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Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech

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Locating the Mislaid Gate: Revitalizing *Tinker* by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech

I. INTRODUCTION

Many know him as the "Star Wars Kid," a pop Internet icon of memetic proportions. His fifteen minutes of fame began when his two-minute long, self-produced action video was uploaded to Kazaa, a popular peer-to-peer file-sharing network. It is one of the most cringe-worthy, carefree displays of geekiness ever caught on film; presumably deprived of his lightsaber by the wily Sith, the heavyset "Star Wars Kid" improvises, twirling a golf ball retriever with reckless abandon. Fellow Star Wars fans felt an immediate kinship with the nameless teenager and, armed with high-tech tools of their own, brought his makeshift lightsaber to life. Portraying the "Star Wars Kid" dueling enemies and deflecting blaster fire, edited versions of the original video took the Web by storm.[1] Eventually, fans tracked down the Star Wars Kid and bestowed on him over $4000 in presents for the unexpected moment of camaraderie and delight he brought into their lives.[2]

There was only one problem: in 2003, when Québécois high school student Ghyslain Raza recorded his martial golf ball retriever prowess, he had no intention of publishing the video locally, let alone to the whole world. Three of his classmates found the video and posted it to the Internet in an act some would describe as "cyber-bullying,"[3] and not everyone responded with kind words for the portly, would-be Jedi. Ghyslain's parents filed a lawsuit against

1. As of November 2006, the "Star Wars Kid" was the single most popular "viral video" (videos that propagate via email forwarding and other word-of-mouth references) on the Internet. *Star Wars Kid Is Top Viral Video*, BBC NEWS, Nov. 27, 2006, http://news.bbc.co.uk/2/hi/entertainment/6187554.stm.

2. For further detail on the development of the Star Wars Kid, see Andy Baio, *Finding the Star Wars Kid*, WAXY.ORG, May 13, 2003, http://www.waxy.org/archive/2003/05/13/finding_.shtml.

3. *See, e.g.*, Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound From Afar*, N.Y. TIMES, Aug. 26, 2004, at A1, *available at* http://www.nytimes.com/2004/08/26/education/26bully.html (discussing the growing use of information technology for adolescent bullying).

the parents of his classmates, seeking recompense for their son's humiliation.[4]

Ghyslain's story is rife with interesting legal issues, ranging from privacy[5] to defamation[6] to copyright and beyond. Though his epic adventure ended in the courtroom, it started in the classroom. What if that classroom had been in the United States? Would Ghyslain's tormentors have been disciplined? *Could* they have been disciplined? Would it matter if they used school computers to upload the video, or if other students used school computers to watch the video? What if the video was recorded, uploaded, and viewed away from campus, but everyone involved shared a common homeroom? What if Ghyslain himself had posted the video online, but his classmates posted disparaging comments in reply?

Student expression has never been a simple concern, and the information age is changing the landscape, blurring the black-letter law of past decades, and challenging administrators and policy-makers to contemplate the particulars of technology in tandem with applicable legal principles. In 1969, when the Supreme Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[7] there could not have been any serious doubt as to the whereabouts of that gate—or the whereabouts of a given student in relation to it. In *Tinker v. Des Moines Independent Community School District*, the Court held that, when on campus, student expression remained protected so long as it did not "materially and substantially"[8] disrupt the educational process. This did not shield off-campus speech from the reach of school discipline, because schools could still potentially discipline constitutionally *unprotected* speech such as off-campus "fighting words."[9] Rather, it established that, on campus, even facially

4. Associated Press, *"Star Wars Kid" Becomes Unwilling Internet Star*, USA TODAY, Aug. 21, 2003, *available at* http://www.usatoday.com/tech/webguide/internetlife/2003-08-21-star-wars-kid_x.htm.

5. *See id.*

6. *See, e.g.*, Susan W. Brenner, *Should Online Defamation Be Criminalized?*, 76 MISS. L.J. 705, 724 (2007).

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

8. *Id.* at 505, 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

9. *See, e.g.*, Fenton v. Stear, 423 F. Supp. 767, 771 (W.D. Pa. 1976) (upholding a student's in-school suspension for calling a teacher a "prick" in a public setting on a weekend. The court does not even mention *Tinker*, instead holding that because the student's speech qualified as "fighting words," it was not protected and so the government—in this case, the school—was free to restrict that speech).

protected speech could be limited by the compelling state interest of effective public education. As students adopt email, Web sites, cell phones, and instant messaging software to facilitate personal expression, however, they are increasingly able to affect others at a distance, blurring the line between on- and off-campus speech. This "telepresence"[10] creates significant difficulties for a jurisprudence of student expression that draws distinctions based on whether a student is at school,[11] at a school-sanctioned event,[12] or might reasonably be viewed as acting under the school's imprimatur.[13]

Decisions reflexively employing the *Tinker* analysis without addressing its relevance compound this difficulty.[14] Lower courts challenged by the nuances of technologically enabled speech, or "cyber-speech," focus almost by default on whether student speech "materially and substantially" disrupted the educational process[15] without analyzing whether that speech actually occurred within the

10. "Telepresence," which indicates the ability to project one's influence in space and time, is a term that enjoys some limited recognition in Internet jurisprudence for its utility in discussing jurisdictional questions. *See, e.g.*, Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3 (1997); Jessica M. Natale, Article, *Exploring Virtual Legal Presence*, 1 J. HIGH TECH. L. 157 (2002). Because this Comment focuses on the impact of technology on the nature and reach of a school's punitive authority, the jurisdictional analogy is useful and will be employed throughout.

11. *Cf. Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998) ("Speech *within the school* that substantially interferes with school discipline may be limited.") (emphasis added).

12. *See* Morse v. Frederick, 127 S. Ct. 2618, 2624 (2007) (holding that when the speech in question occurs during regular school hours at an event sanctioned by school authorities, school speech is at issue); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 689 (1986) (Brennan, J., concurring) ("Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly.").

13. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (suggesting that schools have an increased interest in controlling the expression of "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").

14. *See* Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 730 (2007) ("[M]ost lower courts have applied the Supreme Court's *Tinker* standard to off-campus speech.").

15. *Id.* at 733 ("Although the U.S. Supreme Court has not ruled on the issue, lower courts have reached the consensus that *Tinker's* substantial disruption standard governs [off-campus, technologically enabled] speech.").

school's purview.[16] While perhaps attractive in its simplicity, this approach belies a fundamental misunderstanding of both *Tinker* and technology. It is the unfortunate tendency of scholars and the judiciary alike to declare that all cyber-speech categorically falls under the *Tinker* analysis (or, in the alternative, categorically does not). Both the *Tinker* analysis and the jurisprudence of cyber-speech would be spared a great deal of tortured reasoning if the courts would eschew such overgeneralization and recognize that, like other kinds of speech, cyber-speech may or may not cross the threshold of the schoolhouse gate.

In Part II, this Comment will review the rules controlling student speech generally and establish that the availability of student expression on campus does not presumptively invoke *Tinker*, especially where that expression is plainly analogous to traditional off-campus speech. Part III will juxtapose a sampling of case law addressing student cyber-speech with hypothetical variants to bring into view the need for more consistent jurisprudence. Part IV will explore how treating different technological modes of expression under analogous "material world" standards would best achieve consistency. This Comment will conclude in Part V with a brief inquiry into the practical implications borne by this theoretical inquiry.

II. MATERIAL AND SUBSTANCE: WHAT IS THE RULE FOR RESTRICTING STUDENT SPEECH?

It has been repeatedly observed that "[t]hree landmark U.S. Supreme Court decisions . . . articulate the standards regarding student speech."[17] But this is misleading; every one of these three

16. *But see* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455, 458 (W.D. Pa. 2001). In *Killion*, a student emailed a "top ten list" to his friends, which contained lewd and derogatory remarks about a teacher. Because the student did not compile that list at school or bring it onto campus himself, the court suggested that it qualified as protected off-campus speech. But the court still conducted a *Tinker* analysis, implying that the student might have been subject to discipline had the physical circulation of his list by others proven a substantial disruption.

17. Sandy S. Li, Comment, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 67–68 (2005). *See also, e.g.*, Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 907 (2001) ("Part I of the Article examines the trilogy of cases, *Tinker-Fraser-Hazelwood*, that established the rules for regulating student speech."). Presumably, this trilogy became a quartet when the Court decided *Morse v. Frederick*. 127 S. Ct. 2618 (2007).

cases deals with a school's attempt to limit, during school hours or at a school function, expression that would under other circumstances be protected by the First Amendment.[18] One commentator noted that

> School districts are arms of the government, and the students are citizens of this nation. With numerous Supreme Court decisions allowing the government to regulate the expression of its citizens generally, the *Tinker* trilogy is not the only guidance that schools have in regulating student expression. . . . Consequently, the *Tinker* trilogy, even if interpreted very favorably toward students, does not provide all the answers to schools with student expression questions.[19]

Thus, the constitutionality of a restriction on student speech depends on several factors, not all of them contemplated by the "*Tinker* trilogy." First, it must be determined whether the challenged speech took place under the school's purview.[20] If not, then the school may only be able to discipline the student if the speech falls into a traditionally unprotected class. But if the challenged speech took place on campus, then it must be determined whether that speech disrupted the work of the school.

