MORE CONNECTION, LESS PROTECTION? OFF-CAMPUS SPEECH WITH ON-CAMPUS IMPACT

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Introduction

The same scenarios come up time and time again in student free speech cases. A student spreads rumors about fellow students on his own website. School authorities find out about the website and intervene.[1] A group of students publishes an "underground" newspaper and distributes it on campus. School authorities see the newspaper and suspend the student.[2] A student creates a website threatening or mocking the school principal. Word spreads, the principal finds out, and he suspends the student.[3] A student writes a disturbing poem. It makes its way to school and authorities suspend the student for fear of violence.[4] Sometimes courts uphold the suspensions. Other times, courts hold that schools have impermissibly trampled on student free speech rights.

The cases all involve student speech that originates off campus, but then finds its way to campus either through technology, word of mouth, or a third party. While the Supreme Court has set out relatively clear guidelines to govern student free speech on public school

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1 *See* Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 799–801 (N.D. Ohio 2002) (overturning punishment for student posting website containing profanity and disparaging remarks about classmates).

2 *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052–53 (2d Cir. 1979) (overturning punishment for students who distributed underground newspaper off campus).

3 *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007) (overturning suspension of student for creating parody MySpace profile of principal).

4 *See* Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 625 (8th Cir. 2002) (upholding suspension of student for poem written stating his desire to sodomize and kill ex-girlfriend); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 991–92 (9th Cir. 2001) (upholding suspension of student for poem describing school shooting).

campuses, uncertainty about that precedent's applicability to these scenarios has caused confusion.

School administrators are caught in the middle.[5] They are charged with ensuring order and discipline, inculcating values, and protecting the safety and welfare of children. Yet, schools must also refrain from infringing on the free speech rights of students—rights that the students famously do not shed at the schoolhouse gate.[6] As if that task were not difficult enough already, the rapid change of technology that allows students to communicate instantly, on and off campus, has compounded the problem. The rapid change in communication technology did not simply plateau with the advent of the Internet and email. Rather, in recent years the forms of electronic communication have multiplied, with instant messaging, text messaging, MySpace, Facebook, blogs, YouTube, Twitter, and many more technologies.[7] These allow students to reach each other more and

5 *See* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("The defendant argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places."); Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 995 n.138 (noting the "legal Scylla and Charybdis that school administrators often face").

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

7 Some explanation may be in order for those that are less technology proficient. Instant messaging is a technology through which computer users send instantaneous text messages to each other, often using a program such as AOL Instant Messenger, Yahoo! Messenger, or Google Talk. The messages appear on screen, one after another, reading much like a transcript of a conversation. *See* Webopedia, What is Instant Messaging?, http://www.webopedia.com/TERM/instant_messaging.html (last visited Nov. 20, 2009).

Text messaging allows cell phone users to send short text messages to each other. *See* Verizon Wireless, Answers to FAQs, http://support.vzw.com/faqs/TXT%20messaging/faq.html (last visited Nov. 20, 2009).

MySpace is a social networking service through which users can maintain their own webpages, featuring messages posted to others, music, photos, and more. *See* MySpace, Quick Tour, http://www.myspace.com/index.cfm?fuseaction=userTour.home (last visited Nov. 20, 2009). Facebook is similar to MySpace, but it also allows users to create groups around a certain theme and become friends of each other, linking to other users' web pages via photos or messages. *See* Facebook, http://www.facebook.com/facebook?ref=pf (last visited Nov. 20, 2009).

Blog, short for "web log," is a journal that a user posts online, allowing others to view the entries. Webopedia, What is Blog?, http://www.webopedia.com/TERM/blog.html (last visited Nov. 20, 2009).

YouTube is the ubiquitous video sharing website through which users can upload and view homemade videos. *See* About.com, Web Trends: What is YouTube?, http://webtrends.about.com/od/profi3/p/what-is-youtube.htm (last visited Nov. 20, 2009).

more. They also multiply the number of ways that students can bully, harass, taunt, and slander each other.[8] Cyberbullying—bullying through websites, email, and other forms of electronic communication—has become a widespread problem, with as many as seventy-five percent of teenage students reporting having been bullied online.[9] Teachers and administrators have become targets as well.[10] While some of these forms of student expression may originate off campus, they can eventually have a great impact on the campus environment, sometimes without ever being accessed from school. The disruption caused by such students can wreak havoc on individuals at school[11] and the entire school environment, as though the words were uttered in the classroom. Yet schools are commanded to deal with such disruptive students in an appropriate way, even when those students decline to act appropriately themselves.

On the other hand, school administrators have been known to overreach and overreact to squelch undesirable student speech, often infringing on student free speech rights.[12] In a post-Columbine

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Twitter is another social networking tool whereby users update their status with short text messages indicating their current activities. "Followers" on Twitter subscribe to another person's feed, following the updates as they are posted. *See* Twitter, About Twitter, http://twitter.com/about (last visited Nov. 20, 2009).

8 Tara Parker-Pope, *Parents Often Unaware of Cyber-Bullying*, N.Y. TIMES WELL BLOG, Oct. 3, 2008, http://well.blogs.nytimes.com/2008/10/03/parents-often-unaware-of-cyber-bullying/ (noting the diverse online media through which students can cyberbully). For a cautionary tale on some of the other dangers of such communication technologies besides cyberbullying, see Charlie Sorrel, *Girl Falls into Manhole While Texting, Parents Sue*, WIRED, July 13, 2009, http://www.wired.com/gadgetlab/2009/07/girl-falls-into-manhole-while-texting-parents-sue.

9 *Id.* Cyberbullying can begin even before the teenage years. *See, e.g.*, Julie Blair, *New Breed of Bullies Torment Their Peers on the Internet*, EDUC. WEEK, Feb. 5, 2003, at 6 (noting that children as young as eleven can experience cyberbullying). The phenomenon is also skewed towards girls, who are twice as likely to be cyberbullied as their male counterparts. *Id.*

10 *See, e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002) (upholding suspension of student for website that solicited donations to hire a hit man to have a teacher killed); *see also* Zaz Hollander, *Abusive MySpace Page Draws Lawsuit*, ANCHORAGE DAILY NEWS, Apr. 5, 2009, at A1 (noting a lawsuit filed by a principal for a defamatory MySpace parody of her).

11 *See, e.g.*, *Bethlehem*, 807 A.2d at 852 (noting that the teacher threatened by the website suffered emotional distress and was forced to take a medical leave of absence).

12 *Cf.* Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 729 (2007) ("Academic sanctions and disciplinary punishments doled out by overzealous or misinformed administrators are often overturned or settled months or years later, after significant damage has been done.").

world, schools are especially sensitive to possible threats to student safety.[13] While the Internet may offer students a new outlet for expression, with the potential to reach wide audiences, it is also a place where school administrators may seek out and punish what they find to be inappropriate behavior. In the 1960s, overreaching by administrators was a threat to student expression via "underground newspapers."[14] Now it has become a threat to all student expression via electronic media.[15]

When students are outside of school, they are normally governed by the general laws that govern citizens of all ages.[16] This includes speech. When students choose to express themselves in school, however, their rights are slightly circumscribed, governed by the familiar Supreme Court trilogy of *Tinker v. Des Moines Independent Community School District*,[17] *Bethel School District No. 403 v. Fraser*,[18] and *Hazelwood School District v. Kuhlmeier*,[19] as well as the newest addition, *Morse v. Frederick*.[20] These cases establish that a student's constitutional right to freedom of expression gives way to the school's interests in education, order, and discipline if the expression is substantially disruptive, plainly offensive, perceived to be school sponsored expression, or understood to advocate illegal drug use.

It is an open question, though, as to what protections this type of student speech—speech of off-campus origin that reaches campus somehow—should receive. The student speech trilogy only addresses student speech that takes place squarely within the school environ-

13 *See* Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 626 n.4 (8th Cir. 2002) ("We find it untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [a student's threatening letter] would not have taken some action based on its violent and disturbing content."); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 282 (2001) (attributing the overreaction of school administrators to the slightest threat as "post-Columbine jitters").

14 *See* Thomas E. Wheeler, *Lessons from the* Lord of the Flies*: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 EDUC. L. REP. 227, 231 (2007); *cf.* Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1341 (S.D. Tex. 1969) ("So called 'underground' newspapers have sprung up in high schools all over the United States during the past year.").

15 Professor Clay Calvert has advocated that schools remember the "safety valve" function of speech, allowing students to vent their frustrations, perhaps preventing the sort of school violence seen at Columbine. *See* Calvert, *supra* note 13, at 282–85.

16 *Sullivan*, 307 F. Supp. at 1340–41.

17 393 U.S. 503 (1969).

18 478 U.S. 675 (1986).

19 484 U.S. 260 (1988).

20 127 S. Ct. 2618 (2007).

ment.[21] Thus, the Supreme Court has not directly addressed the question of what protections the Constitution gives to student speech that originates off campus but eventually reaches campus or has an impact there.

Commentators almost universally decry the disarray in the lower courts on this issue. Indeed, there is some confusion. All seem to agree that there is some room for schools to discipline students for speech that originates off campus when there is a sufficient connection to the school campus. But what constitutes a sufficient connection? Is it enough if the student speaker directs his speech to campus in some way? If he reasonably should have known that his speech would reach campus? If a third party brings the speech to campus?

Commentators are divided into two camps on the issue: one, concerned with overzealous school officials violating student free speech rights; the other, concerned with the epidemic of cyberbullying. The cases involve compelling stories that fuel the fires of both camps.[22] In light of the disarray in lower courts, commentators have also suggested various tests to deal with the issue, ranging from the simple, to the intuitive, to the exotic.

This Note attempts to resolve this issue of off-campus speech protection in public schools. Part I looks at the Supreme Court's student speech cases. Part II surveys how the lower courts have handled school regulation of off-campus student speech. Results and methodology differ. Part III examines and critiques various proposed tests for how to treat off-campus student speech. It then suggests a test in which protected off-campus speech would only be subject to school discipline if the speaker intends for the speech to reach campus, and the speech actually does reach campus, with some exceptions.

