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# “INTERNET-SAVVY STUDENTS” AND BEWILDERED EDUCATORS: STUDENT INTERNET SPEECH IS CREATING NEW LEGAL ISSUES FOR THE EDUCATIONAL COMMUNITY

*Caitlin May*<sup>+</sup>

Approximately 87% of juveniles between the ages of twelve and seventeen use the Internet,<sup>1</sup> and approximately 64% of teens create some form of online content, such as a blog, website, or social-networking site.<sup>2</sup> Most juveniles' Internet speech occurs in the privacy of their homes; however, more and more of this Internet speech is impacting the school community.<sup>3</sup> A juvenile's speech within the school community, otherwise known as student speech, has traditionally been subject to certain limitations.<sup>4</sup> With the advent of the Internet, however, a simple geographical definition of student speech is not so clear.<sup>5</sup> The pressing issue confronting schools and courts today is whether schools have the authority to punish off-campus student Internet speech bearing some relation to the school community.

Student Internet speech runs the gamut, from a website poking fun at an unpopular teacher to publicly advertised gossip.<sup>6</sup> It also includes posted

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1. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND TECHNOLOGY: YOUTH ARE LEADING THE TRANSITION TO A FULLY WIRED AND MOBILE NATION 2 (2005), available at [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Tech\\_July2005web.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf). The phrase “Internet-Savvy Students” is found in a Pew Internet and American Life Project report. DOUGLAS LEVIN & SOUSAN ARAFEH, PEW INTERNET & AMERICAN LIFE PROJECT, THE DIGITAL DISCONNECT: THE WIDENING GAP BETWEEN INTERNET-SAVVY STUDENTS AND THEIR SCHOOLS (2002), available at [http://www.pewinternet.org/pdfs/PIP\\_Schools\\_Internet\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_Schools_Internet_Report.pdf).

2. Press Release, Pew Internet & American Life Project, More Teens are Creating and Sharing Material on the Internet (Dec. 19, 2007), [http://www.pewinternet.org/press\\_release.asp?r=150](http://www.pewinternet.org/press_release.asp?r=150) [hereinafter More Teens].

3. See Victoria Kim, *Suit Blends Internet, Free Speech, School*, L.A. TIMES, Aug. 3, 2008, at B1.

4. See *infra* Part I.A.

5. See *infra* Part II.B.1.

6. See Kim, *supra* note 3. The article details a recent incident involving a group of middle school girls who uploaded a video onto YouTube.com that contained a degrading gossip conversation they had about a fellow student. *Id.* The school learned about the video after at least twenty students viewed it and complained to school administrators. *Id.* The school responded by suspending the student who uploaded the video, but not any of the other students involved in the video. *Id.* In response, the student filed a First Amendment claim in district court

messages encouraging people to “[s]tab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face.”<sup>7</sup> When a school learns of such speech, should it be permitted to take action by punishing the student, or should the school sit back and ignore threatening speech—potentially risking another violent school shooting?<sup>8</sup>

Legal issues concerning students’ free speech rights are not new. The Supreme Court’s pronouncement of a student’s right to speak freely in school dates back to 1969, when, in *Tinker v. Des Moines Independent Community School District*, the Court declared students were entitled to wear black armbands at school in protest of the Vietnam War, despite the school’s policy prohibiting such action.<sup>9</sup> However “the advent of the Internet has complicated analysis of restrictions on speech. . . . Indeed, *Tinker*’s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by . . . complex multi-media web site[s], accessible to fellow students, teachers, and the world.”<sup>10</sup> This 2002 statement by the Supreme Court of Pennsylvania recognizes that the Internet complicates the traditional student speech analysis.<sup>11</sup> Although the U.S. Supreme Court has yet to decide a student Internet speech case, its recognition of the Internet’s ability to alter other legal

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in California. *Id.* An attorney who represents school districts reported that she receives multiple queries a month from schools expressing confusion when dealing with instances of student speech. *Id.* She also stated that “[t]he ‘classic situation’ that many school districts face . . . is teenagers using MySpace.com from their home computers to start a negative campaign against a fellow student, posting nasty comments, starting rumors or creating a fake profile page for the victim to spread false information.” *Id.*

7. Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 781–82 (E.D. Mich. 2002).

8. See THE NAT’L SCH. SAFETY CTR., SCHOOL ASSOCIATED VIOLENT DEATHS, available at <http://www.schoolsafety.us/School-Associated-Violent-Deaths-p-6.html> (providing statistics and information on student-perpetrated homicides); see also Boim v. Fulton County Sch. Dist., 494 F.3d 978, 983–84 (11th Cir. 2007) (discussing the prevalence of school violence, especially student-perpetrated shootings in United States schools). One example to consider regarding school inaction is the Columbine school shootings; Eric Harris maintained a website stating “I HATE YOU ERIC HARRIS OWNS EVERY SINGLE ONE OF YOU. The fireworks will set in the four twenty one! Doom will become reality!” Eric’s Final Online Statement?, <http://acolumbinesite.com/eric/fauxreb.html> (last visited June 10, 2009) (providing a reconstructed image of Eric Harris’ website before he committed the Columbine Shootings). Had the school discovered this before the shootings, would they have possessed the authority to act?

9. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504–05, 514 (1969). Student speech is protected under the First Amendment; therefore, students’ objections to schools’ punishments are generally grounded in the First Amendment. *Id.* at 505; see also Kim, *supra* note 3.

10. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863–64 (Pa. 2002).

11. *Id.*; see also Kim, *supra* note 3 (“[T]he Web has catapulted such fights [between students] to a new dimension, where slander becomes far more public and can be forwarded and reproduced in a matter of seconds.”).

standards indicates they may be willing to consider the Internet's effect on student speech in the future.<sup>12</sup>

This Comment surveys legal issues spurred by the increasing prevalence of off-campus student Internet speech, and addresses the various ways courts have attempted to balance students' freedom of speech with schools' interest in prohibiting certain types of student speech. This Comment is limited to a discussion of student speech in public secondary schools;<sup>13</sup> however, similar issues are present in the university setting as well.<sup>14</sup> Further, this Comment merely addresses the constitutionality of schools' punishment of student speech, particularly threatening speech, and does not attempt to address the constitutionality of any criminal action that may be taken against students.<sup>15</sup>

In Part I, this Comment discusses the legal precedent governing free speech issues in schools, including Supreme Court precedent on student speech rights and threat speech in general, as well as the developing body of case law from lower courts specifically tackling student Internet speech. Part II describes the approaches courts have developed to address schools' punishment of student Internet speech, particularly by examining various analytical models for

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12. See *Reno v. ACLU*, 521 U.S. 844, 889–92 (1997) (O'Connor, J., concurring); see also *Ashcroft v. ACLU*, 535 U.S. 564, 595–602 (2002) (Kennedy, J., concurring) (discussing how the unique character of the Internet impacted the application of community standards jurisprudence to issues arising from the Child Online Protection Act). In *Reno*, the Court addressed whether two provisions of the Communications Decency Act (CDA), which prohibited the transmission of "indecent and patently offensive" Internet communications to minors, were unconstitutional. *Reno*, 521 U.S. at 849. The issue, in part, led the Court to address how the Internet altered existing practices to restrict obscene or indecent communications to youths. *Id.* at 849–57. In her concurrence, Justice O'Connor addressed this concern when she stated that "[b]efore today . . . the Court has previously only considered laws that operated in the physical world . . . . The electronic world is fundamentally different." *Id.* at 889 (O'Connor, J., concurring). This recognition of distinct differences between the physical world and the Internet required the Court, and particularly Justice O'Connor, to reconsider the existing free speech doctrine. *Id.* at 868–70 (majority opinion); *id.* at 886 (O'Connor, J., concurring).

13. Secondary schools includes both middle and high schools.

14. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 304, 320 (3d Cir. 2008) (holding Temple University's anti-harassment policy unconstitutionally overbroad because it violated the students' First Amendment free speech rights); *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 574, 592 (D. Del. 2008) (finding that the university did not show disruption or adverse impact resulting from the student's articles or websites). In *Murakowski*, the student challenged the university's right to discipline him for posting allegedly threatening comments on his website, which was maintained on a school server. *Murakowski*, 575 F. Supp. 2d at 578. The school was alerted to the website when the brother of a female student who lived in Murakowski's dorm filed a complaint alleging that she felt unsafe because of statements Murakowski was posting. *Id.* at 578. The court addressed whether the school's punishment infringed on the student's rights, utilizing the same standards applied in cases involving other school speech. *Id.* at 587–92 (finding Murakowski's comments did not constitute a "true threat" or "material disruption").

15. For an example of a student speech case concerning the criminality of the student's speech, see *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001), which addressed whether a high school student's posts in an Internet chat room, threatening to kill fellow students, were "true threats." *Id.* at 285, 287–88.

potentially threatening speech. This section aims to illustrate how the Internet alters the existing student speech standards and to demonstrate which approaches work. Finally, Part III advocates expanding the Supreme Court's reasoning in *Morse v. Frederick*<sup>16</sup> to adopt a categorical approach to a student's threatening Internet speech.<sup>17</sup> This approach would allow schools to punish a student for such speech without infringing on his or her First Amendment rights.<sup>18</sup> In contrast, all other student Internet speech originating off-campus, which fails to substantially impact the school environment, should be presumptively considered protected speech. Such an approach is consistent with recent state and federal legislative attempts to combat cyber-bullying,<sup>19</sup> and strikes an appropriate balance between students' rights to speak freely and schools' interests in providing a safe school environment.

## I. STUDENT SPEECH AND THE FIRST AMENDMENT: AN OVERVIEW

### A. *The Four Seminal Supreme Court Cases on Student Speech*

When the Supreme Court decided *Tinker* in 1969, it marked the origin of a line of Supreme Court cases recognizing the "special characteristics of the

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16. *Morse v. Frederick*, 127 S. Ct. 2618, 2626–29 (2007).

17. See *infra* Part III.

18. This Comment, however, supports the decision in *Morse*. Further, it argues in favor of a content-based regulation for speech advocating/threatening harm within the school on the premise that violence is just as significant a problem, if not worse, than drugs. See *infra* Part III. For an opposite view, see Joanna Narin, Note, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 242, 246 (2008). Narin argues against extending *Morse*'s categorical exemption for certain student speech, alleging that it will "[o]pen[] the [d]oor to [i]nculcation [in schools] [t]hrough [c]ontent-[b]ased [r]egulation." *Id.* at 246. The author contends that *Morse* was both contrary to prior Supreme Court reasoning and incorrect in creating a content-based regulation of speech advocating illegal drug use. *Id.* at 246, 256. Further, she disagrees that schools should instill or "inculcate" values in students. *Id.* at 250.

19. See *infra* note 255 and accompanying text. On April 2, 2009, Congresswoman Linda Sanchez introduced to the House of Representatives the Megan Meier Cyberbullying Prevention Act. The law aims to make it a crime punishable by up to two years in prison to communicate online with "the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person . . . ." Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 881(a) (2009). Congresswoman Sanchez and Congressman Kenny Hulshof previously introduced a substantially similar version of the bill in 2008. See Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008). Whether the bill will pass constitutional muster remains an open question. For example, critics of the 2008 version of the bill questioned its constitutionality, claiming it was simply an impulsive law aimed at combating indecency on the internet. See, e.g., *Federal Lawmaker Targets Cyber Bullying*, ESCHOOL NEWS, May 27, 2008, <http://www.eschoolnews.com/news/top-news/?i=53897> (last visited Aug. 15, 2009).

school environment” as a relevant legal consideration in deciding the scope of students’ First Amendment speech rights within the school setting.<sup>20</sup>

*Tinker* addressed whether a school could suspend its students for violating a school policy by wearing black armbands to protest the Vietnam War.<sup>21</sup> In an analysis many courts would come to follow, the Court established that students and teachers do not “shed their constitutional rights . . . at the schoolhouse gate,” but made clear that such rights are “applied in light of the special characteristics of the school environment.”<sup>22</sup> *Tinker* held that a school could regulate student speech or expression only when it could show that the speech did, or reasonably could be foreseen to have “materially and substantially disrupt[ed] the work and discipline of the school”<sup>23</sup> or “impinge[d] upon the rights of other students.”<sup>24</sup> Ultimately, the Court reasoned that the students’ speech was entirely divorced from any disruptive conduct and, therefore, the punishment violated the students’ First Amendment rights.<sup>25</sup>

Following *Tinker*, the Supreme Court’s decisions, rather than reaffirm and expand students’ speech rights, upheld schools’ punishments of student speech.<sup>26</sup> The first example came in 1986, when the Court, in *Bethel School District v. Fraser*, ruled that public schools could prohibit student speech that was vulgar, lewd, or plainly offensive because such speech was “inconsistent with the ‘fundamental values’ of public school education.”<sup>27</sup> The school in *Fraser* suspended a student for delivering an assembly speech, which contained sexual references, because the school found the speech “‘obscene,’ as used in the disruptive-conduct rule . . .”<sup>28</sup> The majority found that the “pervasive sexual innuendo in Fraser’s speech was plainly offensive to both

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20. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Additionally, *Tinker* represents not only the Court’s first words on students’ First Amendment rights, but its most resounding statement to date. See *infra* Part II.B.

