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## From Keyboard to Schoolhouse: Student Speech in an Age of Pervasive Technology

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## NOTE

# From Keyboard to Schoolhouse: Student Speech in an Age of Pervasive Technology

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

ERIN M. LEACH\*

### I. INTRODUCTION

To most Americans, the First Amendment's Free Speech Clause is among the most sacred provisions of the Constitution. At first reading, it seems a broad guarantee of the right of citizens to speak their mind without limitation. But the jurisprudence on the clause shows that the law governing free speech is far from uncomplicated. The analysis is made more complex in the context of student speech due to a different set of standards governing the rights of students while they are under the care of their schools.

*S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, a recent Eighth Circuit decision, outlines the intricacies of the legal rights of students when speaking out about their school environment.<sup>1</sup> It also highlights the intricacies that the advent of the Internet has added to the issue. With the ability of students to speak through so many different mediums and in almost any location, the decision of whether to treat their speech as occurring inside or outside the schoolhouse gates becomes increasingly more involved with each technological advance.

Beyond the First Amendment concerns at issue in *Wilson* are broader implications regarding the effects that student speech can have on the school environment. When groups of individuals are gathered in one place, the freedoms of each must necessarily yield somewhat to the rights of the others. Students, therefore, cannot exercise unrestrained freedom of speech if safety or disciplinary concerns are implicated.<sup>2</sup> Additionally, school officials have a

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1. 696 F.3d 771 (8th Cir. 2012).

2. See generally *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that a school could properly discipline a student who displayed a "Bong Hits for Jesus" banner at a school function where the principal believed the banner promoted drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that a school has the authority to control the content of the student newspaper where the newspaper bore

duty to not only provide a facility for students to exercise unrestrained rights, but also to instruct and protect the students in their care.<sup>3</sup> These concerns create unique justifications for regulating that most sacred of rights in ways that would never be allowed outside of the school context.

## II. FACTS AND HOLDING

Defendant Lee's Summit R-7 School District (the District) serves a 117-square-mile portion of the southeastern Kansas City metropolitan area.<sup>4</sup> The District operates eighteen elementary schools, three middle schools, three high schools, and several alternative educational institutions.<sup>5</sup> Among its students in 2011 were twin brothers Steven and Sean Wilson (the Wilsons), who were juniors at Lee's Summit North High School (LSNHS).<sup>6</sup> The case was brought on behalf of the twins by their parents, Brian and Linda Wilson.<sup>7</sup> At the time of the incident, the Wilsons were honors students at LSNHS and had never before experienced any significant disciplinary issues.<sup>8</sup>

In December of 2011, the Wilsons created a blog called "NorthPress."<sup>9</sup> The Wilsons alleged that the blog was meant as a forum for half a dozen of their friends who shared a similar sense of humor.<sup>10</sup> Their purpose in creating the website was to "discuss, satirize, and 'vent' about events at [LSNHS]."<sup>11</sup> The site was set up so that it would not appear in a normal Google search, but instead could be accessed only by an Internet user who knew the exact web

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the imprimatur of the school); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that the First Amendment does not preclude a school district exercising its discretion to discipline a student who gives a "lewd" speech at a high school assembly); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968) (holding that to constitutionally discipline student expression, a school must show that the speech would reasonably be expected to have caused substantial disruption of, or material interference with, school activities).

3. *Morse*, 551 U.S. at 397; *Bethel*, 478 U.S. at 683; *Tinker*, 393 U.S. at 507.

4. *About Us*, LEE'S SUMMIT R-7 SCH. D., <http://www.lsr7.org/district/about-us/> (last visited Mar. 20, 2013). The District had an enrollment of 17,600 students during the 2013-2014 school year. *Id.*

5. *Id.* One of these alternative institutions is Summit Ridge Academy (SRA) which serves students in grades 7-12 who are experiencing difficulties in their education such as being retained for one or more grades, chronic absenteeism or truancy, discipline problems, etc. See *Admissions and Procedures*, SUMMIT RIDGE ACAD., <http://sra.leesummit.k12.mo.us/admissions.htm> (last visited Feb. 18, 2014). The Wilsons' suspensions would have placed them at SRA. See *Wilson*, 696 F.3d at 774.

6. *Wilson*, 696 F.3d at 773.

7. *Id.* at 771.

8. Brief of Appellees at 11, *Wilson*, 696 F.3d 771 (No. 12-1727), 2012 WL 2884128.

9. *Wilson*, 696 F.3d at 773.

10. See Brief of Appellees, *supra* note 8, at 12.

11. *Wilson*, 696 F.3d at 773.

address.<sup>12</sup> Once found, however, NorthPress was not password protected; readers could access all posts, blogs, and information posted on the website.<sup>13</sup> The Wilsons alleged that the lack of password protection was due only to their limited technical expertise, not to a desire to make the content public.<sup>14</sup>

The website launched on December 12, 2011, and the first posts were added within the next few days.<sup>15</sup> The content of the Wilsons' posts were not in dispute; many were racist, sexually explicit, and degrading to female classmates, and most posts also used offensive language.<sup>16</sup>

Steven Wilson authored a post entitled "Tips for the Next Big Fight" which discussed the threat of fights at LSNHS and purported to give students advice on how to avoid being injured.<sup>17</sup> He proposed that "angry black children" were the cause of the fights that had been happening at the school and warned his readers that it was difficult to tell "when one of these [black students] will chimp out and let jungle coon out."<sup>18</sup> Steven Wilson also admitted responsibility for "The Biggest Bitch in the Whole School!" which used obscenity to criticize a female student's driving, dating preferences, weight, and affinity for tanning.<sup>19</sup> This post, like the others on NorthPress that talked about LSNHS students, was very specific and included the first and last names of individual students.<sup>20</sup>

Sean Wilson admitted to writing a blog post that specifically named a female student and described, in explicit detail, her recent sexual encounter with "some guy."<sup>21</sup> The post used derogatory terms about the student's appearance and personality, including phrases like "pug-looking ass forehead" and "complete annoying bitch."<sup>22</sup>

In addition to these contributions to the site by the Wilsons, another post was written by a different individual, who remained unnamed throughout the suit.<sup>23</sup> This post was of a racist nature and, like the other racist posts on NorthPress, discussed fights that had been happening at LSNHS and mocked,

12. *Id.* The Wilsons purchased a Dutch domain name, rather than an American .com site, which may have contributed to the limited accessibility of the site. *Id.* It is unclear whether the Wilsons intended their site to be difficult to find, though they assert in their brief that they wanted to keep uninvited students out. See Brief of Appellees, *supra* note 8, at 12.

13. *Wilson*, 696 F.3d at 773.

14. Brief of Appellees, *supra* note 8, at 12.

15. *Wilson*, 696 F.3d at 773.

16. *Id.*

17. Appellants' Brief at 5, *Wilson*, 696 F.3d 771 (No. 12-1727), 2012 WL 6653250.

18. *Id.*

19. *Id.*

20. *Wilson*, 696 F.3d at 773.

21. Appellants' Brief, *supra* note 177, at 6.

22. *Id.*

23. *Wilson*, 696 F.3d at 773.

by name, some of the African American students who had been involved.<sup>24</sup> Unlike the others, however, this post had the N-word in the title<sup>25</sup> and was posted without the Wilsons' knowledge or approval.<sup>26</sup> This post was added to the site early on the morning of December 16, 2011, and was removed by the author later that same day.<sup>27</sup>

The parties disputed the extent to which, if at all, LSNHS computers were used to create or maintain the site,<sup>28</sup> but the parties did agree that the site was accessed from LSNHS' computers multiple times during the week of December 12, 2011.<sup>29</sup> The District's records indicated that at least three of the website visits on December 14 occurred in a computer lab where the Wilsons had class that day.<sup>30</sup> It was unclear from the records whether these visits included uploading of any content or were just views of the website.<sup>31</sup>

Although the Wilsons claimed that they told only five or six friends about the website after its creation and that they did not intend for news of the website to reach any other ears, word spread throughout the student body.<sup>32</sup> By December 16, 2011, the website's existence was general knowledge among students at LSNHS.<sup>33</sup> Much of the interest in the site revolved around the racist post authored by the third student, which came to be known colloquially at LSNHS as "the rant."<sup>34</sup> Teachers testified that students began talking about NorthPress in the classrooms and halls on that morning; and the Wilsons later admitted that they had witnessed many students using personal cell phones to access the site after the school blocked computer access to it.<sup>35</sup> Awareness of the situation spread beyond students to parents and community members; the press even showed up, sparking further interest and creating

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24. *Id.*

25. Brief of Appellees, *supra* note 8, at 10.

26. *See id.* at 14.

27. *Id.*

28. The Wilsons allege that NorthPress was a "private internet blog on their family computers." *Id.* at 11. The District, however, offered evidence that another student saw the Wilsons researching how to create a website, uploading files, and discussing the appearance of the site at school. Appellants' Reply Brief at 10, *Wilson*, 696 F.3d 771 (No. 12-1727), 2012 WL 3720442. The District's computer records also indicate that one of the computers at LSNHS was used to upload files to the website on December 13, 2011. *Wilson*, 696 F.3d at 773.

