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UNSETTLED QUESTIONS IN STUDENT SPEECH LAW

*David L. Hudson, Jr.**

ABSTRACT

More than fifty years ago, the U.S. Supreme Court famously proclaimed in Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In subsequent decades, the Supreme Court reduced the level of free-speech protections for public school students, but Tinker is still the lodestar decision.*

There remain several areas of uncertainty regarding the scope of student (K–12) First Amendment rights. This Article addresses three of those main areas: (1) whether a student's speech can be limited by the unruly behavior of listeners; (2) when student speech invades or infringes on the rights of other students; and (3) when school officials can punish students for off-campus, online speech. All three areas have led to much disagreement and uncertainly among courts, school officials, parents, and commentators.

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INTRODUCTION

Fifty years ago, the United States Supreme Court famously declared in *Tinker v. Des Moines Independent Community School District* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] The decision ushered in a new era of protection for student expression, a new wave of litigation, and a genuine feeling that change was in the air.[2]

Both courts[3] and commentators[4] have described *Tinker* as the "high water mark" for student free-expression rights. The general consensus is that the

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

2 *See* DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 69, 84 (2011) (explaining that *Tinker* created a new sense of opportunity for student activists).

3 *See* Morgan v. Swanson, 659 F.3d 359, 374 (5th Cir. 2011) ("[*Tinker*] has been called the 'high water mark' of student speech rights."); *see also* Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1534 (E.D. Va. 1992) ("*Tinker* . . . is the high-water mark for public school students' First Amendment rights.").

4 *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124 (2004) ("[*Tinker*] was the high watermark of the Supreme Court protecting the constitutional rights of students."); David L. Hudson, Jr., *Black Armbands, "Boobies" Bracelets and the Need to Protect Student Speech*, 81 UMKC L. REV. 595, 595 (2013) ("*Tinker* remains the 'high water mark' of student free-speech rights."); David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 185–86 (2002) (explaining that the prevailing view is that *Tinker* is the "high water mark" of student First Amendment rights); David L. Hudson, Jr., *Fear of Violence in Our Schools: Is 'Undifferentiated Fear' in the Age of Columbine Leading to a Suppression of Student Speech?*, 42 WASHBURN L.J. 79, 83 (2002) (noting that many scholars view *Tinker* as the "high water mark" of student First Amendment rights); Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus "Cyber-Bullying*,*"* 81 MISS. L.J. 189, 195 (2011) (describing *Tinker* as the "zenith" of student First Amendment rights); Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K–12 Sports*, 78 LA. L. REV. 145, 166 (2017) (describing the general view that *Tinker* represents the "pinnacle" of student-speech protections); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 636 (2002) (describing *Tinker* as the "touchstone" and "high water mark" for student free-speech rights); Sean R. Nuttall, Note, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. Rev. 1282, 1309–10 (2008) (noting that scholars view *Tinker* as the "high water mark" of student speech rights, but arguing that the Court in *Tinker* provided greater deference to school officials); Mark Strasser, Tinker *Remorse: On Threats, Boobies, Bullying, and Parodies*, 15 FIRST AMEND. L. REV. 1, 2 (2016) (describing the general view that *Tinker* represents the "high point" of student First Amendment rights); Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 458 (1998) ("Unfortunately, *Tinker* was in many ways a high-water mark for students' rights, and we have seen some sad back-sliding in Supreme Court decisions about students' rights since then.").

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Warren Court in the late 1960s vindicated student free-expression rights and that subsequent Courts narrowed these rights in the following decades.[5]

The Court in *Tinker* set the general standard and then in subsequent cases created so-called "*Tinker* carve-outs" for "vulgar and lewd" speech,[6] school-sponsored speech,[7] and speech that school officials reasonably believe advocates the illegal use of drugs.[8] As the Third Circuit explained in 2011, "Courts have recognized, time and again, that the three exceptions to *Tinker*'s general rule are independent 'carve-outs.'"[9] Furthermore, in these carve-out cases, the Court emphasized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[10]

Despite the standards from these four main student First Amendment cases, many unsettled questions remain in the area of K–12 student speech. Several of the most prominent questions relate directly to the interpretation or application of the *Tinker* decision itself. This Article addresses several of these areas where uncertainty remains. These areas of uncertainty include:

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5 *See* JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER V. DES MOINES* AND THE 1960S, at 206 (1997) ("The *Tinker* decision is still 'good law' . . . but Court decisions of recent years have undercut it."); Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 AM. U. L. REV. 1167, 1173 (2009) (noting that subsequent Supreme Court decisions have undercut *Tinker*); Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 377 (2019) ("Capitalizing on *Tinker*'s discussion of the preeminence of state school control over students, the Court's subsequent student speech jurisprudence has allowed for the restriction of student speech with increasing amounts of discretion granted to school officials."); Thomas C. Fischer, "*Whatever Happened to Mary Beth Tinker" and Other Sagas in the Academic "Marketplace of Ideas*,*"* 23 GOLDEN GATE U. L. REV. 351, 358 (1993) ("Generally speaking, however, students and teachers have lost rights over the past twenty years. In the process, the Supreme Court has established a new Constitutional balance and new legal standards."); Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. U. L. REV. 35, 44–45 (1993) (explaining that, in the 1980s, a more conservative U.S. Supreme Court cut back on the protections for students in *Tinker*).