A. Off-Campus Expression

The Supreme Court has famously observed that

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury

18. *See* Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 633 (8th Cir. 2002) (Heaney, J., dissenting) ("*Tinker* and *Fraser* establish that language that would normally be considered protected speech may be regulated in a school setting to prevent disruptive student conduct.").

19. Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 627 (2002).

20. *But cf.* Li, *supra* note 17, at 93. Li suggests that the on-campus and off-campus distinction is inapplicable to Internet speech. While I will not here attempt a thorough response to Li's excellent treatment of the subject, the primary weakness of Li's approach is that it perpetuates the unfortunate trend of applying *Tinker's* "substantial disruption" test to every student speech case, when it should be limited to on-campus speech of a traditionally protected class. The second weakness is that something akin to an on-campus and off-campus distinction is easily made even with Internet speech as will be demonstrated *infra*.

> or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[21]

The idea that certain kinds of expression fail to inspire any First Amendment protection whatsoever holds true for children and adults alike.[22] The implication for students is that schools are not violating students' rights when they take disciplinary action against unprotected expression—regardless of where that expression took place.

It turns out that very few cases involve purely off-campus expression,[23] but some exist. For example, in *Fenton v. Stear*, student Jeffrey Fenton brought a civil rights action against school district officials for giving him in-school suspension after he called a teacher a "prick."[24] The incident occurred on a Sunday evening at a local shopping center—well removed from school grounds and hours—and the court acknowledged that the insult was likely "de minimus" by civil or criminal standards.[25] Even so, as insulting language or "fighting words,"[26] Fenton's utterance was "not immunized by the Constitutional guarantee of freedom of speech."[27] The court rejected Fenton's argument that the school could not regulate off-campus conduct and held that because the penalties imposed on Fenton were

21. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (footnotes omitted).

22. *See generally* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 3–312 (2d ed. 2005) (detailing numerous forms of speech legitimately restricted based on their communicative impact).

23. *See, e.g.*, *Doe*, 306 F.3d at 619–21 (although the student who wrote the offending letters did so off campus, a third party brought them to campus); Donovan v. Ritchie, 68 F.3d 14, 16, 18 (1st Cir. 1995) (student involved in making offensive photocopies that were discovered in a school trash barrel advanced the defense that the photocopying took place off campus, but the case was decided on a due process question).

24. Fenton v. Stear, 423 F. Supp. 767, 769 (W.D. Pa. 1976).

25. *Id.* at 769, 771.

26. *Id.* at 771. Whether Fenton's insult actually satisfied the constitutional test for "fighting words" was not given extensive treatment in the opinion. It is entirely possible that *Fenton* was wrongly decided based on the proposition that Fenton's speech did not actually fall into an unprotected class. However, such an inquiry would be beyond the scope of this Comment. It is the court's analysis of school discipline as related to unprotected speech generally with which we are presently concerned.

27. *Id.*

(like his speech) "de minimus," they did not violate his rights.[28] At no point in its analysis did the court rely on *Tinker*.

Although this may seem surprising to commentators who "take the position that [off-campus] speech is a matter for parental discipline or even civil or criminal charges,"[29] there is a clear analogy to off-campus participation in prohibited *conduct*. By statute, states allow and even mandate disciplinary action for students in the public school system for the commission of crimes or for participation in activities that would tend to endanger teachers or other students,[30] even if the prohibited conduct takes place off campus. The wisdom of such provisions can scarcely be doubted; assuming, of course, that due process is satisfied, the suspension or expulsion of a dangerous student is unlikely to raise serious objections from anyone. A similar argument can be made that certain unprotected modes of expression likewise have a detrimental effect on the well-being of students and teachers,[31] even when that expression occurs off campus.

There is significant temptation at this point to suggest that off-campus expression thus collapses into the *Tinker* analysis—that the controlling principle is always to limit the impact of anything that might disrupt the work of the school. But, at least with regard to off-campus student speech, this would be both underinclusive and overbroad. *Fenton* plainly establishes that traditionally unprotected expression, such as "fighting words" spoken to a teacher off campus, can support school discipline *even when they do not materially disrupt the school's work*, making the *Tinker* analysis underinclusive with regard to some off-campus speech. Similarly, a student who, in her

28. *See id.* at 772. *But cf.* Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (holding that a student's vulgar gesture to a teacher after school hours and away from school grounds could not be disciplined. The court does, however, hold that the vulgar gesture did not constitute actual fighting words, which may reconcile these cases).

29. Verga, *supra* note 14, at 730.

30. *See, e.g.*, CONN. GEN. STAT. § 10-233d(a)(2) (2007) (mandating expulsion "whenever there is reason to believe" that a student off school grounds illegally possessed a firearm, used a firearm in the commission of a crime, or manufactured or sold a controlled substance); IDAHO CODE § 33-205 (2007) (enrollment may be denied to any student "in the judgment of the board . . . whose presence in a public school is detrimental to the health and safety" of other students); UTAH CODE ANN. § 53A-11-904(2)(a)(ii) (2007) (mandating the expulsion of a student who commits "an act involving the use of force or the threatened use of force which if committed by an adult would be a felony or class A misdemeanor").

31. Bullying is, of course, the paradigmatic example. *See, e.g.*, Colleen Creamer Fielkow, Note, *Bullies, Words, and Wounds: One State's Approach in Controlling Aggressive Expression Between Children*, 46 DEPAUL L. REV. 1057, 1057–58 (1997). Many other examples exist, however.

spare time, actively and energetically advocates recreational marijuana use might very well pose a threat to student safety on par with *Fenton's* "fighting words,"[32] but such pure speech[33] would not be subject to school discipline[34]—creating an overbreadth problem where *Tinker* is applied to off-campus speech.[35] Consequently, a school's ability to regulate off-campus student speech must be coextensive with that of other government agencies.

B. On-Campus Expression

Thanks to *Tinker*, however, a school's power to regulate on-campus speech is much greater than a school's power to regulate off-campus speech. At least in part because *Tinker* was decided in the plaintiff's favor, while later cases were decided in favor of school control, it has been widely accepted by academics that *Tinker* represented a high mark in student expression cases and that the "Supreme Court has retreated from the Tinker standard."[36] But has the Court retreated, or has it merely employed the facts of each

32. *Cf.* Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring) ("Speech advocating illegal drug use poses a threat to student safety that is just as serious [as threats of violence] . . . .").

33. "Pure speech," sometimes referred to as "core speech," includes those "[w]ords or conduct limited in form to what is necessary to convey the idea" and is the most strongly protected kind of speech. *See* BLACK'S LAW DICTIONARY 1436 (8th ed. 2004).

34. *See Morse*, 127 S. Ct. at 2637 (Alito, J., concurring) ("The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'").

35. A more hyperbolic hypothetical might have us imagine a teenager who actively avoids her homework in favor of watching television—ostensibly an exercise of core First Amendment rights, or at least a convincing caricature of such exercise. It seems unlikely in the extreme that a school board could mandate fewer hours of television, yet the aggregate effect of excessive television across an entire classroom of children must be *radically* disruptive of the educational process.

36. Curtis Anderson, Planned Parenthood v. Clark County School District: *"Having Your Cake and Eating It Too" in Public School Free Speech Cases*, 1993 BYU L. REV. 983, 998; *see also, e.g.*, Thomas C. Fisher, *"Whatever Happened to Mary Beth Tinker" and Other Sagas in the Academic "Marketplace of Ideas,"* 23 GOLDEN GATE U. L. REV. 351, 358 (1993) ("Was the *Tinker* decision a '*magna carta*' for students and teachers, or did it represent something of a 'high water mark' in the expansion of constitutional 'rights' for both groups, from which the U.S. Supreme Court has, by-and-large, retreated ever since? The latter . . . proved true.") (footnotes omitted); Karen M. Clemes, Note, Lovell v. Poway Unified School District: *An Elementary Lesson Against Judicial Intervention in School Administrator Disciplinary Discretion*, 33 CAL. W. L. REV. 219, 229 (1997) ("The leading Supreme Court cases that followed *Tinker* retreated from *Tinker's* 'substantially disruptive' constitutional standard . . . .").

successive decision to further refine the standard? In *Tinker*, the Court was dealing with "direct, primary First Amendment rights akin to 'pure speech.'"[37] Both *Bethel School District No. 403 v. Fraser*[38] and *Hazelwood School District v. Kuhlmeier*[39] deal with more easily regulated kinds of speech—vulgarity[40] and government-sponsored speech,[41] respectively.[42] Even in *Morse v. Frederick*[43] the Court ultimately determined that the plaintiff's "BONG HiTS 4 JESUS" sign, regardless of whether it was strictly *unprotected* expression, was clearly not core speech.[44] It might be argued that each case carves out an exception to *Tinker* in the sense that the "substantial disruption" analysis was given short shrift. But a more careful reading reveals that *Tinker's* successors are merely refining what it means to be "on-campus" and what constitutes a "disruption."

