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BIG BROTHER AS PARENT: USING SURVEILLANCE TO PATROL STUDENTS' INTERNET SPEECH

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Abstract: With the pervasiveness of the Internet in students' lives, schools are frequently disrupted by their students' online speech, whether through threats of violence, cyberbullying, or discussion of self-harm. To combat and minimize these disturbances, some schools are turning to third-party surveillance companies to monitor students' Internet posts for potentially harmful speech. The U.S. Supreme Court has never addressed a school's relationship to its students' Internet postings. In the absence of Supreme Court guidance, lower courts rely primarily on a 1969 free speech ruling from *Tinker v. Des Moines Independent Community School District*, which asks whether a student's speech substantially disrupts the educational process. If it does, a school may punish the student for that speech. This Note analyzes the effects that Internet surveillance could have on students and advocates that the Supreme Court grant certiorari to student Internet speech cases and adopt a risk of substantial disruption standard. Additionally, proactive schools should substitute Internet surveillance with an increase in tech-savvy counselors and social media education, each of which may positively guide students toward responsible Internet behavior.

INTRODUCTION

"Drink bleach and die," one bully wrote to twelve-year-old Rebecca Ann Sedwick.[1] "Why are you still alive?" another asked.[2] A third text message sent by a peer to Sedwick's cell phone read, "Can u [sic] die please?"[3] After over one year of online and in-person bullying, Sedwick's bullies' requests were answered as she leapt to her death at an abandoned cement factory near her home in central Florida.[4] Though Sedwick had barely attended middle school,

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[1] Lizette Alvarez, *Felony Counts for Two in Suicide of Bullied Twelve-Year-Old*, N.Y. TIMES, Oct. 16, 2013, at A20.

[2] Emily Bazelon, *Bullies Taunted Rebecca Ann Sedwick with Texts Like "Can u Die Please?" and Then She Did*, SLATE (Sept. 18, 2013, 2:23 PM) http://www.slate.com/blogs/xx_factor/2013/09/18/rebecca_ann_sedwick_suicide_lessons_for_parents_in_the_scary_age_of_cyberbullying.html.

[3] *Id.*

[4] *See* Alvarez, *supra* note 1. One news report estimated that Sedwick was bullied by as many as fifteen girls through online message boards and text messages. Rachel Quigley, *'Yes I Bullied Her, She Killed Herself and I Don't Give a ****': Girls, Twelve and Fourteen, Whose Cyber-Stalking 'Drove Fellow Pupil, Twelve, to Suicide' Are Arrested*. DAILY MAIL ONLINE (Oct. 15, 2013, 3:03

she had experienced deep pain.[5] The chilling words remained in her journal as proof following her suicide: "Every day more and more kids kill themselves because of bullying. How many lives have to be lost until people realize words do matter?"[6]

Following Sedwick's September 2013 suicide, fingers pointed everywhere: at her parents for not monitoring her Internet and cell phone usage, at her school for not identifying her bullies, at the young girls who bullied her, and at the bullies' parents for not controlling their children.[7] Five weeks after her death, a twelve-year-old former friend of Sedwick's and a fourteen-year-old former schoolmate were arrested in connection with her death and charged with aggravated stalking, a third-degree felony in Florida.[8] The most damning evidence against either was a Facebook post allegedly authored by the fourteen-year-old, which stated, "Yes IK [I know] I bullied REBECCA nd [sic] she killed her self [sic] but IDGAF [I don't give a f——]."[9] Upon seeing the blatant disregard for human life in this post, Polk County Sheriff Grady Judd moved quickly to apprehend the fourteen-year-old author and her twelve-year-old friend.[10] Sheriff Judd's justification for prompt action was fear that the girls would bully others.[11]

Today's preteens have never known a world without the Internet.[12] Its accessible nature permeates all aspects of their lives, from use as an educational

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PM), http://www.dailymail.co.uk/news/article-2460996/Rebecca-Ann-Sedwick-suicide-2-girls-aged-12-14-arrested-stalking.html.

[5] *See* Quigley, *supra* note 4; Mike Schneider & Jennifer Kay, *Rebecca Ann Sedwick Suicide: Two Girls Arrested for 'Terrorizing' Bullied Victim*, HUFFPOST MIAMI (last updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/2013/10/15/rebecca-ann-sedwick_n_4100350.html.

[6] *See* Quigley, *supra* note 4.

[7] *See* Alvarez, *supra* note 1. In response to the fourteen-year-old's Facebook posting, Polk County Sheriff Judd Grady, "[b]rimming with outrage and incredulity . . . reserved his harshest words for the girl's parents for failing to monitor her behavior, after she had been questioned by the police, and for allowing her to keep her cellphone." *Id.* The sheriff stated that he was aggravated because "the parents are not doing what parents should do: after she is questioned and involved in this, why does she even have a device? Parents, who instead of taking that device and smashing it into a thousand pieces in front of that child, say her account was hacked." *Id.*

[8] *See* Alvarez, *supra* note 1; *Rebecca Ann Sedwick Suicide: Two Arrests Made in Death of Bullied Florida Girl*, CBS NEWS (Oct. 15, 2013, 1:00 PM), http://www.cbsnews.com/news/rebecca-ann-sedwick-suicide-2-arrests-made-in-death-of-bullied-florida-girl [hereinafter CBS].

[9] *See* Quigley, *supra* note 4; Schneider & Kay, *supra* note 5.

[10] *See* Alvarez, *supra* note 1.

[11] Quigley, *supra* note 4; CBS, *supra* note 8. Indeed, CBS reported, upon her arrest, the fourteen-year-old was "very cold," and "had no emotion at all . . . ." CBS, *supra* note 8. In November 2013, the charges were dropped against both girls, as investigators determined that despite thousands of Facebook messages, their ugly conduct did not rise to the level of a crime. Lizette Alvarez, *Charges Dropped in Florida Cyberbullying Death, but Sheriff Isn't Backing Down*, N.Y. TIMES, Nov. 22, 2013, at A14, *available at* http://www.nytimes.com/2013/11/22/us/charges-dropped-against-florida-girls-accused-in-cyberbullying-death.html.

[12] Alex Vadukul, *In a Queens School, an Early Start on Preparing 'Responsible Digital Citizens*,' N.Y. TIMES, Apr. 11, 2014, at A24; Dinesh Ramde, *College Freshmen Never Knew a World Without*

aid in schools to entertainment at home.[13] As students learn these and other technological innovations, parents often struggle to keep pace with their tech-savvy children.[14] Not knowing what technology exists, coupled with an inability to monitor that technology, leaves many children without parental controls, producing an ongoing opportunity for children and teenagers to communicate—for better or for worse—with one another.[15] What may result is a seemingly limitless virtual playground that emboldens students, creating a troubling amount of freedom for such malleable minds.[16] Absent oversight, students are left to their own devices, able to make independent, potentially dangerous moves in their otherwise micromanaged worlds.[17] The independence that students exercise may simply be speech, but as demonstrated through the case of Rebecca Sedwick, speech may target other students and leave permanent scars.[18]

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the Net, BOSTON.COM (Aug. 24, 2011), http://www.boston.com/news/nation/articles/2011/08/24/college_freshmen_never_knew_a_world_without_the_net.

[13] *See* Amanda Lenhart et al., *Teens, Kindness and Cruelty on Social Network Sites*, PEW RES. CENTER 2 (Nov. 9, 2011), http://www.pewinternet.org/files/old-media//Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf (discussing social media and experiencing online cruelty through social media); Mary Madden et al., *Teens and Technology 2013*, PEW RES. CENTER 2 (Mar. 13, 2013), http://www.pewinternet.org/files/old-media//Files/Reports/2013/PIP_TeensandTechnology2013.pdf. These studies also reported that 95% of American teenagers use the Internet, and 47% of American teenagers own a smart phone. Lenhart et al., *supra*; Madden et al., *supra*.

[14] *See* Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES, Sept. 14, 2013, at A1; Bob Sullivan, *What You Don't Know Can Hurt Kids*, MSNBC.COM, http://www.nbcnews.com/id/3078811/ns/technology_and_science-security (last visited Oct. 13 2014). The popular ABC sitcom "Modern Family" has a father notorious for his cluelessness about his children. *See* Josh Jackson, *The 20 Best Phil Dunphy Quotes*, PASTE MAGAZINE (Jul. 21, 2012, 8:45 AM), http://www.pastemagazine.com/blogs/lists/2012/07/the-20-best-phil-dunphy-quotes.html. In the show's pilot, he says, "I'm a cool dad, that's my thang. I'm hip, I surf the web, I text. LOL: laugh out loud, OMG: oh my god, WTF: why the face," exhibiting a very common parental misstep: thinking they understand what their children are saying through Internet abbreviations. *See id.*

[15] *See* Mary Madden et al., *Parents, Teens, and Online Privacy*, PEW RES. CENTER 2, 3 (Nov. 14, 2012), http://www.pewinternet.org/files/old-media//Files/Reports/2012/PIP_ParentsTeensAndPrivacy.pdf. A November 2012 Pew Research study found that fifty percent of parents of teenagers who use the Internet have used parental controls "or other means of blocking, filtering, or monitoring their child's online activities . . . ." *Id.*

[16] *See generally* Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, Jun. 28, 2010, at A1 (discussing cyberbullying and "cyberspace's escalation of adolescent viciousness").

[17] *See, e.g.*, Jim Taylor, *Is Technology Creating a Generation of Bad Decision Makers?*, PSYCHOL. TODAY (Jan. 7, 2013), http://www.psychologytoday.com/blog/the-power-prime/201301/is-technology-creating-generation-bad-decision-makers (explaining that recent developments in technology make "poor decision making easier, more immediate, and more widely consequential," and that technology discourages deliberation "and promotes acting on [kids'] most base impulses, emotions, and needs"); Kelly Wallace, *'BatDad' and Other Parents: To Post or Not to Post?*, CNN.COM (Oct. 7, 2013, 9:30 AM), http://www.cnn.com/2013/10/07/living/parents-kids-online-privacy/ (stressing the importance of explaining to children the longevity of Internet posts).

[18] *See* Tamara Lush, *Florida Girl Was Bullied for Months Before Suicide*, ASSOCIATED PRESS: THE BIG STORY (Sept. 13, 2013, 5:13 PM), http://bigstory.ap.org/article/florida-girl-was-bullied-

In addition to cyberbullying, students use online speech in a variety of negative ways, free from monitoring or discipline.[19] Unaware or simply indifferent to the repercussions of public postings on the Internet, students have unveiled violent plans against themselves and others, including bomb threats and school shootings.[20] They have discussed eating disorders, underage drinking, sexual encounters, and drug use.[21] Students have also criticized teachers and school administration.[22] Regardless of a student's motive—a cry for help, boredom, or peer pressure—a student's out-of-school Internet speech often has an impact on his educational environment, his peers, and his community.[23]

The U.S. Supreme Court has declined to rule on any cases involving student Internet conduct.[24] Without Supreme Court guidance around this topic,

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months-suicide ("The case has illustrated, once more, the ways in which youngsters are using the Internet to torment others."); Schneider & Kay, *supra* note 5.

[19] *E.g.*, Benjamin Swasey, *Student Charged for Bomb Threats at Harvard*, 90.9 WBUR (Dec. 17, 6:50 PM), http://www.wbur.org/2013/12/17/harvard-bomb-hoax-student-charges (reporting on Harvard undergraduate student who used the Internet to email in a bomb threat at Harvard during an examination period).

[20] *See id.*; *McKinney Police Arrest Juvenile After Facebook Post About Mass Shooting at McKinney Boyd High School*, MCKINNEY ONLINE (Oct. 2012), http://www.mckinneyonline.com/October-2012/McKinney-Police-Arrest-Juvenile-after-Facebook-Post-about-Mass-Shooting-at-McKinney-Boyd-High-School/.

[21] *See, e.g.*, Connor Ryan, *'Joke' Rape Confession Rocks Boston College*, USA TODAY, (Oct. 3, 2013), http://www.usatoday.com/story/news/nation/2013/10/03/bc-sexual-assault-confessions/2917835 (discussing a Boston College student's post on a public Facebook group about his alleged sexual assaults of other students on campus).

[22] *See* Doninger v. Niehoff, 527 F.3d 41, 43 (2d Cir. 2008) (holding that school officials did not violate a student's First Amendment rights when it prevented her from running for student government because of a blog entry she authored on her home computer during non-school hours that criticized the school's decision about a campus event); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (holding in favor of student free speech when student created a webpage that criticized administration and invited students to contact the principal about complaints).

[23] *See, e.g.*, Somini Sengupta, *Warily, Schools Watch Students on the Internet*, N.Y. TIMES, Oct. 29, 2013, at A1 (noting students' various motives for posting on the Internet), Liz Heron, *When a Facebook Post Is a Cry for Help*, NYTIMES BLOG (Feb. 23, 2012, 11:20 PM), http://parenting.blogs.nytimes.com/2012/02/23/when-a-facebook-post-is-a-cry-for-help (discussing teenage use of social media as a means to simply "pour out their feelings" but also to forecast serious issues such as thoughts of suicide).

[24] Robyn Hagan Cain, *Supreme Court Denies Cert in Student Free Speech Rights Cases*, FINDLAW (Jan 17, 2012, 12:02 PM), http://blogs.findlaw.com/supreme_court/2012/01/supreme-court-denies-cert-in-student-free-speech-rights-cases.html; David Kravets, *Supreme Court Rejects Student Social-Media Cases*, WIRED (Jan. 17, 2012, 1:30 PM), http://www.wired.com/threatlevel/2012/01/scotus-student-social-media/; *see* Petition for Writ of Certiorari at 3, Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011) (No. 11-461) [hereinafter Kowalski Certiorari Petition]. On December 1, 2014, the Supreme Court heard arguments for an Internet free speech case that involved explicit and threatening posts toward the defendant's ex-wife and former coworkers. *See* Petition for Writ of Certiorari at 4–7, Elonis v. United States, 730 F.3d 323, 324–26 (3d Cir. 2013) (No. 13-983) [hereinafter Elonis Certiorari Petition]; *Elonis v. United States*, SCOTUSBLOG (Dec. 1, 2014), http://www.scotusblog.com/case-files/cases/elonis-v-united-states/. The defendant was a twenty-seven-year-old male, and the case did not involve any school or student. *See* Elonis Certiorari Petition, *supra*, at 4–5 (describing defendant as a man with two children and a job). Both lower courts that

lower courts and ultimately individual schools must make independent decisions regarding the safety and privacy of their students.[25] In January 2012, the Court denied certiorari for three cases involving student Internet speech, any of which could have established necessary guidelines for school action in response to student Internet speech.[26] The U.S. Circuit Courts of Appeal are split on the question of when a school may discipline its students for Internet speech, which increases the difficulty that schools face in determining when they should intervene to punish students for Internet speech that affects the school environment.[27]

A school's action in response to its students' Internet postings has several characteristics that make it distinct from a strict free speech issue.[28] Although Internet posts may be created off-campus, on a student's own property, and on a student's own time, they may still affect the school.[29] With the advent of smartphones and the accessibility of the Internet, when a student leaves school, she does not necessarily leave her bullies; in-person bullying can be easily

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analyzed the matter—the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit—analyzed his conduct under a true threat standard. *See* United States v. Elonis, 730 F.3d 321, 327–30 (3d Cir. 2013); United States v. Elonis, 897 F. Supp. 2d 335, 345–46 (E.D. Pa. 2012).