29. Appellants' Reply Brief, *supra* note 28, at 12. Six computers accessed NorthPress on December 14; two accessed the site on December 15; and over 100 attempts at access were made on December 16. *See id.*

30. *Id.*

31. *Wilson*, 696 F.3d at 773.

32. *Id.* at 773-74.

33. *Id.* at 774.

34. Brief of Appellees, *supra* note 8, at 16.

35. Appellants' Reply Brief, *supra* note 28, at 12.

more of a disturbance on campus.<sup>36</sup> On that same day, school administrators discovered that the Wilson brothers were responsible for NorthPress and immediately suspended them for ten days.<sup>37</sup>

During this ten-day period, the District held a hearing to determine how the Wilsons should be punished.<sup>38</sup> After hearing testimony from the Wilsons and their father, the members of the disciplinary commission recommended a 180-day suspension, and the District Superintendent agreed.<sup>39</sup> The Wilsons appealed the results of that hearing and were granted a second hearing at which they could present evidence and cross-examine the District's witnesses.<sup>40</sup> At the culmination of the second hearing, the suspensions were upheld, and the Wilsons were provided the option of attending Summit Ridge Academy (SRA) – an alternative school for students experiencing disciplinary issues – since they could not attend LSNHS for the duration of the 180-day suspension.<sup>41</sup>

The Wilsons' suspension became effective on January 11, 2012.<sup>42</sup> The District's stated reason for the suspension was the creation of the website and the disruption it caused at LSNHS.<sup>43</sup> On March 6, 2012, the Wilsons' parents sued the District, alleging a violation of their sons' free speech rights.<sup>44</sup> The Wilsons sought a preliminary injunction to prevent the District from enforcing the suspensions.<sup>45</sup>

A preliminary injunction hearing was held in the U.S. District Court for the Western District of Missouri in late March 2012.<sup>46</sup> The Wilsons contested both the District's allegation that their conduct was disruptive and the presumption that SRA was a viable alternative school for them to attend.<sup>47</sup> The Wilsons first denied that they were racists and claimed that the posts had not been intended to be offensive, but instead were meant as satire.<sup>48</sup> The brothers also testified that the other student's post was the cause of the disruption at LSNHS.<sup>49</sup> Next, the Wilsons alleged that the alternative school, SRA, was not an acceptable option because it did not offer challenging courses, such as

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36. *Wilson*, 696 F.3d at 774. The District reported that phone calls from media outlets and from concerned parents began on December 16, 2011, and continued for some time after the date of "the rant." *Id.*

37. *Id.*

38. *Id.*

39. Appellants' Brief, *supra* note 17, at 7.

40. *Wilson*, 696 F.3d at 774; Appellants' Brief, *supra* note 17, at 8.

41. *Wilson*, 696 F.3d at 774.

42. *Id.* at 773.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 774.

47. *Id.*

48. *Id.*

49. *Id.* at 779.

ACT or honors courses, and because it did not provide an opportunity to earn college band scholarships.<sup>50</sup> Because both brothers planned to attend college and hoped to pursue careers in music or theater,<sup>51</sup> they alleged that the District's action in suspending them constituted irreparable harm.<sup>52</sup>

The District refuted the Wilsons' statements with the testimony of several teachers who claimed that the school environment had been greatly disrupted on December 16, 2011, and that many faculty members had trouble controlling their noticeably upset and excited classes.<sup>53</sup> Administrators further pointed out that the media arrived on LSNHS's campus on the 16<sup>th</sup> and that parents of students enrolled in the high school subsequently began calling the school to inquire about bullying, safety, discrimination, and similar concerns.<sup>54</sup> The District also expressed its concern that the brothers' "early return to [LSNHS] would cause further disruption and might endanger the Wilsons."<sup>55</sup> Lastly, the District argued that SRA was a viable alternative for the Wilsons' education, as it was an accredited school and would keep the Wilsons on track to graduate.<sup>56</sup>

The district court granted the Wilsons' motion for a preliminary injunction, thereby staying the brothers' suspensions and allowing them to return to LSNHS as of April 9, 2012.<sup>57</sup> In so ruling, the district court made several conclusions of fact.<sup>58</sup> The court concluded that NorthPress did cause an actual disruption on LSNHS's campus on December 16, 2011, and that the main cause of that disturbance was the post by the third student.<sup>59</sup> However, the court decided that at least one post that had been "part of the sensation that day" had been authored by the Wilsons.<sup>60</sup> The court further found that the blogs present on the NorthPress website were "targeted at" LSNHS.<sup>61</sup>

50. *Id.* at 774. It seems these claims have some merit. The principal of SRA testified that (a) only thirteen percent of SRA students go on to get a college degree and that college preparation is not a focus of the school, and (b) there was no band program at SRA and that no SRA student had ever received a scholarship for music or theater. Brief of Appellees, *supra* note 8, at 18.

51. Brief of Appellees, *supra* note 8, at 11.

52. *Id.* at 18-19.

53. *Wilson*, 696 F.3d at 774.

54. *Id.*

55. *Id.*

56. *Id.* at 779.

57. *Id.* at 775.

58. *Id.* The District was not satisfied that the district court actually made the findings of fact necessary to granting a preliminary injunction. *See* Appellants' Brief, *supra* note 17, at 18-20. The District argued that Federal Rule of Civil Procedure 65(d) requires that any order for an injunction set out the reasons that it is granted or denied, and that the district court judge did not include sufficient information in its verbal order. *See id.*

59. *Wilson*, 696 F.3d at 775.

60. *Id.*

61. *Id.*

In making its decision, the district court considered the “likelihood of success [on the merits], whether the plaintiffs [would] suffer irreparable harm if relief [were] denied, whether the balance of inequities tip[ped] in the plaintiffs’ favor, and whether injunctive relief [was] in the public interest.”<sup>62</sup> After analyzing these issues, the court found that the loss of potential band scholarships and the lack of honors classes constituted irreparable harm to the Wilsons.<sup>63</sup> The district court further concluded that granting the Wilsons’ injunction would neither harm the District nor affect any significant public interest.<sup>64</sup> This led the district court to declare that the “balance of equities clearly favored the Wilsons.”<sup>65</sup>

The District subsequently appealed the district court’s decision in a notice of appeal dated March 27, 2012.<sup>66</sup> The U.S. Court of Appeals for the Eighth Circuit considered two questions on appeal. First, did the district court make a sufficient finding of irreparable harm and an appropriate finding of the plaintiffs’ likelihood of success?<sup>67</sup> And second, did the district court improperly shift the burden from the Wilsons to the District in conducting the preliminary injunction hearing?<sup>68</sup>

On appeal, the Wilsons argued that the findings made by the district court were adequate to support an injunction and that the posts on NorthPress were protected by the First Amendment’s Free Speech Clause, making the Wilsons likely to win on the merits.<sup>69</sup> They further alleged that section 230 of the Communications Decency Act, which prevents providers of Internet services from being responsible for user-provided content,<sup>70</sup> prohibited punishment for their behavior.<sup>71</sup> The District alleged that issuing an injunction completely forgave the Wilsons’ punishment because they were scheduled to graduate before the appeal would be completed.<sup>72</sup> This argument posited that the district court had improperly awarded the Wilsons the totality of the relief they asked for, without the necessity of a trial on the merits.<sup>73</sup>

62. *Id.* at 774 (alterations in original omitted) (quoting the district court’s oral ruling) (internal quotation marks omitted).

63. *Id.* at 775.

64. *Id.*

65. *Id.*

66. *Id.* at 773. On March 29, 2012, the District also filed and was denied a Motion for a Stay Pending Appeal. *Id.* The Wilsons therefore returned to LSNHS shortly after that date. *Id.* at 775.

67. *Id.*

68. *Id.* at 775-76.

69. *Id.* at 776.

70. Communications Decency Act, 47 U.S.C. § 230(c)(1) (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

71. *Wilson*, 696 F.3d at 776.

72. *Id.* at 775.

73. See Appellants’ Brief, *supra* note 17, at 25.



The Eighth Circuit reversed the district court's ruling, revoking the preliminary injunction and allowing the District to enforce the Wilsons' suspensions.<sup>74</sup> In so ruling, the Eighth Circuit held that the Wilsons did not have a substantial likelihood of success on the merits, given the applicable case law, and that there was no threat of irreparable harm to the Wilsons that could support an injunction.<sup>75</sup>

### III. LEGAL BACKGROUND

Free speech claims start with First Amendment analysis but necessarily progress to the nuanced exceptions, limitations, and qualifications of speech law in a given context. Regulation of student speech in the school context has a particularly long and complex history, involving many Supreme Court decisions and a rich jurisprudence in every circuit court of appeals.<sup>76</sup> To evaluate the legal background of the instant case, it will be necessary to look beyond the law of the Eighth Circuit because the issue in *Wilson* – non-threatening student speech executed at a keyboard in the student's home which nonetheless reaches the school – was a matter of first impression in the Eighth Circuit.<sup>77</sup>

#### A. Speech Claim

The First Amendment declares sweeping protection for speech by providing that “Congress shall make no law . . . abridging the freedom of speech.”<sup>78</sup> But speech is not protected without limit; the Supreme Court has held that in some contexts, and depending on the type of speech, the government has a legitimate interest in regulating speech in a way that leads

74. *Wilson*, 696 F.3d at 773.

