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Tinker-ing with Speech Categories: Solving the Off-Campus Student Speech Problem with a Categorical Approach and a Comprehensive Framework

Scott Dranoff

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NOTES

TINKER-ING WITH SPEECH CATEGORIES: SOLVING THE OFF-CAMPUS STUDENT SPEECH PROBLEM WITH A CATEGORICAL APPROACH AND A COMPREHENSIVE FRAMEWORK

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INTRODUCTION

“You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you.”¹ Online messages like this one, which prompted Megan Meier to kill herself in 2006,² are shockingly common among adolescent and teen students.³ Over half have been bullied online, more than one-third have been threatened online, and over fourteen percent have considered or attempted suicide as a result.⁴ Off-campus student speech, especially that which occurs online, has become a sharpened tool for bullying,⁵ can cause severe and substantial disruptions of the school environment,⁶ and can even foreshadow fatal incidents both on and off campus.⁷ Yet currently no uniform standard for regulating off-campus speech exists.⁸

Off-campus student speech has been a contested topic since the Supreme Court held in *Tinker v. Des Moines Independent Community School District* that on-campus student speech may be regulated if it might reasonably cause a substantial disruption of school activities.⁹ Since then, lower courts have struggled to apply the *Tinker* standard to speech that occurs off campus and, since the

1. Kate E. Schwartz, Note, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 407-08 (2009) (quoting a message sent by the mother of a student, posing as a teenage boy, in an attempt to bully the recipient student).

2. *Id.*

3. See BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html> (last visited Oct. 17, 2013).

4. See *id.*

5. See Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 BYU EDUC. & L.J. 75, 75 (“[C]yberbullying’ is the use of electronic communication technologies to intentionally engage in repeated or widely disseminated cruel acts towards another that results in emotional harm.”).

6. See discussion *infra* Part II.

7. See discussion *infra* Part II.B.

8. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (“There is some uncertainty ... as to when courts should apply school speech precedents.”).

9. 393 U.S. 503, 514 (1969) (holding that schools may regulate on-campus speech that could reasonably cause “substantial disruption of ... school activities”); see *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp. 1328, 1340-41 (S.D. Tex. 1969) (discussing the application of *Tinker* to instances of off-campus student speech).

advent of the Internet, online.¹⁰ The resulting decisions have led to several variations on the Supreme Court's standards.¹¹ In determining whether the speech can be regulated, lower courts have considered factors such as foreseeability of a substantial school disruption,¹² foreseeability that the speech would reach campus,¹³ the actual place of the speech's reception,¹⁴ and the intent of the speaker.¹⁵

Likewise, legal scholars and law students have suggested myriad tests for determining if off-campus student speech can be regulated. These tests include abandonment of the *Tinker* test in off-campus speech cases,¹⁶ application of the *Tinker* test with additional restrictions,¹⁷ various methods of determining the speaker's intended place of dissemination,¹⁸ and frameworks for determining what types of off-campus speech may be regulated under restrictions for on-campus speech.¹⁹

To clarify the disparate case law and academic proposals, this Note will argue for a comprehensive framework that takes a new approach to student speech—the categorical approach. To date, few

10. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-22 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572-73 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

11. See, e.g., *Kowalski*, 652 F.3d at 567; *Wisniewski ex rel. Wisniewski v. Bd. of Ed. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002).

12. *Wisniewski*, 494 F.3d at 39.

13. *Id.*

14. *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998).

15. *Kowalski*, 652 F.3d at 567.

16. See Kenneth R. Pike, Comment, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 974.

17. See Tracy Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1090 (2008); James Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 857 (2010).

18. See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 251-52 (2001); Adamovich, *supra* note 17, at 1090; Patrick, *supra* note 17, at 857; Pike, *supra* note 16, at 974; Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 140 (2003).