21. *Tinker*, 393 U.S. at 504. Specifically, the Supreme Court framed the issue as whether the school could punish students for such “pure speech.” *Id.* at 505. The district court had recognized that “the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.” *Id.*

22. *Id.* at 506.

23. *Id.* at 513.

24. *Id.* at 509. While the Court did not define a material or substantial disruption, it did state that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 508.

25. *Id.* at 514.

26. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); see also *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 862 (Pa. 2002) (stating that, unlike *Tinker*, these cases did not focus “on the role of First Amendment values at school,” but rather “emphasiz[ed] the importance of the educational mission of the school”).

27. *Fraser*, 478 U.S. at 685–86.

28. *Id.* at 678–79. The student’s speech contained various mocking sexual innuendos; such as “Jeff is the man who will go to the very end—even the climax.” *Id.* at 687 (Brennan, J., concurring).

teachers and students.”<sup>29</sup> Therefore, despite the fact that no disruption had occurred, the school’s “interest in protecting minors from exposure to vulgar and offensive spoken language”<sup>30</sup> justified punishment.<sup>31</sup>

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court addressed whether a school could prohibit “expressive activities that . . . bear the imprimatur of the school,”<sup>32</sup> namely censoring certain high school newspaper articles discussing teen pregnancy and divorce.<sup>33</sup> Similar to *Fraser*, the Court refused to apply *Tinker*, reasoning that the school was not merely tolerating, but promoting student speech—something the First Amendment did not require.<sup>34</sup> The majority held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>35</sup> The dissent, however, argued that the majority’s holding created a “taxonomy of school censorship” requiring *Tinker* to apply in one context, *Fraser* in another, and *Hazelwood* in another.<sup>36</sup> This argument highlights how the Court’s subsequent cases, rather than reaffirming *Tinker*, merely crafted new exceptions or categories of analysis for student speech.<sup>37</sup>

After *Hazelwood*, the Supreme Court remained silent on student speech until 2007, when it decided *Morse v. Frederick*.<sup>38</sup> In *Morse*, the Court addressed

29. *Id.* at 683 (majority opinion).

30. *Id.* at 684–85.

31. *Id.* at 685. But see *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007) (stating that the “mode of analysis set forth in *Tinker* is not absolute”). For a more in depth discussion of *Fraser*’s reasoning, see Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 859–61 (2008) (stating that *Fraser* seemed to rest both on the content of the speech and the forum in which it was delivered).

32. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

33. *Id.* at 263–64 (stating that staff members sued the school claiming a violation of their First Amendment rights).

34. *Id.* at 270–71; see also *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008) (applying *Hazelwood* to hold that a school did not violate the student’s rights when it prohibited him from distributing candy canes with a religious card attached at a school-sponsored activity because the school had a valid educational purpose in preventing students from being offended by religious speech).

35. *Hazelwood*, 484 U.S. at 272–73.

36. *Id.* at 281 (Brennan, J., dissenting); see also *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 588 (D. Del. 2008) (“Kuhlmeier [sic] . . . ‘confirms that the rule of *Tinker* is not the only basis for restricting student speech.’”).

37. See Denning & Taylor, *supra* note 31, at 862 (“What might be called the ‘categorization’ of student speech, confirmed in *Morse*, is an interesting development. . . . [T]he process of excluding entire categories of speech from First Amendment protection because of their content sits uneasily beside the tendency of the Court to treat content-based restrictions of speech as presumptively unconstitutional . . . .”); see also Narin, *supra* note 18, at 242, 246 (arguing that in *Morse*, the Court opted to craft another categorical exception—the promotion of illegal drug use—and set forth new precedent for content-based regulation of student speech).

38. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

whether a school could suspend a student for waving a banner declaring “Bong Hits 4 Jesus” at an off-campus, school-approved activity.<sup>39</sup> The Court framed the issue rather uniquely, asking whether a school could restrict speech that is “reasonably viewed as promoting illegal drug use.”<sup>40</sup> The Court refused to apply *Tinker* because it reasoned that “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest,”<sup>41</sup> far more important than the mere disruption to which *Tinker* alluded.<sup>42</sup> Further, reasoning that neither *Fraser* nor *Hazelwood* applied, the Court held that the school could regulate student speech that could “reasonably [be] viewed as promoting illegal drug use.”<sup>43</sup> *Morse* represents the Supreme Court’s last word on the issue, creating yet another category of student speech.<sup>44</sup>

### B. The “True Threat” Doctrine

In addition to the four foundational student speech cases, the Supreme Court has crafted certain categorical exemptions for other types of speech, which are relevant in an analysis of student speech.<sup>45</sup> One exemption of particular importance is the “true threat” doctrine, which states that speech qualifying as a “true threat” falls outside any First Amendment protection.<sup>46</sup> The “true

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39. *Id.* at 2622.

40. *Id.* at 2625; see also Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the School-House Gate*, 12 LEWIS & CLARK L. REV. 27, 29 (2008) (discussing how the Court in *Morse* failed to frame the issue as a school’s authority to punish off-campus speech). *Morse* also recognized that students “do not ‘shed their constitutional rights . . . at the schoolhouse gate,’” but ultimately placed greater emphasis on the schools’ interest in providing a safe environment. *Morse*, 127 S. Ct. at 2627–28 (quoting *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 655–56 (1995)). For example, the Court stated that “‘the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.’” *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

41. *Morse*, 127 S. Ct. at 2628 (quoting *Vernonia*, 515 U.S. at 661).

42. *Id.* at 2629. The Court indicated that *Fraser* established that the *Tinker* analysis is not “absolute.” *Id.* at 2627.

43. *Id.* at 2625. Adopting an entirely new standard supports the argument that the Court applies a categorical approach to student speech. See *supra* note 37.

44. See *Narin*, *supra* note 18, at 242–47 (discussing how the Supreme Court’s decision in *Morse* was contrary to its previous student speech cases); see also West, *supra* note 40, at 29 (discussing the Court’s decision in *Morse* and stating that “[t]he position that schools may sanction a public event held on public property is unsupported by the Court’s precedents”).

45. See generally Sara Redfield, *Threats Made, Threats Posed—School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 679–80 (listing types of speech categorically exempt from the First Amendment which are relevant to student speech, including: “[o]bscenity, child pornography, libel, fighting words, [and] incitement to violence”).

46. *Watts v. United States*, 394 U.S. 705, 707–08 (1969); Richard V. Blystone, *School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?* 2007 BYU EDUC. & L.J. 199, 205–10 (discussing the application of the “true threat” doctrine from *Watts* and arguing that it should be altered to apply to the particularities of the school setting); see generally



threat” doctrine originated in *Watts v. United States*, where the Supreme Court held that “true threats” are not constitutionally protected speech.<sup>47</sup> *Watts* did not concern student speech, but instead addressed whether an eighteen-year-old could be criminally punished for allegedly threatening the life of the president.<sup>48</sup> The lower court upheld the punishment. On appeal the Supreme Court reversed, concluding that his speech was not a “true threat,” but rather constitutionally protected speech.<sup>49</sup> Although the Court did not find that particular speech to be a “true threat,” it did create a categorical exemption for threat speech and provided four factors to determine whether a “true threat” exists: “the reaction of the listener, the conditional nature of the threat, the extent to which one’s speech is mere political hyperbole, and the overall context and background circumstances of the expression.”<sup>50</sup>

The “true threat” doctrine also encompasses certain forms of non-verbal intimidation, as enunciated by the Supreme Court in *Virginia v. Black*.<sup>51</sup> In *Black*, the Court addressed the constitutionality of an ordinance banning cross-burning with “an intent to intimidate a person or group of persons.”<sup>52</sup> The Court stated:

True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . . [The] prohibition on true threats “protect[s] individuals from the fear of violence and from the disruption that fear engenders.”<sup>53</sup>

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Redfield, *supra* note 45, at 680–81 (2003) (discussing *Watts*’s application in cases assessing the constitutionality of student speech).

47. *Watts*, 384 U.S. at 707–08 (finding that the statement was political hyperbole and not a “true threat”).

48. *Id.* at 705–06. The petitioner stated, “I have already received my draft classification . . . . I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Id.*

49. *Id.* at 705–06, 708. The Court did not define a “true threat,” but merely stated “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” *Id.* at 707.

50. Blystone, *supra* note 46, at 204–05; see also *Watts*, 384 U.S. at 707–08.

51. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat . . .”).

52. *Id.* at 347–48. Specifically, the ordinance prohibited cross-burning with an “intent to intimidate a person or group of persons.” *Id.* at 347. The Court held that Virginia’s ban on cross burning with intent to intimidate was constitutional. *Id.* at 363. It also found, however, that the provision of the ordinance stating that the burning of a cross in public view “shall be prima facie evidence of an intent to intimidate” was facially unconstitutional under the First Amendment. *Id.* at 363–64.

53. *Id.* at 359–60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). The Court also stated that intimidation could be constitutionally proscribable and defined it to mean a “type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360.

Therefore, the Court upheld Virginia's prohibition on this particular type of intimidation.<sup>54</sup> This extension of the "true threat" doctrine to exempt certain forms of intimidation from First Amendment protection provides an important basis for schools addressing threatening speech.<sup>55</sup>

### C. Threat Speech in the School Setting

The "true threat" doctrine, although crafted in the criminal context, has also been applied in the school setting.<sup>56</sup> Along with *Tinker* and *Morse*, the "true threat" doctrine supplies the standard by which some courts judge schools' punishment of threatening speech.<sup>57</sup> In a "true threat" analysis—although there is some disagreement over whether to view the threat from the perspective of the speaker<sup>58</sup> or the recipient<sup>59</sup>—courts agree that the threat should be judged under an objective, reasonable standard.<sup>60</sup>

For example in *Mahaffey ex rel. Mahaffey v. Aldrich*, the school suspended a student for threatening speech posted on his "Satan's webpage" site, which both listed people he wished would die and encouraged violent acts.<sup>61</sup> The court applied *Tinker* and the "true threat" doctrine in examining whether there was a First Amendment violation.<sup>62</sup> The court concluded that the school failed to meet the standard set in *Tinker* because there was no actual disruption and

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54. *Id.* at 363.

55. See *infra* Part III (discussing how there should be a categorical rule exempting from First Amendment protection student speech advocating violence in the school community).

56. See *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622–23 (8th Cir. 2002) (discussing how there is a circuit split regarding interpretation of the "true threat" doctrine, but also stating that "[t]he debate over the approaches appears . . . to be largely academic because in the vast majority of cases the outcome will be the same under both tests"); see also Redfield, *supra* note 45, at 680–81 ("Since *Watts*, the Court has left the development of true threat analysis to the circuit and state courts where the results have not been consistent.").

57. See, e.g., *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766, 768–71 (5th Cir. 2007); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 982, 984–85 (11th Cir. 2007); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 783–86 (E.D. Mich. 2002).

58. See, e.g., *United States v. Fulmer*, 108 F.3d 1486, 1490–91 (1st Cir. 1997) (describing the different circuit approaches to the "true threat" doctrine); see also Lovell *ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996). Other circuits following the speaker approach include the Sixth and Tenth Circuits. *Fulmer*, 108 F.3d at 1490–91.

59. *Doe*, 306 F.3d at 622–23. Other circuits following the reasonable recipient approach include the Second, Fourth, and Seventh Circuits. *Fulmer*, 108 F.3d at 1491.

60. Compare *Doe*, 306 F.3d at 622 (adopting the approach "that a court must view the relevant facts to determine 'whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future'" (quoting *United States v. Dinwaddie*, 75 F.3d 913, 925 (8th Cir. 1996))), with *Lovell*, 90 F.3d at 372–73 (forming the question as "whether a reasonable person . . . would foresee that [the listener] would interpret [the] statement as a serious expression of intent to harm or assault").

61. *Mahaffey*, 236 F. Supp. 2d at 781–82. Specifically, the school cited two policies as grounds for Mahaffey's expulsion: an Internet use policy and a policy against intimidation and threats. *Id.* at 782.

