Fraser*, 478 U.S. at 679.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Subsequently, Fraser spoke at his high school graduation on June 8, 1983.

<sup>42</sup> *Id.*

schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>43</sup> The Court recognized that many speech rules exist in the United States.<sup>44</sup> Additionally, the Court recognized that the First Amendment generally offers vast protections in "matters of adult public discourse,"<sup>45</sup> however, adult protections do not necessarily have to be extended to children. The Court noted "the First Amendment gives a high school student the right to wear Tinker's armband, but not Cohen's jacket."<sup>46</sup>

The Court held that schools should be permitted to determine the lessons of conduct for students and that speech in schools cannot be conveyed in lewd or offensive ways. Next, the Court articulated that the Constitution does not compel teachers to surrender control of the school to the students. According to the Court, "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."<sup>47</sup>

### C. HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER

#### 1. Factual and Procedural Background

In *Hazelwood School District v. Kuhlmeier*,<sup>48</sup> student staff members of the school newspaper, *Spectrum*, brought an action against Hazelwood East High School for violation of their First Amendment rights. The *Spectrum* was a student-edited and student-written school newspaper that was published approximately once every two to three weeks.<sup>49</sup> The paper was published through funds given by the board of education, and was the product of the Journalism II class at Hazelwood East. The policy at Hazelwood East regarding publication required the Journalism teacher to submit the page proofs of the school newspaper to the principal of the high school for review before the pages were sent off to the publisher.<sup>50</sup> When the May 13 issue of the *Spectrum* was brought to the principal, he took issue with two of the articles that were to appear in the paper. One article detailed students' experiences with pregnancy, while the other article described the impact of divorce on students.<sup>51</sup>

The principal determined that there was not enough time to change the articles and still get it to the publisher on time. Therefore, he decided to pull the two pages where the pregnancy and divorce articles appeared.

---

<sup>43</sup> *Id.* at 681.

<sup>44</sup> *Id.* at 682 (such as rules prohibiting the use of "impertinent" speech during debate and also prohibiting the use of indecent speech).

<sup>45</sup> *Fraser*, 478 U.S. at 682.

<sup>46</sup> *Id.* (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979)). See also *Cohen*, 403 U.S. 15 (holding a jacket with the words "Fuck the Draft" was protected under the First Amendment).

<sup>47</sup> *Fraser*, 478 U.S. at 685.

<sup>48</sup> 484 U.S. 260 (1988).

<sup>49</sup> *Id.* at 262.

<sup>50</sup> *Id.* at 263.

<sup>51</sup> *Id.*

Student staff members brought this action seeking injunctive relief and monetary damages for the violation of their First Amendment rights.<sup>52</sup> The District Court concluded that no violation of the First Amendment had occurred.<sup>53</sup> On appeal, the Court of Appeals reversed and held that the school paper was a public forum and, as such, school officials could not censor the school paper unless the *Tinker* Test was satisfied.<sup>54</sup> The Court of Appeals determined that the school had not presented evidence to satisfy the *Tinker* Test, and, thus, the school had violated the students' First Amendment rights.

## 2. *Opinion of the Court*

Justice White delivered the opinion of the Court. In his opinion, he discussed the *Tinker* Test and noted that school boards, and not the federal courts, are best able to make decisions regarding students' free speech rights.<sup>55</sup> Justice White next considered the issue of whether the school newspaper may be considered to be a public forum and concluded that "public schools do not possess all the attributes of streets, parks, and other traditional public forums."<sup>56</sup> Hence, public schools and their facilities are not public forums.

The Court then concluded that the question presented in *Kuhlmeier* differed from the question presented in *Tinker*. The Court held that the issue in *Tinker* was whether a school had "to tolerate a particular student speech,"<sup>57</sup> and therefore differed from the issue in this case which is "whether the First Amendment requires a school affirmatively to promote particular student speech."<sup>58</sup> The Court noted that a "school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics."<sup>59</sup>

The Court ultimately held that the *Tinker* Test did not have to be the standard used in cases where a school used its name or finances for the dissemination of student expression. Finally, the Court concluded that the actions of the principal in this case were reasonable because he could have reasonably been concerned about "the privacy interests of the students' boyfriends and parents, who were discussed in the article, but were given no opportunity to consent to its publication or to offer a response."<sup>60</sup> Therefore, the Court reversed the decision of the Court of Appeals.

---

<sup>52</sup> *Id.* at 264.

<sup>53</sup> *Id.*

<sup>54</sup> *Kuhlmeier*, 484 U.S. at 264 (noting specifically that such public forum could only be censored when "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others").

<sup>55</sup> *Id.* at 266–67.

