

Limits on School Disciplinary Authority over Online Student Speech

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I. INTRODUCTION

In the short time frame of about the last two decades, technology has greatly changed the way people communicate. Use of personal computers did not become widespread in the United States until the 1980s, and use of the internet was not widespread until the 1990s.¹ Today, many Americans, especially young people, regularly communicate via email, instant messaging, text messaging, personal websites, and social media, such as Facebook or Twitter.² Unsurprisingly, given that new communications technology is only a tool directed toward human ends, the messages communicated reflect the broad range of human thought, emotion, and activity expressed in previous years without the use of such technology.³ At its best, such technology has been used to facilitate connections between people, to exchange and spread ideas in a way that contributes to the dialogue so important to democratic societies (and to people who aspire to establish a democracy where one does not exist), and to disseminate information that contributes to the success of social events from parties to business activities to revolu-

1. See *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

2. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1032 (2008). In this Comment, I use the term “online speech” (and also “internet speech”) as shorthand to refer to any communication transmitted through computers, cell phones, or other electronic devices. It is meant to include emails, instant messages, text messages, use of personal websites, use of social media websites such as Facebook or Twitter, or any other post of a video, comment, audio clip, or other communication to any website. This Comment focuses specifically on such “online” speech rather than print speech, and it relies on the wealth of literature, including law review articles and court cases, that has emerged over the past two decades to answer the question of how to handle cases involving student internet speech. See *infra* Part IV.B.1.

3. Papandrea, *supra* note 2, at 1036.

tions against oppressive regimes.⁴ At its worst, new communications technology has been used to widely publish false or hurtful information about others, whether done maliciously or thoughtlessly through the unreflective click of a mouse, and to plan criminal activity.⁵

The rapid proliferation of new communications technology has raised a variety of new legal questions, the resolutions of which require courts, legislators, and citizens to make decisions on how to apply or change the law to account for such technology. One of these questions is how public secondary schools may deal with electronic messages and web postings made by students from an off-campus location when those communications contain content alleged to be threatening, offensive, or potentially disruptive.⁶ As student use of these technologies has increased,⁷ schools have increasingly sought to discipline students for off-campus internet activity.⁸

Two legal issues are raised when schools discipline students for off-campus internet activity. First Amendment freedom of speech⁹ issues are implicated since courts consider electronic messages sent over the internet to be speech.¹⁰ Additionally, the separate, but somewhat intertwined, issue regarding the scope of public school authority over students' off-campus activity is raised.¹¹

Generally, when a school makes legal arguments supporting discipline for a student's off-campus speech, the school invokes either the "true threat" doctrine or the "*Tinker* test."¹² Courts have held that "true threats" are considered unprotected speech under the First Amendment regardless of

4. See Jennifer Preston, *While Facebook Plays a Star Role in the Revolts, Its Executives Stay Offstage*, N.Y. TIMES, Feb. 15, 2011, at A10 (discussing the role of Facebook and other social media in revolutions in Egypt and Tunisia).

5. See Ravi Somaiya, *In Britain, A Meeting on Limiting Social Media*, N.Y. TIMES, Aug. 26, 2011, at A4 (calling attention to discussions in the British government on placing limitations on social media after rioters in London used the internet to outmaneuver police).

6. See, e.g., *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002).

7. Papandrea, *supra* note 2, at 1032.

8. See, e.g., *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).

9. The First Amendment to the U.S. Constitution states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Since the U.S. Supreme Court has held that First Amendment protections are incorporated into the Due Process Clause of the Fourteenth Amendment, First Amendment protections of the right to freedom of speech apply to the states and state actors through the Fourteenth Amendment, just as they apply to "Congress" and the federal government. See *id.*; U.S. CONST. amend. XIV, § 1; *Zinerman v. Burch*, 494 U.S. 113, 125 (1990). Public schools are state actors under the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1.

10. See, e.g., *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177, 1180-81 (E.D. Mo. 1998).

11. See, e.g., *J.S. ex rel. H.S.*, 807 A.2d at 850.

12. See, e.g., *id.* at 856, 860-62.

where they occur.¹³ The “*Tinker* test” comes from *Tinker v. Des Moines Independent Community School District*, where the U.S. Supreme Court held that students have a First Amendment right to freedom of speech at school so that schools cannot discipline students for speech unless the speech causes, or can be reasonably forecast to cause, “substantial disruption” to school activities.¹⁴ *Tinker* protects student speech on campus, but it also creates a separate “student speech” standard that offers less protection for student speech occurring on campus than the First Amendment provides to other forms of protected speech.¹⁵ The *Tinker* case involved speech that occurred on campus,¹⁶ and the U.S. Supreme Court has never held that it applies to speech that occurs off campus or outside a school’s supervision and control.¹⁷

13. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“[T]he First Amendment . . . permits a State to ban a ‘true threat.’” (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969))). *See, e.g., Watts*, 394 U.S. at 708; *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622, 626-27 (8th Cir. 2002) (holding that threats of violence are not protected speech under the First Amendment and upholding a school’s decision to discipline a student); *United States v. Fulmer*, 108 F.3d 1486, 1492-93 (1st Cir. 1997) (stating that “a true threat is unprotected by the First Amendment. Thus, a conviction . . . based on a finding that the statement was a true threat, would not violate Fulmer’s constitutionally protected right to speech” in a case affirming the defendant’s criminal conviction for threatening a federal agent).

14. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 509 (1969).

15. *See id.*

16. *Id.* at 504.

17. *See* Tiffany Emrick, Comment, *When MySpace Crosses the School Gates: The Implications of Cyberspeech on Students’ Free-Speech Rights*, 40 U. TOL. L. REV. 785, 790 (2009). Many courts and commentators make a distinction between “on-campus” student speech, which schools can regulate in accordance with on-campus Supreme Court precedents, and “off-campus” speech over which schools have less authority. Usually, such courts and commentators define these terms in a way that allows some speech that does not actually originate on school property to be treated as on-campus speech, such as, for example, allowing speech with a sufficient nexus to the school, or speech that could have been reasonably foreseen to arrive at the school, to be considered on campus no matter where the speech originates. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38-40 (2d Cir. 2007); *J.S. ex rel. H.S.*, 807 A.2d at 864-65; Emrick, *supra*, at 786, 797-800. Harriet A. Hoder argues that it is preferable to use the terms “under school supervision and control” and “outside school supervision and control” instead of “on campus” and “off campus.” Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students’ Online Activity*, 50 B.C. L. REV. 1563, 1594-95 (2009). She argues that this emphasizes the temporal nature of school authority over a purely geographic view of school authority. *Id.* Although I qualify Hoder’s approach slightly by emphasizing the geographic and temporal nature of school supervision and authority, I generally support the supervision approach, so I make use of supervision and control language at times. Lee Goldman, professor of law at the University of Detroit-Mercy School of Law, uses the terms “on campus” and “off campus” interchangeably with “under” and “outside” of “school supervision.” *See* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 397 n.8 (2011). I follow Goldman’s usage by treating the

Despite this, many other courts have applied the *Tinker* student speech standard to off-campus speech instead of giving off-campus speech the full protection to which it is entitled under the First Amendment.¹⁸ Sometimes judicial opinions have relied on the notion that internet speech is not isolated to one geographic location, but effectively takes place everywhere at the same time, in order to make the argument for applying the *Tinker* standard to off-campus internet speech.¹⁹

Most, but not all, legal scholars who have addressed the issue of public schools disciplining students for off-campus internet speech have rejected the notion that *Tinker* applies to off-campus internet speech simply because internet speech may be accessed anywhere at any time.²⁰ Instead, most legal scholars have argued that student speech that occurs off campus, or outside of school supervision, should receive full First Amendment protections instead of the more limited protection set out for speech falling under school supervision in *Tinker* or its progeny.²¹ Some commentators have also argued that a comprehensive approach should be taken to the issue that con-

terms “on campus”/“off campus” and “under school supervision”/“outside school supervision” interchangeably. While I prefer the greater precision of the latter set of terms, I often make use of the former set of terms because they make for less cumbersome writing and because they are used so often by courts and commentators.

18. See *infra* Part IV.B.1.

19. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-21 (3d Cir. 2011) (Jordan, J., concurring) (“For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools. . . . Trying to limit [school authority] along real property lines is bound to run into trouble . . . there can be difficulty in knowing whether speech has occurred on or off campus.”).

20. See *infra* Parts IV.B, IV.B.1.f, particularly note 242.

21. See, e.g., Goldman, *supra* note 17, at 407; *infra* Parts IV.B, IV.B.1.f. In this Comment, I use “full First Amendment protections” and “full First Amendment standard” to refer to the legal rule that would apply to speech if it occurred off campus. I contrast that with the “student speech standard,” which I use to refer to the less speech-protective legal rule that would apply to student speech if it occurred on campus and the Supreme Court’s student speech rules applied. See *infra* Part III (introducing the student speech standard and the Supreme Court cases governing on-campus student speech). Technically, the “full First Amendment standard” and the “student speech standard” both provide the full extent of First Amendment protections within their respective spheres—the student speech standard is simply application of First Amendment principles to the on-campus school context. My use of these terms should not be interpreted as suggesting otherwise. I have chosen to use these terms as shorthand for two reasons. First, using these terms as shorthand makes for clearer and less cumbersome writing. Second, use of these terms makes sense in the context of off-campus speech, where, according to most commentators, the protection afforded by school speech rules actually does fall short of the full protection to which speech is entitled under the First Amendment. See *infra* Parts IV.B, IV.B.1.f. My use of these terms also follows the usage of some other commentators. See, e.g., Goldman, *supra* note 17, at 407.

siders all possible alternatives in addition to school discipline that might be taken to address the problem posed by student internet speech.²²

In addressing both the First Amendment issue and the scope of school authority issue in the secondary school context,²³ I seek to support both of these positions. I argue that *Tinker* and its progeny should not apply to off-campus internet speech for several reasons. First, there are very few, if any, benefits to applying *Tinker* to off-campus speech since schools have other less restrictive measures for dealing with the problems posed by off-campus internet speech.²⁴ Second, the costs of applying *Tinker* to off-campus speech are significant since this would limit students' right to freedom of speech outside of school, which would deprive students and their communities of the salutary effects of student free speech rights.²⁵ Third, school authority should have limits so that schools may focus on their educational mission rather than on policing speech in the general community.²⁶ Finally, contrary to the views of some commentators, it is in fact possible to articulate a clear legal standard that distinguishes between on- and off-campus internet speech.²⁷

By making these arguments in support of a general rule that *Tinker* and its progeny should not apply to off-campus internet speech, I am following the lead of most legal scholars, who tend to agree on this general rule,²⁸ even if courts have not consistently adopted this view.²⁹ But, even

22. See Goldman, *supra* note 17, at 397. Goldman argues that a "comprehensive approach" that encompasses "traditional" and online student speech should be taken toward the student speech issue. *Id.* Mary-Rose Papandrea, assistant professor at Boston College Law School, also takes an approach that takes into account various ways of dealing with the problems caused by online student speech other than school discipline. See Papandrea, *supra* note 2, at 1098-101.

23. This Comment discusses these issues only in the public secondary school context. It does not address private schools at any level because private schools are not considered state actors under the Fourteenth Amendment, so First Amendment protections on freedom of speech do not apply in private schools. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 837, 840, 842 (1982). This Comment also does not address free speech issues or the scope of authority for public colleges and universities, which are governed by different rules than public secondary schools. *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008). It also does not address what issues may occur in public primary schools. As one commentator who similarly chose to focus on secondary schools noted, there is not necessarily a reason to treat primary and secondary schools differently in terms of the legal analysis, but since most cases with these issues occur at the secondary school level, it seems most appropriate to only speak to that particular grade level. See Papandrea, *supra* note 2, at 1032 n.19.

24. See *infra* Part IV.B.2.a.

25. See *infra* Part IV.B.2.b; *infra* note 370 and accompanying text.

26. See *infra* Part IV.B.2.c.

27. See *infra* Parts IV.B.1.f, IV.B.3, IV.B.4 (showing that some courts and commentators, and this Comment, have advocated rules that clearly distinguish between on- and off-campus internet speech).

28. See *infra* Parts IV.B, IV.B.1.f, particularly note 242.

scholars that agree on this general rule often disagree over how to define what speech is “on campus” and what speech is “off campus,” especially in the context of internet speech, where it is sometimes difficult to clearly define the location of the speech.³⁰

The failure to provide a clear test for what speech should be considered “off campus” and what speech should be considered “on campus” has made it more difficult for courts to adopt the general rule that off-campus internet speech should not be subject to *Tinker* and its progeny.³¹ It has also led to a situation where even courts and commentators that agree that off-campus speech should not be subject to *Tinker* and its progeny have often held positions that allow speech that really should be considered “off campus” to be regulated under a school speech standard.³²

Another problem exists in relation to threatening speech. Courts and commentators have often assumed that schools have the authority to apply school rules to govern off-campus speech if the speech is of the type that is unprotected by the First Amendment.³³ This has led courts to uphold school discipline in cases of “true threats” without considering the scope of school authority to discipline students for off-campus illegal conduct.³⁴

Therefore, in addition to supporting the oft-argued point that *Tinker* and its progeny should not apply to off-campus speech, I seek to add nuance to the discussion of the issue and to articulate a new conceptual framework that courts may use to decide cases involving some form of off-campus internet speech. To that end, I argue the following: (1) in “true threat” cases,³⁵ courts should only allow a school to discipline a student for off-campus internet speech when there is some connection between the speech and the school; and (2) when deciding whether electronic messages and internet postings created or sent from an off-campus location may be treated as on-campus speech for the purposes of the *Tinker* test or its progeny, courts should determine whether the off-campus speech was intentionally (re)communicated by the student while he or she was under school supervision (effectively transforming the off-campus speech into on-campus

29. See *infra* Parts IV.B, IV.B.1.f, particularly notes 166-68, 183, 243.

30. See *infra* Parts IV.B, IV.B.1.f, IV.B.4.

31. See *infra* Parts IV.B.1.a-f, IV.B.2 (explaining the various approaches to distinguish between on- and off-campus speech and discussing some weaknesses and problems with these approaches).

32. See *infra* Part IV.B.1.f.

33. See *infra* Part IV.A.

34. See *infra* Part IV.A.

35. The “true threat” analysis is derived from *Watts v. United States*. See *Watts v. United States*, 394 U.S. 705, 706, 708 (1969); *infra* Part II.B.1.

speech) by using the *Spence v. Washington* test for communicative conduct.³⁶

This Comment maintains that the scope of public school authority over students' off-campus activity should be held within certain limits in all contexts, including cases of "true threats." It also buttresses the general rule that *Tinker* and its progeny do not apply to off-campus speech that would otherwise be protected under the First Amendment. It does this by clarifying when speech may be considered to take place on campus or off campus. Specifically, the rule I propose would ensure that only on-campus speech is subject to *Tinker* by defining on-campus speech to only include speech content that, even if created off campus originally, has become on-campus speech through its being intentionally (re)communicated by its originator at an on-campus location.

Part II briefly touches on freedom of speech jurisprudence to highlight legal theories justifying robust protection of speech. It then discusses the First Amendment categories of unprotected speech. These are important because, when considering whether school authority and special First Amendment rules governing student speech should be extended to cover off-campus speech, it is important to keep in mind the extent to which traditional First Amendment categories of unprotected speech may already protect schools from the harmful effects of off-campus internet speech. Part III provides background on the issue of student speech by reviewing the four U.S. Supreme Court cases in which the Court has articulated the student-speech standard.

Part IV articulates the proper limits on public school authority over off-campus internet speech. Subpart A addresses threatening speech that occurs off campus. It notes that courts have failed to consider limits on school authority when affirming school discipline for true threats occurring off campus by foregoing an analysis of where the speech occurred and whether it had some connection to the school. This subpart proposes that courts should only affirm school discipline for an off-campus true threat if the school can show some connection between the true threat and the school (such as showing a "sufficient nexus"). In this way, courts could ensure that true threat case law does not improperly extend the scope of school authority beyond what is necessary to ensure school safety. Subpart B discusses non-threatening internet speech alleged to be disruptive, vulgar, or offensive that occurs off campus. It reviews the approaches taken on this issue by courts and legal scholars, and it argues that only approaches offering full First Amendment protection to off-campus speech should be used. Then, this subpart offers an approach that is best suited to fully protect student

36. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); see also *infra* Part IV.B.3 (explaining the *Spence* test).

First Amendment rights without harming a school's ability to maintain discipline—namely, requiring that off-campus internet speech be intentionally communicated on campus by the speaker before it may be treated as on-campus speech. It proposes that, when it is unclear whether off-campus web content has been communicated on campus, courts should apply the *Spence* test for communicative conduct to determine if such communication of the off-campus speech occurred on campus. This approach presents a new and coherent theoretical framework that supports a clear rule on the issue of when courts may apply school speech precedents to student internet speech. Finally, Subpart B illustrates how this approach should be applied in specific situations that schools are likely to face in the future.