6 Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission.").

7 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

8 *See* Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that a principal may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

9 B.H. *ex. rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 331 (3d Cir. 2011) (Hardiman, J., dissenting).

10 *Fraser*, 678 U.S. at 482.

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(1) whether a student's speech can be limited by the unruly behavior of listeners; (2) when student speech invades the rights of other students; and (3) when school officials can punish students for off-campus, online speech. All three areas have led to much disagreement among courts, school officials, parents, and commentators.

Part I examines the role of the "heckler's veto" in *Tinker*'s substantial disruption analysis. Part II evaluates the meaning of *Tinker*'s often forgotten prong—the invasion of the rights of others. And Part III examines the extent of school officials' authority over off-campus, social media speech.

I. UNPACKING THE SUBSTANTIAL DISRUPTION TEST IN *TINKER*: DOES IT MATTER WHO DOES THE DISRUPTING?

In *Tinker*, several public school students wore black armbands to protest U.S. involvement in the Vietnam War, support Robert Kennedy's Christmas truce, and mourn those who had died in the war.[11] "When we were told that we would not be allowed to express our opinion about the war in this purely nonviolent and nondisruptive way, we felt that there had been an offense against a principle that we were obligated to try to defend," John Tinker said.[12]

Des Moines public school officials learned of the impending protest and quickly passed a resolution that banned the wearing of armbands.[13] Several students—including litigants John, his sister Mary Beth Tinker, and Christopher Eckhardt[14]—wore the armbands to school and incurred suspensions.[15] They challenged their suspensions in federal court. They lost

11 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (detailing the circumstances behind the lawsuit).

12 David L. Hudson, Jr., *Student Free Speech Case 'Chipped Away' at After 50 Years, but 'Overall Idea' Remains*, A.B.A. J. (Feb. 25, 2019, 6:00 AM), http://www.abajournal.com/web/article/50th-anniversary-of-tinker-v-des-moines.

13 *See Tinker*, 393 U.S. at 504 (explaining the school policy that inspired the lawsuit).

14 Eckhardt, who passed away several years ago, was the often-forgotten plaintiff in the case as the style of the case began with Tinker. But he remained a committed champion for individual rights. *See* David L. Hudson, Jr., *Christopher Eckhardt Left His Mark as Student-Speech Litigant*, FREEDOM F. INST. (Jan. 3, 2013), https://www.freedomforuminstitute.org/2013/01/03/christopher-eckhardt-left-his-mark-as-student-speech-litigant/.

15 *See Tinker*, 393 U.S. at 504 (detailing the circumstances behind the lawsuit).

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before a federal district court judge[16] and could fare no better than a 4–4 tie at the federal appeals court level.[17]

The students pursued their cause to the U.S. Supreme Court, which rewarded them with a 7–2 victory.[18] The Court explained that students do not lose their First Amendment free-speech rights at the schoolhouse gate but also emphasized that those rights must be interpreted in light of the "special characteristics of the school environment."[19]

The Court emphasized that the armbands were a form of passive political speech that did not cause any great disruption of school activities. The Court fashioned what came to be known as the "substantial disruption" test. It is known as the dominant test from the *Tinker* decision.[20] However, the Court's opinion in *Tinker* uses different language to describe this test. Consider the following passages from Justice Fortas' opinion:

> But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.
>
> . . . .
>
> As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.[21]

The first passage emphasizes that the students' wearing of the armbands did not cause a material disruption or substantial disorder. The second passage provides that school officials could not reasonably forecast that the students' armbands, would cause a substantial disruption or material interference of school activities.

16 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist. (*Tinker I*), 258 F. Supp. 971 (S.D. Iowa 1966).

17 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist. (*Tinker II*), 383 F.2d 988 (8th Cir. 1967).

18 *See Tinker*, 393 U.S. at 503.

19 *Id.* at 506.

20 *See* David L. Hudson, Jr., *Substantial Disruption Test*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1584/substantial-disruption-test (explaining the test used for determining whether a public school can bar speech under *Tinker*); *see also* David L. Hudson, Jr., *The Leading Student-Speech Standard: Reasonable Forecast of Substantial Disruption*, NAT'L ASS'N SCH. RES. OFFICERS: LEGAL UPDATE (Fall 2014) (same).

21 *Tinker*, 393 U.S. at 513–14.

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The second passage has won out over time in the lower courts. Under most student-speech K–12 cases, school officials do not have to wait for an actual substantial disruption.[22] Instead, they have to point to specific facts in the school environment that would allow them to reasonably forecast that there could be a substantial disruption.