<sup>56</sup> *Id.* at 267.

<sup>57</sup> *Id.* at 270–71.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 272. These sensitive topics range from Santa Claus in elementary school to sexual activity in high schools.

<sup>60</sup> *Kuhlmeier*, 484 U.S. at 274.

D. *MORSE V. FREDERICK*<sup>61</sup>1. *Procedural and Factual Background*

At a school-supervised event to watch the Olympic Torch pass through Juneau, Alaska, a principal noticed some of her students carrying a banner and unwrapping it. The principal believed the message advocated illegal drug use, and she asked the students to take it down. One student refused. This student was Joseph Frederick who reported to school late that day, and met his classmates on the street to watch the torch relay. The banner he unfurled read “BONG HiTS 4 JESUS.”<sup>62</sup> The principal confiscated the banner and suspended Frederick for ten days because she thought the banner promoted illegal drug use.<sup>63</sup>

Frederick appealed his suspension but the punishment was affirmed on administrative appeal. The superintendent said that Frederick was punished because he advocated the use of illegal drugs. The message was “clearly disruptive of and inconsistent with the school’s educational mission to educate students about the dangers of illegal drugs.”<sup>64</sup> Following the administrative appeal, Frederick filed suit under 42 U.S.C. § 1983 alleging a violation of his First Amendment rights, for which he sought an injunction, compensatory and punitive damages, and attorney’s fees.

At the District Court, the school’s motion for summary judgment was granted and the court held that there had not been an infringement of rights. The District Court said that Principal Morse had an obligation and authority to stop this illegal message.<sup>65</sup> The Ninth Circuit Court of Appeals reversed, holding that the school had punished Frederick without demonstrating that his banner would have given rise to the risk of a substantial disruption.<sup>66</sup>

2. *Opinion of the Court*

Chief Justice Roberts delivered the opinion of the Court, first discussing the actual words displayed on Frederick’s banner—words that were offensive to some, funny to some, and had no meaning whatsoever to others, but words that appeared to advocate drug usage to Principal Morse.<sup>67</sup> The Court framed the issue as follows: “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”<sup>68</sup> The Court answered the issue in the affirmative.

The Court then considered prior school-related First Amendment cases. *Tinker* first provided that speech could only be suppressed if it would materially and substantially disrupt the work and discipline of the school.<sup>69</sup>

---

<sup>61</sup> 127 S. Ct. 2618 (2007).

<sup>62</sup> *Id.* at 2622.

<sup>63</sup> *Id.* at 2622–23.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 2624.

<sup>67</sup> *Morse*, 127 S. Ct. at 2625.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 2626 (citing generally *Tinker*, 393 U.S. 503).



The Court then discussed *Fraser* and recognized that the constitutional rights of students are not equivalent to the constitutional rights of adults; schools are special environments and the *Tinker* analysis is not absolute.<sup>70</sup> Next, the Court turned to *Kuhlmeier*, summarily dismissing it because “Frederick’s banner does not have the school’s imprimatur,” but finding the case important to the present one insofar as it shows that *Tinker* is not the only test available for restricting speech.<sup>71</sup> The Court next moved its analysis to discussing the limited Fourth Amendment rights that students have in high schools.<sup>72</sup>

Additionally, the Court focused on the fact that drug abuse is a major problem among school children in America and that America has strong anti-drug policies. Many schools provide programs aimed at educating students about the dangers of illegal drug use. For these reasons, the Court reversed the decision of the Ninth Circuit and held that the First Amendment does not require schools to tolerate expression that would contribute to the dangers of illegal drug use.<sup>73</sup>

#### IV. FIRST AMENDMENT CASES DEALING WITH SOCIAL NETWORKING WEBSITES AND OTHER ONLINE ACTIVITY OF HIGH SCHOOL STUDENTS

##### A. *BEUSSINK V. WOODLAND R-IV SCHOOL DISTRICT*

In this case, plaintiff Brandon Beussink filed suit because he believed his First Amendment rights had been infringed upon when his school district suspended him for ten days because his web page used crude language to criticize his high school.<sup>74</sup> The web page in question was created by Beussink outside of school. On the site, Beussink encouraged others to contact the principal to communicate their opinions about the school to him. Further, the page had a link directly to the high school’s web page.<sup>75</sup>

Several months after he posted this page, a classmate of Beussink’s who knew about the site, purposely accessed it and showed it to the computer teacher at the school. The computer teacher subsequently reported the page to the principal of the school who became upset and “made the decision to punish Beussink *immediately* upon viewing the homepage.”<sup>76</sup> Testimony provided to the District Court did not provide information on how many times Beussink’s page had been displayed at the school. However, the librarian did witness Beussink open the page, and the

---

<sup>70</sup> *Id.* at 2626–27 (citing generally *Fraser*, 478 U.S. 675).

