RESTRICTING ANONYMOUS "YIK YAK": THE CONSTITUTIONALITY OF REGULATING STUDENTS' OFF-CAMPUS ONLINE SPEECH IN THE AGE OF SOCIAL MEDIA

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The First Amendment protects students' rights to free expression, but the degree of that protection has come under increasing scrutiny with the proliferation of social media networks that students increasingly use to communicate. With the advent of mobile digital platforms and the growing popularity of anonymous online networks, the line between speech that occurs on campus and off has become blurred. While social media networks have become popular sites for students to share ideas and spread news, these same platforms have increasingly been used to harass, bully, and threaten other members of the school community. This Article analyzes the extent to which school officials can restrict students' off-campus online speech in the absence of clear doctrinal guidance regarding schools' authority over such speech. It examines the diverse and inconsistent approaches that the appellate courts have adopted to address off-campus online speech, paying particular attention to the Fifth Circuit's recent ruling in

up" a school.[7] School officials are also facing an increasing number of student-speech cases that originate from a multitude of platforms, from Facebook and YouTube to anonymous networking sites, further complicating the regulatory boundaries involving student online expression.

As the Supreme Court observed in *Tinker v. Des Moines Independent Community School District*,[8] students or teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] However, the First Amendment does not provide absolute rights of such freedoms, and due to the special pedagogical environment of education, school officials generally have more authority to regulate student speech.[10] Moreover, students' expressive activity in the era of social media has created unique challenges for school administrators, as digital expression has blurred the line between speech that occurs "off-campus" versus "on-campus." Greatly affecting this landscape is the rise in school shootings and other forms of violence against schools and universities. Online-based threats, harassment, and intimidation directed at the school community create a tension between a student's free-speech rights and a school administrator's duty to maintain discipline and ensure public safety. In our advanced information age, this tension is unprecedented. W4(a)-2to4ihe Fiad un

Tinker,[11] federal circuit courts that have addressed the issue of off-campus online speech have employed a variety of approaches to

afforded First Amendment protection.[15] These questions go beyond the scope of this article, but nonetheless underscore the ubiquity of social media and the importance of addressing the boundaries of expressive activity on such platforms.

While the dynamics of social networking continue to evolve, its popularity has not waned, as evidenced with the exponential rise in the adoption of smartphones. As of 2015, 64% of Americans own a

occupy a ubiquitous existence in today's information society, there is an increasing shift toward anonymity online—particularly for a generation of millennials who are more cognizant of the permanence of their digital tread. In the wake of revelations of extensive data collection by the U.S. government and government-sanctioned surveillance on millions of Americans, online expectations of privacy have reached their nadir, which coincidentally coincides with the meteoric growth of anonymous social media apps on high school and college campuses. The attraction of such platforms is due in part to the intimacy of the hyperlocal feature, which creates a communal dynamic—the same feature that originally attracted college students to Facebook in its infancy—promoting a sense of connection for many in an environment of alienation (*e.g.* college and high school). A social app designed to be "a place where communities share news, crack jokes, ask questions, offer support, and build camaraderie,"[21] Yik Yak has close to 3.6 million monthly active users and students at over 1,500 colleges currently report using the application, with nearly 50% to 80% of enrolled students using the app.[22]

Online anonymity induces many liberating acts, including the ability to speak freely without fear of retaliation. Anonymity on the Internet has also been used to promote political change (*e.g.* disclosures by WikiLeaks, online "hacktivism" by "Anonymous"). Throughout our nation's history, anonymous speech has been used to further public discourse. Several Framers of the Constitution, including Alexander Hamilton, John Jay, and James Madison, wrote the Federalist Papers under the pseudonym "Publius," encouraging the adoption of the new Constitution.[23] While anonymity can encourage political participation and public debate, the same protection afforded the anonymous speaker emboldens many to disseminate repugnant and destructive speech. The increasing frequency of online acts of hate speech, harassment, cyberbullying, and the heightened sensitivity to such acts, has prompted school officials and other civic groups to increase efforts to curtail the risks associated with social media—including anonymous social media use.