But, this reasonable forecast of substantial disruption test is not easy to apply.[23] An area of uncertainty resides in whether courts will allow the negative reaction of listeners to silence the student speakers. Stated another way, will courts allow negative reactions of other students to silence, or impose a heckler's veto, on the student speaker who engages in peaceful expression?

Currently, there is a circuit split on whether a heckler's veto should be incorporated into the *Tinker* substantial-disruption analysis.[24] The Ninth Circuit allows a heckler's veto,[25] while the Seventh and Eleventh Circuits ostensibly do not.[26] The Ninth Circuit ruled in *Dariano v. Morgan Hills Unified School District* that an assistant principal could prevent five Caucasian students from wearing t-shirts with the American flag on them on Cinco de Mayo, a Mexican holiday, because it would offend other students.[27]

The five wearers of the American flag t-shirts engaged in no disruptive behavior on their own. They simply wore t-shirts. The school officials were concerned about the hostile response from some Latino students. The assistant principal expressed concern over the t-shirts in part because there was racial tension during Cinco de Mayo during the previous school year.[28]

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22 *See* Lowery v. Euverard, 497 F.3d 584, 593 (6th Cir. 2007) ("*Tinker* does not require disruption to have actually occurred."); Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973) ("First, the First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances. Second, *Tinker* does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.").

23 *See Karp*, 477 F.2d at 174 ("The *Tinker* rule is simply stated; application, however, is more difficult.").

24 *See* Katherine M. Porter, Comment, Tinker*'s Timeless Teaching: Why the Heckler's Veto Should Not Be Allowed in Public High Schools,* 86 MISS. L.J. 409, 428 (2017) (addressing the split between the Seventh, Eleventh, and Ninth Circuits).

25 *See* Dariano v. Morgan Hills Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014) (upholding a school district's dress policy).

26 *See* Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874, 879 (7th Cir. 2011); Holloman v. Harland, 370 F.3d 1252, 1275 (11th Cir. 2004) (holding that the school district had violated the student's free speech).

27 *See Dariano*, 767 F.3d at 774–75.

28 *See id.* at 777.

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The Ninth Circuit in *Dariano* emphasized that "the crucial distinction is the nature of the speech, not the source of it."[29] In other words, it doesn't matter from where the disruption occurs or from where school officials reasonably forecast where there will be a disruption—if there is a reasonable forecast of substantial disruption, then school officials can censor the peaceful students' expression.

Judge Diarmund O'Scannlain wrote a scathing dissent from a denial of en banc review. He emphasized that the t-shirt wearing students exercised their free-speech rights peacefully and passively.[30] He also warned that his colleagues had "condon[ed] the suppression of the students' speech for one reason: other students might have reacted violently against them."[31] The lesson of the majority decision to students, according to O'Scannlain, was the following: "by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them."[32]

The Seventh Circuit reached a different result in a case involving a student who wore a t-shirt to school bearing the message "Be Happy, Not Gay."[33] School officials sought to prohibit the student from wearing the t-shirt based in part on the fact that other students harassed the T-shirt wearer, Zamecnik.[34] The Seventh Circuit rejected the school officials' reasoning as "barred by . . . the heckler's veto."[35] The Seventh Circuit explained:

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of their disapproval of her message is not a permissible ground for banning it.[36]

29 *Id.* at 778.

30 *See id.* (highlighting the peaceful exercise of the student's free speech rights).

31 *Id.* at 768, (O'Scannlain, J., dissenting).

32 *Id.* at 770.

33 Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874, 875 (7th Cir. 2011).

34 *See id.* at 879 (noting that the school district presented "incidents of harassment of plaintiff Zamecnik" in its argument that the shirt should be prohibited from campus).

35 *Id.*

36 *Id.*

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Interestingly, Mary Beth and John Tinker filed an amicus brief urging the U.S. Supreme Court to review the Ninth Circuit decision.[37] The brief explained that the Tinkers' speech itself—the black armbands as a form of protest—was controversial and banned by school officials in Des Moines because they feared it might cause disruption.[38] It also emphasized that the use of the heckler's veto could have silenced many civil rights speakers during the Civil Rights Movement, as those protesting against segregation were often confronted by angry mobs and upset segregationists: "Limiting peaceful civil rights expression because of the fear of violent crowd reactions would have severely undermined both the First Amendment and the cause of equality."[39]

This issue needs to be resolved by the U.S. Supreme Court. Students, administrators, and others concerned need to know with certainty whether a peaceful student speaker can be punished because of the unruly actions of others.

II. WHEN DOES STUDENT SPEECH INVADE THE RIGHTS OF OTHERS?

As mentioned, the dominant standard from the *Tinker* decision is the substantial disruption test, or the reasonable forecast of a substantial disruption.[40] However, there is another passage from the *Tinker* decision that speaks about student speech that invades or impinges upon the rights of others. The Court in *Tinker* wrote:

> There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.[41]
>
> . . . .
>
> In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school

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[37] *See* Brief for Mary Beth Tinker and John Tinker as Amici Curiae Supporting Petitioners, Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014) (No. 14-720) (urging the U.S. Supreme Court to review the Ninth Circuit's decision).

