

RESOLVING AN INCOHERENT DOCTRINE: REGULATING OFF-CAMPUS STUDENT SPEECH WITH PRINCIPLES OF PERSONAL JURISDICTION

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*“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”*¹

I. INTRODUCTION

Meet Jennifer,² an eighth-grade student. After being disciplined twice for dress code violations, Jennifer copied a picture of her school’s principal to make a fake MySpace profile of him, where she mocked the principal as a sex addict and pedophile.³ Unsurprisingly, Jennifer was suspended. But after suing her school, Jennifer ultimately prevailed as the Third Circuit Court of Appeals held that the suspension was a violation of her First Amendment free speech rights.⁴ It is not an exaggeration to suggest that many school officials, parents, and even students would find such a decision contrary to a public school’s basic need to discipline students. However, the Third Circuit’s decision is not entirely surprising. The current law concerning student speech made outside of school can best be described as an incoherent doctrine. In 1969, the Supreme Court held in *Tinker v. Des Moines* that a public school can prohibit student speech if it “materially and substantially interfere[s] with the school’s requirements of appropriate discipline”⁵ Since then, the Court has heard only three cases involving student speech, none of which addressed harmful speech made outside of

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¹ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

² Jennifer is a fictional name based on a real case. The student at issue was a minor at the time of the incident and was not identified in the subsequent case. Any similarity is coincidental.

³ J.S. ex rel. *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920-21 (3d Cir. 2011).

⁴ *Id.* at 920. The court determined, in part, that the speech caused no substantial disruption in the school and that the speech could not “reasonably have led school officials to forecast substantial disruption in school.” *Id.*

⁵ 393 U.S. 503, 509 (1969) (citation omitted).

school.⁶ As a result, lower courts have been left to rely on their own judgment in formulating rules that address types of speech that have not been contemplated by the Supreme Court.⁷ Public school administrators and teachers are forced to navigate a muddled field of law that differs in most jurisdictions, resulting in confusion as to when schools can discipline students for disruptive and threatening speech made outside of the “schoolhouse gates.”⁸ Contributing significantly to the confusion is the pervasiveness of the internet, what one court has called “the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”⁹ The internet has had profound effects on the way speech is transmitted. Messages can be sent and received instantaneously, near infinite amounts of information can be acquired, and opinions can be shared with the world. Young Americans rely on internet-based technology to engage in speech more than any other demographic. One recent study found that 92% of teens use the internet daily, including 24% who use it “almost constantly.”¹⁰ Speech that traditionally occurred within a school can now be transmitted via the internet with ease, regardless of where the student is located, as such speech flows in and out of the schoolhouse gate. A student can now send vulgar, disruptive, or threatening speech to either a student or teacher from the comforts of home.

The difficulty for school officials is determining whether a student can be disciplined for speech that is made entirely outside of school, yet finds its way to school. Unfortunately for school officials, much of the student speech that leads to disciplinary issues occurs over the internet.¹¹ With the combination of varying law and the ease with which students can broadcast speech, school officials are left to face a dilemma that is certain to grow worse.

Two types of speech delivered over the internet raise serious concerns for schools across the nation: cyberbullying and threats. Cyberbullying resembles a common form of harmful school speech that is facilitated

⁶ See generally *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

⁷ In fact, the Supreme Court declined to grant certiorari in the above *Snyder* case. See *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012). See also *infra* Part III. for the myriad of approaches courts have adopted in addressing student speech made outside of school.

⁸ See JILL JOLINE MYERS, DONNA S. McCAW, & LEAUNDA S. HEMPHILL, *RESPONDING TO CYBER BULLYING: AN ACTION TOOL FOR SCHOOL LEADERS* 24 (2011).

⁹ *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

¹⁰ Amanda Lenhart, *Teens, Social Media & Technology Overview*, 2015 PEW RES. CTR. 2, http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf. The study also found that 71% of teenagers use more than one social network site. *Id.* at 3. Furthermore, 87% of teenagers have access to a computer, while 73% have access to an internet-based smartphone. *Id.* at 8.

¹¹ See Kathleen Conn, *Offensive Student Web Sites: What Should Schools Do?*, 58 EDUC. LEADERSHIP 74, 74 (Feb. 2001).

through a new medium, as it typically occurs when a minor uses a computer, smartphone, or other device to send or post messages intended to harm another child.¹² Teachers are quick to address cyberbullying as one of the top challenges they face.¹³ This is not only because a substantial portion of students face harassment through the internet.¹⁴ Rather, teachers regard cyberbullying as a serious challenge due to the lack of guidance provided by the law.¹⁵ For example, a school is well within its rights to discipline a student for bullying another on the playground.¹⁶ On the other hand, it is not clear whether a school can discipline the same bullying student who sends harassing messages to a student via cyberspace.¹⁷

Threats also stand as an ever-present issue made more troublesome by the ease of communication through the internet. The series of tragic school shootings that have followed the events in Columbine, Colorado in 1999 have required school officials to take threatening statements very seriously. Social media and the internet have not made the task easier. A significant portion of threats made by students against schools and others occur over the internet.¹⁸ Just as with cyberbullying, threats are a traditional type of harmful speech that have been exacerbated by the internet.

¹² Nat'l Crime Prevention Council, *Stop Cyberbullying Before It Starts* at 1 (2014), <http://www.ncpc.org/resources/files/pdf/bullying/cyberbullying.pdf>.

¹³ Mary Ellen Flannery, *Top Eight Challenges Teachers Face This School Year*, NEATODAY (Nov. 13, 2015), <http://neatoday.org/2010/09/13/top-eight-challenges-teachers-face-this-school-year/> (“According to Pew research, nearly one in three teens say they’ve been victimized via the Internet or cell phones. A teacher’s role—or a school’s role—is still fuzzy in many places. What legal rights or responsibilities do they have to silence bullies, especially when they operate from home?”).

¹⁴ Nat'l Crime Prevention Council, *supra* note 12, at 1 (finding that 43% of teens have been victims of cyberbullying within the last year).

¹⁵ See MYERS ET AL., *supra* note 8, at 24 (stating that “[t]he confusion [of the law] is further complicated by the emergence of technology usage by students. The parameters of the schoolyard are no longer clear. What expression occurs on campus and what occurs off campus is often blurred”).

¹⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (commenting that it “has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools”); see also *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011) (commenting that “school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning”).

¹⁷ Compare *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865, 869 (Pa. 2002) (holding that a student’s suspension for creating a website at home mocking teachers in a lewd and obscene way did not violate First Amendment speech rights), with *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207-08, 216 (3d Cir. 2011) (holding that a student’s suspension after creating a MySpace account from home mocking his principal in a crude way did violate First Amendment speech rights).

¹⁸ Ken Trump, *Schools Face New Wave of Violent Threats Sent by Social Media and Other Electronic Means*, Study Says, NAT’L SCHOOL SAFETY & SECURITY SERVICES (Feb. 25, 2014), <http://www.schoolsecurity.org/2014/02/schools-face-new-wave-violent-threats-sent-social->

The ease with which threats can be made over the internet presents a dangerous situation in the hands of school-aged children who are still developing emotional maturity. Threat doctrine developed by the Supreme Court proscribes statements that communicate “a serious expression of an intent” to harm an individual or group.¹⁹ However, teachers and school officials should not be placed in positions where threats are evaluated for intent. Today’s climate presents the unfortunate reality that each reasonably perceivable threat needs to be addressed seriously and swiftly. When dealing with threatening statements, school officials should not be faced with the predicament of weighing discipline against potential legal retaliation. A threatening remark made by a student to a teacher in the classroom can be legally addressed by the school.²⁰ After all, the sincerity of threats is typically easier to evaluate in person. Yet the law is far less clear as to when a school can discipline a student for making threatening comments over the internet.²¹

Due to the inconsistency of the law, public school teachers and administrators may be hesitant to discipline students.²² Determining whether a student’s comments over social media cause a likely substantial disruption,²³ or whether a student’s threatening remarks made on a blog are indicative of an intent to cause harm²⁴ may force an administrator to weigh the decision to discipline the student against the consequence of legal retaliation. Schools also face the prospect of liability for not taking adequate action in preventing harm by students against others. Many jurisdictions

media-electronic-means-study-says/ (compiling one year’s worth of threats against schools and finding that 35% of the threats occurred through the internet).

¹⁹ See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992); *Watts v. United States*, 394 U.S. 705, 708 (1969)).

²⁰ See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372-73 (9th Cir. 1996) (holding that a student’s suspension after stating to his counselor, “[i]f you don’t give me this schedule change, I’m going to shoot you,” was not in violation of the student’s First Amendment free speech rights).

²¹ Compare *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1065-66, 1072 (9th Cir. 2013) (holding that a student’s suspension for sending a message to friends via MySpace expressing that he wished to shoot fellow students did not violate his First Amendment free speech rights), with *Burge ex rel. Burge v. Colton Sch. Dist.*, 100 F. Supp. 3d 1057, 1072 (D. Or. 2015) (holding that a student’s suspension for sending messages to a friend via Facebook that his teacher “needs to be shot” did violate his First Amendment speech rights). Interestingly, the 9th Circuit in *Wynar* did not use a true threat analysis but instead relied on *Tinker*’s substantial disruption test. See *Wynar*, 728 F.3d at 1067-69.

