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Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions

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NOTES

KEEP OUT OF MYSPACE!: PROTECTING STUDENTS FROM UNCONSTITUTIONAL SUSPENSIONS AND EXPULSIONS

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INTRODUCTION

On February 15, 2006, twenty students were suspended from their middle school in Costa Mesa, California.¹ The students had not been in fights. They had not skipped class. In fact, none of the students' behavior on school grounds necessitated disciplinary action. Instead, the students were suspended for their use of MySpace,² a social-networking website, from the privacy of their own homes after school hours.³

The suspensions punished activity that began in January 2006.⁴ A TeWinkle Middle School student created a MySpace group and sent an online invitation to his MySpace "friends" to join it.⁵ The invitation contained a "colorful psychedelic picture" and the name of the group, "I hate [girl's name with an expletive and racial reference]," but did not include a description of the group.⁶ Approximately twenty TeWinkle students accepted the invitation and joined the group.⁷

1. *20 Youths Suspended in MySpace Case*, CBS NEWS, Mar. 3, 2006, <http://cbsnews.com/stories/2006/03/03/tech/main1364880.shtml?CMP=ILC-SearchStories> [hereinafter *20 Youths Suspended*]; Kimberly Edds, *Boy Faces Expulsion Over Web Threat*, O.C. REGISTER, Mar. 2, 2006, available at http://www.ocregister.com/ocregister/news/abox/article_1025571.php.

2. MySpace.com: A Place for Friends, <http://www.myspace.com> (last visited Oct. 17, 2007); see *infra* Part II.

3. See *20 Youths Suspended*, *supra* note 1.

4. See *id.*

5. See *id.* Members of MySpace, or MySpacers, can create groups based on a common interest. Group members share a message board and group page. See *Create a Group on MySpace!*, <http://groups.myspace.com> (follow "Create Group" hyperlink) (last visited Oct. 17, 2007). MySpace allows members to find and add "friends" to their profile pages. See MySpace.com, *supra* note 2. According to a June 2006 study, the typical MySpacer has approximately 200 friends, who may or may not be people the MySpacer knows outside of MySpace. LARRY D. ROSEN, *ADOLESCENTS IN MYSPACE: IDENTITY FORMATION, FRIENDSHIP AND SEXUAL PREDATORS 2* (2006), available at www.csudh.edu/psych/Adolescents%20in%20MySpace%20-%20Executive%20Summary.pdf.

6. Edds, *supra* note 1 (alterations in original).

7. See Gil Kaufman, *Twenty Students Suspended in Latest Round of MySpace-Related Busts*, MTV NEWS, Mar. 3, 2006, http://www.mtv.com/news/articles/1525313/20060303/id_0.jhtml.

Five days later, the group creator sent a MySpace message to the students who had joined his group,⁸ directing group members to click on a nondescript folder.⁹ When members opened the folder, a post appeared, which read, "Who here in the 'I hate (girl's name with an expletive and racial reference)' wants to take a shotgun and blast her in the head over a thousand times?"¹⁰ The post asked group members who agreed to reply.¹¹ None of the TeWinkle students replied.¹² Several days later, TeWinkle teacher Elizabeth Copeland discovered the threatening post on the group's page while browsing MySpace and immediately alerted school administrators.¹³

School officials informed the group creator and message poster that he faced expulsion.¹⁴ He was not the only student punished, however. All twenty TeWinkle students who had joined the group received suspensions.¹⁵ Although the initial invitation to join the group and the second message by the group's creator did not give any indication of the page's threatening content,¹⁶ school officials deemed it appropriate to suspend all of the group members simply for their association with the group.¹⁷ The principal explained that the punishments were necessary because administrators perceived that group membership caused concern for the safety of students on campus.¹⁸ Parents were outraged and believed that the school had "overstepped its bounds by disciplining students for actions that occurred on personal computers, at home and after school hours."¹⁹

The TeWinkle suspensions are but one of the many recent examples of suspensions and expulsions for MySpace-related

8. *Twenty Calif. Schoolkids Suspended Over MySpace.com Page*, FOXNEWS.COM, Mar. 3, 2006, <http://www.foxnews.com/story/0,2933,186711,00.html> [hereinafter *Twenty Calif. Schoolkids*].

9. Edds, *supra* note 1.

10. *Id.* (alterations in original); see also *Twenty Calif. Schoolkids*, *supra* note 8.

11. Edds, *supra* note 1.

12. *Id.*

13. *Id.*

14. Kaufman, *supra* note 7.

15. Edds, *supra* note 1.

16. *Twenty Calif. Schoolkids*, *supra* note 8.

17. *Id.*

18. *Id.*

19. *20 Youths Suspended*, *supra* note 1.

activity around the country.²⁰ As student MySpace usage continues to grow, student MySpacers are falling prey to increased authoritative measures by school administrators.²¹

The United States Supreme Court has yet to issue any decisions regarding schools' limits in regulating or punishing off-campus Internet activity, and only a handful of state and federal courts have tackled the issue.²² Lower court decisions have focused solely on disciplinary action regarding student Internet speech.²³ MySpace suspensions and expulsions, however, have not been limited to incidences of Internet speech.²⁴ Disciplinary action in response to off-campus MySpace activity may infringe not only on a student's freedom of speech, but also on her constitutional rights to privacy, to receive information, freedom of the press, and freedom of association.²⁵

With little judicial guidance, school officials are taking matters into their own hands, frequently overstepping constitutional boundaries. This Note will argue that school administrators must tread lightly in maintaining the necessary balance between preserving school safety and protecting students' constitutional rights.

Part I focuses on the online social-networking phenomenon MySpace and details several suspensions and expulsions for off-campus MySpace activity around the country. Part II examines existing judicially-imposed limits on public school discipline. Part

20. For a detailed account of many suspensions and expulsions stemming from online activity on MySpace, see Kevin Poulsen, *Scenes from the MySpace Backlash*, WIRED NEWS, Feb. 27, 2006, <http://www.wired.com/Politics/law/news/2006/02/70254>; see also *infra* Part I.

21. See Poulsen, *supra* note 20.

22. See Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 153-59 (2003) (providing a detailed description of cases involving student Internet speech by the attorney who represented Internet users Karl Beider, Eastlake Phantom, Nick Emmett, and NoGuano in state and federal courts); David L. Hudson, Jr., *Censorship of Student Internet Speech*, 2000 L. REV. M.S.U.-D.C.L. 199, 211-19 (detailing several off-campus internet speech cases, including *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) and *Emmett v. Kent Sch. Dist. No. 45*, 92 F. Supp. 2d 1088 (N.D. Wash. 2000)). These articles address student online activity strictly as student speech and do not discuss other student rights that may be implicated by online activity. For a discussion of such rights, see *infra* Part III.

23. See Caplan, *supra* note 22; Hudson, *supra* note 22; see also *infra* Part III.

24. See, e.g., *supra* notes 15-17 and accompanying text (describing suspensions for membership in a MySpace group).

25. See *infra* Part IV.

III suggests that those limitations are not sufficient with respect to MySpace punishments. Moreover, Part III identifies other constitutional protections that may be violated by MySpace suspensions and expulsions. Part IV suggests that a new test is necessary to determine the constitutionality of MySpace-related disciplinary actions. This test employs factors from the case law described in Parts II and III. Part V applies the suggested test to the MySpace suspensions and expulsions described in this Introduction and in Part I of this Note.

I. WHAT'S ALL THE FUSS ABOUT?

MySpace.com is an interactive social-networking site self-described as “a web site where members can meet friends, find and listen to new bands/music, blog, plan events, play games, and participate in user forums and create positive social change.”²⁶ In June 2007, MySpace had 70 million users.²⁷ MySpace boasts that its global membership is larger than the population of Great Britain and continues to grow.²⁸

When a new member joins MySpace, she creates and designs her online profile, allowing her to connect to other members, upload photos and graphics, send messages, create and maintain a blog, chat using an instant message (IM) function, post comments to public bulletin boards, create and join user groups, listen to music, and watch videos.²⁹ A summer 2006 study revealed that MySpace is used most frequently for its communicative functions, which include IM, mail messages, and bulletin postings.³⁰

26. A Guide to MySpace for Parents with Teens, <http://creative.myspace.com/safety/safetyguideparents.pdf> (last visited Oct. 17, 2007).