[38] *See id.* at 7–8.

[39] *Id.* at 10.

[40] *See* Emily Gold Waldman, *A Post-*Morse *Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 467 (2008) (referring to the substantial disruption test as the "dominant prong" of *Tinker*).

[41] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

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> authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.[42]
>
> . . . .
>
> When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. . . . But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[43]
>
> . . . .
>
> They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.[44]

In these four passages, the Court in *Tinker* intimates that student speech can be prohibited if the student speakers invade the rights of others, impinge on the rights of others, or their speech collides with the rights of others.[45] This is called the "invasion of the rights of others" prong of the *Tinker* test. It has also been referred to as the "forgotten part" of the *Tinker* case.[46]

Questions abound regarding the use of this standard. When exactly does student speech invade the rights of other students? Can school officials use this standard to support bullying and cyberbullying laws? Can this standard be used when a student utters one ill-timed remark, or must the student speech constitute severe and pervasive harassment?

The U.S. Supreme Court has never explained the contours of the "invasion of the rights" prong of *Tinker*. As a result, many lower courts never

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42 *Id.* at 509.

43 *Id.* at 512–13.

44 *Id.* at 514.

45 *See id.* at 508–09, 512–14 (noting that student speech can be prohibited under circumstance where speakers invade or impinge the rights of others, or their speech collides with the rights of others).

46 *See* David L. Hudson, Jr., *Tinkering with* Tinker *Standards*?, FREEDOM F. INST. (Aug. 9, 2006), https://www.freedomforuminstitute.org/2006/08/09/tinkering-with-tinker-standards/ (referring to the invasion of the rights of others as the "forgotten part" of the *Tinker* case); *see generally* David L. Hudson, Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621 (2012) (proposing the expansion of speech-in-school jurisprudence to the internet).

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even refer to this standard in student-speech cases.[47] However, the Second Circuit picked up on the language very soon after the *Tinker* decision, pointing out its potential vagueness: "The phrase 'invasion of the rights of others' is not a model of clarity or preciseness."[48]

A few years later, the Second Circuit examined whether public school officials in Stuyesvant, New York violated the First Amendment when they prohibited student Jeff Trachtman and others from publishing in the school newspaper a sex survey of fellow students.[49] School officials prohibited the students from publishing the survey because they contended it would be harmful to students. A federal district court enjoined the school officials from prohibiting the publication of the survey.[50] The Second Circuit reversed, finding that school officials could enjoin the publication in order to prevent psychological harm to some students.[51] The court explained: "The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences."[52] The appeals court seemed to base its decision on both prongs of *Tinker*, both substantial disruption and the invasion of the rights of others.

One judge dissented, questioning the broad nature of the phrase "invasion of the rights of others" and its broad application in this case. "The possibilities for harmful censorship under the guise of 'protecting' the rights of students against emotional strain are sufficiently numerous to be frightening," he wrote.[53]

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47 *See* Hudson, *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, *supra* note 46, at 624 (highlighting the tendency of courts to under-emphasize the "invasion of the rights of others" prong of *Tinker*); Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Cyberbullying*, 13 BARRY L. REV. 103, 117 (2009) ("Curiously, though, very few courts have addressed the *Tinker* Court's statement that a school can regulate speech that impinges on the rights of other students, leaving this standard regrettably ambiguous.").

48 Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 (2d Cir. 1971) (noting the lack of clarity provided by the invasion of rights prong of *Tinker*).

49 *See* Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (allowing a school district to censor speech that was harmful to students).

50 *See id.* at 514 (noting that the district court "enjoined [the] defendants from restraining plaintiffs' attempts to distribute a sex questionnaire to eleventh and twelfth grade students").

51 *See id.* at 520 (ruling in favor of the school district).

52 *Id.* at 519–20 (footnote omitted).

53 *Id.* at 521 (Mansfield, J., dissenting).

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The Eighth Circuit in the *Hazelwood* case read the phrase "invasion of the rights of others" as pertaining to "that speech [which] could result in tort liability."[54] The Eighth Circuit explained that "[a]ny yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance."[55] School officials, as we know, appealed this decision and the Supreme Court granted review, ultimately creating a new standard for school-sponsored student speech that was less protective of student rights.[56]

The majority in *Hazelwood* did not address the invasion of the rights of others prong in its decision. However, Justice William Brennan did address the subject briefly in his dissenting opinion in the school newspaper case, *Hazelwood School District v. Kuhlmeier*—a case in which the Court ruled that a high school principal could censor two student-written articles dealing with teen pregnancy and the impact of divorce upon teens.[57] In *Hazelwood*, the Court created a new standard more deferential to school officials—that school officials could prohibit school-sponsored student speech if they had a legitimate pedagogical or educational reason for doing so.[58]

Because the majority in *Hazelwood* created a new standard apart from the *Tinker* case it declined to address the "invasion of the others" prong of *Tinker*. However, Justice Brennan addressed it in his poignant dissenting opinion. Speaking of the invasion of rights of others, Justice Brennan wrote: "If that term is to have any content, it must be limited to rights that are protected by law."[59] If the term had broader meaning, according to Justice Brennan, it could be applied to limit almost any type of speech that school officials thought had "the slightest fear of disturbance."[60] Justice Brennan also agreed

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54 Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1376 (8th Cir. 1986).

