Note

BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction

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Self-expression on the Internet has become a way of life for twenty-first century students. From e-mail to instant messaging to social networking websites like Facebook, MySpace, and LiveJournal, a significant amount of student speech has become cyberspeech.[1] As student speech moves online, schools follow. Afraid their school might become another Columbine,[2] administrators have begun to monitor student online expression, and try to censor student speech they regard as improper.[3] Unfortunately, school administrators lack a strong incentive to protect the free speech rights of their students—they are more concerned with preserving the integrity of the educational process against perceived threats.[4] Protecting student speech is

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1. *See* AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY & ONLINE SOCIAL NETWORKS 11–12 (2007), http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf.

2. On April 20, 1999, two students at Columbine High School went on a shooting spree, killing twelve students and one teacher. *See* Michael Janofsky, *Year Later, Columbine Is Learning to Cope While Still Searching for Answers*, N.Y. TIMES, Apr. 17, 2000, at A12.

3. Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1091 (2003).

4. *Id.* at 1120–21.

a task for the courts, but constitutional jurisprudence provides only the vaguest outline for deciding when a particular student's cyberspeech may constitutionally be regulated by the school.[5] The overreaching of school administrators online is a growing problem, and in the absence of clear judicial standards for evaluating their actions, it will continue to worsen.

In *Morse v. Frederick*,[6] the Supreme Court recently upheld the suspension of Joseph Frederick, a student at Juneau-Douglas High School (JDHS) in Alaska, for displaying a banner reading "BONG HiTS 4 JESUS" at a school-sponsored event.[7] The Court held that, consonant with its mission to discourage drug use, a school could censor on-campus student speech advocating the use of illegal drugs.[8] What if, however, instead of a banner, Frederick created a website, BONGHiTS4JESUS.com (BH4J.com)? Could Principal Morse punish Frederick or insist that the site be taken down? Consider four scenarios:

In the first, Frederick creates BH4J.com entirely on his home computer, and not during school hours. The site advocates for the decriminalization of marijuana, and presents a reasoned argument for why biblical principles support legalization. Frederick never tells anyone at school about the site, but Principal Morse accidentally discovers it while running Google searches on random JDHS students.[9]

In the second scenario, during a computer lab class at school, Frederick accesses BH4J.com and shows it to the student sitting next to him. Word of the site quietly spreads

5. *See generally* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243 (2001) (examining when disciplinary action may be taken against students who engage in on- and off-campus cyberspeech); Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727 (2007) (same).

6. 127 S. Ct. 2618 (2007).

7. *Id.* at 2622–23.

8. *Id.* at 2629 ("The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." (citation omitted)).

9. Though purely hypothetical, this fact pattern addresses the ambiguity between *Morse*-style speech advocating illegal drug use and protected political and religious speech. *See id.* at 2649 (Stevens, J., dissenting) (noting the distinction between advocating illegal drug use and political advocacy for the legalization of marijuana).

through the school, and though no significant activity occurs, the "buzz" reaches the ears of Principal Morse.[10]

In the third hypothetical situation, rather than offering commentary on drug legalization, Frederick uses BH4J.com to post a detailed floor plan of JDHS with emergency exits marked. He posts a clock that counts down to a particular day—below the clock is a caption reading "those of you who know have your instructions." He never accesses the website at school, but one of his classmates who he tells about the site reports it to Principal Morse.[11]

Finally, consider a hypothetical in which Frederick fills BH4J.com with derogatory comments about JDHS faculty and staff. One page is particularly dedicated to Principal Morse, and questions her qualifications, harshly criticizes her appearance in juvenile and shocking language, and speculates on the virtues of her dropping dead of a heart attack. Frederick never accesses the site at school, but e-mails fifteen of his friends and classmates the link from his home computer.[12]

Under which of these fact patterns would Principal Morse be constitutionally justified in censoring Frederick's website, or punishing him because of it? This Note aims to answer these questions. When does a student's online expression become "student speech" such that the school may suppress it or punish its speaker? In the context of the Internet, what is "student speech"?

Part I of this Note sets forth the jurisprudential framework that governs school regulation of student speech, and considers cases addressing the First Amendment status of student online speech, or "cyberspeech." Part II focuses on the threshold inquiry of whether student cyberspeech is student speech and finds that few courts meaningfully consider the initial conditions under which off-campus cyberspeech becomes vulnerable to school regulation. Courts that do consider these initial condi-

10. The "dissemination" of the website in this hypothetical is analogous to the facts of *Layshock ex rel. Layshock v. Hermitage School District*, 496 F. Supp. 2d 587, 591–92 (W.D. Pa. 2007).

11. While entirely hypothetical, recent outbreaks of school violence make this scenario chillingly plausible. *See, e.g.*, Christopher Maag, *Short but Troubled Life of a High School Student Ended in Shooting and Suicide*, N.Y. TIMES, Oct. 12, 2007, at A21 (recounting the story of a Cleveland student who shot two students and two teachers and then committed suicide).

12. This permutation combines the facts of *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 851 (Pa. 2002), and *Wisniewski v. Board of Education*, 494 F.3d 34, 36 (2d Cir. 2007).

tions reach inconsistent outcomes based on content-based evaluations. Finally, Part III argues that courts must apply a more rigorous test to evaluate the nexus between cyberspeech and the school environment. To determine whether schools may regulate off-campus cyberspeech, courts should apply a version of the personal jurisdiction test to ensure that any exercise of school power over student cyberspeech is supported by minimum contacts with the school environment such that the exercise of the school power does not offend notions of fair play and substantial justice.

I. THE FIRST AMENDMENT ON CAMPUS AND ONLINE

The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[13] The speech protected by the First Amendment extends beyond spoken words and encompasses the full range of communicative human behavior—from holding up a banner or flag,[14] to wearing particular clothing,[15] to remaining silent.[16] Three overlapping policy values support and justify the freedom of speech. First is a belief that truth is best served when all points of view can be discussed—in Justice Oliver Wendell Holmes' words, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[17] Second is the contention that free speech is essential to democracy—that the framers designed the First Amendment in part "to protect the free discussion of governmental affairs."[18] Third, freedom of speech is essential to individual autonomy—as Justice Louis Brandeis argued, freedom of speech forces the government to "make men free to develop their faculties."[19] When a court strikes down a law on First Amendment grounds,

13. U.S. CONST. amend. I.

14. *See* Stromberg v. California, 283 U.S. 359, 361, 369–70 (1931) (reversing a conviction under a state statute banning the display of the red Communist flag of Soviet Russia).

15. *See* Cohen v. California, 403 U.S. 15, 16–19 (1971) (reversing the conviction of an individual who wore a jacket bearing the slogan "Fuck the Draft" (internal quotation marks omitted)).

16. *See* Brown v. Louisiana, 383 U.S. 131, 142 (1966) (extending First Amendment protection to the right "to protest by silent and reproachful presence").

17. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

18. Mills v. Alabama, 384 U.S. 214, 218 (1966).

19. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

it does so not just because of the speech directly affected by the law, but also because of the potential "chilling effect" that the law will have on those who might otherwise speak.[20]

However, the right of free expression under the First Amendment is not absolute. The government may restrict the time, place, and manner of speech, as long as that restriction is reasonable, "narrowly tailored to serve a significant governmental interest," leaves open "ample alternative channels for communication," and applies "without reference to the content of the regulated speech."[21] Additionally, some narrowly defined types of speech enjoy no First Amendment protection whatsoever—among them incitement to commit a crime,[22] so-called fighting words,[23] libelous speech,[24] obscenity,[25] child pornography,[26] and "true threats" of violence.[27] Finally, while the Constitution permits some speech regulation that applies without regard to the speech's content, regulations based on content are subject to the highest degree of judicial scrutiny.[28]

20. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2682–83 n.5 (2007) (Scalia, J., concurring) ("Our normal practice is to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech.").

21. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 295 (1984) (affirming the National Park Service's enforcement of a camping ordinance against protesters sleeping in a public park).

22. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (forbidding states from prohibiting advocacy of unlawful activity "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

23. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected).

24. *See* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) ("We find no warrant in the Constitution for denying to Illinois the power to pass [a criminal libel law]."). *But cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

25. *See* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

26. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that content-based restrictions on the distribution of child pornography do not offend the First Amendment).

27. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (upholding a state statute forbidding cross-burning with the intent to intimidate as a "true threat," such as, a "statement[] 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" (internal quotation marks omitted)).

28. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972)

A. PROTECTION OF STUDENT EXPRESSION IN PUBLIC SCHOOLS

The Supreme Court recognized that the First Amendment protects the speech of public school students in *West Virginia State Board of Education v. Barnette*.[29] The Court acknowledged that while a school has "important, delicate, and highly discretionary" educational functions, it nevertheless remains a state actor bound by the Fourteenth Amendment to respect students' First Amendment rights.[30] Justice Robert Jackson's opinion forbade, in the starkest terms, any attempt on the part of schools "to strangle the free mind at its source."[31] Since *Barnette*, the Supreme Court has issued a series of rulings clarifying and delineating the scope of students' First Amendment rights in public schools: *Tinker v. Des Moines Independent Community School District*,[32] *Bethel School District No. 403 v. Fraser*,[33] *Hazelwood School District v. Kuhlmeier*,[34] and most recently *Morse v. Frederick*.[35]

1. The High-Water Mark: *Tinker v. Des Moines Independent Community School District*

In 1965 in Des Moines, Iowa, three students were suspended for wearing black armbands to school as a silent protest against the Vietnam War.[36] Their parents challenged the school's action in a case that set the standard for the protection of student speech. The Court began by asserting that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[37] The Court also recognized that the rights of students must be "applied in light of the special characteristics of the school environment," and that schools require some control over student behavior.[38] To balance these competing in-

("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

29. 319 U.S. 624, 628–29, 642 (1943) (holding that a school could not compel Jehovah's Witnesses to recite the Pledge of Allegiance).

