

SCHOOL SPEECH IN THE INTERNET AGE: DO STUDENTS SHED THEIR RIGHTS WHEN THEY PICK UP A MOUSE?

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In *Tinker v. Des Moines Independent Community School District*, the Supreme Court definitively established that students do not “shed” their right to free speech “at the schoolhouse gate.”¹ However, the Court also said that those rights must be “applied in light of the special characteristics of the school environment”² Ever since, there has been debate over the exact boundaries of those rights.

There have been many changes in education since the Court decided *Tinker*, the birth of the Internet being one of the most revolutionary. The Internet provides immense opportunity for education and enrichment, but it also exposes students to a vast array of dangerous and offensive content, some of which could have been created by their classmates. Such a bridge between the school environment and the outside world causes problems not envisioned in *Tinker*: without using any school resources, students can create obscene, insulting, or disruptive content on their own time and expose all of their classmates to it.

Though the Supreme Court has revisited and retailored the doctrine a number of times, only in its most recent school-speech case, *Morse v. Frederick*,³ has it even obliquely addressed the issue of off-campus speech. The Court has never directly discussed the implications of electronic speech. Nevertheless, this Comment will suggest that such speech can be regulated, even when it occurs outside of school grounds, on the student’s own time, if it is substantially disruptive and directed primarily at a school audience.

Part I will discuss the Supreme Court’s precedent in the area, which began with the *Tinker* “substantial disruption” test. Since then,

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1 393 U.S. 503, 506 (1969).

2 *Id.*

3 127 S. Ct. 2618 (2007).

cases have made it clear that the “substantial disruption” test is not the only rubric under which schools can validly restrict student speech. The Supreme Court has individually restricted both offensively lewd speech in *Bethel School District No. 403 v. Fraser*⁴ and pro-drug speech in *Morse*. The Court’s explicit recognition in *Morse* that “[w]hatever approach *Fraser* employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*”⁵ makes it clear that these are two separate standards existing side-by-side. It seems likely that in the future, courts will have to decide on a case-by-case basis whether to “add[] to the patchwork of exceptions to the *Tinker* standard.”⁶ However, this Comment will consider whether such ad-hoc exceptions are ever appropriate for regulating off-campus student speech and, if so, the type of exceptions that might qualify. It will also attempt to consider whether this approach is inconsistent with First Amendment jurisprudence, or whether the apparent inconsistency is a result of looking at student speech in a vacuum.

Part II will discuss the issue of location. In *Morse*, the Supreme Court summarily rejected the plaintiff’s argument that a student activity taking place across the street from the school during its normal hours was not school speech.⁷ However, it acknowledged “some uncertainty at the outer boundaries as to when courts should apply school-speech precedents.”⁸ This Part will look at off-campus speech largely in isolation. While electronic speech is a more recent and arguably more dangerous phenomenon, schools and courts have been dealing for years with the issues created by off-campus student newspapers and other vehicles for speech.

It is clear that the bar is lower for restricting student speech.⁹ That dichotomy does not end at the schoolhouse gate. Students can be held responsible for speech occurring outside the school setting. This Comment will look at lower court precedent and outside commentary and attempt to determine what exactly “off-campus” means, and what sway *Tinker* and its progeny hold in that realm.

4 478 U.S. 675 (1986).

5 127 S. Ct. at 2627.

6 *Id.* at 2636 (Thomas, J., concurring).

7 *See id.* at 2624 (“Under these circumstances, we agree with the superintendent that Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.’” (citation omitted)).

8 *Id.* (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004)).

9 *See Fraser*, 478 U.S. at 682 (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”).

Part III will discuss technology's promises and pitfalls. The Internet is vital to modern education because it is an integral component of research, business, and life in the modern world. Teachers cannot and should not simply attempt to exclude it from their teaching. Nevertheless, it is a dangerous place. Violence, pornography, hate speech, and countless other evils are available online. The volume and variety of this material is a scathing indictment of humanity's worst nature. However, the freedom of communication that the Internet provides also makes possible some truly remarkable accomplishments, like Wikipedia's army of volunteers attempting to make available "free access to the sum of all human knowledge."¹⁰

This Comment will focus on the recent rise of social networking sites. Facebook and MySpace now claim tens of millions of users,¹¹ sorted into schools and geographical areas and tied together by lists of mutual friends, with even strangers often having access to someone's personal information.¹² In an environment like that, controversial and damaging statements can spread like wildfire, without even the addressing required by e-mail. This Comment will consider whether this unique environment gives school administrators more freedom to discipline students and whether courts should give greater deference to their decisions.

Part IV will discuss what schools can do about all this. What policies can they adopt, consistent both with their duty to protect and educate their students and with the strictures of the First Amendment? There are numerous paths schools could take, from proactive measures like using filtering software and including electronic offenses in disciplinary codes, to reactive measures like the standard detention, suspension, and expulsion. Many seem like veritable constitutional minefields.

Some lower courts have already applied *Morse* to electronic student speech, with mixed results. Commentators have suggested that schools have a countervailing affirmative obligation to protect stu-

¹⁰ Wikipedia Founder Jimmy Wales Responds (July 28, 2004, 13:00 EST), <http://interviews.slashdot.org/article.pl?sid=04/07/28/1351230> (interviewing Wikipedia's founder about the project's history and its direction).

¹¹ Spencer E. Ante et al., *In Search of MyProfits: The Pressure Is on for Murdoch to Turn MySpace into a Cash Machine*, BUSINESSWEEK, Nov. 5, 2007, at 23 (noting that in September 2007 Facebook had 30.6 million unique U.S. users while MySpace had 68.1 million).

¹² See Simon Grose, *Privacy Focus Caught in Web*, CANBERRA TIMES, Nov. 5, 2007, at A15 (addressing the conflict between personal privacy and web 2.0 development: "You can set your Facebook pages to limit who sees them, but many people don't bother").

dents from harassment.¹³ This Comment will review all of these sources and consider when schools can validly restrict student speech and what methods they can use to do it.

I. *TINKER, BETHEL, AND MORSE: A TRIO OF TESTS*

The First Amendment is phrased in clear and unambiguous terms: “Congress shall make no law . . . abridging the freedom of speech”¹⁴ Its application has never been as clear as its text. The Supreme Court has long recognized exceptions to freedom of speech, even before its incorporation against the states.¹⁵ While we value freedom of expression in this country, there is so little social value inherent in libel, obscenity, or speech inciting violence that society tolerates and even encourages its restriction.¹⁶

The Court has also recognized that these restrictions can shift with the identity of the speaker. Since the incorporation of the First Amendment against the states,¹⁷ the Court has recognized that individuals like soldiers,¹⁸ prisoners,¹⁹ and students,²⁰ by the nature of

13 See Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905 (2001) (suggesting a tension between Title IX and the First Amendment); Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools’ Regulation of Fighting Words and the Consequences if They Do Not*, 28 AKRON L. REV. 187 (1995) (suggesting a similar tension with Title VI and harassment on the basis of race).

14 U.S. CONST. amend. I.

15 See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (upholding a conviction under the Espionage Act of 1917 for circulating leaflets challenging the draft during World War I).