27. Anick Jesdanun, *comScore: MySpace Teen Visitors Drops*, ABC NEWS, July 12, 2007, <http://www.abcnews.go.com/Technology/wireStory?id=3372862> (reporting new data compiled by comScore Media Metrix) [hereinafter *comScore*].

28. A Guide to MySpace for Parents with Teens, *supra* note 26.

29. See MySpace.com, *supra* note 2. For details regarding some of the specific MySpace functions, see *supra* note 5.

30. ROSEN, *supra* note 5, at 2. The site features other services as well, such as video and music download capabilities, which are becoming increasingly popular. See, e.g., Bambi Francisco, *MySpace Trumps YouTube in Video*, MARKET WATCH, Sept. 26, 2006, <http://www.marketwatch.com/news/story/myspace-trumps-youtube-google-video/story.aspx?guid=%7B1425D570%2D12BE%2D4157%2DA598%2D5A7BBF5D2FBB%7D> (reporting that, according to comScore Media Metrix, in July 2006, 37.4 million unique MySpace

Membership on MySpace.com is ostensibly limited to people at least fourteen years old³¹; however, 10 percent of all MySpace-page views are by users between the ages of twelve and seventeen.³² On average, MySpacers spend two hours per day, five days per week, on the website.³³ Because of the number of teen members, the networking site has been described as “[t]he new hour long phone call.”³⁴

Widespread teen MySpace usage has led to increased monitoring by school administrators and police officers.³⁵ Although MySpace is blocked on most public school computers,³⁶ school administrators patrol students’ off-campus MySpace activity, believing that off-campus activity may compromise school safety.³⁷ An Indianapolis-area school administrator justified school discipline of MySpace activity, saying, “If something starts online and spills into school, we want to be able to deal with that and restore order to the school.”³⁸

members watched 20 percent of the 7.2 billion video streams on the Web, earning MySpace the title of No. 1 video site on the Web); see also Jeremy Kirk, *MySpace Offers Music Downloads*, PC WORLD, Sept. 5, 2006, <http://pcworld.about.com/news/Sep052006id127033.htm> (discussing the launch of MySpace’s new music download service, which MySpace hopes will compete with Apple Computer’s iTunes store).

31. A Guide to MySpace for Parents with Teens, *supra* note 26.

32. *comScore*, *supra* note 27.

33. ROSEN, *supra* note 5, at 2.

34. DVD: A Guide to Myspace.com for Police Officers (Sgt. Corey MacDonald, Esq.), available for purchase at <http://www.lawintelrpt.com/DVD-Myspace-PolOfcr.html> (last visited Oct. 17, 2007).

35. See *Some Students Say Schools’ Blog Crackdown Crosses Line*, WHAS11 NEWS (Louisville, Ky.), Oct. 2, 2006, http://www.whas11.com/education/stories/WHAS11_TOP_schoolblog.390a99d5.html (discussing “[i]ncreasing crackdowns on what educators deem inappropriate online behavior”); see also Wendy Davis, *Teens’ Online Postings Are New Tool for Police*, BOSTON GLOBE, May 15, 2006, available at http://www.boston.com/yourlife/health/children/articles/2006/05/15/teens_online_postings_are_new_tool_for_police/ (reporting a “rapid increase in law enforcement use of MySpace” to monitor high school students’ profiles).

36. See, e.g., Nate Anderson, *Schools Block MySpace Access; Kids Fight Back*, ARS TECHNICA, May 23, 2006, <http://arstechnica.com/news.ars/post/20060523-6894.html>. In a 410-15 vote, the U.S. House of Representatives passed the Deleting Online Predators Act (DOPA) in July 2006. See Ed Oswald, *House Passes Bill To Block Web Sites*, BETANEWS, July 28, 2006, http://www.betanews.com/article/House_Passes_Bill_to_Block_Web_Sites/1154106691. DOPA requires schools to block all “commercial social networking websites,” like MySpace, from on-campus computers. H.R. 5319, 109th Cong. § 3 (2006).

37. See, e.g., Kaufman, *supra* note 7 (reporting a school administrator’s defense of MySpace-related suspensions, saying that “the incident involved student safety”).

38. *Some Students Say Schools’ Blog Crackdown Crosses Line*, *supra* note 35.

The TeWinkle punishments discussed in the Introduction are not unique. In recent years, school administrators around the country have been expelling and suspending students for MySpace activity.³⁹ The following are only a few examples of the various types of MySpace behavior that have led to public school suspensions and expulsions in the past two years.

In February 2006, in Littleton, Colorado, sixteen-year-old Bryan Lopez was suspended for five days for posting "a satirical comment on the poor physical condition of the school, the behavior and demographics of students and staff, lack of resources and the perceived racial biases of teachers and administrators" on his MySpace page from his home computer.⁴⁰ Lopez's Littleton High School classmates could not view the satirical postings from school computers, because the school's Internet filters prevented MySpace from being accessed on campus.⁴¹ When school administrators obtained a copy of Lopez's comments, they suspended him nevertheless, invoking a school policy that forbade off-campus conduct "that is detrimental to the welfare or safety of other students or district employees."⁴² The superintendent then extended the suspension for an additional ten days to determine whether Lopez should be expelled for the MySpace activity.⁴³

Two eighth graders from Oak Lawn, Illinois, were suspended for four days after administrators saw their MySpace postings, which contained "foul language, a digitally altered photo of George Bush sticking up his middle finger, pop-ups of women in bikinis and disparaging references to [another school in the area] and its staff."⁴⁴ Administrators at the elementary school threatened to cancel graduation ceremonies if students did not delete their MySpace accounts.⁴⁵ Parents were concerned that the school principal was improperly punishing students for off-campus

39. See Poulsen, *supra* note 20.

40. *Student Suspended for MySpace Postings Returns to School*, FIRST AMENDMENT CENTER, Feb. 22, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16526>.

41. *Id.*; see also *supra* note 36 and accompanying text.

42. *Boy's Suspension for MySpace Comments Reduced*, ABC 7 NEWS THE DENVER CHANNEL.COM, Feb. 21, 2006, <http://www.thedenverchannel.com/news/7302412/detail.html>.

43. *Id.*

44. *Students Suspended for MySpace Postings*, NBC5.COM, Mar. 28, 2006, <http://www.nbc5.com/news/8316111/detail.html>.

45. *Id.*

activity.⁴⁶ As one parent put it, "She has no right to spy on our children in our own homes."⁴⁷ The principal defended the suspensions, saying, "We continue to act in the best interest of our students in respect to all areas."⁴⁸

Protecting students was likewise a concern in Beaverton, Oregon, in June 2006, when Southridge High School officials suspended six students for threatening language posted on MySpace.⁴⁹ The postings began after one of the students "started an online forum attacking the Goth students, a group recognizable by their dark clothing and, at times, heavy makeup."⁵⁰ As more students joined the forum, threats of violence grew.⁵¹ A rumor began that one group planned to attack the other on "06-06-06."⁵² School officials could not identify a specific threat, but decided it was necessary to increase security and warn parents of the activity.⁵³ Two hundred fifty students missed school on June 6, and police officers were stationed on campus throughout the day.⁵⁴ Although none of the MySpace postings occurred on campus and MySpace was blocked from the school district's computers, officials suspended the six students under "the district's broad harassment and disruptive behavior policy, which kicks in when an action disrupts learning."⁵⁵

These examples are only a few of the many public school MySpace punishments that have been imposed around the country in the past two years. Schools are and should be concerned with student safety. In the context of MySpace suspensions and expulsions, however, schools lack sufficient guidelines to determine the appropriateness and constitutionality of the punishments they impose. As a result, some students have received unconstitutional suspensions and expulsions. In order to protect both the security interests of schools

46. *Id.*

47. *Id.*

48. *Id.*

49. See Amy Hsuan, *Six Teens Suspended After MySpace Threats*, THE OREGONIAN, June 7, 2006, at B9.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

and the rights of students, more concrete rules must be established regarding school punishments for MySpace activity.