²² See *Teaching Interrupted: Do Discipline Policies in Today’s Public Schools Foster the Common Good?*, PUBLIC AGENDA at 1 (May 2004), http://www.publicagenda.org/files/teaching_interrupted.pdf (“[T]eachers operate in a culture of challenge and second-guessing—one that has an impact on their ability to teach and maintain order.”). The study also found that 55% of teachers blame school districts for not disciplining students for fear of being sued. *Id.* at 26.

²³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

²⁴ See *Virginia*, 538 U.S. at 359.

impose a general duty upon public schools to provide a safe environment for students to grow and learn.²⁵ A school's failure to address harmful speech directed by one student to another may provide grounds for legal action based on several theories, including negligence and equal protection.²⁶ Furthermore, as addressed by the Supreme Court, schools may also face lawsuits from student victims of sexual harassment who allege violations of Title IX.²⁷ The seemingly endless potential for dilemma suggests that the current legal landscape places public schools between a rock and a hard place.

This note serves two purposes. First, it calls on the Supreme Court to address a problem in need of resolution. Older legal standards such as *Tinker* address only on-campus student speech. These standards need to be updated not only to address the problems faced by current educators, but so that they can be applied in a modern legal world far different than what existed when they were developed. The ubiquity of the internet has fundamentally changed how students engage in speech and has, in turn, dramatically impacted the ability of educators to successfully discipline students. As one judge aptly put it, "for better or worse, wireless internet access . . . give[s] an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools."²⁸

The internet has also drastically outpaced the law as student speech is concerned.²⁹ Courts across all jurisdictions are now forced to reconcile older legal principles to meet the once unfathomable development of technology.³⁰ Consequently, educators are left not only to follow wholly inconsistent legal standards, but are left with the dilemma of forgoing discipline for fear of legal

²⁵ See, e.g., *Miller v. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974) ("We believe . . . that the relationship of school pupils and school authorities should call into play the well recognized duty in tort law that persons entrusted with children . . . have a special responsibility recognized by the common law to supervise their charges." (citing RESTATEMENT (SECOND) OF TORTS § 320) (Am. Law Inst. 1965))).

²⁶ See G.D.S. ex rel. *Slade v. Northport-E. Northport Union Free Sch. Dist.*, 915 F. Supp. 2d 268, 278 (E.D.N.Y. 2012) (holding that the defendant school district could be liable for an equal protection claim after a Jewish high school student experienced constant anti-Semitic harassment by other students on campus and over Facebook).

²⁷ See generally *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). See also Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 906 (2001) ("If school officials discipline the student-author, he may sue them on First Amendment grounds. If the administration fails or refuses to discipline the author, the school could face a lawsuit by the victim of the sexual harassment under Title IX.")

²⁸ *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-21 (3d Cir. 2011) (Jordan, J., concurring).

²⁹ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

³⁰ See *infra* Part III.

reprisal, or the possibility of legal consequences for not taking disciplinary action.³¹

An educator should not be forced to face such predicaments. Teachers have a crucial role in our society: to help prepare children become the intelligent, mature model citizens that are expected to comprise a functioning society.³² Speech is inextricably connected with education. Without proper discipline, speech and its potential harmful effects to others cannot effectively be taught.

The second purpose of this note is to offer a solution as to how public schools can better discipline in the internet age, all while maintaining respect for established legal precedent and basic First Amendment rights. Although several scholars have written about the difficulty of reconciling student speech doctrine in the modern internet age,³³ this note will use existing doctrine to answer problems that have gone largely ignored. By using well-established principles of minimum contacts as they relate to establishing personal jurisdiction, a student who purposefully directs substantially disruptive speech towards a school, school official, or student can be disciplined, regardless of the speaker's location. By fusing the *Tinker* standard with the principles articulated in the Supreme Court's reasoning in *Calder v. Jones*,³⁴ an analysis of minimum substantially disruptive contacts can solve disciplinary issues as they relate to cyberbullying.

In addition, by using a minimum contacts analysis when interpreting true threats, the intent of the speaker will not factor into the analysis. Instead, the student speaker's purposeful directing of a threat towards a student or school official—and even the likelihood that the student knows that the speech will

³¹ See Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 728 (2009) (“For school administrators and teachers who have to work with and regulate speech on a daily, indeed an hourly basis, being subject to unintelligible and inconsistent constitutional guidelines controlling their conduct is a draining and demoralizing burden.”).

³² See Stephen Macedo, *Crafting Good Citizens*, 4 EDUCATIONNEXT 10, 14 (Spring 2004) (“Civic education is inseparable from education: no teacher could run a classroom, no principal could run a school, without taking a stand on a wide range of civic values and moral and political virtues.”).

³³ See, e.g., Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 837 (2008) (arguing that schools have jurisdiction to regulate off-campus speech if the student speaker publicized the speech at school or encouraged others to access it); Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 NEB. L. REV. 630, 633 (2009) (suggesting that schools have much discretion in regulating student off-campus speech under the *Tinker* standard); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1028 (2008) (arguing that courts have granted schools too much authority in regulating off-campus student speech, and that schools should instead promote responsibility when using the internet).

³⁴ 465 U.S. 783 (1984).

reach the school—will establish sufficient grounds for disciplinary action. This analysis will be compatible with the due process concerns that underlie personal jurisdiction. If sufficient minimum contacts are established, the maintenance of the suit cannot “offend traditional notions of fair play and substantial justice.”³⁵ For this note, such traditional notions will relate to the free speech protections afforded to students by the First Amendment.

Part II of this note describes the basic function of the First Amendment and why speech is granted great protection. Despite the reverence for free speech, Part II describes how it is not an absolute right by detailing its restrictions as decided by the Supreme Court. Part II also discusses how the Court has curtailed speech rights in the context of public schools.

Part III provides an analysis on the varying approaches to regulating off-campus speech. The analysis focuses on how courts evaluate speech that is substantially disruptive, threatening, or both.

Finally, Part IV provides a unique solution that utilizes well-established doctrine from another facet of law: notions of minimum contacts as they relate to establishing personal jurisdiction. By focusing on the Supreme Court’s precedent in *Calder v. Jones*—which developed a test that evaluates a person’s effect on a forum state and whether that person can reasonably anticipate being hauled to court³⁶—schools will be able to successfully discipline students whose off-campus speech disrupts schools in a substantial way. Schools will also be able to address disruptive behavior and threats using *Calder*’s principles, as the true intent of the speaker does not matter.

II. THE FIRST AMENDMENT TODAY

The First Amendment to the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech,”³⁷ and has been incorporated onto the states through the Fourteenth Amendment’s Due Process Clause.³⁸ The prevailing free speech doctrine most scholars and jurists subscribe to³⁹ stems from Justice Holmes’ famous dissent in *Abrams v. United States*.⁴⁰ In *Abrams*, Holmes stated that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power

³⁵ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

³⁶ *Calder*, 465 U.S. at 789-90.

³⁷ U.S. CONST. amend. I.

³⁸ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

³⁹ See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2-3 (1984); see also William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“In Speech Clause jurisprudence, for example, the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

⁴⁰ 250 U.S. 616 (1919).

of the thought to get itself accepted in the competition of the market.”⁴¹ Under the marketplace of ideas metaphor, speech and ideas should not be suppressed by government but rather should compete amongst others in order to be tested for their validity and resonance.⁴² Although the best ideas may not always prevail, the marketplace offers the best test by which speech can be challenged. The marketplace of ideas theory is now so enshrined by modern Supreme Court precedent that it would be difficult to discuss free speech without it.⁴³ If this theory encapsulates any fundamental purpose found in the Free Speech Clause of the First Amendment, it is to prevent the government from censoring speech it finds disagreeable.⁴⁴ A colleague of Holmes and fellow dissenter in *Abrams*, Justice Brandeis wrote “that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”⁴⁵ In case of falsehoods and bad ideas, Justice Brandeis suggested “to avert the evil by the process of education,” with the remedy being “more speech, not enforced silence.”⁴⁶ Yet, as will be shown in the next section, there is certain speech that cannot be countered by competition.

A. Restrictions on Free Speech

The Supreme Court has been clear that, like most rights, free speech is by no means absolute.⁴⁷ Despite the reverence held for the First Amendment, the right to free speech “does not comprehend the right to speak on any

⁴¹ *Abrams*, 250 U.S. at 628-31 (Holmes, J., dissenting) (arguing that an anti-war protestor who handed out pamphlets in public should not be charged with hindering the war effort).

⁴² Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 821 (2008) (“Ever since Justice Holmes invoked the concept in his *Abrams* dissent, academic and popular understandings of the First Amendment have embraced the notion that free speech, like the free market, creates a competitive environment in which the best ideas ultimately prevail.”).

⁴³ See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“Many persons . . . will choose simply to abstain from protected speech, . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”); *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (commenting how the internet offers a “dramatic expansion of this new marketplace of ideas”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (“[W]e held that it was error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas.”).

⁴⁴ See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972) (stating that the First Amendment “means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture . . . our people are guaranteed the right to express any thought, free from government censorship”).

⁴⁵ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁴⁶ *Id.* at 377 (Brandeis, J., concurring).