[25] *See, e.g.*, Yoder v. Univ. of Louisville, 526 F. App'x 537, 545 (6th Cir.), *cert. denied*, 134 S. Ct. 790 (2013) (discussing lack of Supreme Court guidance on students' out-of-school online speech in a case involving a nursing student's MySpace blog); *see also* Sengupta, *supra* note 23 (discussing the increasing use of online surveillance companies by schools and the question of their legality by critics).

[26] Cain, *supra* note 24; Kravets, *supra* note 24 (stating that courts have "been all over the map on the First Amendment issue because they maintain they have been saddled with a Vietnam War-era high court precedent that predates the Internet"); *see Yoder*, 526 F. App'x at 545; Nixon v. Hardin Cnty. Bd. of Educ., 988 F. Supp. 2d 826, 836 (W.D. Tenn. 2013) (pointing out that the Supreme Court has not considered whether schools may regulate off-campus online speech by students and therefore "the parties here rely on decisions from other circuits").

[27] *Compare* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (discussing displeasure of the judiciary with the ability of a school to punish a student for off-campus social media postings on MySpace and granting summary judgment to the student for freedom of speech), *and* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 829 (3d Cir. 2011) (holding that a student-made MySpace page about her principal did not rise to the level of substantial disruption to warrant the student's punishment), *with Doninger*, 527 F.3d at 53 (deferring to schools' ability to punish students whose off-campus online social media use substantially disrupts a school). In *Layshock*, the Third Circuit warned against overreaching by schools into off-campus online speech: "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." 650 F.3d at 216.

[28] *See* John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying* Tinker *in the Internet Age*, 39 PEPP. L. REV. 939, 940 (2012) (noting that "[a]s the Internet permeates further and further into the daily lives of Americans, it continues to blur the once well-established separations between home and work, and school and play").

[29] *See, e.g.*, *Doninger*, 527 F.3d at 43 (discussing Free Speech on a student's out-of-school webpage); Evans v. Bayer, 684 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010) (discussing Free Speech on a student's out-of-school Facebook group).

continued at home on the Internet.[30] Moreover, students are using the Internet to communicate *about* school, in ways in which administrators lack guidance over how they should respond.[31] In the face of uncertainty, schools must walk on a tightrope, balancing students' First Amendment rights on the Internet with their safety and well-being.[32] Although the Supreme Court has thus far declined to address a school's ability to act on its students' Internet postings, students' use of the Internet is unavoidable, and the Court must weigh in on reality.[33]

As technology continues to advance, Supreme Court guidance from 1969 involving symbolic speech remains the basis for students' Internet free speech rights.[34] Ultimately, it is unclear which rights should be prioritized: the rights of students to speak freely or all students' rights to a safe educational environment.[35] This Note argues that professional surveillance of student Internet postings is ineffective and corrosive to a trusting relationship between students and their schools. Part I of this Note provides the legal history of students' free speech rights, outlining when a school may hold a student liable for his speech. Part II discusses current efforts at student surveillance. Part III analyzes the issues that school officials could address if they choose to proactively monitor students' Internet speech and highlights issues that may stem from these efforts. Part IV recommends that the Supreme Court grant certiorari for Internet student speech cases, outlines potential standards for the Court to adopt, and

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[30] *See* Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1694–95 (2012) (explaining cyberbullying of students while they are at home). Rebecca Ann Sedwick was pushed in the hallway and taunted in person, in addition to the cyberbullying that she experienced on her cellphone. *See* Schneider & Kay, *supra* note 5.

[31] *See J.S.*, 650 F.3d at 920 (case involving a student-made MySpace page about her principal); *Doninger*, 527 F.3d at 43 (case in which a student's blog criticized the cancellation of her high school's event); *Evans*, 684 F. Supp. 2d at 1367 (case involving a student-made webpage about a teacher, calling her "the worst teacher I've ever met").

[32] *See also* Kravets, *supra* note 24 (noting "[t]he ubiquitous use of social networking and other forms of online communication has resulted in a stunning increase in harmful student expression that school administrators are forced to address with no clear guiding jurisprudence"). *Compare*, *Doninger*, 527 F.3d at 43 (finding student's blog entry that criticized her school could be the subject of discipline by school officials) *with Evans*, 684 F. Supp. 2d at 1372–74 (finding student's webpage about teacher did not create a substantial disruption in the educational setting and therefore warranted First Amendment protection).

[33] *See* Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 98, 102–03 (2010–2011) (stating that the need for Supreme Court guidance is fast approaching).

[34] *See id.* at 104 (arguing that cyberspace does not have a captive audience and therefore off-campus online speech should not be penalized and that free speech helps develop a student's identity); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (establishing free speech rights for students).

[35] *See* Tomain, *supra* note 33, at 105 (claiming that free speech rights should take priority over school discipline because of the importance of speech to developing a student's identity); *see also* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 407–08 (2011) (arguing for blanket protection for student off-campus speech unless under the supervision of a faculty member so as to provide clarity and predictability for schools and students).

endorses a risk of substantial disruption standard. While schools await Court guidance, and after it is given, schools should forego new, limited Internet surveillance companies in favor of a well-tested resource: skilled counselors.

I. The First Amendment Rights of Students

The First Amendment grants individuals the right to free speech, yet this right has limits, especially in the educational system.[36] In 1969, the Supreme Court extended free speech to students in *Tinker v. Des Moines Independent Community School District*.[37] *Tinker*'s oft-cited passage stands as a reminder for administrators, teachers, students and parents: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[38] This broad right was tempered in 1986 by *Bethel School District Number 403 v. Fraser*, wherein the Supreme Court stated that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[39]

A. Student Free Speech Precedent: The Tinker Standard

In *Tinker*, two high school students and one junior high school student wore black armbands to school as a visible protest to the then-ongoing hostilities in Vietnam.[40] The Supreme Court held that this action, though not audible speech, was a symbolic act falling within the protections of the Free Speech Clause of the First Amendment.[41] In doing so, the Court established the substantial disruption test: restrictions on free speech may be upheld only if they are "necessary to avoid material and substantial interference with schoolwork or discipline . . . ."[42] Consequently, students may express their opinions if done

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[36] *See* U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 686 (1986) (denying the same latitude of free speech to children as adults).

[37] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[38] *See id.*

[39] *Fraser*, 478 U.S. at 682, 685 (holding the punishment of a student for indecent speech at a school assembly did not violate his free speech rights as the speech was vulgar and offensive and was spoken to an audience that included minors who did not expect such lewdness); *see also* New Jersey v. T.L.O., 469 U.S. 325, 348 (Powell, J., concurring) (stressing "the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting"); Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 331 (6th Cir. 2010) (stating that "school officials retain some 'authority . . . consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools'" (quoting *Tinker*, 393 U.S. at 507)).

[40] *Tinker*, 393 U.S. at 504.

[41] *Id.* at 505, 511.

[42] *See id.* at 511.

"without materially and substantially interfering" with school operations and without intruding on the rights of others.[43] In the opinion, the *Tinker* Court explained that free speech is especially necessary in a school environment, as the classroom serves as a "marketplace of ideas" and educating children to be future leaders requires them to engage in exchanges of ideas and a rich diversity of thought.[44]

B. Courts Split on the Freedom Given to Students' Internet Speech

The basic truths articulated in *Tinker* have stood the test of time, even as technology has created new forums for speech.[45] *Tinker* continues to serve as the basis for free speech issues under the First Amendment for students in elementary through high school, and is also frequently cited in postsecondary free speech cases.[46] In the time since *Tinker*, while technology has evolved, free speech policy for students has floundered with a split at the circuit court level, despite a common application of the substantial disruption test.[47] With increas-

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[43] *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). A simple synopsis of guiding case law is found in the Sixth Circuit case *Barr v. Lafon*, 538 F.3d 554, 563–64 (6th Cir. 2008), which explained three principles: "(1) under *Fraser*, a school may categorically prohibit vulgar, lewd, indecent, or plainly offensive student speech, (2) under *Hazelwood* [*Sch. Dist. v. Kuhlmeier*], a school has limited authority to censor school-sponsored student speech in a manner consistent with pedagogical concerns, and (3) the *Tinker* standard applies to all other student speech and allows regulation only when the school reasonably believes that the speech will substantially and materially interfere with schoolwork or discipline." *Id*. (citing *Fraser*, 478 U.S. 683–85; *Tinker*, 393 U.S. at 513; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

[44] *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[45] *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011) (using *Tinker* as the basis for denial of Internet free speech protection to student); Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 801 (N.D. Ohio 2002) (discussing *Tinker* at length as the basis for Internet free speech protection for student).

[46] *See, e.g.*, *Hazelwood*, 484 U.S. at 262, 266 (using *Tinker* to analyze student speech rights in a high school-sponsored newspaper); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207, 211 (3d Cir. 2011) (discussing *Tinker* while analyzing a student's right to free speech on a MySpace page that he authored which mocked one of his high school teachers); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 674, 680 (6th Cir. 2001) (using *Tinker* to analyze a college professor's free speech rights); DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 637 (D.N.J. 2007) (using *Tinker* to analyze right of fifth grade students to wear buttons protesting school's uniform policy).

[47] *See, e.g.*, Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 700, 703 (W.D. Pa. 2003); *Coy*, 205 F. Supp. 2d at 801; Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177, 1182 (E.D. Mo. 1998). In *Flaherty v. Keystone Oaks School District*, a student posted three messages on a message board regarding an upcoming volleyball game and was disciplined in school. 247 F. Supp. 2d at 700. Although the text of the messages was not revealed, the true issue in the case was whether the school's handbook regarding free speech was constitutionally overbroad and vague. *Id.* at 701. The U.S. District Court for the Western District of Pennsylvania followed *Tinker*'s substantial disruption standard, holding that the school's handbook was too vague and consequentially could be interpreted to prohibit speech protected by the First Amendment in violation of *Tinker*. *Id.* at 703. Interestingly, the *Flaherty* court also attacked the school handbook for being geographically vague: the handbook failed "to geographically limit a school official's authority to discipline expressions that occur on school premises or school related activities . . . ." *See id.* at 705. Instead, the handbook ex-

ing student Internet use beginning in the 1990s, and no opinion from the Supreme Court addressing the issue of students' Internet speech, lower courts have been forced to individually confront student Internet speech, including postings that do not originate at school but have secondary effects within the school.[48] The resulting circuit split is based primarily on varying interpretations of the Court's 1969 holding in *Tinker*, as applied to Internet conduct decades later.[49]

The U.S. District Court for the Northern District of Ohio used the *Tinker* standard of substantial disruption when it granted free speech protection to a high school student's Internet speech in *Coy ex rel. Coy v. Board of Education*.[50] On his home computer, the student created a website that included profanity and a "Losers" section with photos of three classmates and individual insults under each photo.[51] The school board suspended the student, claiming that his access of the site at school violated its code of conduct.[52] Yet the student presented evidence that he was actually disciplined for the *content* of the site, rather than his viewing of the site at school.[53] The court applied the *Tinker* substantial disruption test, finding insufficient evidence that the student's acts affected the school's ability to maintain student discipline, thus protecting the student's speech.[54]

Similarly, the U.S. District Court for the Eastern District of Missouri in *Beussink v. Woodland R-IV School District* used the *Tinker* substantial disruption standard to find that a high school student needlessly suffered irreparable harm when the school disciplined him for his online speech.[55] The speech in question was posted on a website created by the student at his home, through

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tended school authority over "student conduct in school, during the time spent in travel to and from school, and all after school and evening activities, including detention,' and 'in all places where students are within the jurisdiction of the Board . . . ." *Id.* (internal quotations omitted). The court held that this was unconstitutionally overbroad. *Id.* at 706.

[48] *See Beussink*, 30 F. Supp. 2d at 1177, 1179; Kravets, *supra* note 24.

[49] *See* Kravets, *supra* note 24; Paul Easton, Comment, *Splitting the Difference:* Layshock *and* J.S. *Chart a Separate Path on Student Speech Rights*, 53 B.C.L. REV. E. SUPP. 17, 18 (2012), http://bclawreview.org/files/2012/02/02_easton.pdf (discussing the analyses of student Internet speech by the U.S. Court of Appeals for the Second Circuit and Third Circuit, and predicting more school-friendly decisions from the Third Circuit than the Second Circuit). The Third Circuit's decisions in *Layshock* and *J.S.* have been criticized as contradictory. *See* Tanya Roth, *Third Circuit Issues Differing MySpace Student Speech Opinions*, FINDLAW (Feb. 8, 2010, 12:45 PM), http://blogs.findlaw.com/decided/2010/02/3rd-circuit-issues-differing-myspace-student-speech-opinions.html.

[50] *See Coy*, 205 F. Supp. 2d at 801.

[51] *Id.* at 795.

[52] *Id.* at 796.

[53] *Id.* at 801. The court characterized the student's viewing of the website as done in a way so as to draw as little attention to what he was viewing as possible, and this was accepted as proof that the actual viewing was not a problem, but rather the website's content was the issue. *Id.* at 800.

[54] *See id.* at 801.

[55] *Beussink*, 30 F. Supp. 2d at 1180–81.

which he criticized school administration and invited students to complain to the principal.[56] After the administration learned of the website, the student was suspended from school for ten days, which, due to an absentee policy, resulted in his failing his junior year.[57] The *Beussink* court found that the school acted outside of the *Tinker* standard of substantial disruption.[58] "Speech within the school," the court explained, "that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection."[59]

Absent guidance from the Supreme Court on Internet cases, U.S. Circuit Courts of Appeals patch together individual policies for students' Internet use.[60] In *Wynar ex rel. Wynar v. Douglas County School District*, the U.S. Court of Appeals for the Ninth Circuit expressed its frustration over the lack of guidance for student free speech on the Internet.[61] The majority wrote:

> With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result. Courts have long dealt with the tension between students' First Amendment rights and "the special characteristics of the school environment." . . . But the challenge for administrators is made all the more difficult because, outside of the official school environment, students are . . . communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials

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[56] *Id.* at 1177.

