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School to Students: Post That, and You Won't Play

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Schools to Students: Post That, and You Won't Play
When Schools Condition Students' Participation
in Extracurricular Activities
on "Appropriate" Social Media Use

INTRODUCTION	838
I. OVERVIEW OF SPEECH RIGHTS	
FOR STUDENTS IN EXTRACURRICULARS	841
A. Supreme Court Jurisprudence	841
1. <i>Tinker v. Des Moines Independent</i> <i>Community School District</i>	841
2. <i>Bethel School District No. 403 v. Fraser</i>	842
3. <i>Hazelwood School District v. Kuhlmeier</i>	843
4. <i>Morse v. Frederick</i>	844
B. Unclear Precedent and Conflicting Applications by Lower Courts ..	844
1. <i>Layshock ex rel. Layshock v. Hermitage School District</i>	845
2. <i>Doninger v. Niehoff</i>	847
3. The irreconcilable rationales in <i>Layshock</i> and <i>Doninger</i>	849
C. Conflicts in the Extracurricular Context	850
1. <i>B.L. ex rel. Levy v. Mahanoy Area School District</i>	851
2. <i>Johnson v. Cache County School District</i>	852
3. The irreconcilable outcomes of <i>B.L.</i> and <i>Johnson</i>	855
II. INSUFFICIENT CURRENT APPROACHES	
FOR EXTRACURRICULAR ACTIVITIES	855
A. Approach #1: Schools Can Create Higher Standards for Students that Participate in Extracurricular Activities.	856
B. Approach #2: Generous Application of the <i>Tinker</i> Standard	862
III. A MODIFIED STANDARD TO BALANCE STUDENT AND SCHOOL RIGHTS	
A. Modified <i>Tinker</i> Standard	866
1. Unambiguous notice	867
2. Clear connection standard	869
3. Rebuttable presumption against one-time infractions causing substantial disruption	870
4. <i>Tinker</i> , specifically applied to extracurriculars	872
CONCLUSION	873

INTRODUCTION

One Snapchat post later, and high school student S.J. was informed that her post had cost her the chance to be a member of her school's cheer squad.¹ Likewise, one blog post later, high school student Avery Doninger was informed that she could no longer run for student government.² In yet another case, after creating a "parody profile" of his principal on Myspace, high school student Justin Layshock was informed that, among other punishments, he was banned from all extracurricular activities.³ These cases and others beg the question, should schools be allowed to bar students from participation in extracurricular activities on the basis of students' online, off-campus speech?

The importance of this question is magnified by pervasive social media use by youth. One study found that the average age children start signing up for social media accounts is 12.6 years.⁴ And, for children ages thirteen to eighteen, 80% have social media accounts.⁵ This number can only be expected to increase, especially as companies such as Facebook create kid-targeted programs.⁶

However, despite the increasing relevance of this issue, the United States Supreme Court has yet to provide much-needed guidance to lower courts on how to handle cases regarding students' off-campus, online speech. While the Supreme Court has ruled on a number of student-speech cases, these cases are limited to instances where the students' speech occurred either on-campus,⁷ at a school-sponsored event,⁸ or through school-sponsored publications.⁹ Thus, the exact scope and appropriate

1. Johnson v. Cache Cty. Sch. Dist., 323 F. Supp. 3d 1301, 1308–10 (D. Utah 2018).

2. Doninger v. Niehoff, 642 F.3d 334, 339–42 (2d Cir. 2011).

3. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207, 210 (3d Cir. 2011) (en banc).

4. Jacqueline Howard, *What's the Average Age When Kids Get a Social Media Account?*, CNN (June 22, 2018, 10:22 AM), <https://www.cnn.com/2018/06/22/health/social-media-for-kids-parent-curve/index.html>.

5. *Id.*

6. See Daniel Trotta, *Facebook Rolls Out Messenger App for Kids Under 13*, REUTERS (Dec. 4, 2017, 10:11 AM), <https://www.reuters.com/article/us-facebook-messenger-kids/facebook-rolls-out-messenger-app-for-kids-under-13-idUSKBN1DY28F>.

7. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

8. Morse v. Frederick, 551 U.S. 393, 396 (2007).

9. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

application of these Supreme Court cases remains unclear. As a result, federal courts have floundered, reaching dramatically different conclusions even when analyzing similar cases and relying on the exact same legal tests.

Further, even in cases where students are participating in the same extracurricular activity, using the same social media platform to express their views, and expressing their views in similarly offensive ways, courts have disagreed as to the merits of the students' cases.¹⁰ For example, in *B.L. by Levy v. Mahanoy Area School District*, a cheerleader was dismissed from her team for sharing a private snap that had a curse-word-laden caption because her school considered the post to be disrespectful to her school and cheer squad.¹¹ Likewise, in another recent case, *Johnson v. Cache County School District*, another cheerleader was dismissed from her team for sharing a private snap that used four-letter words because administration thought it violated the cheer squad's rules about "appropriate" social media use.¹² Notwithstanding the significant similarities in these cases, the reviewing courts came to radically different conclusions.¹³ In *B.L.*, the court ruled in favor of the student;¹⁴ in *Johnson*, the court ruled in favor of the school.¹⁵ The contradictory outcomes in these two cases represent the ongoing confusion over how schools should deal with students' off-campus speech on social media. More specifically, these cases illustrate the uncertainty schools face when they choose to hold students who participate in extracurricular activities to higher speech standards than their peers.

Analyzing these cases, scholars and commentators have argued for a number of different, and often contradictory, principles that should guide courts' decisions on student speech.¹⁶ In general, there has been significant disagreement over whether schools should have power to control student speech in the first place. Some have argued that "[s]tudents are entitled to all protections

10. Compare *Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1307 (D. Utah 2018), with *B.L. by Levy v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607 (M.D. Pa. 2017).

11. 289 F. Supp. 3d at 610.

12. 323 F. Supp. 3d at 1308–10.

13. See *id.* at 1324; *B.L.*, 289 F. Supp. 3d at 616.

14. *B.L.*, 289 F. Supp. 3d at 616.

15. *Johnson*, 323 F. Supp. 3d at 1324.

16. See sources cited *infra* notes 17–19.

afforded by the Constitution, and schools do not have a right to regulate, restrict, and/or punish their students for behavior that would normally be constitutionally protected, no matter how offensive or controversial the expression.”¹⁷

In contrast, some have argued that schools should have the authority to regulate students’ online, off-campus speech but have differed as to what legal standard courts and schools should rely on.¹⁸ Others have declined to argue for a specific legal standard, but have advised that if students are going to be punished under any Supreme Court precedent, they must be afforded greater speech protections.¹⁹

In terms of student speech specific to the extracurricular context, the opinions have been just as wide-ranging. One commentator has argued that certain Supreme Court precedents should be disposed of entirely and, instead, courts should simply recognize the already “well-established limitations on the conduct of a student that participates in extracurricular activities.”²⁰ In contrast, another commentator has argued that “conditioning participation on giving up speech rights contradicts the educational goals of extracurricular activities and of public schools[,]” and that schools should only be able to punish student speech if there is a connection between the speech restriction and the “educational goal” of the extracurricular activity.²¹

The problem with most of these proposed standards is that, in practical effect, they force courts to choose between prioritizing student speech or prioritizing the management and efficiency of schools at a categorical level. Additionally, some of the proposed approaches only advocate for broad Supreme Court standards that

17. Maiya Dempsey, Note, *Easy to Say, Easy to See: Social Media and the Constitutional Rights of Public School Students*, 17 WHITTIER J. CHILD & FAM. ADVOC. 82, 84 (2018).

18. Compare Jessica K. Boyd, Note, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection Is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215, 1217 (2013); Brittany L. Kaspar, Note, *Beyond the Schoolhouse Gate: Should Schools Have the Authority to Punish Online Student Speech?*, 88 CHI.-KENT L. REV. 187 (2012).

19. See Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1136 (2010).

20. Travis Miller, Note, *Doninger v. Niehoff: Taking Tinker Too Far*, 5 LIBERTY U. L. REV. 303, 330 (2011).

21. Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 342–43 (2012).

are not sufficiently tailored to the unique concerns presented by these types of student speech cases.

