TRACKING OFF-CAMPUS SPEECH: CAN PUBLIC SCHOOLS MONITOR STUDENTS' SOCIAL MEDIA?

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The U.S Supreme Court first articulated guidelines that govern student free speech rights in the landmark 1969 case, *Tinker v. Des Moines Independent Community School District.*[1] The Court in *Tinker* held that public school officials may discipline students for speech that causes a material and substantial interference with the learning environment and orderly work of the school.[2] There is some uncertainty about the application of *Tinker* to student expression that originates off-campus, especially in the area of student speech disseminated online through social media websites. In the absence of clearly defined limits on public school authority, some school districts have taken a proactive approach to the regulation of students' off-campus speech and have sought to affirmatively bring off-campus speech onto campus for the purpose of regulation under *Tinker*. The frequency of disciplinary actions against students for online speech will continue to grow as school administrators undertake greater efforts to increase the flow of actionable information to uncover wrongdoings. This heightened vigilance by school administrators, however, may lead to false positives and subject innocent students to unwarranted disciplinary action by school officials not well-versed in the law.

Based on the Supreme Court's student free speech jurisprudence, school districts may restrict student speech when the speech causes a material and substantial disruption at school or poses a foreseeable risk of serious disruption to the learning environment. Most of the current legal scholarship in the area of student free speech is focused primarily on identifying a clear standard to determine when school administrators are permitted to take disciplinary action against students for their off-campus online speech.[3]

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

[2] *Id.* at 513.

[3] *See, e.g.*, Harriet A. Hader, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B. C. L. Rev. 1563 (2009) (arguing that schools should apply a "supervision and control" test to determine whether a school has the authority to discipline a student for his or her online speech); Lindsay Gower*, Blue Mountain School District v. J.S. Ex Rel. Snyder: Will The Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?,* 64 ALA. L. REV. 709 (2013) (suggesting that courts require purposeful direction and dissemination of off-campus speech before applying Tinker's material and substantial disruption test); Benjamin L. Ellison, *More*

While legal commentators debate which First Amendment standard applies to off-campus student speech, the literature has largely ignored how public school officials have capitalized on the perceived uncertainty in this area of the law. Without clearly defined limits on their authority, public school officials are taking aggressive steps to gather information disseminated by students on social media accounts for the purpose of imposing discipline.

This paper examines whether school districts have any legal authority to conduct sweeping surveillance of students' online social media activity for purposes of collecting actionable information and imposing discipline. Part I of this article briefly summarizes the key U.S. Supreme Court cases addressing student free speech. Part II examines some recent lower court decisions applying the *Tinker* "substantial disruption" test to off-campus online student speech, and specifically focuses on the circumstances that will justify school discipline for postings made by students on their social media accounts. Part III discusses whether a continuous surveillance program, such as the one recently adopted by the Glendale Unified School District in California, is consistent with relevant student free speech jurisprudence. Part III then argues that public school officials lack authority to affirmatively monitor off-campus online student speech for purposes of uncovering actionable information. Part IV explores some of the broader policy concerns associated with public schools conducting broad surveillance of students' off-campus Internet speech.

I. BRIEF OVERVIEW OF STUDENT FREE SPEECH JURISPRUDENCE

The leading U.S. Supreme Court case addressing the First Amendment free speech rights of students is *Tinker v. Des Moines Independent County School District*.[4] In *Tinker*, school officials suspended students from a public high school for ignoring a school policy banning the wearing of black armbands to protest the Vietnam War. Analyzing the effects of the students' symbolic speech, the Court noted that their actions did not interrupt school activities or intrude in the lives of others, but merely caused discussion outside of the classrooms, without interfering with work or order within the school.[5] The U.S. Supreme Court held that school officials could not prohibit the students from engaging in the symbolic speech absent "any facts which might reasonably have led school authorities to forecast substantial

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Connection, Less Protection? Off-Campus Speech with On-Campus Impact, 83 NOTRE DAME L. REV. 809 (2010) (advocating a test in which protected off-campus speech would only be subject to school discipline if the speaker intends for the speech to reach campus, and it actually does reach campus).

[4] *Tinker*, 393 U.S. 503.

[5] *Id.*

disruption of or material interference with school activities."[6] The Court emphasized that the "mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint" would not justify school administrator's actions to limit the students' free speech rights.[7] Stating that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[8] the Court ruled that a student may express her opinions if she does so "without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[9]

The Court elaborated on the *Tinker* standard and recognized further restrictions on student speech in three subsequent cases, but none of these cases specifically addressed the extent to which schools can discipline students for off-campus speech. In *Bethel School District No. 403 et al. v. Fraser*, the Court held that schools may discipline students for the use of lewd, vulgar, and indecent speech at school.[10] In this case, Matthew Fraser delivered a speech at a high school assembly nominating a fellow student for elective office. During the entire speech, Fraser referred to his candidate "in terms of an elaborate, graphic and explicit sexual metaphor."[11] Fraser was suspended from school for violation of Bethel High School's disciplinary rule prohibiting the use of obscene or profane language or gestures. The Court upheld the school district's disciplinary action stating that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"[12] finding that the "determination of what manner of speech in the classroom or in school assemblies is inappropriate properly rests with the school board."[13] The Court held that the First Amendment did not protect offensively lewd, vulgar and indecent speech delivered by a student at a school assembly and that school officials acted within permissible authority in disciplining Fraser's offensive form of expression which undermined the school's basic educational mission.[14]

