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I. INTRODUCTION

While enjoying a home-cooked meal with his family, a father goes around the dinner table asking each family member about their day. His eldest son, a junior at the local high school, answers by going through some of the mundane details of his day, before beginning to complain about his chemistry class and his terrible teacher. The son then exclaims, "My teacher is a dick! He doesn't know how to teach. He is a fat ass who just sits in his chair and tells us to read the textbook when we have questions."

While the language used in the son's statement is objectionable and likely inappropriate for the dinner table, no school would believe that they have a right to regulate this private family conversation. But what happens when, later that night, the student uses his home computer to access the internet and make similar comments on his personal webpage while also suggesting that students protest at school to get the teacher fired? Although the student's speech occurred in a private setting off campus, the internet speech is transferrable and could end up reaching the school. The issue that arises in such a situation relates to the school's authority, if any, to regulate this type of student internet speech.

The internet is at the frontier of legal analysis and has become a source of legal confusion.[1] Courts have been perplexed as they attempt to apply the First Amendment's protection of free speech to the internet.[2] As a borderless medium, the internet does not fit conveniently into traditional First Amendment jurisprudence.[3] This confusion

1. Louis John Seminski, Jr., Note, *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 173 (2001) ("With the advent of the Internet, many new free speech issues have come to the forefront of legal analysis.").

2. *Id.* ("The Internet, however, because of its unique 'electronic' nature, does not fit neatly into First Amendment precedent regarding free speech or free press. The Internet exists in cyberspace, unlike the tangible material world that we live in, which presents many problems in comparing the mediums and using traditional language." (citation omitted)); *see also* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 863 (Pa. 2002) ("[T]he advent of the Internet has complicated analysis of restrictions on speech.").

3. Sandy S. Li, Comment, *The Need for a New, Uniform Standard: The Continued Threat to*

becomes almost insurmountable when the internet is considered in the context of a school environment and the traditional student speech analysis.[4] Despite this confusion, "[t]he First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us."[5]

This Comment addresses the problem created when the traditional student speech analysis is applied to student internet speech. Part II of this Comment establishes the basic framework used to allow public schools to regulate student speech. Part II also discusses the public schools' ability to regulate speech that is unprotected by the First Amendment as well as the framework developed by the Supreme Court to deal with student speech occurring within the school setting. Part III deals with internet speech and the various means the lower courts use to determine when schools can punish students for off-campus internet speech.

Part IV of this Comment discusses the problems associated with the lower court jurisprudence as well as the solutions proposed by other scholars. Part IV then suggests that the on-campus/off-campus dichotomy should not determine a public school's ability to regulate internet speech, but should instead be employed to determine which analysis to use. Part IV further argues that if internet speech can be considered on-campus speech, the Supreme Court's traditional student speech framework applies, but if the internet speech is considered off-campus, courts should use a balancing test to weigh the student's interest in free speech against the school's interest in regulating that speech. Part V concludes that while the new standard appears to broaden the public school's ability to regulate internet speech, the new standard actually promotes intellectual honesty, creating an atmosphere that is more protective of student speech.

Internet-Related Student Speech, 26 LOY. L.A. ENT. L. REV. 65, 93 (2005) ("The Internet differs from other traditional mediums of expression, such as flyers, newspapers, and public speeches, for several reasons: (1) it is pervasive, (2) it allows users to disseminate information to millions of people immediately and easily, and (3) it can be accessed anywhere.").

4. *See* Seminski, *supra* note 1, at 173 ("Adding the school context into the spin only complicates matters further."); *see also* Caitlin May, Comment, *"Internet-Savvy Students" and Bewildered Educators: Student Internet Speech is Creating New Legal Issues for the Educational Community*, 58 CATH. U.L. REV. 1105, 1106 (2009) ("[T]he Internet complicates the traditional student speech analysis.").

5. Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986).

II. THE SUPREME COURT AND A STUDENT'S RIGHT TO FREE SPEECH

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech."[6] Despite this language, the Supreme Court has consistently recognized that some categories of expression are not protected by the First Amendment.[7] By carving out categories of unprotected speech, the Court has recognized that the harm caused by some forms of speech justify society's restriction of such speech.[8] State actors can prevent and punish these limited categories of speech—including obscenity, fighting words, and true threats—without raising a constitutional problem.[9]

As state actors, public schools may punish student speech that falls into one of the unprotected categories of speech. In addition, the Supreme Court has recognized that in light of the "special characteristics of the school environment," public schools must also be able to punish certain types of student speech.[10] With these special circumstances in mind, the Court has developed four situations where the school's interests outweigh the student's interest in free speech. The remainder of this Part elaborates on the development of these situations.

A. Tinker*: Substantial Disruption and Material Interference*

In the seminal student speech case, *Tinker v. Des Moines Independent Community School District*,[11] the Supreme Court expressly stated that "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12] In *Tinker*, a group of students wore black armbands to school to protest the Vietnam War.[13] Upon learning of the plan to wear armbands, the school district's principals instituted a new school policy: any students wearing an armband would be asked to remove it, and any students refusing to take off the armband would be suspended until they returned to school

6. U.S. CONST. amend. I.

7. JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK, & MARTIN REDISH, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS 957 (7th ed. 2006).

8. *Id.*; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It has been well observed that such utterances [fighting words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

9. *Chaplinsky*, 315 U.S. at 571–72.

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

11. *Id.*

12. *Id.*

13. *Id.* at 504.

without wearing the armband.[14] Under this policy, a group of students were suspended.[15] The students brought suit, seeking an injunction restraining the school district and its officials from pursuing disciplinary actions.[16]

In *Tinker*, the Supreme Court indicated that states and school officials have the authority "to prescribe and control conduct in the schools" so long as the exercise of power is consistent with fundamental constitutional safeguards.[17] Recognizing the applicability of the First Amendment because the armbands were symbolic speech,[18] the Court held that teachers and students do not lose their constitutional rights when entering the schoolhouse, but these rights must be "applied in light of the special characteristics of the school environment."[19] The Court stated that a school district must be able to demonstrate that the suppression of a student's opinion is based on reasons other than avoiding the discomfort that accompanies an unpopular viewpoint. Ultimately, the Court concluded that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[20]

Turning to the situation at issue, the Court decided that "the record [did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred" as a result of the armbands.[21] Because the student speech at issue did not create a substantial disruption or material interference with schoolwork or discipline, the Court concluded that the school district's disciplinary actions were unconstitutional and remanded the case to the lower courts to determine an adequate form of relief.[22]

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 507.

18. *Id.* at 505–06.

19. *Id.* at 506.

20. *Id.* at 511.

21. *Id.* at 514. The Court indicated that hostile comments made to the students outside of the classroom did not support a finding that the armbands substantially disrupted schoolwork or discipline. *Id.* at 509 ("[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.").

22. *Id.* at 514.

B. Bethel School District*: Vulgar, Lewd, and Plainly Offensive Speech*

Tinker's substantial disruption and material interference analysis served as the test for determining whether a student's speech was constitutionally protected until the Court's decision in *Bethel School District No. 403 v. Fraser*.[23] In *Bethel*, the Court was called upon "to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly."[24] At a school assembly, Fraser used graphic and explicit sexual metaphor in a speech nominating another student for an elective office.[25] As a result, the school's assistant principal suspended Fraser for three days and removed him from the list of potential commencement speakers.[26] Fraser therefore filed suit, alleging that the school district's disciplinary actions violated his right to freedom of speech.[27]

In its decision in *Bethel*, the Supreme Court created an exception to the applicability of *Tinker*, upholding the school district's sanctions because "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission."[28] The Court reaffirmed that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[29] In recognizing a school's ability to prohibit the use of vulgar and offensive language, the Court considered the traditional role public schools play in instilling in children the habits and manners of civility and preparing them to play a role in a democratic society.[30] The Court concluded that "it was perfectly appropriate for the school to

23. 478 U.S. 675 (1986).

24. *Id*. at 677.

25. *Id*. at 677–78. Fraser's speech included the following statements, which were deemed inappropriate by the school: "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm but most . . . of all, his belief in you, the students of Bethel, is firm[;]" "Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds[;]" "Jeff is a man who will go to the very end—even the climax, for each and every one of you[;]" "So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be." *Id.* at 687 (Brennan, J., concurring in judgment).

26. *Id.* at 678. "A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides: 'Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'" *Id.*

27. *Id.* at 679.

28. *Id.* at 685. "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683.

29. *Id.* at 682.

30. *Id.* at 681.

disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[31]

C. Hazelwood School District*: School-Sponsored Speech*

Two years after *Bethel* permitted schools to prohibit lewd, offensive, and vulgar speech, the Court created a second exception to *Tinker* in *Hazelwood School District v. Kuhlmeier*.[32] In *Hazelwood*, the school's principal removed two pages from an edition of the school newspaper published by the journalism class because he objected to two of the articles.[33] Following this decision, three student-members of the school newspaper brought suit.[34]

In *Hazelwood*, the Supreme Court held that the school newspaper was not a public forum because "[s]chool officials did not evince either 'by policy or by practice' any intent to open the pages of [the newspaper] to 'indiscriminate use' by its student reporters and editors, or by the student body generally."[35] The Court's conclusion that the school newspaper was not a public forum[36] allowed school officials to regulate the content of the paper in any reasonable manner.[37]

After concluding that the school newspaper was not a public forum, the Court indicated that schools are not required to affirmatively promote particular student speech that occurs during "activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," as these events may be characterized as part of the curriculum.[38] When speech bears the

31. *Id.* at 685–86. In his opinion concurring in the judgment, Justice Brennan indicated that "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate." *Id.* at 688 (Brennan, J., concurring in judgment).

32. 484 U.S. 260 (1988).

33. *Id.* at 262–64.

34. *Id.* at 262, 264.

35. *Id.* at 270 (citations omitted).

36. "First Amendment public forum analysis is a judicial doctrine balancing the public's free speech interests against the government's proprietary interests over public property." Gary E. Newberry, Note, *Constitutional Law:* International Society for Krishna Consciousness, Inc. v. Lee: *Is the Public Forum a Closed Category?*, 46 OKLA. L. REV. 155, 155 (1993). A traditional public forum exists where speech occurs "on government property that has traditionally been available for public expression." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). See 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2.4 (1st ed. Supp. 2009) for a general discussion of the forum analysis and how forum analysis applies in the school setting.