75. *Id.* at 776.

76. *See, e.g.*, cases cited *supra* note 2.

77. Because the parties disagreed on where the speech had taken place, and because the lower court did not make a finding of fact on this issue, the Eighth Circuit presumed that the legal precedent involving speech conducted at school could not apply. *See Wilson*, 696 F.3d at 773. Instead, the court was forced to view the case in the light most favorable to the judgment, and therefore acted as if the speech had occurred off campus. *See id.* at 776.

78. U.S. CONST. amend. I. That prohibition has been held to apply to the states by incorporation, preventing state governments from abridging speech rights as well. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.”).

to lower levels of protection.<sup>79</sup> The school context is one specific area of speech regulation.

The inquiry into whether student speech is protected begins with the 1969 Supreme Court case *Tinker v. Des Moines Independent Community School District*.<sup>80</sup> In that case, the school district promulgated a policy specifically intended to prohibit the wearing of black armbands – used to protest the Vietnam War – in the city’s public schools and to allow suspension for a violation of the policy.<sup>81</sup> The district court upheld the school’s ban, finding that it was a reasonable measure of school discipline.<sup>82</sup> The district court’s decision was affirmed by the Eighth Circuit and then reversed by the Supreme Court.<sup>83</sup> The Court famously declared, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>84</sup> The Court went on to say that the speech in question was “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”<sup>85</sup> The Court expressly rejected the lower courts’ finding that schools could regulate solely due to a fear of disturbance.<sup>86</sup> The majority cautioned that such a ruling would allow regulation of any “departure from absolute regimentation,” any “variation from the majority’s opinion,” and any “word spoken . . . that deviates from the views of another person,” finding that this was not allowed by the Constitution.<sup>87</sup> Thus, the *Tinker* Court ultimately held that a school could not constitutionally prohibit student speech unless: (a) there was a finding that the speech would “materially and substantially interfere” with or disrupt the operation of the school or other students’ right to be let alone,<sup>88</sup> and (b) the prohibition was not viewpoint-discriminatory.<sup>89</sup>

That rule of law was easily applied to cases in the Eighth Circuit for many years.<sup>90</sup> For cases involving student speech on campus, related to school activities, there was no question that *Tinker* allowed suppression of

79. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1993); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

80. 393 U.S. 503 (1969).

81. *Id.* at 504. The armbands were worn by students and faculty members in protest of the Vietnam War, and therefore would easily fit into the highly protected political speech category in a normal context. *Id.*

82. *Id.* at 505, 514.

83. *Id.* at 505, 514.

84. *Id.* at 506.

85. *Id.* at 508.

86. *Id.*

87. *Id.*

88. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)) (internal quotation marks omitted).

89. *Id.* at 510-11.

90. See, e.g., *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1467 (E.D. Mo. 1985).

disruptive speech.<sup>91</sup> However, this law has been tested and changed by cases involving speech that takes place away from the school campus.<sup>92</sup>

In 2002, an Eighth Circuit decision addressed this issue in the context of an obscene letter written at home by a male student about his desire to molest, rape, and murder a female student at his junior high school.<sup>93</sup> Though the letter was written while the student was off campus, the Eighth Circuit found that the *Tinker* standard applied because of the disruption that it caused, regardless of the point of origin.<sup>94</sup> This meant that the student could be punished for his speech because it caused a material and substantial interference with the school's disciplinary policy.<sup>95</sup> The court held that the school district's interest in maintaining order and student safety outweighed the student's right to make disruptive and threatening statements, even outside of the schoolhouse gates.<sup>96</sup>

The same justification was used for the regulation of speech eight years later in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*.<sup>97</sup> In that case, a tenth grade student in Missouri, D.J.M., was at home and sent a friend a text message expressing his desire to buy a gun and shoot some other students at school.<sup>98</sup> The friend reported this communication to the school, and school officials suspended D.J.M. and placed him in juvenile detention.<sup>99</sup> After conducting "an independent examination of the whole record to assure [itself] that the judgment [would] not constitute a forbidden intrusion on the field of free expression,"<sup>100</sup> the court found that D.J.M.'s actions had substantially disrupted the school.<sup>101</sup> D.J.M.'s punishment was held to be constitutional because it was "*reasonably foreseeable* that [his speech] would [be brought] to the attention of the school authorities and . . . create a risk of substantial disruption within the school environ-

91. See, e.g., *Bystrom ex rel. Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747 (8th Cir. 1987) (upholding a school's regulations on the content of a student newspaper which required that any material distributed in the school must not be reasonably likely to cause a material and substantial disruption).

92. Interestingly, the court in *Tinker* seemed to allude to the notion that speech away from campus could still be regulated. See *Tinker*, 393 U.S. at 513 ("[C]onduct by a student, in class or out of it, which for any reason . . . materially disrupts class-work [sic] or involves substantial disorder or invasion of the rights of others is, of course, not immunized. . .") (emphasis added).

93. *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619 (8th Cir. 2002).

94. *Id.* at 633.

95. *Id.*

96. See *id.* at 616.

97. 647 F.3d 754 (8th Cir. 2011).

98. *Id.* at 756.

99. *Id.* at 756-57.

100. See *id.* at 757 (quoting *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002)) (internal quotation marks omitted).

101. *Id.* at 766.

ment.”<sup>102</sup> Again, the court did not find it dispositive that the speech occurred away from school but focused only on the disruption that it caused.<sup>103</sup> This articulation of the “reasonably foreseeable” standard aligned the law in the Eighth Circuit with that of other circuits.<sup>104</sup>

In recent years, delineating the distinction between on-campus speech and off-campus speech has become even more difficult, given students’ pervasive use of the Internet, which “raises the metaphysical question of where . . . speech occurred when [a student] used the internet as the medium.”<sup>105</sup> Recently, many courts have taken up cases struggling with the regulation of students’ Internet speech. Although the instant case was a matter of first impression for the Eighth Circuit, decisions outside the jurisdiction show the trend that has developed while applying the *Tinker* line of cases.

The Second Circuit considered Internet speech in *Doninger v. Niehoff* in 2008.<sup>106</sup> Avery Doninger was a high school student council member in Connecticut who sent an unauthorized email to many members of the public expressing concern about the pending cancellation of a school event.<sup>107</sup> After the school principal reprimanded her for sending the email without permission, Doninger placed a post on her blog that referred to district administrators as “douchebags” and encouraged her readers to call the superintendent and “piss her off.”<sup>108</sup> Due to the email and the blog post, the school principal and district superintendent received an influx of calls and emails from angry or concerned community members.<sup>109</sup> When school administrators found out about Doninger’s post, they disallowed her from running for Senior Class Secretary and further prevented her from assuming that position when she won as a write-in candidate.<sup>110</sup> The Second Circuit held that this punishment was constitutionally acceptable under *Tinker* because it was reasonably fore-

102. *Id.* (emphasis added) (quoting *Wisniewski v. Weedsport Cent. Sch. Dist.*, 484 F.3d 34, 39-40 (2d Cir. 2007)) (internal quotation marks omitted).

103. *See id.* at 765. In an independent section, the Court also discussed D.J.M.’s speech in light of the true threat line of cases, holding that because his speech led administrators to have a reasonable belief in a serious risk of harm to students, the District was justified in taking action against him. *See id.* at 761-65.

104. The Second Circuit was the first to hear a case involving students’ online, off-campus speech and held that students could be constitutionally disciplined if it was “reasonably foreseeable that the [expression] would . . . ‘materially and substantially disrupt the work and discipline of the school.’” *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)); *see also* Paul Easton, *Splitting the Difference: Layshock and J.S. Chart a Separate Path on Student Speech Rights*, 53 B.C. L. REV. E-SUPP. 17, 23 (2012).

105. *Kowalski v. Berkley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011).

106. 527 F.3d 41 (2d Cir. 2008).

107. *Id.* at 43.

108. *Id.* at 45.

109. *Id.*

110. *Id.* at 46.

seeable that her speech would reach the school.<sup>111</sup> The court found, in fact, that Doninger had actually intended for her speech to reach campus.<sup>112</sup> The court also stressed that Doninger's posting "foreseeably create[d] a risk of substantial disruption within the school environment"<sup>113</sup> and was therefore within the school district's purview to punish.<sup>114</sup>

In 2011, the Fourth Circuit found that a student's constitutional rights were not infringed when she was punished for creating a Myspace page containing derogatory jokes and comments about a fellow student.<sup>115</sup> The court applied *Tinker* and declared that the "materially and substantially disruptive" nature of the student's speech allowed her to be subjected to punishment, even though the page was created, posted, and maintained from her home computer.<sup>116</sup> The court noted that even though the speech occurred at home, the plaintiff could reasonably foresee the impact it would have on the school environment.<sup>117</sup>

In a recent Third Circuit case, the plaintiff student created a social network profile for his principal on his grandmother's computer.<sup>118</sup> The student invited friends to view the site, which included vulgar and sexual representations of the principal, and word spread to students at the school.<sup>119</sup> The Third Circuit declared the school's punishment of his actions<sup>120</sup> to be unconstitutional because his profile was clearly a parody and did not disrupt the school or reach inside the schoolhouse gate.<sup>121</sup> While the majority in that case chose to analyze the case under *Tinker*'s exceptions,<sup>122</sup> the concurring opinion did analyze the student's speech through the *Tinker* "substantial disruption" framework.<sup>123</sup>

111. *Id.* at 50.

