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Reading, 'Riting, and Regulating Speech: Why Schools Can't Punish Off-Campus Speech and How the North Carolina Legislature Has Tried to Fill the Gaps

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ABSTRACT

The intersection between school discipline and free speech has sparked debates over how far a school's authority extends beyond campus. The internet and the nationwide conversation about cyberbullying have only magnified the debate. In Tinker v. Des Moines, *the Supreme Court recognized that students do retain their First Amendment rights while under the school's authority. The Court then went on to hold that a school can punish a student for his or her on-campus speech if the speech causes a substantial or material disruption to school activities or if the speech invades the rights of another student. Whether this test applies to speech made off-campus was left unanswered, and lower courts were left struggling to supply a solution. Attempting to answer this question, a few circuit courts have created their own tests. The Fourth Circuit follows a "nexus" test, the Eighth Circuit applies a "reasonably foreseeable" test, and the Ninth Circuit uses a mixed approach.*

While schools are limited in what off-campus speech they can punish, legislatures can regulate what school districts cannot reach. The North Carolina legislature passed an anti-bullying statute in 2009. The law was subsequently struck down as unconstitutional by the North Carolina Supreme Court in the case State v. Bishop.

This Comment will explore precedent surrounding a school's authority to punish off-campus speech, highlighting the tests used by the Fourth, Eighth, and Ninth Circuits. It will advocate that Tinker *does not permit a school to punish an off-campus student speaker when the effects of the speech make its way on campus. This Comment will then critique specific North Carolina anti-bullying statutes and propose factors for a law that would better withstand judicial scrutiny.*

> The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.[1]
>
> - Justice Anthony Kennedy

> And whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.[2]
>
> - Justice Antonin Scalia

INTRODUCTION

Free speech has always been one of the most dearly protected and hotly litigated rights in our democracy.[3] Public schools play a crucial role in

1. United States v. Playboy Entm't Grp., 529 U.S. 803, 826 (2000).

2. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

3. For an in-depth look at the history and development of First Amendment doctrine, see Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901 (1993). *See also* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 559–60 (1999).

instilling students with an appreciation of free speech.[4] As schools struggle to handle speech problems on and off campus, they impart an appreciation of the First Amendment. Schools walk a thin line trying to balance the need to ensure learning in an orderly school environment with the duty to protect students' free speech rights.

Increased use of the Internet has only exacerbated free speech issues, especially the issue of student speech and to what extent a school can punish a student for her off-campus speech.[5] While not all off-campus speech occurs on the Internet, the Internet has made it easier for students to express unpopular opinions about teachers, administrators, and fellow students in a way that is permanent and widespread.[6] The United States Supreme Court provided guidance for a school district's authority to punish a student speaker for on-campus speech in *Tinker v. Des Moines Independent Community School District*,[7] but it is not clear how far that authority extends off campus. The question remains: Can a school punish a student when the effects of the student's off-campus speech find their way onto the school's campus? Lower courts have come to different conclusions.[8]

With the lack of authoritative guidance for school discipline of off-campus speech, state legislatures have attempted to fill this gap by passing statutes criminalizing certain behavior where *Tinker* does not apply. For example, the North Carolina legislature passed laws criminalizing some speech that might happen solely off campus, such as cyberbullying.[9] Anti-bullying statutes, however, have the tendency to run afoul of constitutional free speech protections, and many have been struck down for

4. *See* Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1044 (2d Cir. 1979) ("Public education in America enables our nation's youth to become responsible participants in a self-governing society.").

5. *See generally* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011) (analyzing student speech cases and arguing that student speech that occurs outside school supervision should be treated differently than on-campus speech); Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727 (2012) (arguing that the *Tinker* standard is inapplicable to student speech that occurs online).

6. *See generally* Somini Sengupta, *Warily, Schools Watch Students on the Internet*, N.Y. TIMES, Oct. 29, 2013, at A1.

7. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

8. *Infra* Section I.C.

9. Act of Aug. 28, 2009, no. 551, 2009 N.C. Sess. Laws 1510 (codified at N.C. GEN. STAT. § 14-458.1 (2017)), *invalidated by* State v. Bishop, 787 S.E.2d 814, 822 (N.C. 2016); School Violence Prevention Act of 2012, no. 149, § 4, 2012 N.C. Sess. Laws 715 (codified as amended at § 14-458.2).

vagueness.[10] This struggle to write constitutional laws in this area presents another important issue: To what extent can the state criminalize anti-bullying speech?

There are three categories of student speech: (1) on-campus speech; (2) off-campus speech that has no effect on campus; and (3) off-campus speech that has an effect on campus. The first category is covered by *Tinker*'s "materially and substantially" disruptive test.[11] And courts generally agree that schools cannot punish speech in the second category.[12] But courts are split on how to approach the third category. This Comment proposes a solution for the third category.

Part I of this Comment examines the development of case law involving the issue of off-campus speech in K-12 schools. It briefly summarizes the primary cases regarding school speech from various circuit courts, including recent tests used by the Fourth and Eighth Circuits; it also discusses how the Ninth Circuit recently refused to pick one test over the other. Part II will then examine whether *Tinker* permits a school to punish an off-campus student speaker when the effects of speech make their way onto campus. Part III will critique specific North Carolina anti-bullying statutes that can reach speech where a school's authority is inconclusive. It argues that the legislation is unconstitutional and proposes factors for a new law that would better withstand judicial scrutiny.

I. THE SCHOOLHOUSE GATE—WHAT SPEECH CAN SCHOOLS PUNISH?

The United States Supreme Court established in *Tinker* when a school can punish a student speaker for speech on campus.[13] Since then, the Court has created various exceptions to that rule.[14] The Supreme Court has not yet answered, however, whether the same test applies to off-campus speech that makes its way on campus by someone other than the speaker. This Part will analyze circuit court precedent on that issue.

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10. *See, e.g.*, MO. ANN. STAT. § 565.090 (West 2012), *invalidated by* State v. Vaughn, 366 S.W.3d 513 (Mo. 2012) (en banc); Albany County, N.Y., Local Law No. 11 for 2010 (Nov. 8, 2010), *invalidated by* People v. Marquan, 19 N.E.3d 480 (N.Y. 2014); N.C. GEN. STAT. § 14-458.1; *see also* Letter from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA, to U.S. Commission on Civil Rights (May 13, 2011), https://perma.cc/9VK9-ZZRH (noting generally that anti-bullying statutes are vulnerable for vagueness).

11. *Tinker*, 393 U.S. at 509.

