

COMMENTS

IS IT REALLY MYSPACE?

Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era

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I. INTRODUCTION

On a Sunday afternoon in the town of Indiana, Pennsylvania, a high school student named Jeffrey Fenton saw one of his teachers driving through the parking lot of the local mall.¹ Fenton could not resist announcing to his friends in a loud voice that the teacher was “a prick.”² While Fenton’s peers might have found the comment funny, his teacher was not amused.³ When Fenton reported to school on Monday morning, he received three days of in-school suspension and was denied the privilege of attending the senior class trip.⁴ The United States District Court for the Western District of Pennsylvania dismissed Jeffrey’s complaint against the school and held that the punishment was not a violation of his First Amendment rights.⁵ The year was 1976.⁶ Only ten years later and just over five hundred miles away in the town of South Paris, Maine, Jason Klein encountered one of his teachers outside a local restaurant and “gave him the finger.”⁷ Klein had more luck than Fenton—the United States District Court for the District of Maine concluded that punishing Klein for the gesture would be a violation of his constitutional right to free speech.⁸

Students no longer need to take advantage of chance parking lot encounters to communicate their attitudes about teachers when they are away from campus. Today, the Internet allows users to be part of a world wide web of information that can be shared at the speed of light and with the push of a button. Social networking sites such as MySpace, YouTube, Facebook, and Twitter, with their “user friendly” interfaces, allow even the most casual of users to share up-to-the-minute personal information, photographs, and videos.⁹ A modern-day Jason

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

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 773.

6. *Id.*

7. *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986).

8. *Id.* at 1442.

9. Paul Larter, *Aussie Party Boy Corey Delaney Finds Stardom Online*, TIMESONLINE, Jan. 17, 2008, <http://www.timesonline.co.uk/tol/news/world/article3198418.ece> (discussing

Klein can give his teacher the finger once in a parking lot, and then thousands of times on school computer screens around the world by the next morning.

Because the fluidity of Internet speech allows so much material that originates off-campus to make its way into the schoolhouse, school administrators have struggled to maintain discipline in the classroom without violating the First Amendment rights of their students.¹⁰ Unfortunately for schools, courts have reached little agreement in the years since *Fenton v. Stear*¹¹ and *Klein v. Smith*.¹² This comment will examine how the United States Supreme Court has applied the First Amendment to student speech and will detail why precedent in this area does not adequately address how schools may regulate students' private Internet speech.¹³ Section II discusses United States Supreme Court precedents on student free speech, and Section III describes and critiques the nexus test several lower courts use to determine whether student private Internet speech is also school speech.¹⁴ Section IV proposes a new test and gives examples of how it could be applied. Section V analyzes current Georgia law under the proposed test. The author ultimately concludes that Georgia statutes giving schools the power to punish students for speech occurring off-campus must be narrowed in scope in order to comport with the proposed test.

a party advertised on MySpace by a sixteen year old Australian boy that attracted 500 visitors as well as police, the police dog squad, and a police helicopter).

10. *See, e.g.*, *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 251-54 (3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 286-90 (3d Cir. 2010); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

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

12. *Klein*, 635 F. Supp. 1440; *see cases cited supra* note 10.

13. For the purposes of this comment, private Internet speech refers to text, audio files, video files, and pictures that originate away from school and are published on the world wide web from a location that is not on school campus, without the use of any school equipment and at a time when the student is not under direct supervision of school personnel.

14. School speech, as used throughout this comment, refers to speech that occurs within the realm of the school's authority to scrutinize and punish if it is found to be unprotected by the First Amendment.

II. STUDENT FREE SPEECH DOCTRINE & THE UNITED STATES SUPREME COURT

A. *The Supreme Court Has Limited Students' Rights to Expression at School.*

The Supreme Court was first asked to determine the limits of a public school student's First Amendment right to expression in *Tinker v. Des Moines Independent Community School District*.¹⁵ John Tinker and two other students wore black armbands to school in silent protest of the Vietnam War.¹⁶ The school board suspended all three students for violation of a recently enacted policy banning the wearing of armbands by students.¹⁷ The Court began its analysis with a phrase that has become almost infamous in student speech jurisprudence: “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁸

The analysis in *Tinker* focused on the armbands' impact on the school.¹⁹ The Court held that students must be free to express their opinions so long as they are able to do so “without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”²⁰ The District Court upheld the suspension of the students because it found that the school system had acted on a reasonable fear of disturbance that could result from the wearing of the armbands.²¹ In reversing the District Court, the Supreme Court emphasized that any expression deviating from popular opinion could potentially cause a disturbance, but held that a mere desire to avoid

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

16. *Id.* at 504.

17. *Id.*

18. *Id.* at 506.

19. *Id.* at 508.

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

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

unpleasantness associated with a differing opinion was not enough to allow schools to silence student expression.²² The Court held the prohibition unconstitutional because the school failed to identify any specific instances of violence or threats of violence caused by the wearing of the armbands.²³

The First Amendment protections outlined in *Tinker* did not, however, prevent the Court from allowing censorship of student speech in a series of cases that followed.²⁴ In *Bethel School District v. Fraser*, the school's ability to limit student expression was once again questioned.²⁵ But, unlike the symbolic expression at the core of *Tinker*, a student in *Fraser* delivered an offensive speech to the entire student body during an assembly.²⁶ The Court found that "the entire speech was one long drawn-out sexual metaphor," that was "plainly offensive to any mature person," and "acutely insulting to teenage girl students."²⁷ The seemingly shocked and offended majority was faced with a dilemma: the speech might actually be permissible if analyzed strictly under the *Tinker* test because, although there was a bit of hooting and yelling during the speech, the school could not point to any specific facts showing that there was a material and substantial disturbance.²⁸

22. *Id.* at 509. In fact, the Court indicates that our national strength is due in large part to this kind of "hazardous freedom." *Id.*

23. *Id.* at 514. The students caused discussion outside of classrooms, but they did not interfere with any work and there was no disorder. *Id.*

24. See *Morse v. Frederick*, 551 U.S. 393, 397 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680 (1986).

25. *Fraser*, 478 U.S. at 675, 687 (reviewing a speech given by a student in front of 600 plus of his fellow students which stated, "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.").

26. *Id.* at 677.

27. *Id.* at 678, 683.

28. See *Fraser v. Bethel Sch. Dist.*, 755 F.2d 1356, 1359 (9th Cir. 1985) (upholding the district court's decision that *Fraser's* speech did not have a disruptive effect on the educational process), *rev'd* 478 U.S. 675 (1986).

Instead of creating a new test, the Court distinguished the lewd speech from *Tinker*'s black armbands by emphasizing that the expression in *Tinker* was not the type that interfered with the work of the school or infringed upon the rights of other students.²⁹ The Court gave meaning to the "work of the schools" dicta from *Tinker* by explaining that one objective of public education is the teaching of "fundamental values necessary to the maintenance of a democratic political system."³⁰ The Court held that educating students about the boundaries of socially acceptable behavior is one of the fundamental values that must be taught in schools.³¹ Offensive speech inside the school crosses those boundaries and, therefore, is clearly against the "work of the schools."³²

This skillful argument affirmed *Tinker* while also allowing another type of student expression to fall within the control of the school system.³³ The "work of the schools" rationale allowed those in favor of student censorship to ignore a lack of actual physical disruption and to plead a more intangible disruption—an interference with the school's educational mission.³⁴ *Fraser* marked the beginning of a path that has carried the Supreme Court away from employing the *Tinker* analysis.³⁵

In *Hazelwood School District v. Kuhlmeier*, a high school principal removed two pages from the school newspaper because he considered two of the articles objectionable.³⁶ Both of the articles were about students at the school, and the principal was afraid that, even though the names of the students had been changed or deleted, other students and teachers would

29. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680 (1986).