21. Edwin Rios, *Everything You Need to Know About Yik Yak, the Social App at the Center of Missouri's Racist Threats*, MOTHER JONES, Nov. 11, 2015, http://www.motherjones.com/media/2015/11/yik-yak-anonymous-app-missouri-explainer.

22. *See* Dave Smith, *This Is the Next Major Messaging App,* BUSINESS INSIDER, Mar. 30, 2015, http://www.businessinsider.com/yik-yak-the-next-major-messaging-app-2015-3.

23. *See* THE FEDERALIST NOS. 1-85 (Alexander Hamilton, John Jay & James Madison).

Several universities have even attempted to displace Yik Yak's use by blocking access to it when the student is on university campus wi-fi networks, and the student government of one college in Idaho even requested Yik Yak to place a geo-fence around the small campus, which Yik Yak declined to do.[24] Moreover, a coalition of civil rights groups recently urged the U.S. Department of Education to issue guidelines that protect "students from harassment and threats based on sex, race, color or national origin" on social media platforms.[25]

While several categories of speech are exempt from constitutional protection,[26] the courts have only recently begun to address traditional legal principles of free speech, privacy, and criminal law in social media. The boundaries of constitutional protection of online speech continue to evolve. The constitutional boundaries over school regulation of off-campus online speech are even less developed, yet schools are increasingly asserting authority to regulate students' off-campus speech.

However, like the right to free expression, the right to online speech is not absolute and must be balanced against the basic role and mission of schools and colleges in society. In the context of online speech, the state's interest in prosecuting a crime or a party's desire to seek redress for reputational injury is often balanced against free speech principles.[27] Part II will highlight the constitutional considerations when addressing th

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schools and universities are subject to First Amendment challenges[30] and as state actors must abide by constitutional limitations.

A few states, however, have tried to provide students at private educational institutions with free speech protections parallel to those in the First Amendment. For example, in 1992, California passed the "Leonard Law," granting First Amendment protections to students at private and public postsecondary institutions.[31] Under California Education Code section 94367(a), no private postsecondary institution is allowed to discipline a student based on speech or other communication that, "when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."[32] In *Corry v.*

protects not only unpopular minority views, but also protects the true "majority" view among people from an unrepresentative and self-interested governing body.[42] Yet, the protection guaranteed by the First Amendment is not absolute. While internet communication falls within the free speech doctrine as "speech,"[43] not all online speech acts are afforded constitutional protection. Before turning to the applicability of student speech doctrine to online student speech, school administrators and courts must determine whether the speech falls under one of the narrow categories of speech not included within the ambit of First Amendment protection.[44] The Supreme Court has determined that these unprotected speech categories are not an "essential part of any exposition of ideas, and are of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45] Since the early 20th century, the Supreme Court has delineated unprotected speech to include the incitement of imminent lawless action,[46] "patently offensive" material that appeals to the prurient interest (e.g. obscene content),[47] "fighting words,"[48] "true threats" to commit violence,[49] and defamation.[50]

Speech is legally obscene if it satisfies the *Miller* test.[51] In

speech); *see also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 274–76 (1992) (noting that the First Amendment creates more than a mere right to fend off government censorship as conventionally understood, and that the First Amendment is no mere negative right, but has positive dimensions compelling the government to take steps to ensure that legal rules according exclusive authority to private persons (e.g. broadcasters) do not violate the system of free expression).

42. AKHIL REED AMAR, THE BILL OF RIGHTS 21 (1998) ("Thus, although the First Amendment's text is broad enough to protect the rights of unpopular minorities . . . the Amendment's historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.") (citations omitted).

43. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997); *see also In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011).

44. *See infra* III.B for a discussion of unprotected speech, discussing only limited categories of unprotected speech and excluding discussion of unprotected speech such as child pornography and other speech acts pursuant to criminal conduct.

45. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

46. Brandenburg v. Ohio, 395 U.S. 444 (1969).

47. Miller v. California, 413 U.S. 15 (1973).

48. *Chaplinsky*, 315 U.S. at 573.