In 1988, the Supreme Court upheld a school's authority to regulate the content of student speech appearing in a school-sponsored publication. In *Hazelwood School District v. Kuhlmeier*,[15] the school principal eliminated

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[6] *Id.* at 514.
[7] *Id*. at 509.
[8] *Id.* at 506.
[9] *Id.* at 513.
[10] 478 U.S. 675 (1986).
[11] *Id.* at 677.
[12] *Id.* at 683.
[13] *Id.*
[14] *Id.* at 685.
[15] 484 U.S. 260 (1988).

material from a school-sponsored student newspaper that he reasonably believed was inappropriate for the maturity level of some readers. Staff members of the high school newspaper claimed their First Amendment rights were violated by the deletion. The Court found that, unlike *Tinker*, this case addressed "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[16] The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[17]

In 2007, the Supreme Court added one additional restriction on student speech by allowing schools to prohibit student speech that could reasonably be viewed as promoting the use of illegal drugs. *Morse v. Frederick*[18] involved a student's suspension after he refused the principal's request to take down a banner that he displayed at a school-sponsored and school-supervised event. Principal Morse regarded the banner, with the words "BONG HiTS 4 JESUS," as promoting illegal drug use and when the student refused to take down the banner, he was suspended.[19] The Court ruled that a school official may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.[20]

II. APPLICATION OF THE TINKER STANDARD TO OFF-CAMPUS ONLINE SPEECH

The U.S. Supreme Court has not directly addressed how its school speech standards apply to speech that is created off-campus and outside school supervision, and has merely acknowledged that "there is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[21] In 2012, the Court denied certiorari for a case addressing student free speech rights on the Internet and social media,[22] marking the third occasion where the Court declined to clarify the parameters

[16] *Id.* at 271.
[17] *Id*. at 273.
[18] 551 U.S. 393 (2007).
[19] *Id*. at 398.
[20] *Id*. at 403.
[21] *Id*. at 401. The Court also commented that "had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id*. at 405.
[22] Blue Mountain Sch. Dist. v. J.S. *ex rel*. Snyder, 132 S. Ct. 1097 (2012).

of a school district's authority to regulate off-campus online student speech.[23] As a result, there is some variation among the lower courts in how they apply the Court's student speech precedents to online speech that originates off-campus but somehow reaches campus or comes to the attention of school officials. Despite some differences in their approaches, however, nearly all federal courts have treated such circumstances as governed by the *Tinker* standard.[24] The following language from *Tinker* is often cited as support for applying the "substantial disruption" standard to student speech that originates off-campus:

> [C]onduct by the student, in class *or out of it* (emphasis added) which involves 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.[25]

A. *When Does Off-Campus Speech Cause a Substantial Disruption at School?*

The *Tinker* analysis focuses on determining what constitutes a "substantial disruption" and whether the facts demonstrate evidence that the off-campus speech has caused a serious disruption to the work and operations of the school. Where the actual disruption has not yet occurred but is reasonably anticipated, a student may be disciplined for the predicted effects of the off-campus speech provided that school officials are able to point to a specific reason they anticipate a substantial disruption. The courts generally agree that violent and threatening messages posted by students on their social media accounts create a substantial disruption, or pose a foreseeable risk of serious disturbance, to the school's learning environment.[26] If a school is confronted with a challenge to the safety of its students, school officials need not wait for an actual disturbance to materialize before taking action.

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[23] Doninger v. Neihoff, 642 F.3d 334 (2d Cir. 2011) (en banc), *cert. denied,* 132 S. Ct. 499 (2011); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011**)** *cert. denied* 132 S. Ct. 1095 (2012).

[24] *Kowalski*, 652 F.3d at 573 (requiring that off-campus student speech have a sufficient nexus to the school before applying *Tinker* standard); *Doninger*, 642 F.3d at 338 (requiring that it be reasonably foreseeable that student speech would reach the campus before applying the *Tinker* standard); J. S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 34, 39 (2d Cir. 2007) (where the court assumed, without deciding, that the Tinker standard applied).

[25] Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 513 (1969).

[26] *See, e.g.*,Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 772 (5th Cir. 2007).