12. *See* Morse v. Frederick, 551 U.S. 393, 404–05 (2007) (reconciling *Fraser* with *Tinker*, the Court recognized that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected").

13. *Tinker*, 393 U.S. at 509–14.

14. *See infra* Section I.C.

A. On-Campus Speech

A school district's authority to discipline its students for on-campus behavior has long been an accepted societal norm.[15] The Supreme Court, in *Tinker*, addressed how to determine when a student speaker could be punished for her on-campus speech.[16] In *Tinker*, a group of students wore black armbands at school in protest of the Vietnam War.[17] The school had a policy that any student wearing an armband would be asked to remove it.[18] If the student refused, she would be suspended until she returned without the armband.[19] Three students refused to remove their armbands when asked and were sent home.[20] The students' parents sued the school district for violating the students' free speech rights.[21] The district court dismissed the case, holding that the school district's actions were reasonable to "prevent disturbance of school discipline."[22] Sitting en banc, a divided Eighth Circuit upheld the district court's decision.[23]

When the case reached the Supreme Court, the Court held that a public school policy prohibiting the wearing of armbands in political protest violated the First Amendment protection of free speech.[24] The seven-to-two majority stated: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25] Recognizing the school environment's unique character, the Court ruled that a less stringent standard applies to school officials who seek to punish on-campus student speech than if the government was regulating speech in places outside the school.[26]

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15. *See Morse*, 551 U.S. at 413–16 (2007) (Thomas, J., concurring) (describing the historical development of a school's right to discipline students).

16. *Tinker*, 393 U.S. at 504.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 505.

23. *Id.*

24. *Id.* at 514.

25. *Id.* at 506.

26. *Id.* at 507 ("On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."). The holding stated:

The Court created a two-prong test to determine whether a student speaker can be punished for her on-campus speech. First, the school can punish any student for speech that "materially" and "substantially" disrupts school activities.[27] If that speech would not materially and substantially interfere with the operation of the school, the speech is beyond the school's authority—unless the second prong is implicated. If the speech is not substantially or materially disruptive but invades the rights of another student, the school can appropriately discipline the student for her speech.[28]

Soon after *Tinker*, the Supreme Court began clarifying and creating exceptions to *Tinker*'s holding. In 1986, the Court held in *Bethel School District Number 403 v. Fraser*[29] that vulgar, lewd, obscene, and plainly offensive speech made on campus falls within a school's authority to discipline without having to prove a substantial or material disruption to the school environment or an invasion of the rights of another student.[30] *Fraser* involved student speech that contained vulgar, offensive, and graphic sexual undertones.[31] Two years after *Fraser*, the Court carved out another exception to *Tinker* in *Hazelwood v. Kuhlmeier*.[32] The Court allowed the school principal to censor articles in a student-written, school-sponsored newspaper that he found inappropriate.[33] The Court thereby allowed a school to punish a student for school-sponsored speech without having to prove a disruption or invasion of rights.[34] Most recently, in 2007, the Court made another exception to the general *Tinker* requirements in *Morse v.*

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Id. at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (1966)).

27. *Id.*

28. *Id.* at 508. The second part of *Tinker* is a largely undeveloped area of case law. The Supreme Court did not expand on it in the opinion, and few courts have applied it since. Meg Hazel, *Students Behaving Badly*, S.C. LAW., Sept. 2014, at 38, 40–41.

29. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding the school district did not violate the First Amendment by punishing a high school student for giving a lewd and indecent speech during a school assembly).

30. *Id.*

31. *Id.* at 683.

32. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–76 (1988) (holding a student newspaper made during a journalism class was not a "public forum" and, therefore, was not under the school's authority).

33. *Id.* at 273.

34. *Id.* at 276.

Frederick: the school can regulate speech promoting illegal drug use.[35] That case involved a student holding a banner with the message "BONG HiTS 4 JESUS" during a school-supervised event.[36]

B. Tinker *Meets Online, Off-Campus Speech*

While *Tinker* and its progeny provide workable tests for on-campus speech, "[w]hether and how these precedents apply to off-campus speech are questions the Supreme Court has yet to answer."[37] Because the Internet is pervasive, student posts can jeopardize a school's tight control over its educational environment. Schools rightfully have an interest in controlling their environments to promote learning and to shape student values.[38] Schools have long been recognized as having *in loco parentis* authority over students during the school day.[39] However, determining where a school's ability to punish a speaker for her speech stops and where parental authority begins is a complicated task.

The type of speech that schools usually seek to discipline further complicates the issue. Schools often target speech that society frowns upon. Cyberbullying,[40] threats to harm the school,[41] and verbal attacks toward teachers[42] are the most common types of speech school districts attempt to

35. Morse v. Frederick, 551 U.S. 393, 410 (2007) (holding a school could punish a student displaying a sign promoting illegal drug use at an off-campus, school-approved field trip).

36. *Id.* at 397.

37. C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149 (9th Cir. 2016).

38. *Infra* Section I.A.

39. *See Morse*, 551 U.S. at 413–16 (Thomas, J., concurring) (describing the historical development of a school's right to discipline students).

40. *See, e.g.*, Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 576–77 (4th Cir. 2011) (holding that a school could punish a student for creating a MySpace page calling a female classmate a slut and implying she has a sexually transmitted disease).

41. *See, e.g.*, D.J.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 766 (8th Cir. 2011) (holding that it was constitutional for a school to punish a student for sending instant messages to a fellow student threatening to obtain a gun and shoot students at the school); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 992 (9th Cir. 2001) (permitting a school district to punish a student for writing a poem from the perspective of a school shooter and bringing it onto campus for a teacher to review).

42. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 400 (5th Cir. 2015) (permitting a school to punish a student for creating a rap with harassing, intimidating, and threatening statements regarding teachers he believed were sleeping with students); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 941 (3d Cir. 2011) (en banc) (allowing a school to punish a student for creating a MySpace profile while at home on a weekend that mocked her middle school principal).

punish.[43] While "[t]he 'basic educational mission' of the school may at times conflict with the speech rights of its students,"[44] the educational mission should not always trump free speech rights.

The *Tinker* Court in 1969 could not have foreseen the vast changes in technology or the role the Internet would play in the lives of students.[45] Applying *Tinker*'s substantial and material disruption test to off-campus speech is like trying to fit a round peg into a square hole, and lower court opinions on this issue reflect that challenge. Lower courts have had difficulty determining whether *Tinker* applies to student speakers when their speech originates off campus.[46] The lack of Supreme Court guidance on the issue has created problems for schools, attorneys, and students. Schools are hesitant to punish off-campus student speech, for they are unsure of whether they are creating potential liability for their actions.[47] Attorneys are not able to confidently advise their clients, and students are left wary of what they can and cannot say off campus.[48] The gap left by *Tinker* has led to inconsistent outcomes among lower courts.