II. SPEECH UNDER THE FULL FIRST AMENDMENT STANDARD

A. FREEDOM OF SPEECH JURISPRUDENCE

The justifications for protecting speech under the First Amendment provide reminders of the ultimate goals that are to be served through the creation of legal rules relating to free speech. Freedom of speech is essential to democratic self-governance, vital for the protection of human dignity and autonomy, and supportive of the search for truth through a “marketplace of ideas.”³⁷ Government based on the will of the people can only exist where citizens are free to discuss political ideas.³⁸ For this reason, political speech receives the highest level of protection by the Court.³⁹ Many scholars also see freedom of speech as essential to a human need for self-expression.⁴⁰ Speech allows for self-actualization, as speakers communicate messages that define who they are to their audience.⁴¹ Therefore, a right to freedom of speech protects human autonomy through the right to self-definition and human dignity by supporting an essential human need.⁴² Another justification for freedom of speech—the “marketplace of ideas” theory⁴³—arises from its importance at discovering knowledge and truth.⁴⁴ According to this line of thinking, freedom of speech allows the expression of a wide variety of competing ideas, and the truth is most likely to be revealed through this competition.⁴⁵ Courts and scholars differ over the de-

37. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1208-12 (3d ed. 2009); 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 2:3-2:6 (3d ed. 2012).

38. SMOLLA, *supra* note 37, § 2:6.

39. *Connick v. Myers*, 461 U.S. 138, 145 (1983).

40. SMOLLA, *supra* note 37, § 2:5.

41. CHEMERINSKY, *supra* note 37, at 1211; SMOLLA, *supra* note 37, § 2:5.

42. CHEMERINSKY, *supra* note 37, at 1211; SMOLLA, *supra* note 37, § 2:5.

43. CHEMERINSKY, *supra* note 37, at 1209.

44. *Id.*

45. *Id.*

gree to which each of these justifications support certain constitutional rules regarding the freedom of speech, but the general ideas behind these justifications are widely accepted.⁴⁶

B. UNPROTECTED SPEECH

When deciding whether a special student First Amendment standard should place additional limits on off-campus student speech and, if so, what those limits should be, it is important to consider the limits on speech that apply even under the full First Amendment standard. The First Amendment does not grant license to engage in any form of speech at any time and place one chooses.⁴⁷ According to well-established U.S. Supreme Court case law, speech that is not protected under the First Amendment includes true threats,⁴⁸ speech that incites illegal activity,⁴⁹ fighting words,⁵⁰ obscenity,⁵¹ and child pornography.⁵² Even when speech is protected under the First Amendment, the state may restrict speech to an appropriate time, place, and manner provided that it does not do so based on the content of the speech.⁵³ States may also enact statutes prohibiting speech that constitutes harassment or defamation and ascribe criminal and civil penalties to those forms of speech, provided that these state statutes do not run afoul of First Amendment protections on the freedom of speech.⁵⁴ Parts II.B.1-II.B.4

46. *Id.* at 1209-12.

47. *E.g.*, *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

48. *Watts v. United States*, 394 U.S. 705, 706, 708 (1969); *see infra* Part II.B.1 (discussing the test for "true threats").

49. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *see infra* Part II.B.2 (discussing the test for speech that incites illegal activity).

50. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see infra* Part II.B.3 (discussing the test for "fighting words").

51. *Roth v. United States*, 354 U.S. 476, 485 (1957). The three-part test for obscenity that is used today was formulated in *Miller v. California*, where the Court stated:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973).

52. *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is unprotected under the First Amendment even if it does not qualify as obscenity); *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002) (holding that pornography must be produced with real children to be considered child pornography).

53. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

54. *Goldman*, *supra* note 17, at 416; *Papandrea*, *supra* note 2, at 1100-01.

discuss three types of speech not protected under the First Amendment—true threats, speech that incites unlawful activity, and fighting words—as well as time, place, and manner restrictions.⁵⁵

1. True Threats

The First Amendment protects certain types of threatening speech.⁵⁶ If the alleged threats are made as jokes, hyperbole, or under circumstances where they are not to be perceived as serious, they are considered protected speech. However, the First Amendment does not protect “true threats,” so a state may subject someone who makes a “true threat” to criminal penalties.⁵⁷

Courts cite the 1969 case *Watts v. United States*⁵⁸ as the source of the “true threat” doctrine.⁵⁹ In *Watts*, an eighteen-year-old attending a political rally at the Washington Monument said: “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”⁶⁰ Those listening responded to the comment with laughter, but nevertheless, he was arrested under a federal criminal statute prohibiting someone from “knowingly and willfully . . . threat[ening] to take the life of or to inflict bodily harm upon the President of the United States.”⁶¹ Citing principles of free speech, the Court read a requirement that there must be a “true threat” into the language of the statute.⁶² The Court then held that the context in which the alleged threat was made, the response of laughter by the audience, and the conditional

55. Most court cases involving off-campus internet speech that may be unprotected under the First Amendment involve alleged threats or other types of offensive, lewd, or vulgar speech. *See, e.g.*, *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850-51, 856, 860-62 (Pa. 2002). Time, place, and manner restrictions are also essential in maintaining a setting conducive to education at school and must be understood in order to fully comprehend student speech issues. *See infra* Part II.B.4. While sexually explicit communication that may reach the level of constitutionally unprotected speech is increasingly becoming an issue with the rise of “sexting,” implicating issues of child pornography, *see* Emily Bazelon, *The Ninny State*, N.Y. TIMES, June 26, 2011, at 11, this issue is not addressed by this Comment, which instead focuses on the kinds of threatening and offensive speech addressed more frequently in the courts. The lack of further discussion of obscenity or child pornography in this Comment does not reflect a determination that these categories of unprotected speech are unimportant or irrelevant in the context of secondary school students.

56. *See, e.g.*, *Watts v. United States*, 394 U.S. 705, 706, 708 (1969).

57. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

58. *Watts*, 394 U.S. 705.

59. *Id.* at 708. *See, e.g.*, *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622, 626-27 (8th Cir. 2002); *In re A.S.*, 2001 WI 48, ¶¶ 21-25, 626 N.W.2d 712.

60. *Watts*, 394 U.S. at 706.

61. *Id.* at 705-07.

62. *Id.* at 708.

nature of the threat demonstrated the speech in this case was “political hyperbole,” not a “true threat.”⁶³

In subsequent cases, the Court has cited *Watts* to support the proposition that the state may pass laws criminalizing “true threats” without running afoul of the First Amendment.⁶⁴ But the *Watts* Court did not clearly define what constituted a true threat.⁶⁵ In *Virginia v. Black*, the Court elaborated:

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”⁶⁶

Although the Court appears to have stated a subjective requirement that the speaker *mean to* communicate the serious expression of intent to harm,⁶⁷ some lower courts have interpreted it as an objective test of whether a reasonable person would consider the statement to communicate a serious expression of intent to harm.⁶⁸ Some lower courts have also filled in a list of factors to be considered in deciding whether speech constitutes a true threat, including

[1] how the recipient and other listeners reacted to the alleged threat, [2] whether the threat was conditional, [3] whether it was communicated directly to its victim, [4] whether the maker of the threat had made similar statements to the victim on other occasions, and [5] whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.⁶⁹

63. *Id.*

64. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

65. *In re A.S.*, 2001 WI 48, ¶ 21, 626 N.W.2d 712.

66. *Black*, 538 U.S. at 359-60 (alteration in original) (citations omitted) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

67. *See id.*

68. *See, e.g., In re A.S.*, 2001 WI 48, ¶¶ 22-23.

69. *E.g., id.* (quoting *Wisconsin v. Perkins*, 2001 WI 46, 626 N.W.2d 762).

Speech that meets this standard is not protected speech under the First Amendment, which means that someone can be punished criminally for threatening speech that satisfies this “true threat” test.⁷⁰

2. *Speech that Incites Illegal Activity*

The First Amendment also protects some speech advocating illegal activity.⁷¹ However, the First Amendment does not protect speech advocating illegal activity if the speech is intended to incite imminent illegal activity, likely to actually bring about the imminent illegal activity, and directed toward a specific individual or group.⁷² In *Brandenburg v. Ohio*, the Court addressed the conviction of a Ku Klux Klan leader who gave a speech at a Klan meeting at which he said: “[I]f our President, our Congress, and our Supreme Court, continues [sic] to suppress the white, Caucasian race, it’s possible that there might have to be some revenge [sic] taken.”⁷³ He was convicted under an Ohio statute that made it a crime to advocate illegal activity or assemble with a group formed to advocate “criminal syndicalism.”⁷⁴ The Court struck down the statute as unconstitutional, reasoning it failed to distinguish between “mere advocacy” and “incitement to imminent lawless action” as required by the First Amendment.⁷⁵ The Court stated that speech advocating illegal activity may only be banned when the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁷⁶

In subsequent cases, the Court set a high standard for the imminence requirement of the *Brandenburg* test.⁷⁷ The imminence requirement is not met when a person’s advocacy of illegal activity is not sufficiently concrete (such as when it does not call for a specific action to be taken),⁷⁸ when it is

70. See *id.*; *infra* Part IV (addressing the significance of the potential for criminal penalties for threatening speech as it bears on the question of whether school discipline should provide an additional means of sanctioning the same kind of speech).

71. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

72. *Id.* at 447; see also *Hess v. Indiana*, 414 U.S. 105, 106, 108-09 (1973) (“Since . . . Hess’ statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action.”).

73. *Brandenburg*, 395 U.S. at 444-46.

74. *Id.* at 444-45.

75. *Id.* at 448-49.

76. *Id.* at 447.

77. *Hess*, 414 U.S. at 106-07, 109 (reversing a conviction for disorderly conduct for an anti-war protester who said “[w]e’ll take the fucking street later” after the police cleared protesters from the street, reasoning that there was “no evidence” that the speech was “intended to produce, and likely to produce, *imminent disorder*”).

78. See *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1001 (1988).

not directed to a specific individual or group, or when the illegal activity is advocated “at some indefinite future time.”⁷⁹

3. *Fighting Words*

States may also prohibit “fighting words” without violating the First Amendment.⁸⁰ In *Chaplinsky v. New Hampshire*, the Court defined “fighting words” as words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁸¹ But in every case addressing convictions for fighting words since the Court decided *Chaplinsky* in 1942, the Court has reversed the conviction.⁸² In these subsequent cases, the Court has also greatly limited the fighting words doctrine.⁸³ Today, it only applies to speech directed at another person that is “inherently likely to provoke violent reaction”⁸⁴—it does not apply to words that tend to inflict emotional harm.⁸⁵ Furthermore, the Court often declares laws prohibiting fighting words unconstitutional because they are either too broad or too narrow.⁸⁶ The result is that today “[t]he fighting words exception is very limited” and rarely used.⁸⁷

4. *Time, Place, and Manner Restrictions*

Even when speech is protected under the First Amendment, the state may place restrictions on the time, place, and manner of the speech.⁸⁸ The state may prohibit or limit speech on government property that is not open to the public as long as the place is one that the state may properly close to public access, the restriction on speech is reasonable, and the restriction applies regardless of the viewpoint being expressed.⁸⁹ These regulations prevent speech activity that obstructs government officials from conducting

79. *Hess*, 414 U.S. at 108-09.

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

81. *Id.*

82. CHEMERINSKY, *supra* note 37, at 1347-48.

83. *Id.*

84. *Cohen v. California*, 403 U.S. 15, 20 (1971).

85. CHEMERINSKY, *supra* note 37, at 1347-48.

86. *Id.* Statutes are considered overbroad when they ban the use of non-fighting words or when they are not specific enough as to what words are banned. *Id.* Statutes are too narrow when they are considered “content-based” restrictions because they ban some speech based purely on the content of the speech rather than banning fighting words in a way that is “content neutral.” *Id.* “Content neutrality” is discussed below with “time, place, and manner” restrictions. See *infra* Part II.B.4.

87. *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997).

88. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

89. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677-78, 682 (1998).

their daily business and ensure that government property remains available to be used for its intended purpose.⁹⁰

Even in public forums—the types of government property where speech is the most protected, including public parks and streets—the state may restrict the time, place, and manner of speech.⁹¹ This allows the state to protect important interests including public order, health, safety, welfare, and convenience.⁹²

Time, place, and manner restrictions must generally be “content neutral.”⁹³ A restriction is content neutral if it applies to all speech regardless of its content.⁹⁴ The requirement of content neutrality prevents government officials from controlling the range of public discourse by banning speech they do not like and allowing speech they favor, which tends to give voice to those who support government policies while silencing critics.⁹⁵ Content-based restrictions, which restrict speech based on its content, are strictly scrutinized by the Court.⁹⁶ Strict scrutiny means that time, place, and manner restrictions based on the content of the speech are only allowed when regulation is necessary to achieve a compelling state interest and narrowly tailored for that purpose.⁹⁷ By requiring the restriction to be “necessary” and “narrowly tailored,” the First Amendment only allows such regulation when the state cannot achieve its compelling interest in any less restrictive way and ensures the state’s restriction is not so broad that it bans additional speech superfluously.⁹⁸ In practice, strict scrutiny means the First Amendment bans virtually all content-based time, place, and manner restrictions.⁹⁹

The state may place content-neutral time, place, and manner restrictions on speech, wherever the speech occurs, when it can meet the lower burden of intermediate scrutiny.¹⁰⁰ This means the restriction must be reasonable, must be narrowly tailored to an important government interest, and must leave the speaker with adequate alternative ways to communicate

90. See *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

91. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); see *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939).

92. See *Hague*, 307 U.S. at 515-16.

93. *Heffron*, 452 U.S. at 648.

94. *Id.*

95. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

96. *Id.*

97. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

98. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815-17 (2000).

99. CHEMERINSKY, *supra* note 37, at 1540. Chemerinsky notes that there are exceptions to this rule, though. *Id.* (citing *Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny and upholding a content-based restriction banning people from distributing campaign literature within 100 feet of a polling place)).

100. See *Perry*, 460 U.S. at 45.

his or her message within the forum in question.¹⁰¹ Strict scrutiny and intermediate scrutiny differ in several significant ways. Unlike strict scrutiny, intermediate scrutiny does not contain the “necessary” requirement.¹⁰² Additionally, although both strict and intermediate scrutiny require the restriction on speech be “narrowly tailored,” this language is interpreted differently under intermediate scrutiny.¹⁰³ This means the state may apply content-neutral time, place, and manner restrictions even when they are not the least restrictive means available to accomplish the government interest.¹⁰⁴ Finally, a compelling government interest is a significantly higher standard than an important government interest, which means the state does not have to assert as vital an interest in order to uphold a content-neutral time, place, and manner restriction.¹⁰⁵

As demonstrated in Part II, the First Amendment allows the state to place significant limitations on speech in the public interest. Most speech that poses a real danger can be banned under the true threat doctrine or the *Brandenburg* test for speech inciting illegal activity.¹⁰⁶ Sexually explicit speech may be banned if it constitutes obscenity or child pornography.¹⁰⁷ The First Amendment also gives the state a good deal of discretion in regulating the time, place, and manner of speech in a content-neutral way when such regulations serve the public interest.¹⁰⁸ Keeping in mind the restrictions on speech allowed under the full First Amendment standard, I now turn to the special restrictions on speech allowed in a school setting under the more limited First Amendment protection of speech that applies in public secondary schools.

III. THE STUDENT SPEECH STANDARD: SUPREME COURT PRECEDENT FOR ON-CAMPUS SPEECH

A. *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

In *Tinker*, the U.S. Supreme Court stated that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁰⁹ The Court gave several reasons why the right to freedom of speech in schools is important, including its role in educating

101. See *id.*; *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

102. See *Perry*, 460 U.S. at 45.

103. See *Ward v. Rock Against Racism*, 491 U.S. 781, 800 & n.6 (1989).

104. *Id.* at 800.

105. See *Perry*, 460 U.S. at 45.

106. See *supra* Parts II.B.1-2.

107. See *supra* notes 51-52 and accompanying text.

108. See *supra* Part II.B.4.

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

students for citizenship¹¹⁰ and promoting the marketplace of ideas.¹¹¹ Yet, because it is necessary to maintain order and discipline within schools so that schools may accomplish their educational mission, courts properly give deference to the expertise of school officials as to the best way to achieve educational goals and maintain order and discipline at school.¹¹²

Accounting for the unique characteristics of the school environment, the Supreme Court in *Tinker* effectively created a separate First Amendment standard for speech occurring in public schools that allows for greater regulation of speech than the full First Amendment standard.¹¹³ The *Tinker* Court held that, in the school setting, school officials may discipline students for speech that causes, or can be reasonably forecast to cause, “substantial disruption of or material interference with school activities.”¹¹⁴ *Tinker* involved students wearing armbands to school as a form of silent protest against the Vietnam War.¹¹⁵ Since *Tinker* dealt with school discipline for on-campus speech, it did not clearly address the issue of how schools may handle speech that occurs off campus.¹¹⁶

B. SUPREME COURT PRECEDENT ON STUDENT SPEECH AFTER *TINKER*

The Supreme Court elaborated on the school speech standard by allowing greater restrictions on student speech in three subsequent cases, but none of these cases directly addressed the issue of whether, or to what extent, schools may discipline students for off-campus speech.¹¹⁷ In *Bethel School District v. Fraser*, a school disciplined a student for his use of lewd language in a nominating speech delivered during a school assembly.¹¹⁸ The Court found that the First Amendment allowed discipline in this situation, holding that schools may discipline students for lewd, vulgar, and indecent speech even when there is insufficient evidence that school activities were substantially disrupted to satisfy the requirements of *Tinker*.¹¹⁹ The Court

110. *Id.* at 507 (“[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943))).

