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SUPERVISING CYBERSPACE: A SIMPLE THRESHOLD FOR PUBLIC SCHOOL JURISDICTION OVER STUDENTS' ONLINE ACTIVITY

Abstract: This Note addresses the much-debated problem of identifying and limiting the authority that a public elementary or secondary school has over the online expression of its students. In recent years, there have been an increasing number of First Amendment lawsuits brought against schools by students whom the schools disciplined for their online expression. This Note proposes that, before engaging in a First Amendment analysis of the student's expression, courts engage in a threshold inquiry to determine whether a school has any authority to discipline a student for the expression at issue. This Note argues that courts should apply a "control and supervision" test, derived from the analysis used in negligent supervision cases and Title IX cases for student-on-student sexual harassment, to determine whether a school has the authority to discipline a student for his or her online speech.

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life.¹

INTRODUCTION

In April 2007, administrators at Lewis S. Mills High School, a public school in Burlington, Connecticut, punished Avery Doninger, a junior, for using an online blog to criticize her school administration's management of a student battle-of-the-bands event that she had organized as junior class secretary.² In the blog, which she created and used

¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part).

² *See Doninger v. Niehoff*, 514 F. Supp. 2d 199, 202, 206 (D. Conn. 2007) (denying student's motion for preliminary injunction and holding that she did not have a First Amendment right to run for student council office while engaging in offensive speech about school administrators in her blog), *aff'd* 527 F.3d 41, 44 (2d Cir. 2008), *aff'd* 595 F. Supp. 2d 211 (D. Conn. 2009) (granting summary judgment to the school on the student's blog entry First Amendment claim, and denying summary judgment to the school on the student's First Amendment claim concerning the school's censorship of "Team Avery" t-shirts that students were prohibited from wearing at the school's election assembly), *certifying*

only from home, Doninger wrote that the superintendent “got pissed off,” characterized the administrators as “douchebags,” and used other offensive language.³ The school responded by prohibiting Doninger from running for senior class secretary.⁴ Doninger sued the school in July 2007 for violating her First Amendment right to free speech, seeking damages and an injunction preventing the school from enforcing her punishment.⁵ This case presented the U.S. District Court for the District of Connecticut with the difficult task of assessing whether the school’s action was a reasonable exercise of the school’s disciplinary authority or an infringement of Avery Doninger’s First Amendment right to free speech.⁶

This Note seeks to establish a test for determining when a school has jurisdiction over its students’ online expressions.⁷ Legislators, public school administrators, teachers, and parents increasingly are concerned with student speech on the Internet and the effect it may have on a school’s ability to maintain a controlled and constructive learning environment.⁸ The kinds of online speech that public schools have

questions to the U.S. Court of Appeals for the Second Circuit, 2009 U.S. Dist. LEXIS 49908 (D. Conn. May 14, 2009) (holding that there was a question of law for appeal of whether the school’s discipline of Doninger in response to her blog entry violated the First Amendment, and whether the school was entitled to qualified immunity on both First Amendment claims). Doninger’s blog was available at www.livejournal.com, and her privacy setting at the time she wrote the blog was “public” so that anyone could view the webpage. *Id.* at 206; *see also* David Hudson, *Judge Rejects Student’s Blog Claim, Allows T-shirt Issue to Proceed*, FIRST AMENDMENT CENTER, Jan. 20, 2009, <http://www.firstamendmentcenter.org/analysis.aspx?id=21133>.

³ *See Doninger*, 514 F. Supp. 2d at 206. The court quoted her exact language as:

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

Id. (alterations and omissions in original). Paula Schwartz was the superintendent.

⁴ *See id.* at 202.

⁵ *See Doninger v. Niehoff*, 594 F. Supp. 2d 211, 214 (D. Conn. 2009); *Doninger*, 514 F. Supp. 2d at 202, 210.

⁶ *See Doninger*, 514 F. Supp. 2d at 210.

⁷ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”); *see Doninger*, 514 F. Supp. 2d at 210. The First Amendment is incorporated to the states through the Due Process Clause of Section 1 of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁸ *See* Tresa Baldas, “Cyberbullying” Creates Legal Quandary, 18 FULTON COUNTY DAILY REP. (Ga.), No. 240, Dec. 11, 2007; Anne Marie Chaker, *Schools Act to Short-Circuit Spread of “Cyberbullying”*, WALL ST. J., Jan. 24, 2007, at D1; Alan Gomez, *Students, Officials Locking Horns over Blogs*, USA TODAY, Oct. 26, 2006, at 8D; Cynthia Wagner, *Beating the Cyberbullies*, FUTURIST,

tried to curb include politically unpopular speech,⁹ parodies of teachers or administrators,¹⁰ and “cyberbullying.”¹¹ In particular, as student use of the Internet grows, cyberbullying—or online threats, harassment, and ridicule by students of their peers and teachers—is becoming increasingly prevalent.¹² Messages and pictures on the Internet are potentially more disruptive than messages sent by traditional media because the Internet distributes this information to a huge audi-

Sept. 1, 2008, at 14 *available at* <http://www.allbusiness.com/technology/software-services-applications-internet-social/11579506-1.html>.

⁹ See Rob Rogers, *Redwood High Student Says He Was Suspended for Conservative Paper*, MARIN INDEP. J. (Cal.), Oct. 31, 2008, *available at* http://www.marinij.com/larkspur/cortemadera/ci_10859909. An example of punishment for political speech is the case of seventeen-year-old Cyrus Massoumi, who was suspended for five days from Redwood High School in Larkspur, California in 2008 for distributing flyers at school directing students to his online newsletter and for emailing the newsletter to school faculty. *Id.* His newsletter critiqued the liberal politics of Massoumi's town and included satirical articles about environmentalists, Israel, gay-rights activists, women, and the residents of his county. *Id.*

¹⁰ See, e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007); *Beidler v. N. Thurston Sch. Dist.*, No. 99-2-00236-6, slip op. at 6 (Wash. Super. Ct. July 18, 2000); Am. Civil Liberties Union of Wash. State, *Student Gets Damages in Web Parody Case* (Feb. 20, 2001), <http://www.acu-wa.org/detail.cfm?id=169>.

¹¹ See *Layshock*, 496 F. Supp. 2d at 591; *J.S. v. Bethlehem*, 807 A.2d 847, 869 (Pa. 2002); Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 257-58 (2008); Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1218-19. Bullying has become a prevalent problem in schools, causing schools to take online bullying very seriously. See NAT'L CTR. FOR EDUC. STATISTICS, CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS FINDINGS FROM THE SCHOOL SURVEY ON CRIME AND SAFETY: 2005-06, at 9 (2007), *available at* <http://nces.ed.gov/pubs2007/2007361.pdf> [hereinafter EDUCATION STATISTICS 2005-06].

¹² See CARAVAN OPINION RESEARCH CORP., CYBERBULLYING TEEN 3 (2006), *available at* <http://fightcrime.org/cyberbullying/cyberbullyingteen.pdf> [hereinafter CARAVAN TEEN]; AMANDA LENHART, CYBERBULLYING AND ONLINE TEENS 1 (June 27, 2007) *available at* http://www.pewinternet.org/PPF/r/216/report_display.asp; NAT'L ASSOC. OF ATT'YS GEN., CAMPUS SAFETY TASK FORCE: 2007 REPORT AND RECOMMENDATIONS 3 (2007), *available at* <http://www.naag.org/assets/files/pdf/2007.TaskForceOnSchoolAndCampusSafety.pdf> (emphasizing that the “growth in the use of technology and social networking sites by younger Americans has fueled a fear among professionals that cyberbullying will become the means most often utilized to harass, threaten or otherwise cause distress,” and that it is imperative that schools address cyberbullying by students).

Between 2001 and 2006, the percent of young people in the U.S. between the ages of twelve and seventeen that had Internet access at home rose from 73% to 87%. AMANDA LENHART ET AL., TEENS AND THE INTERNET: FINDINGS SUBMITTED TO THE HOUSE ENERGY AND COMMERCE TELECOMMUNICATIONS SUBCOMMITTEE 2 (July 11, 2006), *available at* <http://www.pewinternet.org> (search “teens and the internet house telecom”); AMANDA LENHART ET AL., TEENAGE LIFE ONLINE: THE RISE OF THE INSTANT MESSAGE GENERATION AND THE INTERNET'S IMPACT ON FRIENDSHIPS AND FAMILY RELATIONSHIPS 3 (June 21, 2001), *available at* http://www.pewinternet.org/PPF/r/36/report_display.asp.

ence in a short amount of time.¹³ Because the lives of elementary and secondary school students often revolve around the school, the effects of online student activity at home frequently are brought to school through cell phones, print-outs, and school computers.¹⁴

An increase in school violence and a number of highly publicized student suicides have highlighted the problem of abusive online activity by students and put pressure on legislatures and school officials to pass tougher laws and implement stricter discipline policies to punish cyberbullying.¹⁵ School law has been developing rapidly in response to this social pressure.¹⁶ At least fifteen states now have legislation requiring schools to establish policies on controlling cyberbullying.¹⁷ Some of these policies, however, do not adequately guide schools on when schools have jurisdiction over students' online activity.¹⁸ In order for

¹³ See *Doninger*, 594 F. Supp. 2d at 219 ("An email can be sent to dozens or hundreds of other students by hitting 'send.' A blog entry . . . can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.")

¹⁴ See *id.*; Erb, *supra* note 11, at 258.

¹⁵ See Baldas, *supra* note 8; Chaker, *supra* note 8; Gomez, *supra* note 8; Wagner, *supra* note 8. For information about increased school violence, see WILLIAM D. VALENTE & CHRISTINA M. VALENTE, *LAW IN THE SCHOOLS* 5–6 (6th ed. 2005). From 1997 to 2005, the number of schools reporting at least one incident of serious violent crime rose from 10% to 17.1%. EDUCATION STATISTICS 2005–06, *supra* note 11, at 5 (defining serious violent crime as rape or other type of sexual battery, physical attack or fight with a weapon, or robbery); NAT'L CTR. FOR EDUC. STATISTICS, *CRIME, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996–97* iv (1998), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=98030> (defining serious violent crime as rape or other type of sexual battery, murder, suicide, physical attack or fight with a weapon, or robbery).

For information about student suicides, see Todd Jurkowski, *Bullying Moves from School to Cyberspace*, NBC2 NEWS, Nov. 7, 2005, <http://www.nbc-2.com/articles/readarticle.asp?articleid=4827&z=3&p> (reporting that in June 2005, a fifteen-year-old hanged himself after enduring severe bullying at school and online over the course of almost three years), and Make a Difference for Kids, Inc., <http://www.MakeaDifferenceForKids.org> (last visited Nov. 2, 2009) (website dedicated to promoting awareness and prevention of cyberbullying and suicide).

¹⁶ See *infra* note 17 and accompanying text.

¹⁷ See, e.g., IND. CODE ANN. § 20-30-5.5 (2008); OR. REV. STAT. ANN. § 339.351–.364 (2007); WASH. REV. CODE ANN. § 28A.300.285 (West 1961 & Supp. 2009). Arkansas, California, Idaho, Iowa, New Jersey, Missouri, New York, Vermont, Florida, Oregon, Pennsylvania, South Carolina, Utah, Indiana, and Washington have cyberbullying legislation or policies in place. Kathleen Conn & Kevin P. Brady, *MySpace and Its Relatives: The Cyberbullying Dilemma*, 226 ED. LAW REP. 1, 6 (2008); CyberBullyAlert.com, *Cyberbullying State Laws and Policies* (Oct. 8, 2008), <http://www.cyberbullyalert.com/blog/2008/10/cyber-bullying-state-laws-and-policies>.

¹⁸ See WASH. REV. CODE ANN. § 28A.300.285. For example, the Washington statute does not distinguish between on- and off-campus cyberbullying. *Id.* Arkansas law also allows school officials to take action against cyberbullies even if the bullying did not originate or take place on school property. See ARK. CODE ANN. § 6-18-514 (West 2009). In contrast, the

schools to draft appropriate policies in compliance with cyberbullying statutes, school officials need clarity on the boundaries of their authority over online activity and the extent to which the First Amendment protects students' online expression.¹⁹

In addition to new laws and societal pressure, there are a number of other legal reasons why schools are becoming more involved with students' online expression.²⁰ First, the limits on school jurisdiction over students' online activity are undeveloped.²¹ Although it is well established by forty years of U.S. Supreme Court precedent that public school students retain a First Amendment right to free speech while at school, that right is more limited than speech rights in a public forum because of the school's interest in maintaining an orderly and productive learning environment.²² As a result, student speech rights under the First Amendment have developed as a separate analysis from the more general First Amendment speech jurisprudence that applies to speech in a public forum.²³

Currently, lower courts differ on when school speech standards rather than general First Amendment principles govern in online student speech cases.²⁴ Courts and commentators also debate whether schools should be involved at all in regulating online speech created off school property, regardless of the standard used, general or student-

Oregon statute limits the school's policy to addressing harassment that takes place on campus or at a school-sponsored event. *See* OR. REV. STAT. ANN. § 339.351–.364.

¹⁹ *See Doninger*, 594 F. Supp. 2d at 218.

²⁰ *See infra* notes 22–36 and accompanying text.

²¹ *See infra* notes 108–162 and accompanying text.

²² *See Morse v. Frederick*, 551 U.S. 393, 408–10 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681–83 (1986) (stating that the school's responsibility to teach fundamental values such as tolerance of different viewpoints must be considered in light of the school's need to protect the "sensibilities" of other students and the potential damage lewd speech that could cause to an immature and developing mind); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969); *Layshock*, 496 F. Supp. 2d at 595. Conditions in the school environment potentially justify constraining student speech:

[S]tudents and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because High School teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space

Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 968–69 (5th Cir. 1972).