II. SCHOOL DISCIPLINE: PROTECTING STUDENTS AND SAFEGUARDING RIGHTS

When going home, or when we come,
At morning, noon, or night,
Let no one play along the way,
Or do what is not right.⁵⁶

Since the birth of the American high school in the early nineteenth century, student deportment has been a component “of student life ... shaping classroom culture and the pupil’s destiny.”⁵⁷ From their inception, public schools have sought to nurture character by teaching self-control, inner restraint, and personal responsibility—traits that students were expected to display both in and out of school.⁵⁸

Disciplinary practices reflected the schools’ desire to instill values and mold student behavior. Students recognized that, “every school is a community governed by certain laws; to disobey these laws brings upon the offender the penalty.”⁵⁹

While the importance of student deportment and value inculcation has remained constant, school disciplinary practices and limitations have developed and changed. Federal judicial decisions have regulated public school disciplinary action, seeking to produce consistent disciplinary procedures.⁶⁰

A. Constitutional Safeguards for Public School Students

Under the United States Constitution, students are considered persons who possess fundamental rights that the state must

56. This “closing hymn” was recited by lower-level high school students in the nineteenth century prior to leaving school. WILLIAM J. REESE, *THE ORIGINS OF THE AMERICAN HIGH SCHOOL* 191 (1995).

57. *Id.* at 183.

58. *See id.* at 191, 199-201.

59. *Id.* at 191.

60. *See* Lee E. Teitelbaum, *School Discipline Procedures: Some Empirical Findings and Some Theoretical Questions*, 58 IND. L.J. 547, 547 (1984).

respect.⁶¹ At times, the state's interest in maintaining order and safety in schools comes into conflict with a student's constitutionally protected rights. In such instances, the Court has created safeguards to ensure that students' constitutional rights are protected.

Although the following safeguards are essential in determining the constitutionality of MySpace-related suspensions and expulsions, they address only a few of students' constitutional protections that may be infringed by a MySpace punishment.

1. Due Process Requirements

The Court first addressed the due process requirements of public school disciplinary actions in *Goss v. Lopez*,⁶² decided in 1975. The Court recognized suspension as a "necessary tool to maintain order,"⁶³ but also held that "suspension from school without adequate process violates both property and liberty interests held by public school students."⁶⁴ Writing for the majority, Justice White explained:

The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

The Due Process Clause also forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied.⁶⁵

In order to safeguard a student's rights prior to a suspension, schools must provide the student with notice of the charges against

61. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

62. 419 U.S. 565 (1975).

63. *Goss*, 419 U.S. at 580.

64. Teitelbaum, *supra* note 60, at 549.

65. *Goss*, 419 U.S. at 574 (citation omitted).

him, provide an explanation of the evidence of the charges, and allow the student an opportunity to voice his side of the story.⁶⁶ If these minimal requirements are not met, a student's rights under the Due Process Clause have been violated.⁶⁷

Goss thus established that suspensions and expulsions without notice or explanation violate students' constitutional rights. The Court recognized that education may be "the most important function of state and local governments"⁶⁸ and is protected as a liberty and property interest under the Fourteenth Amendment. Before suspending or expelling students for MySpace activity, school administrators must follow procedural requirements in order to protect these liberty and property interests.

2. Student Speech

An important function of schools is to inculcate children with certain values, such as honesty, respect, and self-control.⁶⁹ These values "make it more likely that [students] will become responsible adults, capable of functioning in society and understanding and meeting their own needs while respecting others."⁷⁰ All school actions—from classroom instruction to disciplinary procedures—provide inculcating value lessons.⁷¹ The Supreme Court has often recognized this important function of public schools.⁷²

At times, however, students choose to express views that may be at odds with the values schools aim to teach. In such situations, the state must balance the importance of value inculcation with students' First Amendment rights of free speech and free expres-

66. *Id.* at 581.

67. *See id.* Significantly, *Goss* addressed only the due process requirements of short-term suspensions, recognizing that requirements for suspensions longer than ten days, as well as expulsions, might require more formal procedures. *Id.* at 586.

68. *Id.* at 576 (citation omitted).

69. *See* KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 86-103 (2003).

70. *Id.* at 86.

71. *See id.* at 97. Saunders uses the example of a school's choice either to take action to prevent cheating on tests or to ignore the cheating. When a school takes action to prevent cheating, it instills honesty; conversely, when a school ignores cheating, it teaches students to use all means necessary to fulfill their wants. *Id.*

72. *See, e.g.,* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

sion.⁷³ Notably, student free speech rights may be limited by compelling state interests.⁷⁴ Depending on the type and location of the speech, the protection afforded to student speech differs.

a. Speech in Schools

In December 1965, a group of parents and students agreed on a plan to peaceably protest the Vietnam War by wearing black armbands during the holiday season.⁷⁵ When the students' principals heard of the plan, they adopted a policy to suspend any student who refused to remove a black armband that she had worn to school.⁷⁶ Three students subsequently wore black armbands to school and were suspended until they agreed to return to school without wearing the armbands.⁷⁷

The students' action against the school district precipitated *Tinker v. Des Moines Independent Community School District*, the landmark case regarding student speech in schools.⁷⁸ Explaining that students are persons under the Constitution who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"⁷⁹ the Court held that the school had violated the students' freedom of expression.⁸⁰ Significantly, the Court noted that, because schools have a duty to educate students and prepare them for citizenship, "scrupulous protection of Constitutional freedoms of the individual" is necessary "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁸¹

73. See U.S. CONST. amend. I. Some scholars argue that, because of a student's minor status, students should be granted only "an enforceable free speech right prohibiting restrictions imposed by the school in such a way as to significantly impair, inhibit, or otherwise stunt the development of the student's future free speech-relevant capacities as an adult." R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* 97 (1990).

74. Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 368 (1988).

75. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

76. *Id.*

77. *Id.*

78. See *id.*; SAUNDERS, *supra* note 69, at 231.

79. *Tinker*, 393 U.S. at 506.

80. *Id.* at 514.

81. *Id.* at 507 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

Recognizing both the state's interest in preventing disturbance on campus and the students' First Amendment rights, the Court held that a school's "undifferentiated fear or apprehension of disturbance" did not overcome the students' right to free expression.⁸² Instead, in order for a school to justify a punishment or prohibition that infringes on a student's expression of opinion:

[The school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.⁸³

Under this test, although restrictions on speech are tolerated if the speech actually interrupts the education of other students or the mission of the schools,⁸⁴ undisruptive opinion speech is protected from school disciplinary action.

The *Tinker* decision exemplifies the Court's acknowledgement of both the congruent and conflicting aims of public education and free speech.⁸⁵ Both strive to encourage individual development and advance knowledge, but free speech presumes a free-thinking and self-sufficient citizenry, while public education seeks to minimize student autonomy.⁸⁶ The *Tinker* Court attempted to protect the schools' and students' rights, while balancing students' needs for a mix of protection and independence.⁸⁷

82. *Id.* at 508.

83. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

84. See SAUNDERS, *supra* note 69, at 242.

85. See ROBERT WHEELER LANE, BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INCULCATION OF VALUES 59 (1995) (listing several of the congruent and conflicting aims of public schools and free speech).

86. *Id.*

87. See *id.*

b. Unprotected Speech: "Offensively Lewd and Indecent Speech," "True Threats," and "Fighting Words"

Political speech, like that expressed in *Tinker*, deserves protection under the First Amendment.⁸⁸ Schools do not have to allow all types of student speech, however.⁸⁹ The "well-defined and narrowly limited" categories of unprotected speech include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."⁹⁰ The Supreme Court has held that state interests in morality and order outweigh the slight social value inherent in such speech.⁹¹

The Supreme Court evaluated unprotected speech and limited *Tinker* in *Bethel School District No. 403 v. Fraser*.⁹² The Court held that obscene or indecent student speech does not deserve the protection given to political student speech.⁹³ Matthew Fraser had given a speech consisting of an extended sexual metaphor, laden with graphic and explicit language, at a school-sponsored assembly.⁹⁴ He was subsequently suspended under the school's disciplinary policy that prohibited the use of obscene language at school.⁹⁵ The Court held that the objective of public schools is to inculcate students with fundamental values.⁹⁶ Schools may decide that such values cannot be adequately conveyed while tolerating "lewd, indecent, or offensive speech and conduct."⁹⁷ As such, the Court determined that Fraser's speech was not protected by the

88. See *supra* Part II.A.2.a.

89. See William Bird, Note, *True Threat Doctrine and Public School Speech—An Expansive View of a School's Authority To Discipline Allegedly Threatening Student Speech Arising Off Campus*, 26 U. ARK. LITTLE ROCK L. REV. 111, 116 (2003).

90. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

91. *Id.*

92. 478 U.S. 675 (1986).

93. *Id.* at 680.

94. *Id.* at 677-78.