1. The original Tinker *analysis*

Of course, all of this depends from the outset on what the *Tinker* analysis actually entails. The facts of the case could not have been laid out more neatly for First Amendment scholars, but the analysis walks a razor's edge. The holding in *Tinker* consequently turns on what sort of conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" while at school.[45]

The speech at issue in *Tinker* stands as a classic example of core political expression. The petitioners wore black armbands to school to "publicize their objections to the hostilities in Vietnam and their

37. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

38. 478 U.S. 675 (1986).

39. 484 U.S. 260 (1988).

40. *Bethel*, 478 U.S. at 684 ("We have . . . recognized an interest in protecting minors from exposure to vulgar and offensive spoken language.").

41. *See Hazelwood*, 484 U.S. at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. . . . The latter question 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.").

42. For further discussion of why and how these kinds of speech are considered separately from core speech, see generally VOLOKH, *supra* note 22, at 114–31, 400–50.

43. 127 S. Ct. 2618 (2007).

44. *Id.* at 2625 (holding that *Morse* was "plainly not a case about political debate").

45. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

support for a truce."[46] Apprehending some disturbance, the schools involved adopted a policy forbidding the armbands.[47] "There is no indication that the work of the schools or any class was disrupted" when the petitioners attended school wearing their armbands.[48] The petitioners were suspended for refusing to remove their armbands, and the students were not permitted to return to school "until they would come back without their armbands."[49]

The Court seemed especially persuaded by an earlier circuit opinion, *Burnside v. Byars*,[50] that refused to prohibit expressive "freedom buttons" unless they "materially and substantially interfere[d] with the requirements of *appropriate* discipline in the operation of the school."[51] It consequently held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right ro freedom of expression" and required the schools to demonstrate "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[52] How much more? Apparently, anything that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" would be sufficient.[53]

Notice that this is significantly broader than most commentators acknowledge. Even the Supreme Court does not seem fully cognizant of the fact that *Tinker* stands for more than mere "substantial disruption."[54] Facially, *Tinker* stands for the proposition

46. *Id.* at 504.

47. *Id.* at 509 n.3.

48. *Id.* at 508.

49. *Id.* at 504.

50. 363 F.2d 744 (5th Cir. 1966).

51. *Tinker*, 393 U.S. at 505 (quoting *Burnside*, 363 F.2d at 749) (emphasis added).

52. *Id.* at 508–09.

53. *Id.* at 513.

54. *Compare* Morse v. Frederick, 127 S. Ct. 2618, 2627 (2007) ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.") *with Tinker*, 393 U.S. at 505 (quoting *Burnside*, 363 F.2d at 749) (holding as limitable any expression that "materially and substantially interfere[s] with the requirements of *appropriate* discipline in the operation of the school") (emphasis added) *and* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("Surely it is a highly *appropriate* function of public school education to prohibit the use of vulgar and offensive terms in public discourse.") (emphasis added). *But see* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 n.2 (1988) ("[The school newspaper's Statement of Policy] cited *Tinker* . . . for the proposition that '[o]nly speech that materially and substantially interferes with the requirements of appropriate discipline can be found unacceptable and therefore be prohibited.' This portion of the

that, "in the cafeteria, or on the playing field, or on campus during authorized hours," schools may only limit student speech that substantially disrupts *appropriate levels of order and discipline.*[55] What is appropriate? The Court does not specify beyond its generic appeal to order and the rights of others, but it does hold that the absolute prevention of all ideological conflict is *not* appropriate, particularly where core speech is at issue.[56]

2. Vulgar speech as a per se disruption in Bethel v. Fraser

Understanding how *Bethel v. Fraser* impacts *Tinker* is largely an exercise in inference. Factually, *Fraser* is immediarely distinguishable from *Tinker* in that the proscribed speech was not core political speech, but "vulgar and lewd" speech[57]—short of outright obscenity, but arguably approaching it, especially considering the youthful audience. Whether *Fraser's* holding is broad or narrow is not made clear by the majority opinion. The concurring and dissenting opinions, however, establish something like a hierarchy of speech that is helpful, by exclusion, in fleshing out the *Tinker* standard.

At issue in *Fraser* was a speech, given by Fraser at a school assembly, filled with "explicir sexual metaphor."[58] Fraser had been warned against giving the speech by two teachers, who thought it was inappropriate.[59] During the speech, other students reportedly made gestures that "graphically simulated the sexual activities pointedly alluded to" in Fraser's speech.[60] Fraser was disciplined for violating the school's prohibition against "[c]onduct which

Statement does not, of course, even accurately reflect our holding in *Tinker*." (nested quotations and citations omitted)).

55. *Tinker*, 393 U.S. at 512–13.

56. *See id.* at 508–09.

57. *Bethel*, 478 U.S. at 685 ("Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

58. *Id.* at 678. It is interesting to note that, had Fraser's speech in fact been sexually explicit, the case would have been much easier as obscenity is not protectable speech. But, as metaphors function by *implication*, Fraser's speech was in truth sexually *implicit*—thus, ironically, the majority repeatedly characterizes Fraser's speech as explicitly implicit. *Cf. id.* at 687 (Brennan, J., concurring) (reprinting Fraser's speech in its entirety).

59. *Id.* at 678.

60. *Id.*

materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."[61]

Because the majority's holding is difficult to pin down, it is informative to work backwards through the dissent and concurrence, determining what *Fraser* says about *Tinker* by first determining what it does *not* say. The dissent, for example, notes that "the School District failed to demonstrate that [Fraser's] remarks were indeed disruptive."[62] This approach reflects the strongest possible reading of *Tinker*—the idea that protected speech can *only* be disciplined when it creates an actual disruption—but even *Tinker* suggests that a bona fide "forecast" of substantial disruption is sufficient to support prophylactic disciplinary action, precluding an "actual disruption" analysis.[63] And in Justice Brennan's concurrence, he seeks to limit the holding to school assemblies, suggesting that Fraser's speech "may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."[64] This suggests a finer contextual distinction than the on-campus or off-campus dichotomy, but while this approach is ripe with possibility, it is not the law.

What is left is the majority's opinion that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[65] This is not necessarily a departure from *Tinker*, as the disruption analysis does not exist outside of student speech cases, but it raises a simple question. If proof of actual disruption is not required and the assembly context is not relevant, then what distinguishes Fraser's speech from Tinker's armband? The bulk of the Court's analysis boils down to repeated assertions that Fraser's speech was *not appropriate*—for young

61. *Id.*

62. *Id.* at 690 (Marshall, J., dissenting).

63. *See Tinker*, 393 U.S. at 514 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .").

64. *Bethel*, 478 U.S. at 689 (Brennan, J., concurring).

65. *Id.* at 682 (majority opinion).

students,[66] mixed company,[67] or the school setting in general[68]—coupled with generic sympathy for the proposition that the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[69] In other words, schools can treat "inappropriate" speech as per se disruptive when applying the *Tinker* standard during school hours. This refines the meaning of "disruption," but still requires the answer to a familiar question: what constitutes "appropriate" speech for a student on campus?

3. Hazelwood v. Kuhlmeier*: School-sponsored speech is distinguishable*

Unfortunately, the final case in the "*Tinker* trilogy" lends little insight to the question of appropriateness. Despite the Eighth Circuit's choice to conduct a *Tinker* analysis,[70] the Supreme Court did not think the *Tinker* analysis applied to the facts of *Hazelwood*.[71] This is not because the students were off campus—they were not—but because the speech in this case was government-sponsored (in the form of a school newspaper).[72] Even though the majority opinion includes an interesting discussion about the limits of administrative discretion regarding school-sponsored speech,[73] these

66. *Id.* at 683 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

67. *Id.* ("By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students.").

68. *Id.* at 681 (stating that the role of public schools is to instill fundamental values in students, including "consideration of the sensibilities of others, and . . . the sensibilities of fellow students").

69. *Id.* at 686 (quoting *Tinker*, 393 U.S. at 525 (Black, J., dissenting)).

70. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 265 (1988).

71. *Id.* at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.").

72. *See id.* at 272–73 ("Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a *school may refuse to lend its name and resources* to the dissemination of student expression.") (emphasis added).

73. *Id.* at 273 ("Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

are not the same as the limits imposed by the *Tinker* standard on disciplining *independent*, on-campus student speech.

While it seems clear that the student expression at issue was in itself similar to core speech, as in *Tinker*, the school was not engaged in disciplining independent on-campus speech, but in making administrative decisions about a message appearing under the school's imprimatur[74]—a sort of government-sponsored speech test. The Court does impose a requirement that editorial control over school-sponsored speech must be based on a "legitimate pedagogical" concern,[75] but this standard has never been extended to the treatment of independent student speech. For the purposes of this Comment, then, *Hazelwood v. Kuhlmeier* provides little more than *obiter dictum*, and will not be considered here in greater depth.