30. *Id.* at 637.

31. *Id.*

32. 393 U.S. 503 (1969).

33. 478 U.S. 675 (1986).

34. 484 U.S. 260 (1988).

35. 127 S. Ct. 2618 (2007).

36. *Tinker*, 393 U.S. at 504.

37. *Id.* at 506.

38. *Id.* at 506–07.

terests, the Court held that the Constitution forbade regulation of student speech unless it would "materially and substantially interfere" with the school environment.[39]

The Court rejected the argument that the school officials were moved to act by a justified fear of a potential disruption and held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[40] While a school could act to prevent a foreseeable disruption, in the Court's view, "state-operated schools may not be enclaves of totalitarianism."[41] *Tinker* thus set a very high bar for determining when a school might curtail the First Amendment rights of a student: a school may exercise such authority only when the speech or conduct would "materially and substantially interfere" with the administration of the school.[42]

2. Exceptions to the Rule: *Fraser* & *Hazelwood*

Nearly twenty years after *Tinker*, the Court returned to the issue of student speech in two cases decided two years apart. Taken together, *Bethel School District No. 403 v. Fraser*[43] and *Hazelwood School District v. Kuhlmeier*[44] create substantial exceptions to the *Tinker* rule and establish new zones in which the First Amendment does not protect student speech.[45]

The first case arose when Matthew Fraser, a Bethel High School student, gave a speech at a school-sponsored assembly in support of his friend's campaign for a student government position, which was couched in an elaborate sexual metaphor.[46]

39. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

40. *Id.* at 508.

41. *Id.* at 511.

42. *See id.* at 509 (internal quotation marks omitted).

43. 478 U.S. 675 (1986).

44. 484 U.S. 260 (1988).

45. *See generally* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000) (arguing that *Fraser* and *Hazelwood* effectively overrule *Tinker*).

46. *Fraser*, 478 U.S. at 677–78. In his concurrence, Justice William Brennan partially reproduced the speech:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the

The next day, Fraser was suspended from school for three days for violating the school's disruptive conduct rule.[47] The Court conceded that Fraser's speech had not been obscene within the meaning of *Miller v. California*,[48] and so merited First Amendment protection.[49] But the Court did not base its ruling on the *Tinker* standard.[50] The Court held that the school—in light of its mission to inculcate "fundamental values of habits and manners of civility essential to a democratic society"—had the power to ban "vulgar and lewd speech" that "would undermine the school's basic educational mission."[51]

Two years later, the Court created a second exception to the *Tinker* rule, when the principal of Hazelwood East High School in St. Louis, Missouri censored a student newspaper.[52] The Court again declined to apply the *Tinker* test.[53] Because the newspaper was part of the curriculum, "[e]ducators are entitled to exercise greater control over [it] to assure that . . . the views of the individual speaker are not erroneously attributed to the school."[54] *Hazelwood* thus articulated a second broad exception to the *Tinker* rule: a student's speech may be censored when it might reasonably be mistaken for that of the school.[55]

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

Id. at 687 (Brennan, J., concurring).

47. *Id.* at 678 (majority opinion). Fraser's name was also removed from the ballot to elect graduation speakers; his classmates nevertheless elected him by write-in vote. *Id.* at 678–79.

48. 413 U.S. 15, 23 (1973).

49. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

50. The majority did not even consider the *Tinker* disruption test, and instead distinguished the political conduct at issue in *Tinker* from the sexual innuendo of Fraser's speech. *Id.* at 685 (majority opinion); *see also* Morse v. Frederick, 127 S. Ct. 2618, 2627 (2007) ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disturbance' analysis prescribed by *Tinker*.").

51. *Fraser*, 478 U.S. at 681, 685 (internal quotation marks omitted).

52. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

53. *Id.* at 270–71.

54. *Id.* at 271.

55. *Id.* at 273 ("[W]e hold 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 . . . .").

3. A New Exception: *Morse v. Frederick*

The third exception to *Tinker* came recently in *Morse v. Frederick*.[56] In considering whether the Constitution permitted Principal Morse's punishment of Frederick for his "BONG HiTS 4 JESUS" banner, the Court first rejected the argument that, because Frederick planted his banner off school property, the school-speech precedents did not apply.[57] The Court admitted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts."[58] Because the event was school-sanctioned, school personnel were present, "[t]he high school band and cheerleaders performed," and Frederick directed his banner at the school, the Court held that he was effectively at school.[59] The Court then established that, although Frederick did not intend to convey a pro-drug message,[60] since there were at least two reasonable pro-drug interpretations,[61] Morse's conclusion that Frederick's banner advocated drug use was nevertheless reasonable.[62] Finally, the Court concluded that "[t]he special characteristics of the school environment and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[63] Thus, the *Morse* Court carved out a third exception to the *Tinker* standard: a school may freely restrict student speech that promotes illegal drug use.[64]

B. STUDENTS, THE INTERNET, AND THE FIRST AMENDMENT

The exponential growth of Internet access over the past decades has led to an unprecedented number of students expressing themselves online. At the same time, schools have increasingly ventured onto the Internet to monitor and sometimes punish students' cyberspeech. The First Amendment

56. 127 S. Ct. 2618 (2007).

57. *Id.* at 2624 (internal quotation marks omitted).

58. *Id.* (citation omitted).

59. *Id.*

60. Frederick insisted that the slogan was meaningless; he just wanted to get on television. *Id.*

61. The two possible interpretations are the imperative statement "'[Take] bong hits,'" and one of the following declarative statements: "'bong hits [are a good thing],' or '[we take] bong hits.'" *Id.* at 2625 (alterations in original).

62. *Id.*

63. *Id.* at 2629 (citation and internal quotation marks omitted).

64. *See id.*

fully protects speech posted on or delivered via the Internet,[65] but the extent to which it protects the off-campus online speech of students remains unsettled.[66] The balance of this Part addresses the phenomenon of student Internet speech, and considers some of the cases in which schools have attempted to regulate that speech.

1. The Explosion of Student Expression Online

Today's high school students were born around 1990, the year computer scientists invented the World Wide Web protocol.[67] When current high school students were in first grade, the Palm Pilot had been invented.[68] By the time they started middle school, Wikipedia was up and running.[69] In high school, they spend their time listening to podcasts, photo sharing on sites like Flickr, and watching YouTube videos.[70] According to a survey conducted by the Pew Internet and American Life Project, ninety-three percent of American teens use the Internet, and sixty-one percent do so daily.[71]

None of the Internet phenomena that have arisen over the course of today's teenagers' lives has had a greater impact, however, than the explosion of social networking websites like MySpace, Friendster, and Facebook.[72] Teenagers use social networking sites like these to build personal profiles and webpages, which in turn they use to maintain and grow their circle of online and offline friends.[73] Fifty-five percent of young people

65. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

66. *See, e.g.*, Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454–55 (W.D. Pa. 2001) (discussing cases that have analyzed off-campus online student speech).

67. *Cf.* Amanda Lenhart, Pew Internet & Am. Life Project, Policy & Advocacy in the Schools Meeting: A Timeline of Teens and Technology (Aug. 16, 2007), http://www.pewinternet.org/PPF/r/105/presentation_display.asp (follow "View PowerPoint Presentation" hyperlink) [hereinafter Lenhart, Timeline].

68. *Id.*

69. *Id.*

70. *Id*.

71. LENHART & MADDEN, *supra* note 1, at 3.

72. *See* Chad Lorenz, *The Death of E-mail*, SLATE, Nov. 14, 2007, http://www.slate.com/id/2177969 (observing that teenagers are abandoning e-mail in favor of instant messaging and the communication systems of social networking websites).

73. *See* AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, SOCIAL NETWORKING WEBSITES AND TEENS: AN OVERVIEW 1 (2007), http://www.pewinternet.org/pdfs/PIP_SNS_Data_Memo_Jan_2007.pdf.

aged 12–17 and sixty-one percent of those aged 14–17 utilize social networking websites.[74] These websites provide a variety of tools for communication, both public and private.[75] Accountholders may use the website's private messaging system to communicate with friends, or may post messages on a friend's "wall," a public bulletin board that any visitor to the profile page may read.[76] Such wall postings are the most popular method of communication on social networking sites; 84% of teen users report having posted to a wall.[77] Finally, 57% of online teens reported posting self-created content.[78]

2. Student Cyberspeech in the Lower Courts

The explosion of student expression online has brought a concomitant expansion of opportunities for schools to regulate that expression. The discontinuity between geographical space and cyberspace, however, confounds traditional analysis of the scope of school power to regulate student speech.[79] Web content created in one location can be instantaneously accessed anywhere in the world, thus undermining the spatial link between a student's expression and its reception.[80]

But geography remains relevant to a school's claim of authority, because *Tinker* and its progeny do not necessarily apply beyond the schoolhouse gates.[81] Courts have addressed stu-

74. LENHART & MADDEN, *supra* note 1, at 11–12.

75. *See id.* at 13.

