

# STUDENTS' FIRST AMENDMENT RIGHTS IN THE AGE OF THE INTERNET: OFF- CAMPUS CYBERSPEECH AND SCHOOL REGULATION

**Abstract:** Public school students have been using the Internet to tease, bully, and ridicule their classmates, teachers, and schools. The Supreme Court has held that schools can punish students for some speech without violating the constitution, if it is uttered on school grounds during school hours. Courts, however, have been divided over when, if ever, schools may punish students for comparable off-campus cyberspeech. Because the Supreme Court has provided no direct guidance, this Note examines the Supreme Court's view of students' First Amendment rights on campus, the student-teacher relationship, and basic First Amendment principles to determine whether schools may punish students for off-campus cyberspeech that would otherwise be protected by the First Amendment. This Note concludes that although, in some circumstances, schools may punish students for off-campus cyberspeech that attacks their fellow students, it is unconstitutional for schools to do the same where the student speech targets teachers, administrators, or the school itself.

## INTRODUCTION

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>1</sup> Almost forty years after the Supreme Court issued these often quoted lines, courts around the country are divided as to whether the very concept of "schoolhouse gates" remains applicable to student speech in the Internet age.<sup>2</sup>

Although it is settled that some student speech that otherwise would be protected from regulation under the First Amendment may

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<sup>1</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>2</sup> See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (analyzing school regulation of student cyberspeech without determining whether it took place on or off campus); see also Sandy S. Li, Note, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 Loy. L.A. ENT. L. REV. 65, 87 (2005).

be regulated in schools,<sup>3</sup> it is unclear where student speech posted on the Internet ("cyberspeech") from off campus fits into the picture.<sup>4</sup> This problem is only exacerbated by the lack of guidance provided by the U.S. Supreme Court, which has not addressed whether public schools may punish off-campus student speech, let alone off-campus cyberspeech.<sup>5</sup>

Now, in the age of the Internet, with personal blogs, social networking websites, and personal webpages, students are turning to the World Wide Web more and more frequently to express their feelings and beliefs.<sup>6</sup> Often, such student expression targets other students or faculty.<sup>7</sup> In these situations, some school administrators may feel they are helpless to curb the harmful effects of such cyberspeech.<sup>8</sup> Other times, schools are imposing sanctions upon students that are challenged in costly lawsuits.<sup>9</sup> Finally, some students who are sanctioned for off-campus cyberspeech may be accepting unconstitutional punishment without challenge.<sup>10</sup> In short, uncertainty in this area of law

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<sup>3</sup> See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings . . . ." (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986))); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." (citation omitted)). The text of the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>4</sup> Compare *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding a substantial likelihood that a student would succeed on the merits of his First Amendment claim because of a lack of evidence that the content of his website constituted a true threat and "the out-of-school nature of the speech"), with *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 216–17 (D. Conn. 2007) (finding that a student's website, which was created off campus, was on-campus speech because it was designed "to come onto the campus" and because "it was reasonably foreseeable that" that it would do so), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

<sup>5</sup> See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 269 (2001).

<sup>6</sup> See *id.* at 244.

<sup>7</sup> See *id.*

<sup>8</sup> See, e.g., Lisa Guernsey, *Telling Tales Out of School*, N.Y. TIMES, May 8, 2003, at G1 (quoting a high school principal as saying he wanted to take disciplinary action against a student for creating a website with content insulting students and discussing students' sexual activities).

<sup>9</sup> See *infra* notes 168–255 and accompanying text.

<sup>10</sup> See *Thomas v. Bd. of Educ., Grandville Cent. Sch. Dist.*, 607 F.2d 1043, 1052 (2d Cir. 1979).

has created a need for a clear standard articulating the extent of a school's power to regulate off-campus Internet speech.<sup>11</sup>

This Note argues that there is a definite need for a clear test courts can apply to off-campus cyberspeech, known to students and teachers alike. The test, however, must make a distinction between speech that targets fellow students, and that which targets the school, its administrators, teachers, and faculty.<sup>12</sup> For the purpose of this Note, cyberspeech is "off-campus" speech if it is created without the use of school resources and away from the school campus and if its creation is not part of a school sanctioned activity.<sup>13</sup> Off-campus cyberspeech that directly targets fellow students should be within the reach of school regulation if it interferes with the rights of other students or causes a substantial disruption.<sup>14</sup> Off-campus cyberspeech targeting the school, however, which is otherwise constitutionally protected,<sup>15</sup> should never be within the reach of school authority.<sup>16</sup>

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<sup>11</sup> See, e.g., Calvert, *supra* note 5, at 269; Li, *supra* note 2, at 67.

<sup>12</sup> See *infra* notes 263–357 and accompanying text.

<sup>13</sup> Cyberspeech is thus treated as occurring at the moment of creation in the place where the student creates it. See, e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591–92, 595 (W.D. Pa. 2007) (finding a student's webpage to be off-campus speech, even though he accessed it at school, because he created it at home). This view rejects the idea that cyberspeech is on-campus speech if it is targeted at the school or is reasonably foreseeable to reach the school grounds. Cf. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (finding a webpage on campus in part because its intended audience was the school community). This view also rejects the idea that cyberspeech is "on-campus" speech if it is accessed from school. See *Layshock*, 496 F. Supp. 2d at 591–92. This does not mean that schools lack the ability to prohibit students from accessing or showing off-campus cyberspeech to other students at school, but merely that where the speech is accessed does not change the location of the speech or the school's ability to prohibit the creation of the speech. See *id.* Although lower courts have described the location of cyberspeech differently in their opinions, it is a mistake to believe that the question of how cyberspeech should be categorized is separate from the question of how it should be treated. See *J.S.*, 807 A.2d at 865. The question of whether cyberspeech created off campus is "off-campus" speech is no different from the question of how cyberspeech created off campus should be dealt with by the courts. See *id.*

<sup>14</sup> See *infra* notes 311–357 and accompanying text.

<sup>15</sup> There are a few narrowly defined categories of speech that the Supreme Court has held to be outside the protection of the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (listing the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). Such speech should be treated as any other conduct that occurs off campus. See *id.* The question of whether or not a school may punish the conduct is thus a question of jurisdiction not addressed by this Note, rather than one of First Amendment protection. See *id.* Schools that choose to enact policies punishing students for unprotected speech, however, must be certain that their policies either cover all unprotected speech within a category or the most extreme speech within that category. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

<sup>16</sup> See *infra* notes 268–310 and accompanying text.

Part I of this Note examines the four Supreme Court cases that directly deal with student speech.<sup>17</sup> Part II considers the three major views of the student-teacher relationship that lie behind the Supreme Court and lower court decisions on student speech.<sup>18</sup> Part III looks at how courts have treated off-campus speech, both before and after the advent of the Internet.<sup>19</sup> Finally, Part IV demonstrates how the view of the student-teacher relationship, the principles of the First Amendment, and Supreme Court precedent suggest that off-campus, otherwise protected cyberspeech targeting the school, faculty, and administrators is beyond the reach of school authority.<sup>20</sup> It also demonstrates that, in contrast, speech targeting students falls within the constitutionally permissible scope of school regulation when the speech infringes upon the rights of other students or causes a substantial disruption to the learning environment.<sup>21</sup>

## I. THE FOUR U.S. SUPREME COURT CASES

The U.S. Supreme Court has only decided four cases that deal with students' First Amendment rights of freedom of speech within the public school context.<sup>22</sup> Each of these cases dealt with speech the Supreme Court found to be "on-campus," and in each case, the Court applied a different test to determine whether the speech was entitled to First Amendment protection.<sup>23</sup> The first case the Supreme Court decided articulated the Court's most speech-protective standard, with each subsequent case carving out an area of on-campus speech that is less protected.<sup>24</sup> None of these subsequent decisions overruled a previous decision.<sup>25</sup> Rather, the Court has recognized that justifications for regulating on-campus student speech differ depending upon the circumstances surrounding the speech and the content of the speech itself.<sup>26</sup> These Supreme Court decisions and the implications of their

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<sup>17</sup> See *infra* notes 22–88 and accompanying text.

<sup>18</sup> See *infra* notes 89–134 and accompanying text.

<sup>19</sup> See *infra* notes 135–262 and accompanying text.

<sup>20</sup> See *infra* notes 263–310 and accompanying text.

<sup>21</sup> See *infra* notes 311–357 and accompanying text.

<sup>22</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 687 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

<sup>23</sup> See *infra* notes 28–88 and accompanying text.

<sup>24</sup> See *infra* notes 28–88 and accompanying text.

<sup>25</sup> See *infra* notes 28–88 and accompanying text.

<sup>26</sup> See *infra* notes 28–88 and accompanying text.

reasoning are thus a necessary starting place for consideration of off-campus student cyberspeech.<sup>27</sup>

A. *Tinker v. Des Moines Independent Community School: The First Articulation of Students' Right to Freedom of Speech in Public Schools*

*Tinker v. Des Moines Independent Community School District*, decided in 1969, was the first Supreme Court case to address students' First Amendment free speech rights in public schools.<sup>28</sup> In *Tinker*, students were suspended for wearing black armbands to school in protest of the Vietnam War.<sup>29</sup> In holding that the suspensions were a violation of the students' First Amendment rights, the Court stated that students do not leave their constitutional rights to freedom of speech at the school-house gates.<sup>30</sup> Emphasizing the importance of First Amendment rights both inside and outside of school, the Court held that student speech could be punished only if it might reasonably lead school authorities to expect it to cause a "substantial disruption of or material interference with school activities" or "the rights of other students to be secure and to be let alone."<sup>31</sup> Thus, *Tinker* set out what has become known as the "material and substantial disruption test" as the standard for school regulation of student speech.<sup>32</sup>

*Tinker* made it clear that schools cannot be enclaves of totalitarianism and that student speech may not be suppressed merely because school administrators would prefer not to deal with it.<sup>33</sup> The Court reasoned that exposure to a wide range of ideas, not only those dictated through "authoritative selection," is crucial to preparing students for citizenship.<sup>34</sup> The Court recognized the need for schools to have authority to maintain order but stressed that this need must be exercised in a manner consistent with the Constitution.<sup>35</sup> The Court found that any student speech might be disagreeable to the listener and could start an argument, but that the Constitution demands that such risks be taken.<sup>36</sup> The Court cautioned that history suggests that freedom of

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<sup>27</sup> See *infra* notes 28–88 and accompanying text.

<sup>28</sup> See 393 U.S. 503.

<sup>29</sup> *Id.* at 504.

<sup>30</sup> *Id.* at 506.

<sup>31</sup> *Id.* at 508, 514.

<sup>32</sup> See *id.* at 514; see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004).

<sup>33</sup> See *Tinker*, 393 U.S. at 511.

<sup>34</sup> See *id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>35</sup> See *id.* at 507.

<sup>36</sup> See *id.* at 508–09.

speech strengthens the nation and that Americans must live their lives in a society that tolerates speech with which they may disagree.<sup>37</sup>

### B. Bethel v. Fraser: *The Lewd, Vulgar, and Obscene*

In 1986, almost two decades after the Supreme Court decided *Tinker*, it took up another student speech case, *Bethel School District No. 403 v. Fraser*.<sup>38</sup> The standard set out in *Fraser* can be and has been interpreted in different ways.<sup>39</sup> At its narrowist, it holds that in a student assembly, a school may punish lewd and vulgar speech.<sup>40</sup> At its broadest, it holds that schools may punish speech that would undermine the school's educational mission as determined by the school board.<sup>41</sup>

In *Fraser*, a student was suspended for delivering a speech nominating a fellow student for class office during a school assembly that was filled with sexual innuendo.<sup>42</sup> Though the speech did not cause a mate-

<sup>37</sup> See *id.*

<sup>38</sup> See 478 U.S. 675.

<sup>39</sup> See *id.* at 685; *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007) (finding that *Fraser* does not allow students to be punished for speech that interferes with a school's educational mission); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (refusing to apply the *Fraser* standard to student cyber-speech because it took place off campus); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 867–68 (Pa. 2002) (suggesting *Fraser* is applicable to cyberspeech that takes place off campus and thus is not limited by location of the speech); see also Calvert, *supra* note 5, at 271–72 (suggesting that *Fraser* only applies to student speech at school-sponsored events or activities).

<sup>40</sup> See *Fraser*, 478 U.S. at 685.

<sup>41</sup> See *id.* The Court stated, "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683. In 2007, in *Morse v. Frederick*, the Supreme Court stated that "the mode of analysis employed in *Fraser* is not entirely clear," but it refused to resolve the debate over the reach of the case's holding. See 127 S. Ct. at 2626. Justice Alito, in his concurring opinion in *Morse*, specifically rejected the idea that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Id.* at 2637 (Alito, J., concurring).

