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## Digitizing the Schoolhouse Gate: Protecting Students' Off-Campus Cyberspeech by Switching the Safety on Tinker's Trigger

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## DIGITIZING THE SCHOOLHOUSE GATE: PROTECTING STUDENTS' OFF-CAMPUS CYBERSPEECH BY SWITCHING THE SAFETY ON *TINKER*'S TRIGGER

*Joshua Rieger*\*

### Abstract

Secondary-school students regularly engage in cyberspeech both inside and outside the schoolhouse gate. Internet-era forms of communication allow these students to produce off-campus cyberspeech that can easily be accessed or brought onto campus by other students or faculty. As early as the 1990s, public-school administrations began punishing students for off-campus cyberspeech, accessed or brought onto campus, that the administrations deemed threatening, intimidating, harassing, or generally inappropriate for the school setting. Parents continue to challenge public-school administrations' punishments of their children by filing civil suits in federal courts claiming these administrations violated their children's First Amendment right to free speech. Whether parents' challenges are successful usually turns upon whether the students' off-campus speech causes, or can be reasonably forecasted to cause, a substantial disruption to school administration under *Tinker*'s substantial-disruption test.

This Note addresses the conflict that arises when public-school administrations punish students for off-campus cyberspeech, pitting a student's right to free speech against a school's duty to provide students a safe, nurturing environment. This Note discusses how federal circuit and district courts apply different standards for triggering *Tinker*'s test and explains why the holdings and dicta in *Tinker* and its progeny cases challenge the application of *Tinker*'s test to off-campus cyberspeech cases. This Note offers a dual proposal that more accurately reflects the Court's school-speech jurisprudence and better protects students' right to free speech. First, federal circuit and district courts should decline to apply *Tinker*'s test to off-campus cyberspeech cases. *Tinker* and its progeny support greater protections for off-campus speech. At minimum, lower federal courts should use a more stringent standard for triggering *Tinker*'s test. Second, if federal courts continue to apply *Tinker*'s test, then states should enact laws prohibiting school officials from punishing students for off-campus cyberspeech, except when that speech constitutes a true threat to the school community or is adjudicated as unlawful, as in cases of cyberbullying, harassment, or defamation.

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\* J.D., University of Florida Levin College of Law; B.A., *summa cum laude*, University of Florida. For her endless patience, I dedicate this Note to my wife, Jacquelyn. For their immeasurable support, I thank my family and friends, professors and teachers, and colleagues at the *Florida Law Review*.

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## INTRODUCTION

Since 2008, the U.S. Supreme Court has denied several petitions for writ of certiorari in First Amendment cases addressing whether public-school administrations may punish public secondary-school students<sup>1</sup> for their cyberspeech<sup>2</sup> created outside the schoolhouse gate during non-school hours.<sup>3</sup> The most recent of these cases, *Bell v. Itawamba County School Board*,<sup>4</sup> concerned the punishment of Taylor Bell, a high-school student from Mississippi.<sup>5</sup>

During winter break of 2011, Bell produced a rap song and posted it from his personal computer to his Facebook account.<sup>6</sup> In his rap, Bell

1. This Note addresses cases concerning public-high-school and middle-school students. Cases concerning private-school students, public-elementary-school students, or private- and public-college students are outside the scope of this Note.

2. This Note defines cyberspeech as any form of speech produced over an internet or wireless connection, such as e-mailing, posting, blogging, texting, messaging, and other similar forms of communication (e.g., tweeting on Twitter or liking on Facebook).

3. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011); *Wisniewski v. Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

4. 774 F.3d 280 (5th Cir. 2014), *vacated en banc*, 799 F.3d 379 (5th Cir. 2015), *aff'g* 859 F. Supp. 2d 834 (N.D. Miss. 2012).

5. *Id.* at 282.

6. *Id.* at 285. The Fifth Circuit en banc described Bell's rap as "incredibly profane and vulgar" and published Bell's lyrics as follows:

Let me tell you a little story about these Itawamba coaches / dirty ass niggas like some fucking coacha roaches / started fucking with the white and know they fucking with the blacks / that pussy ass nigga W[.] got me turned up the fucking max / Fucking with the students and he just had a baby / ever since I met that cracker I knew that he was crazy / always talking shit cause he know I'm from daw-city / the reason he fucking around cause his wife ain't got no tidies / This niggha telling students that they sexy, *betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack* / Quit the damn basketball team / the coach a pervert / can't stand the truth so to you these lyrics going to hurt What the hell was they thinking when they hired Mr. R[.] / dreadlock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as hell / Talking about you gangsta / drive your mama's PT Cruiser / *Run up on T-Bizzle / I'm going to hit you with my rueger* Think you got some game / cuz you fucking with some juveniles / you know this shit the truth so don't you try to hide it now / Rubbing on the black girls ears in the gym / white hoes, change your voice when you talk to them / I'm a dope runner, spot a junkie a mile away / came to football practice high / remember that day / I do / to me you a fool / 30 years old fucking with students at the school Hahahah / You's a lame / and it's a dam shame / instead you was lame / eat shit, the whole school got a ring mutherfucker Heard you textin number 25 / you want to get it on / white dude, guess you got a thing for them yellow

alleged Michael Wildmon and Chris Rainey—athletic coaches at Bell’s high school—sexually harassed female students.<sup>7</sup> A few days after Bell’s posting, news of Bell’s rap reached Wildmon during school hours.<sup>8</sup> Because school computers blocked Facebook and Bell’s rap was only accessible by his Facebook friends, the only way Wildmon could access Bell’s rap was through a student’s cell phone with access to Bell’s Facebook page.<sup>9</sup> A student with access to Bell’s Facebook page provided Wildmon a cell phone to view Bell’s rap, in violation of the school’s regulation prohibiting students from bringing cell phones to school, and Wildmon immediately informed the principal of the rap.<sup>10</sup>

The school administration sent Bell home that day (a Friday) and due to heavy snowfall, Bell’s school remained closed until the following Friday.<sup>11</sup> During this period when school was closed, Bell created another version of his rap and posted this newer version from his personal computer to YouTube before classes resumed.<sup>12</sup> When classes did resume, the school administration removed Bell from class and suspended him until a disciplinary committee hearing could be held.<sup>13</sup> After the disciplinary committee hearing, both the disciplinary committee and the school board concluded some of Bell’s lyrics “threatened, intimidated, and/or harassed” the teachers, in violation of school-board policy and Mississippi law.<sup>14</sup> The disciplinary committee upheld Bell’s seven-day suspension, required Bell to transfer to an alternative school for the remainder of the nine-week grading period, and prohibited Bell from attending school functions.<sup>15</sup>

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bones / looking down girls shirts / drool running down your mouth / *you fucking with the wrong one / going to get a pistol down your mouth / Boww* OMG / Took some girls in the locker room in PE / Cut off the lights / you motherfucking freak / Fucking with the youngins / because your pimpin game weak / How he get the head coach / I don’t really fucking know / But I still got a lot of love for my nigga Joe / And my nigga Makaveli / and my nigga codie / W[.] talk shit bitch don’t even know me Middle fingers up if you hate that nigga / Middle fingers up if you can’t stand that nigga / *middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga.*

*Bell*, 799 F.3d at 384 (alteration in original).

7. *Bell*, 774 F.3d at 283.

8. *Id.* at 285 (“Wildmon received a text message inquiring about the song from his wife, who had been informed of Bell’s Facebook posting by a friend.”).

9. *Id.* at 285–86.

10. *Id.* at 286, 288.

11. *Id.* at 286.

12. *Id.*

13. *Id.*

14. *Id.* at 287–89.

15. *Id.*

Bell's mother brought a civil claim before a federal district court, pursuant to 42 U.S.C. § 1983,<sup>16</sup> alleging the school administrators violated her son's First Amendment right to free speech<sup>17</sup> by punishing him for his off-campus cyberspeech.<sup>18</sup> The district court ruled in the school's favor on cross-motions for summary judgment, finding the school officials acted reasonably under the Supreme Court's *Tinker v. Des Moines School District*<sup>19</sup> substantial-disruption test (hereinafter, *Tinker's test*) and "did not err in punishing Bell for publishing [the rap] to the public."<sup>20</sup>

On appeal to the U.S. Court of Appeals for the Fifth Circuit, Bell nearly prevailed on his First Amendment claim.<sup>21</sup> A Fifth Circuit panel reversed the district court's summary judgment in favor of the school board and declined to determine whether *Tinker's test* is applicable to off-campus cyberspeech.<sup>22</sup> Even if *Tinker's test* were applicable to Bell's case, the Fifth Circuit panel concluded that "the evidence [did] not support a finding . . . that Bell's song either substantially disrupted the school's work or discipline or that the school officials reasonably could have forecasted such a disruption."<sup>23</sup> Further, the rap neither "gravely or uniquely threaten[ed] violence" to the school community, nor constituted a "true threat" to the teachers' safety.<sup>24</sup>

The Fifth Circuit en banc reconsidered Bell's case, vacated its panel's earlier opinion, and affirmed the district court's summary judgment in favor of the school board.<sup>25</sup> Judge Rhesa Hawkins Barksdale, who dissented in the Fifth Circuit's panel opinion and characterized its holding

16. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .").

17. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

18. *Bell v. Itawamba Cty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

19. *Id.* at 840–41; *see* 393 U.S. 503, 513 (1969) ("[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."). For a discussion of *Tinker's* substantial-disruption test, see *infra* Section I.A.

20. *Bell*, 859 F. Supp. 2d at 840.

21. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 289, 304 (5th Cir. 2014), *vacated en banc*, 799 F.3d 379 (5th Cir. 2015), *aff'g* 859 F. Supp. 2d 834 (N.D. Miss. 2012).

22. *Id.* at 304.

23. *Id.*

24. *Id.*

25. *Bell*, 799 F.3d at 383.

as “absurd,”<sup>26</sup> authored the Fifth Circuit’s en banc opinion.<sup>27</sup> Judge Barksdale narrowly concluded *Tinker*’s test is applicable to off-campus cyberspeech “when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.”<sup>28</sup> Judge Barksdale also declined to adopt “any rigid standard [for when *Tinker*’s test should and should not apply]” or “adopt or reject approaches advocated by other circuits.”<sup>29</sup>

Because “a substantial disruption reasonably could have been forecast as a matter of law” by the school administration due to Bell’s “threatening, intimidating, and harassing language” towards teachers,<sup>30</sup> the Fifth Circuit en banc reasoned Bell’s speech was not constitutionally protected under *Tinker*’s test.<sup>31</sup> Therefore, it was unnecessary to determine whether Bell’s speech constituted a true threat.<sup>32</sup> The Fifth Circuit en banc held the school correctly punished Bell and did not violate his First Amendment rights.<sup>33</sup> Four judges dissented to the Fifth Circuit’s en banc opinion,<sup>34</sup> and Judge James L. Dennis, who authored the Fifth Circuit’s vacated panel opinion, criticized “the majority opinion [for] allow[ing] schools to police their students’ Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students’ rights.”<sup>35</sup>

Bell filed a petition for writ of certiorari with the Supreme Court, but the Court denied the petition.<sup>36</sup> With the Supreme Court denying certiorari in Bell’s case and all other off-campus cyberspeech cases,<sup>37</sup> the Court continues to deprive federal circuit and district courts of guidance on whether *Tinker*’s test should apply to off-campus cyberspeech cases—and if so, the appropriate standard for triggering *Tinker*’s test.<sup>38</sup>

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26. *Bell*, 744 F.3d at 307 (Barksdale, J., dissenting).

27. *Bell*, 799 F.3d at 383.