²³ *See infra* notes 42–80 and accompanying text.

²⁴ *See infra* notes 108–150 and accompanying text.

specific.²⁵ The difficulty with applying traditional school speech jurisprudence to online speech is that “Internet content is not limited by geography,” and thus a “geographical distinction is no longer a logical border to school jurisdiction over student speech.”²⁶ The current unpredictability in online student speech case law has resulted in a lack of fair notice to students, a potential chilling of student Internet use and expression, and, of course, a plethora of litigation.²⁷

As a result of the uncertainty in this area of the law, schools can regulate online speech liberally and without the fear of paying damages for a First Amendment violation because, even if a school official violates a student’s speech rights, the official will be granted qualified immunity from monetary damages if the disciplinary action was “objectively reasonable in light of ‘clearly established’ law at the time of the violation.”²⁸ Because of the courts’ inconsistent approaches to online student speech, schools disciplining such speech often have a compelling argument that no “clearly established” law existed to guide their policy.²⁹ As a result, the school can be seen to have acted reasonably

²⁵ See Sherry Saavedra, *Schools Weigh Control Versus First Amendment*, SAN DIEGO UNION-TRIB., June 4, 2006, http://www.signonsandiego.com/uniontrib/20060604/news_1n4myspace.html. For example, Peter Scheer, executive director of the California First Amendment Coalition, said “[m]y own view is that it can be the school’s business if the speech on MySpace is especially offensive or dangerous.” *Id.* In contrast, David Blair-Loy, legal director of the San Diego and Imperial Counties chapter of the ACLU, is of the opinion that schools do not have the right to discipline students for off-campus speech unless the student broke a school rule. *Id.* See generally Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008) (arguing that student Internet speech should be entirely outside of the school’s control).

²⁶ Servance, *supra* note 11, at 1235–36.

²⁷ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 (1973) (Brennan, J., dissenting) (arguing that obscenity should be protected by the First Amendment because of the risk that an unsettled standard for defining obscenity would result in the lack of fair notice, the chilling of protected speech, and a heavy burden on the state and “federal judicial machinery.”). See generally STUDENT PRESS LAW CTR., GUIDE TO MAINTAINING AN OFF-CAMPUS WEB SITE (2008), <http://www.splc.org/pdf/websitelegalguide.pdf>.

²⁸ *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004) (quoting *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 279 (5th Cir. 2003)); see also 42 U.S.C. § 1983 (2000); *Morse*, 551 U.S. at 400 n.1 (failing to hold on the issue of qualified immunity in this situation, but implicitly agreeing with Justice Breyer’s concurring opinion that school officials are entitled to qualified immunity from monetary damages in First Amendment cases where the school acted reasonably in interpreting the existing law); *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

²⁹ See *Porter*, 393 F.3d at 614; *Doninger*, 594 F. Supp. 2d at 218 (granting qualified immunity to school defendants because “the constitutional right at stake was not clearly established at the time the alleged [First Amendment] violation occurred.”). In *Doninger*, the U.S. District Court of Connecticut stated: “If courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly

under a great variety of circumstances.³⁰ Thus, a clear method for analysis is necessary to provide guidance to students, courts, and administrators.³¹ This clarification would also diminish the risk of chilling student speech by giving notice to students of exactly what activity will be free from school interference.³²

Furthermore, public school officials are presented with a legal quandary when deciding whether to discipline a student for online activity.³³ On one hand, if schools discipline students for speech that originated off campus on the student's home computer, the school may be liable for a First Amendment violation.³⁴ On the other hand, if a school does not take action against peer harassment or threats, and a serious incident results, the school may be liable under federal statutes like Title IX of the Education Amendments of 1972, or a state tort law for negligent supervision.³⁵ Schools have relied on the latter concern to justify punishing or censoring student speech.³⁶

This Note attempts to delineate the outer boundary of public elementary and secondary schools' jurisdiction over their students' online expression.³⁷ Part I summarizes the Supreme Court's jurispru-

unreasonable to expect school administrators . . . to predict where the line between on- and off-campus speech will be drawn in this new digital era." *Doninger*, 594 F. Supp. 2d at 220.

³⁰ See *supra* note 29.

³¹ See Tracy Adamovich, *Return to Sender: Off-Campus Student Speech Brought On-Campus By Another Student*, 82 ST. JOHN'S L. REV. 1087, 1096 (2008) ("The lack of a clear guideline, even for those supposedly using a similar standard, produces unfairness and a lack of uniformity across jurisdictions.").

³² See *Paris Adult Theatre I*, 413 U.S. at 93 (Brennan, J., dissenting); Adamovich, *supra* note 31, at 1096.

³³ See Conn & Brady, *supra* note 17, at 2; Servance, *supra* note 11, at 1215; Baldas, *supra* note 8. See generally Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905 (2001); Thomas E. Wheeler II, *Slamming in Cyberspace: The Boundaries of Student First Amendment Rights*, 47 RES GESTAE 24 (2004).

³⁴ See *infra* notes 108–162 and accompanying text.

³⁵ See *infra* notes 163–202 and accompanying text.

³⁶ See *Morse*, 551 U.S. at 398–99; *Kuhlmeier*, 484 U.S. at 264–66 (noting school's concern about libel or invasion of privacy actions by the parents or students mentioned in the articles); *Fraser*, 478 U.S. at 686; *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001).

³⁷ See *Beidler*, No. 99-2-00236-6, slip op. at 3. Even with the appropriate standard for determining when the school-speech jurisprudence should be applied, there remain many unanswered questions about the correct way to apply those standards. See *infra* notes 108–139. There is considerable diversity in what courts have considered a "substantial and material disruption" under *Tinker v. Des Moines Independent Community School District*. See *Tinker*, 393 U.S. at 512–13; *infra* notes 108–139. There are also differing interpretations of the *Bethel School District No. 403 v. Fraser* and *Morse v. Frederick* decisions. See *infra* notes 59, 77 and accompanying text. Compare *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007), and *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770, 772 (5th Cir. 2007) (both cases broadly interpreting *Morse* as giving schools authority to regulate any speech it thinks

dence regarding student speech.³⁸ Part II analyzes the various standards relied upon by lower courts in off-campus and online student speech cases in the absence of a clear Supreme Court directive on the issue.³⁹ Part III examines the principles used to limit school responsibility for student injury in non-speech contexts under the Title IX action for student-on-student sexual harassment and under the tort for negligent supervision.⁴⁰ Part IV proposes that courts use the well-established temporal control and supervision test used in school liability cases to delineate school jurisdiction over online speech.⁴¹

I. SUPREME COURT STUDENT SPEECH JURISPRUDENCE

Four seminal decisions by the U.S. Supreme Court determine when school officials may discipline a public school student for his or her expression.⁴² These cases provide less First Amendment protection for students in public schools and establish that certain kinds of student speech are never permissible in school.⁴³ The standards established by these cases allow greater restriction of expression than the general First Amendment standards that apply to speech in public forums.⁴⁴ Generally, when the government suppresses speech in a public forum, a court will apply strict scrutiny to the government's action, and will only uphold a restriction if there is a compelling governmental interest in the suppression of the speech.⁴⁵ The Supreme Court has held, however, that even in a public forum, certain kinds of speech, such as obscenity, incitement, and libel, are outside the protection of the First Amendment.⁴⁶

may be harmful to students, such as threats), *with Doninger*, 527 F.3d at 48 (interpreting *Morse* as only allowing school authority over speech that promotes illegal drug use).

³⁸ See *infra* notes 42–80 and accompanying text.

³⁹ See *infra* notes 81–162 and accompanying text.

⁴⁰ See *infra* notes 163–202 and accompanying text.

⁴¹ See *infra* notes 203–273 and accompanying text.

⁴² See *Morse v. Frederick*, 551 U.S. 393, 408–10 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

⁴³ See *infra* notes 42–80 and accompanying text.

⁴⁴ See, e.g., *Sable Commc'ns v. F.C.C.*, 492 U.S. 115, 126 (1989).

⁴⁵ See *id.*

⁴⁶ See *Miller v. California*, 413 U.S. 15, 36–37 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964).

A. *The Foundation: Tinker v. Des Moines Independent Community School District*

In 1969, in *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court first established that students retain their First Amendment free speech right in school.⁴⁷ This right is a qualified one: the Court held that a school may censor student speech that causes a material and substantial disruption in the school environment or infringes on the rights of others.⁴⁸ This limit on students' freedom of speech is justified because schools have an obligation to provide a safe, productive, and respectful learning environment.⁴⁹ Using this modified First Amendment test, the *Tinker* Court reversed the decision by the U.S. Court of Appeals for the Eighth Circuit and held that a high school's suspension of students for wearing black armbands in protest of the Vietnam War violated the students' First Amendment rights.⁵⁰ The Court reasoned that the armbands did not cause a substantial disruption to the school's operations or infringe on the rights of others.⁵¹

The material and substantial disruption test in *Tinker* put a considerable burden on school administrators to justify their disciplinary actions and, as a result, was seen as a great expansion of student speech rights.⁵² In order to regulate speech, the school must show that the speech did in fact cause a substantial disruption or that it was reasonably foreseeable that the speech would cause such disruption.⁵³ If the

⁴⁷ 393 U.S. at 506, 512–13. The Court famously stated: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Court continued:

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 like the conflict in Vietnam, 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.

Id. at 512–13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

⁴⁸ *Id.* Despite the reference to two distinct tests in *Tinker*, most courts have adopted the “material and substantial disruption” test, and not the “rights of others” test. *See infra* notes 113–139.

⁴⁹ *See Tinker*, 393 U.S. at 507; *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1283 (W.D. Wash. 2007).

⁵⁰ *Tinker*, 393 U.S. at 508, 510.

⁵¹ *See id.* The school argued that it did not want to be associated with anti-war demonstrations. *Id.* at 509 n.3.

⁵² *See Morse*, 551 U.S. at 416, 420–21 (Thomas, J., concurring) (lamenting that the majority in *Tinker* had expanded student speech rights “well beyond traditional bounds”); *Tinker*, 393 U.S. at 514.

⁵³ *See Tinker*, 393 U.S. at 514.

school argues that a disruption was foreseeable, then *Tinker* requires school officials to show that the speech restriction was necessary to avoid that disruption.⁵⁴ Moreover, it is not permissible to punish speech because of an unspecified fear that the speech might cause a disturbance, because administrators do not agree with the opinion expressed, or because the speech is unpleasant or unpopular.⁵⁵ Finally, the Court expressly limited the application of this standard to speech that occurs on campus and during school hours.⁵⁶ Whether *Tinker* applies to online speech is an unresolved question that has been approached in a variety of ways.⁵⁷

B. *Restrictions on Student Speech: Bethel School District No. 403 v. Fraser*

In 1986, in *Bethel School District No. 403 v. Fraser*, the U.S. Supreme Court broadened school authority and opened the door to content-based restrictions on student speech.⁵⁸ In *Fraser* the Court departed from *Tinker*'s "substantial disruption" test, and instead held that a school may prohibit students from using "lewd, indecent, or offensive speech and conduct," particularly when other students are a captive audience, such as at a mandatory school assembly.⁵⁹ Applying this

⁵⁴ See *id.* at 511.

⁵⁵ See *id.* at 508, 509, 511. The Court stated that students "may not be confined to the expression of those sentiments that are officially approved. . . . [S]chool officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Id.* at 511. The Court also stated:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Id. at 509.

⁵⁶ See *id.* at 512–13.

⁵⁷ See *infra* notes 108–162 and accompanying text.

⁵⁸ See 478 U.S. at 685. *Fraser* has been interpreted both narrowly and broadly by lower courts. Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 846 n.41 (2008). Some courts interpret *Fraser* as giving authority to school administrators to regulate any speech they find offensive. See, e.g., Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469 (6th Cir. 2000); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992). Other courts have interpreted *Fraser* more narrowly as only applying to sexually offensive language. See, e.g., Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) (holding that politically offensive speech must instead be analyzed under *Tinker*).

⁵⁹ See *Fraser*, 478 U.S. at 677, 683, 685–86; *Tinker*, 393 U.S. at 514. *Fraser* has been criticized by commentators for greatly limiting student speech rights and reverting to a time when schools had the authority to regulate any student speech, regardless of its level of disruption on the school. See Denning & Taylor, *supra* note 58, at 840 n.26, 841 (citing

analysis, the Court reversed the U.S. Court of Appeals for the Ninth Circuit and held constitutional a school's discipline of a high school student who had used a sexually explicit metaphor to discuss his friend's candidacy for student council in a speech at a school assembly.⁶⁰ Because the student's speech was lewd and offensive, the school did not violate the student's First Amendment rights by suspending him and prohibiting him from speaking at graduation.⁶¹

The Court used language susceptible to broad interpretation by stating that schools may regulate speech that "is wholly inconsistent with the 'fundamental values' of public school education," or that "would undermine the school's basic educational mission."⁶² The Court based such broad school authority on the concept that the school stands *in loco parentis* to the students, and therefore has an interest in, and obligation to, protect students from indecent speech.⁶³ The Court also emphasized that the school cannot be forced to tolerate speech that other students or teachers might interpret as being endorsed by the school.⁶⁴ In reaction to the potentially broad authority given to schools in *Fraser*, Justice Brennan wrote separately to explicitly limit the decision's application to speech issued on school grounds.⁶⁵

David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002); Royal C. Gardner, III, Note, *Protecting a School's Interest in Value Inculcation to the Detriment of Students' Free Expression Rights: Bethel School District v. Fraser*, 28 B.C. L. REV. 595, 624 (1987); Therese Thibodeaux, Note, *Bethel School District No. 403 v. Fraser: The Supreme Court Supports School in Sanctioning Student for Sexual Innuendo in Speech*, 33 LOY. L. REV. 516, 525-26 (1987)).