<sup>42</sup> *Fraser*, 478 U.S. at 677–78. Justice Brennan, in his opinion concurring in the judgment, provided an excerpt of the student's speech:

"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."

rial and substantial disruption, the Court upheld the suspension.<sup>43</sup> Although it quoted *Tinker* to the extent that students do not lose their rights to freedom of speech at the schoolhouse gates,<sup>44</sup> the Court emphasized that students in public schools do not necessarily have the same degree of constitutional rights as adults outside of public schools.<sup>45</sup> Without questioning the validity of *Tinker*, the Court appeared to distinguish it on the grounds that *Tinker* dealt with political speech.<sup>46</sup> Thus the Court set out a new standard: vulgar and lewd speech may be prohibited, as it is inconsistent with the primary values of public education.<sup>47</sup>

In articulating this new standard, the *Fraser* Court stressed the role school authorities must play in protecting students while their parents are unable to do so.<sup>48</sup> The Court recognized the school's interests in protecting minors from vulgar and offensive language and acknowledged that such an interest is particularly strong where students are in a captive audience.<sup>49</sup> Considering the interest in protecting students entrusted to the school's care and the low social value of the offensive manner in which the speech was communicated,<sup>50</sup> the Court found that the school could punish a student speaking to an "unsuspecting audience of teenage students" even if the speech would be protected outside of the school context.<sup>51</sup>

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*Id.* at 687 (Brennan, J., concurring) (omission in original). The Supreme Court's majority opinion found this speech to be an "elaborate, graphic, and explicit sexual metaphor," *id.* at 678 (majority opinion), which Justice Brennan believed was an overstatement, *see id.* at 687 (Brennan, J., concurring).

<sup>43</sup> *Id.* at 687 (majority opinion).

<sup>44</sup> *Id.* at 680.

<sup>45</sup> *Id.* at 682.

<sup>46</sup> *See id.* at 680. "The marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals." *Id.* at 680. "Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." *Id.* at 685.

<sup>47</sup> *See Fraser*, 478 U.S. at 685-86.

<sup>48</sup> *See id.* at 683-85.

<sup>49</sup> *See id.* at 684.

<sup>50</sup> *See id.* at 685. The Court stressed that the penalties were not imposed for a political viewpoint, but rather for vulgar and lewd conduct. *See id.* The Court suggested that some words are not essential to the expression of ideas and thus their low social value is outweighed by the harm they cause. *See id.* at 684-85 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978)).

<sup>51</sup> *See id.*

### C. Hazelwood v. Kuhlmeier: *Speech Reasonably Attributable to the School*

In 1998, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court used yet another type of analysis.<sup>52</sup> The Court held that if speech is part of the school curriculum and a person might reasonably think that the school endorsed the content of the speech, the school could regulate the speech based on reasonable pedagogical concerns.<sup>53</sup> In *Kuhlmeier*, school administrators removed portions of a school paper written and edited by a school journalism class before the paper went to press.<sup>54</sup> The principal was concerned over the content of two stories, one that described the experiences of three pregnant Hazelwood high school students and another that discussed the impact of divorce on students at the school.<sup>55</sup>

The Court once again started with the same rationale—that students do not lose their First Amendment rights in school—but held that those rights must be circumscribed on campus because of the school setting and educational mission.<sup>56</sup> Having quoted extensively from *Tinker* and from *Fraser*, the Court chose not to apply either.<sup>57</sup> Instead, it inquired whether the school newspaper was a public forum.<sup>58</sup>

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<sup>52</sup> See 484 U.S. at 270, 273.

<sup>53</sup> *Id.* at 273.

<sup>54</sup> *Id.* at 262–64.

<sup>55</sup> *Id.* at 263. The principal objected to the stories because of concern that the identities of the students in the pregnancy story might be discoverable and because she felt the parents should have an opportunity to respond to remarks about them in the divorce article. *Id.*

<sup>56</sup> *Id.* at 266. The Court stated that students “cannot be punished merely for expressing their personal views on the school premises—whether ‘in the cafeteria, or on the playing field, or on the campus during the authorized hours’ unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’” *Id.* (citation omitted). The Court also noted, however, that in public schools, students’ First Amendment rights are not automatically the same as those of adults in other circumstances and must be “applied in light of the special characteristics of the school environment” and the school’s educational mission. *Id.* (quoting *Tinker*, 393 U.S. at 506).

<sup>57</sup> See *Kuhlmeier*, 484 U.S. at 270–71.

<sup>58</sup> *Id.* at 267, 270. A “public forum” is “[a] public place where people traditionally gather to express ideas and exchange views.” BLACK’S LAW DICTIONARY 1266 (8th ed. 2004). These are areas where the First Amendment’s protections are at their strongest, and the government may only circumscribe speech if strict criteria are met. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983) (reviewing the Court’s jurisprudence on the different levels of protection for speech in public forums, designated public forums, and nonpublic forums before determining the constitutionality of a bargaining agreement granting only one union access to an interschool mail system). In contrast, speech on government property that is not a public forum may be prohibited on the basis of its subject matter and the speaker’s identity so long as the prohibition is reasonably related to the purpose served by the forum and is viewpoint-neutral. See *Cornelius v.*

Deciding that it was not, the Court concluded that it was "part of the educational curriculum and a 'regular classroom activit[y].'"<sup>59</sup> Because the school used the paper as a supervised means of teaching journalism skills, the Court held that school officials could regulate the paper so long as the regulations were reasonable.<sup>60</sup> The Court concluded that *Tinker* concerned the ability of school administrators to silence students, but *Kuhlmeier* concerned whether educators could control the contents of a school-sponsored expressive activity that might reasonably be perceived to bear the imprimatur of the school and was part of the school curriculum.<sup>61</sup>

Emphasizing that the Constitution does not compel educators to surrender control of public schools to students,<sup>62</sup> the Court concluded that schools do not have to tolerate student speech that is inconsistent with the values of a civilized society.<sup>63</sup> The school must be allowed to consider the emotional maturity of the student audience in determining whether it is appropriate for the school to be associated with the student speech.<sup>64</sup>

#### D. *Morse v. Frederick: Speech Advocating Illegal Drug Use*

The most recent Supreme Court decision on student speech, *Morse v. Frederick*, came down in June 2007.<sup>65</sup> Although many hoped it would help clarify the extent of student First Amendment speech rights both on and off campus, it instead set out a new fact-specific standard.<sup>66</sup> The Court held that schools may punish speech reasonably interpreted as advocating illegal drug use.<sup>67</sup>

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NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Thus, having found the school paper in *Kuhlmeier* not to be a public forum, the Court was able to apply a more lenient test for the constitutionality of the prohibition. See 484 U.S. at 270.

<sup>59</sup> *Kuhlmeier*, 484 U.S. at 268 (alteration in original).

<sup>60</sup> *Id.* at 270.

<sup>61</sup> *Id.* at 270–71.

<sup>62</sup> *Id.* at 272. "Indeed, the *Fraser* Court cited as 'especially relevant' a portion of Justice Black's dissenting opinion in *Tinker* 'disclaim[ing] any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'" *Id.* at 272 n.4 (quoting *Fraser*, 478 U.S. at 686 & *Tinker*, 393 U.S. at 526) (alteration and omission in original).

<sup>63</sup> *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

<sup>64</sup> See *Kuhlmeier*, 484 U.S. at 271–72.

<sup>65</sup> See 127 S. Ct. 2618.

<sup>66</sup> See *id.* at 2622.

<sup>67</sup> See *id.* Although Chief Justice Roberts did win five votes and produced a majority opinion, two of the Justices who voted with him wrote separately as well. *Id.* All together, the case produced five different opinions. See *id.*

In *Morse*, Joseph Frederick, a senior at Juneau-Douglas High School ("JDHS"), was suspended for unfurling a fourteen-foot banner that read "BONG HITS 4 JESUS" as the Olympic Torch Relay passed by JDHS.<sup>68</sup> Though Frederick had not gone to school that morning, he did go to the relay and stood opposite the school and unfurled his banner in order to get on television.<sup>69</sup> The JDHS students had left the school building on a class trip to watch the relay and, with teachers monitoring them, had been allowed to stand on either side of the street.<sup>70</sup> Avoiding the issue of off-campus speech, the Court stated that Frederick arrived at school late and, because Frederick was surrounded by fellow students during school hours at a school sanctioned activity, he was on campus.<sup>71</sup>

Finding that a school administrator could reasonably interpret the banner as promoting the use of illegal drugs,<sup>72</sup> and not as political speech advocating their legalization, the Court upheld the suspension as a constitutional restriction on student speech.<sup>73</sup> As in *Kuhlmeier*, the Court began by quoting *Tinker* and *Fraser* for the principle that, although students maintain their constitutional rights in school, those rights are not necessarily equal to those of adults in other settings.<sup>74</sup> Though the Court quoted from these cases extensively, it did not apply their standards.<sup>75</sup>

Acknowledging that the mode of analysis in *Fraser* was "not entirely clear," the court distilled two principles from it: that students' First Amendment rights are circumscribed because of the unique character-

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<sup>68</sup> *Id.* at 2622-23.

<sup>69</sup> *Id.* at 2622-24.

<sup>70</sup> See *Morse*, 127 S. Ct. at 2622.

<sup>71</sup> *Id.* at 2622, 2624. "At the outset, we reject Frederick's argument that this is not a school speech case . . ." *Id.* at 2624. The Court noted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents but not on these facts." *Id.* (citation omitted).

<sup>72</sup> *Id.* at 2625.

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* at 2622. The second paragraph of the Court's opinion reads:

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and that the rights of students "must be applied in light of the special characteristics of the school environment."

*Id.* (citations omitted).

<sup>75</sup> See *Morse*, 127 S. Ct. at 2629.

istics of the school environment<sup>76</sup> and that the *Tinker* test is not the only way to analyze school regulation of student speech.<sup>77</sup> From these two principles, the Court determined that it was not under an obligation to use the *Tinker* analysis in the specific case and found that the "important—indeed, perhaps compelling" governmental interest in preventing student drug use allowed the school to prohibit such speech.<sup>78</sup> Thus, the holding was strictly limited: schools can protect students in their care from speech advocating illegal drug use.<sup>79</sup>

The Court's limited holding was based primarily upon three ideas.<sup>80</sup> First, illegal drug use is a very serious problem.<sup>81</sup> Second, it is particularly dangerous to children because the effects of drugs are strongest on children.<sup>82</sup> Third, schools, teachers, and administrators must work to protect children who have been entrusted to their care.<sup>83</sup> Thus, it is unclear whether this standard would be applied if any of the factors were not present.<sup>84</sup>

After *Morse*, it seems that *Tinker* remains the default standard for regulation of on-campus student speech.<sup>85</sup> If the speech is vulgar or lewd, it will be judged under *Fraser*, and it may be prohibited.<sup>86</sup> If the speech takes place as part of a school-sponsored activity or might reasonably be understood as school-sponsored speech, then, under *Kuhlmeier*, it can be regulated for any reasonable pedagogical concern, regardless of whether it is vulgar or likely to cause a substantial

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<sup>76</sup> *Id.* at 2626. The Court distills this principle from the conclusion that "[h]ad *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected." *Id.*

<sup>77</sup> *Id.* The Court reached this second conclusion by noting that "[w]hatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker* . . ." *Id.* at 2627.

<sup>78</sup> *See id.* at 2628 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

<sup>79</sup> *Id.* at 2622. Justice Alito's concurring opinion makes clear that the Court's holding is not broader, stating: "I join the opinion of the Court on the understanding that . . . it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use . . ." *Id.* at 2636 (Alito, J., concurring). His vote was necessary to give Chief Justice Roberts's opinion a majority. *See id.* at 2622 (majority opinion).

<sup>80</sup> *See Morse*, 127 S. Ct. at 2628.

<sup>81</sup> *See id.*

<sup>82</sup> *See id.* (quoting *Vernonia Sch. Dist.*, 515 U.S. at 661–62).

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 2622; *id.* at 2636 (Alito, J., concurring).

<sup>85</sup> *See Morse*, 127 S. Ct. at 2626–27.