62. *Id.* at 783–86.

the student's mere act of accessing the website at school failed to justify punishment.<sup>63</sup> Next, the court applied the reasonable speaker test of the "true threat" doctrine, asking whether "'a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of an intention to inflict bodily harm. . . .'"<sup>64</sup> The court concluded that the postings were not a "true threat," because the site contained a disclaimer and there was no evidence that Mahaffey either communicated his views to or actually threatened anyone.<sup>65</sup> Therefore, the court struck down the school's punishment.<sup>66</sup>

In addition to the "true threat" analysis, two recent cases relied on *Morse* to address students' threatening speech.<sup>67</sup> In *Ponce ex rel. E.P. v. Socorro Independent School District*, the Fifth Circuit held student speech that threatened a Columbine-esque shooting at the school was not protected by the First Amendment.<sup>68</sup> In *Boim v. Fulton County School District*, the Eleventh Circuit held that an entry in a student's notebook about her desire to shoot her teacher "was reasonably likely to further cause a material and substantial disruption to the 'maintenance of order and decorum' within [the school]."<sup>69</sup> In both decisions, the courts focused on the critical and urgent problem of school violence and reasoned that schools have a heightened interest in ensuring a safe school environment, which justifies punishing threatening speech.<sup>70</sup>

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63. *Id.* at 784. The court distinguished the case from *Bethlehem*, stating there was no disruption that "interfere[d] with the educational process." *Id.* at 785.

64. *Id.* (quoting *United States v. Lineberry*, 7 Fed. Appx. 520, 524 (6th Cir. 2001)) (providing an example of the reasonable speaker test).

65. *Id.* at 786.

66. *Id.*

67. *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768–70 (5th Cir. 2007); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 983–84 (11th Cir. 2007). The rationale for both decisions was based on the speech's threatening nature and the school's significant interest in providing a safe school environment. *Ponce*, 508 F.3d at 771–72; *Boim*, 494 F.2d at 983, 985.

68. *Ponce*, 508 F.3d at 771–72. The student in *Ponce* maintained an extended diary detailing a "pseudo-Nazi" group and its plan to commit a shooting at the high school. *Id.* at 766. The student told another student about his notebook and that student later informed school officials. *Id.* After confronting the student about the notebook, the school seized it, read it, and then suspended the student. *Id.* at 766–67. The district court held that the school failed to satisfy *Tinker* and therefore the speech was protected. *Id.* at 767. The Fifth Circuit, rather than relying on *Tinker*, extended *Morse*'s categorical exemption for speech advocating drugs to speech advocating harm and, therefore, upheld the school's punishment. *Id.* at 770–71.

69. *Boim*, 494 F.3d at 983.

70. *Ponce*, 508 F.3d at 771–72 ("School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."); *Boim*, 494 F.3d at 983–84; see also *infra* Part III.

#### D. The Internet and Student Speech

Somewhat surprisingly, cases tackling student Internet speech date back to 1998, when a federal district court in *Beussink ex rel. Beussink v. Woodland R-IV School District*<sup>71</sup> held that a school could not punish a student for a personal website developed off-campus that was merely critical of the school.<sup>72</sup> The *Beussink* court's refusal to allow the school to punish the student was consistent with the reasoning of many other courts; for example, the Second Circuit held, in *Thomas v. Board of Education, Granville Central School District*,<sup>73</sup> that a school lacked authority over student speech originating outside the schoolhouse gate.<sup>74</sup>

Although much Internet speech does originate off-campus, even in the wake of *Beussink*, courts have addressed schools' punishment of student speech on websites,<sup>75</sup> e-mails,<sup>76</sup> instant messages,<sup>77</sup> social networking sites,<sup>78</sup> and even YouTube videos.<sup>79</sup> The courts' opinions range in approaches and outcomes.<sup>80</sup> Only a limited number of decisions have reached the appellate level, and those courts have consistently upheld the schools' punishment of off-campus Internet

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71. *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

72. *Id.* at 1177, 1181–82. In *Beussink*, the court viewed the website as having no connection to the school because it was developed off-campus and did not create a disruption within the school. *Id.* at 1177. The court rejected the argument that *Tinker* permitted the school to regulate speech that reasonably posed a threat of disruption, because *Tinker* required that any action based on a “fear or projection of such disruption” include fear that must “be ‘reasonable’ and not an ‘undifferentiated fear’ of disturbance.” *Id.* at 1180 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 508 (1969)). Rather, the court reasoned that the school punished the student simply because it disliked the website’s content. *Id.*

73. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979).

74. *Id.* at 1050, 1057–58 & n.12 (holding that the school could not punish students for a newspaper published off-campus even though it contained allegedly “morally offensive, indecent, and obscene” material). See generally West, *supra* note 40, at 29, 42–44 (arguing that the Supreme Court’s precedents have gradually expanded schools’ authority over student speech).

75. *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 575–79 (D. Del. 2008); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591–94 (W.D. Pa. 2007); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781–82 (E.D. Mich. 2002); *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 794–95 (N.D. Ohio 2002); *Emmett v. Kent Sch. Dist.*, No. 415, 92 F. Supp. 2d 1088, 1099 (W.D. Wash. 2000); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850–52 (Pa. 2002).

76. *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448–49 (W.D. Pa. 2001).

77. *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35–36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

78. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, \*1–2 (M.D. Pa. Sept. 11, 2008).

79. *Requa v. Kent Sch. Dist.* No. 415, 492 F. Supp. 2d 1272, 1274 (W.D. Wash. 2007).

80. See *Bethlehem*, 807 A.2d at 866; see also Denning & Taylor, *supra* note 31, at 838–41.

speech.<sup>81</sup> Conversely, the majority of trial level decisions have found the speech constitutionally protected.<sup>82</sup>

*1. School Exigencies Win Out: Internet Cases Resulting in Favorable Outcomes for the School*

On the appellate level, only the Second Circuit and the Supreme Court of Pennsylvania have addressed student Internet speech, and both courts upheld the schools' punishments.<sup>83</sup> The most recent example is *Doninger ex rel. Doninger v. Niehoff*, a May 2008 decision by the Second Circuit.<sup>84</sup> *Doninger* addressed whether a school could prohibit a student from running for class secretary because of something she posted on a private blog.<sup>85</sup> The student's message urged her fellow students to protest the school's rumored decision to cancel an upcoming concert; she sent the message even after the principal had asked her to correct the situation caused by an earlier e-mail.<sup>86</sup> Upon being punished for her speech, the student sued the school claiming a First Amendment violation;<sup>87</sup> however, the district court held that she "failed to show a sufficient likelihood of success on the merits."<sup>88</sup> The Second Circuit

81. See *Doninger v. Niehoff*, 527 F.3d 41, 43, 51, 54 (2d Cir. 2008); *Wisniewski*, 494 F.3d at 40; *Bethlehem*, 807 A.2d at 869. There are a plethora of appellate cases dealing with threatening student speech on the Internet in the criminal context. See, e.g., *United States v. Morales*, 272 F.3d 284, 285–86 (5th Cir. 2001). However, criminal cases are beyond the scope of this Comment.

82. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786, 790 (E.D. Mich. 2002); *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 799–800 (N.D. Ohio 2002); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 458 (W.D. Pa. 2001); *Emmett v. Kent Sch. Dist.*, No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

83. See *Doninger*, 527 F.3d at 43, 51; *Wisniewski*, 494 F.3d at 40; *Bethlehem*, 807 A.2d at 869.

84. *Doninger*, 527 F.3d at 44.

85. *Id.* at 43.

86. *Id.* at 45. The dispute began when the student and three other student council members sent an e-mail from a school computer, alerting the school community that an upcoming school concert might be cancelled. *Id.* After the message was sent, an influx of responsive e-mails and calls bombarded the school, leading the administration to confront the students. *Id.* at 44–45. Although school officials confronted the student to convey their disappointment and their intention not to cancel the event, later that night, the student posted a message on *livejournal.com* from her home computer. *Id.* at 45. The message referred to the school administration as "douchebags" and urged further protest. *Id.* Upon learning about the blog posting, the principal prohibited the student from running for senior class secretary, concluding that, because "the posting contained vulgar and inaccurate information," the "conduct had failed to display the civility and good citizenship expected of class officers." *Id.* at 46.

87. *Id.* at 43.

88. *Id.*

affirmed, holding that the student's "post created a foreseeable risk of substantial disruption to the work and discipline of the school."<sup>89</sup>

The Second Circuit framed the issue as whether a school has the authority to regulate expression that did not occur on school grounds—noting that the Supreme Court had yet to speak on the issue.<sup>90</sup> The court applied a two part test, asking (1) whether the student intended the speech to come onto campus, and (2) whether it was foreseeable that the school would become aware of the speech and the speech would create a disruption.<sup>91</sup> The court focused primarily on three factors in reaching its conclusion: (1) "the language . . . was not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy,"<sup>92</sup> (2) the posting "was 'at best misleading and at worst[t] false' information,"<sup>93</sup> and (3) the school's disciplinary action merely prohibited the student from participation in an extracurricular activity, it did not suspend or expel her.<sup>94</sup> Thus, the court concluded that the student did not have a valid First Amendment claim.<sup>95</sup>

The Second Circuit's decision in *Doninger* relied heavily on its earlier Internet speech case, *Wisniewski ex rel. Wisniewski v. Board of Education of Weedsport Central School District*.<sup>96</sup> In *Wisniewski*, a middle-schooler created and sent to some classmates, an instant messaging icon depicting a pistol firing a bullet at his teacher's head.<sup>97</sup> The school suspended him and permitted the teacher who was the subject of the icon to stop teaching him.<sup>98</sup> The student's parents filed a 42 U.S.C. § 1983 action against the school board, alleging that the icon was protected speech under the First Amendment.<sup>99</sup> The district court

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89. *Id.* at 53.

90. *Id.* at 48. The court did not hold that the school could punish the student for vulgar and offensive speech made from her home computer because it refused to answer whether *Fraser* applied to off-campus speech. *Id.* at 49–50.

91. *Id.* at 48–50. The court applied the reasoning from *Wisniewski* and rejected the idea that it extended *Fraser* to off-campus speech. *Id.* at 50.

92. *Id.* at 50–51.

93. *Id.* at 51 (citation omitted).

94. *Id.* at 52.

95. *Id.* at 53 ("We are mindful that, given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.").

96. *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

97. *Id.* at 36 (describing the icon, which also showed a blood splatter above the head). The student created the icon, which he left up for three weeks, soon after the school had instructed students that threats would not be tolerated. *Id.*

98. *Id.* The school further suspended the student for one semester; however, the district provided alternative education. *Id.* at 37. The principal also alerted the police, but the police eventually dismissed the pending criminal case, concluding that the student only meant the icon as a joke and posed "no real threat" to any school official. *Id.* at 36.

99. *Id.* at 37.

held that the icon “was reasonably . . . understood as a ‘true threat’ lacking First Amendment protection” and therefore dismissed the claim.<sup>100</sup>

On appeal, rather than apply the “true threat” doctrine,<sup>101</sup> the Second Circuit adopted a more lenient standard, concluding that “school officials have significantly broader authority to sanction student speech than the [true threat doctrine] allows.”<sup>102</sup> Accordingly, the court applied a different two pronged analysis<sup>103</sup> and concluded that the student’s speech crossed “the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk” of disruption.<sup>104</sup>

The third appellate-level decision came from the Supreme Court of Pennsylvania in *J.S. ex rel. H.S. v. Bethlehem School District*,<sup>105</sup> where the court upheld the school’s decision to permanently expel a student for creating a website entitled “Teachers Sux.”<sup>106</sup> After learning of and viewing the website, the targeted teacher suffered stress, anxiety, and loss of sleep and eventually left the school.<sup>107</sup> “Believing the threats to be serious,” the school contacted the police,<sup>108</sup> and suspended and initiated expulsion proceedings against the student.<sup>109</sup> The student brought suit on First Amendment grounds.<sup>110</sup> Both the trial and intermediate courts agreed with the school, determining that the school could punish off-campus Internet speech that caused a *Tinker* disruption.<sup>111</sup>

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100. *Id.*

101. *Watts v. United States*, 394 U.S. 705, 707–08 (1969); *see also supra* text accompanying note 50.

102. *Wisniewski*, 494 F.3d at 38.

103. *See Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 420–22 (S.D.N.Y. 2008) (applying *Wisniewski*’s framework). The two part analysis asks: (1) whether it is reasonably foreseeable that the student’s speech will reach the school campus, and (2) whether it is reasonable foreseeable that the speech will “materially and substantially disrupt the work and discipline of the school.” *Wisniewski*, 494 F.3d at 38–39 (internal citations omitted).

104. *Wisniewski*, 494 F.3d at 38–39.

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

106. *Id.* at 851. The website contained various threatening sections, including one entitled “Why She Should Die.” The student created the website at home; however, he accessed and showed it to other students at school. *Id.* at 850–52. Once other students knew of the website, teachers quickly learned of its existence. *Id.* at 852.

107. *Id.*

108. *Id.* The police eventually decided not to press charges. *Id.* This case did not even consider the criminality of the student’s actions. *Id.*

109. *Id.* at 852–53. The student remained at school following news of the website, but the school district eventually suspended and expelled him. *Id.* During the expulsion hearings, the student’s parents transferred him to an out-of-state school; therefore, he was never actually subject to the expulsion. *Id.* at 853.