112. *Id.*

113. *Id.* (alteration in original) (quoting *Wisniewski v. Weedsport Cent. Sch. Dist.*, 484 F.3d 34, 40 (2d Cir. 2007)) (internal quotation marks omitted).

114. *Id.* at 53.

115. *Kowalski v. Berkley Cnty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011).

116. *Id.* at 567, 574.

117. *Id.* at 573 ("Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.").

118. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011).

119. *Id.* at 208.

120. The student in *Layshock* received substantial punishment for his speech: a ten-day, out-of-school suspension, placement in an "Alternative Education Program," a ban from all extracurricular activities, and removal from his graduation ceremony. *Id.* at 210.

121. *Id.* at 219.

122. *Id.* at 211-12; see also *supra* notes 88-89 and accompanying text.

123. *Layshock*, 650 F.3d at 220 (Jordan, J., concurring).

The Third Circuit heard a very similar case later in 2011. In *J.S. ex rel. Snyder v. Blue Mountain School District*, a student created a profile for her principal on her home computer and invited twenty-two school district students to view the page.<sup>124</sup> Again, the court chose to analyze the speech through the exceptions to *Tinker* rather than apply its broad standard.<sup>125</sup> However, as a preliminary matter, the court assumed that *Tinker* applied, rather than formally laying out its method of selecting the applicable standard for the student's speech.<sup>126</sup> The court decided that the school district would be unable to show that a material and substantial disruption was reasonably foreseeable and therefore turned to an alternative framework in which the regulation could possibly be upheld.<sup>127</sup> This was likely due, at least in part, to the fact that no students were able to access the page from school computers.<sup>128</sup>

An alternative, albeit less frequently cited, framework for student speech cases can be found in *Bethel School District Number 403 v. Fraser*.<sup>129</sup> In that case, a high school student was suspended after giving a speech at a school assembly that was full of inappropriate language and vulgar sexual innuendos.<sup>130</sup> The school suspended him pursuant to a school rule that prohibited “[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures.”<sup>131</sup> The Supreme Court upheld Fraser’s suspension on the premise that the school’s “basic educational mission” outweighed the unbridled rights of its students and allowed the school to proscribe “vulgar and lewd speech.”<sup>132</sup> In so holding, the Court was careful to distinguish the speech at issue from the speech in *Tinker*.<sup>133</sup> The protection offered to students’ black armbands in *Tinker* was lauded by the Court as a mechanism for fostering the respect for diverse cultural, political, and religious viewpoints that is requisite for civility

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124. 650 F.3d 915, 920-21 (3d Cir. 2011).

125. *Id.* at 927, 932; see also *supra* notes 88-89 and accompanying text.

126. *Snyder*, 650 F.3d at 926.

127. *Id.* at 928.

128. *Id.* at 921.

129. 478 U.S. 675 (1986). *Fraser*’s facts concerned solely on-campus speech conducted without the aid of technological dissemination; this may be the reason that it is less often used to justify schools’ discipline of students for speech that occurs off-campus or through the Internet. However, I will argue in my Comment, *infra*, that this doctrine is just as workable as the *Tinker* line of cases in allowing discipline of student speech. See *infra* Part V.C.

130. *Fraser*, 478 U.S. at 677-78.

131. *Id.* at 678.

132. *Id.* at 685.

133. *Id.* at 680.

in society.<sup>134</sup> Fraser's speech, on the other hand, was decried by the Court as lewd, offensive, and lacking in value to public discourse.<sup>135</sup>

The Court all but admitted that the same speech punishable in *Fraser* could not be proscribed from the mouth of an adult in a non-school context.<sup>136</sup> The difference for the Court came in the fact that, as a minor and in the context of a school, Fraser was entitled to a lesser degree of First Amendment speech protection.<sup>137</sup> The Court opined that "the sensibilities of fellow students" and society's "interest in teaching students the boundaries of socially appropriate behavior" were enough to justify limitations on the speech allowed by students.<sup>138</sup> That decision was overwhelmingly supportive of the notion that schools are responsible for being role models to students and for teaching them how to act in society, and that this responsibility was paired with the power to quash certain offensive speech and behavior.<sup>139</sup> *Fraser*, therefore, constitutes a different approach than *Tinker* in regulating student speech but arrives at basically the same result – permissible limitation of student speech that upsets the school environment.<sup>140</sup>

This overview of decisions illustrates that the overarching trend since *Tinker* has been to allow schools to discipline students for speech according to the standard requiring a reasonably foreseeable risk of a substantial and material disruption.

### B. Preliminary Injunction Standard

The first requirement for the granting of injunctive relief is that equitable relief "must be the *only* way of protecting the plaintiff from harm."<sup>141</sup> Once that fact has been alleged and established, the court moves on to the inquiry of whether an injunction should be issued.<sup>142</sup>

134. *Id.*

135. *Id.*

136. *Id.* at 682. Some courts have determined that the speech would have been protected if Fraser had been an adult *or* had been somewhere away from school. *See, e.g., J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011). There is question about whether this is an accurate interpretation of the Court's *Fraser* dictum. *See infra* note 252 and accompanying text.

137. *See Fraser*, 478 U.S. at 682-84.

138. *Id.* at 681.

139. *See id.* at 683.

140. *Fraser* and a separate group of cases have become known as the exceptions to *Tinker*. *See generally Snyder*, 650 F.3d at 927. The other exceptions will be discussed in the Comment, *infra* Part V, as those cases are only tangential to the court's opinion in the instant case. *See infra* notes 262-265 and accompanying text.

141. *Campbell's Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

142. *See Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 112-13 (8th Cir. 1981).

In the Eighth Circuit, the standard started with the “traditional test” in *Minnesota Bearing Co. v. White Motor Corp.* in 1973.<sup>143</sup> That test required the court to weigh the following factors in deciding whether to grant an injunction: “(1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest.”<sup>144</sup> The court created an “alternative test” a few years later, requiring an inquiry into: “(1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”<sup>145</sup>

The slight differences in these tests and the distinction in titles caused confusion until the court resolved the issue in a 1981 case.<sup>146</sup> The *Dataphase* test requires that the injunctive relief inquiry consider: “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.”<sup>147</sup> In *Dataphase*, the Eighth Circuit asserted that the four factors should be analyzed as a whole and that no single factor in the test is determinative.<sup>148</sup> However, in a footnote, the court reiterated the essentiality of the finding of irreparable harm and stated that an absence of irreparable harm can in itself be enough for vacating an injunction.<sup>149</sup> In balancing the harm to the parties, the court has required that injury be certain, great, and likely to occur.<sup>150</sup>

In this inquiry, it is not necessary for the court to find the probability of success on the merits to be more than fifty percent because it is not meant to be a mathematical inquiry; all that the court must find is a “substantial possibility of success.”<sup>151</sup> The Eighth Circuit also advanced the notion that different factors could be more important in specific cases and that it might be necessary to find a higher likelihood of success on the merits for one party if the other three factors tipped in favor of the opposing party.<sup>152</sup> In the instant decision, the court therefore had to balance all these concerns in determining whether the lower courts had been correct in issuing an injunction in favor of the Wilsons.

143. 470 F.2d 1323 (8th Cir. 1973); see also *Dataphase*, 640 F.2d at 112.

144. *Dataphase*, 640 F.2d at 112 (discussing *Minnesota Bearing Co.*).

145. *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978).

146. *Dataphase*, 640 F.2d at 112-13.

147. *Id.* at 114.

148. *Id.* at 113.

149. *Id.* at 114 n.9.

150. *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). The court held in *Doe v. Banos* that ineligibility for extracurricular activities was not enough to constitute irreparable harm. 713 F. Supp. 2d 404, 415 (D.N.J. 2010).

151. *Dataphase*, 640 F.2d at 113.