49. Virginia v. Black, 538 U.S. 343 (2003).

50. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

51. S*ee Miller*, 413 U.S. at 24.

Miller, the Supreme Court articulated a three-prong test to determine if content is obscene.[52] To find that speech is legally obscene, the following requirements must be met: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) the work depicts or describes in a patently offensive way sexual conduct as defined by state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

Under the fighting words doctrine, speech that includes words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"[54] is also exempted from constitutional protection. However, the constitutional parameters as to what type of content amounts to fighting words have not been conclusively drawn.[55]

A defamatory statement, or the published communication of a false statement of fact that harms the reputation of another person, is another category of unprotected speech.[56] Such statements, when directed at a public official or public figure, require that the speaker had knowledge of the statement's falsity or had a reckless disregard for the truth in order to be exempted from First Amendment protection.[57]

Moreover, government restrictions and limitations on speech must not impermissibly burden protected speech any more than is necessary to achieve the state's goals. Overly broad and sweeping restrictions on the content of speech are subject to constitutional challenges under the overbreadth and vagueness doctrines.[58] Thus, a regulation that prohibits more protected expressive activity than is

52. *Id.*

53. *Id.*

54. S*ee Chaplinsky*, 315 U.S. at 572.

55. *See* Melody L. Hurdle, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143 (1994); *see also* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 443 (2004).

56. *See*

necessary to achieve the government's stated purpose is facially unconstitutional. Furthermore, a law restricting speech can be declared void for vagueness if persons "of common intelligence must necessarily guess at its meaning."[59] The State may also enforce reasonable content-neutral regulations on expressive activity, or limits on the "time, place and manner" of speech, so long as such limitations are narrowly tailored to serve an important government purpose, without regard to content or viewpoint.[60]

Speech that is directed at inciting imminent lawlessness and speech containing "true threats" are particularly relevant categories of unprotected speech for this article's focus on school authority over off-campus online speech. Under the doctrine set forth in *Brandenberg v. Ohio,*[61] speech that advocates for lawlessness or violent action is exempted from constitutional protection if the speech is "directed to inciting imminent lawless action and is likely to incite or produce such action."[62] Since the Court's ruling in *Brandenburg*, questions remain unanswered with regard to how the imminence element should be defined: whether the *Brandenburg* test is limited to mere "political advocacy" that encourages others, or whether it is also applicable to the individual speaker's own announcement of criminal or violent acts pursuant to political ends.[63] Similarly, "true threats" are another category of unprotected speech tethered in uncertainty with its applicability. The Supreme Court articulated that a statement is considered a "true threat" if the speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual group or individuals."[64] However, what counts as a proscribable threat has not been especially clear, even

59. *Coates*, 402 U.S. at 614.

60. *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988).

61. 395 U.S. 444 (1969).

62. *Id.* at 447.

63. *See* Nat'l. Assoc. for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, (1982) (holding that if the unlawful activity advocated is weeks or months away, a court may determine the speech is not "imminent"); *see also* Thomas Healy, Brandenburg *in a Time of Terror,* 84 NOTRE DAME L. REV. 655, 667-70 (2009) (discussing whether *Brandenburg* only applies to speech that encourages others to commit criminal acts in a show of political protest, or whether it applies when the individual speaker discusses their own criminal proclivities in a political context); Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 384 (2014) (questioning whether the *Brandenburg* test is limited to speech that is "political advocacy" or if it applies to all speech).

64. Virginia v. Black, 538 U.S. 343, 360 (2000).

after the Court's most recent holding in *Elonis v. United States*[65] in which it addressed threats via social media.

In *Elonis,* the petitioner, Anthony Elonis, posted tirades in the form of rap lyrics on Facebook, which included violent language and imagery and was charged with violating 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."[66] Elonis's posts frequently included "crude, degrading, and violent material about his soon-to-be ex-wife"[67] and included posts

held that anonymity supports a core First Amendment principle: "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[85] However, in *McConnell v. FEC*[86] the Court upheld disclosure requirements in the context of campaign finance pursuant to the McCain–Feingold Campaign Finance Reform Act.[87] Arguably, the strong government interest and concerns with maintaining the legitimacy of political elections (or the semblance of it) outweigh the interests of contributor anonymity. In 2010, the Court in *Doe v. Reed*[88] addressed the issue of whether disclosure of referendum petitions violates the First Amendment.[89] In *Reed*, the Court held that disclosure of referendum petitions "does not as a general matter violate the First Amendment"[90] and state interests can trump the right to anonymity if there is a sufficiently important government interest.[91] Based on the aforementioned Supreme Court precedent, there is a limited right to anonymous, *political* speech, but questions remain if First Amendment protection extends beyond political speech.[92]