76. *Id.*

77. *Id.*

78. Lenhart, Timeline, *supra* note 67.

79. *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) ("Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility—and legitimacy—of laws based on geographic boundaries."); Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1137 (1996) ("[A]s courts . . . struggle to apply a correct jurisprudential paradigm to the Internet, it has become apparent that the First Amendment law developed for other communications media provides precious few analytical analogs.").

80. *See* Johnson & Post, *supra* note 79, at 1370 ("Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location.").

81. *See* Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 800–01 (N.D. Ohio 2002) ("[U]nder *Tinker*, . . . the school district must show that [the student's] expressive activity 'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.'" (third alteration in original)).

dent cyberspeech at four points along the spatial axis between the campus and the home. First, cyberspeech that occurs unambiguously off campus, or is brought onto campus only by a third party, has usually been placed beyond the school's power to regulate. Second, in cases in which the online speech originates off campus but is brought onto campus by the speaker, courts have reached diametrically opposed conclusions in similar factual situations. The third category encompasses speech that originates on campus, which has been held regulable. Finally, off-campus cyberspeech that poses a foreseeable risk of reaching campus has recently been ruled within the school's authority to censor.

a. Off-Campus Cyberspeech

When a school attempts to regulate the off-campus, online speech of a student, its authority is at its lowest ebb. *Emmett v. Kent School District No. 415*[82] demonstrates this phenomenon. From his home computer, Nick Emmett maintained a website where he posted mock obituaries, written tongue-in-cheek, about his friends.[83] He also allowed site visitors to vote for who would "die" next.[84] After a local television station ran a story on the site characterizing it as a "hit list,"[85] Emmett was expelled from school for "intimidation, harassment, [and] disruption to the educational process."[86] The school district argued that, in the post-Columbine environment, school administrators should be granted wide latitude to monitor and regulate student speech.[87] The court, however, rejected this argument.[88] In granting an injunction prohibiting enforcement of the punishment, the court placed Emmett's website "entirely outside of the school's supervision or control."[89]

A more complicated issue arises when a student's cyberspeech is brought onto campus by another student. In *Killion v.*

82. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

83. *Id.* at 1089. These posts were an extension of an activity that began in Emmett's creative writing class the year before. *Id.*

84. *Id.* (internal quotation marks omitted).

85. *Id.* (internal quotation marks omitted).

86. *Id.* Emmett's expulsion was subsequently changed to a five-day suspension. *Id.*

87. *See id.* at 1090.

88. *Id.* ("[The school district] has presented no evidence that the mock obituaries and voting on this [website] were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.").

89. *Id.*

Franklin Regional School District,[90] Zachariah Paul wrote a "Top Ten" list mocking the school's athletic director and e-mailed it to a number of friends.[91] He specifically did not, however, bring it to school, because he had been warned against bringing such lists on campus.[92] Despite his precautions, someone printed Paul's e-mail and copies were found in the teacher's lounge resulting in Paul being suspended for ten days.[93] The court granted an injunction against the school, applying the *Tinker* test.[94] In the court's estimation, "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*. Further, because the [athletic director] list was brought on campus, albeit by an unknown person, *Tinker* applies."[95] Under *Tinker*, however, the court found no likelihood of disruption.[96]

Other cases in which student cyberspeech has been brought on campus by a third party have reached similar conclusions, relying on the *Tinker* substantial disruption standard.[97] Whether or not a student brings her speech onto campus, it may be subject to regulation.[98]

b. Cyberspeech Brought onto Campus by the Speaker

In contrast to cases in which a student's speech is brought on campus against the student's will, courts are likely to uphold a school's regulatory authority when a student accesses off-campus web content from school computers during school hours. The courts have little guidance, however, in deciding how much on-campus access is enough to support the school's authority. In two cases, courts examined similar situations and came to opposite conclusions.

90. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

91. *Id.* at 448 (internal quotation marks omitted).

92. *Id.*

93. *Id.* at 448–49.

94. *Id.* at 452–56 (analyzing the facts of *Killion* under the *Tinker* standard).

95. *Id*. at 455.

96. *Id.* at 455–56.

97. *See, e.g.*, Latour v. Riverside Beaver Sch. Dist., No. Civ. A. 05-1076, 2005 WL 2106562, at *2–3 (W.D. Pa. Aug. 24, 2005) (denying school's right to discipline a student for apparently violent rap lyrics and songs posted online and brought to school by other students); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1178–82 (E.D. Mo. 1998) (granting a preliminary injunction against a school disciplining a student for the content of a website pointed out to a teacher by another student).

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

Justin Swidler[99] created a website called "Teacher Sux," which contained derogatory statements directed at his teachers.[100] He specifically targeted his algebra teacher Mrs. Fulmer; the website gave a list of reasons why she should die and solicited donations "to help pay for the hitman."[101] Justin showed the site to another student once during class.[102] When Mrs. Fulmer learned of the site, she suffered extreme emotional disturbance—she could not finish the school year—and Justin was suspended.[103] When Justin's parents sued, the intermediate appellate court upheld the school's actions because the court found that Swidler's speech constituted a threat that "materially and substantially interfere[d] with the educational process," and thus was not protected by the First Amendment.[104] While the Pennsylvania Supreme Court held that Justin's website was not a true threat,[105] it nevertheless upheld the punishment under *Tinker*.[106] The court found that Swidler "facilitated the on-campus nature of the speech" by accessing the site at school and showing it to his friends.[107] Finally, the court held that suspension was justified because the disruption of the school was so severe.[108]

A few years after *J.S.*, another Justin—Justin Layshock—created a fake profile of his principal on MySpace.com.[109] Like Swidler, Layshock showed the profile to classmates; he also ac-

99. J.S.'s full name is revealed in Calvert, *supra* note 5, at 246.

100. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002) (internal quotation marks omitted).

101. *Id.* (quoting the "Teacher Sux" website) (internal quotation marks omitted).

102. *Id.* at 852.

103. *Id.*

104. *Id.* at 853.

105. *Id.* at 858–60.

106. *Id.* at 869.

107. *Id.* at 865.

108. *Id.* at 869.

109. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).

> The answers [to MySpace's default profile questions] ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other. For example, in response to the question, 'in the past month have you smoked?,' the profile says 'big blunt.' . . . The answer to the question 'in the past month have you gone on a date?' is 'big hard-on.' The profile also refers to [the principal] as a 'big steroid freak' and 'big whore.' The profile also reflected that [the principal] was 'too drunk to remember' the date of his birthday.

Id.

cessed the profile from school computers twice.[110] When the administration learned of Layshock's profile, he was suspended from school, placed in the Alternative Curriculum Education program for the remainder of the year, suspended from extracurricular activities, and prohibited from participating in his class's graduation ceremony.[111] In considering whether or not the school had properly punished Justin, the court noted that "[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."[112] The court placed the burden on the school to justify its power to punish Layshock.[113] In the court's estimation, the school failed to carry that burden.[114]

J.S. and *Layshock* therefore present identical operative facts: web content created off campus that was accessed by the author on campus.[115] In one case, the school's authority was upheld;[116] in the other, it was denied.[117] This divergence suggests a need for uniform standards whereby judges may determine the limits of school authority over student cyberspeech.

c. Cyberspeech Created on Campus

The third point on the geographical axis of student cyberspeech is speech created on campus. In such a case courts uphold the school's authority to regulate the speech. While there are no reported cases involving purely on-campus cyberspeech, *Doninger v. Niehoff*[118] offers a suggestive example. Avery Doninger, frustrated over her school's refusal to allow the student council to hold a music festival in the newly renovated auditorium, wrote an e-mail protesting the decision and sent it to the parents of many students from the school's computer lab.[119] Later that day, she reposted the text of the e-mail

110. *Id.* at 591–92.

111. *Id.* at 593–94. After a status conference with the court, Layshock was placed back into regular classes and was permitted to take part in the graduation ceremony. *Id.* at 594.

112. *Id.* at 597.

113. *See id.* at 600.

114. *Id.* ("[The school district has] not established a sufficient nexus between Justin's speech and a substantial disruption of the school environment.").

115. *See id.* at 591–92; J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850–52 (Pa. 2002).

116. *J.S.*, 807 A.2d at 869.

117. *Layshock*, 496 F. Supp. 2d at 600–01.

118. 514 F. Supp. 2d 199 (D. Conn. 2007).

119. *Id.* at 204–05.

on her personal website at LiveJournal.com.[120] In response to the LiveJournal.com posting, her principal barred Avery from running for class secretary her senior year.[121] Although Avery's punishment for the e-mail itself was limited to a verbal scolding and a temporary note placed in her student file,[122] the court noted that the *Tinker* line of cases gave school administrators wide latitude in sanctioning Avery for her on-campus, online expression.[123]

d. Speech That May Foreseeably Reach Campus

The *Doninger* court also justified Avery's punishment under a powerful Second Circuit precedent that expands the bounds of school authority,[124] *Wisniewski v. Board of Education*.[125] After being told that his school would take all allegations of threats very seriously,[126] eighth-grader Aaron Wisniewski created an AOL Instant Messenger icon on his home computer that depicted a gun shooting a person, and included the caption "Kill Mr. VanderMolen."[127] During the three-week period in which he used the icon, Wisniewski chatted with fifteen of his "buddies," but never at school.[128] When one of Wisniewski's classmates told Mr. VanderMolen of the icon, the school suspended Wisniewski for a semester.[129] The Second

120. *Id.* at 206.