In response, this Note offers a new approach that provides sufficient protection for students' rights in the extracurricular context, while also ensuring that schools have the necessary leeway to regulate harmful student speech. Part I of this Note provides an overview of Supreme Court precedent in student speech cases and how lower courts have struggled to apply this precedent when student speech occurs online and off-campus. Next, Part II analyzes two common, competing approaches courts currently rely on to analyze and resolve this legal ambiguity. This Part then discusses why these approaches, at least applied in isolation, are inadequate because both approaches fail to sufficiently protect students' interests. Finally, Part III of this Note proposes what I will refer to as the *Modified Tinker Standard*. This approach provides key protections to students, while also ensuring that administrators and coaches can effectively manage their schools' extracurricular programs.

I. OVERVIEW OF SPEECH RIGHTS FOR STUDENTS IN EXTRACURRICULARS

The Supreme Court has declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²² At the same time, however, the Court has acknowledged that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."²³ Thus, in student speech cases, the Court has sought to draw a careful balance between protecting students' rights and protecting the efficiency and effectiveness of schools.

A. Supreme Court Jurisprudence

1. *Tinker v. Des Moines Independent Community School District*

The first major student speech case brought before the Court was *Tinker v. Des Moines Independent Community School District*.²⁴ In

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

23. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1982) (citation omitted).

24. *Tinker*, 393 U.S. 503.

Tinker, three students wore black armbands to school to show their disapproval of the Vietnam War.²⁵ In response, the school district suspended the students until they were willing to come back to school without wearing their armbands.²⁶

Upon review, the Court concluded that schools can punish students for their speech, but only if the students' speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."²⁷ According to the Court, this *substantial disruption test* was the appropriate standard because it ensured that students' rights to free speech were appropriately balanced against schools' valid need to occasionally limit student speech.²⁸

The Court explained, however, that this standard does not mean that schools need to wait until a disruption has actually occurred before taking action; but rather, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."²⁹ Based on this standard, the Court ruled in favor of the students because they "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."³⁰

2. Bethel School District No. 403 v. Fraser

Twenty years later, the Court confronted its next student speech case in *Bethel School District No. 403 v. Fraser*.³¹ In *Fraser*, high school student Matthew Fraser delivered a student government nomination speech that constituted an "elaborate, graphic, and explicit sexual metaphor" at his school's assembly.³² As a result, Fraser was suspended for three days, and he was disallowed from speaking at the school's commencement exercises.³³

When the Court reviewed the case, rather than rely on *Tinker's* substantial disruption test, it created a different standard specific to

25. *Id.* at 504.

26. *Id.*

27. *Id.* at 509 (quoting *Burnside v. Byars*, 353 F.2d 744, 749 (5th Cir. 1966)).

28. *See id.* at 511.

29. *Id.* at 508.

30. *Id.* at 514.

31. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1982).

32. *Id.* at 678.

33. *Id.*

the facts of *Fraser*.³⁴ Ultimately, the Court concluded, “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”³⁵ Thus, “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue . . .”³⁶ Therefore, the Court upheld the school’s decision to punish Fraser for his speech.³⁷

3. Hazelwood School District v. Kuhlmeier

Shortly after *Fraser* came *Hazelwood School District v. Kuhlmeier*.³⁸ In *Hazelwood*, three students alleged that their high school principal violated their First Amendment rights when he deleted articles that discussed controversial topics, such as teen pregnancy, from an issue of the school newspaper.³⁹ The question before the Court was whether schools had “authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁴⁰ In answer, the Court responded that schools have authority to refuse student speech that might reasonably be perceived to be inconsistent with “the shared values of a civilized social order.”⁴¹ Otherwise, schools would be unable to adequately fulfill their key role in “awakening the child to cultural values, in preparing [the student] for later professional training, and in helping [the student] adjust normally to his [or her] environment.”⁴² Thus, the Court ruled in favor of the school, and held, “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their

34. *See id.* at 680–81.

35. *Id.* at 683.

36. *Id.* at 685.

37. *Id.* at 686.

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

39. *Id.* at 262–63.

40. *Id.* at 271.

41. *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

42. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

actions are reasonably related to legitimate pedagogical concerns.”⁴³

4. *Morse v. Frederick*

Finally, and most recently, in *Morse v. Frederick*, students at a school-sponsored event unfurled a banner that stated, “BONG HiTS 4 JESUS.”⁴⁴ To the principal, this banner promoted illegal drug use. When one of the students refused to take down the banner, he was suspended.⁴⁵

As in *Fraser*, the Court in *Morse* affirmed the right of schools to control student speech when students are in their school’s custody.⁴⁶ And, in *Morse*, although the students were not on school campus, the banner was unfurled during normal school hours, during a school-sanctioned trip.⁴⁷ Thus, the Court concluded, “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”⁴⁸

B. Unclear Precedent and Conflicting Applications by Lower Courts

Notwithstanding the insights provided by Supreme Court precedent, the exact scope and application of these cases to students’ online, off-campus speech is debatable. Aside from *Morse*, which was brought before the Court in 2007, the other student speech cases that the Court has reviewed were decided at a time when the technological advancements accessible to most American students today were unimaginable. And, even if the rules established in *Tinker*, *Fraser*, *Hazelwood*, and *Morse* could be easily transplanted into the context of students’ online speech, members of the Court have repeatedly expressed reservation about wide-ranging application of the rules from these cases. For example, in his concurrence in *Fraser*, Justice Brennan stated, “[i]f respondent had given the same speech *outside* of the school environment, he could not have been penalized simply because government officials

43. *Id.* at 273.

44. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

45. *Id.* at 398.

46. *See id.* at 397.

47. *Id.* at 400-01.

48. *Id.* at 403.

considered his language to be inappropriate; the Court's opinion does not suggest otherwise."⁴⁹ Later, the majority in *Hazelwood* appeared to validate Justice Brennan's interpretation, stating, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school."⁵⁰ In *Morse*, the Court also took care to word its holding in such a way that narrowed its application: "The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."⁵¹

Thus, it is unclear how lower courts should apply Supreme Court precedent, and where the rights of schools and students stand. As Justice Thomas lamented in his concurrence in *Morse*, "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators."⁵²

Although the lower courts have tried to faithfully apply Supreme Court precedent, they have often come to contradictory conclusions. And, although there are cases where the facts are distinct enough to possibly justify such conflicting holdings, "even identical facts would likely lead to contradictory rulings given the circuits' analyses on this issue."⁵³ For example, consider the following two cases involving online, off-campus student speech:

1. *Layshock ex rel. Layshock v. Hermitage School District*

In *Layshock*, high school senior Justin Layshock used his grandmother's home computer to create a highly derogatory Myspace "parody profile" of his school principal, Eric Trosch.⁵⁴ For example, Justin gave the following answers to Myspace's "tell me

49. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1982) (Brennan, J., concurring) (emphasis added) (citation omitted).

50. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (emphasis added) (citation omitted).

51. *Morse*, 551 U.S. at 403 (emphasis added).

52. *Id.* at 418 (Thomas, J., concurring).

53. Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 918 (2012).

54. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207-08 (2011).

about yourself” section: “Birthday: too drunk to remember . . . In the past month have you gone Skinny Dipping: big lake, not big dick[.]”⁵⁵ Justin also claimed that Principal Trosch belonged to a club called “Steroids International,” and he listed Principal Trosch’s interests as “Transgender, Appreciators of Alcoholic Beverages.”⁵⁶

This profile “‘spread like wildfire’ and . . . reached most, if not all,” of the students at Justin’s high school.⁵⁷ Inspired by Justin’s post, three other students also created parody profiles, which ended up being even more vulgar and offensive than Justin’s.⁵⁸ As a result of these profiles, computer programming classes had to be cancelled and, for six days, student computer use was strictly limited to the computer labs and library, where internet use could be closely supervised.⁵⁹ Once it was discovered that Justin was responsible for the first Myspace profile, he was given a ten-day, out-of-school suspension, placed in an Alternative Education Program, banned from all extracurricular activities, and not allowed to participate in his graduation ceremony.⁶⁰

When Justin’s case made it to the Third Circuit, the court began its analysis with a discussion of the *Tinker* standard.⁶¹ Importantly, the court found it meaningful that the district court could not “establish[] a sufficient nexus between Justin’s speech and a substantial disruption of the school environment[.]”⁶² Thus, the court concluded that *Tinker* did not apply to Justin’s case.⁶³ Additionally, the court concluded that *Fraser* did not apply.⁶⁴ Citing to *Morse*, the court explained, “*Fraser* does not allow the School District to punish Justin for expressive conduct which occurred outside of the school context.”⁶⁵

55. *Id.* at 208.