110. *Id.*

111. *Id.* On appeal, the Commonwealth Court framed the issue as “whether a student may be disciplined for speech occurring off of school premises and communicated to others via the Internet.” *Id.*

On appeal, the Supreme Court of Pennsylvania affirmed the lower courts' decisions.<sup>112</sup> The opinion emphasized that the Internet presented novel legal issues and discussed how neither *Tinker*, *Fraser*, nor the "true threat" doctrine provided a sufficient framework of analysis.<sup>113</sup> Thus, the court applied a new two-part framework.<sup>114</sup>

First, the court addressed a threshold issue of whether the speech was made on- or off-campus<sup>115</sup> and held that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."<sup>116</sup> Therefore, because the student accessed the website at school and aimed it at a "specific audience of students and others connected with" the school, it was on-campus speech for purposes of punishment.<sup>117</sup> Second, the court considered other relevant factors to determine whether it was constitutionally protected speech, including: (1) "the form of the speech;" (2) "the effect of the speech;" (3) "the setting in which the speech is communicated;" and (4) "whether the speech is part of a school sponsored expressive activity."<sup>118</sup> Based on these factors, the court held that the website created a substantial disruption because it adversely affected the entire school community and impacted the delivery of instruction.<sup>119</sup>

## 2. Students have Free Speech: Trial Courts Generally Find the Student's Speech is Protected

In contrast to appellate-level decisions, many lower courts that have addressed school punishment of student Internet speech have held that the school's punishment violated the student's free speech rights.<sup>120</sup> The courts

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112. *Id.* at 853, 869.

113. *Id.* at 859–60, 862–66. The court reasoned that the "true threat" doctrine did not apply given the "narrowness of the exceptions to the right of free speech, and the criminal nature of a true threat analysis." *Id.* at 859.

114. *Id.* at 864.

115. *Id.*

116. *Id.* at 865.

117. *Id.*

118. *Id.* at 864–65 ("[E]ven after this threshold consideration of the location of the speech is established, the type of speech, the unique setting and manner in which the speech was circulated, and the personal nature of the speech make it difficult to apply any of the three United States Supreme Court cases above.").

119. *Id.* at 869 ("[T]he atmosphere of the entire school community was described as that as if a student had died."). Similarly, *Doninger*, *Wisniewski*, and *Bethlehem* upheld the schools' punishments because the "special characteristics of the school environment" necessitated that the schools intervene to ensure a safe and civil educational environment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1968). See discussion *supra* Part I.D.1.; see also discussion *infra* Part II.A. (discussing schools' duty to ensure a safe environment).

120. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007); *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 799–800 (N.D. Ohio 2002); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454–56



have generally applied either *Tinker* or *Fraser* in their reasoning, depending on the forum, content, and circumstances surrounding the speech.<sup>121</sup>

In *Killion v. Franklin Regional School District*, the school suspended a student for sending an e-mail containing a "Top Ten List" of offensive remarks about his athletic director, including one that stated "[b]ecause of his extensive gut factor the 'man' hasn't seen his own penis in over a decade."<sup>122</sup> The school discovered the e-mail after a fellow student printed and distributed it at school.<sup>123</sup>

Addressing whether the student's First Amendment rights were violated, the court rejected the arguments that a higher standard applied to speech made off-campus and that *Fraser*<sup>124</sup> permitted a school to prohibit offensive, lewd, or indecent speech made off-campus.<sup>125</sup> Therefore, the court applied *Tinker*, focusing mainly on the fact that there was no evidence of any actual or foreseeable disruption.<sup>126</sup> Thus, the court held the e-mail was protected speech.<sup>127</sup>

*Emmett v. Kent School District No. 415*<sup>128</sup> concerned the constitutionality of a high school senior's personal webpage, created and maintained at home, entitled the "Unofficial Kentlake High Home Page."<sup>129</sup> The website included some "tongue-in-cheek" mock obituaries of students, which became a hot topic at school.<sup>130</sup> After learning of the website from a news report—which

(W.D. Pa. 2001); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

121. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at \*6–8 (M.D. Pa. Sept. 11, 2008); *Layshock*, 496 F. Supp. 2d at 599–601; *Coy*, 205 F. Supp. 2d at 799–800; *Killion*, 136 F. Supp. 2d at 455; *Emmett*, 92 F. Supp. 2d at 1090.

122. *Killion*, 136 F. Supp. 2d at 448 & n.1. Specifically, the school stated that it suspended the student because "the list contained offensive remarks about a school official [and] was found on school grounds." *Id.* at 449. In addition, the school also prohibited the student from participation in after-school sports. *Id.*

123. *Id.* The student did not physically bring the list to school because he had distributed lists in the past and had been warned that the school would punish him if it happened again. *Id.* at 448.

124. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986).

125. *Killion*, 136 F. Supp. 2d at 456–57. *Contra Blue Mountain*, 2008 WL 4279517, at \*8 (distinguishing and rejecting *Killion*'s proposition that a school can never punish a student for speech made off-campus).

126. *Killion*, 136 F. Supp. 2d at 455. The court did, however, state that had the school demonstrated that teachers were incapable of teaching or controlling their class, *Tinker* could have been satisfied. *Id.*

127. *Id.* at 459. The court also held that the school district's "Retaliatory Policy" against abuse of teachers and administrators was "unconstitutionally overbroad and vague." *Id.* at 459. See *infra* Part II.D. (analyzing how courts address school policies on First Amendment grounds).

128. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

129. *Id.* at 1089.

130. *Id.* The student created the mock obituaries after completing an assignment in a creative writing class, which had required him to write a personal obituary. *Id.*

characterized the obituaries as a “hit list”—the school suspended the student,<sup>131</sup> who then sought, and was granted, a temporary restraining order prohibiting the school from enforcing the suspension.<sup>132</sup> The court specifically rejected the argument that any of the standards from *Tinker*, *Fraser*, or *Hazelwood* were met, and instead held that the speech was “entirely outside of the school’s supervision” and evidenced no indication of being a threat.<sup>133</sup>

In *Coy ex rel. Coy v. Board of Education of North Canton City Schools*, a school suspended, and ultimately expelled, a student for accessing an unauthorized website on a school computer in violation of the school district’s “Internet acceptable use policy.”<sup>134</sup> The court first assessed the case based on *Tinker* because, although the website contained some inappropriate material, it did not qualify as lewd, offensive, or vulgar speech as found in *Fraser*.<sup>135</sup> The court failed to find any evidence of a disruption, other than the student’s access of the website at school—which alone would not satisfy *Tinker*.<sup>136</sup>

The court then proceeded to address whether the school district’s policy was constitutional under the First Amendment.<sup>137</sup> This analysis is sometimes

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131. *Id.*

132. *Id.* at 1089–90.

133. *Id.* at 1090. The court stated:

Web sites can be an early indication of a student’s violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people. The defendant, however, has presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.

*Id.*

134. *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 794–95 (N.D. Ohio 2002). The website, created at the student’s home, described the “exploits of a group of skate boarders” and included profane, but not obscene material. *Id.*

135. *Id.* at 799. Similar to *Killion*, the court in *Coy* declined to apply *Fraser* because the student merely accessed a personal website on a school computer and there was no evidence he compelled other students to view it. *Id.* Further, the court stated that “unlike *Fraser*, *Coy*’s website, while crude, was not the ‘elaborate, graphic, and explicit sexual metaphor’ at issue in [*Fraser*].” *Id.*

136. *Id.* at 800–01. Specifically, the court determined that issues of material fact existed as to whether the school’s motivation for punishment was really based on the website’s content, which would be impermissible under *Tinker*, or based on the student’s accessing an unapproved site in violation of the policy. *Id.* Therefore, the court denied summary judgment. *Id.*

137. *Id.* at 801; see also *Saxe ex rel. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214–15 (3d Cir. 2001). *Saxe* is a Third Circuit decision written by now-Supreme Court Justice Alito that held that a school district’s “Anti-Harassment Policy” was unconstitutionally overbroad. *Id.* at 202–03, 217. The court considered whether the policy limited itself to speech that would be punishable under existing student speech doctrine, namely *Tinker*, *Fraser*, and *Hazelwood*. *Id.* at 216–17. For example, the court reasoned that the policy could not rely on *Fraser* because it did “not confine itself merely to vulgar or lewd speech; rather, it reach[ed] any speech that interferes or is intended to interfere with educational performance or that creates or is intended to create a hostile environment.” *Id.* at 216. Thus, determining that the policy allowed for punishment of speech outside the scope of those standards, the court held that the policy violated the First Amendment. *Id.* at 217. In addition, the court also held that “[t]here is no categorical

conducted in student speech cases and includes application of both the overbreadth and the void for vagueness doctrine.<sup>138</sup> The “student conduct code” at issue in *Coy* contained three separate provisions.<sup>139</sup> The court held one constitutionally invalid on its face because it did not give students any indication of what actions or behavior would be “inappropriate” and consequently lead to discipline.<sup>140</sup> The other two sections, however, passed constitutional muster because they met the limited specificity requirement and restricted the school’s authority to on-campus behavior only.<sup>141</sup>

In *Layshock ex rel. Layshock v. Hermitage School District*, a high school student created a parody profile of his principal from his home computer on the popular social-networking site MySpace.com.<sup>142</sup> The student then sent the profile to fellow students and accessed it at school.<sup>143</sup> The profile quickly gained popularity among fellow students, who followed suit by creating more profiles of the principal.<sup>144</sup> This led to the school expending considerable efforts to block the website, including an eventual school-wide limit on

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‘harassment exception’ to the First Amendment.” *Id.* at 204. This conclusion is quite different from now-Justice Alito’s reasoning in *Morse v. Frederick*, where he accepted the majority’s conclusion that a school could categorically prohibit speech promoting illegal drug use. *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring). His willingness to adopt a categorical rule in *Morse* but not in *Saxe*, could stem from his belief that a school has a more compelling interest in deterring danger, as opposed to harassment. *Id.*

138. *Coy*, 205 F. Supp. 2d at 801. The overbreadth doctrine states that “[a] law or regulation is overbroad under the First Amendment if it ‘reaches a substantial number of impermissible applications’ relative to the law’s legitimate sweep.” *Id.* (quoting *Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville*, 274 F.3d 377, 389 (6th Cir. 2001)). In *Coy*, the court found that all three sections of the school’s policy “swept up constitutionally protected speech,” and therefore, it had to determine if the policy would be “invalid under the void for vagueness doctrine.” *Id.* at 802. A regulation is void for vagueness if it either (1) “‘denies fair notice of the standard of conduct to which a citizen is held accountable,’” or (2) “‘is an unrestricted delegation of power,’” and thereby invites arbitrary enforcement. *Id.* (quoting *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183–84 (6th Cir. 1995)); see also *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (“The vagueness of [a content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”).

139. *Coy*, 205 F. Supp. 2d at 801.

140. *Id.* at 802. The court concluded that section 21 of the code was a “catch-all” provision and therefore was constitutionally invalid due to vagueness. *Id.* at 801.

141. *Id.* at 803.

142. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591–92 (W.D. Pa. 2007); see also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, \*1 (M.D. Pa. Sept. 11, 2008) (addressing a student’s MySpace profile parody of his principal). The profile in *Layshock* stated that it was created by the principal and reported, among other things, that the teacher smoked pot, was “too drunk to remember” his birthday, and was a “big whore.” *Layshock*, 496 F. Supp. 2d at 591.

143. *Layshock*, 496 F. Supp. 2d at 591.

144. *Id.*

computer access.<sup>145</sup> The school suspended the student responsible, and also imposed additional punishments.<sup>146</sup>

The court approached the case as one of out-of-school speech being brought on-campus.<sup>147</sup> In contrast to the Second Circuit's reasoning in *Bethlehem*, the court found *Fraser* inapplicable because "[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web."<sup>148</sup> The court also found *Tinker* inapplicable because it viewed the school disruption as "minimal."<sup>149</sup> Thus, the court determined that the school violated the student's constitutional rights because there was not a "causal nexus between [the student's] conduct [creating the profile] and any substantial disruption of school operations."<sup>150</sup> Unlike the court in *Coy*, however, the *Layshock* court refused to strike down the school policy as unconstitutional, reasoning that the overbreadth doctrine should be applied with hesitation in schools.<sup>151</sup>

Finally, in contrast to prior district court decisions,<sup>152</sup> a district court in Pennsylvania upheld a school's punishment relating to off-campus student speech in *J.S. ex rel. Snyder v. Blue Mountain School District*.<sup>153</sup> In *Blue Mountain*, an eighth grader created a false profile, also on Myspace.com,

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145. *Id.* at 591–93. The administration reported that the school's technology administrator spent 25% of his time the week of December 12 dealing with profile-related issues. *Id.* at 593.