4. Morse v. Frederick*:* Tinker's *true successor in matters of independent student speech*

With regard to independent student speech, then, the "*Tinker* trilogy" really ends with *Morse v. Frederick*, the Court's most recent student speech case. Like *Fraser*, *Morse* is immediately distinguishable from *Tinker* in that the proscribed speech was not core political speech.[76] But the holding in *Morse* clarifies some questions that remained after *Fraser*, strengthening the *Tinker* analysis on a theoretical level even though the majority seems hostile to what *Tinker*, after almost forty years, has come to represent in the lower courts.[77]

In *Morse*, the student body of Juneau-Douglas High School was permitted to leave class under school supervision to watch the Olympic Torch Relay pass. Student Joseph Frederick arrived at the off-campus gathering from home and proceeded to display a nonsensical, vaguely pro-drug banner in an attempt to attract the

74. *See id.* at 271.

75. *Id.* at 273.

76. Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007) ("The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment.") (citing *Tinker*, 393 U.S. at 514).

77. Specifically, the majority strongly states, "*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute" and suggests that *Tinker's* substantial disruption standard was not employed in *Fraser*, as though substantial disruption was the only test provided by *Tinker*. *See id.* at 2627. But of course, the Court has never *itself* asserted that *Tinker* is the absolute standard, or that *Tinker* only stands for the substantial disruption test—regardless of what history and scholarship have to say on the matter.

attention of television cameras. Morse, the school principal, confiscated the banner, which read "BONG HiTS 4 JESUS."[78] Frederick was disciplined under the school's policies prohibiting advocacy of the use of substances illegal to minors and subjecting students to the same rules of conduct during "social events and class trips" as during regular school hours.[79]

The Court's analysis on two issues is particularly relevant for our purposes: whether *Morse* is a school-speech case and whether Frederick's banner was proscribable expression. First, "Frederick's argument that this is not a school speech case" is dismissed, almost offhandedly.[80] The Court dedicates a single paragraph to the idea that even though Frederick arrived independently, during an off-campus school-sponsored event, his activity still invoked an *on-campus* student speech analysis.[81] The Court does acknowledge that there is "some uncertainty at the outer boundaries as to when courts should apply school-speech precedents," but suggests that *Morse* poses no such difficulty.[82]

In determining whether the school could properly discipline Frederick for displaying the banner, the Court considers in sequence each case from the original *Tinker* trilogy. It first suggests that a *Tinker* analysis requiring the school to provide evidence of a material and substantial disruption applies only to core expression, such as political speech.[83] The Court then suggests that *Fraser* stands for the proposition that "[i]n school . . . First Amendment rights [may be] circumscribed 'in light of the special characteristics of the school environment.'"[84] Finally, the Court acknowledges that *Kuhlmeier* is not terribly relevant with regard to independent student expression.[85] The Court combines all of these propositions in

78. *Id.* at 2622.

79. *Id.* at 2623.

80. *See id.* at 2624 ("At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question.").

81. *Id.*

82. *Id.*

83. *Cf. id.* at 2626 ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.' The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech . . . ." (quoting *Tinker*, 393 U.S. at 513)).

84. *Id.* at 2626–27 (quoting *Tinker*, 393 U.S. at 506).

85. *Id.* at 2627 ("*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur.").

applying to the First Amendment a principle already stated by Fourth Amendment jurisprudence—that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is *appropriate* for children in school."[86] After an extended discussion concerning the promotion of illegal drug use and how such promotion represents a danger that public schools must combat[87]—are indeed *compelled* to combat[88]—the Court finds that because failure to confiscate Frederick's banner could send the wrong message to students, Morse acted reasonably in disciplining Frederick.[89]

Throughout *Morse*, the prevailing idea is that so-called "on-campus" expression, including that which occurs off-campus during school-sponsored events, is fundamentally *different* from everyday, off-campus speech. While core speech remains protected on campus to the extent that it does not cause an actual disruption of the school's educational mission, certain types of speech qualify as per se disruptive—including sexual and drug-oriented speech[90]—based on their level of appropriateness. But, at the risk of sounding obtuse, what is the legal difference between core speech and "inappropriate" (but, off-campus, protectable) speech? No controlling principle, beyond the judgment of the Court, is ever given.

C. Finding the Rule (and the Penumbra)

Very generally, then, a school's capacity to discipline student speech depends on the intersection of two variables: place and kind. It may be instructive to summarize the tests we have encountered so far:

- Unprotected speech may be proscribed:
  - On or off campus
  - Whether or not there is a disruption (no *Tinker* analysis is necessary)

86. *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995) (quoting *Tinker*, 393 U.S. at 506)) (emphasis added).

87. *Id.* at 2628 ("Congress has declared that part of a school's job is educating students about the dangers of illegal drug use.").

88. *Id.* ("Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." (quoting *Vernonia*, 515 U.S. at 661)).

89. *Id.* at 2629.

90. One can only hope that the Court will stop short of adding rock-and-roll to this list.

- "Inappropriate speech" that would be protected off campus may be proscribed:
  - Within the school context only[91]
  - Because it qualifies as a "per se" disruption (if *Tinker* is applied at all)
- Core speech may be proscribed:
  - On campus only
  - Actual or reasonably forecast disruption must be evidenced (pure *Tinker* analysis)

As we have seen, the nature of "inappropriate" is not entirely clear; its known conrents include only those specifically recognized by the Court. It seems likely that local administrative judgment will be shown some deference here,[92] but this cannot be the controlling principle, lest administrative proscription inevitably trump student speech. It also seems possible that certain kinds of speech are inappropriate *because* they are disruptive, but this begs the question: is it the disruption that renders the expression inappropriate, or vice versa?

In all likelihood, this perplexing inquiry boils down to societal norms regarding the nature of healthy, normal child development—which is an especially politic way of saying that "appropriateness" is a deeply personal value judgment.[93] Fortunately, for our purposes, we need not conquer this conundrum, at least not conclusively. It is

91. *Cf. Morse*, 127 S. Ct. at 2626 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."). It should be clear now that "on-campus" speech necessarily refers to a limited range of school-supervised off-campus activities; however, for the sake of consistency with student speech jurisprudence and scholarship I will continue to refer to such speech as "on campus."

92. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

93. It is entirely possible, and indeed has been suggested, that in fact *all* case law is essentially a collection of ad hoc value judgments and thus radically indeterminate. *See* Raymond A. Belliotti, *Is Law a Sham?*, 48 PHIL. & PHENOMENOLOGICAL RES. 25, 26 (1987) (stating the primary theses of the critical legal studies movement). Naturally, a meaningful discussion of critical legal studies vastly exceeds the scope of this Comment. But it is worth mentioning, in passing and for the benefit of would-be critics, an all-too-keen awareness that our attempts to reconcile the apparent inconsistencies in student speech jurisprudence may well be little more than gloss in the margins of the modern-day Corpus. *Cf.* Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241, 244 (1985) ("The first law professors at Bologna, the so-called glossators, concentrated on pure exegesis: they cross-referenced the whole Corpus of texts, bringing together those dealing with similar topics, reconciling apparent contradictions, summarizing, and so on.").

enough that we are able to recognize when, in the course of analysis, we have crossed over a bright-line rule and into the penumbra, where our inquiries must of necessity grow circumspect. Such is the great challenge of most functional legal inquiry and should not burden us overmuch.

There is, however, another troubling question with a more immediate impact on our present inquiry: what of expression that takes place off-campus but is transported on campus by a third party? One very controversial[94] case that partially answers this question is *Doe v. Pulaski County Special School District*.[95] In *Doe*, J.M. composed "two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" a girl who had broken off a relationship with him.[96] Another student took one of the letters from J.M.'s home and brought it to class; J.M. was suspended and brought suit on the theory that the First Amendment protected the letters.[97] Based on the court's finding that J.M.'s letters constituted a "true threat,"[98] the school could presumably discipline J.M.'s speech as unprotected. But before it could conduct the threat analysis, the court addressed "a threshold question of whether J.M. intended to communicate the purported threat."[99]

> Requiring less than an intent to communicate [unprotected speech] would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts. . . . [T]he Supreme Court [has] recognized that the First Amendment means, at a minimum, that the government has no business telling an individual what he may read or view in the privacy of his own home. The government similarly has no valid interest in the contents of a writing that a person, such as J.M., might prepare in the confines of his own bedroom. After all, "our whole

94. *See, e.g.*, William Bird, Note, *Constitutional Law – True Threat Doctrine and Public School Speech – An Expansive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus.* Doe v. Pulaski County Special School District, *306 F.3d 616 (8th Cir. 2002)*, 26 U. ARK. LITTLE ROCK L. REV. 111, 112 (2003) (proposing that "the majority erroneously suggests to school officials a seemingly unlimited authority to discipline student speech arising off campus").

95. 306 F.3d 616 (8th Cir. 2002).

96. *Id.* at 619.

97. *Id.* at 619–20.

98. *Id.* at 626–27. A thoroughgoing analysis of the "true threat" doctrine exceeds the scope of this discussion.

99. *Id.* at 624.