<sup>71</sup> *Id.* at 2627 (citing generally *Kuhlmeier*, 484 U.S. 260).

<sup>72</sup> The Court cites *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (holding that “Fourth Amendment rights . . . are different in public schools than elsewhere”) and *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (holding that “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject”).

<sup>73</sup> The Court, however, refused to adopt a broader rule proposed by the school board that would make speech proscribable because it was plainly offensive.

<sup>74</sup> *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1178.

computer teacher allowed some of her students to access the page to view it later in the day. Additionally, another group of students found the page at some point in the day. However, all told, the computer teacher reported that no real disruption occurred in her class because of the page.<sup>77</sup> Beussink, however, was suspended ten days for his page and ultimately, he and his family brought this suit to enjoin the school district from enforcing his suspension, claiming it violated his First Amendment rights.<sup>78</sup>

In assessing the merits of the First Amendment argument, the District Court recognized the oft-quoted line in *Tinker* that “students do not shed their First Amendment rights at the schoolhouse gate.”<sup>79</sup> However, the court did recognize that the First Amendment rights of school students do not parallel those of adults. The court articulated that pursuant to *Tinker*, in order to justify a curtailment of the student’s free speech rights, the school must show that the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>80</sup> Further, the court noted that speech may be limited upon a fear of a disruption. However, the fear of the disruption must be reasonable.<sup>81</sup> The District Court determined that on the record present, Beussink would likely succeed on the merits of his First Amendment claim because the school district did not suffer a material or substantial disruption due to Beussink’s web page, and because the principal immediately after seeing the web page sought to discipline Beussink because of its *content* and *not* because of a *fear of disruption*.<sup>82</sup>

#### B. *EMMETT V. KENT SCHOOL DISTRICT NO. 415*

In *Emmett v. Kent School District No. 415*,<sup>83</sup> plaintiff Nick Emmett, an eighteen year old senior at Kentlake High School with a 3.95 grade point average and co-captain of the basketball team, created a web page from home with his home computer that was entitled the “Unofficial Kentlake High Home Page.” This page had disclaimers providing that the page was for entertainment purposes only and that the page was not associated with the school at all whatsoever.<sup>84</sup> When the school got word of the web page, it took issue with the obituaries posted on the page, and the poll on who would die next.<sup>85</sup> The news of the web page hit local news on Wednesday, February 16, 2000, reporting the site featured a hit list of people to be killed. That evening, the plaintiff removed his web page from the Internet.<sup>86</sup> The following day at school, the plaintiff was called to report to the principal’s office where he was placed on emergency expulsion “for

---

<sup>77</sup> *Id.* at 1179.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1180 (quoting *Tinker*, 393 U.S. at 506).

<sup>80</sup> *Tinker*, 393 U.S. at 509.

<sup>81</sup> *Beussink*, 30 F. Supp. 2d at 1180.

<sup>82</sup> *Id.*

<sup>83</sup> 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (The obituaries on the page were “written tongue-in-cheek, inspired, apparently, by a creative writing class last year in which students were assigned to write their own obituary.” Further, the list regarding who would die next referred to “who would be the subject of the next mock obituary.”).

<sup>86</sup> *Id.*

intimidation, harassment, [and] disruption to the educational process.”<sup>87</sup> Subsequently, the emergency expulsion was amended to a five-day suspension. Further, the plaintiff was not allowed to participate on the basketball team during this suspension.<sup>88</sup> The plaintiff subsequently filed for a temporary restraining order against the imposition of the suspension, claiming the suspension violated his First Amendment rights.

On the issue of the First Amendment, the District Court noted that the *Tinker* standard would be applicable. Thereby, “prohibition of expressive conduct is justifiable if the conduct ‘would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”<sup>89</sup> Further, the court articulated that *Tinker* has been clarified and modified by two subsequent decisions: *Fraser* and *Kuhlmeier*.<sup>90</sup> The court pointed out that *Fraser* allows a school district to punish students for use of sexually suggestive speech, and that *Kuhlmeier* allows regulation of publications in a school sponsored newspaper because the newspaper “was a nonpublic forum.”<sup>91</sup>

The District Court further noted that the present case differed substantially from both *Fraser* and *Kuhlmeier*. The case differed from *Fraser* because the “Plaintiff’s speech was not at a school assembly,” nor was it “in a school-sponsored newspaper” as in *Kuhlmeier*.<sup>92</sup> Further, the court noted that the web page in question “was not produced in connection with any class or school project”<sup>93</sup> and that “although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.”<sup>94</sup> Therefore, based on the given law, the District Court concluded that because the school did not demonstrate a material and substantial disruption, the plaintiff would have a high likelihood of success on the merits of his First Amendment case.<sup>95</sup>