28. *Id.* at 396.

29. *Id.*

30. *Id.* at 398.

31. *Id.* at 400.

32. *Id.* True threats are not protected under the First Amendment. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding threats against President’s life were not true threats).

33. *Bell*, 799 F.3d at 398, 400.

34. *Id.* at 403, 433, 435.

35. *Id.* at 405 (Dennis, J., dissenting). For additional coverage of the *Bell* case, including concurrences and dissents to the Fifth Circuit’s en banc opinion, see Elizabeth A. Shaver, *Denying Certiorari in Bell v. Itawamba County School Board*, 82 BROOK. L. REV. 1539, 1571–80 (2017).

36. *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016).

37. See cases cited *supra* note 3.

38. See, e.g., *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1102–03 (C.D. Cal. 2010) (“The Supreme Court has yet to address the factual situation presented

This Note addresses various conflicts that arise when public-school administrations punish students for off-campus cyberspeech, pitting a student's right to free speech against a school's duty to provide students a safe, nurturing environment. Bell's case offers a useful window into many of these conflicts. First, should federal courts apply *Tinker's* test to off-campus cyberspeech cases? If so, what standard should federal courts utilize to trigger *Tinker's* test? Second, if a federal court does not apply *Tinker's* test, or *Tinker's* test is not satisfied, what types of cyberspeech still lack First Amendment protection? Third, what are the competing arguments for allowing school administrations to punish students for off-campus cyberspeech that satisfies *Tinker's* test, or prohibiting these administrations from doing so? Fourth, are there alternatives to punishment by school administrations? Lastly, there is a question that has not received great attention from legal scholarship: How can state law affect off-campus cyberspeech cases? This Note addresses these questions and related concerns as follows:

Part I examines the federal case law currently controlling off-campus cyberspeech cases. Part I analyzes how *Tinker* and its progeny cases support greater First Amendment protections for students' off-campus speech than on-campus speech and further details how federal circuit and district courts have established different standards for triggering *Tinker's* test.

Part II examines the relatively sparse state case law affecting off-campus cyberspeech cases, as well as federal case law considering how state law (e.g., constitutions, statutes, and regulations) could impact the federal cases.

Part III addresses whether courts' and school officials' concern for protecting the school environment serves as an adequate justification for allowing school administrations to punish students for their off-campus cyberspeech. Part III also questions to what extent other governmental or private causes of action, such as cyberbullying, harassment, and defamation, may be better suited to meet public policy goals and First Amendment principles than school administrative punishment.

Part IV presents a dual proposal for new federal and state approaches to address students' off-campus cyberspeech cases. First, this Note proposes lower federal courts engage in location-determinative analysis, recognizing a distinction between on-campus and off-campus cyberspeech. The lower federal courts can reject the application of *Tinker's* test to off-campus cyberspeech cases. More realistically, if lower federal courts continue applying *Tinker's* test, the lower federal courts can adopt a more stringent standard for triggering *Tinker's* test. Both

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by the case at hand—that is, whether a school can regulate student speech or expression that occurs outside the school gates, and is not connected to a school-sponsored event, but that subsequently makes its way onto campus, either by the speaker or by other means.”).



options are supported by the holdings and dicta in *Tinker* and its progeny supporting the proposition that students' off-campus speech is entitled to greater free-speech protection than students' on-campus speech. However, lower federal courts will probably continue along the current path.

Second, this Note proposes that states enact laws designed to expand students' right to free speech in the off-campus cyberspeech context beyond what is recognized by the lower federal courts' interpretations of the Court's school-speech jurisprudence. With such a law in place, a parent could more easily file a civil suit in state court rather than the less favorable federal court system.

### I. FEDERAL APPROACH TO OFF-CAMPUS CYBERSPEECH

In the 1969 landmark opinion of *Tinker v. Des Moines School District*, Supreme Court Justice Abe Fortas declared, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>39</sup> Justice Fortas's primary concern was students not losing their constitutional rights to free speech when entering through the schoolhouse gate, not exiting from it.<sup>40</sup> In three student-speech cases that followed, the Court carved exceptions to this declaration, noting when student speech loses its protections inside the schoolhouse gate.<sup>41</sup> Although neither *Tinker* nor its progeny established what test or standard should be applied to off-campus student-speech cases, *Tinker* and its progeny offered dicta that the student speech at issue, though not protected on-campus, would have been protected off-campus under the First Amendment.<sup>42</sup>

In off-campus cyberspeech cases arising since the late 1990s, federal circuit and district courts have concluded *Tinker* and its progeny permit school administrations to punish students for off-campus cyberspeech that satisfies *Tinker*'s test.<sup>43</sup> However, the lower federal courts have crafted different standards for triggering *Tinker*'s test.

Section I.A examines the Supreme Court's four landmark cases concerning student speech and the Court's silence as to whether *Tinker*'s test is applicable to off-campus student-speech cases. Section I.B discusses the circuit courts' creativity in applying *Tinker*'s test to off-campus cyberspeech cases, despite the Court's silence. Section I.C

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39. 393 U.S. 503, 506 (1969).

40. *Id.*

41. *See Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

42. *See infra* Subsection I.A.2.

43. *See Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177–80 (E.D. Mo. 1998).

discusses how district courts that lack a binding circuit decision are then persuaded to adopt one or another of the circuits' different standards for triggering *Tinker's* test.

### A. *U.S. Supreme Court's Silence on Off-Campus Cyberspeech*

From 1969 to 2007, the Supreme Court decided four landmark cases concerning on-campus student speech.<sup>44</sup> But the Court remains deafeningly silent on cases addressing students' off-campus cyberspeech,<sup>45</sup> and off-campus student speech in general. The practical effect is federal circuit and district courts will likely continue to broadly interpret and apply *Tinker's* test to off-campus cyberspeech cases.

#### 1. *Tinker v. Des Moines School District*

In December 1969, two high-school students and one middle-school student from Des Moines, Iowa, crafted a plan to wear black armbands to school in protest of the Vietnam War.<sup>46</sup> The students' principals learned of the plan and adopted a policy restricting students from wearing armbands.<sup>47</sup> When the students refused to remove their armbands at school, the principals suspended the students until they decided to return to school without the armbands.<sup>48</sup> The students' fathers filed a complaint with the U.S. District Court for the Southern District of Iowa asking for an injunction prohibiting the school from punishing the students.<sup>49</sup> The district court ruled in the school's favor, and a divided U.S. Court of Appeals for the Eighth Circuit en banc affirmed the district court's decision without an opinion.<sup>50</sup>

The Supreme Court reversed the circuit court's decision and remanded, opining "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>51</sup> To protect students' First Amendment right to free speech, the Court adopted a substantial-disruption test, that is, *Tinker's* test. To permissibly regulate student's "pure speech,"<sup>52</sup> a school must provide evidence "showing that engaging in the forbidden conduct would

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44. See *infra* Subsections I.A.1–I.A.2.

45. See cases cited *supra* note 3.

46. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 504 (1969).

47. *Id.* at 504.

48. *Id.*

49. *Id.*

50. *Id.* at 504–05.

51. *Id.* at 506, 514.

52. *Id.* at 508.

‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’<sup>53</sup> The Court concluded the schools presented no evidence that the armbands caused, or could reasonably be foreseen to cause, a substantial disruption.<sup>54</sup> Supreme Court Justice Hugo Black dissented to this decision, proclaiming that “[s]chool discipline . . . is an integral and important part of training our children to be good citizens—to be better citizens. . . . This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”<sup>55</sup>

Where the Court unwittingly set the stage for controversy concerning off-campus student-speech cases was its discussion of where, when, and how student speech loses its First Amendment immunization.<sup>56</sup> The Court stated its ruling would not be “confined to the supervised and ordained discussion which takes place in the classroom” or “embrace merely the classroom hours.”<sup>57</sup> The Court specifically qualified that this statement applies to students’ right to free speech in places like cafeterias, playing fields, or the general school campus.<sup>58</sup> Although the Court appeared to restrict its holding to on-campus student speech, the Court later articulated and arguably expanded upon *Tinker*’s test, opening the door for lower federal courts looking to apply *Tinker*’s test to off-campus student-speech:

[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>59</sup>

In *Tinker*’s progeny cases, the Court considers whether *Tinker*’s test is applicable to on-campus student speech, and each case presents an example of when the Court finds a school has an important interest in light of its “special characteristics”<sup>60</sup> outweighing a student’s First Amendment right to free speech.<sup>61</sup> Notably, in each of *Tinker*’s progeny cases, the Court explicitly stated in dicta that the unprotected on-campus

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53. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

54. *Id.* at 509–10.

55. *Id.* at 524–25 (Black, J., concurring).

56. *See id.* at 512–13 (majority opinion).

57. *Id.* at 512.

58. *Id.* at 512–13.

59. *Id.* at 513.

60. *Id.* at 506.

61. *See infra* Subsection I.A.2.

student speech at issue would have been protected under the First Amendment had the speech been made off campus.<sup>62</sup>

## 2. *Tinker*'s Progeny Support Location-Determinative Analysis

The Supreme Court considered three student-speech cases after its decision in *Tinker*, each carving an exception to students' right to free speech on campus: *Bethel School District Number 403 v. Fraser*,<sup>63</sup> *Hazelwood School District v. Kuhlmeier*,<sup>64</sup> and *Morse v. Frederick*.<sup>65</sup> The *Fraser* Court affirmed the school punishment of a student for vulgar language during a speech at a school assembly.<sup>66</sup> The *Hazelwood* Court affirmed the school censorship of two stories in a school-sponsored newspaper concerning a student's pregnancy and the divorce of a student's parents.<sup>67</sup> The *Morse* Court affirmed the school's punishment of a student who unfurled a banner at a school-sponsored event that read, "BONG HiTS 4 JESUS."<sup>68</sup> While the Court ruled the student's speech was not protected under the First Amendment in each of these cases, the Court opined that had the same speech in these cases been made off campus, it would have been protected under the First Amendment.<sup>69</sup> These conclusions by the Court support the contention that the location of student speech (for example, on-campus versus off-campus) is a relevant factor when determining the degree to which student-speech is protected under the First Amendment (the "location-determinative analysis"). Therefore, there is a strong argument to be made that location-determinative analysis should be applied when determining whether *Tinker*'s test is applicable to off-campus student-speech cases, including those involving cyberspeech.

### a. *Bethel School District No. 403 v. Fraser*

*Fraser* arose in April 1983 when—at a school assembly of roughly 600 students—one student gave a speech nominating another student for an elected position.<sup>70</sup> The *Fraser* Court described the student's speech as an "elaborate, graphic, and explicit sexual metaphor"<sup>71</sup> and upheld the

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62. See *infra* Subsection I.A.2.

63. 478 U.S. 675 (1986).

64. 484 U.S. 260 (1988).

65. 551 U.S. 393 (2007).

66. *Fraser*, 478 U.S. at 685.

67. *Hazelwood*, 484 U.S. at 272–74.

68. *Morse*, 551 U.S. at 397.

69. See *infra* Subsections I.A.2.a, A.2.b, A.2.c.

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

71. *Id.* at 677–78. The student's speech read:

school administration's three-day suspension of the student for a violation of the school's regulation prohibiting obscene language.<sup>72</sup> To rationalize why the student's nomination speech was not afforded the protections granted by *Tinker*, the *Fraser* Court looked to the school's interest in educating students to become good citizens<sup>73</sup> and society's interest in protecting minors from inappropriate language.<sup>74</sup> The Court concluded "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>75</sup> The majority explicitly qualified the school board's authority to regulate student speech "in the classroom or in the school assembly," denoting a limit to where the school board's authority exists.<sup>76</sup> Nevertheless, because the student produced a provocative speech at a school assembly, the Court held that the school did not violate the student's First Amendment right to free speech.<sup>77</sup>

In a concurring opinion, Supreme Court Justice William J. Brennan, Jr. specifically addressed the breadth of *Fraser*'s holding.<sup>78</sup> Justice Brennan reasoned, "If [the student] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest otherwise."<sup>79</sup> Although Justice

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

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be.

*Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1357 (9th Cir. 1985).

72. *Fraser*, 478 U.S. at 678, 685. The school rule provided, "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678. This rule's language clearly tracks the language of *Tinker*'s substantial-disruption test.

73. *Id.* at 683.

74. *Id.* at 684–85.

75. *Id.* at 683.

76. *Id.*

77. *Id.* at 685.

78. *Id.* at 688 (Brennan, J., concurring).

79. *Id.* (citations omitted).

Brennan's logic is merely persuasive, it provides support for the contention that location-determinative analysis is warranted in determining whether *Tinker*'s test is applicable to off-campus student-speech cases.

b. *Hazelwood School District v. Kuhlmeier*

*Hazelwood* arose in May 1983 when a high-school journalism class submitted to the principal page proofs for the school's newspaper.<sup>80</sup> The principal censored two stories—one related to a student's pregnancy and another related to the divorce of a student's parents.<sup>81</sup> The newspaper went to print without those two stories, and the parents of three student journalists filed an action in the United States District Court for the Eastern District of Missouri claiming the school violated the students' First Amendment right to free speech.<sup>82</sup> The Supreme Court ultimately held this on-campus student-speech was not protected under the First Amendment.<sup>83</sup>

The *Hazelwood* Court began its analysis looking to *Tinker* and *Fraser*, affirming the special characteristics of the school environment and that students' rights are not co-extensive with those of adults.<sup>84</sup> The *Hazelwood* Court distinguished the question in *Tinker*—"whether the First Amendment requires a school to tolerate particular student speech"—from the instant question—"whether the First Amendment requires a school affirmatively to promote particular student speech."<sup>85</sup> Finding the key difference to be that the speech in *Tinker* did not bear the "imprimatur of the school," whereas a school newspaper created through the school's journalism curriculum does bear a school's imprimatur,<sup>86</sup> the *Hazelwood* Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>87</sup>

Importantly, in dicta, the *Hazelwood* Court interpreted *Fraser* to hold that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not

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80. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

81. *Id.*

82. *Id.* at 263–64.

83. *Id.* at 272–73.

84. *Id.* at 266.

85. *Id.* at 270–71.

86. *Id.* at 271.

87. *Id.* at 273.

*sensor similar speech outside the school.*”<sup>88</sup> Again, the Court clearly provides support for the contention that location-determinative analysis is warranted in determining whether *Tinker*’s test is applicable to off-campus student-speech cases.

c. *Morse v. Frederick*

*Morse* arose in January 2002 when an Alaskan high school held an event to allow students to watch the Olympic Torch Relay.<sup>89</sup> Students were permitted to stand along the sidewalk in front of the high school or the sidewalk across from the high school as the relay passed by.<sup>90</sup> A group of high-school students standing on the sidewalk across from the high school “unfurled a 14-foot banner bearing the phrase: ‘BONG HiTS 4 JESUS.’”<sup>91</sup> When the principal demanded the students take down the banner, all students complied but one.<sup>92</sup> The in-compliant student received a ten-day suspension because the principal believed the banner violated the school policy prohibiting the advocacy of illegal-drug use.<sup>93</sup> The Supreme Court held the student did not have a First Amendment right to unfurl his banner.<sup>94</sup>

Similar to the *Fraser* and *Hazelwood* Courts, the *Morse* Court acknowledged the school environment’s special characteristics and the fact that students’ rights are not co-extensive with those of adults.<sup>95</sup> The *Morse* Court reasoned “[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.”<sup>96</sup> Thus, the *Morse* Court held the school could permissibly “restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”<sup>97</sup>

Reasoning that student speech at school events falls within the purview of on-campus student speech, the *Morse* Court avoided the uncomfortable task of addressing what standards or tests govern off-campus student speech. Professor Mary-Rose Papandrea argued that the

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88. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)) (emphasis added).

89. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

90. *Id.*

91. *Id.*

92. *Id.* at 398.

93. *Id.*

94. *Id.* at 400.

95. *Id.* at 396–97 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

96. *Morse*, 551 U.S. at 408 (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969)).

97. *Id.* at 403.

*Morse* Court missed a glaring opportunity to provide much-needed guidance in off-campus student-speech cases.<sup>98</sup> Nevertheless, the *Morse* Court—like the *Hazelwood* Court—acknowledged in dicta how *Fraser*'s holding supports a distinction between on- and off-campus student speech,<sup>99</sup> providing support for the contention that location-determinative analysis is warranted in determining whether *Tinker*'s test is applicable to off-campus student-speech cases.

### 3. Effect of Denying Certiorari

Following the *Morse* decision, the Supreme Court received several petitions for writ of certiorari in off-campus cyberspeech cases.<sup>100</sup> By denying these petitions, the Court leaves the lower federal courts without guidance on what test or standard should be applied to off-campus cyberspeech cases. Perhaps the Court's silence shows an implicit approval of how the lower federal courts have handled these cases. Perhaps the Court's silence underscores a hesitancy to fashion a test or standard that may cause more issues than it solves as students' use of cyberspeech continues to evolve. One can only guess why the Court denied each petition for writ of certiorari in off-campus cyberspeech cases since 2008. The only outcome of the Court's silence that appears certain is lower federal courts will continue to support the application of *Tinker*'s test to off-campus cyberspeech cases.

#### B. Circuit Courts' Creativity in Triggering *Tinker*

While circuit courts uniformly hold *Tinker*'s test is applicable to off-campus cyberspeech cases, the circuit courts split on the standard for when *Tinker*'s test should be triggered.<sup>101</sup> Some circuit courts adopt a broad reasonable-foreseeability standard.<sup>102</sup> Other circuit courts adopt seemingly narrower standards, such as the Fifth Circuit's intent-based standard outlined in *Bell*.<sup>103</sup> In one case, the U.S. Court of Appeals for the Third Circuit assumed, without deciding, *Tinker*'s test applied because the school administration could not prove the student's off-campus cyberspeech caused a substantial disruption at school.<sup>104</sup>

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98. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1028 (2008) (“[In *Morse*], the Supreme Court missed an opportunity to determine whether public schools have authority to restrict student speech that occurs off school grounds.”).

99. *Morse*, 551 U.S. at 405 (“Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected.”).

100. See cases cited *supra* note 3.

101. See *infra* Subsection I.B.1.

102. See *infra* Subsection I.B.1.a.

103. See *infra* Subsection I.B.1.b.

104. See *infra* Subsection I.B.1.c.



Circuit courts are clearly conflicted and bereft of guidance on what standard is appropriate to trigger *Tinker*'s test in off-campus cyberspeech cases, and arguably, whether *Tinker*'s test should be applied in the first place. Two opinions—one concurrence and one dissent—from the Third Circuit case, *J.S. ex rel. Snyder v. Blue Mountain School District*,<sup>105</sup> provide a useful window into the arguments underpinning this issue.<sup>106</sup>

### 1. Circuit Courts' Different Standards for Triggering *Tinker*

Circuit courts have established different standards for triggering *Tinker*'s test in off-campus cyberspeech cases. At one end of the spectrum, the U.S. Court of Appeals for the Second and Eighth Circuits apply a broad reasonable-foreseeability standard.<sup>107</sup> At the other end, the Third Circuit assumed, without deciding, *Tinker*'s test is applicable to off-campus cyberspeech cases.<sup>108</sup> Between these poles, the U.S. Court of Appeals for the Fourth Circuit fashioned a nexus-based standard, similar to the reasonable-foreseeability standard.<sup>109</sup> The Fifth Circuit imposed an intent-based standard that is facially narrow but broad in its application.<sup>110</sup> Finally, the U.S. Court of Appeals for the Ninth Circuit tailored a true-threat-based standard for a case involving particularly threatening cyberspeech, but this standard and true threats will be discussed more fully in Subsection III.A.1.<sup>111</sup> The circuit courts' lack of coherence on what standard should trigger the application of *Tinker*'s test stems from the circuits stretching the holdings and dicta of *Tinker* and its progeny cases to capture students' off-campus cyberspeech.<sup>112</sup> This lack of coherence and stretching is particularly troubling in off-campus

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105. 650 F.3d 915 (3d Cir. 2011).

106. *See infra* Subsection I.B.2.

107. *See infra* Subsection I.B.1.a.

108. *See infra* Subsection I.B.1.c.

109. *See infra* Subsection I.B.1.b.

110. *See infra* Subsection I.B.1.b.

111. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (“[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.”).

112. *See id.* (“One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech. . . . [W]e are reluctant to try and craft a one-size fits all approach. We do not need to consider at this time whether *Tinker* applies to all off-campus speech . . . .”); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (“Further, in holding *Tinker* applies to the off-campus speech in this instance, because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits.”).

cyberspeech cases because application of *Tinker*'s test has been outcome-determinative.<sup>113</sup>

#### a. Second and Eighth Circuits

In *Wisniewski v. Board of Education*<sup>114</sup> and *Doninger v. Niehoff*,<sup>115</sup> the Second Circuit concluded *Tinker*'s test applies to off-campus cyberspeech that “poses a reasonably foreseeable risk that [it] would come to the attention of school authorities.”<sup>116</sup> The Eighth Circuit, in *D.J.M. v. Hannibal Public School District # 60*<sup>117</sup> and *S.J.W. ex rel. Wilson v. Lee’s Summit School District*,<sup>118</sup> adopted the Second Circuit’s reasonable-foreseeability standard.<sup>119</sup> In adopting a reasonable-foreseeability standard, the Second and Eighth Circuits are the circuits most likely to permit application of *Tinker*'s test in off-campus cyberspeech cases.

Of all forms of off-campus student speech, off-campus cyberspeech is most at risk of coming to the attention of a school official. For example, the cyberspeech at issue in *Wisniewski*, *Doninger*, *D.J.M.*, and *S.J.W.* were online instant messages,<sup>120</sup> blog posts,<sup>121</sup> and content on a student-created website.<sup>122</sup> Anyone with access to these and other forms of student cyberspeech can reproduce it in a matter of seconds at any location with Wi-Fi or cellular service. Thus, it is reasonably foreseeable that nearly all off-campus cyberspeech could make its way inside the schoolhouse gate and before a school official’s desk.<sup>123</sup>

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113. See, e.g., *S.J.W. ex rel. Wilson v. Lee’s Summit Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012) (“The [students’] success on the merits will depend on what standard the District Court applies. The School District argues [*Tinker*] should control. The [students] argue otherwise.”).

114. 494 F.3d 34 (2d Cir. 2007).

115. 642 F.3d 334 (2d Cir. 2011).

116. See *id.* at 347; *Wisniewski*, 494 F.3d at 38.

117. 647 F.3d 754 (8th Cir. 2011).

118. 696 F.3d 771 (8th Cir. 2012).

119. *Id.* at 778 (“Just like the online speech in . . . *Doninger*, the NorthPress posts ‘could reasonably be expected to reach the school . . . .’”); *Hannibal*, 647 F.3d at 766 (“Here it was reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities . . . .”).

120. *Hannibal*, 647 F.3d at 757; *Wisniewski*, 494 F.3d at 35.

121. *Doninger*, 642 F.3d at 340–41.