111. *Id.* at 512 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

112. CHEMERINSKY, *supra* note 37, at 1576.

113. *See Tinker*, 393 U.S. at 509, 513-14.

114. *Id.* at 514.

115. *Id.* at 504, 508, 514. The Court held that there was insufficient evidence to show that the students’ speech caused substantial disruption and found that the speech was protected by the First Amendment. *Id.* at 514.

116. *Id.* at 504.

117. *See Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

118. *Fraser*, 478 U.S. at 677.

119. *See id.* at 685-86.

reasoned that schools have an educational mission to teach shared social values, including the appropriate form of civil discourse and mature conduct, and that school officials could reasonably conclude that allowing lewd, vulgar, and indecent speech would contradict this educational mission.¹²⁰ In a concurring opinion, Justice Brennan clarified that the student could not have been disciplined by the school if he had given the same speech outside of school.¹²¹ Intuitively this makes sense because holding otherwise would appear to allow school officials to discipline secondary school students for using language that is inappropriate for school even when they use such language outside of the school setting.¹²² As a result, courts and commentators generally agree that *Fraser* does not apply to off-campus speech.¹²³

120. *Id.* at 683, 685.

121. *See id.* at 688 (Brennan, J., concurring). In *Morse v. Frederick*, the Court also stated that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.” *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

122. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011) (“[T]o apply the *Fraser* standard to [off-campus speech would] allow[] school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official . . . and is deemed ‘offensive’ by the prevailing authority.”), *cert. denied*, 132 S. Ct. 1097 (2012).

123. *See, e.g., id.* at 932-33; *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 457-58 (W.D. Pa. 2001); Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 130 (2010). Joseph A. Tomain, a visiting assistant professor of law at the University of Louisville Brandeis School of Law, notes that although courts have held that *Fraser* does not apply to off-campus speech not communicated via the internet, courts have been somewhat inconsistent on the question of whether *Fraser* applies to off-campus internet speech. Tomain, *supra*. Tomain correctly points to the fact that some courts have failed to clearly acknowledge that *Fraser* does not apply to off-campus speech or have even applied *Fraser* to such speech. He suggests that this lack of certainty by the courts creates the danger that *Fraser* may be applied to off-campus speech in the future, and he argues persuasively that *Fraser* should not be applied to off-campus speech. *See id.* at 130-59. Most of the cases Tomain cites, however, either involve courts simply engaging in judicial restraint to avoid a ruling on the question of whether *Fraser* applies to off-campus speech, *see, e.g., Doninger v. Niehoff*, 527 F.3d 41, 49-50 (2d Cir. 2008), or simply holding that *Fraser* applies to internet speech that the court has found to be on-campus speech, *see J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865, 867-68 (Pa. 2002) (holding that there was a sufficient nexus between the speech and the school to consider the speech on campus and then going on to apply *Fraser* in addition to *Tinker*, but also exercising judicial restraint to refuse to decide whether *Fraser* or *Tinker* was the proper standard to decide the case since the court found both standards to be met). Tomain only points to two cases where courts have held that *Fraser* applies to off-campus speech. One, the district court decision in *J.S. ex rel. Snyder v. Blue Mountain School District*, *see J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), was vacated by the circuit court and replaced with a clear decision that *Fraser* does not apply to off-campus speech since the time of Tomain’s writing, *see J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650

In *Hazelwood School District v. Kuhlmeier*, the Court held that schools may exercise “editorial control over the style and content of student speech in school-sponsored [publications]” provided any regulations on such speech are “reasonably related to legitimate pedagogical concerns.”¹²⁴ To justify granting school officials more control over the content of school-sponsored publications, the Court pointed to a school’s need to control messages disseminated in the school’s name to prevent student statements from being falsely attributed to the school.¹²⁵ The Court also noted the need of schools to make sure that readers of school-sponsored publications are not exposed to material that is inappropriate for their maturity level, to ensure that the educational goals of the school activity that produces the publication are achieved, and to teach shared social and cultural values.¹²⁶

The Court added one additional restriction on student speech in *Morse v. Frederick*—it allowed schools to prohibit student speech that could reasonably be viewed as promoting the use of illegal drugs.¹²⁷ In *Morse*, a school suspended a student for ten days for displaying a banner that read “BONG HiTS 4 JESUS” at a school-sponsored event.¹²⁸ The Court found

F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). The other, the district court decision in *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007), *aff’d on other grounds*, 527 F.3d 41 (2d Cir. 2008), was affirmed on other grounds by the Second Circuit, which affirmed the case under *Tinker* and indicated that “[i]t is not clear . . . that *Fraser* applies to off-campus speech” and “[w]e . . . need not decide whether [*Fraser*] appl[ies]” even though the district court had decided the case under *Fraser*. See *Doninger v. Niehoff*, 527 F.3d 41, 49-50 (2d Cir. 2008). In affirming the district court’s judgment, the Second Circuit expressly stated, “we acknowledge that the district court did not expressly rely on *Tinker* We nevertheless may affirm the district court’s judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court.” *Doninger*, 527 F.3d at 50 n.2 (internal quotation marks omitted). Therefore, although Tomain correctly points to some inconsistency on the issue in order to make important arguments addressing the threat of *Fraser* being extended to off-campus speech, it now seems clear that there is widespread agreement among courts and commentators that *Fraser* does not apply to off-campus speech. There is, however, significant inconsistency over how to define internet speech as on campus or off campus. Presently, the main danger is that courts will apply *Fraser* to internet speech after improperly finding the speech to be on-campus speech, resulting in *Fraser* being applied to speech that should be considered off-campus speech. When this occurs, though, it does not add any support to the proposition that *Fraser* applies to off-campus speech—it actually affirms that *Fraser* only applies to on-campus speech when courts apply *Fraser* only after finding the speech to be on-campus speech.

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

125. *Id.* at 271.

126. *Id.* at 271-72.

127. See *Morse v. Frederick*, 551 U.S. 393, 396, 403 (2007).

128. *Id.* at 396-98. The event was the 2002 Olympic Torch Relay. Since the Torch Relay was set to pass along the street in front of the school during school hours, the school arranged to allow students to watch the relay from both sides of the street as a school-sponsored and school-supervised event or fieldtrip. *Id.* at 396-98, 400-01. Therefore, even though the student was not on school property when he displayed the banner, he was under

that the banner could reasonably be viewed as promoting illegal drug use.¹²⁹ The Court also noted that preventing drug abuse by students was a significant governmental interest and made a point of mentioning that the banner was not intended to convey a serious political or religious message.¹³⁰

In these cases, the Supreme Court made it clear that there is a different standard for freedom of speech in public schools that is designed to account for the special circumstances of the school setting.¹³¹ Speech that occurs in a school setting is subject to restrictions that do not apply outside of school. Schools have the most control over student speech in school-sponsored publications, which schools may regulate as long as their regulations are reasonably related to legitimate pedagogical concerns. Schools may also ban certain limited categories of speech containing content that is inappropriate for the school setting—namely, lewd, vulgar, or indecent speech, and speech reasonably viewed as promoting illegal drug use. Outside these narrowly enumerated categories for specific types of speech, *Tinker* appears to be the general rule, which means that schools may prohibit speech when the speech causes, or can reasonably be forecast to cause, substantial disruption of school activities.¹³²

The Supreme Court has only applied these rules in addressing speech that occurred on campus or under a school's supervision and control—it has not directly decided the issue of whether, or to what extent, the school speech standard articulated in *Tinker*, *Fraser*, and *Morse* applies to off-campus speech or speech occurring outside the school's supervision and

the school's supervision and control so that his speech was properly treated as on-campus speech. *See id.* at 400-01 (“[A student] cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” (internal quotation marks omitted)). The Court treated this entirely as a case of on-campus speech and did not hold that off-campus speech was subject to regulation under a student-speech standard. *See id.*

129. *Id.* at 401-02.

130. *Id.* at 402-03, 407-09.

131. *See supra* Parts III.A-B.

132. Mark W. Cordes, a law professor at Northern Illinois University College of Law, however, argues that, when the majority opinion is considered with the concurring opinions and previous rulings of the Court, *Morse* appears to suggest a balancing test that takes into account the strength of the asserted state interest, the centrality of the speech to core First Amendment values, and the type of restriction placed on the speech. He theorizes that the Court may allow other types of student speech, in addition to the types enumerated in *Fraser* and *Morse*, to be restricted if this test is met. He also suggests that the Court indicated that this test would be very protective of political speech but might allow further restrictions on speech that is not at the core of what the First Amendment is designed to protect if the state has a strong interest in regulating it. As an example, Cordes points to speech reasonably viewed as promoting violence as a type of speech that the Court may allow schools to prohibit. Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL RTS. J. 657, 660, 701-04 (2009).

control.¹³³ While the rules of *Tinker*, *Fraser*, and *Morse* make sense when applied in the school setting because they balance students' right to freedom of speech with the educational mission of schools, these rules place troubling restrictions on the freedom of speech when applied outside the school setting.¹³⁴

IV. LIMITS ON SCHOOL AUTHORITY OVER ONLINE STUDENT SPEECH OCCURRING OFF CAMPUS

It is widely agreed that there should be limits on public school authority over students. The Supreme Court has clearly held that the First Amendment limits school authority over student speech.¹³⁵ Beyond this, it only makes sense that school authority should be limited to student speech or conduct that has some connection with the school or school-related activities. Even if there is general agreement that school authority should only be exercised in accord with the First Amendment and should only be applied to student speech with some connection to the school, courts and commentators disagree over which First Amendment standard should apply and what kind of connection to the school is needed.¹³⁶ In addressing these issues, it is important to distinguish school authority over speech that constitutes a true threat from school authority over other kinds of speech. Schools should have greater authority over true threats than other speech. Therefore, I will address true threats separately before turning to other student speech.

A. LIMITS ON SCHOOL AUTHORITY OVER TRUE THREATS

One of the strongest government interests in the school context is school safety.¹³⁷ For this reason, courts may be justified in giving more deference to the decisions of school administrators on matters relating to school safety than the deference courts already give to school administrators regarding matters of school discipline.¹³⁸ Since speech that incites illegal conduct and speech that constitutes a true threat are already considered

133. See *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

134. See *supra* Parts III.A-B; *infra* Parts IV.B.1-2.

135. See *supra* Part III.

136. See *supra* Parts IV.A-B.

137. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring) (stating that schools may ban on-campus speech that advocates the use of illegal drugs because it “presents a grave . . . threat to the physical safety of students”); *id.* at 439 (Stevens, J., dissenting) (recognizing a “school’s concededly powerful interest in protecting its students”).

138. See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 627 (8th Cir. 2002); Goldman, *supra* note 17, at 411-12.

unprotected speech under the full First Amendment standard, however, arguably there is no need to extend school authority over off-campus student speech of this type.¹³⁹ The true threat doctrine covers situations where the speaker seriously intends to engage in violence, which means that it can be invoked virtually any time a real danger of violence exists.¹⁴⁰ Importantly, the true threat doctrine also applies when the speaker does not actually intend to engage in the threatened act but merely intends to communicate a serious expression of intent to do the threatened act.¹⁴¹ This means that students can be subject to criminal penalties for making “fake threats,” or threatening statements without the intent to actually carry out the threat, as long as they intend to make others believe the threat is serious.¹⁴² Therefore, the true threat doctrine would apply if a student, who had no intention whatsoever of following through on it, made a false bomb threat or said he or she was going to go on a shooting rampage at school simply hoping that classes would be cancelled or disrupted (it would also apply if he or she was only hoping to laugh about it with his or her friends) as long as the student intended that the threat sound believable to others.¹⁴³

139. See, e.g., Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 267-68 (2001) [hereinafter Calvert, *Off-Campus Speech, On-Campus Punishment*] (arguing that schools should have no authority over purely off-campus true threats and that schools should just contact police and let them handle it if they become aware of a true threat made off campus); Hoder, *supra* note 17, at 1594 n.206 (arguing that schools cannot discipline students for true threats made outside of school supervision). Some commentators take the opposite position that, since true threats are unprotected under the First Amendment, schools should have authority to discipline students for true threats wherever they occur. See, e.g., Goldman, *supra* note 17, at 412.

140. See *supra* Part II.B.1.

141. See, e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003). Some courts have also applied the true threat doctrine in cases where a reasonable person would interpret the speaker's comments as a serious expression of intent to engage in violence, even if the speaker did not actually intend to communicate a serious expression of intent to engage in violence. See, e.g., *In re A.S.*, 2001 WI 48, ¶¶ 22-23, 626 N.W.2d 712. These courts have probably incorrectly interpreted *Virginia v. Black*. In *Virginia v. Black*, the Court appeared to require that the speaker actually intend to communicate a serious expression of intent to do harm. See *Black*, 538 U.S. at 359. Furthermore, subjecting someone who did not intend to engage in the illegal conduct to criminal liability violates time-honored principles of criminal law. See MODEL PENAL CODE § 1.02(1)(c) (1962) (stating that criminal offenses should be defined so as to “safeguard conduct that is without fault from condemnation as criminal”). Since someone could be subject to criminal liability for making a true threat, it is questionable whether they should essentially be held to a negligence standard of intent based on how a “reasonable person” would perceive the threat rather than based on their actual intent in making the allegedly threatening comment. See *id.* Whatever the law is (or should be) on this issue, it is only of marginal relevance to this Comment since none of my arguments depend on the state of the law with respect to this point.

142. See *Black*, 538 U.S. at 359.

143. See *id.*

When the true threat doctrine applies, the First Amendment does not provide a defense to criminal charges for the threatening speech.¹⁴⁴ The question then becomes whether a student who would be subject to criminal charges under state law for making threats can also be disciplined by his or her school. If the true threat occurs on campus or at a school-sponsored event, it is clear a school could discipline a student for the threat since the student could not raise a First Amendment defense as a shield against his or her unprotected speech, and the school clearly has the authority to discipline students for unprotected speech that occurs on campus.¹⁴⁵ Under certain circumstances, current law would also allow school administrators to discipline students for threatening speech that falls short of a true threat when that threatening speech occurs on campus.¹⁴⁶

The extent of school authority over threatening speech that occurs off campus is less clear. If off-campus threatening speech does not satisfy the true threat doctrine or the *Brandenburg* test, schools should not have any authority to discipline students for it.¹⁴⁷ If, however, speech does qualify as a true threat, courts have usually held that schools can discipline students for it even when it is purely off-campus speech.¹⁴⁸ Since true threats are

144. See *supra* Part II.B.1.

145. See *supra* Part III.

146. See *supra* Part III. A school can argue for applying *Fraser*, *Tinker*, or *Morse* to such on-campus speech. *Fraser* applies to lewd, vulgar, and “indecent” speech, and threatening speech should probably be considered “indecent” or vulgar. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986). Furthermore, *Tinker* would apply to any speech that causes, or could be reasonably forecast to cause, substantial disruption to school activities. Threatening speech, even if it is obvious to the speaker and any reasonable listener that the threat is not serious, could possibly either cause substantial disruption or be reasonably forecast to cause substantial disruption when it occurs *at school*. Additionally, at least one scholar has suggested that, after the decision in *Morse*, the Supreme Court might allow schools to discipline students for speech reasonably viewed as promoting violence, which would give schools seeking to discipline threatening speech that does not qualify as a true threat another argument to use with a good chance of success in court. See Cordes, *supra* note 132, at 701-04.

147. Some courts have allowed schools to apply *Tinker* to discipline students for off-campus threatening speech that does not satisfy the true threat doctrine or the *Brandenburg* test when the speech causes, or could reasonably be forecast to cause, substantial disruption at the school. See *infra* Part IV.B. As demonstrated below, this is an improper use of *Tinker*. Aside from any controversy over the issue of applying *Tinker* to discipline students for off-campus threatening speech that causes substantial disruption, there is general agreement that schools cannot discipline students for off-campus threatening speech unless it is unprotected under the full First Amendment standard (i.e., unless it satisfies the true threat doctrine or *Brandenburg* test). The Supreme Court’s holding in *Tinker* that student speech is protected under the First Amendment dictates this result. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 509 (1969).