56. *Id.* (internal quotation marks omitted).

57. *Id.*

58. *Id.*

59. *Id.* at 209.

60. *Id.* at 210.

61. *See id.* at 211–12.

62. *Id.* at 214 (first alteration in original) (quoting *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007)).

63. *See id.*

64. *See id.* at 219.

65. *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 404 (2007)).

In reaching these conclusions, the court also evinced a strong dislike for the idea that schools could monitor students' online speech.⁶⁶ The court explained, "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."⁶⁷ Thus, the court ruled in favor of Justin, and held that the school could not punish his online, expressive conduct.⁶⁸

2. Doninger v. Niehoff

In contrast, consider *Doninger v. Niehoff*.⁶⁹ In *Doninger*, student council member Avery Doninger expressed anger over the way her school had handled an upcoming student event, Jamfest, on livejournal.com.⁷⁰ In her post, Avery referred to school administrators as "douchebags" and encouraged students to continue contacting Paula Schwartz, superintendent of the school district, to complain about the alleged cancellation of the event.⁷¹ As Avery stated at the end of her post, "if you want to write something or call her to piss her off more. im [sic] down."⁷²

Prior to Avery's post, Jamfest had already been causing problems between students and administrators.⁷³ So, even though administration was not aware of Avery's post until about two weeks later, it is unlikely that administration thought it was unusual when, the morning after Avery's post, they continued to receive phone calls, emails, and personal visits regarding Jamfest.⁷⁴ Additionally, a group of upset students had gathered outside the administration's office.⁷⁵ (Critically, this group of students left as

66. *See id.* at 216-19.

67. *Id.* at 216.

68. *Id.* at 219.

69. *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

70. *Id.* at 339-41 (2d Cir. 2011).

71. *Id.* at 340.

72. *Id.* at 341.

73. *Id.* at 349 ("According to the *undisputed* facts in this case, the controversy over Jamfest's scheduling had already resulted in a deluge of phone calls and emails, several disrupted schedules, and many upset students even before Doninger posted her comments on livejournal.com." (emphasis in original)).

74. *See id.* at 339-42.

75. *Id.* at 341.

soon as Avery explained to them that Jamfest was not cancelled.)⁷⁶ Because of these things, administrators testified that they were forced to either miss or arrive late to “school-related activities . . . including a health seminar, an observation of a non-tenured teacher, and a superintendents’ meeting.”⁷⁷ When administration later discovered Avery’s post after these events had taken place, they punished her by disallowing her from running for senior class secretary.⁷⁸

Like Justin, Avery and her parents brought suit. Although the Second Circuit ultimately decided the *Doninger* case in favor of the defendants on the basis of qualified immunity, the court concluded that Avery’s case likely met the *Tinker* test, and that even *Fraser* was potentially applicable to Avery’s case.⁷⁹ As the court explained, *Tinker* “provid[ed] ‘substantial grounds’ for the school officials here ‘to have concluded [they] had legitimate justification under the law for acting as [they] did.’”⁸⁰

To start, it was reasonable for school officials to anticipate a substantial disruption because of the language Avery had used in her post, and the fact that the information she had provided was “at best misleading and at wors[t] false[.]”⁸¹ Additionally, “Doninger’s blog post directly pertained to an event at LMHS, . . . it invited other students to read and respond to it by contacting school officials, [and] th[e] students did in fact post comments on the post[.]”⁸² Neither was *Fraser* out of the question.⁸³ Rather than completely rule out *Fraser* like the Third Circuit did, the court concluded that because “the applicability of *Fraser* to plainly offensive off-campus student speech is uncertain,” so even *Fraser* potentially cut against Avery’s case.⁸⁴

Finally, there was already sufficient evidence that tensions were running high about Jamfest.⁸⁵ Neither party contested the fact that

76. *Id.*

77. *Id.*

78. *Id.* at 342.

79. *Id.* at 343–48.

80. *Id.* at 348 (second and third alterations in original) (citing *Saucier v. Katz*, 533 U.S. 194, 208 (2001)).

81. *Id.* (first alteration in original) (quoting *Doninger v. Niehoff*, 527 F.3d 41, 51 (2008)).

82. *Id.*

83. *See id.*

84. *Id.*

85. *See id.*

“the controversy over Jamfest’s scheduling had already resulted in a deluge of phone calls and emails, several disrupted schedules, and many upset students *even before* Doninger posted her comments on livejournal.com.”⁸⁶ Thus, because tensions at the school were already running high, the court concluded that “there remain[ed] no triable issue here as to whether it was objectively reasonable for school administrators to conclude that Doninger’s posting was potentially disruptive to the degree required by *Tinker*.”⁸⁷

3. *The irreconcilable rationales in Layshock and Doninger*

The *Layshock* and *Doninger* cases showcase the extent to which students’ rights are currently determined by jurisdictional lines. Both Justin and Avery used online platforms to say derogatory things about members of their school administrations, and both Avery and Justin’s actions ended up impacting what took place on-campus. However, Avery’s post, which was arguably much less offensive than Justin’s outrageous Myspace parody profile, was punishable, while Justin’s post was not. Most notably, Avery’s post, which appeared to only cause slight inconveniences for school administrators, such as making administrators late to certain meetings, was determined to be a substantial disruption to the school. In contrast, Justin’s post, which arguably had a greater impact on the student body and teachers, given the resulting class cancellation and nearly week-long limitations on school computer use, was not considered a substantial disruption.⁸⁸

This, of course, is not to say that there are not meaningful factual distinctions between the two cases. Unlike Avery, Justin was not a student leader.⁸⁹ And, where Avery’s punishment was limited to the extracurricular context, Justin’s post got him

86. *Id.* at 349 (emphasis added).

87. *Id.* at 348–49.

88. Perhaps, if the school had specifically argued that Justin’s post had caused a substantial disruption, the court may have been more willing to consider the application of *Tinker* to Justin’s actions. However, even if this was the case, it is unlikely that the court would have been willing to give too much weight to this argument, due to its aversion to allowing schools to monitor students’ off-campus speech.

89. However, as this Note will later show, even if the facts of the cases are much more similar (e.g., the students are both being banned from the same extracurricular activity, for the same type of speech), courts will still come to different conclusions.

suspended, disallowed from participating in his graduation ceremony, banned from all extracurricular activities, etc.⁹⁰ Another difference is that in Avery's case, tensions were already running high, whereas at Justin's school, his post did not occur within the context of a problem that was already schoolwide. This is meaningful because the higher tensions at a school are, the more a court is justified in holding that a school administration was reasonable in concluding that a student's actions could cause a substantial disruption.

These distinctions alone, however, still fail to explain the serious differences in how the courts applied *Tinker* and *Fraser*. According to the Third Circuit's decision in Justin Layshock's case, the *Tinker* and *Fraser* tests can only be applied in specific circumstances; in contrast, to the Second Circuit, *Tinker* is expansive in its reach, and even *Fraser* isn't definitively off the table. The policy rationales motivating each court are also very different. In *Layshock*, the court was incredibly sensitive to the dangers of allowing a school's authority to extend beyond the literal schoolhouse gate; in contrast, the *Doninger* court seemed relatively unconcerned about the possible opportunities for school overreach, and it only mentioned the issue in passing.⁹¹ Thus, cases like *Layshock* and *Doninger* provide more questions than answers.

C. Conflicts in the Extracurricular Context

Finally, the division amongst courts is especially highlighted in the narrower context of regulating the off-campus, online speech of students that choose to participate in extracurricular activities. For

90. Besides the stark fact that Justin's punishment was clearly harsher than Avery's punishment, this distinction is also worth noting because a student is likely to receive greater legal protection if his or her access to school itself has been limited. All state constitutions mandate the creation of a public school system, and many state constitutions specifically state that their school system will be open to all children of the state. See Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMMISSION STS. 1, 5-22 (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>. In contrast, to the knowledge of the author, there are no federal or state laws that hold that extracurricular participation is a right. Therefore, a student automatically has much greater legal protection if her school's punishment threatens her right to an education, not just her desire to participate in an extracurricular activity.

91. See *Doninger*, 642 F.3d at 351. The *Doninger* court stated, "To be clear, we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities." *Id.* But, the court did nothing to expand on this statement. See *id.*

example, consider the details of the following conflicting cheerleader cases.