Much of the recent case law and scholarly work on online anonymity has centered on narrowing a standard for unmasking anonymous, online defendants through the civil subpoena process.[93] However, as one legal scholar points out, outside of the subpoena process, there is very little guidance as to how courts might protect online anonymity.[94] At a minimum, courts generally understand that

85. *Id.* at 357.

86. McConnell v. FEC, 540 U.S. 93 (2001), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

87. *McConnell*, 540 U.S. at 143–223 (discussing the constitutionality of provisions in the Act, formally known as the Bipartisan Campaign Reform Act of 2002).

88. 561 U.S. 186 (2010).

89. *Id.* at 193.

90. *Id.* at 202.

91. *Id.* at 197.

92. *See* Kaminski, *supra* note 83, at 843–44 (explaining the consensus among commentators that the right to anonymous speech is not absolute, and instead must be balanced between the value of the anonymous speech and state interests).

93. Cases that have set forth to narrow or define the standard are referred to as the *Doe* or *Dendrite* cases, referring to the original New Jersey state case that established one of the first subpoena standards to unmask anonymous online defendants in *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001); *see also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace,* 48 DUKE L. J. 855, 881–82 (2000) (explaining how subpoenas have been used to chill defendants' speech through the subpoena process).

94. *See* Kaminiski, *supra* note 83, at 883–86 (discussing how the few past commentators

addressed anonymous student speech, the doctrinal legacy points to at least a limited right of anonymity for political content.

IV. UNRESOLVED DOCTRINAL QUESTIONS: FIRST AMENDMENT ISSUES REGARDING ON- AND OFF-CAMPUS ONLINE SPEECH

The extent to which public school students enjoy constitutionally protected rights to expression has long been debated even before the Supreme Court's landmark 1969 decision in *Tinker v. Des Moines Independent Community School District*.[99] Lately, this debate took a digital turn, further muddling the degree to which school officials can regulate student speech, both on and off campus. Section A of this Part reviews the holding in *Tinker*, and addresses subsequent Supreme Court cases that have refined the scope of student speech. Section B explores the unresolved question regarding the scope of *Tinker* and its progeny's application to the university campus, even while some lowers courts continue to rely on the *Tinker* doctrine in the college context. Lastly, Section C analyzes the variety of approaches that the appellate courts have adopted to address off-campus online speech, including an

majority held that school officials may restrict student speech that can be reasonably viewed as promoting illegal drug use.[110] In concurrence, Justice Alito held that a school may discipline a student for speech which poses a "grave and . . . unique threat to the physical safety of students" including "advocating illegal drug use."[111] Thus, student speech, at least at the K–12 level, can be limited if the content involves "lewd and indecent" material,[112] school-sponsored speech activities,[113] and content that can be reasonably interpreted as promoting illegal drug use.[114] However, beyond these limited contexts, as the Court noted in *Morse*, "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[115] Thus far the Supreme Court has never addressed a

meet off campus.[123] Citing language from *Tinker*, the Court in *Healy* noted that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[124] In *Board of Regents of University of Wisconsin v. Southworth*,[125] the Court noted that the unique cultural and intellectual dynamics of the university allows it to decide how best to serve its students, as long as their civil rights are not violated.[126] Without relying on *Tinker*, the Court acknowledged that changes in communication technology have blurred traditional conceptions of territorial boundaries, but asserted that as long as universities adopt a viewpoint neutral stance, they must be afforded deference with regard to student speech programs.[127]

More recently, in *Christian Legal Society Chapter of the University of California v. Martinez*,[128] the Supreme Court again faced a student group seeking official recognition when the University of California law school rejected the Christian Legal Society's (CLS) application for recognition on the grounds that the group adopted discriminatory membership guidelines. The Court deferred to the school officials' judgment in light of the "reasonableness" of the restrictions, taking into account the "special circumstances" of the educational context and reiterated the boundaries a state may set with regard to student speech: "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint."[129] Supreme Court precedent reveals the Court's willingness to defer to the judgment of university officials when they impose restrictions on speech, so long as they are "reasonable" in light of the forum and are viewpoint

123. *Id.* at 183.