⁴⁷ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” (footnotes omitted)).

subject at any time.”⁴⁸ Many know of the famous Holmes maxim that free speech does not entail the right to falsely yell fire in a crowded theater if panic ensues.⁴⁹ This often-cited quote,⁵⁰ however, does not accurately capture modern jurisprudence on free speech restrictions. Instead, the Supreme Court has held that speech which is directed towards inciting or producing “imminent lawless action,” and is likely to incite or produce such action, falls outside the scope of First Amendment protection,⁵¹ while the mere advocacy of engaging in unlawful conduct is protected.⁵² In addition, so-called “fighting words,” or words that, when hurled at the average person, are “inherently likely to provoke a violent reaction,” can be proscribed.⁵³

True threats, too, are among the types of speech whose tendency for violence and disruption causes it to lose shelter under the First Amendment. In its most recent opinion directly addressing the doctrine of true threats, the Supreme Court stated that such threats include words that “the speaker means to communicate a serious expression of an intent to commit . . . violence to a particular individual or group of individuals.”⁵⁴ This includes intimidation, or when a speaker directs a threat against an individual or group of persons with the intent of inflicting fear of harm or death.⁵⁵ Thus, it is easy to see why true threats against the president are proscribed,⁵⁶ yet it should not be forgotten that threats, like most speech, are dependent on a series of factors

⁴⁸ Am. Comm. Ass’n, C.I.O., v. Douds, 339 U.S. 382, 394 (1950).

⁴⁹ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

⁵⁰ See Carlton F.W. Larson, “Shouting ‘Fire’ in A Theater”: *The Life and Times of Constitutional Law’s Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 208 (2015) (finding that since 1919, 278 opinions written by federal appellate courts, federal trial courts, and state appellate and trial courts have used the metaphor).

⁵¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 446-47 (1969) (holding that a leader of a Ku Klux Klan group could not be charged under the state’s criminal syndicalism statute because his remark that “there might have to be some revengeance [sic] taken” was not likely to produce imminent lawless action); see also *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (holding that an antiwar protestor could not be charged for disorderly conduct because his statement, “We’ll take the fucking streets later,” was not likely to produce imminent lawless action).

⁵² See *Brandenburg*, 395 U.S. at 447-48 (“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961))).

⁵³ See *Cohen v. California*, 403 U.S. 15, 20 (1971); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (describing fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

⁵⁴ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citations omitted).

⁵⁵ *Id.* at 360 (citation omitted).

⁵⁶ See *Watts v. United States*, 394 U.S. 705, 707 (1969) (“The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.”).

such as the context it is spoken in and the surrounding circumstances.⁵⁷ There is also the puzzling issue of intent, as some courts evaluate whether a true threat is subjectively intended as a threat by the speaker, while other courts evaluate threats based on whether a reasonable, objective person would interpret the speech to be threatening.⁵⁸ Regardless of the difficult matter of intent, true threats are similar to fighting words and speech that incites imminent lawless action in that each engenders a fear of violence, as well as a disruption that emanates from such fears, thus leading to the shedding of constitutional protection.⁵⁹

Limits on the First Amendment right to speech also extend beyond regulating its content. Several types of limits are legally permissible when enforced in a content-neutral fashion. For example, federal and state governments can implement reasonable time, place, and manner restrictions on how, when, and even how loud speech can be made in public places.⁶⁰ Although government may not shield the public's eyes from offensive types of speech,⁶¹ it may enforce such reasonable restrictions if they make no reference to the content of speech, if they are "narrowly tailored to serve a significant governmental interest," and if "they leave open ample alternative channels for communication"⁶²

⁵⁷ For example, the Court in *Watts* held that a protestor could not be charged under a valid federal law prohibiting the threatening of the President even after the protestor said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," because the statement: (1) was made at a political rally; (2) was expressly conditional; and (3) was met with laughter by listeners. *Id.* at 706-07.

⁵⁸ Compare *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) ("[I]ntent to intimidate is necessary and . . . the government must prove it in order to secure a conviction."), with *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) ("Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'").

⁵⁹ It should be noted that content-based speech restrictions also apply to non-violent forms of speech, including obscenity, commercial speech, and disruptive government employee speech. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980) (holding that commercial speech can be restricted by regulations that directly advance a substantial government interest); *Miller v. California*, 413 U.S. 15, 24 (1973); see also *Connick v. Myers*, 461 U.S. 138, 150 (1983) (holding that a government employee who spoke about a matter of public concern could be disciplined if such speech substantially disrupted the ability of the government to perform its duties efficiently). Also not discussed is the law of defamation.

⁶⁰ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (holding that the National Park Service could prevent protestors from sleeping in symbolic tents at night on park grounds because the park regulation served the important government interest of maintaining the parks and did not significantly infringe on the rights of the protestors' ability to engage in speech).

⁶¹ See *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government . . . undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.").

⁶² See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Furthermore, government may limit speech if a regulation furthers an important governmental interest unrelated to the suppression of free expression, and the incidental restrictions on freedoms associated with the First Amendment are no greater than are essential to further that interest.⁶³ Therefore, the government may successfully convict a citizen who protests by burning a draft card because of the legitimate governmental interest in supporting a draft and army,⁶⁴ yet may not charge a citizen for burning a flag in a way that poses no harm, as preserving the flag as a symbol of nationhood and unity is not a legitimately important governmental interest.⁶⁵ As shown, the notion that the First Amendment's free speech clause requires absolute adherence ignores the reality that certain speech poses great harm, while other forms of speech need to be reasonably regulated so government can operate effectively.

B. Restrictions on Student Speech

Public schools are no different, as they face the need to handle harmful speech that occurs within their campuses. As such, the Supreme Court has recognized the unique speech challenges public schools encounter by providing them with the legal backing to appropriately deal with such issues. The following details the modern history of the Supreme Court's student speech jurisprudence.

1. *Tinker v. Des Moines*

The Supreme Court's modern jurisprudence on student speech began in 1969 with its *Tinker v. Des Moines*⁶⁶ decision. John and Mary Beth Tinker, siblings and high schools students, wore black armbands to school as part of a larger community protest of the Vietnam War.⁶⁷ The principals of the Des Moines schools learned of the plan to wear the protest armbands and quickly adopted a policy whereby students would be asked to remove the apparel and, if not complied with, the students would be suspended.⁶⁸ John and Mary Beth nevertheless wore the armbands, refused to remove them, and were suspended.⁶⁹

The Supreme Court started its analysis by stating that the wearing of an armband for the purposes of expressing a certain view closely resembles a form of pure speech that is entitled complete protection under the First

⁶³ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁶⁴ See *id.* at 377-80.

⁶⁵ See *Texas v. Johnson*, 491 U.S. 397, 413 (1989).

⁶⁶ 393 U.S. 503 (1969).

⁶⁷ *Id.* at 504.

⁶⁸ *Id.*

⁶⁹ *Id.*

Amendment.⁷⁰ Merely being a student does not result in less First Amendment protection, the Court stated, as neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”⁷¹ thus reflecting a well-established precedent dating back to the early twentieth century.⁷²

The Court, however, recognized its repeated need⁷³ to give “comprehensive authority” to states and school officials “consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools.”⁷⁴ The clash between the Tinkers and the Des Moines public school system resembled a much larger dispute that pitted basic constitutional freedoms against the traditional deference given to schools. In reaching its holding, the Court found no evidence that the school experienced any disruption in its daily operations, nor was there any disruption amongst other students.⁷⁵ On the contrary, it was clear to the Court that the school system implemented the ban in order to avoid possible controversy surrounding the silent protest of the Vietnam War.⁷⁶ For the Court, a suppression of free speech could not stem from a desire to avoid “discomfort and unpleasantness” that surrounds unpopular views.⁷⁷ Instead, in order for a public school to punish a student for his or her speech, the speech must “materially and substantially” disrupt the ability of the school to discipline,

⁷⁰ *Tinker*, 393 U.S. at 505-06 (“[The wearing of the armbands] was closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.” (citations omitted)).

⁷¹ *Id.* at 506.

⁷² *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (holding that the Due Process Clause of the Fourteenth Amendment prevented the state from banning the teaching of certain foreign languages, as it interfered with the constitutional rights of the teacher, parent, and student); *see also* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

⁷³ *See* *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.”); *see also* *Meyer*, 262 U.S. at 401 (commenting that the Nebraska legislature, which mandated that only certain languages could be taught in schools, “has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own”).

⁷⁴ *Tinker*, 393 U.S. at 507.

⁷⁵ *Id.* at 508 (finding that of the 18,000 students in the school system, only a few wore black armbands and just five were suspended, ultimately indicating that no disruption occurred).

⁷⁶ *Id.* at 510. The Court also reached its holding in part by finding that the school system singled out the Vietnam protestors, while allowing other students to wear political campaign buttons and even the Iron Cross, a traditional symbol of Nazism. *Id.*

⁷⁷ *Id.* at 509.

or the rights of other students.⁷⁸ Public schools, the Court commented, are not “enclaves of totalitarianism” but rather are unique marketplaces of ideas, where the nation’s future leaders are exposed to various thoughts and expressions.⁷⁹ Students do not lose basic constitutional freedoms simply for their status or age, nor do students engage in speech just in the classroom.⁸⁰ The Court reminded states and its schools that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁸¹

2. *Bethel School District v. Fraser*

If the Supreme Court’s student speech jurisprudence stopped with *Tinker*, public schools would find it much more difficult to limit ordinary speech that may not be substantially disruptive yet may be contrary to the school’s mission. However, the Supreme Court delved into the realm of student speech again seventeen years later with its *Bethel School District v. Fraser*⁸² decision. High school student Matthew Fraser gave a speech at an assembly of nearly 600 fellow students where he nominated his friend for a student-elected office.⁸³ The speech was sophomoric, as it was rife with sexual innuendos and metaphors.⁸⁴ Fraser, after being suspended for three days,⁸⁵ took legal action, only to later find his case before an unsympathetic Supreme Court.