<sup>86</sup> *See id.*

disruption.<sup>87</sup> Finally, if the speech could reasonably be interpreted as advocating the use of illegal drugs, it may be punished under *Morse*.<sup>88</sup>

## II. THE TEACHER-STUDENT RELATIONSHIP

Perhaps as important as understanding the different modes of analysis courts have used to assess student speech are the underlying theories of the student-teacher relationship and of the role of public school education.<sup>89</sup> Although there are many variations to how courts view the proper role of the teacher and of the student, there are three general categories in which these perspectives tend to fall.<sup>90</sup> First is the idea that teachers act *in loco parentis*, taking on the role of the students' parents.<sup>91</sup> The second approach, similar in effect though not in theory, is that it is a teacher's job to teach and a student's job to learn by doing what the teacher tells them.<sup>92</sup> The third view is that although teachers are obligated to teach, students should be free to question teachers, learn from each other, and challenge school policies.<sup>93</sup>

### A. *The In Loco Parentis View*

The *in loco parentis* view of schools is that the teachers take on the rights and duties of the student's parents and act in their place while the student is at school.<sup>94</sup> There are two particularly relevant consequences of this view.<sup>95</sup> The first is that teachers take on the responsibility of protecting and caring for the child while the child is in their custody.<sup>96</sup> The second is that teachers acquire the same ability to punish and control the child as the child's parents normally would.<sup>97</sup> The natural implication of this view is that teachers, like parents, need not tolerate speech or conduct that they view as harmful, and they have a duty to protect other students from such speech or conduct.<sup>98</sup> Al-

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<sup>87</sup> See *Kuhlmeier*, 484 U.S. at 271.

<sup>88</sup> See *Morse*, 127 S. Ct. at 2622.

<sup>89</sup> See *infra* notes 263-357 and accompanying text.

<sup>90</sup> See *infra* notes 94-134 and accompanying text.

<sup>91</sup> See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2631 (2007) (Thomas, J., concurring).

<sup>92</sup> See, e.g., *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007).

<sup>93</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>94</sup> See *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765)).

<sup>95</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-55 (1995).

<sup>96</sup> See *id.* at 655.

<sup>97</sup> See *id.* (quoting 1 BLACKSTONE, *supra* note 94, at 441).

<sup>98</sup> See *Morse*, 127 S. Ct. at 2631-32, (Thomas, J., concurring).

though the Supreme Court has made clear that the law does not view public school teachers solely as acting in the role of parents and recognizes them as state actors for constitutional purposes,<sup>99</sup> the doctrine remains as does the idea behind it.<sup>100</sup>

Though the doctrine of *in loco parentis* no longer grants school officials free range to restrict student speech, the Court used it as a justification in its 1986 decision in *Bethel School District No. 403 v. Fraser*, allowing punishment of lewd and vulgar speech.<sup>101</sup> The Court recognized that school authorities, acting *in loco parentis*, have an interest in protecting children from sexually explicit, indecent, or lewd speech and that this interest is particularly strong when the children are a captive audience.<sup>102</sup> The *in loco parentis* view of the relationship between teachers and students is thus one where there is an emphasis on protecting those in the care of the school, and it vests parental control in teachers.<sup>103</sup> Unfettered, the doctrine would leave students no free speech rights beyond what the teachers decide is beneficial.<sup>104</sup> Although this view has been rejected,<sup>105</sup> it continues to play a role in framing the issue of student speech.<sup>106</sup>

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<sup>99</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (rejecting the argument that school administrators are not subject to Fourth Amendment restrictions on seizure in dealing with students because they derive their authority from the students' parents, not the state); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (implying that boards of education do not have the same power over students while at school as parents do at home by finding that boards of education are state actors and must comply with the Fourteenth Amendment in granting an injunction preventing the enforcement of a regulation requiring students to salute the American flag).

<sup>100</sup> See *Morse*, 127 S. Ct. at 2633 n.6 (Thomas, J., concurring); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986); see also *Vernonia*, 515 U.S. at 656 (stressing the school's custodial responsibility for children in the context of determining the extent of students' Fourth Amendment rights).

<sup>101</sup> See *Fraser*, 478 U.S. at 684.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *Morse*, 127 S. Ct. at 2635 (Thomas, J., concurring) ("Several points are clear: (1) under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishment for violations of those rules."). Recognizing the implications of the doctrine of *in loco parentis*, Justice Alito warned that the doctrine is "a dangerous fiction" in his concurring opinion in *Morse*. See *id.* at 2637-38 (Alito, J., concurring) ("It is . . . wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.").

<sup>105</sup> Historically, the doctrine of *in loco parentis* developed when parents sent their children to private tutors to be educated. See *id.* at 2630-31 (Thomas, J., concurring) (quoting 1 BLACKSTONE, *supra* note 94, at 441). As the public education system came into existence, the idea that teachers acted under authority of the pupil's parents was complicated by the

Despite the rejection of the historical doctrine of *in loco parentis*, which Justice Thomas laments, the Supreme Court continues to recognize that schools must act to protect children while they are in the school's charge.<sup>107</sup> In the context of Fourth Amendment on-campus search and seizure cases, the Court has stressed that though teachers are state actors for constitutional purposes, their power over students is custodial in nature and therefore provides teachers with the ability to exercise a degree of control over students that the state could not exercise over adults.<sup>108</sup>

### B. The Top-Down, or Authoritarian, View

The top-down or authoritarian view of the relationship between teachers and students is similar to that of *in loco parentis*, but it does not rely on power coming from parents.<sup>109</sup> Rather, it suggests that the

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fact that the teacher was also an agent of the state. See *Ingraham v. Wright*, 430 U.S. 651, 662 (1977). With laws making education mandatory, a decisive blow was dealt to the theory that teachers acted solely with power voluntarily delegated by parents. See *id.* Thus, under the current system of public education and the laws in place in many states, the idea that teachers act with power delegated to them by parents is undermined by the fact that parents have little choice but to send their children to schools. See *Vernonia*, 515 U.S. at 655; *T.L.O.*, 469 U.S. at 336. At the same time that the rationale for granting teachers almost unfettered control over their pupils dissipated, however, the need for teachers to protect children grew because laws requiring mandatory education for children, in many cases, prevent parents from being able to protect their children during the school hours of the day. See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). The development of the modern public school system thus served to place limits on a teacher's ability to discipline a student while increasing the need for teachers to protect students when the law prevents parents from doing so themselves. See *id.*

<sup>106</sup> See *Morse*, 127 S. Ct. at 2633 n.6 (Thomas, J., concurring); *Fraser*, 478 U.S. at 684; see also *Vernonia*, 515 U.S. at 656. Justice Thomas, in his concurrence in *Morse*, even argued that the doctrine should be restored and that *Tinker v. Des Moines Independent Community School District*, decided by the Court in 1969, should be overruled. See *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring).

<sup>107</sup> See *Morse*, 127 S. Ct. at 2633 n.6 (Thomas, J., concurring).

<sup>108</sup> See *Vernonia*, 515 U.S. at 655.

[W]hile denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."

*Id.* (quoting *T.L.O.*, 469 U.S. at 339) (second alteration in original).

<sup>109</sup> Compare *Lowery*, 497 F.3d at 588 (finding that the purpose of a school is for teachers to impart knowledge on their students), with *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring) (describing early public schools under the doctrine of *in loco parentis* as places where

purpose of education is to learn and that teachers are the ones who know how to educate students and thus should be given the power to do so without student interference.<sup>110</sup> This view was articulated in the 2007 decision of the U.S. Court of Appeals for the Sixth Circuit in *Lowery v. Euverard*, which stated that public schools are not run as a democracy but exist so teachers can impart knowledge on students.<sup>111</sup> The school's authority, the court suggested, results from its educational mission, not student consent.<sup>112</sup>

An authoritarian view thus neither requires tolerance of student speech, nor recommends it.<sup>113</sup> The effects of an authoritarian viewpoint on free speech can be seen in Justice Black's dissenting opinion in *Tinker v. Des Moines Independent School District*, decided in 1969.<sup>114</sup> If teachers are the ones who know how to teach, students should not be able to interfere, and certainly should not sue their teachers when teachers punish them for disobeying their rules.<sup>115</sup> Significantly, al-

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"teachers taught, and students listened" and "[t]eachers commanded, and students obeyed").

<sup>110</sup> See *Lowery*, 497 F.3d at 588.

<sup>111</sup> See *id.* The court's language is worth quoting:

Public schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students). Unlike our system of government, the authority structure is not bottom-up, but top-down. The authority of school officials does not depend upon the consent of the students. To threaten this structure is to threaten the mission of the public school system.

*Id.*

<sup>112</sup> See *id.* at 585, 588 (upholding the removal of students from the school football team who wrote and signed a petition stating "I hate Coach Euvar[d] [sic] and I don't want to play for him").

<sup>113</sup> See *id.* at 588.

<sup>114</sup> *Tinker*, 393 U.S. at 525-26 (Black, J., dissenting). Speaking of the majority opinion in *Tinker*, Justice Black stated:

This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.

*Id.* (footnote omitted).

<sup>115</sup> *Id.* at 525 ("Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, imma-

though Justice Black dissented in *Tinker*, where the Court articulated its most permissive standard of student speech, the Court cited a portion of Justice Black's opinion in both *Fraser* and its 1988 decision in *Hazelwood v. Kuhlmeier* for the proposition that the Constitution does not place control of schools in the hands of students.<sup>116</sup>

### C. *The Democratic View*

The democratic view suggests that students should be given some room to question teachers and administrators.<sup>117</sup> This view is consistent with the view that students learn civics best when they are allowed to see the Constitution at work.<sup>118</sup> *Tinker* itself adopts this view in many respects.<sup>119</sup> There, the Court recognized that public schools are not intended to produce a homogeneous population, but free thinking individuals.<sup>120</sup> Though the school wished to avoid the controversy caused by anti-war speech during Vietnam, the Court held that exposure to such speech by fellow students was a valuable part of the educational experience.<sup>121</sup>

Not only does the democratic view of the relationship between students and teachers suggest teachers should not be able to suppress controversial speech<sup>122</sup> but also that part of the learning process itself involves "personal intercommunication among the students."<sup>123</sup> It

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ture students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils.").

<sup>116</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n.4 (1988); *Fraser*, 478 U.S. at 686.

<sup>117</sup> See *Tinker*, 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603).

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 511-13.

<sup>120</sup> See *id.* at 511-12 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

<sup>121</sup> See *id.* at 511-13. The Court reasoned that schools must not be enclaves of totalitarianism but must create an atmosphere where students learn to communicate with each other, consider multiple points of view, and draw their own reasoned conclusions. See *id.* This view led the Court to conclude that schools cannot prevent student speech because it expresses sentiments of which the school does not approve. *Id.*

<sup>122</sup> See *Tinker*, 393 U.S. at 511-13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>123</sup> See *id.* at 512. The Court stated:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.

*Id.* (emphasis added) (footnote omitted).

helps prepare students to live in a society where they will have to determine which of many views to accept.<sup>124</sup> At the same time, this view recognizes that students' free speech rights do not allow speech that substantially disrupts the learning environment or impinges on the rights of other students.<sup>125</sup> The democratic view does not suggest that schools should be run by popular vote, but, rather, that students learn and develop best when they are exposed to a variety of ideas and are free to question their teachers, and that schools should be run accordingly.<sup>126</sup>

Overall, the Court has adopted the democratic view of the student-teacher relationship, but it has also continued to recognize that teachers must maintain order and protect their students.<sup>127</sup> This democratic view, with remnants of the *in loco parentis* doctrine, recognizes that students should be free to express their ideas and question their teachers, while, at the same time, teachers must have authority to regulate speech when it is necessary to protect students and maintain order.<sup>128</sup> Thus, the arm bands in *Tinker* were protected speech, for they exposed students to a political view, which adds to the marketplace of ideas and helps prepare students for citizenship.<sup>129</sup> In contrast, when students are in a captive environment, teachers are permitted to protect students from harmful speech that the students cannot avoid.<sup>130</sup> This includes sexual speech traditionally deemed by the courts to be of low value and advocacy of using illegal drugs.<sup>131</sup> Although such speech might be protected outside the school environment, within the school, when students are unable to avoid the

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<sup>124</sup> See *id.* ("The classroom is peculiarly the 'marketplace of ideas.' The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." (quoting *Keyishian*, 385 U.S. at 603)).

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *Morse*, 127 S. Ct. at 2628; *Fraser*, 478 U.S. at 684–85; *Tinker*, 393 U.S. at 512.

<sup>128</sup> The democratic view does not require school officials "to surrender control of the American public school system" to the students. See *Fraser*, 478 U.S. at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)). It recognizes not only that schools must be able to maintain discipline to serve their purposes but also that student speech is a valuable part of a public school education. See *Tinker*, 393 U.S. at 512–13. Thus, teachers have greater authority over student speech that takes place in the classroom and could be associated with the school than they have over a student's personal speech. See *Kuhmeier*, 484 U.S. at 270–71.

<sup>129</sup> See *Tinker*, 393 U.S. at 512.

<sup>130</sup> See *Morse*, 127 S. Ct. at 2628; *Fraser*, 478 U.S. at 684–85.