55 *Id.*

56 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (creating a rational-basis-type standard for school sponsored speech, allowing school officials to censor speech when they have a legitimate educational, or pedagogical, reason for doing so).

57 *See id.* at 276, 280–81 (Brennan, J., dissenting) (addressing the "invasion of the rights of others" prong of *Tinker*"). For more information on the *Hazelwood* case, see David L. Hudson, Jr., *Thirty Years of* Hazelwood *and Its Spread to Colleges and University Campuses*, 61 HOW. L.J. 491, 491–492 (2018) (analyzing the Court's new rule for school sponsored student speech, and the effects of the rule on students across the country).

58 *See Hazelwood Sch. Dist.*, 484 U.S. at 273 (creating a standard more deferential to school officials for student-speech cases).

59 *Id.* at 289 (Brennan, J., dissenting).

60 *Id.* (quoting Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1376 (8th Cir. 1986)).

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with the Eighth Circuit's application of *Tinker* that the articles in question in the *Hazelwood* case certainly were not tortious or criminal.[61]

Under Justice Brennan's interpretation of the invasion of the rights of others test from *Tinker*, the test only applies if the offending speech rises to the level of a tort or a crime. Thus, the standard might apply to speech that defamed another person, invaded their privacy to a significant degree, or rose to the level of the intentional infliction of emotional distress.

For many years after *Hazelwood*, there was little judicial interpretation of the phrase "invasion of the rights of others." Instead, lower courts simply applied the dominant test of *Tinker*—reasonable forecast of substantial disruption. That changed with the Ninth Circuit's decision in *Harper v. Poway Unified School District*, a case involving a high school student who wore t-shirts with religious-based messages against homosexuality.[62] The Ninth Circuit applied the invasion of the rights of others standard much more broadly than Justice Brennan's interpretation in *Hazelwood*.

During his sophomore year, Harper wore t-shirts expressing his opposition to his school's support of the National Day of Silence, a student-led protest designed to promote equality and respect for LGBTQ students. The shirts bore the messages "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL. Romans 1:27."[63] The next day he wore a t-shirt with a similar message. A teacher told Harper that his t-shirt was "inflammatory" and created a "hostile working environment" for others.[64] An assistant principal also told Harper that the t-shirt was inflammatory and that he should not wear them again.[65] The principal then flatly prohibited Harper from wearing the t-shirts.[66]

Harper sued, alleging many constitutional claims, including free-speech and free-exercise of religion claims.[67] A federal district court refused to grant Harper a preliminary injunction.[68] On appeal, the Ninth Circuit ruled in

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61 *See Hazelwood Sch. Dist.*, 484 U.S. at 289–90 (citing *Hazelwood Sch. Dist.*, 795 F.2d at 1375–76).

62 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177 (9th Cir. 2006).

63 *Id.* at 1171 (internal quotation marks omitted).

64 *Id.* at 1171–72.

65 *See id.* at 1172 (noting that the assistant principal informed Harper that he could return to class only if he removed his inflammatory t-shirt).

66 *See id.* (describing the incident that inspired the lawsuit).

67 *See id.* at 1173 (listing the student's causes of action).

68 *See id.* (summarizing the procedural history).

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favor of the school officials based on the oft-forgotten prong of *Tinker*.[69] Harper had argued that the "invasion of the rights of others" prong only protected other students from actual physical invasions of their privacy.[70] The Ninth Circuit disagreed, writing that Harper's t-shirts collided with the rights of gay and lesbian students "in a most fundamental way."[71] Judge Stephen Reinhardt wrote:

> Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.[72]

Reinhardt emphasized that gay and lesbian youth were more prone to academic underachievement and truancy because of bullying and harassment committed against them.[73] He noted that gay teens drop out at three times the national average rate.[74] He concluded that "the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn."[75]

Judge Alex Kozinski dissented, pointing out the difficult interaction between harassment law and the First Amendment.[76] "The interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect," he wrote.[77] He explained that a school might be able to prevent a student's harassing speech under the invasion of rights part of *Tinker* if the harassment was severe or pervasive.[78] Severe and

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69 *See id.* at 1178.

70 *Id.* at 1177.

71 *Id.* at 1178.