95. *Id.* at 678 ("Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.").

96. *Id.* at 681 (citing *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

97. *Id.* at 683.

First Amendment, because the “offensively lewd and indecent speech” would “undermine the school’s basic educational mission.”⁹⁸

In contrast to lewd and obscene speech, the Supreme Court has not evaluated the applicability of the “true threat” and “fighting words” doctrines in the realm of school discipline. These doctrines have become increasingly relevant to schools since Columbine and other highly publicized school shootings.⁹⁹ Pursuant to these doctrines, administrators may punish students for certain speech because they have an interest in protecting students “from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”¹⁰⁰ Courts evaluating the applicability of these doctrines to school disciplinary actions often invoke them simultaneously.¹⁰¹

The “true threat” doctrine emerged in *Watts v. United States*¹⁰² when an eighteen-year-old antiwar demonstrator announced to a crowd of demonstrators, “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”¹⁰³ This doctrine allows governmental punishment and prohibition of certain speech that constitutes a “true threat.” The Supreme Court has only evaluated “true threat” unprotected speech with regard to criminal statutes that prohibit such speech.¹⁰⁴

The Ninth Circuit first considered “true threat” speech in relation to school discipline in its 1996 decision *Lovell v. Poway Unified School District*.¹⁰⁵ Sarah Lovell, a tenth grader, was suspended for

98. *Id.* at 658. Although lewd and indecent speech may be curtailed on campus, the applicability of the *Fraser* holding to off-campus student speech is unclear. One month before *Fraser*, a federal district court held that a student’s ten-day suspension for “extend[ing] the middle finger of one hand” toward his teacher in a restaurant parking lot could not be sustained because the student’s behavior had occurred off school grounds, at a time when neither the student nor the teacher was engaged in a school-sponsored activity. *Klein v. Smith*, 635 F. Supp. 1440, 1441-42 (D. Me. 1986). Because the *Fraser* Court did not cite or discuss the *Klein* decision, a school’s ability to discipline off-campus lewd or obscene student speech remains uncertain.

99. See Bird, *supra* note 89, at 111.

100. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

101. See, e.g., *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 822 (S.D. Iowa 2004).

102. 394 U.S. 705 (1969).

103. *Id.* at 706 (holding that this language did not constitute a “true threat” to take the life of the President).

104. See, e.g., *id.* (deciding whether 18 U.S.C. § 871(a)’s prohibition on threats against the President was constitutional).

105. 90 F.3d 367 (9th Cir. 1996).

three days after she told her guidance counselor that she would shoot her if the guidance counselor did not change her class schedule.¹⁰⁶ Lovell claimed that she merely uttered a “figure of speech” and said that the school violated her First Amendment rights by punishing her as a result of this speech.¹⁰⁷ The court reviewed *Tinker* and other on-campus speech decisions, but ultimately determined that Lovell’s on-campus speech was not protected, because state and federal law do not protect threats of physical violence.¹⁰⁸

The court evaluated Lovell’s statement under its objective test—“whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault”—and held that her language was not a figure of speech but a true threat.¹⁰⁹ Because Lovell’s speech was unprotected speech, the school’s punishment was valid.¹¹⁰

More recently, the Fifth Circuit held that a “sketch depicting a violent siege” on a high school, which “contained obscenities and racial epithets directed at characters in the drawing, a disparaging remark about [East Ascension High School] principal Conrad Braud, and a brick being hurled at him,”¹¹¹ was not a “true threat.” The court held that:

The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person.¹¹²

106. *Id.* at 368.

107. *Id.*

108. *Id.* at 371.

109. *Id.* at 372. The Eighth Circuit declined to adopt this test in *Doe v. Pulaski County Special School District*, 306 F.3d 616, 623 (8th Cir. 2002). Instead, it relied on the “true threat” test adopted by the Eighth Circuit in *Dinwiddie v. United States*, 76 F.3d 913, 925 (8th Cir. 1996) (stating the appropriate test is “whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’”).

110. *Lovell*, 90 F.3d at 373.

111. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611 (5th Cir. 2004).

112. *Id.* at 616 (emphasis in original).

The Fifth Circuit ultimately determined that, under this test, the student's speech did not constitute a true threat, because the student had not intended for his drawing to be seen at school.¹¹³

The similar "fighting words" doctrine is directed at those words that "men of common intelligence would understand would be words likely to cause an average addressee to fight."¹¹⁴ In *Augustus v. School Board of Escambia County*, a Florida district court found that students' "wearing or displaying of the Confederate Battle Flag" at school or school-sponsored activities could be prohibited as unprotected speech.¹¹⁵ The symbols, which had caused violence and disruption at school and were a source of racial tension between students, were akin to "fighting words."¹¹⁶ The court noted that a "mere ... apprehension of disturbance" would not warrant such a prohibition.¹¹⁷ Because the school's action was based on "evidence indicating a substantial probability of serious disruption and violence if individual use is not limited," the prohibitions were deemed valid.¹¹⁸

As the Ninth Circuit noted in its *Lovell* decision, in light of increasing violence at school, school administrators are justified in taking threats against students or faculty seriously.¹¹⁹

c. Off-campus Speech

The *Tinker* Court specifically limited its holding to on-campus, nondisruptive speech. In most circumstances, school disciplinary action for student speech does not reach beyond school grounds.¹²⁰ Arguably, off-campus speech should be presumed less likely to be

113. *Id.* at 617. The student had drawn the picture at home, had shown it only to his mother, brother, and a friend, and had stored it in his closet. *Id.* at 611. The student's younger brother drew a llama on another sheet of paper in the sketchpad two years later and then unwittingly brought the sketchpad with the "violent siege" drawing to his middle school. *Id.* When the "violent siege" drawing was discovered, the sketchpad was confiscated, and the high school principal was contacted. *Id.* at 611-12.

114. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

115. 361 F. Supp. 383, 389 (N.D. Fla. 1973), *modified by Augustus v. Sch. Bd. of Escambia County*, 507 F.2d 152 (5th Cir. 1975).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 374 (9th Cir. 1996).

120. *LANE*, *supra* note 85, at 87.

disruptive to schools than on-campus speech.¹²¹ The Supreme Court has yet to determine the limits of school disciplinary authority for off-campus speech,¹²² however, and conflict among the lower courts continues to exist.

Four years after *Tinker* was decided, a Texas federal district court judge ruled that students were protected by the First Amendment for the off-campus creation and distribution of newspapers that criticized their school.¹²³ He distinguished on-campus from off-campus student speech, saying:

In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner.¹²⁴

The judge questioned school administrators' authority to punish or prohibit off-campus behavior, even in circumstances in which

121. See *id.* at 90.

122. The Supreme Court recently reversed the Ninth Circuit ruling that, absent "concern about disruption of educational activities [schools may not] punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school." *Frederick v. Morse*, 439 F.3d 1114, 1118 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007). The Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 2625. The case arose after a student held up a banner displaying the message "BONG HiTS 4 JESUS" at an Olympic torch parade in Juneau, Alaska at a school-sponsored, faculty-supervised event, akin to a field trip. *Id.* at 2619-20. This case is distinguishable from the other off-campus speech described in this Part, because the off-campus speech in *Frederick* occurred during a school-sanctioned event. See *id.* at 2624 ("We agree with the superintendent that Frederick cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'"). Because the event was school-authorized and supervised, the speech approximates on-campus speech far more than the off-campus speech discussed in this Part.

123. *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969), *vacated*, 475 F.2d 1071 (5th Cir. 1973) (vacating because the student had shown open disregard for school rules), *reh'g denied*, 475 F.2d 1404 (5th Cir. 1973), *cert. denied*, 414 U.S. 1032 (1973).