16 See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain . . . limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words It has been well observed that such utterances . . . are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (footnotes omitted)).

17 See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); see also U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

18 See *Brown v. Glines*, 444 U.S. 348, 354 (1980) (“Thus, while members of the military services are entitled to the protections of the First Amendment, ‘the different character of the military community and of the military mission requires a different application of those protections.’ The rights of military men must yield somewhat ‘to meet certain overriding demands of discipline and duty’” (citations omitted)).

19 See *Thornburgh v. Abbott*, 490 U.S. 401, 407–12 (1989) (explaining that while prisoners do not lose their First Amendment rights, those rights must be weighed against penologi-

their situation, cannot have the full gamut of rights normally accorded adults.

The watershed case in defining the free speech rights of students was *Tinker v. Des Moines Independent Community School District*, in which the Court concluded that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²¹

In *Tinker*, three students, after meeting with their parents and friends, decided to wear black armbands to protest the Vietnam War.²² Learning of this protest in advance, the school adopted a policy of suspending any student who wore an armband and refused to remove it.²³ The students wore their armbands, were suspended, and filed suit in response.²⁴

The district court dismissed their complaint, and the Court of Appeals for the Eighth Circuit was equally divided *en banc*, thereby affirming the opinion below.²⁵ After granting certiorari, the Supreme Court reversed, determining that schools could restrict student speech if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”²⁶

For seventeen years, the material disruption standard remained the only law on the issue. It is admittedly flexible, allowing school officials the leeway to restrict student speech in a wide variety of different forms as long as they have a “well-founded expectation of disruption”²⁷ arising from the speech’s content or its method of distribution.²⁸ Nevertheless, even when setting the standard in *Tinker*,

cal needs and the difficulties of prison administration, and applying a reasonableness standard instead of the Court’s normal strict scrutiny for speech restrictions).

20 See *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 157 (1969) (“The application of the first amendment in the public schools is limited by the circumstance that a state may restrict a child’s free expression in situations where similar restrictions on adults would clearly be unjustifiable.”).

21 393 U.S. 503, 506 (1969).

22 *Id.* at 504.

23 *Id.*

24 *Id.*

25 *Id.* at 505.

26 *Id.* at 513.

27 *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001).

28 See Note, *Prior Restraints in Public Schools*, 82 YALE L.J. 1325, 1326–27 (1973) (explaining that schools can regulate speech that is disruptive either because of its content or its method of distribution and differentiating between the restrictions that can be placed on each).

the Court expressed a concern with excessively interfering in the administration of schools.²⁹ This concern may have led to the development of exceptions to the *Tinker* rule beginning in *Bethel School District No. 403 v. Fraser*.³⁰

In *Fraser*, the Court confronted the issue of whether a student could be disciplined for making a nominating speech for class elected office that described the nominee in sexually suggestive terms.³¹ Matthew Fraser was smart enough³² to know that the way to get high school students to sit up and pay attention in an assembly where they otherwise would be napping was to “refer[] to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.”³³ Of course, school officials thought they knew the audience as well. Their worry was that the girls and the younger students could be insulted or confused by the speech’s content.³⁴ Thus, they “suspended [him] for three days, and . . . removed [his name] from the list of candidates for graduation speaker at the school’s commencement exercises.”³⁵

29 *Tinker*, 393 U.S. at 507 (“On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”). The Court was likely motivated by such concerns in other areas where it reviewed school actions, like corporal punishment in schools, which it addressed in *Ingraham v. Wright*, 430 U.S. 651 (1977). See *The Supreme Court, 1968 Term, supra* note 20, at 122 (“[T]he Court was no doubt motivated by an implicit concern that the judiciary avoid excessive intervention into local educational policies . . .”).

30 478 U.S. 675 (1986).

31 *Id.* at 677–78.

32 Smart enough to have been named top speaker in the state debate championships two years in a row, which likely explains his flair for the dramatic. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1357 (9th Cir. 1985).

33 *Fraser*, 478 U.S. at 677–78. What was so graphic? Fraser’s speech follows:

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

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

So vote for Jeff for A. S. B. vice-president—he’ll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring in the judgment) (internal quotation marks omitted).

34 *Id.* at 683 (“By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students . . . [and] 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.” (citation omitted)).

35 *Id.* at 678.

Who was right? Probably Matthew Fraser. It is doubtful many students were offended. They later chose him to speak at graduation, even though the school had taken him off the ballot.³⁶ This lends credence to Justice Stevens's conclusion that Fraser "was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."³⁷ However, it is likely something entirely different was going on, and both sides knew it. The Court was not protecting individual students from insult or offense; it was protecting a particular notion of what the school environment should be and to what messages the students should be exposed.³⁸

The conclusion that *Tinker* and *Fraser* use two different standards is now undeniable following *Morse v. Frederick*,³⁹ but two questions remain: First, how do these standards interact? Second, does *Morse* represent an extension of *Fraser*, or a new test entirely?

Fraser suggests at one point that its holding is derived from the fact that "[u]nlike the sanctions imposed on the students wearing arm-bands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."⁴⁰ This could be read as confining *Tinker* to expressions of political speech, while *Fraser* deals with "vulgar speech and lewd conduct"⁴¹ and *Morse* deals with pro-drug speech. However, this does not make a lot of sense, as the Court has not provided an exhaustive list of the types of speech that are "wholly inconsistent

36 *Id.* at 692 (Stevens, J., dissenting); *see id.* at 689 n.2 (Brennan, J., concurring) ("There is no evidence in the record that any students, male or female, found the speech 'insulting.'").

37 *Id.* at 692 (Stevens, J., dissenting).

38 *See id.* at 692 n.2 ("When a more orthodox message is being conveyed to a similar audience, four Members of today's majority would treat high school students like college students rather than like children." (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (dissenting opinions))). A number of commentators have criticized *Bethel* as undermining the rule of *Tinker*. *See* Karrie M. Kalail, Recent Case, *Matthew Fraser Sheds His Constitutional Rights to Freedom of Speech at the Schoolhouse Gates*, 20 AKRON L. REV. 563, 573 (1987) ("It does not seem necessary at this time to change something that has worked well for the past twenty years. The courts and the schools have worked closely together to preserve order and a proper educational environment."); Sara Slaff, Note, *Silencing Student Speech: Bethel School District No. 403 v. Fraser*, 37 AM. U. L. REV. 203, 223 (1987) ("Without clear evidence of disruption, students' free expression rights in school must not be abridged.").

39 127 S. Ct. 2618, 2627 (2007) ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker* . . .").

40 478 U.S. at 685.

41 *Id.*

with the ‘fundamental values’ of public school education.”⁴² Thus, under this reading, a school could not restrict even speech causing a substantial disruption unless it was political, lewd, or promoted drug use. Such an interpretation is simply untenable.

Another reading of *Fraser* might conclude that it does not forbid any specific topic, but simply makes clear that certain methods of conveying those messages are not constitutionally protected.⁴³ This content versus method distinction is difficult to apply when one considers that the “method” the school and the Court found objectionable was part of the content of Fraser’s speech.