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21 *See* Calvert, *supra* note 13, at 269–70. Even the recent case of *Morse v. Frederick*, 127 S. Ct. 2618 (2007), was decided within the school context, even though the speech was technically off campus (though under school supervision). *See infra* Part I.D.

22 One of the most high-profile cyberbullying cases actually occurred outside of school. Lori Drew, a fifty-year-old mother, created a fake MySpace account, posing as a teenage boy, and befriended Megan Meier, a thirteen-year-old girl. Jennifer Steinhauer, *Woman Who Posed as Boy Testifies in Case that Ended in Suicide of 13-Year-Old*, N.Y. TIMES, Nov. 21, 2008, at A18. Drew became increasingly disparaging of Meier, eventually telling her that the world would be better without her. *Id.* Distraught, Meier hanged herself. *Id.* State prosecutors were unable to charge Drew with anything, and her jury conviction on federal fraud charges was overturned. Alexandra Zavis, *Web Hoax Conviction Tossed*, CHI. TRIB., July 3, 2009, at 15. Congress responded by introducing a federal anti-cyberbullying law, see *Cyber-Bullying and the Courts: Megan's Law*, ECONOMIST, July 11, 2009, at 32.

I. STUDENT SPEECH PROTECTIONS

Speech, in general, is divided into two categories: protected and unprotected. Protected speech receives full First Amendment protection.[23] Unprotected speech includes certain categories that governments can regulate, free from the normal restraints. Such categories include fighting words,[24] true threats,[25] incitement,[26] and obscenity.[27] Such speech is unprotected because courts have deemed it to be without value, not advancing political discussion, unnecessary in form to communicate ideas, or a combination of these.[28] Unprotected speech is punishable by schools on campus, just as it is subject to punishment in the rest of the world. The line of Supreme Court cases addressing student speech—*Tinker* and its progeny—apply to the realm of otherwise protected speech in the school context. This Note will refer to the types of speech identified by the *Tinker* line of cases that receive less protection in the school environment as "less-protected speech."

A. Tinker

The student speech trilogy begins in the 1960s with *Tinker v. Des Moines Independent Community School District*.[29] A group of high school and middle school students chose to wear black armbands to school to protest the Vietnam War.[30] School authorities had learned about the plan earlier and enacted a policy banning all armbands from school under pain of suspension.[31] The students wore the armbands anyway

23 The First Amendment states, in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

24 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (classifying speech directed at another and likely to provoke a violent response as unprotected).

25 *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (noting that "[t]he First Amendment does not protect violence"); Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (noting that true threats are not constitutionally protected speech).

26 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (classifying speech that incites imminent lawless action as unprotected).

27 *See, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech").

28 *See, e.g.*, *Chaplinsky*, 315 U.S. at 572 ("It has been well observed that such utterances 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.").

29 393 U.S. 503 (1969).

30 *Id.* at 504.

31 *Id.*

and the school suspended them under the policy.[32] The students brought a civil action against the school authorities for violating their First Amendment rights.[33] The district court upheld the authorities' actions as reasonable in order to prevent disturbance of school discipline.[34] The Eighth Circuit, hearing the case en banc, was evenly divided and thus affirmed the lower court's decision without opinion.[35]

The Supreme Court began by explaining, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[36] Nonetheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[37] Unlike previous cases involving disruptive demonstrations or dress codes regulating hair length, the Court characterized the present case as involving "pure speech."[38]

Accordingly, the Court pronounced the rule regarding the regulation of speech on school campuses:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[39]

The school could not rely on "undifferentiated fear or apprehension of disturbance" to justify its actions.[40] Nor could school officials suppress speech simply because they disagreed with the message.[41] Later in the opinion, the Court indicated that actual "material and

32 *Id.*
33 *Id.*
34 *Id.* at 505.
35 *Id.*
36 *Id.* at 506. *But see* Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., dissenting) ("In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.").
37 *Tinker*, 393 U.S. at 507.
38 *Id.* at 508.
39 *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
40 *Id.* at 508.
41 *Id.* at 511.

substantial interference" was not required, but that a reasonable forecast of such disturbance could justify action by the school authorities.[42] Outside of this "substantial interference" standard, the Court reassured students that they retained broad freedoms of speech in school: "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[43]

Finding neither an actual "material and substantial interference," nor a reasonable forecast of such disturbance, the Court held that the school's actions violated the students' First Amendment rights.[44]

B. Fraser

"'I know a man who is firm—he's firm in his pants.'"[45] So began Matthew Fraser's speech, nominating a classmate for a student elected office at an assembly, attended by six hundred of his classmates. The speech went on, in an elaborate, graphic sexual metaphor, despite earlier warnings from two teachers not to deliver the speech.[46] Matthew was suspended and his name was removed from the list of students participating in graduation exercises.[47] Matthew was disciplined for violating a school rule prohibiting "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."[48]

The Court began by explaining that despite *Tinker*, the schools remained a place where order, discipline, and inculcation of values must be allowed. The Court stated: "'[P]ublic education must pre-

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42 *See id.* at 511, 514.

43 *Id.* at 511.

44 *Id.* at 514.

45 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986) (Brennan, J., concurring in the judgment) (quoting Joint Appendix at 47, *Fraser*, 478 U.S. 675 (No. 84-1667).

46 *Id.* at 677–78 (majority opinion). The entire speech was as follows:

> 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) (quoting Joint Appendix at 47, *Fraser*, 478 U.S. 675 (No. 84-1667)).

47 *Id.* at 678 (majority opinion).

48 *Id.*

pare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'"[49] While inculcating such fundamental values, a school "must also take into account consideration of the sensibilities of others, and . . . the sensibilities of fellow students. . . . Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."[50] The Court continued: "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[51] The Court noted the offense that many students, especially girls, probably took to the speech, and the bewilderment from some of the younger listeners.[52] The Court cited other examples in which standards of decency allowed more freedom for adults than for younger audiences.[53]

Thus, *Fraser* created another facet to permissible school speech regulation. Without needing to prove the substantial disruption required by *Tinker*, schools may regulate student speech that is "plainly offensive"[54] or "offensively lewd and indecent."[55]

C. Hazelwood

Hazelwood School District v. Kuhlmeier concerns only speech that may be construed by an audience to be school sponsored. The students involved were in a high school journalism class and were in

49 *Id.* at 681 (alteration in original) (quoting CHARLES AUSTIN BEARD & MARY RITTER BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

50 *Id.*

51 *Id.* at 683.

52 *See id.* at 683–84 (noting that some in the audience were "only fourteen-years-old and on the threshold of awareness of human sexuality").

53 *Id.* at 684 (citing FCC v. Pacifica Found., 438 U.S. 726, 729 (1978)). In *Pacifica Foundation*, the Court held that FCC regulation of "indecent but not obscene" radio broadcast was constitutional, partly because broadcast would likely be heard by children. *Id.* at 729, 748. *Cf.* Ginsberg v. New York, 390 U.S. 629, 64–45 (1968) (finding ban on sale of sexually oriented material to minors was constitutional, even though material was protected by First Amendment with respect to adults).

54 *Fraser*, 478 U.S. at 685. For some reason, subsequent cases in the lower courts have latched on to the "plainly offensive" standard as the key words from *Fraser*. But those words are used to describe the crowd's reaction to the speech. Instead, the more explicit holding seems to refer to "offensively lewd and indecent speech." *See id.* at 685.

55 *Id.*

charge of publishing the school newspaper.[56] The students were under the supervision of a teacher; the paper was funded entirely by the school.[57] For one particular issue, the principal decided to excise two pages from the paper just before publication because he believed that the topics—divorce and teen pregnancy—would be inappropriate for younger students.[58] He was also concerned about the privacy of the students interviewed in the articles, despite the use of false names.[59] The students filed suit, alleging a violation of their freedom of speech.[60]

While acknowledging *Tinker* and *Fraser*, the Court proceeded to address the case with a forum-based analysis. The Court held that the school was not a public forum, that is, neither a traditional place for speech and dialogue (such as streets, parks, and sidewalks), nor a forum that the government had opened up to the public for all manner of speech.[61] On the contrary, the Court examined the policy and practice regarding the school newspaper and found that the school exercised significant control over the newspaper as part of its journalism curriculum.[62] Thus, rather than relinquishing control of the newspaper, the school "'reserve[d] the forum for its intended purpos[e],'" that is, as a supervised educational experience in journalism.[63] "The . . . question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[64] The Court held that schools are allowed to regulate speech to make sure that the lessons they intend to teach are effectively conveyed, the content is age-appropriate, and the views of a student are not erroneously attributed to the school.[65] Control over school-sponsored student expression does not offend the First Amendment "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns."[66] The Court upheld the school's actions, finding no constitutional violation.

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56 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1987).

57 *Id.* at 262–63.

58 *Id.* at 263.

59 *Id.*

60 *Id.* at 264.

61 *Id.* at 267.

62 *Id.* at 268.

63 *Id.* at 270 (alterations in original) (quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983)).

64 *Id.* at 271.

65 *Id.*

66 *Id.* at 273.

D. Morse

When the Olympic torch relay was passing by Juneau-Douglas High School in Alaska, before a crowd of thousands of students and other citizens, student Joseph Frederick decided it would be a good idea to unfurl a fourteen-foot banner bearing the message, "BONG HiTS 4 JESUS."[67] The principal confiscated the banner and suspended Frederick.[68] The principal's concern was that bystanders might understand the message—as nonsensical as it was[69]—to be advocating illegal drug use.[70]

Although the students were gathered off campus, across the street from school grounds, the Court approached the issue as a student speech issue.[71] Nonetheless, the Court observed that *Tinker* was not the only rule that governed school speech, as noted by *Fraser*,[72] thus leaving some leeway to create a new wrinkle in student speech jurisprudence. Discussing constitutional rights in general, the Court stated that precedent established that students' constitutional rights were limited by the needs of the school context.[73] Some of the same precedent, the Court explained, also emphasized the particular interest that schools have in deterring drug use by students.[74] The Court cited other evidence regarding the seriousness of the drug problem among youth.[75] The Court stated that "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression

67 Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (internal quotation marks omitted). With the addition of *Morse*, the *Tinker* trilogy becomes a tetralogy, from the Greek prefix *tetra-* meaning "four."