The Court first noted that unlike its *Tinker* decision, which involved expressive political speech, the speech here contained nothing of the sort.⁸⁶ The student speech at issue was contrary to what the Court thought was a public school’s mission in instilling “habits and manners of civility.”⁸⁷ Just

⁷⁸ *Tinker*, 393 U.S. at 513. The Court also stated that a school can take action against student speech that has not yet occurred but may nevertheless be forecasted to cause substantial disruption. *Id.* at 514.

⁷⁹ *Id.* at 511-12.

⁸⁰ *Id.* at 512-13 (“A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam . . .”).

⁸¹ *Id.* at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁸² 478 U.S. 675 (1986).

⁸³ *Id.* at 677.

⁸⁴ *Id.* at 677-78.

⁸⁵ *Id.* at 678.

⁸⁶ *Id.* at 680 (noting how “[t]he marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of [Fraser’s] speech in this case seems to have been given little weight by the [Ninth Circuit] Court of Appeals”).

⁸⁷ *Id.* at 681. The Court based its reasoning in part on a then-contemporary history book detailing the traditional role of the American public school system, the education of which “must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the

because an adult's indecent and lewd speech may be protected does not mean that a minor or young adult shares the same rights, as the Court repeated that the constitutional rights of students in public schools are not "automatically coextensive with the rights of adults in other settings."⁸⁸ Because of these reasons, the Court concluded that it was appropriate for the school to punish students for "vulgar and offensive terms in public discourse."⁸⁹ The Court believed that the sexual innuendo used by Fraser in his speech was offensive to teachers and students, especially to younger and more impressionable members of the student audience, and that the school "must teach by example the shared values of a civilized social order."⁹⁰ As a result, a school can disassociate itself with lewd speech that is "wholly inconsistent with the fundamental values of public school education."⁹¹ Deciding what type of speech occurring in a classroom or assembly is lewd is entirely up to local school boards, not a court.⁹²

3. *Hazelwood School District v. Kuhlmeier*

Two years after its *Fraser* decision, the Supreme Court developed a trend in *Hazelwood School District v. Kuhlmeier*.⁹³ Three high school students who were staff members of the school newspaper brought suit against their school when two pages of articles were deleted from an issue.⁹⁴ The deleted material contained two stories, one of which told the story of three Hazelwood High School students and their experiences with pregnancy,

nation." *Fraser*, 478 U.S. at 681 (quoting CHARLES M. BEARD & MARY R. BEARD, *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

⁸⁸ *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (holding that a search by a school official of a student does not require the typical level of probable cause required under the Fourth Amendment but instead requires reasonableness, as teachers and administrators have a substantial need to maintain order in schools)).

⁸⁹ *Id.* at 683. This is in slight contrast to the Court's definition of proscribable obscenity speech, which is defined as material that "taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

⁹⁰ *Fraser*, 478 U.S. at 683. The Court also mentioned that teachers and older students are like role models, who "demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class." *Id.*

⁹¹ *Id.* at 685-86 (internal quotation marks omitted).

⁹² *See id.* at 686. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (commenting how the "Court's lack of specialized knowledge and experience" prevents it from interfering with "the most persistent and difficult questions of educational policy . . ."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.").

⁹³ 484 U.S. 260 (1988).

⁹⁴ *Id.* at 262.

while the other dealt with the impact of divorce on students at the school.⁹⁵ The principal of the high school decided to omit the stories because, in addition to concerns surrounding the privacy of the students who were the subject matter of the articles, it was thought that references to sexual activity and birth control were inappropriate for the younger students.⁹⁶ The three students claimed that their free speech rights were infringed upon when their journalistic pieces were suppressed.⁹⁷

The Court, in echoing much of its precedent that student rights are not coextensive with adults and that the First Amendment must be “applied in light of the special characteristics of the school environment,”⁹⁸ addressed the speech issue before it as being different than the one presented in *Tinker*. While the issue in *Tinker* concerned suppressing a student’s speech in a classroom, the issue in *Kuhlmeier* was whether a school could control speech in school-sponsored activities.⁹⁹ Analyzing the issue through this lens, the Court held that public educators could exercise control over the content of student speech in school-sponsored activities, as long as the educator’s actions were “reasonably related to legitimate pedagogical concerns.”¹⁰⁰ The Court based its decision on the premise that educators must have great control over student speech that occurs in school-sponsored activities—whether they be publications, theatrical plays or any other expressive activity—in order to ensure that students learn the lesson that is meant to be taught from the activity.¹⁰¹ Just as with the lewd speech in *Fraser*, the Court stated that a school can disassociate itself from student speech that is deemed inappropriate or unsuitable for younger audiences.¹⁰² Schools, whether they choose so or not, are permitted to set high standards for students and therefore may limit speech that does not meet those standards, or that may be “inconsistent with ‘the shared values of a civilized social order.’”¹⁰³

⁹⁵ *Kuhlmeier*, 484 U.S. at 263.

⁹⁶ *Id.* The principal also expressed concerns that the identity of the anonymous pregnant students would be unveiled, and that the divorced parents featured in the article were not given the opportunity to respond to claims made by their children. *Id.*

⁹⁷ *Id.* at 264.

⁹⁸ *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁹⁹ *Id.* at 270-71 (“The . . . question [before the Court] concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”).

¹⁰⁰ *Id.* at 273.

¹⁰¹ *Kuhlmeier*, 484 U.S. at 271.

¹⁰² *Id.* The Court also did not forget its *Tinker* analysis, as it stated that schools could disassociate itself “from speech that would ‘substantially interfere with [its] work . . . or impinge upon the rights of other students.’” *Id.* (quoting *Tinker*, 393 U.S. at 509).

¹⁰³ *Id.* at 271-72 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)). The Court in *Fraser* also noted that “[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.” *Fraser*, 478 U.S. at 683.

4. *Morse v. Frederick*

The Court took its last and most recent student speech case in 2007 with its *Morse v. Frederick*¹⁰⁴ decision. In January 2002, high school senior Joseph Frederick watched with friends the passing of the Olympic torch as it made its way to Salt Lake City, Utah for the 2002 winter games.¹⁰⁵ Deborah Morse, the school principal, allowed students and teachers to attend the event as an approved class trip.¹⁰⁶ As the torchbearers made their way past the students, Frederick and his friends unfurled a 14-foot banner that read: “BONG HiTS 4 JESUS.”¹⁰⁷ Principal Morse immediately approached the students and demanded the banner be taken down, but Frederick was the only student who refused to comply.¹⁰⁸ After Morse finally confiscated the banner and suspended Frederick for ten days, Frederick brought suit alleging a First Amendment free speech violation.¹⁰⁹

The Court decided first that because the torch relay event occurred during school hours, it was approved as a school trip by the principal, and the school district’s policies mandated that students in school-approved events were subject to the rules of student conduct, the Court’s precedent applied.¹¹⁰ Thus, the Court expanded the ability of public schools to discipline outside the schoolhouse gate.¹¹¹ If the school could discipline a student for speech that occurred outside of school, the remaining question for the Court was whether the particular speech could be restricted. Because the Court believed that the message on the banner was one that could reasonably be perceived as promoting drug use,¹¹² the school’s important interest in deterring drug use was a sufficient justification to limit drug related student speech.¹¹³ The

¹⁰⁴ 551 U.S. 393 (2007).

¹⁰⁵ *Id.* at 397.

¹⁰⁶ *Id.* By being an approved class trip, the school could more easily argue that rules of student conduct still applied and that student speech could be regulated, despite it occurring outside of the schoolhouse gates. *See id.* at 410.

¹⁰⁷ *Id.* at 397.

¹⁰⁸ *Id.* at 398. The principal, along with the superintendent who upheld the suspension, believed that the “common-sense” interpretation of the banner to be one that advocated drug use. *Id.* Frederick claimed “that the words were just nonsense meant to attract television cameras.” *Id.* at 401 (citation omitted).

¹⁰⁹ *Id.* at 399.

¹¹⁰ *Morse*, 551 U.S. at 400-01.

¹¹¹ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This conflicts with how the *Tinker* Court was primarily concerned with recognizing a student’s expansive free speech rights, which remain intact regardless if the student is in a classroom, cafeteria, playing field, or on the campus. *Id.* at 512-13.

¹¹² *See Morse*, 551 U.S. at 402 (“At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. . . . [T]he phrase could be interpreted as an imperative . . . [and] [a]lternatively, the phrase could be viewed as celebrating drug use . . .”).

¹¹³ *Id.* at 403.