19. See Patrick, *supra* note 17, at 857.

scholars have proposed solutions that comprehensively address both on- and off-campus speech, and none have taken the categorical approach advocated here. The proposed framework will regulate student speech according to which of the following categories it falls into: on-campus speech, threatening off-campus speech, nonthreatening off-campus speech about other students, and nonthreatening off-campus speech about teachers or administrators.²⁰

Under the proposed framework, student speech will be considered on-campus if: (1) it actually takes place on campus; (2) it advocates on-campus action; or (3) a reasonable person would believe, given the circumstances, that the student intended for his speech to reach the school.²¹ If student speech is deemed on-campus, it will be subject to the *Tinker* standard and therefore subject to regulation if the speech might reasonably cause substantial disruption of school activities.²²

Speech that does not meet the above standard will be considered off-campus under the proposed framework. Threatening off-campus speech will be subject to regulation if it could reasonably foreshadow violence. Nonthreatening off-campus speech about other students will be subject to regulation if a reasonable person would expect it to cause a substantial disruption of the targeted students' school activities. Nonthreatening off-campus speech about teachers and administrators will be protected from regulation unless it is about a coach or other leader of a voluntary student activity.

This framework is based on the principle that student speech generally receives less constitutional protection than citizen speech in other contexts.²³ Following from that principle, and from the regular damage caused by cyberbullying and similar speech, student speech about other students should receive less First Amendment protection than student speech about teachers and administrators.

20. For the purpose of this Note, the proposed framework will apply only to public school students from elementary school through high school.

21. See Patrick, *supra* note 17, at 888. This prong has the benefit of incorporating the evolving standard of reasonableness as mobile Internet access becomes increasingly ubiquitous.

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

23. See *Bethel Sch. Dist. No. 403 v. Fraser*, 487 U.S. 675, 682 (1986) (“[T]he constitutional rights of students in school are not automatically coextensive with the rights of adults in other settings.”).

Though courts have not explicitly classified off-campus speech based on the party it impacts, one scholar suggests that courts have been doing so implicitly all along.²⁴

Part I of this Note will review the current state of student speech law and proposed approaches to the problem. This will include a review of the four Supreme Court decisions that have addressed student speech, followed by a review of the commentary addressing the on-/off-campus dichotomy, the content and effects of the speech, and the need for an easy-to-apply standard. Part II will give context to this Note's proposed framework and show how it would apply through a review of lower court student speech cases. This analysis will also demonstrate the potential value of nonthreatening student speech about teachers and administrators and suggest a unifying principle for the seemingly disparate lower court case law. Finally, Part III will discuss some of the most formidable potential criticisms of the proposed framework and how they can be addressed.

By adopting this Note's proposed changes to student speech law, courts can promote clarity, consistency, and a better academic environment for all.

I. CURRENT LAW AND PROPOSED SOLUTIONS

In order to appreciate the off-campus student speech problem, an understanding of the foundational case law and the existing scholarship is necessary. This Part will briefly review the Supreme Court case law on student speech and more thoroughly analyze the present state of academic proposals to the off-campus student speech problem. With that background, Part II will move forward with the proposed framework and its application to lower court cases.

24. Willard, *supra* note 5, at 95 ("Thus far, no court has upheld the discipline of a student where the only disruption ... has been directed at a school staff member.").

A. Supreme Court Student Speech Cases

1. *Tinker v. Des Moines Independent Community School District*

In its seminal student speech case, the Supreme Court articulated the rule that would define the contours of over forty years of debate. On the question of whether students could wear black armbands in school to protest the Vietnam war, the Court held that schools may regulate on-campus speech if that speech might reasonably cause “substantial disruption of ... school activities.”²⁵ The Court did not explicitly address the question of off-campus student speech, but implied that off-campus speech was fully protected under the First Amendment with the pronouncement that “[i]t can hardly be argued that ... students ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁶ This foundational precedent has never been overruled, and it has become the bedrock of student speech law in the United States.²⁷

2. *Bethel School District No. 403 v. Fraser*

The second Supreme Court case to address student speech, *Bethel School District No. 403 v. Fraser*, upheld punishment for a student’s “lewd and indecent” speech.²⁸ This case established three essential points for the present discussion. First, the punishable speech was “unrelated to any political viewpoint;”²⁹ second, the speech was punishable because of its content;³⁰ and third, the Court affirmed

25. *Tinker*, 393 U.S. at 514. The court held that the challenged armbands did not constitute such a disruption. *Id.*

26. *Id.* at 506.