124. *Id.* at 1340-41.

students' behavior off-campus results in on-campus disruption the next day.¹²⁵

The Second Circuit applied a similar standard in *Thomas v. Board of Education*.¹²⁶ The court held that the student-plaintiffs' publication, containing articles satirizing teachers and students, sexual material, and cartoons, was distinguishable from the speech in *Tinker* because it was written and distributed off-campus.¹²⁷ Because freedom of expression is "at its zenith" in the general community, the court held that punishments could not be upheld simply because the public disapproves of the students' behavior.¹²⁸ If the court were to allow schools to regulate off-campus speech, the risk would be too great that school administrators would act unfairly, would punish protected speech, and would thereby hinder future expression.¹²⁹

A similar approach was followed by the Fifth Circuit in *Porter v. Ascension Parish School Board*.¹³⁰ The court determined that a student's drawing of a violent siege on the high school was "not exactly speech on campus or even speech directed at the campus."¹³¹ The drawing was done in the privacy of the student's home, was stored in a closet for two years, and was not intended to be brought on campus.¹³² The court held that "[b]ecause [the student's] drawing was composed off [] campus, displayed only to members of his own household, stored off campus, and not purposefully taken by him to [his school] or publicized in a way certain to result in its appearance at [his school]," the student's drawing was entitled to full protection under the First Amendment.¹³³

The Eighth Circuit did not follow the Second and Fifth Circuits' approach, however, and held in *Doe v. Pulaski County Special School District* that a middle school student's expulsion for off-

125. *Id.* at 1341.

126. 607 F.2d 1043 (2d Cir. 1979).

127. *Id.* at 1050.

128. *Id.*

129. *Id.*

130. 393 F.3d 608, 615 (9th Cir. 2004).

131. *Id.*

132. *Id.* ("He took no action that would increase the chances that his drawing would find its way to school; he simply stored it in a closet where it remained until, by chance, it was unwittingly taken to Glavez Middle School by his brother.")

133. *Id.* at 620.

campus speech did not violate the First Amendment.¹³⁴ The court maintained that the student's letters, describing his desire to molest, rape, and murder his ex-girlfriend,¹³⁵ should not be granted free speech protection because they were "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."¹³⁶ The majority held that the student's letters would have been considered a threat by a reasonable recipient and upheld the constitutionality of the student's expulsion.¹³⁷ The dissent argued that the majority failed to consider "the unique circumstances of speech in a school setting."¹³⁸ By neglecting to evaluate the speech in the school context, scholars have contended that the majority gave school officials "the erroneous impression that school authority over student speech exists around-the-clock and regardless of where the speech originates."¹³⁹

Notably, none of these cases are examples of strictly off-campus speech. The publications at issue in *Sullivan* and *Thomas*, which were created and distributed off-campus, were carried on-campus by other students.¹⁴⁰ Porter's drawing was brought to school by his younger brother.¹⁴¹ Likewise, Doe's letters were taken to school by his best friend, where his ex-girlfriend read them during gym class.¹⁴² As the location of the speech is significant in determining a school's ability to exercise its authority, these distinctions are relevant. When evaluating a school's disciplinary actions for strictly off-campus speech, courts should presume that the interest in protecting students' speech rights outweighs the state's interest in maintaining on-campus safety.¹⁴³

134. 306 F.3d 616 (8th Cir. 2002).

135. *Id.* at 619.

136. *Id.* at 622 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

137. *Id.* at 626.

138. *Id.* at 627 (Heaney, J., dissenting).

139. Bird, *supra* note 89, at 141.

140. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979); *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp. 1328, 1332-33, 1335 (S.D. Tex. 1969), *vacated*, 475 F.2d 1071 (5th Cir. 1973) (vacating because the student had shown open disregard for school rules), *reh'g denied*, 475 F.2d 1404 (5th Cir. 1973), *cert. denied*, 414 U.S. 1032 (1973).

141. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611 (5th Cir. 2004).

142. Bird, *supra* note 89, at 114.

143. See *supra* notes 120-22 and accompanying text.

d. Internet Speech

In recent years, student Internet speech has become increasingly prevalent. Because many public schools now have computer labs and computers in classrooms, distinguishing between on-campus and off-campus Internet speech can be more difficult than in previous speech cases.¹⁴⁴ Although some lower courts have applied the *Tinker* test to Internet speech cases,¹⁴⁵ many legal scholars suggest that this test is ineffective in the Internet context.¹⁴⁶ The Supreme Court has yet to review any cases involving student Internet speech, and lower courts have used a variety of approaches to determine whether Internet speech is protected and whether it is considered on-campus or off-campus speech.

In 2002, the Supreme Court of Pennsylvania held that, “where [Internet] speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”¹⁴⁷ The case involved the expulsion of a high school student who created a website entitled “Teacher Sux” from his home computer.¹⁴⁸ The site contained “derogatory, profane, offensive and threatening comments” about the teacher and a principal and was linked to a page entitled “Why Should [Mrs. Fulmer, his algebra teacher] Die?” with drawings of the teacher, beheaded and dripping blood,

144. See Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 160-61.

145. See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

146. See, e.g., Harpaz, *supra* note 144, at 162 (arguing that a true *Tinker* case in the Internet context is unlikely to occur until a student brings a hand-held personal computer to school and accesses the Internet using wireless technology); Louis John Seminski, Jr., Note, *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 182 (2001) (arguing that because the Internet does not exist in the “tangible world,” traditional school speech language like “schoolhouse gates” does not apply). But see Adrienne J. Stahl, *J.S. v. Bethlehem Area School District: The Pennsylvania Supreme Court Upholds a School District’s Expulsion of a Student for Creating an Offensive Web Site About School Faculty*, 13 WIDENER L.J. 649, 664 (2004).

147. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002). The court noted that, in this case, J.S. “facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site.” *Id.*

148. *Id.* at 850-51.

accompanied by a request for twenty-dollar donations to hire a hitman to kill her.¹⁴⁹

The court was reluctant to base its decision solely on *Tinker*, as it believed that the speech was not political speech like the black armbands protected in *Tinker*.¹⁵⁰ The court did not resolve this issue, however, because it decided that, regardless of the test used, the result would be in favor of the school.¹⁵¹ J.S.'s speech was "lewd, vulgar and plainly offensive,"¹⁵² "caused actual and substantial disruption of the work of the school,"¹⁵³ and "created disorder and significantly and adversely impacted the delivery of instruction."¹⁵⁴ Consequently, the court held that the speech was unprotected on-campus speech, and the resulting suspension did not violate his First Amendment rights.¹⁵⁵

One year before the *J.S. v. Bethlehem* decision, however, the Western District of Pennsylvania held that, under the *Tinker* test, a student's Internet speech was protected.¹⁵⁶ The school suspended a student after he composed a disparaging "Top Ten" list ("The Bozzuto List") about the school's athletic director and emailed it to his friends from his home computer.¹⁵⁷ The court noted that "school officials' authority over off-campus expression is much more limited than expression on school grounds."¹⁵⁸ Although another student eventually printed and distributed the list at school,¹⁵⁹ the list did not disrupt school or interfere with anyone's rights.¹⁶⁰ Specifically highlighting the applicability of *Tinker* to student Internet speech, the court explained that "disliking or being upset by the content of

149. *Id.* at 851.

150. *Id.* at 865-66, 868.

151. *Id.* at 867. The other test described by the court was the test used in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). For an explanation of this test, see *supra* notes 93-99 and accompanying text.

152. *J.S.*, 807 A.2d at 868.

153. *Id.* at 869.

154. *Id.*

155. *Id.* at 860-69 (detailing other significant case law regarding Internet speech by public school students).

156. *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001).

157. *Id.* at 448.

158. *Id.* at 454.

159. *Id.* at 449.

160. *Id.* at 454-58.

a student's speech is not an acceptable justification for limiting student speech under *Tinker*.”¹⁶¹

Without Supreme Court guidance, the applicability of *Tinker* to Internet speech cases is unclear. Because MySpace speech generally occurs as strictly off-campus Internet speech,¹⁶² schools are hampered by the lack of clear, judicially determined standards regarding the limits of their disciplinary actions. If the student Internet speech occurs off-campus, unless the school can prove an actual disruption on-campus, the school should not punish or prohibit the speech.

3. Accessing Information and Ideas

Value inculcation and students' First Amendment rights are again at odds when schools attempt to block students' right to receive information and ideas.¹⁶³ Although schools have an interest in indoctrinating students with a single set of core values, students' access to discussion, debate, information, and ideas prepares them for our pluralistic society.¹⁶⁴

In a 1982 plurality opinion, the Supreme Court recognized public school students' right to receive information.¹⁶⁵ At issue was a board of education's demand to remove certain books from its school libraries that it considered “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.”¹⁶⁶ The school board members believed the books “offended their social, political and moral tastes.”¹⁶⁷ Justice Brennan emphasized the right to receive information and ideas as a corollary of the rights of free speech and press and noted that students, as persons under the Constitution, are beneficiaries of this right.¹⁶⁸ Quoting his language from *Lamont v. Postmater General*, Justice Brennan wrote, “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not

161. *Id.* at 455 (quoting *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)).