[57] *Id.* at 1179–80.

[58] *Id.* at 1180–81.

[59] *Id.* at 1182.

[60] *Compare* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773, 777 (8th Cir. 2012) (overturning a preliminary injunction favoring students who were suspended as a result of a racist and sexually explicit blog about their high school, finding that the blog created a substantial disruption under *Tinker* and thus the school could be justified in punishing them), *with* J.S. *ex rel.* Snyder v. Blue Mountain. Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (finding student's off-campus MySpace postings did not create a substantial disruption and her punishment was unwarranted), *and* Evans v. Bayer, 684 F. Supp. 2d 1365, 1367, 1373 (S.D. Fla. 2010) (finding student's Facebook page created off-campus about her hatred for a teacher did not cause a sufficient disruption on-campus to justify her punishment or any restriction on her free speech).

[61] *See* Wynar *ex rel.* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013) (quoting *Hazelwood*, 484 U.S. 17266) (holding there was a risk of substantial disruption sufficient to justify curbing a student's First Amendment rights when the speech involved was a student's instant messages that threatened school shooting).

> must take care not to overreact and to take into account the creative juices and often startling writings of the students.[62]

The split amongst circuit and district courts over whether students' Internet postings could be the basis of school discipline has led to much policy discussion amongst these courts.[63] In *J.S. ex rel. Snyder v. Blue Mountain School District* five of the eight judges of the U.S. Court of Appeals for the Third Circuit that heard this case stated in a concurrence that First Amendment rights should be extended to students engaging in off-campus speech in the same way that they are extended to all citizens in public.[64] The concurring judges' opinion endorsed the idea that *Tinker* goes too far, and off-campus speech must be vigorously protected from school discipline.[65] Other courts have cited this concurrence as support for more liberalized free speech for high school students.[66] One such case, *T.V. v. Smith Green Community School*, involved two tenth grade girls who posted sexually explicit photos of themselves taken at a slumber party on Facebook, MySpace, and PhotoBucket.[67] A parent brought printouts of the photos to the school to show school administrators, claiming that the photos caused divisiveness on the volleyball team.[68] The school suspended the girls from extracurricular activities in accordance with its handbook.[69] The Northern

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[62] *Id.* (citing *Hazelwood*, 484 U.S. at 266).

[63] *See* Kowalski Certiorari Petition, *supra* note 24, at 3 (noting that "[t]he courts of appeals widely disagree about whether and when punishing that off-campus speech is constitutionally permissible"); *Layshock*, 650 F.3d at 216 (favoring students' rights to free speech in off-campus social media postings); Doninger v. Niehoff 527 F.3d 41, 49, 53 (2d Cir. 2008) (balancing a student's rights with the importance of a school's ability to punish students for substantial disruptions and ultimately finding that a school could do so).

[64] *J.S.*, 650 F.3d at 936 (Smith, J., concurring). The concurrence stated that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.*

[65] *See id.* at 939. To demonstrate how extending *Tinker* to off-campus Internet speech would go too far, the Honorable D. Brooks Smith outlined in his concurrence the following scenario:

> Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.

Id.

[66] *See, e.g.*, *Wynar*, 728 F.3d at 1069; T.V. *ex rel.* B.V v. Smith-Green Cmty. Sch., 807 F. Supp. 2d 767, 781 (N.D. Ind. 2011).

[67] *T.V.* F. Supp. 2d, at 771–72.

[68] *Id.* at 772. The cited divisiveness was that girls on the team formed groups that were either pro-photo or anti-photo. *See id.* Another parent also made a complaint. *Id.* at 773.

[69] *Id.* at 773–74. The handbook stated, "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extracurricular activities for all or part of the year." *Id.* at 774. This punishment was later reduced to twenty-five percent of fall extracurricular activities, which meant that one student missed six volleyball games,

District of Illinois ruled that this punishment intruded on their First Amendment rights, as the behavior was "non-disruptive" under the *Tinker* standard.[70]

In contrast, in 2011, the U.S. Court of Appeals for the Fourth Circuit provided meaningful deference to schools that choose to act in good faith when handling students' online speech that relates to their school.[71] In *Kowalski v. Berkeley County Schools*, the court wrote that "where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."[72] In *Kowalski*, high school senior Kara Kowalski created a MySpace discussion board from her home computer, the goal of which was to ridicule a fellow student.[73] The girl whom the page targeted filed a harassment complaint with the high school and left school for the day, stating that she felt "uncomfortable about sitting in class with students who had posted [online] comments about her . . . ."[74] As a result of the complaint, Kowalski's high school suspended her for five days from school and for ninety days from school social activities.[75] Kowalski filed suit against the school, stating that the punishment made her suffer social isolation, depression, and poor treatment from teachers.[76] In addition to other arguments, Kowalski claimed that she had a First Amendment right to speech because her MySpace posting was not created during an activity related to the

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while the other missed five volleyball games and one choir performance. *Id.* The case did not state whether the handbook specifically addressed social media at all. *See id.*

[70] *See id.* at 780, 781. The court was candid about the implications of free speech rights in the case, calling the girls' photos "juvenile and silly." *See id.* at 775. The opinion begins with, "Not much good takes place at slumber parties for high school kids, and this case proves the point." *Id.* at 771. Even more telling is the judge's loyalty to the law despite his personal opinions:

> Let's be honest about it: the speech in this case doesn't exactly call to mind high-minded civic discourse about current events. And one could reasonably question the wisdom of making a federal case out of a 6-game suspension from a high school volleyball schedule. But for better or worse, that's what this case is about and it is now ripe for disposition.

See id.

[71] *See Kowalski*, 652 F.3d at 577.

[72] *Id.*

[73] *Id.* at 567. The board topic was entitled, "S.A.S.H.," which Kowalski claims stood for "Students Against Sluts Herpes," but a classmate explained was really for "Students Against Shay's Herpes," mocking another high school student, Shay, the main subject of the message board. *Id.* The message board ultimately hosted two dozen other comments, including edited photos of Shay. *Id.* Kowalski did not just create the page, but was active on it, prompting a student to post the message, "you're so awesome kara . . . i never thought u would mastermind a group that hates [someone] tho, lol [laugh out loud]." *See id.* at 568.

[74] *Id.* at 568.

[75] *Id.* at 569.

[76] *Id.* at 569, 570.

school, but rather was "private out-of-school speech."[77] The Fourth Circuit affirmed the district court's summary judgment against Kowalski, agreeing that her site was "created for the purpose of inviting others to indulge in disruptive and hateful conduct," which resulted in an "in-school disruption."[78] The Fourth Circuit qualified what constituted a substantial disruption in this case, stating that Kowalski used the page "to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment . . . ," which thus empowered the school to discipline her because her speech materially and substantially interfered with the school's discipline and collided with the rights of others.[79]

The *Kowalski* court recognized that the Supreme Court had yet to rule on the extent of First Amendment rights as applied to off-campus Internet speech, so it looked instead to the decision from the U.S. Court of Appeals for the Sixth Circuit in *Lowery v. Euverard*, which held that schools "have an affirmative duty to not only ameliorate the harmful effects of disruptions, *but to prevent them from happening in the first place*."[80]

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[77] *Id.* at 567. Kowalski also argued that she was denied due process, was subjected to cruel and unusual punishment under the Eighth Amendment, and had her Fourteenth Amendment rights to equal protection violated. *Id.* at 570.

[78] *Id.* at 567.

[79] *Id.* (quoting *Tinker*, 393 U.S. at 513) (internal quotation marks omitted); *see id.* at 573–74. Other cases under *Tinker* focus instead on safety concerns. *See, e.g.*, *Wynar*, 728 F.3d at 1065. In *Wynar*, a tenth grade student discussed guns and a high school shooting on his MySpace page and within instant messages to his friends. *Id.* at 1064–66. The messages were specific, including names of potential victims, types of weapons to use, a date, and disappointment that he could not kill enough people to satisfy himself. *See id.* at 1065–66. The Ninth Circuit applied the *Tinker* test in analyzing and upholding the school's response of a ninety-day expulsion. *See id.* at 1066, 1068–69. Looking to its "sister circuits" to determine whether some preliminary test must be applied before analyzing off-campus speech under *Tinker*, the court explained that the Second Circuit had not yet decided whether it must be shown that it was "'reasonably foreseeable that [the speech] would reach the school property . . .' [b]ut [that] at least where it is reasonably foreseeable that off-campus speech meeting the *Tinker* test will wind up at school, the Second Circuit has permitted schools to impose discipline based on the speech." *Id.* at 1068–69 (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007), and citing *Doninger*, 527 F.3d at 48). The court found that the student's behavior was "alarming," "explosive," and so specific that it presented "a real risk of significant disruption." *Id.* at 1065, 1070.

[80] *See Kowalski*, 652 F.3d at 572 (quoting Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007)) (emphasis added). The duty of educators to protect students is well-established. *See, e.g.*, Doe Parents No. 1 *ex rel.* Doe v. State Dep't of Educ., 58 P.3d 545, 582 (Haw. 2002), (stating that the Hawaii Department of Education owed middle school children reasonable care to ensure that students are educated in a safe environment, free of any unreasonable risks of harm); Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335 (Mass. 1983) (articulating a college's duty to its students). *Mullins v. Pine Manor College* further explained that

> [t]he duty of due care owed the [student] plaintiff by the [college] defendants in the present case can be grounded on either of two well established principles of law. First, we have said that a duty finds its source in existing social values and customs. . . . The duty of care in this case can be grounded in another theory. It is an established principle that a duty voluntarily assumed must be performed with due care.

C. An Alternative Interpretation: The "True Threat" Standard

Although various circuit and district courts have almost exclusively chosen to analyze student online speech using *Tinker*, the U.S. Court of Appeals for the Eighth Circuit acknowledged the use of the "true threat" standard as an additional, complementary interpretation in 2011.[81] The true threat standard is often used in cases involving threats of violence, as it originated in the context of a vague threat against former President Johnson.[82] However, the true threat standard may apply to numerous circumstances and environments, making it much broader than the substantial disruption test that applies strictly to schools.[83] Indeed, Supreme Court guidance on what constitutes a true threat makes the standard applicable to numerous situations; true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular" person or group, regardless of whether the speaker intends to carry out that threat.[84]

In *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*, the Eighth Circuit analyzed a student's free speech claim under both the substantial disruption and true threat standard in order to conclude that a school's discipline over his speech was warranted.[85] The case involved a tenth grade student, D.J.M., who sent instant messages to his friend that discussed his desire

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Id. at 335–36 (internal quotes omitted).

[81] *See* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 764 (8th Cir. 2011).

[82] *See* Watts v. United States, 394 U.S. 705, 705–06 (1969). The true threat concept came from a 1917 federal statute that prohibits citizens from making threats against a president. *See id.* at 705; *see also* 18 U.S.C. § 871(a) (1917). Although the statute only uses the word "threat," without the word "true," the *Watts* court added "true" in order to analyze what it called the "willfulness" of the speaker's threat, as opposed to political hyperbole. *See Watts*, 394 U.S. at 707; *see also* 18 U.S.C § 871(a). The 1917 statute penalizes anyone who "knowingly and willfully" creates a writing "containing any threat" to kill, kidnap, or harm the president, president-elect, or any other officer, or "knowingly and willfully otherwise makes any such threat" against these individuals. 18 U.S.C. § 871(a).

[83] *See Watts*, 394 U.S. at 707. The threat that the *Watts* court analyzed was the credibility of a threat to the president by an angry citizen at a rally near the Washington Monument who was displeased about being drafted. *See id.* at 706. There, the Supreme Court held that the citizen's speech was "a kind of very crude offensive method of stating a political opposition . . . ," and that it must be examined in context, allowing for the standard to be applied broadly to any speech across environments. *See id.* at 708. In contrast, *Tinker* specifically was decided in the context of schools and has not been extended to other circumstances. *See* 393 U.S. 503, 511 (1969).

[84] *See* Virginia v. Black, 538 U.S. 343, 344 (2003) (citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388); *see also* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (explaining that *Watts* did not create a "particular definition or description of a true threat that distinguishes an unprotected threat from protected speech," which forces lower courts to make subjective determinations about when a school may prevent a substantial disruption through fear of a threat). *Pulaski* used a reasonable recipient test for its true threat analysis. *See id.* at 623; *see also* United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (quoting United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (employing a reasonable recipient test for determination of a true threat)).

[85] *See D.J.M.*, 647 F.3d at 765, 766.

to shoot students in his high school.[86] D.J.M. named students that he wanted to shoot, stated whom he would shoot first, and named the weapon that he would use.[87] The recipient of these messages reported him and, ultimately, D.J.M. was taken into police custody and evaluated for one week at a psychiatric hospital.[88] After his release, school administration suspended D.J.M., at first for ten days and then for the rest of the semester.[89] Administrators justified the suspension by citing the significant disruption and fear that D.J.M.'s actions caused within the school community.[90] D.J.M.'s parents appealed the suspension.[91]

The Eighth Circuit began its interpretation by noting the lack of Supreme Court guidance on the topic.[92] In evaluating D.J.M.'s claim, the Eighth Circuit used *Tinker* to discuss the substantial disruption that the student's statements caused within the school.[93] But before this lengthy analysis, the court touched on the true threat standard, naming it as a consideration in addition to the substantial disruption test.[94] The Eighth Circuit explained that it was not required to determine whether D.J.M. actually intended to carry out his threat; the school had reason to be alarmed and it acted appropriately by involving the police.[95] Accordingly, his suspension was upheld and the court found that his actions satisfied both the substantial disruption and true threat test.[96]

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[86] *See id.* at 757–58.

[87] *Id.* at 758.

[88] *Id.* at 758–59.

[89] *Id.* at 759.

[90] *Id.* Administrators explained that they extended D.J.M.'s suspension for the rest of the year because his instant messages had a "disruptive impact on the school." *Id.* Parents called the principal, asking what action he would take and whether their children were on D.J.M.'s hit list. *Id.* Consequently, the principal increased campus security by assigning staff to monitor entrances and public areas, limiting access to the school, and communicating what measures were taken to parents. *Id.*

[91] *Id.*

[92] *See id.* at 761. The Eighth Circuit stated that in none of the Supreme Court cases on student speech were there any situations where school discipline responded to threats of violence or conduct outside of school. *See id.* Instead, lower courts have faced these decisions, with various approaches to resolve them. *See id.*

[93] *See id.* at 765.