1. B.L. *ex rel.* Levy v. Mahanoy Area School District

In *B.L. ex rel. Levy v. Mahanoy Area School District*, a high school cheerleader, B.L., posted a picture to Snapchat of her and her friend “holding up their middle fingers[.]”⁹² Superimposed over the picture was the caption, “fuck school fuck softball fuck cheer fuck everything.”⁹³ The snap was taken in front of a local convenience store over the weekend, and B.L. was not participating in any school activity at the time.⁹⁴ Additionally, B.L. had only sent the snap to her private followers.⁹⁵

Notwithstanding these facts, when B.L.’s snap was shown to school authorities, B.L.’s coaches removed her from the squad.⁹⁶ According to the coaches, B.L.’s dismissal was justified on the basis that she had used profanity, and that she had violated the cheer squad’s rules. Among other things, the rules stated,

Please have respect for your school, coaches, teachers, and other cheerleaders and teams. Remember, you are representing your school *when at games, fundraisers, and other events*. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.⁹⁷

As a result, B.L.’s parents brought suit against the school district, seeking a preliminary injunction.⁹⁸ Fortunately for B.L., the court concluded that B.L. was likely to succeed on the merits of her claim and granted her motion.⁹⁹ First, because B.L.’s school did not claim that her snap had caused a substantial disruption, the court concluded, with little to no analysis, that B.L.’s punishment could

92. *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 289 F.Supp.3d 607, 610 (M.D. Pa. 2017).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 611. Relevantly, prior to this time, B.L. had already been granted a Temporary Restraining Order, which kept her from being removed from the team. *Id.*

99. *See id.* at 616.

not be justified under *Tinker*.¹⁰⁰ Second, B.L. could not be punished for the offensive language in her snap because the Third Circuit had already determined that *Fraser* was inapplicable to off-campus speech.¹⁰¹

Further, as a policy matter, the court was very uncomfortable with the idea of enforcing school punishments that would essentially allow students to become the “Thought Police—reporting every profanity uttered—for the District.”¹⁰² Therefore, the court refused to offer a different framework for analyzing student speech cases where the punishment involved removal from an extracurricular activity.¹⁰³ The court also concluded that if the cheerleading rules remained in place, “B.L. would be subject to continuing censorship of her protected speech.”¹⁰⁴ Accordingly, the court granted B.L.’s motion.¹⁰⁵

2. *Johnson v. Cache County School District*¹⁰⁶

Conversely, in a nearly identical case, the U.S. District Court for the District of Utah chose to rule in favor of the school district.¹⁰⁷ In *Johnson v. Cache County School District*, shortly after finding out that she had made her high school cheer squad, S.J. posted a video to Snapchat of her and four other cheerleaders singing along to Big Sean’s song, “I.D.F.W.U.”¹⁰⁸ The snap was approximately eight seconds long and showed the girls wearing their Mountain Crest cheer shirts as they sang, “I don’t fuck with you, you little stupid

100. *See id.* at 612 n.7.

101. *See id.* at 613.

102. *Id.* at 614.

103. *See id.* at 613–14.

104. *Id.* at 615.

105. After successfully getting a preliminary injunction, B.L.’s case was again brought before the U.S. District Court for the Middle District of Pennsylvania. On March 21, 2019, the judge issued a ruling in favor of B.L. *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019). However, on April 12, 2019, the school district appealed. *See* Brief for Appellant at 1, *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, No. 19-1842 (June 28, 2019). So, the ultimate outcome of this case is still uncertain.

106. The Author worked as a law clerk for the Litigation Division of the Utah Attorney General’s Office that defended the Cache County School District in the *Johnson* lawsuit. All information included in this Note about the *Johnson* case is drawn from the public record; no confidential information has been disclosed. The opinions expressed herein are not necessarily the opinion of the Attorney General’s Office, the Cache County School District, or any of the individuals involved in the litigation.

107. *Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1324 (D. Utah 2018).

108. *Id.* at 1308–09.

ass bitch, I ain't fucking with you."¹⁰⁹ In addition to using similarly offensive language to the student in *B.L.*, S.J.'s post was also private, and only viewable to thirty to forty of S.J.'s followers.¹¹⁰ Unlike *B.L.*, however, around thirty minutes after posting, S.J. decided that the snap was inappropriate to share, and she deleted it.¹¹¹ Unfortunately for S.J. though, one of the recipients of her post took a screenshot of the snap and showed school administrators and cheer coaches.¹¹² As a result, S.J. was dismissed from the squad.¹¹³

According to S.J.'s coaches and administrators, her punishment was justified for several reasons.¹¹⁴ During the cheer tryout process, administrators and coaches had spoken "at length" about appropriate social media use.¹¹⁵ The squad's coach had told the students "not to post any derogatory or nasty comments, to refrain from bullying or any 'catty' comments, and not to post anything that would do dishonor to themselves, their family, or their school."¹¹⁶ Administrators had also explained that, in the past, cheerleaders' inappropriate social media use had escalated problems between Mountain Crest and the neighboring high school, Ridgeline.¹¹⁷ Further, upon being informed that she had made the cheer squad, S.J. had been encouraged not to post anything about the results until they were formally announced the following day.¹¹⁸

As for the content of S.J.'s post, administration thought that the language in S.J.'s post "bordered on threatening and was informed that the video made other girls who had not been chosen to feel bullied and that S.J. and the other girls were gloating."¹¹⁹ In addition to these factors, the school also concluded that S.J.'s dismissal was appropriate because S.J. remained "unrepentant and insistent that the post was accidental and unintentional[.]" a claim

109. *Id.* at 1309.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1309-10.

114. *See id.* at 1307-10.

115. *Id.* at 1308.

116. *Id.*

117. *Id.*

118. *Id.* at 1308-09.

119. *Id.* at 1310.

that led administrators to conclude that S.J. was lying to them about her choice to post the video.¹²⁰

Like B.L., S.J. brought her case to court, and asked for a temporary restraining order and a preliminary injunction.¹²¹ However, unlike B.L., S.J. was not granted either remedy.¹²² First, the court concluded that it was unclear whether S.J.'s speech could potentially be punished under *Fraser* because the "'school context' [referred to in *Fraser*] [could] be broader than simply 'on school grounds.'"¹²³ Further, S.J.'s speech "could be viewed as more vulgar than the offensive speech in *Fraser*."¹²⁴

The court also concluded that it was unlikely that S.J.'s speech was protected under *Tinker*.¹²⁵ Given the nature of S.J.'s speech, it was "subject to lesser protection than the 'nondisruptive, passive expression of a political viewpoint in *Tinker*.'"¹²⁶ Further, the court concluded that the school had successfully shown that S.J.'s video had "the effect of materially and substantially disrupting the work and discipline of the cheer squad in a variety of ways."¹²⁷ It was insubordinate, "ran the risk of fueling the rivalry between Mountain Crest and Ridgeline, and had the potential of causing conflict between students at Mountain Crest."¹²⁸

Additionally, S.J.'s punishment was also likely to be found valid on the basis that "[t]here is a difference between excluding a student from participation in a voluntary extracurricular activity and disciplining or suspending a student from class."¹²⁹ Essentially, by going out for the team, S.J. and all other students who participated in extracurricular activities necessarily subjected themselves to higher standards.¹³⁰ As the court specifically noted, "this court disagrees with the *B.L.* court's failure to consider the difference between a school suspension and participation in an

120. *Id.*

121. *Id.* at 1307.

122. *Id.* at 1324.

123. *Id.* at 1317 (quoting *Morse v. Frederick*, 551 U.S. 393, 405 (2007)).

124. *Id.* at 1319.

125. *Id.*

126. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986)).

127. *Id.*

128. *Id.* at 1320.