The Ninth Circuit recently determined that it was reasonable for a school district to interpret a student's online messages about a school shooting as posing a serious risk of harm to the safety of other students. In *Wynar v. Douglas County School District*,[27] a high school student was suspended for sending violent instant messages from his home computer to his friends through his MySpace account, [28] bragging about the weapons he possessed and threatening to shoot specific classmates at the school on a specified date. His friends became alarmed and confided in a trusted coach who alerted the school principal and the student was thereafter suspended. The court concluded that when a school is faced with an identifiable threat of school violence, administrators may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*, stressing that there needs to be an "appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students."[29]

Courts have also concluded that the First Amendment does not protect online student speech that harasses and demeans a fellow student, finding that *Tinker* permits school officials to discipline for off-campus bullying speech that substantially interferes with another student's right to receive an education and ability to feel safe at school. In *Kowalski v. Berkeley County Schools*,[30] a high school senior was suspended from school for five days for creating a MySpace.com page from home that was dedicated to ridiculing Shay N., a fellow student. Shay N.'s parents, together with their daughter, complained to school officials and delivered a printout of the offending webpage to school officials.[31] After investigating the complaint, school administrators suspended Kowalski for creating the "hate website" in

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[27] 728 F.3d 1062 (9th Cir. 2013).

[28] *See* Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007) ("MySpace is a popular social networking website that allows its members to create online 'profiles' which are individual web pages on which members post photographs, videos and information about their lives and interests.").

[29] *Id.* at 1070; *see also* D.J.M. v. Hannibal Public School District, 647 F.3d 754 (8th Cir. 2011) (holding that student's online threats of physical violence caused substantial and material disruption to the work and discipline of the school and, as such, is not protected speech under the First Amendment); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (upholding suspension of student who created significant disorder at school after posting a threat to kill her teacher from her home computer); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (finding that school officials acted properly to suspend student who created online image from his home computer depicting the shooting of his English teacher);); Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (en banc) (ruling that a true threat of physical violence is generally not protected under the First Amendment).

[30] 652 F.3d 565 (4th Cir. 2011).

[31] *Id.* at 568.

violation of school policy against harassment, bullying and intimidation.[32] Kowalski sued the school for violating her free speech rights by punishing her for "off-campus, non-school related speech."[33] The Fourth Circuit ruled in favor of the school district, stating that Kowalski's activity fell within the realm of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of all of its students.[34] The court also noted that, had the school not intervened to prevent further abuse, the potential for continued and more serious harassment of other students was real.[35] The court concluded that the targeted, defamatory nature of the speech, directed at a fellow classmate "caused the interference and disruption described in *Tinker* as being immune from First Amendment protection."[36]

B. *Off-Campus Speech that Does Not Meet Substantial Disruption Test*

There are many examples of situations where school officials invoke *Tinker* as the basis for punishing students for off-campus online speech that is neither threatening nor bullying. While schools clearly have some authority to punish students for off-campus speech that satisfies the *Tinker* substantial disruption test, some recent cases indicate that school administrators exercise their regulatory authority over a wide array of non-disruptive off-campus student speech that comes to their attention. School officials are permitted to take preemptive steps to prevent a disturbance only when there is a well-founded belief that a substantial disruption will occur,[37] but students are often disciplined for online speech that is unlikely to impact the operation of the school in any significant or substantial way. When a student is punished unfairly for non-disruptive online expression, the consequences of the school punishment are likely to have been fully suffered

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[32] *Id*. at 569.
[33] *Id.* at 570.
[34] *Id*. at 571.
[35] *Id*.
[36] *Id.* at 572; *see also* S.J.W. v Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012) (students were suspended for creating a website with offensive and racist comments discussing fights at their school and mocking black students, and also containing sexually explicit and degrading comments about particular female classmates).
[37] Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); *See also* Evans v. Bayer, 684 F.Supp.2d 1365, 1373 (S.D. Fla. 2010) (stating that the key is whether school administrators have a well-founded belief that a "substantial" disruption will occur); Saxe v. State College Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001) ("*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.").

before a judicial determination of any First Amendment claims can be rendered.

Critical or hurtful student speech directed at school officials tends to generate a strong negative response from school administrators, and this was clearly evident in a pair of similar cases from the Third Circuit involving fake online profiles of two different school principals.[38] In *Layshock v. Hermitage School District*, a student used the computer in his grandmother's home to access his MySpace account and create a fake parody profile of his school principal.[39] The student was suspended for creating the profile which included "crude juvenile language" describing the principal's drug and alcohol use and a statement that the principal was "too drunk to remember his birthday."[40] The existence of the profile became generally known among the student body and some students viewed the profile at school and wanted to discuss the profile during class.[41] The court found that the actual disruption at school due to the speech was rather minimal—no classes were canceled, no widespread disorder occurred, no violence ensued—so that school officials did not have a specific and significant fear of significant future disruption that justified the student's suspension.[42] The court also noted that the U.S. Supreme Court's decision in *Fraser* did not apply because, while the parody profile was lewd, profane and sexually inappropriate, Layshock's speech occurred off-campus and *Fraser* involved speech expressed at an in-school assembly.[43] In a comparable case, another student was suspended for creating a fake MySpace profile of her school principal from a home computer which described the principal as a pedophile and sex addict.[44] The District Court initially ruled that although the student's profile did not cause a "substantial and material" disruption according to *Tinker*, the school district's punishment was constitutionally permissible because the profile was "vulgar and offensive" under *Fraser* and the student's off-campus conduct had some "effect" at the school.[45] The Third Circuit, sitting *en banc,* reversed and concluded that the school district violated the student's free speech rights because "the facts simply do not support the conclusion that the school district could have reasonably