148. See, e.g., *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619-27 (8th Cir. 2002) (upholding school discipline for a student who wrote a letter while off campus (and kept it in his home, where a friend took it without his permission and showed it to others)

unprotected under the First Amendment, it is correct that the First Amendment itself would not prevent schools from disciplining students for this type of off-campus speech.¹⁴⁹

This should raise a separate issue that is not actually a First Amendment issue—the limits of school authority and the extent of school jurisdiction into the general community.¹⁵⁰ Geographic and temporal limits on school authority are important for a variety of reasons, including allowing parents and the general community to handle off-campus matters regarding child-rearing and civil and criminal law, and preventing school policy from being applied in a way that limits freedom of speech and action outside of the school campus.¹⁵¹ Assuming that school authority should be limited, arguably school administrators should simply contact parents and the police when they learn of off-campus threats by students and allow the parents and authorities to handle the situation instead of applying school rules to discipline students for off-campus conduct.¹⁵² But in the interest of promoting school safety, an alternative approach—one that allows schools to discipline students for certain conduct, in the purported interest of increasing

after finding the letter to constitute a true threat without considering whether the school had authority over this off-campus speech). As of the time of this writing, only one court in only one case has upheld school discipline for off-campus internet speech rising to the level of a true threat. *See* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 756-59, 761, 764-65 (8th Cir. 2011); Emrick, *supra* note 17, at 801 (writing two years before *D.J.M.* was decided and stating that no court had found a true threat from off-campus cyberspeech). This is the case even though off-campus internet speech issues have been raised under *Tinker* and the true threat doctrine for years now in many courts. *See, e.g.*, J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 856, 860-62 (Pa. 2002). Perhaps there are multiple reasons for this. One reason is probably that most students simply do not post true threats on the internet if they really intend to carry out acts of violence. Another is that most material on the internet simply does not rise to the level of a threat that a reasonable person would take seriously. Additionally, material posted on the internet is not likely to be a true threat since it does not usually directly communicate a threat to its target. *See supra* Part II.B.1. All of this may suggest that the issue of whether schools should be allowed to discipline students for off-campus true threats communicated via websites may be more of a theoretical concern than a practical one. Yet, if most material posted off campus on the internet is relatively innocuous, it may be a very important freedom of speech issue to address this question in order to prevent innocuous speech from being restricted more than necessary and the chilling effect that could result from schools disciplining students for internet speech.

149. *See supra* Part II.B.1.

150. *See, e.g.*, Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139.

151. These and other reasons for limiting school authority are fully discussed below. *See infra* Part IV.B.2.

152. Some commentators make this argument, stating that speech that does not occur while a student is under a school's supervision and control simply does not fall under school authority and may not be regulated by the school even if it constitutes a true threat. *See* Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139; Hoder, *supra* note 17, at 1594 n.206.

school safety, while also limiting school authority over off-campus speech and conduct—might be desirable.¹⁵³

153. Arguably, increasing security may not be a very good reason for limiting fundamental personal freedoms including the freedom of speech. See, e.g., Benjamin F. Heidlage, Note, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 607 (2009). This is especially true if it is the case that, as one commentator stated, innocent expression by many students is being stifled to make it easier to target a tiny fraction of students who actually represent a danger. Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 763 (2000) [hereinafter Calvert, *Free Speech and Public Schools*]. Even if it is worth it to limit freedom of speech to increase school safety, the argument that allowing schools to discipline students for true threats that occur off campus will increase school security is a weak one. See, e.g., Heidlage, *supra*. Students in the general community are already deterred from making statements constituting true threats (or even statements that might appear to others to be true threats) by the potential for consequences much more serious than school discipline. Potential consequences include the following: criminal sanctions that could result in jail time and/or fines, civil liability, a police investigation (which could result in inconveniences such as a search of the suspect's home or person, or even a compulsory psychiatric exam with the possibility of involuntary commitment), and the reprobation of members of the community, not to mention the option of parental discipline, which could serve as a greater deterrent for some students than school discipline. See, e.g., D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 759, 763-66 (8th Cir. 2011) (recounting the story of a student who was required to undergo a psychiatric evaluation and subsequently placed in a psychiatric hospital and then juvenile detention based on an investigation into threatening instant messages he sent from his home computer to another student's home computer—in this case the court did find a true threat); Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 36-37 (2d Cir. 2007) (noting that community hostility led to a student and his family moving out of the town after he sent an allegedly threatening instant message to fifteen of his friends that police investigators concluded was meant as a joke); Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 246-51 (discussing *J.S. ex rel. H.S.*, where a middle school student was sued under four tort theories and investigated by the FBI and local police after posting an allegedly threatening website that was eventually determined not to be a true threat). Given this, it is unlikely that the risk of facing school discipline will play a significant role in a student's calculation as to whether to make such a threat. Heidlage, *supra*, at 607 & n.169 (citing Calvert, *Free Speech and Public Schools*, *supra*, at 762-65). Even if the additional deterrence resulting from school discipline would stop some students from making threatening statements, this would arguably have no effect on violence; students might just be more likely to keep their violent intentions to themselves until they act on them. See Heidlage, *supra*, at 607. Some commentators have in fact argued that it would be better not to deter threatening statements because the online statements actually make it easier for parents, school administrators, and law enforcement officials to identify threats of violence and prevent the actual acts of violence from occurring through various forms of intervention. See, e.g., *id.* Finally, several commentators have pointed out that school violence is actually quite rare and suggested that fears of school violence are greatly disproportionate to actual incidents of school violence. See, e.g., Robert D. Richard & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1110 & n.152 (2003) (citing John Leland, *Zero Tolerance Changes Life at One School*, N.Y. TIMES, Apr. 8, 2001, § 9 (Sunday Styles), at 1 (noting that school violence is so rare that students are three times more likely to be struck by lightning than killed through

Currently, courts tend to simply apply the true threat doctrine in cases of school discipline for threatening off-campus speech and uphold the school discipline if the student's off-campus speech constitutes a true threat.¹⁵⁴ This approach fails to appropriately limit school jurisdiction.¹⁵⁵ As an alternative approach, courts should require a significant connection between the off-campus threatening speech and the school before applying the true threat doctrine to uphold school discipline.

A sufficient nexus approach might be appropriate here.¹⁵⁶ Ideally, courts would use such an approach to allow schools to discipline students who say, while off campus, that they will engage in acts of violence *at school*, assuming that these students intend that their threat sound believable to others. Using a sufficient nexus test should also prevent schools from disciplining students for believable threats that are completely unrelated to the school.

A more comprehensive analysis of how courts have applied the true threat doctrine in cases involving school discipline and a more detailed description of the type of connection that courts should require are outside the scope of this Comment. Moving forward, it would be a step in the right direction if courts simply began to consider, as a threshold consideration, whether there is a sufficient connection between the school and the threatening speech before allowing schools to use the true threat doctrine to dis-

acts of violence occurring at school)); Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 112-19 (2003) (discussing fears of school violence and teenage internet use as examples of moral panic, which involves a social consensus around an irrational and exaggerated fear of an activity that creates a disproportionate repressive response against the activity). Therefore, it is important to consider the extent to which legal measures to restrict student speech are truly justified by actual circumstances rather than simply being kneejerk reactions to phantom fears. Although I agree it is true that fears of school violence are greatly exaggerated in proportion to the actual number of violent incidents and that school discipline for off-campus threats is unlikely to increase school safety, I believe the U.S. Constitution should not be interpreted to completely preclude the option of schools disciplining students for off-campus true threats that are directed at the school. Whether it is wise for Congress, state legislatures, or schools to adopt laws and/or policies allowing disciplinary measures for off-campus true threats is another matter.

154. See, e.g., *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 756-59, 761, 764-65 (8th Cir. 2011); *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619-27 (8th Cir. 2002).

155. See *supra* note 154.

156. Some courts already use a sufficient nexus test to determine if there is enough connection with the speech to treat off-campus speech as on campus for the purpose of *Tinker*. See *infra* Part IV.B.1.d. This is improper because *Tinker* should not be used to regulate off-campus speech that is *protected* under the full First Amendment standard. See *infra* Part IV.B. But such a test may be proper for determining if *unprotected* speech (such as a true threat) occurring off campus has enough connection to a school for the school to have disciplinary authority. See *supra* Part IV.A.

cipline students for off-campus speech. Regardless of the specific test used, this simple step would have the effect of properly limiting school jurisdiction without taking away any potential benefits to school safety that may be achieved through applying school discipline to threats directed at schools.

B. LIMITS ON THE APPLICATION OF *TINKER* TO ONLINE SPEECH

As this Comment shifts from true threats to other forms of speech, it is important to note the distinction. Regardless of whether a school may discipline a particular student for a true threat, the student would be subject to criminal penalties because true threats are not protected under the First Amendment.¹⁵⁷ But, speech that is allegedly merely offensive, indecent, lewd, or vulgar (but not obscene, and not falling into some other category of unprotected speech) would be protected from state sanctions by the First Amendment if the speech occurred outside of a school setting.¹⁵⁸ The only argument for applying state sanctions (i.e., school discipline) to such speech is that *school speech rules* should apply to allow the speech to be regulated.¹⁵⁹ Therefore, the issue becomes whether speech that is protected under the First Amendment when it occurs outside of the school context can be subject to school discipline under a school speech standard based on some kind of connection between the speech and the school.

There appears to be a general consensus that *Fraser* and *Morse* only apply to on-campus speech or speech occurring under school supervision.¹⁶⁰ No such consensus has emerged with respect to *Tinker*. The Supreme Court has not decided a case involving school discipline for off-campus speech,¹⁶¹ so lower courts, without firm guidance by the Court, employ a variety of approaches on the issue of whether and when *Tinker* applies to off-campus speech.¹⁶² Although courts are split on the issue, most scholars argue that *Tinker* does not apply to off-campus speech.¹⁶³ The key question that divides those who believe that *Tinker* does not apply to off-campus speech is when internet speech should be considered on campus and when it should

157. See *supra* Part II.B.1.

158. See *supra* Part II.

159. See *supra* Part III.

160. See *supra* Part III.B, particularly note 123 and accompanying text.

161. See Emrick, *supra* note 17, at 790.

162. See *infra* Parts IV.B.1.a-f.

163. See, e.g., Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 285, 320 (2008); Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53; Goldman, *supra* note 17, at 406-10, 423-25; Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 B.Y.U. EDUC. & L.J. 123, 153-63 (2000); Papandrea, *supra* note 2, at 1090-93.

be considered off campus.¹⁶⁴ This Subpart begins by reviewing the major approaches courts and commentators have taken on whether and when *Tinker* applies to off-campus speech.

1. *Tests to Determine When Tinker Applies to Internet Speech*

i. *Tinker Always Applies to Internet Speech*

Some courts have applied *Tinker* to all cases of student discipline for internet speech where *Fraser*, *Kuhlmeier*, and *Morse* do not apply.¹⁶⁵ In some cases, courts have simply done a *Tinker* analysis as a way of covering all bases¹⁶⁶ or as a way of avoiding the issue of whether *Tinker* applies to off-campus speech (by assuming for the sake of argument that *Tinker* applies to decide the case based on a lack of substantial disruption).¹⁶⁷ Some courts,¹⁶⁸ and at least one commentator,¹⁶⁹ have gone further and assumed

164. See *infra* Parts IV.B.1.d-f.

165. See *infra* Part IV.B.1.a, particularly notes 166-68.

166. See, e.g., *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370-74 (S.D. Fla. 2010) (starting with the issue of where the speech occurred and finding it to have occurred off campus, but subsequently doing a substantial disruption analysis and concluding that the speech was protected “[r]egardless of the standard used”); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (discussing whether there was substantial disruption and holding that there was not after suggesting that *Tinker* does not apply to off-campus speech and finding the student’s website to be off-campus speech).

167. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 & n.3, 931 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 781 (N.D. Ind. 2011).

168. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220 & n.2, 221-22 (3d Cir. 2011) (Jordan, J., concurring) (implying that *Tinker* should always apply by lauding the merits of *Tinker* as a test that balances school order with student speech rights and by stating that whenever school officials can show substantial disruption courts “ought to be supportive of their reasonable efforts to maintain appropriate order,” although disclaiming that “[w]hether the test framed by *Tinker* will always be applicable is not a matter to be answered in the abstract”); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1108-09 (C.D. Cal. 2010) (“[U]nder the majority rule, and the rule established by the Ninth circuit . . . the geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech.”); *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799-801 (N.D. Ohio 2002) (holding that *Fraser* did not apply when a student was disciplined for a website he created at home and privately viewed at school (although the student did show the website to another student, the school did not know this when it disciplined the student, so the court did not consider that evidence), but then appearing to assume that *Tinker* applied simply because *Fraser* did not apply). The *J.C. ex rel. R.C.* court cited *LaVine v. Blaine School District*, 257 F.3d 981, 989 (9th Cir. 2001), as establishing the rule that “*Tinker* applies to both on-campus and off-campus speech.” *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1108-09. The court in *LaVine* did state the following:

In deciding whether school officials have infringed a student’s First Amendment rights, we must first determine what type of student speech is at issue. . . . (1) [V]ulgar, lewd, obscene and plainly offensive speech

that *Tinker* should always apply to student discipline issues whether the speech in question occurred on or off campus.

Sometimes this view appears to result from the desire to apply a more speech-protective test to internet speech.¹⁷⁰ Proponents of this line of thinking view *Tinker* as the best standard for internet speech because *Tinker* provides more protection for speech than *Fraser* (since *Tinker* requires a showing of substantial disruption even for lewd, vulgar, and indecent speech while such speech may be restricted under *Fraser* without any proof of disruption).¹⁷¹ But, this ignores the fact that courts need not apply a student speech standard to off-campus speech, which would receive greater protection under a full First Amendment standard than it does under *Tinker*.¹⁷²

The best argument in favor of an approach that always applies *Tinker* is that *Tinker* already balances a school's interest in maintaining a disruption-free environment with a student's right to free speech because it ensures students have free speech rights, but it still allows schools to regulate student speech that could be reasonably forecast to cause a disruption at school.¹⁷³ This argument is premised on the purported difficulty or arbitrariness of distinguishing between on- and off-campus internet speech and on the belief that off-campus student internet speech poses a significant risk of disrupting school activities.¹⁷⁴ These are both dubious propositions.¹⁷⁵

is governed by *Fraser*; (2) school-sponsored speech is governed by *Hazelwood*; and (3) speech that falls into neither of these categories is governed by *Tinker*. [The speech at issue in this case] clearly falls within the third category.

LaVine, 257 F.3d at 988-89 (citation omitted).

Although this language in *LaVine* could be interpreted as suggesting that *Tinker* applies as a default standard to all speech that *Fraser* and *Kuhlmeier* do not cover, this is probably not the best interpretation of the case. *See id.* Since *LaVine* involved discipline of a student for the content of a poem that he brought to campus and shared with a teacher (and several other students) during school, the case only involved an issue of on-campus speech. *See id.* at 984. The *LaVine* court did not explicitly state that *Tinker* applies to off-campus speech, and its holding that *Tinker* is the default standard is best interpreted as being limited to on-campus speech—anything more could only be dicta at most. *See id.* at 984, 988-89. As demonstrated below, it is also not clear that the *J.C. ex rel. R.C.* court is correct that the majority rule is that *Tinker* applies to all speech whether on or off campus. *See J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1108-09.

169. *See* Sandy S. Li, Comment, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 97-100, 102-05 (2005).

170. *See id.*

171. *See, e.g., id.*

172. *See id.*

173. *See Layshock ex rel. Layshock*, 650 F.3d at 220-22 (Jordan, J., concurring); Li, *supra* note 169, at 104.

174. *See Layshock ex rel. Layshock*, 650 F.3d at 220-22 (Jordan, J., concurring); Li, *supra* note 169, at 104.

ii. *Impact Analysis Test*

Some commentators have suggested altering or abandoning *Tinker* for a less speech-protective test as a measure to combat cyberbullying.¹⁷⁶ Renee L. Servance, former J.D. candidate at the University of Wisconsin, has suggested replacing a *Tinker* analysis with a three-prong “impact analysis” test. That test would consider (1) whether the speaker and the target are both “members of the same school community,” (2) whether “the speech has an actual or foreseeable negative impact on the targeted individual,” and (3) whether the speech’s impact disrupts the school’s classroom authority or its “ability to . . . educate students.”¹⁷⁷ The purpose of this test appears to be getting courts to consider the impact of the speech rather than where it occurred¹⁷⁸ and, according to one commentator, allowing schools to regulate speech that may not rise to the level of substantial disruption because it only impacts a small number of students.¹⁷⁹ Another commentator has suggested using this impact analysis test but altering it to make it more speech protective by giving greater protection to speech commenting on social or political issues.¹⁸⁰ As of the time of this writing, it does not appear that any court has applied a student speech standard that is less speech protective than *Tinker* to off-campus internet speech.¹⁸¹ Cyberbullying is a serious concern, but there are alternative methods of dealing with that problem that are less restrictive on the fundamental constitutional right to freedom of speech and that may be more beneficial for all actors involved, including schools, parents, and students.¹⁸²

iii. *Reasonable Foreseeability Test*

One approach that has gained significant traction in the courts is the reasonable foreseeability test, which has been used as a theory to uphold school discipline for off-campus internet speech in the Second and Eighth

175. See *infra* Parts IV.B.2-4.

176. See Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 271-72, 285-86 (2008); Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1238-44 (2003).

177. Servance, *supra* note 176, at 1239.

178. See *id.* at 1238-44.

179. Erb, *supra* note 176, at 285.

180. *Id.*

181. The only exception is that some courts have considered applying the less speech-protective rule from *Fraser*. This has been almost universally rejected as a test for off-campus internet speech. See *supra* Part III.B, particularly note 123 and accompanying text.