146. *Id.* at 593–94. Other punishments imposed included: placing the student in an alternative curricular program, banning him from participation in extracurricular activities, and prohibiting him from participation in the graduation ceremony. *Id.*

147. *Id.* at 595. The district court had previously denied the student's motion for a temporary restraining order, concluding, under the *Tinker* standard, that his actions "substantially disrupted school operations and interfered with the rights of others." *Id.* at 594. The court had to decide whether to grant either party's motion for summary judgment. *Id.*

148. Compare *id.* at 597 (holding Internet access at school is insufficient to warrant punishment by the school), with *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851–52 (Pa. 2002) (finding the fact that the student accessed his personal website at school sufficient to make the speech on-campus). In *Layshock*, the court also stated that "the test for school authority is not geographical" and that "[r]egardless of whether the source of the school's authority is based on timing, function, context or interference with its operations, it is incumbent upon the school to establish that it had the authority to punish the student." *Layshock*, 496 F. Supp. 2d at 598–99.

149. *Layshock*, 496 F. Supp. 2d at 600 ("[T]he actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action.").

150. *Id.* at 601 ("[T]he School's right to maintain an environment conducive to learning does not trump [the student's] First Amendment right to freedom of expression . . .").

151. *Id.* at 604–05; see also *supra* notes 138 and 140.

152. See, e.g., *Layshock*, 496 F. Supp. 2d at 599–601; *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 800–01 (N.D. Ohio 2002); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 456–58 (W.D. Pa. 2001); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

153. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, \*6–8 (M.D. Pa. Sept. 11, 2008).

purporting to be the school principal and indicating he was a pedophile and a sex addict.<sup>154</sup> The principal discovered the profile after being informed by teachers and receiving printed copies from students; he consequentially suspended the student as punishment.<sup>155</sup>

In stark contrast to the reasoning in *Killion*,<sup>156</sup> the court in *Blue Mountain* explicitly declined to apply *Tinker*'s analysis.<sup>157</sup> It determined that the speech was not akin to the political speech that occurred in *Tinker*, but was more like the lewd and vulgar speech in *Fraser* or the speech promoting illegal drugs in *Morse*.<sup>158</sup> Thus, even though the student's speech originated on a home computer, and merely had a minor effect on the school, the court upheld the school's punishment.<sup>159</sup> Accordingly, *Blue Mountain* provides some authority for applying *Fraser* to student Internet speech originating off-campus, even when it does not cause a substantial disruption.

## II. FINDING AN APPROPRIATE STANDARD: DO EXISTING STANDARDS ON FREE SPEECH WORK IN STUDENT INTERNET SPEECH CASES?

### A. Dispelling the Relevant Interests in a Student Speech Debate

Courts addressing the constitutionality of student speech employ a variety of standards and rules.<sup>160</sup> All courts agree that students' rights to free speech are

154. *Blue Mountain*, 2008 WL 4279517, at \*1. See generally Kara D. Williams, Comment, *Public Schools vs. Myspace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 726–30 (2008) (discussing the particular challenges social-networking sites pose for student free speech problems and arguing that a specific standard should apply for speech on social-networking sites). Like each of the other Internet cases discussed in this Comment, this student created the profile from his home computer. *Blue Mountain*, 2008 WL 4279517, at \*1.

155. *Blue Mountain*, 2008 WL 4279517, at \*2.

156. See *supra* note 125 and accompanying text (stating that *Fraser*'s rule could not be applied to off-campus speech).

157. *Blue Mountain*, 2008 WL 4279517, at \*7 (noting that *Tinker* "is not a good fit for every school speech situation").

158. *Id.* at \*6. The court further stated that

while *Tinker* is the seminal United States Supreme Court case in this area, its standard is not a good fit for every school speech situation. This conclusion is bolstered by the findings of the three school free speech cases that the Supreme Court has decided since *Tinker*, none of which apply the *Tinker* standard.

*Id.* at \*7.

159. *Id.* at \*6–8. Additionally, some factors the court considered in finding a sufficient nexus between the off-campus speech and the school included the fact that the website concerned the principal, it made its intended audience the students, it was printed and brought to school, and it featured images taken from the school's website. *Id.* at \*7. Further, because the court found the discipline appropriate, it declined to strike down the school policies as unconstitutional. *Id.* at \*7–8.

160. See *supra* Part I.D. Arguably, the Supreme Court also has developed divergent standards and rules. See Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 604 (W.D. Pa. 2007) ("The majority opinion in *Morse* identified the uncertainty as to the

not equivalent to adults' rights to free speech.<sup>161</sup> Assessing the level of students' rights, however, poses a difficult challenge, but one that is critical in achieving a framework for student speech analysis.<sup>162</sup>

Students possess important constitutional rights, including the First Amendment right to free speech.<sup>163</sup> Courts have stated that a student must have the ability to offer diverse ideas,<sup>164</sup> be unrestrained in voicing her opinion,<sup>165</sup> and not be chilled by overbroad and vague school policies and rules.<sup>166</sup> Nevertheless, both in the First Amendment context<sup>167</sup> and on the Internet, students' rights are subject to limitations.<sup>168</sup> One justification for this stems from the Supreme Court's recognition that juveniles possess some inherent differences from adults, such as a "lack of maturity and an undeveloped sense of responsibility."<sup>169</sup> Another reason—the justification

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boundaries of school-speech precedents . . . . The five separate opinions in *Morse* illustrate the plethora of approaches that may be taken in this murky area of law.").

161. See *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 506 (1969). Every Supreme Court case addressing a student speech issue began its opinion referencing schools' interest in regulating student speech and students' existent but limited free speech rights. *Morse*, 127 S. Ct. at 2622; *Hazelwood*, 484 U.S. at 266–67; *Fraser*, 478 U.S. at 680–81, 683; *Tinker*, 393 U.S. at 511–13; see also Denning & Taylor, *supra* note 31, at 862 (stating that the one thing all the Justices could agree on in *Morse* was that student speech rights did not equal adult speech rights).

162. See generally Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1076–89 (2008) (exploring five justifications for restricting students' speech rights and arguing that none support restricting students' speech on the Internet).

163. See Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons*: "Kids are Just Different" and "Kids are Like Adults" Advocacy Strategies, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273, 279 (2008) (stating that the First Amendment applies to juveniles).

164. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 854 (Pa. 2002).

165. See *Healy v. James*, 408 U.S. 169, 181–82 (1972).

166. See *DeJohn v. Temple Univ.*, 537 F.3d 301, 315–17 (3d Cir. 2008); *Saxe ex rel. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2000); *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 802–03 (N.D. Ohio 2002); see also *infra* Part II.C.

167. Poncz, *supra* note 163, at 278. Poncz explains that "the Supreme Court has created a patchwork jurisprudence of juveniles' constitutional rights." *Id.*

168. *Cf. Reno v. ACLU*, 521 U.S. 844, 874–76 (1997) (recognizing a possible distinction between Internet restrictions on patently vulgar or offensive speech for adults and for children).

169. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (internal citations omitted) (stating juveniles are inherently different from adults because they have a less developed and more susceptible character and a higher degree of vulnerability that many times render "impetuous and ill-considered actions and decisions"). In *Roper*, the Supreme Court held that juveniles could not be subject to the death penalty because such punishment would be cruel and unusual under the Eighth Amendment. *Id.* at 568. The Court based its holding on "social science evidence that demonstrates that kids are physically, developmentally, and socially different from adults." Poncz, *supra* note 163, at 273, 274 n.4 (citing *Roper*, 543 U.S. at 569–70).

most frequently voiced by courts—is the “[s]pecial [c]haracteristics’ of the [s]chool [e]nvironment.”<sup>170</sup>

While there are many “special characteristics of the school environment” that justify restricting certain student speech,<sup>171</sup> the most recent language from the Supreme Court emphasized that a school possesses an “‘important—indeed, perhaps compelling’ *interest*” to deter students’ drug use,<sup>172</sup> and a responsibility to protect the physical safety of students.<sup>173</sup> This language, various legislation on school safety,<sup>174</sup> and state statutes prohibiting cyber-bullying<sup>175</sup> make it clear that a school has a *duty*, not just an interest, to ensure a safe school environment.<sup>176</sup> Courts strive to strike a balance between

170. See Papandrea, *supra* note 162, at 1086. Papandrea argues there are five possible justifications for restricting juveniles’ First Amendment rights: (1) the “First Amendment Theory,” (2) the inherent “[d]ifferences [b]etween [c]hildren and [a]dults,” (3) the need for schools to provide support to parents, (4) the “[s]pecial [c]haracteristics’ of the [s]chool [e]nvironment,” and (5) the “*in loco parentis* doctrine.” *Id.* at 1076, 1080, 1083–84, 1086. For an extensive discussion of the *in loco parentis* doctrine and an argument in favor of making it the sole justification for restricting students’ free speech in schools, see Justice Thomas’s concurrence in *Morse v. Frederick*. *Morse v. Frederick*, 127 S. Ct. 2618, 2630–36 (2007) (Thomas, J., concurring). Papandrea, however, concludes that none of the listed justifications should permit a school to restrict students’ Internet speech rights. Papandrea, *supra* note 162, at 1101–02.

171. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 854 (Pa. 2002) (stating that schools must offer “a laboratory-like setting that encourages diverse thoughts”).

172. *Morse*, 127 S. Ct. at 2628 (quoting *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 661 (1995)).

173. *Id.* (Alito, J., concurring). Justice Alito’s concurrence premised the school’s ability to regulate the student’s speech on the fact that “[s]peech advocating illegal drug use poses a threat to student safety.” *Id.* Further, even Justice Stevens writing for the dissent, recognized that “the relationship between schools and students ‘is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.’” *Id.* at 2646 (Stevens, J., dissenting) (quoting *Vernonia*, 515 U.S. at 655). Thus, all Justices agreed that schools have a right to supervise and control students. *Id.*

174. See No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 et. seq. (2006). As codified, it requires

states receiving funds under this chapter . . . [to] establish and implement a statewide policy requiring that a student attending a persistently dangerous public elementary school or secondary school . . . while in or on the grounds of a public elementary school or secondary school that the student attends, be allowed to attend a safe public elementary school or secondary school.

*Id.* § 7912; see also *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (discussing the No Child Left Behind Act); Children’s Internet Protection Act, 20 U.S.C. §§ 6777, 9134 (2006), 47 U.S.C. § 254 (2006) (requiring schools receiving E-rate funds to install “technology protection measure[s]” to protect juveniles from Internet visual depictions that are “obscene,” “child pornography,” or “harmful to minors”)

175. See *infra* note 255.

176. See generally Shaheen Shariff & Leanne Johnny, *Cyber-Libel and Cyber-Bullying: Can Schools Protect Student Reputations and Free-Expression in Virtual Environments?* 16 EDUC. &

students' rights and schools' interests; therefore, when the school justifies its punishment based on school safety, its *duty* to provide a safe environment will likely outweigh the student's interest in free speech.<sup>177</sup>

### *B. The Internet: Bringing Student Speech to a School Near You*

The advent of the Internet gave rise to a generation of youth completely connected to, and dependent on, the Internet.<sup>178</sup> Youth use the Internet both as an essential form of social interaction and as an educational tool.<sup>179</sup> Students' frequent and skilled Internet use stands, many times, in stark contrast to adults' and educators' Internet use.<sup>180</sup> For example, a 2002 Pew Research Center study reported on the widening gap between "internet-savvy students" and schools, and found that not only was Internet use more common at home, but that students explicitly desired a more Internet-accessible and knowledgeable school.<sup>181</sup> Moreover, this generational gap is evident in certain court opinions addressing student speech that fail to understand the particular Internet forum in which the speech appears.<sup>182</sup> Inadequately understanding the Internet forum hinders a court from fully assessing the purpose and intended audience of the

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L. J. 307, 335 (2007) (citing *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643–47 (1999)) (arguing that schools are legally required to provide a safe school environment free from harassment and bullying, and therefore if schools fail to address a potentially disruptive situation, the school will be "creating a deliberately dangerous environment").

177. See, e.g., *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–71 (5th Cir. 2007); *Boim*, 494 F.3d at 983; *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39–40 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 861–62 (Pa. 2002).

178. LENHART et al., *supra* note 1 (finding that 87% of youth have access to and use the Internet).

179. See Danah Boyd, *Why Youth [heart] Social Network Sites: The Role of Networked Publics in Teenage Social Life in YOUTH, IDENTITY, AND DIGITAL MEDIA* 119, 137 (David Buckingham ed., 2008); Kathleen Conn & Kevin P. Brady, *Myspace and Its Relatives: the Cyberbullying Dilemma*, 226 ED. LAW REP. 1, 1–2 (2008) (listing the various types of Internet forums youths use and providing footnotes explaining each forum); More Teens, *supra* note 2; see also LEVIN AND ARAFEH, *supra* note 1, at 14 (stating that one of the most common activities that youth perform online is schoolwork).

180. LEVIN & ARAFEH, *supra* note 1, at 14 (finding that many schools and teachers have not recognized, or responded, to new ways students communicate and access information over the Internet). The project compiled various findings from surveys of 136 public middle and high schools and over 200 online surveys. *Id.* at ii.