<sup>131</sup> See *Morse*, 127 S. Ct. at 2629; *Fraser*, 478 U.S. at 685.

speech or the speaker, the Court permits greater regulation.<sup>132</sup> Finally, the Court also recognizes that teachers must be free to disassociate themselves from speech of which they do not approve.<sup>133</sup> These views, though never expressed in the context of off-campus cyber-speech, have implications for how such speech should be treated.<sup>134</sup>

### III. OFF-CAMPUS SPEECH

The Supreme Court has not heard any cases relating to student off-campus speech.<sup>135</sup> Lower courts, however, have been forced to deal with the issue in different contexts.<sup>136</sup> Without controlling Supreme Court precedent, these courts have used different reasoning to reach different conclusions.<sup>137</sup>

#### A. *Why None of the Supreme Court Precedents Directly Control*

When the Supreme Court decided *Tinker v. Des Moines* in 1969, the Court weighed the importance of the students' First Amendment rights against the schools' need for authority to "control conduct in the schools"<sup>138</sup> and found that students' rights had to be applied in light of the characteristics of the school environment.<sup>139</sup> The Court thus implied that students have greater First Amendment rights outside of school than inside.<sup>140</sup> This implication became more apparent when the Court recognized that, although the Constitution permits reasonable regulation of speech in carefully restricted circumstances, it does not permit First Amendment rights to be so confined as to lose their significance.<sup>141</sup> If *Tinker* was intended to apply to all off-campus

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<sup>132</sup> See *Morse*, 127 S. Ct. at 2628; *id.* at 2638 (Alito, J., concurring); *Fraser*, 478 U.S. at 685.

<sup>133</sup> See *Kuhlmeier*, 484 U.S. at 266-67.

<sup>134</sup> See *infra* notes 263-357 and accompanying text.

<sup>135</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007) (acknowledging that there is some uncertainty about when speech should be subject to school speech precedents); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) (noting that no Supreme Court case is controlling over out-of-school speech).

<sup>136</sup> See, e.g., *Klein v. Smith*, 635 F. Supp. 1440, 1440-41 (D. Me. 1986) (a parking lot away from campus); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 519-20 (C.D. Cal. 1969) (underground newspaper produced off campus and distributed near campus); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850-52 (Pa. 2002) (website created off campus).

<sup>137</sup> See *Layshock*, 496 F. Supp. 2d at 595 (providing examples of cases where courts concluded out of school speech could not be regulated by the school and examples of cases where courts reached the opposite conclusion).

<sup>138</sup> See 393 U.S. 503, 507 (1969) (emphasis added).

<sup>139</sup> See *id.* at 506.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 513.

student speech, "the schoolhouse gates" would be meaningless; students would have the same free speech rights at home as they would at school regardless of which side of the "gate" they were on.<sup>142</sup>

The standard the Supreme Court articulated in 1986, in *Bethel School District No. 403 v. Fraser*, was created to deal with issues unique to on-campus speech.<sup>143</sup> The Court stressed two reasons for permitting a school to punish lewd and vulgar speech on-campus.<sup>144</sup> First, the Court noted that school authorities "acting in loco parentis" have a responsibility to protect children from lewd and vulgar speech.<sup>145</sup> Thus when students are not in school, but instead have their parents to watch over them and are free to choose with whom to associate, the school presumably no longer has a legitimate reason to restrict student speech.<sup>146</sup>

The second reason for the Court's holding was the school's legitimate interest in providing role models and to help teach students what type of discourse is appropriate in society.<sup>147</sup> To do this, the Court reasoned, the school must be free to express its disapproval of certain language, otherwise its silence might be interpreted as tacit approval.<sup>148</sup> Off campus, unlike in the classroom or a student assembly, there is no reason for students to believe the school approves of their classmates' speech.<sup>149</sup> The very idea that the rights of students in public schools may differ from the rights of adults in other settings suggests that students do have more rights in other settings, such as when they are sitting at home by the computer.<sup>150</sup> Justice Brennan, in his opinion concurring in the judgment in *Fraser*, explicitly stated that if the speech sanctioned by the Court had been given outside of school, it would have been protected by the First Amendment.<sup>151</sup>

The essence of the Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier* is that a school must have great leeway to reasonably regulate speech that might be attributed to it.<sup>152</sup> It grants school officials more authority than *Fraser* because it is limited to

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<sup>142</sup> See *id.* at 506, 513.

<sup>143</sup> See 478 U.S. 675, 681, 684 (1986).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* at 684.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* at 681, 683.

<sup>148</sup> See *Fraser*, 478 U.S. at 683.

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* at 682.

<sup>151</sup> See *id.* at 688 (Brennan, J., concurring); see also *Morse*, 127 S. Ct. at 2626 ("Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected.").

<sup>152</sup> See 484 U.S. 260, 271 (1988).

more extreme situations.<sup>153</sup> Thus, while *Fraser* permits regulation of some speech in part to avoid students interpreting its silence as approval, *Kuhlmeier* permits greater regulation when the speech might reasonably be interpreted as coming from the school or having the school's active approval, not mere silence.<sup>154</sup> *Kuhlmeier* thus cannot apply to off-campus speech unless it might be interpreted as being part of the school's speech.<sup>155</sup> A website claiming to be the school's website might fall in this category, but very little else would.<sup>156</sup>

The Court in *Morse* held that schools may take reasonable steps to "safeguard those entrusted to their care" from speech that can reasonably be interpreted as advocating illegal drug use.<sup>157</sup> The reasoning employed in reaching this holding focused on the dangers of illegal drugs and the school's role in protecting students in the unique school environment.<sup>158</sup> The school's power to regulate speech advocating illegal drug use is derived from the dangers that accompany forced exposure to potentially dangerous students and the inability of parents to provide protection and guidance in the school setting.<sup>159</sup>

### B. Lower Court Treatment of Off-Campus Student Speech

The lower courts' jurisprudence regarding student speech makes it apparent that there is no clear, uniform method of analysis for cyberspeech currently in use.<sup>160</sup> Lower courts have, however, generally recognized that the *Tinker* standard is the only one that might be applicable to off-campus student speech.<sup>161</sup> They have also implicitly recognized that because a school's authority over off-campus student speech cannot logically be greater than that on-campus, the broadest test that could possibly be applied is that in *Tinker*.<sup>162</sup> Unfortunately, courts have used different criteria in determining whether cyberspeech

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<sup>153</sup> Compare *id.*, with *Fraser*, 478 U.S. at 684.

<sup>154</sup> See *Kuhlmeier*, 484 U.S. at 271; *Fraser*, 478 U.S. at 684.

<sup>155</sup> See *Kuhlmeier*, 484 U.S. at 271.

<sup>156</sup> See *id.*

<sup>157</sup> See 127 S. Ct. at 2622.

<sup>158</sup> See *id.* at 2628.

<sup>159</sup> See *id.* at 2638 (Alito, J., concurring).

<sup>160</sup> See *infra* notes 168-259 and accompanying text.

<sup>161</sup> See *infra* notes 168-255 and accompanying text.

<sup>162</sup> See *infra* notes 168-255 and accompanying text; see also *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 968 (5th Cir. 1972) ("[T]he authority of the school board to balance school discipline against the First Amendment by forbidding or punishing off-campus activity cannot exceed its authority to forbid or punish on-campus activity.").

is on-campus or off-campus speech.<sup>163</sup> In some cases, how the court has categorized cyberspeech in this fashion has determined the method of analysis applied.<sup>164</sup> Thus, some of the lower courts have nevertheless applied the *Fraser* analysis to cyberspeech created off campus, finding it to be on-campus speech.<sup>165</sup> Even in such cases, however, the determination is a semantic one.<sup>166</sup> The larger question, and the one all courts must answer, is how they will test the constitutionality of school regulation of cyberspeech created at home.<sup>167</sup>

## 1. Decisions Holding School Regulations Invalid

### a. *Klein v. Smith: Acting Out of Role*

In 1986, in *Klein v. Smith*, the U.S. District Court for the District of Maine faced the question of whether a school could suspend Klein, a student who gave his teacher the middle finger at a parking lot away from school grounds and not during school hours.<sup>168</sup> Without specifically using one of the Supreme Court's tests for student speech, the court found that the suspension violated the student's First Amendment rights.<sup>169</sup> The court stressed that the conduct occurred far from the school campus at a time when the teacher was not acting in his role as a teacher and the student was not acting in his role as a student.<sup>170</sup> Though the court thought that Klein's conduct was deplorable, it held

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<sup>163</sup> Compare *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding cyberspeech created off campus but aimed at the school to be off-campus speech), with *J.S.*, 807 A.2d at 867-68 (finding cyberspeech created off campus to be on-campus speech because it was aimed at the school and because it was accessed by the creator on campus).

<sup>164</sup> See *Emmett*, 92 F. Supp. 2d at 1090 (refusing to apply *Fraser* because the speech was off-campus); *J.S.*, 807 A.2d at 867-68 (applying *Fraser* at least in part because the speech was deemed on campus).

<sup>165</sup> See *J.S.*, 807 A.2d at 867-68.

<sup>166</sup> See, e.g., *id.* It makes no difference whether one concludes that *Fraser* was applied to off-campus cyberspeech or on-campus cyberspeech. See *id.* The analysis applied to the facts remains the same regardless. See *id.*

<sup>167</sup> See *infra* notes 263-357 and accompanying text.

<sup>168</sup> 635 F. Supp. at 1441. It should be noted that this case was decided one month before the Supreme Court handed down its decision in *Fraser*. See *Fraser*, 478 U.S. at 675; *Klein*, 635 F. Supp. at 1440.

<sup>169</sup> *Klein*, 635 F. Supp. at 1442.

<sup>170</sup> See *id.* at 1441. "The conduct in question occurred in a restaurant parking lot, far removed from any school premises . . . at a time when teacher Clark 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 school premises or his role as a student." *Id.*

that under the circumstances, any punishment had to come from Klein's parents.<sup>171</sup>

Although the court never expressly applied the *Tinker* test, it did cite to *Tinker*, among other cases, when it held the suspension unconstitutional.<sup>172</sup> The court rejected the claim that Klein's gesture to someone who happened to be his teacher made it permissible for the school to suspend him.<sup>173</sup> In addition, the court dismissed an argument made by faculty that Klein's actions, going without punishment, weakened their resolve to enforce discipline in the school and that this constituted a substantial disruption under *Tinker*.<sup>174</sup> The court stated that it could not do the teachers "the disservice of believing that collectively their professional integrity . . . and individual character [would] dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy."<sup>175</sup> The court thus seemed implicitly to apply *Tinker* to off-campus speech on the one hand and, on the other hand, to imply that school discipline was inappropriate because Klein was not in "his role as a student."<sup>176</sup> The court was able to avoid articulating whether the speech was subject to the *Tinker* test by denying the possibility that it could have caused any disruption.<sup>177</sup>

b. *Thomas v. Board of Education: Exceeding Jurisdiction*

The U.S. Court of Appeals for the Second Circuit took a stronger position on off-campus student speech in 1979 in *Thomas v. Board of Education, Grandville Central School District*.<sup>178</sup> In that case, students at the Grandville Junior-Senior High School created an off-campus newspaper that emulated the *National Lampoon*, a well-known publication specializing in sexual satire.<sup>179</sup> The articles addressed subjects such as masturba-

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<sup>171</sup> *Id.*

<sup>172</sup> *See id.* at 1442 (citing *Tinker* in a string cite after holding that the suspension could not be sustained "in the circumstances of this case in the face of [Klein's] right of free speech under the First Amendment of the Constitution of the United States").

<sup>173</sup> *See id.* at 1441 ("[A]ny possible connection between [Klein's] act of 'giving the finger' to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities is, on the record here made, far too attenuated to support discipline . . .").

<sup>174</sup> *See Klein*, 635 F. Supp. at 1441 n.4.

<sup>175</sup> *Id.*

<sup>176</sup> *See id.* at 1441-42; *see also Tinker*, 393 U.S. at 509 (articulating the material and substantial disruption test).

<sup>177</sup> *See Klein*, 635 F. Supp. at 1441-42.

<sup>178</sup> *See* 607 F.2d 1043, 1044-45, 1050 (2d Cir. 1979).