⁶⁰ *Fraser*, 478 U.S. at 677-78. The speech elicited obscene gestures and jeering from the students in the crowd and teachers canceled classes to discuss the incident with students. *Id.* at 678.

⁶¹ *See id.* at 685-86.

⁶² *See id.*

⁶³ *See id.* at 684; *infra* note 167.

⁶⁴ *See Fraser*, 478 U.S. at 685. The Court in *Fraser* quoted Justice Black's dissent in *Tinker*: "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

⁶⁵ *See id.* at 688 (Brennan, J., concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest otherwise.") (internal citation omitted).

C. *Further Limiting Student Speech: Hazelwood School District v. Kuhlmeier*

In 1988, in *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court continued to cut away at the stringent *Tinker* rule by specifying yet another kind of student speech that schools may regulate.⁶⁶ The Court held that when student speech occurs in a school-sponsored medium, such as a school newspaper, and therefore could be attributed to the school, the school may regulate that speech as long as its actions are “reasonably related to legitimate pedagogical concerns.”⁶⁷ The school need not show any disruption in order to prohibit the speech.⁶⁸ In *Kuhlmeier*, the staff members of the school newspaper sued the school for violating their First Amendment rights after the school prohibited publication of certain articles relating to pregnancy, divorce, and birth control.⁶⁹ The Court reversed the judgment of the Eighth Circuit and declared the school’s censorship constitutional.⁷⁰ The Court distinguished between tolerating speech, as in *Tinker*, and promoting or publishing student speech, which puts the school’s imprimatur on that speech.⁷¹

Kuhlmeier probably cannot be applied to student websites because it requires the speech medium to be school-sponsored.⁷² It might apply, however, where a student uses school technology to create a website, posts advertisements at school directing people to a website, or creates an ostensibly school-sponsored website, because in these situations it appears that the school has endorsed the speech.⁷³

D. *A Third Constraint on Student Speech: Morse v. Frederick*

In 2007, the U.S. Supreme Court created a third content-based exception to the stringent *Tinker* standard in *Morse v. Frederick*.⁷⁴ In *Morse*, the Court held that a school’s restriction of speech is justified when the speech encourages illegal drug use, even if it does not cause a

⁶⁶ See 484 U.S. at 273.

⁶⁷ See *id.*

⁶⁸ See *id.* at 272–73.

⁶⁹ *Id.* at 262. The school feared that the identities of the students described in the articles would be revealed and did not want to be responsible for the dissemination of the personal information of those families. *Id.* at 263.

⁷⁰ *Id.* at 270.

⁷¹ See *id.* at 270–71.

⁷² See *Kuhlmeier*, 484 U.S. at 270–71; Jake Tabor, Note, *Students’ First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 580 (2009).

⁷³ See Tabor, *supra* note 72, at 580; Rogers, *supra* note 9 (discussing the punishment of a student who placed the address for his website on posters around the school).

⁷⁴ See 551 U.S. at 403.

disruption and it is not in a school-sponsored medium.⁷⁵ In *Morse*, the school suspended a student who unfurled a banner at an off-campus, but school-sanctioned, event that read, "BONG HiTS 4 JESUS."⁷⁶ The Court agreed with school administrators that the banner promoted illegal drug use and, reversing the holding of the Ninth Circuit, held that the school's disciplinary action did not violate the student's First Amendment rights because the "special characteristics of the school environment" and the strong governmental interest in preventing student drug use were sufficient justifications for the censorship and discipline.⁷⁷

Although the speech in *Morse* occurred off campus, the plurality concluded that there was a sufficient relationship between the school and the activity to justify the school's punishment.⁷⁸ This connection was established because the speech had occurred during school hours, the student was at a school-sanctioned event, the banner was in the presence of teachers and administrators who were supervising students at the event, the school band and cheerleaders were performing, and the message was directed at the student body.⁷⁹ The Court did, however, acknowledge that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents."⁸⁰

⁷⁵ See *id.* at 403, 408–10.

⁷⁶ *Id.* at 397.

⁷⁷ See *id.* at 398, 408 (quoting *Tinker*, 393 U.S. at 506). Justice Alito, in his concurrence, clarified that this decision does not give schools the authority to regulate speech that comments on political or social issues under the guise that it interferes with the school's "educational mission." *Id.* at 422–25 (Alito, J., concurring). Justice Alito advocated greater speech rights for students than those envisioned by the plurality and argued that school authority should be determined only by the school's need to protect the physical safety of students. See *id.* In *Ponce v. Socorro Independent School District*, the U.S. Court of Appeals for the Fifth Circuit interpreted Justice Alito's concurrence as giving schools the broad authority to censor any speech that threatens the physical safety of students. 508 F.3d 765, 770 (5th Cir. 2007). In *Boim v. Fulton County School District*, the U.S. Court of Appeals for the Eleventh Circuit also interpreted *Morse* broadly as allowing schools to prohibit speech if that speech contains certain subjects, such as illegal drugs, because of the governmental interest in stopping certain behaviors, such as drug use and school violence. 494 F.3d 978, 984 (11th Cir. 2007).

⁷⁸ See *Morse*, 551 U.S. at 400–01.

⁷⁹ See *id.*

⁸⁰ *Id.* (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, n.22 (5th Cir. 2004)). In his concurrence to the plurality opinion, Justice Thomas opined that courts should defer to the school in all student speech cases because the school acts *in loco parentis* and the Constitution does not provide students with any First Amendment rights in a public school. *Id.* at 418–21 (Thomas, J., concurring). Justice Thomas argued that if parents do not like the school's rules, they can send their child to a different school or challenge the rules through the political process. *Id.* at 419–20.

II. OFF-CAMPUS STUDENT SPEECH CASES

The U.S. Supreme Court has never addressed the issue of school discipline of student speech that occurs online.⁸¹ Lower courts differ in how they apply the Court's student speech precedents in their analysis of online speech that originates off campus but comes onto campus or to the attention of school administrators.⁸² As a result, existing case law does not provide students or school administrators with clear guidance on when the Constitution permits school regulation of online speech.⁸³

A. Non-Internet, Off-Campus Student Speech Cases

1. Applying General First Amendment Principles to Off-Campus Speech

When student speech originates on campus and is in a tangible or audible format, such as a newspaper or assembly address, it is unquestioned that courts should analyze the speech using the student speech jurisprudence introduced in Part I.⁸⁴ When the speech originates off-campus in a tangible format, courts generally analyze the speech using the more stringent general First Amendment principles (even if the speech is subsequently brought onto campus by a third party).⁸⁵ For example, in 1979, in *Thomas v. Board of Education*, the U.S. Court of Appeals for the Second Circuit refused to use the school-speech jurisprudence to analyze a school's suspension of a student who distributed a newspaper off-campus because only a minimal level of school resources were used in the paper's preparation and distribution.⁸⁶ Unlike in *Hazelwood School District v. Kuhlmeier*, the students wrote the paper al-

⁸¹ See *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (The Court avoided clarifying the extent of a school's authority over off-campus speech). The *Morse v. Frederick* decision provides the closest indication of how the Court might analyze such a case because *Morse* dealt with speech that was off campus. *Id.* The Court has denied certiorari on this issue in at least one case. *Wisniewski v. Bd. of Educ.*, 128 S. Ct. 1741 (2008) (denying certiorari).

⁸² See *infra* notes 108–162 and accompanying text.

⁸³ See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619–20 (5th Cir. 2004).

⁸⁴ See *supra* notes 42–80 and accompanying text.

⁸⁵ See *Porter*, 393 F.3d at 615; *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979); *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986) (holding that a school could not punish a student who extended his middle finger to a teacher off school grounds because “[t]he First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us”).

⁸⁶ 607 F.2d at 1050 (“The case before us, however, arises in a factual context distinct from that envisioned in *Tinker* and its progeny. While prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate.”).

most exclusively from home and after school hours, and distributed it off-campus.⁸⁷ Despite these precautions, however, administrators found a copy on campus, and suspended the publishers for five days because of the paper's objectionable content.⁸⁸

The Second Circuit applied general First Amendment principles and held that the student's speech did not fall into a category of unprotected speech, such as obscenity, and thus, the school's discipline was unconstitutional.⁸⁹ Regarding a school's authority off-campus, the *Thomas* court stated: "[T]he arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government."⁹⁰

In his concurrence in *Thomas*, Judge Newman argued that geography should not be a limit on a school's ability to regulate student speech or activity that concerns the school.⁹¹ Instead, he opined that a court should apply a proximate cause test and permit schools to hold students responsible for the "natural and reasonably foreseeable consequences of [their] action[s]."⁹² In Judge Newman's opinion, the test laid out in *Tinker v. Des Moines Independent Community School District* allows for regulation of speech that will foreseeably cause a material and substantial disruption, regardless of where the speech originated.⁹³ Judge Newman suggested that, even if the *Tinker* standard is not met, discipline of students for distributing indecent material off school grounds may be justified if the circulation on school property was intended.⁹⁴

In another case, the U.S. Court of Appeals for the Fifth Circuit also refused to apply the school-speech jurisprudence to tangible speech that originated off campus.⁹⁵ In 2004, in *Porter v. Ascension Parish School Board*, the Fifth Circuit refused to use the *Tinker* test to analyze the indefinite suspension of a student whose drawing of the school being

⁸⁷ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Thomas*, 607 F.2d at 1045. The school contact amounted to a few articles typed on campus and use of a teacher's closet for storage of unsold issues. *Thomas*, 607 F.2d at 1045. The students put a note in the newspaper disclaiming responsibility for copies found on school campus. *Id.*

⁸⁸ *Thomas*, 607 F.2d at 1046. The school reasoned that the newspaper was offensive and obscene because it included articles on masturbation and prostitution. *Id.*

⁸⁹ See *id.* at 1050.

⁹⁰ *Id.* at 1045.

⁹¹ See *id.* at 1058 n.13 (Newman, J., concurring).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

⁹⁵ See *Porter*, 393 F.3d at 615.

bombed was inadvertently brought to campus by his brother two years after he drew it.⁹⁶ The court reasoned that, because the speech at issue occurred off-campus and there was no evidence that the speech was directed toward the school campus, the less stringent student speech jurisprudence would not be appropriate.⁹⁷ Thus, the court analyzed the drawing using general First Amendment standards, and concluded that, because the speech did not constitute a “true threat,” it was protected by the First Amendment.⁹⁸ The court also placed weight on the intent of the speaker in analyzing whether to use the *Tinker* test, like Judge Newman did in his concurrence in *Thomas*.⁹⁹

In both *Thomas* and *Porter*, the courts assumed that, if the off-campus speech had fallen into a category of unprotected speech, such as true threats or incitement, then the school could regulate it, even though the speech occurred off campus.¹⁰⁰ This extension of school authority seems to contradict the court’s assertion in *Thomas* that a school does not have any authority over off-campus speech.¹⁰¹ Similarly, in 2002, in *Doe v. Pulaski County Special School District*, which involved a threatening letter written off campus, the U.S. Court of Appeals for the Eighth Circuit also assumed that the school had the authority to regulate speech that was unprotected under general First Amendment standards, even though the speech at issue originated off-campus.¹⁰² In his dissent, Judge McMillian pointed out this contradiction, and questioned whether the school should have jurisdiction over *any* speech is-

⁹⁶ *Id.* at 611–12.

⁹⁷ *See id.* at 615, 620.

⁹⁸ *See id.* at 618.

⁹⁹ *Compare id.* at 619–20, with *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

¹⁰⁰ *See Porter*, 393 F.3d at 617–18; *Thomas*, 607 F.2d at 1050 (majority opinion). In a footnote in *Thomas*, the Second Circuit envisioned a situation where “a group of students incites substantial disruption within the school from some remote locale.” 607 F.2d at 1052 n.17.

¹⁰¹ *See Thomas*, 607 F.2d at 1050.

¹⁰² *See* 306 F.3d 616, 626–27 (8th Cir. 2002). In *Pulaski*, the student was expelled for writing threatening letters to his ex-girlfriend even though he wrote the letters off campus and did not bring them to school himself. *Id.* at 636 (McMillian, J., dissenting). The student’s friend had brought them to school and showed them to the ex-girlfriend, who complained to the principal. *Id.* at 620 (majority opinion). The court upheld the student’s expulsion, stating that the letters were “true threats” and thus not protected under the First Amendment. *Id.* at 626–27 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). The court defined a true threat as speech that a reasonable person would interpret as “a serious expression of an intent to cause a present or future harm.” *Id.* at 622. The threat must be intentionally and knowingly communicated to the potential victim. *Id.* at 624. Because the speech was unprotected under general First Amendment principles, the Court did not need to decide whether the speech would be protected under the school speech principles. *See id.* at 626–27.

sued by a student “in the privacy of his home, not at school or during school hours or using school equipment”¹⁰³ Judge McMillian argued that the facts of the case involved a purely police matter and that, consequently, the school had no authority to act.¹⁰⁴

B. Online Student Speech Cases

Courts deciding cases involving speech that originates off campus in newspapers or other traditional media have generally applied the *Thomas* analysis outlined above.¹⁰⁵ In contrast, courts have used a variety of different analyses to determine the extent of school authority over students' online speech.¹⁰⁶ The major methods are outlined below.¹⁰⁷

1. The *Thomas* Analysis

At least one court has followed *Thomas* and *Porter* and refused to apply the less stringent student speech standards to online student speech.¹⁰⁸ In 2000, in *Beidler v. North Thurston School District*, the Superior Court of Washington held unconstitutional the suspension of a student who created an Internet parody of the school's assistant principal.¹⁰⁹ Because the student created the website at his home, no school property was involved, and there was no substantial disruption at school, the court concluded that none of the less stringent school speech standards applied to the speech at issue.¹¹⁰ The court left open whether it would have applied the *Tinker* analysis had there been a material and substantial disruption of the work or discipline of the

¹⁰³ See *id.* at 636 (McMillian, J., dissenting).