All these approaches continue a mistake that has long been made with regards to school speech: that it is somehow different from regular First Amendment jurisprudence. *Tinker* and *Fraser* could also be described as a specific factual microcosm of the free speech rules for adults, including their exceptions for obscenity, fighting words, etc. Just as the Constitution generally prohibits restrictions on speech, it recognizes certain exceptions to that rule: libel, fighting words, defamation, false or misleading commercial speech, and child pornography.⁴⁴

Fraser represents the enunciation of this rule for the school context.⁴⁵ As Justice Brennan makes clear, Fraser’s speech would have been protected had it been given by an adult outside of school.⁴⁶ The response to this criticism is that there is a vast difference between the two situations, and thus a corresponding difference between the rules applied to them. Students may have the right to say things of social value, but they do not have the right to use any method or form to

⁴² *Id.* at 685–86.

⁴³ *See id.* at 683 (“Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.”).

⁴⁴ *See* *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563–66 (1980) (commercial speech); *Miller v. California*, 413 U.S. 15, 23, 24 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (fighting words); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (libel); *see also* Slaff, *supra* note 38, at 208 n.33 (listing these categories and the related cases).

⁴⁵ Unsurprisingly, lower courts have already held that the narrower exemptions, like fighting words, that apply to all free speech continue to be applicable in the school context. Even when the words are uttered off-campus, school administrators can punish students’ use of language falling within these exemptions. *See, e.g., Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976) (holding that a student’s suspension after an incident in a shopping center was permissible under the fighting words doctrine).

⁴⁶ *Fraser*, 478 U.S. at 688 (Brennan, J., concurring) (“If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . .”).

disseminate that message.⁴⁷ The Court has recognized that obscene speech is unprotected, and *Fraser* can be viewed as an extension of that doctrine, owing to the unique nature of the school.⁴⁸

If *Fraser* is simply an extension of existing free speech jurisprudence, where does that leave *Morse*? It would seem to be an opinion that stands alone, declaring that pro-drug speech is so harmful that “the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁴⁹ This is important, because when the Court permits the government to circumscribe speech for all, it generally does so on the basis 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.”⁵⁰ *Fraser* is an extension of this concept for obscenity, declaring that speech that was borderline before, now measured against the potential susceptibility of children to its influence, is no longer shielded by the Constitution.

With that in mind, *Morse* can seem in some places to be a natural outgrowth of existing jurisprudence and in some places something entirely new. It is familiar because it is banning not speech that is harmful in itself, but speech that could result in harm—the use of drugs by students.⁵¹ In that sense, it is like *Tinker*, articulating a standard that allows the suspension of speech that could reasonably lead to a harmful result.

47 See *id.* at 682 (majority opinion) (“[T]he First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not *Cohen*’s jacket.” (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979))). *Cohen*’s jacket refers to a jacket bearing the words “Fuck the Draft” worn by Paul Cohen in the Los Angeles County Courthouse, for which he was arrested for disturbing the peace. *Cohen v. California*, 403 U.S. 15 (1971). The Supreme Court reversed the conviction because, among other reasons, “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.” *Id.* at 25.

48 See *Ginsberg v. New York*, 390 U.S. 629, 635 (1968) (“Obscenity is not within the area of protected speech or press.”). *But cf. Fraser*, 478 U.S. at 688 (Brennan, J., concurring) (“Moreover, despite the Court’s characterizations, the language respondent used is far removed from the very narrow class of ‘obscene’ speech which the Court has held is not protected by the First Amendment.”).

49 *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

50 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

51 See *Morse*, 127 S. Ct. at 2628 (“Drug abuse can cause severe and permanent damage to the health and well-being of young people . . .”).

Justice Stevens insists otherwise and relies on the fighting words doctrine to come to the conclusion that Morse's sign cannot be prohibited.⁵² In relying on the fighting words doctrine as it applies to adults, though, he seems to be ignoring part of the Court's point: that the vulnerability of a particular group to a particular type of harm can be taken into account in determining whether that harm is sufficient. The difference is in what harmful results are adequate to support suppression for each particular audience.⁵³

There is one aspect of *Morse* that makes it difficult to integrate with the rest of First Amendment jurisprudence. Most restrictions on speech are content-based, but *Morse* restricts speech on the basis of viewpoint, banning only pro-drug speech, not anti-drug speech. Justice Stevens also criticizes this aspect of the Court's opinion.⁵⁴ Though the majority attacks him for immediately undermining his own argument by admitting that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting,"⁵⁵ it also seeks to refocus the argument onto the effects of the speech.⁵⁶ While a full discussion of the differences between content and viewpoint discrimination is beyond the scope of this Comment, it is worth noting that this approach would stand in stark contrast to a case like *R.A.V. v. St. Paul*.⁵⁷ In that case, the Court was bound to accept a lower court determination that the scope of a state hate speech statute restricted only speech recognized as fighting words, but it still struck

52 *See id.* at 2646 (Stevens, J., dissenting) ("No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, 'ha[s] no chance of starting a present conflagration.'" (alteration in original) (quoting *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting))).

53 Another aspect that should eventually be examined is the likelihood of the harmful result being obtained from the speech in question. It does not appear from decisions in the lower courts that this has been thoroughly examined, with most inquiries focusing on the potential magnitude of the resultant harm. For example, if a student is "disrespectful" to a teacher, there is little question that it will encourage some of his classmates to be disrespectful, but how many classmates is it likely to encourage, and will that constitute a material disruption? *See generally* Shlomit Wallerstein, *Criminalising Remote Harm and the Case of Anti-Democratic Activity*, 28 *CARDOZO L. REV.* 2697 (2007) (providing an informative breakdown of the issues surrounding criminalization of actions that incite others to violence or create a climate that might encourage others to violence).

54 *Morse*, 127 S. Ct. at 2644–46 (Stevens, J., dissenting).

55 *Id.* at 2646; *see id.* at 2629 (majority opinion) (criticizing Justice Stevens's viewpoint).

56 *See id.* at 2628 (majority opinion) (discussing the serious problem of drug abuse by children).

57 505 U.S. 377 (1992).

down the law because it facially discriminated on the basis of viewpoint.⁵⁸

Before I examine the landscape created by *Tinker*, *Fraser*, and *Morse*, I will consider the Dartagnan to these Three Musketeers⁵⁹: *Hazelwood School District v. Kuhlmeier*.⁶⁰ While the other three cases speak of a general standard of behavior, *Hazelwood* seems to stand only for the proposition that educators can control speech that “one would reasonably believe . . . bore the school’s imprimatur.”⁶¹ The Court in *Hazelwood* concluded 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.”⁶²

Hazelwood has led to plenty of debate and discussion, but I believe it simply illustrates the idea that the school speech arena is not isolated from developments in wider First Amendment jurisprudence. In the past several decades, there has been substantial evolution of the government speech doctrine, which recognizes that government has a legitimate right to speak⁶³ and to take sides on issues when doing so.⁶⁴ *Hazelwood* recognizes that schools are government actors and therefore entitled to control speech that could be reasonably viewed as originating with them.⁶⁵

So, what points the way forward in the world after *Morse*? Will we keep seeing isolated issues ascend to the High Court one after the

58 *Id.* at 381 (“Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the ‘fighting words’ doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”).