### C. *KILLION V. FRANKLIN REGIONAL SCHOOL DISTRICT*

In this case, plaintiff Zachariah Paul was a student at Franklin Regional High School, and became upset with the school because he was denied a parking permit and because of the regulations placed on members of the track team.<sup>96</sup> In response to this, the plaintiff, at home, made a top ten list about the school’s athletic director that he emailed to his friends from his home computer.<sup>97</sup> The plaintiff never brought a copy of the list to school

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Emmett*, 92 F. Supp. 2d at 1090 (quoting *Tinker*, 393 U.S. at 509).

<sup>90</sup> Please note that at the time of this decision, the decision of *Morse v. Frederick*, the third clarification to *Tinker*, had not been handed down by the Supreme Court.

<sup>91</sup> *Emmett*, 92 F. Supp. 2d at 1090.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001).

<sup>97</sup> *Id.* The list read as follows: 10) The School Store doesn’t sell tw[i]nkies. 9) He is constantly tripping over his own chins. 8) The girls at the 900 #’s keep hanging up on him. 7) For him, becoming Franklin’s “Athletic Director” was considered “moving up in the world.” 6) He has to use a pencil to type and

because he had been warned about distributing a list he had written in the past.<sup>98</sup>

Several weeks after the plaintiff had written and emailed this list, several individuals found copies of the list in the teachers' lounge. This document was created because "an undisclosed student had reformatted Paul's original email and distributed the document on school grounds."<sup>99</sup> When the plaintiff was called to the principal's office regarding the paper, he admitted to creating it and emailing it from his home computer. However, he steadfastly denied bringing the email to school.<sup>100</sup> The principal asked him to bring a copy of the email to school the following day and allowed the plaintiff to return to class.

The following day, the plaintiff was called back to the principal's office and was informed that he was going to be suspended for ten days "because the list contained offensive remarks about a school official, the list was found on school grounds, and Paul admitted to creating the list."<sup>101</sup> Further, the principal felt the suspension was warranted because the plaintiff had engaged in verbal/written abuse of a staff member. Ultimately, the plaintiff filed a civil action seeking a preliminary injunction for the violation of his First Amendment right so that he could return to school immediately.<sup>102</sup>

On the First Amendment issue, the District Court reiterated the *Tinker* standard of material and substantial disruption and recognized that in order to prevail, "the school needed evidence that such disruption had occurred or was likely to occur."<sup>103</sup> The court recognized that *Fraser* provided that a school "may categorically prohibit lewd, vulgar, or profane language on school property"<sup>104</sup> and that under *Kuhlmeier*, "a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern."<sup>105</sup> Further, the court pointed out that if the case did not fall within *Fraser* or *Kuhlmeier*, then the case would be in *Tinker* territory.<sup>106</sup>

The District Court next turned its analysis to that of "substantial disruption." The court noted "that school officials' authority over off-campus expression is much more limited than expression on school grounds."<sup>107</sup> However, the court observed, the *Tinker* analysis has been applied to off-campus speech that has made its way onto campus grounds.

---

make phone calls because his fingers are unable to hit only one key at a time. 5) As stated in the previous list, he's just not getting any. 4) He is no longer allowed in any "All You Can Eat" restaurants. 3) He has constant flashbacks of when he was in high school and the athletes used to pick on him, instead of him picking on the athletes. 2) Because of his extensive gut factor, the "man" hasn't seen his own penis in over a decade. 1) Even if it wasn't for his gut, it would still take a magnifying glass and extensive searching to find it. *Id.* at 448 n.1.

<sup>98</sup> *Id.* at 448.

<sup>99</sup> *Id.* at 448-49.

<sup>100</sup> *Id.* at 449.

<sup>101</sup> *Id.*

<sup>102</sup> *Killion*, 136 F. Supp. 2d at 449.

<sup>103</sup> *Id.* at 452.

<sup>104</sup> *Id.* at 453.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Note that *Killion* was decided prior to the *Morse v. Frederick* decision of 2007.

<sup>107</sup> *Id.* at 454.

The court determined, though, that the school district did not meet the requisite burden to show that there was an actual disruption. According to the court, “[t]here is no evidence that teachers were incapable of teaching or controlling their classes because of the Bozzuto Top Ten list.”<sup>108</sup> Further, no one was threatened by this speech. Therefore, pursuant to *Tinker*, the material and substantial disruption requirement was not met.