<sup>179</sup> *Id.* at 1045.

tion and prostitution.<sup>180</sup> Finding that the newspaper was produced predominantly off campus and was sold off campus, the court found that it was beyond the jurisdiction of school officials.<sup>181</sup>

The court emphasized three separate reasons for its holding.<sup>182</sup> First, because the speech was off campus, it was subject to the full protections of the First Amendment.<sup>183</sup> The court reasoned that when teachers and students are not on campus, but in the general community where freedom of expression is at its apex, teachers are no different from other government officials and thus cannot punish any speech that is not proscribed by law.<sup>184</sup> The court stated that it was willing to grant school officials a larger degree of authority within the academic domain because the geographical limits of that power ensured that society was not denied the beneficial effects of student speech.<sup>185</sup>

The second factor the court was concerned with was encroachment on the rights of parents.<sup>186</sup> The court stressed that parents, not the state, have the primary right and responsibility to bring up their children.<sup>187</sup> To allow teachers to exercise custodial powers over children outside of school would infringe upon parental rights.<sup>188</sup> There is a realm of parental control over children, the court recognized, that teachers cannot enter off campus.<sup>189</sup>

The third reason the court refused to uphold the punishment is that the speech, being off-campus and subject to full First Amendment protection, could only be judged by an impartial third party.<sup>190</sup> Teachers act as both the judiciary and the executive, and, sometimes, the injured party as well.<sup>191</sup> The court reasoned that teachers and other school administrators could not be viewed as impartial because they had a strong interest in curtailing speech they disliked.<sup>192</sup> Therefore, if teachers were allowed to regulate off-campus speech, they would pun-

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<sup>180</sup> *Id.*

<sup>181</sup> *See id.* at 1050.

<sup>182</sup> *See id.* at 1050, 1052 & n.18.

<sup>183</sup> *See Thomas*, 607 F.2d at 1050.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1052.

<sup>186</sup> *See id.* at 1051, 1052 n.18.

<sup>187</sup> *Id.*

<sup>188</sup> *Thomas*, 607 F.2d at 1051, 1052 n.18 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

<sup>189</sup> *See id.*

<sup>190</sup> *Id.* at 1050.

<sup>191</sup> *See id.*

<sup>192</sup> *See id.* at 1051. The court feared impartiality in part because of parental pressure that could be brought to bear on school officials. *See id.*

ish more speech than is constitutionally permissible.<sup>193</sup> The court further reasoned that students would remain silent rather than articulate controversial ideas, knowing that their speech would be judged by school officials with an interest in maintaining order and avoiding criticism, disagreement, or debate.<sup>194</sup> The chilling effect on student speech would only be exacerbated by disincentives for students to challenge punishments that they believe violate their First Amendment rights.<sup>195</sup> The court noted that suspensions end quickly and lawsuits are costly.<sup>196</sup> The end result, the court feared, was that impermissible restrictions on speech would go unchallenged.<sup>197</sup>

Though the court spoke strongly against regulation of off-campus student speech and used reasoning that would suggest that off-campus speech is always subject to the full protection of the Constitution, the court suggested, in a footnote, that this might not always be the case.<sup>198</sup> The court stated that it could envision a case where students incite substantial disruption in school from a remote location, but it concluded that the facts of the case did not force them to consider such a scenario.<sup>199</sup> Thus, despite the court's reasoning, it left the door open to *Tinker* analysis for off-campus speech.<sup>200</sup> The court did, however, reject the argument that speech should be considered on campus if it is reasonably foreseeable that it will reach campus.<sup>201</sup> This, the court found, would allow the school to sanction the local store for selling the real *National Lampoon* publication.<sup>202</sup>

c. *Beussink v. Woodland R-IV School District: The Public Interest*

Without Supreme Court precedent directly on point, courts have dealt with cyberspeech in many different ways.<sup>203</sup> The predominant approach has been to apply *Tinker*'s substantial disruption test, but

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<sup>193</sup> See *Thomas*, 607 F.2d at 1048, 1051.

<sup>194</sup> See *id.* at 1048.

<sup>195</sup> See *id.* at 1052.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *Thomas*, 607 F.2d at 1052 n.17.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.* at 1052 n.18.

<sup>201</sup> See *id.*

<sup>202</sup> *Id.*

<sup>203</sup> See *infra* notes 204–259 and accompanying text.

that is not the only way courts have looked at these cases, and, even when they have, not all have applied it in the same fashion.<sup>204</sup>

One of the earliest decisions relating to cyberspeech came from the U.S. District Court for the Eastern District of Missouri in 1998 in *Beussink v. Woodland R-IV School District*.<sup>205</sup> Beussink, a student at Woodland High School, created a homepage from his house that was highly critical of the school administration and insulted teachers, the principal, and the school's webpage, using vulgar language.<sup>206</sup> The webpage was not intended to be accessed at school and did not cause a substantial disruption there.<sup>207</sup> Holding that Beussink was likely to succeed on the merits of his claim, the court granted a preliminary injunction against the school's proposed discipline of Beussink.<sup>208</sup>

The court applied *Tinker* without addressing its actual applicability but found that the website did not cause a substantial disruption.<sup>209</sup> The court made clear that the burden was on the school to prove it was not trying to avoid the discomfort that is always caused by an unpopular viewpoint.<sup>210</sup> The court emphasized that student speech could not be limited merely because the content is upsetting to the administration.<sup>211</sup>

The court concluded its analysis by looking at the public interest, one of the factors to be considered in granting a preliminary injunction.<sup>212</sup> The court found that the public interest was best served by protecting Beussink's speech because "one of the core functions of free speech is to invite dispute" and it is such speech that is most likely to need protection.<sup>213</sup> Finally, the court noted that the public interest is also served by allowing students to see the Bill of Rights at work.<sup>214</sup>

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<sup>204</sup> See *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001) (surveying lower court decisions involving school regulation of off-campus cyberspeech).

<sup>205</sup> 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998).

<sup>206</sup> *Id.* at 1177. School officials found out about the webpage through one of Beussink's friends who had accidentally seen it while using his home computer and then later told school officials about it after she had a fight with Beussink. *Id.* at 1177-78.

<sup>207</sup> *Id.* at 1177-78.

<sup>208</sup> *Id.* at 1180.

<sup>209</sup> See *id.*

<sup>210</sup> *Beussink*, 30 F. Supp. 2d at 1180 (quoting *Tinker*, 393 U.S. at 509).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1181-82.

<sup>213</sup> *Id.*

<sup>214</sup> See *id.* at 1182.

d. *Emmett v. Kent School District: Applying Tinker, Not Fraser*

*Emmett v. Kent School District No. 415*, decided by the U.S. District Court for the Western District of Washington in 2000, is another early cyberspeech case where the court found that a student had a substantial likelihood of succeeding on the merits of his First Amendment claim.<sup>215</sup> In *Emmett*, an 18-year-old student posted mock obituaries on his "Unofficial Kentlake High Home Page," which had a disclaimer warning visitors that the site was not sponsored by the school and was for entertainment purposes only.<sup>216</sup> The website was inspired by a creative writing class he took the year before in which students wrote their own obituaries.<sup>217</sup> The website let people vote on who should die next (i.e., whose obituary should be written next).<sup>218</sup> The webpage was up for a few days and had been discussed at school, without any evidence that students felt threatened, before an evening news story characterized the website as a "hit list."<sup>219</sup> Subsequently the student was expelled with his punishment later downgraded to a suspension.<sup>220</sup>

The court seemed to employ the *Tinker* test, suggesting that *Tinker's* purpose was to protect students in a school setting.<sup>221</sup> The court, however, found that *Fraser* was not applicable off school grounds.<sup>222</sup> The court also found that *Kuhlmeier* was not on point because it was limited to school-sponsored speech.<sup>223</sup> The court concluded that, although the speech was intended for people connected with the school, the speech was outside the school's supervision and control.<sup>224</sup>

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<sup>215</sup> *Emmett*, 92 F. Supp. 2d at 1090.

<sup>216</sup> *Id.* at 1089.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Emmett*, 92 F. Supp. 2d at 1089.

<sup>221</sup> See *id.* at 1090. It is unclear if the court actually applied *Tinker*; it stated that the lack of evidence that the student's website threatened or intended to threaten anyone and that it was off-campus gave the student a substantial likelihood of success on the merits. See *id.*

<sup>222</sup> See *id.* The court based this conclusion off of Justice Brennan's concurring opinion in *Fraser* which stated, in relevant part, that "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate" and that the Court's statements "obviously do not, and indeed given our prior precedents could not, refer to the government's authority generally to regulate the language used in public debate outside of the school environment." *Fraser*, 478 U.S. at 688 & n.1 (Brennan, J., concurring); *Emmett*, 92 F. Supp. 2d at 1090.

<sup>223</sup> See *Emmett*, 92 F. Supp. 2d at 1090.

<sup>224</sup> *Id.*

## 2. Cases Upholding Off-Campus Regulation of Student Speech

Although *Beussink* and *Emmett* provide examples of courts finding student cyberspeech to be protected, courts have also come down the other way.<sup>225</sup> The same is true of off-campus student speech before the Internet.<sup>226</sup>

### a. *Baker v. Downey City Board of Education: Going to and Coming from School*

In 1969, in *Baker v. Downey City Board of Education*, the U.S. District Court for the Central District of California upheld the suspension of two high school students for the off-campus publication and distribution of an underground newspaper.<sup>227</sup> The school suspended the students who were distributing the paper just outside the school gates before school began.<sup>228</sup> The school claimed that the underground newspaper contained vulgar or profane language and that the suspension was necessary to maintain an atmosphere of respect for rules and laws and to maintain a studious environment.<sup>229</sup> In upholding the suspension, the court rejected the argument that because the production and distribution of the paper took place off campus it was beyond the reach of the school.<sup>230</sup> The court stressed that the students knew they were distributing their publication to students entering the school grounds and that public schools "are responsible for the morals of students while going to and from school" as well as when they are in school.<sup>231</sup>

### b. *J.S. v. Bethlehem Area School District: Insulting a Teacher and the Principal*

In 2002, in *J.S. v. Bethlehem Area School District*, the Supreme Court of Pennsylvania upheld a student's expulsion for creating a website on

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<sup>225</sup> See, e.g., *J.S.*, 807 A.2d at 869.

<sup>226</sup> See *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 525 (C.D. Cal. 1969).

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 526.

<sup>229</sup> See *id.* at 525.

<sup>230</sup> *Id.* at 526.

<sup>231</sup> *Baker*, 307 F. Supp. at 526. It is worth noting that during the time students are going to and from school they often are not in the care of their parents and are unavoidably exposed to a student standing by the school entrance. See *id.*; cf. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). The situation is therefore in many ways more comparable to an on-campus situation, where parents cannot protect their children who are forced to associate with others attending school. See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

his home computer but viewed at school.<sup>232</sup> The website, titled "Teacher Sux," consisted of many pages of derogatory, offensive, and threatening comments primarily targeting the principal and an algebra teacher.<sup>233</sup> The pages featuring the teacher included a picture of her that morphed into Adolf Hitler and a page titled "Why Should She Die?" where the student asked visitors to the site to give him "\$20 to help pay for the hitman."<sup>234</sup> When the website was discovered, both the police and the FBI were contacted and discovered the identity of the student but declined to press charges, concluding it was not a true threat.<sup>235</sup>

The court first considered whether the speech was a true threat, assuming that if it were, the school could expel the student for unprotected speech.<sup>236</sup> Determining that the speech was not a true threat, but "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody,"<sup>237</sup> the court decided the speech was on-campus speech.<sup>238</sup> The court found that the speech was on campus both because its intended audience was the high school and because the student accessed the website from school and showed it to another student.<sup>239</sup> Because the speech was on-campus, the court analyzed the speech under both *Tinker* and *Fraser*.<sup>240</sup> The speech was not protected under *Fraser* because it was lewd and offensive.<sup>241</sup> It also was not protected under *Tinker* because it caused the teacher to suffer anxiety and depression and left her unable to complete the semester, thus requiring three different substitute teachers to teach the class, and because it disrupted the school community generally.<sup>242</sup>

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<sup>232</sup> See 807 A.2d 847.

<sup>233</sup> *Id.* at 851.

<sup>234</sup> *Id.* at 851-52.

<sup>235</sup> *Id.* at 852.

<sup>236</sup> See *id.* at 856.

<sup>237</sup> *J.S.*, 807 A.2d at 859.

<sup>238</sup> See *id.* at 865.

<sup>239</sup> See *id.* This suggests that, although the court considered the fact that the student showed the website to another student on campus in determining the speech was on campus, it might have been satisfied by the fact that the website was directed at campus. See *id.* at 865 n.12.

<sup>240</sup> See *id.* at 867-68. Although the court believed that *Fraser* applied, it recognized that some courts did not think *Fraser* was appropriate for cyberspeech and thus avoided deciding the case on *Fraser* alone by using *Tinker* as well. See *id.*

<sup>241</sup> *Id.* at 868.