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[38] Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2011); J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011).
[39] *Layshock*, 650 F.3d 205.
[40] *Id*. at 208.
[41] *Id.* at 209.
[42] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).
[43] *Id.; see also* T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 775-776 (N.D. Ind. 2011) (stating that the School District's argument fails because "*Fraser* does not apply to off-campus speech.").
[44] J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3rd Cir. 2011).
[45] *See id*. at 923.

forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile."[46]

There are other examples where school officials have overreacted to undesirable student speech that reflects nothing more than routine dissension and general dissatisfaction with school personnel. One notable example involves a twelve year-old sixth grader who was disciplined for posting on her Facebook[47] website that she "hated" an adult hall monitor because the aide was "mean" to her."[48] The message, posted from a home computer after school hours, was shown to the school principal by another student and the girl was disciplined for bullying. The student subsequently posted a second message on her Facebook page saying that she wanted to know the identity of the student who told the principal about her posting, and in response to this second message, the student received an in-school suspension and was also prohibited from attending a class ski trip.[49] The court ruled that punishing the student for her online postings clearly infringed on her right to free speech stating that any reasonable school official should have known that the student's speech clearly fit within "the heartland of protected nonviolent and non-disruptive out-of-school speech."[50] The American Civil Liberties Union filed a subsequent lawsuit against the school district on behalf of the student. The case was eventually settled and the school district agreed to pay the student $70,0000 in damages.[51]

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[46] *Id*. at 931. *But see* Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011) (holding that a student's blog posting about the proposed cancellation of a school event caused a substantial and material disruption to the school environment in the form of angry phone calls and email messages from students and parents) The decision in *Doninger*, however, has received some criticism. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 218 (3d Cir. 2011) ("Moreover, in citing *Doninger*, we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there."); Nancy Willard, *Student Online Off-Campus Speech: Assessing "Substantial Disruption"*, 22 ALB. L. J. SCI. & TECH. 611, 630 (2012) ("A Second Circuit ruling in Doninger v. Niehoff also applied the Tinker standard, but in a disturbing manner under the circumstances.").

[47] Facebook is an online social network for people to communicate with family, friends and coworkers. A main feature of Facebook is the "Homepage," a profile page which provides a feed of news regarding friends and interests and where people can share information on education, employment and contact information. *See Products*, FACEBOOK, http://newsroom.fb.com/products/ (last visited April 5, 2012) (describing the current features available through Facebook).

[48] R.S. v. Minneswaska Area Sch. Dist., 894 F. Supp. 2d 1128 (D. Minn. 2012).

[49] *Id*. at 1133.

[50] *Id*. at 1141; *see also* T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp.2d 767, 782 (N.D. Ind. 2011) (holding that students could not be disciplined for inappropriate photographs taken at a slumber party because the off-campus speech did not come close to meeting the *Tinker* standard of a specific and significant fear of substantial disruption).

[51] Carol Kuruvilla, *Schools Pay $70,000 to Minnesota Student Forced to Give Up Facebook Password*, New York Daily News, March 27, 2014,

In another case, school administrators in Nevada disciplined a high school senior for posting unflattering tweets on his Twitter account about his basketball coach.[52] The student made the postings from his personal cellular phone while eating dinner with his family at a local restaurant. The coach was informed of the posts and the student was disciplined for cyberbullying and eventually reassigned to a different high school. The District Court refused to dismiss the student's claim for violation of his First Amendment rights, finding that the school district had no reasonable basis to believe that the student's off-campus speech would reach the campus and cause a substantial and material disruption.[53]

School officials have also disciplined students for off-campus online speech involving petty disagreements and ordinary personality conflicts among middle and high school students. In one case, school officials suspended a tenth grade girl from her extracurricular activities for posting racy photographs of herself on her MySpace and Facebook accounts.[54] The photographs were taken during a mid-summer slumber party attended by members of the high school volleyball team and were posted by the student from her home computer. A concerned parent delivered printouts of the photos to the school principal claiming the pictures were causing disagreement and discord among the girls on the volleyball team. The court determined that school officials merely responded to complaints about the pictures from two parents, and could not point to any students creating or experiencing disruption during any school activity. The court stated that "these types of occurrences cannot be what the Supreme Court had in mind when it enunciated the substantial disruption standard in *Tinker*. To find otherwise would be to read the word "substantial" out of "substantial disruption."[55]

In another example, a middle school girl used her home computer after school to post angry tweets on her Twitter account directed at her young classmate regarding a dispute over a boy.[56] The student was disciplined and reassigned to an alternative school. The District Court determined that the student's online speech had no connection to the middle school whatsoever, other than the fact that both the speaker and the target of the speech studied there. The court noted that the speech was not made at school or directed at the school, and did not involve the use of school time or equipment, and that

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http://www.nydailynews.com/news/national/school-pays-70-000-forcing-student-reveal-facebook-password-article-1.1736528.

[52] Rosario v. Clark Cnty. Sch. Dist., 2013 U.S. Dist. LEXIS 93963 (D. Nev. July 3, 2013).