¹⁰⁴ See *id.*

¹⁰⁵ See *supra* notes 84–104 and accompanying text.

¹⁰⁶ See *infra* notes 108–162 and accompanying text.

¹⁰⁷ See *infra* notes 108–162 and accompanying text.

¹⁰⁸ See *Porter*, 393 F.3d at 615; *Thomas*, 607 F.2d at 1050; *Beidler v. N. Thurston Sch. Dist.*, No. 99-2-00236-6, slip op. at 4–6 (Wash. Super. Ct. July 18, 2000).

¹⁰⁹ *Beidler*, No. 99-2-00236-6, at 4–6; Am. Civil Liberties Union of Wash. State, *Student Gets Damages in Web Parody Case* (Feb. 20, 2001), <http://www.aclu-wa.org/detail.cfm?id=169>.

¹¹⁰ See *Beidler*, No. 99-2-00236-6, at 6. As in *Thomas*, the student's on-campus activities in connection with the website were minimal. Compare *Thomas*, 607 F.2d at 1050, with *Beidler*, No. 99-2-00236-6, at 5. The court in *Beidler* admitted that the Internet presents problems of determining the limits of school authority over student activity and drastically changes the “landscape upon which the line where the balance tips from protected speech for students to permissible punitive power for school administrators.” *Beidler*, No. 99-2-00236-6, at 3. Nevertheless, the court concluded that, “while the landscape has changed, the line has not.” *Id.*

school.¹¹¹ Instead, the court applied general First Amendment principles and concluded that, because the student's speech did not invoke the fighting words doctrine, the student's speech was off-limits to school authorities.¹¹²

2. The *Tinker* Standard

On the opposite end of the spectrum, the majority of courts have applied the *Tinker* analysis without considering where the online speech in controversy originated or how it reached campus.¹¹³ In 1998, in *Beussink v. Woodland R-IV School District*, the U.S. District Court for the Eastern District of Missouri used the *Tinker* standard to analyze the ten-day suspension of a student who used vulgar language on his website to criticize the school, despite the fact that, as in *Thomas*, the student created the speech at home and did not personally bring it to campus.¹¹⁴ As in *Thomas* and *Porter*, another student brought the speech to campus and showed it to a teacher.¹¹⁵ The court held in favor of the student because the website did not create a substantial and material disruption to the school environment.¹¹⁶

¹¹¹ See *Beidler*, No. 99-2-00236-6, at 4 (“[T]he evidence does not show material and substantial disruption of the work or discipline of the school. Regardless of where the geographical limits of school district authority may lie, *Tinker* does not support defendants.”).

¹¹² See *id.* at 7, 8.

¹¹³ See, e.g., *Bowler v. Town of Hudson*, No. 05-11007-PBS, slip op. at 19 (D. Mass. Oct. 4, 2007) (applying *Tinker* and holding that including the link to a website hosting graphic video footage of hostage beheadings on a poster displayed at school was a permissible exercise of the students' First Amendment rights because the posters did not cause a substantial disruption at the school); *Dwyer v. Oceanport Sch. Dist.*, No. 03-6005, slip op. at 1, 15 (D. N.J. Mar. 31, 2005) (applying *Tinker* even though the website, which criticized the school and specific teachers, was created at home and never shown at school by its creator); *Neal v. Efurud*, No. 04-2195, slip op. at 11, 13, 18-19 (W.D. Ark. Feb. 18, 2005) (applying the *Tinker* analysis even though the website, which criticized groups of students and specific teachers, was created at home and never shown at school by its creator); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781-82, 784 (E.D. Mich. 2002) (holding that the school's suspension of a student who posted on his website a list of people that he wished would die violated the student's First Amendment rights because there was no proof of disruption to the school, or that the student had created the website at school, or intended for it to be accessed at school); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448, 450, 455 (W.D. Pa. 2001) (using *Tinker* to analyze the suspension of a student who wrote a derogatory “Top Ten” list about a teacher at the school and emailed it to other students, one of whom brought a print-out to school); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998); Complaint at 4-5, *Bowler v. Stapelfeld*, No. MBB (D. Mass. May 16, 2005), available at <http://www.citmedialaw.org/threats/hudson-high-school-v-bowler>.

¹¹⁴ See *Beussink*, 30 F. Supp. 2d at 1177-78, 1182.

¹¹⁵ Compare *id.* at 1178, with *Porter*, 393 F.3d at 615, and *Thomas*, 607 F.2d at 1050.

¹¹⁶ See *Beussink*, 30 F. Supp. 2d at 1182.

This unquestioning and automatic application of the school-speech jurisprudence to online speech is problematic because it assumes that schools can regulate *any* speech, regardless of where it originated and who is responsible for bringing it to school, as long as the speech meets the *Tinker* standard.¹¹⁷ This approach flouts the holdings in *Tinker*, *Kuhlmeier*, *Thomas*, and *Porter*, which established that the school speech jurisprudence does not apply unless the speech occurred on campus or while the student was under the control and supervision of the school.¹¹⁸

3. The Foreseeability Test

In a slightly stricter analysis, some courts have applied the student speech jurisprudence—primarily the *Tinker* analysis—to students' online speech only when it was foreseeable that the speech would make its way onto campus.¹¹⁹ This is the approach proposed by Judge Newman in his concurrence in *Thomas*.¹²⁰ For example, in 2007, in *Wisniewski v. Board of Education*, the Second Circuit upheld the expulsion of a student who created a drawing online that depicted a specific teacher being shot and killed.¹²¹ The student never brought the image onto campus, but another student showed it to a teacher.¹²² The court applied the *Tinker* material and substantial disruption test because, the court decided, the student had created the image knowing that there was a “reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline at the school.’”¹²³

¹¹⁷ See *supra* note 113. *Contra Morse*, 551 U.S. at 400–01; *Kuhlmeier*, 484 U.S. at 273; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

¹¹⁸ See *Morse*, 551 U.S. at 400–01; *Kuhlmeier*, 484 U.S. at 273; *Tinker*, 393 U.S. at 512–13; *Porter*, 393 F.3d at 615; *Thomas*, 607 F.2d at 1050.

¹¹⁹ See *infra* notes 121–128 and accompanying text.

¹²⁰ See *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

¹²¹ 494 F.3d 34, 35–36 (2d Cir. 2007).

¹²² *Id.* at 36.

¹²³ See *id.* at 38–39 (quoting *Tinker*, 393 U.S. at 513). The court stated: “The fact that [the student’s] creation and transmission of the [Instant Messenger] icon occurred away from school property does not necessarily insulate him from school discipline. We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school” *Id.* at 39. Unlike in *Doe v. Pulaski County Special School District*, the court in *Wisniewski* asserted that the speech does not have to rise to the level of a “true threat” under *Watts v. United States* for the school to have the authority to sanction it. See *Wisniewski*, 494 F.3d at 38; *Pulaski*, 306 F.3d at 621–27.

In an even more surprising case, the Second Circuit extended school authority to off-campus online speech that had not yet caused any disruption.¹²⁴ In May 2008, in *Doninger v. Niehoff*, the Second Circuit upheld a school's punishment of a student for her website's criticism of the school.¹²⁵ The court applied the *Tinker* standard because the content was related to school issues and, the court surmised, the student had intended for the blog to be read by students.¹²⁶ Thus, the court concluded that it was reasonably foreseeable that other students and administrators at her school would become aware of the blog.¹²⁷ Like in *Wisniewski*, the court adopted Judge Newman's interpretation of *Tinker*, reasoning that a school may punish off-campus speech if it is foreseeable that the speech will reach campus and create a substantial disruption on campus.¹²⁸ The Second Circuit did, however, question whether *Bethel School District No. 403 v. Fraser* was applicable to off-campus speech.¹²⁹

The cases interpreting *Tinker* in this way distort that holding by ignoring that *Tinker's* test does not apply to off-campus speech.¹³⁰ It is stretching school authority too far to say that schools may punish a student for speech that might come onto campus and cause a disruption, but has not yet done so.¹³¹ Such holdings also present the difficult task of determining the foreseeability of the speech reaching campus.¹³²

¹²⁴ See *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008), *aff'd* 595 F. Supp. 2d 211 (D. Conn. 2009).

¹²⁵ See *id.* at 45, 53; see *supra* notes 2–5 and accompanying text.

¹²⁶ See *Doninger*, 527 F.3d at 50–52.

¹²⁷ See *id.* In the preceding judgment in *Doninger*, the district court deferred completely to the decision of the school without discussing whether the *Tinker* or *Fraser* tests were satisfied. See *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 215 (D. Conn. 2007). This is the position advocated by Justice Thomas in his concurrence in *Morse*. See *Morse*, 551 U.S. at 418–21 (Thomas, J., concurring). The Connecticut court stated that it “ha[d] no wish to insert itself into the intricacies of the school administrators’ decision-making process.” *Doninger*, 514 F. Supp. 2d at 215.

¹²⁸ See *Doninger*, 527 F.3d at 48–49 (citing *Wisniewski*, 494 F.3d at 40; *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring) (“[T]erritoriality is not necessarily a useful concept in determining the limit of [school administrators’] authority.”)).

¹²⁹ *Id.* at 49.

¹³⁰ See *Tinker*, 393 U.S. at 512–13; *supra* note 47.

¹³¹ See *Wisniewski*, 494 F.3d at 35; *Thomas*, 607 F.2d at 1058 n.13.

¹³² See *Wisniewski*, 494 F.3d at 35; *Thomas*, 607 F.2d at 1058 n.13.

4. The “Sufficient Nexus” Approach

A federal district court in Pennsylvania looked to that state’s supreme court for guidance in analyzing a student’s online speech.¹³³ In 2002, in *J.S. v. Bethlehem Area School District*, the Supreme Court of Pennsylvania attempted to clear up the uncertain boundary of school jurisdiction over online speech by requiring that there be a “sufficient nexus” between the online speech and the school before the court would analyze the student’s speech under the U.S. Supreme Court’s school-speech jurisprudence.¹³⁴ If no such nexus existed, then the court would apply the more stringent general First Amendment principles.¹³⁵

In *J.S.*, the court upheld the expulsion of a student whose website displayed threatening and derogatory comments about a teacher and the principal because the website caused a substantial disruption to the school environment.¹³⁶ Because the student accessed the website at school, showed it to other students, and clearly intended for the website to be seen by students and teachers at the school, the court concluded that there was a “sufficient nexus” between his website and the school campus to justify an evaluation under *Tinker* and *Fraser*.¹³⁷

The “sufficient nexus” test is more protective of student speech than simply applying the *Tinker* analysis to all student speech cases because it creates a threshold inquiry before the less stringent school speech principles can be applied, and thus attempts to draw a line between off-campus and on-campus online speech.¹³⁸ Unlike the three approaches to online student speech discussed above, under the “sufficient nexus” test, the manner in which the speech reached campus is an important factor.¹³⁹

This analysis was adopted by the U.S. District Court for the Western District of Pennsylvania in 2007, in *Layshock v. Hermitage School Dis-*

¹³³ See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007), appeal docketed, No. 07-4465 (3rd Cir. Dec. 10, 2008).

¹³⁴ See 807 A.2d 847, 865 (Pa. 2002).

¹³⁵ See *Layshock*, 496 F. Supp. 2d at 602.

¹³⁶ *J.S.*, 807 A.2d at 851, 869. The website listed reasons why the targeted teacher must die and solicited money from students to pay for a hitman. *Id.* at 851. The teacher was so disturbed by the website that she was unable to return to school to finish the school year. *Id.* at 869.

¹³⁷ See *id.* at 865; see also *Fraser*, 478 U.S. at 683; *Tinker*, 393 U.S. at 512–13. The court in *J.S.* was clear that, outside of the school setting, the website was protected speech because it did not rise to the level of a true threat. 807 A.2d at 859–60.

¹³⁸ See *supra* note 113. *Contra J.S.*, 807 A.2d at 865.

¹³⁹ See *Doninger*, 527 F.3d at 50–52; *Wisniewski*, 494 F.3d at 38–39; *Beussink*, 30 F. Supp. 2d at 1177–78, 1180.

trict.¹⁴⁰ In this case, a student was suspended for creating a parody of the school principal on a social networking website, which he then accessed at school and showed to other students and a teacher.¹⁴¹ In contrast to *J.S.*, the court held that merely accessing a website at school did not create a nexus between the website and the school sufficient to justify applying the school speech jurisprudence to the student's off-campus activity.¹⁴² Thus, the court analyzed the website using general First Amendment principles, and concluded that the student's suspension was unconstitutional because the student's website did not fall under any of the categories of unprotected speech.¹⁴³

The district court's language in *Layshock* reveals the confusion created by online student speech cases.¹⁴⁴ On one hand, the court emphasized that "school officials are authorized only to punish speech on school property, [and] the student is free to speak his mind when the school day ends."¹⁴⁵ On the other hand, the court stated that "the test for school authority is not geographical. The reach of school administrators is not strictly limited to the school's physical property."¹⁴⁶ The court in *Layshock* looked to the Pennsylvania School Code to resolve this problem and found that the Code defines school authority in a "temporal" way, by limiting school authority to times when students are "under the supervision of the board of school directors and teachers."¹⁴⁷

¹⁴⁰ 496 F. Supp. 2d at 602.