72 *Id.*

73 *See id.* at 1179 (noting the study that found that, "among teenage victims of anti-gay discrimination, 75% experienced a decline in academic performance, 39% had truancy problems, and 28% dropped out of school").

74 *See id.* (comparing the drop-out rate of gay students to the national average).

75 *Id.* at 1180.

76 *See id.* at 1198 (Kozinski, J., dissenting) ("The interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect.").

77 *Id.*

78 *See id.* (applying the long neglected "invasion of the rights of others" prong of *Tinker*).

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pervasive is the standard often used to determine whether speech rises to the level of sexual or racial harassment in employment law.[79]

Judge Kozinski concluded that "[t]he 'rights of others' language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established."[80]

The Third Circuit differs in its interpretation of the invasion of the rights of others. Writing for the Third Circuit, then-Judge Samuel Alito acknowledged that there was uncertainty as to the scope of this part of *Tinker*.[81] The court explained that "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear."[82] But, Judge Alito elaborated that whatever its precise scope, it surely cannot apply to speech that is merely offensive to others.[83]

A federal district court also determined that the invasion of the rights of others did not apply to a public high school student's in-class speech that he did not accept gays for religious reasons.[84] The student's teacher had worn a purple anti-bullying t-shirt in support of Tyler Clementi, the gay Rutgers University student who killed himself after harassment from other students.[85] The teacher then ordered a female student to remove a Confederate belt buckle.[86]

Student Daniel Glowacki then asked why the student had to remove her Confederate belt buckle but the teacher could wear the purple anti-bullying shirt.[87] A discussion ensued and at one point Glowacki stated: "I don't accept gays because I'm Catholic."[88] The teacher then ordered Glowacki to leave

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79 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).

80 *Id.*

81 *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (addressing the uncertainty of the scope of the "invasion of the rights of others" prong of *Tinker*).

82 *Id.*

83 *See id.* (noting the potential danger of assigning broad scope to the "invasion of the rights of others" prong).

84 *See* Glowacki v. Howell Pub. Sch. Dist., No. 2:11-cv-15481, 2013 U.S. Dist. LEXIS 85960, at *10, *25–26 (E.D. Mich. June 19, 2013) (rejecting the application of *Tinker*'s "interference with the rights of others" language to religious speech in school).

85 *See id.* at *7–8 (detailing the factual background).

86 *See id.* at *8.

87 *See id.* at *9.

88 *Id.* at *10 (internal quotation marks omitted).

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the class.[89] The student sued, alleging a violation of his First Amendment free-speech rights. The school and teacher argued that Glowacki's free-speech rights were not violated because his speech intruded upon the rights of gay students.[90]

The federal district court reasoned that in order to punish a student for speech that invades the rights of other students, the speech must involve something more than creating discomfort or unpleasantness.[91] The court stated: "Simply put, the law does 'not establish a generalized "hurt feelings" defense to a high school's violation of the First Amendment rights of its students . . . .'"[92]

The court explained that *Tinker* requires "some sort of threat or direct confrontation" before the school can punish speech for invading the rights of others.[93] The court quoted *Tinker*: "[there was] no evidence . . . , actual or nascent, . . . of collision with the rights of other students to be secure and to be let alone."[94]

Legal scholar and law professor Catherine J. Ross explains that *Tinker*'s rights of others language "must mean more than a conflict with the sensibilities or preferences of those who hear the offensive speech."[95] Ross calls for what she terms an "infringement matrix" for school officials to consider before punishing students for speech that supposedly invades the rights of others.[96] This matrix consists of several factors, including: "whether the asserted infringement resembled harassment by virtue of being directed to one or more targeted individuals and whether it was aggressive and 'in your face,' pervasive, severe, objectively offensive, threatening, or . . . 'intolerable.'"[97] Ross explains that this analysis would be a totality of the circumstances evaluation and no single factor would be dispositive.[98]

89 *See id.* at *11.

90 *See id.* at *22 (explaining the defendants' argument).

91 *See id.* at *24 describing the relative degree of harm required for a student to be punished for speech).

92 *Id.* at *24 (quoting Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 877 (7th Cir. 2011)).

93 *Id.* at *25.

94 *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

95 CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 194 (2015).

96 *Id.* at 195.

97 *Id*.

98 *Id*.

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Another prominent student-speech scholar, Professor Emily Gold Waldman, posits that the key distinction in these cases is whether the student speech targets a specific student or individual or whether the speech expresses a general political or religious viewpoint.[99] Certainly, when student speech targets a specific individual as opposed to general comments, there is a much greater likelihood that the receiving student will feel pressure or perhaps even harassment.

Still, there is no definitive explanation of the phrase "invasion of the rights of others." The most likely application is that it applies to speech that could result in tort or criminal liability. But there are seeds of doubt planted by cases like *Harper v. Poway Unified School District*.

Once again, this area likely will need clarification from the U.S. Supreme Court. Students, administrators, teachers, parents, and others need to know what the applicable rule is regarding student speech that offends other students to the extent that they claim some sort of invasion or infringement.