182. See *infra* Part IV.B.2.a.

Circuits.¹⁸³ The key case supporting this theory is *Wisniewski ex rel. Wisniewski v. Board of Education*, where the Second Circuit adopted the reasonable foreseeability approach.¹⁸⁴

In *Wisniewski*, a middle school student, Aaron Wisniewski, sent an AOL instant message from his home computer to fifteen members of his “buddy list,” which included students from his school.¹⁸⁵ Within a messaging icon, Wisniewski included a drawing depicting a gun firing a bullet at a person’s head with the words “Kill Mr. VanderMolen” (his English teacher).¹⁸⁶ The icon was viewable for three weeks.¹⁸⁷ One of the students who received the message showed school staff members the icon, and the school administration called the police.¹⁸⁸ The police started a criminal investigation that included an evaluation of Wisniewski by a psychologist.¹⁸⁹ Ultimately, the police closed the case without criminal charges after concluding that the icon was meant as a joke and that Wisniewski posed no real threat to any school staff.¹⁹⁰

The school suspended Wisniewski for one semester, and his parents challenged the suspension in court, claiming it violated Wisniewski’s First Amendment right to freedom of speech.¹⁹¹ The lower court granted summary judgment in favor of the school, and the parents appealed.¹⁹²

Even though the issue of whether Wisniewski’s message constituted a true threat was raised and contested by the parties, the Second Circuit chose to skip the true threat analysis and decide the case based on a *Tinker* analysis.¹⁹³ The court held that *Tinker* applied because “it was reasonably foreseeable that the [instant messaging] icon would come to the attention of school authorities.”¹⁹⁴ It reasoned that Wisniewski’s “distribution” of the icon to his “buddies,” who were students that might pass the icon on, made it foreseeable that the icon would eventually come to the attention of the school administration.¹⁹⁵ The court also held that the school could discipline

183. See, e.g., *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 765-66 (8th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48, 50 (2d Cir. 2008); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007); *O.Z. v. Bd. of Trs.*, No. CV 08-5671 ODW (AJWx), 2008 WL 4396895, at *4 (C.D. Cal. Sept. 9, 2008).

184. See *Wisniewski*, 494 F.3d at 39.

185. *Id.* at 35-36.

186. *Id.*

187. *Id.* at 36.

188. *Id.*

189. *Wisniewski*, 494 F.3d at 36.

190. *Id.*

191. *Id.* at 35, 37.

192. *Id.* at 35.

193. *Id.* at 37-38.

194. *Wisniewski*, 494 F.3d at 38-40.

195. *Id.*

Wisniewski regardless of whether he intended to communicate the icon to school administrators.¹⁹⁶

Several courts have cited and followed *Wisniewski*.¹⁹⁷ In *Doninger v. Niehoff*, the Second Circuit applied the *Wisniewski* approach to uphold a school's discipline of a student government representative who posted comments to her blog from her home computer.¹⁹⁸ In her blog post, she criticized a school administrator's decision to reschedule a concert at her school, calling the administrator a "douchebag[]" and calling on students to contact the administrator to "piss her off more."¹⁹⁹ The Second Circuit upheld the district court's decision that the school discipline in this case did not violate the First Amendment because it was reasonably foreseeable that the blog posts would come to the attention of school administrators.²⁰⁰

The reasonable foreseeability standard has merit insofar as it protects some speech communicated privately off campus while allowing school administrators to discipline students for speech that would foreseeably reach campus.²⁰¹ However, the reasonable foreseeability approach is not without its flaws. *Wisniewski* and *Doninger* illustrate that this test is not very speech protective if sending an instant message to fifteen friends from home²⁰² or making a post to a personal blog from home²⁰³ could end up being analyzed under a school speech standard. In practice, a court applying the reasonable foreseeability test can find reasonable foreseeability of arrival on campus for almost any speech posted on the internet or sent via email or instant message.²⁰⁴

196. *Id.* at 40.

197. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 48, 50 (2d Cir. 2008).

198. *Id.* at 44-45.

199. *Id.*

200. *Doninger*, 527 F.3d at 50. It should be noted, however, that the standard of review for this case was abuse of discretion and that the court limited its holding to cases where the school's discipline did not go beyond placing restrictions on a student's participation in extracurricular activities. *Id.* at 43-44, 52-53. These factors narrow the court's decision and suggest the possibility that the court may have reached a different outcome under a different standard of review or if a more severe sanction, such as a suspension or an expulsion, was involved. *See id.*

201. *See id.* at 48, 50.

202. *See Wisniewski*, 494 F.3d at 35-36, 38-40.

203. *See Doninger*, 527 F.3d at 44-45, 48, 50.

204. *See Wisniewski*, 494 F.3d at 35-36, 38-40; *Doninger*, 527 F.3d at 44-45, 48, 50; Benjamin L. Ellison, Note, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 844 (2010) ("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."). *See also D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 757-59, 765-66 (8th Cir. 2011) (finding reasonable foreseeability when a student sent instant messages from his home computer to another student's home computer); *O.Z. v. Bd. of Trs.*, No. CV 08-5671 ODW (AJWx), 2008 WL 4396895, at *1, *4 (C.D. Cal. Sept. 9,

iv. Sufficient Nexus Tests

All of the tests discussed to this point would allow schools to regulate off-campus student internet speech to varying degrees.²⁰⁵ Other tests do not follow this approach. Instead of allowing schools to regulate off-campus speech, these tests limit school authority to on-campus speech. Despite this commonality, these tests vary significantly in how they define on- and off-campus speech.²⁰⁶

The first approach that begins to head in this direction is called the sufficient nexus approach. Sufficient nexus tests require some kind of connection, called a “sufficient nexus,” between the speech and the school before speech may be subject to regulation under the school speech standard. There are various types of sufficient nexus tests.²⁰⁷ Most consider off-campus speech as beyond regulation and attempt to define what speech that occurs off school property may be treated as on-campus speech for the purposes of *Tinker*.²⁰⁸ Several types of sufficient nexus tests are discussed below. They are addressed roughly in order from the least speech-protective test to the most speech-protective test.

The least speech protective of the sufficient nexus tests does not provide much more protection for off-campus speech than the reasonable foreseeability test.²⁰⁹ This sufficient nexus approach would allow schools to regulate student internet speech anytime the speech reaches the school.²¹⁰ *Killion v. Franklin Regional School District* exemplifies this approach.²¹¹ In *Killion*, a student, at home on his own time, created a “top ten list” mocking his school’s athletic director and emailed it to other students of the school from his personal computer.²¹² Another student, who was never identified, printed his email and distributed it at school.²¹³ The court held that “because the [top ten] list was brought on campus, albeit by an unknown person, *Tinker* applies.”²¹⁴ Unlike the reasonable foreseeability approach, this suffi-

2008) (finding reasonable foreseeability that a YouTube video about a teacher created and posted off campus would reach campus even though it only reached campus when the teacher found it while “googling” her own name from her home computer and then told school administrators about the video).

205. See *supra* Parts IV.B.1.a-c.

206. See *infra* Parts IV.B.1.d-f.

207. See *infra* Part IV.B.1.d.

208. See *infra* Part IV.B.1.d.

209. Compare *Wisniewski*, 494 F.3d at 35-36, 38-40, with *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 448-49, 455 (W.D. Pa. 2001).

210. See *Killion*, 136 F. Supp. 2d at 455.

211. See *id.*

212. *Id.* at 448.

213. *Id.* at 448-49.

214. *Id.* at 455.

cient nexus approach requires the speech actually reach the school.²¹⁵ Except in rare cases, however, speech usually does not come to the attention of school administrators unless it reaches campus somehow. Therefore, in practice, this type of sufficient nexus test may subject almost as much off-campus speech to school regulation as the reasonable foreseeability test.²¹⁶

Kyle W. Brenton, former J.D. candidate at the University of Minnesota, has proposed an interesting idea for a sufficient nexus test based on the civil procedure concept of personal jurisdiction.²¹⁷ If adopted, it would arguably be the next-to-least speech protective of the sufficient nexus tests because it appears to allow schools to regulate some off-campus speech.²¹⁸ He proposes that a school may regulate off-campus speech without running afoul of the First Amendment if there are certain minimum contacts between the speech and the school or if a student purposefully avails himself or herself of school jurisdiction over the speech, and if school jurisdiction would satisfy an additional test balancing the interest of free speech against the interest of school order (which Brenton, continuing the personal jurisdiction analogy, terms “traditional notions of fair play and substantial justice”).²¹⁹ Brenton argues that reasonable foreseeability that speech would reach the school is not enough, so his personal jurisdiction test would require a student either intend to cause harm at the school through their internet speech or avail themselves of school jurisdiction by accessing their web content repeatedly while at school.²²⁰

Other sufficient nexus approaches offer more protection for off-campus speech. Benjamin L. Ellison, former J.D. candidate at Notre Dame Law School, suggests a test that focuses primarily on the intent of the speaker.²²¹ His approach only allows schools to target “on-campus” speech, but it allows a significant amount of off-campus speech to be considered on-campus speech.²²² He proposes that “[o]ff-campus speech should be considered on-campus when the student intends that the speech reach the school and the speech actually does reach the school.”²²³ Ellison suggests that this intent requirement would be met if a student either encourages

215. Compare *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35-36, 38-40 (2d Cir. 2007), with *Killion*, 136 F. Supp. 2d at 448-49, 455.

216. Compare *Wisniewski*, 494 F.3d at 35-36, 38-40, with *Killion*, 136 F. Supp. 2d at 448-49, 455.

217. See Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1233-36, 1238-42 (2008).

218. See *id.*

219. *Id.*

220. *Id.* at 1235, 1238-39.

221. Ellison, *supra* note 204, at 813, 842.

222. See *id.*

223. *Id.*

other students to view his or her website at school or shows others his or her website at school. But, Ellison implies intent might not be established by a student simply accessing his or her own site repeatedly at school without showing it to others.²²⁴

J.S. ex rel. H.S. v. Bethlehem Area School District illustrates a final type of sufficient nexus approach.²²⁵ The *J.S. ex rel. H.S.* court indicated the first step in analyzing a *Tinker* issue is to decide whether the speech occurred on or off campus.²²⁶ The problem in *J.S. ex rel. H.S.* was that it was difficult to determine whether the speech was on or off campus because the student created the website at issue off campus and then accessed the website on campus and showed it to another student.²²⁷ In resolving this issue, the court held that “where 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.”²²⁸ This test includes two parts: (1) the speech must be “aimed at” the school (or its staff), and (2) the originator must either bring the speech to school or access it at school.²²⁹ Although the “aimed at” requirement is not precisely defined, it probably includes an element of intent on the part of the student, who must “aim” the speech at the school or its staff.²³⁰ It also requires the originator be the one who brings the speech to campus.²³¹ Both of these factors make it the most speech protective of the sufficient nexus tests discussed so far.²³² In a concurring opinion, however, Justice Zappala criticized the majority’s approach to the *Tinker* issue as not speech protective enough.²³³ Justice Zappala reasoned that, under *Tinker*, simply accessing a website at school, without more, should not be enough to subject web content that was created off campus to regulation by school administrators.²³⁴

As illustrated above, sufficient nexus tests vary significantly in what speech they would protect. But, they all tend to require more than reasonable foreseeability approaches by shifting the focus to actions or intentions that transform off-campus speech into on-campus speech.

224. *See id.*

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

226. *Id.* at 863-64.

227. *Id.* at 865.

228. *Id.*

229. *See id.*

230. *See J.S. ex rel. H.S.*, 807 A.2d at 865.

231. *See id.*

232. *See id.*

233. *See id.* at 870 (Zappala, J., concurring).

234. *See id.*

v. *Relational Approach*

The relational approach offers yet another angle on the issue of when off-campus speech may be treated as on-campus speech for the purposes of the *Tinker* test.²³⁵ Under this approach, *Tinker* only applies to speech that occurs off campus if the speech occurs when the student is acting in his or her role as student.²³⁶ The idea behind this approach is to move beyond a purely geographical definition of school authority while still retaining clear limits on such authority.²³⁷ Under this approach, school authority is based on its relationship with the student rather than geographic location.²³⁸ Although it does not appear that any court has explicitly adopted this approach, courts have made reference to whether students were acting as students while engaging in off-campus speech.²³⁹ For example, in *Klein v. Smith*, the court held that a student could not be disciplined for giving his teacher “the finger” off campus in a restaurant parking lot.²⁴⁰ The court stated that “[t]he conduct in question occurred . . . when [the teacher] was not associated in any way with his duties as a teacher [and] [t]he student was not engaged in any school activity or associated in any way with . . . his role as a student.”²⁴¹ The relational approach is similar to the supervision and control approach discussed below.

vi. *Geographic and Temporal Approaches*

Most scholars appear to support an approach that, with some exceptions, grants off-campus internet speech the protection of the full First Amendment standard and limits school authority under *Tinker* to internet speech that occurs either on campus or when a student is under the school’s supervision and control—this is a geographic and/or temporal approach because it defines the limits of school authority in terms of location and/or time.²⁴² Despite this scholarship, comparatively few courts have adopted this approach.²⁴³

235. See Heidlage, *supra* note 153.

236. *Id.* at 594.

237. *Id.* at 594-96.

238. *Id.*

239. See, e.g., *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986).

240. *Id.* at 1440-42.

241. *Id.* at 1441.

242. See, e.g., Beckstrom, *supra* note 163, at 285, 320; Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53; Goldman, *supra* note 17, at 406-10, 423-25; Harpaz, *supra* note 163, at 153-63; Papandrea, *supra* note 2, at 1090-93.

243. One Third Circuit concurring opinion and a few lower court majority opinions directly support the proposition that *Tinker* does not apply to off-campus internet speech. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936, 940 (3d Cir.

Although those who advocate a geographic and/or temporal approach generally believe that only the full First Amendment standard should apply to off-campus speech, they would not simply limit school authority to school property.²⁴⁴ Geographic and temporal approaches allow for a number of exceptions to the general rule that school speech precedents do not apply to off-campus speech.²⁴⁵ For example, they generally accept the holdings of *Kuhlmeier* and *Morse* that school authority should extend to student speech at school-sponsored events occurring off campus (and to student speech in school-sponsored publications wherever they are created) so that schools may regulate student speech at such events (or in such publications) under school speech precedents.²⁴⁶ Additionally, most commentators who advocate geographic and temporal approaches would also allow for a number of other situations where off-campus internet speech may be transformed into on-campus speech through a student's actions and/or intentions.²⁴⁷ As a result, the different types of geographic and temporal approaches differ mainly over the issue of when internet speech should be considered on campus (or under school supervision) and, thus, subject to *Tinker*.²⁴⁸ Some who follow a geographic or temporal approach would allow enough speech

2011) (Smith, J., concurring), *cert. denied*, 132 S. Ct. 1097 (2012); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 705-06 (W.D. Pa. 2003) (holding that a school's student handbook is unconstitutionally overbroad and vague if it fails to provide geographical limits on a school's authority to regulate speech); *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1089-90 (W.D. Wash. 2000) (holding that a student had substantial likelihood of success on the merits because "the speech was entirely outside the school's supervision or control"). Some other courts have implied that *Tinker* does not apply to off-campus internet speech but have left some doubt as to the certainty of this proposition. *See, e.g.*, *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370-74 (S.D. Fla. 2010) (starting its *Tinker* analysis with the question of whether the speech occurred on or off campus but still doing a substantial disruption analysis after finding the internet speech was off campus in an apparent attempt to cover all bases); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (suggesting that *Tinker* does not apply to off-campus internet speech and finding the student's website to be off-campus speech, but still doing a substantial disruption analysis).

244. *See supra* notes 242-43; *infra* note 246.

245. *See supra* notes 242-43; *infra* note 246.

246. *See supra* notes 242-43. The dispute over whether school speech standards apply to school-sponsored events because such events occur on campus or because such events occur under school supervision and control is largely a semantic one, where various commentators disagree more over language use than over any substantive differences in how speech at school-sponsored events should be treated. *Compare* Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53, 271 (following a geographic on- and off-campus approach that would allow schools to regulate speech at school-sponsored activities under student speech standards), *with* Hoder, *supra* note 17, at 1594-97 (advocating a supervision and control approach that would allow schools to regulate speech at school-sponsored activities under student speech standards).

247. *See infra* notes 251-66 and accompanying text.

248. *See infra* notes 251-66 and accompanying text.

to fall under an exception to the general rule of full First Amendment protection for off-campus speech that their approach appears similar to the sufficient nexus approaches discussed above.²⁴⁹ Others hold more strictly to the proposition that the full First Amendment standard, and not *Tinker*, should govern off-campus internet speech.²⁵⁰

Judge Smith's concurrence in *J.S. ex rel. Snyder v. Blue Mountain School District* is probably the least speech-protective test proposed that still qualifies as a geographic approach.²⁵¹ That Judge Smith's concurrence articulates a geographic approach seems clear from his statement that "I write separately to address . . . whether *Tinker* applies to off-campus speech I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."²⁵² But, Judge Smith would allow an exception so that "[r]egardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech."²⁵³ As an example of a case where *Tinker* should apply because a student intentionally directed speech at a school, Judge Smith refers to a situation in which a student sends a "disruptive email" from off campus to school staff.²⁵⁴ Regardless of the merits of this particular example, it is clear that this test could potentially include a good deal of off-campus speech depending on how broadly courts interpret "intentionally directed towards a school."²⁵⁵ It could be reduced almost to an intent test similar in its level of protection for off-campus speech as the sufficient nexus approaches described above.²⁵⁶

Several commentators have argued for geographic and temporal approaches that are more speech protective than the *J.S. ex rel. Snyder* concurrence but that would still allow schools to restrict certain categories of off-campus internet speech.²⁵⁷ Some exceptions to the general rule that

249. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936, 940 (3d Cir. 2011) (Smith, J., concurring), *cert. denied*, 132 S. Ct. 1097 (2012).