68 *Id.* at 2622–23.

69 *See id.* 2624 (noting that Frederick claimed "'that the words were just nonsense meant to attract television cameras'" (quoting *Morse*, 439 F.3d at 1117–18)).

70 *Id.* at 2623. School board policy prohibited such advocacy. *See id.* ("The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .").

71 *See id.* at 2623–24. The Court held that the outing was a school-sponsored event, and that school personnel were monitoring students. School rules specifically provided that students in "approved social events and class trips are subject to district rules for student conduct." *Id.* at 2624.

72 *See id.* at 2627. The Court also noted that *Hazelwood* was inapplicable because "no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Id.*

73 *See id.* ("'Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere.'" (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995))).

74 *See id.* at 2628 (citing *Acton*, 515 U.S. at 661).

75 *Id.*

that they reasonably regard as promoting illegal drug use."[76] The proscription of student speech in this case dealt with a serious danger, and not merely an unpleasant viewpoint with which the school did not want to contend.[77] The Court held that the principal did not violate Frederick's constitutional rights.[78]

II. LOWER COURT TREATMENT

Lower courts differ in how they treat off-campus student speech. While Supreme Court cases have marked the contours of student's free speech rights in school, it is unclear what it takes to bring speech originating off campus under the umbrella of less-protected speech in the school environment. This confusion is not unique to electronic communication, but it is particularly acute with respect to Internet, a medium that blurs traditional notions of geographic location.[79] Every lower court that has ruled on the issue has required off-campus student expression to have some connection to campus to bring it within the realm of less-protected speech for school disciplinary purposes. The strength of the connection that courts require varies. The variation usually concerns the mental state of the speaker with regard to the presence of the speech on campus. Some courts require that the student directed his speech towards campus. Some require only that the student had knowledge that his speech would reach campus. Other courts require only that it have been reasonably foreseeable that the speech would reach campus. Still others look at a multitude of factors to require a strong nexus between the off-campus speech and the on-campus impact.

Commentators seem to agree on one thing regarding First Amendment protections for off-campus speech: the lower courts are

76 *Id.* at 2629 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503, 506 (1969)).

77 *Id.* The Court rejected, however, the school's contention that *Fraser* allowed it to proscribe Frederick's speech because it was "plainly offensive." *Id.*

78 Justice Alito concurred, writing separately to reiterate his understanding that the majority's holding

> [went] no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and . . . 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."

Id. at 2636 (Alito, J., concurring) (quoting *id.* at 2649 (Stevens, J., dissenting)).

79 *See* Reno v. ACLU, 521 U.S. 844, 851 (1997) (noting that the Internet is "located in no particular geographical location").

in a state of total disarray.[80] However, careful analysis shows that the courts are only in a state of *slight* disarray and uncertainty. Courts all agree that there must be some sort connection between the speech and the school campus. It is true that, in exercise of judicial prudence, some courts have chosen not to address the issue of on-campus/off-campus location of speech if it need not be addressed. For example, if the court can decide a case because the speech did not amount to a substantial disruption under *Tinker* anyway, it will do so. The court can thus dispose of the case without having to decide more than is necessary.[81] This does not indicate disarray.[82]

One might be inclined to think that this entire analysis is pointless, as schools have no business meddling in student affairs off campus. Indeed, to the judge in *Sullivan v. Houston Independent School District*,[83] the very notion was preposterous:

> In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.[84]

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80 *See* Pike, *supra* note 5, at 990 ("[W]hen it comes to student cyber-speech, the lower courts are in complete disarray."); Tracy Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1095 (2008) (noting the "disarray" and "confusion"); Darryn Cathryn Beckstrom, Note, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 302 (2008) ("When lower courts have applied the *Tinker* standard to off-campus cyberspeech, they have not uniformly held that school discipline violates the First Amendment."). *But see* Wheeler, *supra* note 14, at 244 ("It seems clear that contrary to the difficulties forecast by some commentators the [student speech] trilogy has survived the leap into the cyberage and [various holdings create] a framework for regulating cyberspeech without unnecessarily restricting either student rights or endangering the educational function of the schools.").

81 *See, e.g.*, Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 456 (W.D. Pa. 2001) (finding a lack of substantial disruption without deciding the location of the student speech).

82 *But cf.* Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1227 (2008) ("To employ the *Tinker* test to answer the threshold question of when cyberspeech is student speech is to use the wrong tool for the wrong job.").

83 307 F. Supp. 1328 (S.D. Tex. 1969).

84 *Id.* at 1340–41.

Nevertheless, schools do generally have the authority to punish students for off-campus conduct.[85] Courts have upheld such punishments for student offenses such as fighting,[86] reckless driving,[87] intoxication,[88] illegal drugs,[89] and fighting words spoken to teachers,[90] all while off campus. In some of these cases, students brought challenges under the Due Process Clause, each one of them failing. As long as state law grants the school authorities such power, there remains no constitutional barrier to school authority reaching off campus.[91] There is no "limitation on overreaching school authority clause" in the Constitution.

From the outset, then, it is clear that schools can exercise some authority over off-campus student conduct. State law notwithstanding, there are no federal constitutional limits to the authority of schools over its students while off campus.

But of course there is still the First Amendment. In the speech context the question becomes what level of protection does off-campus student speech receive? Is it protected under the standards set

85 *See generally* Ronald D. Wenkart, *Discipline of K-12 Students for Conduct off School Grounds*, 210 EDUC. L. REP. 531, 533–38 (describing cases in which courts upheld school discipline over off-campus student conduct).

86 *See* Pollnow v. Glennon, 594 F. Supp. 220, 221 n.2 (S.D.N.Y. 1984), *aff'd* 757 F.2d 496 (2d Cir. 1985); Nicholas B. v. Sch. Comm., 587 N.E.2d 211, 212 (Mass. 1992).

87 *See* Clements v. Bd. of Trs., 585 P.2d 197, 204 (Wyo. 1978).

88 *See* Douglas v. Campbell, 116 S.W. 211, 213 (Ark. 1909). *But see* Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 564 (Iowa 1972). In *Bunger*, the court invalidated an athletic regulation prohibiting student athletes from riding in a car they knew contained beer because of a lack of a sufficient nexus to school and because of the unreasonableness of the rule. *Id.*

89 *See* Howard v. Colonial Sch. Dist., 621 A.2d 362, 365–66 (Del. 1992) (upholding suspension of student for selling cocaine to an undercover officer during summer break).

90 *See* Fenton v. Stear, 423 F. Supp. 767, 771 (W.D. Pa. 1976). *But see* Klein v. Smith, 635 F. Supp. 1440, 1441 (D. Me. 1986) (holding that connection between a school and a student "giving the finger" to a teacher off campus, outside of school hours was too attenuated for the school to suspend the student).

91 *See* Bush *ex rel.* Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562, 573 (D. Minn. 1990) (upholding school punishment for off-campus conduct involving alcohol where punishment did not exceed statutory authority); *Howard*, 621 A.2d at 365 (holding that suspension for off-campus drug dealing was within statutory authority for the school board to "'prescribe rules and regulations for the conduct and management of the schools'" (quoting DEL. CODE ANN. tit. 14, § 1049 (1990))). Even when a state statute limits schools to discipline only while students are under school supervision, even a small connection to off-campus activity can provide the necessary link for schools to act. *See, e.g.*, Giles v. Brookville Area Sch. Dist., 669 A.2d 1079, 1082 (Pa. Commw. Ct. 1995) (holding a student who arranged sale of drugs while on campus, to take place off campus, punishable by school).

forth in the Supreme Court free speech trilogy or is it given the full protection that speech receives in the rest of the real world?

A. Brought on Campus by the Speaker

The strongest case for a connection to campus seems to exist when the student speaker brings the off-campus speech to campus himself. In many ways, this speech is not much different from the student expressing the very same words on campus, in person. In *LaVine v. Blaine School District*,[92] James LaVine, a high school student, was expelled for a poem that he had written at home and brought to school. The poem, entitled "Last Words," described a school shooting in which the student kills twenty-eight students and then takes his own life.[93] Despite his mother's warnings, James brought it to school and showed it to several friends and eventually submitted it to his English teacher for her feedback.[94] Upon reading the poem, the teacher alerted the school counselor about the disturbing content.[95] After a series of discussions and encounters with James by school officials, the sheriff's department, and his parents, the principal decided to expel him.[96] The court proceeded to analyze James's free speech claim under the *Tinker* standard.[97] The court ultimately upheld the emergency expulsion, finding that the school reasonably predicted a substantial disruption to the school environment, due to the threatening nature of his expression.[98] The court never questioned the assumption that the student speech cases controlled in the case before them, as it was James himself that brought his own speech to school.

Similarly, in *Coy v. Board of Education*,[99] the fact that the student brought the speech to school himself—albeit electronically—seemed to supply the necessary connection to school. Jon Coy, a middle school student, created a website at home that contained insulting remarks about three of his classmates, as well as other uses of profanity, and "a depressingly high number of spelling and grammatical errors."[100] Jon accessed the website on a school computer during

92 257 F.3d 981 (9th Cir. 2001).

93 *Id.* at 983–84.

94 *Id.* at 984.

95 *Id.*

96 *Id.* at 985–86. After seventeen days, the expulsion was rescinded and James returned to school. *Id.* at 986.

97 *See id.* at 988–92.

98 *Id.* at 991–92. The court did, however, overturn the issuance of a disciplinary letter in the student's permanent file. *Id.*

99 205 F. Supp. 2d 791 (N.D. Ohio 2002).