The court next moved its analysis to a *Fraser*-style analysis. However, the court recognized that *Fraser* involved on-campus speech and that this case involves off-campus speech. Further, the court recognized that “courts considering lewd and obscene speech occurring off school grounds have held that students cannot be punished for such speech, absent exceptional circumstances.”<sup>109</sup> Therefore, on this basis, the court concluded that because the list was created in the plaintiff’s home, and because the creation of the list had nothing to do with a school activity, *Fraser* would not be directly applied because no exceptional circumstances were present. Therefore, the court concluded that the plaintiff’s First Amendment rights had been violated by the school district.<sup>110</sup>

#### D. *J.S. v. BETHLEHEM AREA SCHOOL DISTRICT*

In *J.S. v. Bethlehem Area School District*,<sup>111</sup> the plaintiff was an eighth grade student at Nitschmann Middle School. The plaintiff created a website entitled “Teacher Sux” on his personal home computer. This page consisted of “derogatory, profane, offensive and threatening comments, primarily about the student’s algebra teacher, Mrs. Kathleen Fulmer, and Nitschmann Middle School principal, Mr. A. Thomas Karsotis.”<sup>112</sup> Although the website had a disclaimer that read that by entering the website a visitor agrees not to report the website’s contents to the school, the website was in fact accessible by any person.

Specifically, the web page provided the following statements: “Mrs. Fulmer is a B\_\_\_\_, In D minor;” and 136 times, the page provided “F\_\_\_\_ You Mrs. Fulmer. You Are A B\_\_\_\_. You Are A Stupid B\_\_\_\_.”<sup>113</sup> There was another page about why Mrs. Fulmer should die, whereby the plaintiff solicited persons to donate money to pay for a hitman, and a diagram of Mrs. Fulmer with her head cut off and blood dripping from her neck.<sup>114</sup>

This website was viewed by many persons at the school, causing quite a disruption. Mrs. Fulmer took medical leave for the remainder of the year. Further, the school was viewed in a negative light in the community. After the school year ended, the plaintiff and his family received a letter from the school board informing them that the board was aware of the website and that the plaintiff was going to receive a three day suspension because of it. The school board later extended the suspension to ten days and began

---

<sup>108</sup> *Killion*, 136 F. Supp. 2d at 455.

<sup>109</sup> *Id.* at 456–57.

<sup>110</sup> *See id.* at 458.

<sup>111</sup> *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

<sup>112</sup> *Id.* at 850.

<sup>113</sup> *Id.* at 858–59.

<sup>114</sup> *Id.* at 851.

expulsion proceedings against the student.<sup>115</sup> Subsequently, the plaintiff commenced an action to assert that his punishment was in violation of his First Amendment rights.<sup>116</sup> The trial court upheld the punishment and concluded that a material and substantial disruption had taken place.

On appeal, the Pennsylvania Supreme Court analyzed the First Amendment issue on many levels, recognizing that the First Amendment is not absolute in its application. The court acknowledged the fact that “schools are given monumental charge of molding our children into responsible and knowledgeable citizens.”<sup>117</sup> The court first considered whether the plaintiff’s punishment could be upheld by virtue of it being a true threat. On this issue, the court declared, “[W]e conclude the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances.”<sup>118</sup> But, rather, the court concluded that his website, taken as a whole, was “sophomoric, crude, highly offensive and perhaps [a] misguided attempt at humor or parody.”<sup>119</sup>

This, however, did not end the court’s analysis. The court next considered whether the website was a material and substantial disruption of the educational process. Accordingly, the court noted that “school officials do not have to wait for possible harm or material disruption to come to pass before taking appropriate steps.”<sup>120</sup> Further, the court considered *Fraser*’s prohibition on lewd speech, and the court considered the location of the speech: whether the speech was on-campus speech or off-campus speech. Here, the court determined that although the speech in question was actually done off campus, “there is a sufficient nexus between the web site and the school campus to consider the speech as on campus.”<sup>121</sup> Specifically, the court held that “where speech that is aimed at a specific school and/or its personnel [and] is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”<sup>122</sup>

After making the determination that the speech was in fact on-campus speech, the court next grappled with which Supreme Court precedent this case fit most neatly under, and in doing so, the court concluded that “the type of speech at issue in this case straddles the political speech in *Tinker*, and the lewd and offensive speech expressed at an official school assembly in *Fraser*.”<sup>123</sup> The court then waffled as to which case this most closely fits under, and ultimately the court concluded that regardless of whether the present circumstances were analyzed under *Tinker* or *Fraser*, the student was justly punished, and his First Amendment constitutional rights had not been violated.<sup>124</sup>

---

<sup>115</sup> *Id.* at 852.