30. *Id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

31. *Id.* at 681.

32. *Id.* at 683.

33. *Id.* at 685 (holding that schools may punish vulgar and lewd speech).

34. *Id.*

35. Neither *Kuhlmeier* nor *Morse*, employed the material and substantial disturbance test from *Tinker*. *Morse v. Frederick*, 551 U.S. 393, 407-10 (2007) (holding that failure to censor *Frederick* would also fail to send the appropriate message to students about the dangers of drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988) (holding that *Tinker* is not the appropriate standard for analyzing school-sponsored speech).

36. *Kuhlmeier*, 484 U.S. at 260.

be able to discern the identity of those mentioned.³⁷ As in *Fraser*, the Court found that a *Tinker* analysis was inappropriate.³⁸ While *Tinker* involved personal expression by a student, the speech in *Kuhlmeier* occurred in a school-sponsored publication.³⁹ The Court found that schools have much wider latitude to act in the latter form of speech because it reasonably could be interpreted to bear the imprimatur of the school, and schools should not be forced to sponsor speech that does not meet high standards of scholarship or is inconsistent with “the shared values of a civilized social order.”⁴⁰ By creating a new test for scrutinizing school-sponsored expressive activities, the Supreme Court was able once again to uphold censorship of student speech that did not cause a material disruption without overturning *Tinker*.⁴¹

In its most recent school speech case, the Court upheld a school administrator’s censorship of student expression that actually occurred off the school’s campus.⁴² In *Morse v. Frederick*, the principal of Juneau-Douglas High School allowed her students and staff to participate in the Olympic Torch Relay as the torchbearers passed down the street in front of the school.⁴³ Although the Relay occurred during school hours, the students and staff walked to the event as part of a school-sanctioned class trip.⁴⁴ Among the group of students standing across the street from the school was Joseph Frederick.⁴⁵ Although Frederick was a student at Juneau-Douglas High, he arrived late for school and went immediately down the street and joined his classmates without entering the school building.⁴⁶ As the procession and camera crews

37. *Id.* One of the questionable articles was about three students’ experiences with pregnancy, while the other was an interview with a student concerning his upbringing in a divorced home. Several other articles were deleted because they were on the same page as the questionable articles. *Id.*

38. *Id.* at 270-71.

39. *Id.*

40. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

41. *Id.* at 270-71.

42. *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

43. *Id.* at 397.

44. *Id.*

45. *Id.*

46. *Id.*

approached, Frederick and his friends held up a fourteen-foot banner displaying the message, "BONG HiTS 4 JESUS."⁴⁷ The principal immediately demanded removal of the sign, but Frederick refused.⁴⁸

The Court's analysis began by rejecting Frederick's claim that his was not a case of school speech, stating that Frederick could not "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."⁴⁹ After determining that the banner was school speech, the Court concluded that it promoted illegal drug use in direct violation of school policy.⁵⁰ In upholding school policies that regulate speech concerning drug use, the Court carefully noted that it was not using a *Tinker*,⁵¹ *Fraser*,⁵² or *Kuhlmeier*⁵³ analysis.⁵⁴ Instead, the Court relied on the statistical dangers of drug use and the measures taken by Congress to educate students about the dangers of using illegal drugs in holding that a school need not tolerate speech reasonably interpreted to advocate the use of illegal drugs at school events.⁵⁵

In four cases where the Supreme Court has been tasked with determining how the First Amendment applies to public school students, the Court has used four different tests.⁵⁶ After making a stand for student rights in *Tinker*,⁵⁷ the three subsequent

47. *Id.*

48. *Morse v. Frederick*, 551 U.S. 393, 398 (2007).

49. *Id.* at 400-01 (citing *Frederick v. Morse*, 439 F.3d 1114, 1117 (9th Cir. 2006), *rev'd*, 551 U.S. 393 (2007)).

50. *Id.* at 401-02.

51. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

52. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680 (1986).

53. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

54. *Morse v. Frederick*, 551 U.S. 393, 403-06 (2007). There was no substantial and material disruption as required by *Tinker*, no offensiveness as required by *Morse*, and no perceived school imprimatur as required by the *Kuhlmeier* test. *Id.*

55. *Id.* at 407-09.

56. *See id.* at 403-06 (discussing the tests outlined in *Tinker*, *Fraser*, and *Kuhlmeier* and why they are inappropriate for *Morse*); *see also id.* at 410 (holding that schools are not required to tolerate speech at school events that promotes illegal drug use).

57. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Supreme Court cases dealing with student expression have allowed schools to silence student speech.⁵⁸ The developing pattern indicates that schools have wide latitude in disciplining student speech that occurs at school, a fact which left Justice Thomas uncertain in *Morse* about the current status of *Tinker* in student speech jurisprudence.⁵⁹ Amidst the potential confusion as to what public schools must allow, it is clear from precedent that there are at least four types of speech that schools may control and punish during the school day: speech that materially and substantially disrupts; speech that is lewd or offensive; speech that is school-sponsored; and speech that advocates the use of illegal drugs.⁶⁰

B. Lower Courts Cannot Rely Solely on Supreme Court Precedent in the Arena of Student Private Internet Speech

While schools have been given more and more power to censor student speech occurring during school, it is important to note that the Supreme Court has not had occasion to rule on student speech occurring after school hours. *Tinker*,⁶¹ *Fraser*,⁶² *Kuhlmeier*,⁶³ and *Morse*⁶⁴ provide ample rationale as to why schools must be allowed to control student expression at school, but when the tests outlined in those cases are extended to student speech occurring at places and times when the students are no longer under school supervision, the logic behind each of the tests begins to crack, if not completely crumble.

In *Tinker*, the court warned that “[a]ny word spoken, *in class, in the lunchroom, or on the campus*, that deviates from the views of another person may start an argument or cause a

58. *Morse*, 551 U.S. at 403-06, 410; *see supra* note 54 and accompanying text.

59. *Morse*, 551 U.S. at 403-06; *id.* at 418 (“Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not.”) (Thomas, J., dissenting).

60. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 688-89 (1986); *Tinker*, 393 U.S. at 514.

61. *Tinker*, 393 U.S. at 507.

62. *Fraser*, 478 U.S. at 680.

63. *Kuhlmeier*, 484 U.S. at 271-72.

64. *Morse*, 551 U.S. at 410.

disturbance,”⁶⁵ and that, while the schools must be dedicated to accommodating students, this dedication is only for prescribed hours and only for certain types of activities.⁶⁶ In *Fraser*, the Court concluded that “[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage children,” but stopped far short of holding that students may never use lewd or offensive language.⁶⁷

Justice Brennan, in his concurrence, opined that *Fraser*’s punishment would not have been justified on the grounds that it was inappropriate if it had been spoken outside of the school environment.⁶⁸ When students post sexually explicit or other offensive speech from private computers, the recipient of the speech is not part of a captive classroom audience, and may be neither unsuspecting nor immature – factors which weighed heavily on the Court’s decision to grant school boards the power to decide what is inappropriate in classrooms and school assemblies.⁶⁹ *Kuhlmeier* proves even less helpful in the realm of student private Internet speech because its narrow holding only addresses student speech that is sponsored by the school.⁷⁰

Unlike the preceding cases, *Morse* presented facts that could have allowed the Court to outline the boundaries of school authority because the student expression was occurring off of

65. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503 (1969) (emphasis added). Off-campus locales such as a student’s home are absent from the rationale.