100 *Id.* at 795.

class time, and the school suspended him.[101] The court indicated that because Jon had brought the website to school, *Tinker* would apply.[102] While ultimately failing to find a disruption of any kind that would support the punishment under *Tinker*,[103] the district court nonetheless made it clear that the in-school actions of the student-speaker—accessing the website while in school—would have supplied the necessary connection to school.[104]

B. Knowledge Supplies the Connection

At least one court has found a connection to campus when the student had knowledge that the disruptive speech would be distributed at school. In *Boucher v. School Board*,[105] Justin Boucher, a high school junior, was suspended for writing an article explaining "'how to hack the school[']s gay ass computers'" that was distributed in an underground newspaper at school.[106] While the newspaper was created and printed off campus, it was distributed—perhaps by a third party—in the bathrooms, lockers, and cafeteria of the school.[107] "Justin wrote the article outside the school and it then appeared *with his*

101 *Id.* at 796. School administrators had been alerted to the existence of the website the day before. *Id.* at 795. Jon was later expelled for eighty days. *Id.* at 796. He was cited for violating three rules: obscenity, disobedience, and inappropriate action or behavior. *Id.* at 795–96. Since the website was not authorized according to the technology use policy, he could also have been in violation of that rule. *Id.* at 800.

102 *Id.* at 799.

103 *See id.* at 799–801.

104 The court does not even mention the on-campus/off-campus distinction, finding no question that the student's actions constituted expressive activity at school. The court did characterize the activity as private, silent and passive, thus finding that *Tinker* would apply:

> Throughout a single class period, Jon Coy occasionally accessed his website in a manner designed to draw as little attention as possible to what he was viewing. *Tinker*'s holding that it is only appropriate to regulate "silent, passive expression of opinion" when the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" is the proper standard for the Court to analyze the plaintiffs' first claim.

Id. at 800 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508–09 (1969)).

105 134 F.3d 821 (7th Cir. 1998).

106 *Id.* at 822–23 (alterations in original) (quoting *The Last*, Justin Boucher's underground newspaper). Justin was suspended for "endanger[ing] school property." *Id.* at 823.

107 *Id.* at 822. The newspaper, entitled *The Last*, was distributed for the first time in April 1997. Justin's article appeared in the June issue. *Id.*

knowledge . . . for distribution at school."[108] The court upheld the suspension under *Tinker* because the school reasonably forecasted that the article would cause substantial disruption to the school.[109] While Justin argued that the school's authority over off-campus speech was less than its authority on school grounds, the court found his argument inapplicable since the newspaper had actually been distributed on campus.[110] "In addition, the district court found that the article advocates on-campus activity. Thus, on the record before us, it appears the case law applicable to *student* expression will apply. . . ."[111] Either Justin's knowledge that the article would reach campus, the article's advocacy of on-campus activity, or both supplied the necessary connection to campus.

C. Reasonable Foreseeability

Reasonable foreseeability is the weakest connection that courts have found sufficient to establish a connection between off-campus speech and the school campus. Not all courts have accepted it. In *Wisniewski v. Board of Education*,[112] the court upheld an eighth grader's semester-long suspension because of his off-campus expression.[113] Aaron Wisniewski created an Instant Message icon[114] for his account that depicted a gun shooting the head of a person, with blood splat-

108 *Id.* at 824 (alteration in original) (emphasis added) (internal quotation marks omitted). Without any further clarification, all that can be known is that Justin knew the article would be distributed. It might be a fair inference, however, that Justin submitted the article to the publishers of *The Last*, intending it to be distributed at school.

109 *Id.* at 828. The only disruption the article seems to have caused is the series of precautionary measures taken by the school: running diagnostics and changing passwords. *Id.* at 827.

110 *See id.* at 829.

111 *Id.*

112 494 F.3d 34 (2d Cir. 2007).

113 *Id.* at 35–36.

114 The court explained:

> Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group ["buddies"] who have the same IM software on their computers. . . .
>
> The [America Online] IM program, like many others, permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two "buddies," and each can copy the icon of the other and transmit it to any other "buddy" during an IM exchange.

Id. at 35–36.

tering.[115] Below the image appeared the words "Kill Mr. VanderMolen"—Aaron's English teacher.[116] A few weeks earlier, the teacher had informed the class that the school would not tolerate threats, and that they would be treated as acts of violence.[117] While Aaron did not send his icon to anyone at school, it was visible to anyone on his buddy list for approximately three weeks.[118]

During that time, one of Aaron's classmates noticed the icon while on his home computer, printed out a copy of it, and brought it to the attention of the teacher, who in turn submitted it to other school authorities.[119] Aaron never brought the icon to school. The school took disciplinary action, including an initial five-day suspension, and then a semester-long suspension, determined by a special hearing officer and ratified by the school board.[120] Police also opened a criminal investigation, but abandoned it after the investigating officer concluded that the student intended the icon as a joke and posed no actual threat to VanderMolen or any other official.[121]

The Second Circuit found that the matter could be resolved under the *Tinker* standard because the icon caused substantial disruption on campus.[122] Thus, the court did not find it necessary to determine whether or not the icon constituted a true threat under the *Watts v. United States*[123] standard.[124] Addressing the issue of the location of the speech, the court stated, "The fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline. We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school as have other courts."[125] The panel was divided, however, on what was required to hold the student liable for that disruption—either because it actually reached campus, or because it was reasonably foreseeable that the icon would reach cam-

115 *Id.* at 36.
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.* The officer found that the student had violated New York Education Law section 3214(3) by "endangering the health and welfare of other students and staff at the school." *Id.* The officer further found that the icon should be understood as a threat and not merely as a joke. *Id.*
121 *Id.*
122 *Id.* at 38–39.
123 394 U.S. 705, 708 (1969) (per curiam) (articulating the standard for what amounts to a "true threat" and thus, is unprotected speech).
124 *See Wisniewski*, 494 F.3d at 37.
125 *Id.* at 39 (footnote omitted),

pus.[126] The court conveniently resolved the issue by finding that, either way, the icon *did* reach school property and it was also reasonably foreseeable that it would do so.[127]

Though other courts have adopted the *Wisniewski* approach,[128] one court has rejected the idea that "reasonable foreseeability" that off-campus speech would reach campus is enough to subject the original speaker to school discipline. In *Thomas v. Board of Education of Granville Central School District*,[129] a group of high school students were punished for publishing and distributing a "morally offensive, indecent, and obscene" underground newspaper.[130] The court found that the school had no authority to punish the students because the speech was not on-campus speech that would have made it subject to the *Tinker* standard.[131] The students had carefully prepared, published, and distributed the paper off campus, outside of school hours.[132] Despite the students' care, a copy of the publication came to the attention of school administrators when they seized it from another student.[133] The court stated, "[O]ur willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."[134] Furthermore, the court expressly rejected the idea that off-campus speech became on-campus speech if it was merely foreseeable to the student that the speech would reach campus, stating, "[W]e believe that this power is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result."[135]

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126 *See id.* at 39.

127 *See id.* at 39–40.

128 *See, e.g.*, Doninger v. Niehoff, 514 F. Supp. 2d 199, 216–17 (D. Conn. 2007) (citing *Wisniewski*, holding that student could be punished for blog posting that was reasonably foreseeable to be viewed by students).

129 607 F.2d 1043 (2d Cir. 1979).

130 *Id.* at 1046. The newspaper, entitled *Hard Times* styled itself after the *National Lampoon*, a "well-known publication specializing in sexual satire." *Id.* at 1045. The offensive content included articles lambasting "school lunches, cheerleaders, classmates, and teachers," as well as articles on masturbation and prostitution. *Id.*

131 *See id.* at 1044–45.

132 *Id.* at 1045. The court found that a de minimis part of the paper was prepared on campus. *Id.* at 1050.

133 *Id.* at 1045–46.

134 *Id.* at 1044–45. The court also stated that outside the school campus, school officials would be bound by the same First Amendment restrictions that normally apply to all government actors. *Id.*

135 *See id.* at 1053 n.18. *But see* Wisniewski v. Bd. of Educ., 494 F.3d 34, 39–40 (2d Cir. 2007) (holding that foreseeability was enough).

D. On-Campus Presence Through a Third Party Alone is Insufficient

Courts have almost universally held that the fact that speech reaches campus via a third party is not enough, without more, to create a sufficient connection to campus. In *Porter v. Ascension Parish School Board*,[136] the Fifth Circuit ruled on just such a case. Adam Porter, then age fourteen, drew a picture showing a "siege" of his school, involving a gasoline truck, missile launchers, and helicopter, as well as racial epithets, profanity, and a brick being thrown at the head of a principal.[137] The drawing remained in a notebook that he stored in a closet at his home until two years later, when his younger brother, Andrew, brought the notebook to school, came across the drawing, and brought it to the school bus driver.[138] The high school suspended Adam and advised him that he would likely lose in an expulsion hearing.[139] Adam waived his right to an expulsion hearing and preemptively transferred to an alternative school.[140]

While recognizing that other cases gave schools the authority to punish off-campus speech that was later brought on campus or directed at campus,[141] the court nonetheless held that the facts of this case—that the speech remained off campus for two years and that it was *inadvertently* brought on campus by a third party—took the case "out of the scope of [those] precedents."[142] Because of the unintentional manner in which the notebook reached campus, the court held that the *Tinker* standard of "substantial disruption" did not apply to the speech.[143] Other courts have agreed that mere presence of

136 393 F.3d 608 (5th Cir. 2004).

137 *See id.* at 611.

138 *Id.* Andrew had drawn a picture of a llama in the sketchpad and wanted to show it to others. *Id.*

139 *Id.* at 611–12.

140 *Id.* at 612.

141 *See id.* at 615 n.22 (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001); Boucher v. Sch. Bd., 134 F.3d 821, 827–28 (7th Cir. 1998); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075–77 (5th Cir. 1973); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001)).