152. *Id.*



## IV. INSTANT DECISION

The question before the Eighth Circuit in *Wilson* was whether the district court properly enjoined the suspensions of the Wilson brothers for publishing an offensive blog relating to events and people at their high school.<sup>153</sup> The district court had initially granted an injunction because of its consideration of the “likelihood of success, whether [the Wilsons would] suffer irreparable harm if relief [were] denied, whether the balance of inequities tip[ped] in the [Wilson’s] favor, and whether injunctive relief [was] in the public interest.”<sup>154</sup> The Eighth Circuit set out to review this decision for an abuse of discretion, that is, for clearly erroneous factual findings or legal conclusions.<sup>155</sup> All conclusions of law were reviewed de novo.<sup>156</sup>

A. *Speech Claim*

On appeal, the Wilsons argued that “all off-campus speech is protected and cannot be the subject of school discipline, even if the speech is directed at the school or specified students.”<sup>157</sup> In the alternative, the Wilsons suggested that if the *Tinker* standard applied, their speech was not directed at the school and did not cause a substantial disruption.<sup>158</sup>

The District, on the other hand, argued that the *Tinker* standard applied without question to this type of case and that its application necessitated that injunctive relief be denied.<sup>159</sup> Further, the District argued that the standard allows administrators to punish speech which “materially disrupts” schoolwork or the functioning of the District.<sup>160</sup>

The Eighth Circuit applied the same test used by the district court in determining whether a preliminary injunction should be issued.<sup>161</sup> In its opinion, however, the Eighth Circuit spent most of its time analyzing the merits of the speech claim and the applicable case law because in a preliminary injunction inquiry, the “likelihood of success on the merits is most significant.”<sup>162</sup>

153. *Wilson ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012).

154. *Id.* at 774.

155. *Id.* at 776.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

161. *Id.* (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

162. *Id.* (quoting *Minn. Ass’n of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 83 (8th Cir. 1992)) (internal quotation marks omitted); *see also supra* notes 144-145 and accompanying text.

The court found that were the case to go to trial on the merits, *Tinker* would likely apply, and that under such standard, the Wilsons would be unlikely to succeed because of the district court's factual finding that NorthPress caused substantial disruption.<sup>163</sup> In support of this conclusion, the court cited *D.J.M.* because it was reasonably foreseeable that the Wilsons' speech would "reach the school community and cause a substantial disruption to the education setting."<sup>164</sup> The court said that the Wilsons' speech met this reasonably foreseeable requirement.<sup>165</sup>

The Eighth Circuit went on to cite the *Doninger*, *Snyder*, and *Kowalski* decisions in an attempt to analogize the instant case, looking to the Second,<sup>166</sup> Third,<sup>167</sup> and Fourth Circuits<sup>168</sup> for support.<sup>169</sup> The court noted that all three circuits embraced the reasonably foreseeable and materially disruptive standards.<sup>170</sup> Therefore, the court chose to apply the rule that speech came within the purview of a school's administration and ability to punish when it "would foreseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus."<sup>171</sup> Under these standards, the court announced that *Tinker* would apply to the Wilsons' speech, regardless of the dispute over where it originated, because the speech was targeted at LSNHS.<sup>172</sup> Further, the court concluded that the speech met both requirements of *Tinker*: first, that the Wilsons' speech could reasonably have been expected to reach or impact the school environment and second, that their speech caused an actual and "considerable disturbance and disruption" at LSNHS.<sup>173</sup>

163. *Wilson*, 696 F.3d at 777.

164. *Id.* (citing *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 753, 766 (8th Cir. 2011)); see also *supra* notes 97-102 and accompanying text.

165. *Wilson*, 696 F.3d at 777.

166. *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); see *supra* notes 106-114 and accompanying text.

167. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011); see also *supra* notes 123-128 and accompanying text.

168. *Kowalski v. Berkley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011); see also *supra* notes 115-117 and accompanying text.

169. *Wilson*, 696 F.3d at 777-78.

170. *Id.* at 777.

171. *Id.* (quoting *Doninger*, 527 F.3d at 48) (internal quotations marks omitted).

172. *Id.* at 778.

173. *Id.* Because the instant case is a preliminary injunction case, and therefore success on the merits is only one of four factors, the court did not go into much discussion of the facts of the case and instead drew its conclusion regarding each of the *Tinker* factors based on the District Court's factual findings below. *Id.* (discussing the application of *Tinker* because of "*the District Court's finding that the posts were directed at [LSNHS]*" and because "*the District Court found that the NorthPress postings caused considerable disturbance and disruption.*") (emphasis added) (internal quotation marks omitted). For a reiteration of the facts the district court relied on in

### B. Preliminary Injunction Standard

After its discussion of the merits, the court turned to whether or not the district court should have issued a preliminary injunction.<sup>174</sup> The court used the same test employed by the district court in determining whether an injunction should ensue.<sup>175</sup> This inquiry centered around the irreparable harm test: whether “harm is certain and great and of such imminence that there is a clear and present need for equitable relief.”<sup>176</sup> The court first pointed out that a failure to demonstrate irreparable harm is enough, standing alone, to deny injunctive relief.<sup>177</sup> The Eighth Circuit concluded that the district court’s factual findings did not show irreparable harm to the Wilsons if an injunction was not issued.<sup>178</sup>

In coming to this ruling, the court expressly rejected the contention that the Wilsons would be negatively affected by their transfer to SRA.<sup>179</sup> The record reflected that SRA was an academically acceptable school, that it was accredited, and that their attendance there would have kept the Wilsons on track for their anticipated graduation in 2013.<sup>180</sup> The court also pointed out that the injunction came too late to allow the Wilsons into honors courses at LSNHS, such that the loss of honors courses would have occurred regardless of the issuance or non-issuance of the injunction.<sup>181</sup> The court also discounted harm to the Wilsons’ future musical careers in that any harm in not getting a scholarship would be only speculative.<sup>182</sup> In summary, the court remarked that it was “not convinced the Wilsons were at risk of any real . . . harm, much less any ‘certain and great’ harm that could be prevented by an injunction.”<sup>183</sup>

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finding reasonable foreseeability and material disruption, *see supra* notes 28-37 and accompanying text.

174. *Wilson*, 696 F.3d at 778.

175. *Id.* at 776 (quoting *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)) (stating that the criteria to be considered in analyzing a whether to grant a preliminary injunction are as follows: “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.”).

176. *Id.* at 778 (quoting *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 716 (8th Cir. 2011)) (internal quotation marks omitted).

177. *Id.*; *see also Dataphase*, 640 F.2d at 114 n.9.

178. *Wilson*, 696 F.3d at 778.

179. *Id.* at 779.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996)).

The court in this case did not feel that any other factors needed to be analyzed because it had found no irreparable harm to plaintiffs.<sup>184</sup> However, the Eighth Circuit did leave open the possibility that other factors (including the interests of the school, students, and the public in preventing the potential tragic consequences of cyber-bullying) could have weighed into a free speech analysis, if necessary.<sup>185</sup>

### *C. Non-Speech Claims and Counterclaims*

The Wilsons' Communications Decency Act argument was easily dismissed by the court,<sup>186</sup> which declared it inapplicable to the present case in that its purpose was to provide protection for "provider[s] . . . of an interactive computer service" from being "treated as the publisher or speaker of any information provided by another information content provider."<sup>187</sup> The court declined to treat the other student's post as information provided by a third party on the Wilsons' computer service.<sup>188</sup> Additionally, the court agreed with the court below that some of the disruption was caused by the Wilsons' own posts, making them the creators of the unprotected speech rather than just possessors of the channel of communication.<sup>189</sup>

The court was equally dismissive of the District's claim that because of the Wilsons' pending graduation date, the district court's injunction had effectively freed the Wilsons from having to face punishment.<sup>190</sup> As a part of this claim, the District had urged the district court to apply a permanent injunction standard instead of the *Dataphase* factors.<sup>191</sup> The Eighth Circuit concluded that the injunction had served only to delay the Wilsons' suspensions, not to erase them, and therefore, the district court had applied the cor-

184. *Id.*

185. *Id.*

186. *Id.* at 779-80.

187. Communications Decency Act, 47 U.S.C. § 230(c)(1) (2006).

188. *Wilson*, 696 F.3d at 779-80.

189. *Id.*

190. *Id.* at 780. The court also gave no regard to the District's claim that the burden had been improperly shifted to them at the preliminary injunction hearing. *Id.* The court below made comments suggesting that the case could probably be resolved if the defendants would file for summary judgment, but the court in the instant case held that this did not shift the burden of proof to the District. *Id.*

191. *Id.* The permanent injunction standard advocated by the District necessitates a higher standard of proof; it would require a showing of actual success on the merits and that the Wilsons would have actually suffered irreparable harm. See *United States v. Green Acres Enters., Inc.*, 86 F.3d 130, 132-33 (8th Cir. 1996) (citing *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.")).

rect standard.<sup>192</sup> The court also pointed out that to get a permanent injunction, the moving party must show actual success on the merits and that the Wilsons would not have been able to show that at the district court hearing.<sup>193</sup>

#### D. Holding

The court found that the Wilsons were unlikely to succeed on the merits of their claim and that they were not sufficiently irreparably harmed by the suspension.<sup>194</sup> The court also found that although the district court did not make inadequate findings of fact, its findings did not support the relief granted.<sup>195</sup> Given the low likelihood of success on the merits under the application of the *Tinker* standard, and given that there was no threat of irreparable harm, the court held that an injunction was not available to the Wilsons.<sup>196</sup> The Eighth Circuit, in a 3-0 decision, reversed the district court and remanded the case with instructions that the lower court face the “unenviable task of fashioning a remedy several months after the entry of the injunction and the Wilsons’ return to school.”<sup>197</sup>

#### V. COMMENT

The Eighth Circuit’s decision in *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School District* keeps the Circuit in line with the national trend regarding student speech cases.<sup>198</sup> Nearly every jurisdiction in the United States has been expanding on the *Tinker* standard since that decision was published in 1969.<sup>199</sup> Circuits across the country now allow schools to control student speech similar to the Wilsons’ (regardless of whether it originates on-campus or off) as long as it is reasonably foreseeable that the speech will cause a material disruption in the school environment.<sup>200</sup> This Note argues that includ-

192. *Wilson*, 696 F.3d at 780.