181. *Id.* at ii, 14. Considering that the study dates to 2002, there is an argument to be made that the generation gap may have decreased. But see Boyd, *supra* note 179, at 137; Laura M. Holson, *Text Generation Gap: U R 2 old (JK)*, N.Y. TIMES, Mar. 9, 2008, at BU1. Boyd discusses the need to understand and promote social networking sites for teens because they provide teens with a forum to develop their identity and status. *Id.* at 137–38. Further, Boyd argues that restricting teens' participation would risk augmenting an existing generational divide. *Id.* at 137.

182. See, e.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 419 n.2 (S.D.N.Y. 2008) (attempting to explain the instant messaging system).



student's speech, both of which are relevant factors in student speech analysis.<sup>183</sup>

The implications of the generational gap make clear why so many problems arise in schools when students are punished for Internet speech and why courts are wary of applying the free speech framework created before the advent of the Internet.<sup>184</sup> Generally, however, courts base their decisions on geography, effect, or content, and apply the standard set out in either *Tinker* or *Fraser*.<sup>185</sup> There has been some movement away from a traditional geography- or effect-based approach toward a more content-focused one, which, when applied to Internet speech, has a more promising and balanced outlook.<sup>186</sup>

### 1. Geography

When the issue of students' speech rights first originated, the preliminary analysis was much more straightforward, focusing on whether the speech occurred on school grounds, or at a school sponsored activity so as to justify punishment based on the "special characteristics of the school environment."<sup>187</sup> For example, in *Thomas*, the Second Circuit adhered strictly to an on-campus/off-campus delineation, and held that the school could not punish students for speech published in an independent off-campus newspaper, even though the speech was arguably indecent, employed some school resources, and impacted the school community.<sup>188</sup> Further, in *Emmett*, the court refused

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183. *A.B. v. State*, 885 N.E.2d 1223, 1224–25 (Ind. 2008) (going so far as to make the point that the parties failed to present sufficient evidence explaining what MySpace.com was—which was a central issue in the case); see also *infra* Part II.B.2. (discussing how courts consider the intended audience of the speech to connect off-campus speech to the school).

184. See *supra* Part I.A. (discussing the four seminal Supreme Court cases addressing student speech); see also DAVID HUDSON, FIRST AMENDMENT CENTER, STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPEACE MEAN FOR STUDENTS' FIRST AMENDMENT RIGHTS 1–3, available at <http://www.fac.org/PDF/student.internet.speech.pdf>.

185. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, \*8 (M.D. Pa. Sept. 11, 2008); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 596 (W.D. Pa. 2007); *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 797–99 (N.D. Ohio 2002); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 453–55 (W.D. Pa. 2001); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

186. See *infra* Part III.

187. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.* 393 U.S. 503, 506 (1969)); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Layshock*, 496 F. Supp.2d at 587; *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002); Tracy Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus By Another Student*, 82 ST. JOHN'S L. REV. 1087, 1087 (2008) (stating that whether a students' speech originated off campus is often a threshold issue for courts).

188. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979). The court felt that the fact that "a few articles were transcribed on school typewriters" and the paper was stored at the school was "de minimus" activity within the school. *Id.* However, in his concurrence, Justice Newman noted that "territoriality is not necessarily a useful concept in

to allow the school to punish offensive and indecent speech on a student's website, which was created off-campus, because the speech was "entirely outside of the school's supervision or control."<sup>189</sup> A geographical distinction, when determining a school's authority, should not be the only inquiry courts pursue when addressing student Internet speech.<sup>190</sup>

The Internet is slowly dispelling this simplistic "off-campus"/"on-campus" distinction.<sup>191</sup> Student speech on the Internet is more permanent and transferable,<sup>192</sup> and therefore, even when it originates off-campus it can impact the school and justify punishment.<sup>193</sup> Thus, some courts are now upholding schools' decisions to punish certain student speech originating off-campus.<sup>194</sup>

For example, the court in *Blue Mountain* disagreed with the *Emmett* court holding that a school could not regulate vulgar, lewd, and indecent speech on a website created off-campus.<sup>195</sup> Furthermore, the Second Circuit, in *Doninger*, moved away from its earlier geography-based rationale<sup>196</sup> and upheld the school's punishment of a student for an off-campus blog posting.<sup>197</sup> The court

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determining the limit of [a school administrator's] authority." *Id.* at 1058 n.13 (Newman, J., concurring). His statement suggests that, even in 1979, the court felt a geography-based distinction was somewhat arbitrary. *Id.*

189. *Emmett*, 92 F. Supp. 2d at 1090 (stating that *Fraser's* rule allowing a school to punish offensive or vulgar student speech could not be applied to student off-campus speech).

190. *Thomas*, 607 F.2d at 1050 (stating that when "school officials . . . ventured out of the school yard and into the general community where freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena"); see also *Coy*, 205 F. Supp. 2d at 801 (finding that the school could not discipline a student for his personal website absent evidence that the student's accessing the website on a school computer disrupted the school).

191. See Shariff & Johnny, *supra* note 176, at 309–10 (stating that "cyberspace provides a new frontier that allows people to repeatedly violate the rights of others" resulting in "a Pandora's Box of legal challenges that courts need time to work out"); see also *Reno v. ACLU*, 521 U.S. 844, 889 (1997) (O'Connor, J., concurring) ("The electronic world is fundamentally different.").

192. See Boyd, *supra* note 179, at 137–38 (discussing how youth fail to recognize that saying something on the Internet differs from traditional gossip because it becomes semi-permanent and public); Kim, *supra* note 3; see also NANCY WILLARD, CYBERBULLYING AND CYBERTHREATS—RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 58 (2007) (stating that youths fail to understand the public nature of the Internet).

193. See Shariff & Johnny, *supra* note 176, at 309–10.

194. See, e.g., *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 49–50 (2d Cir. 2008); *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38–39 (2d Cir. 2007), *cert. denied*, 127 S. Ct. 1741 (2008); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, \*7 (M.D. Pa. Sept. 11, 2008).

195. *Blue Mountain*, 2008 WL 4279517, at \*6–8. The court in *Blue Mountain* even upheld the punishment of a student for her MySpace profile despite a lack of evidence of a substantial and material disruption. *Id.*; see *supra* Part I.D.2. and accompanying notes (detailing *Blue Mountain*).

196. See *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

197. *Doninger*, 527 F.3d at 49–50. For a more extensive discussion of *Doninger*, see *supra* Part I.D.1. and accompanying notes.

adopted the reasoning of its earlier decision in *Wisniewski* that off-campus speech can “create a foreseeable risk of substantial disruption within a school.”<sup>198</sup> In *Doninger*, the court’s reasoning looked both at the foreseeability of the speech reaching the school as well as the foreseeability of the speech creating a disruption within the school.<sup>199</sup> Such an analysis slightly modifies *Tinker* to address off-campus speech and grants schools wider authority to regulate students’ Internet speech.<sup>200</sup>

## 2. Effect on the School

The most consistent approach that courts employ to assess a school’s decision to punish student Internet speech is *Tinker*’s material and substantial disruption test.<sup>201</sup> Courts generally focus on the effect, or potential effect, of the speech, but also consider how connected the off-campus speech is to the school environment.<sup>202</sup> *Tinker*’s easy adaptability provides courts with an analytical structure for students’ off-campus Internet speech; however, courts struggle in defining what qualifies as a disruption, or a foreseeable risk of disruption.<sup>203</sup>

For example, in *Bethlehem*, the Supreme Court of Pennsylvania defined material and substantial disruption as not requiring “complete chaos” and found it satisfied when a “Teacher Sux” website “created disorder and

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198. *Wisniewski*, 494 F.3d at 39. The court’s analysis in *Wisniewski* could be read broadly to have held that *Fraser* allowed a school to prohibit lewd, indecent, and vulgar speech made off-campus. *Id.* Alternatively, it could be read narrowly to have only developed a modified-*Tinker* analysis. *Id.* at 38–39.

199. *Doninger*, 527 F.3d at 50. Similarly, the *Wisniewski* court also looked at the foreseeability factor. *Wisniewski*, 494 F.3d at 39–40; see also *supra* note 103. Specifically, the *Doninger* court found that the student’s blog posting, which encouraged other students to protest a recent school decision, posed a “‘foreseeabl[e] . . . risk of substantial disruption within the school environment’” because it was “‘purposely designed . . . to come onto the campus’” and was “‘offensive,’ ‘misleading,’ and ‘incendiary.’” *Doninger*, 527 F.3d at 50–51 (internal citations omitted).

200. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (failing to include an analysis of whether the speech would reach the school environment, but merely looking at the risk of material or substantial disruption); see also Denning & Taylor *supra* note 31, at 844 (“The potential malleability of the material disruption standard renders an impact approach potentially less speech-protective than a geographic approach.”).

201. *Tinker*, 393 U.S. at 509; see also *supra* Part I.A. (discussing, in greater detail, the *Tinker* standard).

202. See *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–71 (5th Cir. 2007); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864–65, 869 (Pa. 2002).

203. See Shariff & Johnny, *supra* note 176, at 329 (“[T]here have been mixed interpretations regarding the application of the material and substantial disruption standard.”). Additionally, when addressing Internet speech made off-campus, courts remain undecided whether a “heightened standard” should apply. See *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

significantly and adversely impacted the delivery of instruction.”<sup>204</sup> Other factors that courts have found dispositive of a disruption include when the speech: (1) affected the school’s environment,<sup>205</sup> (2) forced students out of class,<sup>206</sup> (3) disrupted either class or the teacher’s control over the class,<sup>207</sup> (4) affected the school computer system,<sup>208</sup> (5) forced faculty to field phone calls or miss or arrive late to class,<sup>209</sup> or (6) incited violence and fear among faculty or students.<sup>210</sup>

Aside from evidence of a disruption, when the speech originates off-campus, courts must also determine whether the speech is sufficiently connected to the school to justify the school’s punishment.<sup>211</sup> In *Bethlehem*, the court adopted the rule that “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”<sup>212</sup> Alternatively, in *Layshock* the court looked at whether there was a sufficient “causal nexus”

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204. *Bethlehem*, 807 A.2d at 868–69; see also Shariff & Johnny, *supra* note 176, at 329 (discussing *Bethlehem* and reasoning that the “public solicitation”—the student’s invitation to readers to “send \$20.00 to help pay for a hit man” to kill his teacher—“towards a potentially violent goal was enough for a judge to uphold the expulsion of the student”).

205. See *Bethlehem*, 807 A.2d at 869 (concluding that *Tinker*’s disruption standard was satisfied because the student’s speech had caused the atmosphere of the entire school, as well as the outside community, to be described as if “a student had died”).

206. *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 50–51 (2d Cir. 2008).

207. See *Killion*, 136 F. Supp. 2d at 455 (stating that because there was no showing that teachers were incapable of controlling their class, there was insufficient evidence of a disruption).

208. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).

209. *Doninger*, 527 F.3d at 51.

210. See *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 369 (9th Cir. 1996) (permitting a school to suspend a student who threatened to shoot her counselor).

211. See *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–71 (5th Cir. 2007); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984–85 (11th Cir. 2007); *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008). Each of these cases determined that the intended audience of the students’ threatening speech was an important factor in considering the school’s punishment; however, they differed in what type of intended audience was sufficient. *Ponce*, 508 F.3d at 770–71; *Boim*, 494 F.3d at 984; *Cuff*, 559 F. Supp. 2d at 420–21. For example, in *Ponce* the court felt that only student speech that targeted the entire school community could justify punishment. *Ponce*, 508 F.3d at 770–71 (“The speech in question here is not about violence aimed at specific persons . . . [for] [s]uch threats, because they are relatively discrete in scope . . . do not amount to the heightened level of harm that was the focus of . . . *Morse*.”). Conversely, in *Boim* and *Cuff*, the courts felt that it was immaterial whether a student targeted a specific individual, or targeted the entire school community; the school could permissibly punish the student in either case. *Boim*, 494 F.3d at 984; *Cuff*, 559 F. Supp. 2d at 420–21.

212. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002). In *Bethlehem*, the court found that because the website was aimed “not at a random audience, but at the specific audience of students and others connected with this particular School District,” the school’s punishment could be upheld. *Id.*

between the Internet speech and a disruption,<sup>213</sup> and thereby placed a higher burden on the school to connect the speech to the disruption.<sup>214</sup> While not all courts agree that speech merely targeting the school justifies punishment, the majority of cases suggest that the intended audience of the speech is a relevant factor.<sup>215</sup>

### 3. Applying a Public Forum Analysis?

One final consideration bearing upon Internet speech concerns the applicability of *Hazelwood*.<sup>216</sup> Although no reported decision addressing student Internet speech has been based on *Hazelwood*, its potential applicability warrants some discussion.<sup>217</sup> Under *Hazelwood*, a school is permitted to regulate student speech appearing in a school publication because it is school sponsored speech and the school is not required to *promote* speech that is contrary to its educational mission.<sup>218</sup> Applying *Hazelwood*'s reasoning to Internet speech, the question becomes: if a student accesses a website, blog,

213. *Layshock*, 496 F. Supp. 2d at 601. The court defined this "causal nexus" by focusing on whether there were "gaps in the causation link between . . . off-campus conduct and any material and substantial disruption of operations in the school." *Id.* at 600. But see *Bethlehem*, 807 A.2d at 865 (finding that a "sufficient nexus [existed] between the website and the school campus to consider the speech as occurring on-campus").