66. *Id.* at 512.

67. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

68. *Id.* at 688 (Brennan, J., concurring) (“If the 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.”).

68. *Id.* at 685.

69. *Id.* at 684 (stating that precedent demonstrates a concern on the part of both parents and school authorities to protect children, especially a captive audience of children, from sexually explicit, indecent, or lewd speech); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (“[S]peech may be more readily subject to restrictions when a school or workplace audience is ‘captive’ and cannot avoid the objectionable speech.”).

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

school property.⁷¹ However, only one paragraph of the entire decision focused on the threshold issue of whether Frederick's banner constituted school speech, and the Court dismissed the fact that Frederick was not geographically located on school property almost without explanation.⁷² Instead, the majority of the opinion simply rationalized the authority of the school to ban school speech advocating the use of illegal drugs.⁷³ However, the Court did acknowledge that there is some outer boundary at which schools can no longer apply school-based precedents.⁷⁴

The *Morse* opinion is important in the realm of student private Internet speech because it demonstrated that a court must first resolve the issue of whether student expression falls within the authority of the school before determining whether it belongs in one of the four categories of speech that schools may control.⁷⁵ However, because the Court did not outline a method for determining how speech that occurs off campus can become school speech, lower courts were left to formulate their own tests.⁷⁶

III. THE LOWER COURTS' APPLICATION OF PRECEDENT TO STUDENT INTERNET SPEECH

In the absence of Supreme Court precedent on how to analyze student speech occurring off campus, the lower courts were left with a dilemma when faced with student private Internet speech.⁷⁷ Though the Supreme Court has appeared to be distancing itself from *Tinker*, it has become the most popular test in the lower courts for analyzing school punishment of student speech occurring on the Internet.⁷⁸ In general, the courts have tried to look for some link between the student expression

71. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

72. *Id.* at 400-01.

73. *Id.* at 401-10.

74. *Id.* at 401 (finding no uncertainty on the facts as to whether the school had passed the boundary of when to apply school-speech precedents).

75. *Id.* at 400 ("At the outset, we reject Frederick's argument that this is not a school speech case"); see *supra* note 54 and accompanying text.

76. See cases cited *supra* note 10.

77. See cases cited *supra* note 10.

78. See cases cited *supra* note 10.

and the school campus, or some disruption of the school.⁷⁹ If the court is able to find a sufficient “nexus” linking the speech to some disruption, or risk of disruption, then the punishment of the student creating the speech has been upheld.⁸⁰ Unfortunately, different courts have had very different opinions about what constitutes a true disruption, and what constitutes a sufficient nexus, as demonstrated by the cases that follow.

In *J.S. v. Bethlehem Area School District*,⁸¹ the Supreme Court of Pennsylvania was careful to examine, first, whether a student’s personal website constituted on-campus or off-campus speech before applying Supreme Court precedent to the student expression.⁸² The student produced a website titled, “Why Should She Die?” from his home computer and on his own time.⁸³ The page contained a diagram of a teacher’s face with arrows pointing out physical flaws⁸⁴ and a solicitation for twenty dollars to “help pay for the hit-man.”⁸⁵

The Court held that there was a sufficient nexus between the website and the school campus to classify it as on-campus speech because the website was aimed at the school and because the student accessed the website at school for the purpose of showing other students.⁸⁶ Only after determining that there was a nexus between the off-campus speech and the school campus, did the Court use a *Tinker* analysis to conclude that the site caused a material and substantial disruption of the school day because, among other things, the math teacher was afraid for her life, suffered severe mental trauma, and was forced to take a medical leave of absence from the school.⁸⁷

79. See cases cited *supra* note 10.

80. See cases cited *supra* note 10.

81. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

82. *Id.* at 864-65.

83. *Id.* at 850.

84. *Id.* at 858.

85. *Id.* at 851. Lines from the photograph of Mrs. Fulmer connected to four statements regarding the author’s reasons why Mrs. Fulmer should die. The statements were: (1) “Is it a rug, or God’s Mistake?” (2) “Puke Green Eyes” (3) “Zit!” and (4) “Hideous smile.” *Id.* at n.4.

86. *Id.* at 865.

87. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

The United States Court of Appeals for the Third Circuit reached the opposite decision when faced with similarly school-targeted, albeit less threatening, Internet postings.⁸⁸ Justin Layshock created a fake MySpace profile for his principal using his grandmother's computer and a picture that he copied and pasted from the school website.⁸⁹ The fictitious profile consisted of answers to various personal questions that Layshock answered while posing as the principal.⁹⁰ The bogus answers all centered around the theme of "big" in an apparent attempt to make fun of the principal because of his large size.⁹¹ Layshock invited other students from the district to view the profile by listing them as "friends" on the MySpace website.⁹² News of the page "spread like wildfire" and despite the best efforts of the administration to block the site, students were able to view it from school computers.⁹³ Layshock accessed the site at least one time from a school computer in order to show it to other students.⁹⁴

The district court employed a nexus analysis and found an insufficient causal link between the off-campus Internet speech and the disruption of the school day because the school failed to establish that the disruption was caused by Layshock's Internet site.⁹⁵ The court continued to hold that even if there were a sufficient nexus, a reasonable jury could not conclude that the "substantial disruption" standard of *Tinker* could be met because there had been no widespread disorder at the school,

88. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 264 (3d Cir. 2010).

89. *Id.* at 252.

90. *Id.*

91. *See id.* at 252-53. In response to a question regarding whether the principal had smoked in the past month, the profile says "big blunt." *Id.* In response to the question, "ever been beaten up," the profile says "big fag." *Id.* The answer to the question "in the past month have you gone on a date?" is "big hard-on." *Id.* The profile also refers to the principal as a "big steroid freak" and "big whore." *Id.*

92. *Id.* at 253.

93. *Id.*

94. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 253 (3d Cir. 2010).

95. *See Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007). There were three other similar sites circulating at the time that Layshock's site was visible. *Id.*

none of the classes had been canceled, and there was no violence or student disciplinary action.⁹⁶ In fact, the court implied that any disruption at school may have been caused by the administration's reaction to the site by having the computers locked down and by investigating students.⁹⁷ The court suggested that the nexus requirement might be met if Layshock were punished for accessing the site at school, but the record indicated that the school staff did not know that Layshock had accessed the site from a school computer at the time that he was disciplined.⁹⁸

On appeal, the school attempted to show a nexus between the website and the school because Layshock had accessed the school's website to copy a picture of the principal in order to paste it onto the fictitious MySpace page.⁹⁹ The Court of Appeals was not persuaded, and in finding that the act of signing into the school website was a far cry from trespass, stated that it would be "unseemly and dangerous" to begin allowing school authorities to reach into the homes of children as if they were at school.¹⁰⁰

However, when confronted with a more vulgar MySpace profile, the Third Circuit was able to find a nexus despite the fact that no material disruption of school occurred.¹⁰¹ In *Snyder v. Blue Mountain School District*,¹⁰² a middle school student created a fake profile for her principal from her parent's computer during non-school hours.¹⁰³ The court characterized the speech as "challenging [the principal's] fitness to hold his position by means of baseless, lewd, vulgar, and offensive language."¹⁰⁴ Under facts strikingly similar to *Layshock*, the court found that no actual disruption had occurred to satisfy

96. *Id.*

97. *Id.*

98. *Id.* at 600-01.

99. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 259-60 (3d Cir. 2010).