<sup>242</sup> See *J.S.*, 807 A.2d at 869.

c. *Doninger v. Niehoff: Advocating but Using Bad Language*

*Doninger v. Niehoff*, decided by the U.S. District Court for the District of Connecticut in 2007 and affirmed by the U.S. Court of Appeals for the Second Circuit in 2008, is another case where a court held for the school, though this time on a motion for a preliminary injunction.<sup>243</sup> In *Doninger*, Lewis S. Mills High School prevented Avery Doninger, a senior, from running for class office because of a message on her Internet blog.<sup>244</sup> Doninger, as a member of the student council, had been working to organize Jamfest, a school event where student bands would perform.<sup>245</sup> Jamfest was postponed multiple times because of renovations and location problems.<sup>246</sup> Upon hearing that Jamfest would be postponed again, Doninger and other students emailed parents and taxpayers asking them to call the school and complain.<sup>247</sup> On her Internet blog, Doninger posted a message coarsely criticizing the school's decision.<sup>248</sup>

In analyzing the case, the district court focused on the fact that Doninger's punishment was merely that she could not run for elected office, which the court emphasized is a voluntary activity.<sup>249</sup> Reasoning that schools have greater discretion in deciding whether students can participate in extracurricular activities, the court did not apply *Tinker* or *Fraser* initially.<sup>250</sup> Instead, the court reasoned that because Doninger did not "have a First Amendment right to run for a voluntary extracurricular position" while acting in an uncivil fashion, she could be prevented from running without implicating the First Amendment.<sup>251</sup>

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<sup>243</sup> See 514 F. Supp. 2d 199, 220 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

<sup>244</sup> *Id.* at 202.

<sup>245</sup> *Id.*

<sup>246</sup> See *id.* at 203–04.

<sup>247</sup> *Id.* at 204–05.

<sup>248</sup> *Doninger*, 514 F. Supp. 2d at 206. The blog stated:

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

*Id.* (alterations and omissions in original). She also suggested that people write or call the administrator in charge "to piss her off more." *Id.* (emphasis omitted).

<sup>249</sup> See *id.* at 212.

<sup>250</sup> See *id.* at 213, 216.

<sup>251</sup> See *id.* at 216.

The court continued, however, to analyze the case under *Fraser* in case it was "wrong" that it did not need to apply either *Tinker* or *Fraser*.<sup>252</sup> The court classified the speech as on campus because it was designed to come onto campus and because it was reasonably foreseeable that it would do so.<sup>253</sup> Applying *Fraser*, the court stated that it was permissible to punish Doninger because her offensive speech "interfered with the school's 'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse.'"<sup>254</sup> The court noted, however, *Morse's* warning not to stretch *Fraser* too far and thus emphasized the role Doninger's punishment played in its decision.<sup>255</sup>

The court of appeals upheld the decision of the district court, but it did so applying *Tinker* rather than *Fraser*.<sup>256</sup> Finding it unclear whether *Fraser* applied to off-campus speech, the court refused to reach the issue because the *Tinker* standard had been met.<sup>257</sup> Reasoning that the language Doninger used on her website was "potentially disruptive of efforts to resolve the ongoing controversy" and that the content of her post was misleading at best, the court found that it was reasonably foreseeable that the content of the website would reach school grounds and that it was reasonably foreseeable that it would create a risk of substantial disruption.<sup>258</sup> The court also stressed that it was reasonably foreseeable that Doninger's post would create a risk of undermining the values that student government is intended to promote.<sup>259</sup>

### 3. The Current Unsettled State of the Law

Because courts are using different criteria to determine if cyber-speech is on-campus or off-campus speech and are applying different standards even when they reach similar conclusions as to the location of the speech, neither students nor teachers can be sure of what speech is protected and what is not.<sup>260</sup> The result of this state of affairs

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<sup>252</sup> *Id.*

<sup>253</sup> *Doninger*, 514 F. Supp. 2d at 217.

<sup>254</sup> *Id.* (quoting *Fraser*, 478 U.S. at 683).

<sup>255</sup> *See id.*

<sup>256</sup> *See Doninger*, 527 F.3d at 50.

<sup>257</sup> *Id.* (stating that because the *Tinker* standard was met, the court "need not decide whether other standards may apply when considering the extent to which a school may discipline off-campus speech").

<sup>258</sup> *Id.* at 50–51.

<sup>259</sup> *Id.* at 52.

<sup>260</sup> *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 620 (5th Cir. 2004) (holding that a school official was entitled to qualified immunity despite having punished a student

will likely have a chilling effect on student speech in some cases and a hesitancy to act on the part of school administrators in other cases.<sup>261</sup> A uniform standard is needed to determine when cyberspeech created off campus can be regulated by schools.<sup>262</sup>

#### IV. RECOGNIZING THE NEED FOR A DISTINCTION BETWEEN CYBERSPEECH TARGETING STUDENTS AND CYBERSPEECH TARGETING THE SCHOOL, FACULTY, AND ADMINISTRATION

The question of school regulation of off-campus cyberspeech is a challenging one that the Supreme Court has not directly resolved.<sup>263</sup> The principles behind the First Amendment and the Supreme Court's rulings on student speech, however, strongly suggest that cyberspeech targeting students should not be analyzed under the same standard as cyberspeech targeting the school, faculty, or administrators.<sup>264</sup> There are times when, consistent with the First Amendment and Supreme Court precedent, off-campus speech targeting students may be subject to school regulation.<sup>265</sup> Cyberspeech targeting a school, faculty, or administration, however, cannot be regulated constitutionally by schools.<sup>266</sup> Any system of analysis that applies to both without differentiation is therefore flawed.<sup>267</sup>

##### A. *Cyber-Speech Targeting the School, Faculty, or Administration Is Beyond School Regulation*

School regulation of off-campus cyberspeech targeting the school undermines the Supreme Court's generally democratic view of the student-teacher relationship.<sup>268</sup> Teachers can only justify curtailing student speech to maintain order in their classrooms and to protect other students.<sup>269</sup> Criticism of teachers, the school, or the administra-

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for protected off-campus speech because of the "unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus").

<sup>261</sup> See *id.*; see also *Thomas*, 607 F.2d at 1048 (warning of the chilling effect caused by uncertainty in the realm of First Amendment speech protections).

<sup>262</sup> See *Thomas*, 607 F.2d at 1048.

<sup>263</sup> See *supra* notes 204–227 and accompanying text.

<sup>264</sup> See *infra* notes 268–357 and accompanying text.

<sup>265</sup> See *infra* notes 311–357 and accompanying text.

<sup>266</sup> See *infra* notes 268–310 and accompanying text.

<sup>267</sup> See *infra* notes 268–357 and accompanying text.

<sup>268</sup> See *supra* notes 127–134 and accompanying text.

<sup>269</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2628 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S.

tion must therefore be tolerated unless it prevents teachers from maintaining order in the classroom or harms the students who have been entrusted to the care of the school.<sup>270</sup>

School punishment of off-campus student speech targeting the school is not necessary to protect impressionable children.<sup>271</sup> The argument that it is necessary to maintain discipline in the school is unacceptable.<sup>272</sup> If off-campus speech criticizing the school would indirectly cause disruption, that is all the more reason for protecting it from school regulation.<sup>273</sup> A school must be free to discipline disruptive conduct caused by the speech, but to allow a school to punish an off-campus speaker for causing the disruption would allow the school to punish its most effective critics—and this is inconsistent with the Supreme Court's view of the role of free speech and the educational system.<sup>274</sup>

### 1. Schools Do Not Need to Regulate Off-Campus Cyberspeech Targeting the School to Maintain Order or Protect the Rights of Other Students

When students are off campus, their speech cannot directly disrupt the classroom.<sup>275</sup> By definition, off-campus criticisms of the school cannot instantly interrupt a history class or prevent a teacher from going over homework.<sup>276</sup> The speech is not taking place in a classroom or assembly or field trip, and any later incidental disruption to such activity is different in kind to a student standing up during a lecture and telling the teacher that the school is a terrible school and the teacher is a terrible teacher.<sup>277</sup> Thus, although it is conceivable that off-campus speech targeting a school or teacher could cause students to later disrupt classroom activities or to cause a teacher to be distracted or even

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503, 512 (1969). Questioning a teacher's views, for example, is generally permissible. See *Tinker*, 393 U.S. at 512; *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

<sup>270</sup> See *supra* notes 127–134 and accompanying text.

<sup>271</sup> See *Morse*, 127 S. Ct. at 2628; *Fraser*, 478 U.S. at 684–85.

<sup>272</sup> See *Klein v. Smith*, 635 F. Supp. 1440, 1441 & n.4 (D. Me. 1986); see also *Tinker*, 393 U.S. at 511.

<sup>273</sup> See *Tinker*, 393 U.S. at 511; see also *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (finding a speech where the speaker referred to his opponents as slimy scum, snakes, and bedbugs constitutionally protected because “a function of free speech under our system of government is to invite dispute” and because speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger”).

<sup>274</sup> See *supra* notes 127–134 and accompanying text.

<sup>275</sup> See *Tinker*, 393 U.S. at 512–13.

<sup>276</sup> See *id.*

<sup>277</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

to stop teaching,<sup>278</sup> off-campus speech cannot disrupt immediate classroom activity or school discipline.<sup>279</sup> The time gap between the creation of the speech and the possible disruption allows schools to take less speech-restrictive measures.<sup>280</sup> A school could, for example, block a website from being accessed by school computers or prevent disruptive activity by announcing the consequences of such activity to the students in advance and punish the activity itself.<sup>281</sup> Where there is no immediate threat of disruption and other, less speech-restrictive alternatives are available, it is constitutionally impermissible to restrict off-campus speech.<sup>282</sup> Any disruptive activity that takes place as a result of the off-campus speech, of course, might be subject to school discipline.<sup>283</sup>

Just as schools cannot justify punishing off-campus student speech on the grounds that it directly disrupts classroom activity, teachers can-

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<sup>278</sup> See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852 (Pa. 2002).

<sup>279</sup> See *Klein*, 635 F. Supp. at 1441 n.4.

<sup>280</sup> Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). In *Brandenburg*, the Court held that the First Amendment prohibits a state from proscribing advocacy of illegal activity unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* (emphasis added). The requirement that speech cause imminent or immediate harm is common to other areas of speech as well. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining "fighting words" as a narrow category of words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace") (emphasis added); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (suggesting that speech cannot be prohibited because it would disclose government secrets unless the speech would "inevitably, directly, and immediately" cause harm) (emphasis added); *id.* at 730 (Stewart, J., concurring) (suggesting speech disclosing sensitive governmental information is protected under the First Amendment unless it "will surely result in direct, immediate, and irreparable damage") (emphasis added). The common requirement that the harm be imminent results from the Court's requirement that valuable speech only be chilled when there is no less speech-restrictive alternative. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 668-69 (2004).

<sup>281</sup> See *Ashcroft*, 542 U.S. at 668-69 (suggesting that Internet filters can be employed to block offensive content); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597, 600 (W.D. Pa. 2007) (finding a student's website did not cause a substantial disruption at least in part because the school was able to block on-campus access to the website); cf. *Schneider v. State*, 308 U.S. 147, 162 (1939) (holding unconstitutional an ordinance prohibiting the distribution of leaflets in streets and sidewalks because the alleged state interest in avoiding litter could be achieved without burdening speech by punishing the act of littering).

<sup>282</sup> See, e.g., *Ashcroft*, 542 U.S. at 668-69 (finding that a law requiring pornographic Internet websites to use credit card verification of a viewer's age is unconstitutional because filtering technology provided a less restrictive means of achieving the legitimate purpose); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 804 (2000) (finding that a law preventing cable television operators from showing sexually explicit programs during the day is unconstitutional because private blocking technology could achieve the government's purpose in a less speech-restrictive manner).

<sup>283</sup> See *Tinker*, 393 U.S. at 512-13; cf. *Schneider*, 308 U.S. at 162.

not justify punishing off-campus speech targeting teachers in order to protect pupils in their charge.<sup>284</sup> Nothing about the special characteristics of the school requires teachers to protect students from speech attacking the school.<sup>285</sup> That students are forced to attend a school or class that has been ridiculed by a peer is not grounds for punishing the speech.<sup>286</sup> The Supreme Court has made it clear that it is altogether appropriate for students to question authority figures.<sup>287</sup> What students cannot do is question these figures at a time that immediately disrupts the classroom, undermines discipline, or exposes students to harmful language while they are captive listeners.<sup>288</sup>

Parents, not teachers, must protect their children while they are away from school.<sup>289</sup> Thus, although it is true that students may be drawn to a website because it attacks their school or one of their teachers, the school is stripped of its custodial responsibilities and incidental powers so long as parents are able to protect their children.<sup>290</sup> Any harm that a child suffers from exposure to such off-campus speech occurs at the time of exposure and not while at school.<sup>291</sup> A student sitting at home who views a website that ridicules the student's school and teachers using vulgar language is harmed, if at all, while at home viewing the website.<sup>292</sup> Teachers, who derive their custodial role from the theory of *in loco parentis*, do not have the responsibility or authority to try to protect this student as their custodial powers last no longer than they are fictitiously delegated by the student's parents.<sup>293</sup> Here, the only harm the student could suffer comes from the language used and is inflicted instantly.<sup>294</sup> If the student who viewed the website is forced to sit next to its creator at school, the harm to the student is unlikely to increase.<sup>295</sup> If teachers do not gain the power to punish off-campus

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<sup>284</sup> See *infra* notes 285–288 and accompanying text.

