

**ENOUGH TINKERING WITH STUDENTS' RIGHTS:
THE NEED FOR AN ENHANCED FIRST AMENDMENT
STANDARD TO PROTECT OFF-CAMPUS STUDENT
INTERNET SPEECH**
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INTRODUCTION

“The students, all girls, were made to remove the remarks from their Internet diaries, or blogs, and suspended [from their school] for three days last month.”¹ This punishment resulted from three students, acting like typical teenagers, deciding to “flame” their teacher online.² The offending

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¹ Sandra Davie and Liaw Wy-Cin, *Schools Act Against Students for ‘Flaming’ Teachers on Blogs*, ASIA MEDIA, Sept. 27, 2005, <http://www.asiamedia.ucla.edu/article-southeastasia.asp?parentid=30494>. “A blog (an abridgment of the term web log) is a website, usually maintained by an individual, with regular entries of commentary, descriptions of events, or other material such as graphics or video.” Wikipedia, *Blog*, <http://en.wikipedia.org/wiki/Blog> (as of May 22, 2008 18:21). The content of a blog may range in scope from personal online diaries to news, media programs, and corporations. *Id.*

² Davie and Wy-Cin, *supra* note 1. “Flaming is the hostile and insulting interaction between Internet users. Flaming usually occurs in the social context of a discussion board, Internet Relay Chat (IRC) or even through e-mail [or blog].” Wikipedia, *Flaming (Internet)*, http://en.wikipedia.org/wiki/Flaming_%28Internet%29 (as of May. 22, 2008, 00:21 GMT).

An Internet user typically generates a flame response to other posts or users posting on a site, and such a response is usually not constructive, does not clarify a discussion, and does not persuade others. Sometimes, flammers attempt to assert their authority, or establish a position of superiority over other users. Other times, a flamer is simply an individual who believes he or she carries the only valid opinion. This leads him or her to personally attack those who disagree. Occasionally, flammers wish to upset and offend other members of the forum, in which case they can be called “trolls”. Most often however, flames are angry or insulting messages transmitted by people who have strong feelings about a subject.

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comments include calling the teacher a “‘prude’ for disciplining a student for wearing a too-short skirt and a [f]rustrated old spinster [who c]an’t stand to see attractive girls.”³ With increasing frequency, school districts in the United States seek to punish its students for Internet speech that is no more offensive than the comments listed above.⁴ What may surprise some is that the United States seems to offer no greater student Internet speech protection than Singapore, the location of the events described above.

The Internet is an invaluable source; it can provide information and opinions instantly to a worldwide audience.⁵ Fortunately (or unfortunately), it is also a forum by which public school students can vent their personal animosity towards students, teachers, or school administrators.⁶ In fact, a student-based forum to lampoon or harass school members can be created by the student in one to two minutes.⁷ Despite this small time commitment by the student, the effects of speech broadcasted

Some equate flaming with simply letting off steam, though the receiving party may be less than pleased. Similarly, a normal, non-flame message may have elements of a flame—it may be hostile, for example—but it is not a flame if its author seriously intends to advance the discussion.

Id.

³ Davie and Wy-Cin, *supra* note 1.

⁴ See STUDENT PRESS LAW CENTER, SPLC GUIDE TO OFF-CAMPUS WEB SITES, (2004) <http://www.splc.org/legalresearch.asp?id=74>. See also David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Rights, Fear of the Internet, and Columbine*, 2000 L. REV. M.S.U.-D.C.L. 199, 206 (2000) (stating that government’s initial censorship of emerging media is a common theme throughout history, tracing back to the first censorship bureaus created in wake of Guttenberg’s printing press).

⁵ It is estimated that the Internet is growing at a 50% annual rate and close to 100% of public schools in the United States have internet access. Martha M. McCarthy, *Internet Censorship: Values in Conflict*, 183 EDUC. LAW. REP. 299 (2004).

⁶ For an example of such non-constructive criticism of school officials and students, see Justin Neal’s website, GREENTREE, <http://web.archive.org/web/20050504093830/http://www.angelfire.com/comics/greentree/comic.htm> (last visited May 16, 2008). After creating this website, Neal was suspended by his school. See *Neal v. Efurd*, Civ. No. 04-2195 (W.D. Ark. Feb. 18, 2005). Neal sought the aid of the courts and his suspension was eventually overturned. *Id.* at 28.

⁷ I created my own “Blog,” Markey’s Manifesto in approximately two minutes. This monumental achievement in student speech can be found at <http://justinmarkey.blogspot.com> (last visited May 16, 2008).

through the Internet can be both devastating and long-term.⁸ Accordingly, school districts frequently seek to punish its students under the school discipline code for their off-campus Internet speech.⁹ Once the school district levies punishment, the student may seek the aid of the courts to vindicate their First Amendment rights by overturning the punishment.¹⁰

⁸ These effects include emotional and psychological harm to teachers, students, and administration, and potential and actual disruptions during school. See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416–17 (Pa. Commw. Ct. 2000) (discussing the emotional and psychological harm to teacher and principal of J.S.); Sandy Coleman, *Battling the Web's Dark Side: Schools Balance Student Rights, Rules in Incidents on Net*, BOSTON GLOBE, Mar. 27, 2000, at B1 (discussing five Massachusetts high school students who created a website to label fellow students as hated or anorexic) (cited in Alexander G. Tuneski, Note, *Online, Not On Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 144 (2003)); John G. Seminski, Note, *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 170 (2001) (“In addition to murderous rampages, extreme criticism, and falsified stories, rumors and defamation have also leaped to the forefront of Internet-related discipline issues.”).

⁹ See Hudson, *supra* note 4, at 209. This phenomenon affects both private and public schools. See Kyle McCarthy, *Principal Bans Students from Using Online Personal Profiles, Blogs*, SPLC NEWS FLASHES, Oct. 25, 2005, <http://www.splc.org/newsflash.asp?id=1107&year=2005> (discussing a private school principal's decision to suspend any student that does not erase “all personal profiles and blogs from the Internet”); STUDENT PRESS LAW CENTER, *Off-campus Web sites Endure Censorship*, SPLC REPORT, Winter 2004–2005, http://www.splc.org/report_detail.asp?id=1175&edition=34 (stating “four students were suspended in August after posting comic strips and comments about Greenwood High School on their personal Web sites. One was posted on www.angelfire.com, and the other was posted on Xanga, an independent journal site.”); April Hale, *High Schools Enacting Policies to Punish Students for Social Networking Sites Created Outside School*, SPLC REPORT, Winter 2006–2007, http://www.splc.org/report_detail.asp?id=1310&edition=41 (detailing efforts by public school officials in Indiana, Washington state, and New York City to author disciplinary policies for inappropriate student Internet postings made off-campus); STUDENT PRESS LAW CENTER, *Blogging Student Leader Sues Connecticut School District*, SPLC NEWS FLASHES, July 24, 2007, http://www.splc.org/newsflash_archives.asp?id=1585&year=2007 (detailing student's removal from student council office for off-campus blog posting in which she called school officials “douche bags.”).