142 *See id.*

143 *Id.* at 615. Neither did the speech constitute a true threat. *See id.* at 618. Nevertheless, the court found an issue of material fact as to whether the speech was the impetus behind his punishment. *Id.* at 618. The court also found that the principal was entitled to qualified immunity on the claim, specifically because the standards for determining if off-campus speech brought on campus is punishable were unclear. *Id.* at 621.

speech on-campus, due to a third party, is insufficient to connect the otherwise off-campus speech to the school campus.[144]

E. Finding a Multifactor Nexus

Some courts choose to analyze the connection between off-campus speech and on-campus impact with a multifactor analysis, rather than relying solely on the mental state of the student-speaker. In *J.S. v. Bethlehem Area School District*,[145] the court upheld the suspension of an eighth grade student for a website he created that ridiculed teachers and administrators.[146] J.S. created the website from his home computer and titled it "Teacher Sux."[147] The website made derogatory, profane, and offensive comments about J.S.'s algebra teacher and principal, listing reasons why the teacher should die, and soliciting donations to pay for a hitman to kill her.[148] J.S. told other students about the website and even showed it to students on a school computer.[149] News of the website spread throughout the school. Soon, the principal learned of the website, investigated it, alerted the FBI, and informed the algebra teacher targeted by the website.[150] The teacher suffered severe distress, and was not able to return to teaching that year or the next.[151] Eventually, the school expelled J.S.[152]

144 *See, e.g.*, Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 975 (5th Cir. 1972) (finding that an underground newspaper distributed off campus was not subject to school discipline, even though other students brought the paper into school). However, the court was not willing to entirely foreclose the possibility of subjecting off-campus conduct to school discipline. *See id.* at 974. ("Although the students urge the argument, we do not feel it necessary to hold that *any* attempt by a school district to regulate conduct that takes place off the school ground and outside school hours can never pass constitutional muster.").

145 807 A.2d 847 (Pa. 2002).

146 *Id.* at 869.

147 *Id.* at 850–51.

148 *Id.* at 850–52. The website claimed that the principal was having sexual relations with the principal at another school. *Id.* The website was even more brutal to the algebra teacher, as it made derogatory and profane remarks about her, ridiculed her physical appearance and disposition, and compared her to Adolf Hitler. *Id.* Finally, the reasons why the teacher should die were accompanied by a small drawing of the teacher, decapitated, with blood dripping from her neck. *Id.*

149 *Id.* at 851–52.

150 *Id.* at 852.

151 *Id.* Worrying that someone wanted to kill her, her symptoms included stress, anxiety, loss of sleep, and other consequences requiring medication. *Id.* She received medical leave for the following year. *Id.*

152 *Id.* at 853. About a week after the administration discovered the website, J.S. took it down on his own accord, having not yet been confronted about the website. *Id.* at 852.

The court began by stating, "First, a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated [in order to apply *Tinker*], i.e., is it on campus speech or purely off-campus speech?"[153] The court rejected J.S.'s claim that the speech was "purely off-campus speech, which would arguably be subject to some higher level of First Amendment protection."[154] The court found a "sufficient nexus between the [website] and the school campus," noting J.S.'s efforts to access the website in school and show it to others, his targeting of the website to his fellow members of the school community as the intended audience, and the fact that the school administrators learned of it.[155] The court concluded, "[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[156] The connection to campus thus being established, the court also found that the website caused a substantial disruption and upheld the suspension.[157]

In *Layshock v. Hermitage School District*,[158] the court did not find a sufficient nexus to connect the student's off-campus speech to campus. The student created a parody MySpace profile of the school principal, mocking him with accusations of alcohol abuse and sexual behavior.[159] While the student originally created the profile off campus, he accessed it several times from school and showed it to others while at school.[160] A teacher also found other students accessing the website and giggling about it while in the computer lab.[161] Several other teachers reported students discussing the profile in class, and eventually an administrative meeting was called.[162] The school limited computer access for several days, finally barring access to MyS-

153 *Id.* at 864.

154 *Id.*

155 *See id.* at 865.

156 *Id.* The court also noted that "[a]lthough not before our court, we do not rule out a holding that purely off-campus speech may nevertheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are satisfied." *Id.* at 864 n.11.

157 *Id.* at 869. The teacher targeted by the website later succeeded in a suit against J.S., securing a $500,000 judgment against him for intentional infliction of emotional distress and invasion of privacy. *See* Kathryn Balint, *Personal Fouls: Students Get Rude and Crude with Internet Slambooks*, SAN DIEGO UNION-TRIB., Nov. 3, 2001, at E1.

158 496 F. Supp. 2d 587 (W.D. Pa. 2007).

159 *Id.* at 590–91.

160 *Id.* at 591–93.

161 *Id.* at 592.

162 *Id.* at 593.

pace entirely.[163] The court noted that unlike traditional school speech cases, "in cases involving off-campus speech, such as this one, the school must demonstrate an appropriate nexus" in order to punish speech in the *Tinker* context.[164] The court found that several factors necessitated finding that no sufficient nexus existed:

> [T]he School District is unable to connect the alleged disruption to Justin's conduct insofar as there were three other profiles of [the principal] that were available on myspace.com during the same timeframe [sic]. Moreover, the School has not demonstrated that the "buzz" or discussions were caused by Justin's profile as opposed to the reaction of administrators.[165]

The court also noted that while the student accessed the profile from school, there was no evidence that the school was aware of this when they punished him.[166]

F. Avoiding the Issue

A few courts have conveniently avoided the issue altogether, by looking at Internet speech or other forms of off-campus speech brought on campus through the *Tinker* and *Fraser* analyses, and finding that, even if the expression were considered on-campus, the school's restriction of the speech would violate the First Amendment. Despite the greater leeway that school officials enjoy over student speech in school, their actions in these cases would not have been constitutional, because these examples of student expression did not fall into the categories of less-protected speech.[167]

In *Killion ex rel. Paul v. Franklin Regional School District*,[168] Zachariah Paul, a high school student, was suspended for a "Top Ten List" he created ridiculing the school athletic director. While he composed the list entirely on his own time, from his own computer, and

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163 *Id.* at 592–93.

164 *See id.* at 599.

165 *Id.* at 600. *But see* J.S. v. Blue Mountain Sch. Dist., No. 3:07-cv-585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008) (holding, under similar circumstances, that sufficient nexus existed).

166 *Id.* at 601.

167 Commentators have decried this practice as somehow using *Tinker* to determine the location of the speech, or as a threshold matter to see if the speech was on-campus speech. *See* Brenton, *supra* note 82, at 1227 ("To employ the *Tinker* test to answer the threshold question of when cyberspeech is student speech is to use the wrong tool for the wrong job."). On the contrary, courts do not use *Tinker* to determine the location of speech. They may, however, assume that *Tinker* applies for the purposes of disposing of the issue without having to decide the location of the speech.

168 136 F. Supp. 2d 446 (W.D. Pa. 2001).

distributed it to others via e-mail, another unknown student reformatted the list, printed copies, and distributed them at school.[169] The school suspended Zachariah for ten days for "verbal/written abuse of a staff member."[170] The court found that the "overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."[171] Zachariah's list had not created any substantial disruption, nor could the school reasonably foresee the threat of substantial disruption.[172] The court found that even if it had reached the issue of whether or not the speech was on campus, it did not rise to a *Tinker* disruption and thus the suspension violated the student's First Amendment rights.[173]

In *Beussink v. Woodland R-IV School District*,[174] school officials suspended Brandon Beussink when they discovered that he had created a website criticizing the school with crude and vulgar language and inviting students to contact the school with their concerns and criticisms. The student created the website on his home computer, outside of school time; he claimed he never intended anyone from school to view it.[175] Unfortunately, a student did view the website from a school computer and brought it to the attention of a teacher.[176] The school then suspended the student for ten days.[177]

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169 *Id.* at 444–49. The list read as follows:

> 10) The School Store doesn't sell twink[i]es.
> 9) He is constantly tripping over his own chins.
> 8) The girls at the 900 #'s keep hanging up on him.
> 7) For him, becoming Franklin's "Athletic Director" was considered "moving up in the world".
> 6) He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time.
> 5) As stated in previous list, he's just not getting any.
> 4) He is no longer allowed in any "All You Can Eat" restaurants.
> 3) He has constant flashbacks of when he was in high school and the athletes used to pick on him, instead of him picking on the athletes.
> 2) Because of his extensive gut factor, the "man" hasn't seen his own penis in over a decade.
> 1) Even if it wasn't for his gut, it would still take a magnifying glass and extensive searching to find it.

Id. at 448 n.1 (internal quotation marks omitted).

170 *Id.* at 449.

171 *Id.* at 455.

172 *Id.* The court also considered and rejected the defense that the speech could be prohibited as patently offensive under *Fraser*. *See id.* at 453–54.

173 *Id.* at 455.

174 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

175 *Id.* at 1177.

176 *Id.* at 1177–78. The student admitted that she did it in order to get Brandon in trouble, in retaliation for an earlier disagreement. *Id.*

Again, ignoring the on-campus/off-campus distinction, the court found that the website did not cause a substantial disruption—only a few other students viewed the website during the day before Brandon removed it.[178] The only disturbance resulted from the delivery of disciplinary notices to Brandon during the day.[179] Thus, without having to address the location of the speech, the court found that the suspension was unconstitutional, since the speech did not even amount to a disruption under *Tinker*.

III. Creating a Test for On-Campus/Off-Campus Speech

A test is needed to mark the boundaries of free speech protection from school discipline over speech that originates off campus.[180] Students will benefit from a clear test so that they can order their lives accordingly and be put on notice that certain less-protected forms of speech, though originating off campus, could make them subject to school discipline. Even more importantly, schools need guidance on how far their control over disruptive student speech extends. Schools need a test that is easy for administrators to apply and leaves them a large measure of discretion to deal with disruptive speech in order to maintain order and discipline in schools. Schools have an interest in knowing the extent of their power, so they can respond quickly and confidently to disciplinary problems, all while avoiding costly and time-consuming lawsuits down the road.[181] Such a test should continue to vindicate the interests that the Supreme Court has stated are important in the freedom of speech context in schools. That is, the law must permit schools to have "comprehensive authority . . . to prescribe and control conduct,"[182] without making schools "enclaves of totalitarianism."[183] The schools must be a place for "teaching stu-

177 *Id.* at 1179.