214. *Layshock*, 496 F. Supp. 2d at 601. The court focused on the fact that in addition to the student's Myspace.com profile, three other students also had created profiles in the same time frame. *Id.* at 600. Therefore, because the school failed to demonstrate that the student's profile specifically caused the disruption, he should not have been punished. *Id.*

215. See *Ponce*, 508 F.3d at 770–71; *Boim*, 494 F.3d at 984; *Cuff*, 559 F. Supp. 2d at 420–22. But see *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (finding that the intended audience of the "Unofficial Kentlake High Home Page" was "undoubtedly connected" to the school, but nevertheless concluding that the speech was outside the control of the school).

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

217. See Shariff & Johnny, *supra* note 176, at 331–33 (arguing that because school computers are school property, and the Supreme Court has emphasized that schools need not promote speech contrary to their fundamental values, "it seems reasonable for schools to place limitations on any form of student expression (including digital forms) that either infringes upon the rights of others or is inconsistent with school values"). For a recent case applying *Hazelwood* to a non-Internet student speech issue, see *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 577 (6th Cir. 2008).

218. *Hazelwood*, 484 U.S. at 270–71; see also *supra* Part I.A. In *Hazelwood*, the Court addressed whether the public forum doctrine was applicable and stated that

school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech . . . .

*Id.* at 267 (internal citations omitted). The Court reasoned that since the school had authority and control over the newspaper, it was not a public forum. *Id.* at 270. Therefore, the speech was school sponsored, and thus subject to the school's regulation. *Id.*

or e-mail on a school computer, can the school justify punishment by arguing that the student's speech became school sponsored speech?<sup>219</sup> Can the student, in response, argue that the school computer was a public forum and therefore his speech was protected?

While no case has specifically addressed either issue, courts have considered a student's utilization of a school computer in other analyses.<sup>220</sup> For example, in *Layshock* the court found that merely accessing a website at school was insufficient to create a substantial disruption.<sup>221</sup> However, in *Bethlehem*, the court concluded that the student's speech could be considered on-campus because he accessed it at school.<sup>222</sup> *Hazelwood's* applicability is limited to a small subset of cases in which a court concludes that the speech was school sponsored.<sup>223</sup> Therefore, it seems unlikely that *Hazelwood* will warrant much application in Internet speech cases because most Internet speech occurs outside the school, and merely accessing speech on a school computer should not make the speech school sponsored.<sup>224</sup>

### C. Threat Speech: What Standard Applies?

Apart from the traditional geography- and effect-based approaches to Internet speech, courts sometimes apply a different standard for threatening speech.<sup>225</sup> Considering that student Internet speech can commonly be threatening, distinguishing courts' various methods of analysis is particularly relevant.

First, some courts treat students' threatening speech like any other student speech and apply *Tinker's* disruption standard.<sup>226</sup> For example, the Second

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219. See Shariff & Johnny, *supra* note 176, at 331–34 (arguing that when students use school-owned computers, that speech becomes school property and is subject to extensive school regulation based on *Hazelwood* and other Supreme Court precedent). But see *Layshock*, 496 F. Supp. 2d at 597 (“The mere fact that that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web.”).

220. See *Layshock*, 496 F. Supp. 2d at 597; J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002).

221. *Layshock*, 496 F. Supp. 2d at 597. See generally Rosann DiPietro, *Constitutional Limitations on a Public School's Authority to Punish Student Internet Speech*, 12 J. INTERNET L. 3, 8 (2008) (discussing various issues resulting from student Internet speech, including the *Layshock* case).

222. *Bethlehem*, 807 A.2d at 869.

223. See *supra* note 218.

224. Cf. *supra* note 219. Further, given that many schools have Internet use policies that restrict students' access to certain websites, situations in which students are creating or accessing websites on school computers will likely be less frequent. See *Newton v. Slye*, 116 F. Supp. 2d 677, 682 n.5 (W.D. Va. 2000) (discussing a particular school Internet filtering system that “provide[s] protection against inappropriate student and staff exposure to the Internet”).

225. See, e.g., *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770 (5th Cir. 2007); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784–85 (E.D. Mich. 2002).

226. See, e.g., *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Sch. Dist.*, 494 F.3d 34, 39–40 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

Circuit in *Wisniewski* applied a *Tinker* based rationale to the student's Internet depiction of a pistol firing a bullet at his teacher's head and concluded that it was not First Amendment protected speech.<sup>227</sup> The court stated that "there can be no doubt that the icon . . . would foreseeably create a risk of substantial disruption within the school environment."<sup>228</sup> Additionally, in *Mahaffey*, the court applied *Tinker* to a student's "Satan's webpage," which encouraged readers to kill people and listed various people the student wished would die.<sup>229</sup> There, however, the court concluded that there was no showing of an actual disruption and held that the school's punishment violated the student's rights.<sup>230</sup>

Alternatively, other courts apply a "true threat" analysis and thus consider whether the student's speech falls entirely outside the protection of the First Amendment, as opposed to considering whether the mere special characteristics of the school environment justify punishment.<sup>231</sup> Because the "true threat" doctrine originated in the criminal context, it requires the school to meet a much higher burden.<sup>232</sup> For example, the court in *Mahaffey* also considered whether the speech constituted a "true threat."<sup>233</sup> It determined that the website was not a "true threat" because there was no evidence that the student communicated or intended to communicate the website to anyone, nor was it specifically threatening a particular individual.<sup>234</sup> Therefore, to prove the student's speech was a "true threat," a school must provide some evidence

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227. *Id.*; see also *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 417 (S.D.N.Y. 2008) (applying the same reasoning to a fifth-grade student's drawing of an astronaut saying he would "blow up the school with all the teachers in it").

228. *Wisniewski*, 494 F.3d at 40.

229. *Mahaffey*, 236 F. Supp. 2d at 781, 782, 784.

230. *Id.* at 786. Specifically, the court concluded that there was no showing of an actual disruption because the student created the website off-campus and the website did not interfere with the school. *Id.* The court failed to address, though, the foreseeability prong of *Tinker*; therefore, the court may have upheld the school's punishment if it had considered this prong. See *id.* at 784–85 ("[T]he evidence simply does not establish that any of the complained of conduct occurred on [school] property . . . . [T]here is no evidence that the website interfered with the work of the school . . . [and] [t]here is no such evidence of disruption on the record before this Court.").

231. See, e.g., *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 626 (8th Cir. 2002); *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

232. *Wisniewski*, 494 F.3d at 38 (stating that the First Amendment gives school officials "significantly broader authority to sanction student speech than the *Watts* standard allows"); see also *supra* note 113.

233. *Mahaffey*, 236 F. Supp. 2d at 786.

234. *Id.*; see also *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 574–75, 590–91 (D. Del. 2008) (considering whether a university had the right to punish a student for "posting allegedly threatening comments on a website maintained on the University's server," and concluding that the "true threat" standard was not satisfied).

demonstrating that the student intended and was capable of communicating a threat.<sup>235</sup>

Finally, the most recent approach to students' threatening speech originates from cases addressing non-Internet off-campus speech.<sup>236</sup> This approach creates an almost categorical exemption for student speech which is reasonably perceived as advocating or threatening school violence.<sup>237</sup> While such reasoning originated before *Morse*, it has since gained momentum and legitimacy.<sup>238</sup>

In *Ponce*, the Fifth Circuit adopted the rule that "speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from school environment is unprotected."<sup>239</sup> The court developed this rule by reading *Morse* as establishing a "content-based regulation" of student speech promoting illegal drug use, and extended that rule to student speech "advocating harm."<sup>240</sup>

The rule established by *Ponce* is buttressed by the Eleventh Circuit's decision in *Boim*.<sup>241</sup> The court stated "there also is no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day."<sup>242</sup> Further, the *Boim* court, through its reliance on *Tinker*'s disruption standard and its extensive discussion of the problem of school violence, demonstrated implicitly that it primarily based its holding on the threatening content of the

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235. See *Mahaffey*, 236 F. Supp. 2d at 786; see also *supra* note 60 (discussing two cases applying the "true threat" doctrine to the school setting).

236. *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007). The fact that *Ponce* did not address Internet speech does not render the decision inapplicable for several reasons. *Id.* at 770. First, student speech in a written diary is sufficiently similar to student speech on a blog or other Internet site such as livejournal.com. *Id.* at 766; see *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 43, 51 (2d Cir. 2008) (dealing with a student's blog posting on livejournal.com). Second, the speech in *Ponce* originated off-campus and the school learned of it from a fellow student. *Ponce*, 508 F.3d at 766; see also *Doninger*, 527 F.3d at 50.

237. See *Ponce*, 508 F.3d at 765, 769–70; see also *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 983–84 (11th Cir. 2007) (making a similar argument based on *Morse*).

238. *Ponce*, 508 F.3d at 768, 770–71; see also Redfield, *supra* note 45, at 719–20 (arguing that an implicit reading of *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001), supports the argument that "speech that poses a threat of violence" could become part of the list of categories of speech schools could permissibly prohibit).

239. *Ponce*, 508 F.3d at 770; see also *supra* note 68 (discussing the facts of *Ponce* in greater detail).

240. *Ponce*, 508 F.3d at 770. *Ponce* discussed *Morse* at length, and stated that Justice Alito's "concurring opinion therefore makes explicit that which remains latent in the majority opinion: speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment is unprotected." *Id.*

241. *Boim*, 494 F.3d at 984.

242. *Id.*; see also *supra* text accompanying note 69.



speech.<sup>243</sup> Therefore, *Ponce* and *Boim* open the door to arguments that the Supreme Court would accept a content-based regulation of significantly threatening student speech.

*D. Speech Codes: Walking a Thin Line Between Protecting Students and Violating the First Amendment*

The final issue relevant to student Internet speech is whether a court should strike down a school's entire speech or conduct policy, or simply the school's individual disciplinary action, on First Amendment grounds.<sup>244</sup> Arguments against school policies are premised on the overbreadth or void for vagueness doctrines.<sup>245</sup> The Supreme Court has never addressed this issue, but has held that "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code."<sup>246</sup> Decisions such as *Layshock* demonstrate that many courts, even when striking down the school's individual disciplinary action, refuse to do the same for the school policy.<sup>247</sup> In *Coy* and *Killion*, however, courts showed a willingness to strike down a school's policy on First Amendment grounds.<sup>248</sup>

The most critical factor bearing on a court's willingness to strike down a school policy appeared to be whether it contained a geographical limitation.<sup>249</sup> For example, in *Killion* the court held the school's "Retaliatory Policy" against

243. *Boim*, 494 F.3d at 983–85. For example, the court discussed the prevalence of school shootings, and cited the No Child Left Behind Act of 2001 as legislation compelling schools to take school safety more seriously. *Id.* at 984. Further, the court stated that *Morse*'s rationale "applies equally, if not more strongly, to speech reasonably construed as a threat of school violence." *Id.*

244. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 314–20 (3d Cir. 2008) (addressing university students' speech); *Saxe ex rel. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001); *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 802–03 (N.D. Ohio 2002). See generally WILLARD, *supra* note 192, at 111 (discussing the constitutionality of anti-bullying and anti-harassment policies as a pertinent legal consideration for schools).

245. *DeJohn*, 537 F.3d at 313; see also *supra* note 138 (discussing the overbreadth and void for vagueness doctrines in the school setting).

246. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986); see also *DeJohn*, 537 F.3d at 313 ("[T]he Supreme Court's resolution of student free speech cases has been, to this point in time, without reference to the overbreadth doctrine.").

247. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 604–05 (W.D. Pa. 2007) (stressing that the overbreadth doctrine warrants more hesitant application in the school setting); see also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at \*8 (M.D. Pa. Sept. 11, 2008).

248. *Coy*, 205 F. Supp. 2d at 802; *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001); see also *DeJohn*, 537 F.3d at 320 (striking down Temple University's sexual harassment policy because it violated a student's First Amendment free speech rights); *Saxe*, 240 F.3d at 217.

249. See, e.g., *Blue Mountain*, 2008 WL 4279517, at \*8; *Coy*, 205 F. Supp. 2d at 802; *Killion*, 136 F. Supp. 2d at 459.

abuse of teachers overly broad because it failed to define “abuse” and failed to limit the school’s authority strictly to school grounds.<sup>250</sup> Further, in *Coy*, the court struck down the speech code’s “catch-all” policy because it was not specific enough and failed to include a geographical limitation.<sup>251</sup>

A court’s willingness to strike down a school policy lacking a geographical distinction stands in stark contrast to its willingness to uphold punishments of off-campus speech, as well as recent cyber-bullying legislation.<sup>252</sup> Currently thirteen states have enacted cyber-bullying statutes,<sup>253</sup> at least six states are considering enactment of such statutes, and a proposal to enact a federal cyberbullying statute is currently pending in Congress.<sup>254</sup> Of the thirteen laws in place, five permit schools to punish students for incidents of cyber-bullying that occur off school grounds.<sup>255</sup> For example, Delaware’s School Bullying Prevention Act of 2007 states that “[t]he physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action by the school district . . . provided there is a sufficient school nexus.”<sup>256</sup> The

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250. *Killion*, 136 F. Supp. at 458–59. The court also found that the school failed to provide any evidence of how the policy had actually been applied. *Id.*

251. *Coy*, 205 F. Supp. 2d at 802.

