

**CHILDREN ARE CRYING AND DYING WHILE  
THE SUPREME COURT IS HIDING: WHY  
PUBLIC SCHOOLS SHOULD HAVE BROAD  
AUTHORITY TO REGULATE OFF-CAMPUS  
BULLYING “SPEECH”**

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*Bullying has long been a concern for students, parents, teachers, and school administrators. But technological advances—including the internet, cell phones, and social media—have transformed the nature of bullying and allow “cyberbullies” to extend their reach far beyond the schoolhouse gate.*

*The U.S. Supreme Court established that schools may regulate on-campus speech if the speech creates a substantial disruption of, or material interference with, school activities. However, the Court has yet to rule on a school’s ability to regulate students’ off-campus bullying speech. This Note examines how various courts have approached the issue, analyzes the current circuit split, and ultimately proposes that schools should have the authority to discipline students for off-campus bullying speech.*

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#### INTRODUCTION

Megan Meier, a thirteen-year-old girl, was very excited when an attractive teenage boy named Josh Evans sent her a friend request on Facebook and began talking to her.<sup>1</sup> For several months, Megan rushed home from school

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1. Steve Pokin, 'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen, ST. LOUIS TODAY (Nov. 11, 2007), [http://www.stltoday.com/suburban-journals/stcharles/news/stevepokin/my-space-hoax-ends-with-suicide-of-dardenne-prairie-teen/article\\_0304c09a-ab32-5931-9bb3-210a5d5dbd58.html](http://www.stltoday.com/suburban-journals/stcharles/news/stevepokin/my-space-hoax-ends-with-suicide-of-dardenne-prairie-teen/article_0304c09a-ab32-5931-9bb3-210a5d5dbd58.html) [<https://perma.cc/93TZ-YA8B>].

to talk to Josh online.<sup>2</sup> Megan had a lifelong struggle with weight and self-esteem, but now she had a boy who made her feel pretty.<sup>3</sup> And then one day, Josh told Megan he no longer wanted to be her friend.<sup>4</sup> Josh then apparently shared some of Megan's messages with others.<sup>5</sup> People began commenting on Megan's profile, saying things like, "Megan Meier is a slut. Megan Meier is fat."<sup>6</sup> Megan sobbed.<sup>7</sup> She then went to her room and hanged herself.<sup>8</sup> Megan died the next day, three weeks before her fourteenth birthday.<sup>9</sup> Josh never existed.<sup>10</sup> It was all a cyberbullying hoax.<sup>11</sup>

Mallory Grossman was a lively twelve-year-old girl who enjoyed gymnastics and cheerleading.<sup>12</sup> In the fall of 2016, Mallory became a victim of bullying from several classmates, both in person and online.<sup>13</sup> After months of receiving taunts in text messages, Instagram posts, and Snapchats, Mallory took her own life.<sup>14</sup>

Jason Lamberth did not know why his beautiful thirteen-year-old daughter, Hailee, an honor roll student, killed herself.<sup>15</sup> Then he read her farewell note. "Please tell my school that I killed myself, so that the next time (name withheld) wants to call somebody (expletives), maybe they won't."<sup>16</sup> Lamberth asserts "[t]here's no denying bullying played a part in why Hailee killed herself."<sup>17</sup>

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. The person behind this cyberbullying scheme was Lori Drew, the mother of Megan's former friend. Jonann Brady, *Exclusive: Teen Talks About Her Role in Web Hoax That Led to Suicide*, ABC NEWS (Apr. 1, 2008), <http://abcnews.go.com/GMA/story?id=4560582> [<https://perma.cc/HAV3-WEAQ>].

12. Samantha Schmidt, *After Months of Bullying, Her Parents Say, a 12-Year-Old New Jersey Girl Killed Herself. They Blame the School.*, WASH. POST (Aug. 4, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/02/after-months-of-bullying-a-12-year-old-new-jersey-girl-killed-herself-her-parents-blame-the-school> [<https://perma.cc/N8JC-L3VX>].

13. Justin Zaremba, *The Tragic Suicide of 12-Year-Old Mallory Grossman: A Timeline*, NJ.COM (Oct. 5, 2017, 10:43 AM), [http://www.nj.com/morris/index.ssf/2017/08/timeline\\_mallory\\_grossman\\_death.html](http://www.nj.com/morris/index.ssf/2017/08/timeline_mallory_grossman_death.html) [<https://perma.cc/4ZMZ-GY8Z>].

14. *Id.*

15. Paul Takahashi, *In Wake of Student's Suicide, School District Forms Anti-Bullying Task Force*, L.V. SUN (Mar. 13, 2014, 6:00 PM), <https://lasvegassun.com/news/2014/mar/13/wake-students-suicide-school-district-forms-anti-b/> [<https://perma.cc/Y3NX-W32M>].

16. Trevon Milliard, *Father: White Middle School Student's Suicide Related to Bullying*, L.V. REV.-J. (Feb. 28, 2014, 7:26 PM) (alterations in original), <https://www.reviewjournal.com/news/father-white-middle-school-students-suicide-related-to-bullying/> [<https://perma.cc/G5YP-KJGZ>].

17. *Id.*

Phoebe Prince, a twelve-year-old girl, was bullied in cyberspace.<sup>18</sup> Her sister found her hanging by a scarf in a closet in her apartment.<sup>19</sup> The day Phoebe took her own life, one of the bullies wrote the word “accomplished” on Phoebe’s Facebook page.<sup>20</sup>

Ryan Halligan lost his life to cyberbullying.<sup>21</sup> He committed suicide by hanging himself in the bathroom of his home.<sup>22</sup>

Bullying is a continuing problem.<sup>23</sup> More than one out of every five students report being bullied,<sup>24</sup> more than 160,000 kids miss school each day due to fear of bullying,<sup>25</sup> and bullying victims are “about 2.5 times as likely to try and kill themselves” as nonvictims.<sup>26</sup> Studies suggest that involvement in bullying—as victim *or* bully—is associated with suicidal ideation and behavior.<sup>27</sup>

Traditionally, bullying occurred within school walls. In the 1990s, many popular television shows portrayed bullying as comedic. Students would get pushed into lockers<sup>28</sup> and the really unlucky ones would get their head thrown into a toilet (a “swirlie”).<sup>29</sup> Unfortunately, the reality is that there is

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18. Nancy Gibbs, *When Bullying Goes Criminal*, TIME (Apr. 19, 2010), <http://content.time.com/time/magazine/article/0,9171,1978773,00.html> [https://perma.cc/S5QE-JXZZ].

19. *Id.*

20. Dale Archer, Opinion, *Phoebe Prince’s Death Is a Call to Action*, FOX NEWS (Apr. 6, 2010), <http://www.foxnews.com/opinion/2010/04/06/dr-dale-archer-phoebe-prince-south-hadley-mass-bullying-death-da.html> [https://perma.cc/DC7N-DAQT].

21. Lisa Capretto, *A Father’s Painful Crusade Against Bullying 12 Years After His Son’s Suicide*, HUFFINGTON POST (Apr. 6, 2016, 1:17 PM), [https://www.huffingtonpost.com/entry/john-halligan-ryan-suicide\\_us\\_57043f13e4b0537661880e93](https://www.huffingtonpost.com/entry/john-halligan-ryan-suicide_us_57043f13e4b0537661880e93) [https://perma.cc/6F2F-DH4N].

22. *Id.*

23. “Bullying is certainly not a new problem. Even a cursory look at ancient fairy tales such as *Cinderella* or classic literature like *The Lord of the Flies* reveals the timeless concern of harassers who leverage actual or perceived power to push others around repeatedly.” Matthew Fenn, Note, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2735 (2013).

24. DEBORA LESSNE & CHRISTINA YANEZ, U.S. DEP’T OF EDUC., STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2015 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY (2016), <https://nces.ed.gov/pubs2017/2017015.pdf> [https://perma.cc/HKK5-TBW7].

25. Eleanor Barkhorn, ‘160,000 Kids Stay Home From School Each Day to Avoid Being Bullied,’ ATLANTIC (Oct. 3, 2013), <https://www.theatlantic.com/education/archive/2013/10/160-000-kids-stay-home-from-school-each-day-to-avoid-being-bullied/280201/> [https://perma.cc/WM6Z-GGR9].

26. Karen Kaplan, *Teens Taunted by Bullies Are More Likely to Consider, Attempt Suicide*, L.A. TIMES (Mar. 10, 2014), <http://articles.latimes.com/2014/mar/10/science/la-sci-sn-bullying-cyberbullying-suicide-risk-20140310> [https://perma.cc/W3H4-CMSW]; see also Mitch van Geel et al., *Relationship Between Peer Victimization, Cyberbullying, and Suicide in Children and Adolescents*, 168 JAMA NETWORK 435, 438 (2014). See generally Dimitrios Nikolaou, *Does Cyberbullying Impact Youth Suicidal Behaviors?*, 56 J. HEALTH ECON. 30 (2017).

27. See generally Melissa K. Holt et al., *Bullying and Suicidal Ideation and Behaviors: A Meta-Analysis*, 135 PEDIATRICS, Feb. 2015, at 1.

28. See *Boy Meets World: Back 2 School* (ABC television broadcast Sept. 23, 1994).

29. See *Hey Arnold!: Big Gino* (Nickelodeon television broadcast Mar. 15, 1999); *7th Heaven: Saturday* (The WB television broadcast Nov. 4, 1996).

nothing funny about bullying. And, nowadays, bullying is no longer confined to school grounds.