100. *Id.* at 258-59.

101. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.* 593 F.3d 286, 299 (3d Cir. 2010) (finding that there was a disruption, but not a substantial disruption).

102. *Id.*

103. *Id.* at 291.

104. *Id.* at 308.

Tinker.¹⁰⁵ However, the court held that when student speech threatens to cause a substantial disruption or material interference with the educational process, the school may act without satisfying any other standard.¹⁰⁶ Because the website was aimed at the principal and lewdly insinuated that he engaged in sexually inappropriate behavior and illegal conduct, the court found that the principal had properly punished the student out of a foreseeable risk of a substantial disruption.¹⁰⁷

In *Wisniewski v. Board of Education*,¹⁰⁸ the Second Circuit was able to make the facts fit *Tinker* by using a double foreseeability test.¹⁰⁹ A student created an icon on his home computer that depicted a pistol firing a bullet into a person's head.¹¹⁰ Beneath the picture were the words, "Kill Mr. Vandermolen."¹¹¹ Vandermolen was the student's English teacher.¹¹² The icon was not public, and over the course of three weeks the student only showed the icon to fifteen people, some of whom were classmates.¹¹³ When the school administration learned of the icon, the student was suspended from school.¹¹⁴ The student was interviewed by both local law enforcement and a psychologist, both of whom determined that the icon was meant as a joke and that the student posed no real threat.¹¹⁵

105. *Id.* Both cases involved a MySpace profile created by a student purporting to be the school principal; created from private computers, away from school, after school hours; and disrupted at the school primarily through the principals' investigations. *Compare id.* at 291-94, with *Layshock*, 593 F.3d at 249-54.

106. *Snyder*, 593 F.3d at 298 (holding that a two-step test is unnecessary before proceeding to a *Tinker* analysis).

107. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.* 593 F.3d 286, 302 (3d Cir. 2010).

108. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007).

109. *Id.* (finding that the "foreseeability of both communication to school authorities, including the teacher, and the risk of substantial disruption is not only reasonable, but clear").

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007).

115. *Id.*

However, the school system found that intent was irrelevant and suspended the student for a full semester.¹¹⁶ The court upheld the school's actions because of the icon's threatening content, "extensive" distribution to classmates, and the three week circulation period made it reasonably foreseeable that the icon would come to the attention of school authorities.¹¹⁷ Once the school authorities were alerted, the court reasoned, it would be reasonably foreseeable that there would be a risk of substantial disruption within the school environment.¹¹⁸

Bethlehem,¹¹⁹ *Layshock*,¹²⁰ *Snyder*,¹²¹ and *Wisniewski*¹²² were all decided using some variation of *Tinker*. The irony is that it appears that the Supreme Court is moving away from *Tinker* because it is too narrow for analyzing on-campus speech, while the lower courts seem to be gravitating to it because it allows them to punish large amounts of off-campus speech. If schools are allowed to punish students for expressions or expressive behavior solely because it causes some disturbance at school, then all manner of protected speech may be censored. For instance, a student that wears a jacket bearing the phrase, "Fuck the Draft" to the local courthouse,¹²³ a student that delivers a lewd and offensive speech outside of the school setting,¹²⁴ or a

116. *Id.* at 37.

117. *Id.* at 38.

118. *Id.* at 38-39.

119. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 855 (Pa. 2002).

120. *Layshock ex rel. v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010) (noting that the district court found that Layshock's conduct caused no disruption at school).

121. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010) (finding that school authorities could have forecasted a substantial disruption of or material interference with the school).

122. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38-39 (2d Cir. 2007) (concluding that the student's conduct crossed the boundaries of protected speech because there was a reasonably foreseeable chance that the school would find out about the icon, and that once the school found out, there would be a reasonably foreseeable risk of disruption).

123. *But see* Cohen v. California, 403 U.S. 15, 26 (1971) (holding that the First and Fourteenth Amendments prohibit the state from punishing a man for wearing a jacket bearing the phrase "Fuck the Draft" into a public courthouse in the presence of children).

124. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 688 (1986) ("If respondent had given the same speech outside of the school environment, he could not

student that creates and distributes a magazine full of sexual humor may create a disruption at school the next day.¹²⁵ The test is broadened even further when schools are allowed to punish student speech for creating merely a risk of disturbance. A student may know that she will likely cause a disturbance at school when she truthfully reports being sexually assaulted by a teacher, but hopefully this risk will not merit her silence. As the lower courts have looked back to *Tinker*, it is unfortunate that some seem to have ignored the powerful message that accompanied the Supreme Court's holding, which was a firm statement that students must be allowed to speak.¹²⁶

The rationales behind the holdings in the various cases are not only incongruent, but they are so specific that lower court precedent in this area appears less like a test and more like an enumeration of several very narrow circumstances in which schools may censor student expression.¹²⁷ A narrow list is not very helpful when other courts are trying to analyze similar speech under different facts, or when individuals are trying to determine what they may or may not say. Instead, a true test is needed to provide the courts, schools, and students a framework

have been penalized simply because government officials found his speech inappropriate.”) (Brennan, J., concurring).

125. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (holding that the First Amendment did not allow schools to punish authorship of a student newspaper conceived, executed, and distributed outside of school).

126. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.”); *id.* at 511 (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

127. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 261 (3d Cir. 2010).

for knowing how to proceed in the realm of student private Internet speech.

IV. A PROPOSED TEST

The District Courts should abandon the nexus test and adopt a new test for determining whether student speech that originates off campus falls under the authority of the schools. Instead of allowing action because of some risk of disturbance, as advocated by the courts in *Snyder* and *Wisniewski*, the courts should only allow schools to punish student expression when it can be considered school speech.¹²⁸ This can be accomplished by applying a threshold analysis analogous to the one employed in *Layshock* and *Bethlehem*.¹²⁹ This comment proposes that courts only consider private student Internet speech to be school speech in three circumstances: (1) when the material is willfully published at school by the student that created the speech; (2) when the speech violates the rights of other students by creating an unsafe school environment; or (3) when a reasonable observer would attribute the speech as occurring under the auspices of the school.¹³⁰ Only after a finding that the student's private Internet postings meet one or more of the above tests should the court apply Supreme Court precedent to determine whether the school speech falls within one of the four categories of speech that schools may punish.¹³¹

128. See J.S. *ex rel.* *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 302 (3d Cir. 2010); see also *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007).

129. J.S. *ex rel.* *H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) ("First, a threshold issue regarding the "location" of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?"); see *Layshock*, 593 F.3d at 259-60 (analyzing first whether the student's internet speech was school speech.).

130. This comment does not propose a new test for how schools may regulate school speech. If one of the three factors outlined is met, the court must still determine that either *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* is triggered before undertaking censorship of student speech.

131. See *supra* note 54 and accompanying text.

A. Student Private Internet Speech That Is Willfully Published At School

Speech that is protected by the First Amendment in one forum may no longer be protected when it is brought into another.¹³² In *Morse*, the Court made reference to *Fraser* by stating, “[h]ad Fraser delivered the same speech . . . outside the school context, it would have been protected.”¹³³ The Court cited as its authority for this statement the landmark case of *Cohen v. California*.¹³⁴ The majority cited *Cohen* again by stating that “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”¹³⁵ The Supreme Court implies with this statement that students may wear jackets bearing offensive speech, but when the jacket is exhibited on school grounds it becomes unacceptable school speech.¹³⁶ The same reasoning can be applied to Internet speech: even if the speech is protected by the First Amendment when created away from school, when the creator accesses the speech from a school computer he purposefully brings it within the boundaries of school authority.