Court cited studies detailing the problem of drug use amongst minors,¹¹⁴ along with Congress' directions that it is up to schools to educate students about illegal drug use.¹¹⁵ Combining these important government interests with the "special characteristics of the school environment," public schools could restrict student speech that can reasonably be regarded to promote illegal drug use.¹¹⁶

After more than forty years of jurisprudence, the Supreme Court recognized several general principles that are still used as the basis in evaluating student speech issues.¹¹⁷ Public schools can now restrict the following: speech that is materially disruptive to the school's ability to discipline or the rights of other students, whether it occurs on campus, or off campus in school-sponsored events; lewd and offensive speech; speech occurring in school-sponsored activities if the restriction is reasonably related to legitimate pedagogical concerns; and speech that is reasonably interpreted to encourage illicit drug use.¹¹⁸

These principles are not questioned for their validity or soundness but rather their applicability in a world that has fundamentally altered how speech is communicated. As the Supreme Court has been reluctant to adjust its precedent to meet issues brought by tools like the internet, lower courts have been left to reconcile old precedent with modern challenges, as some reach similar conclusions while others differ greatly.¹¹⁹ In short, a series of irreconcilable tests have led to the creation of an incoherent student speech doctrine.

PART III. CURRENT OFF-CAMPUS STUDENT SPEECH TESTS

Recognition of the conflicts surrounding the current state of student speech jurisprudence is not new. Commentators have addressed the issue of the Court's lack of guidance and, in turn, have called for action,¹²⁰ while

¹¹⁴ *Morse*, 551 U.S. at 407.

¹¹⁵ *Id.* at 408 ("Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs . . .").

¹¹⁶ *Id.* (quoting *Tinker*, 393 U.S. at 506).

¹¹⁷ See *infra* Part III.

¹¹⁸ See *supra* Part II.B.

¹¹⁹ See *infra* Part III.A., B.

¹²⁰ See, e.g., Papandrea, *supra* note 33, at 1054 (commenting how "[a]ll four of the Court's student speech cases involve situations where the student expression at issue either took place on school grounds or during a school-sanctioned activity off campus (*Morse*, *Fraser*, and *Tinker*) or was considered school-sanctioned speech (*Hazelwood*"); see also Sandy S. Li., *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 76 (2005) (stating "how courts are divided over the definitions of on-campus speech and true threat, and on which standard—*Tinker*, *Fraser*, or *Kuhlmeier*—should be applied").

courts, too, have been familiar with the apparent split amongst themselves.¹²¹ Despite the inconsistencies, certain commonalities can be discerned throughout the diverging precedents. The many approaches employed by courts can be simplified into two categories: the geographical approach and the impact approach.¹²² These broad groupings best capture the basis of the courts' reasoning, as the geographical approach evaluates whether there is a connection between the off-campus speech and school, while the impact approach takes into account the foreseeability and purposefulness of off-campus speech.¹²³ It is through these two categories that the incoherent doctrine is evaluated.

A. Geographical Approach

The geographical approach is an attempt to reconcile the Supreme Court's precedent concerning student speech that occurs solely on campus grounds.¹²⁴ As previously discussed, the advent of the internet has enabled much of student speech to originate off-campus, only to be broadcasted to other students through the schoolhouse gates.¹²⁵ Some courts have addressed this difficulty while being aware of the prospect of public schools disciplining students for speech originating at home. Thus, the geographical approach places a constraint on school authority by permitting discipline only when the student establishes a connection with his or her speech and the school campus.¹²⁶

Several courts, both federal and state, have adopted this approach yet have reached different outcomes. In *Kowalski v. Berkeley County Schools*, a high school student created at home a MySpace webpage mocking another student for having a sexually transmitted disease.¹²⁷ After inviting nearly 100

¹²¹ See *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068-69 (9th Cir. 2013) (noting how “[a] number of our sister circuits have wrestled with the question of *Tinker*’s reach beyond the schoolyard,” as the Second, Fourth, and Eight Circuits have reached conclusions that differ than the ones reached by the Third and Fifth Circuits).

¹²² This classification has been noted by other commentators, as well as a court. See, e.g., *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010); see also Papandrea, *supra* note 33, at 1056-64; John T. Ceglia, Note, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 959-64 (2012).

¹²³ See *infra* Part III.A., B.

¹²⁴ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *but see Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that a public school could limit student speech that occurred off-campus amidst a school-sponsored event).

¹²⁵ See *supra* Part I.

¹²⁶ See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 620 (5th Cir. 2004) (holding that a school could not suspend a student for drawing at home a violent picture of his school being attacked after his younger brother brought the picture to school without his knowledge).

¹²⁷ 652 F.3d 565, 567 (4th Cir. 2011). The webpage was entitled “S.A.S.H.,” an acronym for “Students Against Shay’s Herpes.” *Id.*

students to the webpage and adding more offensive content, the parents of the defamed student quickly notified school officials, who suspended the webpage creator for violating school policy against harassment, bullying, and intimidation.¹²⁸ In addressing the student's argument that her speech was completely off-campus, the Fourth Circuit Court of Appeals found that a sufficient nexus existed between the speech and school, as the webpage served as a platform to interfere with and disrupt another student.¹²⁹ Because of the targeted speech and its substantially disruptive nature, a connection between speech and school was sufficiently formed, which permitted the school to take disciplinary action.¹³⁰

Even when no connection is proven to exist, speech that is reasonably likely to reach a school or school official and cause a substantial disruption creates sufficient grounds for a school to take action.¹³¹ Two teenage brothers in Missouri created a webpage where they posted racist comments mocking black students, as well as sexually explicit comments about particular classmates.¹³² Although the messages were intended only for a few friends, news quickly spread about the webpage and made its way to school administrators, who suspended the brothers for ten days.¹³³ The Eighth Circuit Court of Appeals ultimately pushed aside the issue of whether the webpage was created and accessed off-campus, as the court held that because the speech was directed at the school and its students, it could reasonably be expected that the speech would reach the school and disrupt its environment, thus allowing for discipline.¹³⁴

¹²⁸ *Kowalski*, 652 F.3d at 567-69.

¹²⁹ *Id.* at 572-73. The Fourth Circuit also noted how the student did “indeed push[] her computer’s keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.” *Id.* at 573.

¹³⁰ *Id.* at 574 (“Given the targeted, defamatory nature of Kowalski’s speech, aimed at a fellow classmate, it created ‘actual or nascent’ substantial disorder and disruption in the school.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969))).

¹³¹ See *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 766 (8th Cir. 2011).

¹³² See *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 773 (8th Cir. 2012). There was a dispute about where the website was created and accessed, as school computer records could show only that the website was visited twice at school by an unknown person. *Id.*

¹³³ *Id.* at 773-74.

¹³⁴ *Id.* at 778 (“[T]he location from which the [brothers] spoke may be less important than the District Court’s finding that the posts were directed at Lee’s Summit North.”). The Eighth Circuit borrowed from the Fourth Circuit’s reasoning in *Kowalski*. *Id.* (citing *Kowalski*, 652 F.3d at 573).

Several other federal circuit courts¹³⁵ and district courts¹³⁶ also follow the geographical approach illustrated by the Fourth and Eighth Circuits in upholding schools' decisions to limit off-campus speech, while others have not. A Pennsylvania high school student used his grandmother's computer to access his school's website and copy a picture of his principal, which the student used to create a parody MySpace webpage that mocked the principal.¹³⁷ After inviting friends to see the webpage via the internet during class, many other students learned of the parody and brought it to the attention of administrators, who suspended the student for ten days.¹³⁸

The Third Circuit Court of Appeals, however, held that the suspension was in violation of the student's free speech rights because a sufficient nexus did not exist between the mock profile and the school.¹³⁹ Even though it was argued that the student entered the school website to misappropriate the principal's photograph, accessed his parody webpage at school, and directed the speech towards the school community and principal,¹⁴⁰ the court did not find a sufficient connection, citing fears associated with a school being able to reach into the home of a child in order to control speech.¹⁴¹ The Third Circuit also declined to accept that the speech could have likely reached the principal or school and cause substantial disruption, as the speech in question

¹³⁵ See, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 45-48 (2d Cir. 2008) (holding that a school could discipline a student for posting vulgar remarks at home on a blog about administrators because it was likely that the off-campus speech would reach the school and cause disruption); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989-91 (9th Cir. 2001) (holding that a school could discipline a student who wrote a violent poem at home describing how he planned to kill many of his classmates because the student brought the poem to school); *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827-29 (7th Cir. 1998) (holding that a school could discipline a student for writing an underground newspaper that gave students advice on hacking into school computers because the student was found with a copy of the newspaper at school).

¹³⁶ See, e.g., *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001) (finding that a sufficient connection formed when a student—who created at home a "top ten list" that mocked the school athletic director and sent it as an email to other students—had a physical copy of the email brought to school by another student, but ultimately holding that the student could not be suspended because the school was unable to show a substantial disruption).

¹³⁷ *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207-08 (3d Cir. 2011). The student mocked the principal for his appearance and supposed alcoholism. *Id.* at 208.

¹³⁸ *Id.* at 209-10.

¹³⁹ *Id.* at 214-16.

¹⁴⁰ *Id.* at 214 (The school district argued that a connection had been established in part because "[t]he 'speech' was aimed at the School District community and the Principal and was accessed on campus by [the student]. It was reasonably foreseeable that the profile would come to the attention of the School District and the Principal").