59 See ALEXANDRE DUMAS, *THE THREE MUSKETEERS* (New York, Crowell 1894).

60 484 U.S. 260 (1988).

61 *Morse*, 127 S. Ct. at 2627. But see Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 75 (2008) (“The courts that have concluded that *Hazelwood* is inapplicable . . . have done so on the grounds that textbook and curricular decisions reflect pure government speech In contrast, the courts that have applied *Hazelwood* seem to have interpreted *Hazelwood* as implicitly announcing a generally applicable ‘reasonableness’ standard for all school district decisions about speech-related matters.”).

62 *Hazelwood*, 484 U.S. at 272–73.

63 See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (“[S]ome government programs involve, or entirely consist of, advocating a position.”).

64 See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding a government program funding health care services, but forbidding doctors from mentioning abortion to patients whose care is subsidized by the program).

65 See Edward L. Carter et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 177–81 (2006) (linking *Hazelwood* with government speech doctrine more generally).

other, “adding to the patchwork of exceptions to the *Tinker* standard”⁶⁶? In *Morse*, pro-drug speech is entirely permissible for adults, but the potential harm to children is considered so profound that it must be banned. Though drug use by children is unquestionably harmful, so are a myriad of other issues: teen pregnancy, school violence, low graduation rates, and poor instruction. It is unclear what separates pro-drug speech from the rest.

Justice Thomas suggests the Court’s “jurisprudence now says that students have a right to speak in schools except when they don’t—a standard continuously developed through litigation against local schools and their administrators.”⁶⁷ He is probably not far from the truth, but that truth is not unusual in constitutional litigation. The rules in school speech are evolving as different cases test, in light of different facts, the free speech interests of students against the duty of governments to protect and educate them. This is the manner of First Amendment jurisprudence generally.⁶⁸ *Morse* may be the beginning of recognition that school speech jurisprudence is not a walled garden with its own special standards and rules, completely isolated from outside legal developments.

We may soon see the integration of the school speech line of cases with the standard tiers of scrutiny.⁶⁹ *Morse* suggests just this result when the Court notes that “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”⁷⁰ For anyone versed in constitutional litigation, these words are heavy with mean-

66 *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring).

67 *Id.* at 2634.

68 This does not, however, mitigate Justice Thomas’s point that this is “a standard continuously developed through litigation against local schools and their administrators,” *id.*, and his implicit criticism of such a system that distracts teachers from their primary duty to educate.

69 This follows a trend of merging a number of independent First Amendment analyses under the umbrella of intermediate scrutiny. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784–85 (“First Amendment intermediate scrutiny thus first emerged as a product of the merger of several distinct and relatively narrow branches of the Court’s jurisprudence.”); see also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 (1987) (lumping a number of different tests under the rubric of “[i]ntermediate review”). This assumes, of course, that the tiered approach itself does not come tumbling down. See Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

70 *Morse*, 127 S. Ct. at 2628 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

ing. They indicate a balancing of governmental rights against individual rights, and suggest a type of intermediate scrutiny.⁷¹

However, it is far from certain that the Court will fold school speech jurisprudence into intermediate scrutiny. Justices Alito and Kennedy, for example, may conclude that such an approach would be a further extension to which they could not adhere.⁷² Even if intermediate scrutiny is adopted, it says nothing of what the Court will hold to be an important interest, especially if it determines the standard to be an important interest “in light of the special characteristics of the school environment.”⁷³

School speech rules after *Morse* are not entirely clear, but some conclusions can be drawn. Speech likely to cause a material disruption can be restricted under *Tinker*. Lewd speech can be restricted under *Fraser*. Pro-drug speech can be restricted under *Morse*. The only issue is that, while *Fraser* could have been viewed as an extension of broader First Amendment doctrine on obscene speech, the same cannot be said of *Morse*. So it remains to be seen if the Court will continue to approve ad hoc exceptions, attempt to create an overarching standard as I have suggested, or overhaul the system entirely, as Justice Thomas has recommended.⁷⁴

71 Strict scrutiny is the traditional approach for content-based restrictions challenged under the Free Speech Clause. *See* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (testing New York’s Son of Sam Law for a compelling interest and narrow tailoring). However, intermediate scrutiny is used in a wide variety of content-neutral regulations on speech. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (time, place, and manner restrictions); *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“The State must assert a substantial interest to be achieved by restrictions on commercial speech.”); *United States v. O’Brien*, 391 U.S. 367 (1968) (applying intermediate scrutiny to symbolic conduct).

72 *See Morse*, 127 S. Ct. at 2638 (Alito, J., concurring) (stating in his opinion, which Justice Kennedy joined: “I join the opinion of the Court with the understanding that the opinion does not endorse any further extension”). Of course, the concurrence also states that both Justices “join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools *necessarily* justify any other speech restrictions.” *Id.* at 2637 (emphasis added). This does not preclude further permissible restriction, so long as the case in question presents a more compelling regulatory interest than pro-drug speech, residing as it does at the “far reaches of what the First Amendment permits.” *Id.* at 2638.

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

74 *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring) (“I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.”).

II. EXAMINING OFF-CAMPUS SPEECH

As difficult as the behavioral boundaries of school speech can sometimes be to navigate, its physical boundaries are even more uncertain. There is a simple reason for that: despite discussing student First Amendment rights in at least five significant cases (*Tinker*, *Fraser*, *Board of Education*, *Island Trees Union Free School District No. 26 v. Pico*,⁷⁵ *Hazelwood*, and *Morse*), the Supreme Court has thus far only obliquely examined the extent to which the student speech doctrine extends beyond the physical boundaries of the school. Cut adrift without Supreme Court guidance, the lower courts and numerous commentators have attempted to divine the extent to which the school speech doctrine reaches off-campus conduct, but it is not clear if they have had any success. While I suspect the Court will eventually have to confront this issue head-on and I may therefore be adding my voice to a storm soon to be quelled, I will nevertheless make the attempt because it is an important component of an examination of school speech in the Internet age.

The Supreme Court's only examination (if one can call it that) of the off-campus speech issue came recently in *Morse*, where it recognized "some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts."⁷⁶ Its determination was based on the fact that Morse's actions were directed towards the school and visible by its students. They took place across the street, during regular school hours, at an event sanctioned by the school and supervised by its staff.⁷⁷ The Court concluded that "Frederick cannot stand in the midst of his fellow students, during

⁷⁵ 457 U.S. 853 (1982). This case is not always cited as a major school speech case because it did not actually deal with the right of students to speak, but dealt instead with their right to receive information. In *Pico*, the Court was faced with the question of whether a school board could have books removed from the school library because it disagreed with their content. *Id.* at 856-57, 873. The Court held that it could not. *Id.* at 875. However, Justice Brennan's opinion spoke for only a plurality of the Court and may no longer be good law in the wake of *United States v. American Library Ass'n*, 539 U.S. 194 (2003), in which the Court approved Congress's requirement of filtering software as a condition of funding provided to libraries. See Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 103, 147 ("ALA thus left *Pico* on uncertain terms. Is the omission of a reference to *Pico* an acknowledgement of the apparent distinction between selection and removal? Or does the Rehnquist plurality mean to imply that *Pico* has no vitality as precedent?").