¹⁰ As a threshold matter, the First Amendment only protects expression or conduct that a speaker intends to communicate and that is likely to be understood by the intended audience. See, e.g., *Jarman v. Williams*, 753 F.2d 76, 77 (8th Cir. 1985) (stating that social and recreational dance in public schools is not expression) (cited in NELDA H. CAMBRON-MCCABE, ET AL., *PUBLIC SCHOOL LAW, TEACHER'S AND STUDENT'S RIGHTS* 109 (5th ed. 2004)). Aside from the federal Constitutional claim, students may also sue under the State

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In these lawsuits, courts typically apply the *Tinker* standard of substantial and material disruption to the off-campus Internet speech to determine if the school district's punishment was justified.¹¹

In this paper, I hope to show that to adequately protect a student's First Amendment right to off-campus Internet speech, the *Tinker* standard of material and substantial disruption should only be applied to off-campus Internet speech when the student knowingly or recklessly distributes the speech on-campus. This limitation on the school's otherwise recognized authority to punish off-campus student conduct is justified by the value placed on off-campus student Internet speech under the First Amendment balancing test. Section I gives the background and current state of student speech rights.¹² Section II is an overview of recent court decisions litigating student's rights regarding off-campus Internet speech.¹³ Section III argues for the standard by which courts should judge off-campus Internet speech and the practical difficulties in applying the standard.¹⁴

I. CURRENT STATE OF STUDENT'S SPEECH RIGHTS

A. Supreme Court Precedents

The Supreme Court has never squarely addressed students' First Amendment rights in off-campus Internet speech. In fact, the Court has yet to define students' First Amendment rights in any form of off-campus speech.¹⁵ Nevertheless, the Supreme Court has addressed the First

Constitution or a State Freedom of Expression statute, enacted by several states. See Jennifer Kathleen Schwartz, Note, *Beyond the Schoolhouse Gates: Do Students Shed Their Constitutional Rights When Communicating to a Cyber-Audience*, 48 DRAKE L. REV. 587, 596–97 (2000) (discussing state freedom of expression statutes in Iowa and Massachusetts).

¹¹ See *infra* notes 91–108 and accompanying text (discussing the cases that apply the *Tinker* standard to off-campus student internet speech cases). However, as several sources indicate, school districts usually settle these cases because they do not want to chance the “fuzzy” precedents and publicity. See Seminski, *supra* note 8, at 176.

¹² See *infra* notes 15–86 and accompanying text.

¹³ See *infra* notes 87–117 and accompanying text.

¹⁴ See *infra* notes 111–60 and accompanying text.

¹⁵ The most recent opportunity for the Supreme Court to define off-campus speech came in *Morse v. Frederick*, 127 S Ct. 2618 (2007). In *Morse*, Joseph Frederick, a high school student from Juneau, Alaska, unfurled a fourteen foot banner across the street from the school with the words “BONG HITS 4 JESUS.” *Id.* at 2622. This act occurred while the 2002 Winter Olympic torch relay passed in front of the school. *Id.* The student argued that his case should not be analyzed within the traditional school speech framework because his expressive conduct ostensibly occurred off-campus. *Id.* at 2425. The Court rejected

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Amendment rights of public school students in on-campus speech and the status of the Internet as a protected public forum.¹⁶

The United States Supreme Court defined the First Amendment rights of public school students in a famous trilogy of cases: *Tinker v. Des Moines Independent Community School District*,¹⁷ *Bethel School District No. 403 v. Fraser*,¹⁸ and *Hazelwood School District v. Kuhlmeier*.¹⁹ While defining the general First Amendment rights of students, these cases also provide some clues into how the Court would view off-campus speech by students.

Although anxious teenagers would like to think otherwise, “the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings.”²⁰ In *Tinker*, the United States Supreme Court considered whether a public school violated the First Amendment for punishing its students for wearing black arm bands in protest of the Vietnam War.²¹ The Court held for the students and emphasized that “state-operated schools may not be enclaves of

Frederick’s argument and held that his conduct was school speech occurring on-campus because: the Olympic torch relay event was a school sponsored class trip during school hours, school teachers and other administrators were supervising the students, and Frederick unfurled his banner towards the school while standing amongst his fellow students. *Id.*

¹⁶ See *supra* notes 17–48 and accompanying text.

¹⁷ 393 U.S. 503, 514 (1969).

¹⁸ 478 U.S. 675, 685 (1986).

¹⁹ 484 U.S. 260, 272–73 (1988).

²⁰ *Bethel*, 478 U.S. at 682. Lower courts have clarified this statement by holding that what is reasonable speech and conduct for college students may not be reasonable for secondary school students. RONNA GREFF SCHNEIDER, *General Restrictions on Freedom of Speech in Schools*, in EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:3 (Supp. 2007).

²¹ *Tinker*, 393 U.S. at 504–05. The students wanted to publicize their opposition to the Vietnam War by both wearing the black armbands and by fasting on December 16 and New Year’s Eve. *Id.* at 504. The principals of the Des Moines schools learned of the plan on December 14th and adopted a policy for disciplining students wearing the arm band. *Id.* This policy stated that “any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.” *Id.* John Tinker wore his armband on December 17th and was suspended under the policy. *Id.*

totalitarianism . . . students are entitled to freedom of expression of their views.”²²

In spite of this affirmative protection of speech, a student’s speech may be punished if their speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others”²³ In addition, a school may preemptively punish student speech that school officials reasonably forecast may cause material and substantial disruption of work and discipline at the school.²⁴ However, the Court made clear that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”²⁵

For purposes of this paper, there are two important points to take from the *Tinker* case. First, the material and substantial disruption test is a compromise born out of the difficult balancing of two weighty interests.

²² *Id.* at 511. The Supreme Court held that the school administrators did not have reason to believe that wearing the armbands would substantially interfere with school work. *Id.* at 509.

²³ *Id.* The school district must “show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* The school district’s ability to punish is limited; blatant viewpoint discrimination by the school district violates the First Amendment. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (holding that university program requiring student to pay activities fee is permissible if done in a viewpoint neutral manner).

²⁴ *Tinker*, 393 U.S. at 509. For examples of what has been defined as a material or substantial disruption see Michael J. Waldman, *What Oral Statement of Student is Sufficiently Disruptive to Fall Beyond Protection of the First Amendment*, 76 A.L.R. FED. 600 and *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 525 (C.D. Cal.1969) (holding that a substantial disruption established based on diminished control of students, disruption and interference with classroom study and teaching following distribution of off-campus newspaper).

²⁵ *Tinker*, 393 U.S. at 508. The court expanded on this thought:

Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society (citation omitted).

Id. at 508–09.

On the one hand, students are guaranteed the freedom of speech in the First Amendment, one of our most jealously guarded rights.²⁶ However, those “First Amendment rights [must be] applied in light of the special characteristics of the school.”²⁷ Thus, “on the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”²⁸ “Our problem [the Court noted] lies in the area where students in the exercise of First Amendment rights collide with the rules of school authorities.”²⁹ As the following discussion will show, three decades have not lessened the difficulty of applying this balancing test.

Second, the *Tinker* case did not expressly extend its reasoning to off-campus student speech.³⁰ In fact, the Supreme Court hinted that its reasoning applied only to on-campus speech when it stated, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression *at the schoolhouse gate*.”³¹ Additionally, the Court narrowly defined the purpose of schools, “[t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities.”³² One scholar suggests that these two quotes intimate the Court’s view that the school’s authority to punish speech does not “reach past the schoolhouse gate.”³³

Since its *Tinker* decision, the Supreme Court has infrequently elected to redefine and expand its student speech jurisprudence. In *Bethel School District No. 403*, the Court held that the First Amendment does not bar a

²⁶ *Id.* at 506. For the various jurisprudential justifications for protecting speech, see RODNEY A. SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 2:03–07 (1994).

²⁷ *Tinker*, 393 U.S. at 506.

²⁸ *Id.* at 507.

²⁹ *Id.*

³⁰ See Clay Calvert, *Off-campus Speech, On-campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 270 (2001); but see *infra* notes 54–77 and accompanying text (discussing the extension of *Tinker* to off-campus speech). See also *infra* notes 72–77 and accompanying text (discussing *Thomas* and the dichotomy between off-campus and on-campus speech); and notes 114–28 (discussing the difference between off-campus and on-campus speech).