Regardless of whether the source of the school's authority is based on timing, function, context or interference with its operations, it is incumbent upon the school to establish that it had the authority to punish the student. In most cases, this will be a simple and straight forward exercise. However, in cases involving off-campus speech, such as this one, the school must demonstrate an appropriate nexus. As the case law demonstrates, on this threshold "jurisdictional" question the Court will not defer to the conclusions of school administrators.

Id. at 599.

¹⁴¹ *Id.* at 591; see also ACLU of Pennsylvania: *Layshock v. Hermitage School District*, <http://www.aclupa.org/legal/legaldocket/studentsuspendedforinterne.htm> (last visited Nov. 3, 2009). The profile caused the principal considerable emotional distress and embarrassment. See *Layshock*, 496 F. Supp. 2d at 592. The school attempted to block access to the site from school computers but was unable to. *Id.* No school resources were used in the creation of the website. *Id.* at 591.

¹⁴² See *Layshock*, 496 F. Supp. 2d at 601.

¹⁴³ See *id.*

¹⁴⁴ See *infra* notes 145–146 and accompanying text.

¹⁴⁵ *Layshock*, 496 F. Supp. 2d at 597 (quoting *Thomas*, 607 F.2d at 1052).

¹⁴⁶ *Id.* at 598.

¹⁴⁷ See *id.* at 598–99 (citing PA. CONS. STAT. § 13-1317 (2006); PA. CONS. STAT. § 5-510 (1992)).

Despite having such a clear and easily administered standard in the statute, the court still decided to use the less definite “sufficient nexus” test, presumably to allow for flexibility in applying the student speech jurisprudence, depending on the facts of the case.¹⁴⁸ The inconsistency between how the courts in *J.S.* and *Layshock* applied the “sufficient nexus” test to the issue of accessing the speech at school demonstrates how unpredictable and subjective this test is, even though it marks an advance over the cases discussed earlier that had no threshold test at all.¹⁴⁹ The problem with such an indefinite, multi-factor test is that it does not provide sufficient notice to students and administrators of the exact boundary of school authority.¹⁵⁰

C. *The Effect of School Rules on School Jurisdiction*

In some cases, courts have deferred to school decisions by upholding the enforcement of school rules, even where the student’s speech would not be punishable under the tests laid out in the four Supreme Court student speech cases.¹⁵¹ For example, in 1973, in *Sullivan v. Houston Independent School District*, the Fifth Circuit upheld a school’s expulsion of a student who sold his underground newspaper off-campus but near the entrance to the school.¹⁵² The school expelled the student because the paper contained “coarse language,” and because the distribution violated a school rule requiring him to submit the paper to the principal for review prior to distributing it.¹⁵³ Despite the fact that the newspaper was distributed off school grounds and did not materially and substantially disrupt school activities, the court upheld the expulsion because the student “flout[ed] school regulations and def[ied] school authorities.”¹⁵⁴ Thus, in this case, the school was able to use a

¹⁴⁸ See *id.* at 601.

¹⁴⁹ See *supra* notes 113–132 and accompanying text. Compare *Layshock*, 496 F. Supp. 2d at 601, with *J.S.*, 807 A.2d at 865.

¹⁵⁰ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 (1973) (Brennan, J., dissenting) (discussing how vague speech laws result in the lack of fair notice and the chilling of speech).

¹⁵¹ See, e.g., *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1276, 1280 (W.D. Wash. 2007); see also *Beidler*, No. 99-2-00236-6, at 6 n.5 (suggesting that, although the school cannot punish the student for the content of the speech, if there was punishable action involved in the creation of the website, then school discipline might be warranted).

¹⁵² 475 F.2d at 1072, 1074.

¹⁵³ See *id.* at 1074.

¹⁵⁴ See *id.* at 1076.

disciplinary rule to restrain speech that would otherwise be subject to general First Amendment standards.¹⁵⁵

Likewise, in 2007, in *Requa v. Kent School District*, the U.S. District Court for the Western District of Washington used a school rule to justify upholding school authority over otherwise protected off-campus online speech.¹⁵⁶ The court upheld the forty-day suspension of a student who had secretly videotaped his teacher in class, in violation of a school rule prohibiting the use of personal electronic devices in class, and then posted the video online with mocking commentary.¹⁵⁷ Although the court in *Requa* agreed that the off-campus posting of the video was protected speech, it upheld the suspension as appropriate discipline for the student's impermissible on-campus conduct.¹⁵⁸ The court concluded that the school's "primary responsibility to provide safe and supportive learning and working conditions for students and faculty" outweighed the student's interest in having the freedom to criticize his teachers.¹⁵⁹

The reasoning used in *Houston Independent School District* and *Requa* is arguably unconstitutional because, in *Tinker*, the plaintiff students had violated a school dress code rule, and yet the Court still held that the First Amendment prevented the school from prohibiting the students' speech.¹⁶⁰ *Requa* and *Houston Independent School District* highlight the danger that, if a rule is broken, the school will confuse the severity of a rule violation with the content of the speech when determining the amount of punishment.¹⁶¹ These two cases further illustrate the need to draw a clear line that limits school jurisdiction over students' online expression.¹⁶²

¹⁵⁵ Compare *id.*, with *Thomas*, 607 F.2d at 1050.

¹⁵⁶ See 492 F. Supp. 2d at 1280, 1283.

¹⁵⁷ *Id.* at 1274–76.

¹⁵⁸ See *id.* at 1279, 1283. The court concluded that schools must be able to punish any on-campus conduct that is disrespectful of a teacher. See *id.* at 1280–81.

¹⁵⁹ See *id.* at 1283.

¹⁶⁰ See *Tinker*, 393 U.S. at 504, 507–08.

¹⁶¹ See *Houston Indep. Sch. Dist.*, 475 F.2d at 1074; *Requa*, 492 F. Supp. 2d at 1278–79. *Coy v. Board of Education*, decided in 2002, provides an example of a disproportionate punishment given on the basis of the content of the student's speech and not on the severity of the rule violation. See 205 F. Supp. 2d 791, 794–95, 806 (N.D. Ohio, 2002). In *Coy*, the school suspended a student for eighty days because the student merely violated a school policy by accessing his personal website, which he had created at home, from a school computer. See *id.* The court refused to grant the defendants summary judgment because it was unclear whether the school had disciplined the student for merely violating a school rule or whether they punished him for the content of his speech. *Id.*

¹⁶² See *supra* note 161.

III. LIMITING SCHOOL RESPONSIBILITY IN SCHOOL LIABILITY CASES

A. *The Relationship Between School Liability and School Authority*

In developing a threshold test for school jurisdiction over students' online speech, it is better to rely on established principles of law than to invent entirely new standards.¹⁶³ Established principles provide case law and reasoning that courts can draw from.¹⁶⁴ School liability cases lend a useful perspective to the online student speech cases because they do not rely on geography to determine the limits of the "schoolhouse gate."¹⁶⁵ Instead, in the liability cases analyzed in this Note, courts used a temporal test to determine the school's duty of care and looked at whether the school had assumed supervisory responsibility and control over the student at the time the harm occurred.¹⁶⁶

It is also instructive to look at school liability cases because both a school's authority to control and discipline its students and a school's responsibility to prevent harm to students originally stemmed from the doctrine of *in loco parentis*.¹⁶⁷ Under this doctrine, parents cede their

¹⁶³ See, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 50–52 (2d Cir. 2008), *aff'd* 595 F. Supp. 2d 211 (D. Conn. 2009), *appeal certified* 2009 U.S. Dist. LEXIS 49908 (D. Conn. May 14, 2009); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007); *supra* note 109.

¹⁶⁴ See *supra* note 163.

¹⁶⁵ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *Jenkins v. Anderson*, 922 A.2d 1279, 1287 (N.J. 2007).

¹⁶⁶ See *infra* notes 179, 198 and accompanying text.

¹⁶⁷ See EDWARD C. BOLMEIER, LEGALITY OF STUDENT DISCIPLINARY PRACTICES 11 (1976); *infra* notes 179, 191–193 and accompanying text. The Latin phrase *in loco parentis* translates to "in place of the parent." BOLMEIER, *supra*, at 9. *In loco parentis* is a common law doctrine that originally gave the school discretionary authority to control and discipline students as parents would, and the responsibility to protect students in the parents' absence. See *id.* The use of the phrase most likely originated from Blackstone's *Commentaries*, in which he wrote:

A parent may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent, viz. that the restraint and correction, as may be necessary to answer the purposes for which he is employed.

Id. (citing BLACKSTONE, COMMENTARIES OF THE LAW OF ENGLAND 453 (T. Cooley ed. 1884)).

By 1837, states were applying the *in loco parentis* principle in public school cases to give teachers wide discretion in disciplining students. *Morse v. Frederick*, 551 U.S. 393, 413–15 (2007) (Thomas, J., concurring). The judiciary generally deferred to teachers' decisions on how best to maintain order in the school. *Id.* at 414. The justification for giving schools such discretion was that, like parents, schools could not perform their duty to teach children how to be "useful and virtuous members of society . . . without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits." *Id.* at 413–14 (quoting *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837)).

Some state laws rely on the *in loco parentis* doctrine to describe the scope of a school's duties and authority. See, e.g., 105 ILL. COMP. STAT. 5/24-24 (West 1995); 24 PA. CONS.

authority over their children to the school when they drop their children off.¹⁶⁸ Parents then rely on schools to ensure the safety and productivity of their children while they are under the school's care and supervision.¹⁶⁹ Because both the school's responsibility to care for students and the school's authority to discipline students arise from the same source, examining the limits imposed on a school's responsibility in school liability cases can serve as a guide for how to delineate a school's authority over the online speech of its students.¹⁷⁰

B. *The Substantial Control Test in Title IX Cases Involving Student-on-Student Sexual Harassment*

Cases involving actions under Title IX of the Education Amendments of 1972 for student-on-student sexual harassment illustrate how courts apply a temporal test to determine the limits of a school's responsibility for its students' well-being.¹⁷¹ Under Title IX, educational institutions are prohibited from excluding students from participation in educational opportunities on the basis of sex.¹⁷² In *Davis v. Monroe County Board of Education*, in 1999, the U.S. Supreme Court held that a

STAT. § 13-1317 (2006). For example, Pennsylvania law equates a school's *in loco parentis* authority with its responsibility to supervise students. § 13-1317. Pennsylvania law codifies the *in loco parentis* principle by giving school officials the "right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents . . . to such pupils may exercise over them." *Id.* The Illinois School Code also places the school *in loco parentis* by stating that:

In all matters relating to the discipline in and conduct of the schools and the school children, [the school] stand[s] in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program . . . and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents and guardians.

105 ILL. COMP. STAT. 5/2424.

The wide authority traditionally afforded to schools under the *in loco parentis* doctrine has diminished with the Supreme Court's recognition of parental rights to make some curricular decisions and students' rights to privacy and free speech. *New Jersey v. T.L.O.*, 469 U.S. 325, 336–37 (1985); *Tinker*, 393 U.S. at 512–13; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

¹⁶⁸ See *Jenkins*, 922 A.2d at 1285.

¹⁶⁹ See *id.*

¹⁷⁰ See *supra* note 167; see also Tabor, *supra* note 72, at 574–78 (discussing other ways the teacher-student relationship has been conceptualized).

¹⁷¹ See *infra* notes 173–182 and accompanying text.

¹⁷² See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2006). The relevant section provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a).

school may be liable under Title IX for the creation of a hostile educational environment if the school fails to prevent student-on-student sexual harassment because the hostile environment effectively prevents the victimized student from benefiting from school attendance.¹⁷³ In *Davis*, the parents of a fifth grade student sued the school for failing to remedy the repeated sexual harassment by another student that their child had experienced in the school classrooms and hallways over a three-month period.¹⁷⁴ The student had told teachers about the harassment, but the perpetrator was never disciplined.¹⁷⁵ The Court remanded the case to the trial court for a determination of whether the facts of the case entitled the plaintiff to relief under the Court's new interpretation of Title IX.¹⁷⁶

To recover damages under this theory of liability, a student must show that the school had actual knowledge of the harassment, that the school acted with "deliberate indifference to known acts of harassment in its programs or activities," and that the harassment was "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit."¹⁷⁷ Under Title IX, a school does not incur a duty to prevent harassment unless the "known acts of harassment" occur while students are "subject to the guidance and instruction of" or "subject to the authority, direction, or

¹⁷³ 526 U.S. 629, 637–38 (1999). A school can also incur liability under section 504 of the Rehabilitation Act of 1973 and section 202 of the Americans with Disabilities Act of 1990 for deliberately failing to prevent student-on-student harassment motivated by a student's disability. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (2000 & Supp. V 2005); Americans with Disabilities Act of 1990, § 202, 42 U.S.C. § 12132 (2000); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008). Likewise, a school can incur liability under title VI of the Civil Rights Act of 1964 for deliberately failing to prevent student-on-student discrimination or harassment on the basis of race, color, or national origin. Title VI of Civil Rights Act of 1964, 42 U.S.C. 2000d (2000); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998). Liability for student-on-student harassment under these statutes is based on the same theory as liability for student-on-student sexual harassment under Title IX: by deliberately doing nothing in the face of known harassment, the school is intentionally facilitating that harassment. See *S.S.*, 532 F.3d at 454; *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003). Thus, in each of these actions, a court will analyze the school's actions based on the same "deliberate indifference" test established in *Davis*. See *S.S.*, 532 F.3d at 454; *Bryant*, 334 F.3d at 934.