[53] *Id*. at *12-13.

[54] *T.V. ex rel. B.V*., 807 F. Supp. 2d at 782.

[55] *Id*.

[56] Nixon v. Hardin Cnty. Bd. of Ed., 2013 U.S. Dist. LEXIS 180591 (W.D. TN. E.D. December 27, 2013).

no disruption of school activities or impact on the school environment occurred.[57] In light of the complete lack of disruption and the absence of any reasonable expectation of a substantial impact on the school environment, the court refused to dismiss the student's claim of a First Amendment violation.[58]

These cases tend to show that overzealous school administrators are willing to discipline students for off-campus speech that is merely unpleasant, even when the showing of actual or anticipated disruption is extremely weak. School officials will not hesitate to squelch off-campus online speech that has even the slightest potential to cause discord within the school because there is little incentive for school officials to act in a manner that is protective of students' First Amendment rights. School officials often have a qualified immunity and will not be subject to civil liability for damages so long as their actions could reasonably have been viewed as consistent with the student's First Amendment free speech rights.[59] In addition, few families will choose to absorb the cost of litigation to reverse a suspension that has already been served.[60] In the absence of any real check on their authority, school officials are likely to continue to discipline students for off-campus online speech that does not even come close to reaching the level of *Tinker's* substantial and material disruption.

III. CONTINUOUS MONITORING OF STUDENTS' SOCIAL MEDIA ACTIVITY EXCEEDS PUBLIC SCHOOLS' AUTHORITY

The threat of cyberbullying and school violence is a growing concern within the nation's schools. In the interest of student safety, school districts understandably need the opportunity to react to potentially serious problems occurring online before they spill into the classroom. But the special cases of student threats and cyberbullying should not be used as the basis to allow public schools to monitor all of their students' activity no matter where it

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[57] *Id*. at *32.
[58] *Id*. at *33-34.
[59] T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp.2d 767, 782 (N.D. Ind. 2011). *See also* Doninger v. Niehoff, 642 F.3d 334, 353 (2d Cir. 2011) ("The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges.").
[60] *See* Thomas v. Bd. of Educ. 607 F.2d 1043, 1052 (2d Cir. N.Y. 1979) (noting that "the short duration of most sanctions imposed by school officials insulates the entire process from effective review" and stating "although students must absorb considerable expense to challenge a suspension in court, school officials can mete out punishment without incurring the costs of procedural safeguards a conventional prosecution would require"); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 408 (2011).

takes place.[61] Policing the Internet for objectionable student speech is outside the typical pedagogical functions performed by a public school in fulfilling its basic educational mission. The Supreme Court's decision in *Tinker* has never been interpreted to confer on public schools the authority to affirmatively search and seek out students' off-campus expression, but school officials in some school districts are conducting proactive monitoring of students' online speech for the purpose of uncovering actionable information.

A. *The Glendale School District Experiment*

In the summer of 2013, the Glendale Unified School District in California launched a pilot program to conduct broad, continuous surveillance of all the online communication of its high school students occurring on social media websites. The Glendale School District hired the Hermosa Beach-based technology company, Geo Listening, to monitor the off-campus online speech of 14,500 students at its three high schools for a cost of $40,500.[62] According to the company website, the Geo Listening monitoring service provides timely and actionable information to strengthen the ability of schools to enforce their existing policies by collecting relevant data into a daily report shared with school administrators.[63] The technology company scans students' public postings on social media sites such as Twitter, Facebook, Picasa, Instagram, Vine, Flickr, Ask.fm., YouTube and Google for certain keywords indicating bullying, cyberbullying, hate and shaming activities, depression, harm and self-harm, self-hate and suicide, crime, vandalism, substance abuse and truancy.[64] The school district does not provide a list of current students to the company, so Geo Listening uses

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[61] The "true threat" doctrine presumably allows school officials to suspend students for off-campus speech reasonably perceived to pose a physical threat or risk of harm to other students because such speech is unprotected by the First Amendment. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam). *See also*, Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 412 (2011) (arguing that school officials, through the "true threats" doctrine, would still be able to rely on speech outside their supervision to suspend students who the officials reasonably believe pose a physical threat to other students); Steve Varel, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 445 (2013) (stating that since true threats are unprotected under the First Amendment, schools are not prevented from disciplining students for this type of off-campus speech).

[62] Kelly Wallace, *At Some Schools Big Brother is Watching*, November 8, 2013, http://www.cnn.com/2013/11/08/living/schools-of-thought-social-media-monitoring-students/.

[63] GEO LISTENING, https://www.geolistening.com (last visited March 31, 2014).

[64] *Id.*

"deductive reasoning" to link public accounts to students.[65] Because only the public accounts of students are being monitored, the company claims that no privacy rights are being violated.[66] Geo Listening also has a "Report" button feature which is a mobile application that permits anyone to anonymously report a sensitive incident experienced or witnessed from a remote location.[67] At present, the Glendale School District is the only public school subscriber to the Geo Listening surveillance service, but the company founder, Chris Frydrych, said he expects to be monitoring 3,000 schools worldwide within the next year.[68] The underlying question presented, however, is whether the Glendale School District, or any other public school district, has the constitutional authority to discipline students for social media speech collected through a sweeping surveillance program.