<sup>116</sup> *Id.* at 853.

<sup>117</sup> *Bethlehem*, 807 A.2d at 855.

<sup>118</sup> *Id.* at 859.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 865.

<sup>122</sup> *Id.*

<sup>123</sup> *Bethlehem*, 807 A.2d at 866.

<sup>124</sup> *Id.* at 868.

E. *J.S. v. BLUE MOUNTAIN SCHOOL DISTRICT*

In this case, the plaintiff and a fellow student created a profile page on MySpace of their principal, Mr. McGonigle. On this profile page, the students indicated that Mr. McGonigle “is a married, bisexual man whose interests include ‘fucking in [his] office’ and ‘hitting on’ students and their parents.”<sup>125</sup> In addition, the profile made derogatory comments about Mr. McGonigle’s family. When word of the profile spread throughout the school, the principal suspended the plaintiff for ten days because of the very upsetting nature of the profile. Subsequently, the plaintiff brought an action pursuant to 42 U.S.C. § 1983 for violation of his First Amendment rights.

The plaintiff’s main contention was that he was improperly punished for out of school conduct and speech. The court began by noting that even though this speech occurred off campus, the school may still “regulate this speech if it substantially disrupts school operations or interferes with the rights of others.”<sup>126</sup> The court next considered whether such a disruption had occurred at the school, and resultantly, the court noted that “at least some disruption [had] occurred at the school.”<sup>127</sup> Therefore, the court, on the record before it, denied the injunction on the basis that the plaintiff had failed to show a likely success on the merits of his case.

F. *REQUA v. KENT SCHOOL DISTRICT NO. 415*

In this case, plaintiff Gregory Requa was an eighteen year old senior at Kentridge High School. During the plaintiff’s junior year, some video footage of a teacher was taken, edited, graphics added, a musical soundtrack added, and was posted on YouTube.<sup>128</sup> Specifically, the video in question included “commentary on the teacher’s hygiene and organization habit [and] footage of a student standing behind the teacher making faces, putting two fingers up at the back of her head and making pelvic thrusts in her general direction.”<sup>129</sup> Additionally, a portion of the video, announced by text reading “Caution Booty Ahead,” included shots of the teacher’s buttocks as she bent over.<sup>130</sup>

The plaintiff admitted to having posted the video from his own home. News of the story hit local news a few months later and the video was aired. Shortly thereafter, the plaintiff removed the video from YouTube. Subsequently, the plaintiff was given a forty day suspension from school. When he had exhausted his administrative appeals, he filed an action for a temporary restraining order to have him placed back in the classroom, claiming that the school had violated his First Amendment rights by suspending him.

---

<sup>125</sup> *J.S. v. Blue Mountain Sch. Dist.*, No. 307cv585, 2007 WL 954245, at \*1 (M.D. Pa. March 29, 2007).

<sup>126</sup> *Id.* at \*2 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)).

<sup>127</sup> *Id.*

<sup>128</sup> *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1274 (W.D. Wash. 2007). YouTube is a website whereby users may upload amateur videos for others to view.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

On the First Amendment issue, the court noted that the school district reported that it punished the plaintiff, not for his speech, but for his conduct, specifically his conduct of the close-up shots of the teacher's buttocks and the pelvic thrusts in the video.<sup>131</sup> The court noted that the plaintiff presented no evidence that the school had in fact punished him for his speech, or that the school board saying it was punishing him for his conduct was pretextual.<sup>132</sup> The court further noted that all parties stipulated that the video was free speech. However, the court still analyzed the case under the *Fraser* and *Tinker* tests. Pursuant to *Fraser*, the court noted that the repeated footage of the teacher's buttocks with the booty rap song playing was lewd and offensive, and fell within the parameters of *Fraser*.<sup>133</sup> Further, regarding *Tinker*, the court held that there was "no difficulty in concluding that one student filming one student behind a teacher making . . . pelvic thrusts in her direction, or a student filming the buttocks of a teacher as she bends over in the classroom constitutes a material and substantial disruption to the work and discipline of the school."<sup>134</sup> Therefore, for all of the above reasons, the court concluded that the punishment of the plaintiff did not violate his First Amendment rights.