Earlier opinions declined to apply *Tinker* to off-campus speech in many circumstances. For example, in 1979, the Second Circuit did not allow a school district to punish students for publishing a satirical and sexual underground newspaper off campus and after school hours.[49] While the newspaper was composed mainly off campus, a few articles had been written on school typewriters, and the finished product was secretly stored in a teacher's closet.[50] Despite these "[*d*]*e minimis*" contacts with the school, the Second Circuit held that, because the newspaper was "conceived, executed, and distributed outside the school," it was off-campus speech and had the

43. *See* Michael Begovic, Note, *Mo Speech Mo Problems: The Regulation of Student Speech in the Digital Age and the Fifth Circuit's Approach in* Bell v. Itawamba County School Board, 84 U. CIN. L. REV. 499, 508–09 (2016).

44. C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1148 (9th Cir. 2016) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

45. *See Bell*, 799 F.3d at 392 ("Over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.").

46. *See* Begovic, *supra* note 43.

47. *See* 42 U.S.C. § 1983 (2012) (providing a cause of action for plaintiffs whose constitutional rights are violated by state actors); Hazel, *supra* note 28.

48. *Id.*

49. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1051–52 (2d Cir. 1979).

50. *Id.* at 1050.

full protection of the First Amendment.[51] Here, the court did not apply *Tinker* to the off-campus speech that made its way on campus, even when, at times, some of the speech originated on campus.

Twenty years later, the Fifth Circuit also declined to apply *Tinker* to off-campus speech.[52] The dispute in *Porter v. Ascension Parish School Board* involved a student's picture drawn at home of missiles, helicopters, and armed assailants attacking the school.[53] The drawing made its way onto the school campus when the student's little brother accidentally showed it to a teacher two years later.[54] The student was expelled and required to enroll in an alternative school.[55] His mother sued on his behalf.[56] The court considered Fifth Circuit precedent and concluded that the *Tinker* standard only "applies to school regulations directed at specific student viewpoints."[57] The court further decided that because the student's drawing "was completed in his home, stored for two years, and never intended by him to be brought to campus," the speech was considered to be made off campus.[58] Because the student had no intention to communicate the threat to the school, his expression was not even "speech directed at the campus."[59]

Recent case law diverged from these early cases and expanded the proverbial schoolhouse gates beyond the physical boundaries of the school.[60] For example, in *Bell v. Itawamba County School Board*, the Fifth Circuit held the *Tinker* standard applied to a student's rap video in which he accused a high school coach of sleeping with students, even though the video was filmed and posted off campus.[61] The rap video only made its way onto campus when the coach heard about it from his wife, who had herself heard about it from a friend, and the coach asked another student to show him the video on his phone.[62] Because Bell's speech was reasonably understood by school officials to threaten, harass, and intimidate a teacher and, thus, was

51. *Id.*

52. Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004).

53. *Id.* at 611.

54. *Id.*

55. *Id.* at 612.

56. *Id.*

57. *Id.* at 615.

58. *Id.* ("Given the unique facts of the present case, we decline to find that [the student's] drawing constitutes student speech on the school premises.").

59. *Id.*

60. *See, e.g.*, C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1153 (9th Cir. 2016) (holding that a school may discipline a student for speech that occurred a few hundred feet off campus at a public park).

61. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 384, 400 (5th Cir. 2015) (en banc).

62. *Id.* at 385.

intentionally directed at the "school community," the school could punish the student for his speech.[63]

The *Bell* court expanded *Tinker* to apply to student speech that originated and was disseminated off campus and was produced without school resources.[64] After determining that Bell's speech was within the reach of *Tinker*, the court then considered whether Bell's speech created an actual substantial disruption or if there was a reasonable forecast of a substantial disruption to the school environment.[65] Giving significant deference to the school board, the court held that because of the threatening nature of the speech, the specific targeting of a teacher, the objective seriousness of the speech, and the relationship of the speech to the school, it was reasonably foreseeable that the speech would create a substantial disruption on campus.[66] In dicta, the court described how threatening, harassing, and intimidating a teacher "impedes, if not destroys, the ability to educate."[67]

Similarly, the Second Circuit in *Wisniewski v. Board of Education of Weedsport Center School District* permitted the school to suspend a student who, while on his home computer, sent an instant-messaging (IM) icon depicting his English teacher shot in the head with a pistol.[68] The IM icon was sent to fifteen others, including some who attended the same school.[69] Like the rap video in *Bell*, the IM icon only made its way on campus when another student showed it to a school official.[70] In a hearing held to determine punishment for the student, the school board found the icon to be a threat to the teacher.[71] The Second Circuit affirmed the school official's broader authority to punish threats and held that in a circumstance where "a student's expression [can be] reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in [*Tinker*]."[72] Like the Fifth Circuit, once it was determined that *Tinker* applied, the court looked to the facts to see if there was an actual disruption or if a disruption in the school environment was reasonably foreseeable. It held, in these circumstances, that a threat to a

63. *Id.* at 396–97.
64. *Id.* at 393.
65. *Id.* at 397–98.
66. *Id.*
67. *Id.* at 399–400.
68. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 36 (2d Cir. 2007).
69. *Id.*
70. *Id.*
71. *Id.* at 36–37.
72. *Id.* at 38.

school official at least creates a strong foreseeability of disruption to the school environment.[73] The court found it irrelevant whether the student intended for his IM icon to be communicated to school authorities and permitted the school district to punish him for his expression.[74]

The Third Circuit, sitting en banc in *J.S. ex rel. Snyder v. Blue Mountain School District*, assumed for the sake of argument that *Tinker* can apply to off-campus speech, but it found the school's actions violated the student's First Amendment right because there was no substantial or material disruption to the school environment.[75] In this case, a student was suspended for creating a fake MySpace profile of her middle school principal while sitting at home one weekend.[76] The court began by recognizing a school board's vast, but not unlimited, authority.[77] The court assumed *Tinker* applied to the speech at issue but refused to make a binding holding on the question.[78] The court refused to determine whether *Tinker* applied because it held that there was no disruption to the school environment or any reasonable belief by a school official of a future disruption caused by the speech.[79] This was because the profile was "so outrageous" that "no one took its content seriously."[80] Moreover, only about twenty-two students could view the profile, and none of those students accessed the profile while on campus.[81] The only printout of the profile brought onto school grounds was one a student brought at the principal's request.[82] Interestingly, while the court refused to expressly determine whether *Tinker* applies to off-campus speech, it did explicitly hold that *Fraser*, the lewdness and vulgarity exception to *Tinker*, does not apply to off-campus speech.[83]

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73. *Id.* at 39–40.