193. *Id.*

194. *Id.* at 776.

195. *Id.*

196. *Id.* at 776-77, 779-80.

197. *Id.* at 780.

198. *See supra* notes 97-128 and accompanying text.

199. *See supra* notes 97-128 and accompanying text.

200. In addition to the cases discussed *supra* Part III.A., nearly every other circuit has upheld punishment for student speech in similar circumstances. *See, e.g.*, *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2011) (holding that *Tinker* allows a school to sanction Internet speech transmitted only to a student’s friends when it depicts the school principal being shot); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 983-85 (11th Cir. 2007) (holding punishment constitutional for a student who wrote a note about a dream she had in which she shot her math teacher, because it caused a “material and substantial disruption” to the school); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th

ing the Wilsons' speech within the regulatory control of schools was an appropriate decision by the Eighth Circuit and is grounded not only in precedent but also in adherence to a changing social context and sound policy goals. This Part also argues that the Wilsons' punishment could have alternatively been upheld under *Fraser* and that by failing to analyze the instant case through that framework, the Eighth Circuit has deprived its schools of a potential tool for achieving their educational mission.

### A. *Losing Arguments for the Wilsons*

At trial, the Wilsons attempted to bring arguments that had previously been successful in protecting the rights of students to speak and act freely away from school; however, in a telling turn of events, the court virtually ignored those arguments.<sup>201</sup> The Wilsons cited case law in support of the proposition that students' speech rights when they are off-campus are equivalent to those of adults.<sup>202</sup> This contention, from *J.S. ex rel. Snyder v. Blue Mountain School District*, may not be applicable because it is based on Supreme Court dictum in a case dealing with on-campus speech rather than off-campus speech, and therefore the Court was not forced to rule on how far the school context extends.<sup>203</sup>

A similar proposition by the Wilsons was that content-based regulations on speech are to be presumed invalid unless the government can show the constitutionality of the regulations.<sup>204</sup> While this is an accurate statement of a rule of law,<sup>205</sup> the court was apparently not persuaded that it is controlling in the school context because it is not even mentioned in the Eighth Circuit's opinion. The court instead implied, as it has in other

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Cir. 1998) (analyzing the speech in an underground, unsponsored newspaper distributed on school grounds through *Tinker*).

201. See *Wilson*, 696 F.3d at 776-79.

202. See Brief of Appellees, *supra* note 8, at 33.

203. 650 F.3d 915, 932 (3d Cir. 2011); see also *Morse v. Frederick*, 551 U.S. 393, 405 (2007); *infra* notes 251-252 and accompanying text.

204. See Brief of Appellees, *supra* note 8, at 29.

205. See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); see also *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (applying prohibition of content-based restrictions to a law preventing citizens from falsely claiming they received the Medal of Honor and noting that "[w]hen content-based speech regulation is in question . . . exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment.").

cases,<sup>206</sup> that the limit on governmental control of speech can be found in the *Tinker* standard itself.<sup>207</sup>

Another argument made by the Wilsons was historically strong but seems to be falling out of the circuit courts' favor in more recent years. The Wilsons argued that schools do not have the authority to reach into the homes of students and regulate their conduct, as this is a violation of the rights of students' parents to raise them as they see fit.<sup>208</sup> While this right was declared a fundamental right by the Supreme Court in two decisions in the 1920s<sup>209</sup> and has been upheld with limitations since then,<sup>210</sup> it has also been recognized that schools play a role in the upbringing of children today.<sup>211</sup> The Wilsons cited two decisions for the proposition that school administrators and teachers are forbidden from regulating conduct before and after school, but both cases are from the 1970s, suggesting that this argument, although historically strong, may be becoming antiquated.<sup>212</sup>

The Wilsons brought up the above-mentioned arguments in their brief to the court and subsequently in their arguments at trial.<sup>213</sup> However, the court did not spend any part of its decision discussing these concerns.<sup>214</sup> Not ex-

206. See, e.g., *Morse*, 551 U.S. at 396-97 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (reiterating that students do not shed their constitutional rights at the schoolhouse door, and that with consideration of the school context, their rights must still be applied).

207. *Wilson*, 696 F.3d at 776-77 (preserving the rule of law that students and teachers retain their constitutional rights within the schoolhouse).

208. See Brief of Appellees, *supra* note 8, at 33.

209. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) ("Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act [in question] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.") (emphasis added) (internal citations omitted).

210. See Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental,"* HOME SCH. LEGAL DEF. ASS'N (Oct. 27, 2003), <http://www.hslda.org/docs/nche/000000/00000075.asp>.

211. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) ("[A] parent may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge . . .") (internal quotations omitted).

212. See Brief of Appellees, *supra* note 8, at 33-34 (referencing *Shanley v. Ne. Indep. Sch. Dist.*, Bexar Cnty., Tex., 462 F.2d 960 (5th Cir. 1972); *Thomas v. Bd. of Educ.*, Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979)).

213. See Brief of Appellees, *supra* note 8, at 29-34.

214. A vague mention of the parties' remaining arguments and the unanalyzed interests of the District, the students, and the public may allude to the Wilsons' attempt to bring in this case law, but the court declared it "need not address" those concerns, and dismisses them in a paragraph only slightly longer than this footnote. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012).

tending the case law to this context allowed a lower level of protection for student speech than would have been required had the court found those cases to apply. The question of why courts are starting to allow less protection will be discussed in the following two subsections. The reasons seem to be two-fold: first, that the notion of the separation of school and home has been shattered by the advent of the Internet,<sup>215</sup> and second, that the public has come to expect a great deal from schools in the raising, educating, and protecting of its children.<sup>216</sup>

### B. Policy Justifications

After completing its legal analysis of the Wilsons' case, the Eighth Circuit mentioned that policy considerations and public safety concerns could have figured into the analysis of whether the speech at issue should have been protected.<sup>217</sup> The court in the instant case did not need to reach this inquiry in order to reinstate the Wilsons' suspensions, but the concerns that they listed somewhat casually in the opinion deserve more than just a passing mention.<sup>218</sup>

Bullying has been a problem throughout the history of primary and secondary education.<sup>219</sup> Within schoolhouse gates, children face the threat of verbal abuse and even physical violence.<sup>220</sup> But the advent of the Internet has changed the face of this issue; not only can bullying happen more easily and with less thought than before, but hurtful words can come from anywhere on the worldwide web.<sup>221</sup> Today, school administrators must not only worry about the bullying that occurs on playgrounds or in lunch rooms, but they must also concern themselves with the consequences of the bully's actions

215. See *supra* note 105 and accompanying text.

216. See *infra* notes 246-250 and accompanying text.

217. See *Wilson*, 696 F.3d at 779; *supra* note 185 and accompanying text.

218. The court discusses the interests of schools, students, and the public, including bullying concerns, in a single, short paragraph after its discussion of the likelihood of success on the merits. *Wilson*, 696 F.3d at 779.

219. To be more realistic, bullying has likely been a problem since the ability of *homo sapiens* (or their ancestors) to mock each other has existed. See generally Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Schools in a Sticky Situation?* 81 *Fordham L. Rev.* 2729, 2735-36 (2013) (discussing a history of bullying from fairytales and classic literature to the modern school context).

220. See generally *id.*

221. The U.S. Department of Health and Human Services defines cyberbullying as "bullying that takes place using electronic technology" including "devices and equipment such as cell phones, computers, and tablets as well as communication tools including social media sites, text messages, chat, and websites." *What is Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/what-is-it/index.html> (last visited Feb. 20, 2014). From this definition it is easy to see that technology's pervasiveness has changed the landscape of American schools and of bullying.



when he sits in front of his keyboard miles away from the physical school building. Additionally, this degree of separation has allowed bullying to become bolder and more common.<sup>222</sup> Bullying concerns have moved beyond larger children picking on smaller kids and now include, for instance, fashionable girls who judge others based on their looks and honors students looking to share their sharp “sense of humor” with classmates.<sup>223</sup> This Note argues that just as the “schoolhouse wall” no longer serves as much protection to students, it has also ceased to be a useful distinction in determining the type of conduct that can be regulated by schools.