250. See, e.g., Papandrea, *supra* note 2, at 1090-93.

251. See *J.S. ex rel. Snyder*, 650 F.3d at 936, 940 (Smith, J., concurring).

252. *Id.* at 936.

253. *Id.* at 940.

254. *Id.*

255. See *id.* The case of a student sending a disruptive or otherwise inappropriate email to a teacher from an off-campus location is discussed below. See *infra* Part IV.B.4.c. I argue that the key factor should be whether the email was sent to (or from) a school email account—not whether the email was intentionally directed at a school. I argue that the speech should be treated as on-campus speech and *Tinker* and *Fraser* should apply if it was sent to (or from) a school email account. If it was not sent to (or from) a school email account, *Tinker* and *Fraser* should not apply. See *infra* Part IV.B.4.c.

256. See *supra* Part IV.B.1.d.

257. See *infra* notes 258-66 and accompanying text.

Tinker should not apply to off-campus speech that are commonly suggested by those advocating geographic and temporal approaches include allowing schools to regulate (under *Tinker*) the content of a website created off campus when a student (1) intentionally accesses the website on a school computer or distributes its content at school,²⁵⁸ (2) intentionally tells or encourages other students to access the website or distribute its content at school,²⁵⁹ (3) intentionally communicates the content of the website using school resources,²⁶⁰ or (4) intentionally communicates the content of the website during school hours.²⁶¹ The most controversial exceptions are (1) and (2), which would apply *Tinker* when a student simply accesses a website created off campus at school or encourages others to do so (respectively).²⁶² Other common exceptions include a student posting to a school-sponsored website from off campus²⁶³ and a student engaging in speech for the purpose of furthering academic misconduct (such as telling another student the answers to an assignment or a test while off campus).²⁶⁴

Aaron H. Caplan, a staff attorney for the ACLU, generally adheres strictly to a geographic approach but suggests an interesting exception might apply for off-campus “conduct that is directed exclusively at the school (as opposed to the world at large), that is maliciously intended for the purpose of disrupting school, and that has a high likelihood of succeeding in its purpose.”²⁶⁵ This language appears to suggest a modified form of the *Brandenburg* test for inciting illegal activity for schools to use against students who would attempt to incite school disruption from off campus.²⁶⁶

258. See, e.g., Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53, 285; Emrick, *supra* note 17, at 799, 805.

259. See, e.g., Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53, 285; Goldman, *supra* note 17, at 423-25; Emrick, *supra* note 17, at 799, 805.

260. See, e.g., Goldman, *supra* note 17, at 423-25; Emrick, *supra* note 17, at 799, 805.

261. See, e.g., Goldman, *supra* note 17, at 423-25; Emrick, *supra* note 17, at 799, 805; Hoder, *supra* note 17, at 1594-95.

262. See, e.g., Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53, 285 (suggesting accessing a website created off campus at school may be enough); Caplan, *supra* note 153, at 158 (arguing that even accessing a website created off campus at school and fixing a typo on the website would not be enough to turn the website into on-campus speech); Goldman, *supra* note 17, at 423-25 (arguing that accessing a website is not enough to turn off-campus speech into on-campus speech, and suggesting that a student must not only access his or her website but also communicate it to others to make its content subject to school regulation under *Tinker*); Emrick, *supra* note 17, at 799, 805 (making the same suggestion as Calvert).

263. See Papandrea, *supra* note 2, at 1091.

264. See Caplan, *supra* note 153, at 162.

265. *Id.* at 163-64.

266. See *id.* Caplan’s examples of situations where this test might apply include threatening emails or calls directed at the school, “conspiring to bomb the school,” or spreading a computer virus on school computers. *Id.* Such a test would probably be unneces-

In addition to disagreeing over when off-campus speech may be treated as on-campus speech under *Tinker*, commentators who advocate geographic and temporal approaches also differ over whether school authority should be treated as primarily geographic or temporal in nature.²⁶⁷ Those who focus on the geographic nature of school authority continue to use the on- and off-campus distinction even while recognizing that some speech occurring off campus, including speech at school-sponsored activities or in school-sponsored publications, must be treated as on-campus speech.²⁶⁸ Those who focus on the temporal nature of school authority have started to abandon the on- and off-campus language.²⁶⁹ Instead, they make a distinction between speech that occurs under school supervision and control, and speech that occurs outside of school supervision and control.²⁷⁰ This approach essentially maintains that student speech standards like *Tinker* and *Fraser* apply whenever students are under school supervision and that a full First Amendment speech standard applies when students are not under the supervision of schools or school staff.²⁷¹ This approach more easily explains why schools should have authority over school-sponsored activities that take place outside the physical property of the school.²⁷² At least one commentator who advocates a supervision and control approach has chosen to use supervision and control language interchangeably with the geographic on- and off-campus language.²⁷³

Although the temporal approach is generally more precise, there are good reasons to use supervision and control language interchangeably with on- and off-campus language. One reason for this is simply that the geographic language of on and off campus is commonly used and less cumber-

sary if it only targeted these, though, because bomb conspiracies and releasing computer viruses both involve conduct—not speech—which is not covered under the First Amendment, and threatening communications would likely be covered under the true threat doctrine. *See id.* *See also supra* Part II.B.1 (explaining that the true threat doctrine covers threats that someone intended people to take seriously); *supra* Part IV.A (arguing that schools should have the authority to discipline students for true threats with a sufficient nexus to the school—threatening emails and phone calls to the school would count); *infra* Part IV.B.4.c (arguing that emails sent to or from school email accounts should be treated as on-campus speech).

267. *See, e.g.,* Calvert, *Off-Campus Speech, On-Campus Punishment, supra* note 139, at 252-53, 271 (focusing on the geographic on- and off-campus distinction in defining the limits of school authority); Hoder, *supra* note 17, at 1594-97 (advocating a supervision and control approach that defines school authority as primarily temporal in nature).

268. *See, e.g.,* Calvert, *Off-Campus Speech, On-Campus Punishment, supra* note 139, at 252-53, 271.

269. *See, e.g.,* Hoder, *supra* note 17, at 1594-97.

270. *See id.*

271. *See id.*

272. *See id.*

273. *See* Goldman, *supra* note 17, at 397 n.8.

some, making it difficult to avoid. There is also a substantive purpose behind using both sets of terms—school authority over student speech must be considered to be limited by both space and time. Treating school authority as only limited by time ignores the fact that the speech of students who skip school, leave school before it is over, or leave an extra-curricular activity may not fall under school jurisdiction even while school activities are occurring.²⁷⁴ This can partly be explained by time in that school authority over speech no longer applies starting at the time that supervision and control is terminated. But the precise point of termination of school supervision and control when a student leaves an ongoing school activity is best defined, at least in part, as the time when a student puts a certain amount of physical space between himself or herself and the school activity. Therefore, school authority over speech is best understood as being defined by space and time. Use of both terms reminds readers of this and also acknowledges that both the geographic and temporal approaches have the same general goal of placing appropriate limits on school authority.

2. *Reasons Tinker Should Not Apply to Off-Campus Speech*

i. *It Is Unnecessary to Apply Tinker to Off-Campus Speech*

In a landmark decision, the *Tinker* Court declared that students have a right to freedom of speech on campus in public schools.²⁷⁵ In upholding this right, the *Tinker* Court faced the challenge of crafting a legal rule that would protect student speech while also ensuring that constitutionally protected student speech could occur on school grounds without disrupting school activities.²⁷⁶ With this in mind, the *Tinker* Court designed its test for student speech to take into account the specific concerns of the on-campus school environment. The test it produced was never meant to be applied to off-campus speech, which would require a test designed to account for the entirely different concerns that must be balanced when dealing with speech occurring outside of the school environment.²⁷⁷ Yet, given the role of the *Tinker* test in striking a balance between free speech and a disruption-free school environment, courts and commentators have sought to apply it to the issue of off-campus internet speech.²⁷⁸ As this has occurred, an important fact has been ignored—it is unnecessary to apply *Tinker* to off-campus internet speech because, with the application of measures that do not suppress off-campus internet speech, the impact of off-campus internet speech on

274. See Hoder, *supra* note 17, at 1594-97.

275. See *supra* Part III.A.

276. Papandrea, *supra* note 2, at 1093.

277. See *id.*

278. See *supra* Part IV.B.1.

school activities can be mitigated to the point that it is largely insignificant.²⁷⁹

Schools have many options to prevent off-campus speech from affecting what occurs on middle and high school campuses because school administrators have been properly granted a great deal of power over what goes on at school during school hours. Schools can ban students from using electronic devices during the school day, including cell phones and other wireless devices that may be used to receive or transmit text messages or access the internet.²⁸⁰ If schools limit students to using school computers and technology, they can make use of filtering software to prevent access to certain sites altogether.²⁸¹ Schools can also place limits on student use of school computers (and other technology owned by the school) through “acceptable-use policies” (AUPs).²⁸² Schools are generally free to set the rules for use of school property. Schools may even be able to implement a policy requiring students to agree not to use school technology in any way that could foreseeably cause substantial disruption at school (although a better policy would be much more specific on exactly how students are allowed to use school property and exactly how they are not allowed to use school property).²⁸³

Schools may also limit speech on campus through time, place, and manner restrictions designed to make sure that public property may be used for its designated purpose.²⁸⁴ Schools can prevent problems from arising through good classroom management. Teachers can require that students work on schoolwork during the school day—when a teacher is giving a lesson, it is perfectly reasonable for a student to face school consequences for sending instant messages to a friend, talking to other students about social or political issues of public significance, or doing anything other than following along with the teacher’s instruction and working on schoolwork

279. See *infra* notes 280-303 and accompanying text.

280. Papandrea, *supra* note 2, at 1091.

281. Emrick, *supra* note 17, at 813.

282. *Id.* at 812. Students can be required to sign AUP agreements before being allowed to use school computers. Students who violate the agreements may be disciplined for conduct violating the AUP by discipline including restricting future use of school computers. See *id.* Today, even more effective enforcement mechanisms allow teachers to exercise greater control over student use of school computers. Many schools, for example, have installed software in computer labs that allows teachers to monitor student computer use from a central teacher computer station. Teachers can use it to get a visual display of what is on each computer screen without having to walk around the room and look at a student’s screen. Teachers can also use it to remotely take control of student computers when they see students are using computers inappropriately.

283. See Goldman, *supra* note 17, at 424-25; Emrick, *supra* note 17, at 813.

284. See *supra* Part II.B.4.

in the classroom.²⁸⁵ As long as schools can provide structured educational activities to keep students focused on learning during the school day, students will not have the opportunity to follow off-campus web postings. Furthermore, schools may sometimes discipline students for insubordination or disrespectful conduct occurring on campus even when their off-campus speech is protected.²⁸⁶ Given the scope of schools' power to control what occurs on campus during the school day, it appears that off-campus internet speech cannot penetrate into school during the school day any further than schools allow it to.²⁸⁷

Even if off-campus internet speech with the potential to cause substantial disruption does make its way on campus, schools have options to address the problem without disciplining students for the off-campus speech itself. It is unnecessary for schools to discipline students for the off-campus speech because they can always discipline the student who brought it to campus (i.e., the student who (re)communicated or distributed the speech on campus—in many cases it will be the same student).²⁸⁸ Disciplining the student who brought the disruptive speech to school appears to be a win-win scenario because it is a more speech-protective policy that is likely to be just as effective at minimizing disruption during the school day.²⁸⁹ Furthermore, it is a more fair way to deal with the problem because the student who brings the speech to campus is the one who actually caused the disruption, not the person who merely sent a message over the internet while outside of school.²⁹⁰

Additionally, it is best for schools to limit their authority to on-campus speech in order to maintain the high level of authority that courts have

285. See Papandrea, *supra* note 2, at 1093.

286. See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 & n.12, 1052 (2d Cir. 1979) (holding that a student newspaper was protected as off-campus speech even though students used school typewriters to transcribe articles and stored copies of the newspaper in a teacher's closet at school, but suggesting that the students could have been disciplined for insubordination for their on-campus conduct (presumably using the typewriters or teacher's closet without permission) if the school had used that as the basis for the discipline); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (holding that the student's off-campus website was protected speech but suggesting that the student could be disciplined for disrespectful conduct for his on-campus comments to the school librarian or for insubordination if he had used library computers after being banned from using them as a result of previous violent and disrespectful behavior).

287. See Papandrea, *supra* note 2, at 1093 (noting that internet speech "by [its] very nature cannot cause an immediate disruption to the work of the school" since it cannot "intrude into the public space," making it even less disruptive on school activities than the silent speech in *Tinker*, which was visible for everyone to see).

288. See, e.g., *Emrick*, *supra* note 17, at 813.

289. See *id.*

290. See *id.* at 815.

granted them in dealing with on-campus speech.²⁹¹ If schools claim the power to regulate off-campus speech under school speech precedents, it may weaken those precedents as courts, with an eye to the danger of school speech precedents reigning in protected speech in the general community, will likely narrow definitions of substantial disruption.²⁹² As stated by the Second Circuit in *Thomas v. Board of Education*: “[O]ur willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.”²⁹³ By overreaching beyond the schoolhouse gates, schools may end up facing a higher burden to prove substantial disruption in cases involving on-campus speech, which would result in schools losing authority where they really need it.

When school discipline cannot be applied, several alternatives may still be available. Parental discipline, which is already relied on to deal with most of the minor transgressions of children in the community at large, is always an option.²⁹⁴ When parental discipline is not enough, the same criminal and civil justice system that maintains order in the world outside the school campus is always available to deal with students whose speech is part of conduct that constitutes a true threat, inciting illegal activity, harassment, stalking, and defamation, among other things.²⁹⁵ School discipline is not the only check on off-campus speech, and it is probably less effective in certain ways than parental discipline and the criminal and civil justice system.²⁹⁶ Further, criminal penalties for conduct outside of school teach the lesson that “[r]eal-world speech carries real-world consequences.”²⁹⁷

Furthermore, a school can always deal with off-campus speech it does not like by engaging in more speech.²⁹⁸ Because of their educational mission, schools can play a very significant role in bringing awareness to issues that affect members of the school community and educating students about them.²⁹⁹ Schools can play a more important role than disciplining every

291. See Goldman, *supra* note 17, at 423 (advocating deference to the decisions of school administrators regarding speech that occurs under school supervision, but suggesting that such deference is only appropriate if speech occurring outside school supervision is protected under the full First Amendment standard).

292. See *id.*

293. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979).

294. See, e.g., Papandrea, *supra* note 2, at 1101.

295. See, e.g., Beckstrom, *supra* note 163, at 316-19; Papandrea, *supra* note 2, at 1100.

296. See Goldman, *supra* note 17, at 416; see also *supra* note 153 (explaining that other methods of dealing with true threats may be more effective than school discipline).

297. Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 246.

298. Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 253, 286.

299. See Papandrea, *supra* note 2, at 1098-99.

student who makes rude and offensive comments over the internet on his or her own time or acts as a verbal bully toward others while off campus.³⁰⁰ Even though it might, at times (and especially after learning of an incident where someone was hurt by cyberbullying), seem desirable for someone to police the general community to prevent bullies from hurting others through mean-spirited and emotionally abusive online comments, it is not possible or even desirable for schools to do this.³⁰¹ Schools can play a more important role by working with students to foster positive relationships and educating students about the impact of their internet use on others and about what they can do to protect themselves from abusive online speech.³⁰² Schools can also educate students about the First Amendment, which should result in students learning that some kinds of speech are not protected.³⁰³

Ultimately, schools can maintain a disruption-free environment on campus despite whatever off-campus internet speech may occur. Therefore, it is unnecessary to apply *Tinker* to off-campus internet speech.

ii. *Value of Free Speech Rights for Students Outside of School*

Allowing schools to apply *Tinker* to off-campus internet speech would, at best, result in marginal benefits. It is doubtful those benefits would outweigh the significant cost. Student speech adds value to communities that may be lost if it is overly burdened by school restrictions. Allowing students free speech while they are off campus is socially beneficial in the same way that freedom of speech generally is. It gives students the opportunity to contribute to the marketplace of ideas, to develop their own identities through experimenting with self-expression, and to raise issues of public concern, including issues relating to school policies that might be of political and social importance in the general community as well as the school community.³⁰⁴ Valuable social and political commentary might be chilled if students are made to run the risk that they could be disciplined for

300. See Goldman, *supra* note 17, at 416.

301. See Beckstrom, *supra* note 163, at 283-85, 320 (illustrating the tragic impact of cyberbullying, but arguing that schools should not be allowed to discipline students for cyberbullying that occurs off campus unless it constitutes “an objective threat of violence to students, teachers, or school administrators”); Goldman, *supra* note 17, at 416. *But see* Erb, *supra* note 176, at 260 (arguing school authority over off-campus internet speech should be expanded so schools can deal with the problem of cyberbullying); Servance, *supra* note 176, at 1213-16, 1238-44 (making the same argument as Erb).