178 *Id.* at 1178–79.

179 *Id.* at 1179–80. Furthermore, the principal testified that his only reason for issuing the suspension was his dislike of the content of the website. *See id.* at 1180.

180 *Cf.* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619–20 (5th Cir. 2004) (noting legal commentators' calls for clarity).

181 *See, e.g.*, Lisa Stiffler, *Ex-Student Awarded Damages in His Free-Speech Lawsuit*, Seattle Post-Intelligencer, Feb. 21, 2001, at B1 (reporting that student who sued after school punished him for his website parodying an administrator awarded $62,000 in settlement agreement).

182 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (emphasis added).

183 *Id.* at 511.

dents the boundaries of socially appropriate behavior,"[184] yet also operate as the "marketplace of ideas."[185]

This Part first examines the various tests that commentators have suggested. Then, it suggests a new test for determining when student speech of off-campus origin has "reached campus" such that a school can exercise its authority over the speech if it falls into the less-protected category. This optimal test requires that the speech (1) physically reach campus and (2) be intended by the speaker to reach campus. That intent can be shown by either examining the subjective intent of the speaker, or by looking at the medium of communication the speaker used.

A. Other Tests

Critics and commentators have suggested many tests as to how schools should be able to address off-campus speech. Tension exists between schools' interest in maintaining order and students' interests in free expression of ideas. Scholarship is quite divided between calls to protect student speech even more against school intrusion, and calls to give schools more power to punish speech, usually animated by the concern over cyberbullying.[186] Tension also exists between the benefits of having a clear rule for school administrators to live by and having a flexible test for judges to apply as they see fit. Such suggested tests range from the simple to the exotic. Some propose a dramatic divergence from the current, somewhat muddied line of lower court decisions, while others attempt to compile the decisions together to extract a multifactor test. Most are concerned only with Internet speech, which leaves unaddressed student speech cases that involve underground newspapers or other methods of distribution.[187] While such tests are useful for addressing very specific aspects of the student speech issue, they lack universal applicability.

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

185 *Tinker*, 393 U.S. at 512.

186 *Compare* Todd D. Erb, Note, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 271–87 (2008) (calling for fewer overall protections for student speech), *with* Christi Cassel, Note, *Keep out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 666–80 (2007) (advocating a test that gives student Internet speech special protections). Another approach emphasizes the importance of protecting student free speech rights, because of the safety-valve effect of free speech, allowing students to vent their frustrations without acting out in true violence. *See* Calvert, *supra* note 13, at 282–85.

187 One test even limits itself to only MySpace-type websites. *See* Cassel, *supra* note 186, at 672–73.

Importantly, almost every test suggested recognizes the importance of the state of mind of the student speaker. Beyond that common thread, the tests fall into three basic categories: intent-based, nexus-based, and technology-based.[188]

1. Intent-Based

While nearly all suggested tests depend on the intent of the student speaker to some degree, some turn on that issue exclusively. For example, Alexander Tuneski suggests a test that categorically places Internet speech outside the realm of school authority altogether, unless the student intended his speech to reach campus.[189] The test calls for a "a clear line [to] be drawn between on- and off-campus speech in order to guard off-campus speech adequately."[190] It is framed in terms that suggest a hard-line stance to protect Internet student speech from unconstitutional infringement,[191] but at its heart, it is a test that turns on the intent of the speaker. Under this test, *Tinker* would not necessarily apply even to Internet speech that is disruptive to campus.[192] If, however, the student directed his speech to campus via the Internet, school administrators could discipline the student under *Tinker*.[193] The student might direct his speech towards campus by emailing it to a school email address, by opening a webpage of his creation in school, or by directing others to do so.[194]

This test seems reasonable and affords students a certain level of protection for their off-campus speech. Other states of mind, such as knowledge or reasonable foreseeability will not be enough to connect the speech to campus. Neither will speech that reaches campus via a third party, without the original student taking proactive steps to direct it there. The test does not open up the entire realm of Internet speech to school discipline, and yet ensures that the most malicious speech—disruptive speech that students intentionally direct towards school—is punishable.

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188 However, as this Note explains below, each possible test considers the intent of the speaker in some way.

189 Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech,* 89 VA. L. REV. 139, 177 (2003). Tuneski's primary concern seems to be the malleability of the *Tinker* substantial disruption test. *See id.* at 170.

190 *Id.* at 159.

191 *See id.* ("Both policy and logic demand that internet speech be clearly classified as off-campus speech and afforded the full protection of the First Amendment.").

192 *See id.* at 177.

193 *See id.* ("By taking this additional step, a speaker decides whether she wishes to subject herself to the jurisdiction of school officials.").

194 *See id.* at 178.

Of course, the difficulty for school administrators will be in determining whether or not the student intentionally directed the speech to campus. Subjective intent can be difficult to determine.[195] Tuneski's test relies, however, on outward signs to indicate the intent of the speaker, such as sending an email to a school email account, or the student accessing the website himself from school, signs which could be rather apparent to school officials.

2. Nexus-Based

Several suggested tests use multifactor analyses to ensure that the off-campus speech has enough of a connection to campus before schools can punish it as less-protected speech. This methodology seems intuitive and has been frequently applied by courts.[196] While each test suggests different factors to be considered, the common thread that runs through most of them is the speaker's intent. Though combined with many other factors, most tests suggest that the intent of the speaker that his off-campus speech reach campus is highly relevant to the analysis.

Tracy Adamovich suggests a test for off-campus speech that uses the standard for government employee speech.[197] Specifically, Adamovich's test is designed to address the situation where off-campus student speech is brought onto campus by a third party, and to determine whether or not a school can punish the student for that speech.[198] Though not exactly the same, obviously, Adamovich contends that there are enough similarities between students and government employees—the need for government to maintain discipline and the similarities between the teacher-student relationship and the supervisor-employee relationship—for the test to be applicable.[199] Of course, as Adamovich points out, the test for employee speech is at its heart a balancing test.[200] Adamovich suggests that in the student con-

195 *See generally* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 526–27 (1992) (noting the difficulty of determining mental state).

196 *See supra* Part II.E.

197 *See* Adamovich, *supra* note 80, at 1102–06.

198 *Id.* at 1107–11. Thus, the test merges the location question and the disruption question. That is, it proposes to be an "all in one" test, replacing *Tinker* for purposes of off-campus speech.

199 *Id.* at 1103–04.

200 *Id.* at 1104–05; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, 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.").

text, this balancing should consider four factors: "(1) the intent, if any, for the speech to reach campus; (2) the number of listeners; (3) the nexus between the student speech and school operations; (4) the level of disruption on the school's operations caused by the speech."[201] When the number of listeners is greater, the connection to campus is stronger. The "nexus" factor looks at the relevance of the off-campus speech to the potential disruption on campus, the subject of the speech, and whether or not school is in session.[202] The last factor, the level of disruption, simply restates the *Tinker* standard.[203] Thus, instead of being another factor to balance against the others, this last element appears to be a strict requirement of the test.

Similarly, Kyle Brenton makes another analogy, comparing the off-campus speech issue to the issue of personal jurisdiction.[204] This analogy seems the most intuitive and is the most responsive to the heart of the matter—that is, how far does school authority extend? Brenton suggests that just as states can exercise personal jurisdiction over noncitizens who show purposeful availment of the rights and privileges of the state,[205] in the school context, Brenton suggests that a school could show purposeful availment if a student accessed his own website while on campus, showed it to others, and did not access it for school purposes.[206] Additionally, just as a state can exercise personal jurisdiction over an individual when there are minimum contacts, shown by intentional conduct by the defendant that harms the plaintiff in the forum state,[207] a school could do the same if the student targeted the speech towards school, with the intent that it be accessed at school, and the intent that the speech cause harm.[208] Lastly, just as courts still make one final check for fundamental unfairness in the personal jurisdiction realm, even if other criteria have been satis-

201 Adamovich, *supra* note 80, at 1108.

202 *See id.* at 1110.

203 *See id.* at 1111 (noting that there must be either actual, substantial, or the reasonable foreseeability of disruption, per *Tinker*).

204 *See* Brenton, *supra* note 82, at 1230–31 ("[C]ourts have at their disposal a robust jurisprudential mechanism that they may readily adapt to evaluate a school's claim of authority over a student's off-campus cyberspeech: the rules of personal jurisdiction.").

205 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

206 Brenton, *supra* note 82, at 1235; *cf.* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 870 (Pa. 2002) (Zappala, J., concurring) ("[T]he fact that a web site is merely accessed at school by its originator is an insufficient basis [to consider the speech on-campus]." (emphasis omitted)).

207 *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984).

208 Brenton, *supra* note 82, at 1236.

fied,[209] in the school context, Brenton suggests that courts would do the same, striking a balance between "the interest of the student in the right of unrestrained expression, and the interests of the school in maintaining an orderly educational environment."[210]

Unlike other multifactor tests, Renee Servance does not take into account the intent of the speaker.[211] Like most others seeking to address cyberbullying, she advocates more deference to schools to address the problem.[212] She does so, however, by removing any sort of geographic requirement, and by adding a requirement of negative personal impact on top of the *Tinker* standard. In her three-step test, in order to punish student speech that originates off campus, a school must show that the speech (1) has a sufficient "nexus" in connection with the school campus, usually satisfied if both speaker and victim are members of the same school community; (2) had an actual or foreseeable negative impact on the target of the speech, much like that of traditional bullying; and (3) caused an actual negative impact on the school's ability to educate students or maintain authority over the classroom.[213] Thus, there is no requirement that the speaker intend for his speech to reach campus, nor that the speech actually reach campus. Servance explains that "off-campus status [is] a somewhat false barrier to school authority."[214] Because, "[u]nlike traditional forms of speech, Internet content is not limited by geography," the test does not require that the speech actually be present on campus.[215] Servance does not deny that when students are off campus, their free speech protections are normally at their "zenith."[216] Rather, her point is that the narrow category of Internet speech is not geographically locatable, and thus, courts should not place any sort of on-campus or off-campus connection requirement, giving schools the

209 *See Int'l Shoe*, 326 U.S. at 316.