However, this analysis must not ignore the element of willfulness, or intention, on the part of the student. Courts have recognized the difficulty in trying to keep off-campus speech away from school computers as virtually anything that is put on the Internet has the potential to be accessed by someone at school.¹³⁷ But, while the Internet has certainly made

132. *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *see id.* at 405 (“In school, however, Fraser’s *First Amendment* rights were circumscribed in light of the special characteristics of the school environment.”); *see also* *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

133. *Morse*, 551 at 405 (Brennan, J., concurring) (citing *Fraser*, 478 U.S. at 682-83).

134. *Fraser*, 478 U.S. at 405; *Cohen v. California*, 403 U.S. 15, 26 (1971) (prohibiting punishment of a man for wearing a jacket that says, “Fuck the draft” into a courthouse against a policy forbidding such speech inside the courthouse).

135. *Fraser*, 478 U.S. at 682-83.

136. *Id.* The court did not take into consideration where Cohen’s jacket originated.

137. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07CV585, 2008 U.S. Dist. LEXIS 72685, at *20 (M.D. Pa. Sept. 11, 2008) (recognizing that off-campus internet speech “almost inevitably leaks onto campus”).

information more fluid, it has not created a river that empties unchecked into the school system. In order for information from the Internet to enter the school building, someone has to sit down at a computer and search for it. If students are punished for their speech that is brought to school by other students or staff members, then they will no longer have freedom of expression on the Internet.¹³⁸ Where the Supreme Court has found it permissible for students to own Cohen's jacket, it is unreasonable to punish the owner when another finds the jacket in the owner's closet and wears the jacket school.¹³⁹

In *Layshock*, the District Court applied the spirit of this test by recognizing that, had the school known that Layshock accessed his site from a school computer, it may have been justified in punishing his speech.¹⁴⁰ In *Snyder*, however, the Court allowed the school to punish the student because, in part, the principal accessed the site at school.¹⁴¹ If every website accessed by a school principal becomes school speech, then it is impossible for students to put anything on the Internet without having to answer to the school.¹⁴² Under a *Wisniewski* analysis, students cannot even avoid punishment by making sure that information on the Internet can only be viewed by a hand-

138. Analyses that urge that student postings become school speech when the poster "reasonably knows" that the speech will be accessed at school are flawed for the same reason. Virtually anything posted online could reasonably crop up at school.

139. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617-18 (5th Cir. 2004) (holding that a student's violent drawing taken to school by his brother was not school speech because it was not created on campus nor aimed at campus); but see *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39-40 (2d Cir. 2007) (finding that an instant messaging icon was school speech despite the fact that it was set to private and the only person that accessed it at school was the principal).

140. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600-01 (W.D. Pa. 2007).

141. *Snyder*, 2008 U.S. Dist. LEXIS 72685, at *22; *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 292 (3d Cir. 2010) ("Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school.").

142. See *Snyder*, 593 F.3d at 303 (finding that student did not take steps to keep MySpace profile out of school because anyone that knew the URL could access the site).

picked group because they must presume one of their friends will report them to the school administration.¹⁴³

Decisions that find a nexus to school based on the fact that the topic concerns school or is shared with peers are equally troublesome because, if students cannot express themselves to their classmates, then expression becomes pointless. In other words, if the determination of whether the expression is school speech rests on whether it was intended to reach other students, then virtually all student Internet speech is also school speech. Students spend a lot of time at school, and it is only natural that they will want to discuss what they find on the Internet with others who share the same experience. Instead of punishing students for intending to communicate with their peers, schools should only scrutinize students that intentionally communicate with their peers *while at school*.

B. Private Internet Speech That Violates the Rights of Other Students

As part of its holding in *Tinker*, the Supreme Court found that school speech should not violate the rights of other students.¹⁴⁴ But, the Court gave no indication as to what the rights of other students were.¹⁴⁵ Justice Alito seems to believe that these rights might arise based on the “special characteristics” of the school setting.¹⁴⁶ First, Justice Alito opines that, realistically, most parents have little choice but to send their children to a public school.¹⁴⁷ Then, he explains that school attendance exposes students to real physical threats without the protective presence of their parents.¹⁴⁸ While free to avoid threatening people and situations outside of school, students in school may be forced to

143. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39-40 (2d Cir. 2007) (finding that the icon, when distributed to fifteen persons, some of whom were classmates, made the risk of eventual transmission to school administration foreseeable, if not inevitable).

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

145. *See id.* at 512-14.

146. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., joined by Kennedy, J., concurring).

147. *Id.*

148. *Id.*

spend time in close proximity to other students that may do them real harm.¹⁴⁹

In light of Justice Alito's description of the school setting, perhaps one of the rights referenced by the Court in *Tinker* is the right of a student to learn in an environment free from unnecessary fear of harm. If students have such a right, then it is possible that the court may find a compelling government interest in preserving that right. Under a properly worded statute aimed at preventing bullying, even private Internet speech could constitutionally be brought within the boundaries of school authority when that speech is being used for the express purpose of creating a threatening and miserable learning environment for other students that are incapable of escaping an encounter with their antagonist.

It must be noted that there is no provision under the proposed test for the protection of teachers and administrators from private Internet speech. This is because adult employees of the school system may not have any extra rights created by the "special characteristics" of the school setting.¹⁵⁰ Specifically, unlike the students, the adults in school are not compelled to attend. School administration and staff are not without recourse, however, as they maintain the same protections against private Internet speech that belong to any other professional.¹⁵¹

It is redundant to give schools authority to judge speech simply because it is criminal or gives rise to civil liability, as courts are already charged with that task.¹⁵² In fact, courts have reasoned that school administrators are trusted with such broad

149. *Id.*

150. *But see* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07CV585, 2008 U.S. Dist. LEXIS 72685, at *18-19n.4 (M.D. Pa. Sept. 11, 2008) (finding that a defamatory website indicating that principal engages in inappropriate sexual behaviors affected rights of principal because it could be damaging to his reputation).

151. *See Snyder*, 593 F.3d at 308 ("Aggrieved schools and school officials may seek redress through civil lawsuits and perhaps even by pressing criminal charges.") (Chandler, J., dissenting).

152. *Evans v. Bayer*, No. 08-61952, 2010 U.S. Dist. LEXIS 12560, at *19 (S.D. Fla. February 12, 2010) ("Moreover, if school administrators were able to restrict speech based upon a concern for the potential of defamation ... students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom.").

authority at school because that power is limited to the school setting.¹⁵³ School administrators are not judges trained in the law.¹⁵⁴ Courts are better suited for determining whether speech is criminal or unprotected by the First Amendment, especially considering that if administrators are left to make their own determination as to whether speech is defamatory, they are often left judging speech that is directed at them.¹⁵⁵

As for student speech that does not trigger criminal or civil action, school personnel are expected to be more mature than the students whom they teach.¹⁵⁶ Both the Supreme Court of Pennsylvania in *Bethlehem* and the District Court in *Snyder* cite the fear of a reaction from school personnel as proof of a disturbance at school.¹⁵⁷ This fact might lead more

153. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1044-45, 1052 (2d Cir. 1979).

154. *See id.* at 1048 (“[T]he caselaw explicating the limits of governmental authority over expression counsels, both implicitly and explicitly, that the constitutional status of speech be determined by the judiciary, the one institution of government intentionally designed to render dispassionate justice.”).

155. In *Thomas*, the court emphasized that a principal’s intimate association with the school gives him a vested interest in suppressing controversy. This interest presents a conflict when the principal acts as both judge and prosecutor in suppressing student speech. *See id.* at 1051.