#### G. LAYSHOCK V. HERMITAGE SCHOOL DISTRICT

In *Layshock v. Hermitage School District*,<sup>135</sup> a seventeen year old student named Justin Layshock was punished by his school for out of school conduct. Layshock created a web page that was a parody of the school principal on MySpace.<sup>136</sup> Layshock created this MySpace profile at his grandmother's house using her computer.<sup>137</sup> The profile had a picture of the principal which had been copied and pasted from the school's web page. Additionally, the profile indicated that the principle liked to smoke "big blunts[.]" liked to drink from "big kegs[.]" and had been on a date with a "big hard-on."<sup>138</sup> Additionally, Layshock sent friend requests to various friends of his so that they too could add the profile to their pages. Eventually, most, if not all, of the students at the school were aware of the web page. In addition to Layshock's profile, there were at least three other parody profiles of the principal on MySpace at the time. These profiles also included vulgar and lewd language. Further, Layshock even showed this profile to friends of his at school, although he did not claim that he was the creator of the page.<sup>139</sup> This website caused the principal to be quite upset and ultimately, the school computer system was locked down so that students were only permitted to use computers at regularly scheduled activities in the computer lab. Beyond that, students were not permitted to

---

<sup>131</sup> *Id.* at 1277.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1279.

<sup>134</sup> *Requa*, 492 F. Supp. 2d at 1280.

<sup>135</sup> *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591 (2007).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*



use computers. Further, the school's computers were later disabled so that MySpace could not be accessed.<sup>140</sup>

Subsequently, Layshock and his mother were called to the principal's office. During this meeting, Justin admitted that he had made the profile. Nothing happened at this meeting regarding punishment. However, subsequent to the meeting, Layshock received notice that he was suspended from school. Layshock filed an action contending that his First Amendment rights had been violated by the school.

Regarding the First Amendment issue, the court first noted that "this case began with purely out-of-school conduct which subsequently carried over into the school setting."<sup>141</sup> The court next considered the application of the First Amendment to the high school setting and recognized that if speech does not fall within one of the exceptions to *Tinker*, then it is subject to the general rule of *Tinker*. The court recognized that under *Tinker*, "a mere desire to avoid discomfort or unpleasantness will not suffice."<sup>142</sup>

The court next considered the issue that the speech in question took place off of the school campus, and the court recognized that "the reach of school administrators is not strictly limited to the school's physical property."<sup>143</sup> However, to justify punishment of a student for his off-campus speech, the school must demonstrate an appropriate nexus between the speech in question and the school.<sup>144</sup>

Next, the court considered the application of *Tinker* and *Fraser*. The court determined that *Fraser* would not justify Layshock's punishment in this instance because "there is no evidence that Justin [Layshock] engaged in any lewd or profane speech while in school."<sup>145</sup> With regard to *Tinker*, the court concluded, "There are several gaps in the causation link between Justin's off-campus conduct and any material and substantial disruption of operations in the school."<sup>146</sup> Most notably, the court pointed out that the school never demonstrated it was Layshock's profile that caused the disruption. Further, even if it was Layshock's profile that caused the disruption, "no classes were canceled, no widespread disorder occurred, there was no violence or student disciplinary action."<sup>147</sup> Therefore, the court held that the school district had failed to show that Layshock's conduct created a material and substantial disturbance to justify punishment under *Tinker*.

## V. ANALYSIS

These cases all demonstrate an interesting trend in the law of the First Amendment. While the text of the First Amendment provides that

---

<sup>140</sup> *Id.* at 593.

<sup>141</sup> *Layshock*, 496 F. Supp. 2d at 595.

<sup>142</sup> *Id.* at 597.

<sup>143</sup> *Id.* at 598.

<sup>144</sup> *Id.* at 599.

<sup>145</sup> *Id.* at 600.

<sup>146</sup> *Id.*

<sup>147</sup> *Layshock*, 496 F. Supp. 2d at 600.

“Congress shall pass no law . . . abridging freedom of speech,”<sup>148</sup> the Court has never taken the view that this protection is guaranteed in all circumstances. School speech has been such an area, since the decision of *Tinker* in 1969.<sup>149</sup> Further, as the above case law shows, the Court has been more than willing to limit the rather broad *Tinker* holding that a school must show that a student’s speech is a material and substantial disruption in order to curtail that student’s First Amendment rights.<sup>150</sup> The Court, on each instance since the *Tinker* case, has chosen to limit *Tinker* as opposed to applying it as written. In *Fraser*, the Court carved out the exception for lewd, sexual, and profane speech.<sup>151</sup> Next, in *Kuhlmeier*, the Court carved out the exception for school-sponsored speech, or what may also be referred to as speech that includes the school’s imprimatur on it.<sup>152</sup> And, recently, the Court, in *Morse*, carved out a special exception stating a school may categorically prohibit speech dealing with pro-drug messages.<sup>153</sup>

The newest free speech issues before the Court will deal with students’ online activity. When these cases involve online activity conducted while the student is at school, the question is not all that difficult for the Court to ponder. The *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* decisions rather neatly cover all possible scenarios by which such a case may come down.