> constitutional heritage rebels at the thought of giving government the power to control" the moral contents of our minds. It is only when a threatening idea or thought is communicated that the government's interest in alleviating the fear of violence and disruption associated with a threat engages.[100]

The Eighth Circuit ultimately concluded that J.M. had, based on further inquiry into the facts of the case, intended to communicate the contents of his letters to his ex-girlfriend.[101]

Pulaski stands in contrast with *Porter v. Ascension Parish School Board*.[102] In *Porter*, a high school student sketched his school under violent siege.[103] Two years later, his younger brother mistakenly transported that sketch to the local junior high school, resulting in disciplinary action for both boys.[104] Although significant analysis was dedicated to Fourth Amendment concerns due to the way the discipline played out, the court did hold with regard to the older brother's drawing that it did not constitute "student speech on the school premises," despite finding its way eventually to the junior high school, because the older brother never intended to communicate his message on school grounds.[105] The court even noted the difficulty addressed in this Comment:

> We are aware of the difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus either by the communicating student or others to whom the message was communicated. Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus.[106]

100. *Id.* at 624 (citations omitted).

101. *Id.*

102. 393 F.3d 608 (5th Cir. 2004).

103. *Id.* at 611.

104. *Id.* at 611–12.

105. *Id.* at 615.

106. *Id.* at 615 n.22. The court goes on to cite numerous cases both applying *Tinker* to off-campus speech and declining to apply *Tinker* to off-campus speech. This exposes a much larger gap in student speech jurisprudence—namely, whether *Tinker's* "schoolhouse gate" language is even remotely substantive—but while closely related to the topic at hand, this question is beyond the scope of this Comment. I maintain throughout this Comment that *Tinker* does not apply outside the schoolhouse gate because the Supreme Court has never suggested that it does, and has often implied that it does not, despite regular misapplication of the test in the lower courts. *See also* Alexander G. Tuneski, Note, *Online, Not on Grounds:*

Based on this circuit split, a definitive resolution to this conundrum will almost certainly require the Supreme Court to address the question of speech that is transported onto campus by a third party. But the "intent to communicate" question addressed by both circuits will be helpful in our forthcoming inquiry. While information technology generally facilitates communication, it can also be used to store private thoughts, and students are not always entirely aware that *intending* something should remain private is not the same thing as *keeping* it private.[107] Bringing us, at last, to the impact of technology on student speech.

III. THE TRANSFORMATIVE IMPACT OF TECHNOLOGY: TEST CASES AND HYPOTHETICALS

As the Supreme Court has never addressed a student-speech case where the on-campus or off-campus distinction was muddied by technology, it has fallen on the lower courts to determine the extent—if any—to which technology impacts their analysis. What is interesting about such cases is that the lower courts tend to look immediately to *Tinker*,[108] at least in part because cyber-speech is difficult to see as factually congruent with *Fraser* or *Kuhlmeier*. But not every court relies on *Tinker*, or relies in the same way as other courts. Some apply *Tinker* to all student speech whether on or off the Inrernet; some assume that Internet speech is necessarily on-campus speech; and others treat Internet speech as strictly off-campus expression.[109] So, when it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles.

Protecting Student Internet Speech, 89 VA. L. REV. 139, 141 (2003) ("[B]ecause the United States Supreme Court has not considered whether school officials have the authority to punish students for their off-campus speech, there is no justification for allowing schools to abridge what would otherwise be constitutionally protected expression.").

107. This is especially true of Internet technology, and many children seem unaware of just how truly public the Internet is. *See, e.g.*, Common Sense Media, *Keeping Your Kids Internet Safe and Smart: A Survival Guide for Parents*, http://www.commonsense.com/download/CommonSenseInternetSafetyGuide.pdf ("There's no such thing as 'private' on the Internet. You may think so, but it's not true. People can find anything they want—and keep what you post—forever."). Presumably, if children were generally aware of this fact, it would not be so emphasized.

108. *See* Li, *supra* note 17, at 82 ("Internet-related student speech cases have typically been reviewed using the *Tinker* standard.").

109. *See* Tuneski, *supra* note 106, at 153.

A. Cases Involving Internet Speech[110]

1. Beussink v. Woodland R-IV School District

Perhaps unsurprisingly, one of the earliest cases dealing with student cyber-speech is factually very similar to *Fraser*. But while the court in *Beussink v. Woodland R-IV School District*[111] reaches a renable conclusion, it conducts a "substantial disruption" analysis without determining whether or how *Tinker* actually applies to Internet speech. Despite some insightful and interesting discussion on the question of information technology, the court's analysis is tainted because the facts of the case should not have inspired application of the "substantial disruption" test.

Like Matthew Fraser, Brandon Beussink employed crude and vulgar language to humorous effect; unlike Fraser, Beussink was at home when the relevant expression took place.[112] Specifically, Beussink created a Web site that employed vulgar language in criticizing his school, though he never specifically intended anyone to access that Web site from campus.[113] When another student, after an unrelated argument with Beussink, showed Beussink's Web site to a teacher, the teacher immediately reported the site to the principal, who promptly determined to discipline Beussink.[114] Beussink was suspended for five days,[115] later increased to ten days, and told to remove the site, which he did.[116] But because Beussink's suspension counted against his grades as unexcused absences, the school's

110. It should not come as any surprise that one could fill much more than a Comment with Internet-related student speech cases—but of course, we haven't the space here, and so have included a handful of the most influential cases for analysis. What does come as a significant surprise is that *none* of these cases have reached the U.S. Supreme Court in the fifteen years since the World Wide Web was born.

111. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

112. *Id.* at 1177.

113. *Id.* It is worth noting that while ninety-four percent of public secondary schools had some kind of Internet access by 1998, Internet use by students was limited. A little more than fifty percent of secondary school instruction rooms had Internet access, probably in the form of a single computer—in all likelihood, the teacher's computer. *See* National Center for Education Statistics, *Statistics in Brief* at 2, 4, May 2001, http://nces.ed.gov/pubs2001/2001071.pdf.

114. *Beussink*, 30 F. Supp. 2d at 1178.

115. *Id.* at 1179.

116. *Id.*

attendance policy transformed Beussink's discipline into failure in four classes.[117]

The Court begins its analysis with an inquiry into whether Beussink's discipline was "based on a fear of disruption or interference with school discipline,"[118] and ultimately holds in Beussink's favor because "Beussink's homepage did not materially and substantially interfere with school discipline."[119] The court even restates *Tinker* with some accuracy, noting, "[s]peech *within the school* that substantially interferes with school discipline may be limited."[120] But while the court's recitation of the facts hints several times at the limited circulation of Beussink's Web site on campus, this is employed only to emphasize the lack of disruption; at no point does the court's inquiry reach the fact that Beussink's expressive acts took place *off campus*. The location of the schoolhouse gate and the supervisory rights of Beussink's parents remain similarly unaddressed.

This is significantly problematic, for reasons previously noted[121]—it expands the "substantial disruption" analysis to cover *all* student speech, creating an overbreadth problem. And while it seems likely that some distinction between off-campus speech and Internet speech is possible—in that Internet speech is automatically "available" on campus wherever the Internet reaches—we will momentarily defer further exploration of this important point, as the *Beussink* court does not draw any such distinction.

2. J.S. v. Bethlehem Area School District

While Brandon Beussink was ultimately spared by the *Tinker* rest, others have suffered its misapplication. For example, Justin Swidler, who arguably engaged in *unprotected* speech, nonetheless found himself at the wrong end of a "substantial disruption" analysis.[122] The Supreme Court of Pennsylvania decided the case in the school's favor, but not before the case had drawn significant criticism from local commentators.[123] This is at least in part because

117. *Id.* at 1179–80.

118. *Id.* at 1180.

119. *Id.* at 1181.

120. *Id.* at 1182 (emphasis added).

121. *See supra* Part II.A.

122. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).

123. *See, e.g.*, Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 248–51 (2001).

the "substantial disruption" test was employed to discipline Swidler even though his speech both took place off campus and was found by the court to be facially protectable.[124]

The facts of *J.S. v. Bethlehem Area School District* are familiar—disgruntled student lashes out against oppressive adults with immature Web site, shocked and appalled adults retaliate with school discipline, lawsuit ensues. Swidler does, perhaps, win the award for "most egregious lack of restraint," as his criticism of one teacher in particular included extensive and vituperous profanity, direct comparisons to Adolf Hitler, a picture portraying the teacher's bloody beheading, and a solicitation for money to pay a hit man to dispatch the object of Swidler's ire.[125] The teacher, understandably, experienced extreme and debilitating distress.[126] Local police as well as federal authorities were contacted, but no charges were filed,[127] presumably because all relevant decision makers agreed with the county attorney that Swidler's "threat" "simply was not serious."[128] The teacher also filed a civil action against Swidler for "defamation, inrerference with contractual relations, invasion of privacy, and loss of consortium."[129]

It seems clear that, if Swidler did engage in formally unprotected speech, the fact that his speech rook place off campus would be irrelevant.[130] But law-enforcement authorities and the court agreed that Swidler had not issued a "true threat" and so had engaged in facially protectable speech.[131] Of course, the teacher's tort actions arguably remained viable, but the court did not address this point. Instead, it focused on the "disruption" created by Swidler's speech, with particular attention to the abused teacher's absence from campus due to her emotional injuries.[132] In justifying its application of the "substantial disruption" standard, the court holds that "where speech that is aimed ar a specific school and/or its personnel is

124. *J.S.*, 807 A.2d at 852, 859.