[94] *See id.* at 764. The two cases that the Eighth Circuit cited that used true threat as their primary test involved a letter and a drawing, respectively, not online conduct. *See id.* at 761–62; *see also* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 620 (5th Cir. 2004) (involving a student's violent sketch and using both the substantial disruption and true threat standards); *Pulaski*, 306 F.3d at 621, 625 (involving a threatening letter written by a student and using the true threat standard alone).

[95] *See D.J.M.*, 647 F.3d at 764.

[96] *See id.* At the time of that opinion, the Eighth Circuit was unable to cite to any cases involving student free speech online that used solely the true threat standard without discussion of the substantial disruption test. *See id.*

II. CURRENT SCHOOL SURVEILLANCE EFFORTS

Given that the Supreme Court has not ruled on off-campus Internet speech, the legality of student Internet surveillance carried out by schools remains uncertain.[97] Today's efforts at student Internet surveillance are mostly old-fashioned, relying on students or parents as whistleblowers who bring alarming circumstances to the school administration's attention.[98] These circumstances arise on websites such as Facebook, MySpace, and Tumblr, where students who have accounts may choose to post information publicly or "privately," to those to whom they have granted page access.[99]

The traditional reliance on whistleblowers, however, may not be enough in a world where teenage Internet interactions are so prevalent.[100] In the wake of widely publicized tragedies such as student suicides, some schools are taking preventative steps by employing third-party companies to monitor public posts by students made both on and off school grounds.[101] An October 2013

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[97] *See* Sengupta, *supra* note 23; *Supreme Court Declines to Hear Student Internet Speech Cases*, NAT'L SCH. BOARDS ASS'N, (Jan. 19, 2012), http://legalclips.nsba.org/2012/01/19/breaking-news-supreme-court-denies-cert-in-student-internet-speech-cases/. Having standards for student free speech overall creates some predictability, but is ultimately insufficient for the realities of an Internet society. *See id.*

[98] Sengupta, *supra* note 23.

[99] *Privacy Policy*, GEO LISTENING (Oct. 10, 2013), http://geolistening.com/privacy-policy/. Facebook and MySpace are social networking sites organized on the premise of creating networks of "friends," with whom users can share biographical information, photos, preferences, videos, and thoughts. *See* Daniel Nations, *Facebook Profile*, ABOUT.COM, http://webtrends.about.com/od/profiles/fr/facebook-profile-what-is-facebook.htm (last visited Oct. 18, 2014); Linda Roeder, *What Is MySpace?*, ABOUT.COM, http://personalweb.about.com/od/myspacecom/a/whatismyspace.htm (last visited Oct. 18, 2014). Tumblr is more freeform and may be called "microblogging," where users create websites that can host blog posts, photographs, and other media, and individuals can "follow" another's Tumblr. Doug Aamoth, *What is Tumblr?*, TIME MAG., (May 19, 2013), http://techland.time.com/2013/05/19/what-is-tumblr/.

[100] *See* Sengupta, *supra* note 23.

[101] *See id.* Although this Note does not attempt to tackle the complicated and timely topic of cyberbullying, there are First Amendment implications for the speakers, namely, the cyberbullies. *See, e.g.*, Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 801 (N.D. Ohio 2002). The examples of extreme cyberbullying and First Amendment rights are, unfortunately, plentiful. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011) (involving a student-created webpage targeting another student, called "Students Against Shay's Herpes"); Ahrens, *supra* note 30, at 1694; Schneider & Kay, *supra* note 5. Technology also came into the spotlight in the "Steubenville Rape Case" of 2012, where teenagers, via cellphone, threatened a girl who was raped against going to authorities. *See* Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape That Social Media Brought to Light*, N.Y. TIMES, Mar. 18, 2013, at A10, *available at* http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html. This case generated a national media frenzy when an intoxicated sixteen-year-old was raped in Ohio and photos and a video of the rape were circulated over the Internet. *See id.* The "Steubenville Rape Case," as it became known, involved primarily text messages and a publicly available YouTube video. *Id.* Conviction of the Steubenville teenagers involved in the rape demonstrates the gravity of the consequences that a social media posting could create. *See* Alexandra Kushner, *The Need for Sexting Law Reform: Appropriate Punishments*

New York Times article reported that although surveillance of students' off-campus Internet speech still relies mostly on students reporting their peers' behavior, some schools are taking proactive steps to ensure the safety of their students through professional surveillance companies that monitor students' public Internet posts.[102]

Geo Listening and CompuGuardian are two companies that offer services for schools to monitor students' Internet speech, though they use different approaches.[103] CompuGuardian monitors student activity on school-owned hardware, regardless of where the activity occurs, while Geo Listening looks at publicly-available posts, posted from anywhere, using any hardware.[104] CompuGuardian welcomes its website visitors with a statistic from the *Chicago Sun Times*: two out of three "violent school acts start with digital aggression."[105] Geo Listening's website greets visitors with a similarly bold assertion: "Disrupt bullying before it's too late."[106]

Geo Listening's website explains that its goal is to shift the school's intervention from where it is presently, relying on student reporting, to a stage closer to the beginning of cyberbullying, before harm is severe.[107] Geo Listening

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for Teenage Behaviors, 16 U. PA. J.L. & SOC. CHANGE 281, 281 (2013) (giving a thorough analysis of the sexting phenomenon and advocating for teenage responsibility and education around actions).

[102] *See* Sengupta, *supra* note 23. In this article, the executive director of the American Association of School Administrators, Daniel Domenech, called the policy of preventative surveillance of students' online speech "cumbersome and confusing." *Id.*

[103] *Id.*

[104] *Compare Features*, COMPUGUARDIAN, http://www.compuguardian.com/category/features (last visited Feb. 22, 2015) (explaining the company's services as including live monitoring of student hardware use, content blocking, remote control, and activity logs), *with FAQs*, GEO LISTENING, http://geolistening.com/faq/ (last visited Feb. 22, 2015) (explaining that the company does not bypass security for student online activity, but rather gathers information "from public posts on social networks") [hereinafter *FAQs*]. CompuGuardian's services are not limited to publicly available information; it relies on information obtained from the school owned equipment, such as keystroke tracking, screenshots, and instant message conversations. *See* COMPUGUARDIAN, http://www.compuguardian.com/ (saved on Nov. 8, 2013) (accessed by searching for http://www.compuguardian.com/ in the Internet Archive Index) [hereinafter COMPUGUARDIAN Archive]. The services appear to be marketed to schools for services similar to Geo Listening with two main exceptions: (1) CompuGuardian explicitly names pornography as an aim for its surveillance, and (2) CompuGuardian's services appear to target schools for help in the surveillance of school district-owned hardware, so that students' activity may easily be tracked. *See id.* Much to the dismay of reporters, Geo Listening and CompuGuardian did not reveal how their services truly operate. *See* Cyrus Farivar, *California School District Hires Online Monitoring Firm to Watch 13,000 Students*, ARS TECHNICA (Sept. 16, 2013, 6:20 PM), http://arstechnica.com/tech-policy/2013/09/california-school-district-hires-online-monitoring-firm-to-watch-13000-students/.

[105] *See* COMPUGUARDIAN Archive, *supra* note 104 (citing Frank Main, *Gangs Using Social Media to Spread Violence*, CHI. SUN TIMES, Feb. 28. 2012, http://www.suntimes.com/news/metro/10256178-418/cyber-tagging-now-the-gang-graffiti-of-the-internet.html (Former Chicago Police Superintendent Jody Weis "estimated two-thirds of school-related violence is spawned on social-media sites.")).

[106] *See* GEO LISTENING, http://www.geolistening.com/ (last visited Feb. 23, 2015).

[107] *Schools*, GEO LISTENING, http://geolistening.com/schools/ (last visited Feb. 23, 2015).

does not monitor any private pages, text messages, emails, phone calls, voicemails or other private content, but instead, it

> collects, processes, analyzes and reports only publicly available data that aligns with school district procedures and board policies related to student conduct and safety. [Its] Monitoring Service takes into account frequency and severity of a student's posts that include indicators relating to the school conduct and safety categories, including bullying, cyberbullying, hate and shaming activities, depression, harm and self harm [sic], self hate [sic] and suicide, crime, vandalism, substance abuse and truancy.[108]

Geo Listening explains that to opt out of its surveillance, a student simply should not post *publicly* on the sites that it presently monitors, including Twitter, Facebook, Instagram, Picasa, Vine, Flickr, Ask.fm, YouTube, and Google+, because the company does not bypass any user privacy settings.[109] School administrators receive daily reports of flagged comments, regardless of where the posts were created, and are the ones to decide whether to act.[110]

Geo Listening's services emphasize that students' posts are captured by the service in the same way that any member of the public, including administrators, could have found the content on his own.[111] This type of surveillance does not tackle the issue of private postings, which may include peer-to-peer messaging such as instant messages over smartphone and tablet applications.[112] But for now, this is how some schools have chosen to tackle one part

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[108] *Privacy Policy*, *supra* note 99.

[109] *Id.* The sites listed by Geo Listening are all part of a broad classification of social media sites, where users are able to post comments to their own and others' accounts. *See generally* Nick Bilton, *Newest Battle Is in Messaging*, N.Y. TIMES, Mar. 3, 2014, at B6 (explaining a plethora of messaging applications and "messaging app overload").

[110] *Glendale School District Monitoring Students' Social Media with Geo Listening*, HUFFINGTON POST (Sept. 16, 2013, 6:43 PM) http://www.huffingtonpost.com/2013/09/16/glendale-schools-social-media_n_3935075.html. The creator of Geo Listening explained that the kinds of posts that get flagged are those that "deal with . . . despair," though "[h]e wouldn't share an example of the types of reports that would go to school officials . . . ." *See* Farivar, *supra* note 104.

[111] *See* Sengupta, *supra* note 23.

[112] *See id.* Students have a significant number of smartphone and tablet applications, or "apps," to choose from when pursuing social messaging. *See* Sarah Perez, *Overrun with Messaging Apps*, TECHCRUNCH (Dec. 6, 2013), http://techcrunch.com/2013/12/06/overrun-with-messaging-apps. In November 2013, analysts predicted that the number of messages sent on social messaging apps will grow from 27.5 trillion in 2013 to 71.5 trillion in 2014. *Id.* Before her suicide, Rebecca Ann Sedwick changed her name on Kik Messenger, a peer-to-peer messaging app, to "That Dead Girl." Alvarez, *supra* note 14. Kik was one of the apps through which she had been bullied. *See* Bazelon, *supra* note 2. Other apps made specifically for messaging include WhatsApp, Viber, ask.fm, MessageMe, Wut, and Popcorn. Bilton, *supra* note 109. Recognizing the growing market of messaging and its inability to compete, Facebook purchased WhatsApp for $19 billion in February 2014. *See* Sarah Frier, *Facebook to Buy Messaging App WhatsApp for $19 Billion*, BLOOMBERG (Feb. 20, 2014, 4:54 PM), http://

of students' disruptive speech that may threaten the safety of their schools.[113] Glendale Unified School District in Glendale, California, is one of the schools making this effort; in 2012, it signed a $40,500 contract with Geo Listening to monitor high school students' public posts on certain social media sites, in part to respond to a string of teenage suicides in the district.[114]

III. Benefits of and Problems with Surveillance

As some schools choose to employ third-party companies to monitor students' Internet conduct, the benefits and drawbacks of these services must be identified.[115] Ultimately, as a result of the lack of Supreme Court guidance and the ubiquitous nature of Internet technology, it is unclear whether schools may legally surveil students' Internet posts in order to protect the school population from a substantial disruption to its educational goals.[116] Although school surveillance companies offer schools a way to aggregate public online action by students, their services are expensive, have yet to be proven effective, and most importantly, such surveillance raises real constitutional concerns about limiting student speech.[117]

A. Importance of Student Free Speech and Student Safety

Students' free speech is of great importance to not just students themselves, but also to educators and the parents who entrust schools with their children's development; concerned parties want to encourage free thinking, expose children to multiple perspectives and diversity of thought, and promote expression of thought, autonomy, and tolerance.[118] Schools are heralded as ex-

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www.bloomberg.com/news/2014-02-19/facebook-to-buy-mobile-messaging-app-whatsapp-for-16-billion.html.

[113] *See Glendale School District Monitoring Students' Social Media with Geo Listening*, *supra* note 110.

[114] *See* Sengupta, *supra* note 23; *Glendale School District Monitoring Students' Social Media with Geo Listening*, *supra* note 110. Online surveillance companies have grown substantially in the collegiate athletic market as well, due in part to NCAA guidance that has recommended, though not mandated, monitoring of student-athlete social media postings. *See University of North Carolina, Chapel Hill Public Infractions Report*, NCAA 1, 11 (Mar. 12, 2012), http://chronicle.com/blogs/ticker/files/2012/03/UNC.pdf. In response to this growing trend, several bills were proposed to make it more difficult for colleges to monitor student-athletes online. *See* Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. Times, Mar. 31, 2012, at D1.

[115] *See* Sengupta, *supra* note 23.

[116] *See id.*

[117] *See id.*

[118] *See* Murray Dry, *The Mixed Character of Free Speech and Its Implication for Public Schools in America*, 32 Vt. B.J., 32, 35 (2006) (discussing free speech within schools). Murray Dry explains that teachers face two "dangers": manipulating students to accept certain opinions rather than research and form their own, and encouraging the equality of ideas, which could validate ethically irresponsible views. *See id.* at 36. Student free speech, he explains, is crucial in schools despite this second danger:

perimental zones where students learn lessons that cannot be taught at home.[119] A student must be able to express himself in a controlled learning environment such as a school, in part to test the boundaries of what is acceptable in greater society.[120] But students whose out-of-school Internet speech affects their peers' ability to learn at school create a great disadvantage for their peers, and *Tinker v. Des Moines Independent Community School District* establishes that free speech concerns must be tempered when student speech creates a substantial disruption.[121]

Internet speech, however, also implicates some of a school's core functions, including the promotion of social utility, civility, and respect for others.[122] It is precisely for these reasons that the Supreme Court has granted schools the ability to discipline students if their free speech is too disruptive.[123] But after the Supreme Court deemed any "exclusion from the educational process for more than a trivial period . . . a serious event in the life of the suspended child . . ." lower courts have made significant efforts to ensure that students are not suspended or otherwise removed from school unless the need is great.[124] Therefore the importance of keeping students in school must be balanced with the need to ensure a safe environment for all students and grant schools some autonomy in the process.[125] School officials must be able to make snap decisions: they can never be prepared for all of the challenges that a diverse student body can bring.[126] Preventatively surveying social media and

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"If the most basic part of free speech is the development of the mind, it is an essential part of education." *Id.* at 35.