¹⁴¹ *Id.* at 216 ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.").

was not disruptive but instead lewd.¹⁴² The Third Circuit made it known that *Tinker*'s schoolhouse gate is not made up solely of a wall that surrounds the school, but instead consists of an area of control greater than traditionally thought.¹⁴³ Nevertheless, the court cautioned that only under limited circumstances can a school justify a restraint on off-campus speech.¹⁴⁴

Certain state courts have reflected this approach. An eighth grade student in Pennsylvania created a website at home that consisted of a series of pages with derogatory and threatening comments about a teacher and principal.¹⁴⁵ After the student showed friends his website at school, a teacher discovered it and notified administrators, who suspended the student for three days.¹⁴⁶ The Pennsylvania Supreme Court held that a sufficient connection exists only when speech is aimed at a school, the speech is brought to the school, or the speech is accessed at the school by its creator.¹⁴⁷ Although the student could be suspended because his speech was directed towards students and accessed by friends at school,¹⁴⁸ the student's website would have been considered completely off-campus had it not been directed towards or accessed at school.

The geographic approach alone presents enough variations that warrants a call for uniformity. Determining what suffices for a nexus, a likely connection, or a link that is formed only once speech manifests itself at school presents nothing but inconsistent outcomes. Even if a nexus is found, further compounding the confusion is determining whether the speech that flows from the connected area is or likely could be disruptive. Despite the many interpretations of the geographic method, it is not the only approach.

¹⁴² *Layshock*, 650 F.3d at 219. The Third Circuit cited the Supreme Court's comment about lewd speech in its *Morse* decision, that "[h]ad Fraser delivered the same [lewd] speech in a public forum outside the school context, it would have been protected." *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 405 (2007)).

¹⁴³ *Id.* at 216 (referring to a school's ability under *Morse* to regulate speech in school-sponsored activities that may occur off-campus).

¹⁴⁴ *Id.* at 219. Judge Jordan stated in his concurrence that the majority opinion "may send an 'anything goes' signal to students, faculties, and administrators of public schools. . . . [I]t bears emphasis that, whatever else may be drawn from these decisions, we have not declared that *Tinker* is inapplicable to off-campus speech simply because it occurs off-campus." *Id.* at 222 (Jordan, J., concurring).

¹⁴⁵ *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850-51 (Pa. 2002). Although many of the comments were immature, more serious webpages contained captions such as "Why Should She Die?" *Id.*

¹⁴⁶ *Id.* at 852.

¹⁴⁷ *Id.* at 865. The court noted that it might consider speech on-campus if a student directs speech at a school and knows that it can be accessed there. *Id.* at 865 n.12.

¹⁴⁸ *Id.* at 865.

B. Impact Approach

If the geographical approach is an attempt to visualize a connection between speech and school, then the impact approach can be seen as a way to measure the effect speech has on a school and its members. Courts that follow the impact approach do not look to see where the speech is coming from, or if it is connected with the school. Rather, these courts look to see how the speech affected the school environment, staff, or student body.¹⁴⁹

Recently, a high school student in Mississippi posted at home to his Facebook and YouTube pages a rap recording containing vulgar and threatening language directed towards two coaches.¹⁵⁰ The student used an image of a Native American similar to his school's mascot as the recording's cover image, and made the recording open to the public.¹⁵¹ The coaches learned of the recording soon thereafter and informed school administrators, who suspended the student for seven days due to the harassing and intimidating content of his lyrics.¹⁵²

The Fifth Circuit Court of Appeals, noting the difficulties created by the internet,¹⁵³ found that schools can limit off-campus speech when it is intentionally directed at the school community and reasonably understood to be threatening, harassing or intimidating.¹⁵⁴ Thus, the speech's impact on the school and its community is more crucial than determining the connection the speech has with the school, as the Fifth Circuit concluded that it does not matter where the speech comes from or what connection it makes. The court based its reasoning on the fact that the student intended for the speech to reach the school, as the speech was created to affect a certain audience.¹⁵⁵

¹⁴⁹ See *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010) (“[T]he substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis. Where the foreseeable risk of a substantial disruption is established, discipline for such speech is permissible.” (citations omitted)).

¹⁵⁰ *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015). The student, whose song included the lyrics, “going to get a pistol down your mouth” and “I’m going to hit you with my rueger [sic],” accused the two coaches of sexual misconduct against female students. *Id.* at 383-85.

¹⁵¹ *Id.* at 383.

¹⁵² *Id.* at 386. The student, speaking at a school board disciplinary-committee hearing, stated that part of his motivation for putting the recording on Facebook and YouTube was to raise awareness amongst students about the supposed misconduct between the coaches and female students. *Id.*

¹⁵³ *Id.* at 392 (“Over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.”).

¹⁵⁴ *Id.* at 396.

¹⁵⁵ See *id.* at 395 (“A speaker’s intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*’s school-speech standard to that speech.”). The Fifth Circuit’s impact analysis may appear to

Keeping in line with *Tinker*, the court held that the suspension did not infringe on the student's free speech rights not only for the above reasons but because the school could have reasonably forecasted a substantial disruption.¹⁵⁶

The Third Circuit Court of Appeals, in a case previously mentioned in the introduction to this note,¹⁵⁷ used the impact approach to reach a different result. After being disciplined twice for dress code violations, an eighth grade student made a mock MySpace profile at home of her principal, which contained crude insinuations that the principal was a sex addict and pedophile.¹⁵⁸ The mock profile was initially open to be viewed by the public, but after several students mentioned it to its creator, the page was made private a day later so only those whom were invited by the profile's owner could see it.¹⁵⁹ The principal nevertheless learned of the profile from another student and suspended the profile's creator for ten days.¹⁶⁰

The Third Circuit, in analyzing the effects the parody profile had on the school, found not only that the school could not prove that a substantial disruption occurred, but that it could not have reasonably forecasted one.¹⁶¹ The court reasoned that since the student took measures to make the profile private and because it was so outrageous that no one could take it seriously, no school official could have reasonably predicted substantial disruption in school.¹⁶² Reminding the school that disruption cannot derive from "undifferentiated fear or apprehension,"¹⁶³ the court found that nothing in the record suggested that the school could have reasonably foreseen substantial

be in slight contrast with its earlier precedent, where the court held that a school could not suspend a student for a violent and threatening cartoon drawn at home even though it was brought to school by his brother. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 620-21 (5th Cir. 2004). However, the court relied on the fact that the student never intended for the drawing to reach school and therefore never intended for it to affect the school community. *Id.* at 620.

¹⁵⁶ See *Bell*, 799 F.3d 379 at 398. The court also concluded that there was no genuine dispute that the student's lyrics could be interpreted as being threatening, harassing or intimidating. *Id.* at 396-97.

¹⁵⁷ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).

¹⁵⁸ *Id.* at 920-21. The court noted that although the content of the MySpace page was "disturbing, the record indicates that the profile was so outrageous that no one took its content seriously." *Id.* at 921.

¹⁵⁹ *Id.* at 921.

¹⁶⁰ *Id.* at 921-22.

¹⁶¹ *Id.* at 928-31. The school district conceded that no substantial disruption occurred, despite a few instances of students discussing the website during class. *Id.* at 928.

¹⁶² See *id.* at 929-30 ("[T]he profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.").

¹⁶³ *J.S. ex rel. Snyder*, 650 F.3d at 929 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

disruption from the MySpace webpage.¹⁶⁴ The Third Circuit also declined to use a geographical approach when analyzing the suspension, dismissing the school district's argument that because the principal brought a printed copy of the MySpace profile to school, the off-campus speech became connected with the campus and thus was transformed into on-campus speech.¹⁶⁵

As shown, the impact approach can lead to inconsistent outcomes because it requires courts to second-guess a school's determination that a substantial disruption is possible to occur. The District Court of the Central District of California exemplified this, as it held that a school could not suspend a student for making an off-campus video posted to YouTube featuring derogatory remarks about another student.¹⁶⁶ Although the court stated that "any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school,"¹⁶⁷ it found that there was no actual disruption, as classroom activities were not interrupted, nor were some students unable to attend classes for significant periods of time.¹⁶⁸ More surprising is how the court rejected the school's argument that there was no reasonable foreseeability of disruption occurring from such a harassing and humiliating video.¹⁶⁹

Due to the lack of guidance from the Supreme Court, courts have adopted the previously discussed approaches while supplementing them with their own interpretations, creating what can only be seen as a series of irreconcilable principles. This incoherent off-campus student speech doctrine, which encompasses much more,¹⁷⁰ might explain the reason why

¹⁶⁴ *J.S. ex rel. Snyder*, 650 F.3d at 931. The court stated that "[i]f anything, [the principal's] response to the profile *exacerbated* rather than contained the disruption in the school." *Id.*

¹⁶⁵ *Id.* at 932-33. The court also rejected this argument because the Supreme Court made it clear in *Morse* that non-disruptive lewd speech cannot be restricted by public schools when the speech occurs off-campus. *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 405 (2007)).

¹⁶⁶ *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010). The student was called a "slut," "spoiled," and was subject to other personal attacks that used sexual innuendos. *Id.* at 1098.

¹⁶⁷ *Id.* at 1107. *See also id.* at 1107-08 ("[T]he Court finds that Plaintiff's geography-based argument—i.e., that the School could not regulate the YouTube video because it originated off campus—unquestionably fails. . . . [T]he geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech.").

¹⁶⁸ *Id.* at 1117-18. The court found that it was not enough that the subject of the video was "undoubtedly upset" and needed to be counselled into going back to class. *See id.* at 1117.

¹⁶⁹ *Id.* at 1119-21 (finding that the school's fears about foreseeable gossip and other disruption unpersuasive).