156. *See Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986) (“The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy. I know that the prophecy implied in their testimony will not be fulfilled. I think that they know that, too The Court can only conclude, contrary to what might be its reflexive, uninformed judgment, that “the finger,” at least when used against a universe of teachers, is not likely to provoke a violent response.”).

157. The court in *Bethlehem* held that the student should have known that once the teacher and administrators found out about the icon that there would be a risk of substantial disruption. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 n.14 (Pa. 2002). Therefore, the Court seems to be afraid of a disturbance caused by the reaction of the teacher and administrators. *See id.*; *see also J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685, *21-22 (M.D. Pa. Sept. 11, 2008).

sophisticated principals to take advantage of this “heckler’s veto” under the nexus test.¹⁵⁸

C. *The Reasonable Observer Test*

The Supreme Court has recognized the need for a school to distance itself from inappropriate speech.¹⁵⁹ In *Fraser*, the Court found that it was “appropriate for the school to disassociate itself” from the vulgar speech in order to show that it did not approve of the conduct.¹⁶⁰ In *Kuhlmeier*, the Court held that the school needed to have more control of school-sponsored student publications so that the “views of the individual speaker are not erroneously attributed to the school.”¹⁶¹ It is possible that *Morse* expanded the power of the school to distance itself from certain types of nonschool-sponsored publications, including some types of student private Internet speech.

It should not be surprising that the Court in *Morse* did not immediately balk at the fact that Frederick was not standing on school property at the moment that he was asked to put away his infamous banner.¹⁶² Schools have long punished students for misconduct on field trips or school sporting events away from campus.¹⁶³ While Frederick was not technically on a field trip, the Court listed six facts, with very little discussion, that lead to

158. The term “heckler’s veto” was created by H. Kalven and refers to government suppression of otherwise legitimate speech because of a fear of the reaction of a hostile audience. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140-45 (1965). If governments allow the heckler’s reaction to speech to determine what the Constitution protects, then it is the masses and not the judiciary that would ultimately determine what speech is protected. Donald A. Downs, *Skokie Revisited Hate Group Speech and the First Amendment*, 60 *NOTRE DAME L. REV.* 629, 633-34 (1985).

159. See *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (finding that the principal’s failure to act might send the wrong message to others about how serious the school was about the issue of illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

160. *Fraser*, 478 U.S. at 685.

161. *Kuhlmeier*, 484 U.S. at 271.

162. *Morse*, 551 U.S. at 400-01.

163. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007).

a conclusion that his banner was school speech.¹⁶⁴ Those six facts were that the event occurred during school hours, the event was sanctioned by the principal as an approved social event or class trip, teachers and administrators were interspersed among the students and charged with supervising them, the high school band and cheerleaders performed, Frederick was standing with his classmates, and the banner was directed towards the school.¹⁶⁵

Perhaps the Court's underlying justification for determining that the banner was school speech was that a reasonable outside observer would have believed that Frederick was under the authority of the school at the time of its display.¹⁶⁶ This supposition is supported by the Court's assertion that Frederick could not stand in the midst of his fellow students and claim that he was not at school.¹⁶⁷ If principals were unable to censor students that appeared to be under their control, then it would have the opposite effect of appearing as if the school condoned the speech in question. Putting an end to this effect comports with dicta found both in *Kuhlmeier* and *Fraser*.¹⁶⁸

More circumstantial evidence of an application of a "reasonable observer" test becomes apparent if one speculates as to the motivations of the Court in justifying the censorship of Frederick's banner. While the use of drugs by young Americans may be a very real problem, it stretches the boundaries of imagination to assume that a student would see Frederick's message and decide to try marijuana. Instead, it may be a more rational assumption that the principal wanted the banner to be removed quickly because he was embarrassed and feared a backlash from the community. The parade was

164. *Morse*, 551 U.S. at 400-01.

165. *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007).

166. *Id.* It may not be a giant leap from school-sponsored to school-approved. *Cf.* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (defining school-sponsored speech as speech a reasonable observer would view as school's own speech).

167. *Morse*, 551 U.S. at 401.

168. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988) (indicating that the school must be free to disassociate from those views which are against the purpose of the school.); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (indicating that the school was right to disassociate itself from the language used in order to show that such speech is not appropriate in a civilized society).

televised; in fact, Frederick characterized the event as a meaningless and funny attempt to get on television.¹⁶⁹ Also, there were members of the community present, all of whom were likely mindful of the presence of the students and teachers.¹⁷⁰ An embarrassing incident could have had the community talking for a long time and the principal's phone ringing with complaints.

School administrators and teachers should be allowed to censor student speech that a reasonable outside observer in the community would believe occurred while the student was under the authority of the school, regardless of whether the speech actually originated on school campus. This test would allow administrators to act quickly in situations where action is necessary to save the reputation of the school, would mesh with the Court's dicta in *Kuhlmeier*,¹⁷¹ and would offer a potential explanation for the Court's finding that Frederick's banner was school speech.¹⁷² The reasonable observer test would also justify school authority for control of student speech while students are away from campus on school field trips.¹⁷³ Possible situations where student private Internet speech could appear to a reasonable observer to occur while the student is under the authority of the school are student-created media made to look like school work, online postings fraudulently purporting to be made from a school computer, and emails sent from school email addresses.

V. ANALYSIS OF GEORGIA LAW UNDER THE PROPOSED TEST

The Constitution of the State of Georgia also contains a guarantee of freedom of expression.¹⁷⁴ However, the freedom granted by the Georgia State Constitution is no broader a guarantee than the First Amendment of the Federal Constitution.¹⁷⁵ Because the proposed test is designed to

169. *Morse*, 551 U.S. at 401.

170. *Id.*

171. *Kuhlmeier*, 484 U.S. at 266-67.

172. *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

173. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007).

174. GA. CONST. art. I, § 1, para. 5.

175. *Cahill v. Cobb Place Assocs.*, 519 S.E.2d 449, 450 (Ga. 1999) (stating that Georgia's constitutional free speech provision does not confer

maximize student rights under the Federal Constitution, it is also appropriate for analyzing speech under Georgia's Constitution.

A. Georgia School Statutes and Off-Campus Behavior

The Official Code of Georgia requires that all schools shall have a student code of conduct that addresses the behavior of students during school hours, at school related functions, and on the school bus.¹⁷⁶ However, O.C.G.A. § 20-2-751.5(c) provides that “[e]ach student code of conduct shall also contain provisions that address any off-campus behavior of a student which could result in the student being criminally charged with a felony and which makes the student’s continued presence at the school a potential danger to persons or property at the school or which disrupts the educational process.”¹⁷⁷ It seems that the statute gives schools the power to bring student private Internet speech under the umbrella of school authority when the speech is both felonious and also either a danger or a disruption.¹⁷⁸

The test proposed by this comment classifies student speech as school speech when it violates the rights of other students—specifically the right to learn in a safe environment. Any speech that endangers the students in the school building could be censored by the school system under the test, regardless of the criminal nature of the speech. An argument could also be made that while teachers may not have the special rights of students, any speech that results in actual danger to any person or property at the school while the students are on campus will put the students under reasonable fear and apprehension for their own safety.¹⁷⁹ By protecting the rights of students in the special

any greater free speech right than the United States Constitution); *but see* State v. Fielden, 629 S.E.2d 252, 255 (Ga. 2006) (stating that the Georgia Constitution confers even broader protection for expression than the First Amendment (citing State v. Miller, 398 S.E.2d 547, 550 (Ga. 1990))).