37. *Hazelwood*, 484 U.S. at 270.

38. *Id.* at 270–71. The Court stated that activities may be considered to bear the imprimatur of

imprimatur of the school, educators can regulate student speech if the regulation is reasonably related to the school's legitimate pedagogical concerns.[39]

In applying its new test, the Court concluded that the principal's decision not to publish the two articles and the pages containing those articles did not violate the students' First Amendment rights.[40] The school newspaper bore the imprimatur of the school because it was part of the journalism class curriculum and the Board of Education allocated funds for it.[41] Since the newspaper bore the imprimatur of the school, the principal could regulate its contents pursuant to the school's legitimate pedagogical concerns.

D. Morse*: Speech Promoting Illegal Drug Use*

The Court created a third exception to *Tinker* in *Morse v. Frederick.*[42] In *Morse*, a student and his friends displayed a banner stating "BONG HiTS 4 JESUS" during the Olympic Torch Relay.[43] Upon seeing the banner, the principal demanded that it be taken down because it violated a school policy prohibiting expression advocating the use of substances illegal to minors.[44] After Frederick, a student, refused to comply with the principal's request, the principal confiscated the banner and suspended Frederick for ten days.[45] Subsequently, Frederick filed suit.

In *Morse*, the Supreme Court created a third exception to *Tinker*, concluding that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[46] Both the Court and Congress[47]

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the school and thus be part of the school curriculum, "whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.*

39. *Id.* at 273.
40. *Id.* at 276.
41. *See id.* at 262–63.
42. 551 U.S. 393 (2007).
43. *Id.* at 397.
44. *Id.* at 398.
45. *Id.*
46. *Id.* at 403.
47. As the Court noted:

> Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug-prevention programs "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful."

recognized the state has a compelling interest in deterring drug use by students and "part of a school's job is educating students about the dangers of illegal drug use."[48] Because preventing student drug use is part of the school's mission, "[s]tudent speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse."[49] Justice Alito's concurrence is a key limiting vote[50] in the *Morse* decision: he joined the majority's opinion

> on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[51]

In addressing Frederick's case, the Court first determined that the banner constituted on-campus speech because it occurred during school hours, at an event sanctioned by the school, where teachers and administrators supervised the students.[52] The Court then examined the cryptic message on the banner and concluded that it was reasonable for the principal to interpret the message as promoting illegal drug use.[53] Under the new test, because Frederick's speech could be reasonably construed as promoting illegal drug use, the Court held that the

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Id. at 408 (internal citations omitted).

48. *Id.*

49. *Id.* at 408.

50. *See* Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech After* Morse v. Frederick, 58 AM. U.L. REV. 1221, 1226 (2009) ("Perhaps even more telling than the majority opinion is the Alito and Kennedy concurrence in *Morse.*"); *see also* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007) (referring to Justice Alito's concurring opinion as "controlling"). *But see* Nuxoll *ex. rel.* Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 673 (7th Cir. 2008) (Justices Alito and Kennedy "joined the majority opinion, not just the decision, and by doing so they made it a majority opinion" not a plurality opinion).

51. *Morse*, 551 U.S. at 422 (Alito, J., concurring) (quoting Stevens, J., dissenting).

52. *Id.* at 400–01 (majority opinion).

53. *Id.* at 401–02.

> At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits . . ."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

Id. at 402.

principal's actions did not violate the First Amendment.[54]

In summation, the Supreme Court's jurisprudence divides student speech into four categories. Originally, all student speech was governed by *Tinker*. Under *Tinker*, schools can only regulate student speech reasonably calculated to cause a substantial disruption or material interference with school activities. *Bethel* limits *Tinker*'s applicability by allowing schools to regulate lewd, vulgar, or plainly offensive student speech without forecasting disruption. The *Hazelwood* Court distinguished individual student speech on school premises from school-sponsored speech and held that school officials may regulate student speech if it is reasonably perceived to bear the imprimatur of the school. Finally, *Morse* permits schools to regulate student speech that may reasonably be interpreted as promoting illegal drug use.[55] Although *Morse* provides a new analysis, lower courts are still deciding how *Morse* fits into the framework.[56]

III. CHAOS IN THE LOWER COURTS: ATTEMPTING TO DETERMINE WHEN STUDENT INTERNET SPEECH IS SUBJECT TO PUNISHMENT AT SCHOOL

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[57] As one scholar has pointed out, the negative inference of this passage "implies that outside those gates, the school should have no power to regulate student speech."[58] The Supreme Court has not needed to address a school district's ability to regulate speech occurring off campus because the student speech framework cases all dealt with on-campus speech. Because the speech unequivocally occurred within the schoolhouse gates, the school's authority to punish such speech was not in question.[59] In contrast, student internet speech often cannot be considered to have occurred within the gates of the schoolhouse.[60] With this in mind, before the

54. *Id.* at 403.

55. *Id.*

56. *See* Doninger *ex rel.* Doninger v. Niehoff, 514 F. Supp. 2d 199, 213 (D. Conn. 2007) (In *Morse*, "the Supreme Court extended *Fraser* to cover on-campus speech that school administrators could reasonably interpret as advocating the use of drugs, a message 'clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.'" (quoting *Morse*, 551 U.S. at 399)), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

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

58. Kyle W. Brenton, Note, *BONGHITS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1223 (2008).

59. *Id.* at 1224.

60. *Id.* ("In cases involving student cyberspeech, however, it is rarely clear that the speech at issue occurs within [its] gates."). "A student who comes to school the morning after creating a website

traditional student speech analysis is applied to off-campus student internet speech, it must be determined that the school's regulatory power encompasses it.[61]

While recognizing that internet speech is protected by the First Amendment, the law is unsettled regarding the amount of protection afforded to off-campus student internet speech.[62] As a result of this uncertainty, courts have established different methods for determining when student internet speech is subject to a school's disciplinary regime. One approach requires that internet speech fall into the category of on-campus speech before a school can regulate it.[63] If the internet speech is classified as off-campus speech, schools can only punish the speech if it falls into one of the unprotected categories such as obscenity, fighting words, and true threats.[64] Despite the apparent simplicity of the on-campus/off-campus dichotomy, courts have differed with respect to the analysis used to determine whether student internet speech is considered on- or off-campus speech.[65] Another approach categorically applies the *Tinker* analysis to off-campus internet speech.[66] This Part analyzes the various approaches taken by lower courts.

A. Seventh Circuit Court of Appeals

The Seventh Circuit Court of Appeals requires that speech be categorized as on-campus speech before schools can regulate it. In order to determine when off-campus speech may be considered on-campus speech, the Seventh Circuit has established what one scholar called the "place of reception standard."[67]

In *Boucher v. School Board of the School District of Greenfield*, a

on her home computer does not bring the site with her, attached to her person." *Id.*

61. *Id.*

62. *Id.* at 1214–15.

63. *See* Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–40 (2d Cir. 2007).

64. *See* Evans v. Bayer, 684 F. Supp. 2d 1365, 1372–73 (S.D. Fla. 2010); *see also supra* notes 7–9 and accompanying text.

65. *See Boucher*, 134 F.3d at 829 (indicating that where speech was disseminated determines whether speech is categorized as "on-campus"); *Bethlehem Area Sch. Dist.*, 807 A.2d at 865 (holding that school's ability to regulate off-campus speech depends on whether the speech had sufficient connections to the school environment); *Wisniewski*, 494 F.3d at 39–40 (indicating that analysis of school's ability to regulate turns on whether it was foreseeable that the off-campus speech would create a disruption on campus).

66. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010), *vacated, reh'g, en banc, granted*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

67. Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1148–49 (2008).

student contributor for an underground newspaper published off campus wrote an article about hacking the school's computers.[68] The underground newspaper was distributed at school.[69] The student author, who was suspended and ultimately expelled for writing the article,[70] brought suit and was granted a preliminary injunction by the district court.[71] On appeal, the Seventh Circuit vacated the preliminary injunction.[72] In doing so, the court held that the traditional student expression framework applied because the newspaper was distributed on campus.[73] The court focused on where the speech was ultimately disseminated, not where it originated.[74]

The Seventh Circuit's "place of reception standard" has been criticized as establishing a low threshold for when off-campus speech can be considered on-campus speech, especially when applied to student internet speech.[75] One problem with the standard is that one unilateral action by a third party could result in a student's off-campus internet speech falling subject to the school's jurisdiction. For example, a fellow student accessing the internet speech from a school computer would bring the speech under the school's jurisdiction. In addition, this threshold can easily be manipulated by administrators or a student's enemies to bring the speech into the realm of on-campus speech.[76]

B. Supreme Court of Pennsylvania

The Supreme Court of Pennsylvania also requires speech to be categorized as on-campus speech before schools can regulate it. In order to determine when off-campus speech may be considered on-campus speech, the court developed the sufficient nexus test, which looks at whether the off-campus speech has sufficient connections with the school before it can be considered on-campus speech.

In *J.S. ex rel. H.S. v. Bethlehem Area School District*,[77] an eighth grade student was expelled as a result of a website he created on his

68. *Boucher*, 134 F.3d at 822.

69. *Id.* (The newspaper was distributed "in bathrooms, in lockers and in the cafeteria at Greenfield.").

70. *Id.* at 823.

71. *Id.*

72. *Id.* at 829.

73. *Id.* "The court focused not on whether the speech was produced on- or off-campus, but whether it was received in an on- or off-campus context." Reeves, *supra* note 67, at 1148.

74. *Boucher*, 134 F.3d at 829.

75. *See* Reeves, *supra* note 67, at 1149.

76. *Id.*

77. 757 A.2d 412 (Pa. Commw. Ct. 2000), *aff'd*, 807 A.2d 847 (Pa. 2002).

home computer outside of school hours.[78] The website was entitled "Teacher Sux" and contained web pages with derogatory remarks about faculty members at the student's school.[79] The website's pages contained offensive language and graphic images of violence directed toward the school's staff.[80]

One of the teachers received an anonymous e-mail about the website and reported it to the principal.[81] Investigations by the police and the Federal Bureau of Investigation identified J.S. as the website's creator.[82] J.S. was ultimately expelled,[83] and his parents filed suit.