121. *Id.* at 207–08. As the court pointed out, the denial of a privilege is substantively different from a more severe punishment, such as suspension or expulsion, which would implicate a constitutionally protected property interest. *Id.* at 213–14; *cf.* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650, 664–65 (1995) (holding that students who participate in school athletics voluntarily subject themselves to a higher degree of regulation, and random drug tests of team members do not violate the Fourth Amendment). However, for the purpose of this analysis, Avery's conduct was such that, jurisdictionally, the school could have meted out a more severe punishment.

122. *See Doninger*, 514 F. Supp. 2d at 211 ("The Court also will not consider any First Amendment claims related to discipline for the original Jamfest email, given that the only alleged discipline, the activity log entry, has been removed from Avery's file.").

123. *See id.* at 211–12 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681–85 (1986) and Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506–13 (1969)).

124. *See id.* at 216–17.

125. 494 F.3d 34 (2d Cir. 2007).

126. *Id.* at 36.

127. *Id.* at 35–36 (internal quotation marks omitted). Mr. VanderMolen was an English teacher at Wisniewski's school. *Id.* at 36.

128. *Id.* at 36 (internal quotation marks omitted).

129. *Id.* at 36–37.

Circuit held that, given the content of the icon, Wisniewski's distribution of it, and the period of time that Wisniewski used it, it was reasonably foreseeable that the icon would make its way onto campus and come to the attention of school authorities.[130] The court concluded that "the icon, once made known to . . . school officials, would foreseeably create a risk of substantial disruption."[131] Under *Wisniewski*, therefore, a school can regulate cyberspeech not only if it reasonably forecasts substantial disruption based on on-campus speech; it may do so if it reasonably forecasts that the potentially disruptive speech might reach the campus.[132]

II. TRIPPING OVER THE THRESHOLD QUESTION: WHEN IS STUDENT CYBERSPEECH "STUDENT SPEECH?"

If, indeed, there is "some uncertainty" about when to apply the Court's school-speech precedents, as Chief Justice John Roberts indicated in *Morse v. Frederick*,[133] student cyberspeech brings that uncertainty into sharp relief. As this Part elucidates, Supreme Court student speech precedent has dealt with on-campus expression, but it does not control the question of when a school may regulate a student's off-campus speech. Determining when a student's online expression becomes student speech, which may be regulated under the *Tinker* line of cases, has been left to the lower courts. In answering that threshold question, courts have faced recurrent factual patterns across multiple cases, but the lack of a clear standard has led to inconsistent outcomes in similar scenarios. This Part first considers the impact of Supreme Court precedent on off-campus cyberspeech, then examines a case where the distinction between off-campus cyberspeech and on-campus behavior was unusually clear, and the court grasped the distinction unusually well. Finally, this Part outlines the ad hoc approach most courts have

130. *Id.* at 39–40.

131. *Id.* at 40.

132. *Id.* at 38–39. Wisniewski's parents have filed a petition for a writ of certiorari to the Supreme Court in order to reverse the Second Circuit's decision. Petition for Writ of Certiorari, Wisniewski v. Bd. of Educ., No. 07-987 (Jan. 24, 2008), 2008 WL 261214. In the petition, the Wisniewskis ask the Court to decide "[w]hether a public school district may lawfully punish a student for engaging in a private conversation, off of school grounds and not at an event bearing the imprimatur of the district, merely because the subject matter of the speech relates to the District." *Id.* at *i.

133. 127 S. Ct. 2618, 2624 (2007).

used in trying to answer the threshold question, and finds that application of the *Tinker* test leads to content-based regulation.

A. SUPREME COURT PRECEDENT DOES NOT APPLY TO OFF-CAMPUS SPEECH

In *Tinker*, the Court relied on the "special characteristics of the school environment" in empowering schools to regulate student speech.[134] Precisely what those characteristics are, or what exactly makes them "'special,'" the Court left unanswered.[135] The very nature of the "material and substantial disruption" test,[136] however, strongly hints that the Court's test permits the school to protect the integrity of the classroom environment itself. The oft-quoted central passage from the case[137]—that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"—by negative inference implies that outside those gates, the school should have no power to regulate student speech.[138] Later Supreme Court cases have not faced this question. *Hazelwood*, for instance, addressed only school-sponsored speech in the form a school newspaper.[139] *Fraser*, where the speech at issue occurred during an assembly, was equally agnostic on the subject of off-campus speech.[140] With *Morse*, the Court had an opportunity to

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

135. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 59 (1996) (pointing out that while the Court has acknowledged that the school environment is "'special,'" it has failed to elucidate a "guiding principle" for evaluating the nature and status of school power).

136. *See Tinker*, 393 U.S. at 509.

137. A search of the ALLCASES database on Westlaw with the terms "shed their constitutional rights" & "schoolhouse gate" returned 336 cases, as of March 12, 2008.

138. *Tinker*, 393 U.S. at 506; *see also* Calvert, *supra* note 5, at 270–71 ("Not only did the facts in *Tinker* deal with in-school expression by students, but also the Court indicated it was only concerned with on-campus expression when it reasoned [that student freedom of expression persists within the schoolhouse gate.]"); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 142 ("[T]he clear inference to be drawn from the Court's cases is that it is assuming the school's authority over the speech of its students ends as the student leaves the schoolhouse.").

139. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

140. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

address off-campus speech, but declined it, and instead declared that Joseph's banner stood functionally on campus.[141]

In the canonical student speech cases, therefore, the threshold question of whether the school had authority to regulate the speech never required consideration. Each incident occurred on campus—within the schoolhouse gates—such that the school's authority was never in doubt. In cases involving student cyberspeech, however, it is rarely clear that the speech at issue occurs within the gates. A student who comes to school the morning after creating a website on her home computer does not bring the site with her, attached to her person. Supreme Court student-speech precedent, therefore, should not apply to off-campus cyberspeech until and unless a court determines that the school's power to regulate extends far enough to encompass it.[142]

B. PARSING THE DETAILS: WHAT SPEECH IS BEING PUNISHED?

The first task of a court faced with a school's claim of authority over student cyberspeech is to determine what speech, precisely, is being regulated. Many cyberspeech cases involve deceptively simple fact patterns that ultimately reveal unexpected complexity, allowing schools to use on-campus behavior related to off-campus speech to ignore the distinction between the two. A perfect example of this distinction—and of a court that grasped it unusually well—is *Coy ex rel. Coy v. Board of Education*.[143]

Jonathan Coy enjoyed skateboarding with a group of friends, and to memorialize their exploits, he created a website using his home computer.[144] In addition to photos of his friends, the site included a gallery of "losers," North Canton Middle School students that Coy did not like, with a caption under each photo, many incorporating insulting and vulgar sentiments.[145] The site also featured profanity, photos of rude gestures, and "a depressingly high number of spelling and grammatical errors."[146] While Coy created the site at home, on one occasion he used a school computer to access it.[147] When school

141. Morse v. Frederick, 127 S. Ct. 2618, 2624 (2007).
142. *See* Calvert, *supra* note 5, at 269–73.
143. 205 F. Supp. 2d 791 (N.D. Ohio 2002).
144. *Id.* at 795.
145. *Id.*
146. *Id.*
147. *Id.* at 795–96.

officials discovered the website, Coy was expelled for eighty days for violating the school's computer use policy.[148]

On summary judgment, the court faced the question of what behavior precisely had prompted the discipline.[149] The school asserted that, because the content of Coy's website was vulgar, *Fraser* empowered the school to discipline Coy for its content.[150] The court rejected this position and focused only on Coy's access of the site in class—the only behavior the school could properly regulate.[151] Coy produced evidence that the school district attempted to force his web hosting company to take down the site, which convinced the court of the existence of a triable issue of fact as to whether Coy was disciplined for the creation of the website or for its access in class.[152] If the former, the court suggested that the school acted unconstitutionally in punishing Coy for off-campus speech.[153]

The *Coy* case is illustrative of the problems that courts face in student cyberspeech cases. The *Tinker* line of cases establishes school authority over behavior that occurs within "the schoolhouse gate[s]."[154] The omnipresence of the Internet, however, provides a ready argument that off-campus cyberspeech is in some sense always "on campus" as well. When a student—like Jonathan Coy—accesses his website at school, that behavior only buttresses the school's argument. Therefore, courts must look carefully to determine whether the punishment meted out by the school was in fact a consequence of the on-campus behavior, or if it was merely a proxy for punishment of the off-campus speech. The facts in *Coy*—in which a student accesses a personal website on a school computer, thus giving rise to a school's claim of authority to regulate[155]—recur frequently in student cyberspeech cases.[156] The *Coy* court's understanding

148. *Id.* at 796.

149. *Id.* at 799–801.

150. *Id.* at 799.

151. *Id.* at 799–800 ("The extent of Jon Coy's expressive activity was the private viewing of his own website.").

152. *Id.* at 800–01 (characterizing the claim that the school punished Coy only for the access of the site as "implausible").

153. *See id.* at 801 ("If the school disciplined Coy purely because they did not like what was contained in his personal website, the plaintiffs will prevail.").

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

155. *Coy*, 205 F. Supp. 2d at 795–96.