¹⁷⁴ *Davis*, 526 U.S. at 633–35.

¹⁷⁵ *Id.* at 634–35.

¹⁷⁶ *Id.* at 654.

¹⁷⁷ *Id.* at 633, 642. "Damages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender." *Id.* at 652. The severity of the harassment depends on the type, frequency, and duration of the conduct. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12041 (Mar. 13, 1997).

supervision of” a school that receives federal funding.¹⁷⁸ In *Davis*, the Court interpreted this statutory language as meaning that a school’s liability is limited to incidents occurring when the school “exercises substantial control over both the harasser and the context in which the known harassment occurs.”¹⁷⁹ Because this is a temporal test, and not a geographic one, a school can be liable under Title IX for student-on-student harassment that takes place off campus, as long as it occurs at a time and place where the school has assumed substantial supervisory control over the student.¹⁸⁰

Thus, under the requirements laid out in *Davis*, a school could only be held liable for being deliberately indifferent to known acts of harassment that occur on the Internet if the school had assumed “substantial control” over the perpetrator student at the moment when he or she harassed the victim student.¹⁸¹ This might be the case if the student used school computers to access or send messages on the Internet, but not if the student issued the harassing speech at home.¹⁸²

C. *The Control and Supervision Test in Negligent Supervision Cases*

The long-established and widely-recognized liability in tort for negligent supervision as applied to schools also turns on whether a school has assumed supervisory responsibility and control over the student at

¹⁷⁸ *Davis*, 526 U.S. at 645 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1961)) (interpreting 20 U.S.C. § 1687 (2006), which defines the phrase “program or activity” from 20 U.S.C. § 1681(a) (2006)).

¹⁷⁹ *Id.* The Court reasoned that liability was justified because “the nature of [the State’s] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” *Id.* at 646 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)). Furthermore, the Court asserted that schools have the “comprehensive authority . . . to prescribe and control conduct in the schools.” *Id.* (quoting *Tinker*, 393 U.S. at 507).

The four dissenting Justices argued that student-on-student harassment is never “under” the schools’ “program or activity.” *Id.* at 660 (Kennedy, J., dissenting). The dissent also pointed out that the school’s control over its students is complicated and limited, and is of a different nature than the control a school exercises over its teachers. *Id.* at 664. The dissent outlined the legal and practical obstacles a school faces in trying to control the conduct of its students, such as laws protecting the educational rights of students with disabilities, state constitutional rights to education, and the limited resources of schools. *Id.* at 664, 666.

¹⁸⁰ *See Morgan v. Bend-La Pine Sch. Dist.*, No. CV-07-173-ST, 2009 WL 312423, at *23 (D. Or. Feb. 6, 2009) (holding that a school could be liable for failing to prevent student-on-student sexual harassment that occurred on a number of school field trips and on the school buses because, although the students were off campus, they were under the supervision of teachers on the field trips and the bus driver reported directly to the school).

¹⁸¹ *See Davis*, 526 U.S. at 645; *Morgan*, 2009 WL 312423, at *23.

¹⁸² *See Davis*, 526 U.S. at 645; *Morgan*, 2009 WL 312423, at *23.

the time of the alleged negligence.¹⁸³ Negligent supervision is the most common action brought against schools by families.¹⁸⁴ In at least forty states, a school may be liable for negligent supervision if the school unreasonably fails to prevent the foreseeable injury of a student.¹⁸⁵

Foreseeability of the injury is determined by looking at a totality of the circumstances.¹⁸⁶ For example, if a school is aware that a student is being bullied continuously by another student either on or off campus, and that bullying escalates to violence at a time when the school has assumed supervisory duties, then a court may find that the school had a duty to prevent the foreseeable escalation.¹⁸⁷ As in a Title IX action for

¹⁸³ See *Coates v. Tacoma Sch. Dist.* No. 10, 347 P.2d 1093, 1096 (Wash. 1960).

¹⁸⁴ VALENTE & VALENTE, *supra* note 15, at 124.

¹⁸⁵ See generally Allan E. Korpela, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision*, 38 A.L.R. 3D 830 (1971). To prevail on a claim of negligent supervision a plaintiff must show: 1) that the school owed a duty of care to the student because the school had assumed supervisory control over the student; 2) breach of the school's duty of care by either a total lack of supervision or ineffective supervision; 3) harm; and 4) the breach proximately caused the harm. *M.W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 518–19 (Cal. Ct. App. 2003). A school is obligated to exercise the degree of care "which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circum[s]tances." *Id.* at 518 (alteration in the original) (citing *Dailey v. L.A. Unified Sch. Dist.*, 470 P.2d 360, 363 (Cal. 1970)). Nevertheless, there are limits on the school's duty to supervise and the "school district is not an insurer of its students' safety." *Id.* at 526.

The common law rule regarding a duty of care is that "one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." *Id.* at 517. A duty of care will arise when: "(a) A special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." *Id.* *The Restatement (Third) of Torts* describes the teacher-student relationship as a special relationship. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Tentative Draft No. 5, 2007).

California courts, for example, have concluded that the compulsory nature of education creates a special relationship between the school and its students and, thus, the school has an affirmative duty to "take all reasonable steps to protect its students." *M.W.*, 110 Cal. App. 4th at 517; Justin Wieland, *Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California's Public Schools: Contemporary Issues in Prevalence, Response and Prevention*, 11 U.C. DAVIS J. JUV. L. & POL'Y 235, 239 (2007). Despite the language in the *Restatement*, many states do not recognize an action against schools for failure to act based on a special relationship. See, e.g., *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1166–67 (Colo. D.C. 2001).

¹⁸⁶ See *M.W.*, 110 Cal. App. 4th at 519. For an incident to be foreseeable, it is not required that an identical event or injury has previously occurred or that the specific harm that occurred was foreseeable. See *id.* One only needs to show only that harm of that general kind was reasonably foreseeable. See *id.*

¹⁸⁷ *Id.* at 520–21; *Beacham v. City of Starkville Sch. Sys.*, 984 So.2d 1073, 1079 (Miss. Ct. App. 2008) (Carlton, J., concurring) ("Where . . . the school district has knowledge of a prior incident, and it has received continued complaints of harassment, the risk of a subsequent incident is foreseeable."). For example, in 2003, in *M.W. v. Panama Buena Vista*

peer-on-peer sexual harassment, the school must have had actual knowledge of the perpetrator's "assaultive propensities" in order to be held liable for student-on-student harassment or injury.¹⁸⁸ Schools may also have a duty to warn parents if they have actual knowledge of potential harm to a student that might occur outside of the school's supervision and control.¹⁸⁹

Courts consider a variety of policy and fairness factors before imposing a duty of reasonable supervision on a school, however, a duty does not arise unless the school has assumed control and supervision over the student at the time the alleged negligence occurs.¹⁹⁰ The duty of reasonable supervision arises because, under the *in loco parentis* doctrine, when a school assumes supervisory control over a child, the school obtains authority over and bears responsibility for the child in lieu of the child's parents.¹⁹¹ Thus, the limit of school responsibility for supervision is not geographic.¹⁹² Rather, the line is at the point where responsibility for the supervision of the child is transferred to the parent.¹⁹³ Because the test for school responsibility is temporal and not geographic, teachers have the same supervisory responsibility to exer-

Union School, the California Court of Appeals for the Fifth District held that the school owed a duty of care to a special education student who was sodomized in a school bathroom by another student because the assault was foreseeable and it occurred while the student was entrusted to the school's care. *M.W.*, 110 Cal. App. 4th at 520-21. The escalation from constant bullying to assault was foreseeable because the perpetrator in that case had been disciplined over thirty times for various infractions and the victim, M.W., had complained multiple times to teachers about the daily bullying. *Id.* at 520.

¹⁸⁸ See *M.W.*, 110 Cal. App. 4th at 513-16, 523; *Garufi v. Sch. Bd. of Hillsborough County*, 613 So. 2d 1341, 1343 (Fla. Dist. Ct. App. 1993).

¹⁸⁹ See *Eisel v. Bd. of Educ.*, 597 A.2d 447, 448-50, 456 (Md. App. 1991) (holding that school counselors had a duty to warn a student's parents that she had expressed suicidal thoughts, and that the counselors could therefore be liable for failing to prevent the student's off-campus suicide); *Valente & Valente*, *supra* note 15 at 129-30.

¹⁹⁰ See *Coates*, 347 P.2d at 1096-97. The other factors courts consider include the age and maturity of the students, the nature of the harm, the level of risk that the harm would occur, the opportunity and ability of the school to exercise care, and the public interest served by imposing a duty. See *M.W.*, 110 Cal. App. 4th at 519, 527 (Levy, J. dissenting); *Dailey*, 470 P.2d at 364; *Mancha v. Field Museum of Natural History*, 283 N.E.2d 899, 902 (Ill. App. 1st 1972); *Eisel*, 597 A. 2d at 452; *Jerkins*, 922 A.2d at 1285.

¹⁹¹ See *Jerkins*, 922 A.2d at 1285 (determining that "[p]arents . . . relinquish their supervisory role over their children to teachers and administrators during school hours, and thus 'transfer to school officials the power to act as guardians of those young wards'") (omission in original); *Bolmeier*, *supra* note 167, at 9.

¹⁹² See *Jerkins*, 922 A.2d at 1287 (holding that the school had a duty of reasonable supervision during school dismissal and that the school could be liable for a child's injury that occurred off-campus and out of the sight of school officials if the injury was the foreseeable result of a school's negligent dismissal of the child).

¹⁹³ See *id.* at 1285.

cise reasonable care on school-sponsored trips and activities off campus as they have on campus.¹⁹⁴

The key question is not whether the school was actually supervising the student, but rather whether the school had *assumed* supervisory responsibility and control over the student.¹⁹⁵ For example, in 1967, in *Chappel v. Franklin Pierce School District*, the Supreme Court of Washington held that a school had a duty to use reasonable care to prevent a student's injury at an off-campus student club event, because the school had assumed responsibility for the event by assigning a faculty member to supervise it.¹⁹⁶ In this case, the faculty supervisor failed to attend the event and, due to the lack of proper supervision, a student was injured.¹⁹⁷ As in *Davis*, the court rejected the school's assertion that school liability is limited by geography to the school premises and instead emphasized that both liability and authority arise from the schools "exercise or assumption of control and supervision over the organization and its activities."¹⁹⁸

Conversely, a school is not responsible for student injury when the time and place of the student's activity enters the zone of parental authority and the school has not assumed any supervisory authority.¹⁹⁹ For example, in 1960, in *Coates v. Tacoma School District No. 10*, a student was injured in a car accident miles away from the school, at 2:00 a.m., after an initiation ceremony for a non-school sponsored club.²⁰⁰ The Supreme Court of Washington held that the school did not have a duty to supervise because there was no allegation that the club initiation was a school-sanctioned activity.²⁰¹ Instead, the court explained, the parents were responsible for adequately supervising their child's voluntary ac-

¹⁹⁴ See, e.g., *Morris v. Douglas County Sch. Dist. No. 9*, 403 P.2d 775, 776-77 (Or. 1965) (holding teachers on a school trip liable for the injury to a child who was crushed by a log at the beach because the accident was foreseeable and the teachers could have mitigated the harm by paying more attention). The duty to reasonably supervise school-sponsored activities parallels the school's authority to regulate the contents of a school-sponsored publication. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988).

¹⁹⁵ See *Chappel v. Franklin Pierce Sch. Dist. No. 402*, 426 P.2d 471, 475 (Wash. 1967).

¹⁹⁶ See *id.* at 472-73, 475.

¹⁹⁷ See *id.* at 472-73.

¹⁹⁸ See *id.* at 472-73, 475 ("[T]he nexus between an assertion of the school district's authority and potential tort liability springs from the exercise or assumption of control and supervision over the organization and its activities by appropriate agents of the school district.").

¹⁹⁹ See *Coates*, 347 P.2d at 1097.

²⁰⁰ *Id.* at 1094.

²⁰¹ See *id.* at 1095-97.

tivities that took place well after school hours and far from the school.²⁰²

IV. A NEW ANALYSIS FOR ONLINE STUDENT SPEECH CASES

A. *The Proposed Control and Supervision Test*

The Internet is unique because it exists both at home and at school and, thus, a geographical test for school jurisdiction in these cases is unworkable.²⁰³ Because both school liability and school authority are rooted in the theory that the school acts at least partially *in loco parentis*, the control and supervision test that courts have used consistently and successfully in school liability determinations provides a clear and established way of delineating school jurisdiction in school speech cases.²⁰⁴ This Note proposes using the control and supervision test to determine school jurisdiction over students' online speech because it is a temporal test and, as a result, it avoids the problem of establishing a geographical location for online speech.²⁰⁵

Under this proposed test, schools would have jurisdiction to regulate only speech that occurs when the school has assumed control and supervision over the student who is speaking.²⁰⁶ Speech would be considered within the school's authority only when the student accesses

²⁰² See *id.* at 1097.

²⁰³ See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597–98 (W.D. Pa. 2007), *appeal docketed*, No. 07-4465 (3rd Cir. Dec. 10, 2008) (stating “[i]t is clear that the test for school authority is not geographical” and “[s]chools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.”); *Beidler v. N. Thurston Sch. Dist.*, No. 99-2-00236-6, slip op. at 3 (Wash. Super. Ct. July 18, 2000).

²⁰⁴ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645 (1999); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Chappel v. Franklin Pierce Sch. Dist. No. 402*, 426 P.2d 471, 475 (Wash. 1967).

²⁰⁵ See *Davis*, 526 U.S. at 645; *Chappel*, 426 P.2d at 475.