³¹ *Tinker*, 393 U.S. at 506 (emphasis added).

³² See Calvert, *supra* note 30, at 271 (quoting *Tinker*, 393 U.S. at 512 (emphasis added)).

³³ *Id.*

school from punishing a student's lewd and inappropriate speech delivered at a school assembly.³⁴ The Court based the *Bethel* decision on two bases. First, there is a government interest in protecting children from sexually explicit materials.³⁵ Second, obscene speech is entirely unprotected by the First Amendment.³⁶

Although *Bethel* does not discuss student off-campus or Internet speech rights, it does provide several helpful insights. First, before deciding whether a student's First Amendment rights were violated, a court must first determine whether the student's expression is protected by the First Amendment.³⁷ The recognized categories of unprotected student

³⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986). Fraser gave the speech in front of six-hundred high school students, who were attending as part of school sponsored self-government program.

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in.

If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.

Matthew Fraser Speech, available at <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/fraserspeech.html> (last visited May 16, 2008).

³⁵ *Bethel*, 478 U.S. at 684. Initially, the Supreme Court noted that the “constitutional rights of students in public schools students in public school are not automatically coextensive with the rights of adults in other settings” and may be limited by reasonable policies designed to protect the educational environment. *CAMBRON-MCCABE ET AL.*, *supra* note 10, at 108 (quoting *Bethel*, 478 U.S. at 682). “Surely, it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” *Bethel*, 478 U.S. at 683. The Court applied a balancing test; weighing the student's right to advocate unpopular and controversial views against society's interest teaching students the boundaries of socially appropriate behavior. *Id.* at 681. The Court believed that Fraser's sexual speech did not deserve the protection received by Tinker's political speech and resolved the test in favor of the school district. *See Seminski, supra* note 8, at 175.

³⁶ *Bethel*, 478 U.S. at 684–85.

³⁷ *See id.* at 685–86; *see CAMBRON-MCCABE ET AL.*, *supra* note 10, at 109 (discussing what constitutes expression under the First Amendment).

speech include: defamation or libel,³⁸ obscenity,³⁹ lewd and vulgar expression in schools,⁴⁰ fighting words,⁴¹ incitement,⁴² and true threats.⁴³

³⁸ See CAMBRON-MCCABE ET AL., *supra* note 10, at 109. Defamation is spoken and written statements that are (1) false; (2) communicated to another; and (3) expose a person to public “shame or ridicule.” *Id.*

³⁹ See *Bethel*, 478 U.S. at 686. Obscene speech occurs when (1) an “average person, applying contemporary community standards,” taken as a whole, would find the material appeals to prurient instincts; (2) the material “depicts or describes” sexual conduct, specifically described by a state law, written or construed, “in a patently offensive way;” and (3) the material, “taken as a whole,” lacks any significant “literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

⁴⁰ See CAMBRON-MCCABE ET AL., *supra* note 10, at 110 (citing *Bethel*, 478 U.S. 675, 685 (1986)).

⁴¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that speech is illegal if the words would likely provoke the average person to retaliate, causing an immediate breach of peace).

⁴² See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that speech advocating the use of force or of violation of the law is unprotected if it is directed/intended to produce lawless action, lawless action is imminent, action is serious (relative to the nature of the speech), and action is likely to occur).

⁴³ The government can proscribe a true threat of violence without offending the First Amendment. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371–72 (9th Cir. 1996); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). Speech is a “true threat” and therefore unprotected if an objectively reasonable person would interpret the speech as a “serious expression of an intent to cause a present or future harm.” See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (upholding Virginia law prohibiting cross burning with intent to intimidate). The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (“[T]hreats of violence are outside the First Amendment . . .”); See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (finding that the First Amendment permits states to prohibit speech that constitutes a “true threat”).

Whether a speaker intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a “true threat.” *Black*, 538 U.S. at 359–60 (2003). However, “[t]he circuit courts are split about whether the reasonable person is viewed as a reasonable speaker or a reasonable recipient. . . .” Jonnie Macke, Note, *The True Threat Doctrine Misapplied in Doe v. Pulaski County Special School District*, 57 ARK. L. REV. 303, 319 (2004).

It is also possible that courts will favor broader school control of off-campus student expression via *Tinker* rather than categorizing the speech as a true threat. See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007). *Wisniewski*, an eighth-grade student,
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If the student's expression falls into one of the categories above, then the First Amendment offers no protection.⁴⁴ Secondly, in his concurrence, Justice Brennan posited that the student's offensive speech would not be grounds for punishment if it was given outside the schoolhouse gate.⁴⁵

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that school administrators could censor student writings from school-sponsored publications and activities so long as the restriction is based on legitimate pedagogical concerns.⁴⁶ However, as was recently discussed, *Hazelwood* "has everything to do with in-school and school-sponsored expression generated as part of the curriculum and nothing to do with expression created off campus and independent of the school's sponsorship."⁴⁷

In *Reno v. ACLU*, the Supreme Court held that the Internet is a forum fully protected by the First Amendment.⁴⁸ Thus, a student's Internet speech should be afforded all protections guaranteed by the First Amendment.

created and transmitted a drawing using his parents' home computer that advocated the killing of his English teacher. *Id.* at 35–36. The message was intended as a joke and was sent only to fellow students. *Id.* However, the court upheld the school-imposed suspension by concluding that Wisniewski's conduct was unprotected speech posing "a reasonably foreseeable risk" that the drawing "would come to the attention of school authorities" and "materially and substantially disrupt the work and discipline of the school." *Id.* at 38–39 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

⁴⁴ See *Bethel*, 478 U.S. at 686 (citing *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) ("[Disclaiming] any purpose . . . to hold that the Federal Constitution compels the teaches, parents, and elected school officials to surrender control of the American public school system to public school students.")).

⁴⁵ See *Bethel*, 478 U.S. at 688 (Brennan, J., concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest otherwise." (citation omitted)).

⁴⁶ 484 U.S. 260, 271 (1988). The publication censored in *Hazelwood* included articles discussing teen pregnancy and teens' reaction to divorce. *Id.* at 263.

⁴⁷ See Calvert, *supra* note 30, at 273. In fact, the Supreme Court made it clear that it was only concerned with "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271.

⁴⁸ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

More recently, in *Morse v. Frederick*,⁴⁹ the Supreme Court upheld the *Tinker*, *Bethel*, and *Hazelwood* decisions.⁵⁰ The Court also carved out a new area of unprotected student expression—speech advocating illegal drug use.⁵¹ The majority refused to read *Bethel* expansively to “encompass any speech that could fall under some definition of ‘offensive.’”⁵² Finally, Justice Alito’s concurrence is noteworthy because he points out that the Court’s decision does not permit “public school officials to censor any student speech that interferes with a school’s ‘educational mission.’”⁵³

B. Schools’ General Authority Over “Off Campus” Speech

Currently, nearly all lower courts apply the *Tinker* standard of substantial and material disruption to determine if a school district may punish off-campus student speech.⁵⁴ This includes Internet speech that occurs exclusively outside of the schoolhouse gates (student created a website on a home computer).⁵⁵ The lower courts also agree the *Bethel* and *Hazelwood* precedents do not control off-campus Internet speech cases.⁵⁶ As no court has suggested relying on either *Bethel* or *Hazelwood* in off-campus speech cases, I will focus my analysis on application of the *Tinker* standard.

Although the results are not unanimous, the courts typically adopt the *Tinker* standard of material and substantial disruption to determine if the school district’s actions are constitutionally permitted.⁵⁷ While generally applying the *Tinker* test, courts diverge on whether the student is required to participate in the distribution of the off-campus speech on-campus prior

⁴⁹ 127 S. Ct. 2618 (2007).