Today, cyberbullying is prevalent.<sup>30</sup> “Cyberbullying” is bullying through the use of electronic technology such as cell phones, computers, and online messaging platforms.<sup>31</sup> Cyberbullying commonly occurs through social media, text message, instant message, and email.<sup>32</sup> Today, 77 percent of the U.S. population has a social media profile,<sup>33</sup> and there are approximately 2.46 billion social media users worldwide.<sup>34</sup> Facebook has approximately two billion active users.<sup>35</sup>

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30. See Justin W. Patchin & Sameer Hinduja, *Lifetime Cyberbullying Victimization Rates*, CYBERBULLYING RES. CTR. (Nov. 26, 2016), <https://cyberbullying.org/summary-of-our-cyberbullying-research> [<https://perma.cc/D7X3-MKCP>]; Alexandra Topping, *Cyberbullying: Increasing Number of Children Suffering, Says ChildLine*, GUARDIAN (Jan. 8, 2014, 9:16 AM), <https://www.theguardian.com/society/2014/jan/08/cyberbullying-more-children-affected-childline> [<https://perma.cc/H2SX-6D2R>]; see also Steven M. Puzis, “*Tinkering with the First Amendment’s Protection of Student Speech on the Internet*,” 29 J. MARSHALL J. COMPUTER & INFO. L. 167, 175 (2011) (“Today any student with a computer can post information on the Internet that can be accessed anywhere in the world, almost instantaneously.”).

31. “Cyberbullying includes sending, posting, or sharing negative, harmful, false, or mean content about someone else.” *What Is Cyberbullying*, STOPBULLYING.GOV, <https://www.stopbullying.gov/cyberbullying/what-is-it/index.html> [<https://perma.cc/8HVH-L89P>] (last visited Oct. 4, 2018).

32. See *id.*

33. *Percentage of U.S. Population with a Social Media Profile from 2008 to 2018*, STATISTA, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> [<https://perma.cc/HT66-N7VU>] (last visited Oct. 4, 2018).

34. *Number of Social Media Users Worldwide from 2010 to 2021 (in Billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> [<https://perma.cc/A2CR-EAX9>] (last visited Oct. 4, 2018); see also K. G. Coffman & A. M. Odlyzko, *The Size and Growth Rate of the Internet*, AT&T LABS-RES. (Oct. 2, 1998), <http://www.dtc.umn.edu/~odlyzko/doc/internet.size.pdf> [<https://perma.cc/2RTJ-M27Y>] (finding that, in the mid-1990s, the internet growth rate exploded over 100 percent per year).

35. If Facebook were a country, it would be the largest nation in the world. See Josh Constine, *Facebook Now Has 2 Billion Monthly Users . . . and Responsibility*, TECHCRUNCH (June 27, 2017), <https://techcrunch.com/2017/06/27/facebook-2-billion-users/> [<https://perma.cc/E93F-V6KZ>]; Conrad Hackett, *Which 7 Countries Hold Half the World’s Population?*, PEW RES. CTR. (July 11, 2018), <http://www.pewresearch.org/fact-tank/2014/07/11/half-the-worlds-population-live-in-just-6-countries/> [<https://perma.cc/MW7T-K8VA>].

Cyberbullying has far-reaching consequences.<sup>36</sup> “If someone is picking on you in the school yard, you can go home,”<sup>37</sup> said the mother of a thirteen-year-old boy who committed suicide with a shotgun after cyberbullies taunted him. “When it’s on the computer at home, you have nowhere to go.”<sup>38</sup>

Technological changes in the past twenty years—including the internet, cell phones, and social media—have extended the reach of off-campus speech,<sup>39</sup> leading to parent complaints that this off-campus conduct disrupts the learning environment.<sup>40</sup> These technological advancements have thus created new legal dilemmas for public school administrators who are considering disciplining students.<sup>41</sup>

While school boards may have broad authority to define disciplinable conduct, they cannot abridge students’ First Amendment rights.<sup>42</sup> Interestingly, “student speech cases are among the most commonly litigated cases under the First Amendment.”<sup>43</sup> Nevertheless, the Supreme Court has not ruled on students’ First Amendment rights as to off-campus bullying speech.

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36. Witold Walczak, legal director for the American Civil Liberties Union (ACLU) of Pennsylvania explained, “For students, even though the speech may be protected there’s a big difference between whispering on a playground and posting on the Internet. They need to understand you can cause real pain to people on the Internet. The Internet just amplifies the speech, so the consequences are far greater.” Tim Grant, *Bullies Take Intimidation to Cyberspace*, PITTSBURGH POST-GAZETTE (June 26, 2006, 12:00 AM), <http://www.post-gazette.com/life/lifestyle/2006/06/26/Bullies-take-intimidation-to-cyberspace/stories/200606260090> [<https://perma.cc/5CGM-LX5X>]; see also Puiszis, *supra* note 30, at 174 (“The spoken or printed word is capable of reaching a finite audience. Information posted on the Internet can reach a far larger audience potentially anywhere in the world.”).

37. Bob Meadows, *The Web: The Bully’s New Playground*, PEOPLE (Mar. 14, 2005, 12:00 PM), <http://people.com/archive/the-web-the-bullys-new-playground-vol-63-no-10/> [<https://perma.cc/YR3M-6KUA>].

38. *Id.*

39. See Donna L. Whiteman, *Social Media and the Authority of Kansas School Districts to Discipline Students*, 86 J. KAN. B. ASS’N, April 2017, at 24, 25, 30; see also Carolyn Joyce Mattus, Note, *Is It Really My Space?: Public Schools and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder v. Blue Mountain School District*, 16 B.U. J. SCI. & TECH. L. 318, 321 (2010) (“[L]ower courts are struggling to apply pre-Internet legal standards to student speech on the Internet because of substantial doubt as to how far school administrators’ authority extends—or should extend—over student speech made off-campus that reaches the school environment.”).

40. See Whiteman, *supra* note 39, at 31 (“Advancements in technology . . . ha[ve] resulted in school districts receiving increased numbers of complaints from students and parents concerning students’ off-campus social media speech that affects the school learning environment.”).

41. See *id.* at 25–31.

42. See *id.*

43. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011) (discussing how there are more student speech cases than cases “dealing with ‘obscenity, indecency, incitement to or advocacy of unlawful activity, defamation, commercial advertising, [and] campaign finance’” (alteration in original) (quoting Frederick Shauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 208)).

This Note addresses whether schools may discipline students for off-campus bullying speech. Specifically, it searches for the proper test for determining whether a school district has the regulatory authority to discipline a student for off-campus bullying speech without violating the First Amendment. Part I provides background on the First Amendment, the role of public schools as state actors, and the contours of free speech protection in public schools as established by the Supreme Court. Currently, courts are divided on whether schools may ever regulate off-campus speech and, if so, what threshold conditions must be met for that authority. Part II analyzes how lower courts have approached this issue and describes the circuit split regarding the proper test for determining whether a school can discipline a student for off-campus speech. Part III proposes a resolution to the circuit split by arguing that schools should have broad authority to regulate off-campus student speech. Specifically, this Note argues that safety, efficiency, inadequate legal remedies, and fairness support affording this authority to school administrators.

## I. STUDENT SPEECH REGULATION BY PUBLIC SCHOOLS

This Part discusses public schools' legal authority to regulate student speech. Part I.A provides background on the First Amendment of the Constitution and public schools as state actors. Part I.B introduces four rationales that courts and scholars use to justify giving schools broad authority to regulate student behavior. Part I.C introduces the existing Supreme Court precedent establishing the contours of free speech doctrine as applied to public schools.

### A. *As State Actors, Public Schools Are Subject to the First Amendment*

The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>44</sup> The First Amendment was designed to prevent previous restraints<sup>45</sup> on expression. In effect, the First Amendment promotes the free exchange of ideas<sup>46</sup> and protects unpopular forms of speech.<sup>47</sup> It even protects the expression of odious and

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44. U.S. CONST. amend. I. The First Amendment applies to the actions of state actors. *See generally* *Gitlow v. New York*, 268 U.S. 652 (1925).

45. *See* *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *see also* *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968) (“The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet.”).

46. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”).

47. *See* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); Abner Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253, 1253 (2011) (“Why we have such firm protection for speech we abhor is a matter of much debate. To some extent, it’s because we don’t trust the state to make content-based judgments consistently as a matter of principle; we fear that too often it will be merely playing favorites, helping friends and harming enemies.”).

noxious ideas.<sup>48</sup> And while “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” the First Amendment is essential to prevent “empower[ing] a majority to silence dissidents simply as a matter of personal predilections.”<sup>49</sup>

Public schools are state actors primarily because they are run by the state.<sup>50</sup> As a result, students in public schools are afforded First Amendment protections. In contrast, private schools, by their very nature, are not state actors. Therefore, students in private schools are not afforded the same First Amendment protections as students in public schools.<sup>51</sup> For example, just last year, Harvard University rescinded offers to students who posted offensive memes online.<sup>52</sup> Those students did not have First Amendment recourse because Harvard University is a private university.<sup>53</sup> Public school students are still afforded First Amendment protections, despite the broad regulatory authority conferred on public schools.

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48. *See Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (finding that the First Amendment protects signs bearing messages such as “Thank God for Dead Soldiers” and “You’re Going to Hell” at a former marine’s funeral); *id.* at 468 (Alito, J., dissenting) (discussing that the First Amendment protects a press release stating “God Almighty killed” a former marine and that the former marine “died in shame, not honor—for a fag nation cursed by God . . . . Now in Hell—sine die.” (alteration in original)).

49. *Cohen v. California*, 403 U.S. 15, 21–26 (1971) (holding that the defendant could not, consistently with the First Amendment, be punished for wearing a jacket in court that read “fuck the draft”). “[T]he freedom of Speech may be taken away—and, dumb & silent we may be led, like sheep, to the Slaughter.” Letter from George Washington to Officers of the Army (Mar. 15, 1783), <https://founders.archives.gov/documents/Washington/99-01-02-10840> [<https://perma.cc/TR5Q-SJR8>].