124. *Id.* at 180.

125. 529 U.S. 217 (2000).

126. *Id.* at 232–33.

127. *Id.* at 234 ("Universities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse. If the rule of viewpoint neutrality is respected, our holding affords the University latitude to adjust its extracurricular student speech program to accommodate these advances and opportunities.").

128. 561 U.S. 661 (2010).

129. *Id.* at 685.

neutral.[130]

directly related to established professional conduct standards."[137]

However, other circuits, including the Sixth, Seventh, and Ninth, have imported the speech standards from the K-12 context and applied them to curricular student speech in the higher education context,[138] eliciting criticism from many commentators.[139] Thus, while some lower courts have recognized a higher degree of speech protection in the university setting, the Supreme Court has yet to clarify the parameters of school authority over student speech in the extent to which it is coextensive with secondary schools.[140] Despite this murky picture of free speech jurisprudence on college campuses, many lower courts continue to rely on the secondary school decisions in speech cases involving college students.

C. Online Speech Originating Off-campus: Circuit Court Variation

New media technologies and their adoption by secondary and post-secondary students have created challenges centered on balancing the students' right of free expression and competing pedagogical concerns in maintaining order and protecting the school community. With the growth of social media, the crucial question as to when and to what extent speech originating off campus but implicating the school community can be regulated, has become

137. *Id.* at 520–21.

138. *See, e.g.*, Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) ("Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."); Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (extending *Hazelwood* to the university context); Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) ("It is thus an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work. We conclude that it does.").

139. *See, e.g.*, Gregory C. Lisby,

highly contested and tethered in judicial uncertainty. This complicated balancing act in the age of 140 characters or less has resulted in differing circuit court standards being applied to off-campus speech—albeit primarily in the K–12 context—muddling the scope of government authority over off-campus online speech. Lamenting the failure of guidance as to when the *Tinker* standards apply, Justice Thomas noted in *Morse*: "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not."[141] While the *Tinker* doctrine and its progeny address student speech in the context of K–12 education, the Supreme Court, as mentioned in the previous sections, has yet to address this doctrinal legacy in the context of higher education, particularly where speech occurs online and originates outside the "schoolhouse gate." However, recent circuit decisions have addressed off-campus online speech and if courts' previous reliance on secondary school precedent in the college setting is a harbinger of future application, then a similar alignment with off-campus online speech is expected. The circuit cases reviewed in this section are therefore instructive, and can provide guidance to the extent that school officials and university administrators can restrict online speech that originates off-campus.

As of the fall of 2015, six circuits have addressed whether *Tinker* applies to off-campus online speech. The Second,[142] Fourth,[143] Fifth,[144] Eighth,[145] and Ninth[146] Circuits have held that *Tinker* applies to online speech that originated off-campus in certain situations. In the Third Circuit, there is an intra-circuit split as to the *Tinker* standard's applicability.[147] The Second Circuit first addressed off-

141. Morse v. Frederick, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).

142. *See* Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007); *see also* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

143. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011).

144. *See*

campus online student speech in *Wisniewski v. Board of Education*,[148] which involved a student who sent instant messages to fellow classmates. The instant messages contained an icon of a small drawing of the student's English teacher being shot in the head. After learning about the messages' crude content, school officials suspended the student.[149] The court ruled that the speech in question was not immunized from government regulation because there was a "reasonably foreseeable risk" that the icon would cause a "substantial disruption" within the school environment.[150] Thus, the *ent.*

Kowalski, the court underscored the affirmative duty that school officials have as "trustees of the student body's well-being"[158] holding that "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."[159] As opposed to the threshold inquiries followed by the Second and Eighth Circuits, the *Kowalski* court appears to have cast a wider net of potential off-campus speech subject to school regulation with its "nexus" standard.[160]