Citing the broad discretion given to a school's disciplinary policies, the Commonwealth Court of Pennsylvania affirmed the Court of Common Pleas' decision to uphold J.S.'s expulsion.[84] In addressing J.S.'s First Amendment claim, the court acknowledged that J.S.'s speech "occurred *off of school premises* and was communicated to others via the Internet."[85] The court looked to precedent to determine "whether a student may be disciplined for conduct occurring off of school premises."[86] Interpreting these cases, the court concluded "courts have allowed school officials to discipline students for conduct occurring off of [campus] premises where it is established that the conduct materially and substantially interferes with the educational process."[87] In other words, the court held that off-campus speech can be punished under *Tinker*. In applying the substantial and material interference standard to

78. *Id.* at 415, 417.

79. *Id.* at 415.

80. *Id.* at 415–17. The web pages contained curse words including "fuck" and "bitch." *Id.* at 416. In addition, one web page contained "a diagram of [a teacher] with her head cut off and blood dripping from her neck," while also soliciting money to hire a hitman to kill her. *Id.* Visitors to the website had to agree to a disclaimer before they could access the website. *Id.* at 415 ("The disclaimer indicated, *inter alia*, that the visitor was not a member of the School District's faculty or administration and that the visitor did not intend to disclose the identity of the web-site creator or intend to cause trouble for that individual.").

81. *Id.*

82. *Id.* at 415.

83. *Id.* at 417.

84. *Id.* at 417, 426.

85. *Id.* at 419.

86. *Id.* at 419–21 (citing Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995); Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976); Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998)). *But see* Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 167 (2003) ("A more thorough analysis of these decisions, however, suggests that they do not in fact support the J.S. court's conclusion: the J.S. court misinterpreted one of these decisions, and the other two decisions were themselves of debatable value or distinguishable from the situation faced by the J.S. court. In short, it seems more likely that the J.S. court used the decisions to attempt to legitimize its holding as being grounded in the law rather than public policy.").

87. *Bethlehem Area Sch. Dist.*, 757 A.2d at 421.

the facts of the case, the court determined that the evidence indicated the website hindered the educational process.[88]

On appeal, the Supreme Court of Pennsylvania upheld the lower court's decision, but justified the school's punishment in an alternative manner. Before considering the applicability of the student speech jurisprudence, the Supreme Court of Pennsylvania examined whether J.S.'s speech constituted an unprotected true threat and concluded it did not.[89]

The court held that it needed to conduct a two-step inquiry to determine whether the traditional student speech case law applied. As a threshold issue the speech's location must be determined: "[I]s it on campus speech or purely off-campus speech?"[90] If it is considered on-campus speech, the court considers other factors, including the speech's form, effect, and setting, as well as "whether the speech is part of a school sponsored expressive activity."[91]

In addressing the threshold inquiry, the court developed a sufficient nexus approach: where speech that originates off campus is aimed at a specific school or its staff, brought onto the school's campus, or accessed at the school by its originator, the speech is to be considered on-campus speech for purposes of First Amendment analysis.[92] Applying this analysis to J.S.'s speech, the court concluded there was a sufficient nexus between the website and the school to constitute on-campus speech.[93] The court considered the fact that J.S. had accessed the website on a school computer, showed the site to another student while on campus, and discussed the website with other students.[94]

Concluding that J.S.'s internet website constituted on-campus speech, the court moved on to the second step of the inquiry. Although J.S.'s speech did not fall neatly under any one test, the court attempted to apply *Fraser* and *Tinker*.[95] The court ultimately concluded that the

88. *Id.* The court indicated that one teacher had to take medical leave based on the website's content and that the website's statements had a negative effect on other students' perceptions of the teachers involved. *Id.* In upholding J.S.'s expulsion, the court also recognized that schools are justified in taking threats of school violence seriously, as they have become commonplace. *Id.* at 422.

89. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 856–59 (Pa. 2002). After considering "the statements, the context in which they were made, the reaction of listeners and others as well as the nature of the comments," the court concluded J.S.'s statements did not constitute a true threat and turned to determining the applicability of the student speech jurisprudence. *Id.* at 858–60.

90. *Id.* at 864.

91. *Id.*

92. *Id.* at 865.

93. *Id.*

94. *Id.* Faculty members and administrators had also accessed the website on campus. *Id.*

95. *Id.* at 865–68.

website created a substantial disruption in the school.[96] It found that the educational process was disrupted because one teacher had to miss class, which required using substitute teachers.[97] In addition, the court indicated that several students visited counselors and expressed anxiety.[98] The court found yet another disruption based on the parents voicing their displeasure with the situation.[99]

The Supreme Court of Pennsylvania's opinion is important for two reasons. First, it reinforces that schools may punish students for speech that is categorically unprotected by the First Amendment. Second, the court recognized the school's authority to discipline internet speech once it determined that the speech could be considered on-campus speech.[100]

C. Second Circuit Court of Appeals

The Second Circuit has had two opportunities to address off-campus student internet speech. In the first case, the Second Circuit indicated that if it was reasonably foreseeable that off-campus speech would reach the school, the speech could be regulated under *Tinker*. One year later, the Second Circuit applied this framework in a subsequent case. Both cases will be addressed below.

1. *Wisniewski v. Board of Education of the Weedsport Central School District*[101]

In *Wisniewski*, a middle school student created an image with a pistol firing a bullet into a person's head; the image displayed the words "Kill Mr. VanderMolen," who was a teacher at the middle school.[102] The image was used as an icon on the student's AOL Instant Messaging (IM) messages.[103] When the student sent an AOL IM,[104] the icon helped

96. *Id.* at 869.

97. *Id.* The school district's findings indicated that "Mrs. Fulmer has had lasting effects from viewing the Web page, including stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of lost well-being," that "Mrs. Fulmer's lifestyle has changed dramatically," that "Mrs. Fulmer has suffered headaches, takes Zanac as an anti-anxiety/anti-depressant, and was unable to return to school at the end of the year," and that "Mrs. Fulmer has applied for a medical sabbatical leave for the 1998–99 school year because of her inability to return to teaching." J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 416–17 (Pa. Commw. Ct. 2000), *aff'd*, 807 A.2d 847 (Pa. 2002).

98. *Bethlehem Area Sch. Dist.*, 807 A.2d at 869.

99. *Id.*

100. *See* Reeves, *supra* note 67, at 1144.

101. 494 F.3d 34 (2d Cir. 2007).

102. *Id.* at 36.

103. *Id.* at 35–36.

104. As the Second Circuit noted:

identify the student as the sender.[105] The student created and transmitted the icon off campus and did not send it to the teacher or any other school official.[106] However, another student informed the teacher about the icon and provided him with a copy of it, which was later passed on to the principals and the police.[107]

Upon receipt of the icon, the school questioned the student and suspended him for five days.[108] The police also investigated the matter and concluded that the student meant the icon as a joke, and he did not pose any threat to the teacher.[109] After the student served his suspension, the superintendent appointed a hearing officer to determine whether the student should receive a long-term suspension.[110] At the conclusion of the hearing, the hearing officer recommended to the Board of Education a one semester suspension, which the Board approved.[111] The student filed suit against the school district.[112]

The Second Circuit Court of Appeals held that "[t]he fact that [the student's] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."[113] The Second Circuit concluded "that off-campus conduct can create a foreseeable risk of substantial disruption within a school,"[114] which allows school officials to regulate the speech consistent with *Tinker*.[115] In this case, the court concluded that the

> Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called "buddies" in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a "buddy list" who happen to be on-line at the same time. Different IM programs use different notations for indicating which members of a user's "buddy list" are on-line at any one time. Text sent to and from a "buddy" remains on the computer screen during the entire exchange of messages between any two users of the IM program.

Id. at 35.

105. *Id.*

106. *Id.* at 36.

107. *Id.*

108. *Id.*

109. *Id.* A psychologist also concluded that the icon was meant as a joke and not an actual threat. *Id*.

110. *Id.*

111. *Id.* at 37.

112. *Id.*

113. *Id.* at 39.

114. *Id.*

115. *Id.* at 38. "With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District . . . .*" *Id.*

student's conduct "pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[116] The court concluded it was reasonably foreseeable that the icon would reach school authorities.[117] Based on the facts of the case, the court concluded that the First Amendment claims were properly dismissed.[118]

At a minimum, *Wisniewski* indicates that a school district can punish speech that occurs entirely off campus. In order for a school district to be able to punish such speech, it must be reasonably foreseeable that the speech would reach school property.[119] *Wisniewski* does not address which traditional student speech tests are applicable to off-campus speech, but it does imply that a school district can punish student off-campus speech under *Tinker*'s substantial disruption and material interference test.

2. *Doninger v. Niehoff*

The *Doninger* line of cases allowed the Second Circuit to flesh out *Wisniewski*'s meaning. Doninger, a high school student, was punished for a posting made on livejournal.com.[120] As a member of student council, Doninger was responsible for planning a battle of the bands concert, which having been previously delayed, now faced further delay.[121] Upset by the potential delay, four student council members used the school computers to access one of their parent's e-mail accounts and send a mass e-mail encouraging local citizens to contact the superintendent about the problem.[122] Flooded with responses to the e-mail, the principal met with Doninger and offered her opinions

116. *Id.* at 38–39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

117. *Id.* at 39. The Second Circuit could not unanimously decide whether it must be shown that the speech was reasonably foreseeable to reach school property or whether the fact that it reached the school eliminates the need to inquire into foreseeability. *Id.*

118. *Id.* at 40.

119. *Id.* at 39.

120. Doninger *ex rel.* Doninger v. Niehoff, 514 F. Supp. 2d 199, 203, 206–08 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

121. *Id.* at 203. Jamfest, the battle of the bands concert, had been postponed twice and "was scheduled to take place on April 28, 2007." However, the teacher responsible for the auditorium was not available to work on that day, which forced the principal to either have the students reschedule the event or hold the event in the cafeteria. Unbeknownst to the students, a Board of Education policy required the teacher's presence at all events in the auditorium. *Id.*

122. *Id.* at 204–05. Doninger claimed that their faculty advisor suggested sending a mass e-mail to the taxpayers, but the advisor adamantly rejected making such a suggestion. *Id.* at 204. Based on the testimony heard, the court concluded that the advisor's version of the events was most credible. *Id.*

regarding the corrective actions that should be taken.[123] Later that evening, Doninger posted an entry to her livejournal.com blog regarding the concert.[124] The blog entry was critical of the administration's reaction to the students' concerns about the concert and encouraged others to contact the office to anger the administration.[125] A few weeks later, when the administration discovered the blog entry, Doninger was prohibited from running for senior class secretary.[126] Despite winning as a write-in candidate,[127] Doninger was not permitted to hold the office and another student assumed the position.[128] Doninger's mother brought suit claiming violation of her daughter's First and Fourteenth Amendment rights[129] and seeking a preliminary injunction requiring the school to hold a new election for senior class secretary in which she would be able to run.[130]

The District Court of Connecticut found that Doninger failed to establish a likelihood of success on the merits and therefore denied her motion for preliminary injunction.[131] The court concluded that

123. *Id.* The principal "told [Doninger] that using the school computer system to send a personal email violated the school's internet policy, and that in general, the students had failed to act in a manner appropriate to class officers." *Id.* at 205.