[119] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (upholding a school's disciplinary action, stating that, as "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," and that "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct").

[120] *See id.*; *see also* Dry, *supra* note 118, at 38.

[121] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[122] *See* Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 WM. & MARY BILL RTS. J. 657, 660 (2009) (discussing the decision in *Morse v. Frederick* and stating that "[s]chools don't exist to facilitate free speech, but rather to educate students, and students' free speech interests must be tailored to a school's unique environment").

[123] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (citing *Tinker*, 393 U.S. at 506) (outlining the tension between First Amendment rights and the "special characteristics of the school environment," and upholding a school's right to discipline its students).

[124] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 577, 579–80 (1975) (discussing the importance of caution in any decisions to suspend a student from school, claiming, "the risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process"); Boucher v. Sch. Bd., 134 F.3d 821, 826 (7th Cir. 1998) (recognizing the severe harm that a one-year expulsion would create in a case involving a newspaper created off-campus but distributed on-campus by a student).

[125] *See Goss*, 419 U.S. at 580.

[126] *See id*. (noting that, in a school, "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action"); *see also Morse*, 551 U.S. at 409–10; New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (explaining that maintaining classroom order in recent years has

enforcing punishments for inappropriate speech could increase safety within schools and ideally would lessen the number of snap decisions that teachers must make by having a third-party forecast disruptions before they bubble over into the school.[127]

Whether prevention of a substantial disruption is compelling enough to warrant Internet surveillance is open to conjecture.[128] In *Kowalski v. Berkeley County Schools*, the Fourth Circuit named school officials as "trustees of the student body's well-being."[129] If taken to the extreme, this could intrude on a parent's ability to raise his child as he deems fit, a fundamental right guaranteed by the Supreme Court.[130] The *Kowalski* court, however, may be outdated in its view.[131] Although schools once felt responsibility for the moral formation of students under the theory of *in loco parentis*, educational theorists and courts have noted a shift in that mindset; today, schools emphasize practical education over morality and courts are willing to impose liability on schools.[132] This shift originated in the late 1960s, as the Civil Rights move-

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become more challenging due to social issues such as drug use and violent crime). In *Morse*, a student was suspended after he refused to take down a banner reading "BONG HiTS 4 JESUS" at a school event. *Id.* at 397. The Court found that the principal's decision to suspend him and remove the banner did not violate the First Amendment, as a principal must be able to make a snapshot decision in a critical moment. *Id*. at 409–10. The *Morse* Court recognized that "[s]chool principals have a difficult job, and a vitally important one." *Id.* at 409. When the student who unveiled the banner did so "suddenly and unexpectedly," the principal had to decide instantly whether to act. *Id.* at 410. "It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message" about the school's seriousness regarding drug use. *Id.* The Court explained that the First Amendment does not require that schools tolerate student expression that contributes to the danger of making light of illicit drug use. *Id.*

[127] *See* Sengupta, *supra* note 23.

[128] *See id.*

[129] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011).

[130] *See* Wisconsin v. Yoder, 406 U.S. 205, 205 (1972) (upholding the rights of members of the Old Order Amish religion and the Conservative Amish Mennonite Church to educate their children only to the age of sixteen in accordance with the religion and lifestyle that they chose for their children, contrary to Wisconsin's requirement of education through high school).

[131] *Compare T.L.O.*, 469 U.S. at 336 (explaining that immunity for high schools from scrutiny because of *in loco parentis* is inconsistent with Supreme Court precedent and rejecting *in loco parentis* because it does not fit into reality), *and* Webb v. McCullough, 828 F.2d 1151, 1156 (6th Cir. 1987) (stating that "the *in loco parentis* doctrine is no longer recognized as the source of school officials' general authority over pupils" in relation to a high school field trip), *with* R.C.M. v. State of Tex., 660 S.W.2d 552, 554 (Tex. App. 1983) (stating that the Texas Appellate court is bound by *in loco parentis* in relation to a situation at a high school), *and* Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. Ct. App. 1913) (explaining that college authorities stand *in loco parentis* to the physical, mental, and moral welfare of students and can thus make any rule or regulation for the betterment of those students that a parent could make for the same purpose).

[132] *See T.L.O.*, 469 U.S. at 336 (stating that *in loco parentis* is "in tension with contemporary reality and the teachings of [the] Court"); Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 970 (2010) (discussing the history and evolution of *in loco parentis*). *In loco parentis* is frequently discussed in reference to higher education regarding liability, but also exists in elementary, middle, and high schools. *See, e.g.*, *T.L.O.*,

ment created tension between students and their schools, and courts responded by formally recognizing students' rights over their former trustee—the school.[133] If a court sees a school as acting *in loco parentis* and as a trustee of the student body, that school must be able to act on the conduct outside of school that causes a substantial interference within the educational process.[134]

B. Potential Benefits of Surveillance

Professional surveillance is a technology-forward response to a technology-based problem.[135] Through the use of surveillance, schools attempt to show a conscious effort to educate the whole student by encouraging responsible behavior outside of the school alongside similar behavior that is required within it.[136] By ensuring that students' Internet usage does not substantially interfere with their peers' learning, schools encourage the development of their students, who may worry less about Internet threats and more about their education.[137] Many courts have held that an actual substantial disruption to the educational environment is not required; rather, the risk of a substantial disruption may be sufficient to justify schools curbing or punishing student online speech.[138] Ideally, use of Internet surveillance intercepts troubling messages

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469 U.S. at 336 (involving high school freshman and search and seizure issues); *R.C.M.*, 660 S.W.2d at 554 (involving discipline for high school student who disobeyed test taking procedures).

[133] *See, e.g.*, *Goss*, 419 U.S. at 581 (granting students the rights to due process for high school suspensions requiring notice of charges and a prior hearing); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 155 (1961) (requiring due process of the law for student expulsion that resulted from Civil Rights activism).

[134] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654, 655 (1995) (establishing *in loco parentis* between both public and private schools and their minor students). In *Vernonia School District 47J v. Acton*, the Supreme Court qualified a school's duty to its students, noting that it did not, "of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect' . . . ." (quoting DeShaney v. Winnebago Cnty Dep't Soc. Servs., 489 U.S. 189, 200 (1989)).

[135] *See* Sengupta, *supra* note 23 (discussing schools' justifications for using online surveillance of students).

[136] *See* Editorial, *Cyber-Nosey Schools*, L.A. TIMES, Sept. 18, 2013, at A12 (noting that monitoring students online could cause students to be more cautious about Internet posts).

[137] *See Tinker*, 393 U.S. at 508.

[138] *See* Wynar *ex rel.* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1065 (9th Cir. 2013) (finding in favor of a school when it took action against a student for threatening, off-campus instant messages, justifying the actions because of a risk of a substantial disruption); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d at 764, 765 (8th Cir. 2011) (holding that it was reasonably foreseeable that a student's instant messages would pose a risk of a substantial disruption and, accordingly, the school was justified in taking action against him); Wisniewski v. Bd. of Educ., 494 F.3d 34, 39–40 (2d Cir. 2007) (finding against a student who sued on the basis of his First Amendment rights, reasoning that the risk of substantial disruption that his AOL Instant Messenger icon posed was significant enough to warrant school action). Each of these cases involved threats of violence. *See Wynar*, 728 F.3d at 1064–65 (violence involved MySpace posts and instant messages detailing a desire to kill classmates); *D.J.M.*, 647 F.3d at 758 (violence was instant messages detailing school shooting desire); *Wisniewski*, 494 F.3d at 36 (involving AOL Instant Messenger buddy icon, which was an image of a

before they become an issue, legally justified by their risk of substantial disruption.[139]

One benefit of Internet surveillance is that it is conducted by professionals who are third-parties to the schools and their communities.[140] This allows the review of students' public posts by an unbiased but trained professional who is unrelated to the school.[141] This individual therefore cannot judge students, and students' relationships to a school employee will not suffer.[142] Instead, the surveillance professional may look for key signs of troubling behavior, such as threats made by one student to another or signs of bullying or self-hate.[143] Third-party surveillance saves students from the embarrassment associated with teachers or parents investigating their online lives.[144]

Proponents argue that using a professional surveillance company minimizes the intrusion on student free speech rights in several ways.[145] First, professional surveillance does not bypass any security features if a student uses privacy controls on his account.[146] Surveillance companies simply read publicly available content, just as a peer would.[147] The advantage of using a company, however, is that a trained professional may make an educated judgment call, as opposed to the current reliance on young, untrained students, who may either take their classmates too seriously or not seriously enough.[148] Secondly,

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teacher being shot). The Second, Sixth, Eighth, and Ninth Circuits have all rendered decisions that use a risk of substantial disruption standard for evaluating restrictions on student online speech. *See Wynar*, 728 F.3d at 1065; *D.J.M.*, 647 F.3d at 765; Lowery *ex rel.* Lowery v. Euverard, 497 F.3d 584, 592 (6th Cir. 2007); *Wisniewski*, 494 F.3d at 39–40. In *Lowery ex rel. Lowery v. Euverard*, the Sixth Circuit held that *Tinker* does not require a certainty of substantial disruption. 497 F.3d at 592. Instead, the court held that if a substantial disruption is forecasted that materially interferes with school activities, then school officials would be justified in restricting student speech. *See id.*

[139] *See Wynar*, 728 F.3d at 1064; *Schools*, *supra* 107.

[140] *Cyber Bullying, Other Serious School Threats Addressed by Geo Listening's Social Network Monitoring Services*, PR NEWSWIRE (Sept. 3, 2013), http://www.prnewswire.com/news-releases/cyber-bullying-other-serious-school-threats-addressed-by-geo-listenings-social-network-monitoring-services-222152961.html (highlighting one surveillance company's expertise in social networks, children's privacy, and privacy requirements in education).

[141] *See id.*

[142] *See Kowalski*, 652 F.3d at 569 (relaying a student's argument that her online actions were judged by her teachers as a result of their publicity).

[143] *See Glendale's Cyber-Nosey Schools*, *supra* note 136.

[144] *See Kowalski*, 622 F.3d at 569.

[145] VP, Comment to Sengupta, *supra* note 23, Oct. 30, 2013, 8:28 AM (emphasizing the public nature of posts contributing to surveillance's legality); Thom J., Comment to Sengupta, *supra* note 23, Oct. 29, 2013, 8:12 PM (explaining the distinction between privacy and speech and the lack of privacy afforded when someone chooses to post publicly).

[146] *Privacy Policy*, *supra* note 99.

[147] *See* Stephan Ceasar, *Glendale District Says Social Media Monitoring Is for Student Safety*, L.A. TIMES (Sept. 14, 2013), http://articles.latimes.com/2013/sep/14/local/la-me-glendale-social-media-20130915 (explaining surveillance proponents' viewpoint that public posts are no different from speaking in front of a teacher).

[148] *See* Sengupta, *supra* note 23.

the technology could be one tool in a school's comprehensive approach to decreasing cyberbullying, albeit, as a concerned parent of a Glendale School District student explained, a very small piece in that tool kit.[149]

Finally, surveillance may be effective in curtailing specific types of disruptive online speech.[150] Sexual violence and language are one area in which schools have intervened when a student's Internet actions create a substantial disruption; third-party Internet surveillance could target these areas.[151] In 2013, a Facebook group popular at Boston College, "Boston College Confessions" made national headlines when a student "confessed" to the rape of three female students on the college campus via the group.[152] The post, publicly available and made on the student's own time, was purportedly authored by an undergraduate student who came forward and claimed that his posting was a joke.[153] His act undeniably affected the campus community, dominating Boston College's attention.[154] It was reported that the student was referred for discipline, though to what degree is unclear.[155] This accountability was championed by the greater community.[156] Because the student's posting was public, it falls into the category of posts that an online surveillance company would target, and could have been caught without relying on the bravery of whistleblowers.[157]

Another area that surveillance would target is public cyberbullying[158] Before fourteen-year-old Jamey Rodemeyer committed suicide in Amherst, New

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[149] *See* Kelly Corrigan, *Glendale School District to Monitor Students' Social Media Posts*, L.A. TIMES, Aug. 28, 2013, http://articles.latimes.com/2013/aug/28/local/la-me-ln-glendale-public-schools-to-monitor-students-social-media-posts-20130828 (quoting a student's mother who said that online surveillance could be positive if used in moderation and alongside other tools).

[150] *See* Sengupta, *supra* note 23.

[151] *See* T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch., 807 F. Supp. 2d 767, 780, 782 (N.D. Ind. 2011) (using a risk of a substantial disruption standard); *Privacy Policy*, *supra* note 99.

[152] Steve Annear, *Boston College Sexual Assault Confession Deemed 'Hoax,'* BOSTON MAG. (Oct. 2, 2013, 2:55 PM), http://www.bostonmagazine.com/news/blog/2013/10/02/boston-college-confessions-sexual-assault-hoax; *see* Ryan, *supra* note 21.

[153] *See* Ryan, *supra* note 21; *see also* Eleanor Hildebrandt, *'Confession' About Assault Deemed Hoax*, HEIGHTS, Oct. 3, 2013, at A1, available at http://bcheights.com/news/2013/bc-confession-no-7122-deemed-hoax/.

[154] *See* Ryan, *supra* note 21.

[155] Matt Rocheleau, *BC Eyes Discipline for Student Who Allegedly Wrote 'Disturbing,' but Fake Facebook Post About Raping Three Women*, BOSTON.COM, (Oct. 2, 2013, 2:13 PM), http://www.boston.com/yourcampus/news/bc/2013/10/bc_eyes_discipline_for_student_who_allegedly_wrote_disturbing_but_fake_facebook_post_about_raping_th.html (stating that the student would be "referred to the student conduct system for resolution of this matter").

[156] Ryan, *supra* note 21 (reporting that "hundreds of [BC] students planned to meet . . . for a discussion about the culture of sexual abuse on campus").

[157] *See Schools*, *supra* note 107.