¹⁷⁰ Not discussed is how some courts apply *Tinker*'s substantial disruption standard when analyzing threats, while others use traditional true threat doctrine to evaluate the speaker's speech. *Compare Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 625 (8th Cir. 2002) (holding that a school could suspend a student for writing a violent letter at home threatening harm to another student, because a reasonable recipient could have interpreted the letter to be a threat), *with Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d

some federal circuit courts have completely avoided the issue of off-campus speech.¹⁷¹ Therefore, to achieve uniformity when evaluating off-campus student speech, and to bring much-needed coherency to schools, the following section offers a solution using principles adopted from an unlikely facet of law.

PART IV. A SOLUTION THROUGH PRINCIPLES OF PERSONAL JURISDICTION

Personal jurisdiction refers to the power of a court to hear a claim concerning a specific party.¹⁷² Although one's domicile, presence or consent may typically establish a court's personal jurisdiction over a party,¹⁷³ more must be shown to establish personal jurisdiction over a party that does not have such an apparent connection with the court's forum state.¹⁷⁴ The Due Process Clause of the Fourteenth Amendment¹⁷⁵ places additional demands on courts by requiring that the defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁷⁶

Although the concept of minimum contacts may seem abstract, there are at least a few general principles that help define it. Minimum contacts are established when the "defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹⁷⁷ If a party avails itself of a state's benefits and laws, the party can reasonably anticipate being hauled to a court in that state.¹⁷⁸ Minimum contacts "give[] a degree of predictability to the legal system" by allowing "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not

Cir. 2007) (holding that a school could suspend a student—whose online profile picture featured a gun pointing at a person's head with the name of the student's teacher underneath it—who sent instant messages from his home via the internet to other friends, because it was reasonably likely that a substantial disruption would occur).

¹⁷¹ Currently, the First, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuit Courts have not addressed the issue. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393-94 (5th Cir. 2015) ("[O]f the six circuits to have addressed whether *Tinker* applies to off-campus speech, five, including our own, have held it does. . . . The remainder of the circuits (first, sixth, seventh, tenth, eleventh, D.C.) do not appear to have addressed this issue.").

¹⁷² See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹⁷³ See *id.*

¹⁷⁴ For the sake of brevity, state long-arm statutes and their relationship with personal jurisdiction are not discussed. See *Omni Capital Int'l. v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987). See also FED. R. CIV. P. 4(e).

¹⁷⁵ U.S. CONST. amend. XIV, § 1.

¹⁷⁶ *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁷⁷ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319).

¹⁷⁸ See *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) ("Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be haled before a Delaware court.").

render them liable to suit.”¹⁷⁹ For example, a car dealership based in New York that sells a car that malfunctions in Oklahoma will not be subject to an Oklahoma court’s personal jurisdiction if the car dealership did not sell any cars in Oklahoma, as the dealership did not establish sufficient minimum contacts with the state such that it purposefully availed itself of the state’s benefits and laws.¹⁸⁰ Thus, “random, fortuitous, or attenuated contacts” with a forum state are not enough for a court to establish personal jurisdiction.¹⁸¹

Minimum contacts are easier to understand when the contacts are more tangible, as in contacts that are established through products that are sold inside a state.¹⁸² The difficulty in analyzing contacts arises with those that occur over the internet, the effect of which may touch another state but cannot be as easily identified.¹⁸³ Courts have nevertheless consistently applied the effects test developed in *Calder v. Jones*¹⁸⁴ to determine contacts via the internet. It is through this test that a solution to regulating off-campus student speech can be realized.

A. *Calder v. Jones and Minimum Contacts Through the Internet*

In its October 9, 1979 issue, the *National Enquirer* published an article about actress Shirley Jones, which claimed that the star was often too drunk to work on a television series.¹⁸⁵ Jones sued the tabloid magazine in California for libel, invasion of privacy, and intentional infliction of emotional harm.¹⁸⁶ Although the magazine did not object to the California

¹⁷⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

¹⁸⁰ *See id.* at 295.

¹⁸¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1983); *World-Wide Volkswagen*, 444 U.S. at 299). It should be noted that personal jurisdiction analysis is further divided into general and specific jurisdiction. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Because this discussion is limited to the nature and not degree of contacts, an exhaustive discussion about the types of personal jurisdiction is not necessary.

¹⁸² *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) (contacts involving machinery sold from England to New Jersey); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 105-06 (1987) (contacts involving motorcycle tire parts sold from Japan to California).

¹⁸³ *See* Brian Covotta, *Personal Jurisdiction and the Internet: An Introduction*, 13 *BERKELEY TECH. L.J.* 265, 268 (1998) (“Because the Internet transcends territorial boundaries, courts have been confronted with difficult personal jurisdiction issues and the results have been far from consistent.”).

¹⁸⁴ 465 U.S. 783 (1984).

¹⁸⁵ Aljean Harmetz, *National Enquirer Agrees to Settle with Shirley Jones in Libel Suit*, *N.Y. TIMES*, Apr. 27, 1984, <http://www.nytimes.com/1984/04/27/us/national-enquirer-agrees-to-settle-with-shirley-jones-in-libel-suit.html>. The article claimed that Jones was driven to drink by her husband, who also sued the magazine. *Id.*

¹⁸⁶ *Calder*, 465 U.S. at 785.

court's jurisdiction because of the large circulation in the state,¹⁸⁷ South, the reporter, as well as Calder, the editor and president, did object by claiming that the court's jurisdiction over them would be in violation of their due process rights given that they lacked sufficient minimum contacts.¹⁸⁸ Both resided in Florida, conducted their research in Florida, and made only a few calls to California about the article.¹⁸⁹ Nevertheless, the Supreme Court found that sufficient minimum contacts between South, Calder, and California existed "because of their intentional conduct in Florida calculated to cause injury to [Shirley Jones] in California."¹⁹⁰ The Court reasoned that the article concerned California activities about a California resident, it "impugned" the career of an entertainer based in California, and that the "brunt of the harm" was felt in California.¹⁹¹ Jurisdiction by the California court was therefore proper because of the effects the state felt, regardless of where they came from.¹⁹² South and Calder argued that their contacts were more like those of a welder employed in Florida whose boiler plate is sold and explodes in California, causing injury.¹⁹³ The Court rejected the analogy because South and Calder, through their intentional actions, expressly aimed the article at California, knowing of its potential impact on Jones.¹⁹⁴ Being aware that the "brunt of [the] injury" would be felt in California, South and Calder could have reasonably anticipated being hauled to a court there.¹⁹⁵

Today, courts have adopted the following as the *Calder* "effects test" when determining intangible¹⁹⁶ minimum contacts with a state: (1) the defendant must commit an intentional act; (2) the act must be expressly

¹⁸⁷ *Calder*, 465 U.S. at 785 (finding that the magazine had a total circulation of 5 million, with about 600,000 in California).

¹⁸⁸ *Id.* at 785-86.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 791.

¹⁹¹ *Id.* at 788-89.

¹⁹² *Id.* at 789.

¹⁹³ *Calder*, 465 U.S. at 789 ("Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer . . . should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State." (citations omitted)).

¹⁹⁴ *Id.* ("Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.").

¹⁹⁵ *Id.* at 789-90 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

¹⁹⁶ Concepts like "purposeful availment" and reasonable anticipation are difficult to conceptualize when the contacts are abstract, like speech. Such concepts are easier to comprehend when contacts in the form of a product enter a state and injure a citizen. Thus, the effects test attempts to account for contacts like speech while adhering to long-standing principles of personal jurisdiction. See Scott Fruehwald, *The Boundary of Personal Jurisdiction: The "Effects Test" and the Protection of Crazy Horse's Name*, 38 J. MARSHALL L. REV. 381, 386 (2004).

aimed at the forum state; and (3) the defendant must know that the harm to the plaintiff would be suffered in the forum state.¹⁹⁷ Courts have also consistently applied the effects test to determine contacts that are established through the internet.¹⁹⁸ The readiness to apply the effects test combined with the ubiquity of the internet may explain why the number of effects-test cases has more than tripled in the past decade.¹⁹⁹ Because the effects test stands as the standard in determining contacts occurring over the internet, it can serve just as well in determining whether a public school can discipline a student for speech occurring off-campus.

B. Application of Calder's Effects Test to Off-Campus Student Speech

The effects test is an effective way to determine whether public schools can restrict off-campus student speech not only because the test requires a level of intent, but because the defendant can reasonably anticipate being hauled to court.²⁰⁰ Thus, a student who purposefully directs certain speech at a school establishes sufficient contacts with it and can reasonably anticipate being disciplined there. Yet in keeping with the principles of *Tinker*, the effects test as it is commonly used today²⁰¹ cannot be applied identically. Instead, the test must be modified so that it conforms to the Supreme Court's long-standing precedent that students do not lose their First Amendment rights merely by being students.²⁰²

¹⁹⁷ See, e.g., *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012); *LaSala v. Marfin Popular Bank Pub. Co., Ltd.*, 410 F. App'x 474, 477 (3d Cir. 2011); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 485-86 (5th Cir. 2008); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1072 (10th Cir. 2008); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002). See also Lee Goldman, *From Calder to Walden and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 359 (2015).

¹⁹⁸ See Goldman, *supra* note 197, at 358 ("With the advent of the Internet . . . individuals are accused of causing injury in distant states in which they have had no direct contacts on a daily basis. Trademark, copyright and defamation cases are regularly brought where the defendant's primary contacts with the forum are internet related.")

¹⁹⁹ See Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1304 (2012).