74. *Id.* at 40.

75. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926, 929–30 (3d Cir. 2011) (en banc).

76. *Id.* at 920–21.

77. *Id.* at 925–26.

78. *Id.* at 926 ("The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.'s speech in this case.").

79. *Id.* at 928.

80. *Id.* at 921.

81. *Id.*

82. *Id.*

83. *Id.* at 932 ("The School District's argument fails at the outset because *Fraser* does not apply to off-campus speech. Specifically in *Morse*, Chief Justice Roberts, writing for the majority, emphasized that '[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.'" (quoting Morse v. Frederick, 551 U.S. 393, 405 (2009))).

Judge Smith of the Third Circuit wrote a concurrence, joined by four other judges, in which he argued *Tinker* does not apply to any off-campus speech.[84] He asserted, "[T]he First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."[85] Judge Smith noted various decisions by the Supreme Court discussing the dichotomy between on-campus and off-campus speech, writing, "If *Tinker* and the Court's other school-speech precedents applied to off-campus speech, this discussion would have been unnecessary."[86] Even the *Tinker* decision itself was "expressly grounded in 'the special characteristics of the school environment,'" Judge Smith wrote.[87] Regarding policy, he argued that applying *Tinker* to off-campus speech would dangerously increase a school's power to regulate any student's expressive activity that somehow caused substantial disruption at school—regardless of where the speech took place, the subject matter of the speech, or whether the student intended that speech to reach campus.[88] Further, "if *Tinker* were applied to off-campus speech, there would be little reason to prevent school officials from regulating *adult* speech" that caused a substantial disruption on campus.[89] Despite his firm stance against applying *Tinker* to off-campus speech, Judge Smith agreed that any speech "intentionally directed towards a school" is on-campus speech regardless of its origin.[90] This would include, for example, an email to a school employee sent on a home computer. In light of First Amendment precedent, Judge Smith wrote, "We must tolerate thoughtless speech like [the student's] in order to provide adequate breathing room for valuable, robust speech—the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination."[91]

C. *Development of Tests to Determine Whether* Tinker *Applies*

Amidst the confusion and lack of uniformity, the Fourth and Eighth Circuits have developed tests to determine when *Tinker* will apply to

84. *Id.* at 936 (Smith, J., concurring).

85. *Id.*

86. *Id.* at 937–38 (discussing, *inter alia*, the exceptions found in *Fraser*, *Kuhlmeier*, and *Morse*).

87. *Id.* at 937 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

88. *Id.* at 939.

89. *Id.* at 940.

90. *Id.*

91. *Id.* at 941.

off-campus speech.[92] The Fourth Circuit applies a "nexus" test, examining how closely related the speech is to the school.[93] The Eighth Circuit, on the other hand, applies a "reasonably foreseeable" test, wherein the court asks if it is reasonably foreseeable that the offending speech will reach the school.[94] Recently, the Ninth Circuit applied both tests and refused to pick one over the other.[95]

1. The Fourth Circuit's "Nexus" Test

The Fourth Circuit case, *Kowalski v. Berkeley County Schools*, centered around a fake MySpace profile of a fellow student.[96] High school senior Kara Kowalski created a MySpace page entitled "S.A.S.H.," an acronym for "Students Against Shay's Herpes."[97] After Kowalski made the profile, she invited approximately 100 people to join the group.[98] The school suspended Kowalski, and her parents responded with a lawsuit against the school district.[99] The district court entered summary judgment in favor of the school district because Kowalski's webpage was "created for the purpose of inviting others to indulge in disruptive and hateful conduct [causing an] in-school disruption."[100]

The Fourth Circuit upheld the district court's decision and set out a nexus test for determining whether *Tinker* applies.[101] This test examines the nexus of the speech to the school's "pedagogical interests" and then determines whether the school's interest "was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."[102] The court held that if the Internet was used to specifically target another student, the speech was sufficiently connected to the school environment.[103] Additionally, under these circumstances, the MySpace page was both materially and substantially

92. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150–53 (9th Cir. 2016); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777–78 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011).

93. *Kowalski*, 652 F.3d at 573.

94. *S.J.W.*, 696 F.3d at 777–78.

95. *C.R.*, 835 F.3d at 1150–52.

96. *Kowalski*, 652 F.3d at 567.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 573–74.

102. *Id.* at 573.

103. *Id.*

disruptive to the school environment and collided with the rights of others as set out in *Tinker*.[104]

2. *The Eighth Circuit's "Reasonably Foreseeable" Test*

The Eighth Circuit case, *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, concerned an online blog created by two students.[105] The Wilson twins were juniors in high school when they created an Internet blog that contained many racist and sexually degrading comments about specific classmates.[106] The Wilsons claimed they created the public website to "discuss, satirize, and 'vent' about events at [their high school]."[107] The school district suspended the Wilsons for 180 days, and the parents sued on the boys' behalf.[108] The district court granted a preliminary injunction in favor of the Wilsons, delaying any suspension.[109] At the hearing for the preliminary injunction, the Wilsons claimed the website was merely satirical.[110] The school district offered evidence to show that the discovery of the blog caused an actual and "substantial disruption" at the school and that numerous school computers were used to access or attempt to access the blog.[111] Teachers testified they had trouble controlling their classrooms when students found out about the Internet post.[112] The incident also caused the media and students' parents to contact the school, further disrupting the school environment.[113] Despite deciding in favor of the Wilsons, the district court found that the blog was "targeted at" the high school.[114]

The Eighth Circuit held that the district court erred in granting a preliminary injunction because the findings of fact did not support the relief granted.[115] The court held that *Tinker* applied "to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting."[116]

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104. *Id.* at 573–74.

105. S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773 (8th Cir. 2012).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 774.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 775.

115. *Id.* at 776.