302. See, e.g., Papandrea, *supra* note 2, at 1098-99.

303. E.g., Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 286.

304. See Goldman, *supra* note 17, at 414; Heidlage, *supra* note 153, at 592-93; *supra* Part II.A.

off-campus speech if other students bring it to school or disrupt class by discussing it instead of doing their classwork.³⁰⁵

Even speech that does not include social and political commentary—speech that is not at the core of what the First Amendment protects—may still have significant social utility.³⁰⁶ There is a benefit to students learning to freely express themselves in the world outside of school.³⁰⁷ If instant messages sent off campus to a small group of friends can lead to discipline at school, students may feel constrained in confiding with their close friends.³⁰⁸ Young people so often communicate via the internet and electronic messages today that this could significantly inhibit communication.³⁰⁹

Furthermore, even pure venting of frustrations appears to have value. Some suggest that it makes it less likely students will act out in more destructive ways.³¹⁰ In any case, venting frustrations is an important way that people share their thoughts and feelings with others and realize that they are not alone in having those feelings. This is an important coping mechanism for everyone, no less teenagers struggling with the challenges of adolescence. Given that they spend so much time in school where their right to free speech is limited, it is important that, as stated by the *Thomas* court, “the student is free to speak his mind when the school day ends” (subject, of course, to the restrictions placed on speech by parents and the criminal and civil justice system).³¹¹

Since *Tinker* is designed to prevent on-campus disruption, it does not take much account for the content of the speech or intent of the speaker—if the speech causes substantial disruption, it can generally be regulated by the school.³¹² While this may be appropriate for on-campus speech because it is

305. See Goldman, *supra* note 17, at 414; Brenton, *supra* note 217, at 1230.

306. See Goldman, *supra* note 17, at 414; Heidlage, *supra* note 153, at 592-93.

307. See Goldman, *supra* note 17, at 414; Heidlage, *supra* note 153, at 592-93.

308. See Goldman, *supra* note 17, at 414; Heidlage, *supra* note 153, at 592-93.

309. See Hoder, *supra* note 17, at 1600 (suggesting that current law inhibits communication by sending the message that the only way to avoid school discipline is to avoid internet speech altogether).

310. See, e.g., Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252, 282-85 (arguing that free speech for students outside of school functions as a “safety-valve,” or a “non-violent and passive method of blowing off steam”).

311. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979); see Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252, 282-85.

312. See Papandrea, *supra* note 2, at 1093. The Court and some commentators have pointed out that the content of speech may matter under the *Tinker* analysis and that political speech will receive greater protection than types of speech that do not go to the core of what the First Amendment protects. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507-08 (1969) (noting that the case only presented an issue concerning regulation of “direct, primary First Amendment rights akin to pure speech” (internal quotation marks omitted)); Cordes, *supra* note 132, at 660, 701-04; Erb, *supra* note 176, at 285 (citing Morse

an important state interest to have a disruption-free environment at school, it is not an appropriate standard outside of that setting.³¹³ The *Thomas* court provides an illustrative example of the danger of regulating off-campus speech through a hypothetical situation involving a student-written editorial in the *New York Times* criticizing his school and its administration.³¹⁴ Assume that the student intended his article to have an impact at school, that he really hoped someone would bring it to school but did not take any action to bring this about, that another student brought it to school, and that many students disrupted class when this happened by talking about the article. It is possible that *Tinker* could be applied to uphold school discipline for the student who wrote the article under all of the following tests: a reasonable foreseeability approach, a sufficient nexus test simply requiring the speech to reach campus (like that in *Killion*), a sufficient nexus test based on intent (like that proposed by Ellison), or an approach requiring that speech be directed at the school.³¹⁵ The article could be considered directed at school administrators, and the student did intend his article to have an impact on the school (and even intended that it actually be brought to school). The article did reach school, and it was reasonably foreseeable that it would come to the attention of school administrators and cause students to discuss the article at school.³¹⁶ Nevertheless, disciplining the student for such speech would chill valuable social and political commentary.³¹⁷

v. Frederick, 551 U.S. 393, 396, 422 (2007) (Alito, J., concurring)). The main analysis in *Tinker* is centered on whether substantial disruption occurred, though, and political speech is not necessarily immune from regulation under *Tinker*. See *Tinker*, 393 U.S. at 513-14 (holding that the political speech at issue—wearing armbands at school as a form of silent protest against the war in Vietnam—was protected because it did not cause substantial disruption and, therefore, implying that such speech could be regulated if it did cause substantial disruption); Goldman, *supra* note 17, at 414.

313. See Papandrea, *supra* note 2, at 1093.

314. See *Thomas*, 607 F.2d at 1053 n.18. Other commentators have also invoked the student-written newspaper article example. See, e.g., Papandrea, *supra* note 2, at 1092.

315. See *supra* Parts IV.B.1.b-d.

316. See *supra* Parts IV.B.1.b-d.

317. See Papandrea, *supra* note 2, at 1093. Papandrea points out that almost any off-campus speech could distract students from their work at school stating:

Students may be just as distracted by the new Harry Potter book or X-Man movie or an episode of *Gossip Girl* or a new video game or a new website as they will be by the message someone has posted on their social networking site. These other cultural influences could also have a much more profound educational effect on the students than someone's e-mail icon or website. It would be unthinkable to permit school officials to control their students' access to television shows, movies, public libraries, and other materials on the Internet.

Id.

iii. Properly Limit School Authority and Maintain View of Schools as Educational Institutions

School boards are elected for the limited purpose of running schools to achieve an educational mission.³¹⁸ Allowing school administrators to regulate off-campus speech intrudes upon the authority that parents, democratically-elected state and local officials, courts, and law enforcement officials have over activity occurring outside of school.³¹⁹

Limiting school authority to discipline off-campus student speech also teaches students an important lesson: different standards for speech and conduct exist in different places, so people must adjust their behavior and speech accordingly.³²⁰ It can only be beneficial to the educational mission of schools for students to realize that they must speak and act according to different standards at school than outside of school.³²¹

Finally, limiting school authority also benefits schools to the extent that it allows educators to be seen more as educators at school and fellow human beings outside of school, and less as community disciplinarians imposing school standards of speech and conduct on students wherever they go.³²² Given the nature of our system of compulsory education, it is already all too easy for students to take oppositional stances toward educators as authority figures who have so much power over their lives at school.³²³ Keeping educators out of the business of policing student speech outside of school should at least help educators to be seen more as fulfilling an educational mission instead.³²⁴

318. See Caplan, *supra* note 153, at 145.

319. See *Thomas*, 607 F.2d at 1051 & n.15, 1053 n.18; Caplan, *supra* note 153, at 145.

320. Brenton, *supra* note 217, at 1240-41.

321. See *id.*

322. See Goldman, *supra* note 17, at 416. Goldman argues that [l]eaving discipline to parents and the judicial process also has the advantage of keeping schools institutions of learning as opposed to penal institutions. If schools start policing and punishing off-campus speech, students' views of schools, teachers, and administrators may be altered in a manner that interferes with the learning process itself.

Id.

323. See *id.*

324. See *id.*; see also Heidlage, *supra* note 153, at 589-94 (suggesting that schools in a democratic society should allow freedom of speech as a way of exposing students to democratic norms and values).

3. *Proposed Rule: Off-Campus Speech May Only Be Treated as On-Campus Speech When It Is Communicated on Campus or Under School Supervision*

Given the fact that there are good alternatives to maintain a disruption-free environment at school that do not involve regulating off-campus internet speech, the fact that such speech is potentially beneficial, and the proposition that limiting school authority is a good idea, it is best not to allow schools to apply *Tinker* to exercise authority over speech that occurs off campus. Even though most scholars agree with this approach, significant disagreement remains over when internet speech should be considered on campus so that it falls within school authority under *Tinker*.³²⁵

Luckily, the rule that should govern this situation is relatively simple and clear: courts should only apply *Tinker* to internet speech that was originally created or transmitted from an off-campus location when the speech is intentionally (re)communicated by its originator while he or she is on campus or under school supervision.³²⁶ Only the content that is intentionally communicated on campus by its originator, and not the entire content of the off-campus website or email, should be considered on-campus speech.³²⁷

Despite the simplicity of this rule, it is true that in some cases, it will be difficult to determine whether off-campus speech was communicated on campus. This is because it may be debatable whether a student engaged in *speech* communicating certain content or *conduct*. Conduct alone would not subject a student to school discipline for the content of off-campus speech, but it could subject the student to discipline for the conduct itself. In these difficult cases, courts should apply the U.S. Supreme Court test for communicative conduct from *Spence v. Washington* to determine if a student engaged in conduct communicating the content of off-campus internet speech.³²⁸ According to the two-pronged *Spence* test, communicative con-

325. See *supra* Part IV.B.1.f; *infra* Parts IV.B.4.a-b.

326. See Goldman, *supra* note 17, at 425. Goldman suggests a similar distinction between speech that is communicated on campus and speech that is not communicated on campus. See *id.* As described below, this Comment differs in that it explicitly proposes application of the *Spence* test to provide a more solid theoretical framework and rule to achieve a similar result. The rule proposed by this Comment would also achieve different results in certain specific situations. For example, Goldman proposes allowing schools to discipline students who create websites off campus and then tell others to access them at school, Goldman, *supra* note 17, at 424, which would not be allowed under the rule proposed by this Comment. See *infra* Part IV.B.4.a.

327. This is consistent with the principle articulated by some courts that a student cannot be disciplined solely for content in his or her off-campus website that school officials do not like. See, e.g., *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 800-01 (N.D. Ohio 2002).

328. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

duct occurs when “[1] intent to convey a particularized message [is] present, and [2] in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view[] it.”³²⁹ As demonstrated below through application of this proposed rule to specific situations schools will face in the future, this approach provides a clear and logical way for courts to decide cases involving off-campus internet speech that properly protects student speech without threatening the educational mission of schools.

4. *Application of the Proposed Communicated-on-Campus Rule to Specific Scenarios*

*i. A Website Created off Campus but Accessed on Campus*³³⁰

This is quickly becoming a classic scenario faced by courts.³³¹ A student should never be disciplined under *Tinker* for the content of his or her website simply because another student accesses it on campus because, in such a case, the student who created the website did not communicate any of its content on campus.³³² This is true even if the student who created the

329. *Id.*

330. The analysis in this Subpart should also be applied in cases where the content of a website is distributed on campus in a way other than through access of a website. This might occur if a student brought printouts of their website to school. *See, e.g., Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448-49, 455 (W.D. Pa. 2001). The issue with respect to disciplining a student for the content of the website created off campus should still be the extent to which it was communicated. A school could discipline the student who actually distributed the material at school for his or her on-campus conduct even if it cannot discipline the student who created the speech at home. *See supra* Part IV.B.3.a. A school may be allowed to apply school rules that discipline the student simply for the *conduct* of bringing the material to school (assuming the school can legally ban that type of conduct) even if the speech content of it was not communicated, as long as the school disciplines the student only for the conduct and not for any of his or her off-campus speech.

331. *See, e.g., J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850-52 (Pa. 2002).

332. A special case might arise when a student creates a website that serves as a forum for other students to post comments. *See* Caplan, *supra* note 153, at 163-78. The same principle applies to this situation, though—a student should not be held responsible for the posts of others, and a student should not be subject to discipline for the off-campus content of their website simply because another student makes a post to the website on campus. *See id.* at 163. An interesting exception could apply if a student was, privately without showing or communicating the website to others, editing posts other students made to his or her website at school. *See id.* at 163-78. Under this Comment's approach, though, the student still probably could not be held responsible for the content of another student's post unless, by editing the post, he or she intended to communicate a message in accord with the post that others would be likely to understand. An editor usually does not intend to actually communicate the content of the document he or she is editing, but rather a different message about his or her own website, so only the latter could be considered as intentionally commu-

website told or encouraged the other student to access the website on campus since it was still the other student who made the choice to bring the content on campus.³³³ Therefore, let us assume going forward that the student who created the website was the one who accessed it at school.

The first question in such a situation should always be whether the student was disciplined for the content of his or her off-campus website or for his or her conduct in accessing the website. A school is always within its authority to impose reasonable time, place, and manner restrictions on on-campus activity.³³⁴ So, a school could, for example, implement a policy that only allows students to access the internet at certain times with proper permission, or only allows students to use school computers (rather than personal wireless devices) during the school day. Schools may discipline students for conduct that violates these policies as long as the discipline is not based on the content of an off-campus website.³³⁵ Additionally, schools may have AUPs that limit the websites students are allowed to access on school-owned computers or other school-owned electronic devices.³³⁶ A student may also be disciplined for violating valid AUPs provided he or she had appropriate notice of the policy and provided he or she was not disci-

minated on campus. *See id.* For example, a student who created a forum off campus and went on the site at school to edit a post containing what he viewed as inappropriate language for his site (and did so privately without showing the webpage to others at school) could not be held responsible for the language of the post, but only for the message that he intends his site not to have such language on it. *See* Caplan, *supra* note 153, at 163-78. Complicating things even more, however, it is possible that an editor or publisher could be held responsible for the content of publications over which he or she exercises editorial control and that this editorial control could be considered as on-campus communication if done on campus. *See id.* Ironing out the difficulties raised by this hypothetical situation is beyond the scope of this Comment.

333. This is a more speech-protective position than that taken by several other commentators who follow the geographic and temporal approach. These commentators would allow off-campus speech to be considered on-campus speech if the creator of an off-campus website encouraged others to access the site on campus. *See, e.g.,* Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53, 285; Goldman, *supra* note 17, at 423-25; Emrick, *supra* note 17, at 799, 805. Under this Comment's proposed approach, the only proper exception (other than the rare case in which this encouragement might somehow satisfy *Brandenburg* incitement to illegal activity) allowing the creator of the website to be disciplined when another student accesses and communicates the site on campus would be if the other student was the agent of the creator of the website. This could result, for example, if the creator of the website not only encouraged but paid the other student to communicate the contents of the website on campus, if the creator of the website was the employer of the other student (and accessing the website at school was within the scope of employment), or if both students were co-conspirators acting in furtherance of a criminal conspiracy.

334. *See supra* Part IV.B.2.a.

335. *See supra* Part IV.B.2.a.

336. *See supra* Part IV.B.2.a.

plined for the content of his or her website.³³⁷ It is possible that in the future, courts will have to deal with this scenario less frequently as schools learn how to implement AUPs, ban the use of private wireless electronic devices during the school day, and use filtering software on school computers to limit student access to potentially disruptive websites during the school day.³³⁸

Assuming that the student's conduct of accessing the website was not prohibited by a school policy functioning as a valid time, place, or manner restriction, and that the school wanted to discipline him or her based on the content of his or her website, the next question would be whether the student communicated the content of his or her website while on campus. It is possible a student might access a website with the intent that that action itself communicate a particular message to another student (but in most cases, there would need to be more evidence of a gesture or speech that made it clear that the student was attempting to show or communicate the website accessed to another student).³³⁹ The message intended could be related to the content of the website (e.g., a student wishes to show another student words or images contained on the website) or unrelated to the content of the website (e.g., a student only wishes to show another student that he is accessing the internet during school even though his parents told him not to). A school could not discipline the student for the content of his or her website if the student did not intend to communicate a message related to the content of the website. If, however, the student did intend to communicate words or images on the website to another student, and it was likely that the other student would understand the message conveyed, the student's actions should be considered communicative conduct that satisfies

337. See *supra* Part IV.B.2.a.

338. See *supra* Part IV.B.2.a.

339. This approach is consistent with the more stringent geographic and temporal approach that requires more than simply accessing a website to transform its contents from off-campus speech into on-campus speech. Where some commentators have argued that a student must access his or her website and show it to other students, this Comment argues that he or she must access the website and communicate it in a way that satisfies the *Spence* test. This Comment's approach is very similar to these approaches with very subtle differences. See, e.g., Hoder, *supra* note 17, at 1594-95 (suggesting that accessing a website created outside of school supervision and showing it to other students would make it speech under school supervision and control). See also Goldman, *supra* note 17, at 423-25 (suggesting the same as Hoder except going further to suggest a distinction between speech that was communicated and speech that was not communicated on campus—this approach is essentially the same as this Comment's except for the application of the *Spence* test). This Comment's approach differs from those who take the geographic and temporal approach but suggest that accessing an off-campus website on campus is sufficient to transform the speech into on-campus speech. See, e.g., Calvert, *Off-Campus Speech, On-Campus Punishment*, *supra* note 139, at 252-53, 285; Emrick, *supra* note 17, at 799, 805.

the *Spence* test.³⁴⁰ In such a case, the school could apply *Tinker* to the content of the website that the student communicated. It is important to note that all of the contents of the website do not then become transformed from off-campus speech to on-campus speech. Only the contents of the website that the student communicated (or attempted to communicate), as defined in *Spence*, may then be treated as on-campus speech subject to *Tinker* and *Fraser*.³⁴¹ After establishing the speech was on campus, the school would be allowed to discipline the student if the on-campus speech was lewd, vulgar, or indecent, or if it caused (or could reasonably be forecast to cause) substantial disruption to school activities.

ii. *Electronic Communication Created and/or Transmitted While at School*

This situation might arise if a student, while at school and under school supervision, sent a text message, an instant message, or an email; posted a comment to any website; or accessed a website that he or she created off campus to change its content (assuming that the school wanted to discipline the student for the content of his or her message, comment, or website).³⁴² The key issue would be whether the off-campus content was intentionally communicated on campus.³⁴³ Generally, all of this activity involves on-campus communication. When a student at school sends (i.e.,

340. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

341. Note that once the speech is (re)communicated and becomes on-campus speech, it should be subject to all student speech precedents including *Fraser* as well as *Tinker*.