156. *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007) ("[Layshock] accessed his profile from a

provides a useful framework for evaluating cyberspeech cases: while the *Tinker* test may have applied to Coy's access of the website, the school could not constitutionally punish Coy for creating the site.[157]

C. THE *TINKER* STANDARD AND CYBERSPEECH: THE WRONG TOOL FOR THE WRONG JOB

Unlike the *Coy* court, most other courts have not found a coherent way to answer the threshold question of when off-campus cyberspeech becomes student speech. On the one hand, they have a school with a legitimate and even compelling interest in ensuring the safety and security of both the educational process and of the student body itself.[158] On the other, they have immature, even incoherent student cyberspeech lashing out at school administrators, teachers, and peers in the crudest of terms,[159] which may hardly seem worthy of protection. However, deciding whether speech may be regulated based on its content is a determination fraught with First Amendment peril. In desperation, courts have turned to the *Tinker* test to determine whether or not speech may be regulated.[160] This strategy is ill-advised. The *Tinker* test is designed to determine whether expression that is unambiguously student speech may be censored. It should not, then, be used to determine whether to begin with a particular expression is student speech. Any off-

computer in the Spanish classroom . . . ."); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) ("[T]he record clearly reflects that the off-campus [website] was accessed by J.S. at school . . . .").

157. *Coy*, 205 F. Supp. 2d at 801 ("In this case, the defendants say they disciplined Coy for accessing the website, not for the content of the site. But no evidence suggests that Coy's acts in accessing the website had any effect upon the school district's ability to maintain discipline in the school.").

158. *See, e.g.*, Dupre, *supra* note 135, at 86–88 (noting judicial support for schools standing *in loco parentis* over the children in their care).

159. *See, e.g.*, *J.S.*, 807 A.2d at 851 (discussing a website that made derogatory, profane, offensive, and threatening comments about a teacher).

160. Nearly every case set forth in Part I.B.2 eventually analyzes the student expression under the *Tinker* standard. *See, e.g.*, Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) ("The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."). The court in *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007), believed that the *Wisniewski* precedent meant that Doninger's off-campus speech, if it was reasonably certain that it would come onto campus, could be regulated under *Fraser* as lewd and vulgar. *See id.* at 216 n.11 ("[The court] sees no reason to deny the application of *Fraser* to off-campus speech that affects the school in a reasonably foreseeable manner and that would otherwise be analyzed under *Fraser* had it actually occurred on-campus.").

campus speech, by any speaker, may create a material and substantial disruption on campus. If Mary Beth Tinker had appeared on the evening news to protest the Vietnam War, it could have caused a greater disruption of her school than her black armband, but such speech should be no more regulable than was her silent protest. To employ the *Tinker* test to answer the threshold question of when cyberspeech is student speech is to use the wrong tool for the wrong job.

The dichotomy of *Layshock* and *J.S.* once again illustrates the problem. In terms of the threshold question of whether the expression at issue was student speech, the cases are identical: a website is created off campus, is accessed by the author on campus a minimal number of times, and causes some disruption of the school environment.[161] In both cases, the student argued that his expression was not student speech because it occurred off campus.[162] The *J.S.* court answered the objection by resorting to a combination of Swidler's actions in accessing the website at school and its school-related content to assert that it was, in essence, on-campus speech.[163] Because Swidler had taken an affirmative step to bring the speech onto campus, and because "it was inevitable that the contents of the [website] would pass from students to teachers, inspiring circulation of the web page on school property," the court held that the site was "aimed" at the school and was thus equivalent to on-campus speech.[164] While this reasoning seems questionable, especially with regard to inevitability, the court was clearly influenced by what it saw as the degree of disruption that flowed from Swidler's website, which harmed both Mrs. Fulmer the entire student body.[165] Read together, it becomes clear that the degree of the disruption moved the court to overlook the paucity of contacts between Swidler's speech and the school; the court leapt over, in essence, meaningful consideration of the threshold question in favor of a condemnation of the speech and its effects.

The *Layshock* court conducted a more penetrating analysis in reaching its conclusion, but in the end also relied on the disruption to the school. After considering various theories of

161. *See Layshock*, 496 F. Supp. 2d at 590–93; *J.S.*, 807 A.2d at 850–53.

162. *See Layshock*, 496 F. Supp. 2d at 599–600; *J.S.*, 807 A.2d at 864.

163. *J.S.*, 807 A.2d at 865.

164. *Id.*

165. *See id.* at 869 (detailing disruptive events caused by Swidler's website).

school power, it concluded that the burden was on the school "to establish that it had the authority to punish the student. . . . [by] demonstrat[ing] an appropriate nexus" between the off-campus cyberspeech and the on-campus disruption.[166] It determined that the school failed to establish this nexus, because the disruption itself was "minimal," and because of "several gaps in the causation link" between Layshock's MySpace profile and the minimal disruption.[167] So, as in *J.S.*, the *Layshock* court paid more heed to the degree and nature of the disruption ex post than to the nature of the speech and its relationship to the school ex ante in deciding whether or not it was regulable student speech.

The *Tinker* test is very good for examining a factual record and determining whether or not on-campus speech was in fact disruptive, and thus vulnerable to suppression. It has significantly less utility for conducting a nuanced, careful analysis of whether speech that has in fact caused a disruption was student speech. The *Wisniewski* decision[168] exposes the inherent danger when courts use disruption to justify stepping over the threshold inquiry. *Wisniewski* requires only that it be reasonably foreseeable that the speech will reach campus; once on campus it must be reasonably foreseeable that the speech will cause a disruption.[169] Thus, *Wisniewski* effectively removes all restraints on a school's power to regulate student cyberspeech. Aaron Wisniewski was in eighth grade when he created his IM icon—it should come as no surprise that among his online buddies were many of his classmates.[170] It should also come as no surprise that he and his buddies might use the Internet to talk about school and to sound off against teachers and the administration. Wisniewski crossed a line, but it was not the line between on-campus and off-campus speech. Wisniewski crossed the line between appropriate and inappropriate off-campus expression, which is not a line that the school should police.

The *Wisniewski* decision also highlights a problem that lurks beneath all the student cyberspeech cases: the danger of content-based judgments coloring what should be neutral jurisdictional determinations. The types of behavior that escape

166. *Layshock*, 496 F. Supp. 2d at 599.
167. *Id.* at 600.
168. Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007).
169. *See id.* at 39–40.
170. *Id.*

regulation—online jokes,[171] parodies,[172] and general vulgarity and bad taste[173]—seem fundamentally nonobjectionable. By and large, they fall into the broad, tolerant category of "kids will be kids" behavior.[174] The student speech that courts find subject to regulation, on the other hand—Swidler's vituperations at Mrs. Fulmer[175] and Wisniewski's IM icon[176]—usually falls on the objectionable, even dangerous, side of the equation.[177] There would be nothing fundamentally troubling about that dichotomy if the courts at issue found the dangerous speech to be truly threatening, and thus unprotected by the First Amendment.[178] In both cases, however, they declined to do so.[179]

Unless a student's cyberspeech falls into one of the categories of speech unprotected by the First Amendment, it deserves full First Amendment protection. For courts to consider the content of speech before determining that school-speech precedents apply smacks of a content-based regulation of speech.[180] Content-based rules are subject to the most heightened level of judicial review, strict scrutiny.[181] The *Tinker* test itself is content-neutral;[182] deciding which speech it applies to based on the

171. *See Layshock*, 496 F. Supp. 2d at 591 (recounting an offensive MySpace website created as a joke).

172. *See* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (describing a website that was created as a parody of a high school's home page).

173. *See* Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002) (discussing a website that made profane and insulting comments about other students).

174. Sandy S. Li, Note, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 66–67 (2005) (arguing that courts place too much emphasis on the dangers of student violence and are not sufficiently tolerant of juvenile behavior) (internal quotation marks omitted).

175. *See* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).

176. *See* Wisniewski v. Bd. of Educ., 494 F.3d 34, 35–36 (2d Cir. 2007).

177. *See* Calvert, *supra* note 5, at 267 (positing variables for determining the status of speech based on its content).

178. *Cf.* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (holding that cross-burning may constitute a true threat).

179. *See Wisniewski*, 494 F.3d at 38–39; *J.S.*, 807 A.2d at 860.

180. *See* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:3 (2007) ("When the government's purpose is disagreement with the message, the regulation is obviously content-based.").

181. *See id.* § 4:1 ("The strict scrutiny test is the default standard for measuring the content-based regulation of speech.").

182. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). The government's decision to regulate speech that substantially dis-

content of that speech is decidedly not. Further, using the *Tinker* test to decide when off-campus student cyberspeech may be regulated has the potential to significantly chill student cyberspeech. When *Tinker* applies, if a student vents about a teacher online, any disruption of the school—whether caused by the student or by anyone who reads the site, including the targeted teacher—could lead to censorship and punishment. Knowledge of this state of affairs would deter any reasonable student from expressing herself online. To eliminate the danger of chilling effects over student online expression and to avoid the perils of *sub rosa* content-based determinations, courts must therefore adopt a more systematic framework for evaluating school claims of authority over student cyberspeech.