124. *Id.* at 206 ("Livejournal.com is an online community that allows its members to post their own blog entries and comment on the blog entries of others. One need not be a registered member of the community to view the webpages, unless a blogger has adjusted her privacy settings to restrict access, in which case it is possible to view the blog only if the author has previously added the viewer to her 'friends' list. A privacy setting is also available that restricts access to the author alone. At the time [Doninger] posted her blog entry, her privacy setting was 'public,' and [Doninger] understood that this meant that anyone could view the webpage. The content of the message itself suggests that her purpose was in fact to encourage her fellow students to read and respond to the blog . . . .") (citation omitted).

125. *Id.* In pertinent part, the blog entry stated:

> jamfest is cancelled due to douchebags in central office. . . . basically, because we sent [the original Jamfest email] out, [the superintendent] is getting a TON of phone calls and emails and such. . . . however, she got pissed off and decided to just cancel the whole thing all together, anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do[,] it is going to be after the talent show on may 18th.

Id. (internal quotation marks omitted).

126. *Id.* at 207–08.

127. *Id.* at 208. In an issue related to this case, but not related to this Comment, the school prohibited students from wearing "Team Avery" t-shirts into the election assembly. *Id.* This issue raises other student free speech concerns.

128. *Id.* at 208–09.

129. *Id.* at 202, 211 (Doninger "argues that her First Amendment rights were violated in the following ways: (1) when she was prevented from running for Senior Class Secretary; (2) when she was not permitted to wear a 'Team Avery' t-shirt into the auditorium on May 25, 2007; and (3) when she was not permitted to give a speech at the May 25, 2007 assembly."). Because this Comment focuses on student internet speech, Doninger's other First Amendment claims are not addressed. For the same reason, Doninger's Equal Protection claim will not be addressed.

130. *Id.* at 202.

131. *Id.* at 218, 220.

Doninger's speech was created off campus but was "purposely designed by [Doninger] to come onto the campus."[132] The district court reiterated the Second Circuit's holding in *Wisniewski* that when off-campus speech affects the school in a reasonably foreseeable manner, the speech "may be considered on-campus speech for the purposes of the First Amendment."[133] Because the speech was deemed on-campus speech for First Amendment purposes, the school could regulate the speech based on the traditional student speech framework.[134] With this in mind, the district court indicated that *Fraser* permits school officials to punish offensive speech, such as that contained in Doninger's blog,[135] and Doninger was therefore unlikely to succeed on the merits.[136]

Doninger appealed the district court's decision, but the Second Circuit Court of Appeals affirmed the denial of a preliminary injunction.[137] The Second Circuit reiterated its holding from *Wisniewski* "that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct '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."[138] The Second Circuit applied the *Wisniewski* framework and concluded that it was reasonably foreseeable that the online post would reach school property[139] and that once there it would create a risk of substantial disruption.[140] Because Doninger's speech

132. *Id.* at 216.

133. *Id.* at 217; *see also id.* at 217 n.11 ("At oral argument, [Doninger's] counsel suggested that the holding in *Wisniewski* should be limited to the *Tinker* framework; that is, that off-campus speech directly affecting the school in a reasonably foreseeable manner could only be analyzed under the *Tinker* rubric for on-campus speech. The Court, however, does not read *Wisniewski* to be so limited, and in fact sees no reason to deny the application of *Fraser* to off-campus speech that affects the school in a reasonably foreseeable manner and that would otherwise be analyzed under *Fraser* had it actually occurred on-campus.").

134. *See id.* at 216–17.

135. *Id.* at 217.

136. *Id.* at 218.

137. Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 44 (2d Cir. 2008).

138. *Id.* at 48 (quoting Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007)).

139. *Id.* at 50. In making this determination, the Second Circuit looked at the fact that Doninger designed the speech to disseminate onto campus, that the posting pertained to events at the school, and that Doninger's intent was to encourage other students to act. *Id.*

140. *Id.* "There are three factors in particular on which we rely to reach this conclusion. First, the language with which [Doninger] chose to encourage others to contact the administration was not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy." *Id.* at 50–51. "Second, and perhaps more significantly, [Doninger's] post used the 'at best misleading and at wors[t] false' information that Jamfest had been cancelled in her effort to solicit more calls and emails to" the superintendent. *Id.* at 51. "Moreover, [Doninger] and the other students who participated in writing the mass email were called away either from class or other activities on the morning of April 25

could be regulated under the *Tinker* standard, the Second Circuit did not decide whether the scope of *Fraser* encompassed off-campus speech,[141] although it did indicate its reluctance to apply *Fraser* to Doninger's off-campus speech.[142]

Although the preliminary injunction was denied, the case proceeded. The district court partially granted summary judgment for the defendants.[143] Although the Second Circuit was unwilling to address *Fraser*'s applicability to the case, the district court stated that until the Second Circuit overrules its position, "the [c]ourt does not believe there is any reason to change its position that Ms. Doninger's First Amendment rights were not violated."[144]

The Second Circuit Court of Appeals has recognized that the creation and transmission of internet speech off campus does not always insulate the student from school discipline.[145] If it is reasonably foreseeable that off-campus internet speech will reach school authorities and create a risk of substantial disruption, the off-campus speech is actually on-campus speech that can be regulated under *Tinker*.[146] The Second Circuit has not yet determined whether the reasonable foreseeability test allows a school district to regulate off-campus student speech under the other student speech tests.[147] However, at least one district court appears willing to permit schools to regulate off-campus student speech under *Fraser* when it is reasonably foreseeable that the speech will reach the school campus.[148]

D. Third Circuit Court of Appeals

The Third Circuit Court of Appeals has placed less emphasis on whether the off-campus student internet speech can be considered on-

because of the need to manage the growing dispute . . . ." *Id.*

141. *Id.* at 50. "We need not conclusively determine *Fraser*'s scope, however, to be satisfied that [Doninger's] posting—in which she called school administrators 'douchebags' and encouraged others to contact [the superintendent]'to piss her off more'—contained the sort of language that properly may be prohibited in schools." *Id.* at 49. "We therefore need not decide whether other standards may apply when considering the extent to which a school may discipline off-campus speech." *Id.*

142. *Id.* at 49–50.

143. Doninger v. Niehoff, 594 F. Supp. 2d 211, 214 (D. Conn. 2009). The court granted summary judgment for the defendants on Doninger's First Amendment claim because the defendants were entitled to qualified immunity. *Id.* at 221.

144. *Id.*

145. Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007).

146. *Id.* at 39–40.

147. *See* Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

148. *Doninger*, 594 F. Supp. 2d at 221.

campus speech. In contrast to the off-campus/on-campus approach, the Third Circuit has held that all off-campus internet speech can be regulated under *Tinker*.

In *J.S. ex rel. Snyder v. Blue Mountain School District*, two students created a fake MySpace profile of their principal, Mr. McGonigle.[149] The profile, which included the principal's picture, referenced him as a pedophile and sex addict.[150] Although the profile was allegedly set to a private setting shortly after its creation, the profile became a topic of much conversation within the school.[151] After receiving a print-out of the profile, the principal called one of the students, J.S., to his office.[152] During this meeting, J.S. confessed to creating the profile and was subsequently suspended for ten days.[153] J.S.'s parents filed suit alleging violations of their daughter's First Amendment rights and their own constitutional rights to direct the upbringing of their child.[154]

The district court granted summary judgment for the defendant.[155] In doing so, the court concluded that the speech was "akin to the lewd and vulgar speech" in *Fraser*.[156] The court also noted that the speech could have resulted in criminal prosecution.[157] The court held that the school could punish the student's off-campus creation when the off-campus speech had an effect on campus.[158] Because the court found the connection between the off-campus action and the on-campus effect, the school's punishment was constitutional.[159] The parental rights claim

149. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *1 (M.D. Pa. Sept. 11, 2008), *aff'd*, 593 F.3d 286 (3d Cir. 2010), *vacated, reh'g, en banc, granted*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

150. *Id.*

151. *Id.* at *1–2.

152. *Id.* at *2.

153. *Id.*

154. *Id.* at *3.

155. *Id.* at *9.

156. *Id.* at *6.

157. *Id.*

158. *Id.* at *7.

159. *Id.*

> The facts that we are presented with establish much more of a connection between the off-campus action and on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code. J.S. lied in school to the principal about the creation of the imposter profile. Moreover, although a substantial disruption so as to fall under *Tinker* did not occur . . . there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an

was rejected because J.S.'s activities "were not merely personal home activities."[160]

On appeal, the Third Circuit Court of Appeals affirmed the district court's decision to grant summary judgment for the defendants.[161] The Third Circuit recognized the need to balance "the protected nature of off-campus student speech" against the school's interest in preventing speech that creates a substantial disruption with school functions.[162] With this in mind, the Third Circuit created a categorical exception to the on-campus requirement.[163] The Third Circuit held "off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."[164] In this case, the court held that but for the quick corrective actions taken by the principal, the profile would have created a reasonable possibility of disruption.[165]

Schools within the Third Circuit's jurisdiction can regulate on- and off-campus student speech under *Tinker*.[166] Having created a categorical exception for *Tinker*'s application, which governed the current case, the Third Circuit declined to determine "whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus."[167]

E. United States District Court for the Southern District of Florida

The United States District Court for the Southern District of Florida has established a hybrid approach. This approach embraces the

effect on-campus, we find no error in the school administering discipline to J.S.

Id. (citation omitted).

160. *Id.* at *9.

161. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010), *vacated, reh'g, en banc, granted*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

162. *Id.* at 299.

163. *Id.* at 301.

164. *Id.*

165. *Id.* at 300 ("[T]he profile presented a reasonable possibility of a future disruption, which was preempted only by McGonigle's expeditious investigation of the profile, which secured its quick removal, and his swift punishment of its creators.").

166. One scholar has recognized that *Tinker*'s language seems to permit regulation of off-campus speech that created a substantial disruption within the school. Kara D. Williams, Comment, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 712 (2008) ("For off-campus speech, . . . *Tinker* is probably the only ruling that may be applied; recall that in *Tinker*, the Supreme Court expressly referred to speech occurring 'in class or out of it.'").

167. *J.S. ex rel. Snyder*, 593 F.3d at 298.

traditional on-campus/off-campus dichotomy while at the same time it recognizes that off-campus speech may potentially be regulated under *Tinker*.

In *Evans v. Bayer*,[168] a senior created a Facebook group entitled, "Ms. Sarah Phelps is the worst teacher I've ever met," which served as a place for students to voice their grievances.[169] The student made a posting stating: "Ms. Sarah Phelps is the worst teacher I've ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred."[170] The group was created after school hours from a home computer; the postings were never seen by the teacher; there was no threat of violence or disruption at school; and the posting was removed after two days.[171]

The principal found out about the posting, suspended the student, and forced her to take fewer advanced placement courses.[172] The student brought suit against the principal for violations of the First and Fourteenth Amendments and sought an injunction and nominal damages.[173] The principal filed a motion to dismiss, which the district court denied with respect to the nominal damages because the principal was not entitled to qualified immunity.[174] In determining that the defendant violated the Constitution, the district court synthesized the various Supreme Court and circuit court rulings in order to establish a basic framework.[175] First, the location of the speech "should be determined at the outset in order to decide whether the 'unique concerns' of the school environment are implicated."[176] On-campus speech can be regulated according to the student expression standards. The district court indicated that "[s]tudent off-campus speech, though generally protected, could be subject to analysis under the *Tinker* standard . . . if the speech raises on-campus concerns."[177] In addition,

168. 684 F. Supp. 2d 1365(S.D. Fla. 2010).

169. *Id.* at 1367.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1377. "To overcome qualified immunity, the plaintiff must show (1) that the defendant violated a constitutional right, and (2) that this right was clearly established at the time of the alleged violation." *Id.* at 1369. The district court granted the motion to dismiss regarding the injunction because an officer sued in his or her individual capacity could not be ordered to perform the injunction's mandate. *Id.*

175. *Id.* at 1369–73.

176. *Id.* at 1370 (citing J.S. *ex. rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002)).

177. *Id.* (citing J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010), *vacated*, *reh'g*, *en banc*, *granted*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010)).

off-campus speech can be disciplined by the schools if it is unprotected speech.[178]

The district court determined that the student's speech was off-campus speech.[179] In making this determination, the court rejected the argument that the mere fact that the speech's intended audience was the school, was by itself, enough to label the speech as occurring on campus.[180] The district court concluded that the student's off-campus speech could not be viewed as creating a well-founded expectation of disruption, precluding *Tinker*'s application.[181] The district court also rejected the principal's argument that no constitutional violation existed because the principal could punish the off-campus speech under *Fraser*.[182] After determining that the principal violated the student's constitutional rights, the district court indicated that the law was clearly established and denied the principal's motion to dismiss the claim for nominal damages.[183]

IV. CALMING THE CHAOS: COURTS MUST BALANCE ANY COMPELLING INTEREST THE SCHOOL HAS IN PUNISHING OFF-CAMPUS INTERNET SPEECH AGAINST STUDENTS' RIGHT TO FREEDOM OF SPEECH

In the absence of guidance from the Supreme Court, the lower courts have struggled to apply the current student speech framework to student internet speech.[184] The lack of guidance has created numerous problems. First, the lower courts inconsistently apply the existing student speech framework and reach different conclusions.[185] Further complicating the problem is that "courts have interpreted differently the distinction between on-campus and off-campus speech, with some courts defining on-campus speech much more expansively than other courts."[186]

This inconsistency creates other problems. Without an adequate

178. *Id.* 1372.

179. *Id.*

180. *Id.* at 1371.

181. *Id.* at 1373. "[T]he key is whether the school administrators have a well-founded belief that a 'substantial' disruption will occur." *Id.*

182. *Id.* at 1374. "Fraser's First Amendment rights were circumscribed in light of the school environment in which the speech occurred. For the Court to equate a school assembly to the entire internet would set a precedent too far reaching." *Id.* (citation omitted).

183. *Id.* at 1377.

184. *See* Williams, *supra* note 166, at 719 ("The Supreme Court has never addressed student Internet speech specifically, and it is difficult for lower courts to apply the existing framework to [these] type of cases.").

185. *Id.*

186. *Id.* at 720.

framework, school districts lack adequate guidance in crafting policies[187] and in disciplining student internet speech.[188] In order to effectively administer their schools, public school officials

> must be able to determine (1) when student Internet speech created off-campus may be considered on-campus speech and (2) when student Internet speech constitutes a material and substantial disruption if the students cannot access the speech from school. Public schools must be capable of making these determinations with certainty, or schools may continue punishing students for speech protected by the First Amendment.[189]

The lack of clear guidelines results not only in the punishment of protected speech, but the uncertainty also increases the amount of litigation.[190] Instead of focusing on educating, administrators continuously have to defend against lawsuits.

If schools are uncertain regarding what student internet speech they may regulate, it follows that students are inherently unsure of when they will be subject to their school's jurisdiction.[191] Without notice of when their internet speech will be subject to punishment at school, students are unable to appropriately censor themselves from making improper statements online.[192] Students may therefore refrain from expressing

187. *Id.* at 724; *see also* Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1566–67 (2009) ("In order for schools to draft appropriate policies in compliance with cyberbullying statutes, school officials need clarity on the boundaries of their authority over online activity and the extent to which the First Amendment protects students' online expression.").

188. Williams, *supra* note 166, at 719 ("[T]he current jurisprudence provides only limited guidance to the schools addressing student Internet speech, especially when social networking sites are involved."); *see also* Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators who seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 640 (2000) (In dealing with student internet speech containing low value speech, educators are virtually limited to two alternatives, creating a "dangerous dilemma": "The educators can take a threat seriously, possibly infringing students' First Amendment rights, and then become confronted with a lawsuit brought by indignant parents. Alternatively, educators can wait to see if the vociferous, threatening student eventually comes to school carrying a handgun, intent on fulfilling his murderous threats.").

189. *See* Williams, *supra* note 166, at 722.

190. *See* Hoder, *supra* note 187, at 1568 ("The current unpredictability in online student speech case law has resulted in . . . a plethora of litigation.").

191. *Id.* at 1600 ("The vague and unpredictable standards currently applied in online student speech cases do not give students any guidance on when their expression is beyond the school's reach.").

192. *Id.* at 1568 ("The current unpredictability in online student speech case law has resulted in a lack of fair notice to students, a potential chilling of student Internet use and expression . . . ."); *see also* Williams, *supra* note 166, at 725 ("[M]ore guidance would enable schools to communicate to students and parents the circumstances under which students may be punished for their Internet speech. Such communication benefits schools as well as students and parents. First, it is likely to discourage students from making improper statements or posting improper pictures and persuade parents to more closely monitor their children's Internet speech. This would limit the occurrence of improper student Internet

themselves online; the lack of concrete guidelines thus has a chilling effect on the exercise of constitutional rights. Students also suffer because uncertainty results in the punishment of protected speech, a problem exacerbated by "school administrators [who] lack a strong incentive to protect the free speech rights of their students [as] they are more concerned with preserving the integrity of the educational process against perceived threats."[193]

In the absence of guidance from the Supreme Court and the presence of confusion in the lower courts, scholars have attempted to define when off-campus student internet speech should be subject to punishment by school administrators. The approaches often suggest different methods for determining when off-campus internet speech may be considered on-campus speech subject to the Supreme Court's traditional framework. The first portion of this Part critiques some of these scholarly approaches. The second portion of this Part proposes a new approach, which deemphasizes the on-campus/off-campus dichotomy.

A. Scholarly Approaches to Off-Campus Student Internet Speech

1. The Student's Intent Governs

In his early scholarly foray into student internet speech, Alexander Tuneski suggested that the courts "establish a clear rule that off-campus speech is not subject to the jurisdiction of school officials."[194] This rule requires a clear line between off-campus and on-campus speech.[195] Tuneski suggested drawing "[t]he line between on- and off-campus expression . . . based on where the expression originated and how it was disseminated."[196] If the speech was created and disseminated off campus, the speech could not be regulated by the school. However, if the author of the off-campus speech took "steps to bring the material to a school campus," the speech could be considered on-campus speech subject to the school's authority.[197] Affirmative steps to bring the

speech and decrease the frequency of speech-based punishments.").

193. *See* Brenton, *supra* note 58, at 1206; *see also* Hoder, *supra* note 187, at 1568, 1597 ("As a result of the uncertainty in this area of the law, schools can regulate online speech liberally and without the fear of paying damages for a First Amendment violation because, even if a school official violates a student's speech rights, the official will be granted qualified immunity from monetary damages if the disciplinary action was 'objectively reasonable in light of "clearly established" law at the time of the violation.'").

194. *See* Tuneski, *supra* note 86, at 177.

195. *Id.*

196. *Id.*

197. *Id.*; *see also* Kenneth R. Pike, Comment, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 B.Y.U. L.

speech on campus include "opening a web page at school, telling others to view the site from school, distributing a newspaper as students enter school, and sending e-mail to school accounts."[198] If the off-campus speech reached campus due to the actions of a third-party and not the author of the speech, the speech would still be considered off-campus.[199] Essentially, Tuneski suggests that to determine whether speech occurs on or off campus, courts must look "to the objective intent of the speaker and whether the student affirmatively acted to bring the speech on-campus."[200]

In order to determine a student's intent, another scholar has suggested looking at the type of technology used to communicate the message. This scholar suggests that the type of technology used by the student can be evidence of the student's intent because "an understanding of technology makes it possible to draw analogies between 'material world' practices and cyber-speech, demonstrating that certain uses of technology are more like on-campus speech, while other uses of technology more closely resemble true off-campus speech."[201] The scholar breaks technology into three separate categories: (1) telephony, (2) instant messaging and email, and (3) websites. Telephony, directly calling the school, creates an active, direct presence at the school, which would make any such communication on-campus speech.[202] Instant messaging is similar to using the telephone but in printed form, while sending an email to a teacher is comparable to calling the teacher's desk.[203] With this in mind, "email and instant messaging should only establish an active telepresence where the student engaged in the

REV. 971, 1007 ("Whether a student can be considered 'on campus' for purposes of disciplining their expression should depend on whether their expression was intended to directly influence the school environment, or whether such influence arose as the incidental result of off-campus expression.").