⁷⁶ 127 S. Ct. at 2624 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

⁷⁷ *Id.*

school hours, at a school-sanctioned activity and claim he is not at school.”⁷⁸

In acknowledging the uncertainty in the lower courts, the Chief Justice cited *Porter v. Ascension Parish School Board*, which addressed the issue of holding Adam Porter responsible for a drawing he had made at the age of fourteen depicting his school under siege and his principal being attacked.⁷⁹ The sketch was on a pad that was stored away in the closet and only emerged two years later when his younger brother decided to draw a llama and take it to school.⁸⁰ Another student spotted the earlier drawing and showed it to the bus driver, who confiscated the pad and informed the school, which led to the suspension of both Adam and his younger brother.⁸¹

In *Porter*, the Fifth Circuit held that Adam’s drawing was “not exactly speech on campus or even speech directed at the campus.”⁸² The court recognized that its precedent had previously held students responsible for off-campus speech, as had the Seventh Circuit and a number of district courts.⁸³ Nevertheless, the court concluded that “the fact that Adam’s drawing was composed off-campus and remained off-campus for two years until it was unintentionally taken to school by his younger brother takes the present case outside the scope of these precedents.”⁸⁴

So we have rough boundaries: *Morse* at one end and *Porter* at the other. Only a few circuits have examined the space between. Before I consider their opinions, it will be helpful to frame the issues. The first is which, if any, of the standards applies off-campus. Is it *Tinker* alone, or *Fraser*, as well?⁸⁵ The second issue is what culpability the speaker had in the speech reaching the school. There are three basic possibilities: the speaker could actually have directed the speech at the school, he could have realized it was likely the speech would reach the school, or he could simply have realized it was possible that the speech would reach the school.

78 *Id.* (internal quotation marks omitted).

79 393 F.3d at 611.

80 *Id.*

81 *Id.* at 611–12.

82 *Id.* at 615.

83 *Id.* at 615 n.22.

84 *Id.* at 616 n.22.

85 At the time of this Comment’s publication, no court of appeals has yet examined whether *Morse* applies to conduct that is more clearly off-campus than the situation presented in the case itself.

In *Boucher v. School Board of the School District of Greenfield*, the Seventh Circuit reversed a preliminary injunction blocking the expulsion of a student who had written an underground student newspaper on how to hack the school's computers.⁸⁶ Though the articles were written off-campus, the paper was distributed on campus.⁸⁷ The Seventh Circuit noted that "the district court found that the article advocates on-campus activity."⁸⁸ Thus, it had no problem concluding that the paper was subject to *Tinker* and its progeny.⁸⁹ Though this is cited by other courts as an off-campus speech case, because the paper was actually distributed on school grounds, it should probably not be viewed as one.

In *Sullivan v. Houston Independent School District*, the Fifth Circuit permitted the suspension of a student for the distribution of a paper just outside the school grounds as students entered.⁹⁰ The school had a policy requiring prior submission of papers to be distributed, and following a warning by the principal, Paul Kitchen was suspended.⁹¹ In the ensuing disciplinary proceedings, Paul insulted the school and the principal, using (amongst other things) "the common Anglo-Saxon vulgarity for sexual intercourse."⁹²

The Fifth Circuit did not address the fact that the speech was off-campus, and it even conceded that "his actions did not materially and substantially disrupt school activities."⁹³ Nevertheless, the court upheld the suspension because of Paul's "flagrant disregard of established school regulations."⁹⁴ Given when and where Paul distributed the papers, it can at least be said that it was likely the papers would make their way onto campus, and it would be reasonable to say that Paul directed them at campus. Thus, the Fifth Circuit has apparently

86 134 F.3d 821 (7th Cir. 1998).

87 *See id.* at 828–29.

88 *Id.* at 829.

89 *Id.*

90 475 F.2d 1071 (5th Cir. 1973).

91 *Id.* at 1074.

92 *Id.*

93 *Id.* at 1076. Given the insubordination that Paul Kitchen had shown to school officials, it is a little surprising that the Fifth Circuit did not simply conclude that insubordination itself constituted a disruption or at least relied on the "expectation of disruption" standard. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001). Of course, given how soon this was decided after *Tinker*, it is possible that this standard had simply not yet developed.

94 *Sullivan*, 475 F.2d at 1077 ("Today we merely recognize the right of school authorities to punish students for the flagrant disregard of established school regulations; we ask only that the student seeking equitable relief from allegedly unconstitutional actions by school officials come into court with clean hands.").

held that off-campus speech directed at campus can be punished even when it does not cause a material disruption.⁹⁵

The Second Circuit addressed the issue of off-campus speech in *Thomas v. Board of Education*.⁹⁶ There, in a case involving the primarily off-campus publication of an irreverent satirical magazine, the court noted that though it could “envision a case in which a group of students incites substantial disruption within the school from some remote locale,” it did not have to address the issue because “there was simply no threat or forecast of material and substantial disruption within the school.”⁹⁷ However, the Second Circuit also set an apparently strong presumption against punishing off-campus speech, explaining that:

When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.⁹⁸

In *Killion v. Franklin Regional School District*, the District Court for the Western District of Pennsylvania reviewed the punishment of a student for a derogatory top ten list that insulted the school’s athletic director.⁹⁹ Canvassing a number of cases and jurisdictions, it concluded that “[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*. Further, because the Bozzuto list was brought on campus, albeit by an unknown person, *Tinker* applies.”¹⁰⁰

That reasoning seemingly conflicts with the guiding principles laid down by the Second Circuit in *Thomas*. If students are subject to punishment because of their off-campus speech simply because an unknown individual brings it onto campus without their knowledge or consent, then they are not really free to speak their mind. In *Killion*, the student, Zachariah Paul, had already been warned (after a

95 The continuing vitality of this holding is questionable. As previously noted, under more modern doctrine, the Fifth Circuit would have been able to use the “expectation of disruption” standard as well as a fuller understanding of *Tinker* itself.

96 607 F.2d 1043 (2d Cir. 1979).

97 *Id.* at 1052 n.17.

98 *Id.* at 1052.

99 136 F. Supp. 2d 446 (W.D. Pa. 2001).

100 *Id.* at 455.

previous list) that he would be punished if he brought another list to school.¹⁰¹ He therefore created the list at home, e-mailed it to friends, and did not attempt to bring it to school.¹⁰² Had he known that he would be punished for these actions, perhaps he would not have spoken at all.¹⁰³

The *Killion* court does come to the conclusion though that *Fraser* would be an inapplicable precedent to use in the case of off-campus speech. It cites Justice Brennan's concurrence in *Fraser*¹⁰⁴ as well as the principles set forth in *Thomas* and other cases in coming to the conclusion that while *Tinker* may reasonably be applied to the out-of-school context, *Fraser* may not.¹⁰⁵

To summarize, the status of off-campus speech in the wake of *Morse* is as unclear as the question of what speech can be restricted. Nevertheless, courts have generally agreed that speech originating off-campus that is purposely directed on-campus and causes or could reasonably be foreseen to cause a material disruption can be restricted.