129. *Id.*

130. *Id.* at 1321.

extracurricular activity.”¹³¹ Thus, “[e]ven if S.J. had not used profanity, she could have been disciplined for insubordination, lying to administrators, and failing to take responsibility for her actions.”¹³²

Finally, unlike in *B.L.*, where the court specifically discussed the dangers of chilling student speech, the *Johnson* court did not think that the cheer squad rules would continue to negatively impact S.J. As the court summarized, “S.J. has no specific plan to post anything inappropriate in the future and it is a condition of participating in an extracurricular activity, not a condition of her right to attend school.”¹³³ Therefore, since the school’s actions were not a clear violation of S.J.’s rights, the court ruled in favor of the school.¹³⁴

3. *The irreconcilable outcomes of B.L. and Johnson*

Few factual differences exist between *B.L.* and *Johnson*. Both students’ posts were connected to cheer and, according to their schools, both cheerleaders showed disrespect towards their schools and violated their squads’ rules. The only significant incongruity between these cases is the fundamentally different interpretations the reviewing courts and the parties to these cases had of *Tinker* and *Fraser*, and their more general disagreement about how extracurricular activities should be treated under the law.¹³⁵

II. INSUFFICIENT CURRENT APPROACHES FOR EXTRACURRICULAR ACTIVITIES

Although it is still unclear how courts should resolve the dicey issues presented in cases like *B.L.* and *Johnson*, trends for how courts should evaluate these cases have begun to emerge. Most commonly, the rationales that courts and commentators rely on tend to diverge into one of two approaches. Under the first approach, schools can create higher standards for students that participate in extracurricular activities. Under the second approach, schools can rely on courts’ generous application of the *Tinker*

131. *Id.*

132. *Id.*

133. *Id.* at 1316.

134. *Id.* at 1323–24.

135. To see just how diametrically opposed the *B.L.* and *Johnson* courts are, see a later case *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 438–39 (M.D. Pa. 2019).

standard. Unfortunately, although both of these approaches have their merits, as I will explain below, both approaches also suffer from serious defects.

A. Approach #1: Schools Can Create Higher Standards for Students that Participate in Extracurricular Activities.

Some courts¹³⁶ and commentators¹³⁷ have concluded that one of the best ways to resolve the debacle over students' online speech in the extracurricular context is to simply recognize that by going out for the team, students necessarily subject themselves to higher standards. This solution, which I will refer to as the *Higher Standards Approach*, is attractive for a number of reasons. First, this rule cuts down on the complexity and uncertainty courts face when students bring claims that their rights have been violated. Rather than struggling to apply less-than-clear Supreme Court precedent to student speech in the digital age, courts can simply defer to a school's sense of judgment. Such deference is merited on the basis that participation in extracurricular activities is a privilege, not a right. Additionally, it is schools, not courts, that are in the best position to determine how extracurricular programs should be run.

Second, although such outcomes would not necessarily always be fair, the *Higher Standards Approach* would at least bring much needed clarity to schools and even to students – at least in a sense. Through this approach, schools would be able to confidently assert boundaries for different student groups, rather than always be uncertain as to whether their rules will embroil the school district in a nasty lawsuit. Additionally, students would go into extracurricular activities knowing that their school's standards for its extracurriculars are nonnegotiable and, if in doubt, they should err on the side of caution when posting anything on social media.¹³⁸

136. See *Doninger v. Niehoff*, 642 F.3d 334, 350–51 (2d Cir. 2011); *Johnson*, 323 F. Supp. 3d at 1321.

137. See *Miller*, *supra* note 20, at 305.

138. Although it is possible to imagine a scenario where a court would conclude that a school's heightened standards for extracurricular activities had gone so far as to violate students' constitutional rights, as I will explain later in this Note, such outcomes will only occur in rare, exceptional cases.

Third, both Supreme Court¹³⁹ and some circuit court¹⁴⁰ precedents support the proposition that schools can hold students who participate in extracurricular activities to higher standards. For example, in *Vernonia School District 47J v. Acton*, a student and his parents challenged the school district's policy of randomly drug testing student athletes.¹⁴¹ Ultimately, the Court ruled in favor of the school.¹⁴² As the Court explained, "[b]y choosing to 'go out for the team,' [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."¹⁴³ Additionally, the Court analogized that "[s]omewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."¹⁴⁴ More recently, in *Doninger*¹⁴⁵ and *Johnson*,¹⁴⁶ the courts have also justified their decisions, at least in part, upon this rationale.

Notwithstanding the benefits of this *Higher Standards Approach*, transplanting principles from cases like *Vernonia* (which did not implicate First Amendment concerns) to cases involving student speech on social media has a number of unwelcome consequences. When constitutional rights are at stake, the efficiency and ease of bright-line rules should not supplant equity and justice. Although this approach has the benefits of being relatively straightforward and easy to apply, it is insufficient to ensure that students' most important rights are protected. This is because it allows courts to give far too much deference to schools' decisions on student speech. Rather than resolve more complex questions, such as whether the student's speech actually had a substantial impact on the school, or rely on other, equally difficult-to-apply Supreme Court precedent, this enables courts to take the path of least resistance and simply conclude that the student essentially "signed up" for the speech

139. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

140. *See, e.g., Lowery v. Euverard*, 497 F.3d 584, 589–600 (6th Cir. 2007).

141. *Vernonia*, 515 U.S. at 651.

142. *Id.* at 666.

143. *Id.* at 657.

144. *Id.* (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 627 (1989); *U.S. v. Biswell*, 406 U.S. 311, 316 (1972)).

145. *Doninger v. Niehoff*, 642 F.3d 334, 350–51 (2d Cir. 2011).

146. *Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1321 (D. Utah 2018).

restrictions at issue by choosing to participate in the activity. Thus, with the exception of cases involving outrageous encroachment on student speech, courts will likely defer to schools' student-speech restrictions.

Further, even though some court precedents have established that students who participate in extracurricular activities may be held to higher standards than normal students, there is a meaningful difference between allowing schools to punish students when they are on school campus, or at a school-sanctioned event, and allowing schools to punish students for completely off-campus speech. If a coach could not discipline players during practice, or if club advisors were required to tolerate any and all behavior at their events, these extracurricular programs would doubtlessly suffer. And when parents place their children in the care and custody of a school, the school has a duty to protect and guide them. As the Supreme Court has explained, "When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."¹⁴⁷ Likewise, it makes sense that parents delegate some degree of authority to schools when their children are participating in an extracurricular activity at school, or at another location under the direct supervision of school authorities. The same cannot be said, however, for students who are at home using Facebook, Snapchat, Twitter, etc. As the Second Circuit summarized, "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."¹⁴⁸ Thus, the facts in *Vernonia*, where the relevant student activity took place *on school campus*, are again distinguishable from cases where students participating in an extracurricular activity post something online while they are off-campus.

Ambiguity and uncertainty for students is also certain to result if schools can impose broad regulations on students' speech because of their involvement in extracurricular activities. In contrast, the drug testing in *Vernonia* does not even come close to

147. *Vernonia*, 515 U.S. at 655.

148. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979).

implicating the ambiguities associated with First Amendment concerns. Drug tests are analyzed through scientific means and have a relatively limited range of outcomes. The same cannot be said for student speech, which is much more subject to variables like context, interpretation, and bias.

This is especially the case when students are communicating online. Statements like “I ain’t fucking with you” may seem objectively offensive to coaches and school administrators. But, without seeing the student’s demeanor, body-language, and understanding the context surrounding the statement, it is impossible to tell whether a student truly intended to disrespect coaches and undermine their team. Instead, the student may have been merely seeking attention, or blowing off steam about an entirely unrelated matter. Or, the student may come from a home or neighborhood where expletives like “fuck” are everyday words used to express a broad range of emotions; in other words, to some students, such expletives may not be particularly weighty, or highly offensive terms.

Even if the import of students’ online speech could always be fairly understood by just looking at the words on the screen, it would be far better for courts to specify that schools may only penalize students for very specific, narrow categories of online speech. Otherwise, schools are at liberty to penalize students for any online speech the school perceives to be at odds with the purpose of the extracurricular activity.

Requiring schools to have narrow, specific speech restrictions has a host of benefits. First, such a requirement would provide students and their parents with clearer guidelines. For example, there is a significant difference between a school rule that students may be dismissed for personally attacking their coach online (such as by advocating that the coach be fired), and a school rule that students may be dismissed for any “inappropriate” social media use. Requiring greater specificity—or narrower speech restrictions on students—would also prevent a school from abusing its power and silencing student speech on the mere basis that the student’s speech is rude, unflattering, or merely disagreed with by the school. This would also ensure that school officials do not use broad speech restrictions to selectively enforce vague standards against students who have beliefs, opinions, and lifestyles that fall outside of school

or community norms: the broader the speech restrictions, the easier it is for schools to justify their choice to punish a student after-the-fact.