⁵⁰ *Id.* at 2626.

⁵¹ *Id.* at 2627–29.

⁵² *Id.* at 2929.

⁵³ *Id.* at 2637 (Alito, J., concurring). Justice Alito noted that the educational mission standard “can easily be manipulated in dangerous ways” by public officials with authority over the schools. *Id.*

⁵⁴ See *infra* notes 55–77 and accompanying text (discussing the extension of *Tinker* to off-campus speech).

⁵⁵ See, e.g., *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 828–29 (7th Cir. 1998) (holding that distribution of underground newspaper off-campus may be punished by school district even when the origination and distribution of speech never occurred on-campus).

⁵⁶ See KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 394 (6th ed. 2005). These standards also do not control other forms of off-campus internet speech. *Id.*

⁵⁷ *Id.*

to punishment.⁵⁸ This divergence is highlighted by two cases: *Thomas v. Board of Education*,⁵⁹ and *Boucher v. School Board of Greenfield*.⁶⁰

In *Boucher*, the Seventh Circuit declined to issue a preliminary injunction to a high school student who was expelled by his school district after publishing an article about “hacking” the high school’s computers in an underground newspaper.⁶¹ This article was creatively titled, “So You Want to be a Hacker?”⁶²

The *Boucher* court agreed that Boucher did not use school facilities to publish the article, nor did he participate in the on-campus distribution of the article.⁶³ Nevertheless, the court determined that because the article was actually distributed on campus and advocated an on-campus activity, the potential for on-campus disturbance was great enough to overcome the geographic origin of the speech.⁶⁴ Accordingly, the court applied the *Tinker* test and determined that the school officials reasonably believed that the article would lead to substantial disruption.⁶⁵

⁵⁸ See generally STUDENT PRESS LAW CENTER, *supra* note 4 (discussing geographic boundaries of punishment of student speech).

⁵⁹ 607 F.2d 1043 (2d Cir. 1979).

⁶⁰ 134 F.3d 821 (7th Cir. 1998).

⁶¹ *Id.* at 823–29. An underground newspaper is a non-school sponsored student publication. See ALEXANDER & ALEXANDER, *supra* note 56, at 387. Because the publication is not school sponsored; the school district may not censor or punish the speech under *Hazelwood*. *Id.* In *Boucher*, the underground newspaper was named “The Last” and its authors intended to “ruffle a few feathers and jump-start some action.” *Boucher*, 134 F.3d at 822. Students distributed the first issue of “The Last” on June 4, 1997 in the lockers, bathrooms, and cafeteria of Greenfield High School. *Id.*

⁶² *Boucher*, 134 F.3d at 821–22. For a complete republication of Boucher’s article, see the appendix to *Boucher*. Boucher’s article was a self-help manual to teach other student’s how to “hack the school[’]s gay ass computers.” *Id.* at 822. It offered tips on how to view hidden computer files, how to hack teacher’s passwords, and how not to get caught performing these acts. *Id.*

⁶³ *Id.* at 829. Although not discussed by the court, the school board at its suspension proceedings believed that the on campus distribution of Boucher’s article was done with Boucher’s knowledge. *Id.* at 824.

⁶⁴ *Id.* at 829 (stating *Tinker* applies when there is in fact on-campus distribution).

⁶⁵ *Id.* at 829. In fact, the school board contends that it provided proof of an actual disruption. *Id.* at 827. At the expulsion hearing, Greenfield’s technology expert testified that the article cause the school to: hire experts to conduct four hours diagnostic tests and change the passwords on all school computers. *Id.* The court agreed that this was some evidence of past disruption. *Id.*

In reaching this decision, the Court of Appeals noted that “[t]he Supreme Court ‘has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools.’”⁶⁶ In other words, the courts must balance the school’s authority to punish against the student’s right to speak.⁶⁷ However, in *Boucher*, the 7th Circuit sided unequivocally with the school district, failing even to discuss the student’s First Amendment rights in the written article.⁶⁸

In *Thomas v. Board of Education*, the Second Circuit tipped the balance between school authority and students’ rights in favor of the student.⁶⁹ Similar to *Boucher*, four high school students wrote and self-financed publication of an underground newspaper.⁷⁰ This newspaper was distributed off campus, but copies of the paper inevitably appeared on campus.⁷¹ Unlike *Boucher*, the underground newspaper in *Thomas* had a strong connection to on-campus speech; the students used school typewriters to produce some of the articles and stored the finished product in a teacher’s closet.⁷²

In spite of this on-campus connection, the court made it clear that the students attempted to sever “all connections between their publication and

⁶⁶ *Id.* at 827 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

⁶⁷ See *infra* notes 79–85 (discussing the balancing test approach to the First Amendment).

⁶⁸ *Boucher*, 134 F.3d at 827–28. See also *Donovan v. Ritchie*, 68 F.3d 14, 15–18 (1st Cir. 1995) (off-campus “shit list” created by students and discovered in trash barrel by faculty member of school district may be punished under the First Amendment).

⁶⁹ See 607 F.2d 1043, 1045 (2d Cir. 1979).

⁷⁰ See *id.* at 1045. The student’s newspaper, “Hard Times,” emulated National Lampoon and discussed “school lunches, cheerleaders, classmates, teachers . . . masturbation, and prostitution . . .” *Id.* The student’s printed one-hundred copies of “Hard Times” at a local business. *Id.*

⁷¹ *Id.* at 1045–46. A teacher confiscated a copy of “Hard Times” on January 24, 1979 and handed it over to William Butler, the school’s principal. *Id.* at 1046. Although the school superintendent initially took no action against the students, each was eventually suspended for five days. *Id.*

⁷² *Id.* at 1045–46. With the permission of their teacher, Mager, the student’s initially stored all one hundred copies in Mager’s closet. *Id.* In addition, Mager offered advice about the paper after school hours. *Id.* By the time “Hard Times” surfaced at the school, the students had sold all but seven copies of the newspaper stored in Mager’s closet. *Id.*

the school.”⁷³ This severing by the students reduced the newspaper’s status to “de minimis” on-campus speech.⁷⁴ In other words, the suspect speech was classified as off-campus speech that school officials could not constitutionally punish, even under *Tinker*.⁷⁵ As the *Thomas* court eloquently stated, “because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”⁷⁶ Distilled to its basics, this case portends that off-campus student speech should enjoy *full* First Amendment protection, unless the student somehow caused the speech to occur on-campus.⁷⁷

C. *Why Tinker Should Not Apply to All Off-Campus Speech*

As previously mentioned, most courts apply the *Tinker* substantial and material disruption test to all forms of off-campus student speech.⁷⁸ For this reason, it is important to explain why *Tinker* should not apply in all off-campus student speech cases.

Ostensibly, *Tinker* simply applied the view that the student’s First Amendment freedoms are subject to a balancing harm test, employed in other First Amendment contexts.⁷⁹ The ad hoc balancing test applies a

⁷³ *Id.* at 1045. The attempts to sever include: a legend disclaiming responsibility for copies found on school property; producing all copies of the paper in an off campus business; excising several articles and student names from the paper; working exclusively in their homes, off-campus, and after hours; and selling the newspaper to other students only at an off campus store. *Id.*

⁷⁴ *Id.* at 1050.

⁷⁵ *Id.* at 1048. See also *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986) (holding that a “student’s making of a vulgar gesture off school grounds and after school hours was too attenuated to support the imposition of discipline and, therefore, the student’s suspension violated the First Amendment); *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972) (applying *Tinker* and overturning a school’s discipline of students who distributed a newspaper away from school property).

⁷⁶ *Thomas*, 607 F.2d at 1050.