50. The legal control of public education resides with the state. STEPHEN B. THOMAS ET AL., *PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS* 2 (6th ed. 2009). State constitutions and statutes enacted by state legislatures often describe, in very vague and general terms, the ways schools should be governed. *See* MICHAEL IMBER ET AL., *EDUCATION LAW* 2 (5th ed. 2014); MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 3 (2d ed. 2000) (discussing how “state constitutions contain vague language stating that there shall be schools”). “The specificity of statutes governing the operation of public schools varies from state to state,” but most state laws create local school districts and give school boards the authority to raise taxes, borrow money, hire and fire teachers, determine the curriculum, and discipline pupils. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 3 (6th ed. 2005); *see, e.g.*, CONN. GEN. STAT. § 10-222d(b) (2017) (“Each local and regional board of education shall develop and implement a safe school climate plan to address the existence of bullying . . . in its schools.”); N.Y. EDUC. LAW §§ 10–18 (2018) (providing policies and guidelines for the board of education and requiring that every school district craft policies and guidelines intended to create a school environment free from discrimination or harassment); *cf.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (“Each locality is free to tailor local programs to local needs.”).

51. Safia Samee Ali, *Harvard Revokes Admission of Several Students for Posting ‘Offensive’ Memes*, NBC NEWS (June 5, 2017, 1:22 PM), <https://www.nbcnews.com/news/us-news/harvard-revokes-admission-several-students-posting-offensive-memes-n768361> [<https://perma.cc/UV3F-FLPR>].

52. *Id.*

53. *Id.*



*B. Public Schools' Regulatory Authority Is Broad*

While public schools have no inherent powers,<sup>54</sup> the Supreme Court views public education as “perhaps the most important function of state and local governments.”<sup>55</sup> Traditionally, courts have conferred considerable deference to schools because schools were viewed as acting *in loco parentis*.<sup>56</sup> But new developments in the past four decades have led many courts to abandon the *in loco parentis* justification.<sup>57</sup>

Today, courts still give public school officials broad authority to regulate student speech. In fact, for a span of forty years (from February 1969 to June 2009), school authorities prevailed in every constitutional challenge brought by a student that made it to the Supreme Court.<sup>58</sup>

Courts and scholars provide several reasons why schools should have broad authority to regulate student speech. First, when public school officials regulate student speech, the state is acting in a managerial capacity.<sup>59</sup> And when the state acts in a managerial capacity with respect to certain key functions, like public education, it is entitled to greater authority to regulate speech.<sup>60</sup>

Second, judges and scholars often distinguish the rights of students from those of adults. They reason that “[w]hat may be wholly permissible for

54. The authority to operate public schools must be found in either the express or implied terms of statutes. ALEXANDER & ALEXANDER, *supra* note 50, at 3.

55. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

56. *See* IMBER, *supra* note 50, at 98 (“Courts commonly viewed the school as operating in the place of parents (*in loco parentis*). This doctrine justified all manner of regulation, just as true parenthood confers broad powers.”).

57. *See id.* (“Courts have acknowledged that for most purposes it is more appropriate to view the school as an arm of the state rather than as a substitute parent.”).

58. Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 202 (2011); *see* Richard Arum & Doreet Preiss, *Still Judging School Discipline*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 238, 249 (Joshua M. Dunn & Martin R. West eds., 2009) (“[C]ourts in general have become less favorable to student claims in court.”); *see also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (recognizing the “comprehensive authority” of teachers and other public school officials). *But see* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (“The authority of public school officials is not boundless.”).

59. State action regarding speech varies with the type of power the government is exercising. For example, private speech receives the greatest speech protection, and therefore general regulation of private speech is heavily scrutinized. But when the state acts in the capacity of manager of public schools, it has broader authority than when regulating private speech more generally. *See* Robert Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) (discussing how First Amendment doctrine within managerial domains differs fundamentally from First Amendment doctrine within public discourse).

60. *See* Barry McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 731 (2012) (“[W]hen the government acts in certain capacities to accomplish functions assigned to it by the people . . . such as . . . educating much of America’s youth, the Court sensibly gives the government more latitude to regulate speech as necessary to effectively perform and accomplish its assigned functions.”); *see also* Post, *supra* note 59, at 164 (“[T]he state can regulate speech within public educational institutions so as to achieve the purposes of education; it can regulate speech within the judicial system so as to attain the ends of justice; [and] it can regulate speech within the military so as to preserve the national defense . . .”).

adults . . . may not be so for children,”<sup>61</sup> and therefore “[t]he constitutional rights of students in public school are not automatically coextensive with the rights of adults”<sup>62</sup>—or of children in other settings.

Third, schools are state actors tasked with creating safe learning environments.<sup>63</sup> And fourth, students’ First Amendment rights must be tempered by “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>64</sup> This need of balancing First Amendment rights with society’s countervailing interests has not been limited to students. In fact, the Supreme Court has found that the First Amendment provides no protection or limited protection to certain categories of speech because they have such little social value.<sup>65</sup>

*C. Supreme Court Cases Establish the Free Speech Doctrine’s Contours as Applied to Public Schools*

The Supreme Court has deemed several categories of speech to be so harmful or so lacking in value as to be outside the protection of the First Amendment.<sup>66</sup> When a person’s speech fits within one of these categories

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61. *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944).

62. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); see McDonald, *supra* note 60, at 738 (distinguishing between ordinary free speech principles that govern the speech of general citizens and the less speech-protective rules that govern student speech); see also *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 655–56 (1995) (“[T]he nature of [the State’s power over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. . . . [Children’s] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere. . . .”); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 674–75 (7th Cir. 2008) (“[H]igh-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students.”). But see *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

63. See *Abrams*, *supra* note 58, at 201 (“[S]tudents’ constitutional rights may be limited because “special needs” inhere in the public school context, “where the State is responsible for maintaining discipline, health, and safety.” (footnote omitted) (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002))); see also *Nuxoll*, 523 F.3d at 672 (“Mutual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning.”).

64. *Fraser*, 478 U.S. at 681–83 (“The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. . . . The schools . . . may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.”).

65. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (discussing certain categories of speech that have so little social value and are “outweighed by the social interest in order and morality”).

66. See *id.* at 571–72 (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”).

the First Amendment generally offers no protection.<sup>67</sup> These categories include true threats,<sup>68</sup> fighting words,<sup>69</sup> obscenity,<sup>70</sup> child pornography,<sup>71</sup> solicitations to commit crimes,<sup>72</sup> speech that incites imminent lawless action,<sup>73</sup> defamation and libel,<sup>74</sup> and commercial speech at times.<sup>75</sup> Interestingly, courts generally have not applied these First Amendment carveouts to students. Instead, the Supreme Court has established a separate doctrine for regulating student speech.<sup>76</sup>

Part I.C.1 discusses the Supreme Court cases that outline the four types of student speech that schools may restrict. Part I.C.2 focuses on *Tinker v. Des Moines Independent Community School District*,<sup>77</sup> the leading authority on the issue of whether schools may regulate on-campus student speech,<sup>78</sup> which has been widely applied to cases involving off-campus student speech regulation.<sup>79</sup>

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67. Puiszis, *supra* note 30, at 176–84; *see also* Bethany Poppelreiter, Note, *When Words Are Weapons: Using Tinker and Premises Liability Doctrine to Keep Schools Safe in a Digital Age*, 86 Miss. L.J. 643, 648 (2017).

68. *E.g.*, *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (holding that a state may ban cross burning with the intent to intimidate without running afoul of the First Amendment); *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (“What is a threat must be distinguished from what is constitutionally protected speech.”); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764–65 (8th Cir. 2011) (applying the “true threat” test to instant messages sent from one student, at home, to another student).

69. *E.g.*, *Chaplinsky*, 315 U.S. at 568 (holding that “fighting words” are not protected under the First Amendment).

70. *E.g.*, *Miller v. California*, 413 U.S. 15, 23 (1973) (“[O]bscene material is unprotected by the First Amendment.”).

71. *E.g.*, *United States v. Williams*, 553 U.S. 285, 299 (2008) (“[O]ffers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”); *New York v. Ferber* 458 U.S. 747, 774 (1982).

72. *E.g.*, *Williams*, 553 U.S. at 297 (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”).

73. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

74. *See generally, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

75. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (outlining the four-part test courts use to determine when restrictions on commercial speech violate the First Amendment). Under *Central Hudson*, commercial speech is subject to intermediate scrutiny which directs courts to consider: (1) whether the expression at issue concerns lawful activity and is not misleading; (2) “whether the asserted governmental interest is substantial”; (3) “whether the regulation directly advances the governmental interest asserted”; and (4) “whether it is not more extensive than is necessary to serve that interest.” *Id.* at 566.

76. *See infra* Part I.C.1.

77. 393 U.S. 503 (1969).

78. “*Tinker* sets the general rule for regulating school speech, and that rule is subject to several narrow exceptions [defined by *Tinker*’s progeny].” J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011).

79. *See, e.g.*, *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011).

## 1. Student Speech Cases

Students have First Amendment protections and cannot be punished merely for expressing their personal views about political issues on school premises.<sup>80</sup> As the Supreme Court opined, “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>81</sup> But over time, the Court has restricted certain types of permissible student speech in public schools, thereby giving schools authority to regulate such speech.

The four landmark Supreme Court cases outlining when student speech may be regulated are *Tinker*,<sup>82</sup> *Bethel School District v. Fraser*,<sup>83</sup> *Hazelwood School District v. Kuhlmeier*,<sup>84</sup> and *Morse v. Frederick*.<sup>85</sup> Together, *Tinker* and its progeny cover four types of student speech that schools may regulate: (1) speech causing a “substantial disruption of or material interference with school activities”;<sup>86</sup> (2) “offensively lewd and indecent speech”;<sup>87</sup> (3) school-sponsored student publications;<sup>88</sup> and (4) speech “advocating or promoting illegal drug use.”<sup>89</sup>

## 2. *Tinker*

In *Tinker*, three students wore black armbands to school “to publicize their objections to the hostilities in Vietnam.”<sup>90</sup> School administrators suspended the students.<sup>91</sup> Through their parents, the students sued the school district for

80. *Tinker*, 393 U.S. at 512–13 (“When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . 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.” (alteration in original) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966))); *see also* *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” (alteration in original) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

81. *Tinker*, 393 U.S. at 506; *see also* *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.”).

82. 393 U.S. at 503.