116. *Id.* at 777. The Second Circuit has also supported this analytical framework. *See* Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) (noting its previous determination "that

Here, because it was reasonably foreseeable that the blog would reach the school's campus, especially since it discussed other students at the school, the Eighth Circuit reversed the district court's preliminary injunction.[117]

3. *The Ninth Circuit's Use of the "Nexus" and "Reasonably Foreseeable" Tests*

In September 2016, the Ninth Circuit applied both the Fourth and Eighth Circuit's tests but refused to adopt one over the other.[118] Unlike *Kowalski* and *Lee's Summit*, *C.R. ex rel. Rainville v. Eugene School District 4J* did not involve the Internet. A school punished a seventh-grade student, C.R., and two other seventh-grade boys for teasing two disabled sixth graders while on the walk home from school.[119] The students walked on a path several hundred feet from the school's property line.[120] The older students' jokes to the sixth-grade students escalated and soon became sexual in nature.[121] An instructional aide in the school district witnessed C.R. and the older students teasing the younger ones.[122] The aide broke up the group and finished walking the two disabled students home.[123] The next day, she called and reported the incident to the school.[124] After interviewing the students involved, the school determined that "the incident fell within the School District's definition of sexual harassment and that C.R. had participated in that harassment."[125] C.R. received a two-day suspension.[126] His parents sued the School District on his behalf.[127]

The district court entered summary judgment in favor of the school district.[128] The Ninth Circuit presented its analysis in the form of two issues: (1) "whether the school could permissibly regulate the student's off-campus

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a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus." (quoting Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007))).

117. *S.J.W. ex. rel. Wilson*, 696 F.3d at 778, 780.

118. C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150–53 (9th Cir. 2016).

119. *Id.* at 1146.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1147.

126. *Id.*

127. *Id.*

128. *Id.* at 1146.

speech *at all*"; and (2) "whether the school's regulation of the student's speech complied with the First Amendment's requirements."[129] The court affirmed the district court's judgment.[130]

The Ninth Circuit applied both the "nexus" test and the "reasonably foreseeable" test to the first part of the analysis—whether the school could permissibly regulate the off-campus speech at all. In applying the Fourth Circuit's nexus test, the court reasoned that the sexual harassment was "closely tied to the school" considering that all participants were students, the incident took place on a path that started on school grounds, there was no visual marker to show where the school property ended and where it began, and the school's schedule was what brought the students together on the path.[131] Applying the Eighth Circuit's reasonably foreseeable test, the court held the school district's discipline was proper because "administrators could reasonably expect the harassment's effects to spill over into the school environment."[132] The school offered no evidence of an actual disruption on school grounds.[133] However, the court held it was enough that the students could run into each other in the hallway or that the harassed students would likely discuss it with other students for the administrators to reasonably expect a disturbance in the school environment.[134]

Next, the circuit court evaluated the school district's two-day suspension under *Tinker*.[135] The court held that because sexual harassment de facto interferes with another student's "ability to feel safe and secure at school," the suspension was permissible.[136]

Under both the Fourth and Eighth Circuits' tests, the court came to the same conclusion: *Tinker* applied. The court was not inclined to pick one test over the other when both analyses led to the same conclusion. The Ninth Circuit's decision demonstrates just how broad both tests are: regardless of which test is used, both are extensive enough that most of the time the result will be the application of the *Tinker* standard, which is less protective of speech. While a "nexus" test in theory may be more expansive than the reasonably foreseeable test—as students' lives are usually centered around school so that almost everything in their lives will have some sort of "nexus"

129. *Id.* at 1148.

130. *Id.* at 1146.

131. *Id.* at 1150–51.

132. *Id.* at 1151.

133. *Id.* (noting only what disruptions administrators could "reasonably expect" at school but failing to point to any actual disruptions in the school environment).

134. *Id.*

135. *Id.* at 1152.

136. *Id.* at 1153.

with the school environment—no case has yet shown how one test results in the application *Tinker* while the other does not.

Kowalski, *Lee's Summit*, and *Eugene School District*, along with cases discussed earlier, show the shift in favor of applying the *Tinker* test to off-campus student speech. Whether this shift is because courts believe *Tinker* to be the best standard or because it is the only Supreme Court precedent regarding school speech is unclear. With the increasing integration of technology in students' everyday lives, these types of cases are not going away, and a consistent test would benefit students, school districts, and attorneys.

II. DOES *TINKER* ALLOW SCHOOLS TO PUNISH AN OFF-CAMPUS STUDENT SPEAKER WHEN THE EFFECTS OF HER SPEECH CAUSE A DISRUPTION ON CAMPUS?

While *Tinker* is not impermissibly restrictive of free speech when applied to on-campus speech, it becomes too restrictive when applied outside the schoolhouse gates. Because "[f]ree speech encourages stability, neutrality, and restraint from tyranny, corruption, and ineptitude," it is better to err on the side of free speech and not apply the *Tinker* rule beyond on-campus speech.[137]

Applying *Tinker* to off-campus speech is a dangerous choice for two reasons. First, it would vastly expand a school's power to punish student speech. This could create a slippery slope that greatly restricts all student speech. The line between off-campus and on-campus speech could become hopelessly blurred. If the location of the student's speech and the student's intention for the speech not to reach the school do not matter, the school would have the power to punish almost anything the student says. For example, think about two young girls at a sleepover where one says to the other, "Sharon's fat." The girl makes the comment sitting in her own room and in confidence, never intending for the friend to share her comment or for the comment to make its way to school. The next day, the friend tells everyone about the girl's comment regarding Sharon. It causes an uproar among the students, and Sharon is deeply upset. If *Tinker* applied to this speech, the school could permissibly punish the girl for a comment she made while at a sleepover. Or, take for example the neighborhood bully who

137. Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 CAMPBELL L. REV. 1, 5 (2013); *see also* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 941 (3d Cir. 2011) (Smith, J., concurring) ("We must tolerate thoughtless speech like [the student's] in order to provide adequate breathing room for valuable, robust speech—the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination.").

intimidates other kids in the neighborhood. He also could be punished for his speech that takes place solely in the neighborhood.