122. *Lee’s Summit*, 696 F.3d at 773.

123. In his concurrence to *Blue Mountain*, Judge Smith reasoned, “A bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters.” *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

### b. Fourth and Fifth Circuits

The Fourth and Fifth Circuits adopted what appear facially to be more stringent standards for triggering *Tinker*'s test. In *Kowalski v. Berkeley County Schools*,<sup>124</sup> the Fourth Circuit put forth a nexus-based standard considering whether there is a "sufficiently strong" nexus between the student's cyberspeech and the school's "pedagogical interests" to "justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."<sup>125</sup> One scholar argues that the Fourth Circuit actually adopted a reasonable-foreseeability standard, like the Second and Eighth Circuits.<sup>126</sup> Whether the Fourth Circuit adopted a nexus-based or reasonable-foreseeability standard is ultimately a distinction without a difference, as is discussed below.

In *Bell v. Itawamba County School Board*, the Fifth Circuit fashioned an intent-based standard considering whether "a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources."<sup>127</sup> Although these standards appear narrower than the reasonable-foreseeability standard for triggering *Tinker*'s test, the nebulous wording of these two standards allow judges leeway in determining what "sufficient nexus" and "intentionally directs at the school community" mean.

In *Kowalski*, the Fourth Circuit concluded a student's webpage entitled "Students Against Sluts Herpes" satisfied the nexus-based standard because:

[The student] knew that the electronic response would be . . . published beyond her home and could reasonably be expected to reach the school or impact the school environment. [The student] also knew that the dialogue would and did take place among . . . students whom she invited to join the [webpage] and that the fallout from her conduct and the speech within the group would be felt in the school itself.<sup>128</sup>

Here, the Fourth Circuit's reasoning for satisfying its nexus-based standard in *Kowalski* makes the application of the nexus-based standard

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124. 652 F.3d 565 (4th Cir. 2011).

125. *Id.* at 573.

126. Shaver, *supra* note 35, at 1595 n.435.

127. 799 F.3d 379, 396 (5th Cir. 2015).

128. *Kowalski*, 652 F.3d at 573.

virtually identical to the Second and Eighth Circuits' reasonable-foreseeability standard.<sup>129</sup>

The Fifth Circuit's intent-based standard also lacks teeth.<sup>130</sup> The Fifth Circuit concluded in *Bell* that the intent-based standard was satisfied because "[the student] intended his rap recording to reach the school community. . . . [The student] produced and disseminated the rap recording knowing students, and hoping administrators, would listen to it."<sup>131</sup> Here, the Fifth Circuit blurred an important distinction between a student intending cyberspeech to reach the school community (that is, an intent for the cyberspeech to be accessed on-campus) versus a student intending cyberspeech to reach a target audience including members of the school community.<sup>132</sup> A student knowing or hoping fellow students and administrators would access her off-campus cyberspeech does not necessarily equate to the student intending the cyberspeech to reach the school community, especially when the school has policies designed to limit off-campus speech from being accessed or brought on-campus.<sup>133</sup> Whether a student evinces an intent for off-campus cyberspeech to reach the school community should be a fact-intensive determination requiring more than a student's knowledge or hope that members in the school community access the off-campus cyberspeech.<sup>134</sup>

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129. See *supra* Subsection I.B.1.a.

130. See Shaver, *supra* note 35, at 1596–97 (“The intentional direction language used by the Fifth Circuit in *Bell* might, at first glance, appear to set a higher threshold because it would require that the student had directed speech into the school environment. However, it suffers from essentially the same defects as the reasonable foreseeability test. Again, the threshold for imposition of authority is quite low if a student’s intentional direction is determined by the extent to which the student spoke on a matter of interest to the school community and intended that other students would consider the speech. As with the reasonable foreseeability test, it seems that students would essentially have no protection if they sought to speak about a matter in any way related to school and if they wanted their speech to reach others. In addition, the intentional direction test has the added difficulty of asking school officials to determine the subjective intent of a student before imposing discipline.” (footnotes omitted)).

131. *Bell*, 799 F.3d at 396.

132. *Id.*

133. See *id.* at 430 (Dennis, J., dissenting) (including policies blocking specific website access on school computers and banning students’ use of or access to cell phones on-campus).

134. The importance of this distinction is supported by the Second and Eighth Circuits’ decisions addressing students’ distribution of underground periodicals, which is another common off-campus student-speech situation. Compare *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050–52 (2d Cir. 1979) (holding the school violated student’s First Amendment right to free speech by punishing the student for distributing an underground periodical off-campus), with *Bystrom v. Indep. Sch. Dist.*, 822 F.2d 747, 750, 755 (8th Cir. 1987) (holding constitutional a school policy prohibiting students from distributing their off-campus publications on campus). Consider two students who publish underground periodicals. The first student distributes the periodical to students and faculty just before entering the school premises as the school day begins, whereas the second student distributes the periodical to students and faculty just as they exit the school

### c. Third Circuit

The Third Circuit, in *Layshock v. Hermitage School District*<sup>135</sup> and *J.S. ex rel. Snyder v. Blue Mountain School District*, skirted the issue of establishing a standard for triggering *Tinker*'s test and just assumed, without deciding, that *Tinker*'s test is applicable to off-campus cyberspeech cases.<sup>136</sup> In both cases the Third Circuit concluded the school districts could not establish a substantial disruption or reasonably forecast a substantial disruption, thus failing *Tinker*'s test.<sup>137</sup> It is not clear what approach the Third Circuit will take when it reviews a district court decision with facts supporting a conclusion that a school district experienced a substantial disruption or could reasonably forecast a substantial disruption.<sup>138</sup> Although the Third Circuit currently lacks a standard triggering *Tinker*'s substantial-disruption test in off-campus cyberspeech cases, this circuit appears most amenable to taking a narrow view of *Tinker*'s holding.<sup>139</sup>

In a buried footnote of the *Blue Mountain* decision, the Third Circuit noted there was “some appeal” to the student’s argument “that the First Amendment ‘limits school official[s]’ ability to sanction student speech to the schoolhouse itself.”<sup>140</sup> The Third Circuit ultimately concluded the school administration violated the student’s right to free speech, so the

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premises after the school day ends. Both students know and hope students and faculty will access their periodicals. It is clear the first student evinces a stronger intent for his off-campus speech to reach the school community, and thus more likely to trigger *Tinker*'s test, because the students and faculty are more likely to bring the periodical with them inside the schoolhouse gate. But it is less clear whether the second student intended for the periodical to reach the school community.

135. 650 F.3d 205 (3d Cir. 2011).

136. *Id.* at 219 (“We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because . . . the district court found that [the student’s] conduct did not disrupt the school, and the District does not appeal that finding.”); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (“The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to [the student’s] speech in this case.”).

137. *Layshock*, 650 F.3d at 219; *Blue Mountain*, 650 F.3d at 930–31.

138. *See, e.g.*, *A.N. v. Upper Perkiomen Sch. Dist.*, 228 F. Supp. 3d 391, 400–01 (E.D. Pa. 2017) (denying suspended student’s emergency motion for preliminary injunction seeking immediate reinstatement because student was unlikely to succeed on the merits that school violated student’s right to free speech in punishing him for an Instagram post mashing up a Sandy Hook video and song about school shooting, which could reasonably lead the school district to forecast a substantial disruption).

139. *Blue Mountain*, 650 F.3d at 933 (“Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school. . . . An opposite holding would significantly broaden school districts’ authority over student speech and would vest school officials with dangerously overbroad censorship discretion.”).

140. *Id.* at 926 n.3.

majority declined to address the merits of location-determinative analysis.<sup>141</sup> Instead, Third Circuit judges took to concurrences and dissents to debate the merits of location-determinative analysis.<sup>142</sup>

## 2. Third Circuit Debate on Location-Determinative Analysis

In *Blue Mountain*, Judge Brooks Smith's concurrence (joined by four Third Circuit judges) and Judge Michael Fisher's dissent (joined by five Third Circuit judges) specifically debated the role location should play in determining whether *Tinker*'s test is applicable to students' off-campus cyberspeech cases. Judge Smith's concurrence argues against applying *Tinker*'s test to off-campus student speech, except off-campus speech that is "intentionally directed towards a school [which] is properly considered on-campus speech."<sup>143</sup> Judge Fisher's dissent argues *Tinker*'s test should govern "off-campus speech which causes substantial on-campus disruption under *Tinker*."<sup>144</sup> Both opinions differ on their interpretation of *Tinker*'s language, particularly the phrase "in class or out of it."<sup>145</sup> Both opinions also offer slippery-slope arguments, where Judge Smith thrusts a concern of school officials' overreach and Judge Fisher parries with a concern about "leav[ing] schools defenseless to protect teachers and school officials against [students'] attacks and powerless to discipline students for the consequences of their actions."<sup>146</sup>

Judges Smith and Fisher strike at the heart of issue debating whether the *Tinker* Court meant the phrase "in class or out of it" to limit application of *Tinker*'s test solely to on-campus speech or to off-campus speech as well. Judge Smith took the narrow view finding the *Tinker* Court meant to limit its test to on-campus speech, for "[h]ad the Court intended to vest schools with the unprecedented authority to regulate students' off-campus speech, surely it would have done so unambiguously."<sup>147</sup> Judge Smith supported his interpretation of the phrase "in class or out of it" by reading it in context with its immediately preceding sentences,<sup>148</sup> where the *Tinker* Court stated:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among

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141. *Id.* at 926 n.3, 931.

142. *Id.* at 936 (Smith, J., concurring); *id.* at 941 (Fisher, J., dissenting).

143. *Id.* at 940 (Smith, J., concurring).

144. *Id.* at 943 (Fisher, J., dissenting).

145. *Compare id.* at 937–38 n.1 (Smith, J., concurring), *with id.* at 942 (Fisher, J., dissenting).

146. *Id.* at 939 (Smith, J., concurring); *id.* at 941 (Fisher, J., dissenting).

147. *Id.* at 937–38 n.1 (Smith, J., concurring).

148. *Id.*

those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. *A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.*<sup>149</sup>

To Judge Smith, the plain meaning of the *Tinker* Court's language is unambiguous and limits *Tinker's* substantial-disruption test to on-campus student speech. Judge Fisher disagrees.

Judge Fisher found the phrase "in class or out of it" ambiguous, or as Judge Fisher put it, "unclear."<sup>150</sup> Judge Fisher was uncertain whether the phrase was meant to distinguish students' on-campus speech from off-campus speech—in which case *Tinker's* test would apply to off-campus student speech—or to distinguish students' on-campus speech in the classroom from other places on the school grounds—in which case *Tinker's* test would not apply to off-campus student speech.<sup>151</sup> But Judge Fisher was certain of two things. First, the Court did not address the issue of whether *Tinker's* test should apply to off-campus student speech; second, *Tinker's* test should determine the outcome of that case.<sup>152</sup>

Permeating Judges Smith and Fisher's debate are public policy rationales. Judge Smith expressed two concerns. How long should the long arm of the school's regulatory powers over student speech be?<sup>153</sup> And would applying *Tinker's* test to off-campus speech give rise to a scenario where adults could be regulated for their off-campus speech causing substantial disruptions in a school?<sup>154</sup> The first concern is clearly more legitimate than the second, which Judge Smith noted is "absurd."<sup>155</sup> Parents bring civil suits in federal courts precisely because they do not

149. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 512–13 (1969) (alteration in original) (emphasis added) (citations omitted) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

150. *Blue Mountain*, 650 F.3d at 942 (Fisher, J., dissenting).

151. *Id.*

152. *Id.* at 943.