83. 478 U.S. 675 (1986).

84. 484 U.S. 260 (1988).

85. 551 U.S. 393 (2007).

86. *Tinker*, 393 U.S. at 514.

87. *Fraser*, 478 U.S. at 685 (justifying the regulation of student expression on campus or otherwise during school-sponsored activities).

88. *Hazelwood* involves speech that was produced in a journalism class and thus falls under “school as educator” rather than “school as regulator of student speech.” *See* 484 U.S. at 271 (“[E]xpressive activities that students, parents, [or] members of the public might reasonably perceive to bear the imprimatur of the school [may be regulated by the school administration].”).

89. *Morse*, 551 U.S. at 394.

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

91. *Id.*

violating their rights of expression.<sup>92</sup> The Supreme Court held that the regulation,<sup>93</sup> which prohibited students from wearing armbands to school and suspended those who did, was an unconstitutional denial of students' right of expression of opinion.<sup>94</sup> The Court explained, "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."<sup>95</sup>

*Tinker*, which was decided almost fifty years ago, outlined the two-part substantive test courts use to determine when speech may be regulated in public schools.<sup>96</sup> The test allows school authorities to regulate student expression if school authorities have reason to anticipate that the expression would (1) substantially interfere with the work of the school,<sup>97</sup> or (2) impinge upon the rights of other students.<sup>98</sup> Once a court decides that the *Tinker* substantial-disruption standard applies, "actual or reasonably forecasted disruption of school functions from the disputed speech is sufficient to support sanctioning it."<sup>99</sup> Currently, circuit courts are divided as to whether *Tinker*'s test applies to off-campus student speech.<sup>100</sup>

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92. *Id.* at 504, 506.

93. "The principals of the Des Moines schools became aware of the plan to wear armbands" and subsequently "adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband." *Id.* at 504.

94. *Id.* at 504, 510–11.

95. *Id.* at 514.

96. *Id.* at 509, 514. Technically, the "*Tinker* test" is dictum because the Court held that the school authorities violated the students' First Amendment rights.

97. "The substantial disruption inquiry is highly fact-intensive. Perhaps for that reason, existing case law has not provided clear guidelines as to when a substantial disruption is reasonably foreseeable. There is, for example, no magic number of students or classrooms that must be affected by the speech." *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.* 711 F. Supp. 2d 1094, 1111 (C.D. Cal. 2010). A substantial disruption requires something "more than some mild distraction or curiosity created by the speech" but need not rise to the level of "complete chaos." *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

98. *Tinker*, 393 U.S. at 509; see also John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 947–48 (2012) (discussing the two-pronged rule).

99. McDonald, *supra* note 60, at 737; see *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008) (holding that *Tinker* does not require "actual disruption to justify a restraint on student speech"); *Lowery v. Euverard*, 497 F.3d 584, 591–92 (6th Cir. 2007) ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. . . . *Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable.>").

100. "Even the Supreme Court has acknowledged that *Tinker*'s applicability is somewhat unclear, stating that '[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.'" Susan S. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School's Disciplinary Arm Reach Speech Made in a Student's Bedroom?*, 48 WILLAMETTE L. REV. 195, 196–97 (2011) (alteration in original) (quoting *Morse v. Frederick*, 551 U.S. 393, 401 (2007)).

## II. THE CIRCUIT SPLIT REGARDING PUBLIC SCHOOL AUTHORITY TO REGULATE OFF-CAMPUS STUDENT SPEECH

Circuit courts have been responsible for addressing off-campus speech without guidance from the Supreme Court.<sup>101</sup> As a result, these courts have differed in their approaches to the question of whether schools have the authority to regulate students' off-campus speech.<sup>102</sup>

This Part analyzes the different approaches courts use to determine whether schools have the regulatory authority to discipline students for their off-campus speech. Some courts hold that schools may never regulate off-campus speech and, therefore, that *Tinker's* test for regulating student speech does not apply to off-campus speech.<sup>103</sup> A second group of courts holds that schools may sometimes regulate off-campus speech.<sup>104</sup> These courts apply *Tinker's* test only after a threshold jurisdictional inquiry.<sup>105</sup> A third group of courts holds that schools always have the authority to regulate off-campus speech and that *Tinker* is the only test needed to determine when schools may discipline students for off-campus speech.<sup>106</sup>

### A. Schools May Never Regulate Off-Campus Speech: *Tinker* Does Not Apply to Off-Campus Speech

Some courts refuse to apply *Tinker* to off-campus speech.<sup>107</sup> These courts have established a bright-line rule along geographical lines—the “geographical-nexus” test.<sup>108</sup> If speech originates off campus then schools cannot regulate the speech.<sup>109</sup> Therefore, off-campus speech will never be subject to the *Tinker* test. Instead, general First Amendment principles would apply.<sup>110</sup>

101. *But see Tinker*, 393 U.S. at 513 (“[C]onduct by the student, in class or out of it, which for any reason . . . 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.”); Puiszis, *supra* note 30, at 172 (“Because the Court’s analysis in *Tinker* applies to conduct ‘in class or out of it,’ *Tinker* is broad enough to encompass Internet speech.”).

102. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (Smith, J., concurring); *see also Bendlin, supra* note 100, at 218–19 (discussing how courts apply different analytical approaches including the geographic approach, the sufficient-nexus approach, the reasonably foreseeable approach, and the intent or aimed-at-the-school approach).

103. *See infra* Part II.A.

104. *See infra* Part II.B.

105. *See infra* Part II.B.

106. *See infra* Part II.C.

107. *See, e.g., Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004); *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

108. *See Ceglia, supra* note 98, at 959.

109. *See Porter*, 393 F.3d at 620; *Thomas*, 607 F.2d at 1050.

110. Under general First Amendment principles, students would be treated as ordinary citizens and their speech would only be regulated if it falls into one of the general excludable carveouts like true threats. *See Clay Calvert, Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 276 (2001) (“When off-campus, society must view minors not in what amounts to their occupational status as students—minors play the role of student, just as if they went to work on a job—but in their status as citizens of the United States.”).

The Fifth Circuit adopted this approach in *Porter v. Ascension Parish School Board*,<sup>111</sup> where it held that a school district could not punish a student for a violent drawing depicting his school “under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons.”<sup>112</sup> The court reasoned that the picture could not be considered on-campus speech, or even speech directed at the campus, because the student never intended for the picture to reach the campus and took no action to bring it to school.<sup>113</sup> As a result, the court did not apply *Tinker*’s less protective standard and instead applied general First Amendment principles.<sup>114</sup>

The Second Circuit, in *Thomas v. Board of Education*,<sup>115</sup> similarly chose not to apply *Tinker* to off-campus speech<sup>116</sup> when school officials “ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith.”<sup>117</sup> The Second Circuit stated that school officials are granted “substantial autonomy within their academic domain” and that this power “rests in part on the confinement of that power within the metes and bounds of the school itself.”<sup>118</sup> The court found that the conduct in that case, the publication of a magazine parody, “was conceived, executed, and distributed outside the school,” so school officials had exceeded their powers when they punished the students for this out-of-school conduct.<sup>119</sup>

Judge D. Brooks Smith of the Third Circuit came to a similar conclusion in *J.S. ex rel. Snyder v. Blue Mountain School District*.<sup>120</sup> He wrote separately in a concurring opinion to address whether *Tinker* applies to off-campus speech.<sup>121</sup> He stated that it does not “and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.”<sup>122</sup>

There are certain disadvantages to applying this geographical-nexus test.<sup>123</sup> Most obviously, it is difficult for school administrators to apply it

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111. 393 F.3d 608 (5th Cir. 2004).

112. *Id.* at 611, 615, 620 (holding that *Tinker* does not apply to students’ off-campus speech).

113. *Id.* at 615.

114. *See id.* at 616–18 (applying general First Amendment principles).

115. 607 F.2d 1043 (2d Cir. 1979).

116. *Id.* at 1050, 1053 n.18 (distinguishing *Tinker* in a case involving a publication printed outside the school).

117. *Id.* at 1050.

118. *Id.* at 1052.

119. *Id.* at 1050.

120. 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring).

121. *Id.*

122. *Id.* at 936, 939 (“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.”); *see also* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (“It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.”).

123. On-campus and off-campus distinctions should not determine whether schools may regulate student speech, “just as a defendant’s location is no longer the sole determinant of

when speech is in cyberspace.<sup>124</sup> How will school administrators know where the student was when he posted on Facebook or sent a text message to a classmate? The advent of technologies like the internet, cell phones, and social media, “and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.”<sup>125</sup> The internet makes it nearly impossible to draw a line between on- and off-campus speech. Therefore, a geographical boundary is arguably not the best solution.<sup>126</sup> It seems that the “‘schoolhouse gate’ cannot exist in a world where speech is electronic, intangible, and can be instantly transmitted and accessed.”<sup>127</sup>

*B. Schools May Sometimes Regulate Off-Campus Speech: Tinker Applies if the School Satisfies Some Threshold Jurisdictional Test*

Most circuit courts that consider the issue of whether schools may regulate off-campus speech conclude that some form of threshold “jurisdictional” test must be met before the *Tinker* standard is applied to off-campus speech.<sup>128</sup>

This section explores the different treatment of this issue among the Fourth, Eighth, and Ninth Circuit courts. The Fourth Circuit and Eighth Circuit apply *Tinker* only after threshold standards have been met. They differ, however, in which threshold tests they use. The Fourth Circuit applies a nexus test, which looks at how closely the offending speech is tied to the school, while the Eighth Circuit asks if it is reasonably foreseeable that the

whether a state can reach him.” Rashmi Joshi, Comment, *Sharing the Digital Sandbox: The Effects of Ubiquitous Computing on Student Speech and Cyberbullying Jurisprudence*, 53 SANTA CLARA L. REV. 629, 653 (2013) (“Overturning the rigid geographical analysis of *Pennoyer*, the Court stated in *International Shoe* that a state may have jurisdiction over a defendant if said defendant has certain minimum contacts within the state, and . . . if the suit does not offend the traditional notions of fair play and substantial justice.”).