⁷⁷ See *infra* notes 118–60 (discussing the court’s rationale for protecting the student underground newspaper and off-campus student speech in general).

⁷⁸ See *supra* notes 55–77 and accompanying text (discussing the extension of *Tinker* to off-campus speech).

⁷⁹ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”). See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“Where First Amendment rights are asserted to bar governmental
(continued)

cost-benefit analysis to balance the speech interest against the weight of the competing societal interest, on a case-by-case basis.⁸⁰ Understanding this basic approach to First Amendment jurisprudence is essential for understanding why the lower federal courts have not consistently applied the *Tinker* standard.⁸¹ It also explains why lower court treatment of off-campus Internet speech varies, as explained in the cases below.⁸² Each case presents facts distinguishable from *Tinker*, requiring each court to conduct its own balancing test.⁸³

As the *Thomas* court stated, “[t]he case before us, however, arises in a factual context distinct from that envisioned in *Tinker* and its progeny.”⁸⁴ If an underground newspaper creates a unique factual predicate, allowing a court to diverge from *Tinker*, then the Internet creates even greater factual discrepancies.⁸⁵ These include instant access for students and teachers on

interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”).

⁸⁰ See SMOLLA, *supra* note 26, § 2:11. The ad hoc balancing test is the least protective of speech of all constitutional tests. *Id.* The other methods include absolutism and heightened scrutiny. *See id.* § 2:9. The heightened scrutiny test simply refers to different levels of judicial scrutiny given to speech in different contexts. *Id.* § 2.12. However, this methodology sounds suspiciously like a balancing test.

⁸¹ See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 529–30 (2000); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 646–49 (2002).

⁸² See *infra* notes 76–108 and accompanying text (discussing lower court treatment of off-campus student internet speech).

⁸³ See generally Miller, *supra* note 81, at 646 (“Some courts have taken the view that the need for school power outweighs the individual students’ interest in free expression. Other courts have taken the other view and applied *Tinker*’s substantial and material interference test unless given a reason to do otherwise.”).

⁸⁴ *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1046 (1979). For this reason the *Thomas* court believed that “the proper resolution of this appeal requires us to measure the sanctions imposed by Granville School officials against the yardstick of our constitutional commitment to robust expression pursuant to the First Amendment.” *Id.* at 1050.

⁸⁵ See Seminski, *supra* note 32, at 181 (discussing why the internet differs from traditional student publications). “With the inception of more and more powerful search engines and the advent of personalized web pages, the flow of information between users is almost instantaneous—so fast that the catastrophic results are nearly unpreventable through ‘prior restraints.’” *Id.*

campus and off campus, worldwide publishing capabilities, and the Internet's place as a protected non-school sponsored forum.⁸⁶

Based on the foregoing, I believe the courts can and should modify *Tinker* to afford greater protection to student Internet speech. However, I fully recognize that a court may follow the same logic and resolve this balancing test in favor of the school district. I will discuss the competing principles in this balancing test more fully in Section III B 2.

II. SURVEY OF STUDENT INTERNET SPEECH CASES

Currently, student Internet speech cases fall into two competing camps. The first camp, following *Boucher*, endorses the view that *Tinker* should apply to student Internet speech cases without exception.⁸⁷ The only question to resolve in the first camp is whether a material and substantial disruption was reasonably forecasted or actually occurred.⁸⁸ The second camp, following the *Thomas* approach, believes that Internet speech occurring off-campus is outside the school's jurisdiction to punish.⁸⁹

A. School District's Punishment Upheld under *Tinker*

In *J.S. v. Bethlehem Area Sch. Dist.*,⁹⁰ J.S. (the student) sought appellate review of his school district's decision to expel him based on comments made on an off-campus website.⁹¹ The website, named "Teacher Sux," contained threatening and derogatory comments about both teachers and the principal of his school.⁹² During the discipline

⁸⁶ *See id.*

⁸⁷ *See infra* notes 91–108 and accompanying text (discussing application of the *Tinker* standard).

⁸⁸ *See id.*

⁸⁹ *See infra* notes 110–17 and accompanying text (discussing *Emmett v. Kent Sch. Dist. No. 415*).

⁹⁰ 757 A.2d 412 (Pa. 2000)

⁹¹ *Id.* at 415.

⁹² *Id.* The student was expelled for violating the School District policy through three "Level III offenses:" threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal. *Id.* For example, the school board made the following findings of facts regarding comments made about his teacher, Mrs. Fulmer:

16. The reference to Mrs. Fulmer states, in pertinent part: "Why Fulmer Should be Fired."

17. The Web page goes on to state: "5. She shows off her fat fucking legs. 11. The fat fuck smokes. 12. She's a bitch!"

(continued)

proceedings, the school board made several weak allegations that J.S. was involved with on-campus distribution of the website, but never conclusively stated that fact on the record.⁹³

Luckily for the school board, the Court of Appeals did not consider whether J.S. was involved with on-campus distribution.⁹⁴ In fact, the court chose not to acknowledge the student's right to Internet speech at all.⁹⁵ Instead, the court perfunctorily announced that "it is evident that the courts have allowed school officials to discipline students for conduct occurring off of school premises . . . [if] the conduct materially and substantially interferes with the educational process."⁹⁶ Using the *Tinker* test, the court found that the effect of the website on Mrs. Fulmer, J.S.' teacher, justified punishment of J.S.⁹⁷ The effects on Mrs. Fulmer included physical and emotional trauma leading to a medical leave of absence the following school year and a decreased reputation among the students.⁹⁸

18. The Web page regarding Mrs. Fulmer goes on to state: "Why Should She Die?". (Take a look at the diagram and the reasons I gave, then give me \$20.00 to help pay for the hitman.) Some words from the Writer: Fuck you Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch." (listed 136 times).

19. Another Web page has a diagram of Mrs. Fulmer with her head cut off and blood dripping from her neck.

Id. at 416 (internal citations omitted).

⁹³ *Id.* The allegations include "5. [Student] informed a fellow student that he created a Website known as 'Teacher Sux.' . . . 8. On a band trip, [Student] stated to [another student] that he was 'taking down' the Web page." *Id.*

⁹⁴ *See id.* at 419–21.

⁹⁵ *See id.*

⁹⁶ *Id.* at 421. The court also launched into a *Bethel*-type analysis of J.S.'s website, which was clearly wrong because J.S. did not conduct the speech through a school sponsored activity. *See* Adrienne J. Stahl, *J.S. v. Bethlehem Area School District: The Pennsylvania Supreme Court Upholds a School District's Expulsion of a Student for Creating an Offensive Web Site About School Faculty*, 13 WIDENER L. REV. 649, 662–63 (2004) (discussing the PA's Supreme Court's misapplication of the *Bethel* standard).

⁹⁷ *J.S.*, 757 A.2d at 422. The court decided that the "School District could properly conclude that a reasonable person could be both *physically* and *emotionally* disturbed after viewing a web-site that contained a picture of her severed head dripping with blood, a picture of her face morphing into Adolph Hitler, and a solicitation, whether serious or otherwise, for funds to cover the cost of a hit man." *Id.* at 421 (emphasis added).

⁹⁸ *Id.* at 421. Although Mrs. Fulmer was personally affected, the dissent points out that there was no evidence that the website "materially disrupt[ed] classwork or involve[d]"
(*continued*)

B. School District's Punishment Not Upheld under Tinker

*Mahaffey ex rel. v. Aldrich*⁹⁹ stands for the proposition that a school district may not punish student Internet speech without proof of material disruption or on-campus activity by the student.¹⁰⁰ In *Mahaffey*, a student created a website titled "Satan's web page," which contained, among other things, a list of "people I wish would die."¹⁰¹ A classmate's parent

substantial disorder" of the school itself. *Id.* at 426 n.1 (Friedman, J., dissenting). Thus, the dissent argues that the student's speech should have been constitutionally protected. *Id.* at 426. For further critique of the alleged disruptions in *J.S.*, see Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1114 (stating that Mrs. Fulmer's reaction was "thin-skinned" and should not have been acted upon by the school, especially in light of the \$500,000 recovered against J.S. in a 2000 civil suit).