198. *See* Tuneski, *supra* note 86, at 178.

199. *Id.* at 177–78 ("If, however, the off-campus expression reaches the school passively without any intentional efforts by the author to disseminate the speech on-campus, schools would be prevented from sanctioning the student for the effects of the speech, even if it was reasonably foreseeable that it would reach the school. If the author does not take steps to encourage the dissemination at school, it can be presumed that the author intended the speech which originated off-campus to be viewed and received off-campus. Thus, the distinction relies on evidence that the author proactively took steps to have the material read or disseminated at school.") (citations omitted).

200. *See* Reeves, *supra* note 67, at 1149.

201. Pike, *supra* note 197, at 1002 ("[W]e will refer to student use of technology that has the same impact as any other off-campus speech as establishing a 'passive telepresence'—meaning that even if the student's expression has on-campus influence, such influence is not the active or intended result of the challenged expression. The alternative is an 'active telepresence' by which a student seeks to directly impact the campus environment through remote means. The hope is that courts can preserve the *Tinker* rendition of the schoolhouse gate, despite the problems posed by ubiquitous information technology.").

202. *Id.* at 1002–03.

203. *Id.* at 1003.

challenged expression deliberately transmitted it directly to the school's network."[204] In contrast to the first two modes of communication, a website is not sent directly by the author, but rather the information must be affirmatively requested by a third party.[205] Instead of suggesting that a website could never be considered on-campus speech, the scholar suggests that the inquiry should be whether the student "'intend[ed] to communicate' his or her Web site to an audience on campus."[206]

Allowing a student's intent to govern whether speech is on- or off-campus speech has two major problems. The first problem is how to determine intent: an objective analysis would consider what a reasonable person would think was the student's intent; a subjective analysis would look to what the student in question actually intended. The second problem is that under this standard internet speech that creates a threat of violence could go unregulated. Applying this standard to internet statements containing hate messages, "school officials would be powerless to take any preventative action against the students based on this speech unless those students took affirmative steps to introduce [those messages] on-campus."[207] In critical situations, ultimately, schools would not have adequate authority to prevent potential calamity.

2. Applying Personal Jurisdiction Jurisprudence to Student Internet Speech

A second scholarly approach suggests applying personal jurisdiction jurisprudence to the student internet speech context. The key inquiry is whether the school's exercise of jurisdiction over the student's internet speech "is supported by minimum contacts with the school environment such that the authority does not offend notions of fair play and substantial justice."[208]

A court using this test would first determine whether the student's

204. *Id.* at 1004.

205. *Id.* ("One can create a Web site and post to the Internet without any reference to the school's network, and all it takes to bring the content on campus is for someone on campus to visit the site. Because this requires an affirmative request from someone on campus, a Web site could never in itself constitute an 'active telepresence.'").

206. *Id.*; *see also* Williams, *supra* note 166, at 728–31 (suggesting that a student's decision to set their social networking profile to either private or public is a strong suggestion of the student's intent and that "[r]evising and modifying *Tinker* to factor into consideration the differences between public profiles and private profiles [would result] in a standard that both protects student speech rights and ensures that the schools are able to maintain order and discipline").

207. *See* Reeves, *supra* note 67, at 1150 ("For example, prior to the mass shootings at Columbine High School in 1999, killers Eric Harris and Dylan Klebold created web pages that were hosted off-campus and contained ominous statements and hate messages.").

208. *See* Brenton, *supra* note 58, at 1231.

internet speech had "sufficient minimum contacts with the school environment."[209] Under the minimum contacts analysis, minimum contacts exist if the internet speech took place on campus.[210] Additionally, if off-campus internet speech had a clear connection with the school, the speech may have sufficient minimum contacts with the school environment.[211] In determining whether the contacts were sufficient, the court would have to determine if the students purposefully availed themselves of the school environment.[212] However, if the minimum contacts with the school are based on the unilateral actions of a third party, the speech would not fall within the school's jurisdiction.[213]

If the student's internet speech has the required minimum contacts with the school, the second inquiry is whether "the school's exercise of authority offends notions of fair play and substantial justice."[214] This inquiry would seek to balance the student's right to free speech against the school's interest in maintaining order.[215]

Unfortunately, this approach only provides real guidance for the courts. Using personal jurisdiction, a confusing topic even for law students, would require middle and high school students as well as school administrators to understand the concept of minimum contacts. The complexity of this approach does not fix the lack of Supreme Court guidance because students will still not be fully aware of when their online speech may be subject to discipline. With no notice, students will still be unable to appropriately censor their online speech to avoid

209. *Id.* at 1234.

210. *Id.*

211. *Id.* at 1234–35. When a student's internet speech is "created off-campus, but has a clear and unambiguous connection to the school environment, the court should examine the purported connection between the speech and the school to determine whether the student purposefully availed herself of the school environment in creating the speech." *Id.* at 1234.

212. *Id.* at 1235.

> Factors that a court should consider in making this determination include whether the access happened only once or multiple times; whether the student merely viewed the site herself or showed it to others; and the student's purpose in accessing the site—was it accessed in school for a school-related purpose, or merely incidentally during school hours? . . .
>
> . . . .
>
> The second way in which a student might purposefully avail herself of the school environment is by intentionally targeting the school environment with an aim to doing harm there.

Id.

213. *Id.* at 1237 ("A student should . . . not be subject to the power of a school to censor speech merely because a third party brings that speech inside the schoolhouse gates.").

214. *Id.* at 1240.

215. *Id.*

punishment.

3. The "Scope of a Student" Analysis

One scholar proposes borrowing from the realm of public employee free speech rights to establish the scope of a student test.[216] A public employee's free speech rights are governed by *Garcetti v. Ceballos*, which clarified the test used in previous Supreme Court cases.[217] The "scope of a student" test's two prongs are similar in form to the first and third prongs of the public employee speech analysis. First, the role in which the individual spoke is considered. Then, if necessitated by the first inquiry, the government's interests are balanced against the speaker's rights.

In applying the principles of the public employee free speech doctrine to determine if student speech is on-campus or off-campus, the scholar first asks whether the speech in question clearly took place on campus.[218] If there is any doubt that the student speech occurred on campus, "then students, school administrators, and courts should ask: Did the speech occur within the scope of the speaker's status as a student?"[219] In answering this question, the inquiry should be a but-for test; in other words, "[b]ut for the fact that the speaker was a student, would the speech have occurred?"[220]

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216. *See* Reeves, *supra* note 67, at 1154.

217. 547 U.S. 410 (2006). The Supreme Court has established a three-pong test for determining when a public employee's speech is constitutionally protected. First, the speech must be made as a citizen, which means the speech cannot be made pursuant to official employment duties. *Id.* at 421. Second, the speech must be on a matter of public concern. *Id.* at 418. Third, the court must determine whether the government as an employer had grounds for treating the employee differently than the general public. *Id.*

218. *See* Reeves, *supra* note 67, at 1154.

219. *Id.*

220. *Id.* at 1157; *see also id.* at 1157–58 ("For example, when a student posts a message on his or her website that contains derogatory references to his or her principal, the but-for inquiry would be answered in the negative: But for the fact that the speaker was a student at the principal's school, the speech would not have occurred. Thus, the offending speech occurred within the scope of the speaker's status as a student."). *But see* Hoder, *supra* note 187, at 1594–95 ("[A] school would not have jurisdiction over speech just because it relates to the school," instead "the control and supervision test [should be used] to determine school jurisdiction over students' online speech because it is a temporal test and, as a result, it avoids the problem of establishing a geographical location for online speech."). Under this scholar's proposed test,

> schools would have jurisdiction to regulate only speech that occurs when the school has assumed control and supervision over the student who is speaking. Speech would be considered within the school's authority only when the student accesses and shows the online speech to others, or creates the online speech while that student is under the assumed control and supervision of the school. All other online student speech would remain outside of the school's jurisdiction and under the authority of the parent or law

If the speech occurred due to the speaker's status as a student, the speech is considered on-campus speech, which the school may constitutionally punish based on the traditional student speech jurisprudence.[221] In comparison, if the speech did not occur within the scope of the speaker's status as a student, "the speech should be treated as off-campus speech" and presumed to be constitutionally protected.[222] However, the school does not completely lose its ability to regulate student speech when it occurs off campus.[223] If the speech is off-campus speech the scope of the student test requires a determination regarding "whether the school has a legitimate justification to infringe on the student speaker's First Amendment rights."[224] This burden will likely only be met if the school attempts to regulate a category of speech that traditionally falls outside the protection of the First Amendment.[225]

While the scope of the student test provides a unique approach to the on-campus/off-campus dichotomy, it fails to provide any meaningful protection for students' First Amendment rights. The inquiry into whether the speech would have occurred but-for the speaker being a student turns any off-campus speech tangentially related to the school into on-campus speech. Although the inquiry is tied to the student's status and choices regarding speech, the standard creates a threshold that is too low. This proposed standard overvalues the need for administrative guidance and devalues the student's constitutional rights.

4. Eliminate the On-Campus/Off-Campus Distinction

One scholar has boldly proposed eliminating the on-campus/off-campus distinction when dealing with student internet speech because the distinction is riddled with inherent flaws.[226] First, the lower courts are fractured regarding an appropriate standard for determining when speech that occurs off campus can be considered on-campus speech.[227] Due to the lack of a consistent standard, some courts have so broadly

enforcement to regulate.

Id. at 1594–95 (citations omitted).

221. *See* Reeves, *supra* note 67, at 1154. If the speech occurred within the scope of the speaker's status as a student, "the speech should be treated as on-campus speech, and school administrators should be able to impose reasonable censorship or punishment based on the three standards articulated by the Supreme Court in *Tinker*, *Fraser*, and *Hazelwood*." *Id.*

222. *Id.*

223. *Id.* at 1158.