124. See McDonald, *supra* note 60, at 746 (“[I]n truth[,] cyberspace knows no geographic boundaries and cybercommunications are much more pervasive, enduring and easy to engage in than communications in the ‘physical’ world.”).

125. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015).

126. See Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) (“It is clear that the test for school authority is not geographical. . . . [S]chools have an undoubted ability to govern student conduct at school-sponsored field trips, sporting events, academic competitions and during transit to and from such activities.”), *aff’d in part on reh’g en banc*, 650 F.3d 205 (3d Cir. 2011).

127. Ceglia, *supra* note 98, at 976.

128. *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1148 (9th Cir. 2016) (discussing how federal courts first consider “the threshold question of whether the school could permissibly regulate the student’s off-campus speech *at all*”); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010) (“Some courts . . . have considered the location of the speech to be an important threshold issue for the court to resolve before applying the Supreme Court’s student speech precedents.”); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (Pa. 2002) (discussing that a court must determine if speech was on-campus speech subject to *Tinker* or off-campus speech “which would arguably be subject to some higher level of First Amendment protection”); McDonald, *supra* note 60, at 736 (“[Most federal courts of appeals] concluded that some form of threshold standard must be met before the *Tinker* standard, rather than ordinary free speech principles, applied to the case.”).



speech will reach the school.<sup>129</sup> Refusing to pick one, the Ninth Circuit applies both threshold tests.

### 1. The Fourth Circuit's "Sufficient-Nexus" Test

The Fourth Circuit uses a "sufficient-nexus" threshold test to determine whether schools may discipline students for their off-campus bullying speech. In *Kowalski v. Berkeley County Schools*,<sup>130</sup> Kara Kowalski, a high school senior, was suspended from school for creating and posting to a MySpace webpage that was largely dedicated to ridiculing a fellow student.<sup>131</sup> Kowalski commenced an action against the Berkeley County School District, contending that the school district violated her free speech rights under the First Amendment.<sup>132</sup> Kowalski alleged that "the School District was not justified in regulating her speech because it did not occur during a 'school-related activity,' but rather was 'private out-of-school speech.'"<sup>133</sup> The Fourth Circuit admitted that Kowalski pushed her computer's keys in her home, but explained that she knew that the webpage and her posts could reasonably be expected to reach the school.<sup>134</sup> The court recognized that there is a limit to the scope of a school's interest "in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate,"<sup>135</sup> but the court was satisfied that there was a "sufficient nexus"<sup>136</sup> between the offending speech and the school's pedagogical interests to justify the action taken by school officials.<sup>137</sup> The court reasoned, "[E]very aspect of the webpage's design and implementation was school-related. Kowalski designed the website for 'students,' . . . she sent it to students inviting them to join; and those who joined were mostly students."<sup>138</sup> The court used the word "nexus" again: "Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."<sup>139</sup>

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129. Whether it is reasonably foreseeable that speech will reach the school is a different question from *Tinker*'s question, which asks whether school authorities could anticipate that expression would substantially interfere with the work of the school.

130. 652 F.3d 565 (4th Cir. 2011).

131. *Id.* at 567.

132. *Id.*

133. *Id.*

134. *Id.* at 573 ("Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.").

135. *Id.*

136. *Id.* at 577.

137. *Id.* at 573 ("[W]e are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.").

138. *Id.* at 576.

139. *Id.* at 577.

## 2. The Eighth Circuit's "Reasonably Foreseeable" Test

The Eighth Circuit uses a reasonably foreseeable threshold test to determine whether schools may discipline students for their off-campus internet speech.<sup>140</sup> In *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*,<sup>141</sup> twin brothers were suspended from their school because they created a blog<sup>142</sup> where they posted offensive, racist, sexist, and degrading comments about particular classmates.<sup>143</sup> The court held that *Tinker* applied to the off-campus online speech because it was reasonably foreseeable that the speech would reach the school or affect its environment.<sup>144</sup> The court explained that it was reasonably foreseeable that the blog posts would be brought to the attention of school authorities because the posts were "targeted at" the school and even accessed by students on school computers.<sup>145</sup>

## 3. The Ninth Circuit's Application of Both Threshold Tests

The Ninth Circuit has not adopted one specific threshold test to determine whether schools may discipline students for their off-campus speech. Instead, it applies both threshold tests.

In *Wynar ex rel. Wynar v. Douglas County School District*,<sup>146</sup> the Ninth Circuit held that school officials did not violate Landon Wynar's First Amendment rights by expelling him for sending threatening messages about planning a school shooting from his home to his friends.<sup>147</sup> The court noted that some circuits apply threshold tests in determining whether schools may regulate off-campus speech. The court explained that "the Fourth Circuit requires that the speech have a sufficient 'nexus' to the school, while the Eighth Circuit requires that it be 'reasonably foreseeable that the speech will reach the school community.'"<sup>148</sup> The Ninth Circuit refused "to try and craft a one-size fits all approach" and declined to choose between the two threshold tests.<sup>149</sup> Instead, the court applied both tests and held that both were satisfied in the case of a threatened school shooting.<sup>150</sup> The court explained that, "[g]iven the subject and addresses of Landon's messages, it is hard to imagine how their nexus to the school could have been more direct;

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140. See generally, e.g., *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011).

141. 696 F.3d 771 (8th Cir. 2012).

142. The blog was called "NorthPress" and it was named after Lee's Summit North High School. *Id.* at 773.

143. *Id.*

144. *Id.* at 778 ("[T]he NorthPress posts 'could reasonably be expected to reach the school or impact the environment.'" (quoting *Kowalski*, 652 F.3d at 573)).

145. *Id.*

146. 728 F.3d 1062 (9th Cir. 2013).

147. *Id.* at 1064, 1070.

148. *Id.* at 1068 (citation omitted) (first quoting *Kowalski*, 652 F.3d at 573; then quoting *S.J.W.*, 696 F.3d at 777).

149. *Id.* at 1069.

150. *Id.*

for the same reasons, it should have been reasonably foreseeable to Landon that his messages would reach campus.”<sup>151</sup>

Similarly, the Ninth Circuit in *C.R. v. Eugene School District 4J*<sup>152</sup> did not choose just one test to apply to off-campus speech.<sup>153</sup> Rather, it concluded, “under either [threshold] test, the School District had the authority to discipline C.R. for his off-campus speech.”<sup>154</sup>

In this case, the court considered whether a school may discipline a student for off-campus sexual harassment.<sup>155</sup> It was a matter of first impression. In the case, C.R., a twelve-year-old boy, sexually harassed two disabled students while the students walked home from school.<sup>156</sup> As a result, the school suspended C.R. for two days.<sup>157</sup> C.R.’s parents challenged his suspension under the First Amendment and argued that the school lacked this disciplinary authority because the harassment occurred off campus in a public park.<sup>158</sup> The Ninth Circuit noted that there were no “directly analogous decisions from any other circuit” and that “the vast majority of the law . . . concerns . . . internet speech.”<sup>159</sup> Following its precedent in *Wynar*, the court applied both the nexus and reasonably foreseeable tests.<sup>160</sup>

The harassing speech satisfied the sufficient-nexus test because (1) all of the individuals involved were students, (2) “the incident took place on a path that begins at the schoolhouse door,” (3) the school’s dismissal schedule “brought the students together on the bike path,” and (4) “it is a reasonable exercise of the School District’s *in loco parentis* authority to be concerned with its students’ well being as they begin their homeward journey at the end of the school day.”<sup>161</sup>

The harassment speech satisfied the reasonably foreseeable test because (1) “administrators could reasonably expect the harassment’s effects to spill over into the school environment,” and (2) “[a]dministrators could also reasonably expect students to discuss the harassment in school.”<sup>162</sup> The court explained that “a student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment.”<sup>163</sup>

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151. *Id.*

152. 835 F.3d 1142 (9th Cir. 2016).

153. *Id.* at 1150–51.

154. *Id.* at 1150.

155. *Id.* at 1145.

156. *Id.* at 1146.

157. *Id.* at 1147.

158. *Id.* at 1145–46.

159. *Id.* at 1150.

160. *Id.*

161. *Id.* at 1150–51 (“Although the harassment at issue in this case took place off school property, it was closely tied to the school.”).

162. *Id.* at 1151.

163. *Id.*

#### 4. The Limitations of Threshold Tests

The Fourth and Eighth Circuits require schools to overcome threshold tests that are poorly defined, confusing, inefficient, and redundant. The Fourth Circuit's sufficient-nexus threshold test, which asks whether a student's off-campus speech was tied closely enough to the school to permit its regulation,<sup>164</sup> has its limitations. First, the Fourth Circuit does not provide clear guidance as to what constitutes a "sufficient nexus."<sup>165</sup> Second, the test is confusing because different courts use different versions of the sufficient-nexus test.<sup>166</sup>

The Eighth Circuit's reasonably foreseeable threshold test, which asks whether it was reasonably foreseeable that off-campus speech would reach the school,<sup>167</sup> is unclear and almost always satisfied. It is unclear because in *S.J.W. ex rel. Wilson*, the court did not specify who must be able to reasonably foresee that speech will reach the school.<sup>168</sup> Instead, the court relied on language from other courts without specifying whether the test should be employed from the vantage point of a reasonable person, the student wrongdoer, the student victim, or school authorities.<sup>169</sup> As a result, courts are applying the threshold test from different vantage points. In *Wynar*, the Ninth Circuit applied the Eighth Circuit's reasonably foreseeable threshold test from the bully's vantage point—the court stated that "it should have been reasonably foreseeable to Landon" that his bullying speech would reach the school.<sup>170</sup> In contrast, in *C.R.*, the Ninth Circuit applied the Eighth

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164. *See supra* notes 130–39 and accompanying text.

165. One lower court has admitted, "It is unclear, however, when such a nexus exists." J.C. *ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010).