⁹⁹ 236 F. Supp. 2d 779 (E.D. Mich. 2002).

¹⁰⁰ *See id.* at 786. *See also* *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177-78 (E.D. Mo. 1998) (holding that Beussink's First Amendment rights were violated when he was punished for a website created at home, after another student showed the website to school officials without Beussink's authorization, encouragement, or knowledge); *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 800 (2002) (denying summary judgment to defendant school district because material and substantial disruption had not been proven); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (2001) (stating that suspension of a student for creating a top ten list without proof of actual disruption violates the student's First Amendment rights); *Neal v. Efurd*, Civ. No. 04-2195 at 26 (W.D. Ark Feb. 18, 2005) (holding that a public high school principal violated the First Amendment rights of two students when he suspended them for comments they made on their private, off-campus websites. Any disruption to the school that might have occurred was the result of the school's investigation and subsequent punishment of the students and not the websites themselves.); *Layshock v. Hermitage Sch. Dist.* 496 F. Supp. 2d 587, 600-01 (W.D. Pa. 2007) (granting summary judgment to student who was suspended for his off-campus parody website of the school principal because the school district could not produce any evidence showing a substantial disruption in the classroom). *Layshock* is instructive because the school district's punishment was directed solely at the student's off-campus conduct. *Id.* at 601. The only on-campus activity occurred when the student showed the website to classmates briefly during a class. *Id.* However, the school district could not establish that the teacher was aware of this classroom activity, and, more importantly, the school district's claims of classroom disruption were attributable to websites created by other students. *Id.* at 600.

¹⁰¹ *Mahaffey*, 236 F. Supp. 2d at 781-82. Ostensibly, this list contained the names of students from Kettering, the students' school. *Id.* Although, plaintiff and another student created this website for some "laughs" and because they were bored, the content of the
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discovered the website and reported it to the police, who then reported it to Mahaffey's school.¹⁰² After Mahaffey admitted that a school's computer may have been used to create the website, the school district suspended Mahaffey and threatened expulsion.¹⁰³

The district court granted Mahaffey's motion for summary judgment on his First Amendment claims.¹⁰⁴ In granting the motion, the court attempted to distinguish Mahaffey's case from the *Boucher* and *J.S.* cases listed above.¹⁰⁵ First, unlike *J.S.* and *Boucher*, the school district in *Mahaffey* failed to produce evidence of a past or potential future substantial disruption on the record.¹⁰⁶ Second, unlike *Boucher*, the website created by Mahaffey did not include a blueprint for an invasion of school property, nor did Mahaffey encourage on-campus activity.¹⁰⁷ Finally, there was no evidence that Mahaffey ever communicated the statement on his website to any other student.¹⁰⁸

website would be enough to scare any parent. *Id.* at 781. This content included the following message:

SATAN'S MISSION FOR YOU THIS WEEK: Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. unless [sic] Im [sic] there to watch. Or just go to Detroit. Hell is right in the middle. Drop by and say hi.

Id. at 782.

¹⁰² *Id.*

¹⁰³ *Id.* The basis for the suspension was violation of several school policies, including "Internet Violations." *Id.* After the suspension, Mahaffey withdrew from his school and enrolled in a new school district. *Id.* at 782-83.

¹⁰⁴ *Id.* at 786. The court rejected in toto defendant's assertion that schools may discipline students for off-campus conduct if the disciplinary rule is reasonable and the off-campus conduct has "an effect on the discipline or general welfare of the school." *Id.* at 784-86.

¹⁰⁵ *Id.* at 785.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 786. However, given the fact the Internet is a ubiquitous medium providing instant access to information, some may argue that the communication was made the second the website was posted.

C. Off-Campus Speech is Outside the Jurisdiction of Schools

In *Emmett v. Kent School District No. 415*,¹⁰⁹ Kentlake High School suspended Nick Emmett after he created the “Unofficial Kent High Home Page.”¹¹⁰ Emmett’s website contained mock obituaries of Kentlake students, written “tongue-in-cheek,” and allowed students to vote on who would “die” next (i.e., the next obituary subject).¹¹¹ Although the website caused discussion at Kentlake, no action was sought against Emmett until a local news station characterized the website as a “hit list.”¹¹² Although this characterization was blatantly untrue, Emmett took down his website and the school district felt pressured to act.¹¹³

Nick Emmett applied for a Temporary Restraining Order preventing the suspension and the court granted the application.¹¹⁴ The court recognized that websites that advocate violence or death place administrators in “an acutely difficult position [especially] after recent school shootings in Colorado, Oregon, and other places.”¹¹⁵ Nevertheless, Emmett’s speech did not occur at a school assembly, was not in a school-sponsored newspaper, was not connected a class or school project, and was

¹⁰⁹ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

¹¹⁰ *Id.* at 1089. The school district initially placed Emmett on emergency expulsion, but later reduced the expulsion to a five-day suspension. *Id.* Nick Emmett was not a stereotypical internet speech plaintiff. He had a 3.95 grade point average, was co-captain of the school basketball team, and had no disciplinary history. *Id.*

Courts implicitly (if not expressly) treat academic success and clean behavioral records as mitigating factors when assessing First Amendment student speech cases. See *Neal v. Efurd*, Civ. No. 04-2195 at 14 (W.D. Ark. Feb. 18, 2005) (noting that the students had “outstanding academic and behavioral records”); *Layshock v. Hermitage Sch. Dist.* 496 F. Supp. 2d 587, 590–91 (W.D. Pa. 2007) (observing that the student was “generally an academic success”). These students prevailed in their First Amendment claims. See *Emmett*, 92 F. Supp. 2d at 1090; *Neal*, Civ. No. 04-2195 at 26–28; *Layshock*, 496 F. Supp. 2d at 600–01.

¹¹¹ *Emmett*, 92 F. Supp. 2d at 1089. Apparently, the mock obituaries were based on a creative writing project that Emmett participated in the previous year. *Id.*

¹¹² *Id.* The court stressed the point that nothing on the website indicated that it was a “hit list.” *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1090.

¹¹⁵ *Id.*

not intended or interpreted as a threat.¹¹⁶ Accordingly, the Internet speech was “entirely outside of the school’s supervision or control.”¹¹⁷

III. PROTECTING OFF-CAMPUS STUDENT INTERNET SPEECH

A. *What is Off-campus Internet Speech? When Does it Become On-campus Speech?*

In the broadest context, I define the terms on-campus Internet speech as speech that the school district may discipline under *Tinker* and off-campus Internet speech as speech that the school district may not constitutionally discipline. However, using a realistic view of the term, student Internet speech is never truly “off-campus.”¹¹⁸ When a student posts information on the Internet, that information may be accessed by anyone, both inside and outside the schoolhouse gates.¹¹⁹ Instead, the concept of defining speech by its geographic origin or receipt is nothing more than a legal construct to limit the scope of a school district’s authority to punish student speech.¹²⁰ It is a policy determination that is a product of the First Amendment’s balancing test coming out in favor of protecting student speech.¹²¹

As a starting point to defining off-campus speech, there are several categories of speech that all courts agree may be punished: (1) true threats; (2) on-campus speech that is lewd and inappropriate; (3) on-campus speech that may be censored for legitimate pedagogical concerns; and (4) on-campus speech advocating illegal drug use.¹²² Thus, if a student creates the Internet speech on a school computer or during school sponsored activities, the Supreme Court precedents of *Fraser* and *Hazelwood* may apply to allow the school to punish the student.¹²³ Moreover, even the court in

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Thomas W. Wheeler II, *Slamming in Cyberspace: The Boundaries of Student First Amendment Rights*, RES GESTAE, May 2004 at 29–30 (discussing why off-campus distinction for Internet speech is dubious).