III. THE "PERSONAL JURISDICTION" OF SCHOOLS OVER STUDENT CYBERSPEECH: AN ANALOGY AND A PROPOSAL

As demonstrated above, to determine when a student's online speech constitutes student speech, courts have relied on an ad hoc application of *Tinker*, a test designed to accomplish a completely different function. However, courts have at their disposal a robust jurisprudential mechanism that they may readily adapt to evaluate a school's claim of authority over a student's off-campus cyberspeech: the rules of personal jurisdiction. The personal jurisdiction rules establish by analogy a method for courts to determine whether or not a particular expression is vulnerable to school regulation without regard to its content. At the same time, they protect both the speaker's in-

rupts the educational process applies without regard to the content of that speech. *See* SMOLLA, *supra* note 180, § 3:3. The post-*Tinker* cases do not universally establish content-neutral rules. *Hazelwood* does because it applies when a reader might mistake a student's speech for that of the school, regardless of its content. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988). *Fraser* may enable content-based regulation when an administrator feels speech is vulgar, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986), but many courts have limited *Fraser* to compulsory-attendance activities, such as school assemblies. *Morse* established a rule that is content-based—speech advocating drug use is regulable because of its content—but the Court justified that rule based on the extremely narrow category of prohibited speech, and the exceedingly compelling justification of preventing student drug abuse. Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007). Justice Samuel Alito in his narrowing concurrence argued that speech advocating illegal drug use poses a direct threat to the safety of the school environment. *Id.* at 2638 (Alito, J., concurring).

terest in unfettered expression and the school's need for an orderly educational environment.

Part III does not claim that the jurisdictional inquiry in student cyberspeech cases is identical to a determination of a state's personal jurisdiction over a non domiciliary. Nor is the suggested inquiry meant to supplant the tests developed in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*. Rather, Part III suggests that when examining off-campus cyberspeech, before conducting any of those analyses—for example, whether a substantial disruption took place or whether speech was lewd or vulgar—courts should first consider, by analogy to the rules of personal jurisdiction, the threshold question of whether a particular exercise of school authority is supported by minimum contacts with the school environment such that the authority does not offend notions of fair play and substantial justice.[183]

A. THE STRUCTURES AND POLICIES OF PERSONAL JURISDICTION

The Fourteenth Amendment guarantees that no state may deprive an individual of "life, liberty, or property, without due process of law."[184] Through the doctrine of personal jurisdiction, the Supreme Court ensures that no lower court that passes judgment over a party beyond the borders of its state does so in a way that offends due process.[185] The Court's classical personal jurisdiction doctrine sharply limited a court's ability to reach beyond the territorial boundaries of its home state.[186] The modern test for personal jurisdiction, however, is a more flexible evaluation. Under the modern test, a court must consider the relationship between the defendant, the acts in question, and the forum in order to determine whether the potential defendant has sufficient minimum contacts with the forum state such that the exercise of personal jurisdiction over him does not

183. The rough contours of a similar approach are suggested in a footnote in Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, HASTINGS CONST. L.Q. (forthcoming) (manuscript at 51–52 n.241, available at http://ssrn.com/abstract=1031509). However, Denning and Taylor suggest, in passing, applying only Internet-specific personal jurisdiction concepts to student cyberspeech, rather than employing more fundamental personal jurisdiction principles to evaluate the character of student cyberspeech. *See id.*

184. U.S. CONST. amend. XIV, § 1.

185. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("[The] clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.").

186. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

offend "traditional notions of fair play and substantial justice."[187] Personal jurisdiction thus serves dual policy goals—it safeguards individual liberty from unjust extensions of state power,[188] while regulating the states' relationships with one another in a manner consistent with the American system of federalism.[189]

The simplest and most fundamental basis for personal jurisdiction is the defendant's physical presence in the forum state,[190] even when that presence is temporary.[191] If the defendant is not physically present in the forum, the party asserting jurisdiction must prove that the defendant has minimum contacts with the forum state that are sufficient to support jurisdiction without offending traditional notions of fair play and substantial justice.[192] The cornerstone of the inquiry is whether or not the defendant purposefully availed himself of the privileges and protections of the forum state—if so, he should reasonably foresee being haled into court there.[193] The unilateral actions of third parties are never sufficient to create personal jurisdiction,[194] nor is the mere fact that a defendant's product might foreseeably reach the forum state via the stream of

187. *See Int'l Shoe*, 326 U.S. at 316–17 (internal quotation marks omitted).

188. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("[Personal jurisdiction] protects the defendant against the burdens of litigating in a distant or inconvenient forum.").

189. *Id.* ("[Personal jurisdiction] acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."); *cf.* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1016 (1983) ("Federalism has no role in the decision . . . but the cases explain that federalism is nonetheless preserved when personal jurisdiction is an issue in a case."). *But see* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982) ("The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.").

190. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 610 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

191. *See id.* at 610–11 (noting that personal jurisdiction is appropriate over a defendant present within the state "no matter how fleeting his visit").

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

193. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . .").

194. Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

commerce.[195] In the case of intentional conduct, a defendant may subject himself to jurisdiction in a distant forum by committing a tort aimed at a citizen of that state such that the forum state is the focus of the harm suffered.[196] This effects test has also been applied to intentional tortious conduct over the Internet.[197]

Once minimum contacts have been established, the court must determine whether the exercise of personal jurisdiction under the facts at hand is justified under traditional notions of fair play and substantial justice.[198] In conducting this step of the analysis, courts balance the various interests at stake, including the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining effective relief, and the burden on the non resident of defending the suit in a remote location.[199] This inquiry is a flexible one, and even where minimum contacts exist, a court may decline to exercise jurisdiction when it would be fundamentally unfair.[200]

B. MINIMUM CONTACTS WITH THE SCHOOL ENVIRONMENT

The concerns and policies underlying personal jurisdiction are applicable by analogy to the problem of student cyberspeech. Just as it proved unworkable to restrict a state's juris-

195. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (holding that a consumer's unilateral action of driving a car from New York to Oklahoma was not a sufficient basis for Oklahoma to exercise personal jurisdiction over the dealer); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110–12 (1987) (holding that mere awareness that its products would be sold in California was not a sufficient basis for California to exercise personal jurisdiction over a foreign manufacturer).

196. *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984) ("California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California.").

197. *See* Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265–66 (3d Cir. 1998) (applying a modified *Calder* "effects test" to a business tort committed via the Internet (internal quotation marks omitted)). Where commerce conducted over the Internet is the asserted basis for personal jurisdiction, courts have frequently applied the test developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, which measures the interactivity of the website at issue to determine whether or not it may give rise to personal jurisdiction. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

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

199. *Asahi*, 480 U.S. at 113.

200. *See id.* at 113–16 (overturning state exercise of jurisdiction, even where eight Justices agreed that minimum contacts existed, because the balance of interests pointed solidly against state jurisdiction over two foreign corporations).

diction to those individuals who happen to be within its borders, basing a school's authority on purely geographical considerations would be inadequate to the boundary-defying nature of online speech.[201] A court analyzing a school's claim of authority over student cyberspeech should first determine whether or not that speech has sufficient minimum contacts with the school environment. This Section thus returns to the facts of the student cyberspeech cases to analyze them in terms of minimum contacts. This Section will examine on-campus speech, off-campus speech, off-campus speech brought onto campus by third parties, and off-campus speech that might foreseeably reach campus.

1. On-Campus Cyberspeech

Presence in the forum, or on campus, is as compelling a basis for school authority over student cyberspeech as it is for personal jurisdiction.[202] When a student uses school computers during school hours to create online speech, the school should have the authority to regulate that speech, subject to the limits laid out in the *Tinker* line of cases. Therefore, under this framework, Avery Doninger's e-mail remains vulnerable to school censorship, as long as the requirements of the Court's school-speech precedents are met.[203]

2. Off-Campus Cyberspeech and "Purposeful Availment" of the School Environment

In cases where cyberspeech is created off-campus, but has a clear and unambiguous connection to the school environment, the court should examine the purported connection between the speech and the school to determine whether the student purposefully availed herself of the school environment in creating the speech. The cases on record establish two basic forms of this type of connection: student access of off-campus websites at

201. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) ("It is clear that the test for school authority is not geographical."); Johnson & Post, *supra* note 79, at 1370–71 (noting that physical territorial borders are meaningless in cyberspace).

202. The difference, of course, between personal jurisdiction and student cyberspeech in this case is that while the presence of the *defendant* is sufficient for the jurisdiction of a court, the *speech itself* must be "present" in the school—created there—in order to be automatically subject to regulation by the school.

203. *See* Doninger v. Niehoff, 514 F. Supp. 2d 199, 205 (D. Conn. 2007) (noting that Avery's e-mail was sent from a school computer lab).

school, and off-campus cyberspeech that intentionally causes harm within the school environment.

When a student accesses her personal, off-campus website during school hours on a school computer, she establishes a contact between the off-campus speech and the school environment.[204] A court must then determine whether that particular contact establishes that she purposefully availed herself of the school environment. Factors that a court should consider in making this determination include whether the access happened only once or multiple times; whether the student merely viewed the site herself or showed it to others; and the student's purpose in accessing the site—was it accessed in school for a school-related purpose, or merely incidentally during school hours?[205] If the student has accessed the site only once, has not shown it to any other students, and accessed it for reasons completely unrelated to school, the access itself does not demonstrate purposeful availment of the school environment.[206]

The second way in which a student might purposefully avail herself of the school environment is by intentionally targeting the school environment with an aim to doing harm there. It is conceivable that a student could create a web page entirely off campus with the intent that it be read at school and thus cause harm to a student, teacher, or the educational process itself.[207] Under the effects test set forth in *Calder v. Jones*, such intentional conduct could conceivably form the ba-

204. *See Layshock*, 496 F. Supp. 2d at 591 (noting that Layshock accessed his profile from a Spanish classroom); Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 795–96 (N.D. Ohio 2002) (recounting one-time in-school access of a website by Coy); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851–52 (Pa. 2002) (stating that Swidler showed "Teacher Sux" to another student at school).