224. *Id.*

225. *Id.*

226. *See* Li, *supra* note 3, at 92–93.

227. *Id.* at 92.

defined when off-campus speech constitutes on-campus speech that they have virtually destroyed any meaningful distinction between the two.[228] Finally, the distinction fails to take into account the unique nature of the internet. As a "borderless medium," the internet contains significant distinctions from traditional mediums of expression.[229]

In light of the unique nature and pervasiveness of the internet, the scholar proposes a new standard that attempts to balance the two competing interests at play: "protecting a student's individual free speech rights and protecting schools from violent student behavior."[230] This proposed standard only applies to student internet speech that does not bear the imprimatur of the school.[231] In those cases, the *Fraser* and *Hazelwood* standards should apply.[232] "Once a court determines that . . . *Fraser* and *Hazelwood* . . . do not apply," it must decide, given the totality of the circumstances, "whether the speech constitutes a true threat under the reasonable speaker approach,"[233] which is a fact intensive inquiry. If the speech does not constitute a true threat, the court should apply the *Tinker* test.[234] Ultimately, this approach is similar to the approach taken by the Third Circuit Court of Appeals in *Blue Mountain School District* and allows all internet speech to be regulated under *Tinker*.

The problem with this approach is that all internet speech is subject to *Tinker*, an analysis which has lost much if not all of its bite.[235] If all

228. *Id.* "Additionally, although courts generally protect off-campus speech, the standards are so malleable that a court could possibly justify punishing a student even if the speech actually occurred off-campus." *Id.* at 93.

229. *Id.* at 93. "The Internet differs from other traditional mediums of expression, such as flyers, newspapers, and public speeches, for several reasons: (1) it is pervasive, (2) it allows users to disseminate information to millions of people immediately and easily, and (3) it can be accessed anywhere." *Id.*

230. *Id.* at 97.

231. *Id.* at 98. "[I]t is important to emphasize that this new standard should only apply to Internet-related student speech cases that do not involve school-sponsored events or activities."

232. *Id.* "However, if the school sponsors the Internet-related student speech or includes it as part of a school-sponsored activity, then the *Fraser* and *Kuhlmeier* standards should apply, and schools should be able to exercise control over the activities they sponsor." *Id.*

233. *Id.* at 99.

> [A] court should consider the totality of the circumstances, including the listeners' reactions, the speaker's intentions, the school's reaction, and whether the threats sound equivocal. When looking at the speaker's intentions, a court should consider several factors: the student's academic standing, the student's level of social activity, the student's psychological history, and the student's willingness and promptness to remove the Internet speech in question.

Id. (citations omitted).

234. *Id.*

235. "Unfortunately, most courts that apply the *Tinker* standard are far too deferential to the

internet speech is subject to a substantial disruption test, it seems "school officials with an axe to grind over the disrespectful commentary of immature, ungrateful students" receive the primary benefits.[236] By giving schools such broad authority, students are likely to be punished for constitutionally protected speech. Consider Avery Doninger, who referred to the administration as "douchebags": courts are upholding punishments for what is essentially name-calling under *Tinker*'s substantial disruption test.[237] Allowing speech such as Doninger's to be punished under *Tinker* ignores the fact that the speech is student criticism that, while not proper or eloquent, "encourages improvement in the educational process."[238] This problem is exacerbated by the deference courts give to the decisions of school officials.[239]

B. A New Approach: Allowing Schools to Regulate Off-Campus Internet Speech if the School has a Compelling Interest

Up to now, courts and scholars have failed to provide a workable standard for addressing a school's ability to punish student internet speech. The inability of courts and scholars to provide a framework stems from using the on-campus/off-campus dichotomy to determine whether a school can regulate student internet speech. This Part provides a new mode of analysis, which deemphasizes the on-campus/off-campus dichotomy. If the student internet speech is

schools' claims that the speech at issue caused a reasonable fear of substantial disruption . . . courts generally permit the unreasonable reaction of teachers and school officials to constitute a disturbance." Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1067 (2008) (citation omitted). "The lower courts are all over the map in the way in which they apply *Tinker*'s requirement that the expression cause a material-and-substantial disruption or interfere with the rights of others." *Id.* at 1065. "Some courts conclude that *Tinker*'s material-and-substantial disruption standard is met when other students distribute, read, and react to the material at issue, or even when only the school administration reacts to the speech." *Id.*

236. *See* Pike, *supra* note 197, at 1000.

237. *See supra* notes 125, 140–141 and accompanying text.

238. *See* Pike, *supra* note 197, at 999.

239. *See* Papandrea, *supra* note 235, at 1054 ("[T]he Court's increasing deference to school administrators indicates that the Court is willing to give schools wide berth when it comes to disciplining their students for their expression, regardless of which medium they use."); *see also* Sean R. Nuttall, Note, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1293–94 (2008) ("[T]he *Tinker* standard actually mandates deference to the reasonable decisions of educators as to the likelihood of disruption and provides only very modest protection for student speech."); Adrianne Mittelstaedt, Note, *Dressing up a Constitutional Issue: First Amendment Protection of School Uniform Protests in* Lowry v. Watson Chapel School District *and the Threads Remaining to Enforce School Policies*, 32 HAMLINE L. REV. 609, 644–45 (2009) ("The underlying policy of [the Supreme Court's cases following *Tinker*] represents judicial deference to school officials, with intervention being appropriate only when the regulation lacks a viewpoint-neutral pedagogical purpose.").

considered on-campus speech, the school may punish the speech under existing Supreme Court student speech jurisprudence. However, if the student internet speech is deemed off-campus, the school may regulate the speech if their compelling interest outweighs the student's interest in his or her First Amendment rights.

1. Establishing a New Standard

As an initial matter, this new framework requires a mode of determining whether student internet speech can be considered on-campus speech. Because this determination will not prohibit school districts from regulating student internet speech, the method used should be the most student-protective standard possible.[240] With this in mind, the student speaker's intent should be used to determine whether his or her internet speech is on- or off-campus speech.[241] This analysis should not be based on the student's subjective intent, as actual intent would be difficult to determine,[242] but instead the analysis should be objective.[243] An objective analysis should ask whether a reasonable person would believe, given the circumstances surrounding the student's speech, including the mode of technology used[244] and any steps taken to ensure the privacy of the speech,[245] that the student intended to guarantee his speech reached the school. If the answer is yes, the speech is deemed on-campus speech subject to the Supreme Court's existing student speech jurisprudence. If the answer is no, then the school and the court should engage in the balancing test discussed below.

If a student's internet speech cannot objectively be said to have been deliberately sent into the school's purview, a presumption arises that the speech is protected by the First Amendment.[246] The school has the burden of showing a compelling interest in punishing the speech that outweighs the student's interest in the constitutional right to freedom of speech.[247] Additionally, schools retain the ability to punish off-campus

240. Another reason for a student protective inquiry is the expansion of the school's jurisdiction to off-campus speech.

241. *See supra* notes 200–207 and accompanying text.

242. *See* Hoder, *supra* note 187, at 1595 ("A student's intent should not be the definitive test, because it is difficult to prove a student's actual subjective intent.").

243. *See supra* note 200 and accompanying text.

244. *See supra* notes 201–206 and accompanying text.

245. *See supra* note 206.

246. *See* Williams, *supra* note 166, at 728 ("[W]hen student Internet speech occurs off-campus . . . schools and courts should presume the speech is protected by the First Amendment.").

247. This approach is similar to the balancing test originally used in the public employee free speech context, but its application is more stringent by requiring the school to have a compelling interest

internet speech that falls outside the protection of the First Amendment.[248]

While a comprehensive list of compelling interests is beyond the scope of this Comment, the spirit of the Supreme Court's student speech jurisprudence provides guidance regarding what would qualify as such an interest. For example, the spirit of *Tinker* recognizes that schools are justified in preventing violence at their facilities. Therefore, if it were reasonably foreseeable that the off-campus student internet speech would cause violence at the school, the school would have a compelling interest in preventing the violence. Collectively, *Bethel*, *Hazelwood*, and *Morse* stand for the principle that schools may take steps to regulate inappropriate speech when such speech is or seems to be closely associated with the school. Therefore, if the off-campus student internet speech actually bore the imprimatur of the school, the school would have a compelling interest in disassociating itself with such speech.[249] In other words, if a student created a webpage that contained the school district's official emblem as well as inappropriate language, the school would have a compelling interest in disassociating itself from the speech.[250]

2. Allowing Schools to Expand Their Reach Beyond the Schoolhouse Gates

The internet provides new technology for students to express grievances that prior generations expressed without technology.[251] While students have gossiped about teachers and fellow students for decades, the mode of communication has changed from face-to-face conversations to sending e-mails and instant messages.[252] These new

in regulating the speech. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 568 (1968) (The Court recognized the need "to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). However, this approach is more lenient in its application than the balancing test set forth by the scope of the student test. *See supra* notes 224–225 and accompanying text.

248. *See supra* notes 7–9 and accompanying text.

249. This approach goes further than the approach taken by the scholar who proposed eliminating the on-campus/off-campus distinction. Under that scholar's proposal, "if the school sponsors the Internet-related student speech or includes it as part of a school-sponsored activity, then the *Fraser* and *Kuhlmeier* standards should apply, and schools should be able to exercise control over the activities they sponsor." *See* Li, *supra* note 3, at 98.

250. *See* Morse v. Frederick, 551 U.S. 393, 407 (2007) ("[T]hese cases . . . recognize that deterring drug use by schoolchildren is an 'important-indeed, perhaps compelling' interest." (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995))).

251. Papandrea, *supra* note 235, at 1036.

252. *Id.* at 1036–37.

means of communication make it easier for adults to see what minors are saying.[253] In light of these changes, a new issue has arisen: if the content of the speech is similar, then why should the mode of communication used alter the school's ability to punish speech? Ultimately, just as technology has changed, so have many of the legal circumstances that justify allowing schools to regulate off-campus internet speech.