Second, allowing schools to punish off-campus speakers would create a chilling effect on student speech, especially speech that engages in political or other controversial matters. Oftentimes, political and controversial speech creates a substantial and material disruption on campus, but that does not mean a student should be punished for expressing her beliefs. For instance, a student could post her views against the state recognizing gay marriage while off campus on a private blog. This blog could be read by, and would likely be read by, her student peers. Her views could create a material and substantial disruption to the school environment: it could spark protests, cause other students to harass her, or beget a variety of other events. A school's punishment for this off-campus speech would dilute almost all of the student's First Amendment rights. Having the same standard for on-campus and off-campus speech strips students of any permissible outlet to share their thoughts and ideas, however offensive or uncivil they may be.[138] "[R]estrictions on on-campus speech can at least be defended on the grounds that the students remain free to speak elsewhere," but if *Tinker* applies to off-campus speakers, as well, it effectively strips students of alternative channels to express themselves.[139]

The Fourth Circuit's nexus test and the Eighth Circuit's foreseeability test are insufficient to determine whether an off-campus speaker can be punished for her speech. Both are too broad in their stroke.[140] As noted by Judge Smith for the Third Circuit, "A bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters."[141] The same goes for a nexus test, especially given that a student's life centers around school. Most students spend about five-to-six hours at school for five days a week. Activities and friend groups often stem from the school environment. It is unreasonable to think that most of a student's conversations will not involve something about the school environment. Because both tests are broad, there is a risk that they can be arbitrarily applied. One judge might think speech would foreseeably reach a school or has a sufficient nexus to the school while another might not. Under either test, teachers, attorneys, and students are left as confused and unsure as they were before *Tinker* extended beyond the physical premises of schools.

138. *See* Letter from Eugene Volokh, *supra* note 10.

139. *Id.*

140. *J.S. ex rel. Snyder*, 650 F.3d at 940 (Smith, J., concurring).

141. *Id.*

A school should be permitted to punish an off-campus student speaker when the effects of that speech cause a substantial and material disruption on campus. Adult speech may just as well materially disrupt public schools, but the adult is not subject to discipline by the school district.[142] There should be two exceptions to this general rule, however. First, a school should be permitted to punish a student for speech intentionally directed at the school. For example, this would include an email sent to an employee of the school district or any threats to the school, other students, or school personnel. Second, if the off-campus speech reaches campus, the school should be permitted to punish those students who bring that speech onto campus. To illustrate, consider *J.S. ex rel. Snyder* and *Wisniewski*, where the speech was only brought on campus by a student who did not originate the speech. The student who created the profile (the original speaker) may not have said a word about the profile while on campus. The school can punish those students who talk about the profile while on school grounds but should not be permitted to punish the original speaker. In the sleepover example given earlier, the school could punish the friend who brings the girl's comment on campus for repeating the speech, but it should not be able to punish the original speaker.

A school should not be able to punish an off-campus speaker when the effects of her speech reach the school's campus unless she is the one that brings such speech onto campus or she intentionally directs it at the school. A student who finds herself a victim of off-campus speech that is not punishable by the school has other alternatives. While the school would not be able to punish the speaker, the school could move either student to another class, and the school could direct the student victim to recourse given by state statutes, such as anti-bullying statutes.

III. HOW THE NORTH CAROLINA LEGISLATURE HAS REGULATED WHAT SCHOOLS CANNOT

While schools are limited in what off-campus speech they can punish, state legislatures can regulate what school districts cannot reach. Whether such statutes are constitutional under the First Amendment is another question.

142. *See id.* ("Adults often say things that give rise to disruptions in public schools. Those who championed desegregation in the 1950s and '60s caused more than a minor disturbance in the southern schools. Of course, the prospect of using *Tinker* to silence such speakers is absurd. But the absurdity stems . . . from the antecedent step of extending *Tinker* beyond the public-school setting to which it is so firmly moored.").

A. North Carolina's Anti-Cyberbullying Law

After thirteen-year-old Megan Meier's suicide in 2006, legislatures across the country scrambled to enact anti-cyberbullying laws.[143] An adult masquerading as a fellow student bullied Megan through a fake online profile, ultimately causing Megan's suicide.[144] There was no criminal recourse for cyberbullying at the time of Megan's death, and the adults behind the messages never faced any charges.[145] Thus began a nationwide campaign, spearheaded by Megan's mother, to end cyberbullying through legislation and a shift in societal norms.[146]

The North Carolina General Assembly in 2009 passed a statute criminalizing cyberbullying.[147] The statute made it unlawful for any person to use a computer or network "[w]ith the intent to intimidate or torment a minor" to: "[b]uild a fake profile or Web site"; pose as a minor in a chat room, e-mail, or other instant messaging network; "[f]ollow a minor online or into an Internet chat room"; or "[p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor."[148] The statute also outlawed "any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor."[149] The statute was passed in both the House and Senate with overwhelming support.[150]

Despite the almost unanimous votes in both houses, questions about the constitutionality of the bill arose soon after its passage.[151] Phrases included in the bill, such as "[w]ith the intent to intimidate or torment a minor" and "likely to provoke," were called "remarkably vague," and the statute notoriously failed to provide much guidance in measuring those

143. *See* Steve Pokin, *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, ST. LOUIS POST-DISPATCH (Nov. 11, 2007), https://perma.cc/S8GE-4VJL.

144. *Id.*

145. *Id.*

146. *Id.*

147. Act of Aug. 28, 2009, no. 551, 2009 N.C. Sess. Laws 1510 (codified at N.C. GEN. STAT. § 14-458.1 (2017)), *invalidated by* State v. Bishop, 787 S.E.2d 814, 822 (N.C. 2016).

148. § 14-458.1(a)(1). The statute made violations a Class 1 misdemeanor if the offender was eighteen years or older. *Id.* § 14-458.1(b). If the offender was younger than eighteen, then a violation was a Class 2 misdemeanor. *Id.*

149. *Id.* § 14-458.1(a)(3).

150. The bill passed the House unanimously and passed the Senate with a 39-2 vote. *House Bill 1261/S.L. 2009-551*, N.C. GEN. ASSEMBLY, https://perma.cc/4ASZ-YNVT.

151. *See* Bob Luebke, *HB 1261: Cyberbullying Overreaction?*, CIVITAS INST. (Aug. 14, 2009), http://perma.cc/Z4XT-CBLZ; *see also* Michael R. Gordon, Recent Development, *The Best Intentions: A Constitutional Analysis of North Carolina's New Anti-Cyberbullying Statute*, 11 N.C. J.L. & TECH. ON. 48, 49 (2009).

thresholds.[152] For example, one scholar suggests the scenario where one seventeen-year-old sends a message to another seventeen-year-old ex-lover accusing that student of cheating in the relationship.[153] Due to the ambiguous language of the statute, it is unclear whether this message could have criminal consequences.[154] The North Carolina Supreme Court took up the constitutionality of this statute in the 2016 case *State v. Bishop*.[155]