162. *See supra* notes 36-37 and accompanying text.

163. *See supra* notes 70-75 and accompanying text.

164. *See* LANE, *supra* note 85, at 130-32.

165. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality opinion).

166. *Id.* at 857 (alteration in original).

167. *Id.* at 858-59 (citation omitted).

168. *Id.* at 867-68.

free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."¹⁶⁹

The Court determined that, despite the schools' function as value inculcators, school libraries should be places where "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum."¹⁷⁰ Because access to new and different ideas and viewpoints "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members,"¹⁷¹ schools may not restrict students' right to receive information and ideas in school libraries.

Although a student's right to receive information is relevant in the MySpace context, the *Pico* decision addressed only school libraries. A student's right to receive information outside of school deserves even greater protection.¹⁷²

III. ADDITIONAL CONSTITUTIONAL PROTECTIONS FOR STUDENT MYSPACERS

The Supreme Court has repeatedly acknowledged students' protections as persons under the Constitution.¹⁷³ Doctrines regarding the "right to receive" information in places other than school libraries, expressive association, and speech advocating violent or lawless action, have not been applied in the framework of school disciplinary actions. A review of these doctrines is useful to determine their applicability, because they are likely to be called into question by MySpace suspensions and expulsions. These rights, like those described in Part II of this Note, should receive particularly strong protection when schools attempt to curtail student behavior off campus, where student freedoms are "at their zenith."¹⁷⁴

169. *Id.* at 867 (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

170. *Id.* at 869 (quoting *Right to Read Def. Comm. v. Sch. Comm. of Chelsea*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

171. *Id.* at 868.

172. See *supra* Part II.A.2.c.

173. See, e.g., *supra* note 79 and accompanying text.

174. See *supra* note 128 and accompanying text.

A. Combining the Right to Privacy and the Right To Receive Information

MySpace users often read information posted by others on profiles, messages, and group pages. When a student accesses such information at home, her right to receive information should be granted even greater protection than would be allowed on school grounds, because the student is protected not only by her right to receive, but also by her right to privacy.¹⁷⁵

The Supreme Court has recognized that the right to receive information and ideas is enhanced in the privacy of one's home. In *Stanley v. Georgia*,¹⁷⁶ a man was arrested for looking at obscene material in the privacy of his own home. The Supreme Court held that his arrest was unconstitutional because:

[T]he Constitution protects the right to receive information and ideas.... This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.¹⁷⁷

A student's right to receive information at home via Internet sites such as MySpace should be granted greater protection than those Internet sites that are read or viewed at school. Due to public school

175. The right to privacy under the Fourteenth Amendment protects both adults and minors. See Elisabeth Frost, Note, *Zero Privacy: Schools Are Violating Students' Fourteenth Amendment Right of Privacy Under the Guise of Enforcing Zero Tolerance Policies*, 81 WASH. L. REV. 391, 391 (2006) (arguing that schools' "zero tolerance" disciplinary drug policies for contraception infringe on students' privacy rights). Children's rights to privacy have been acknowledged in the school context with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2006). FERPA conditions a school's receipt of federal funds on the school's compliance with statutory requirements to protect access to students' records. *Id.* See also Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 564 (2004).

176. 394 U.S. 557 (1969).

177. *Id.* at 564 (citations omitted).

regulations blocking MySpace from schools, student MySpace activity is now decidedly *off campus*.¹⁷⁸

The Court in *Stanley* emphasized:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.¹⁷⁹

Similarly, a school should not have the authority to regulate what a student views or reads on MySpace from her home computer.

The assertion that children do not deserve the privacy protection afforded to adults because Internet activity without supervision can be dangerous does little to weaken this argument. Even if the need to protect children outweighs their privacy interests, the state may not infringe on parents' privacy interests in rearing their children as they see fit.¹⁸⁰ Children's off-campus protection is the job of parents, not schools.¹⁸¹

When accessing information on MySpace from her home computer, a student is protected by her right to receive information and ideas combined with her right to privacy. The parents, not the schools, are responsible for monitoring and disciplining this behavior.

B. Rights to Expressive Association

MySpace encourages members to connect with others who share similar interests or values. Users create groups based on

178. See *supra* note 36 and accompanying text.

179. *Stanley*, 394 U.S. at 565.

180. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Stuart, *supra* note 175, at 564 (noting that privacy interests of children are normally subsumed by their family's privacy interests).

181. See Anita L. Allen, *Minor Distractions: Children, Privacy and E-Commerce*, 38 HOUS. L. REV. 751, 772-73 (2001) (arguing that it is the parents' job, not the legislature's, to make decisions to protect their children).

shared interests and invite their MySpace friends and other members to join.¹⁸² Some groups, such as Food Not Bombs¹⁸³ and Support Same-Sex Marriages!,¹⁸⁴ encourage support of popular social and political issues. Others, such as Occult Studies¹⁸⁵ and Anarcho-Communism,¹⁸⁶ offer a forum for people with alternative or unpopular views to discuss their ideas and opinions.

Students who participate in these and other MySpace groups deserve full protection to associate freely under the First Amendment. Freedom of association “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”¹⁸⁷ Although value inculcation is an important role of schools and school administrators on school grounds,¹⁸⁸ students off campus should be protected when they choose to explore other values and viewpoints.

To determine whether a group is protected to associate freely without governmental intrusion, the Supreme Court created a three-prong test in *Boy Scouts of America v. Dale*.¹⁸⁹ First, the group must engage in “expressive association.”¹⁹⁰ The group or association does not have to meet or associate for the purpose of disseminating a particular message or value system to be protected, nor must every group member agree on the issue, message, or values being expressed. The group simply has to engage in some form of public or private expressive activity.¹⁹¹

Second, the state action in question must significantly burden the group’s ability to express its viewpoints.¹⁹² Deference is given both

182. See *supra* note 5 and accompanying text.

183. Food Not Bombs, <http://groups.myspace.com/foodnotbombs> (last visited Oct. 12, 2007) (advocating “sharing free vegetarian food with hungry people and protesting war and poverty throughout the Americas”).

184. Support Same-Sex Marriages!, <http://groups.myspace.com/thesupportgaymarriages> group (last visited Oct. 17, 2007).

185. Occult Studies, <http://groups.myspace.com/occult> (last visited Oct. 12, 2007).

186. Anarcho-Communism, <http://groups.myspace.com/ac> (last visited Oct. 12, 2007).

187. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000).

188. See *supra* notes 69-72 and accompanying text.

189. 530 U.S. 640 (2000).

190. *Id.* at 648.

191. *Id.*

192. *Id.* at 653.

to the group's articulation of its views and the group's statements of when its ability to express those views would be impaired.¹⁹³

Finally, the government's interests must not outweigh the burden imposed on the group.¹⁹⁴ The state may infringe on the right to associate for expressive purposes if governmental "[i]nfringements on that right [are] ... adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."¹⁹⁵

If a student MySpacer has created, joined, or participated in a MySpace group that engages in expressive activity, school disciplinary action for this behavior would significantly impair her ability to express her viewpoints. The student would be forced to curtail her expressive activity or risk continued punishment for it. A school's interests in maintaining on-campus discipline and inculcating students with a certain value system do not outweigh a student's interest in expressing and exploring new and different viewpoints. Furthermore, school discipline aimed at suppressing views different from the indoctrinating values of the school should not be allowed in any circumstance if the expressive association occurs off campus.

Under the *Dale* test, a student's freedom of expressive association should be protected from school disciplinary actions. School regulation of such associations "burdens the expression of individuals" and "threatens, crowds out, and commandeers their educational, soul-making role."¹⁹⁶

C. Advocacy of the Use of Force or Law Violation

MySpacers may post comments or write messages on their own profile pages, on group pages, or on others' profiles. At times, comments may advocate violence toward teachers, students, or others. Comments advocating violence or other lawless action may be protected by the First Amendment because punishing

193. *Id.* at 651-53.

194. *Id.* at 659.

195. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

196. Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1849-50 (2001).