210 Brenton, *supra* note 82, at 1240. When speech is on the Internet, this fairness factor would shift the balance of interests strongly in favor of the student. *See id.*

211 *See* Renee L. Servance, Note, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1238–43.

212 *Id.*

213 *Id.* at 1239.

214 *Id.* at 1237.

215 *Id.* at 1235; *see also* Louis John Seminski, Jr., Note, *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 181–84 (2001) (urging that a new understanding of the Internet replace the Court's current definition). *But see* Tuneski, *supra* note 189, at 163–65 (arguing that because the speech on the Internet is not geographically locatable, schools should not have authority over any of it).

216 Servance, *supra* note 211, at 1234.

ability to address the impact of the speech.[217] Thus, she suggests, courts should depart both from the *Tinker* line of student speech cases, and the muddied line of lower court cases dealing with off-campus speech, in order to specifically address cyberbullying.

These multifactor tests have their advantages and disadvantages. One advantage is that courts are already applying similar balancing tests, albeit on an ad hoc basis.[218] Most look at a variety of factors to determine the strength of the connection to campus before they regard the expression as school speech. Adamovich and Brenton both draw upon tests familiar to courts in order to create a new test. Brenton's seems more appropriate because he derives it from a test for jurisdiction, which is essentially the issue that courts have considered in these cases.[219]

However, there are numerous shortcomings of these tests. The principal shortcoming is the unpredictability of multifactor balancing tests.[220] While most commentators strive to create a clear test, such multifactor nexus and balancing tests will prove to be anything but clear. Multifactor tests are "ubiquitous" though "imperfect" devices in

217 *Id.* at 1235–36. Servance cites *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), for support that there is no requirement for a geographic connection to campus and that only the impact of the speech need be considered. *See id.* at 1242.

218 *See supra* Part II.0.

219 *See, e.g.*, *Bethlehem*, 807 A.2d at 864 ("First, a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated."). The analogy is not perfect, however. The reason for the requirement of personal jurisdiction, the Supreme Court has explained, is the need to balance the interests at stake, including the defendant's interest in being put on notice as to what jurisdiction he might be subject to, the forum state's interest in deciding the dispute, the plaintiff's interest in obtaining efficient relief, the interstate judicial system's interest in an efficient system of adjudication, and the interest of all the states in a promoting certain social policies. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). While student speech involves interests of the student and the school, it typically does not implicate competing interests between different jurisdictions. Thus, the situation is not the same as having two states competing to protect their citizens' interests, as in personal jurisdiction.

220 One frequently noted problem with multifactor tests is that the human mind tends instinctively to rely on no more than a few of the factors, no matter how many factors are available. *See* Barton Bebee, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1601–02 (2006). Also, when a multifactor test is presented, the mind ceases to gather information relevant to the other factors once enough has been gathered with regard to the most important factors to make them dispositive. Judges also tend to "stampede" the remaining factors. That is, once they have decided a dispositive factor, the other factors tend to fall in line with the same result. *See id.* at 1614–15.

jurisprudence.[221] The tests must give guidance not only to courts, but also to schools and students so they can order their conduct accordingly.[222] Even Brenton's personal jurisdiction analogy becomes muddied because of his introduction of a balancing test for unfairness on top of the minimum contacts analysis.[223] Additionally, though multifactor tests purportedly give guidance to judges, they can also open the door to broad judicial discretion.[224]

Furthermore, with some of the tests, it is difficult to imagine an example of student speech that would end up being substantially disruptive, or reasonably foreseeable to be substantially disruptive, that could not also satisfy the other factors. For example, looking at Adamovich's test, what truly substantially disruptive student speech would not also meet the requirements of a large enough audience and a close enough connection between the target of the speech—if any—and the speaker? It seems that most speech that could actually be substantially disruptive, is so because it reaches a large audience at the school and has relevance to that audience. Neither is it clear what work those factors are actually doing.[225] If student speech was substantially disruptive, and yet only reached a small audience of students that the student speaker did not have any close connection to, is that speech really less worthy of deference to school authority than any other disruptive speech? Should a clever student who devises a way to direct his speech towards campus yet only reaches a small audience but still causes a substantial disruption, really be rewarded by exempting him from school discipline?

Additionally, these tests do not always claim to be able to address other student speech situations, such as those presented by *Fraser*, *Hazelwood*, or *Morse*. For example, Adamovich's test merges with the *Tinker* substantial disruption test. The additional factors—the size of the audience and the connection to the audience—might have some similarity to the goals of preventing substantial disruption, but they

221 Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 41 (2007).

222 *Cf. id.* ("[M]ultifactor or balancing tests may be indeterminate, and applying or weighing some of the factors within the test may require intuition.").

223 *See supra*, notes 209–10 and accompanying text.

224 *See* Carlos Gonzales, *Trumps, Inversions, Balancing, Presumptions, Institution Prompting, and Interpretive Canons: New Ways for Adjudicating Conflicts Between Legal Norms*, 45 SANTA CLARA L. REV. 233, 286 (2005).

225 Looking at the cases that found a substantial disruption, they would likely all still find a connection to campus under one of the balancing tests. Furthermore, not one case found that the speech constituted a substantial disruption, and yet did *not* have a sufficient connection to campus, thus making the speech off-limits from school authority.

are not as relevant if the issue is speech that is plainly offensive or promotes illegal drug use. In a similar fashion, Servance's impact analysis test is really addressed towards cyberbullying, which leaves unaddressed substantially disruptive speech that does not constitute cyberbullying, as well as the other categories of less-protected student speech.

3. Technology-Based Tests

One commentator suggests that the test should turn on the intent of the speaker, as indicated by the medium of communication the student speaker used.[226] Kenneth Pike explains that certain modes of communication create "active telepresence," such as email, text messaging, and phone calls.[227] Others are passive in nature, such as web pages, blogs, and MySpace.[228] However, most forms of passive telepresence can be used in an active way, such as blogs, where the posting is of special interest to a particular audience.[229] These types of communication would require an analysis of the creator's intent to communicate the website with an audience on campus.[230] Relevant factors would include whether or not the student encouraged others to access the website at school, or whether or not the website advocates some sort of action at school.[231] However, a website that simply includes the school name or discussion of school events or people, absent an intent that the website be viewed at school, would be passive.[232] Pike's test could easily be applied to nonelectronic means of communication. For example, off-campus distribution of an underground newspaper would likely be "passive" communication, while mailing a letter to a teacher or administrator would be "active."

The shortcoming of this test is that it is unwilling to look at the subjective intent of a speaker to determine if an otherwise passive mode of communication was used intentionally to reach campus. For example, if a student posts something on his personal blog, knowing full well that other students will be accessing that blog in a computer lab during school hours, Pike's test would be unable to connect that speech to campus.[233]

226 *See* Pike, *supra* note 5, at 1002.
227 *Id.* at 1002–04.
228 *Id.* at 1004.
229 *See* Doninger v. Niehoff, 514 F. Supp. 2d 199, 206 (D. Conn. 2007).
230 Pike, *supra* note 5, at 1004.
231 *Id.*
232 *Id.*
233 As this Note suggests this problem is remedied by combining Tuneski's intent test with Pike's passive/active telepresence test. *See infra* Part III.B.

B. Suggesting a Pure Intent and Location Test

Off-campus speech should be considered on-campus when the student intends that the speech reach the school and the speech actually does reach school. The student's intent to reach campus could be indicated by the type of communication technology employed or by some overt act of the student. Merely requiring that the student "reasonably foresee" that speech reach school is not enough. Also, a multifactor nexus will lead to inconsistent outcomes, an undesirable result as commentators already decry the "total disarray" of lower courts regarding the issue now. Once it has been established that student speech, whether it is written or electronic, has reached campus, and that the speaker intended it to reach campus, then the school would be able to restrict the speech if it also fell into a less-protected category.

Intent that the speech reach campus could be evidenced by a student who "tell[s] others to view [a web]site from school" or "distribut[es] newspaper as students enter school."[234] If the student views the website himself at school and shows it to others, that would be the equivalent to the student bringing the speech to school himself, which would automatically establish a connection to school. In addition, some forms of electronic communication, such as email or instant messaging, inherently imply intent to communicate to a certain recipient.[235] Thus, this proposed test would also incorporate Pike's test, finding some mediums of communication to be active and others passive. If the medium is a passive form of communication, it could still be shown that the student intended the speech to reach school, if there was additional evidence to indicate this.[236]

The test follows the basic framework of what courts are already doing. Thus, it will not represent a dramatic departure from the various cases in scattered jurisdictions addressing the issue. Most courts engage in a two-step analysis: (1) determine if the speech is connected to campus; (2) determine if the speech is less protected. Most courts already consider the state of mind of the student speaker regarding the speech in order to determine the strength of the connection to

234 Tuneski, *supra* note 189, at 178.

235 *See supra* notes 226–28 and accompanying text.

236 For example, in *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007), the student created a website, a normally passive form of telepresence. However, the student also showed the website to others. *Id.* at 591–93. Because he took affirmative steps to make the website available to others while at school, his actions indicate an intent to reach school campus, essentially using the medium of the website as a form of active telepresence.

campus. Sometimes the analysis turns on this factor alone, while at the very least, it is a significant factor among several others.