However, the greater question arises when the speech is speech done while the student is at home, completely off the school campus. This seems far more problematic when the school punishes the student for such speech. Courts appear to be somewhat reluctant to allow schools to punish students for such speech, although courts are becoming more willing to uphold these punishments.<sup>154</sup> The current test to allow such punishment is when there is a sufficient nexus between the speech and the school campus.<sup>155</sup>

Courts that have articulated this test have also held that where the student brings the speech onto campus, the regular First Amendment in high school analysis applies. However, the test articulated in this case is somewhat problematic because the courts have not necessarily implied whether that student in particular had to be the one to bring the speech to school, or whether the student is subject to punishment if anyone else brings it to school. It seems that it would be appropriate to punish the student pursuant to the *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* decisions if the student does, in fact, bring the speech in to school. However, if another student brings the speech in, it seems that this rule may be overly broad, as it does not seem just to curtail a student’s free speech rights when another student is the person causing the disruption. A better rule might be that the nexus has to be directly between the student bringing her speech into the school and the disruption taking place.

---

<sup>148</sup> U.S. CONST. amend. I.

<sup>149</sup> *Tinker*, 393 U.S. 503.

<sup>150</sup> See generally *Fraser*, 478 U.S. 675; *Kuhlmeier*, 484 U.S. 260; *Morse*, 127 S. Ct. 2618.

<sup>151</sup> *Fraser*, 478 U.S. 675.

<sup>152</sup> *Kuhlmeier*, 484 U.S. 260.

<sup>153</sup> *Morse*, 127 S. Ct. 2618.

<sup>154</sup> See *Bethlehem*, 807 A.2d 847.

<sup>155</sup> See *id.*

Further, the cases that have already been handed down create uncertainty as to whether *Fraser*, *Kuhlmeier*, and we can assume *Morse*, would be applicable. If these cases are read specifically, *Fraser* would apply only to in-school speech, as Fraser's speech was delivered in front of an auditorium full of students at school. One could not possibly fathom a more direct example of on-campus speech.<sup>156</sup> Further, *Kuhlmeier* dealt with a school-sponsored newspaper where the school's imprimatur appeared. Again, this appears to be a clear cut example of on-campus speech. However, one may make the argument that certain web pages that do not have disclaimers could be viewed as having the school's imprimatur on them. And, if so, then this more closely resembles the *Kuhlmeier* case.<sup>157</sup> However, as of today, a court has yet to handle a case of this nature; all the cases that have been reviewed dealing with online activity have disclaimers or are clearly parodies and do not have the school's imprimatur, and so would not cause a person to believe that it was the school's official page. Finally, in *Morse*, although the plaintiff was outside the school when he unfurled his banner, he was nevertheless attending a school-sponsored event—watching the Olympics travel through town.<sup>158</sup> He was on the street with the remainder of his classmates. Further, he was, for all intents and purposes, under the control of the school at the time he unfurled his banner. Therefore, it is questionable as to whether the school would be able, consistent with the First Amendment, to punish students for their off-campus speech pursuant to the *Fraser* or *Morse* decisions.

While it is understandable that occasionally a school must discipline a student for off-campus speech, it appears that such a trend should be the exception as opposed to the rule. It seems that the school is over-extending itself when it begins to police the activity of students for their free speech beyond school hours and school-sponsored activities. It seems that First Amendment jurisprudence is rather well-established, and perhaps a better way to handle such cases would be to work them through the already established First Amendment line of cases. For instance, if a student posted a parody page about a principal and the page involved slander, the slander line of cases would be a better approach. If the page constituted fighting words, then the fighting words doctrine should be applied. If the page contained obscene remarks, then the obscenity line of cases would be the best approach to take. Finally, if the page consisted of a true threat, then that line of cases should be followed.

## VI. CONCLUSION

In conclusion, as access to technology continues to increase for the American student, cases such as these will likely fill the dockets of the courts across our nation as students continue to press the boundaries of what conduct is acceptable under the First Amendment of the Constitution. As of now, the Court has only had limited opportunity to consider the

---

<sup>156</sup> See *Fraser*, 478 U.S. 675.

<sup>157</sup> See *Kuhlmeier*, 484 U.S. 260.

<sup>158</sup> See *Morse*, 127 S. Ct. 2618.

matter, and as such, the jurisprudential lines are not firmly drawn. However, as courts continue to consider this issue, it is imperative that they not lose focus of the fundamental importance of the First Amendment to the American landscape, especially in shaping the minds of our future generations.