The Ninth Circuit most recently addressed off-campus online speech in *Wynar v. Douglas County School District*.[161] Landon Wynar, a high school sophomore, sent instant messages to classmates via MySpace, where he also frequently wrote about his guns and his interest in shooting, and glorified Hitler as "our hero."[162] However, the content of Wynar's messages became increasingly violent, eventually including statements that centered around a school shooting to take place on a specific date in the near future.[163] Wynar was later suspended by school officials. He then sued the school district for violating his constitutional rights.[164] While declining to adopt or incorporate the threshold tests from other sister circuits, the *Wynar* court did acknowledge that both the speech's "nexus" to the school and the message's foreseeable reach into the school "could be easily satisfied in this circumstance."[165] The Ninth Circuit had the opportunity to craft a standard as to when *Tinker* applies to off-campus speech, but declined to do so.[166] Instead, the panel made

speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role . . . .").

158. *Id.* at 573.

159. *Id.* at 572.

160. *Id.* at 577. Observing the growing phenomenon of harassing and bullying speech that originates online and off-campus, the court concludes, "where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."

161. 728 F.3d 1062 (9th Cir. 2013).

162. *Id.* at 1065.

163. *See id.* (the student's online messages included violent statements centered on a school shooting to take place on April 20, the date of the Columbine massacre, and referencing the Virginia Tech shooter).

164. *Id.* at 1066.

165. *Id.* at 1069.

166. *See id.* ("One of the difficulties with the student speech cases is an effort to define and impose a global standard for a myriad of circumstances involving off-campus speech. A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach.").

explicit what the Ninth Circuit made implicit in a previous decision,[167] and carved out a new and narrow boundary: "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."[168] The court then analyzed Wynar's speech under *Tinker*, including the rarely addressed "rights of other students to be secure"[169] prong and found the disciplinary action by the school board to be constitutional.[170]

Bell v. Itawamba County School Board[171] is a circuit court's most recent foray into the evolving doctrinal legacy of *Tinker* and the constitutional boundaries of off-campus online speech. Rehearing the case *en banc*, the Fifth Circuit addressed the constitutionality of school officials disciplining a student for posting an online rap video made off campus containing threatening language against the school's

school."[176] Furthermore, the rap song did not "advocate illegal drug use"[177] or "portend a Columbine-like mass, systematic school shooting."[178] Thus, the Fifth Circuit panel found that Bell's online rap piece did not trigger an exception necessitating divergence from the *Tinker* standard.

Citing its own precedent in *Porter v. Ascension Parish School Board*[179] as instructive, the panel held that a speaker's intent matters when determining whether off-campus speech is subject to *Tinker*.[180] Referencing the omnipresent nature of the Internet, increased social media use, and school officials' concerns for public safety in the wake of recent school shootings, the *Bell*

amount to a "substantial disruption," the *Bell* panel found that Bell's expressive activity could have at least reasonably been forecast to cause a substantial disruption.[185] Citing *Tinker*, the panel reiterated the fact that school authorities are not expressly required to forecast a "substantial or material disruption," only requiring the *possibility* of a reasonable forecast based on the facts and context of the speech.[186] The *Bell* panel outlined several factors that other circuits have considered in determining whether *Tinker*'s "substantial disruption" or "reasonable forecast" standard is satisfied, before finding that the record at hand established that a substantial disruption reasonably could have been forecast by school authorities.[187] In the context of off-campus online messages intentionally directed at the school community, the latest circuit precedent reveals that courts afford greater deference to school officials disciplining students for speech that reasonably is understood as harassing, intimidating, and threatening to members of the school community if the speech causes a substantial disruption or is reasonably forecast to cause one. Compared to the Ninth Circuit's narrow application of *Tinker* to an "identifiable threat of school violence,"[188] the Fifth Circuit expanded the reach of school officials to restrict off-campus online speech that could include words and expressive activity that could be "reasonably understood . . . to threaten, harass, and intimidate."[189]

In sum, the circuit courts that have addressed the circumstances under which *Tinker* applies to off-campus online speech have applied diverse approaches. Both the Second[190] and Eighth[191] Circuits have adopted a "reasonably foreseeable risk" standard, requiring that off-campus speech present a reasonably foreseeable risk of substantial disruption to the school environment before *Tinker* applies.[192] In

whether Bell's recording either caused an actual disruption or reasonably could be forecast to cause one.").