¹¹⁹ See, e.g., Seminski, *supra* note 8, at 181.

¹²⁰ See Wheeler, *supra* note 118, at 29.

¹²¹ See *id.* at 30.

¹²² See, e.g., *Emmett*, 92 F. Supp. 2d at 1090. See also *supra* notes 38–43 and 49–53.

¹²³ See Hudson, *supra* note 4, at 204 (“[I]f a student created inappropriate material on the school’s web server as part of a class project, the Kuhlmeier standard would apply. If a student distributed a hard copy of his online material at school, the *Tinker* standard would apply.”); see Calvert, *supra* note 30, at 264–65.

Emmett would agree that schools may punish speech if it constitutes a “true threat.”¹²⁴

However, if the student creates the Internet speech independent of school activities, independent of the school’s resources, and the speech is not a true threat; there should be a rebuttable presumption that the student Internet speech occurred off-campus. Once classified as off-campus, the school district may not constitutionally punish the student’s speech unless the student intentionally or recklessly caused the speech to be distributed on campus.¹²⁵ If the speech is re-classified as on-campus speech, then the court should apply the *Tinker* substantial disruption test as traditionally stated.¹²⁶ This proposed test essentially adopts the reasoning of *Thomas* and *Emmett*.

Intentional distribution of speech occurs when the student: (1) has a purpose to distribute the speech inside the schoolhouse gates or (2) knows to a substantial certainty that the student’s actions will cause the speech to be distributed inside the schoolhouse gates.¹²⁷ Reckless distribution of speech occurs if the student, conscious of the risk that the Internet speech will be distributed on-campus, chooses to produce the Internet speech.¹²⁸ For example, if a student emails the contents of their website to a friend, knowing that the friend only checks their email at school, then the student recklessly distributed their speech. Since this test adopts standards currently used in the law of torts, courts should have no problem applying the new standard.

¹²⁴ See *Emmett*, 92 F. Supp. 2d at 1090.

¹²⁵ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (1979) (stating generally that where activity was deliberately designed to take place outside of the schoolhouse gate, *Tinker* should not apply). This would provide student internet speech with a similar level of protection given to underground newspapers. For the view that geographic origin of the speech should not limit the school’s jurisdiction, see Renee L. Severance, Comment, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1233–38 (2003). For other proposed First Amendment frameworks, see generally Lisa Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635 (2000) and Nancy Willard, *Legal and Ethical Issues Related to the Use of the Internet in K-12 Schools*, 2000 BYU EDUC. & L.J. 225 (2000).

¹²⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

¹²⁷ See DAN B. DOBBS, *THE LAW OF TORTS* 48 (2000).

¹²⁸ *Id.* at 51. The fact that the speech is likely to be distributed on-campus is not enough to prove recklessness. *Id.*

B. Strength of Student's Speech vs. Strength of School District's Interest

To legitimately apply the enhanced *Tinker* standard for student Internet speech, it is necessary to balance the competing interests of the school district and the First Amendment rights of the student. If the balance tips in favor of the student, then the application of a more protective standard is warranted.

1. School District's Interest

On the school district's side is the ever present institutional need to preserve order within the school district.¹²⁹ The Court in *Tinker* found the need to preserve order so strong that, by itself, it could be enough to outweigh the student's speech rights.¹³⁰ The threat to school order posed by Internet speech occurs in several factual scenarios: students mocking faculty members, students personally attacking fellow students, sexually explicit gossip about students and faculty members, taunting members of another school's sports teams, threats of violence, slander of students and faculty members, and excessive use of foul-language.¹³¹ In each case, the student's speech can permeate the school environment causing various forms of disorder.¹³² For this reason, school districts seek to punish student Internet speech.¹³³

The interest in preserving order is both legitimate and compelling and I believe still justifies the imposition of the *Tinker* standard for most student speech.¹³⁴ I will not argue that this interest has diminished since the 1960's.¹³⁵ In fact, there are three reasons why the school's interest may have increased. First, many observers note that in a post-Columbine

¹²⁹ *Tinker*, 393 U.S. at 507. As was stated in *Tinker*, "[t]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.*

¹³⁰ *Id.* at 513.

¹³¹ See Tuneski, *supra* note 8, at 144–46.

¹³² *Id.* at 140.

¹³³ *Id.*

¹³⁴ See Miller, *supra* note 81, at 625. It is also the reason that courts reflexively apply the *Tinker* standard whenever schools punish a student's speech. *Id.* at 646.

¹³⁵ In fact, many argue that the courts have given school districts increasing greater deference since *Tinker*, the high point of student's rights. See, e.g., Chemerinsky, *supra* note 81, at 528, 541. In addition, the decision of whether a material and substantial disruption actually occurred is accorded deference by the courts. Robert E. Simpson, Jr., *Limits on Students' Speech in the Internet Age*, 105 DICK. L. REV. 181, 198–99 (2001).

world, the threat of violence is so great that the need to preserve order has increased since *Tinker*.¹³⁶ Second, Internet speech can reach the entire student population at any time, in school, or out of school, which can lead to a quickly developing widespread disruption.¹³⁷ Third, school districts face a catch-22 when the subject of student speech also falls within Title IX's prohibition of peer-on-peer harassment.¹³⁸ Accordingly, it is necessary to distinguish *Tinker* by showing either (1) *Tinker* was not meant to encompass off-campus Internet speech or (2) students have a greater interest in off-campus Internet speech relative to the school district's interest in punishing speech.

2. Student's Interests

First, the Supreme Court has never indicated, either in *Tinker* or its subsequent cases, that a school district may apply the *Tinker* standard to off-campus speech.¹³⁹ In contrast, the Supreme Court has twice hinted that a school district's arms do not extend to speech occurring off-campus.¹⁴⁰

In *Tinker*, the Supreme Court stated “[i]t can hardly be argued that either students or teachers shed the constitutional right to freedom of speech or expression *at the schoolhouse gate*.”¹⁴¹ Thus, the Supreme Court itself appears to draw a distinction between speech occurring inside and outside the schoolhouse gate. As one commentator noted, the *Tinker* Court “never suggested that this limitation on students’ speech rights applied *outside* the school setting or that it gave schools the power to punish off-

¹³⁶ See Calvert, *supra* note 30, at 1091 (“Quite simply, the events at Columbine gave high school administrators all the reasons—legitimate or illegitimate—they needed to trounce the First Amendment rights of public schools in the name of preventing violence.”). For the view that school’s interest is not enough to allow censoring of student internet speech, see Hudson, *supra* note 4, at 221–22.

¹³⁷ Tuneski, *supra* note 8, at 140.

¹³⁸ See Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 906 (2001) (“If school officials discipline the student-author, he may sue them on First Amendment grounds. If the administration fails to discipline the author, the school could face a lawsuit by the victim of the sexual harassment under Title IX.”).

¹³⁹ See Calvert, *supra* note 30, at 270.

¹⁴⁰ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (implying a distinction between speech inside of school and outside of school); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986).

¹⁴¹ *Tinker*, 393 U.S. at 506 (emphasis added).

campus expression that never reached the campus confines.”¹⁴² Also, the *Tinker* court carefully disclaimed:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.¹⁴³

In *Bethel*, Justice Brennan stated in his concurring opinion “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court’s opinion does not suggest otherwise.”¹⁴⁴ Although limited to a concurring opinion, this statement attempts to confirm what had been left unstated in *Tinker*, school districts may not punish off-campus speech.