153. *Id.* at 939 (Smith, J., concurring) ("Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.")

154. *Id.* at 940.

155. *Id.*

believe the school should have the regulatory power to punish their children for speech that occurred when the children were in the comfort of their homes or elsewhere outside the schoolhouse gate. Those parents do not share Judge Smith's concern that they will be punished by a school for their off-campus speech, not because *Tinker*'s test could not be applied equally between students and their parents, but because it is absurd to "extend[] *Tinker* beyond the public-school setting to which it is so firmly moored."<sup>156</sup>

Judge Fisher's public policy concern centered upon the distinction between the political speech protected in *Tinker* and the vulgar speech protected in *Blue Mountain*. Judge Fisher was most concerned about the negative effects the vulgar speech in *Blue Mountain* could have on educators and their families.<sup>157</sup> Whereas *Tinker* involved the political speech of wearing of an armband to protest the Vietnam War, which Judge Fisher agreed deserved protection under the First Amendment,<sup>158</sup> *Blue Mountain* involved the creation of a fake MySpace profile of an educator accusing that educator of sexual misconduct.<sup>159</sup> Judge Fisher did not see the profile as a nonsensical, juvenile joke, as the majority did.<sup>160</sup> Judge Fisher saw the profile, and ones similar to it, as capable of causing educators psychological harm to the point that they cannot interact sufficiently with students or quit their jobs altogether.<sup>161</sup>

Under the dissent's reasoning, it should be left to the school to determine "how it should handle violations of its policy that are of as serious and grave a matter as false accusations of sexual misconduct."<sup>162</sup> Judge Fisher believes "[s]chool administrators, not judges, are best positioned to assess the potential for harm in cases like this one, and we should be loath to substitute our judgments for theirs."<sup>163</sup> But a potential gap in Judge Fisher's public policy argument is that it presupposes *Tinker*'s test is applicable equally to on-campus and off-campus cyberspeech cases.

Shifting from the underlying public policy to the practical application of legal tests and standards for off-campus cyberspeech cases, Judge Smith notes that public policy concerns are "only half the battle."<sup>164</sup> The other half of the battle involves how courts should determine whether

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156. *Id.*

157. *Id.* at 946 (Fisher, J., dissenting).

158. *Id.* at 943–44.

159. *Id.* at 948–49.

160. *Id.* at 948.

161. *Id.* at 947.

162. *Id.* at 948.

163. *Id.*

164. *Id.* at 940 (Smith, J., concurring).



cyberspeech is off-campus or on-campus speech. Judge Smith admits this is a difficult task due to the “‘everywhere at once’ nature of the internet.”<sup>165</sup> Here, Judge Fisher agrees with Judge Smith.<sup>166</sup> Daring not to define an exact test or standard to be used to determine whether cyberspeech is on-campus or off-campus, Judge Smith explains why he would favor an intent-based standard over a reasonable-foreseeability standard.<sup>167</sup> Judge Smith would allow off-campus cyberspeech “intentionally directed towards a school [to be] properly considered on-campus speech.”<sup>168</sup> Viewed alone, this intent-based argument could single-handedly undermine Judge Smith’s argument that students’ off-campus cyberspeech discussing school matters should not be subject to *Tinker*’s test. Opponents would simply argue students’ off-campus cyberspeech concerning school matters is intentionally directed towards the school because the speech will inevitably reach students, teachers, and administrators.

Judge Smith is careful to qualify his argument for an intent-based standard with a countervailing argument against a reasonable-foreseeability standard.<sup>169</sup> Judge Smith warns that off-campus student speech does not “mutate into on-campus speech simply because it foreseeably makes its way onto campus.”<sup>170</sup> He further criticizes “[a] bare foreseeability standard [because it] could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters.”<sup>171</sup> Unsurprisingly, Judge Fisher favors adopting the Second Circuit’s reasonable-foreseeability standard<sup>172</sup> in applying *Tinker*’s test to off-campus student-speech cases. Noting public-school students’ near-universal access to wireless technology, Judge Fisher worries “offensive and malicious speech [] directed at school officials and disseminated online to the student body” will inevitably and negatively impact the school environment.<sup>173</sup>

To conclude their opinions, Judges Smith and Fisher again look to public policy rationales for support. On the one hand, Judge Smith proposes that his opinion supports a robust marketplace of ideas, where society must “tolerate thoughtless speech . . . in order to provide adequate

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165. *Id.*

166. *Id.* at 951 (Fisher, J., dissenting) (“The line between ‘on-campus’ and ‘off-campus’ speech is not as clear as it once was.”).

167. *Id.* at 940 (Smith, J., concurring).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See supra* Subsection I.B.1.a.

173. *Blue Mountain*, 650 F.3d at 951–52 (Fisher, J., dissenting).

breathing room for valuable robust speech.”<sup>174</sup> Judge Fisher proposes that his opinion supports an “orderly learning environment” necessary for children’s development.<sup>175</sup> A robust marketplace of ideas and an orderly learning environment are not mutually exclusive, and most would agree that society supports both. But in the context of students’ off-campus cyberspeech cases, these two ideas are at odds. Which idea comes out on top in these cases will depend largely on the standards lower federal courts use to trigger the application of *Tinker*’s test to off-campus cyberspeech cases.

### C. District Courts’ Adoption of Circuits’ Different Triggers

District courts faithfully adhere to the standards set by their respective circuit courts when determining whether to apply *Tinker*’s substantial-disruption test in students’ off-campus cyberspeech cases. Two cases out of the District Court for the District of Minnesota, *R.S. v. Minnewaska Area School District # 2149*<sup>176</sup> and *Sagehorn v. Independent School District # 728*,<sup>177</sup> illustrate how district courts followed the Eighth Circuit’s reasonable-foreseeability standard established in *DJM v. Hannibal Public School District # 60*.<sup>178</sup> Another case out of the District Court for the District of Oregon, *Burge ex rel. Burge v. Colton School District 53*,<sup>179</sup> illustrated how a district court applied the Ninth Circuit’s true-threat-based standard from *Wynar v. Douglas County School District*.<sup>180</sup>

What is more interesting is how district courts approach the issue of whether to apply *Tinker*’s test if its circuit has not established a standard for triggering *Tinker*’s test in an off-campus cyberspeech case. This

174. *Id.* at 941 (Smith, J., concurring).

175. *Id.* at 952 (Fisher, J., dissenting).

176. 894 F. Supp. 2d 1128 (D. Minn. 2012).

177. 122 F. Supp. 3d 842 (D. Minn. 2015).

178. 647 F.3d 754, 766 (8th Cir. 2011) (“Here it was reasonably foreseeable that D.J.M.’s threats . . . would be brought to the attention of school authorities and create a risk of substantial disruption of the school environment.”); *Minnewaska*, 894 F. Supp. 2d at 1140 (“The law on out-of-school statements by students can thus be summarized as follows: Such statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial disruption in that environment.”); *Sagehorn*, 122 F. Supp. 3d at 856–57 (following the *Minnewaska* framework).

179. 100 F. Supp. 3d 1057 (D. Or. 2015).

180. 728 F.3d 1062, 1069 (9th Cir. 2013) (“[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.”); *Burge*, 100 F. Supp. 3d at 1071 (“Under *Wynar*, if [the student’s] off-campus comments constitute ‘an identifiable threat of school violence’ and would substantially disrupt or materially interfere with school activities, then [the school] could discipline him without violating the First Amendment.”).

occurred in 2010 at the District Court for the Southern District of Florida (U.S. Court of Appeals for the 11th Circuit)<sup>181</sup> and the District Court for the Central District of California (9th Circuit pre-*Wynar*),<sup>182</sup> in 2011 at the District Court for the Northern District of Indiana (U.S. Court of Appeals for the Seventh Circuit),<sup>183</sup> and in 2013 at the District Court for the Western District of Tennessee (U.S. Court of Appeals for the Sixth Circuit).<sup>184</sup> After thorough discussions of *Tinker* and its progeny as well as other circuit and district court decisions, these district courts adopted different standards for triggering the application of *Tinker*'s test to their respective off-campus cyberspeech cases.

The district court in *Evans v. Bayer*<sup>185</sup> reasoned from Second and Third Circuit decisions that “[s]tudent off-campus speech, though generally protected, could be subject to analysis under the *Tinker* standard as well if the speech raises on-campus concerns,”<sup>186</sup> and the district court held that a student’s Facebook page was protected speech because the page did not cause a substantial disruption nor was it “lewd, vulgar, threatening, or advocating illegal or dangerous behavior.”<sup>187</sup>

The district court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*<sup>188</sup> applied a reasonable-foreseeability standard and found that it was reasonably foreseeable for a student’s YouTube video to make its way on-campus, triggering and satisfying *Tinker*'s test.<sup>189</sup>

The district court in *T.V. ex rel. R.V. v. Smith-Green Community School Corporation*<sup>190</sup> followed the Third Circuit’s decision in *Blue Mountain* assuming, without deciding, that *Tinker*'s test applied because the school could not prove students’ photos posted on the internet caused, or could reasonably be forecasted to cause, a substantial disruption.<sup>191</sup>

Finally, the district court in *Nixon v. Hardin County Board of Education*<sup>192</sup> failed to articulate a coherent standard, but it focused on whether the social-media posts had a “connection to [the school]” (nexus-based), was “made at school” (location-based), “directed at the school”

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181. See *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

182. See *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

183. See *T.V. ex rel. R.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767 (N.D. Ind. 2011).

184. See *Nixon v. Hardin Cty. Bd. of Educ.*, 988 F. Supp. 2d 826 (W.D. Tenn. 2013).

185. 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

186. *Id.* at 1370.

187. *Id.* at 1374.

188. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

189. *Id.* at 1107–08.

190. 807 F. Supp. 2d 767 (N.D. Ind. 2011).

191. *Id.* at 781, 784.

192. 988 F. Supp. 2d 826 (W.D. Tenn. 2013).

(intent-based), or “involved the use of school time or equipment” (nexus-based).<sup>193</sup> The *Nixon* court determined the student’s off-campus cyberspeech failed to both meet these standards and cause a substantial disruption.<sup>194</sup>

With the circuit courts divided on the standards for triggering *Tinker*’s test, it is logical that district courts without binding precedent would be divided as well. With differing standards at the circuit and district courts, it follows that the degree of First Amendment protection afforded to a student for her off-campus cyberspeech turns upon what standard the federal court uses to trigger *Tinker*’s test. Theoretically, state courts provide another option for parents wanting to bring civil suits against schools for punishing their children for off-campus cyberspeech. Part II demonstrates that this option has rarely been utilized.

## II. STATE APPROACH TO OFF-CAMPUS CYBERSPEECH

This Part’s title may be misleading because the state approach to handling students’ off-campus cyberspeech cases is virtually non-existent and guided almost entirely by the federal approach. It is the sheer lack of a state approach that makes this Part so critical in addressing a major opportunity for reforming how the legal system approaches students’ off-campus cyberspeech cases. Legal scholarship has given short attention to how state law can impact students’ off-campus cyberspeech cases.<sup>195</sup> Section II.A discusses the Supreme Court of Pennsylvania’s approach in *J.S. v. Bethlehem Area School District*<sup>196</sup>—one of the only cases, if not the only case, before a state’s highest court concerning a student’s on-campus cyberspeech.<sup>197</sup> Section II.B discusses how federal circuit and district courts hint at how state constitutional provisions, statutes, and regulations can play a larger role in students’ off-campus cyberspeech cases.