185. *See id.* at 398.

186. *See id.* at 398 ("Accordingly, school authorities are not required expressly to forecast a 'substantial or material disruption"; rather, courts determine the possibility of a reasonable forecast based on the facts of the record.").

187. *See id.* (The panel explained that these factors include: "the nature and content of

contrast to the "reasonably foreseeable risk" standard, the Fourth Circuit[193] requires that the off-campus speech have a sufficient "nexus" to the school environment. Thus far, the Fourth Circuit's threshold inquiry as to when *Tinker* governs student speech is the

regarding the boundaries of school authority over off-campus speech. The mixed approaches adopted by several circuit courts and state courts have led to legal uncertainties that preclude conclusive answers, leaving school officials and courts without clear guidance as to how off-campus speech should be constitutionally governed. Given the growing free speech concerns with online speech, what are the current constitutional boundaries of off-campus student speech, including anonymous speech, following the latest circuit decision in *Bell*? Section A of this Part will first analyze the off-campus speech implications that arise from the qualitative differences in how the circuit courts have applied the *Tinker* standards. Section B will highlight the unresolved issues that are in need of emphatic clarity and guidance from the high court in order to fashion an analytical framework that would adequately balance students' First Amendment rights with the duty of school authorities to "maintain discipline and protect the school community."[198] Lastly, Section C will address some of the evolving issues and challenges that school officials and courts face when applying student speech doctrine to anonymous

off-campus speech in violation of professional codes of conduct can also be regulated.[204]

The latest circuit court precedent, discussed above, reveals that school officials are given significantly broad authority to regulate online student speech that is violent in character and threatens the safety of students and the school. In the wake of recent school shootings and advancements in communication technology, courts have acknowledged the difficulty that school administrators face in balancing public safety without impinging on student's constitutional rights.[205] In this context, lower courts have given greater deference to the judgment of school officials with regards to speech limit0.00Bsigw31court1(Y)22( ).4(0011

intent for the speech to reach the school before *Tinker* governs.[209] Thus, if the speech in question is *threatening* in nature or urges *violent conduct*, such speech will be subject to a standard of either a "reasonably foreseeable risk" of "substantial disruption" or an actual "substantial disruption" to the operation of the school. Other than the Fifth Circuit's decision in *Bell*, circuit courts addressing violent or threatening online speech have not required a student's intent to "target the school" before applying *Tinker*, leaving greater discretion to school officials to act on a "reasonably foreseeable risk" that such speech will cause a substantial disruption.

Apart from off-campus expressions of violent themes or threatening posts, one question left unanswered is how far does *Tinker's*

disruption" analysis to confirm the school's disciplinary action. Conceivably, the court could have applied *Fraser* to justify the

in incidents of violence against school communities, and the need for school officials to be vigilant and give serious consideration to statements resembling violence as well as harassment posted online.[227] However, off-campus online speech takes many forms, and vulgar or menacing speech is often intertwined with political commentary, satire, and matters of public concern. While certain aspects of Bell's online rap could be construed as addressing a matter of public concern,[228] the majority in *Bell* ruled that its graphic discussion of violence against teachers did not elevate the speech above *Tinker*. Unfortunately, neither the Supreme Court, nor any circuit court, has established articulable standards to determine when off-campus speech could "reasonably" be found to be "threatening" or "harassing" let alone "substantially disruptive," when the speech is also tethered with content on matters of public concern. For that reason, this article calls for a standard beyond a "reasonable school officials" standard; such a standard gives school administrators sweeping authority to discipline students for posts that are interpreted out of context. At a minimum, courts should impose a *recklessness* standard whereby *Tinker* governs when students' online posts are made with the knowledge that they will be viewed as harassing or threatening.