125. *Id.* at 851.

126. *Id.* at 852.

127. *Id.*

128. Calvert, *supra* note 123, at 248.

129. *Id.* at 247–48 (footnotes omitted).

130. *See supra* Part II.A.

131. *J.S.*, 807 A.2d at 852, 859 ("We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm.").

132. *Id.* at 869.

brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[133]

This is certainly more clarity than *Beussink* provided, but it also introduces additional wrinkles. Specifically, creating a "nexus" wherein all school-*related* speech falls into the on-campus category potentially spawns a significant chilling effect with regard to online speech about school-related topics. The Internet is a powerful medium of communication, and one that is arguably indispensable in modern life. Under *Tinker*, on-campus speech need only be disruptive to be proscribed, but as one commentator points out, this is "tantamount to a heckler's veto—the speaker's rights [are] trampled by the audience's reaction."[134] While the special requirements of public schools may justify this approach in a limited setting, extending such restrictions to an entire medium of communication simply because that medium is available on-campus challenges the feeblest of reasoning. Under such a regime, students unable to air their complaints electronically for fear of inadvertently causing a campus disruption would likely benefit more from the Internet were it removed from schools entirely, so that they could once again communicate without fear of administrative reprisal.

3. Emmett v. Kent School District

Fortunately, many courts have not adopted the Pennsylvania standard. In fact, at least one court has suggested that the "out-of-school nature" of Internet speech, despite being related to the operation of the school, necessarily placed it "entirely outside of the school's supervision or control."[135] What *Emmett v. Kent School District* may best demonstrate is that, when the *Tinker* test is properly applied—or properly *not* applied—the equitable result can be as simple as it is obvious.

Unlike the antagonistic, often antisocial plaintiffs of the more notorious school-speech cases, Nick Emmett had "a grade point average of 3.95, [was] co-captain of the basketball team, and [had]

133. *Id.* at 865. An additional footnote is appended to this statement, suggesting that "one who posts school-targeted material in a manner known to be freely accessible from school grounds *may* run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs." *Id.* at 865 n.12 (emphasis added).

134. Calvert, *supra* note 123, at 249.

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

no disciplinary history."[136] His Web site was actually inspired by a class exercise in which students were asked to write their own obituaries; Emmett's Web site displayed "mock obituaries" of fellow students and "allowed visitors to the [Web site] to vote on who would 'die' next—that is, who would be the subject of the next mock obituary."[137] After an evening newscast reported that the Web site was a "hir list," Emmett immediately took the page down;[138] even so, Emmett received an "emergency expulsion."[139]

The court's analysis is concise and, like other courts, it does mention *Tinker*, but it does not resort immediately to the "substantial disruption" analysis. Instead, it analyzes the *limits* within which *Tinker* operates, and finds Emmett's Web site beyond the school's disciplinary reach as laid out by the *Tinker* standard because it took place off campus.[140] The court further allows that the school persuasively argued for greater latitude in controlling unprotected speech—namely, the sort of threatening speech that often precedes school violence—but notes that (despite the sensationalist news report), Emmett's Web site was not classically *unprotected* speech.[141]

This holding functionally opposes the *Bethlehem* decision, while providing a more workable analysis than *Beussink*, because it puts the "substantial disruption" standard in its place: on campus. It acknowledges the school's capacity to proscribe unprotected speech, no matter where it might occur, while protecting off-campus student speech from the reach of administrators. But would the court have conducted the same analysis if Emmett had been a less sympathetic figure? In other words, while *Emmett* seems to follow the student speech framework laid out in section II.C, the court had no

136. *Id.* at 1089.

137. *Id.*

138. The nature of sensationalist press reports and the dependable tendency of some parents to overreact are both well beyond the scope of this Comment. However, it is worth bearing in mind the legal Scylla and Charybdis that school administrators often face. No matter the issue at hand, responding to the concerns of one group of parents may well invoke the wrath of another, equally vocal group. Even acknowledging that some inevitable degree of strife is built into the process of educating children en masse, however, we should be willing to take as given that some degree of legal predictability is ipso facto desirable. Hence, academic attempts (like this one) to uncover controlling legal principles, despite the fact that sometimes the real problem is neither the law of public education nor its administrative implementation.

139. *Emmett*, 92 F. Supp. 2d at 1089.

140. *Id.* at 1090.

141. *See id.*

particularly compelling reason to subject a plainly inculpable student to reactionary discipline.

B. Filling in the Blanks: Hypotheticals Ripped from the Headlines

With at least three conflicting approaches to analyzing student cyber-speech in play, small wonder that school officials seem to be "unclear about the legal boundaries of their powers."[142] But without a clearly articulated legal standard, *especially* one easily applied by teachers and administrators who lack legal training, focus shifts away from an analysis of what the law *is* to a question of what the law *ought to be*. Framed differently, one might ask what each approach seeks to accomplish, for conflicting approaches might nevertheless ultimately stem from uniform intent. While the world of "what if" is both crowded and vast, we need not spin every hypothetical situation from whole cloth. The realm of experience is similarly vast, at least by comparison to the limited range of issues that have received conclusive treatment from the judiciary.

1. The special problem of bullying

Perhaps the most immediately pressing problem for schools is a new kind of bullying, or perhaps a new way of carrying out very old kinds of bullying. Often referred to as "cyber-bullying,"[143] the use of cyber-speech to torment classmates is widespread. While true threats or other forms of traditionally unprotected speech may be disciplined under basic First Amendment principles, bullying is not always so overt.

Consider, for example, the recent tragedy of Megan Meier, who committed suicide after an online-only friendship ended in cruel words.[144] Weeks after her death, Megan's family learned that her online friend, "Josh," was not a real person at all, but a fake MySpace profile maintained by an adult neighbor with the limited participation of at least two of Megan's peers.[145] None of the involved expression took place on campus and it appears that Megan

142. Verga, *supra* note 14, at 729.

143. *See, e.g.*, Harmon, *supra* note 3.

144. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23, *available at* http://www.nytimes.com/2007/11/28/us/28hoax.html.

145. *Id.*

had recently transferred to a private school, but it is clear from the outcome that "Josh's" words posed a very real danger to Megan—the precise concern that played a central role in the Court's analysis in *Morse*.[146] Even if this kind of bullying consequently qualifies as "inappropriate" for a school setting, however, it did not take place on campus.

While in Megan's case the facts appear to preclude school discipline, it encapsulates the dilemma faced by school administrators. Cyber-speech can pose a very real danger to their students' safety, but when it takes place off campus and does not rise to the level of classically unprotected speech, school interference may violate students' First Amendment rights. Under the first approach—a universally applicable *Tinker* analysis—online social "bullying" might be proscribable when it constitutes a "substantial disruption," which would not be a difficult case to make where a student's suicide is involved. But this injects a causal difficulty into the analysis: did the *speech* create the disruption, or did the *suicide*? The second approach—treating all online speech as on-campus speech—might permit the school to find a per se disruption where students create abusive MySpace pages,[147] but under such an approach, the mere act of, inter alia, employing profanity anywhere on the Internet could subject students to possible discipline, so long as some "school nexus" could be found.[148] The third approach—to treat all online speech as off-campus speech—would be a powerful declaration of the inviolability of the First Amendment, but it would also send a clear message to bullies that the Internet is a safe haven for tormenting one's classmates.

146. *See* Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007).

147. At the very least, it has been alleged that the page referred to Megan as a "slut," which under other circumstances might invoke a *Fraser* "inappropriateness" analysis if the page qualified as on campus speech. But of course, cruel things can be said without ever resorting to sexual slurs, and it is not entirely clear whether social bullying would inspire the same degree of protection as physical threats or even verbal abuse. This is not a new problem, as criminal law must grapple all too often with the difference between physical and mental abuse. *See, e.g.*, Todd Taylor, Note, *The Cultural Defense and Its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 339–40 (1997) ("[W]hile physical abuse, neglect, and sexual abuse are always included in [child protection statutes], emotional abuse is not, despite the general recognition that children who are emotionally abused or neglected can suffer both severe psychological and physical damage. One reason for the statutory absence of emotional abuse may be based on its elusive and intangible nature.") (footnotes omitted).

148. Because children tend to associate with their classmates online, establishing such a nexus would in all likelihood prove trivial.

Tinker made it clear that schools can limit on-campus expression not only where it interferes with appropriate school discipline, but also where that expression interferes with the rights of others.[149] This supports the notion that a school can act to limit verbal abuse as well as physical bullying. But do schools have the same ability—or perhaps more daunting, the same *responsibility*—to discipline students for the way they speak and socialize off campus? This would appear to trample parental rights of supervision, not to mention place an impossible strain on school resources. So the application of *Tinker* to all student speech, even if constitutionally valid, is at best untenable and at worse invidiously applied.