“mere advocacy” of violence violates the First and Fourteenth Amendments.¹⁹⁷

Six weeks after issuing its *Watts* decision, the Supreme Court held in *Brandenburg v. Ohio* that “free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁹⁸ According to the Court, a Ku Klux Klan member could not be punished by an Ohio criminal statute that did not distinguish between advocacy of violence and incitement to imminent lawless action.¹⁹⁹ The Klan leader had been arrested for making statements such as “Nigger will have to fight for every inch he gets from now on” during a Klan organizers’ meeting.²⁰⁰ The Court held that “mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”²⁰¹

Today, courts may analyze threatening speech under either the *Watts* standard or the *Brandenburg* standard.²⁰² When the threat would be carried out by the speaker, courts use the *Watts* test.²⁰³ If, however, the speech incites others to commit violence, the *Brandenburg* standard applies.²⁰⁴ Often speech does not fit precisely into one of the two categories, so courts face difficulty in distinguishing and determining how to apply the two standards.²⁰⁵

Some courts have discussed the *Brandenburg* test in relation to school disciplinary action,²⁰⁶ but they have not clearly defined its

197. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

198. *Id.* at 447.

199. *Id.* at 448.

200. *Id.* at 446 n.1.

201. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)) (omission in original).

202. Scott Hammack, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 68 (2002).

203. See *supra* notes 102-04 and accompanying text.

204. Hammack, *supra* note 202, at 72.

205. *Id.* at 72-73.

206. See, e.g., *Boucher v. Sch. Bd.*, 134 F.3d 821, 829 (7th Cir. 1998) (discussing *Brandenburg* briefly, but holding that because case law regarding student expression was applicable, the *Brandenburg* test did not need to be applied).

application in this context. If MySpacers are suspended or expelled for posting comments advocating violence toward teachers or students, and these comments do not rise to the level of being likely to incite or produce imminent lawless action, these punishments would violate the student's First Amendment rights under the *Brandenburg* test.

IV. PROTECTING STUDENTS' CONSTITUTIONAL FREEDOMS: A SUGGESTED TEST

MySpace suspensions and expulsions have the potential to violate numerous constitutional protections afforded to students. As indicated in Parts II and III of this Note, the law regarding these protections is not well defined. The Supreme Court has not evaluated the "true threat" doctrine outside the criminal context and has not addressed the "fighting words" doctrine in regard to student speech, off-campus speech, student Internet speech, a student's right to receive information in the privacy of her home, the boundaries of off-campus expressive association, or a student's freedom to advocate violence or lawless activity. Conflicting lower court decisions often provide little clarification in these areas. Without more concrete guidance, schools do not know the limits of their authority, and students are not aware of the extent of their constitutional protections.

Evaluation of the constitutionality of MySpace suspensions and expulsions requires consideration of the competing interests of schools and students. The law discussed in Parts II and III of this Note does little to guide courts in weighing these interests. Because a "case itself only addresses one such situation and leaves open what other kinds of facts and conditions fall within this class and thus are subject to the stated rule,"²⁰⁷ courts do not have guidelines for weighing competing interests when multiple doctrines apply. Supreme Court decisions "do not purport to describe comprehensively what persons may and may not do across a broad range of activities"; instead they refer only "to a small set of activities, or often a single kind of act, carried out under specifically defined

207. Teitelbaum, *supra* note 60, at 580.

conditions.”²⁰⁸ A specific test is therefore needed to determine the constitutionality of school suspensions or expulsions for student off-campus MySpace activity. Such a test would provide guidance to schools and safeguards for students.

Courts should apply a test that acknowledges the state’s interest in maintaining order and discipline on campus, as well as the students’ interests in protecting and preserving their constitutional rights. This test should combine relevant factors from the doctrines described in Parts II and III of this Note.

Such a test must first determine whether the student-plaintiff engaged in the MySpace activity off school grounds.²⁰⁹ If a student’s suspension or expulsion stemmed from off-campus activity, her constitutional protections are “at their zenith.”²¹⁰ To support her claim that all MySpace activity occurred off campus, a student could offer evidence of her school district’s computer use policy prohibiting MySpace access at school, the existence of firewalls blocking MySpace from the school’s computers, teacher supervision of computer use on campus, and parental knowledge of MySpace use from a home computer.²¹¹

If the student offers evidence sufficient to support a finding that all MySpace activity occurred off campus, the burden should then shift to the school to show that the disciplinary action did not violate the student’s constitutional protections. Because the MySpace activity occurred off campus, courts should presume that the disciplinary action violated the student’s rights.²¹² In order to rebut this presumption, the school should satisfy a three-prong test, proving that they have followed all procedural requirements, that the student MySpace activity caused a valid on-campus concern, and that the school’s interest in order and value inculcation outweighs the student’s constitutional rights.

208. *Id.* at 578.

209. If the MySpace activity occurred on campus, the suspension or expulsion would likely be based in part on a violation of the school’s computer use policy, and the suggested test would not be applicable. *See supra* note 36. Notably, this test could also be applied to off-campus student Internet activity on other online social-networking or dating sites, as well as instant message exchanges, blog postings, and online chats.

210. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

211. *See supra* note 36 and accompanying text.

212. *See supra* notes 121, 125, 128-29 and accompanying text.

The first prong of the test requires the school to show that it followed all procedural requirements before suspending or expelling the student. At a minimum, administrators must provide the student with notice of the charges against her, provide an explanation of the evidence of the charges, and allow the student an opportunity to voice her side of the story.²¹³ If the school fails to satisfy this prong of the test, the school has violated the student's due process rights by depriving her of liberty and property without due process of law.²¹⁴

If the school meets the first prong of the test, it must then show that the student's off-campus MySpace activity caused a valid on-campus concern. Administrator, student, or teacher anxiety would not be sufficient to yield on-campus concern; the school must show more than a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."²¹⁵ The suspension or expulsion must have been based on MySpace activity that "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."²¹⁶ A school may show any material interruption in the education of another student or in the mission of the school.²¹⁷ If the school is unable to show a material and substantial interference on campus, the school action to regulate or prohibit student behavior is without merit.²¹⁸

Once a school satisfies both the first and second prongs of the test, the school must show that its interest in maintaining order and discipline on school grounds outweighs the protection and preservation of students' constitutional rights. A school satisfies this third prong of the test by showing that the nature of the student's behavior does not warrant full constitutional protection. For example, a student who posted comments or wrote messages on MySpace would not enjoy protection under the First Amendment if

213. See *supra* note 66 and accompanying text.

214. See *supra* note 67 and accompanying text.

215. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

216. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

217. See *supra* notes 83-84 and accompanying text. The following behaviors would be examples of interruptions sufficient to meet the second prong of the test: fights or verbal altercations at school, disruptions of classroom instruction, threats or purposeful intimidation, and bullying.

218. See *supra* notes 82-84 and accompanying text.

her comments constituted a “true threat”²¹⁹ or incited imminent violent or lawless action.²²⁰ The school’s interest would outweigh her constitutional protections. In contrast, when the student’s comments merely advocated illegal action²²¹ or were political or opinion speech,²²² her constitutional rights would likely outweigh the school’s interest in maintaining discipline. When the student’s suspension or expulsion stems from participation in a MySpace group, the student’s constitutional rights would likely outweigh the school’s interest if the group’s activity constituted protected expressive association under the *Dale* test.²²³ If the group’s activity did not qualify for protection under the *Dale* test, the school’s interest would outweigh the student’s constitutional rights. Finally, if the student had simply accessed or viewed information on MySpace, her right to receive information and right to privacy would likely outweigh the school’s interest.²²⁴

The purpose of this test is threefold. First, it provides guidance to schools regarding the limits of their disciplinary authority for student MySpace activity occurring off campus. Second, it safeguards students’ constitutional rights. Third, it provides structure for consistent analyses by courts in evaluating schools’ and students’ competing interests.²²⁵

219. See *supra* Part II.A.2.b.

220. See *supra* Part III.C.

221. Under *Brandenburg*, speech advocating violence or illegal conduct is protected, so long as such speech does not incite imminent and probable violent or illegal conduct. See *supra* notes 198-99 and accompanying text.

222. In order for state action to be deemed unconstitutional under the test, a group must engage in “expressive association,” the state action must significantly burden the group’s ability to express its viewpoints; and the government’s interests must not outweigh the burden imposed on the group. See *supra* notes 192-97 and accompanying text.