B. State v. Bishop—*Striking Down North Carolina's Anti-Cyberbullying Law*

Robert Bishop, a student at Southern Alamance High School, was charged under North Carolina's cyberbullying statute for using a computer to "[p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor."[156] Other students, including Bishop, "began to post negative pictures and comments" about a fellow student, Dillion Price, to Facebook.[157] One student posted to Price's Facebook profile a sexually charged text accidentally sent to him by Price.[158] Both Price and Bishop commented on the post.[159] Price accused the student who posted the picture of fabricating the text.[160] Bishop replied, saying the text was "excessively homoerotic" and "accused others of being 'defensive' and 'pathetic for taking the [I]nternet so seriously.'"[161] Two other similar Facebook posts about Price followed.[162] Upon finding her son extremely upset over the post, Price's mother contacted the police.[163] Bishop was arrested and charged with one count of cyberbullying under section 14-458.1.[164]

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152. § 14-458.1. *Cf.* Eugene Volokh, *It's Now a Crime in Louisiana to Electronically Communicate With "Intent to . . . Abuse [or] Torment" a Minor*, VOLOKH CONSPIRACY (Jul. 9, 2010, 3:30 PM), http://perma.cc/JX7D-BLT3 (discussing a Louisiana statute utilizing similar language to the North Carolina statute).

153. Volokh, *supra* note 152.

154. *Id.*

155. State v. Bishop, 787 S.E.2d 814 (N.C. 2016).

156. *Id.* at 815 (alteration in original) (quoting § 14-458.1(a)(1)(d)).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 816.

164. *Id.*

Bishop was found guilty at trial.[165] Upon appeal to the Alamance County Superior Court for a de novo trial, Bishop unsuccessfully argued that the statute was unconstitutional under the First and Fourteenth Amendments of the United States Constitution.[166] Bishop was convicted by a jury for the second time.[167] He appealed to the North Carolina Court of Appeals, arguing that the statute was unconstitutional under the First Amendment because it applied a content-based restriction and failed strict scrutiny.[168] The court of appeals unanimously held the statute regulated conduct, not speech, and that any burden on speech was "merely incidental."[169]

The North Carolina Supreme Court granted Bishop's petition for discretionary review[170] and held section 14-458.1(a)(1)(d) of the North Carolina General Statutes was unconstitutional.[171] The court reasoned that the statute regulated speech because it "outlawed posting particular subject matter, on the [I]nternet, with certain intent."[172] But, it continued, simply because the speech took place online does not mean the speech is "subject to any lesser protection."[173] The supreme court rejected the court of appeals' rationale that the statute regulated conduct rather than speech.[174] The court then had to determine whether the cyberbullying statute was content-based or content-neutral.[175] It held the statute was content-based because it regulated speech by subject matter: "The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication."[176]

Content-based speech restrictions are subject to strict scrutiny.[177] The state must present a compelling interest and show that the law achieves that interest by narrowly tailored means. The court held the cyberbullying law did not satisfy this heightened review, stating:

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165. *Id.*

166. *Id.*; U.S. CONST. amend. I; *id.* amend. XIV, § 1.

167. *Bishop*, 787 S.E.2d at 816.

168. *Id.*

169. State v. Bishop, 774 S.E.2d 337, 343–44 (N.C. Ct. App. 2015) ("[The] Statute punishes the *act* of posting or encouraging another to post on the Internet *with the intent* to intimidate or torment" a minor).

170. *Bishop*, 787 S.E.2d at 816.

171. *Id.* at 817.

172. *Id.*

173. *Id.* at 818.

174. *Id.* at 818–19.

175. *Id.* at 818.

176. *Id.* at 819.

177. *Id.*

> [A]s to both the motive of the poster and the content of the posting, the statute sweeps far beyond the State's legitimate interest in protecting the psychological health of minors. Regarding motive, the statute prohibits anyone from posting forbidden content with the intent to "intimidate or torment" a minor. However, neither "intimidate" nor "torment" is defined in the statute, and the State itself contends that we should define "torment" broadly to reference conduct intended "to annoy, pester, or harass." The protection of minors' mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.[178]

The subject matter prohibited by the statute was "similarly expansive" because it prohibited posting "private, personal, or sexual information pertaining to a minor."[179] These terms were not defined in the statute.[180] The State argued for a broad interpretation of "personal" as "of or relating to a particular person."[181] The court held, "Such an interpretation would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent."[182] Not even a *mens rea* requirement could sufficiently narrow the statute's scope to pass strict scrutiny.[183] Thus, because the cyberbullying statute criminally punished an "alarming breadth" of speech, it was ruled unconstitutional.[184]

C. *North Carolina's Protection Against School Violence Act—Is it Constitutional?*

North Carolina has passed multiple anti-bullying statutes that are vulnerable under the *Bishop* rationale.[185] The general assembly passed the School Violence Prevention Act of 2012 to amend a similar act from 2009

178. *Id.* at 821.

179. *Id.* (quoting N.C. GEN. STAT. § 14-458.1(a)(1)(d) (2017)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* (quoting United States v. Stevens, 559 U.S. 460, 474 (2010)).

185. *See* NC School Violence Prevention Act, no. 212, 2009 N.C. Sess. Laws 341 (codified at N.C. GEN. STAT. §§ 115C-407.15 to -407.18 (2017)) (amending North Carolina statutes concerning "[b]ullying and harassing behavior," "[p]olicy against bullying or harassing behavior, "[p]revention of school violence," and "[c]onstruction of [the bullying] statute"); *see also* Act of Oct. 22, 2015, no. 282, 2015 N.C. Sess. Laws 1376 (codified at § 14-196.3) (amending North Carolina's cyberstalking statute); Act of July 14, 2000, no. 125, 2000 N.C. Sess. Laws 609 (codified at § 14-196) (amending North Carolina's statute regulating harassment over the telephone).

with the goal of promoting safer school environments.[186] This Act added a new section punishing cyberbullying of a school employee by a student.[187] It is the first law in the nation to impose criminal sanctions on students intending to intimidate or torment school employees online.[188]

The School Violence Prevention Act uses language identical to the statute struck down by the North Carolina Supreme Court in *State v. Bishop*.[189] The only difference between the statutes is that one regulated speech between students, while the other regulated speech between student and employee.[190]

The North Carolina Supreme Court will likely do just what it did in *Bishop* and hold section 14-458.2 unconstitutional because of its impermissible restrictions on speech.[191] Schools do have a compelling interest in protecting *children* from physical and psychological harm, but that interest becomes less compelling as the victim becomes an adult.[192] If section 14-458.1 did not pass strict scrutiny, the fact that section 14-458.2 regulates speech between a student and adult employee makes the School Violence Prevention Act even less likely to pass strict scrutiny.