III. THE PARTICULAR DANGERS OF THE INTERNET

By now, parents, teachers, and anyone else responsible for the care and safety of children should be aware of the potential dangers of the Internet. The ease of communication and relative anonymity that it affords can have a corrosive effect on the judgment and manners of even responsible adults.¹⁰⁶ Moreover, the dangerous content

101 *Id.* at 448.

102 *Id.*

103 The court in *Killion* ultimately held that "Paul's suspension violates the First Amendment because defendants failed to satisfy *Tinker's* substantial disruption test." *Id.* at 455. However, this does not remove the implication that, under the Court's reasoning, *Tinker* could potentially apply anywhere in the world at any time if the individual is a student and their speech somehow finds its way onto campus. This seems in tension with the principles of *Thomas* and in clear contradiction of the holding in *Porter*.

104 *Id.* at 456 ("[I]f respondent had given the same speech outside the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate. . . ." (second alteration in original) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring))).

105 *Id.* at 458 ("Given the out of school creation of the list, absent evidence that Paul was responsible for bringing the list on school grounds, and absent disruption . . . we hold . . . that defendants could not, without violating the First Amendment, suspend Paul for the mere creation of the Bozzuto Top Ten list.").

106 See, e.g., The Editors of *Fortune*, *The 101 Dumbest Moments in Business, 2007*, FORTUNE, Dec. 24, 2007, at 147 ("I like Mackey's haircut. I think he looks cute."—*Whole Foods CEO John Mackey, posting under the screen name Rahodeb, on a Yahoo Finance stock forum*. The Federal Trade Commission reveals that Mackey authored this and numerous other posts over

of the Internet can have an especially negative influence on impressionable young minds. It exposes students to predators,¹⁰⁷ “stalking, bullying, raunchy photos and videos, too much time spent on social networking sites, academic fraud,”¹⁰⁸ and even increased temptation to commit suicide.¹⁰⁹

At the same time, the Internet can be a powerful educational tool and a celebration of the best of human nature. Near-instantaneous communication shrinks the world in which we live. Online news websites enable us to read articles from the *New York Times*, the *Sydney Herald*, and the *Jerusalem Post* all at the same time.¹¹⁰ Online entertainment lets us watch the television show, *American Gladiators*,¹¹¹ at our own convenience.¹¹² From the encouraging to the disheartening, the enriching to the corrupting, the Internet puts it at our fingertips. Most importantly for schools, though, it is now an essential part of life and business for many adults, and therefore an essential part of education for students the world over.¹¹³

Focusing specifically on the ability to restrict student speech narrows the issues. Teachers and the courts are generally worried about the ability of students at home to project disruption onto school

an eight-year period, hyping his company and himself while trashing the competitor he hoped to acquire, Wild Oats.”). See generally Penny Arcade!—Green Blackboards (And Other Anomalies), <http://www.penny-arcade.com/comic/2004/03/19> (last visited Jan. 15, 2009) (expounding a theory of the effect on a normal person of the anonymity and audience the Internet provides).

107 See, e.g., Dena Potter, *Victim Battles Child Sex ‘Monsters,’* DAILY PRESS (Newport News, Va.), Jan. 24, 2008 (discussing the efforts of Alicia Kozakiewicz, a Pennsylvania teenager abducted in 2002 after meeting a man online, to expand police efforts to fight online predators).

108 Alan Sepinwall, *What Your Kids Are up to Online*, STAR-LEDGER (Newark, N.J.), Jan. 22, 2008, at 29.

109 See David Pilditch, *Dangers That Lurk on Friends’ Websites*, EXPRESS (U.K.), Jan. 24, 2008, at 17 (“Anne Parry, of the suicide prevention charity Papyrus, said: ‘We’ve been running a campaign for the last three years to try to draw attention to the dangers of the internet.’ . . . In a study earlier this month, the charity found a growing number of young people were committing suicide after reading about it on the internet.”).

110 See *New York Times*, <http://www.nytimes.com> (last visited Jan. 15, 2009); *Jerusalem Post*, <http://www.jpost.com> (last visited Jan. 15, 2009); *Sydney Morning Herald*, available at <http://www.smh.com.au> (last visited Jan. 15, 2009).

111 *American Gladiators* (NBC television broadcasts 2008).

112 *American Gladiators: Video*, http://www.nbc.com/American_Gladiators/video/index.shtml#mea=282944 (last visited Jan. 15, 2009).

113 See, e.g., Matt Walcoff, *Kenyan Teacher Outlines Internet Needs*, RECORD (Kitchener-Waterloo, Ontario), Nov. 19, 2007, at B3 (“Computer literacy is an essential part of education that can help young Africans escape the cycle of poverty and benefit from the global economy, said Kaye Jackson of Cobourg, co-founder of the Canada/Kenya-Rarieda Development Programme, or CANRAD.”).

grounds, causing harm from a distance unimagined in *Tinker*. Social networking sites are a particular danger. Two social networking sites currently dominate the landscape: Facebook, with approximately 30.6 million unique users every month, and MySpace, with approximately 68.1 million.¹¹⁴

Both have had their problems. MySpace has come under fire for its use by child predators.¹¹⁵ In response, “it detected and deleted 29,000 convicted sex offenders on its service” in July 2007.¹¹⁶ Facebook has been criticized for things like its Beacon service, which “tracked purchases Facebook members made on other Web sites and sent alerts to their Facebook friends about the transactions.”¹¹⁷

The problem with sites like MySpace and Facebook is that they tend to magnify issues already present on the Internet. Users can post things that are “part diary, part photo album, with gossip, favorite music, pet peeves—sometimes even phone numbers and home addresses. And occasionally, revealing pictures.”¹¹⁸ All of these are available at other sites. The difference with social networking sites is threefold: (1) these functions are gathered together in one place; (2) the sites have massive user bases and daily traffic; and (3) your friends have quick and convenient access to everything you post.

Facebook’s personal privacy settings allow you to adjust precisely who can see what you post,¹¹⁹ but by default, information can be seen by any of your friends and anyone in your networks.¹²⁰ Since networks include both major cities and major universities, when you post a picture you later regret, it is probably not comforting that it was “only” available to the Philadelphia major metropolitan area or every Penn State student and alum. Also, though Facebook does some filtering

114 Ante, *supra* note 11.

115 See Pete Williams, *MySpace, Facebook Attract Online Predators*, MSNBC.COM, Feb. 3, 2006, <http://www.msnbc.msn.com/id/11165576/> (discussing the use of MySpace by teenagers and the assaults of children occurring after meeting individuals on the site).

116 *MySpace Deletes 29,000 Sex Offenders*, REUTERS, July 24, 2007, available at <http://www.reuters.com/article/domesticNews/idUSN2424879820070724?feedType=RSS&rpc=22&sp=true>.

117 *Facebook Adds Privacy Features*, USA TODAY, Mar. 18, 2008, available at http://www.usatoday.com/tech/products/2008-03-18-179825145_x.htm.

118 Williams, *supra* note 115.

119 Help Center: Privacy, How can I protect my privacy?, <http://www.facebook.com/help.php?page=419> (last visited Jan. 15, 2009) (“You can customize your privacy settings from the Privacy page. From here you have total control over who can view all of your content.”).