Another reason the *Higher Standards Approach* is problematic is that applying cases like *Vernonia* to students' online speech gives schools unprecedented authority to shape students' expression and, in turn, shape students' thoughts and views. The core of *Vernonia* is essentially a take-it-or-leave-it approach: if students want to participate in extracurriculars, they must be willing to be held to higher standards. If students don't want to be held to higher standards, they can quit the team. Before the digital age, however, the number of ways that schools could actually hold students to higher standards was much more limited than it is now. The school may have been able to regulate a student's conduct at school dances, in class, or other similar school-sanctioned events—but nothing nearly as personal as the private messages students send to their friends.¹⁴⁹

Thus, allowing schools to hold students who participate in extracurricular activities to indeterminate "higher standards," while also allowing schools to monitor students' social media speech, will likely have a chilling effect on student speech. At the cost of keeping their spot on the team, students may be forced to radically change some of the most personal aspects of their life, such as the messages they send to a single friend; or, they may be required to forsake sharing their opinions on social media altogether if they know that the school will punish them for expressing any viewpoints contrary to school or community norms.

Finally, the fact that students do not have a right to extracurricular participation does not mean that such activities are not critical to a student's education, or that students should be afforded little to no protection in this area of the law. As the Supreme Court acknowledged, "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the

149. Obviously, not all social media is private. However, at the time this Note was written, some instant message applications allow for messages to disappear unless the recipient screenshots the message. See, e.g., *Our Privacy Principles*, SNAP INC., <https://www.snap.com/en-US/privacy/privacy-center/> (last visited Dec. 23, 2019) ("You decide . . . just how long your Snaps stick around.")

shared values of a civilized social order.”¹⁵⁰ Of the many lofty goals of the American school system, the Supreme Court has said that schools are “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.”¹⁵¹ Undoubtedly, extracurricular activities provide just such opportunities for students to learn the “values of a civilized social order”¹⁵² and gain critical skills.

A wide variety of empirical studies have shown that there is a meaningful link between extracurriculars and such student success. According to National Education Longitudinal Study data, high school participation in extracurricular activities is “positively associated with post secondary educational attainment, voting, volunteering, and occupational factors 2 and 8 years after high school[.]”¹⁵³ Scholars have also found that extracurricular activities “benefited socioeconomically disadvantaged students as much or more than advantaged students.”¹⁵⁴ Likewise, other researchers have concluded, “that when vulnerable youth are exposed to a broad distribution of extracurricular activity settings . . . their chances of being educationally resilient are enhanced.”¹⁵⁵ It is these disadvantaged students, who are unlikely to have access to legal services, that will bear the brunt of extracurricular policies that unjustly circumscribe their First Amendment rights.

If courts want to ensure that the critical benefits of extracurriculars are truly available to students, they must not give

150. *Bethel Sch. Dist. No. 493 v. Fraser*, 478 U.S. 675, 683 (1986).

151. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

152. *Fraser*, 478 U.S. at 683.

153. *The Case for High School Activities*, NAT'L FED'N ST. HIGH SCH. ASS'NS, <https://www.nfhs.org/articles/the-case-for-high-school-activities/> (last visited Dec. 23, 2019) (citing Margo Gardner et al., *Adolescents' Participation in Organized Activities and Developmental Success 2 and 8 Years After High School: Do Sponsorship, Duration, and Intensity Matter?*, 44 DEVELOPMENTAL PSYCHOL. 814, 814–30 (2008)). Notably, in the cited study, researchers controlled for “several demographic, achievement, individual and family factors.” *Id.*

154. *Id.* (quoting Herbert W. Marsh & Sabina Kleitman, *Extracurricular School Activities: The Good, the Bad, and the Nonlinear*, 72 HARV. EDUC. REV. 464, 464 (2002)).

155. *Id.* (quoting Stephen C. Peck et al., *Exploring the Roles of Extracurricular Activity Quantity and Quality in the Educational Resilience of Vulnerable Adolescents: Variable- and Pattern-Centered Approaches*, 64 J. SOC. ISSUES 135, 135–56 (2008)).

schools a blank check to remove students from extracurricular activities.¹⁵⁶

B. Approach #2: Generous Application of the Tinker Standard

Courts have often looked to *Tinker* to resolve student speech issues in the extracurricular context. *Tinker* is an effective catchall: unlike cases such as *Fraser* and *Morse*, where the Court took care to specifically limit the scope of its holdings, the language in *Tinker* indicates that the substantial disruption test is susceptible to broad application. As the Court stated in *Tinker*,

[C]onduct by the student, *in class or out of it*, which for any reason—*whether it stems from time, place, or type of behavior*—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.¹⁵⁷

For this reason, even courts that are divided in their views have relied, at least in part, on *Tinker* when examining students' off-campus, online speech.¹⁵⁸ Thus, to depart from the *Tinker* standard would mean losing a helpful, intuitive rule,¹⁵⁹ and it would also mean taking away one of the few tests most courts agree can be effectively applied to cases involving students' online speech.

Unfortunately though, some courts' application of the *Tinker* standard has led to case law that is both confusing and disingenuous to the substantial disruption test. Although *Tinker* cautioned courts that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of

156. This of course does not mean that students who participate in extracurricular activities should never be treated differently from the student body at large. There is value in allowing schools to create heightened standards for students that participate in extracurricular activities. Instead, this Note argues that if courts choose to give schools unprecedented power to control students' speech, there should be a corresponding increase in protections given to students who choose to participate in extracurriculars.

157. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (emphasis added).

158. See, e.g., *Johnson v. Cache Cty. Sch. District*, 323 F. Supp. 3d 1301, 1318–19 (D. Utah 2018); *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607, 612 (M.D. Pa. 2017).

159. I use the word *intuitive* because it seems only logical to conclude that matters that could substantially disrupt a school are not limited to what takes place at the physical school. If anything, with the immense amount of time students spend online, things said on social media may have even greater potential to substantially disrupt a school than what actually occurs on-campus.

expression,"¹⁶⁰ courts are often all too willing to defer to a school's interpretation of what constitutes a substantial disruption.¹⁶¹ Although school administrators likely understand the dynamics of their schools better than courts ever will, even highly knowledgeable, involved administrators are still susceptible to overreacting or taking a student's post personally. These realities, combined with the natural desire to reduce conflict and maintain order, can lead even the best-intentioned administrators to perceive a substantial disruption where none exists.

For example, in *Johnson*, it was questionable at best that S.J.'s snap would have caused a substantial disruption for the cheer team. Based on the evidence presented to the court, it was unclear how many members of the cheer squad, the rival school, or students at Mountain Crest at large actually saw the post.¹⁶² And, although S.J. used what many may consider to be inappropriate language in her post, to say that her post could reasonably be viewed as subversive, or that it was intended to undermine the authority of her coaches, is taking the matter to the extreme.

S.J. ultimately deleted her snap only thirty minutes after it was posted—a sign that she may have realized how her coaches and school would view her actions, and that she did not want to cause trouble. Further, even if S.J. had not deleted the post, it is only realistic to expect that students, including those that participate in extracurricular activities, will inevitably make mistakes and disobey certain rules. This is especially true if such rules require them to modify very personal aspects of their lives, such as the pictures and videos they privately share with friends, or the language that they typically use at home. Just because a rule has been disobeyed does not mean that every time this happens a *substantial* disruption has occurred.

160. *Tinker*, 393 U.S. at 508.

161. See Allison E. Hayes, Note, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 285 (2010); Miller, *supra* note 20, at 323–24.

162. Although the court importantly acknowledged that "SnapChat stories can be saved and screen recorded by anyone in the SnapChat story and sent to others[.]" the court could only confirm that S.J. had sent her post to approximately thirty to forty of her personal contacts, *Johnson*, 323 F. Supp. 3d at 1309, and that her "unknown group of 'followers' . . . may have included other students who did not make the cheer squad." *Id.* at 1317 (emphasis added).

Neither should the school's claim that S.J.'s post could have caused a schoolwide substantial disruption satisfy the *Tinker* test. First, even if merely using swear words in a vague, celebratory post allegedly made some students feel "bullied" the fact that S.J.'s post may have made some students feel sad about not making the cheerleading squad is too low a threshold for a *substantial disruption*. Although it may be easy to sympathize with the students on the receiving end of this post, if the substantial disruption test can be met any time that a single, vague statement makes a handful of students feel offended, it is hard to imagine what would not create a substantial disruption.