The American Civil Liberties Union of North Carolina (ACLU) criticized the 2012 act soon after it was passed.[193] In its press release, it stated the law

> is too broad, threatens to chill students' free speech, sets a bad precedent by telling students it's wrong to criticize government officials, and could saddle students as young as 16 with up to 60 days in jail or a $1,000 fine for a wide range of acts that do not merit a criminal punishment.[194]

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186. School Violence Prevention Act of 2012, no. 149, § 4, 2012 N.C. Sess. Laws 715 (codified as amended at § 14-458.2). Originally named the "NC School Violence Prevention Act," the original Act was passed into law in 2009. NC School Violence Prevention Act § 1. Senator Tommy Tucker (R-Union County) introduced amendments to address computer-related crimes in 2012 and renamed it the "School Violence Prevention Act of 2012." School Violence Prevention Act of 2012, S. 707, 2011 Gen. Assemb. (N.C. 2011); *see* Gordon, *supra* note 151.

187. § 14-458.2.

188. *See New Law Criminalizing Online Student Speech Takes Effect Dec. 1*, ACLU OF N.C. (Nov. 28, 2012), http://perma.cc/9JKC-G64R.

189. § 14-458.2(b)(1)(b) ("Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a school employee."); State v. Bishop, 787 S.E.2d 814 (N.C. 2016).

190. § 14-458.2(b)(1).

191. *Bishop*, 787 S.E.2d at 822.

192. *Id.* at 820.

193. *See New Law Criminalizing Online Student Speech Takes Effect Dec. 1*, *supra* note 188.

194. *Id.*

As the ACLU noted, the statute is so vague that simply criticizing a teacher on the Internet could lead to criminal punishment.[195] Other parts of section 14-458.1 and section 14-458.2 are overbroad and stifle speech in violation of the First Amendment. Section 14-458.2(b)(1)(a) makes it illegal for a student to build a fake profile or website with the intent to intimidate or torment an employee.[196] These statutes, which rely on words such as "harassment" and "hostile educational environment," give students and parents almost no guidance on what kind of speech would and would not be punishable by the state or school.[197]

The future of North Carolina's attempt to punish cyberbullying within school environments does not seem optimistic. If the legislature is to take on the task of regulating speech within the schoolhouse gates, it must pass an even higher standard than a school must pass under the lesser *Tinker* standard. A narrower and more specific law must exist.

The United States Department of Education issued a letter noting eleven components found in current state laws tackling bullying and cyberbullying.[198] Including all eleven components is not enough to make a criminal anti-bullying law constitutional, but incorporating certain components might help to survive heightened scrutiny. A purpose statement, explicit statement of the law's scope, narrow definition of prohibited conduct, and clear enumeration of protected characteristics all help to narrow the law's effects. North Carolina's anti-bullying legislation includes a purpose statement and clearly enumerates protected characteristics, but the legislature could improve on its scope section and definition of prohibited conduct.

The North Carolina Supreme Court took issue with section 14-458.1's vagueness and lack of definitions and specificity.[199] The court's main problem was no definition for the terms "intimidate or torment" and "to annoy, pester, or harass"; it also took issue with the expansive sweep of possible content subject to the law ("private, personal, or sexual information

195. *Id.*

196. N.C. GEN. STAT. §14-458.2(b)(1)(a) (2017).

197. Letter from Eugene Volokh, *supra* note 10, at 4.

198. Letter from Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. (Dec. 16, 2010), https://perma.cc/82DY-72KU. The eleven components, which were attached to the letter, were: (1) a purpose statement, (2) a statement of the law's scope, (3) specific descriptions of prohibited conduct, (4) identification of specific protected characteristics, (5) development and implementation of local school board policies, (6) components of a local school board policies, (7) required review of local policies, (8) a communication plan notifying students, family, and staff of the policies, (9) training and preventive education for staff, (10) transparency and monitoring, and (11) statement of rights to other legal recourse. *Id.*

199. State v. Bishop, 787 S.E.2d 814, 821 (N.C. 2016).

pertaining to a minor").[200] The legislature could borrow from other places in the criminal code where such terms are defined. For example, harassment defined under stalking includes "[k]nowing conduct, including written or printed communication, . . . and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose."[201] The legislature could require some showing of substantial emotional distress by the person who receives those messages to further narrow the scope.[202]

One other consideration could be useful in drafting a narrower law. With a few short clicks, students have access to a large audience through sites like Facebook, Instagram, Twitter, or MySpace.[203] The Internet has created a dichotomy in the types of audiences readily available to students. It has opened the door for more direct one-on-one (or one-to-few) chats and posts to the public at large. To whom the student directs his or her off-campus speech should play a key role in deciding whether states can constitutionally punish a student's off-campus speech.[204] States should not be allowed to punish students for speech they publish to the world at large but should have more power to punish unwanted one-to-one or one-to-few speech.[205] At the very least, a statute should be limited to the one-to-one or one-to-many rationale.

The legislature might never be able to pass a law with as much authority over bullying as it would like. But there are also other legal recourses for speech beyond criminal laws—to wit, defamation and intentional infliction of emotional distress. Some bullying may overlap with other criminal violations like stalking or assault, too.

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200. *Id.*

201. § 14-277.3A(b)(2).

202. *See id.* (including a definition for substantial emotional distress under the stalking statute).

203. Social media changes at a rapid pace. Often, the courts lag and decide cases involving outdated social media platforms.

204. *See* Letter from Eugene Volokh, *supra* note 10 at 7 ("Schools might also be able to prohibit unwanted one-to-one communication by one student to another student, when the target has said he doesn't want to hear more from the speaker." (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970))).

205. *See id.* ("But this exception is limited to one-to-one statements (or perhaps one-to-a-few statements when all the listeners have told the speaker to stop). It can't be used to justify suppressing speech among willing communicators—even when the speech is offensive to a third party, for instance when it reveals accurate information about a romantic or sexual relationship involving the third party—or speech addressed to the public at large, as on a Web site of T-shirt.").

CONCLUSION

Tinker should only apply to on-campus student speech, with two exceptions: speech intentionally targeted at the school and students who bring the off-campus speech on campus. While not perfect, this rule provides more protection for freedom of speech. On the other hand, state legislatures can punish certain off-campus speech that a school cannot reach under *Tinker*. North Carolina has attempted to do this by passing various anti-bullying statutes, but under the *Bishop* rationale, some of these statutes are vulnerable to invalidation. The North Carolina General Assembly should more carefully define words such as "harass" included in the statute and make a clear distinction between one-to-one versus one-to-many speech to narrow the parameters of anti-bullying laws.

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