²⁰⁶ See *Chappel*, 426 P.2d at 475. Under the tests for school jurisdiction described in Part II, courts appear to have assumed that a school can punish online speech that is unprotected under general First Amendment standards. See *supra* notes 81–162 and accompanying text. In contrast, the control and supervision test provides a bright line limit on school jurisdiction. *Contra supra* notes 81–162 and accompanying text. If the speech does not occur while the school has assumed supervisory control over the student, then any school interference is simply impermissible under any First Amendment standard, whether general or student-specific. See *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 636 (8th Cir. 2002) (McMillian, J., dissenting). Even if the speech constitutes a true threat or obscenity, it is still impractical to expect or allow the school to police the Internet, and it is not the school's proper role. See *id.*

and shows the online speech to others, or creates the online speech while that student is under the assumed control and supervision of the school.²⁰⁷ All other online student speech would remain outside of the school's jurisdiction and under the authority of the parent or law enforcement to regulate.²⁰⁸

Moreover, a school would not have jurisdiction over speech just because it relates to the school, as in *Doninger v. Niehoff*.²⁰⁹ Nor would this test give schools jurisdiction over speech just because a student tells another student to visit his website, or because a student apparently intended the speech to come to campus.²¹⁰ A student's intent should not be the definitive test, because it is difficult to prove a student's actual subjective intent.²¹¹ Instead, it is only fair to punish a student if he or she was the one who brought the speech onto the school grounds.²¹² In contrast to proposals that courts apply school-speech jurisprudence when a student intends for the speech to reach the school campus, the proposed test has the advantage of certainty because it does not depend upon the divination of a student's subjective intent.²¹³

Like the "sufficient nexus" test, this test asks a threshold jurisdictional question before applying the school-speech jurisprudence.²¹⁴ A court applying the proposed test will only analyze whether the speech caused a "substantial and material disruption," or falls under one of the

²⁰⁷ See, e.g., *Davis*, 526 U.S. at 645; *Chappel*, 426 P.2d at 475.

²⁰⁸ See, e.g., *Davis*, 526 U.S. at 645; *Chappel*, 426 P.2d at 475; see also *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

²⁰⁹ See *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 202, 211 (2007), *aff'd* 527 F.3d 41, 44 (2d Cir. 2008), *aff'd* 595 F. Supp. 2d 211 (D. Conn. 2009), *appeal certified* 2009 U.S. Dist. LEXIS 49908 (D. Conn. May 14, 2009); see *supra* notes 2–5 and accompanying text.

²¹⁰ See *Layshock*, 496 F. Supp. 2d at 591–92. *Contra Doninger*, 514 F. Supp. 2d at 202, 211.

²¹¹ See *J.S. v. Bethlehem*, 807 A.2d 847, 865 (Pa. 2002) (applying school speech jurisprudence because the student intended for his website to be seen by students and teachers at the school).

²¹² Compare *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979) (refusing to condone school discipline for a newspaper distributed off campus, even though it was foreseeable that the paper would end up on campus), with *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008), *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1178 (E.D. Mo. 1998), and *J.S.*, 807 A.2d at 865.

²¹³ Compare *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619, 621 (5th Cir. 2004), with *Doninger*, 527 F.3d at 50–52; *J.S.*, 807 A.2d at 865. *Contra Adamovich*, *supra* note 31, at 1108; Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 1002; Christopher E. Roberts, *Is MySpace Their Space?: Protecting Student Cyberspeech in a Post-Morse v. Frederick World*, 76 U. MO. KANSAS CITY L. REV. 1177, 1177 (2008).

²¹⁴ See *Layshock*, 496 F. Supp. 2d at 599.

other tests the U.S. Supreme Court has developed for student speech if the online speech is deemed to have occurred at a time when the school had assumed control and supervision over the student.²¹⁵ The proposed test is more easily understood by students and administrators than the “sufficient nexus” test, however, because it relies on terminology and temporal limits that have long been in practice.²¹⁶

B. *Justifications for a Control and Supervision Based Test*

I. The Proposed Test Is Based on Established Principles of Law

The control and supervision test for determining school authority is rooted in established legal principles that have been consistently and successfully applied to determine school responsibility in situations where school jurisdiction was not immediately apparent.²¹⁷ Courts analyzing cases brought under federal statutes like Title IX of the Education Amendments of 1972 and state tort law for negligent supervision have used a control and supervision test to define the limits of school responsibility.²¹⁸

This test is also consistent with the line-drawing analysis employed by the U.S. Supreme Court in its student speech jurisprudence.²¹⁹ In *Tinker v. Des Moines Independent Community School District* in 1969 and *Hazelwood School District v. Kuhlmeier* in 1988, the Court expressly limited the application of the relaxed student First Amendment standards to instances when the speech occurred within the school environment and the students were under the control of teachers.²²⁰ In 2007, in *Morse v. Frederick*, the Court based the school’s jurisdiction over the speech on the fact that, although the student displayed the banner in public and off campus, the student was under the supervision and control of school staff at the moment the speech was issued.²²¹ Similarly, in *Kuhl-*

²¹⁵ See *Morse v. Frederick*, 551 U.S. 393, 400–01 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71, 273 (1988); *Fraser*, 478 U.S. at 684, 688 (Brennan, J., concurring); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

²¹⁶ Compare *Davis*, 526 U.S. at 645, and *Chappel*, 426 P.2d at 475, with *Layshock*, 496 F. Supp. 2d at 599.

²¹⁷ See *Davis*, 526 U.S. at 645; *Chappel*, 426 P.2d at 472, 475; *Coates v. Tacoma Sch. Dist.* No. 10, 347 P.2d 1093, 1095 (Wash. 1960); *supra* notes 119–146 and accompanying text.

²¹⁸ See, e.g., *Davis*, 526 U.S. at 645; *Chappel*, 426 P.2d at 475; see *supra* notes 173, 192 and accompanying text.

²¹⁹ See *Morse*, 551 U.S. at 400–01; *Kuhlmeier*, 484 U.S. at 270–71; *Fraser*, 478 U.S. at 684, 688 (Brennan, J., concurring); *Tinker*, 393 U.S. at 512–13.

²²⁰ See *Kuhlmeier*, 484 U.S. at 270–71; *Tinker*, 393 U.S. at 512–13.

²²¹ See 551 U.S. at 400–01.

meier, the fact that the school “exercised a great deal of control over” the school newspaper was the key factor in the Court’s determination that the paper was not a public forum and the school’s speech censorship was permissible.²²²

A control and supervision test would also align with the U.S. Courts of Appeals for the Second and Fifth Circuits’ reasoning in the off-campus student speech cases involving traditional media.²²³ For example, in 1979, in *Thomas v. Board of Education*, the Second Circuit made clear that school administrators may not regulate what students are exposed to after they leave school and, instead, it is a parent’s responsibility and right to monitor what students say and do when they are not under the school’s control.²²⁴

Furthermore, this test has already been successfully applied in one online student speech case.²²⁵ In 2000, in *Emmett v. Kent School District*, the U.S. District Court for the Western District of Washington applied the control and supervision test to determine the limits of school jurisdiction.²²⁶ The court held unconstitutional a school’s suspension of a student who published a website featuring mock obituaries, because the student had created the website while he was at his home and “outside of the school’s supervision or control.”²²⁷ It was irrelevant that the intended audience included students at the school.²²⁸

2. The Proposed Test Prevents Over-Extension of School Authority and the Chilling of Protected Student Speech

A clear test for school jurisdiction over students’ online activity is necessary because the current, unsettled state of the law will inevitably result in the chilling of students’ online activity, a lack of fair notice to students, the potentially unlimited expansion of school authority, and an excess of litigation.²²⁹ The proposed control and supervision test remedies these concerns by providing a clear and easily administrable

²²² See 484 U.S. at 268, 270–71 (“These activities may fairly be characterized as part of the school curriculum . . . so long as they are supervised by faculty”).

²²³ See *Porter*, 393 F.3d at 611–12; *Thomas*, 607 F.2d at 1051.

²²⁴ See *id.* (“Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *Pavens patriae*.”).

²²⁵ See *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

²²⁶ See *id.*

²²⁷ *Id.* at 1089–90.

²²⁸ See *id.*

²²⁹ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 (1973) (Brennan, J., dissenting).

guide for schools and students on exactly when it is permissible for a school to regulate students' online activity.²³⁰

Furthermore, this test prevents the unbounded extension of a school's power over off-campus speech because it limits school authority to the easily identifiable circumstances when the school is responsible for supervising students and regulating their behavior.²³¹ Thus, the proposed test prevents schools from infringing on the privacy of students' home activities, and adheres to the long-standing First Amendment principle that the government has no business telling an individual what he may read or view in the privacy of his or her home.²³² This protection from state interference in the home also extends to any writings or speech.²³³

In contrast, if schools are given the authority to punish and censor any student activity on the Internet that will foreseeably reach school campus, then the potential jurisdiction of school power over students' online activity would be limitless.²³⁴ The foreseeability test potentially expands school authority to all online student speech because it is arguably foreseeable that any online speech will reach school grounds.²³⁵

Furthermore, liability for negligent supervision depends on whether the school assumed supervisory responsibility over the child and his or her activities at the time the harm occurred.²³⁶ As a result, if schools assume authority over online speech created at home, then parents might expect that schools are policing the Internet and, in turn, hold schools responsible for not acting to prevent or punish online threats or harassment.²³⁷ Thus, the expansion of school jurisdiction over online student speech could lead to a parallel expansion of

²³⁰ See *supra* notes 204–216 and accompanying text.

²³¹ See *Thomas*, 607 F.2d at 1051; Brief for The Rutherford Institute as Amicus Curiae Supporting Appellees, *Layshock*, No. 07-4465, at 7, available at <http://www.achupa.org/legal/legaldocket/studentsuspendedforinterne.htm> [hereinafter Rutherford Institute].

²³² See *Stanley v. Georgia*, 394 U.S. 557, 564–68 (1969).

²³³ See *Pulaski*, 306 F.3d at 624 (“Requiring less than an intent to communicate the purported threat would run afoul of the notion that an individual’s most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts.”); *Thomas*, 607 F.2d at 1051.

²³⁴ See *Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 35.

²³⁵ See *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring). For this reason, the *Thomas* court rejected using the foreseeability test to determine school jurisdiction over student speech. See *id.* at 1052–53 n.18 (majority opinion) (explaining that this power easily could be stretched to punish a student who engages in activity that should be within the realm of parental authority and responsibility, such as buying a vulgar magazine and giving it to a school friend while at home, or writing a scandalous letter to the *New York Times*).

²³⁶ See *Chappel*, 426 P.2d at 475.

²³⁷ See *Pike*, *supra* note 213, at 1006.

school liability for negligent failure to prevent foreseeable injury.²³⁸ Such expansion of school jurisdiction over activities that occur outside of the school's control and supervision has been explicitly rejected in Title IX and negligent supervision cases and therefore must also be rejected in online student speech cases.²³⁹

An additional concern with undefined school authority is that it may chill protected speech.²⁴⁰ In *Thomas*, the Second Circuit was concerned about the chilling of protected expression that might result if schools are given the authority to punish speech that occurs off campus.²⁴¹ It is vital to protect against the chilling of online student speech because the Internet provides a public forum on which students can experiment with their First Amendment right to express themselves freely.²⁴² Further, it would be ironic and unfortunate if schools were responsible for the chilling of such experimentation because the school is supposed to be where students learn about their constitutional rights.²⁴³

²³⁸ See *Chappel*, 426 P.2d at 475; Pike, *supra* note 213, at 1006.

²³⁹ See *Davis*, 526 U.S. at 645; *Morgan v. Bend-La Pine Sch. Dist.*, No. CV-07-173-ST, 2009 WL 312423, at *23 (D. Or. Feb. 6, 2009); *Beacham v. City of Starkville Sch. Sys.*, 984 So.2d 1073, 1075 (Miss. Ct. App. 2008).

²⁴⁰ See *Thomas*, 607 F.2d at 1051.

²⁴¹ See *id.* (“The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression.”). The chilling effect of school discipline can be considerable because of school officials’ “susceptibility to community pressure,” their low level of understanding of First Amendment jurisprudence, the possibility that a principal will “act ‘arbitrarily, erratically, or unfairly,’” and the low likelihood that a student will challenge a punishment. See *id.* at 1051–52 (quoting *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 809 (2d Cir. 1971)).

²⁴² See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853, 863 (1997) (stating that the Internet is “the most participatory form of mass speech yet developed” . . . [and] is entitled to the “highest protection from governmental intrusion.” (citation omitted)). Public forums are places of general public access and, because of their public nature, are where First Amendment protections are strongest. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). “Nonpublic forums are government properties that the government can close to all speech activities. The government may prohibit or restrict speech in nonpublic forums as long as the regulation is reasonable and viewpoint neutral.” Denning & Taylor, *supra* note 58, at 840 n.25 (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.4.2.4, at 1139 (3d ed. 2006)). The Internet is a public forum and Internet speech contrasts starkly with speech that is insulated within the school environment, like the school newspaper in *Kuhlmeier*. See 484 U.S. at 267–70 (concluding that the school newspaper was a non-public forum and, thus, the school could regulate its contents).