III. OFF-CAMPUS SPEECH ON SOCIAL MEDIA

Arguably the most pressing question in student-speech law concerns the extent of school officials' authority to regulate students' off-campus, online speech.[100] Students' use of social media is pervasive and arguably the most common way that students communicate in the present day.[101] It is a ubiquitous reality in modern-day life. Professor Ross explains that the pressures to regulate such off-campus speech are enormous: "State legislatures, teachers, some parents, and even agencies of the federal government increasingly look to school disciplinarians to rein in student speech that takes place off campus, outside of school hours, and online."[102]

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99 *See* Waldman, *supra* note 40, at 492 (distinguishing two types of potentially hurtful student speech).

100 *See* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 218 (2009) ("The need to examine the issue of the jurisdictional authority of public schools over high-tech, off-campus-created student expression thus is both paramount and timely.").

101 *See* Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 158 (2009) (noting that "[a]n overwhelming number of teens are adept Internet users").

102 ROSS, supra note 95, at 207.

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Through the years, students have been punished for mocking school officials online with a fake profile,[103] bullying other students online, creating parodies online of school officials, posting rap lyrics that school officials deemed threatening,[104] and a variety of other variants. The fear is that school officials are overextending their authority by flexing their disciplinary muscles to punish students for matters that are better left for parental discipline or, in worse cases, law enforcement.[105] Others, however, voice concerns from the opposite direction—namely that school officials desperately need the authority to regulate off-campus, online student speech because of the pervasive problem of bullying.[106]

One legal scholar has identified at least five different approaches to the problem: (1) no authority to regulate off-campus speech; (2) little to no distinction between off-campus and on-campus expression; (3) requiring a sufficient nexus between the off-campus expression and the school environment; (4) requiring that the online speech creator reasonably forecast that the student speech reach the school environment; and (5) limiting school officials' authority to act when there is a clear and identifiable threat.[107]

The general rule is that public school officials must show some sort of connection or nexus between off-campus, online student speech and something that occurs at school.[108] James C. Hanks, author of *School Bullying:*

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103 *See, e.g.*, Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207, 210 (3d Cir. 2011) (describing an instance in which a high school student was punished for creating a degrading "parody profile" of his school principal).

104 *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 379, 384 (5th Cir. 2015) (examining a situation in which a high school student posted an "incredibly profane" and "vulgar" rap recording about two school administrators on his social media).

105 *See* ROSS, *supra* note 95, at 207 ("The assertion of authority over off-campus speech is a breach of remarkable proportions, amounting to an abuse of power.").

106 *See, e.g.*, Jennifer Butwin, Note, *Children Are Crying and Dying While the Supreme Court is Hiding: Why Public Schools Should Have Broad Authority to Regulate Off-Campus Bullying "Speech,"* 87 FORDHAM L. REV. 671, 693 (2018) ("It is important for schools to have the authority to regulate student speech that occurs both on and off campus because schools are tasked with creating safe environments conducive to learning. Bullying that occurs either on or off campus causes real harm and prevents schools from providing safe learning environments.").

107 *See* Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K–12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 848 (2016) (listing possible approaches for using *Tinker* doctrine to address cyberbullying).

108 *See* ROSS, supra note 95, at 207 (explaining a school district's burden for regulating student online speech).

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How Long Is the Arm of the Law?, agrees, writing that "courts thus far are saying 'Show me the nexus!'"[109]

In other words, most courts will apply the *Tinker* substantial disruption standard to students' social media speech as long as there was a reasonable foreseeability that the student's off-campus speech will have an impact on the school environment or there is a clear nexus, or connection, between the student's social media posts and events at school.[110]

However, the federal circuit courts of appeals have not reached consistent results when addressing how to determine whether school officials have the authority to discipline students for such speech.[111] The courts have approved of a variety of tests for analyzing student digital speech cases. These include the "reasonable foreseeability" test from the Eighth Circuit[112] and the "nexus" test from the Fourth Circuit.[113] Such requirements are designed to ensure that the school is not overextending its jurisdictional authority. As Professor Ross explains: "Almost universally, courts require the school to show a 'nexus,' or close connection, between the speech and the school or

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109 JAMES C. HANKS, SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW 99–100 (2d ed. 2015).

110 *See, e.g.,* D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 766 (8th Cir. 2011) (applying *Tinker* to off-campus student speech that was threatening if it was "reasonably foreseeable" that the speech would cause a substantial disruption at school); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) ("There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests 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.").

111 *See* Aaron J. Hersh, Note, *Rehabilitating* Tinker*: A Modest Proposal to Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309, 1312–13 (2013) ("This growing ambiguity is most evident in recent circuit-court cases in which the Second, Third, and Fourth Circuits have applied differing standards, invoked inconsistent reasoning, and reached incompatible results in student online-expression cases."); *see also* David L. Hudson, Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621, 621–22 (2012) (proposing the expansion of speech-in-school jurisprudence to the internet); Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 102–03 (2010) ("Not only are lower court decisions in disarray as to the limits of school jurisdiction over online student speech, legal commentary also exhibits uncertainty as to these limits.").