### A. State Approach Subordinate to Federal Approach

In *J.S. v. Bethlehem Area School District*, the Supreme Court of Pennsylvania considered whether a middle school permissibly punished—in accordance with the U.S. Constitution, not the Pennsylvania Constitution—a student for creating a website titled,

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193. *Id.* at 830, 839.

194. *Id.* at 839.

195. See Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 849–50.

196. 807 A.2d 847 (Pa. 2002).

197. As opposed to an off-campus cyberspeech case where the student does not access her off-campus cyberspeech while at school, *Bethlehem* is an on-campus cyberspeech case because the student accessed his website at school and showed it to a peer. *Id.* at 865.

“Teacher Sux,” and posting vulgar material on that website about principals and a teacher.<sup>198</sup> The reason the student did not allege a violation of his right to free speech under the Pennsylvania Constitution is that the right to free speech is no greater under the Pennsylvania Constitution than it is under the U.S. Constitution.<sup>199</sup> Therefore, the court set out to analyze this case in conformity with federal case law, namely *Tinker* and its progeny at that time, *Fraser* and *Hazelwood*.<sup>200</sup>

The court determined the “constitutional analysis of a student’s freedom of speech must include a number of considerations,” the first of which was the location of the speech.<sup>201</sup> The court found a “sufficient nexus between the web site and the school” to consider the student’s off-campus cyberspeech to be on-campus because the student accessed his website while at school and showed it to a fellow student, school faculty and administrators accessed the website at school, the website was “aimed . . . at the specific audience of students and others connected with this particular School District,” and the principal and a teacher were “subjects of the site.”<sup>202</sup> Therefore, the court held that “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”<sup>203</sup>

First Amendment protection of students’ on-campus cyberspeech is outside the scope of this Note, however, *Bethlehem* is important for two reasons. First, *Bethlehem* established that the court’s first consideration of the constitutional analysis was the location of the cyberspeech.<sup>204</sup> At first blush, it appears the court may be amenable to a location-determinative analysis of students’ off-campus cyberspeech cases, but buried in a footnote, the court acknowledged it would “not rule out a holding that purely off-campus speech may nevertheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are

198. *Id.* at 850–51.

199. *Id.* at 853 n.5 (citing *Commonwealth v. Edmunds*, 526 Pa. 374 (1991)); *see also* PA. CONST. art. I, § 7 (“The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak . . . on any subject, being responsible for the abuse of that liberty.”); *Edmunds*, 526 Pa. at 393 (“[T]he Pennsylvania Declaration of Rights was the ‘direct precursor’ of the freedom of speech and press.”).

200. *Bethlehem*, 807 A.2d at 860–64.

201. *Id.* at 864 (“First, a threshold issue regarding the ‘location’ of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?”).

202. *Id.* at 865.

203. *Id.*

204. *Id.* at 864.

satisfied.”<sup>205</sup> *Bethlehem* fits neatly within the federal jurisprudence on student off-campus cyberspeech cases.

The second reason *Bethlehem* is important is its breathtakingly broad holding of how off-campus speech can mutate into on-campus speech. If a student’s off-campus cyberspeech discusses her school or any of the school’s personnel and that cyberspeech is “brought onto the school campus” *by anyone*, the off-campus speech mutates into on-campus speech.<sup>206</sup> In other words, everything a student says about her school and its personnel through cyberspeech is on-campus speech under this holding, so long as it makes its way inside the schoolhouse gate. There would be no such thing as off-campus cyberspeech that addresses specific schools or school personnel.

Even if the court had determined the students’ cyberspeech took place off-campus, it also found that the cyberspeech caused a substantial disruption under *Tinker*’s test.<sup>207</sup> Therefore, unless the court determined *Tinker*’s test did not apply to students’ off-campus cyberspeech, then the court would reach the same conclusion: The school permissibly punished the student for his website and its content. Therefore, *Bethlehem* likely does not instill confidence in Pennsylvania’s parents and students contemplating bringing off-campus cyberspeech cases before Pennsylvania’s state courts.

As discussed in Subsection I.B.1, not a single federal circuit court has utilized location-determinative analysis in determining whether *Tinker*’s test is applicable to students’ off-campus cyberspeech cases. Yet, there is hope for students and their parents when looking closely at how lower federal courts addressed the applicability of state constitutions, statutes, and regulations in these cases.

### B. Federal Court Cases Addressing Applicability of State Law

Some of the lower federal court decisions, discussed earlier, address how state constitutions, statutes, and regulations may provide an effective means for students and their parents to bring claims that students’ off-campus cyberspeech should be provided greater protection than the U.S. Constitution’s First Amendment provides pursuant to lower federal courts’ interpretations of *Tinker* and its progeny cases. The only issue is that not all states provide constitutions, statutes, or regulations offering these protections. *Doninger v. Niehoff*, *J.S. ex rel. Snyder v. Blue Mountain School District*, and *R.L. v. Central York School District*<sup>208</sup>

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205. *Id.* at 864 n.11.

206. *Id.* at 865.

207. *Id.* at 869.

208. 183 F. Supp. 3d 625 (M.D. Pa. 2016).

each provide an example of how the states could offer new avenues for future litigation.

At the district court level in *Doninger*, the student claimed her school violated her right to free speech under the Connecticut Constitution.<sup>209</sup> The district court dismissed without prejudice the student's state constitutional claim by refusing to grant supplemental jurisdiction,<sup>210</sup> and the Second Circuit affirmed this decision.<sup>211</sup> The district court offered a variety of reasons for its dismissal—the brief spent less than two pages on the claim; the brief did not identify any Connecticut case deciding the Connecticut Constitution affords greater free-speech protections for public-school students than does the U.S. Constitution; the Connecticut Constitution may not afford money damages for a violation of one's free speech right; deciding whether a state constitution grants greater protections than the U.S. Constitution is not the role of federal courts.<sup>212</sup> Offering a glimmer of hope, the district court noted, “Ms. Doninger is, of course, free to pursue her [state constitutional] claims in state court.”<sup>213</sup>

In *J.S. ex rel. Snyder v. Blue Mountain School District*, the Third Circuit held that the school's suspension of the student for creating a fake MySpace profile of the principal violated his First Amendment right to free speech because the school did not satisfy *Tinker's* test.<sup>214</sup> Less obvious was the court's holding in a footnote that the school's punishment violated a Pennsylvania statute—24 Pa. Stat. Ann. § 5-510—limiting school districts to

adopt[ing] and enforce[ing] such reasonable rules and regulations . . . regarding the conduct and deportment of all pupils attending the public schools in the district, *during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school.*<sup>215</sup>

The Third Circuit looked to how a state case interpreted the statute and concluded that it prohibited the school district from “punishing students for conduct occurring outside of school hours—even if such conduct occurs on school property.”<sup>216</sup> Therefore, the Third Circuit reasoned that

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209. *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 228 (D. Conn. 2009); see CONN. CONST. art. I, § 4 (“Every citizen may freely speak . . . his sentiments on all subjects, being responsible for the abuse of that liberty.”).

210. *Doninger*, 594 F. Supp. 2d at 229.

211. *Doninger v. Niehoff*, 642 F.3d 334, 357 (2d Cir. 2011).

212. *Doninger*, 594 F. Supp. 2d at 228–29.

213. *Id.* at 229.

214. 650 F.3d 915, 931 (3d Cir. 2011).

215. *Id.* at 929 n.5 (alteration in original) (quoting 24 PA. CONS. STAT. § 5–510).

216. *Id.*

student conduct occurring during non-school hours and off campus would also be protected.<sup>217</sup>

In his dissent to *Blue Mountain*, Judge Fisher distinguished the facts of the state case interpreting the statute from the facts of *Blue Mountain*, finding that the state case involved student's conduct at school during non-school hours that "had no effect on the school," whereas *Blue Mountain* involved student conduct that "had a foreseeable impact on the operations of the classroom."<sup>218</sup> Therefore, Judge Fisher would hold that the statute is not as exhaustive as the majority holds and the statute does not prohibit regulations of "out-of-school conduct that threatens to materially interfere with the educational process."<sup>219</sup> Nevertheless, *Blue Mountain* provides an example where a state statute is interpreted to protect a student's off-campus cyberspeech.

In the federal district court case of *R.L. v. Central York School District*, a student claimed that the school violated his free speech rights under a Pennsylvania's Administrative Code, 22 Pa. Code § 12.9(b), which states "[s]tudents shall have the right to express themselves unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual's rights."<sup>220</sup> Finding that the language substantially similar to *Tinker's* test, the district court held that if the drafters intended to expand students' speech rights beyond those protected in *Tinker*, then the drafters would have done so explicitly.<sup>221</sup> Although this is an example where a state regulatory code failed to protect a student's off-campus cyberspeech, the analysis implicitly recognizes the possibility that a regulatory code could be drafted and implemented to shield students from school punishment for their off-campus cyberspeech.

What is garnered from these three federal cases is the possibility that states can enact laws providing their students stronger free speech protections for off-campus cyberspeech than the lower federal courts currently provide. These cases also offer two important notes for litigation strategy. First, to argue that a student receives greater free speech protections under a state constitution than under the U.S. Constitution, an off-campus cyberspeech case should only be brought in federal court if there is case law supporting such an argument. Otherwise, the argument should be brought before a state court. Second, to argue that a student receives greater free speech protections under a state statute or regulation than that under federal law, an off-campus cyberspeech case

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217. *Id.*

218. *Id.* at 949–50 (Fisher, J., dissenting).

219. *Id.* at 950, 950 n.7.

220. 183 F. Supp. 3d 625, 641 (M.D. Pa. 2016) (quoting 22 PA. CODE § 12.9(b)).

221. *Id.* at 642.



can be brought in federal or state court, but the outcome will likely turn upon the breadth of the statute, including whether the statute or regulation's language tracks or explicitly departs from the language of *Tinker's* test.

### III. PROTECTING THE SCHOOL ENVIRONMENT

Courts and school administrations have legitimate concerns for the protection of the school environment from the negative effects associated with students' off-campus cyberspeech. These concerns primarily involve the protection of students' and faculty members' well-being and reputations, as well as the promotion of an orderly learning environment. In his dissent to *Blue Mountain*, Judge Fisher summarized the concern that narrowly applying *Tinker's* test—or worse, scrapping or limiting the application of *Tinker's* test—to off-campus cyberspeech cases “leaves schools defenseless to protect teachers and school officials against [students'] attacks and powerless to discipline students for the consequences of their actions.”<sup>222</sup> This Part challenges this contention on two fronts. Section III.A challenges whether scrapping, limiting, or narrowing the application of *Tinker's* test will leave school administrations defenseless. Section III.B challenges whether school administrative punishment provides the best protection for the school environment, as well as society at large.

#### A. Alternatives to School Administrative Punishment

Lower federal courts' decisions in students' off-campus cyberspeech cases show school administrations are most concerned about three types of off-campus cyberspeech: (1) threatening; (2) bullying or harassing; and (3) defamatory. Most students' off-campus cyberspeech cases fall into one or more of these categories. To date, lower federal courts have utilized the application of *Tinker's* test to either uphold or enjoin school administrations' punishments of students for these types of off-campus cyberspeech. However, Judge Fisher's concern that scrapping, limiting, or narrowing the application of *Tinker's* test would leave school administrations defenseless against these types of off-campus cyberspeech does not appear well-founded. There are alternative governmental and private causes of action that can provide redress for these types of off-campus cyberspeech.

##### 1. True Threats

School administrations are never defenseless when punishing a student for her off-campus speech when that speech constitutes a true threat, defined as a: “serious expression of an intent to commit an act of

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222. *Blue Mountain*, 650 F.3d at 941 (Fisher, J., dissenting).

unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.”<sup>223</sup> The Supreme Court has concluded that true threats do not receive First Amendment protection from state punishment.<sup>224</sup> Thus, the application of *Tinker*'s test does not appear necessary for a court to uphold a school administration's punishment of a student for her off-campus cyberspeech if it constitutes a true threat.