Furthermore, courts should require an analysis of the "overall thrust" of the speech in order to determine if the speech is designed to address matters of public concern, political speech, and other "non-threatening" speech, or if its primary purpose is to harass and threaten. In applying this prong, the Court should develop an inquiry that considers the factors outlined in *Wynar* in order to conclude whether the speech satisfies this threshold inquiry: (1) the nature and content of the speech; (2) the objective and subjective seriousness of the speech; and (3) the severity of the possible consequences should the speaker take action.[229] Against the backdrop of a national

227. *Bell*, 799 F.3d at 393 ("[t]his now-tragically common violence increases the importance of clarifying the school's authority to react to potential threats before violence erupts.") (citing Morse v. Frederick, 551 U.S. 393, 408 (2007)).

228. *Id.* at 408–09 (Dennis, J., dissenting) (Noting that the lyrics of Bell's song describe in detail female students' allegations of sexual misconduct on the part of some of the school's teachers and coaches: "[a]lthough the song does contain some violent lyrics, the song's overall 'content' is indisputably a darkly sardonic but impassioned protest of two teachers' alleged sexual misconduct . . . .").

229. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1070–71 (9th Cir. 2013); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 3-10.3(,.3(799)8(3-10.3)-13.90F.)-1e4.2(xua)-1490F..(1I25.6(.)15)2.8(D)]12.8(e9p3y(.)-)s.p15c88.8(V

epidemic in cyberbullying, sexual harassment, and continued violence in schools, the Supreme Court needs to clearly articulate at least a recklessness standard—as opposed to a reasonableness standard—for school officials to follow. A recklessness standard balances the need for deference to the reasonable judgment of school officials, without overly constricting the free speech rights of students. Under *Tinker*, the suppression of speech is based on its effects rather than its content, so broad off-campus regulation could potentially create ominous implications, allowing schools to regulate speech when and wherever it takes place. In its quest to fashion an appropriate standard, the Supreme Court should remain steadfast in striking the appropriate balance to allow school administrators to properly identify warning signs and prevent violence, while limiting arbitrary disciplinary decisions that adversely affect students' freedom of expression.

C. Regulating Anonymous Online Speech Beyond the "Schoolhouse Gate"

Assuming that school officials can constitutionally discipline and regulate off-campus online expression pursuant to *Tinker*, courts will be faced with the broader question of *Tinker*'s applicability with anonymous online speech. As discussed above, the First Amendment protects speech in cyberspace, and the right to speak anonymously, especially speech pursuant to political advocacy, has been recognized by the Court.[230] Public schools are, therefore, bound by free speech concerns that limit the scope of what school administrators can constitutionally limit, including anonymous online content. There is currently no federal law addressing cyberbullying or online harassment, and regulating anonymous online speech because it is "offensive" or "unpopular" will presumptively be found unconstitutional. As the Supreme Court has unequivocally declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[231] While anonymous online speech on platforms like Yik Yak can veer into

applicability to the second prong is appropriate since threatening, harassing, and intimidating students and teachers "inherently portends a substantial disruption making feasible a *per se* rule in that regard.") (citing *Bell*, 799 F.3d at 397).

230. *See supra* III.C.

231. Texas v. Johnson, 491 U.S. 397, 414 (1989).

sexist, racist, and other harassing content, there is no "harassment exception" to the First Amendment, unless the severity of the conduct creates a "hostile environment."[232] In addition, school harassment policies applied to online speech can also be challenged under overbreadth grounds, where core-protected speech is unduly chilled in the government's quest to target "u

Some colleges[235] have also banned anonymous online speech platforms such as Yik Yak from their campus wi-fi networks. It remains unresolved whether similar bans or geo-fencing would be found constitutional if state schools adopted the same measures. Conceivably, if public schools did adopt measures to prevent students on campus networks from accessing online platforms, they could be subject to claims of unconstitutional prior restraints on speech. Furthermore, blocking anonymous online platforms could also implicate restricted use of virtual private networks, limiting a student's ability to transmit information through shared or public

instances of "cyberbullying," hate speech, harassment, and threatening speech. While several appellate courts have addressed *Tinker*'s applicability to off-campus online speech, they have struggled to apply a consistent, uniform standard to off-campus speech. Exacerbating this problem is the growing adoption and use of