112 *See* S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (applying the "reasonable foreseeability" test); D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 766 (8th Cir. 2011) (same).

113 *See* Kowalski v. Berkeley County Sch., 652 F.3d 565, 577 (4th Cir. 2011) (applying the "nexus" test).

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that it was 'reasonably foreseeable' that the speech would reach the school community."[114]

For example, the Fourth Circuit ruled in *Kowalski v. Berkeley County Schools* that public school officials in West Virginia could punish a student for violating the school's policy against "harassment, intimidation, and bullying" for creating a web page devoted to mocking another student.[115] The appeals court reasoned that there was a "sufficiently strong" nexus or connection between the student's web posts and bullying that occurred on school grounds.[116]

Similarly, the Second Circuit ruled in *Doninger v. Niehoff* that public school officials in Connecticut were entitled to qualified immunity even though they punished a student for blogging on her own computer off school grounds that "jamfest [has been] cancelled due to [the] douchebags in central office."[117] Instead, the appeals court reasoned that it was "reasonably foreseeable that [the student's] post would reach school property and have disruptive consequences there."[118]

The Third Circuit has been the most speech-protective circuit for students. The court's approach does not assume that school officials have the authority to regulate off-campus social media expression by students. Instead, the Third Circuit requires a very clear nexus or connection between a student's social media posts made off campus and events that occur on campus.[119] In *Layshock v. Hermitage School District*, seventeen-year-old student Justin Layshock created a parody profile that lampooned his principal.[120] In the litigation, the school officials conceded that the online profile did not constitute a substantial disruption under *Tinker*.[121] School officials contended, however, that they had authority to discipline Layshock because his act of publishing the photo of the principal constituted a form of online trespass.[122]

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114 ROSS, supra note 95, at 224.

115 *Kowalski*, 652 F.3d at 574.

116 *Id.* at 573.

117 Doninger v. Niehoff, 642 F.3d 334, 340 (2d Cir. 2011).

118 *Id.* at 348.

119 *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214–15 (3d Cir. 2011) (applying the "nexus" test).

120 *See id.* at 207 (detailing the factual background).

121 *See id.* at 214.

122 *Id.* at 214–15.

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The Third Circuit disagreed with this approach and sided with Justin Layshock, writing: "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."[123]

Five judges of the Third Circuit strongly questioned whether *Tinker* even applies at all to student online speech. Judge Brooks Smith wrote: "Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so 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."[124] Judge Smith explained 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."[125] In fact, this was extended by a three-judge panel of the Third Circuit on June 30, 2020, which ruled that *Tinker* did not apply *at all* to off-campus, online student speech.[126]

Federal appellate judges have recognized that there is a split of authority on these online, off-campus student speech cases. One dissenting jurist in the *Blue Mountain* case before the Third Circuit wrote: "Our decision today causes a split with the Second Circuit."[127]

Given the pervasive presence of social media in the lives of public school students, this may be the most unsettled issue in K–12 student speech law. It is hard to argue with Judge Edward Prado of the Fifth Circuit, who in his dissenting opinion in the *Bell* case bluntly wrote: "I hope that the Supreme Court will soon give courts the necessary guidance to resolve these difficult cases."[128]

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123 *Id.* at 216.

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

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

126 B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., No. 19-1842, 2020 WL 3526130 (3d Cir. June 30, 2020) (precedential).

127 *Blue Mountain*, 650 F.3d at 950 (Fisher, J., dissenting).

128 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 433 (5th Cir. 2015) (Prado, J., dissenting) (citing DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 7.6 (2012) ("[T]he next frontier in student speech that the U.S. Supreme Court will explore is online speech.")).

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CONCLUSION

The Supreme Court's decision in *Tinker v. Des Moines* was a landmark decision and it remains so more than fifty years later.[129] While the Court has created several carve-outs, the default standard still comes from *Tinker*. However, several unsettled areas remain from the celebrated decision. These include: whether a heckler's veto applies to limit student speakers who themselves are peaceful; what is the meaning of the oft-forgotten part of *Tinker* referring to the "invasion of the rights of others"; and how does *Tinker* apply to online student speech created entirely off-campus.

These questions have been percolating in the student speech field for quite some time. Hopefully, the U.S. Supreme Court will provide these answers when it finally decides to review another K–12 student-speech decision. Clarity is much needed.

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129 *See* David L. Hudson, Jr., Tinker *After 50: A Historic Ruling Still Relevant After All These Years*, FREEDOM F. INST. (Jan. 30, 2019), https://www.freedomforuminstitute.org/2019/01/30/tinker-after-50-a-historic-ruling-still-relevant-after-all-these-years/ (noting that the *Tinker* decision remains the leading standard in student K–12 speech law).

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