[158] *See* Susan Donaldson James, *Jamey Rodemeyer Suicide: Police Consider Criminal Bullying Charges*, ABC NEWS (Sept. 22, 2011), http://abcnews.go.com/Health/jamey-rodemeyer-suicide-ny-police-open-criminal-investigation/story?id=14580832 (discussing potential criminal charges for

York in 2011, one of his peers anonymously posted, "HE MUST DIE!" on a public website.[159] Because New York State did not have any bullying laws at the time, the only way a student could be liable for this speech was through aggravated harassment charges.[160] But these charges could only have been brought following Rodemeyer's suicide, when the totality of the harassment was brought to light; surveillance, arguably, could have highlighted students' public posts earlier and notified school administrators of a threat to student safety through cyberbullying.[161]

Internet surveillance of students would also target physical threats of violence against students.[162] In late 2007, a student at Loyola Marymount University was arrested after posting a threatening post on JuicyCampus.com, a then-existing college gossip blog that was accessible to the public.[163] The message read, "I am going to shoot and kill as many people as I can until which time I am incapacitated or killed by the police."[164] The twenty-one-year-old student was arrested; it was not determined whether he had any intention to follow through on his post.[165]

In the debate between free speech and student safety, proponents of Internet surveillance of students argue that students are posting public information and holding them accountable for their words is not an invasion of privacy, but

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middle school students who cyberbullied a peer who ultimately killed himself); *Schools*, *supra* note 107.

[159] James, *supra* note 158. Several posts had been written on Rodemeyer's Formspring account, a website that allows users to post anonymously. *Id.* One referenced post stated, "JAMIE IS STUPID, GAY, FAT ANND UGLY. HE MUST DIE!" *Id.* Another stated, "I wouldn't care if you died. No one would. So just do it :) It would make everyone WAY more happier!" *Id.*

[160] *Id.*

[161] *See id.*; *Schools*, *supra* note 107.

[162] *See, e.g.*, *D.J.M.*, 647 F.3d at 758, 765 (denying First Amendment protection for a student who used instant messages to name students he wanted to kill, discussed a specific weapon, and said he wanted to make his high school known for something, because it was reasonably foreseeable that his threats would cause a risk of substantial disruption within the school).

[163] *Internet-Based Threat Against University Results in Arrest*, L.A. POLICE DEP'T (Dec. 8, 2007), http://www.lapdonline.org/december_2007/news_view/37145.

[164] Andy Sternberg, *LMU Student Arrested in Connection with Campus Shooting Web Post*, LAIST.COM (Dec. 9, 2007, 4:50 AM), http://laist.com/2007/12/09/lmu_carlos_huerta.php.

[165] *Internet-Based Threat Against University Results in Arrest*, *supra* note 163. Similarly, in 2008, a Colgate University student accessed Juicy Campus and criticized the site because anyone could access it and potentially threaten a school shooting. *See* Jeff Young, *Colgate U. Student's Violent Message to a Gossip Web Site Leads to His Arrest*, CHRON. HIGHER EDUC., (Mar. 12, 2008, 3:41 PM), http://chronicle.com/blogPost/Colgate-U-Student-s-Violent/3756. The posting stated:

> I wonder if i could shut down the school . . . by saying I'm going to shoot as many people as i can in my second class tomorrow. I hope I get more than 50 [ ]. For liability reasons and ip tracking I won't leave it at that. But seriously, this site is ridiculous, if it got big, and someone put the effort into writing a big long serious suicide note informing all readers that he would kill over 100 kids, they could shut down the school. Nice.

Id. The student was tracked through his IP address and arrested. *Id.*

rather a lesson in the consequences that constitutionally guaranteed free speech could produce.[166] On the other hand, courts have established that schools must be careful not to penalize a student just because he expresses something with which the school disagrees.[167] If surveillance was truly implemented in a deliberate way with a high threshold, it could help schools intervene to curb extreme cyberbullying as in the case of Rodemeyer, look for school shooting discussion as in Columbine and other tragedies, and monitor harmful sexual discussions that champion rape and other sexual issues. [168]

C. Drawbacks of Using Professional Surveillance

Despite these benefits, there are many drawbacks to using surveillance, including upkeep.[169] Although an unrelated professional cannot judge a student, he also has no context with which to understand the school, student body, or specific student.[170] Knowledge of gossip within a school, student interactions, upcoming school events, or even school traditions would be necessary to fully understand situations.[171] Context is key in these evaluations, and a professional monitoring service requires constant communication with its clients in order to learn the required context.[172]

A threshold concern in implementing student Internet surveillance is whether it intrudes on students' free speech rights.[173] Internet surveillance could chill free speech, as students would know that their posts were monitored and consequently could choose not to express their thoughts on the Inter-

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[166] *See Privacy Breach or Public Safety? Teens' Facebook Posts Monitored by School District*, NBC NEWS (Sept. 16, 2013, 12:17 PM), http://www.nbcnews.com/technology/privacy-breach-or-public-safety-teens-facebook-posts-monitored-school-8C11167659 (quoting a sixteen-year-old, who stated, "[w]e all know social media is not a private place, not really a safe place").

[167] *See Hazelwood*, 484 U.S. at 266; Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012) (citing *Hazelwood*, 484 U.S. at 271, 273 and quoting *Tinker*, 393 U.S. at 514) (stating that generally, "[t]he closer expression comes to school-sponsored speech, the less likely the First Amendment protects it . . . [a]nd the less the speech has to do with the curriculum and school-sponsored activities, the less likely any suppression will further a 'legitimate pedagogical concern' . . .").

[168] *See generally* Sengupta, *supra* note 23 (describing areas that online surveillance targets).

[169] *See Glendale's Cyber-Nosey Schools*, *supra* note 136.

[170] *See* ROBYN S. HESS ET AL., COUNSELING CHILDREN AND ADOLESCENTS IN SCHOOLS 10 (2012) (noting that counselors balance the context of a student's academic, career, social and emotional considerations).

[171] *See id.*

[172] *See id.* It is unclear whether any of the online monitoring companies attempt to learn background information about the schools that they target. *See Schools*, *supra* note 107. If a school employs an online monitoring company, it should provide that company background about the demographics of the school and school-specific jargon, and keep the company abreast of major school events or scandals so that the company may monitor in an educated manner. *See id.*

[173] *See Glendale's Cyber-Nosey Schools*, *supra* note 136; *Glendale School District Monitoring Students' Social Media with Geo Listening*, *supra* note 110 (discussing American Civil Liberties Union comment that Glendale Unified School District's use of social media surveillance is questionable).

net.[174] Moreover, critics have argued that Internet surveillance could lead to the fabrication of claims, and educators' consequential preoccupation with these claims, instead of focusing on educating students.[175] Surveillance could also erode trust between school employees and students, the latter feeling as though they were being spied upon.[176] Some worry that student privacy is being invaded generally, even despite the public nature of the posts.[177]

Another consideration is the lack of proven results of surveillance.[178] Preliminary results are unavailable as to whether student surveillance has been successful, and the Superintendent of the Glendale Unified School District stated that to his knowledge, no student had been disciplined after Geo Listening found any social media posting as of September 2013.[179] Yet given the ease with which a student may employ privacy controls on social media, a company's ability to observe many posts is clearly limited.[180] In November 2011, the Pew Internet and American Life Project reported that sixty-two percent of teenagers with a social media profile stated that the profile they use most frequently is set to "private," enabling only their friends to be able to see their posts.[181] Similarly, only seventeen percent of teenagers surveyed reported that their profiles were set to completely public.[182] If students are aware of Internet

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[174] *See Glendale's Cyber-Nosey Schools*, *supra* note 136 (suggesting that surveillance could chill free speech); Sengupta, *supra* note 23 ("[W]hen does protecting children from each other or from themselves turn into chilling free speech?").

[175] *See Glendale's Cyber-Nosey Schools*, *supra* note 136. Similarly, one may create a fraudulent Facebook account with great ease. *See* Alexis Kleinman, *Facebook User Numbers Are Off: Ten Percent of Reported Users Are Not Human*, HUFFINGTON POST (May 17, 2013, 11:17 AM), http://www.huffingtonpost.com/2013/05/17/facebook-user-numbers_n_3292316.html. In May 2013, an estimated ten percent of Facebook users were pets or products, not humans. *See id.*

[176] *See* Corrigan, *supra* note 149; *Glendale's Cyber-Nosey Schools*, *supra* note 136.

[177] *See Calif. School District Pays Firm to Monitor Kids' Social Media*, UNITED PRESS INTERNATIONAL, INC. (Sept. 14, 2013, 2:50 PM), *available at* http://www.upi.com/Top_News/US/2013/09/14/Calif-school-district-pays-firm-to-monitor-kids-social-media/UPI-75701379184611/ (quoting a senior staff attorney for the Electronic Frontier foundation, who compared public schools hiring surveillance firms to the government hiring a contractor to stalk students' social media, emphasizing that proactively gathering this information crosses a line); Andy Meek, *Glendale School District Hires Firm to Monitor Students' Social Media Use*, TIME MAG. (Sept. 14, 2013), http://nation.time.com/2013/09/14/glendale-school-district-hires-firm-to-monitor-students-social-media-use/ (stating that Glendale Unified School District's decision to use online surveillance has been critiqued as government-sponsored stalking, raising privacy concerns for students being monitored).

[178] *See* Ceasar, *supra* note 147. The Superintendent of Glendale Unified School District, Dick Sheehan, stated that to his knowledge, as of September 2013, no student had been disciplined after Geo Listening found any social media posting. *See id.*

[179] *See* Ceasar, *supra* note 147. Superintendent Sheehan did claim, however, that a pilot run of the service uncovered a student who was contemplating suicide. *See* Farivar, *supra* note 104. "We were able to save a life," he reported, as a result of discovering these messages. *Id.*

[180] Farivar, *supra* note 104. Geo Listening's CEO claimed that if his service inspired students to change their settings to private, he would consider it a positive for all involved. *See id.*

[181] Amanda Lenhart et al., *supra* note 13 (also reporting that in 2006, this number was consistent: fifty-nine percent).

[182] *Id.*

surveillance, they may be less likely to post publicly, and thus jeopardize the effectiveness of Internet surveillance companies.[183] Moreover, public Internet posts are just the tip of the iceberg: Internet surveillance companies cannot penetrate peer-to-peer messaging through text messages or applications, where much of student bullying, online threats, and unsafe conduct occurs.[184]

Furthermore, the Third Circuit has held that school administrators' authority to make decisions regarding their students is not without limits.[185] In *Layshock v. Hermitage School District*, the Third Circuit emphasized that although students do not shed their constitutional rights at school, "the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits."[186] As the reach of authorities is not without limits, so is their decision-making ability; schools must not go too far so as to progress beyond their mandate of education.[187]

Schools must also seriously consider the financial cost of Internet surveillance.[188] Internet surveillance companies are for-profit; their services are expensive and because they aim to make money, they have split motivations.[189] Critics of using district resources to pay for online monitoring point to underpaid teachers and administrators and unemployed counselors who could make a greater impact.[190] According to the U.S. Department of Labor's Bureau of Labor Statistics, the average American school counselor made approximately $53,610 per year as of May 2012.[191] Hiring an additional school counselor, who perhaps has specialized knowledge of student social media use, may make an additional, more personalized impact on a school than a $40,500 annual contract with a third party surveillance company.[192]

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[183] *See Glendale's Cyber-Nosey Schools*, *supra* note 136. In its frequently asked questions, Geo Listening explains that part of why students choose to post publicly despite the availability of privacy settings is because they seek a public platform. *See FAQs*, *supra* note 104.

[184] *See* Alvarez, *supra* note 1.

[185] *See* Layshock v. Hermitage School Dist., 650 F.3d 205, 216 (3d Cir. 2011).

[186] *Id.*

[187] *See T.L.O.*, 469 U.S. at 336 (recognizing shift away from *in loco parentis*).

[188] *See* Susan J. Demas, *Education Is Not a For-profit Business, So Don't Treat It Like One*, MLIVE.COM (Sept. 20, 2013, 8:55 AM), http://www.mlive.com/politics/index.ssf/2013/09/michigan_school_cuts_rick_snyd.html (explaining that money does matter to the operation of schools).

[189] *See id.* (reminding readers that businesses operate to earn profits while public schools operate to educate students).

[190] *See* Justin W. Patchin, *Should Schools Monitor Students' Social Media Accounts?*, CYBERBULLYING RES. CTR. (Sept. 17, 2013), http://cyberbullying.us/schools-monitor-students-social-media-accounts/.

[191] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, SCHOOL AND CAREER COUNSELORS, (Jan. 8, 2014), http://www.bls.gov/ooh/community-and-social-service/school-and-career-counselors.htm (last visited Mar. 26, 2015).

[192] *See* Patchin, *supra* note 190.

IV. Taking Action on Student Internet Behavior: Supreme Court Certiorari and, in Its Absence, Counselors in Lieu of Professional Surveillance

Given the pervasiveness of the Internet in students' lives, the complicated nature of student free speech, and the dubious constitutionality and efficacy of professional student surveillance efforts, the Supreme Court made a significant error in denying certiorari for Internet cases involving student free speech.[193] The lack of guidance leaves schools in limbo, fearful of overstepping their boundaries or not acting in time to prevent student harm.[194] To solve these issues, the Supreme Court must grant certiorari to student Internet speech cases.[195] In doing so, the Court should adopt the risk of substantial disruption standard as laid out in *Tinker v. Des Moines Independent Community School District* and its progeny.[196] Additionally, schools should instruct their students and educators in social media and Internet usage, and prioritize the use of skilled and technology-savvy guidance counselors instead of diverting resources to for-profit surveillance companies.[197]

A. The Supreme Court Must Rule on Student Internet Posts That Affect School Environments and Adopt a Risk of Substantial Disruption Standard

Students' constant use of the Internet, originating for some as early as elementary school, begs the attention of legislatures and courts.[198] After pointing

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[193] *See* Kravets, *supra* note 24 (discussing the lack of Supreme Court guidance and opposite decisions that lower courts have made from similar fact patterns using the *Tinker* standard).

[194] *See id.*; *see also* Wynar *ex rel.* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013) (likening the limbo to "a feat like tightrope balancing, where an error in judgment can lead to a tragic result"); Sengupta, *supra* note 23.

[195] *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 (3d Cir. 2011) (Jordan, J., concurring).