342. Being under school supervision is necessary because *Tinker* would not apply if the student was on school property but not under school supervision. This might occur if the school opened a public forum where community groups were allowed to use school facilities on weekends for certain events and a student was attending such an event. Also note that school discipline for a reason other than the content of the message, comment, or website could be possible. The same analysis as to whether the school was disciplining a student for off-campus speech or for violating a time, place, and manner restriction banning use of certain electronic devices during school hours, or an AUP, as was applied in Part IV.B.4.a *supra* would apply in such a situation.

343. Several commentators advocating a geographic and temporal approach appear to take similar positions as this Comment on this particular issue of emails and texts sent while at school. See Goldman, *supra* note 17, at 423-45 (arguing that such communications should be considered under school supervision because they are “created and received instantaneously”); Papandrea, *supra* note 2, at 1091 (arguing that a text sent during school hours should be considered on-campus speech); Emrick, *supra* note 17, at 799 (suggesting such speech occurring during school hours would be considered on campus only if it was communicated). At least one commentator who supports the geographic and temporal approach holds a less speech-protective position on this particular issue, though. See Hoder, *supra* note 17, at 1594-95 (suggesting that creating the speech while under school supervision might be enough to make the speech on campus even if it was not transmitted or communicated).

transmits) an email, text message, or instant message, the student is attempting to communicate a message while under school supervision.³⁴⁴ The same is true when a student posts a comment to a website while under school supervision.³⁴⁵ In both cases, the student is attempting to communicate a message on campus even if the message is intended to be sent to someone who is off campus.

The situation becomes complicated when a student creates/types an email or text message off campus and sends it while under school supervision, or if a student creates such a message on campus and sends it while off campus. In the former case, the content of the student's message would be considered on campus because the transmission of the message, which itself constitutes communication, occurred on campus. If an email or text message was created on campus but not sent until after a student left campus, however, it would not have been communicated on campus.³⁴⁶ Therefore, its content should not be subject to *Tinker* or *Fraser*.³⁴⁷

The case of a student accessing his or her own website at school to make changes to it presents an interesting issue. Caplan suggests that the content of a website should not be considered on-campus speech simply because a student accesses a website he or she created off campus to fix a typo.³⁴⁸ This Comment's approach would not allow the entire content of the website to be considered on-campus speech in such a case, but it would not rule out that the message communicated through the change in the website might be considered on-campus speech. The key question would be whether the change to the website was intended to communicate a particular message related to the content of the off-campus website that others would be likely to understand.³⁴⁹

344. See *supra* Part IV.B.3.

345. See *supra* Part IV.B.3.

346. Most commentators do not specifically address the difference between creating and transmitting emails, texts, and instant messages. See, e.g., Papandrea, *supra* note 2, at 1091 (discussing only "send[ing]" texts). Some commentators appear to support the approach advocated by this Comment, though, by using language suggesting such electronic messages must be *communicated*, rather than just created, under school supervision for the content of the speech to be considered under school supervision. See Goldman, *supra* note 17, at 425; Emrick, *supra* note 17, at 799. Others suggest that creating the speech under school supervision is enough to consider the speech as under school supervision even if it was not actually communicated while under school supervision. See, e.g., Hoder, *supra* note 17, at 1594-95.

347. However, it is possible that other school policies might apply here since an unsent text message is essentially like a note that was written but not passed yet. See Goldman, *supra* note 17, at 425 (making the analogy between electronic communications and printed notes). Writing a note instead of paying attention during class is *conduct* that can be disciplined.

348. Caplan, *supra* note 153, at 152-53.

349. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

Generally, when someone makes changes to a website, they intend to make a change to the message they are communicating. Changing the content of a website is a form of communication that happens instantly so that a student who is making such a change should usually be considered to have communicated a message related to the content of the website on campus.³⁵⁰

If a student just fixes a typo, however, it is possible this would not change the content of the message in any way that would be likely to be understood by others.³⁵¹ The only message might be that the student wishes to use proper spelling and grammar on his or her website, which would probably be a message that was unrelated to the content of the website. Even if the message was related to the content, fixing a typo would probably have so little impact on the message of the website that very little of its off-campus content would actually be communicated on campus; therefore, very little of it could be treated as on-campus speech. On the other hand, it is possible, though unlikely, that changing a typo could have a significant impact on the message by changing one word into another word and completely changing the content of the website. In such a case, the content of the off-campus website should be considered as being communicated on campus and should be subject to *Tinker* and *Fraser*; but again, only the part of the website that was communicated through the alteration to its content should be considered on campus.³⁵²

iii. *Sending an Email from off Campus to a School Email Account or Posting Content to a School-Sponsored Website from off Campus*

The content of a post to a school-sponsored website should fall under *Kuhlmeier* as speech in a school-sponsored publication, which is subject to the highest level of school regulation of any form of speech.³⁵³ School-sponsored websites should include course websites, such as a class Blackboard page.³⁵⁴ A school email account should also be considered a school-sponsored website. School speech rules including *Tinker* and *Fraser* should, therefore, apply to allow students to be disciplined for the content of their speech in emails sent either to or from school email accounts.³⁵⁵

350. See Goldman, *supra* note 17, at 425.

351. This would not satisfy the second prong of the *Spence* test, so in such a case, the speech should be considered off campus. See *Spence*, 418 U.S. at 410-11.

352. See *supra* Part IV.B.3.

353. See *supra* Part III.B.

354. See *supra* Part III.B.

355. Some courts and commentators have reached this result by suggesting that off-campus internet speech “directed at” school staff could be disciplined under *Tinker*. See *supra* Part IV.B.1. That is different than the approach advocated by this Comment, which

This issue would most likely come up if a student sent a lewd, vulgar, indecent, threatening, or disruptive message to a teacher at his or her school email account (or to a fellow student at his or her school email account). This conduct should be subject to discipline even if it does not rise to the level of harassment, and even if it does not disrupt school.

iv. Speech Created While Using a School Laptop from an Off-Campus Location

Today, schools are increasingly providing students laptops to complete school-related assignments. Some schools now allow students to take school laptops home. This makes it increasingly likely that a case will arise where a school seeks to discipline a student for speech the student created or transmitted using a school laptop from home. This presents an interesting scenario that may be challenging for courts to decide.

First, it is worth noting that schools may use AUPs to restrict student use of school laptops.³⁵⁶ Schools can implement AUPs prohibiting students from using school laptops for anything other than doing schoolwork, and/or schools can prohibit students from using school laptops to access certain websites or transmit personal messages.³⁵⁷ If a student with proper notice of an AUP chooses to violate the AUP, a school can always discipline the student for the conduct of violating the AUP.³⁵⁸

But, what if a school wants to discipline a student for the content of speech created or transmitted on a school laptop from an off-campus location? Arguably, the school has no need to extend its reach over this kind of off-campus speech. After all, the school has sole control over whether it allows students to take school laptops home. It can end this practice if it judges the risks outweigh the benefits. Further, the school has the option of disciplining students for violating AUPs, which may be grounds for termination of a student's laptop privileges.³⁵⁹ Given this, it seems unnecessary to allow schools to also discipline students for the speech.

On the other hand, arguably courts should treat student activity on laptops at home the same as student activity on computers at school.³⁶⁰ The

only allows regulation of emails sent off campus if they are sent through a school email account. The former approach allows off-campus speech to be restricted and could throw a wide net over other forms of speech, *see supra* Parts IV.B.1-2, while this Comment's approach only allows emails to or from school email accounts to be regulated because these emails occur in a school-sponsored website.

356. *See supra* Part IV.B.2.a.

357. *See supra* Part IV.B.2.a.

358. *See supra* Part IV.B.2.a.

359. *See supra* Part IV.B.2.a.

360. *See supra* Parts IV.B.4.a-b.

school laptop could be treated like a miniature, mobile campus so that all student activity on the laptop is on-campus activity wherever it occurs. Arguably, school restrictions on student speech with school laptops would not significantly restrict student speech rights because students may easily avoid school regulation by using their own computers, computers at a public library, or some other means of communicating the same message that does not involve use of school laptops.

This Comment's approach admittedly does not clearly resolve this question, but it does provide some guidance. At most, student speech on school laptops could only be subject to discipline to the same extent as student speech on on-campus computers would be.³⁶¹ As discussed above, under this Comment's approach, a student could not be disciplined for the content of an off-campus email or website for simply accessing the email or website on a school computer on campus if the student did not also intentionally communicate the content of that email or website while on campus.³⁶² Similarly, an email or text message that a student typed/created while on campus, but transmitted while off campus, would not be considered on-campus speech. The same rule would have to apply as a limitation against school authority over speech *created* (but not transmitted) using school laptops.³⁶³ This means that a student would only be subject to discipline for speech they *created* using a school laptop if they then communicated the content of that speech on campus.³⁶⁴

Speech that is not just created but actually *transmitted* by a student using a school laptop from an off-campus location might be treated differently. As noted above, emails and other communications that are transmitted from an on-campus location would be subject to school speech restrictions because transmitting internet speech from on campus is communicating a message on campus.³⁶⁵ If a laptop is just a portable piece of the school campus, arguably any online communications a student actually sends using the laptop would be subject to school speech precedents.³⁶⁶ This is one of the few cases where differences between a geographic approach and a temporal approach might make a substantive difference in the outcome. Ultimately, school authority is best viewed as limited in space *and* time.³⁶⁷ This may suggest that the best policy is to not allow schools to apply school speech precedents to govern speech students transmit using school laptops from an off-campus location. To do so would appear to improperly extend

361. See *supra* Parts IV.B.4.a-b.

362. See *supra* Parts IV.B.4.a-b.

363. See *supra* Parts IV.B.4.a-b.

364. See *supra* Parts IV.B.4.a-b.

365. See *supra* Parts IV.B.4.a-b.

366. See *supra* Parts IV.B.4.a-b.

367. See *supra* Part IV.B.1.f.

school jurisdiction in both space and time so that it would truly be left without definable limits. Additionally, it would encourage schools to engage in investigations regarding student speech that takes place after the school day is over, which could intrude into student privacy and chill student speech.³⁶⁸

v. Inciting Substantial Disruption from an Off-Campus Location

The *Thomas* court issued an important holding in defense of students' right to free speech while off campus.³⁶⁹ The court persuasively demonstrated the importance of protecting student speech, and stated:

When school officials are authorized to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.³⁷⁰

In an oft-cited footnote to the same paragraph quoted here, the *Thomas* court, in an apparent act of judicial discretion, stated: "We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale. We need not, however, address this scenario"³⁷¹ As a final example, I address this scenario.

To start, it is important to note that *Brandenburg* would apply to make speech unprotected under the full First Amendment standard if a student was inciting imminent *illegal* activity of a serious nature.³⁷² This should cover a situation where a student incites other students to engage in violence, or other illegal activity of a serious nature, at school.³⁷³ Some commentators have suggested that a modified version of *Brandenburg* with a

368. Cf. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045, 1052-53 (2d Cir. 1979) ("When school officials are authorized to punish speech on school property, the student is free to speak his mind when the school day ends. . . . Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.").

369. See *id.*

370. *Id.* at 1052.

371. *Id.* at 1052 n.17.

372. See *supra* Part II.B.2.

373. See *supra* Part II.B.2.

relaxed imminence requirement might apply to cases involving school speech, or to cases involving internet speech.³⁷⁴ Assuming *Brandenburg* without these alterations, however, applying the same rule proposed in Part IV.A for the true threat analysis to *Brandenburg* cases would result in schools at least being able to discipline students who advocate imminent illegal activity that has a sufficient connection to the school.³⁷⁵

Whether *Tinker* should apply in this situation is a separate issue from how *Brandenburg* should be applied. The only reason to apply the student-speech standard in *Tinker* (instead of using a variant of *Brandenburg*) would be to prevent students from inciting *disruptive* activity that was not also *criminal* activity.³⁷⁶

Despite all of the technological advances in the thirty years since *Thomas* was decided (which would seem to increase the likelihood that students would be able to use technology to incite disruption from off campus), it appears that no court has decided a case requiring it to address the issue of students using communications technology to incite substantially disruptive activity from off campus that was not covered under *Brandenburg*. In reality, the case of a student using internet speech to incite other students to disrupt school from an off-campus location is unlikely to become a problem for schools because of the control schools are properly allowed to exercise over the on-campus school environment.³⁷⁷ Additionally, schools can always discipline any student who actually causes disruption on campus to deal with the problem instead of disciplining a student who “incited” other students to be disruptive through a post to Facebook, for example.³⁷⁸ Although some have suggested applying *Tinker* to off-campus student speech due to fear of students inciting substantial disruption via the

374. In his dissent in *Morse*, Justice Stevens suggested that he might consider applying *Brandenburg* with a watered down imminence requirement in on-campus cases involving school discipline. See *Morse v. Frederick*, 551 U.S. 393, 439 (2007) (Stevens, J., dissenting). Caplan appears to have suggested that courts might apply a version of *Brandenburg* covering disruptive activity rather than only illegal activity. See *supra* notes 265-66 and accompanying text. The test as he describes it appears to leave out an imminence requirement. See *supra* notes 265-66 and accompanying text. At least one commentator discussing speech outside of the school context has suggested internet speech could never satisfy the imminence requirement of *Brandenburg* because posting something on a website can never incite illegal conduct that could be properly considered imminent due to uncertainty about when viewers would actually see the posted speech. See John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428 (2002). He proposed relaxing the *Brandenburg* requirements to create a suitable standard for internet speech. See *id.* at 455.

375. See *supra* Part IV.A.

376. See *supra* Parts II.B.2., III.A.

377. See *supra* Part IV.B.2.a.

378. See *supra* Part IV.B.2.a.

internet from off campus, it appears this is simply unnecessary.³⁷⁹ Furthermore, extending *Tinker* to this type of off-campus speech would have a similar chilling effect on potentially beneficial student speech as the other applications of *Tinker* to off-campus speech discussed above.³⁸⁰ Therefore, only a full First Amendment standard such as *Brandenburg* or *Watts*, and not a school speech precedent, should apply in such a situation.

V. CONCLUSION

Given the proliferation of online speech, the issue of whether, and to what extent, schools can discipline students for off-campus internet speech is likely to be raised with even greater frequency in the future. Two major challenges are likely to present themselves going forward. The first involves dealing with threatening speech in a way that maximizes school safety without setting a precedent that extends school authority unnecessarily beyond the schoolhouse gates. Most courts today do not consider whether schools have authority over the speech when applying the true threat doctrine. This is problematic because it fails to limit school authority and could result in schools gaining increasing power to regulate off-campus speech and conduct that should, instead, fall under the authority of parents and the local community. An approach that requires some connection between the school and the true threat, such as a sufficient nexus, would place appropriate limits on school authority without decreasing safety. This simple test is the best change that should be made in this area since it would allow schools to discipline students for off-campus threats involving the school or school staff without allowing schools to discipline students who engage in off-campus threatening conduct that is unrelated to the school. Schools could suspend or expel students who make threats against the school in the interest of protecting the school if it became necessary. And the mission of public schools to educate all children, even those who have made mistakes in their lives outside of school, would remain intact by leaving children who make off-campus threats unrelated to the school to be dealt with by parents and police only.

The second challenge presented by the regulation of off-campus internet speech involves speech that does not pose any serious threat and would be protected outside of the school context but that may have disruptive potential or seem lewd, vulgar, or offensive to some. Fortunately, off-campus internet speech is unlikely to pose a major threat to schools' ability to maintain discipline since schools are properly allowed to implement a multitude of measures to maintain a disruption-free environment at school. These

379. See *supra* Part IV.B.2.a.

380. See *supra* Part IV.B.2.b.

measures make it unlikely that internet speech will penetrate schools in a way that has a significant impact on school activities. Given this and the fact that free speech rights for students using the internet off campus may be beneficial to American society in many ways, it is important that students' right to free speech off campus be protected. Therefore, school speech precedents such as *Tinker* and *Fraser* should not be applied to off-campus internet speech, which should instead be governed only by the full First Amendment standard. But, due to the complexities of internet communications, this does not resolve the issue. It is also important that the distinction between on- and off-campus speech be properly made in order to ensure appropriate protection for student internet speech. In order to promote clarity and to offer a more speech-protective standard, this Comment proposes that student off-campus internet speech should only be treated as on-campus speech when it is intentionally (re)communicated on campus by its originator, and that the *Spence* test be used as a way to determine if off-campus content has been communicated on campus. It also proposes how this method could be applied to increase clarity and properly protect speech in specific situations that frequently arise. This approach appears to be the best way to balance the need to establish a disruption-free environment in schools with the fundamental right of freedom of speech, a right that all should be allowed to enjoy without excessive state interference.

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