²⁰⁰ *Calder*, 465 U.S. at 789-90; see also *World-Wide Volkswagen Corp.*, 444 U.S. at 297; *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

²⁰¹ See *supra* Part IV.A.

²⁰² See generally *Morse v. Frederick* 551 U.S. 393, 406 (2007) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

The first prong of the effects test requires the defendant to commit an intentional act.²⁰³ Because the test applies to intentional torts,²⁰⁴ this prong can seem redundant. For the off-campus student speaker, the intent required in the first prong is found through engaging in speech. However, allowing public schools to discipline students for any type of off-campus speech would be contrary to established precedent.²⁰⁵ Therefore, in keeping with *Tinker*, the first prong of the effects tests would require the off-campus student to engage in speech that is or reasonably anticipated to be materially and substantially disruptive to the ability of the school to discipline or of the rights of other students.²⁰⁶

While the first prong pertains only to engaging in speech, the third relates to its effects. Yet, the brunt of certain off-campus speech is felt mainly at school. Cyberbullying, as previously discussed,²⁰⁷ causes much disruption for the student and the school's ability to discipline, and can typically be forecasted to cause similar problems. Threats potentially cause even greater disruption yet can easily be countered under the effects test, as the intent of the speaker is not evaluated.²⁰⁸ The effects of bullying and threats to the school community are the same regardless if they occur on or off campus. This reflects the reasoning used by courts that employ an impact analysis, which ignores the geographic connection between off-campus student speech and school, and instead analyzes the effect that the speech had.²⁰⁹ The downside to the impact approach, however, is that courts have the tendency

²⁰³ See, e.g., *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012); *LaSala v. Marfin Popular Bank Pub. Co., Ltd.*, 410 F. App'x 474, 477 (3d Cir. 2011); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 485-86 (5th Cir. 2008).

²⁰⁴ See *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007) (“[I]t is well established that the [effects] test applies only to intentional torts, not to the breach of contract and negligence claims”); see also *Tamburo v. Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010) (“*Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet.” (citations omitted)).

²⁰⁵ See *Tinker*, 393 U.S. at 509 (“In order for . . . 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.”).

²⁰⁶ *Id.* at 513.

²⁰⁷ See National Crime Prevention Council, *supra* note 12, at 1.

²⁰⁸ *But see* *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (noting that when evaluating threats, “[the] intent to intimidate is necessary and . . . the government must prove it in order to secure a conviction”). Justice Alito noted that schools can address threats using *Tinker*'s substantial disruption standard, which considers the effect of speech, not the intent of the speaker. See *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring).

²⁰⁹ See *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010) (“[T]he substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis. Where the foreseeable risk of a substantial disruption is established, discipline for such speech is permissible.” (citations omitted)).

to second-guess a school's forecasting of substantial disruption. Although this is unlikely to occur with threats, it already has with cyberbullying.²¹⁰ Courts should be quick to remember the Supreme Court's long history of deference to public schools.²¹¹

Substantially disruptive speech should not be limited to cyberbullying and threats. Just as with the reporter and editor in *Calder*, whose allegedly libelous article established sufficient contacts with California in part because of the harm suffered there,²¹² certain off-campus student speech that causes real or likely substantial disruption establishes sufficient contacts with the school. This means that substantially disruptive violent, lewd or personally abusive speech about a teacher or school official can be restricted because of the contacts made with the school. Yet, lewd or drug-related speech could not be regulated absent real or likely substantial disruption.²¹³ For these reasons, it may be easy to envision a school disciplining a student for undisruptive speech directed towards no one.²¹⁴ It is because of this real fear that the most important prong of the effects test plays a crucial role in evaluating off-campus student speech.

²¹⁰ *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1119-21 (holding that a school could not suspend a student who posted a video on YouTube harassing another student in part because the school's fears about foreseeable gossip and other disruption were unpersuasive).

²¹¹ *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (commenting how the "Court's lack of specialized knowledge and experience" prevents it from interfering with "the most persistent and difficult questions of educational policy . . ."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

²¹² *See Calder v. Jones*, 465 U.S. 783, 788-89 (1984).

²¹³ The Supreme Court cautioned that the same lewd speech legally restricted on campus would be afforded First Amendment protection outside the schoolhouse gates. *See Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same [lewd] speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Furthermore, the holding in *Morse* only went so far as to allow the restriction of speech reasonably perceived to promoting drug use at school or during school-sponsored events. *Id.* at 410.

²¹⁴ *See, e.g.*, David R. Wheeler, *Do Students Still Have Free Speech in School?*, ATLANTIC MONTHLY (April 7, 2014), <http://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/> (discussing how a school disciplined a student for making fun of his school's football team, and another school that forced a student to turn over her Facebook password after she posted that a hall monitor was "mean" to her).

The second prong of the effects test requires the defendant to expressly aim an act at the forum state.²¹⁵ Although much disagreement existed about the proper interpretation of the second prong,²¹⁶ the Supreme Court recently clarified the matter by interpreting the prong to mean that the defendant must create a substantial connection with the forum state, not the plaintiff who resides there.²¹⁷ This prong is critical to developing an off-campus student speech doctrine because it prevents public schools from reaching into a student's home and disciplining for speech directed towards no one. By adopting the second prong for evaluating off-campus speech, the student must direct speech at either a school, student or school faculty member. This is consistent with the Supreme Court's most recent personal jurisdiction precedent, as the speech purposefully directed at any of the above targets would need to cause real or likely substantial disruption at school, thus establishing sufficient contacts with the school just as a defendant would need to establish with a forum state.²¹⁸

Therefore, a student who expressly aims bullying speech at a student or a threat towards a school would establish sufficient contacts with the school if real or likely substantial disruption would occur there. The same would apply to a student who invites fellow students to view a substantially disruptive Facebook post or YouTube video, if the student would likely know real or likely substantial disruption would occur at school.²¹⁹ This is because the brunt (or effect) of the disruptive student speech is likely to be felt at school, much like the brunt of the harm from the defamatory article in *Calder* was felt in California.

²¹⁵ See *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1072 (10th Cir. 2008); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002).

²¹⁶ See *Goldman*, *supra* note 197, at 359 (stating that until recently, some courts interpreted the prong to require the defendant to target the forum itself, while others required the defendant to target just the forum state).

²¹⁷ *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) ("The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on the relationship among the defendant, the forum, and the litigation.'" (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1983)).

²¹⁸ *Id.* at 1125. The Court stated that "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum" and that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* Thus, if off-campus speech targeting a student or school administrator causes harm to them as forum residents, there would be a real or likely substantial disruption to the forum state/school.

²¹⁹ See *Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (commenting how the brunt of the harm occurred in the forum state and that it was the focal point of both the story and harm suffered).

Two cases help illustrate this point. In *McVea v. Crisp*,²²⁰ the defendant posted three allegedly defamatory comments about the plaintiff on a website dedicated to the sharing of information about the Texas Revolution.²²¹ The defendant claimed that the District Court for the Western District of Texas lacked jurisdiction over him, but because the website's focus was Texas and the plaintiff's previous postings indicated her location to be in Texas, there was a likelihood that the defendant knew that the brunt of the harm would be felt in Texas.²²²

Yet the Fifth Circuit Court of Appeals in *Revell v. Lidov*²²³ held that the District Court for the Northern District of Texas did not have personal jurisdiction over the defendant, who posted an allegedly defamatory article on a message board hosted by Columbia University, based in New York.²²⁴ Because the article did not refer to the Texas activities of the plaintiff, it was not directed towards readers in Texas, and the defendant had no knowledge that the plaintiff was a resident of Texas, the Fifth Circuit ruled that sufficient contacts did not exist, as it was not likely known that the brunt of the injury would be felt in Texas.²²⁵

After much discussion, the following modified *Calder* effects test can be used when analyzing off-campus student speech: for a public school to restrict off-campus student speech, the student must expressly aim speech at either a student, teacher or school administrator that causes real or likely substantial disruption with regards to the school's ability to discipline or the rights of other students. The test accounts for the long adherence to the *Tinker* standard while adopting the *Calder* effects test to prove that the speaker likely knew that the brunt of harm would be felt at school. By having knowledge of where the brunt of the harm is to occur, the student can reasonably anticipate being hauled to the principal's office.

V. CONCLUSION

The *Calder* effects test is an attempt to reconcile concerns surrounding First Amendment free speech rights and a public school's ability to discipline. The internet should always stand as a tool unparalleled at distributing information and facilitating communication. Yet, it is a tool that

²²⁰ 2007 WL 4205648 (W.D. Tex. Nov. 5, 2007), *aff'd*, 291 F. App'x 601 (5th Cir. 2008).

²²¹ *Id.* at *1. The plaintiff, a historical researcher, claimed that the defendant's comments defamed her research and work. *Id.*

²²² *Id.* at *2. The court described the defendant's likely knowledge that the harm would occur in Texas to be the "essential factor" in the *Calder* effects test. *Id.*

²²³ 317 F.3d 467 (5th Cir. 2002).

²²⁴ *Id.* at 476.

²²⁵ *Id.* at 473-76. The court emphasized that knowledge of the forum in which a plaintiff will feel the brunt of the harm "forms an essential part of the *Calder* test. The defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum . . ." *Id.* at 475.

can be misused like any other. By using the *Calder* effects test, schools will be able to restrict off-campus speech that is directed and of a disruptive nature. It is through this test that an incoherent doctrine can be made sound.