166. Compare *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (finding that a nexus was not established because there were several gaps in the causation link between the speech and a disruption), *aff'd in part on reh'g en banc*, 650 F.3d 205 (3d Cir. 2011), and *Layshock ex rel. Layshock v. Hermitage Sch. Dist.* 650 F.3d 205, 221 n.3 (3d Cir. 2011) (Jordan, J., concurring) ("Speech that neither relates to school nor occurs on campus or during a school sanctioned event will in all likelihood lack a reasonable nexus to school . . ."), with *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at \*7 (M.D. Pa. Sept. 11, 2008) ("The facts that we are presented with establish much more of a connection between the off-campus action and on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website."), *aff'd in part, rev'd in part on reh'g en banc*, 650 F.3d 915 (3d Cir. 2011), and *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865–67 (Pa. 2002) (finding that a nexus was established because the speech was aimed at a specific audience of students and the website was accessed at school).

167. *See supra* notes 140–45 and accompanying text.

168. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) ("[The online posts] could reasonably be expected to reach the school or impact [its] environment.")

169. *See id.* at 777 (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)).

170. *Wynar ex rel. Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (emphasis added).

Circuit's reasonably foreseeable threshold test from the school administrators' vantage point.<sup>171</sup>

Another limitation of the reasonably foreseeable threshold test is that it will almost always be foreseeable that student internet speech regarding school issues will reach the school audience.<sup>172</sup> Moreover, even noninternet speech regarding nonschool issues will be within the school's jurisdiction so long as the bully and the victim go to the same school.<sup>173</sup> For these reasons, it would be more efficient<sup>174</sup> for courts to go straight to *Tinker*'s test and ask whether school authorities could reasonably forecast a "substantial disruption of or material interference with school activities."<sup>175</sup>

*C. Schools May Always Regulate Off-Campus Speech:  
Tinker Applies to Off-Campus Speech*

Many courts analyzing off-campus speech that is subsequently brought to campus or to the attention of school authorities apply *Tinker* regardless of where the speech originated.<sup>176</sup> These courts apply *Tinker* to speech that originates both on and off campus without first applying a threshold test.<sup>177</sup> Under this approach, speech's geographic origin is not relevant.<sup>178</sup>

171. *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1151 (9th Cir. 2016) ("[A]dministrators could reasonably expect the harassment's effects to spill over into the school environment.").

172. Anything published in cyberspace could ultimately end up at school by means of a phone, iPad, or computer. See Lindsay J. Gower, Note, *Blue Mountain School District v. J.S. ex rel. Snyder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709, 730 (2013) ("The target of most student Internet speech will be the students' friends—those who are most likely to understand and appreciate the speech and who are likely to also be students at the school.").

173. See *supra* note 172 and accompanying text.

174. See *infra* Part III.A.2.

175. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

176. See, e.g., *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 970–71 (5th Cir. 1972) (applying *Tinker* where a student-created underground newspaper was authored and distributed off campus, but some of the newspapers turned up on campus); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) ("[T]he majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means."); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying *Tinker* where a student composed a degrading top-ten list and distributed it off campus to friends via email, but one recipient subsequently printed and carried it onto school grounds); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying *Tinker* to a website created by a student off campus that criticized the school administration where another student accessed the website at school and showed it to a teacher); see also McDonald, *supra* note 60, at 736 ("[T]he *Tinker* standard applied regardless of where the student speech occurred as long as it somehow made its way onto campus.").

177. Put another way, some courts treat *Tinker*'s substantial-disruption prong as the threshold jurisdictional test. This approach merges the jurisdictional question (whether schools may regulate speech generally) with the merits question (whether schools may regulate the speech in a particular instance).

178. McDonald, *supra* note 60, at 736 (discussing how some federal district courts take the approach that the geographic location of student speech is immaterial); see *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988–92 (9th Cir. 2001) (analyzing the speech under *Tinker* without giving any consideration to the fact that the poem was written outside of school); *J.C. ex rel.*

Opponents of this approach include those who, despite believing schools should teach students not to bully,<sup>179</sup> insist that disciplining students for off-campus speech simply goes too far.<sup>180</sup> Additionally, many scholars have criticized this approach by pointing out that there are sufficient remedies and redress in the civil<sup>181</sup> and criminal<sup>182</sup> justice systems. These scholars argue that students would unfairly “face two sets of punishments: liability in court for civil or criminal violations and school discipline.”<sup>183</sup> Others criticize this approach as interfering with parents’ fundamental liberty interest in raising their children.<sup>184</sup>

Courts are clearly divided on whether schools may regulate students’ off-campus speech. While some courts hold that schools may either always or never regulate off-campus speech, the majority of courts allow regulation only when various threshold tests are satisfied.

### III. *TINKER* AS BOTH A THRESHOLD JURISDICTIONAL TEST AND A SUBSTANTIVE TEST

As discussed in Part II, circuit courts do not know how to evaluate whether schools can discipline students for off-campus speech. Consequently, victims of bullying have minimal protections or recourse for off-campus bullying. The Supreme Court must step in and provide guidance for addressing off-campus bullying speech.

This Note argues that *Tinker* should be applied as both a threshold jurisdictional test and a substantive test.<sup>185</sup> Under this approach, schools would be allowed to regulate off-campus student speech when school

*R.C.*, 711 F. Supp. 2d at 1108 (“[U]nder the majority rule . . . the geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech.”).

179. The government has differentiated roles. Schools are afforded great latitude and flexibility when it comes to choosing curriculums and lesson plans because the school is viewed as an educator. Therefore, schools can choose to teach students about bullying. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 910 (1982) (Rehnquist, J., dissenting) (“[A]ctions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.”).

180. *See supra* notes 110–22 and accompanying text.

181. *See, e.g.*, Calvert, *supra* note 110, at 245 (“[I]f traditional and generally applicable *off-campus* civil law remedies such as libel are available for teachers and principals who feel defamed by student speech that originates off campus, then why should school administrators be able to mete out a second, *in-school* punishment against those students?”).

182. *See, e.g., id.* (“[I]f generally applicable criminal threat statutes exist to punish students for off-campus expression that allegedly menaces school personnel or other students, why should a school be able to double-dip and punish those students as well?”).

183. *See* Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 144 (2003).

184. “[T]he custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.” *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting); *see also* Caplan, *supra* note 183, at 144 (discussing how off-campus student behavior is not within the jurisdiction of the school, but is largely within the jurisdiction of parents).

185. This approach accepts that schools have the authority to discipline students for off-campus speech. And because private schools may discipline students for off-campus speech, this approach would put public school administrators on the same playing field as private school administrators.

authorities could reasonably forecast a “substantial disruption of or material interference with school activities.”<sup>186</sup> In this way, students’ off-campus speech would be treated as an additional carveout to the First Amendment. But, importantly, this carveout would only apply when *Tinker* is satisfied.<sup>187</sup>

This Part argues that schools should have the authority to regulate off-campus speech. Part III.A explains that allowing schools to regulate off-campus speech is beneficial for society. Specifically, it fosters safe learning environments in schools and efficiency in courtrooms. Part III.B describes how existing criminal and civil remedies inadequately address off-campus bullying. Part III.C discusses the many policy reasons that support giving schools the authority to regulate off-campus bullying speech. And Part III.D explains that allowing schools to regulate off-campus speech does not leave bullies susceptible to unfair discipline.

#### A. Allowing Schools to Regulate Off-Campus Speech Is Necessary

It is important for schools to have the authority to regulate student speech that occurs both on and off campus because schools are tasked with creating safe environments conducive to learning.<sup>188</sup> Bullying that occurs either on or off campus causes real harm and prevents schools from providing safe learning environments.<sup>189</sup>

Whether or not schools can regulate speech should not rest on a distinction between on-campus and off-campus conduct.<sup>190</sup> Instead, schools should have the authority to regulate student speech regardless of where it occurs so long as there are “substantial effects” at school.<sup>191</sup> If the off-campus bullying speech causes—or, in the view of school administrators, is likely to cause—a substantial disruption at school, then the school should be able to discipline the bully.<sup>192</sup>

Courts also need to have an efficient way to analyze these types of claims. The reasonably foreseeable threshold test, which asks whether it is foreseeable that speech may end up at school, is very similar to *Tinker*’s first prong, which asks whether it is foreseeable that speech will cause a

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186. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

187. The *Tinker* standard is satisfied when school administrators could reasonably forecast a substantial disruption in school. *Id.*

188. See *supra* note 63 and accompanying text.

189. See *supra* Part I; see also *supra* note 63 and accompanying text.

190. See *supra* notes 123–27 and accompanying text.

191. See CONN. GEN. STAT. § 10-222d (2017) (prohibiting off-campus bullying if such bullying “(i) creates a hostile environment at school for the student against whom such bullying was directed, or (ii) infringes on the rights of the student against whom such bullying was directed at school, or (iii) substantially disrupts the education process or the orderly operation of a school”).

192. Courts apply the “effects” test from *Calder v. Jones*, 465 U.S. 783 (1984), in cases where there are insufficient minimum contacts to establish personal jurisdiction. The Court’s rationale in *Calder* should apply to a school’s regulatory authority to discipline students. See Puiszis, *supra* note 30, at 224 (“While the jurisdictional question *Calder* addressed is analytically distinct, conceptually the logic of the Court’s rationale generally can be applied here, given the nature of Internet speech.”).

substantial disruption at school. Therefore, it would be more efficient to collapse the reasonably foreseeable threshold test into *Tinker*'s first prong. Under this approach, courts would continue to apply *Tinker*'s test from the vantage point of school administrators.<sup>193</sup>

Additionally, the Ninth Circuit's holdings in *Wynar* and *C.R.* suggest that when the sufficient-nexus threshold test is met, the reasonably foreseeable threshold test will likely also be met.<sup>194</sup> Therefore, the sufficient-nexus threshold test is not materially different from the reasonably foreseeable threshold test.<sup>195</sup> Rather, it seems like courts may be labeling their fact-driven analyses as "threshold tests" when, in reality, each case's outcome is fact specific.<sup>196</sup>

For these reasons, it would be more efficient for courts to apply *Tinker* and analyze the facts of each case<sup>197</sup> instead of hiding behind threshold tests.