27. *See, e.g.*, cases cited *infra* Part II.B-E.

28. 478 U.S. at 676. The student addressed the punished speech to approximately six hundred high school students, age fourteen and older, and in it described a classmate in an “elaborate, graphic, and explicit sexual metaphor.” *Id.* at 677-78.

29. *Id.* at 685.

30. *Id.* As “lewd and indecent,” Fraser’s speech was necessarily regulatable because of the category it fell into. *Id.* at 676. One could infer after this holding that all “lewd and indecent” speech is subject to administrative regulation. *See id.* at 685 (“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech ... would

that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³¹ Thus, the Court held that in some instances, regulation of student speech because of its content is permissible.³²

3. *Hazelwood School District v. Kuhlmeier*

Two years later, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*.³³ The Court held that a high school newspaper did not constitute a public forum, and as a result, in some situations school officials could regulate its content.³⁴ The Court also made an important distinction: individual student expression is entitled to greater protection than speech that could be construed as subsidized by the school.³⁵

4. *Morse v. Frederick*

Most recently, the Supreme Court revisited this issue in the context of speech at a school-sponsored event.³⁶ On a field trip, Joseph Frederick unfurled a banner that his principal, Deborah Morse, believed was advocating illegal drug use.³⁷ Consistent with school policy, Morse confiscated Frederick’s banner and suspended him—a punishment the Court upheld as constitutional.³⁸ Two

undermine the school’s basic educational mission.”).

31. *Id.* at 682.

32. *Id.* at 685.

33. 484 U.S. 260 (1988). In *Kuhlmeier*, a school principal removed two proposed student newspaper articles, one addressing student pregnancy and one addressing the impact of divorce on students, to protect the identities and privacy of the people described in them. *Id.* at 263-64.

34. *See id.* at 270-71. The Court found that the school board’s policy ensuring that articles were “developed within the adopted curriculum and its educational implications” implied that school officials retained control over final publication decisions. *Id.* at 269.

35. *Id.* at 271. This distinction will be essential to the proposed framework’s narrow exception for student speech about certain administrators, as discussed *infra* Part II.E.1.

36. *Morse v. Frederick*, 551 U.S. 393, 396 (2007). The school principal had invited staff and students to watch the Olympic Torch Relay as it passed in front of Frederick’s high school. *Id.* at 397.

37. *Id.* at 396. The now-infamous banner was fourteen feet long, and bore the phrase “BONG HiTS 4 JESUS” in large, easily readable letters. *Id.* at 397.

38. *Id.* at 397 (“[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.... [T]he

important points come from this case. First, the Court upheld regulation of speech that was not strictly on-campus.³⁹ Second, as in *Fraser*, the Court upheld the regulation of speech because it fell into a specific category: here, it was speech “promoting illegal drug use.”⁴⁰

The foregoing cases give several clues to the direction and limits of future student speech decisions. *Tinker* provided the background rule to which all subsequent decisions conform.⁴¹ *Fraser* expanded *Tinker* by adding a categorical exception for lewd speech and reaffirmed that student speech, particularly nonpolitical speech, is subject to less protection than nonstudent speech in other contexts.⁴² *Kuhlmeier* limited *Tinker* to unsubsidized student expression and clarified that schools have greater control over school-sponsored student expression that might “reasonably [be] perceive[d] to bear the imprimatur of the school.”⁴³ Finally, *Morse v. Frederick* slightly expanded the reach of *Tinker* to include off-campus speech at school-sponsored events, and reaffirmed the Court’s willingness to restrict certain categories of student speech.⁴⁴ These cases frame the following discussion and form the basis of this Note’s proposed framework.