205. These factors are interpolations of the fact situations faced by courts in the student cyberspeech cases. *See e.g.*, *Layshock*, 496 F. Supp. 2d at 591 (finding that Layshock did not access his website for a school-related purpose); *Coy*, 205 F. Supp. 2d at 795–96 (describing how Coy only accessed his website once at school); *J.S.*, 807 A.2d at 852 (observing that Swidler showed his website to only one other student at school).

206. *See Coy*, 205 F. Supp. 2d at 799 ("The extent of Jon Coy's expressive activity was the private viewing of his own website."); *see also J.S.*, 807 A.2d at 870 (Zappala, J., concurring) ("[T]he fact that a [website] is merely *accessed at school by its originator* is an insufficient basis upon which to base a characterization of the speech as on-campus speech.").

207. *Cf.* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.").

sis for personal jurisdiction.[208] The adoption of this rule in the student cyberspeech arena could threaten to swallow the distinction between on-campus and off-campus cyberspeech, since most student online expression will likely concern the school in some respect. When a student spends half her time at school, it should come as no surprise that a substantial portion of her cyberspeech addresses the school environment.

However, the crux of the effects test in both *Calder v. Jones* and in *Imo Industries, Inc. v. Keikert AG*, which applied *Calder*'s rule to the Internet, is the intent to cause harm.[209] Harm alone in a remote forum does not necessarily support jurisdiction;[210] intentional harm, however, makes such jurisdiction more reasonable.[211] Therefore, a determination of whether a student's "targeting" of the school environment via off-campus cyberspeech supports school authority should depend on whether the student intended to cause harm in the school.[212] In *J.S.*, Swidler's website certainly caused harm within the school environment.[213] Whether Swidler intended to cause that harm, however, is unclear from the opinion. The presence of a disclaimer stating that all visitors to the site agreed not to disclose its existence to any employees of the school,[214] for instance, might argue against a finding of intent on Swidler's part. Had Swidler intended that his website cause harm to the teachers and administrators of his school, that would have constituted purposeful availment under the effects test. But absent such intent, the school should have no authority to punish him for his off-campus cyberspeech, because that speech did not possess minimum contacts with the school environment.

208. *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984) (holding that intentional conduct aimed at a citizen of another state and that causes harm in that state gives rise to personal jurisdiction in that state).

209. *See id.*; Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265–66 (3d Cir. 1998).

210. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–96 (1980).

211. *See Calder*, 465 U.S. at 788–89.

212. While *Calder* relied on the fact of harm to support jurisdiction, *Tinker* makes clear that schools are not required to wait for a disruption to occur—they may suppress speech if they reasonably forecast substantial disruption. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

213. *See* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852 (Pa. 2002) (noting that Mrs. Fulmer had to take a medical leave of absence due to the "Teacher Sux" website (internal quotation marks omitted)).

214. *Id.* at 851.

Deciding whether or not a particular speaker intended to cause harm in the school is not a task amenable to a bright-line test. A judge faced with such a situation must evaluate the nature and quality of the speech in light of the totality of the circumstances and decide whether the speaker intended to cause harm directly, or to induce others to cause harm. A judge must do so, however, mindful of the fact that harm in the school can arise from myriad causes. Unless such harm is attributable directly to the intentional actions of the online student speaker, the school should have no power to censor the speech.

3. Off-Campus Cyberspeech and the Unilateral Actions of Third Parties

It seems inevitable that regardless of a disclaimer, word of Swidler's website would eventually reach campus. Over and over in the student cyberspeech cases, a third party—typically another student—brings a speaker's off-campus cyberspeech on campus.[215] Once again, the jurisprudence of personal jurisdiction provides a ready analogue to such situations. The unilateral actions of third parties never suffice to subject a nonresident defendant to the judicial power of a particular state.[216] A student should likewise not be subject to the power of a school to censor speech merely because a third party brings that speech inside the schoolhouse gates.[217]

Neither the purpose nor the effect of this rule, however, would hamstring school administrators' efforts to secure an orderly school environment. When the principal of Kentlake High School saw the report about Nick Emmett's so-called hit list, he need not have sat on his hands merely because he found out

215. *See, e.g.*, Latour v. Riverside Beaver Sch. Dist., No. Civ. A. 05-1076, 2005 WL 2106562, at *2 (W.D. Pa. Aug. 24, 2005) (finding that violent songs that were published on the Internet or sold in the community were not brought to school by the student); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448–49 (W.D. Pa. 2001) (recounting that an offensive list that a student e-mailed to the home computers of his friends had been distributed on school grounds by another student); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177–78 (E.D. Mo. 1998) (describing that a friend accessed the student's vulgar homepage during school hours without the student's authorization).

216. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

217. *See, e.g.*, Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 177–78 (2003) (proposing a bright-line test of whether or not the speaker took an affirmative act to bring the speech on campus).

about the site on the evening news.[218] Unilateral actions of third parties should never be sufficient, in and of themselves, to justify a school's censorship of student cyberspeech. But third-party reports remain an essential tool in helping make school administrators aware of situations that might require intervention, if the rest of the jurisdictional predicates are met. So, if school administrators first learn of potentially problematic cyberspeech from third parties, they are not therefore precluded from conducting an investigation into the speech to determine whether or not additional sufficient minimum contacts with the school environment exist. It would be a reactionary administration that relied exclusively on the report of a third-party student to discipline another student. Such behavior should be discouraged by the courts.

4. Off-Campus Cyberspeech, Foreseeability, and the Stream of Commerce Theory

The final category of potential contacts between online speech and the school environment is the "reasonably foreseeable" exception created by the Second Circuit in *Wisniewski*.[219] This rule also has a close analogue in the domain of personal jurisdiction—the so-called stream of commerce theory.[220] The Supreme Court rejected the pure stream of commerce theory, holding that foreseeability alone is not a sufficient basis for personal jurisdiction.[221] Similarly, mere foreseeability that a particular online expression might reach the schoolhouse gates should not suffice to justify censorship of that speech, absent additional conduct by the student that indicates an intent to partake of the school environment.

Properly applied, this rule should have prevented punishment of Aaron Wisniewski for his AOL Instant Messenger (IM) icon.[222] The very nature and structure of an instant messaging

218. *See* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (recounting exposure of Emmett's website on the local news).

219. Wisniewski v. Bd. of Educ., 494 F.3d 34, 38–39 (2d Cir. 2007).

220. *See, e.g.*, Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961) (holding that a component manufacturer that sold its component to a third party could be haled into court in the state where injury occurred, because the item was launched into the stream of commerce and injury in the forum state was thus foreseeable).

221. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) ("'[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction . . . .").

222. *Wisniewski*, 494 F.3d at 35–36.

program dictate that any IM communication sent by a student might foreseeably make its way onto campus. As noted above, given the nature of a middle school student's life, his peer group is inevitably composed of fellow students. It would be surprising if Wisniewski, an eighth-grader, had fifteen IM buddies who were not fellow students at Weedsport Central. Therefore, permitting censorship of instant messages based on mere foreseeability swallows any meaningful protections of student cyberspeech. When all online speech might eventually make it onto school grounds, all speech becomes fair game for suppression by the school.

Requiring additional behavior on the part of students of a type illustrated above—for example, intentional harm or repeated on-campus access—would properly limit the application of the foreseeability rule. The foreseeability rule derogates an essential function of the protection of speech in our society: the necessity of free speech as a "safety valve."[223] One major purpose of a school is to impose discipline and order upon frequently fractious and rebellious students.[224] It is natural, even inevitable, that students will become frustrated with their teachers and administrators, and will occasionally speak out against them in anger and irritation. Given the general migration of student speech online, it is no surprise that this angry speech will be expressed via MySpace, Facebook, IM, e-mail, and any number of other Internet vehicles. Absent purposeful activity connecting this speech with the school environment, there is no reason why a school should be any freer to censor speech just because it appears on the Internet.[225]

223. *Cf.* Calvert, *supra* note 5, at 282 ("The Internet . . . provides a new medium on which students can express their frustrations and feelings. Swidler [of *J.S. v. Bethlehem Area School District*] was using this medium as a passive outlet . . . for his anger and rage. We should be thankful that he was using speech and not a gun to express his emotions." (emphasis omitted)).

224. *See* Bruce C. Hafen & Jonathan O. Hafen, *The* Hazelwood *Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379, 385 (1995) ("To help our children develop real autonomy, we must help them temporarily submit their immediate freedom to the schoolmaster of educational discipline, limiting their freedom temporarily through 'compulsory education' that enhances their capacity for the meaningful exercise of freedom.").

225. *See* Tuneski, *supra* note 217, at 177–78.