Second, it is quite a stretch to claim that S.J.'s snap would ultimately encourage interschool conflict between Mountain Crest and Ridgeline, and that these problems would then lead to a substantial disruption for Mountain Crest High. Not only was S.J.'s snap private, nothing in S.J.'s snap appeared to be directed at Ridgeline. Additionally, even if S.J.'s snap encouraged other cheerleaders to create similar posts, it is unclear how even this would lead to increased rivalry, or that this rivalry would then have a substantial impact on the school. In the defendant's memorandum, counsel noted that, in the past, the rivalry between the two schools had "spawned displays of racist symbols, led to occasional violent outbursts, and ha[d] been exacerbated by disrespectful, cruel, and even hateful social media posts from students from both schools."¹⁶³ But nothing in the lyrics S.J. sang in her post was racist; and although the language in the post may have been foul, it is unclear to whom at Ridgeline S.J.'s post could have been interpreted as being "cruel" or "hateful."

Unless it could be shown that the song had been consistently used to taunt students at Ridgeline, or some other context-specific reason why that song would be seen as an attack at Ridgeline students, it seems odd to assume that, just because the song had swear words, students at Ridgeline could reasonably be expected to feel disrespected or targeted by the snap.

Therefore, a myriad of variables would have all had to *perfectly* align for S.J.'s snap to truly cause a substantial disruption. And,

163. Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order at 3, *Johnson v. Cache Cty. Sch. District*, 323 F. Supp. 3d 1301 (2018) (No. 1:18-cv-00057-DAK), 2018 WL 6831878.

when the likelihood of a disturbance is so hypothetical, schools should not be justified in stifling students' speech.

Likewise, in *Doninger*, the school claimed that Avery Doninger's post had caused a substantial disruption merely because administrators had received more phone call and emails than on average, they had been made late to some meetings, and a group of upset students had temporarily gathered outside the administration's office. While receiving more phone calls and emails may have made for busier days for administrators, it is doubtful that this could have caused a major disruption for the school. When administrators are juggling the many responsibilities of running a high school, it can only be expected that they may occasionally be made late for meetings, or sometimes experience an overwhelming influx of phone calls and emails. Finally, although an upset group of students was gathered outside the administration's office, after Avery explained that Jamfest was not actually cancelled, the students dispersed without further problem. The administration did not have to lift a finger and nothing in the case mentions that classes, or other school activities, were negatively impacted by this event.

Although schools do not have to wait for a substantial disruption to occur, it was unreasonable for administrators to forecast that Avery's post would cause further substantial disruption. Administrators did not even know about Avery's post until two weeks after she had shared her thoughts. Nothing in the *Doninger* case indicates that serious problems over Jamfest were continuing by that point. Instead, the administration's determination that a two-week-old post would create a substantial disruption seems questionable at best.

In sum, "Avery was still disciplined, though her online speech did not cause actual disruption, and the possibility that it would cause a disruption had essentially passed."¹⁶⁴

If the events that took place in *Johnson* and *Doninger* can be considered substantial disruptions, even relatively mild, everyday events can be classified as substantial disruptions. School rivalries, even heated ones, are not uncommon. And whenever a student chooses to defy the status quo, or question authority, there will

164. Miller, *supra* note 20, at 324.

inevitably be some level of disruption. As the Court explained in *Tinker*, “any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”¹⁶⁵ But disruptions of this sort are merely the occupational hazard administrators take on when they run a school.¹⁶⁶

Unfortunately, until students are given greater protections, inconveniences can constitute substantial disruptions, and highly speculative concerns can constitute a reasonable forecast of what will occur in the aftermath of a student’s speech.

III. A MODIFIED STANDARD TO BALANCE STUDENT AND SCHOOL RIGHTS

A. *Modified Tinker Standard*

Based on the problems in the above approaches, this Note advocates for a new legal test that will better balance the rights of students and the needs of schools to maintain order and efficiency. I refer to this approach as the *Modified Tinker Standard*. Under this standard, three key elements must be met before a student participating in an extracurricular activity can be penalized for their online, off-campus speech. First, students must be put on unambiguous notice of the *specific* ways in which participation in extracurricular activities will impact their rights and responsibilities. Second, schools must be able to show that there is a clear connection between the unique needs of a particular extracurricular activity and the speech restrictions associated with the activity. Third, as an additional protection to students, there should be a rebuttable presumption that a single, one-time infraction of an extracurricular activity’s social media policy does not constitute a substantial disruption.

If a school can meet the first two elements, and, if necessary, overcome the rebuttable presumption that a single infraction of the extracurricular’s social media policy does not constitute a

165. *Tinker*, 393 U.S. at 508.

166. *See id.* at 508–09.

substantial disruption, then the school would be entitled to the benefits of the fourth and final element of the *Modified Tinker Standard*. Under this final element of the *Modified Tinker Standard*, a school is permitted to prove that a substantial disruption has occurred even if the substantial disruption is limited to the disruption of a single extracurricular activity. Put another way, this provides a lower bar for schools to prove substantial disruption: rather than showing that there was a schoolwide disruption, the school would only have to prove that a single extracurricular group had been disrupted.

As further discussion of each element of this test will show, the *Modified Tinker Standard* would be effective for two key reasons. First, it will provide protections to students that, in recent cases, have been all but nonexistent. Second, at the same time, this standard provides new benefits for schools and will allow schools to remain flexible and responsive to the needs of different extracurricular activities.

1. Unambiguous notice

Schools must be required to show that students who have chosen to participate in an extracurricular activity have been put on notice that their participation impacts their rights and responsibilities. Preferably, students and parents should be given such notice in writing, such as in a disclosure slip given to parents and students. Additionally, coaches and club advisors should take the time to explain the standards to parents and students.

Next, it is critical that such notice is written and explained in such a way that will be unambiguous to students – including those that do not necessarily share the general school community's ideas of what constitutes "appropriate" speech. For example, in the *Johnson* case, the coaches had explained to the cheer squad that they should not post anything that would "do dishonor to themselves, their family, or their school."¹⁶⁷ In terms of the written information students were provided about the cheer squad's social media policy, students were simply informed that "[m]embers w[ould] be dismissed for improper social media usage."¹⁶⁸

167. *Johnson*, 323 F. Supp. 3d at 1308.

168. *Id.* (first alteration in original).

Statements such as these fail to recognize that a team is made up of unique individuals, who may have very different views as to what it means to “dishonor” themselves, or what it means to be “inappropriate.”

Instead, telling students that it is not permissible to use racial slurs, complain about their coach, or other more concrete examples, would likely be much more effective in clarifying to students what is and is not acceptable conduct. Such a mechanism will also ensure that, before schools impose a speech requirement on students who participate in extracurricular activities, administrators and coaches will have carefully considered and defined what types of speech will actually hurt the extracurricular program. In turn, this will prevent schools from overreacting to students’ posts that do not legitimately constitute a substantial disruption to an extracurricular activity.

In addition to these benefits, requiring unambiguous notice to students is consonant with Supreme Court precedent established in cases where the government seeks to limit citizens’ speech: a law is unconstitutionally vague if it does not provide an “ascertainable standard of conduct.”¹⁶⁹ Otherwise, citizens, and especially students, who often will not have the resources to fight their school’s policies and sanctions, will “steer far wider of the unlawful zone” of the prohibited speech.¹⁷⁰ Not only will such an incentive to self-censor have a negative effect on students’ personal lives, it will also prevent schools from fulfilling what the Supreme Court has stated is one of its “vital” goals, which is to facilitate a “robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.”¹⁷¹

Thus, although such “disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions[.]”¹⁷² schools must be required to prove that, by a preponderance of the evidence, the student was put on notice, in unambiguous language, of the

169. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

170. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

171. *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603) (internal quotation marks omitted).

172. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

ways in which their participation in an extracurricular activity impacts their online, off-campus speech.

2. Clear connection standard

In order to penalize a student's speech, schools must be able to show that, objectively, there is a *clear connection* between the relevant social media policy and the specific purposes of the extracurricular activity.

Requiring a clear connection ensures that overzealous administrators and coaches are not overreaching into students' lives and restricting student speech when such speech restrictions are unnecessary to the relevant extracurricular program. "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."¹⁷³ Likewise, a student's participation in an extracurricular activity should not be *carte blanche* for administrators and coaches to regulate the students' speech just to avoid "image" problems or speech that personally makes them feel uncomfortable.