B. *Fourth Amendment Issues*

When school officials attempt to exert their regulatory authority out in the general community, their actions should be evaluated in accordance with the principles that govern similar actions by government officials.[69] The first concern raised by a school district's monitoring practices is whether any privacy interests of the student are violated by viewing the publicly available

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[65] Stephen Caesar, *Glendale District Says Social Media Monitoring Is for Student Safety*, Sept. 14 2013, http://www.nytimes.com/2013/10/29/technology/some-schools-extend-surveillance-of-students-beyond-campus.html. It is unclear how the company determines who is currently a student at the school, and whether the monitoring is halted on weekends, during school holidays or summer vacations. It is also not stated on the company website how long the information will be retained.

[66] *Privacy Policy*, GEO LISTENING, http://www.geolistening.com (last visited March 31, 2014).

[67] *Id*. Anonymous Alerts is another remote reporting capability utilized by several school districts. This service permits students and parents from the school community to anonymously submit and report "any suspicious activity, bullying or other sensitive issues to a school official(s)" through a link on the school's homepage. Any report can be made anonymously and will be sent directly to a school official who will investigate the matter. According to its website, the Anonymous Alerts reporting service "enables students to quickly report bullying, cyberbullying, depression, family problems, drug and alcohol abuse, gang-related issues, sexual harassment, guns/weapons in schools, theft/vandalism or unusual student behavior which may warrant immediate attention by school officials." *See* K12 ALERTS, http://k12alerts.com/webcorp/anonymous.html (last visited March 31, 2014).

[68] Caesar, *supra* note 65. The school superintendent of the Burbank Unified School District in California stated that while her school district does not currently monitor students' social media activity, she would be "keeping an eye" on the results of the program adopted by the Glendale school district and that she planned to gather more information. Tim Cushing, *CA School District Announces Its Doing Round-the-Clock Monitoring of Its 13,000 Students' Social Media Activities*, (Sept. 10, 2013, 3:35 AM), http://www.techdirt.com/articles/20130902/13154624384/ca-school-district-announces-its-doing-round-the-clock-monitoring-its-13000-students-social-media-activities.shtml.

[69] Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979).

information students post on social media accounts. The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[70] A person has a constitutionally protected reasonable expectation of privacy when he or she has both a subjective expectation of privacy and that expectation is one that society recognizes as reasonable.[71] What a person knowingly exposes to the public is not subject to Fourth Amendment protection.[72]

A user's privacy settings on a social media account will determine which information is available for public viewing. On Facebook, for instance, users may decide to keep their profiles completely private, share them with "friends," or more expansively with "friends of friends" or choose to disseminate them to the public at large.[73] When a user with a public privacy setting posts a message on a social media website, he or she intends for the message to be read by the public at large and the messages are not protected by the Fourth Amendment.[74] Where the user's Facebook privacy settings allow viewership by "friends," the government may also access the user's messages through a cooperating third party who is a "friend" without violating the Fourth Amendment.[75] In a similar way, Twitter provides a public and private privacy setting for its users. If a user maintains a public setting, then anyone searching the Internet may read the user's tweets or messages.[76] As stated by one court, "A tweet from a user with public privacy settings is just a twenty-first century equivalent of an attempt to publish an opinion piece or commentary in the New York Times or Las Vegas Sun."[77] As a result, school administrators and any third-party monitoring services do not violate a student's Fourth Amendment rights by reading information that anyone searching the Internet may view and read.[78] When a student disseminates postings and information to the public on a social media account, the messages are not protected by the Fourth Amendment.

While continuous monitoring of publicly viewable social media activity may not violate students' Fourth Amendment rights, there are certainly other privacy concerns raised by school officials reading and reviewing daily

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[70] U.S. CONST. amend. IV.
[71] *See* Katz v. United States, 389 U.S. 347 (1967).
[72] *Id*. at 351.
[73] *Help Center*, FACEBOOK, http://facebook.com/help/privacy (last visited April 5, 2014).
[74] United States v. Meregildo, 883 F. Supp. 2d 523,525 (S.D.N.Y. 2012).
[75] *Id*. at 526.
[76] *Help Center*, TWITTER, http:// /support.twitter.com/articles/14016# (last visited April 5, 2014).
[77] Rosario v. Clark Ctny. Sch. Dist., 2013 U.S. Dist. LEXIS 93963, *15 (D. Nev. July 3, 2013).
[78] *Id*.; *see also* Chaney v. Fayette Ctny. Pub. Sch. Dist., 2013 U.S. Dist. LEXIS 143030 (N.D. Ga. Sept. 30, 2013) (holding that society would not recognize a legitimate expectation of privacy where student shared Facebook photograph with broadest audience possible).