176. O.C.G.A. § 20-2-751.1(a) (2009).

177. O.C.G.A. § 20-2-751.1(c) (2009).

178. *Id.*

179. Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007). For instance, had the student in *Wisniewski* actually intended for his expression to be a true threat towards his teacher, it would likely be reasonable for his classmates to be in fear of attending school. *Id.*

circumstances of the school setting, O.C.G.A. § 20-2-751.5(c) properly brings such dangerous speech under the authority of the school system.

However, some types of felonious speech might not create an unsafe learning environment.¹⁸⁰ The Georgia statute would also bring felonious speech under the authority of the school when it creates a disturbance of the educational process.¹⁸¹ The proposed constitutional test purposefully ignores whether the student speech could result in criminal charges or civil liability because school authority should not hinge on whether another agency could punish a student, but rather on whether the off-campus expression is school speech. While schools do have the power to punish some types of off-campus speech that are disruptive to the educational process, the whole purpose of the proposed test is to clearly divorce the analysis of whether the student private Internet speech is also school speech from an analysis of whether school speech gives rise to a disturbance so as to satisfy *Tinker*.¹⁸² Therefore, O.C.G.A. § 20-2-751.5(c) improperly allows schools to punish student private Internet speech that disrupts the school day without mandating that the school first determine that the speech is school speech. Despite the fact that the statute gives more authority to local school boards than the proposed test would allow, an analysis of individual student codes of conduct throughout Georgia reveals that many school systems believe that their authority to control

180. For example, charges of harassment when the alleged student harassment was aimed at non-school personnel or charges of transmission of child pornography, while criminal, may not necessarily create an unsafe school. See Murad Ahmed, *Teen 'Sexting' Craze Leading to Child Porn Arrests in U.S.*, TIMESONLINE, Jan. 14, 2009, http://technology.timesonline.co.uk/tol/news/tech_and_web/article5516511.ece. Sexting is a "new trend spreading across America" that involves teens sending nude photographs of themselves via their mobile phones. *Id.* This practice has led to serious consequences for several teens. For instance, in Texas, a thirteen year-old boy was arrested and charged with possession of child pornography for receiving a nude photo of a fellow student on his phone. *Id.*

181. O.C.G.A. § 20-2-751.1(c) (2009).

182. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

off-campus student behavior extends beyond the provisions of O.C.G.A. § 20-2-751.5.¹⁸³

B. Student Codes of Conduct in Georgia

Schools in Georgia appear to treat the school code statute as a floor and not a ceiling for school authority.¹⁸⁴ For instance, some codes ignore the felony requirement of O.C.G.A. § 20-2-751.5 and simply allow schools to punish acts that *could* result

183. See generally BIBB COUNTY SCHOOL DISTRICT, CODE OF CONDUCT 18 (2009-2010), available at http://www.bibb.k12.ga.us/images/secondary_conduct.pdf [hereinafter BIBB]; BREMEN CITY SCHOOL SYSTEM, STUDENT HANDBOOK 44 (2008-2009), available at <http://www.bremencs.com/bhs/20082009/Docs/08StudentHandbook.pdf> [hereinafter BREMEN]; BUFORD CITY SCHOOLS, STUDENT AGENDA 44 (2009-2010), available at <http://www.bufordcityschools.org/bhs/files/09-10%20Student%20Agenda.pdf> [hereinafter BUFORD]; CAMDEN COUNTY HIGH SCHOOL, STUDENT HANDBOOK 44 (2009-2010), available at <http://wildcat.camden.k12.ga.us/Student%20Handbook.doc> [hereinafter CAMDEN]; CARTERSVILLE HIGH SCHOOL, STUDENT/PARENT HANDBOOK 28 (2009-2010), available at <http://www.cartersville.k12.ga.us/CHS/pdfs/studenthandbook0910.pdf> [hereinafter CARTERSVILLE]; FAYETTE COUNTY SCHOOL SYSTEM, STUDENT CODE OF CONDUCT SECONDARY 6 (2009-2010), available at http://www.fcboe.org/joomla153/files/discipline/codeofconduct_secondary.pdf [hereinafter FAYETTE]; FLOYD COUNTY SCHOOL SYSTEM, COOSA HIGH SCHOOL STUDENT HANDBOOK 25 (2009-2010), available at <http://www.floydboe.net/SchoolFacts/handbooks/CHS.pdf> [hereinafter FLOYD]; FULTON COUNTY SCHOOL SYSTEM, CODE OF CONDUCT & DISCIPLINE HANDBOOK 16 (2009-2010), available at http://www.fultonschools.org/Dept/documents/HS_handbook_000.pdf [hereinafter FULTON]; SAVANNAH-CHATHAM COUNTY PUBLIC SCHOOL SYSTEM, CODE OF CONDUCT 10 (2009-2010), available at http://www.sccpss.com/PDFs/Code_of_Conduct_2009-2010.pdf [hereinafter SAVANNAH-CHATHAM]; UNION COUNTY SCHOOLS, PARENT-STUDENT HANDBOOK CODE OF CONDUCT 4 (2009-2010), available at http://www.union.k12.ga.us/uploads/rb/ob/rbob8qr6k60jXn7yWeP4gA/Parent_Student_Handbook-09_10_Final.pdf [hereinafter UNION]; WAYNE COUNTY HIGH SCHOOL, 2009-10 PARENT/STUDENT HANDBOOK 28 (2009-2010), available at <http://www.wayne.k12.ga.us/Schools/Handbooks/WCHS%20Handbook%202010.pdf> [hereinafter WAYNE].

184. See school codes cited *supra* note 183.

in criminal charges.¹⁸⁵ Other codes of conduct include the language of O.C.G.A. § 20-2-751.5(c), but then include an additional statement that indicates that schools may punish off-campus activities that have an immediate and direct effect on discipline in the school or an adverse effect on the safety and welfare of the students.¹⁸⁶ This language is probably the result of case law from other jurisdictions concerning the authority of schools to punish off-campus behavior and should be impermissible because it allows the school to punish any expression that may somehow affect the school, without a preliminary determination that the expression is school speech. While the proposed test allows schools to punish off-campus speech that adversely affects the safety and welfare of the students, the test requires more than a mere showing that student private Internet speech caused some effect on campus.

Still other student codes of conduct attempt to expand school authority to any act by a student that disrupts the operation of the school system.¹⁸⁷ The mere fact that student private Internet speech causes some disruption at school cannot be enough to bring the speech under the authority of the school. Perhaps school systems in Georgia have added this language to their student code of conduct in a response to O.C.G.A. § 20-2-1181, which makes it a misdemeanor of a high and aggravated nature to “disrupt or interfere with the operation of any public school .

185. See BREMEN, *supra* note 183, at 44 (stating that student code of conduct covers conduct off of school grounds when that conduct could result in a student being “criminally charged.”); FULTON, *supra* note 183, at 16 (stating students may be disciplined for off-campus conduct which includes, but is not limited to, felony charges); BIBB, *supra* note 183, at 18 (stating students may be disciplined for off-campus conduct which includes, but is not limited to, felony charges).

186. BIBB, *supra* note 183, at 18; BREMEN, *supra* note 183, at 44; BUFORD, *supra* note 183, at 44; CAMDEN, *supra* note 183, at 44; CARTERSVILLE, *supra* note 183, at 28; FLOYD, *supra* note 183, at 25; FULTON, *supra* note 183, at 16; SAVANNAH-CHATHAM, *supra* note 183, at 10; UNION, *supra* note 183, at 4.