Several federal circuit courts have addressed off-campus cyberspeech cases in which the cyberspeech either could have been deemed a true threat or was found to be a true threat. The Second and Fifth Circuits applied *Tinker*'s test and chose not to engage in true-threat analysis because the off-campus cyberspeech at issue satisfied *Tinker*'s test.<sup>225</sup> The Ninth Circuit fashioned a true-threat-based standard for triggering *Tinker*'s test because that “approach . . . strikes the appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students.”<sup>226</sup> Finally, the Eighth Circuit both engaged in true-threat analysis and applied *Tinker*'s test, finding the off-campus cyberspeech at issue not protected under either approach.<sup>227</sup> Despite this variation, these circuit court opinions support the contention that school administrations may punish students for off-campus cyberspeech that constitutes a true threat without any concern of abridging a student's First Amendment right to free speech. Various legal scholars have either agreed with or advocated for the position that *Tinker*'s test is not necessary to uphold school administrative punishment in the true-threat context.<sup>228</sup>

## 2. Cyberbullying and Online Harassment

Many legal scholars have recently addressed, and offered solutions on, the issue of how the legal system should address students' off-campus cyberspeech that constitutes cyberbullying or online harassment. At one

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223. *Virginia v. Black*, 538 U.S. 343, 344 (2003) (citation omitted).

224. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

225. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 400 (5th Cir. 2015); *Wisniewski v. Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38–39 (2d Cir. 2007).

226. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069–70 (9th Cir. 2013) (“[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.”).

227. *DJM v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 764, 766 (8th Cir. 2011).

228. See Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 661–62 (2011); Shaver, *supra* note 35, at 1581–88; Ari Ezra Waldman, *Triggering Tinker: Student Speech in the Age of Cyberharassment*, 71 U. MIAMI L. REV. 428, 430, 430 nn.6–7 (2017).

end, some scholars support triggering *Tinker*'s test through the reasonable-foreseeability standard and nexus-based standard.<sup>229</sup> At the other end, one scholar rejects the application of *Tinker*'s test but advocates for non-punitive, anti-bullying programs.<sup>230</sup> In the middle, one scholar even proposes the application of *Tinker*'s second, less-discussed "rights of others" prong.<sup>231</sup>

Due to the many terrible stories of children and young adults victimized by the horrors of cyberbullying and online harassment, states have enacted several laws related to the subject. All fifty states have some form of bullying or harassment law, or both: forty-nine states' laws require a school policy on cyberbullying; forty-eight states' laws explicitly include cyberbullying or online harassment, or both; forty-five states' laws permit school sanctions for cyberbullying; but only sixteen states permit school sanctions for off-campus cyberbullying or online harassment.<sup>232</sup> Some legal scholars advocate that more states should enact cyberbullying and online harassment laws permitting school sanctions for off-campus cyberbullying or online harassment.<sup>233</sup> Even if states do not enact such laws, many exist in application. For example, in *Kowalski v. Berkeley County Schools*, the Fourth Circuit triggered *Tinker*'s test and upheld the school administration's punishment of a student for her bullying and harassing off-campus cyberspeech, even though West Virginia's anti-bullying law did not provide for school sanctions for off-campus cyberbullying or online harassment.<sup>234</sup>

If lower federal courts are going to follow the *Kowalski* approach, then states' cyberbullying and online harassment laws will not be successful in limiting school administrative punishment to students' on-campus cyberspeech constituting cyberbullying or online harassment. It is possible school administrations could seek to honor legislative intent and refer cases of cyberbullying and online harassment to other governmental authorities, such as the police, or parents of those involved. Forty-four states enacted laws permitting criminal sanctions for cyberbullying or online harassment,<sup>235</sup> but some legal scholars have criticized these

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229. Goodno, *supra* note 228, at 696–97 (offering model statute); Lee, *supra* note 195, at 884 (supporting reasonable-foreseeability or nexus-based standard); Waldman, *supra* note 228, at 450–52 (arguing for "relational nexus" standard).

230. Papandrea, *supra* note 98, at 1098–1101.

231. Shaver, *supra* note 35, at 1589.

232. *Bullying Laws Across America*, CYBERBULLYING RESEARCH CTR. (2017), <https://cyberbullying.org/bullying-laws>.

233. Goodno, *supra* note 228, at 696–98; Lee, *supra* note 195, at 884.

234. Lee, *supra* note 195, at 884.

235. CYBERBULLYING RESEARCH CTR., *supra* note 232.

statutes as poorly drafted, overbroad, and potentially in violation of the First Amendment.<sup>236</sup>

### 3. Defamation

An action for defamation is an option for students and faculty members who are maligned by students' off-campus cyberspeech, whether it be parody profiles or negative reviews. Off-campus cyberspeech cases involving parody profiles and negative reviews, which are the cases best suited for a defamation action, are also the cases in which most students prevailed because the cyberspeech failed to satisfy the *Tinker*-test requirement that there be a substantial disruption, or the reasonable foreseeability of a substantial disruption.<sup>237</sup>

However, there are many reasons why faculty or students may prefer school administrative punishment to a defamation action. First, it is not clear whether an action for defamation can offer faculty and students any better odds in cases involving parody pages, negative reviews, or similar off-campus cyberspeech. Legal scholars have also recognized that defamation actions fail to offer remedies that "acknowledge the unique nature of the digital world."<sup>238</sup> Finally, parents and faculty members pursuing the defamation action could bear the high costs of civil litigation under certain fee arrangements.

#### B. School Administrative Punishment and School-to-Prison Pipeline

The school administrative punishment at issue in students' off-campus cyberspeech cases often consists of suspensions and expulsions. Both of these forms of punishment are "[e]xclusionary discipline . . . [that] is commonly understood to be a 'drastic' remedy, one with enormous downsides that can change the trajectory of a child's life forever."<sup>239</sup> A 2014 report by the Council of State Governments found that suspended students are "at a significantly higher risk of falling behind academically, dropping out of school, and coming into contact with the juvenile justice system."<sup>240</sup> The same report also explained that these "risks exist whether a student misses classes during in-school

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236. See Lyrisa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 Mo. L. REV. 693, 698 (2012).

237. See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207, 216 (3d Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011).

238. Lee, *supra* note 195, at 862.

239. Catherine J. Ross, "Bitch," *Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 718 (2016).

240. *Id.* at 721.

suspension, during an out-of-school suspension that lasts only a few days, or is excluded for weeks or months.”<sup>241</sup>

Proponents of applying *Tinker*’s test in off-campus cyberspeech cases dealing with cyberbullying or online harassment have put forth the argument that schools are in the best position to remedy these situations, in part because a suspension or expulsion does not derail a child or young adult’s life to the same degree as a criminal conviction for the same offense.<sup>242</sup> However, legal scholars examining the school-to-prison pipeline would caution that school administrative punishment consisting of exclusionary discipline may not be as effective a remedy as previously thought.<sup>243</sup>

#### IV. DIGITIZING THE SCHOOLHOUSE GATE

During the Internet era, technology has enabled students to produce various forms of cyberspeech accessible by anyone anywhere at any time. As a result, anyone with access to a student’s texts, e-mails, instant messages, posts, blogs, and other forms of cyberspeech can reproduce that student’s cyberspeech in a matter of seconds at any location with Wi-Fi or cellular service. According to Pew’s most recent research study of teens’ social media and technology use, of teens ages thirteen to seventeen, 92% go online every day, nearly 75% have access to a smartphone, and 71% join more than one social networking site.<sup>244</sup> The increasing rates of wireless-technology ownership and use make off-campus cyberspeech only that much easier to access and bring inside the schoolhouse gate. Thus, it is reasonably foreseeable that nearly all off-campus cyberspeech can make its way inside the schoolhouse gate and to a school administrator’s desk.

By using reasonable-foreseeability or nexus-based standards to trigger the application of *Tinker*’s test to students’ off-campus cyberspeech cases, lower federal courts are connecting a fiber-optic cable from the schoolhouse gate to a student’s electronic devices, mutating all off-campus cyberspeech into on-campus cyberspeech. As a result of this trend, legal scholars—like Professors Papandrea, Lee Goldman, and Clay Calvert—have argued *Tinker*’s test should either no longer be applied to

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241. *Id.* at 719.

242. *See, e.g.,* Lee, *supra* note 195, at 863–68.

243. *See* Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 287–98 (2012).

244. PEW RESEARCH CTR., *TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015: SMARTPHONES FACILITATE SHIFTS IN COMMUNICATION LANDSCAPE FOR TEENS 2–3* (2015), [http://www.pewinternet.org/files/2015/04/PI\\_TeensandTech\\_Update2015\\_0409151.pdf](http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf).

off-campus cyberspeech cases<sup>245</sup> or be revised to better protect students' right to free speech.<sup>246</sup>

This Part contends that the schoolhouse gate should be digitized to adequately protect students' First Amendment right to free speech in the Internet era. Section IV.A agrees with and builds upon those legal scholars' contention that *Tinker's* test should be scrapped or at least narrowed, arguing that students' cyberspeech, despite its "everywhere at once" nature, should be treated like other forms of student speech that receive greater free speech protections off-campus than they do on-campus. Section IV.A's new federal approach is designed to aid federal courts in this pursuit to unwire *Tinker's* test for the wireless world.

Section IV.B's new state approach is designed to help states switch the safety on *Tinker's* triggers by prohibiting school administrations from punishing students for their off-campus cyberspeech, except when that cyberspeech is either a true threat or unlawful (for example, cyberbullying, harassment, and defamation). This new state approach can adequately protect the school environment while providing students stronger free speech protections for their off-campus cyberspeech.

#### A. *Unwiring Tinker for the Wireless World: A New Federal Approach*

Erwin Chemerinsky once described *Tinker* as the "most important Supreme Court case in history protecting the constitutional rights of students."<sup>247</sup> *Tinker* originally stood for the proposition that students do not shed their constitutional rights when entering the schoolhouse gate.<sup>248</sup> Today, *Tinker* stands for the proposition that school administrations do not surrender their power to punish students after students exit the schoolhouse gate.

The standards federal courts use to trigger *Tinker's* test can determine whether students' off-campus cyberspeech will be protected under the First Amendment.<sup>249</sup> Further, Papandrea warns that once *Tinker's* test is triggered "many courts are far too deferential to schools' assertions that the challenged [student-speech] was substantially and materially

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245. Papandrea, *supra* note 98, at 1102 ("The application of *Tinker's* materially disruptive standard—regardless of whether it is preceded with an inquiry into whether the speech is properly labeled 'on-campus' or 'off-campus' speech—provides little protection to students' expressive rights. . . . [T]he *Tinker* test is ill-suited to speech in the digital media.").

246. Clay Calvert, *Off-Campus Speech, On Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 285 (2001); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 430 (2011).

247. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 527 (2000).

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

249. See *supra* Sections I.B–I.C.

disruptive to schoolwork or discipline.”<sup>250</sup> This Note argues that under a new federal approach, federal courts should either do one of two things. First, federal courts can scrap *Tinker*’s test and apply full First Amendment free speech protections to off-campus cyberspeech cases. Second, federal courts can employ a more stringent standard for triggering *Tinker*’s test.