reports of their students' social media activities. Broad and sweeping monitoring of social media activity will gather a large amount of personal information about the student's home life, personal struggles, likes, and dislikes. All of this student-specific information will be collected and stored in a database maintained by the third-party vendor hired by the school district. In the case of Geo Listening, for example, the company website does not reveal how long the student's personal information will be retained by the company. Conceivably, the information could be stored indefinitely, well after a student graduates and leaves the school district. If the technology company is sold, the accumulated personal data could be transferred to a new purchaser and treated as an asset under the terms of any sale agreement.[79] Collected student data may also be viewable by law enforcement in connection with any legal proceedings involving the company.[80] In response to the privacy concerns raised by Geo Listening's data retention practices, legislation has been introduced in the California Assembly to require, among other things, that all information collected from students' social media websites be destroyed within one year of the student leaving the school or turning age eighteen.[81]

C. *First Amendment Issues*

Schools do not have the power to regulate all their students' activities no matter where they take place,[82] and courts have specifically indicated that school officials lack the constitutional authority to reach out to discover, monitor or punish off-campus speech.[83] As the District Court stated in *Layshock*:

> [T]he mere fact that the [I]nternet may be accessed at school does not authorize school officials to become censors of the world-wide

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[79] *See, e.g.*, *Privacy Policy*, GEO LISTENING, http://www.geolistening.com (last visited March 31, 2014).
[80] *Id.*
[81] A.B. 1442 passed the California Assembly Judiciary Committee on April 1, 2014 by a vote of 9-0 and will move to the California Assembly Education Committee. The bill requires that parents be notified when school districts, county offices of education, or charter schools gather information, or contract with a third-party vendor to collect information about students. The bill also provides students the opportunity to examine information collected about them. Finally, it requires that any such information be destroyed within one year of the student turning eighteen years of age or leaving the district. *Mike Gatto's Bill to Protect Students' Social Media Data Advances*, http://www.asmdc.org/members/a43/press-releases/mike-gatto-s-bill-to-protect-students-social-media-data-advances (last visited April 13, 2014).
[82] Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2762 (2013).
[83] D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 765-766 (8th Cir. 2011).

> web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.[84]

1. No Specific Basis to Anticipate Disruption

When off-campus speech makes its way to campus, or if school officials receive a specific report about an online posting or message that has the potential to disrupt the learning environment, they have a difficult and important choice to make about how to respond consistent with the First Amendment.[85] When the disruption from the speech has not actually occurred but is reasonably anticipated, school officials may act preemptively to prevent a disturbance only if the predicted disruption is based on a specific and significant fear. A school district that conducts broad monitoring of its students' online social media activities is not reacting to any particular speech, and identifying a specific violation of the law or school rules is very difficult within a broad surveillance program.

With the Geo Listening monitoring service, for example, students' accounts are scanned for key terms that are not clearly defined, and slang terms and acronyms may be misunderstood.[86] More importantly, scanning for certain words means that "subtweets"[87] and other more cryptic messages may be missed, and these hidden communications may also pose a significant risk of harm to students or disruption to the school environment. The vague and imprecise nature of the key words that are flagged in a broad surveillance sweep make it difficult for school officials to identify a precise reason that one message poses a foreseeable risk of substantial disruption at school while another message does not. Determining whether a particular message or

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[84] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).
[85] *D.J.M.*, 647 F.3d at 765.
[86] According to Chris Frydrych, the company founder, analysts employed by Geo Listening stay abreast of the symbols, phonetic spellings, abbreviations, initials and other code-speak that youths type on social media. Hate, for example, could be spelled "h8," and teens may refer to drugs with such words as "red," "rolling," and "blunt." In another example, Frydrych claims that his firm learned how youths use drugs such as liquid hashish through vaporizers, or "vapes," which are devices like electronic cigarettes that allow for inhalation without creating smoke. Michael Martinez, *Geo Listening Monitoring Students' Social Media Posts in Glendale, California School District*, (Sept. 14, 2013), http://www.rwptv.com/news/national/geo-listening-monitoring-students-social-media-posts-in-glendale-california-school-district.
[87] A "subtweet" is shortened version of subliminal tweet which is a message that refers to a particular person without directly mentioning him or her. http://urbandictionary.com/define.php?term=Subtweet (last visited April 5, 2014).

online communication has the potential to create a substantial disruption at school is likely to require follow-up investigations, interviews and further searching, but *Tinker* requires that school officials experience more than a generalized fear or apprehension of a disturbance before imposing discipline on a student.[88]

2. School Officials Cannot Create the Disruption

The *Tinker* analysis requires evidence that the student's speech is the cause, or potential cause, of the substantial and material disruption at school.[89] Courts have drawn a careful distinction between circumstances where the school officials' reaction to the speech, and not the speech itself, is the source of the disturbance. When the disruption at school is attributable to the school district's own response to the online student speech, the courts have concluded that a school-created disruption does not provide a valid basis to discipline under *Tinker*.