<sup>285</sup> See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

<sup>286</sup> See *id.*

<sup>287</sup> See *id.* at 2629 (majority opinion); *Fraser*, 478 U.S. at 684–85; *Tinker*, 393 U.S. at 512.

<sup>288</sup> See *Tinker*, 393 U.S. at 513.

<sup>289</sup> See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051, 1052 n.18 (2d Cir. 1979); *Layshock*, 496 F. Supp. 2d at 606 (finding a parent's claim that the school interfered with the parent's rights by punishing the child for off-campus cyberspeech to be duplicative of the student's claim that the school violated his First Amendment rights, which the court accepted).

<sup>290</sup> See, e.g., *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

<sup>291</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978); *Thomas*, 607 F.2d at 1052.

<sup>292</sup> See *Pacifica Found.*, 438 U.S. at 748–49.

<sup>293</sup> See *supra* notes 94–106 and accompanying text.

<sup>294</sup> See *Pacifica Found.*, 438 U.S. at 748–49.

<sup>295</sup> See *id.*

speech because they are educators, and if they do not gain the power from their custodial relationship with their students, then there is no theoretical basis from which the teachers could obtain such power.<sup>296</sup>

## 2. Off-Campus Cyberspeech Attacking the School Must Be Protected to Ensure Students' First Amendment Rights Are Not Violated

Just as the Supreme Court's view of the student-teacher relationship demonstrates that schools have no basis for power to regulate off-campus speech targeting the school, the Supreme Court's view that students should be permitted to criticize the school suggests that schools should not be permitted to regulate such speech.<sup>297</sup> First, speech that attacks a school or teacher is, in a sense, political speech because it expresses dissatisfaction with authority figures.<sup>298</sup> Although this speech may be offensive, insulting, and inarticulate, it does convey a message.<sup>299</sup>

Second, allowing the school to regulate off-campus speech that targets it would likely lead to over-censorship.<sup>300</sup> Though the Supreme Court has made it clear that schools cannot prohibit student speech because they do not want to contend with the message the speech expresses,<sup>301</sup> this is exactly what would likely happen if schools could pun-

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<sup>296</sup> See *supra* notes 94–106 and accompanying text.

<sup>297</sup> See *supra* notes 117–126 and accompanying text.

<sup>298</sup> Cf. *Cohen v. California*, 403 U.S. 15, 26 (1971); *Watts v. United States*, 394 U.S. 705, 708 (1969).

<sup>299</sup> See *Cohen*, 403 U.S. at 16, 26 (recognizing that words are often chosen for their emotive force in holding that the conviction of a man for wearing a jacket with the words "Fuck the Draft" violated the First Amendment by criminalizing protected speech); *Watts*, 394 U.S. at 706, 708 (holding the statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J." to be a constitutionally protected statement of opposition to the President because language in politics is often abusive, crude, and offensive, but it retains political meaning). Thus, for example, in *J.S. v. Bethlehem Area School District*, a 2002 Pennsylvania Supreme Court case in which a student created a webpage about a teacher captioned "Why Should She Die?" (and providing reasons why she should), the speech, though clearly deplorable, had a political message of general opposition to an authority figure. See *J.S.*, 807 A.2d at 851; cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–28 (1982) (finding that an advocate can use threatening language to draw a reaction from the audience in holding that language threatening to break the necks of boycott violators in an unscripted speech was permissible to appeal for unity in the context of a longer speech); *Watts*, 394 U.S. at 708.

<sup>300</sup> See *Thomas*, 607 F.2d at 1051; cf. *N.Y. Times*, 376 U.S. at 279 (recognizing, in the context of newspapers criticizing public officials, that attaching liability too easily for defamatory comments would chill valuable speech and violate the First Amendment).

<sup>301</sup> See *Tinker*, 393 U.S. at 511.

ish speech critical of them.<sup>302</sup> It is natural that officials would seek to silence expression that is critical of them even if it is not harmful to students or disruptive.<sup>303</sup> Because schools would act both as the "victim" of the speech and, in the first instance, as the judge of its permissibility as well as enforcer, student opposition to school policies and teachers would likely be greatly chilled.<sup>304</sup> Students very often will not challenge restrictions on their speech or punishment that results from it in courts, and thus, frequently the school has the final say about all critical student speech.<sup>305</sup> Further, allowing schools to regulate off-campus speech that targets the schools would place an unconstitutional limit on what speech adults can receive.<sup>306</sup>

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<sup>302</sup> See, e.g., *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 206–08 (D. Conn. 2007) (permitting the punishment of a student for a website with bad language critical of school policy and administrators and encouraging people to call the school to complain), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

<sup>303</sup> See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) (stating, in the context of on-campus speech, that "where arguably political speech is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion"); *Thomas*, 607 F.2d at 1051; cf. *Brown v. Glines*, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting) ("[T]he expertise of military officials is . . . tainted by the natural self-interest that inevitably influences their exercise of the power to control expression."); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 141–42 (1977) (Marshall, J., dissenting) (stating that prison wardens are biased toward suppressing prisoner speech because wardens are much more likely to face criticism that places their jobs in jeopardy if there is disorder than if they "needlessly repress[] free speech"—thus causing prison officials to "err on the side of too little freedom").

<sup>304</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637–38 (1943) (recognizing the danger that schools' unconstitutional conduct will go unchallenged because they draw little outside attention); cf. *Glines*, 444 U.S. at 370 (Brennan, J., dissenting) ("Partiality must be expected when government authorities censor the views of subordinates, especially if those views are critical of the censors.").

<sup>305</sup> See *Thomas*, 607 F.2d at 1052 (noting that the short nature of most school punishment, like a suspension, combined with the expense of challenging school punishment in court, prevents many students from bringing lawsuits). School regulation of student speech is in many ways more comparable to prior restraints than normal regulation. See *id.* Just as the Supreme Court has recognized that prior restraints are particularly offensive to the First Amendment because they have a greater chilling effect on speech due in part to the fact that they cannot be challenged after the alleged constitutional violation, the speed and frequently short duration of student punishment often makes challenging the constitutionality of the school's actions pointless. Compare *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967) (finding that those leading a civil rights parade in violation of a temporary restraining order could not challenge the constitutionality of the order after violating it), with *id.* at 345 (Brennan, J., dissenting) (noting the importance of the right to challenge an unconstitutional restriction of speech to the exercise of free speech). Although this is true for all regulation of student speech, it demonstrates the harm caused by extending school regulation to more speech than necessary. See *id.* at 345 (Brennan, J., dissenting); *Thomas*, 607 F.2d at 1052.

<sup>306</sup> See *Ashcroft*, 542 U.S. at 665–66; *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

Finally, allowing schools to punish students for off-campus speech that targets the school would violate a child's First Amendment rights unless and until the Supreme Court holds that minors who attend public schools do not have the same constitutional rights to speak as minors who do not attend public schools or as adults.<sup>307</sup> If schools, as state actors, can punish students for speech that is off campus and otherwise would be constitutionally protected, then the very phrase "would otherwise be constitutionally protected" means that it would be protected were they adults, home-schooled, or students at private schools.<sup>308</sup> This would require the Supreme Court to find that the First Amendment provides a different set of speech rights for a subset of minors.<sup>309</sup> Although on-campus speech restrictions could be seen as time, place, and manner restrictions or as restrictions upon the right to hear certain speech while in the school's care, none of these justifications holds true for off-campus speech targeting the school.<sup>310</sup>

### B. *Tinker Applies to Cyberspeech Targeting Fellow Students*

Although teachers do not need to protect themselves from off-campus student speech, schools need to protect students in their care.<sup>311</sup> The Supreme Court's adoption of this view is evident from its on-campus student speech cases.<sup>312</sup> In particular, the Court recognized first that teachers must protect the rights of students to be secure and let alone and must preserve a level of order necessary for education.<sup>313</sup> Second, the emotional maturity of students means that they require protection from harmful language, and, third, the school must be able to protect students from the unique dangers caused by the school environment.<sup>314</sup> These three principles demonstrate the need for schools to be able to regulate off-campus speech attacking students that inter-

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<sup>307</sup> See *Tinker*, 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution.").

<sup>308</sup> See *N.Y. Times*, 376 U.S. at 266 ("[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.").

<sup>309</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (recognizing that public school teachers are state actors for purposes of constitutional law).

<sup>310</sup> Although it is true that the Supreme Court has made clear that minors do not have the same First Amendment rights to receive information as adults, it has not held they normally lack the same rights as adults to be heard by adults. See *Pacifica Found.*, 438 U.S. 726; *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>311</sup> See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995).

<sup>312</sup> See *Morse*, 127 S. Ct. at 2628; *Fraser*, 478 U.S. at 684-85; *Tinker*, 393 U.S. at 512.

<sup>313</sup> See *Morse*, 127 S. Ct. at 2628; *Fraser*, 478 U.S. at 683; *Tinker*, 393 U.S. at 513.

<sup>314</sup> See *Morse*, 127 S. Ct. at 2628; *Fraser*, 478 U.S. at 683-85; *Tinker*, 393 U.S. at 513.

feres with the rights of other students or substantially disrupts the learning environment.<sup>315</sup> At the same time, the potential dangers to the First Amendment that are present when schools are permitted to regulate off-campus cyberspeech targeting students are either absent or substantially mitigated when teachers can only regulate off-campus speech attacking other students that violates the *Tinker* standard.<sup>316</sup>

### 1. Off-Campus Cyberspeech Targeting Students Can Interfere with Students' Rights to Be Secure and Let Alone and Can Substantially Disrupt the Learning Environment as a Whole

Unlike off-campus speech attacking the school, speech attacking students can infringe upon the rights of students to be secure and let alone while at school.<sup>317</sup> For example, a group on MySpace.com, a social networking site, entitled "I hate [girl's name with an expletive and anti-Semitic reference]," though formed off campus, could easily have an impact on the named student while in school.<sup>318</sup> Likewise, it is relatively easy to imagine how a posting called "Lauren is a fat cow MOO BITCH" on a webpage visited by students from sophomore Lauren's high school could infringe upon her right to be secure and let alone at school.<sup>319</sup> Nor is it hard to see that the webpage would create an environment that was not conducive to learning.<sup>320</sup> Though these web

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<sup>315</sup> See *infra* notes 317–337 and accompanying text.

<sup>316</sup> See *infra* notes 338–357 and accompanying text.

<sup>317</sup> See *infra* notes 318–324 and accompanying text.

<sup>318</sup> See Kimberly Edds, *Boy Faces Expulsion over Web Threat*, ORANGE COUNTY REG., Mar. 2, 2006, at Local 1.

<sup>319</sup> See Amy Benfer, *Cyber Slammed*, SALON, July 3, 2001, [http://archive.salon.com/mwt/feature/2001/07/03/cyber\\_bullies/print.html](http://archive.salon.com/mwt/feature/2001/07/03/cyber_bullies/print.html). Salon.com described a website frequented by Lake Highlands high school students in Texas:

Among other things, the anonymous poster, who identified himself or herself as "MOO BITCH," made fun of Lake Highlands sophomore Lauren Newby for her weight ("people don't like you because you are a suicidal cow who can't stop eating") and her bout with multiple sclerosis ("I guess I'll have to wait until you kill yourself which I hope is not long from now, or I'll have to wait until your disease [multiple sclerosis] kills you"), and urged her boyfriend, Chris, to break up with her ("I will have a huge celebration and hook up Chris with some hookers so that he knows what a non-fat cow looks like.").

*Id.* (alteration in original).

<sup>320</sup> See Benfer, *supra*, note 319; Edds, *supra* note 318. The Supreme Court explicitly acknowledged that student speech harassing another student can effectively deny that student equal access to an education in its 1999 decision in *Davis v. Monroe County Board of Education*. See 526 U.S. 629, 651 (1999). Though that case dealt with a lawsuit for damages against the school for showing deliberate indifference to systematic sexual harassment, its

pages were created and generally accessed off campus, the students who were targeted by these websites had to face their peers five days a week not knowing which of their classmates was writing horrible things about them at home and posting them for fellow students to see.<sup>321</sup>

The unique nature of the school environment prevents students from choosing with whom to associate and can force students to come in close contact with their tormentors.<sup>322</sup> This can distract students from learning, cause them to stay home, and risk violent outbursts at school.<sup>323</sup> Although much student speech targeting students would likely fail the *Tinker* substantial disruption test, it is easy to envision situations where off-campus cyberspeech attacks on students could infringe upon the rights of students or cause a material and substantial disruption.<sup>324</sup>

## 2. The Unique School Setting and the Level of Maturity of Students Permits Schools to Regulate Off-Campus Student Cyberspeech Attacking Students

The Supreme Court has repeatedly recognized that students, and minors in general, are particularly susceptible to the harms of certain types of speech and that government actors may enact policies designed to help parents protect minors from such speech.<sup>325</sup> In the school context, the Supreme Court in *Fraser* asserted that speech "glorifying male sexuality" was insulting to female students and could be "seriously damaging" to younger and less mature students.<sup>326</sup> Although the standard articulated in *Fraser* permitting schools to prohibit indecent or lewd speech does not apply to off-campus speech, it demon-

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holding that harassing speech can deny students an equal education is equally applicable to off-campus student cyberspeech. *See id.*

<sup>321</sup> *See* Benfer, *supra* note 319; Edds, *supra* note 318.