Before discussing how to scrap or limit *Tinker*’s test, it is important to reiterate that several legal scholars believe *Tinker*’s test is beneficial in application to all or some of students’ off-campus cyberspeech cases. As discussed in Subsection III.A.2, some legal scholars, including Naomi Goodno, Philip Lee, and Ari Waldman, also argue that *Tinker*’s test serves a unique purpose in addressing cyberbullying and online harassment.<sup>251</sup>

In a study of federal district court cyberspeech cases, Professor Tova Wolking concluded that district courts “used [*Tinker*’s] balancing test to uphold students’ off-campus cyber expression unless it is outweighed by the countervailing rights of teachers or other students.”<sup>252</sup> Wolking favorably viewed how district courts approached and analyzed students’ off-campus cyberspeech cases,<sup>253</sup> and she created a three-part “Framework for Electronic (‘Cyber’) Speech Created Off School Grounds & Without School Resources.”<sup>254</sup> Wolking’s framework incorporates a nebulous nexus standard—that the “student brought [the cyberspeech] to school or [the cyberspeech] was accessed at school”—for triggering *Tinker*’s test.<sup>255</sup> Wolking’s nexus standard appears fairly easy to meet because the off-campus cyberspeech need only be accessed on-campus by anyone to satisfy the nexus requirement. If a student brings the cyberspeech to school, satisfying the other prong of Wolking’s nexus standard, it is arguable that federal courts would consider that on-campus cyberspeech.<sup>256</sup>

For those who seek to scrap, limit, or narrow the application of *Tinker*’s test to off-campus cyberspeech cases, one of the simpler approaches would be to treat off-campus cyberspeech like other forms of

250. Papandrea, *supra* note 98, at 1102.

251. See *supra* Subsection III.A.2.

252. Tova Wolking, *School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights*, 23 BERKELEY TECH. L.J. 1507, 1528 (2008) (“For example, school discipline will be upheld if a student’s off-campus cyber speech poses a ‘true threat’ to a teacher’s safety or incites on-campus disruption, but the student’s free speech rights will be upheld if he merely posts unflattering comments about his teacher or uses vulgar language on the Internet.”).

253. *Id.* at 1527–28 (“[L]ower courts have clung to *Tinker*; and more often than not, they rely on *Tinker* to uphold student rights.”).

254. *Id.* at 1524.

255. *Id.*

256. See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002).

off-campus student speech. Goldman is a supporter of this approach and argues that “student speech occur[ing] outside of school supervision . . . should receive the same First Amendment protection as non-student’s speech. Speech outside school supervision does not implicate the ‘essential characteristics’ of the school environment that justify special First Amendment treatment of student speech.”<sup>257</sup> Such a principle has been recognized by federal circuit courts in off-campus student-speech cases involving underground newspapers,<sup>258</sup> and even a case involving a student flipping the bird to a teacher in a restaurant parking lot.<sup>259</sup> However, proponents of *Tinker*’s test, and even opponents of *Tinker*’s test, in the off-campus cyberspeech context have already acknowledged that off-campus cyberspeech is unique because of its everywhere-at-once nature.<sup>260</sup>

Calvert took another approach, proposing a narrower standard than that of Wolking for when schools may punish students for an off-campus-created website:

[O]nly when a student “brings” his or her home-created Web site onto campus, either by downloading it on a school-controlled computer or by encouraging other students to do so, that a school should be able to assert discipline authority. And it is only in this situation that the *Tinker* substantial-and-material disruption standard would apply. . . . If the speech remains outside the proverbial schoolhouse gate, then administrators should not view juvenile Web site creators as students but, rather, as citizens who face the same legal repercussions in the civil and criminal justice systems as adults. School discipline becomes unnecessary in this situation.<sup>261</sup>

Calvert’s standard can be extended to all forms of cyberspeech, not just websites. Calvert’s standard would only trigger *Tinker*’s substantial-disruption analysis if the student either accesses the cyberspeech at school or encourages others to access the cyberspeech at school. Thus, it appears Calvert supports a standard that would only be triggered in a situation analogous to *J.S. v. Bethlehem Area School District*, in which the court

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257. Goldman, *supra* note 246, at 430.

258. Thomas v. Bd. of Educ., 607 F.2d 1043, 1050–52 (2d Cir. 1979); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 974–75 (5th Cir. 1972).

259. Klein v. Smith, 635 F. Supp. 1440, 1440–42 (D. Me. 1986).

260. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (Smith, J., concurring).

261. Calvert, *supra* note 246, at 285.



held a student accessing a website at school mutates off-campus cyberspeech into on-campus cyberspeech.<sup>262</sup>

Papandrea takes the extreme position arguing that *Tinker*'s substantial-disruption test be scrapped and First Amendment principles be applied to all cyberspeech cases whether on- or off-campus.<sup>263</sup> Papandrea argues that schools are punishing students for "[s]peech that in another time would escape the school's notice."<sup>264</sup> As technological devices become more intertwined with the lives of millennials, Papandrea fears how that technology may serve as "the basis for suspensions, expulsions, and other significant punishment."<sup>265</sup> Ultimately, Papandrea finds that *Tinker* now provides little in terms of First Amendment protections for students as federal courts employ reasonable-foreseeability standards in triggering *Tinker*'s substantial-disruption test and gives deference to school officials in forecasting of substantial disruptions in the off-campus cyberspeech context.<sup>266</sup>

Adopting Calvert's narrow standard or heeding Papandrea's call to scrap *Tinker* would certainly expand students' free speech rights in the context of off-campus cyberspeech cases. But it seems unlikely that lower federal courts would do either when the courts' analyses always account for the special characteristics of the school environment<sup>267</sup> and the "'everywhere at once' nature of the internet."<sup>268</sup> A more moderate approach that may appeal to lower federal courts is treating off-campus cyberspeech like other forms of off-campus student speech. Another option would be for lower federal courts to adopt the standard applied by the Fifth Circuit en banc in *Bell*: "*Tinker* governs our analysis . . . when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources."<sup>269</sup>

By including an intent element in this standard, district courts within the Fifth Circuit taking a more narrow view of this standard can look at the facts to determine whether the student intended to direct off-campus cyberspeech at the school community.<sup>270</sup> The Fifth Circuit en banc also required that the cyberspeech be reasonably understood as threatening,

262. 807 A.2d 847, 865 (Pa. 2002).

263. Papandrea, *supra* note 98, at 1102.

264. *Id.*

265. *Id.*

266. *Id.*

267. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 942 (3d Cir. 2011) (Smith, J., concurring).

268. *Id.* at 940.

269. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015).

270. *Id.*

harassing, or intimidating to a teacher or conceivably anyone related to the school environment such as principals, fellow students, and other school employees.<sup>271</sup> Although the Fifth Circuit en banc broadly applied its standard to the facts in *Bell*,<sup>272</sup> such a standard could be a first step toward adopting narrower standards and scrapping *Tinker*'s substantial-disruption test altogether, ushering in a new federal approach to off-campus cyberspeech cases.

### B. *Switching the Safety on Tinker's Trigger: A New State Approach*

With the Supreme Court remaining silent on off-campus cyberspeech cases,<sup>273</sup> and the circuit courts adopting different standards triggering *Tinker*'s test,<sup>274</sup> it is time for the states to supersede *Tinker* by enacting a law that adequately protects students' First Amendment right to free speech in the Internet-era.

This Note proposes the following statutory framework:

*School officials shall not punish a student for his or her off-campus cyberspeech, unless*

- (1) *school officials reasonably believe the student's off-campus cyberspeech constitutes a true threat to any member of the school community; or*
- (2) *the student's off-campus cyberspeech is declared or adjudicated by a court to be violative of federal or state law; or*
- (3) *the student who produced the off-campus cyberspeech*
  - (a) *intentionally brings that off-campus cyberspeech to school or intentionally causes another to bring that off-campus cyberspeech to school; and*
  - (b) *that off-campus cyberspeech causes a substantial disruption at school.*

Two issues that jurisdictions will need to resolve is how to define the terms *off-campus* and *cyberspeech*. With technological evolution, it is likely any definitions created will need to be amended. Beyond those issues, this statutory language is designed to accomplish three critical ends.

First, this statutory framework explicitly creates a sphere of protection for students' off-campus cyberspeech.

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271. *Id.*

272. *See supra* notes 25–35 and accompanying text.

273. *See supra* Subsection I.A.3.

274. *See supra* Section I.B.

Second, it recognizes exceptions to address courts' and school administrations' primary concerns. This statutory framework would not protect off-campus cyberspeech that would constitute a true threat. It would not protect off-campus cyberspeech declared or adjudicated by a court to be unlawful, such as cyberbullying or online harassment in the states that have enacted anti-cyberbullying statutes, as well as defamation.<sup>275</sup> It also would not protect a student's off-campus cyberspeech that is designed to disrupt the orderly learning environment in the event the student *intentionally* mutates off-campus speech into on-campus speech either through her own actions or through the actions of another.

Third, this statutory framework provides an avenue for students and their parents to bring a substantive claim in state courts or federal courts other than a violation of the child's First Amendment right to free speech or a corresponding provision in a state constitution.

Federal courts have provided a roadmap for legislators to draft statutes that can better protect students' right to free speech than the First Amendment in the off-campus cyberspeech context.<sup>276</sup> In *Blue Mountain* and *Central York*, the Third Circuit and the District Court for the Middle District of Pennsylvania respectively reasoned how a school violated a Pennsylvania statute that broadly protected a student's right to free speech, and how a school did not violate a Pennsylvania regulatory code because it tracked *Tinker's* language, thus granting no more free speech protection to the student than *Tinker's* test.<sup>277</sup> The proposed statutory language is broad in that it grants free speech protection to all students' off-campus cyberspeech, except under three narrow circumstances. The proposed statute can also be broadened to protect all student off-campus speech. In addition, this proposed language expressly departs from *Tinker's* language and lower federal courts' interpretation of *Tinker's* language.

By enacting a similar statutory framework or language that provides greater free speech protections for off-campus cyberspeech, state legislatures will again perform their noble service as laboratories of democracy by protecting students' right to free speech beyond that which is currently granted by the First Amendment to the U.S. Constitution.

## CONCLUSION

With the Supreme Court silent on whether *Tinker's* substantial-disruption test is applicable to students' off-campus cyberspeech, circuit courts creatively fashioned different standards to trigger *Tinker's* test.

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275. For thorough discussion about cyberbullying statutes and First Amendment issues associated with those statutes, see Lidsky & Garcia, *supra* note 236, at 693.

276. See *supra* Section II.B.

277. See *supra* Section II.B.

District courts adhere to circuit courts' binding precedent, but if a circuit had not decided what standard to apply, the district courts in those circuits applied the standard or standards the district courts found most persuasive. State courts, on the other hand, play virtually no role in students' off-campus cyberspeech cases, but federal courts have hinted at ways state law can provide new avenues to protect students' right to free speech.

This Note has proposed new federal and state approaches for off-campus cyberspeech cases. Federal courts could apply more stringent standards to trigger *Tinker's* test or scrap *Tinker's* test altogether in the off-campus cyberspeech context. But if the federal courts continue on their current course, state legislatures can enact statutes or regulations that supersede *Tinker* by providing parents the opportunity to file civil actions in state court. This Note's proposed statutory framework can provide for a state action addressing violations of a student's right to free speech if and when school administrations punish a student for her off-campus cyberspeech, unless that cyberspeech was threatening, unlawful, or mutated into on-campus speech.

With students' increasing usage of cyberspeech both on- and off-campus, students should be just as worried that their constitutional right to free speech will be shed when they exit the schoolhouse gate as when they enter it. This Note proposes new federal and state approaches designed to digitize the schoolhouse gate for the twenty-first century and protect students' free speech as *Tinker* intended nearly a half-century ago.