In *Killion v. Franklin Regional School District*,[90] a student was suspended for creating a rude and demeaning Top 10 list about the athletic director from his home computer. The list circulated around the school for several days before administrators became aware of its existence and took disciplinary action. The court concluded that the student's suspension was improper because the Top 10 list itself clearly was not the source of any substantial disruption. The court rejected the school's assertion that the distress experienced by the athletic director and a librarian was a disruption sufficient to justify the student's punishment.[91] In *Latour v. Riverside Beaver School District*, [92] a student was expelled for two years from school for four rap songs that he wrote and recorded at home over a two-year period. The court found that the student's songs did not cause any disruption at school prior to his expulsion, and that the only disruption at school occurred in response to the student's suspension when other students wore t-shirts to school in a show of support. The court concluded that any impact on the school environment was not caused by the student's songs, but by the school district's punishment of the student, and determined that the suspension was not justified.[93] Similarly in *J.S. Snyder ex. rel. v. Blue Mountain School District*, the Third Circuit determined that any disruption at school occurring as a result of a student's fake profile of the school principal was attributable

[88] Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 513 (1969).
[89] *Id*. at 514.
[90] 136 F. Supp. 2d 446 (W.D. Pa. 2003).
[91] *Id*. at 455.
[92] 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. August 24, 2005).
[93] *Id.* at *7.

to the principal's reaction to the profile, rather than the speech itself.[94] At the specific direction of the school principal, another student brought a printed copy of the fake profile into school. The principal reacted to the profile by suspending the student and threatening legal action against her and her parents, reporting the incident to the local police and contacting MySpace to request removal of the profile, and contacting the school superintendent to discuss the matter.[95] The court concluded that without the actions of the principal, no disruption at all would have occurred at school.[96]

In all of these cases, the courts make it clear that school officials cannot classify their own reaction as the material and substantial disruption required by *Tinker* to justify discipline for the speech. The broad surveillance of all students' online social media would, in effect, allow a school district to manufacture and create disruptions for the purposes of regulating student speech. Prior to receiving and reviewing a daily report generated by a monitoring service, school officials would be completely unaware of any online student speech that had not yet sparked any reaction or caused any stir whatsoever within the school community. The disruption or potential disruption at school would only occur when school officials received and reacted to a report of objectionable speech collected by the monitoring service. The school district would be effectively orchestrating its own material and substantial disruption every time it decided to further investigate a report containing flagged student speech. As one commentator noted:

> *Tinker* contemplated a situation where the speech itself, not the reaction to the speech, causes the disruption. If the school's response to student expression could be the substantial disruption it complains of . . . a school could censor any speech it has a mind to simply by responding in a way that substantially disrupts the operations of the school.[97]

Any surveillance program involving the proactive gathering of student speech allows a school district to manipulate the circumstances and produce its own self-created school disruption, which is certainly not contemplated under *Tinker*. Schools have broad power to control what occurs on campus

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[94] J.S. *ex. rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); *see also* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (where the District Court pointed out that the school district was unable to demonstrate that any "buzz" resulting from the student's parody online profile of the principal was in fact caused by the profile as opposed to the reaction of school administrators.).
[95] *Id.* at 923.
[96] *Id.* at 931.
[97] Eric P. Motylinski, *Out of School Means Out of School: Protecting Student Speech in the Internet Era*, 20 TEMP. POL. & CIV. RTS. L. REV. 331, 349 (2011).

during the school day and if the off-campus Internet speech of a student penetrates into school, school officials may respond appropriately to the in-school disruption. *Tinker* is designed to prevent serious on-campus disruption, and should not be available for schools to use as a tool to discipline students for their speech that exists outside the school community and may never find its way back to school. Public school authority to regulate student speech is tied to the need to maintain order to allow the effective discharge of its pedagogical responsibilities. Off-campus online student speech is outside the school's reach unless and until there is some impact or foreseeable effects at school caused by the speech itself. Directed searching for online speech that violates school rules is an attempt to bring all off-campus student speech onto campus solely for the purpose of regulation under *Tinker*. When purely off-campus student speech raises concerns, it is more appropriately handled by parents and possibly law enforcement.

IV. CONCLUSION

While many parents and community members support the expansion of efforts to combat school violence and cyberbullying, there needs to be some outer boundaries to public school jurisdiction over off-campus speech. A public school's authority to regulate student behavior hinges on the need to maintain an orderly learning environment, but schools are not in the business of policing the private lives of students outside school. Allowing a school district to discipline students for information gained through the continuous monitoring of all online student activity removes any distinction between students' school speech and speech entitled to normal First Amendment protections.

School districts argue that the monitoring is primarily designed to uncover cyberbullying and threats of school violence, but the case law in this area reflects a far different reality. A significant number of disciplinary actions are imposed by school officials for student speech that does not even begin to approach the level of threatening, violent or harassing speech. There are many cases where school officials invoke *Tinker* as the basis for disciplining student speech that is virtually non-disruptive. In particular, speech targeting school officials is often severely sanctioned by school administrators. Given the tendency of school officials to employ a low threshold for objectionable speech, there is a strong possibility that seemingly harmless speech will continue to be swept into the larger category of bullying or threats and lead to even more unnecessary student suspensions or expulsions. Students can and should be sanctioned for off-campus speech that has a serious detrimental effect on the learning environment, but school

officials cannot rewrite *Tinker* to grant them unfettered authority to regulate students' speech no matter where it occurs.