<sup>322</sup> *See Morse*, 127 S. Ct. at 2638 (Alito, J., concurring) ("During school hours . . . students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm.").

<sup>323</sup> *See id.* ("[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence."). One principal, Allan J. Weiner of Cleveland High School in Reseda, a San Fernando Valley neighborhood of Los Angeles, worries about students lashing out at their online tormentors at a school: "You just never know if someone who has been hurt by something they read online might try to retaliate in a physical way." Lisa Guernsey, *Telling Tales Out of School*, N.Y. TIMES, May 8, 2003, at G1.

<sup>324</sup> *See Davis*, 526 U.S. at 651.

<sup>325</sup> *See Pacifica Found.*, 438 U.S. at 749-50; *Ginsberg*, 390 U.S. at 639.

<sup>326</sup> *See Fraser*, 478 U.S. at 683.

strates the Court's concern over the effects of speech on minors who are still maturing.<sup>327</sup> Likewise, in *Morse*, the Court recognized that the maturity level of students leaves them particularly susceptible to peer pressure, and, therefore, schools must be permitted to prohibit speech advocating the use of illegal drugs even though the speech would be constitutionally protected in another setting.<sup>328</sup>

Outside of the school context, the Supreme Court has also recognized that the maturity level of minors and their resulting susceptibility to peer pressure and outside influence must be taken into account.<sup>329</sup> The Court has found that it is appropriate for government to protect minors from indecent speech based on the assumption that minors need greater protection than adults.<sup>330</sup> The government's interest in protecting minors from sexual speech should logically be no greater than its interest in protecting minors from other harmful speech.<sup>331</sup> The Court's recognition that minors are particularly vulnerable to harmful forces strongly argues in favor of allowing schools to protect students from cyberspeech attacking them, consistent with *Tinker*, despite the fact that it originates off campus.<sup>332</sup>

The ability of state actors to protect minors from student speech should be greatest where parents are unable to provide such protection themselves and the government is in a unique position to do so.<sup>333</sup> Just as the unique school setting poses dangers to children by forcing them to come in close contact with others, the exclusion of parents from school grounds denies parents the opportunity to protect their children from harm during school hours.<sup>334</sup> Because man-

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<sup>327</sup> See *id.*; see also *Morse*, 127 S. Ct. at 2626 (stating that if the student in *Fraser* had given the same speech outside the school context it would have been protected).

<sup>328</sup> See *Morse*, 127 S. Ct. at 2628–29.

<sup>329</sup> See, e.g., *Pacifica Found.*, 438 U.S. at 749; *Ginsberg*, 390 U.S. at 643.

<sup>330</sup> See *Pacifica Found.*, 438 U.S. at 749 (holding that the FCC could prohibit indecent materials from being broadcast during hours when children were most likely to hear them because of the government's interest in the well-being of its youth); *Ginsberg*, 390 U.S. at 643 (holding that the New York State Legislature could prohibit the sale of sexually indecent materials to minors in the interest of safeguarding minors from content that could harm their growth). Additional evidence of the Court's concern about the impressionability of minors is evident from the Court's holding that the death penalty is unconstitutionally cruel and unusual punishment for minors, at least in part because minors are less mature and more susceptible to negative influences and peer pressure than adults. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

<sup>331</sup> See *Roper*, 543 U.S. at 569; *Pacifica Found.*, 438 U.S. at 749; *Ginsberg*, 390 U.S. at 643.

<sup>332</sup> See *Roper*, 543 U.S. at 569; *Pacifica Found.*, 438 U.S. at 749; *Ginsberg*, 390 U.S. at 643.

<sup>333</sup> See *Morse*, 127 S.Ct. at 2638 (Alito, J., concurring); *Vernonia Sch. Dist.*, 515 U.S. at 654–56.

<sup>334</sup> See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

datory attendance laws often prevent parents from protecting their children, schools need to be able to adopt policies and take actions to help parents protect their children.<sup>335</sup> Recognizing that school-age children are susceptible to the harmful content of speech, that they lack the emotional maturity to be expected to deal with verbal attacks the same way adults are, and that the school environment places students in a situation where they face unique dangers from such speech without the possibility of parental protection, it becomes clear that schools have a strong interest in prohibiting attacks on students that rise to the *Tinker* level.<sup>336</sup> To protect minors at school, in extreme cases, the school must be able to reach off-campus cyberspeech.<sup>337</sup>

### 3. Allowing Schools to Punish Off-Campus Student Cyberspeech When It Attacks Students and Either Infringes upon Students' Rights or Causes a Material and Substantial Disruption Does Not Endanger the First Amendment to the Same Extent as School Regulation of Other Off-Campus Cyberspeech

Speech targeting students is much less likely to be "political" speech than speech targeting the school or its faculty.<sup>338</sup> For students, teachers and school administrators largely serve the same function as public officials do for adults—only the policies set by the school generally have a more direct effect upon students.<sup>339</sup> Students are directly subject to the authority of their teachers and school administrators five days a week.<sup>340</sup> The way a teacher runs a classroom has a very direct effect on the experience of the students in the class.<sup>341</sup> In contrast, speech attacking students is much less likely to be political or "pure speech."<sup>342</sup> An attack on a teacher can be understood at a minimum as

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<sup>335</sup> See *id.*; *Vernonia Sch. Dist.*, 515 U.S. at 654–56 (holding that public schools, as state actors, may exercise a greater degree of control over children than the state can over adults because children are in the schools' care and, for many purposes, take on the responsibilities of parents while children are at school); *Pacifica Found.*, 438 U.S. at 749 (recognizing that states may restrict a minor's access to certain types of speech in order to help parents protect their children where parents might not be able to do so otherwise).

<sup>336</sup> See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring); *Fraser*, 478 U.S. at 684; cf. *Roper*, 543 U.S. at 569; *Pacifica Found.*, 438 U.S. at 749.

<sup>337</sup> See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring); *Fraser*, 478 U.S. at 684; cf. *Roper*, 543 U.S. at 569; *Pacifica Found.*, 438 U.S. at 749.

<sup>338</sup> See, e.g., Benfer, *supra*, note 319; Edds, *supra* note 318.

<sup>339</sup> See, e.g., *Doninger*, 514 F. Supp. 2d at 202.

<sup>340</sup> See, e.g., *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

<sup>341</sup> See *Fraser*, 478 U.S. at 683 (finding that the school, as an instrument of the state, may determine what conduct is appropriate for the school environment).

<sup>342</sup> See *Tinker*, 393 U.S. at 508.

a statement of dissatisfaction with an authority figure.<sup>343</sup> An attack on a student, in contrast, is an attack on a peer and does not raise the same First Amendment concerns.<sup>344</sup>

Additionally, the risk that schools will extend their reach too far is lower when schools are not punishing speech that attacks them.<sup>345</sup> Although teachers will continue to have an interest in sanctioning speech that causes discomfort at school, they will not have the same personal incentive to punish attacks on students as they have to punish attacks on themselves.<sup>346</sup> The risk that schools will punish off-campus cyberspeech that does not cause a substantial disruption or infringe upon the rights of other students remains, but the risk of speech being punished for vindictive or emotional purposes is greatly diminished.<sup>347</sup>

Further, any chilling effect caused by allowing schools to regulate off-campus cyberspeech attacking students under the *Tinker* standard will be outweighed by the increase in student cyberspeech created by certainty.<sup>348</sup> Currently, different courts are applying different tests to off-campus student speech and thus inadvertently making it nearly impossible for students to know if their cyberspeech is protected from school regulation.<sup>349</sup> This uncertainty is likely causing some students to avoid posting comments on the Internet.<sup>350</sup> By making clear that schools can only regulate a certain type of off-campus cyberspeech—speech that infringes upon the rights of other students to an adequate education or that causes a substantial disruption to the learning environment—students will not have to fear school punishment for speech on other topics.<sup>351</sup> Thus, although there may be a slight chilling effect on speech that harshly attacks fellow students, more “pure” speech, such as political speech by students, is likely to increase.<sup>352</sup>

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<sup>343</sup> See *supra* notes 297–299 and accompanying text.

<sup>344</sup> Compare *Doninger*, 514 F. Supp. 2d at 206–07 (permitting the punishment of a student for cyberspeech criticizing school policy), with *Benfer*, *supra* note 319 (describing a webpage criticizing a student for her eating habits, among other things).

<sup>345</sup> See *Chandler*, 978 F.2d at 531.

<sup>346</sup> See *id.*

<sup>347</sup> See, e.g., *Doninger*, 514 F. Supp. 2d at 206–07, 209 (permitting the punishment of a student for posting an “extremely disrespectful blog” about school policy that used vulgar language and requiring the student to write a letter apologizing to the superintendent for insulting her online); *Klein*, 635 F. Supp. at 1141 n.4 (permitting the punishment of a student for giving his teacher the middle finger in a parking lot at a restaurant during non-school hours).

<sup>348</sup> See *Thomas*, 607 F.2d at 1051; Calvert, *supra* note 5, at 269.

<sup>349</sup> See *Thomas*, 607 F.2d at 1051; Calvert, *supra* note 5, at 269.

<sup>350</sup> See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 620 (5th Cir. 2004).

<sup>351</sup> See *Chandler*, 978 F.2d at 531; *Thomas*, 607 F.2d at 1051.

<sup>352</sup> See *Tinker*, 393 U.S. at 508; Calvert, *supra* note 5, at 269.

Finally, school regulation of off-campus cyberspeech targeting students avoids the problem of creating different classes of First Amendment rights for minors who attend public school by focusing on the effects of the speech.<sup>353</sup> All minors have a First Amendment right to criticize their schools from off campus, even if such criticism later results in disruption of the classroom.<sup>354</sup> All public school students also have the same right to verbally attack students at private schools as students at private school have to attack those at public school using cyberspeech.<sup>355</sup> The rights of public school students are only limited in that they may not use cyberspeech to attack each other if such speech will result in an infringement of the rights of the other or in a substantial disruption of the learning environment.<sup>356</sup> The limited scope of a school's authority over off-campus cyberspeech, therefore, preserves the rights of all minors to use the Internet for expressive purposes and only subjects a narrow category of student cyberspeech to school regulation in the most extreme circumstances.<sup>357</sup>

### CONCLUSION

Students and teachers alike need to know the extent of a school's ability to regulate off-campus speech, and particularly cyberspeech. Without a clear understanding of the limits of the school's reach, speech will be chilled in some cases. In others, teachers will feel helpless to act and protect the children in their care. Costly litigation will continue, and unjust punishments will go unnoticed. Courts should agree that off-campus student cyberspeech targeting the school, faculty, and administration is beyond the reach of school punishment. Otherwise, student speech will be suppressed, hurting the learning environment and violating First Amendment rights. In contrast, schools should be able to punish off-campus cyberspeech when it targets other students and infringes upon the rights of those students to be secure and

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<sup>353</sup> See *supra* notes 307–310, 348–352 and accompanying text.

<sup>354</sup> See *supra* notes 297–310 and accompanying text.

<sup>355</sup> See *supra* notes 311–352 and accompanying text.

<sup>356</sup> See *Tinker*, 393 U.S. at 508, 514.

<sup>357</sup> See *id.* Although this Note does not argue that strict scrutiny should be applied to off-campus student speech or cyberspeech, it should be recognized that the proposed system of regulation is very narrowly tailored to serve compelling governmental interests—by only applying *Tinker* to off-campus cyberspeech attacking fellow students, it is less burdensome than the approach taken by many courts. See, e.g., *Dominger*, 514 F. Supp. 2d at 206–07. It ensures that students maintain their First Amendment rights outside of school while protecting students' rights to equal education inside school. See *Davis*, 526 U.S. at 651; *Tinker*, 393 U.S. at 508, 514.

let alone. As time goes on, more and more communication will take place over the Internet. The sooner students and schools understand what is permissible the better.

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