²⁴³ See *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., dissenting) (asserting that children learn by example, and it would be inconsistent to “charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections”). In his concurrence in *San Antonio Independent School District v. Rodriguez*, Justice Marshall argued that one cannot benefit fully from the freedom

The vague and unpredictable standards currently applied in online student speech cases do not give students any guidance on when their expression is beyond the school's reach.²⁴⁴ Instead, current case law sends students the message that the only way to definitely prevent discipline at school is to avoid speaking on the Internet altogether.²⁴⁵ Thus, until there is a simple and unambiguous limit on school authority over the Internet, students' online speech may be substantially chilled.²⁴⁶ The control and supervision test prevents the chilling of student's protected online expression because it is a test that students can easily comprehend.²⁴⁷ Additionally, because the proposed test only holds students accountable when the student brings his or her own speech to campus, students need not fear that another student will subject them to punishment by bringing their online speech to school.²⁴⁸

In contrast, the "foreseeability" standard advocated by Judge Newman in *Thomas*, and used by the Second Circuit in *Wisniewski v. Board of Education* and *Doninger*, gives the school too much authority to intervene in off-campus speech and does not provide students fair notice of when they may be punished by the school.²⁴⁹ That test presents the difficult task of determining to what extent one can expect adolescents to predict the consequences of their online activity.²⁵⁰ Moreover,

of speech or participate fully in the political process without an education. 411 U.S. 1, 115 n.74 (1973) (Marshall, J., concurring). Similarly, the majority stated that education is "essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote." *Id.* at 35. In *Tinker*, the Court stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citations omitted)). It is clear that "free speech is of special value in the school setting" and "[s]chools offer a laboratory-like setting that encourages diverse thoughts." *J.S.*, 807 A.2d at 854; *see also* Papandrea, *supra* note 25, at 1078, 1082 (discussing the benefits to young people of expressing themselves on the Internet).

²⁴⁴ *See Thomas*, 607 F.2d at 1051–52.

²⁴⁵ *See id.*

²⁴⁶ *See id.* at 1051; Rutherford Institute, *supra* note 231, at 7 (expressing concern that extending school authority over "[a]nything posted by public school students on the Internet that even vaguely relates to the school environment, teachers, students, etc. . . ." will result in "rife potential for abuse by school administrators . . .").

²⁴⁷ *See Paris Adult Theatre I*, 413 U.S. at 93 (Brennan, J., dissenting) (discussing how vague speech laws result in the lack of fair notice and the chilling of speech).

²⁴⁸ *See Porter*, 393 F.3d at 619–20 (refusing to apply the *Tinker* test because the speech at issue occurred off campus and there was no evidence that the speech was directed toward the school campus); *supra* note 212 and accompanying text.

²⁴⁹ *See Wisniewski*, 494 F.3d at 35; *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

²⁵⁰ *See Wisniewski*, 494 F.3d at 35; *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

the foreseeability test chills speech because it does not matter who was responsible for bringing the speech to campus.²⁵¹ Although the “sufficient nexus” test is an improvement over the foreseeability test or no threshold test at all, it is still quite vague and, because it considers many variables, it does not provide students with the bright line rule that they need in order to make informed decisions about their online activity.²⁵²

3. The Proposed Test Avoids a Legal Quandary

Because it would make the tests for school liability and school authority equivalent, adopting the proposed control and supervision test would ensure that schools would not be placed on legally and constitutionally uncertain ground when deciding whether to restrict or punish a student's online speech.²⁵³ As established by the Title IX and negligent supervision cases, schools can only be liable for failing to prevent injury or harassment that occurs when the school has assumed supervisory responsibility and control over the student.²⁵⁴ Thus, to satisfy their legal obligations, schools only need to be concerned with regulating speech or conduct that occurs under their control and supervision, and the proposed test allows for this.²⁵⁵

An examination of cases alleging school liability for negligent supervision reveals that, under the control and supervision analysis used in those cases, it is unlikely that a school would be held liable for negligent supervision for failing to prevent online student-on-student harassment that takes place outside of the school's supervision and control, and reported case law does not provide instances of such liability.²⁵⁶ This is because it would be unreasonable to require a school to protect students from what occurs on the Internet at times when their use of the Internet is outside of the school's control.²⁵⁷ The few

²⁵¹ See *Thomas*, 607 F.2d at 1053 n.18 (Newman, J., concurring).

²⁵² See *Layshock*, 496 F. Supp. 2d at 601–02; *J.S.*, 807 A.2d at 865; *supra* notes 133–150 and accompanying text.

²⁵³ See *Baldas*, *supra* note 8; *supra* notes 33–36 and accompanying text.

²⁵⁴ See *Davis*, 526 U.S. at 645; *Jenkins v. Anderson*, 922 A.2d 1279, 1285 (N.J. 2007); *Chappel*, 426 P.2d at 475; *supra* notes 171–202 and accompanying text.

²⁵⁵ See *supra* notes 171–202 and accompanying text.

²⁵⁶ See, e.g., *Emmett*, 92 F. Supp. 2d at 1090 (holding that the school did not have jurisdiction to punish a student's online speech because the student was not under the school's control and supervision when the speech was issued); *M.W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 517–18 (Cal. Ct. App. 2003); *Beacham*, 984 So.2d at 1075 (stating that incidents of student-on-student harassment “that occurred off school grounds, such as harassing phone calls and rumors throughout the community . . . are of no consequence to this matter”); *Korpela*, *supra* note 185.

²⁵⁷ See, e.g., *Davis*, 526 U.S. at 645; *Chappel*, 426 P.2d at 475.

negligence cases alleging failure to prevent student-on-student harassment focused only on the harassment that occurred under the school's supervision, and rejected the possibility that the school would be liable for harassment occurring outside of the school's supervision and control, even where the school knew about the off-campus incidents.²⁵⁸ Thus, schools are not responsible for policing student activity on the Internet, and it follows that schools should also lack the authority to police the Internet.²⁵⁹

This is not to say that a school should ignore harassment or bullying that is brought to their attention, but a school should be limited to taking measures to prevent incidents from occurring while students are under the school's supervision.²⁶⁰ For example, schools can block websites so that students cannot access them at school, thus diminishing the chance that the websites will cause any disruption at school.²⁶¹ Schools can also make rules against accessing certain websites while on school grounds, which would deter online activity from infiltrating the school environment.²⁶²

²⁵⁸ See *Beacham*, 984 So.2d at 1075. For an argument that the schools should have an affirmative duty to prevent student-on-student harassment, see Daniel B. Weddle, *Brutality and Blindness: Bullying in Schools and Negligent Supervision by School Officials*, in *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN* 385, 386–87 (Maurice R. Dyson & Daniel B. Weddle, eds., 2009).

²⁵⁹ See, e.g., *Davis*, 526 U.S. at 645; *Pulaski*, 306 F.3d at 636 (McMillian, J., dissenting) (arguing that the school should be uninvolved in off-campus speech and that any speech that violates the criminal law can be dealt with by the police); *Chappel*, 426 P.2d at 475. In *Thomas*, the Second Circuit emphasized that a school's desire to protect students and teachers does not justify its reaching out to the home and punishing a student for activity done there. 607 F.2d at 1051.

²⁶⁰ See *Porter*, 393 F.3d at 620. Schools may be able to deter cyberbullying by educating parents and students about the psychological effects of cyberbullying, and teaching students how to express their emotions in a constructive way. See *Neal v. Efurud*, No. 04-2195, slip op. at 22 (W.D. Ark. Feb. 18, 2005) (urging schools to view controversial speech as an opportunity to educate students about their civil rights, and not as a source of disruption); *In re George T.*, 93 P.3d 1007, 1019 n.10 (Cal. 2004) (“encouraging students to express their feelings teaches students to write out their feelings rather than acting them out and permits early intervention.”); Papandrea, *supra* note 25, at 1102 (arguing that, instead of punishing students, schools should focus on being more tolerant of unpopular speech and on teaching students how to use the Internet responsibly).

²⁶¹ See *Layshock*, 496 F. Supp. 2d at 591.

²⁶² See *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1280 (W.D. Wash. 2007). The punishment for violating these rules, however, must be commensurate to the rule violation and should not be based on the content of the student's Internet speech. See *supra* note 161 and accompanying text.

4. The Proposed Test Provides for a School's Unique Needs

The primary justifications given by the Supreme Court for affording students only limited First Amendment rights are that: (1) public schools are not traditional public forums and, as a result, a school's inaction may be interpreted by the community as the school's endorsement of a student's speech,²⁶³ and (2) schools have a legal, professional, and ethical duty to maintain control and protect students in the school environment.²⁶⁴ The control and supervision test appropriately provides for these considerations, as well as protecting the rights of students when they are speaking in a public forum.²⁶⁵

The Court recognized in *Kuhlmeier* that the risk of an observer assuming that the school is endorsing a student's speech is most potent when the speech is issued while the student is under the control and supervision of the school.²⁶⁶ Thus, the proposed test properly gives schools the authority to regulate speech in circumstances where those outside the school community might interpret the speech as being school-sponsored.²⁶⁷

Applying the control and supervision test to student online expression will not unduly restrict the school's ability to provide for the safety of its students because, if a school administrator believes that a student's online speech and other circumstances indicate that a student poses an immediate threat to the safety of students and teachers at the school, the administrator can work with parents and, where appropri-

²⁶³ See *Kuhlmeier*, 484 U.S. at 267, 272-73. See generally Susan Garrison, *The Public School as Public Forum*, 54 TEX. L. REV. 90 (1975) (discussing the school as a potentially public forum).

²⁶⁴ See, e.g., *Fraser*, 478 U.S. at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."); *Tinker*, 393 U.S. at 507; *Thomas*, 607 F.2d at 1049; NAT'L EDUC. ASSOC., CODE OF ETHICS OF THE EDUCATION PROFESSION (1975), <http://sites.nea.org/aboutnea/code.html> (making it an education professional's ethical obligation to "make reasonable effort to protect the student from conditions harmful to learning or to health and safety"). For example, in *J.S.*, the court analyzed the student's speech by balancing the student's interest in free speech against the school's interest in providing a "safe and productive school environment." See 807 A.2d 847, 855 (Pa. 2002).

²⁶⁵ See *infra* notes 266-273 and accompanying text.

²⁶⁶ See *Kuhlmeier*, 484 U.S. at 268, 270-71.

²⁶⁷ See *id.* at 267 ("The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'") (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

ate, law enforcement to address the threatening online speech.²⁶⁸ Furthermore, statutes in many states allow a school to suspend a student who is charged with a felony committed on or off campus, and expel a student who is convicted of a felony if the school administrator determines that “the student’s continued presence in school would have a substantial detrimental effect on the general welfare of the school.”²⁶⁹ Thus, in these states, if threats or harassment constitute a felony and a student is charged, then the school has the authority to suspend the student.²⁷⁰

Finally, if school staff or students are harmed by online speech, they may have recourse using civil torts, such as defamation or slander, or in criminal statutes prohibiting true threats or harassment.²⁷¹ Schools are not equipped for the role of law enforcement and they should not be the discretionary enforcers of these statutory remedies.²⁷² If there are gaps in the law regarding online activity, legislatures need to respond by creating civil remedies and criminal sanctions to address true threats, defamation, harassment, obscenity, and other forms of potentially damaging online speech that may be directed at students, teachers, or administrators.²⁷³

²⁶⁸ See, e.g., *Pulaski*, 306 F.3d at 632 (“[H]ad [the plaintiff] had a criminal record, or handed the letter to [his ex-girlfriend] directly, or previously expressed an intent to hurt her, it would be far easier to conclude that [his ex-girlfriend] reasonably believed that [he] intended to impose harm.”); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (“We look not only to [the student’s] actions, but to all of the circumstances confronting the school officials that might reasonably portend disruption.”); *Latour v. Riverside Beaver Sch. Dist.*, No. Civ. A 05-1076, 2005 WL 2106562, at *2 (W.D. Pa. Aug. 24, 2005); *In re George T.*, 93 P.3d at 1017 (“[A] threat must ‘on its face and under the circumstances in which it is made, [be] so unequivocal, unconditional, immediate, and specific as to convey . . . a gravity of purpose and an immediate prospect of execution of the threat.’”) (alterations in original) (emphasis omitted).

²⁶⁹ MASS. GEN. LAWS ch. 71, § 37H1/2 (1996); see, e.g., FLA. STAT. ANN. § 1006.09 (2003); N.J. STAT. ANN. 18A:37-2 (West 1959). A school may suspend a student who is charged with a felony and expel a student who is convicted of a felony for an incident which occurred off campus if that incident is shown “to have an adverse impact on the educational program, discipline, or welfare in the school in which the student is enrolled.” § 1006.09.

²⁷⁰ See *supra* note 268.

²⁷¹ See LIBEL LESSONS, VOL. XXII, NO. 1 STUDENT PRESS LAW CENTER 16 (2000), available at http://www.splc.org/report_detail.asp?id=615&cedition=17; see also Rutherford Institute, *supra* note 231, at 13.

²⁷² See Rutherford Institute *supra* note 231, at 13 (The public schools cannot be expected to cure all of America’s social ills.”). *Contra Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 772 (5th Cir. 2007).

²⁷³ See *Pulaski*, 306 F.3d at 636 (McMillian, J., dissenting); *supra* note 17 and accompanying text.

CONCLUSION

At the moment, school officials face the daunting task of looking at a conflicting body of online student speech case law and trying to develop effective policies for addressing students' online expression. The proposed control and supervision test provides a simple solution to the question of when schools have jurisdiction over student online activity. This test is easily understood by students and administered by schools because it is a workable, non-geographic analysis, and it is consistent with the well-established standards for determining school responsibility and authority. This test also strikes a fair balance between a school's interest in providing a safe environment and the students' and public's interest in providing students with First Amendment speech rights. Moreover, this test provides fair notice to students of the boundary between school and home and, thus, minimizes the chilling of protected student speech. Finally, making the standard for a school's authority over online speech equal to the standard for a school's responsibility to protect its students avoids placing schools in a legal quandary by allowing schools to regulate any speech that they have a legal obligation to address.

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