This test retains the basic framework for evaluating on-campus/off-campus speech, while still being able to address all types of speech, electronic and nonelectronic, disruptive, plainly offensive, or otherwise. It avoids creating a new and complicated test, or generating a specific test only to be applied to Internet speech, or worse, only to MySpace pages.[237]

This test adequately addresses the real question that courts struggle with. That is, when does off-campus speech become on-campus speech, subject to school discipline as less-protected speech? It is a question of location.[238] While cyberbullying is certainly a concern for society, the real issue over which courts are in "total disarray" is the extent of school authority over speech. This test clarifies that confusion, without disturbing the relatively clear categories of less-protected student speech in the *Tinker* line of cases.[239]

As previously noted, courts and commentators alike recognize the importance of the state of mind of the speaker to this issue. Courts from very different jurisdictions instinctively cling to that issue in their analyses.[240] While schools should be able to hold students accountable for their speech, students also need to be put on sufficient notice that their speech could fall within the realm of school discipline. The intent requirement accomplishes this.[241]

The test protects those whose speech is brought to campus, without their knowledge, by a third party. In the case of *Porter*, for example, Adam Porter, the original creator of the drawing, could not be subject to discipline over the drawing under a *Tinker* standard, because his brother inadvertently brought the drawing to campus.[242] Similarly, in *Killion*, the student would not be punished for creating the Top Ten list that another student later printed out and brought to

237 *See* Cassel, *supra* note 186, at 672.

238 *See* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002).

239 Despite some criticisms of the *Tinker* test, see Tuneski, *supra* note 189, at 170, it is remarkable that it has stood for so long with little modification. It remained for twenty years before *Fraser* was decided, and it has continued to remain the widely accepted standard to this day. *But see* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 646 (2002) ("As one might expect from the foregoing discussion, *Tinker* and its progeny have left the lower courts in a state of confusion.").

240 *See supra* Part III.

241 *See* Tuneski, *supra* note 189, at 177.

242 *See supra* notes 136–45 and accompanying text.

campus.[243] Again, the chilling effect on speech would be great if students could be held accountable for their speech if another party simply unilaterally printed or copied his expression and brought it to school. It would be akin to strict liability.

Courts are familiar with the intent requirement, and they have required intent in other speech contexts in order to remove speech from its normally protected status. Under *Brandenburg v. Ohio*,[244] for example, speech that incites imminent lawless action is unprotected only if the speaker directs his speech towards producing the action.[245] *Cohen v. California*[246] found that unless speech likely to provoke a violent reaction was *directed* at another, it could not be proscribed as fighting words.[247] Thus, intent is no stranger to the realm of free speech and it should be a required element for analyzing a connection between off-campus expression and the school environment.[248]

While subjective intent can be a hard thing for schools to determine, fortunately, overt actions will often evidence a student's intent to direct off-campus speech to school. Additionally, when schools investigate instances of disruptive off-campus expression, they frequently have a multitude of witnesses to call upon, if the speech has truly been widely disseminated.[249] They will be able to inform administrators as to the speaker's conduct and whether or not he showed it to others or directed others to access it.

Reasonable foreseeability is simply not enough. Because the Internet is so readily available in school and elsewhere, it is reasonably foreseeable that once speech is on the Internet, it will end up anywhere there is a computer and a user interested in accessing it, including at school. Allowing schools to punish speech that merely reaches school, through a medium that essentially exists everywhere, would

243 *See supra* notes 168–74 and accompanying text. Tuneski would, however, have the person who brought the list to school able to be punished, just the same as anyone else who brought disruptive outside speech into the classroom. *See* Tuneski, *supra* note 189, at 164 n.107.

244 395 U.S. 444 (1969) (per curiam).

245 *Id.* at 447–48.

246 403 U.S. 15 (1971).

247 *Id.* at 20.

248 *See also* Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) ("Requiring less than an intent to communicate the purported threat would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts.").

249 *See, e.g.*, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 592 (W.D. Pa. 2007) (noting that the principal was able to question numerous students about an offensive website another student created).

result in a strong chilling effect on student speech outside of school.[250] Given the increasing use of Internet in schools, and the increasing expansion of electronic communication, this problem will only continue to grow. Over time, it will become reasonably foreseeable that more and more speech would reach school campus, resulting in ever-diminishing protections for off-campus student expression. As one court has noted:

> We acknowledge that the line between on-campus and off-campus speech is blurred with increased use of the Internet and the ability of students to access the Internet at school, on their own personal computers, school computers and even cellular telephones. As technology allows such access, it requires school administrators to be more concerned about speech created off campus—which almost inevitably leaks onto campus—than they would have been in years past.[251]

Furthermore, the level of reasonable foreseeability could depend on the amount of filtering that schools implement over Internet access. That is, the more restrictions and filters the school puts on Internet access, the less foreseeable it is that a particular website will reach campus. This puts control of the extent of their own authority in the hands of schools. The intent test prevents all these problems by requiring something more than merely presence on the Internet.

The test applies equally well to electronic and nonelectronic means of communication. For example, the analysis would be the same for an underground student newspaper. Distribution of the newspaper after school, off of school grounds does not necessarily indicate intent for the speech to reach school, while distribution before school, near campus, would probably tend to indicate intent. By requiring presence of the speech on campus and intent of the speaker to reach campus, the test will continue to be relevant even as technologies change. Of course, since certain forms of communication can automatically indicate the intent of a speaker to reach campus,[252] courts will still have to be aware of what mediums of communication constitute "active telepresence" and which ones are "passive." As technologies develop, however, courts can build up pre-

250 *See also* Calvert, *supra* note 13, at 282–85 (urging schools to give students leeway to vent frustration via the Internet so as to avoid violence in schools).

251 J.S. v. Blue Mountain Sch. Dist., No. 3:07-cv-585, 2008 WL 4279517, at *7 n.5 (M.D. Pa. Sept. 11, 2008).

252 *See supra* text accompanying note 235.

cedent and knowledge about how to categorize different mediums of communication.[253]

The test excels at simplicity of application for schools. Schools face the difficult task of maintaining order and preserving the educational environment without infringing on student rights.[254] The test that they should apply to walk that fine line should favor the school over judicial flexibility. Schools have to make quick disciplinary decisions through the school day, and do not have the benefit of examining all the facts in a judicial proceeding, after the threat of disruption has ceased. Courts have already recognized that schools are unique environments where students do not enjoy the same rights as adults.[255] While courts have also remarked that the extent of deference extended to schools depends on their willingness not to overstep their bounds of authority,[256] this intent-based test does not ask for any additional deference or an overreaching of authority. It merely asks that courts establish clear boundaries within which schools are able to exercise their authority. Unlike other tests,[257] it does not attempt to redefine the categories of less-protected speech or reduce the overall protection of student speech.

A simple test like this is far more desirable than a complex multifactor test. It will lead to more consistent outcomes in courts.[258] Also, when courts have applied multifactor tests, they have done so without schools having the benefit of knowing in advance what factors would be relevant to the analysis. Making the requirements clear—that the speech must reach campus and that the student must have intended it to do so—allows schools to know ahead of time to what standard the courts will hold them.

Perhaps most importantly, this test adequately vindicates the concerns that the Supreme Court has identified in other student speech

253 It is well known that courts tend to be not as aware of technology as young people. *See* Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997) (Posner, J.). Nevertheless, some judges are known as extremely tech-savvy—or even electronic discovery "rock stars." *See* Jason Krause, *Rockin' Out the E-Law*, 94 A.B.A. J. 48 (2008) (noting specific judges for their technological expertise).

254 *See supra* notes 5–6 and accompanying text.

255 *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2627 (2007).

256 *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1044–45 (2d Cir. 1979).

257 *See, e.g.*, Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet Related Student Speech*, 26 LOY. L.A. L. REV. 65, 87 (2006) (calling for a separate standard for student Internet speech); Erb, *supra* note 186, at 284 (calling for less overall protection for student speech).

258 Though multifactor tests can "nudge[ ] judges toward more deliberative processes," Guthrie et al., *supra* note 221, at 41, a clear intent requirement will be much more effective at focusing judges on the *proper* deliberative process.

cases. It protects the school environment, and yet allows the school to inculcate values of civility in its students.[259] It allows schools to maintain an orderly environment for learning and discipline[260] when speech is actually present on campus, and thus, presents the greatest possibility for disruption of the school day. It permits schools to punish the most egregious offenders, those who intentionally disrupt the school environment by directing their speech to school, including those who bring the speech to school themselves, or those that encourage others to access the speech at school.

Just like the Supreme Court student speech cases, this test represents a compromise. It fairly balances the interests in protecting student expression and allowing schools to protect against disruption in the school environment. It is a simple test, familiar to courts, which will be easy to apply. It is a universal test that avoids carving out exceptions for electronic speech, a medium that can change dramatically in a short period of time.

Conclusion

Someday, the occasion may arise for the Supreme Court to address the extent of school authority over student speech of off-campus origin. *Tinker* and other cases, even *Morse*, have left that issue open. While lower courts have exhibited some inconsistency in handling these cases, for the most part, they have followed the same basic framework: (1) the speech must have some connection to campus; (2) it must fall under *Tinker* or another less-protected category of speech, or be unprotected speech. Once those requirements are met, the school can properly proscribe student speech.

In place of tests requiring "knowledge," "reasonable foreseeability," or a nexus connecting the off-campus speaker, the speech, and the school campus, courts should adopt an intent test. The test will provide clear guidelines for students, schools, and courts. It will allow schools to discipline the most egregiously disruptive speech, speech a student intentionally directs towards campus. Other tests introduce complicated, unpredictable multifactor or balancing tests. The intent test is simple, yet it gives schools the authority to address the most disruptive speech.

As the Internet continues to alter and expand the ways in which students communicate with each other, it becomes more and more likely that speech that originates off campus can come into immediate

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

260 *See id.* at 685; *Morse*, 127 S. Ct. at 2629; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

contact with the on-campus environment. Addressing this issue with an intent test will help clarify the extent of students' free speech rights, even as technology continues to change. It strikes a balance between students' freedom of speech, the unique characteristics of the school environment, and ever-changing technologies.