252. See *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008); *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002). For a more in depth discussion of the recent surge of cyber-bullying legislation, see Katherine Fitzgerald, *Bullying 2.0: Dramatic Cases Have Legislators Concerned About Online Harassment, but Civil Libertarians Worry New Laws Might End Up Picking on Free Speech*, STUDENT PRESS LAW CENTER REPORT, Spring 2008, at 28, available at [https://www.splc.org/report\\_detail.asp?id=1426&edition=45](https://www.splc.org/report_detail.asp?id=1426&edition=45); see also Bully Police USA, <http://www.bullypolice.org> (last visited June 10, 2009) (providing evaluative information on state statutes governing bullying and cyber-bullying).

253. ARK. CODE ANN. § 6-18-514 (2007); DEL. CODE ANN. tit. 14, § 4112D (2007); IDAHO CODE ANN. § 18-917A (2008); IOWA CODE ANN. § 280.28 (West 2008); KAN. STAT. ANN. § 72-8256 (2007); Mich. HB-4162 (2007); MINN. STAT. ANN. § 121A.0695 (West 2008); NEB. REV. STAT. § 79-2,137 (2008); N.J. STAT. ANN. § 18A:37-14 (West 2008); OR. REV. STAT. ANN. § 339.351 (2008); S.C. CODE ANN. § 59-63-120 (2008); VA. CODE ANN. § 22.1-279.6 (2009); WASH. REV. CODE § 28A.300.285 (2008).

254. See Fitzgerald, *supra* note 252, at 28–29 (noting that Maryland, Missouri, New York, Rhode Island, Florida, and Utah are considering cyber-bullying legislation).

255. Arkansas, Delaware, and New Jersey explicitly state that schools have the authority to punish cyber-bullying originating off-campus. ARK. CODE ANN. § 6-18-514 (2007); DEL. CODE ANN. tit. 14, § 4112D (2008); N.J. STAT. ANN. § 18A:37-14 (West 2008). Idaho’s and Minnesota’s legislation does not discuss any geographical restriction on the school’s jurisdiction. IDAHO CODE ANN. § 18-917 (2008); MINN. STAT. ANN. § 121A.0695 (West 2008). However, Iowa, Kansas, Nebraska, South Carolina, and Oregon all limit the school’s authority to speech occurring within the school campus or at a school sponsored event. IOWA CODE ANN. § 280.28 (West 2008); KAN. STAT. ANN. § 72-8256 (2007); NEB. REV. STAT. ANN. § 79-2,137 (2008); OR. REV. STAT. ANN. § 339.351 (2008); S.C. CODE ANN. § 59-63-120 (2008). For discussion of the proposed federal legislation, see *supra* note 19.

256. DEL. CODE ANN. tit. 14, § 4112D (2007). Additionally, a 2007 law in Arkansas added cyber-bullying to its school anti-bullying policies and included a provision that allows schools to

growing popularity of these statutes indicates a trend among state legislatures to expand the authority of schools to certain off-campus student speech.<sup>257</sup>

### III. A CATEGORICAL APPROACH FOR THREATENING INTERNET SPEECH

The Supreme Court has yet to address the pressing issue of student Internet speech originating off-campus.<sup>258</sup> Therefore, defining the appropriate authority schools have to punish certain student Internet speech is an important task.<sup>259</sup>

An appropriate analysis for student Internet speech should begin with the presumption that off-campus Internet speech is protected, except in rare circumstances.<sup>260</sup> Students' off-campus Internet speech normally does not implicate the "special characteristics of the school environment."<sup>261</sup> In certain circumstances, however, either because of its content or its effect, off-campus Internet speech can dramatically impact the school.<sup>262</sup>

Where student Internet speech originating off-campus impacts the school community an analysis of the permissibility of that speech should begin by asking whether it advocates violence within the school community.<sup>263</sup> Such an

take action against "an electronic act that results in the substantial disruption of the orderly operation of the school or educational environment" and therefore is not limited to cyber-bullying that originates on school grounds. ARK. CODE ANN. § 6-18-514 (2007).

257. See *supra* note 255.

258. See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007) (addressing the issue of speech promoting an illegal activity). The Court could have framed the issue as whether a school had the authority to punish student speech made off-campus, because the speech in this case occurred at a public rally. *Id.* at 2622, 2624–25; see also *supra* note 40 and accompanying text. However, the court declined to address that issue and instead framed a very narrow issue: whether schools could punish students for speech reasonably seen as promoting drugs. *Morse*, 127 S. Ct. at 2625.

259. See generally DiPietro, *supra* note 221, at 3 (discussing how the Internet poses difficult jurisdictional issues for schools). If student Internet speech originated on-campus, such as on a school computer, the school could easily apply *Tinker*, *Fraser*, *Hazelwood*, or *Morse* because each case permits schools to punish certain student speech occurring within the school environment. See *Morse*, 127 S. Ct. at 2625; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969). Therefore, the more difficult issue is determining when schools are warranted in punishing student Internet speech that originates off-campus.

260. See *supra* Part II.A. (discussing how the "special characteristics of the school environment" justify a school's authority to limit student speech).

261. *Id.*

262. See *supra* Part II.B. This Comment argues that a categorical approach to Internet speech, like the one adopted in *Morse* and *Ponce*, will strike an appropriate balance between students' right to free speech and the school's interest in promoting a safe environment. *Id.*; see also *Morse*, 127 S. Ct. at 2625; *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–71 (5th Cir. 2007).

263. See Redfield, *supra* note 45, at 719–20. Redfield briefly discussed the possibility of categorizing and prohibiting speech that poses a threat. *Id.* at 719. However, the article was

inquiry would be similar to that in *Ponce* because it would strictly examine the form and subject matter of the speech to determine whether it poses a threat of violence or harm to the school community; if so, punishment would be appropriate.<sup>264</sup> Second, the analysis should determine whether the speech qualifies as a “true threat.”<sup>265</sup> This portion of the analysis should focus on both the context of the speech and the intent of the speaker.<sup>266</sup> If the speech falls into either category—advocating or threatening harm—it should be categorically exempt from First Amendment protection in the school setting. If, however, the speech does not have threatening content, then the court should conduct the traditional fact-based analysis articulated in *Tinker*.<sup>267</sup> This framework recognizes that the “special characteristics” of schools requiring a safe environment should outweigh students’ rights to speak freely.<sup>268</sup>

It may be true that employing such a categorical distinction would be impractical because it is difficult to differentiate between threatening and non-threatening speech.<sup>269</sup> As demonstrated in *Boim* and *Ponce*, however, adopting such a distinction is both permissible and necessary.<sup>270</sup> As the court stated in *Ponce*, “[i]f school administrators are permitted to prohibit student speech that advocates illegal drug use . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence.”<sup>271</sup>

In distinguishing Internet speech, which threatens or advocates violence in the school, courts and schools should consider the content, intent of the

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written before *Morse v. Frederick* and subsequent cases that address expanding the rule to threatening speech. *Id.*; see also *Ponce*, 508 F.3d at 770–71; *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007). Further, this Comment expands beyond merely advocating a content-based regulation of threatening speech by providing a method to distinguish between threatening and non-threatening speech, and by limiting the rule to Internet speech in particular.

264. See *Ponce*, 508 F.3d at 770–71; *Boim*, 494 F.3d at 984. *Ponce* formulated the rule to allow for punishment of student speech advocating “demonstrably grave” harm related to the school environment. *Ponce*, 508 F.3d at 770. An alternative formulation of the rule would exclude speech that reasonably poses a significant threat of violence.

265. See *supra* Part I.B.–C.

266. *Id.*; see also text accompanying notes 233–34.

267. See *supra* Parts I.D., II.B.

268. See *supra* Part II.A.

269. See WILLARD, *supra* note 192, at 129–31 (recognizing that schools are not always capable of distinguishing between legitimate threats and non-legitimate threats).

270. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (finding that the “same rationale [as in *Morse*] applies equally, if not more strongly, to speech reasonably construed as a threat of school violence”); see also *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–71 (“[T]he difficulty of identifying warning signs in the various instances of school shootings across the country is intrinsic to the harm itself. . . . School administrators must be permitted to react quickly and decisively . . . without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance.”).

271. *Ponce*, 508 F.3d at 771–72.

speaker, and form of the Internet speech.<sup>272</sup> An assessment of content and intent should be similar to a “true threat” analysis, except that it should provide schools with greater leeway, accounting for the school environment, rather than the criminal context.<sup>273</sup> Further, the court must take into account the school’s perspective, as well as its “compelling interest” in promoting student safety.<sup>274</sup> For example, certain contextual facts such as the target of the speech and the identity of the speaker should impact whether the punishment was appropriate.<sup>275</sup> Such factors are of particular importance in the cyber-bullying context—one of the most pervasive forms of Internet speech that schools must confront.<sup>276</sup>

Assessing the form of the Internet speech would determine whether the speech arose in an e-mail, personal website, social networking site, blog, or instant message.<sup>277</sup> The speech’s form provides insight into the intended audience of the speech, which is a relevant factor in a court’s analysis.<sup>278</sup> Additionally, evaluating the speech’s form would aid a school in conducting a *Tinker* inquiry to determine how potentially disruptive the speech would be.<sup>279</sup> For example, Internet speech posted on a private website was likely never intended to reach the school community.<sup>280</sup> On the other hand, speech in e-

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272. See *supra* text accompanying note 118 (articulating the factors considered by the court in *Bethlehem*).

273. See *supra* note 15.

274. See *Boim*, 494 F.3d at 983–84 (discussing the prevalence of school violence and the school’s strong interest in punishing speech advocating school violence).

275. See *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (failing to consider that the student had no past disciplinary record and did not intend to threaten anyone before affirming his punishment for allegedly threatening Internet speech). In *Emmett*, the school discovered a student’s website through an exaggerated news report, which claimed that the student was posting a “hit list.” *Id.* at 1089. The student did not have a prior disciplinary history and had created the so-called hit list as obituaries in a “tongue-in-cheek” after he and his classmates wrote their own mock obituaries in a creative writing class. *Id.* Had the school considered the entire context of the student’s website, as well as the identity of the student, it is likely the school would have determined that the threat was not legitimate and therefore not worthy of punishment.

276. See generally WILLARD, *supra* note 192 (examining the extensive problem of cyber-bullying).

277. See *supra* text accompanying notes 75–79 (discussing the variety of Internet forums in which student speech has appeared).

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

279. See *supra* Part II.B.2. This issue will arise most frequently when the school fails to demonstrate an actual disruption, and instead justifies its punishment on a reasonable foreseeability that a disruption would occur. *Id.*

280. See generally WILLARD, *supra* note 192, at 137 (arguing that schools should characterize student speech that is critical of the school as a “[t]eachable [m]oment,” enabling teachers and schools to learn from the students’ comments). Thus, student speech on private websites that is merely critical of the school should be outside the school’s jurisdiction to punish. See, e.g., *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (stating that a school could not punish a student for his website simply because it disliked his criticism of the school).

mails, instant messages, or blogs is targeted at a specific audience and, as a result, invites outside responses.<sup>281</sup> This type of Internet speech arguably poses a greater threat of disruption to the school environment. In conclusion, conducting the three-part inquiry discussed—guided by assessing the factors of content, intent, and form—courts and schools should be better equipped to tackle problems arising from student Internet speech.

#### IV. CONCLUSION

The Internet has radically changed student speech issues by challenging the previously accepted geographical definition of student speech.<sup>282</sup> Although in the past, student speech made off-campus remained outside the schoolhouse gate, when it is posted on the Internet, the speech is placed in the public realm and is potentially disruptive to the school environment. While not all student speech made off-campus implicates the school, certain types of speech, such as that advocating illegal drug use, creating a substantial disruption, or advocating or threatening harm to the school community should be subject to school punishment.

Recognizing a geographical definition of student speech is no longer adequate, and attempting to formulate a new definition is problematic. Defining student speech requires balancing students' sacred and important free speech rights with schools' duty to ensure a safe and civil school environment. Determining a simple, clear definition will likely never be possible, but dispelling certain rules and guidelines will aid schools in navigating both the difficult waters of student speech and snap decisions based on a "very tricky calculus."<sup>283</sup>

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281. See Boyd, *supra* note 179, at 137.

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

283. Kim, *supra* note 3 (quoting Tom Hutton, legal counsel for the National School Boards Association).