### B. Existing Legal Remedies Do Not Work

Another reason schools should have regulatory authority to discipline students for off-campus speech is that existing criminal and civil remedies fail the victims of off-campus bullying. This section discusses the inadequacy of criminal and civil remedies to address off-campus bullying.

#### 1. Criminal Remedies Fail the Victims of Off-Campus Bullying

There has been little success prosecuting cyberbullies.<sup>198</sup> An incident at Horace Greeley High School "highlights the inability of the legal system to effectively deter cyberbullying."<sup>199</sup> Horace Greeley administrators suspended two male students for five days because they posted personal

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193. Nonetheless, nothing prevents school administrators from ratcheting down discipline for students who could not reasonably foresee the consequences of their bullying speech.

194. See *supra* notes 146–63.

195. Gower, *supra* note 172, at 727, 730 (discussing reasons why the Supreme Court continues to deny certiorari in student free-speech cases). "[T]he circuit courts of appeal are not in disagreement over the rule of law to apply; rather, the diverging results and analyses in the different circuits are merely based on factual considerations." *Id.* at 727.

196. The Fifth Circuit has not adopted one specific threshold test to determine whether schools may discipline students for their off-campus speech. Instead, it explicitly declined to "adopt or reject approaches advocated by other circuits," like the sufficient-nexus test or the reasonably foreseeable test, because the outcome of each case is "heavily influenced by the facts in each matter." *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383, 396, 400 (5th Cir. 2015) (holding that a student could be disciplined for his off-campus speech without violating the First Amendment where he "posted a rap recording containing threatening language against two high school teachers/coaches on the Internet").

197. See *supra* note 97 and accompanying text.

198. See, e.g., *United States v. Alkhabaz*, 104 F.3d 1492, 1494 (6th Cir. 1997) (holding that emails expressing sexual interest in violence against women did not constitute "a communication containing a threat" within the meaning of the statute); see also DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 19 (2014) ("Victims are told not to expect any help: 'This is the INTERNET folks . . . There are no laws here, at least not clearly defined ones.'" (alteration in original) (quoting a comment on a blog post)).

199. Todd D. Erb, Note, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 260 (2008).



information about female students—“including family history, phone numbers, addresses and, most troubling, sexual experience”—on a website.<sup>200</sup> The principal called the police and the boys were “charged with second-degree harassment, which carries a sentence of up to one year in jail and a \$1,000 fine.”<sup>201</sup> But, a few days later, the Westchester District Attorney announced that, while some of the material was “‘offensive and abhorrent,’ it did not meet the legal definition of harassment and [the] criminal charges against the two boys would be dropped.”<sup>202</sup> Clearly, there were no criminal remedies available to address this behavior.

If they are available, criminal remedies are often ineffective. And even in the limited instances where criminal remedies can provide adequate redress, they are often more detrimental than rehabilitative for the bullies themselves. Specifically, criminal remedies contribute to the school-to-prison pipeline.<sup>203</sup> Additionally, they do not serve any educational purpose.<sup>204</sup> Young students make mistakes. And school principals can help bullies learn from their mistakes without involving the police.<sup>205</sup>

## 2. Civil Remedies Fail the Victims of Off-Campus Bullying

Civil remedies do not provide bullying victims with recourse when off-campus speech substantially disrupts the learning environment but does not

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200. Amy Benfer, *Cyber Slammed*, SALON (July 3, 2001, 7:03 PM), [https://www.salon.com/2001/07/03/cyber\\_bullies/](https://www.salon.com/2001/07/03/cyber_bullies/) [<https://perma.cc/QL8C-4DMM>].

201. *Id.*

202. *Id.* Alternatively, this could have been pursued as doxing, “a form of cyberharassment involving the public release of personal information that can be used to identify or locate an individual.” See Julia M. MacAllister, Note, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 *FORDHAM L. REV.* 2451, 2453 (2017) (discussing existing statutory schemes and the need for an effective and consistent legal remedy for doxing).

203. The school-to-prison pipeline is “a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems.” See *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> [<https://perma.cc/A57N-68T3>] (last visited Oct. 4, 2018).

204. See Marilyn Elias, *The School-to-Prison Pipeline*, *TEACHING TOLERANCE MAG.*, Spring 2013, at 38, 38–40 (discussing that school discipline fosters learning in ways that criminal and punitive discipline do not).

205. See *infra* Part III.C.

rise to the level of a “true threat.”<sup>206</sup> In other words, there is a category of hurtful speech that never makes it to court because it is not threatening.<sup>207</sup>

Moreover, litigation is expensive and student victims should not have to go to court for redress. Going to court is detrimental to both the victim and the bully. For example, if student victims of cyberbullying want to file libel actions, their bullies can use the affirmative defense that the hurtful statements are true.<sup>208</sup> So if the bully called the victim a “slut” or “fat,” the bully could use the defense that the statements are true.<sup>209</sup> This type of litigation would likely hurt the victim even more, while also inaccurately teaching the bully that actions do not have consequences. It is a lose-lose situation.

In sum, civil remedies fail to provide bullying victims with proper redress because bullies often use speech that is neither actually threatening nor meets the legal standard of libel. And even in the limited instances where civil remedies can provide adequate redress, they are often expensive and harmful for the victim.

### *C. Policy Reasons Support Granting Schools Broad Regulatory Authority over Off-Campus Bullying Speech*

This section discusses why giving schools regulatory authority over off-campus bullying speech is good public policy. First, school systems are better suited than local police departments and courts when it comes to working with children and regulating student speech. Second, teachers and school administrators need legal support to teach and run schools. And third, all forms of off-campus bullying should be treated equally.

#### 1. School Systems Are a More Appropriate Regulator

“The determination of what manner of [student] speech . . . is inappropriate properly rests with the school board”<sup>210</sup> and not the courts

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206. The phrase “true threat” is a constitutional term of art used to describe a category of speech that the First Amendment does not protect. *See* *Watts v. United States*, 394 U.S. 705, 708 (1969); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002) (finding that a website containing a list of students that one student wished would die and included a “mission” for all those reading the website to “[s]tab someone for no reason[,] then set them on fire[,] throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face” did not constitute a true threat); *see also* Lisa L. Swem, *Sticks and Stones in Cyberspace*, LEADERSHIP INSIDER, Aug. 2006, at 5, 11; Erb, *supra* note 199, at 271 (“[M]any school officials are frustrated and left wondering what can be done to address speech that does not rise to the level of a ‘true threat’ . . . but still negatively affects the school environment and the students that attend the school.”).

207. Speech is a “true threat” if a reasonable person would interpret it “as a serious expression of an intent to cause a present or future harm.” *See* *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002).

208. *See* *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975) (“It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense . . .”).

209. *See* Erb, *supra* note 199, at 279.

210. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *see also* *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 n.1 (2009) (“[S]tandards of conduct for schools

because school systems are very involved with parents and children in the community.<sup>211</sup> First, parent-teacher conferences often take place several times a year to keep parents informed about their children. At these meetings, teachers team up with parents to better meet students' academic and behavioral needs. Parent-teacher partnerships are effective because they often lead to higher student achievement.<sup>212</sup> Second, parent-teacher organizations (PTOs) give parents another opportunity to be involved in school affairs. Parents often act as volunteers in schools, but they can also participate in the educational process by attending local school meetings. Third, parents are invited to attend school board meetings to voice opinions and concerns about educational policies affecting the local community.

In contrast, criminal and judicial systems are much less willing to involve parents in their affairs. Police departments are too busy to look into small burglaries,<sup>213</sup> much less bullying that affects students at school.<sup>214</sup> And court dockets are already overloaded.<sup>215</sup>

For these reasons, it is most practical to allow school systems to regulate off-campus bullying speech that affects students on campus.

are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed.” (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985)); *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part) (“[N]o one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.”); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 671 (7th Cir. 2008) (“[J]udges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere conducive to learning . . . .”); THOMAS, *supra* note 50, at 83 (“[T]he judiciary has been reluctant to interfere with school boards’ prerogatives in selecting and eliminating instructional materials.”).

211. Justin Patchin, Opinion, *Most Bullying Cases Aren’t Criminal*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 30, 2010), <https://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/most-bullying-cases-arent-criminal> [<https://perma.cc/WXK5-GV8L>] (“The vast majority of cyberbullying incidents can and should be handled informally: with parents, schools, and others working together to address the problem before it rises to the level of a violation of criminal law.”).

212. Am. Fed’n of Teachers, *Building Parent-Teacher Relationships*, READING ROCKETS, <http://www.readingrockets.org/article/building-parent-teacher-relationships> [<https://perma.cc/C8FP-KHN5>] (last visited Oct. 4, 2018) (“Substantial evidence exists showing that parent involvement benefits students, including raising their academic achievement.”).

213. See Patrick Scott & Ellie Kempster, *Revealed: How Likely Is It That the Police Will Manage to Catch the Person Who Burgles Your House?*, TELEGRAPH (Oct. 19, 2017, 4:04 PM), <http://www.telegraph.co.uk/news/2017/10/19/nine-10-home-burglaries-now-go-unsolved-effective-police-force/> [<https://perma.cc/EJ93-HC2C>].

214. Erb, *supra* note 199, at 283.

215. *Id.*; see also Martha Neil, *US Courts: Federal Litigants Face Record Civil-Case Backlog Due to Shortage of Judges*, A.B.A. J. (Apr. 6, 2015, 4:55 PM), [http://www.abajournal.com/news/article/us\\_courts\\_federal\\_litigants\\_face\\_record\\_civil\\_case\\_backlog\\_due\\_to\\_shortage](http://www.abajournal.com/news/article/us_courts_federal_litigants_face_record_civil_case_backlog_due_to_shortage) [<https://perma.cc/X2H9-P7MP>] (discussing the backlog of cases and mentioning that “the federal prison population has grown by more than 50 percent”); Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, CHI. TRIB. (Sept. 28, 2015, 12:32 AM), <http://www.chicagotribune.com/news/nationworld/sns-bc-us--federal-case-backlog-20150927-story.html> [<https://perma.cc/6ULH-LSFD>] (“[F]ederal district courts have seen a rise in recent years in the time it takes to get civil cases to trial and resolve felony criminal cases as judges’ workloads have increased . . . .”).