Cyber-bullying has become a serious issue affecting thousands of students across the nation each year.<sup>224</sup> About twenty percent of students know of someone who has been bullied online, and another nineteen percent admit to being the harassers themselves.<sup>225</sup> The bullying that occurs on the Internet every day ranges from stray comments directed to or at an individual to posts criticizing a more general group.<sup>226</sup> The effect is devastating. Thousands of students across the country and around the world suffer from mental illness, depression, or self-esteem issues in part because of how they are treated by their peers.<sup>227</sup> And each year there are terrible stories of students who commit suicide because of the hateful treatment they endure at the hands of their peers.<sup>228</sup>

222. A study in 2006 found that fifty percent of students think that one of the main reasons for the commonality of cyber-bullying is the “lack of tangible consequences for such behaviour [sic].” Christine Suniti Bhat, *Cyber Bullying: Overview and Strategies for School Counsellors, Guidance Officers, and All School Personnel*, 18 AUSTL. J. OF GUIDANCE & COUNSELING 53, 57 (2008).

223. See Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227, 231 (2011) (“Contrary to face-to-face bullying, where the bully is typically bigger, stronger, or more favorably situated socially, cyberbullies can be of less stature and less powerful than their targets.”).

224. See *Bullying Statistics*, NEV. PEP, [http://www.nvpep.org/bullying/bullying\\_statistics.html](http://www.nvpep.org/bullying/bullying_statistics.html) (last updated Aug. 21, 2013).

225. *Id.*

226. See Elizabeth Landau, *When Bullying Goes High-Tech*, CNN HEALTH (Apr. 15, 2013), <http://www.cnn.com/2013/02/27/health/cyberbullying-online-bully-victims/index.html>.

227. See Bhat, *supra* note 222, at 55 (summarizing the results of a series of studies which found significant depression, loneliness, anxiety, and self-esteem issues in young people and noted that “children who were bullied were more likely than others to experience comparatively low levels of mental health”) (internal quotations omitted).

228. See Michelle Janaye Nealy, *Mother of Suicide Victim, Lawmaker Push for Ban on Cyberbullying in Maryland*, ASSOCIATED PRESS (Feb. 27, 2013), <http://michellejanaye.com/2013/03/mother-of-suicide-victim-lawmaker-push-for-ban-on-cyberbullying-in-maryland/>.

Another issue often discussed in the same conversation as bullying and cyber-bullying is the increase in violence taking place on school grounds. In recent years, school administrators have seen an increase in fights and acts of violence.<sup>229</sup> It is also common for incidents of bullying to incite physical conflict of some type – often from bullied students fighting back. This fear has proven realistic in recent years, in part because of the continual barrage of violence in American schools and tragedies such as the Sandy Hook shooting in December 2012.<sup>230</sup> Indeed, the fear of retribution was one of the reasons cited by the District in the instant case for not wanting to allow the Wilsons back to school,<sup>231</sup> and the Eighth Circuit agreed.<sup>232</sup>

In the instant case, the court acknowledged that “[t]he specter of cyber-bullying hangs over this case . . . [t]he repercussions of cyber-bullying are serious and sometimes tragic.”<sup>233</sup> And while this statement echoes the common feeling that most Americans have that cyber-bullying is a growing trend that needs to be slowed, it does not offer any suggestions as to how that can be accomplished, and it is not even clear that regulating students’ speech plays a role. However, it is likely true that the regulation of speech that mocks and ridicules students (like the Wilsons’ speech here) has prevented both mental and physical injuries to students across the country in at least some instances.<sup>234</sup> And the goal of such regulations is noble: to lessen disruption in schools, to encourage students to treat each other in a more respectful manner as they grow to adulthood, and to prevent terrible tragedies like the

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229. See Nat’l Ctr. for Educ. Statistics, *Indicators of School Crime and Safety: 2011*, <http://nces.ed.gov/programs/crimeindicators/crimeindicators2011/key.asp> (last visited Feb 20, 2014). This study found that thirty-three violent deaths occurred in schools from July 1, 2009 through June 30, 2010 as well as an additional 828,000 nonfatal incidents, many involving violence. *Id.*

230. See Elizabeth Landau, *Rejection, Bullying are Risk Factors Among Shooters*, CNN (Dec. 19, 2012), <http://www.cnn.com/2012/12/18/health/ct-shooting-mental-illness> (describing Adam Lanza as “socially awkward” and citing the trend that mass killers in the U.S. “were usually bullied, harassed and ignored”).

231. *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 S.W.3d 771, 774 (8th Cir. 2012).

232. *Id.* at 779 (“[P]ossibly even more significant [than the disruption of the racist comments] is the distress the Wilsons’ return to Lee’s Summit North could have caused the female students who the Wilsons targeted.”).

233. *Id.*

234. OLWEUS is a national organization dedicated to working toward safer schools and safer communities which helps school administrators implement policies and practices to combat bullying. Their website cites successes in many states and proclaims as its motto, “Violence Prevention Works!” Hazeldon Found., *Home of the OLWEUS Bullying Prevention Program*, VIOLENCE PREVENTION WORKS, <http://www.violencepreventionworks.org/public/index.page> (last visited Feb. 20, 2014).

suicide or backlash of those who have experienced the sting of bullying.<sup>235</sup> The achievement of any of these goals would be a substantial benefit of the suppression of certain student speech.

What is clear is that something must be done.<sup>236</sup> With the dark statistics surrounding bullying and the ever more pervasive nature of technology, students will likely experience increased exposure to cyber-bullying as new advances allow them to be even more connected and faceless in the future.<sup>237</sup> Additionally, schools are beginning to face negative publicity for not controlling rampant bullying and cyber-bullying,<sup>238</sup> but simultaneously face stringent restrictions on the actions they can take regarding student discipline.<sup>239</sup> Some scholars suggest that schools could improve their image and their success with bullying prevention if courts were to reframe the speech issue.<sup>240</sup> One suggestion is that the Supreme Court should undertake to hear an off-campus student speech case and establish that disruptive speech under *Tinker* can be regulated, even if it occurs off-campus, as long as there is some relationship to on-campus activities.<sup>241</sup> This proposal may bring up issues of its own (discussed *infra*)<sup>242</sup> but deserves to be considered as one possibility of many for cyber-bullying and speech regulation reform. While the solution is unclear, it seems that allowing regulation of hateful and insensitive speech, which has been proven to incite violence, conflict, suicide and other issues, and is connected to the school environment, is at least a step in the right direction.<sup>243</sup>

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235. See, e.g., RYAN'S STORY, <http://www.ryanpatrickhalligan.org/> (last visited Feb. 20, 2014) (detailing the story of Ryan Patrick Halligan, a boy who was taunted and teased about his academic struggles, rumors about homosexuality, and a public breakup with a girlfriend for years before he took his own life at the age of thirteen).

236. See Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 648 (2011) ("There is no question that schools must be more proactive about stopping students from cyberbullying."). That Note also details numerous incidents of suicide, violence, and tragedy related to cyber-bullying, in case the reader is not yet convinced of the gravity of the issue. *Id.* at 646-47.

237. See *id.* at 641.

238. See Conn, *supra* note 223, at 231 ("Parents increasingly turn to schools for solutions, but principals are unsure of their authority to discipline students for out-of-school behavior, even if they can identify the perpetrator.").

239. See *infra* notes 269-270 and accompanying text.

240. See Goodno, *supra* note 236, at 657-59.

241. See *id.* at 657-64. Goodno is an advocate for the "sufficient nexus" standard which requires a looser connection than the "reasonably foreseeable" standard in the instant case. *Id.* at 660.

242. See *infra* Part V.D.

243. See Goodno, *supra* note 236, at 641-44.

### C. *Eliminating a Tool*

With such important policy goals in mind, it seems clear that the result reached in the instant case was correct. However, there is some question as to whether the court's method of evaluating the issue was the best way to arrive at the necessary answer. It is true that circuit courts across the country have been applying doctrine from the *Tinker* line of cases to encompass off-campus speech such as the *Wilson*s',<sup>244</sup> and it was probably wise of the Eighth Circuit to bring that standard to its jurisdiction. But the court could have also decided the case under *Fraser*,<sup>245</sup> a decision based on regulation of offensive speech that would have provided school administrators more leeway in their regulation of certain speech.

*Fraser* allowed school officials to punish speech that was "vulgar and lewd" and speech that "undermine[d] the school's basic educational mission."<sup>246</sup> This standard provides a large amount of discretion to schools as to what constitutes vulgar and lewd speech, but it can hardly be argued that the *Wilson*s' speech here would not qualify.<sup>247</sup> The Court in *Fraser* further defined the mission of the American public school as not only providing an academic education but also protecting minors from offensive and obscene speech<sup>248</sup> and "teaching students the boundaries of socially appropriate behavior."<sup>249</sup> With that mission in mind, it is clear that the *Wilson*s' speech in the instant case would undermine the District's goal of producing upstanding citizens of society.<sup>250</sup> Thus, the *Wilson*s' speech could be regulated under the *Fraser* standard.

One reason the court may not have applied *Fraser* here is that that case involved the regulation of purely on-campus speech.<sup>251</sup> The *Fraser* opinion implicitly assumed that the speech and behavior at issue occurred within its walls.<sup>252</sup> Indeed, in 1986, before the proliferation of the Internet, the distinc-

244. See *supra* Part III.A.

245. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

246. *Id.* at 685.