Anything less than a clear connection standard opens the door for schools to attach greater responsibilities to extracurricular activities simply by creating broad "educational purposes" for an activity. For example, if all an administrator or coach has to show is that the restriction on students' speech is for an "educational purpose," or that it is "reasonably related" to the goal of the extracurricular activity, schools will nearly always be able to show that the social media policies that it has implemented are "necessary."¹⁷⁴ Many things may *relate* to an extracurricular program, but if they are not *integral* to the program, the value in allowing schools to prohibit such speech is likely low – especially when viewed in light of the chilling effect that additional social media restrictions will have on students' speech. Additionally, extracurricular programs often purport to teach a variety of skills, but that does not mean that students in every extracurricular activity should necessarily be held to all of those educational standards on their social media accounts. For example, although

173. *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

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

nearly all extracurricular programs may consider one of their goals to be teaching leadership skills, this does not mean that a school should hold every student who participates in any extracurricular activity to the same standards of conduct as a member of student government.

In addition to the ways in which the clear connection standard will protect students from sweeping speech codes, this standard is already supported by statements the Supreme Court has made regarding schools' authority to regulate student speech that occurs off-campus, during a student's personal time. For example, in discussing the *Fraser* case, the Court specifically emphasized that, although the school was allowed to limit Fraser's speech, which occurred on-campus, "the government could not censor similar speech outside the school."¹⁷⁵ This fact, which the Court again reiterated in *Morse*,¹⁷⁶ indicates that although "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings[,]"¹⁷⁷ schools may be required to meet a higher burden of proof when a student's speech occurs off-campus, during a student's personal time. Further, the requirement that there be a clear connection between a school's speech policy and the needs of an extracurricular activity also comports with the more general First Amendment principle that if a speech restriction is content-based, or viewpoint-based, then such restrictions must meet *some* level of scrutiny.

Therefore, the clear connection standard not only ensures that students are not forced to submit to broad speech codes in order to participate in an extracurricular activity, it also ensures that, just like in any other case where the government seeks to limit speech because of its content or viewpoint, school policies are actually scrutinized.

3. Rebuttable presumption against one-time infractions causing substantial disruption

There should be a rebuttable presumption that a one-time disciplinary infraction does not constitute a substantial disruption.

175. *Id.* at 266.

176. *Morse v. Frederick*, 551 U.S. 393, 406 (2007).

177. *Bethel Sch. Dist. No. 403*, 478 U.S. at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)).

As has been discussed, the *Tinker* standard is so broad that it is incredibly difficult for courts to decide when “school discipline cross[es] the line from merely punishing speech that the school disagrees with, to punishing speech that the school foresees would cause a substantial disruption[.]”¹⁷⁸ As a result, what constitutes a substantial disruption in one jurisdiction will not necessarily fit the bill in another jurisdiction. Thus, adding a presumption that tips the scale in favor of students will provide clarity to the *Tinker* analysis and, in turn, this will help improve uniformity across jurisdictions. It will also ensure that courts are not overly deferential to a school’s interpretation of what constitutes a substantial disruption—something that has been a consistent problem in past cases.

Additionally, this presumption will incentivize schools to ensure that if they want to take extreme measures to punish students for their speech, such as dismissing a student from a team, they must have equally extreme facts to back up such a substantial, impactful decision. This, of course, does not mean that a student’s one-time post could never be enough to meet the substantial disruption standard. If a school can show that tensions are already running high at a school, a single, well-timed comment may be enough to risk a substantial disruption to the school or to the extracurricular activity itself. For example, if there have been serious problems with racial hostilities at a school, a student’s online comment targeting an opposing racial group could be enough to constitute a substantial disruption. Instead, what schools cannot do under this standard is immediately punish student speech and then craft a creative storyline to prove that such punishment was merited merely because if *everything* went for the worse, there was a *possibility* that the students’ speech could have caused a disruption.

Such a presumption will also have the additional benefit of ensuring that schools take less extreme punitive measures when they disagree with students’ online speech. For example, rather than immediately dismissing a student from the team, it may be equally effective to give the student a warning or some lesser

178. Samantha M. Levin, Note, *School Districts as Weathermen: The School’s Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students’ Online Speech*, 38 *FORDHAM URB. L.J.* 859, 861 (2011).

punishment, such as cleaning team equipment. Such measures will still teach students that their speech has consequences, without immediately robbing students of the critical learning opportunities that extracurricular activities provide.

Finally, and perhaps most importantly, adding this presumption to the *Tinker* test will help prevent schools and courts from “strangl[ing] the free mind at its source and teach[ing] youth to discount important principles of our government as mere platitudes.”¹⁷⁹ The *Tinker* standard was intended to protect “fundamental rights” and ensure that student expression was not confined to “sentiments that are officially approved.”¹⁸⁰ However, applied in isolation, courts relying on the *Tinker* standard do not consistently attain this goal. Thus, adding this presumption will ensure that the *Tinker* standard will be applied as the Supreme Court intended it to be.

4. *Tinker*, specifically applied to extracurriculars

Finally, if a school can prove that these three elements have been met, then the school would be entitled to the *Tinker* standard as applied to the specific extracurricular activity at issue. Although some courts have already interpreted *Tinker* as having such an application,¹⁸¹ other courts seem to feel compelled to show that a student’s actions also caused a schoolwide disruption. For example, both the *Doninger* and *Johnson* courts reviewed the ways in which a schoolwide disruption had allegedly occurred, even though it would have been more believable and legitimate for them to merely prove that the extracurricular activity itself had been disrupted.¹⁸²

Instead, if the three, above-described standards were met, it would be enough for the school to show that there had been a substantial disruption to the specific extracurricular activity. This would allow schools to determine that there has been a substantial disruption, even if the disruption was isolated to a relatively small

179. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

180. *Id.* at 511.

181. See *Lowery v. Euverard*, 497 F.3d 584, 587–89 (6th Cir. 2007).

182. Likely, this stems from the fact that some of the language in *Tinker* indicates that the Court intended for the substantial disruption test to only apply in the context of a schoolwide disruption. See *Tinker*, 393 U.S. at 514 (referring to a substantial disruption to “school affairs,” “school premises,” and “school activities”).

group. For example, if a member of student government has been cyberbullying another student, this will not likely lead to a substantial disruption of the whole school. But, bullying is likely to be highly disruptive to the life of the student being cyberbullied and it is antithetical to the purpose of student government. Or, if a member of a school's swim team is consistently making derogatory comments about the team coach online, this likely would not constitute a disruption to the school, but it could reasonably be construed to lead to serious problems for the swim team's unity and respect for their coach.

In addition to these benefits, allowing schools to have the flexibility that *Tinker* provides is an appropriate counterbalance to the above-described mechanisms for protecting students' rights. Just as students' freedom of speech must be protected, the Supreme Court has also repeatedly emphasized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."¹⁸³ Further, schools have a duty, not only to facilitate students' discussion of controversial views, but also to teach students "the boundaries of socially appropriate behavior" and the "habits and manners of civility."¹⁸⁴ Therefore, although relying on the *Tinker* standard still opens the door to some level of uncertainty in judicial decision making, when combined with the appropriate safeguards, it is still the ideal method for dealing with such student speech cases.

CONCLUSION

Balancing students' First Amendment rights and schools' needs to effectively manage their extracurricular activities is of critical importance. Notwithstanding, the Supreme Court has yet to definitively rule on the question of whether schools can condition students' participation in extracurricular activities on "appropriate" social media use. As a result, lower courts have come to radically different conclusions even when they are presented with nearly identical fact patterns. Additionally, although analytical frameworks for how courts should rule on these cases

183. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (citations omitted).

184. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal quotation marks omitted).

have begun to emerge, neither of the two most popular frameworks for resolving student speech cases in the extracurricular context are sufficient. This is because, under either approach, students' free speech rights are nearly always subjected to the whims and preferences of school administrators.

It is critical to ensure that students truly understand what they are getting into when they choose to participate in extracurricular activities, and that courts do not unduly defer to a school's definition of what constitutes a substantial disruption. At the same time, utilizing a modified version of the *Tinker* standard provides schools with the necessary flexibility to define key standards for their extracurricular programs. Through implementing such measures, a single post will not be make-or-break for a student's education, and school administrators and coaches can return their full focus to what they do best: improving students' lives through quality education both in and out of the classroom.

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