223. See *supra* Part III.B.

224. See *supra* Part III.A.

225. Arguably, in light of the perceived need for increased protection against school violence following the Columbine shootings, the state’s interest in maintaining school safety is not sufficiently safeguarded under this test. Schools are able to protect themselves against legitimate dangers, however, as the balancing test would allow for punishments for MySpace behavior that constitutes a “true threat” or “fighting words” or incites imminent violent or lawless action. See *supra* notes 219-20 and accompanying text. Conversely, under the test, students would be protected against unconstitutional punishments arising from exaggerated, unsubstantiated, or unwarranted fear of school violence.

V. APPLICATION OF THE THREE-PRONG MYSPACE TEST

The test suggested in Part IV provides courts with a framework by which to analyze the constitutionality of school MySpace punishments consistently.²²⁶ Application of this test to the examples of MySpace-related suspensions and expulsions described in the Introduction and Part I of this Note illustrates the test's effectiveness.

The twenty TeWinkle Middle School suspensions described in this Note's Introduction are extreme examples of school discipline for MySpace activity. Under the proposed test, these suspensions would violate the students' constitutional rights.

The students would satisfy the test's threshold requirement by parental testimony that all of the MySpace activity at issue occurred from home computers.²²⁷ The burden would then shift to the school to rebut the presumption that the suspensions violated students' rights.

The school would likely satisfy the first prong of the test because school officials showed printouts of the group posts to the students and their parents, explained why the students were being suspended for the posts, and allowed the students to explain their involvement.²²⁸

The school would not likely meet the second prong of the test, however. The suspensions occurred after a teacher discovered the group posts online and alerted administrators.²²⁹ The posts had not caused a material or substantial disruption on campus.

Even if the school were able to satisfy the second prong of the test, the school's action would fail the third prong of the test. Although the speech of the boy who *posted* the comments on the group page could be considered threatening and, therefore, unprotected speech, none of the students who were suspended had posted any comments at all.²³⁰ They were suspended merely for reading the

226. Although a balancing test is inherently subjective, use of a consistent framework would yield far more consistent results than would be achieved without such structure.

227. See *supra* notes 3, 19 and accompanying text.

228. See Edds, *supra* note 1.

229. *Id.*

230. See *supra* notes 10-12 and accompanying text.

posts and joining the group.²³¹ Under the *Dale* test, the students' freedom of expressive association might not be protected because the school's interest in protecting student safety arguably outweighed the burden imposed on the students.²³² The students' right to receive information, combined with their right to privacy, however, should have protected them from school disciplinary action.²³³ Students should not be disciplined for simply reading or viewing material on MySpace from their home computers. At home, students should be free to access and receive information and values that are different from those expressed at school.²³⁴ Because the school would not be able to meet all three prongs of the proposed test, it could not rebut the presumption of the unconstitutionality of its actions.

Under the three-prong analysis, Bryan Lopez's five-day suspension for MySpace postings containing satirical comments on the physical condition of the school, the behavior and demographics of the students and teachers, the school's lack of resources, and the perceived racial biases of the school faculty would be an unconstitutional violation of Lopez's freedom of speech.²³⁵ Because the school's Internet filters prevented MySpace access on school grounds,²³⁶ Lopez would be able to meet the threshold requirement of the test.

Even if the school fulfilled the procedural requirements under the first prong of the test, the school would not likely be able to meet the second or third prongs of the test. Lopez's suspension was based on a school policy that forbids off-campus conduct "that is detrimental to the welfare or safety of other students or district employees."²³⁷ No evidence exists, however, that Lopez's comments created an actual disruption at school. Consequently, the second prong of the test is not satisfied.

Assuming, arguendo, that the school's interest in maintaining on-campus discipline does not outweigh Lopez's free speech rights, Lopez's satirical commentary was not threatening, and it did not incite imminent violence or other lawless action. Instead, the

231. See *supra* note 17 and accompanying text.

232. See *supra* notes 192-98 and accompanying text.

233. See *supra* notes 178-82 and accompanying text.

234. See *supra* note 182 and accompanying text.

235. For the facts of Lopez's case, see *supra* notes 40-43 and accompanying text.

236. See *supra* note 41 and accompanying text.

237. See *supra* note 42 and accompanying text.

comments Lopez posted were political commentary at odds with the school's beliefs. Lopez's political speech deserved the full extent of protection granted under the First Amendment. Lopez's right to exercise the freedom of speech outweighed the school's interest in preventing any slight disruptions on school grounds. The school would not be able to rebut the presumption that it had violated Lopez's constitutional rights.

Similarly, the suspensions of the two Oak Lawn elementary students who posted pictures of George Bush, pictures of women in bikinis, foul language, and disparaging comments about other schools would be constitutionally invalid under the proposed test.²³⁸ Parents could offer evidence that the MySpace activity occurred at home, off school grounds.²³⁹ This testimony would meet the test's threshold requirement.

Under the assumption that the school had followed the procedural requirements under the first prong of the test, the school would probably not meet the second and third prongs of the test. Principal Gross's assertion that she was acting in the "best interest" of the students does not indicate that any material and substantial disruption actually occurred on campus.²⁴⁰ The best-interest standard does not apply when schools are regulating off-campus activity. Thus, the school could not meet the second prong of the test.

Furthermore, despite the unpleasant and surprising nature of some of the language and pictures displayed on the students' MySpace pages, the speech was still protected under the First Amendment. The speech was not threatening and did not incite unlawful action. The foul language and image of President Bush extending his middle finger may, however, be considered obscene or lewd.²⁴¹ If the images and language were not considered obscene or lewd, the school's interest in value inculcation would not outweigh the student's First Amendment rights. Accordingly, the school would not be able to meet the third prong of the test. If, however, the images and language were considered obscene or lewd, the speech would not deserve full protection under the First Amendment, and the school would meet the third prong of the test.

238. For the facts of the Oak Lawn case, see *supra* note 44 and accompanying text.

239. See *supra* notes 46-47 and accompanying text.

240. See *supra* note 48 and accompanying text.

241. See *supra* notes 93-99 and accompanying text.

Nevertheless, because the school did not meet the second prong of the test, the suspensions would be constitutionally invalid.

In contrast, the suspensions for threats by and against “Goth” students in Beaverton, Oregon, did not violate students’ constitutional rights.²⁴² Although the students could meet the test’s threshold requirement by showing that MySpace was blocked on all school computers,²⁴³ the school could rebut the presumption that the suspensions violated student rights.

Assuming that the school followed all required disciplinary procedures, the school could easily show an actual on-campus disruption. Due to the numerous threats posted on MySpace, 250 students missed class on June 6, 2006.²⁴⁴ The threats caused a material and substantial disruption to the education of hundreds of other students. Such a disruption meets the requirements of the second prong of the test.

Additionally, the school’s interest in maintaining safety and protecting its students far outweighed the students’ rights because the students’ “true threat” and “fighting words” speech did not deserve full protection under the First Amendment.²⁴⁵ Consequently, the school could regulate, prohibit, or punish the speech without violating the students’ First Amendment rights.

The preceding examples demonstrate the necessity of a test that evaluates student MySpace suspensions and expulsions using a consistent framework. In order to protect the interests of both students and schools adequately, a delicate balancing test must be employed. Because the test requires courts to balance factors on a case-by-case basis, the results will vary depending on the reasons for the punishment, the student’s rights that are in need of protection, and the school’s interest. Without a test to establish consistent guidelines with which to determine punishments, students will continue to be suspended and expelled for behavior that should be constitutionally protected.

242. For the facts surrounding the Beaverton suspensions, see *supra* notes 49-55 and accompanying text.

243. See *supra* note 55 and accompanying text.

244. See *supra* note 54 and accompanying text.

245. See *supra* Part II.A.2.b.

CONCLUSION

Public schools aim not only to teach students information but also to protect them, to guide them, to prepare them for the future, and to instill values in them. Although achieving these goals is essential in maintaining a strong and able citizenry, these goals do not always override the individual interests and protections of students. Schools should protect students, but they may not trample on their constitutional rights in the process.

In light of heightened student MySpace activity, schools have become increasingly involved in monitoring and disciplining students' online social-networking behavior. When MySpace activity at home leads to potential or perceived problems at school, schools' aims and interests conflict with students' constitutional rights. Due to sparse and inconsistent judicial guidance, schools are unsure of the appropriate limits in disciplining this off-campus behavior. As a result, students' constitutional protections may be infringed. In order to begin defining disciplinary boundaries and protecting students' rights adequately, courts should adopt a test that consistently evaluates the constitutionality of potential MySpace suspensions and expulsions.

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