The second approach seems to strike a greater balance, seeking some reason, however small, to include a student's off-campus speech within the nexus of school discipline. Taking as given that expression outside the school environment—whether something as serious as bullying, or as innocuous as watching television—can nonetheless have an eventual impact on campus, what initially looks like an attempt to balance student rights with school interests ultimarely falls apart as overbroad.

2. Comment, criticism, or defamation? The role of civil action in cases of student libel

This overbreadth is perhaps most evident when students choose to lampoon teachers and administrators. There are several cases where this has occurred, with predictably divergent analyses leading to various results.[150] A more generic approach to the practice, however, will lend additional clarity to our analysis.

Consider the potential liability of a student who uses the Internet to criticize a school official, whether via a personal Web page, a "teacher rating" site,[151] or any other method. Speaking broadly (in order to avoid too much entanglement with the much larger subject

149. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

150. *See, e.g.*, Coy v. Bd. of Educ. of N. Canton City Sch., 205 F. Supp. 2d 791, 801 (N.D. Ohio 2002) (student could be disciplined if his Internet parody of the principal substantially interfered with the school's educational mission, but not based on the content of the site); I.M.L. v. State of Utah, 61 P.3d 1038, 1048 (Utah 2002) (finding Utah's criminal libel statute unconstitutional following a challenge to the statute brought by a student who had his personal computer seized and spent seven days in a juvenile detention facility after referring on his Web site to his principal as the "town drunk").

151. *See, e.g.*, RateMyTeachers.com, http://www.ratemyteachers.com (last visited Aug. 8, 2008) (advertising "K-12 Teacher Ratings By Students and Parents").

of defamation law in the United States), truth is the strongest defense a student has.[152] So, whether the student has engaged in wholly unprotected speech (obviating *Tinker*) depends on the truth of the student's statement. Applying the legal maxim that no one should be a judge in his or her own cause, the maligned official would have to initiate proceedings to establish the remarks as false before disciplining the student. This makes universal application of the "substantial disruption" standard an attractive alternative, because even when a student's criticism is in fact entirely true, a showing of substantial disruption would allow the slighted official to retaliate through disciplinary channels.

But—still assuming the student's criticism bears the shield of truth—how does this result protect anyone's rights? The answer, of course, is that it does not. Quite the opposite, in fact; it allows the school to trample student rights by proscribing a very important kind of speech—speech that encourages improvement in the educational process. Further, while truthful criticism might naturally disrupt education by limiting a reacher's effectiveness, it would be very strange to suggest that the Constitution shields school officials from criticism, unlike literally every other member of society. There seems to be a good argument that restrictions on when, where, and how a student criticizes school officials would be constitutional,[153] but the accepted constitutional approach to restrictions on time, place, and manner of expression precludes the possibility of eliminating an entire medium of expression,[154] preserving Internet speech generally against wholesale proscription.

152. *See* RESTATEMENT (SECOND) OF TORTS § 581A (1977) ("To create liability for defamation there must be publication of matter that is both defamatory and false. There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.") (internal references omitted).

153. That argument would be, roughly, that criticizing a teacher's methods mid-lesson or berating a principal on her disciplinary approach during an assembly would probably constitute unnecessarily severe interference with the school's pedagogical mission—but the same jarring sense of "non sequitur" interference would be wholly absent in the context of a Web site dedicated to critical evaluation.

154. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.").

In other words, extraordinary speech restrictions made possible by the "special characteristics of the school environment"[155] only make sense—tautologically—*within the school environment.* If a given expression is constitutionally protected the moment it takes place, how can it become proscribable based on later impact, let alone a prediction, however reasonable, of eventual impact? The approach of assuming that all Internet speech qualifies as on-campus speech and is therefore subject to a substantial disruption analysis seems primarily to benefit school officials with an axe to grind over the disrespectful commentary of immature, ungrateful students.

3. But what about Columbine?

Inevitably, when it comes to proscription of student speech, someone will maintain that, whatever the vagaries of First Amendment jurisprudence, schools need greater latitude to conduct prophylactic discipline in light of the recent national rise in school violence.[156] Presumably, such fears are only partially allayed by the fact that schools *can* act on true threats or other modes of unprotected speech, especially since a great deal of potentially "dangerous" speech is also facially protectable. Combined with lingering objections that schools should have the power to discipline off-campus bullying on the theory that it creates a hostile campus environment, this last-ditch effort to frighten the First Amendment into submission seems to confirm that an approach granting complete First Amendment protection to off-campus Internet speech is about as desirable as the other two approaches.

So, of the federal courts' three approaches, only the third appears to enjoy complete compatibility with existing First Amendment jurisprudence.[157] But courts have uniformly refused to adopt this approach where the speech at issue is facially protectable but the student appears undesirable or blameworthy on some qualitative

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

156. *See, e.g.*, Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("The [school] argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places. Web sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people.").

157. For a Note arguing powerfully in favor of this precise position, see generally Tuneski, *supra* note 106.

level. This has occasionally been termed the "Columbine effect,"[158] by which fear and suspicion transform every anomalous behavior into an act of terror worthy of zero-tolerance condemnation. Such prophylactic overreaching is unbecoming of a rational jurisprudence. While we have established that the compelling interest of school safety does permit narrowly tailored approaches to proscribing student speech, judges should not be choosing stronger or weaker applications of *Tinker* based on whether the accused has some unrelated personal attribute, interest, or activity in common with the perpetrators of the Columbine massacre.[159]

In other words, Columbine is a red herring; the problem of student violence may permit limited suspension of First Amendment rights, but it does not excuse inconsistent and potentially unconstitutional misapplication of the *Tinker* standard based on whether the court takes umbrage at the content of a given student's speech. One possible principled approach would be to uncover a calculus of choice between the three methods of analysis—a calculus that, assuming it exists at all, has not been so much as hinted at in relevant case law.[160] An easier approach, however, considers the role technology plays in communication and finds analogous situations in the analog realm by which to determine whether a *particular use* of technology should be considered on- or off-campus expression.

IV. THE SOLUTION: ACTIVE VERSUS PASSIVE TELEPRESENCE

As briefly mentioned in Part III.A, even when cyber-speech takes place away from campus, outside of school hours, and using only personal devices, there is a sense in which its availability on campus

158. *See, e.g.*, John Cloud, *The Columbine Effect*, TIME, Dec. 6, 1999, at 51, *available at* http://www.time.com/time/magazine/article/0,9171,992754,00.html. Of particular note are Cloud's parting words: "If the corrective to zero-tolerance excesses won't come from courts, it may come from parents. Communities sometimes revolt against pitiless punishments. In Hartford, Wis., outside Milwaukee, 550 people crammed into a high school cafeteria for a shouting match over zero tolerance. Since the beginning of the academic year, ten students have been expelled from the school for various infractions. Raged one parent: 'Expulsion is just another unfeeling word for abandonment.'" *Id.*

159. In fact, Columbine's typological status in discussions of school safety is on par with analogies to Hitler or Nazis in other public debates; references to Columbine tend to be rhetorically inflammatory rather than logically contributive. The factual assertion that there has been a rise in school violence is many, many steps removed from conclusions about what ought to be done, to say nothing of how effective thusly proposed solutions might ultimately prove.

160. Beyond, of course, an apparent tendency to select stricter measures where the students involved have other, unrelated discipline problems.

nonetheless distinguishes such speech from conventional off-campus speech. This distinction has not received any significant consideration at either the judicial or the legislative level, and so must admittedly be approached as a policy argument rather than a formal legal inquiry. But an understanding of technology makes it possible to draw analogies between "material world" practices and cyber-speech, demonstrating that certain uses of technology are more like on-campus speech, while other uses of technology more closely resemble true off-campus speech. For our purposes, we will refer to student use of technology that has the same impact as any other off-campus speech as establishing a "passive telepresence"—meaning that even if the student's expression has on-campus influence, such influence is not the active or intended result of the challenged expression. The alternative is an "active telepresence" by which a student seeks to directly impact the campus environment through remote means. The hope is that courts can preserve the *Tinker* rendition of the schoolhouse gate, despite the problems posed by ubiquitous information technology.

While it may not be immediately evident, the following analogies rely in principle on the "intent to communicate" analysis mentioned previously.[161] This is not to suggest that courts must rely on the subjective intent behind technologically enabled student speech; rather, the objective mode of expression as manifested by the choice and implementation of a given technology can establish something like "intent to disrupt."

A. A Brief Consideration of Selected Communications Technologies

1. Telephony

The easiest analogy to draw is perhaps the most commonplace: a student that telephones the school from home (or from a personal cell phone) achieves an immediate and active telepresence. While there are an unlimited number of innocuous reasons to call one's school, the fundamental purpose of the telephone is to ***speak as though present.***[162] This is the paradigmatic example of active

161. *Supra* Part II.C.