120 Help Center: Privacy, How Can I Control Who Can See My Profile?, <http://www.facebook.com/help.php?page=419> (last visited Jan. 15, 2009) (“By default, only users within your networks and your confirmed friends can view your profile.”).

when you claim an affiliation with a college¹²¹ or high school network,¹²² it will not perform any filtering when you join a regional network.¹²³ So that guy who says he is from “West Philadelphia born and raised”¹²⁴ may actually be from the South Side of Chicago or Corpus Christi, Texas. There is simply no way to know.

As problematic as this is, the real issue in the school speech context is school network affiliation. As I noted, under Facebook’s default privacy settings, anyone attending a school would have access to student posts. Even under restricted settings, their friends (which likely include many of their classmates) would have access.¹²⁵ Very quickly, a message written in the heat of the moment, an embarrassing picture, or an unflattering description of a faculty member can become the talk of the school.

The rapid distribution of painful insults can magnify an existing problem. Billy Wolfe knows this well. He is a sophomore at a high school in Fayetteville, Arkansas, and bullies have been picking on him since he was twelve.¹²⁶ Facebook only made things worse. In ninth grade, some boys started a Facebook group named “Every One That Hates Billy Wolfe.”¹²⁷

121 Help Center: Networks, What Do I Need in Order to Join a Supported Facebook Network?, <http://www.facebook.com/help.php?page=403> (last visited Jan. 15, 2009) (“To join a college network, you need to have a valid school email account.”).

122 *Id.* (“If you have a school email address or an invitation from another member of your high school network, you will be able to affiliate during registration. Alternatively, . . . you will need to be approved by a member of your high school network in order to join it.”).

123 *Id.* (“Just enter your city, and we’ll show you the regional networks closest to you.”). Facebook does, however, restrict how frequently you can change your regional network. See I Can’t Add a Network., <http://www.facebook.com/help.php?page=403> (last visited Jan. 15, 2009) (“Facebook limits all users to a single regional network. This region can only be changed twice every sixty days from the ‘Networks’ tab of the Account page. These limits are in place to protect the privacy of our users’ accounts.”).

124 See DJ JAZZY JEFF & THE FRESH PRINCE, *The Fresh Prince of Bel Air*, on DJ JAZZY JEFF & THE FRESH PRINCE: THE GREATEST HITS (Zomba Productions Ltd. 1988); see also Fresh Prince of Bel Air Theme Song Lyrics, <http://www.jazzyjefffreshprince.com/lyrics/will-smith/b-sides/will-smith-fresh-prince-of-bel-air-theme.htm> (last visited on Jan. 15, 2009).

125 People should carefully consider who they leave on their friends list. Photos posted by two Penn State students that showed them dressed up in Halloween costumes mocking the Virginia Tech shootings were restricted so that only friends could view them, but they were still discovered and distributed by “a Virginia Tech senior and ‘high school enemy’” of one of the pair. Lauren Boyer, *Students Defend Costume Choice*, DAILY COLLEGIAN, Dec. 10, 2007, available at http://www.collegian.psu.edu/archive/2007/12/10/students_defend_costume_choice.aspx.

126 Dan Barry, *A Boy the Bullies Love to Beat Up, Repeatedly*, N.Y. TIMES, Mar. 24, 2008, at A1, available at <http://www.nytimes.com/2008/03/24/us/24land.html?ex=1364097600&en=a959e88983771fc2&ei=5088&partner=rssnyt&emc=rss>.

127 *Id.*

Facebook “feeds” only amplify these problems. Whenever you change your profile, update your status, post a picture, or write a message on a friend’s wall, your actions get listed on your friends’ homepages.¹²⁸ They do not have access to information they could not already have gotten by checking your profile, your pictures, etc.,¹²⁹ but it does “make[] it easier for people to get that information pushed to them.”¹³⁰ Suddenly, not only is there a group whose purpose is to mock a student by calling him a “bitch” and a “homosexual that NO ONE LIKES,”¹³¹ but everyone knows about it immediately.

The initial introduction of the feature caused outrage among Facebook users, who formed online protest groups joined by thousands of people.¹³² One user described it as “kind of stalker-ish.”¹³³ The *Washington Post* viewed it as an example of Facebook’s “immense popularity backfir[ing],”¹³⁴ exposing more users to more information more quickly, and fanning the flames of outrage harder and faster than would have occurred otherwise. Facebook has since “introduced privacy settings that give users more control over what information gets broadcast to members of their social network”¹³⁵ but it did not abandon the feature.¹³⁶

In order to illustrate the effect of these features, let’s consider an example from a case I discussed earlier. One can take the insulting top-ten list from *Killion*¹³⁷ and imagine that instead of simply e-mailing

128 See Bambi Francisco, *Facebook’s Growing Pains*, MARKETWATCH, Sept. 14, 2006, <http://www.marketwatch.com/news/story/Story.aspx?guid=f84d887b-6e05-4c47-a30d-f2895ccdf0cb&siteid=mktw&dist=morenews> (“Facebook’s News Feed—for those unclear about what it is—works just like alerts or headlines on RSS readers or pages. The only difference is that news on Facebook’s feeds isn’t about the latest problems at H-P, or Google’s quarterly results, but rather whether someone is single or not.”).

129 *Id.* (“Facebook’s news feeds never broadcast information to people who would not have already had access to that personal information.”); see also Help Center: News Feed, What Privacy Settings Are Used for News Feed?, <http://www.facebook.com/help.php?page=408> (last visited Jan. 15, 2009) (“You will only see stories about actions that you have permission to see, as determined by the privacy settings of the person who made the action.”).

130 See Francisco, *supra* note 128.

131 Barry, *supra* note 126.

132 Susan Kinzie & Yuki Noguchi, *In Online Social Club, Sharing Is the Point Until It Goes Too Far*, WASH. POST, Sept. 7, 2006, at A1 (“Within hours, online protest groups were formed and thousands of people had joined.”).

133 *Id.*

134 *Id.*

135 Laura Schreier, *After Uproar, Facebook Boosts Privacy: Complaints Prompt Networking Site to Upgrade Its Upgrade*, DALLAS MORNING NEWS, Sept. 9, 2006, at 10A.

136 *Id.*

137 See *supra* note 99 and accompanying text.

the list to friends, he posted it on a classmate's Facebook wall.¹³⁸ If both Zachariah Paul (the plaintiff in *Killion*) and his friend leave their privacy settings on the default, then essentially the entire school will instantly have access to the fact that the athletic director "is constantly tripping over his own chins."¹³⁹ Moreover, anyone logging in to the site will see that Paul posted something and can click a simple link to go to it. In many cases, the text of the post may appear in the feed. It is the twenty-first century equivalent of taking out a giant roadside ad right in front of the school.

In this Section, I have examined the problems that the Internet and social networking sites present in the school speech context. They combine instantaneous communication with the ability to distribute information (sometimes unintentionally) to a large group of people. If they are accessed on campus, then they are no different than an underground newspaper like the one in *Sullivan v. Houston Independent School District*.¹⁴⁰

IV. WHAT SCHOOLS CAN DO

This Comment has examined the evolution of school speech law to this point, both in what can be regulated and when it can be regulated. It has also looked at the unique issues raised by student speech being conducted on the Internet and particularly on social networking sites. It is time to consider all of these elements. The final question in this examination of school speech in the Internet age is: "What can schools do about all this?"