187. FULTON, *supra* note 183, at 16; FLOYD, *supra* note 183, at 25; BUFORD, *supra* note 183, at 44; UNION, *supra* note 183, at 4; SAVANNAH-CHATHAM, *supra* note 183, at 10; CARTERSVILLE, *supra* note 183, at 28; WAYNE, *supra* note 183 at 28.

. . .”¹⁸⁸ However, the author maintains that speech should not automatically be under the control of the school merely because it is criminal in nature, but rather when it meets one of the three elements of the proposed test. If student speech is disruptive so as to be criminal under the law, then that fact can be determined by a court of law with punishment meted out through the appropriate channels of an unbiased legal system.¹⁸⁹

A similar broadening of school authority from statute to school code can be found in the area of school bullying. O.C.G.A. § 20-2-751.4 prohibits any bullying between students, and both definitions given in the statute seem to require a physical presence.¹⁹⁰ However, several systems have adopted student codes of conduct that also prohibit cyberbullying.¹⁹¹ As discussed above, as long as the code of conduct is narrowly

188. See FAYETTE, *supra* note 183, at 28 (citing O.C.G.A. §20-2-1181 (2009) as authority for the rule against school disruption).

189. Some school systems even have provisions in their student codes of conduct that allow the school to punish torts or simply disrespect occurring off campus. FAYETTE, *supra* note 183, at 16 (stating that off-campus behavior that is disrespectful to school personnel is prohibited); CAMDEN, *supra* note 183, at 45-46 (prohibiting off-campus behavior that results in physical harm to school employees); SAVANNAH-CHATHAM, *supra* note 183, at 10 (forbidding slander or libel).

190. O.C.G.A. § 20-2-751.4(a) (2009) (“As used in this Code section, the term ‘bullying’ means: (1) Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so; or (2) Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm.”).

191. BIBB, *supra* note 183 (defining cyberbullying as “[t]he use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging (IM), personal web sites, online personal polling web sites, social networking web sites (such as MySpace, Facebook, etc.) to support deliberate, repeated, or hostile behavior by an individual or group that is intended to harm others. Cyberbullying includes but is not limited to (1) harassing, (2) teasing, (3) defaming, (4) intimidating, (5) threatening, or (6) terrorizing another person by sending or posting inappropriate and hurtful e-mail messages, instant messages, text messages, digital pictures or images, website postings, or blog postings.”); *id.* at 58 (giving schools authority to punish off-campus cyberbullying when it disrupts the educational process, the educational environment, interferes with the rights of others, or is a true threat); *see also* SAVANNAH-CHATHAM, *supra* note 183, at 19 (forbidding harassment through use of electronic devices); UNION, *supra* note 183, at 15 (giving O.C.G.A. definition of bullying, but then stating that cyber bullying is included).

tailored and is aimed at protecting students' rights to learn in a safe environment, it should withstand the proposed test.

Lastly, O.C.G.A. § 20-2-751.5(a)(17) dictates that schools shall address instances where a student is guilty of “[f]alsifying, misrepresenting, omitting, or erroneously reporting information regarding instances of alleged inappropriate behavior by a teacher, administrator, or other school employee toward a student.”¹⁹² It seems clear that the legislature intended this paragraph to be an added protection to the reputation of teachers. However, the protection might extend too far. The paragraph begins with verbs implying intent, but then includes the term “erroneously.”¹⁹³ If the legislature intended for schools to only address intentional misconduct, then the word “erroneously” adds nothing to the phrase that is not already supplied by the verbs “falsify” and “misrepresent.” Therefore, it appears that the statute was written with the intent to allow schools to address even good faith mistakes on the part of a student. In an area such as sexual misconduct, where it is historically difficult for victims or their friends to come forward, it is questionable whether it is good policy for Georgia schools to punish a report made with a good faith belief to be true but later determined to be in error.¹⁹⁴

As Georgia courts are given the opportunity to rule on the statutes enumerated above, they should construe them narrowly in order to fit them within the proposed constitutional test. When determining whether student speech may be punished by the school system, the courts should ignore whether the student speech resulted in, or could have resulted in, felony charges. Perhaps most importantly, schools in Georgia must not be allowed to punish student speech simply because it has some de minimus impact on the school day so as to satisfy the base

192. O.C.G.A. § 20-2-751.5(a)(17) (2009).

193. *Id.*

194. Abused children often feel guilty for their own abuse as well as fear retaliatory action from their abusers. Nancy Faulkner, Ph.D., *School Based Research on Undisclosed Sexual Abuse: Shouldn't Children Have the Right to Speak Out Anonymously?*, available at <http://www.prevent-abuse-now.com/shouldntChildren.htm> (last visited Mar. 5, 2010). Many victims of abuse fail to report because they are afraid that a confession will bring even worse consequences than being abused again. *Id.*

requirements of O.C.G.A. § 20-2-1181.¹⁹⁵ The statute should not apply to student private Internet speech because it fails to address whether or not the student expression has become school speech.¹⁹⁶ Finally, O.C.G.A. § 20-2-751.5(a)(17) should be construed narrowly to only allow punishment of students whose reports of teacher misconduct are intentionally untrue or when they are given with a reckless disregard for the truth, lest the state risk chilling the speech of those students who have reason to suspect illegal activity but are afraid to come forward.

VI. CONCLUSION

From the time that *Tinker* recognized that “students do not shed their constitutional rights at the schoolhouse gate,”¹⁹⁷ courts have been faced with many conflicting ideals.¹⁹⁸ Those who fear that schools might become enclaves of totalitarianism must struggle with the fear that to give students too much freedom would be to surrender control of the school to the students.¹⁹⁹ These conflicts have been made far more difficult in an age where technology allows information to flow easily from home to school and back again. However, in this “information age” in which we live, it is all the more important that schools prepare young children to be able to communicate and to use the technology that is available. Students, as surely they have done in some form since the dawn of schools, “will test the limits of acceptable behavior in myriad ways” and perhaps “school officials need a degree of flexible authority to respond to disciplinary challenges.”²⁰⁰ But, as the court asserted in *Layshock*, the power that comes with such a wide degree of

195. See *In re D.H.*, 663 S.E.2d 139, 140 (Ga. 2008).

196. Cf. O.C.G.A. § 16-11-34 (2006); *State v. Fielden*, 629 S.E.2d 252, 256-57 (Ga. 2006) (holding O.C.G.A. § 16-11-34 unconstitutionally overbroad because the statute does not require proof of intent or proof of actual and substantial disturbance, and because the literal language of the statute forbids innocent and constitutionally protected conduct in such a way that it cannot be subjected to any narrowing interpretation by the courts).

197. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

198. See *supra* Part III.

199. See *Tinker*, 393 U.S. at 511; see also *id.* at 526 (Black, J., dissenting).

200. *Morse v. Frederick*, 551 U.S. 393, 428 (2007).

authority must be tempered by the confinement of that power within the school setting, and when the school day ends students should be free to speak their mind so that the community is not deprived of their expression.²⁰¹ In order to maintain this balance, courts should first, before applying *Tinker*²⁰² or any other school speech precedent to student private Internet speech, determine whether one of the three proposed factors pulls the speech within the boundaries of school authority. This test should be clearly established by the courts so that students throughout Georgia will realize the same First Amendment rights rather than experience the wide discrepancy that currently exists in student codes of conduct throughout the state. Without a clear rule, protected expression will continue to be chilled because those who would speak will remain silent for fear of violating the law.

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201. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

202. *Tinker*, 393 U.S. 503.

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