Expanding school jurisdiction to off-campus internet speech may seem like a drastic step; however, allowing schools to regulate off-campus behavior is not a novel concept. State legislation demonstrates the growing trend in allowing schools to punish off-campus behavior. States already allow certain off-campus activities to be regulated.[254] One scholar has pointed out, that states statutorily authorize school disciplinary action for students who commit crimes or who participate in activities that endanger the school environment, even if the conduct took place off campus.[255]

Courts have acknowledged and played a more active role in recognizing a school's right to regulate off-campus behavior to the extent that "some courts are now upholding schools' decisions to punish certain student speech originating off-campus."[256] For example, in *Blue Mountain School District*, the Third Circuit created a categorical exception allowing all internet speech to be regulated under *Tinker*.[257] This trend recognizes that even though speech originates off-campus, internet speech is more transferable and can still impact the school, which justifies punishment.[258] In other words, while the speech may still contain a grievance about a teacher, internet speech, unlike face-to-face conversations, creates a permanent record of the speech that can be transferred to the school environment, thereby making it more likely to reach and affect the school environment.

Additionally, schools and courts have become acutely aware of the effect violence can have on the school environment. The threat of violence has been a motivating factor used by the courts to expand the

253. *Id.* at 1037.

254. Pike, *supra* note 197, at 977; *see also* Hoder, *supra* note 187, at 1604 ("[S]tatutes in many states allow a school to suspend a student who is charged with a felony committed on or off campus, and expel a student who is convicted of a felony if the school administrator determines that 'the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.'" (quoting MASS. GEN. LAWS ch. 71, § 37H1/2 (1996))).

255. Pike, *supra* note 197, at 977.

256. May, *supra* note 4, at 1129.

257. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010), *vacated, reh'g, en banc, granted*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

258. May, *supra* note 4, at 1129.

school's jurisdiction off campus.[259] The Supreme Court of Pennsylvania has recognized that "in this day and age where school violence is becoming more commonplace, school officials are justified in taking threats . . . seriously."[260] The need to prevent violence is accentuated by the occurrence of tragedies such as school shootings,[261] and by "[c]hildren's constant exposure to violent images on television, video games, and movies."[262] Allowing schools to regulate off-campus student internet speech when the speech is indicative of violence ensures that schools can take preventative measures to avoid a possible massacre.

Finally, allowing off-campus internet speech to be regulated by the schools helps reduce the impact the technological generation gap has on the constitutionality of student internet speech. Today's generation is "completely connected to, and dependent on, the Internet."[263] This generational gap in internet use and understanding appears in court decisions where judges fail to understand the internet as a forum, which "hinders a court from fully assessing the purpose and intended audience of the student's speech."[264] By allowing courts to regulate off-campus speech, the inability to properly understand the internet is deemphasized, especially because the ultimate question does not depend on the answer to an on-campus/off-campus distinction laden with technological complexities.

The Supreme Court has recognized that "First Amendment rights apply differently in different situations, for example the school environment."[265] The internet must be accepted as a special situation.[266]

259. *See supra* notes 87–88, 164 and accompanying text.

260. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 853 (Pa. 2002).

261. *See* Williams, *supra* note 166, at 723 ("[M]any public schools argue, and many courts agree, that following the tragedies at Columbine High School and other schools throughout the country, schools are in an 'acutely difficult position' to prevent violent statements from resulting in violent actions."); *see also* Seminski, *supra* note 1, at 169–70 ("Some educators and legal scholars aver that these are merely isolated incidents. As time has proven, however, the fact is that these occurrences are more than isolated incidents and such dangerous Internet-related conduct is not limited to only these deadly threats.") (citations omitted); Hoder, *supra* note 187, at 1566 ("An increase in school violence and a number of highly publicized student suicides have highlighted the problem of abusive online activity by students and put pressure on legislatures and school officials to pass tougher laws and implement stricter discipline policies to punish cyberbullying.").

262. Li, *supra* note 3, at 66.

263. May, *supra* note 4, at 1127. The "[s]tudent's frequent and skilled Internet use stands . . . in stark contrast to adults' and educators' Internet use." *Id.*

264. *Id.* at 1127–28.

265. Seminski, *supra* note 1, at 183; *see also* Hoder, *supra* note 187, at 1603 ("The primary justifications given by the Supreme Court for affording students only limited First Amendment rights are that: (1) public schools are not traditional public forums and, as a result, a school's inaction may be interpreted by the community as the school's endorsement of a student's speech, and (2) schools have a

In the modern world, allowing schools to punish off-campus student internet speech is a necessary and proper analytical tool, which will provide increased protection for student free speech.

3. The Need for a Compelling Interest Standard

When student internet speech takes place off campus, it "normally does not implicate the 'special characteristics of the school environment.'"[267] For one reason, recipients of off-campus internet speech are not a captive audience[268] as are students whose attendance at school is mandated by law.[269] Therefore, if schools are allowed to regulate off-campus speech, a test needs to be implemented that properly balances the interests of all parties involved. Requiring schools to justify punishment of off-campus student internet speech with a compelling interest for doing so properly balances these interests.

First, the compelling interest test places a high burden on the school to overcome the presumption that a student's off-campus speech is protected by the First Amendment. The compelling interest test fixes the infirmities associated with applying *Tinker* to off-campus internet speech. *Tinker*'s substantial disruption and material interference standard has become severely watered down because of the deference courts give to school administrators and their determinations of what constitutes a disruption.[270] A compelling interest test restores crucial protection to student speech while allowing schools to regulate violent speech, which was the justification for applying *Tinker* to off-campus speech.[271] The compelling interest test eliminates the weaknesses of *Tinker* while addressing the concerns behind the decision. For example, student internet speech discussing the desire to kill a teacher could be regulated under both *Tinker* and the compelling interest test in order to prevent violence. In contrast, speech discussing the perceived inadequacies of a teacher in derogatory terms, which could result in

legal, professional, and ethical duty to maintain control and protect students in the school environment.") (citation omitted).

266. Seminski, *supra* note 1, at 183.

267. May, *supra* note 4, at 1138.

268. *See* Papandrea, *supra* note 235, at 1088 ("When it comes to digital media . . . it becomes much more difficult to conclude that students are forced—aside from perhaps peer pressure—to view their classmates' speech."); *see also* Williams, *supra* note 166, at 714 ("Unlike students gathered at an assembly as in *Fraser*, student Internet users are not a captive audience.").

269. *See* Papandrea, *supra* note 235, at 1088 ("In classrooms and at other school events students are required to attend, they might be properly considered a 'captive audience,' which might warrant some limitations on their classmates' expressive rights that would otherwise not be tolerated.").

270. *See supra* notes 235–237 and accompanying text.

271. *See supra* notes 259–262 and accompanying text.

regulation under *Tinker* based on a potential disruption of the learning environment, would be protected under the compelling interest test. Such a test also eliminates a weakness of the true threat doctrine, which places a high burden on the school by requiring a showing that the student intended his speech to be a threat.[272] In the example previously discussed, the student's desire to kill a teacher would likely go unregulated under the true threat analysis because the student did not intend the speech to be a threat.

Restricting a school's ability to punish off-campus speech pursuant to a compelling interest also protects the education system. With the ease of regulating speech under *Tinker*, a vast number of school resources would be consumed regulating off-campus speech, placing a significant strain on the school's resources.[273] Without curtailing the regulation of off-campus speech, schools are unable to focus on their primary purpose—preparing students for citizenship and teaching them how to thrive in republican government[274]—to the desired extent. If school administrators focus too much on regulating speech and not on teaching inside the classrooms, lessons will suffer.

Requiring a school to proffer a compelling interest before regulating off-campus student speech places a check on the school's discretion. It also ensures that school administrators and judges, who are often out of touch with young society, are not attempting to use the First Amendment to create a society molded in their vision.[275] A compelling interest standard helps bridge this generation gap by preventing such individuals from using the First Amendment "to force-feed good manners to the ruffians."[276] At the same time, a compelling interest standard allows schools to address real, violent threats to the school, which has been a

272. *See* May, *supra* note 4, at 1134–35 ("[T]o prove the student's speech was a 'true threat,' a school must provide some evidence demonstrating that the student intended and was capable of communicating a threat.").

273. *See* Pike, *supra* note 197, at 998.

274. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); *see also* Nuttall, *supra* note 239, at 1318 ("Protecting children's speech rights and encouraging their exercise is critical to the continued vitality of a liberal democratic state.").

275. *See* Li, *supra* note 3, at 90–91 ("Accentuating this judicial misconception is the generation gap between judges and students—many judges do not understand popular culture and thus are unable to grasp the student's perspective. Two law professors have argued that judges are so generationally removed from popular teen culture that they have difficulty understanding the culture. Instead of recognizing that teens are immersed in this culture and are inundated with violent and profane imagery every day, judges are focused on uncommon, tragic events like Columbine. For example, Eminem, a popular rap artist among teenagers, has produced songs that contain 'violent, misogynistic, and homophobic lyrics,' and yet he has sold millions of albums. Judges need to remember that children are impressionable and that although their speech may at times appear crude and even violent, they are really imitating artists such as Eminem or popular teen culture in general.") (citations omitted).

276. Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986).

justification for applying *Tinker* to off-campus speech.[277]

V. CONCLUSION

The lack of guidance from the Supreme Court has created chaos in the lower courts and in scholarship regarding the ability of schools to deal with off-campus student internet speech. This chaos inhibits schools, parents, and students from complying with the First Amendment. As a result, student speech that falls within the protection of the First Amendment is nonetheless being punished. Additionally, schools, parents, and students are needlessly wasting money and time litigating cases that could be avoided if a clear standard were readily apparent.

This Comment puts forth a new standard that addresses some of the weaknesses created by the current state of the law. Under this proposed standard, the initial inquiry remains the same: does the student internet speech in question fall into the category of on-campus speech subject to the Supreme Court's traditional student speech jurisprudence? This question is answered by looking at the objective intent of the student author, which is the most speech protective mode of analysis. If the student internet speech cannot objectively be considered on-campus speech, it is off-campus speech and presumptively protected by the First Amendment. A student's off-campus internet speech can be punished by the school in two ways. First, the school can punish speech that is traditionally unprotected by the First Amendment. Second, the school can punish speech if the school can articulate a compelling interest that outweighs the student's interest in freedom of speech. This new approach enables school districts to prevent violence on their campuses by monitoring student internet speech, but also ensures that parental and student rights are not violated. In the presence of chaos, this approach adequately balances the interests of all parties involved.

277. *See supra* notes 259–262 and accompanying text.