247. See *supra* notes 17-22 and accompanying text.

248. See *Fraser*, 478 U.S. at 684.

249. *Id.* at 681.

250. The District's webpage contains a simpler mission statement than that advocated by the court: "We prepare each student for success in life." *About Us*, LEE'S SUMMIT R-7 SCH. DIST., <http://www.lsr7.org/district/about-us/> (last visited Feb. 20, 2014). This mission nonetheless points to a commitment of shaping students in areas beyond academics. See *id.*

251. See *Fraser*, 478 U.S. at 689.

252. See *id.* at 680-83. Other courts have held that because of this limitation, *Fraser* does not apply to off-campus speech. See e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011). However, this contention has not been verified by the Supreme Court; when it mentioned *Fraser* in *Morse* in 2007, the Court simply stated that "[h]ad *Fraser* delivered the same speech in a public fo-

tion between on-campus and off-campus speech was very clear, and thus, the court did not have to discuss speech that originated off campus but still reached the school. However, this distinction is not fatal to the application of *Fraser* to off-campus speech in the instant case. The Court's discussion in *Fraser* shows great concern for the ability of schools to foster civility and protect the sensibilities of students.<sup>253</sup> Both of these purposes are thwarted just as effectively by offensive speech that is typed on a keyboard at home as they are by lewd comments projected in a school assembly.

But even if neither the Framers, in granting protection to speech, nor the *Fraser* Court specifically intended for Internet speech that reached the school environment to be regulated, the changing times mandate an alteration in the interpretation of the Free Speech Clause and the Court's opinion in *Fraser*. The First Amendment, like the *Fraser* decision and other constitutional jurisprudence, was produced to address certain evils known to its proponents at the time. Because of its inherent antiquity, many great legal minds subscribe to the theory expressed best by Justice Brandeis that:

Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be.<sup>254</sup>

According to this reasoning, the Court should be willing to adapt Constitutional interpretations to the changing times. *Fraser* may have been about on-campus speech in its time, but the legal reasoning and policy arguments that formulated its disposition are equally applicable to the school context in 2013 (including both on-campus and off-campus activities), as modified by the development of the Internet and other technology.

Given the facts of the instant case, the application of either *Tinker* or *Fraser* would have yielded the same result. The Wilsons' speech was lewd

rum outside the school context, it would have been protected." *Morse v. Frederick*, 551 U.S. 393, 405 (2007). This statement alludes to the fact that in a *public forum* and when students are acting *outside* of the school context, they have more protection of speech – the Wilsons' rants meet neither requirement.

253. See *Fraser*, 478 U.S. at 681.

254. *Olmstead v. United States*, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting).

and offensive,<sup>255</sup> and it was reasonably foreseeable that their blog posts would cause a disruption within the school environment. However, what if the facts had been slightly different? What if the Wilsons' blog had been even more offensive and hurtful to students at LSNHS but the brothers had conducted their activities in a more secretive way so as to make it not reasonably foreseeable that their words would reach the school? Without *Fraser*, it seems that the District would be unable to punish the speech, even if it were drastically inconsistent with the behavior expected of students in schools or of people in society. As schools across the country seek to fulfill the goals of the education system and appropriately deal with student speech that interferes with that important mission, it seems that the court would have been wise to update *Fraser* and to provide an additional tool for school administrators.

#### D. A Caution – How Far is Too Far?

This is not to say that schools should be able to quash any speech by students, no matter how tangential its relation to the school environment. Critics of regulations of speech say that these cases create “dangerous precedent [when they] allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she [is] in school . . . .”<sup>256</sup> This value of being able to conduct oneself as one wishes in one's own home has been held up by Americans ever since the debate and subsequent enactment of the protections offered by the Bill of Rights – and many would see the extension of *Fraser* into the private lives of students as a violation of that value.

As the complexity of the jurisprudence and the numerosity of student speech cases show, it has been difficult for courts to find the line where regulation of student speech becomes too invasive. The decision of the court in the instant case to so easily reject the arguments discussed *supra* is an indication that the law may be approaching that line.<sup>257</sup> The legal analysis in all student speech cases starts with *Tinker's* mantra that students do not “shed their constitutional rights to freedom of speech or expression at the school-house gate.”<sup>258</sup> But many courts quickly move past this obligatory sentence

255. To refresh the reader's memory, the Wilsons' speech included phrases such as “jungle coon,” “completely annoying bitch,” “angry black children,” and the N-word. See *supra* notes 17-22 and accompanying text.

256. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011).

257. See *supra* Part V.A.

258. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); see also, e.g., *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012); *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 637 (D.N.J. 2007); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 106 (3d Cir. 2013); *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001).

to state that it is also “well within the parameters of school officials’ authority to . . .”<sup>259</sup> and go on to list one or more ways in which they will allow discipline for dissident student speech.

Depending on the jurisdiction and on the individual facts of the case, there has indeed been a trend toward expansion of these reasons. Tools that administrators may use include *Tinker*’s “reasonably foreseeable to cause a material disruption” standard for speech on or off campus<sup>260</sup> and the *Fraser* sexually explicit or lewd standard (which may or may not apply to off-campus speech).<sup>261</sup> But schools can also punish on-campus speech related to drug use,<sup>262</sup> school-sponsored student speech that is reasonably deemed unsuitable,<sup>263</sup> and speech that constitutes a “true threat” of violence.<sup>264</sup> These standards provide multiple avenues for a court to uphold the suppression of speech.<sup>265</sup> The combination of these doctrines creates an expansive list of permissible regulations, and courts should be careful to not go too far in creating new exceptions to *Tinker*. With such important policy considerations, it is admittedly a difficult balance.

## VI. CONCLUSION

*S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School District* strikes the correct balance of respecting and applying speech rights to students while still recognizing that the school context entails a unique need for control. Though the precise line indicating where courts will disallow schools to reach beyond their walls to censor speech has yet to be determined, this case falls within it. Temporary discipline for offensive speech lacking in value to public discourse and within the limited setting of the school environment can hardly be thought to equate to the type of invasive regulation of speech that the earliest Americans sought to avoid through the enactment of the First Amendment.

Historically, schools were much more powerful in the discretion they enjoyed to discipline students.<sup>266</sup> In the Supreme Court’s most recent student

259. *Wildman*, 249 F.3d at 771.

260. *See supra* Part III.A.

261. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

262. *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

263. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

264. *Watts v. United States*, 394 U.S. 705, 708 (1969); *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). This circumstance, when added to the circumstances described in the two preceding footnotes, constitute the exceptions to *Tinker* in the student speech context. Therefore, speech that falls into one of these three categories need not meet *Tinker*’s material disruption standard or subsequent cases’ reasonably foreseeable to reach the school environment standard.

265. The courts in multiple circuits incorporate discussions of these exceptions in their analysis of student speech. *See, e.g., J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011).

266. *See Morse*, 551 U.S. at 411 (Thomas, J., concurring).

speech case, *Morse v. Frederick*, Justice Thomas recited a summary of the trend from the idea of “in loco parentis” to the current environment where students like the Wilsons bring suit for their hurtful actions rather than apologizing for their inappropriate blog posts.<sup>267</sup> Schools were originally used to “train up and qualify . . . children for becoming useful and virtuous members of society,” and this involved the regulation of student speech.<sup>268</sup>

In recent years, laws and public sentiment have forced teachers to walk on eggshells around their students – including in the regulation of student speech. This trend has turned our society from one that “generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children” to a society that requires teachers to “accept defiance, disrespect, and disorder as daily occurrences.”<sup>269</sup> Yet, at the same time that we have limited options for student discipline, parents and community members still expect the graduating student to emerge from the schoolhouse walls as a well-rounded and appropriately trained citizen.<sup>270</sup> The Eighth Circuit was right to loosen the ties on the hands of administrators who seek to accomplish this mission. And the court was wise to recognize the need, in changing technological times, for expansion of that regulatory power to reach the keystrokes that could cause irreparable harm to individual students or groups within the schoolhouse walls.

Surely there are important First Amendment concerns at issue. Students, as citizens, possess the right to free speech, and this right is as dear to Americans as any other right guaranteed by the Constitution. Yet, this right is limited, trimmed, and quashed by our school districts more than in any other context. Why should we allow it? Schools cite as the bottom line various aforementioned policy reasons, contending that regulation is needed to nurture students, control the school environment, and provide protection.<sup>271</sup> It is not difficult to imagine tragic events (fights, suicides, or violent acts) stemming from student speech that is as full of hate and disrespect as in the cases discussed in this Note and indeed in the instant case itself. Schools emphasize that they cannot be too careful. Indeed, when the safety and well-being of the nation’s children are at risk, it is difficult to disagree. In the end, the silencing of the Wilsons’ keyboard is a small price to pay.

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267. *See id.* at 411-19.

268. *Id.* at 413.

269. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WAS. L. REV. 49, 50 (1996).

270. *See supra* note 227 and accompanying text.

271. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).