[196] *See id.*

[197] *See* Robert Bardwell, *A Plea for More School Counselors*, NYTimes Blog (Oct. 25, 2010, 3:56 PM), http://thechoice.blogs.nytimes.com/2010/10/25/counselor-2/. Robert Bardwell noted that students "need counselors now more than ever because of the complex and complicated society in which we live." *Id.*

[198] *See* David L. Hudson Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 Or. L. Rev. 621, 625 (2012) (arguing that First Amendment and Fourth Amendment issues should push the Supreme Court to analyze off-campus online speech); Easton, *supra* note 49, at 18. In a 2010 Comment, James M. Patrick noted some of the issues that arise as a result of the lack of Supreme Court guidance. *See* James M. Patrick, Comment, *The Civility Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. Cin. L. Rev. 855, 878 (2010). Notably, he states, "[T]he lower courts inconsistently apply the existing student speech framework and reach different conclusions. Further complicating the problem is that 'courts have interpreted differently the distinction between on-campus and off-campus speech, with some courts defining on-campus speech much more expansively than other courts.'" *See id.*

out the abundance of lower court cases and their inconsistent results, the petition for certiorari for *Kowalski v. Berkeley County Schools* trumpeted its case's merits as "an appropriate vehicle to address . . . inconsistent lower court decisions and provide badly-needed guidance on First Amendment protections afforded to student speech that takes place away from school grounds."[199] Indeed, as constitutional law scholar Professor Frederick Schauer pointed out in a 2007 article, there has been more litigation in lower courts over student speech since the ruling in *Tinker* than on most other free speech areas, including obscenity, defamation, commercial advertising, and campaign finance.[200] Given social media's prevalence, students' speech through social media constitutes a large portion of the most recently decided student speech cases.[201] The last time that the Supreme Court ruled on anything relating to student speech was in 2008, in a case involving a banner at a school-sponsored event; no technology was involved there.[202]

In his concurrence in *Morse v. Frederick*, Supreme Court Justice Clarence Thomas highlighted the precise problem with the current jurisprudence around student speech: "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators."[203] It is time to give students, schools, and parents Supreme Court guidance.[204]

(quoting Kara D. Williams, Comment, *Public Schools v. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 720 (2008)).

[199] Kowalski Certiorari Petition, *supra* note 24, at 3; *see also* Easton, *supra* note 49, at 18 (pointing out the inconsistent lower court decisions around online student speech). An *amicus* brief in the *Kowalski* case echoed the sentiments expressed in its petition for certiorari: "The bottom line is that teens and technology have outstripped the law in this area. The Court should grant Petitioner's Petition for a Writ of Certiorari to begin the work of playing legal catch-up." *See* Brief for Marion B. Brechner as Amicus Curiae Supporting Petitioner, Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011) (No. 11-461).

[200] Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 208–09.

[201] *See, e.g.*, *Layshock*, 650 F.3d at 216 (involving MySpace comments made off-campus); Nixon v. Hardin Cnty. Bd. of Educ., 988 F. Supp. 2d 826, 830–31 (W.D. Tenn. 2013) (involving Twitter posts made off-campus by a student); T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch., 807 F. Supp. 2d 767, 772 (N.D. Ind. 2011) (involving photos posted off-campus to PhotoBucket and other public sites).

[202] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007) (involving a banner reading "BONG HiTS 4 JESUS" at a school-related viewing of the Olympic torch run). In this case, because the banner was at a school-sponsored event, the school principal was justified in asking the student to remove the banner, as it advocated drug use. *See id.* at 397. Given that this is the last free speech case ruled upon by the Supreme Court, not only are parents often out of touch with their students' online lives, but the Court is out of touch with the reality of what students, administrators, and parents have to handle. *See* Kowalski Certiorari Petition, *supra* note 24, at 3.

[203] *Morse*, 551 U.S. at 418 (Thomas, J., concurring).

[204] *See* Kowalski Certiorari Petition, *supra* note 24, at 3.

1. Potential Standards to Adopt

The Supreme Court's analysis of student social media usage could result in several different standards to guide school decision making for student punishment.[205] Instead of a *Tinker* substantial disruption extension, the Court could create an entirely new standard.[206]

One potential standard is purposeful direction, as proposed by several scholars who adapted a decision from the U.S. Court of Appeals for the Seventh Circuit as the standard's basis.[207] In a case about a student underground newspaper, the Seventh Circuit focused on dissemination, stating that because a student intentionally disseminated his newspaper on campus, school officials had the authority to act on it.[208] Applying this idea to student Internet speech, scholars established the purposeful direction standard, which asks whether a student purposefully directed his Internet speech to a school's campus.[209] A purposeful direction standard requires a student to bring the content to school through email transmission, the viewing of the content at school, or the direction of others to view the content.[210] Because the author's direction is the focus of this test, simply discussing the content of the online speech would presumably be insufficient, as would the introduction of the speech to a school campus by a third party.[211] The author must have acted in a way that directs its content to the schools through an affirmative step.[212] The purposeful direction standard allows for student free speech while still ensuring that schools may continue to discipline students for speech that constitutes a true threat.[213] This standard would be a dramatic departure from *Tinker*, under which courts have justified discipline based on any incidental knowledge of off-campus Internet speech—

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[205] *See* Ceglia, *supra* note 28, at 943 (outlining two main tests that would be derived from *Tinker* and could be used by the Supreme Court to analyze of off-campus speech).

[206] *See, e.g.*, *Wynar*, 728 F.3d at 1065 (employing a risk of substantial disruption standard); *Layshock*, 650 F.3d at 214 (using, in part, a nexus standard); Lowery *ex rel.* Lowery v. Euverard, 497 F.3d 584, 592 (6th Cir. 2007) (involving a risk of substantial disruption). In *Morse*, the Supreme Court recognized that *Tinker* is not the only basis to restrict student speech. 551 U.S. at 405.

[207] *See* Lindsay J. Gower, Note, 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, 729 (2013); *see also* Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 177–78 (2003).

[208] Boucher v. Sch. Bd., 134 F.3d 821, 829 (7th Cir. 1998). Although this case did not involve Internet speech, the Seventh Circuit judged its merits based on a "reasonable forecast of disruption." *See id.* at 828.

[209] *See* Gower, *supra* note 207, at 725–26.

[210] *See id.*at 726; *see also* Tuneski, *supra* note 207, at 142.

[211] *See* Gower, *supra* note 207, at 726.

[212] *See id.*; *see also* Tuneski, *supra* note 207, at 142.

[213] *See* Gower, *supra* note 207, at 730. A true threat analysis is not mutually exclusive with a purposeful direction standard. *See id.* (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 620 (5th Cir. 2004)).

whether brought to the school's attention by a parent or other student—as long as it causes a school disruption.[214]

A second standard has also yet to be supported by circuit courts: blanket protection of all student Internet speech performed off-campus.[215] This standard would create a clear, predictable line that protects student Internet speech as long as the speech was not authored on school property.[216] Under blanket protection, threats of violence could still be regulated under the existing true threat analysis, wherein schools could act when a student makes a credible and imminent threat against the school environment.[217] First Amendment advocates that support this standard include the five judges who concurred in the Third Circuit's *J.S. ex rel. Snyder v. Blue Mountain School District*.[218] These five judges voiced fears of overreaching by schools when disciplining students for Internet speech: "Applying *Tinker* to off-campus speech would . . . empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school."[219]

A third test was advanced by the Supreme Court in *Bethel School District Number 403 v. Fraser*: a school may punish student speech that "would undermine the school's basic educational mission."[220] *Fraser* involved a sexually

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[214] *See, e.g.*, D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 765 (8th Cir. 2011) (using risk of substantial disruption standard in case in which instant messages were all transmitted off-campus but were brought to the attention of school administration).

[215] *See* Patrick, *supra* note 198, at 894 (discussing a requirement that speech be on-campus before it may be regulated); Matthew I. Schiffhauer, Note, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN'S J.L. COMM. 731, 758 (2010) (discussing the fear that administrators will arbitrarily discipline students if the student ridicules anything about the school).

[216] *See* Goldman, *supra* note 35, at 408; Patrick, *supra* note 198, at 894. Lee Goldman advocates for First Amendment protection for student off-campus speech unless made it is made under the supervision of a school employee. Goldman, *supra* note 35, at 408.

[217] *See* Goldman, *supra* note 35, at 409, 411; Patrick, *supra* note 198, at 858. Goldman concedes that off-campus speech could result in a substantial disruption of schooling, despite not rising to the level of "true threat." *See* Goldman, *supra* note 35, at 408. Yet he maintains that the substantial disruption test goes too far at the expense of free speech. *See id.* As previously discussed, the Eighth Circuit applied both the substantial disruption test and the true threat test simultaneously in its 2011 decision for *D.J.M.* 647 F.3d at 764, 766. There, the student's instant messages threatening violence caused both a substantial disruption within the school and "significant disruption and fear" constituting a true threat. *See id.* The court did not feel it necessary to evaluate whether the student would actually carry out his threat; the risk of the threat was serious enough to warrant police referral and school suspension. *See id.* at 764–65.

[218] J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J., concurring).

[219] *Id.* Judges Fuentes, Hardiman, and Sloviter, along with Chief Judge McKee, joined Judge Smith's concurrence. *Id.* at 936.

[220] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); *see also* Hazelwood Sch. Dist. v Kuhlmeier, 484 U.S. 260, 266 (1988); Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007).

explicit speech by a student at a mandatory school assembly, where students as young as fourteen years old were captive listeners.[221] *Fraser* discussed *Tinker* at length, but instead of explicitly adopting *Tinker*, it focused on a school's ability to protect its students from sexually explicit speech.[222] Indeed, the Court affirmed an interest in shielding minors from vulgar and offensive speech, though it did not explicitly include schools as protective agents.[223] The Court held that the student's "offensively lewd and indecent speech" undermined the school's fundamental values, and, as such, was permissible as a basis for discipline.[224] In its holding, however, the *Fraser* court did not specify that a school had to adopt its own values specifically, but rather it could discipline speech that was "wholly inconsistent with the 'fundamental values' of public school education [generally]."[225] Application of this value-based standard to all speech could allow any school to claim a set of conveniently broad and vague values, and consequently could cause a flood of litigation for courts.[226] To avoid this, the Supreme Court could explicitly specify which values are fundamental, or it could leave it to the lower courts to subjectively analyze those values on a case-by-case basis.[227]

2. The Supreme Court Should Adapt the *Tinker* Risk of Substantial Disruption to Student Internet Speech

In consideration of all of these standards, the Supreme Court should simply adapt *Tinker* to modern times and extend the substantial disruption test to off-campus speech.[228] In this approach, students' off-campus Internet speech would be treated as any other campus speech, and would follow circuit courts that applied the *Tinker* test to off-campus Internet speech.[229] Many courts have held that an actual substantial disruption is not required; rather, the risk of a substantial disruption is sufficient to justify schools in curbing or punishing

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[221] *See Fraser*, 478 U.S. at 677–78.

[222] *See id.* at 685–86; *see also Morse*, 551 U.S. at 405 ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.").

[223] *See Fraser*, 478 U.S. at 684.

[224] *Id.*

[225] *See id.* at 685–86.

[226] *See* Schiffhauer, *supra* note 215.

[227] *See Fraser*, 478 U.S. at 685–86.

[228] *See Layshock*, 650 F.3d at 221 (Jordan, J., concurring) (explaining that in analyzing free speech, discipline, and order in public schools, "we should be applying rather than avoiding *Tinker*"); Schiffhauer, *supra* note 215, at 733 (noting that *Tinker* "strikes the appropriate balance between" free speech and the First Amendment rights of students).

[229] *See, e.g.*, *Kowalski*, 652 F.3d at 573–74 (applying substantial disruption to off-campus MySpace post); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1274, 1280 (W.D. Wash. 2007) (applying substantial disruption test to student's YouTube post).

student online speech.[230] The risk of substantial disruption standard is often discussed in cases that involve violent threats that require timely responses.[231] The *Tinker* risk of substantial disruption standard would be friendlier to schools than other proposals, granting them more deference when safety is at stake.[232] Because the risk of disruption still must be substantial, however, students' free speech rights would not be unnecessarily curtailed.[233]

In a concurrence to the Third Circuit's decision in *Layshock v. Hermitage School District*, Judge Kent A. Jordan advocated for the adoption of *Tinker* to student Internet speech, explaining that *Tinker* aimed to balance school order with free speech, and highlighting the challenges of Internet speech.[234] Judge Jordan compared Internet student speech to an individual shouting "fire" in a movie theater: if that person were standing outside of the theater shouting "fire" into the building, the speech would not be protected solely because the speaker was not in the building.[235] Thus, "it is hard to see how words that may cause pandemonium in a public school would be protected by the First

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[230] *See Wynar*, 728 F.3d at 1064 (using a risk of a substantial disruption standard); *D.J.M.*, 647 F.3d at 764 (holding that student's off-campus speech posed a reasonably foreseeable risk of a substantial disruption); Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007) (reasoning that risk of substantial disruption justified discipline).

[231] *See Wynar*, 728 F.3d at 1064–65; *D.J.M.*, 647 F.3d at 758.

[232] *See Wynar*, 728 F.3d at 1064, 1065 (granting school deference when school shooting online threat was involved); *Kowalski*, 652 F.3d at 577 (granting schools much deference without physical safety concern).

[233] *See Layshock*, 650 F.3d at 221 (Jordan, J., concurring). The risk of substantial disruption standard could be qualified using a nexus standard, as applied by the Western District of Pennsylvania in *Layshock*. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007); Gower, *supra* note 207, at 725. There, the court added the nexus standard to the substantial disruption test, explaining that not only was there no substantial disruption, but there was an insufficient nexus between the student's speech and the school's discipline. *Layshock*, 496 F. Supp. 2d at 600. *Layshock* demonstrates that the standard for disruption is high, given the amount of disturbance at the high school. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 508 (W.D. Pa. 2006) (outlining the facts of the case during its first hearing in front of the Western District of Pennsylvania). The school shut down its entire computer system for five days. *Id.* Not only was the student body incessantly accessing the pages, but the school district technology coordinator devoted twenty-five percent of his time to blocking IP addresses and creating firewall protections for school hardware. *Id.* Teachers and administrators monitored comments on the page and sent commenting students to the principal, who, in turn devoted his time to handling discipline. *Id.* Yet despite school administrators being the subject of the page and the preoccupation of the school community, the Third Circuit found that the substantial disruption test was not met, and there was an insufficient nexus to the school. *See Layshock*, 650 F.3d at 214. If adopted as a qualification by the Supreme Court, the nexus standard would shape online surveillance by creating a fairly high threshold for student online speech to meet. *See id.* Students' posts would need to be tightly related to a feared disruption, rather than a contributing factor. *See id.* The subjectivity of this test may be inefficient for administrators, preventing them from action even if disruption occurs but is incidental to the school. *See Morse*, 551 U.S. at 409.