162. This fact likely needs no scholarly support; it is (or ought to be) common knowledge that "tele-" is a prefix indicating distance, while "phone" indicates sound, especially speech. Even so, for further discussion the reader might see, for example, WikiAnswers, What is the telephone's purpose?, http://wiki.answers.com/Q/What_is_the_telephone's_purpose (last

telepresence: the use of technology to create a direct virtual presence. Any student's expression taking place during a telephone call to campus would therefore qualify as on-campus speech, enabling proscription of "inappropriate" as well as unprotected speech. Conversely, a school could only discipline a student who telephones another student while both are off campus if he or she engaged in classically unprotected speech.

2. Instant messaging and email

Perhaps the closest "new technology" to the telephone is in fact the telegraph of the digital age: instant messaging. Instant messaging, or IM, "is a form of real-time communication . . . based on typed text."[163] It is available as an Internet service[164] as well as a function of some cell phones.[165] In practice, instant messaging works like a telephone, but in printed form. Ostensibly, then, it should be treated much the same. Email begins to blur the line between on- and off-campus speech a little further, though this is largely a matter of convention rather than of technology. While not necessarily instantaneous in transmission, an email sent to a teacher's district-provided email address appears commensurate with a call to a teacher's desk phone—even when that teacher is checking his or her email from home.

The primary difficulty presented by such technologies is that they create a permanent record of communication that another may transmit. If two students exchange instant messages or personal

visited Aug. 8, 2008) ("To enable two remotely located users to communicate by voice between each other.").

163. Wikipedia, Instant Messaging, http://en.wikipedia.org/wiki/Instant_messaging (last visited Aug. 8, 2008). Incidentally, I am aware of the rhetorical objections some academics level against citing to Wikipedia and other wholly meritocratic bastions of knowledge. I will attempt no thoroughgoing defense of my source selection here, except to note that this Comment is directly concerned with technologies that are poorly understood by the vast majority of the so-called experts writing about them. Those readers who are not already familiar with instant messaging will, in any event, benefit at least as greatly from a Wikipedia reference as from reference to a modern dictionary.

164. Currently including such software packages as AOL Instant Messenger (*available at* http://www.aim.com/), Google Talk (*available at* http://www.google.com/talk/), and MSN Web Messenger (*available at* http://webmessenger.msn.com/).

165. *See, e.g.*, AT&T, Instant Messaging, http://www.wireless.att.com/learn/messaging-internet/messaging/instant-messaging.jsp (last visited Aug. 8, 2008) (advertising the availability of AOL Instant Messenger, Yahoo! Messenger, and Windows Live Messenger on AT&T's cell phone network).

emails containing protected but "inappropriate" speech, and one student prints a copy of that speech and brings it to school, can the school discipline the other student? This would be akin to allowing Tommy Trickster to record Adam Angry's rant about a teacher and play it back in class. The disturbance created by Tommy's action would plainly be proscribable, but why should Adam be punished for the same event, assuming he did not collude in its execution? Consequently, email and instant messaging should only establish an active telepresence where the student engaged in the challenged expression deliberately transmitted it directly to the school's network.[166]

3. Web sites

But perhaps the foregoing is too obvious; after all, virtually every challenge to student cyber-speech to date has been about Web sites. One can create a Web site and post to the Internet without any reference to the school's network, and all it takes to bring the content on campus is for someone on campus to visit the site. Because this requires an affirmative request from someone on campus, a Web site could never in itself constitute an "active telepresence." Rather, the *Doe/Porter* dichotomy[167] comes into play: did the student "intend to communicate" his or her Web site to an audience on campus?

This would naturally be a fact-intensive analysis. Evidence that the student visited the site or encouraged others to visit the site during school hours would be significant. Other possible factors might contemplate the purpose of the site—for example, a site advertising ways to circumvent school network filters or hack school technology would strongly imply that the site was intended for on-campus use. This approach bears some similarity to the "nexus" test applied in *J.S. v. Bethlehem Area School District*.[168] However, a site including the school's name, discussing school events, or criticizing classmates or school personnel seems just as likely to be intended for friends and family to view from home as for on-campus viewing,

166. For those more inclined to direct technical analogies, what I am asserting is that the school has one or more "Internet phone numbers," known as IP addresses, to which the student's speech would have to be actively directed in order to consider that speech as having occurred on-campus.

167. *Supra* Part II.C.

168. See analysis *supra* at Part III.A.2.

shifting the nexus from "school-related" expression to expression "intended for on-campus access."

B. The Evidentiary Function of Technology

It must be acknowledged that, whatever academic problems it solves, this approach still leaves the Ghyslains and Megans of the world open to off-campus torment, so long as that rorment does not rise to the level of unprotected speech. It is undoubtedly the case that protected off-campus expression can act to create a hostile on-campus environment for some students. But if the First Amendment is to be taken at all seriously, the school's response cannot be to discipline those who have a very natural right to dislike and, for that matter, snub their peers.

Fortunately, technology is more than a burden for such students—in fact, it has the potential to be a boon. In addition to serving as a channel for communication, information technology can serve an evidentiary function for the administrative decision-making process. When a student presents evidence that they are being mistreated off campus, such mistreatment should be taken seriously, even if formal discipline of the perpetrator is impossible. Adjustments to the victim's schedule or seating arrangemenr or even a simple gesture of heightened attention to the victim's personal needs may be sufficient to remedy the situation, and technology can aid in identifying the victims of subtle abuse before an unfortunate situation escalates into a bad one. This does suggest that some limited degree of social conflict is inevitable, but it may be rhetorically useful to recognize that ir is possible to be *over*protective, too.

Of course, sometimes off-campus speech that fails to rise to actionably unprotected levels may nonetheless be genuine cause for concern. In these cases, too, the evidentiary function of technology might justify commensurate administrative action—in other words, formal discipline is not the only response available to school administration. When protected but disconcerting speech is brought to the attention of school officials, they should work closely with parents to determine how best to address a student's needs before the situation escalates. There is admittedly some measure of idealism inherent in this proposition, as parents are not always cooperative. But the hope is that technology, by furnishing evidence of a student's mindset, can assist in persuading reluctant parents that

their child needs something more than the school and the parents are already providing.

C. The Practical Problem of Administrative Application

Finally, it was hinted previously[169] that an ideal standard would not only be legally sound, but easily applied by teachers and administrators who lack legal training. The "active versus passive telepresence standard" is admittedly something of a mouthful, but it boils down to asking whether the student manifested a particular desire for his or her expression to be seen, heard, read, or to otherwise take place on campus. An undifferentiated desire for one's classmates or even one's teachers to be among the audience is insufficient. If a desire that off-campus speech become on-campus speech is objectively manifested, then the "*Tinker* trilogy" should apply; otherwise, the school should only discipline expression that is formally unprotected.

Somewhat more callously, if a particular school official refuses to become informed enough about technology to properly apply the telepresence standard, then that official is not in a position to appropriately discipline students engaging in cyber-speech. And to those school officials who might chafe ar having their disciplinary reach curtailed, it is wotth pointing out that limiting school involvemenr in off-campus speech is as much to preserve the resources of the school as to protect the rights of the students. A "right" to police electronic speech might easily and rapidly devolve into an onerous responsibility to do so.

V. CONCLUSION

When Ghyslain Raza suffered global humiliation at the hands of his peers, the most significant response came from the civil courts. When a neighbot's cruelty drove Megan Meier to take her own life, law enforcement authorities determined that no charges would be filed. It is clear that children, like adults, often mistreat one another—on and off the Internet—without ever escalating their mistreatment to legally actionable levels. This is an unfortunate fact of life, but unpredictable administrative response from schools—not

169. *Supra* Part III.B.

to mention inconsistent judicial response from the courts—only serves to compound the problem.

Schools do have the ability to proscribe speech that rises to actionably unprotected levels. They also have a right, as well as a responsibility, to proscribe speech that is "inappropriate" within the public school setting. Concern for student safety and welfare is laudable, but the public school system does not have the right, let alone the resources, to police student speech at all times and in all places. Consequently, as long as traditional First Amendment jurisprudence protects off-campus speech, it is beyond the reach of school administrators.

Cyber-speech poses a new problem for federal courts, which appear confused as to what the proper analysis is for speech that is ***available*** on campus, though the expressive act did not take place there. Three divergent approaches have arisen, each suggesting that all Internet speech as such musr be treated uniformly. This has created an atmosphere of uncertainty with regard to technologically enabled student speech.

This difficulty can be traced to an overgeneralization: a tendency by courts and scholars alike to suggest that all technologically enabled speech is *either* categorically on-campus *or* categorically off-campus in nature. But in reality, not all information technology is created equal. Whether a student can be considered "on campus" for purposes of disciplining their expression should depend on whether their expression was intended to directly influence the school environment, or whether such influence arose as the incidental result of off-campus expression. This approach allows sufficient flexibility for courts to arrive at equitable results without overgeneralizing Internet speech in a way that tramples students' First Amendment rights. But based on the gradually widening splits in authority, the confusion of the lower courts is likely to continue until the Supreme Court weighs in on the matter.

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