C. FAIR PLAY AND SUBSTANTIAL JUSTICE IN THE CONTEXT OF STUDENT CYBERSPEECH

Once a court determines that a student's cyberspeech does have minimum contacts with the school environment, it must then ask whether or not the school's exercise of authority offends notions of fair play and substantial justice. This evaluation should strike a balance between two conflicting, but equally valid, interests: the interest of the student in the right of unrestrained expression, and the interest of the school in maintaining an orderly educational environment.[226]

The student's interest in unfettered expression and substantial legal protection of speech is readily apparent, and should be accorded great weight. Unless the speech falls into one of the carefully delineated categories of expression that does not enjoy First Amendment protection—for instance, if it is a true threat—that speech, no matter how offensive, juvenile, or vulgar, should be entirely protected. On the other hand, schools have a legitimate interest in ensuring that they can effectively educate their students and prepare them for participation in adult society.[227] In an on-campus setting, the balance of interests tips in favor of the school. The integrity of the educational process sometimes requires that teachers exercise a degree of control over their students that the students find distasteful. The process, however, frequently requires such control.[228] On campus, student expression sometimes must be controlled in order to guarantee that students are prepared to effectively partake in the unfettered marketplace of ideas once they exit the schoolhouse gates permanently.[229]

When a student expresses herself online, however, the balance of interests shifts solidly in her direction. Part of learning to engage in adult society is learning that different rules apply in different settings. Preventing schools from overregulating student online behavior could reinforce a student's comprehension that while some kinds of behavior may be tolerated on the Internet, the same behavior will not pass muster in the

226. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting) ("Uncontrolled and uncontrollable liberty is an enemy to domestic peace."); Hafen & Hafen, *supra* note 224, at 385.

227. *See* Hafen & Hafen, *supra* note 224, at 385.

228. *See* Dupre, *supra* note 135, at 67 ("[T]he school plays a vital part in creating a sense of community and molding character based on a shared philosophy.").

229. *See* Hafen & Hafen, *supra* note 224, at 385.

school.[230] In addition, carefully and specifically drawing lines beyond which schools may not reach may actually encourage parents to take a more active part in their children's online activities. Just as personal jurisdiction helps maintain the federal balance between the states,[231] a clearer separation between the spheres of authority of parents and of schools could help to clarify the scope of authority for both.[232]

D. APPLYING THE MODEL TO UNTANGLE THE BONGHITS4JESUS.COM HYPOTHETICALS

Under this personal-jurisdiction-based model, the BH4J.com hypotheticals previously propounded may now be unraveled. In the first situation, in which Frederick's site advocates for legalization of marijuana, Principal Morse has no authority to regulate the website—Frederick has not purposefully availed himself of the school environment, and Morse's discovery of the site through a random Google search is entirely unrelated to the school. Furthermore, because the content of the site is unmistakably political in nature, it may not be regulable under *Morse*, even if it were classified as on-campus. The second hypothetical, in which Frederick accesses the site during a computer lab class and shows a friend at school, presents a closer call. In that case, the court must evaluate Frederick's intent in accessing the site. If Frederick accessed it only once, only showed its contents to one classmate, and intended no in-school effect, no school jurisdiction should follow.

The third variation, in which Frederick posts a floor plan of the school with an ominous countdown and message, presents the "intent to harm" type of purposeful availment, which is regulable under the effects test. The content of BH4J.com in this hypothetical raises a strong inference of intent to cause harm in the school environment. Absent highly probative countervailing evidence of contrary intent, a court should find that Frederick purposefully availed himself of the school environment,

230. *See* Calvert, *supra* note 5, at 286 ("A teachable moment arises when administrators . . . confront students about their speech activities. . . . They should inform students that the constitutional right of free speech carries with it a concomitant responsibility not to abuse it.").

231. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).

232. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007) ("Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.").

and thus rendered his website subject to regulation. Note in this hypothetical that the unilateral action of Frederick's classmate in telling Principal Morse of the website would not support school authority on its own, but would certainly lead Morse to the site, and would allow her the chance to discover its potentially dangerous content.

The final variation on BH4J.com, in which the content is vulgar and juvenile and Frederick e-mails the link to fifteen of his friends, presents the *Wisniewski* problem. Frederick has shown the site to so many of his classmates that it is reasonably foreseeable that the site will "come on campus." If he were unlucky enough to live in the Second Circuit, Frederick's site could clearly be shut down by the school. Under the framework presented here, however, the school must demonstrate more substantial contacts with the school environment before it may impact Frederick's speech, no matter how objectionable. The First Amendment, even applied in light of the school environment, should tolerate no less.

E. POTENTIAL OBJECTIONS

Applying the rules of personal jurisdiction by analogy to school attempts to censor student cyberspeech provides a systematic way of evaluating schools' claims of authority without resorting to content-based decision making. However, at least two distinct objections to the approach may be raised. First, it could be said that while this framework would help judges make ex post determinations of the validity of school action, it does little to aid school administrators or students in making ex ante decisions about real-world policy. Second, in light of Columbine and other recent incidents, this approach may needlessly tie the hands of school administrators who try to proactively protect their schools from potentially dangerous students. Neither objection is fatal, and the second actually points to a systematic benefit that the personal jurisdiction perspective brings to the question.

1. Administrability

Underlying much of personal jurisdiction jurisprudence is the assumption that a person's purposeful availment of a particular state's laws makes it reasonable and expected that that person might be haled into the courts of that state.[233] One ob-

233. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76 (1985).

jection to that proposition is that, until a court has pronounced a particular kind of behavior sufficient to support jurisdiction, no average person could predict what actions will give rise to jurisdiction and what actions will not. A similar objection could be made to applying personal jurisdiction principles to student cyberspeech—how is a principal or a student to know what is permitted and what is forbidden until a court rules on the issue?

In this case, a difference between student cyberspeech and personal jurisdiction answers this objection. First, the total universe of possible factual scenarios of school censorship of student cyberspeech is vastly smaller than that of individuals and their relationships with the laws of the various states. Therefore, under this approach, a body of law should quickly develop to give administrators a ready set of rules for making these types of decisions.[234] Second, the very existence of a clear minimum contacts requirement in order for school jurisdiction to arise is a significantly brighter line than currently exists. Finally, the existence of a framework for review—no matter how fuzzy its contours—will encourage school administrators to look more carefully at the facts of a particular situation before blindly censoring student cyberspeech. In an age of ever-increasing online presence on the part of students, that can only be a good thing.

2. School Violence and the Availability of Alternative Remedies

The second major objection to the personal jurisdiction perspective is that it unfairly ties the hands of school administrators at the very time that they need to be liberated to proactively prevent tragedies.[235] Teachers and principals must be granted a very free hand so that they can effectively ensure the physical safety of the school environment. Because troubled students may pour out their violent plans online, that hand's reach should extend beyond the schoolhouse gate and onto the Internet. The flaw in this objection is that it expects far too much of schools, in terms of the regulation of student behavior.

234. Such a body of bright-line rules has developed in certain areas of Fourth Amendment jurisprudence. *See, e.g.*, United States v. Watson, 423 U.S. 411, 423–24 (1976) (establishing a bright-line rule to avoid needless litigation).

235. *See, e.g.*, Janofsky, *supra* note 2 (discussing the 1999 shooting at Columbine High School); Chris Maag & Ian Urbina, *Student, 14, Shoots 4 and Kills Himself in Cleveland School*, N.Y. TIMES, Oct. 11, 2007, at A22 (discussing the 2007 shooting at a Cleveland high school).

In *J.S.*, the student cyberspeech case involving the most threatening and potentially disturbing expression, the victim of Swidler's vituperation had a perfectly adequate means of redress: the civil justice system.[236] In addition to requesting a medical sabbatical, the much-maligned Mrs. Fulmer sued Swidler for defamation, invasion of privacy, loss of consortium, and interference with contractual relations.[237] If speech is so threatening as to become actionable—and this would encompass so-called cyberbullying[238]—the courts already provide a remedy. Both the juvenile justice system and the First Amendment exception for true threats and incitement are sufficient to punish truly dangerous behavior, and denying a school the authority to censor speech does not strip it of the ability to refer potentially troubled students to counseling.

Saddling a school with the responsibility of spotting and neutralizing potentially murderously disaffected students before they can do damage imposes too much responsibility on the school. The most effective way to ensure that troubled students receive the help they need is not for schools to zealously police their every online encounter. That responsibility, rather, should rest with their parents, who are far better suited to monitor and shape their children's activities on the Internet.[239] The fundamental fairness assumption underlying the doctrine of personal jurisdiction is that, even if a particular state cannot exercise its judicial power over a particular defendant, there is some state, somewhere, in which the injured party can get redress. Similarly, the responsibility for the well-being of students should neither begin nor end with the school; schools are only one part of the community- and family-based network for watching out for our nation's most vulnerable citizens: its children.[240]

236. Calvert, *supra* note 5, at 247–48.

237. *Id.*

238. *Cf.* Thomas E. Wheeler II, *Lessons from* The Lord of the Flies*: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 EDUC. L. REP. 227, 244 (2007) ("[W]hile school administrators are given broad discretion [to regulate student speech], they must resist the temptation to over regulate.").

239. *See id.* at 244 ("[T]he ethical responsibility for individual conduct must rest with the individual, and not the schools. The primary teachers in this regard are parents and families, not governmental agencies.").

240. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

CONCLUSION

Student cyberspeech presents a tempting target for school administrators. Their students, who in class may be sullen and uncommunicative, are transformed into loquacious, vibrant community members online and post their innermost thoughts and feelings with reckless abandon, for anyone to read. But this unparalleled access to student speech must not be allowed to transform into unparalleled censorship of student speech. The Supreme Court has clearly delineated when a school may censor student expression that takes place on campus. In the realm of off-campus student cyberspeech, however, both courts and administrators lack any clear method to determine when a school has the power to censor student expression. Analogizing to the principles of personal jurisdiction provides an opportunity for a clear inquiry that does not impermissibly examine the content of student cyberspeech. This approach would allow administrators to regulate that cyberspeech that might genuinely be of concern to the school, while at the same time permit courts to give students' off-campus, online expression the highest degree of First Amendment protection.