[234] *Layshock*, 650 F.3d at 221 (Jordan, J., concurring) (explaining that the need to balance free speech with order in public schools "is the problem *Tinker* aimed to address and it is the problem we are confronting too, so we should be applying rather than avoiding *Tinker*").

[235] *Id.* at 221–22.

Amendment simply because technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary."[236]

Extending the risk of substantial disruption standard to student Internet speech would provide uniform guidelines to schools and enable teachers and administrators to quickly respond to problematic issues.[237] The *Morse* court highlighted the difficulty that school administrators face, in that they must be able to quickly respond to pressing student issues without fear of liability when students' safety, including long-term safety, is at issue.[238] A risk of substantial disruption standard would sweep in higher standards as well; any risk of imminent threat or true threat would clearly create a risk of substantial disruption within a school and could also be addressed through this standard.[239]

The Court must be careful not to carve out space for schools to discipline a student for offensive speech.[240] As the Court warned in *Morse*, that which each person judges as offensive is different: "much political and religious speech might be perceived as offensive to some."[241] Therefore, the Court should adopt the *Tinker* standard with strict language that qualifies what a substantial disruption would mean in light of the ease with which a student may post online, which ultimately results in a great deal of student speech with a traceable record.[242]

3. The Survival of Surveillance Companies If a Risk of Substantial Disruption Standard Is Applied

Internet surveillance companies' success depends on the standards that circuit and district courts have established for a school's action on students'

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[236] *Id.* Judge Jordan ended his guidance by again advocating for the adoption of *Tinker*: "If it is accepted that the First Amendment would not protect such a deliberate disturbance, we should acknowledge that we are weighing competing interests and do so in the straightforward though sometimes challenging way directed by *Tinker*." *Id.*

[237] *See Morse*, 551 U.S. at 409.

[238] *See id.*

[239] *See* Patrick, *supra* note 198, at 858.

[240] *See Morse*, 551 U.S. at 409.

[241] *See id.*

[242] *See* Courtney M. Willard, Comment, *Decoding Student Speech Rights: Clarification and Application of Supreme Court Principles to Online Student Speech Cases*, 43 GOLDEN GATE U. L. REV. 293, 294 (2013). A critic of the substantial disruption test noted that it may be used to combat cyberbullying, but explained that bullying has been occurring for longer than the Internet existed, and it is not enough to justify chilling free speech. *See* Goldman, *supra* note 35, at 413. As previously stated, the bullying that may occur in present times, due to the constant accessibility of the Internet, is unlike bullying of the past. *See* Ahrens, *supra* note 30, at 1694–95. Instead, the Internet has created a greater need for the addressing of pervasive bullying, and substantial disruption balances free speech rights with the right to an education, free from constant disruption. *See id.*; *see also Layshock*, 650 F.3d at 221 (Jordan, J., concurring).

Internet speech.[243] If a risk of substantial disruption standard is adopted by the Court as suggested above, Internet surveillance could operate just as it claims to presently: companies could peruse the public posts of students and report those posts that it deems pose a risk of substantial disruption within a school.[244] Still, as with all standards, Internet surveillance would be limited to public posts, thus calling the effectiveness of the operation into question.[245]

B. Professional Surveillance of Student Posts: Expensive, Untested, and Easily Replaced by Education and Counselors

Proponents of professional surveillance of students' Internet postings justify these services through the public nature of students' posts, claiming that surveillance does not intrude on any student privacy.[246] Still, surveillance is limited in its effectiveness because of privacy settings, its significant price tag, and the lack of proof that it is more effective than peer reporting.[247] With these problems and the absence of Supreme Court guidance, schools should pursue the promotion of safer social media interaction amongst students using education and effective counselors.[248]

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[243] *See generally* Ceglia, *supra* note 28 (noting the lack of Supreme Court guidance and possible standards for interpretation); Sengupta, *supra* note 23 (describing characteristics of Internet surveillance companies).

[244] *See* Sengupta, *supra* note 23.

[245] *See* Ceasar, *supra* note 147. If the Supreme Court were to apply the purposeful direction standard, Internet surveillance companies would be virtually ineffective. *See generally* Sengupta, *supra* note 23 (noting that "Geo Listening looked for keywords and sentiments on posts that could be viewed publicly," which is contrary to a purposeful direction). The purposeful direction standard focuses not on the speech itself, as surveillance does, but on the direction of that speech. *See* Gower, *supra* note 207, at 731 (discussing the purposeful direction standard); *see generally* Sengupta, *supra* note 23 (highlighting Internet surveillance companies). Without being able to see a student bring content to school, or direct content in any way since they can only see the speech, Internet surveillance companies would likely not be utilized if this test were to be adopted. *See* Gower, *supra* note 207, at 731 (discussing purposeful direction); Sengupta, *supra* note 23 (discussing Internet surveillance companies). Internet surveillance companies could still operate, however, if the Court were to adopt either the true threat standard or the *Fraser* value-based standard. *See Fraser*, 478 U.S. at 685–86; Sengupta, *supra* note 23. With a true threat standard, companies could simply analyze public posts and report those that seemed to approach a true threat, granting schools the ultimate discretion as to whether they will intervene. *See* Gower, *supra* note 207, at 725, 730 (comparing true threat standard to purposeful direction standard). *See generally* Sengupta, *supra* note 23 (highlighting Internet surveillance companies). Similarly, the adoption of the *Fraser* value-based standard would create space within which Internet surveillance companies could operate to aid schools. *See Fraser*, 478 U.S. at 685–86; Sengupta, *supra* note 23. With knowledge of a school's basic mission or fundamental values, an Internet surveillance company could cast a wide net for online student speech that runs in the face of those values. *See* Sengupta, *supra* note 23; *FAQs*, *supra* note 104.

[246] *See Privacy Policy*, *supra* note 99.

[247] *See* Ceasar, *supra* note 147 (noting price of one year's services by Geo Listening and that no student has been disciplined from a subscribing district yet).

[248] *See* Bardwell, *supra* note 197; Patchin, *supra* note 190.

Instead of employing a for-profit company at an annual cost of over $40,000, schools with money in their budget should look to professional counselors to be a physical presence on campus.[249] Counselors are well-tested: they have been standard in most public schools since the late twentieth century and their presence has proven to be effective in supporting and guiding students.[250] Young counselors grew up with the Internet and generally can grasp the significance of digital socialization for students, while more experienced counselors could be required to take social media training so that they are up-to-date with the technology that their students use.[251] Counselors could be tasked with the role of general therapy or may be chosen to specialize in social media, so that students are comfortable with the concept of sharing any issues that they may encounter.[252] Moreover, being physically on campus, interacting and collaborating with faculty, and keeping an open-door policy may encourage student discussion.[253] With enough attention given to cyberbullying and threats of violence, students may be more likely to discuss gossip, observed bullying, or other threats of violence that may surface.[254] Counselors also have the added advantage of context: they know how class schedules are structured, understand the general culture of a school and what community issues are occurring that could impact students, and see students in both emotional and academic counseling.[255]

Educating students about social media use could also assist in improving awareness of the consequences of misbehavior, and could encourage open dia-

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[249] *See* Patchin, *supra* note 190.

[250] *See* Kenneth B. Hoyt, *A Reaction to Mark Pope's (2000) 'A Brief History of Career Counseling in the United States,'* 49 CAREER DEV. Q., 374, 378 (2001) (discussing the history of guidance counseling and the expansion of a counselor's position in the U.S., beginning in the 1930s); Bardwell, *supra* note 197 (highlighting the benefits of school counselors and calling for a renewal in funding and attention for school counselors).

[251] *See generally* Ramde, *supra* note 12 (noting that those entering college in 2011 were raised with Internet access).

[252] *See* Vadukul, *supra* note 12; Ian Quillen, *School Counselor Facebook Guide Released*, EDUC. WK., Apr. 25, 2012, at 18, *available at* http://blogs.edweek.org/edweek/DigitalEducation/2012/04/school_counselor_facebook_guid.html; Facebook for School Counselors, IKEEPSAFE, http://www.ikeepsafe.org/educators/facebook/ (last accessed Feb. 23, 2015) (discussing the ways in which school counselors can understand and use social media).

[253] *See generally* TAMARA E. DAVIS, EXPLORING SCHOOL COUNSELING 10 (2nd ed. 2014) (explaining that the American School Counselor Association's recommendation for comprehensive school counseling programs includes targeting academic, career, personal and social development to help students better learn); Bardwell, *supra* note 197.

[254] Patchin, *supra* note 190.

[255] *See* Merri Rosenberg, *Counselors Wear More Hats Than Ever*, N.Y. TIMES, Feb. 9, 2003, at WE2, *available at* http://www.nytimes.com/2003/02/09/nyregion/counselors-wear-more-hats-than-ever.html (discussing the many roles that school counselors provide, spanning both academic and emotional needs).

logue relating to cyberbullying.[256] In September 2012, the New Jersey Assembly introduced Bill No. 3292, which proposed a requirement for school districts to teach students in grades six through eight responsible social media use as a part of the state's Core Curriculum Content Standards in Technology.[257] The bill was passed by the Assembly and nearly unanimously passed by the New Jersey Senate in January 2014.[258] It outlines training on cyber safety, security, and "cyber ethics," along with information on negative consequences of the failure to use social media responsibly.[259] The Baby Boomer generation took classes in Home Economics; Generations Y and Z may need education on social media.[260]

With schools at a loss regarding whether their punishment or proactive surveillance of students is constitutional, education is one of the safest ways to attempt to cut back on student Internet misconduct, without the risk of eroding student trust or chilling student speech.[261] By using budgetary resources to educate students on correct Internet usage and to train faculty, staff, and counselors in technology-based socialization, schools can attempt to bridge the gap between students and adults.[262] Additionally, training can educate older professionals who have opted to ignore the reality of the Internet age; exposing older teachers to social media and online resources may even enhance their teaching methods.[263]

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[256] *See Facebook for Educators & Community Leaders*, FACEBOOK (2013), https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/t39.2178/851544_346736518795050_615854749_n.pdf (Facebook-created guide to assist adults in understanding teenage interactions on the site).

[257] *See* Assemb. B. 3292, 215th Leg., (N.J. 2012); *see also* Matt Friedman, *Bill Would Mandate Middle Schoolers Learn Social Media Savvy*, STAR-LEDGER (Jan. 9, 2014), http://www.nj.com/politics/index.ssf/2014/01/bill_would_mandate_middle_schoolers_learn_how_to_use_social_media.html (discussing proposed bill in the New Jersey Senate that would require social media education for middle school students).

[258] *See* Assemb. B. 3292, 215th Leg., (N.J. 2012); *see also* Friedman, *supra* note 257 (discussing New Jersey Assembly Bill No. 3292's implementation in 2014–2015). New Jersey is at the forefront of school Internet issues: in 2014, Governor Chris Christie signed S-441, legislation that requires public school districts to create a written policy about Internet communications between school employees and students. *See N.J. School Boards Association Issues Model Social Networking Policy*, N.J. SCH. BDS. ASS'N, (Apr. 29, 2014), https://www.njsba.org/news/press-releases/njsba-issues-model-social-networking-policy.php. The policy must, at minimum, detail "provisions governing communication between school employees and students via email, cell phones, social networking websites and other Internet-based social media." *Id.*

[259] *See* Assemb. B. 3292, 215th Leg., (N.J. 2012). Educational programs may make students more aware of not only the permanency of their Internet conduct for their own lives, but also the permanence of their hateful actions on their peers' lives. *See* Friedman, *supra* note 257.

[260] *See* Friedman, *supra* note 257; Vadukul, *supra* note 12 (noting that cyber safety lessons "may become as commonplace as sex education" or drug education).

[261] *See Education; Counseling, from Careers to Everyday Stresses*, N.Y. TIMES (Dec. 27, 1989), http://www.nytimes.com/1989/12/27/us/education-counseling-from-careers-to-everyday-stresses.html.

[262] *See* Patchin, *supra* note 190.

[263] *See* Trip Gabriel, *Speaking Up in Class, Silently, Using the Tools of Social Media*, N.Y. TIMES, May 13, 2011, at A1 (discussing high school class in Sioux Rapids, IA, where students use

CONCLUSION

Despite the Internet's prevalence in American culture and particularly among American youth, the Supreme Court has repeatedly denied certiorari for cases involving student Internet free speech. Instead, lower courts must rely on speech standards laid out in *Tinker v. Des Moines Independent Community School District*, a case that predates the Internet's emergence by several decades. In other areas of law, such reliance on outdated precedence would be unacceptable. Imagine contraceptive law without guidance on the Pill, or family law without attention paid to the high national rate of divorce.[264] Jurisprudence on student speech must include Internet speech.

Given the mushrooming litigation surrounding student Internet conduct, the Supreme Court should grant certiorari to cases involving the subject. Clarity about student Internet speech would update law that is nearly fifty years old. In doing so, the standard for penalizing student Internet speech must be high: student speech should not be chilled for anything less than a risk of substantial disruption or reasonable threat of imminent violence. Such a standard would correlate with the gravity of First Amendment concerns and the necessity of deliberation and process that must occur before any deprivation of a student's education. The Supreme Court has ample precedent to follow, both in its previous non-Internet jurisprudence and from the circuits, to support adoption of this standard.

In the absence of Supreme Court guidance, schools that wish to proactively address any negative effects of off-campus student Internet speech should turn away from professional surveillance services. Professional student surveillance is untested, expensive, and jeopardizes the trust that students feel toward their school. Instead, trained, skilled counselors may be hired at a similar price to the cost of surveillance services, and counselors have the added benefit of being physically present in a school. Professional surveillance pairs budget-tight schools with for-profit companies that are neither in touch with the daily happenings of the school nor available to actually interact with students. Alternatively, if a school has the resources to afford a professional surveillance company, it should channel those resources to Internet education for students and teachers and to the hiring and support of counselors.

The *Tinker* court called schools the "marketplace of ideas," highlighting the important learning and experimentation that students undertake through formal education. In promoting this important learning, schools must balance student free speech with the need to protect the school population from harm-

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social media during class to vocalize difficult thoughts); Vadukul, *supra* note 12 (profiling a teacher in Queens, NY, who, with the great approval of the New York City Education Department, teaches social media use and responsibility to students in grades one through five).

[264] The Pill refers to the combined oral contraception pill.

ful disruptions. The Supreme Court must abandon its current strategy of ignoring technology and instead aid students and schools by providing guidance on student Internet speech. Until the Supreme Court grants certiorari on student Internet speech cases, a standard from 1969 will be applied to a quintessentially millennial issue.