Second, there are at least three mechanisms that mitigate the school district’s need for the *Tinker* standard to preserve order highlighted above.¹⁴⁵ The first mechanism, existing legal remedies, was illustrated by “the first post-*Tinker* case involving the issue of a school’s authority to punish off-campus speech activities”¹⁴⁶

In this court’s judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student’s behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A

¹⁴² See Calvert, *supra* note 30, at 270. See also Anne Proffit Dupre, *Should Students Have Constitutional Rights?: Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 61 (1996) (stating that the Court in *Tinker* granted school district’s greater power than the State possesses generally because of the special circumstances of a school) (cited in Tuneski, *supra* note 8, at 161 (arguing that the *Tinker* standard should never apply to internet speech that originates off-campus)).

¹⁴³ *Tinker*, 393 U.S. at 511.

¹⁴⁴ *Bethel*, 478 U.S. at 688 (Brennan, J., concurring) (citations omitted).

¹⁴⁵ See Tuneski, *supra* note 8, at 181.

¹⁴⁶ See Calvert, *supra* note 30, at 275.

student is subject to the *same criminal laws and owes the same civil duties* as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.¹⁴⁷

More precisely, students are subject to both civil and criminal penalties for their speech.¹⁴⁸ These “real world” remedies provide more than adequate protection for school districts, making additional, in-school penalties unnecessary.¹⁴⁹

The second mechanism occurs if and when the student’s off-campus Internet speech manifests itself as a material and substantial disruption on campus. When this occurs, the school district may then punish the student’s speech under the *Tinker* standard.¹⁵⁰ Thus, this proposed standard merely limits a school from preemptively punishing off-campus Internet speech prior to on-campus distribution. Thirdly, as discussed above, unprotected student speech, including slander and threats, may be punished by the school district.¹⁵¹

Finally, there are important policy considerations that favor limiting a school district’s authority to off-campus student Internet speech. When a school district punishes student speech, it acts as both judge and prosecutor, requiring the school to gauge the constitutionality of the student’s speech.¹⁵² The *Thomas* court illuminated the trouble with this practice:

[A school official’s] intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy

¹⁴⁷ *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp 1328, 1340–41 (D.C.S.D. Tex. 1969) (emphasis added).

¹⁴⁸ See Tuneski, *supra* note 8, at 181. For a discussion of defamation lawsuits involving school officials and students see CAMBRON-MCCABE, ET AL., *supra* note 10, at 490 (discussing defamation lawsuits involving school officials and students).

¹⁴⁹ See Calvert, *supra* note 30, at 275. In a civil suit against J.S. by the offended teacher in the *J.S.* case listed above, Mrs. Fulmer was awarded \$500,000 in damages. See Kathryn Balint, *Personal Fouls: Students Get Rude and Crude With Internet Slambooks*, SAN DIEGO UNION-TRIB., Nov. 3, 2001, at E1.

¹⁵⁰ See Tuneski, *supra* note 8, at 181.

¹⁵¹ See *id.*

¹⁵² See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (2d Cir. 1979).

The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts such as libel and obscenity. Since superintendents and principals may act “arbitrarily, erratically, or unfairly,” the chill on expression is greatly exacerbated. Indeed, while Granville officials staunchly maintained that *Hard Times* is obscene, there is no evidence they ever consulted the constitutional standard embodied in *Miller v. California*. . . .

Moreover, we cannot overlook the fact that the short duration of most sanctions imposed by school officials—e.g., a five-day suspension—insulates the entire process from effective review. Where, as here, the punishment is virtually terminated before judicial review can be obtained, many students will be content to suffer in silence, a silence that may stifle future expression as well. Further, although students must absorb considerable expense to challenge a suspension in court, school officials can mete out punishment without incurring the costs of procedural safeguards a conventional prosecution would require.¹⁵³

The four main concerns of the *Thomas* court are worth repeating. First, school officials are likely to be biased in favor of censorship to suppress controversy, which is contrary to our First Amendment jurisprudence encouraging more speech, not less speech.¹⁵⁴ Also, given the ubiquity of the Internet, nothing would prevent teachers and school officials from affirmatively seeking out student speech to preemptively punish the student.¹⁵⁵ Second, school districts are incredibly susceptible to community pressure when deciding to punish student speech.¹⁵⁶ Third,

¹⁵³ *Id.* at 1051–52 (internal citations omitted).

¹⁵⁴ *See id.* at 1051. *See also* Calvert, *supra* note 30, at 277.

¹⁵⁵ This unfettered power to punish student speech could potentially lead to teachers or administrators seeking out a disliked student’s website in order to take revenge against them.

¹⁵⁶ The school districts in *Emmet* and *Thomas* both sought punishment only after community pressures were applied. *See Thomas*, 607 F.2d at 1051 (stating “Granville school administrators failed to discipline appellants until urged to do so by a community
(continued)

school officials are most likely unable to determine the constitutionality of student speech.¹⁵⁷ Fourth, given the short duration of their punishment, students are unlikely to challenge the constitutionality of the school official's action.¹⁵⁸ Moreover, even if students desire to challenge the punishment, court review may be cost-prohibitive. Although the *Thomas* case dealt with underground newspapers, its "logic is fundamentally sound and should be considered by courts facing the same or similar issues today involving student Web sites."¹⁵⁹

Taken together, the factors listed above create a greater student interest than the general right to on-campus speech considered in *Tinker*. In addition, when compared to the school district's need to preserve order, I believe the student's interest in off-campus Internet speech is more substantial. Although school districts already have broad authority to punish on and off-campus speech,¹⁶⁰ some deference must be given to the student's First Amendment rights. Accordingly, under the ad hoc balancing test, students deserve greater protection for their off-campus Internet speech than the *Tinker* standard provides. I believe the intentional and reckless standard proposed above provides this greater protection.

OVERVIEW AND CONCLUSION

Student Internet speech may be inflammatory and insensitive, causing limitless problems for school administrators attempting to counteract the speech's harmful effects.¹⁶¹ Nevertheless, students are entitled to limited First Amendment rights in public schools. Thus, for the reasons discussed above, school districts should not be able to punish off-campus student Internet speech. Student Internet speech is off-campus if it was: created independent of school activities, independent of the school's computer resources, and it is not a true threat. Once classified as off-campus speech, the school district should not be able to constitutionally punish the student's speech unless the student intentionally or recklessly caused the

leader. . . ."); see *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (stating that no punishment occurred until after a news report brought attention to the website).

¹⁵⁷ See *Thomas*, 607 F.2d at 1051.

¹⁵⁸ See *id.*

¹⁵⁹ See *Calvert*, *supra* note 30, at 277.

¹⁶⁰ See *Tuneski*, *supra* note 8, at 181

¹⁶¹ *Id.* at 144–46.

speech to be distributed on campus.¹⁶² If the school proves intentional or reckless distribution, then the speech is re-classified as on-campus speech. This on-campus speech is then subject to *Tinker* substantial disruption test as traditionally stated.¹⁶³

¹⁶² See *Thomas*, 607 F.2d at 1050 (stating generally that where activity was deliberately designed to take place outside of the schoolhouse gate, *Tinker* should not apply). This would provide student internet speech with a similar level of protection given to underground newspapers. For the view that geographic origin of the speech should not limit the school's jurisdiction, see Severance, *supra* note 125, at 1232–38. For other proposed First Amendment frameworks, see generally Pisciotta, *supra* note 125, and Willard, *supra* note 125.

¹⁶³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