## 2. Teachers and School Administrators Are Entitled to Legal Protection

Teachers and school administrators need support from the legal system to do their jobs. Today, teachers fear being sued by both bullying victims and bullies.<sup>216</sup> Specifically, teachers may be sued by bullying victims if they do not discipline bullies and by bullies if they do.<sup>217</sup>

Bullies cannot get away with bullying merely because parents, “the primary agents in the pediatric safety system[,] falter in preventing and responding effectively.”<sup>218</sup> Instead, “professionals who teach the young [should] assume additional responsibilities as protectors, cyber ethicists, and disciplinarians.”<sup>219</sup> While “good” teachers will assume additional responsibilities, “smart” teachers will do so only when they have legal support.<sup>220</sup>

Teachers will have the support they need to control their classrooms if the Supreme Court recognizes schools’ authority to regulate off-campus bullying speech. Specifically, teachers will be able to discipline students for off-campus bullying speech that substantially disrupts the classroom environment without fearing lawsuits.

## 3. It Is Necessary to Treat Cyberbullying and Other Forms of Off-Campus Bullying Equally

The majority of off-campus bullying cases involve cyberbullying. Accordingly, while the Supreme Court may be more inclined to hear a cyberbullying case, it is still important for the Court to recognize that schools should have the authority to regulate other forms of off-campus bullying speech.

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216. See Abrams, *supra* note 58, at 187 (discussing how school authorities often avoid meaningful discipline because they fear that students and their parents will respond with lawsuits); see also Elizabeth Elizalde, *Family of New Jersey Cheerleader Suing School District After Cyberbullying Led to Girl’s Suicide*, N.Y. DAILY NEWS (Aug. 2, 2017, 12:52 PM), <http://www.nydailynews.com/news/national/n-family-suing-school-not-stopping-girl-cyberbullying-article-1.3375238> [<https://perma.cc/AQ36-GUPV>].

217. See Fenn, *supra* note 23, at 2765 (discussing how schools may be liable to victims of cyberbullying if they did not act aggressively to combat it or to off-campus bullies if courts find that schools violated cyberbullies’ First Amendment rights).

218. Abrams, *supra* note 58, at 224.

219. *Id.* (“Teachers and administrators frequently assume responsibility not only as classroom instructors, but also as counselors, confidantes, psychologists, hygienists, nutritionists, and various other authority figures essential to the growth and development of an entire generation of children.”); see also *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 615, 635 (8th Cir. 2002) (“Educators serve as surrogate parents, psychologists, social workers, and security guards, above and beyond their normal teaching responsibilities.”).

220. See Tresa Baldas, *School Suits*, NAT’L L.J. (May 17, 2004, 12:00 AM), <https://www.law.com/nationallawjournal/almID/900005407928/school-suits/> [<https://perma.cc/QQH9-TEQV>] (discussing an interactive poll of 800 public school teachers and principals nationwide, which found that 82 percent of teachers and 77 percent of principals agree that fear of lawsuits has created a “defensive teaching mode . . . motivated by a desire to avoid” litigation); *id.* (“[N]early 8 in 10 teachers, 78%, say students are quick to remind them that they have rights or that their parents can sue, . . . [and] 62% of principals said that they have been threatened with a legal challenge . . .”).

Some may argue that cyberbullying is the only form of off-campus speech that should be regulated by schools because the hurtful speech can be accessed anytime and anywhere, including at school.<sup>221</sup> And while it is true that cyberbullying has an “everywhere” and “all the time” effect<sup>222</sup> there are also instances where in-person bullying has this effect.<sup>223</sup> This was found to be the case in *C.R. v. Eugene School District 4J*, where a student was suspended for harassing two disabled students while walking home from school.<sup>224</sup> In these instances, schools should have the authority to discipline students.

*D. There Should Be Adequate Safeguards for Those Accused of Bullying*

Even though this Note argues that schools should have broad authority to regulate student bullying speech, significant procedural safeguards should be available for those accused of bullying. Allowing schools to protect bullying victims by regulating off-campus speech should not swing the pendulum too far by subjecting bullies to unfair discipline without having an opportunity to be heard. And while “[t]here is no constitutional right to be a bully,”<sup>225</sup> there are many ways schools could ensure that bullies are treated fairly.

First, schools should provide all students and their families with written notice before the school year begins that there will be zero tolerance for bullying and that those who violate the school’s antibullying policy may be disciplined and possibly suspended from school. The school’s antibullying policy should also explicitly caution that students may be held responsible both for off-campus and on-campus bullying.

Second, teachers and school administrators should only be permitted to discipline students for off-campus speech in accordance with school district policies and procedures. Students facing suspension or expulsion should, at a minimum, be given notice of the charges against them and afforded a hearing.<sup>226</sup>

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221. Proponents of this view would allow schools to discipline students for bullying that occurs on Facebook but not for bullying that occurs at a public park or during a playdate. *See supra* notes 36–38 and accompanying text.

222. McDonald, *supra* note 60, at 746 (“[C]yberbullying can be engaged in with much less effort or notice than traditional bullying, even anonymously, and the concomitant threat to the targeted student’s psychological well being seems sufficiently greater to make it legitimate for schools to take cognizance of such disputes and apply speech standards to them that take into account the need to protect the learning environment for targeted students.”).

223. *See supra* notes 155–63 and accompanying text.

224. 835 F.3d 1142, 1145 (9th Cir. 2016) (“[The incident] occurred about five minutes after school let out, a few hundred feet from campus.”).

225. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) (“Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent.”).

226. *Goss v. Lopez*, 419 U.S. 565, 572–76 (1975) (holding that a suspension without a hearing violated the Due Process Clause of the Fourteenth Amendment in a case where an Ohio statute guaranteed a free education to all residents).

Third, like the imposition of other school sanctions, the type of discipline should be proportional to the offense.<sup>227</sup> Teachers and school administrators should take various factors into account, including the student's age, the severity of the bullying, and whether the bully is a first-time offender.

Fourth, another protection for accused bullies should include the use of positive behavior interventions and supports, which is becoming increasingly popular.<sup>228</sup> Today, many schools are moving away from traditional types of discipline,<sup>229</sup> like suspensions, because recent research shows that sending students home from school may do them more harm than good.<sup>230</sup> Therefore, when school administrators consider the appropriate form of discipline for students who have engaged in off-campus bullying speech, they should examine whether to employ a form of positive behavior intervention or support.<sup>231</sup> Schools should use the least punitive measures available if they are adequate to protect the victim and the school's learning environment. But there will still be times where suspensions are the only adequate remedy. And when school administrators use their professional judgment to suspend students, instead of administering positive behavior interventions, courts should give schools great deference—because these decisions can save lives.

#### CONCLUSION

Bullying, both on and off campus, has far-reaching consequences. The Supreme Court cases establishing the contours of free speech doctrine as applied to public schools are outdated and ineffective because they do not address off-campus bullying speech. The Supreme Court has had several

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227. Types of discipline include, but are not limited to, receiving a detention, suspension, or expulsion. Other creative forms of discipline may include getting “bully-related” homework like writing an apology, losing a school privilege, or receiving a parent notification.

228. “Positive Behavior Interventions and Supports is a systems approach to establishing the social culture and behavioral supports needed for all children in a school to achieve both social and academic success.” Rob Horner, George Sugai & Timothy Lewis, *Is School-Wide Positive Behavior Support an Evidence-Based Practice?*, PBIS (Apr. 2015), <https://www.pbis.org/research> [<https://perma.cc/49WZ-Q4MR>]. It includes preventative and responsive approaches that may be implemented with all students in a classroom and intensified to support small groups or individual students. *Id.*

229. The current trend is for schools to limit the number of suspensions wherever possible. See Jane Adams, *Suspensions and Expulsions Decline as Districts Adopt Alternatives*, *State Says*, EDSOURCE (Jan. 13, 2016), <https://edsource.org/2016/suspensions-and-expulsions-decline-as-districts-adopt-alternatives-state-says/93297> [<https://perma.cc/NP5L-6HBQ>].

230. See Christopher Ferguson, *Does Suspending Students Work?*, *TIME* (Dec. 5, 2012), <http://ideas.time.com/2012/12/05/does-suspending-students-work/> [<https://perma.cc/EFN6-FRUU>] (explaining that suspending a student does “nothing to teach appropriate alternative behavior nor address underlying issues that may be causing the bad behavior”); LouAnne Johnson, *Down with Detention!*, *EDUC. WEEK* (Nov. 30, 2004), <https://www.edweek.org/ew/articles/2004/12/01/14johnson.h24.html> [<https://perma.cc/9Q8M-UH52>] (“Using detention as a catchall cure for student misbehaviors is like using one medicine for every physical ailment.”).

231. As a former first grade teacher, I have implemented several positive behavior interventions for my students, including: (1) speaking to the student-bully about the impacts of bullying, (2) hosting group interventions allowing student-bullies to apologize to student-victims, and (3) creating behavior-management plans to reinforce positive “nonbullying” behaviors.

opportunities to define the parameters of student speech but has declined to do so.<sup>232</sup> As a result, educators and students must continue to guess how a court would rule in any specific case.<sup>233</sup> The Supreme Court should clarify *Tinker*'s test as both a jurisdictional and substantive test. Doing so would allow school administrators to regulate students' off-campus bullying speech and save lives.

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232. The U.S. Supreme Court has recently denied certiorari in off-campus student speech cases. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017); *see also* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir.) (en banc), *cert. denied*, 565 U.S. 976 (2011).

233. Gower, *supra* note 172, at 722.