They could choose to eliminate Internet access in schools entirely, but as we have seen, it is now becoming such a vital part of life and business that technological literacy may be almost as important as math or science. Schools could also choose to employ filtering software.¹⁴¹ Even these responses may be ineffective, though. The social

138 The wall is a particular area on an individual's profile page where friends can write messages, post links, etc. See Help Center: Wall, <http://www.facebook.com/help.php?page=443> (last visited Jan. 15, 2009).

139 *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448 n.1 (W.D. Pa. 2001).

140 475 F.2d 1071 (5th Cir. 1973); see *supra* notes 90–95 and accompanying text.

141 See *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003) (upholding a condition Congress put on library funding that mandated the use of filtering software by the libraries receiving the funds); see also *supra* note 75 (discussing a previous case, *Pico*, 457 U.S. 853 (1982), and its questionable validity in light of the decision in *American Library Ass'n*). Regardless of the applicable law, these solutions are easily circumvented. See Peacefire: To Get Around Your Blocking Software, <http://www.peacefire.org> (last visited Jan. 15, 2009) (listing various ways of disabling or getting around blocking software).

links and software features on sites like Facebook still permit students to rapidly share potentially disruptive information. Postings that insult or undermine teachers and administrators, cause fights between students, or can otherwise cause a significant disruption in the school are still being spread rapidly among students even if none of them access it in the building.

Some judges have already addressed these issues. In *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit addressed off-campus electronic speech head-on, concluding that Aaron Wisniewski could be punished for having an Instant Messenger icon depicting a person being shot in the head with the words “Kill Mr. VanderMolen” below it.¹⁴² The court concluded that “[t]he fact that Aaron’s creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.”¹⁴³ However, the panel was divided on the rationale, so it is unclear how useful *Wisniewski* is for laying a framework.¹⁴⁴ Nevertheless, finding that the school’s punishment was permissible under the *Tinker* standard, the court upheld Aaron’s suspension.¹⁴⁵

In *Beussink v. Woodland R-IV School District*, the District Court for the Eastern District of Missouri reviewed the suspension of Brandon Beussink for creating a vulgar webpage “critical of the administration at Woodland High School.”¹⁴⁶ He had created it at home, on his own computer, outside of school hours.¹⁴⁷ After a dispute, a student who viewed the page at Beussink’s house showed it to the computer teacher at their high school.¹⁴⁸ Beussink was suspended, and application of the high school’s policy on unexcused absences (which includes days on suspension) resulted in him “failing *all* of the classes

142 494 F.3d 34, 36 (2d Cir. 2007). Mr. VanderMolen was the plaintiff’s English teacher at the time. *Id.*

143 *Id.* at 39.

144 *Id.* (“In this case, the panel is divided as to whether it must be shown that it was reasonably foreseeable that Aaron’s IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability.”).

145 *Id.* at 38–39 (“Even if Aaron’s transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of *Tinker*, we conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that . . . it would materially and substantially disrupt the work and discipline of the school.” (internal quotation marks omitted)).

146 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

147 *Id.*

148 *Id.* at 1178.

in which he was enrolled for the second semester of his junior year.”¹⁴⁹

The court concluded that Beussink’s suspension was improper because his actions “did not materially and substantially interfere with school discipline.”¹⁵⁰ However, perhaps the most notable part of the opinion is that it sidesteps the off-campus issue entirely. Granted, the page did not rise to the *Tinker* standard of disruption, but given the “crude and vulgar language”¹⁵¹ employed, one would think the court would at least mention *Fraser*. Of course, this may reflect the reasoning of *Killion* that *Fraser’s* standard is inapplicable to off-campus speech.¹⁵²

The court in *Doninger v. Niehoff* did not find such an argument persuasive.¹⁵³ The case dealt with a student’s punishment for a post on her LiveJournal that referred to school administrators as “douchebags.”¹⁵⁴ LiveJournal is a site which, like Facebook and MySpace, permits users to list their friends and thereby easily access each other’s entries.¹⁵⁵ For this reason, it implicates many of the same concerns discussed with regards to social networking sites. The court, relying on *Wisniewski*, “believe[d] that Avery’s blog entry may be considered on-campus speech for the purposes of the First Amendment.”¹⁵⁶ It relied especially on the foreseeability of the speech being viewed by other students and school administrators.¹⁵⁷

In short, the courts seem to be split. There is general support, both under off-campus speech precedents and under these electronic speech cases, for regulating off-campus electronic speech under the *Tinker* standard. Whether schools will also be able to regulate off-

149 *Id.* at 1180.

150 *Id.* at 1181.

151 *Id.* at 1177.

152 *See* *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 457 (W.D. Pa. 2001) (“Although we agree that several passages from the list are lewd, abusive, and derogatory, we cannot ignore the fact that the relevant speech, like that in *Klein* and *Thomas*, occurred within the confines of Paul’s home, far removed from any school premises or facilities.”).

153 514 F. Supp. 2d 199 (D. Conn. 2007).

154 *Id.* at 206.

155 *See* FAQ Question #61, <http://www.livejournal.com/support/faqbrowse.bml?faqid=61&view=full> (last visited Jan. 15, 2009).

156 *Doninger*, 514 F. Supp. 2d at 217.

157 *Id.* (“Most importantly, the content of the blog was related to school issues, and it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it.”).

The Second Circuit affirmed this decision in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

campus electronic speech under *Fraser* is a much more tenuous question.

V. CONCLUSION

Since *Tinker* was decided, school speech has been a contentious issue. Students want the right to express themselves freely. Administrators want the right to enforce school rules and to create an atmosphere conducive to learning. The courts are trying to balance these competing interests and to maintain the integrity of the First Amendment while advancing the state's compelling interest in educating its children.

This was difficult enough before the Internet and social networking sites made statements that were once confined to underground newspapers or graffiti on the wall of the bathroom stall available to all and widely publicized. It seems clear that schools can regulate any speech, electronic or not, on-campus or not, that is likely to cause a material disruption. Whether they may go beyond that and apply the Supreme Court's more recent standards from *Fraser* and *Morse* is yet to be decided.

The courts should be willing to apply both *Fraser* and *Morse*, but in sharply circumscribed situations, namely where students have specifically targeted the school with their speech. Otherwise, the Internet would make it possible to skirt *Tinker*-and-*Fraser*-era restrictions simply because there is now a back door into the school that did not then exist. Direct targeting of the school by students is insubordinate. It should be considered an attempt to undermine teacher authority and rightly punished on that basis. However, such a policy will require careful monitoring by the courts to ensure that schools are not punishing students simply for targeting other students, absent some substantial disruption that spills over into the school setting. Schools should not be policing student social relationships.

Beyond intentionally targeted speech, there is great value in the Second Circuit's determination that the student should be "free to speak his mind when the school day ends"¹⁵⁸ and that "our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself."¹⁵⁹ Education is vital and school discipline is essential to providing an effective education.

¹⁵⁸ *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979).

¹⁵⁹ *Id.*

Nevertheless, the free expression of students and their free interaction with their peers is also important, and it should not be curtailed simply because of the development of new technology.