B. Academic Proposals

Commentators have offered myriad suggestions for solving the off-campus student speech problem. Given the present state of Supreme Court case law, most commentators focus on whether speech can be considered on- or off-campus before addressing the question of

school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.”).

39. *Id.* at 400-01 (holding that, although Frederick was across the street from the school at the time, he could not “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he [was] not at school.”).

40. *Id.* at 400.

41. Schools may regulate on-campus speech only if that speech might reasonably cause “substantial disruption of ... school activities.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

42. See discussion *supra* Part I.A.2.

43. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

44. See *supra* Part I.A.4.

regulation.⁴⁵ Although there are a variety of different models for distinguishing on- from off-campus student speech, most focus on the intent of the student speaker at the time of the speech.⁴⁶

After answering the on-/off-campus question, one subset of commentators suggests that a student's speech should not be subject to regulation if it occurred off campus.⁴⁷ Others suggest that off-campus speech should be regulated, subject to certain restrictions.⁴⁸ Yet another group of commentators proposes that the content of the speech alone, regardless of its on- or off-campus designation, should determine whether it can be regulated.⁴⁹ This subset deals mainly with speech that impedes learning.⁵⁰ Finally, one commentator even argues that off-campus student speech should be regulated through a personal jurisdiction framework.⁵¹ The difficulty for school administrators to apply such a model proves the need for the clear, easy-to-apply standard for which this Note advocates.

Though a survey of every regulatory model is beyond the scope of this Note, this Part will highlight some of the most promising attributes of the selected frameworks and point out the key weaknesses that have prevented them from being adopted by courts. Each of the following sections will address one of the aforementioned subsets of proposals, and the proposed framework to follow will incorporate the best elements of each. Research indicates that the ideal standard will have three essential elements: (1) a workable model for distinguishing on- from off-campus speech; (2) a clear framework for distinguishing between protected and unprotected off-campus speech; and (3) the simplicity to be applied by busy school administrators "who lack legal training."⁵²

45. See, e.g., Patrick, *supra* note 17, at 857.

46. See, e.g., Calvert, *supra* note 18, at 251-52; Adamovich, *supra* note 17, at 1090; Pike, *supra* note 16, at 974; Tuneski, *supra* note 18, at 140.

47. See, e.g., Calvert, *supra* note 18, at 251-52; Tuneski, *supra* note 18, at 140.

48. See, e.g., Adamovich, *supra* note 17, at 1090; Patrick, *supra* note 17, at 857.

49. See, e.g., Martha McCarthy, *Student Expression that Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 EDUC. L. REP. 1, 15 (2009).

50. See, e.g., *id.* at 1-2.

51. See Kyle W. Brenton, Note, *BONGHITS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1230-44 (2008).

52. Pike, *supra* note 16, at 1005-06; see also Benjamin L. Ellison, Note, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 833 (2010).

1. *The On-/Off- Dichotomy*

As noted above, any standard that addresses off-campus student speech must comport with current Supreme Court case law. As the law currently stands, on-campus student speech may be regulated if it might reasonably cause a “substantial disruption of ... school activities.”⁵³ Therefore, most analyses focus primarily on whether the contested speech can be considered on-campus.

a. *Objective Intent of the Speaker*

Perhaps the most promising framework for making this designation comes from commentator James Patrick, who proposes that schools may regulate student speech as if it took place on campus if “a reasonable person would believe, given the circumstances surrounding the student’s speech, including the mode of technology used and any steps taken to ensure the privacy of the speech, that the student intended to guarantee his speech reached the school.”⁵⁴

This objective test is appealing because of its simplicity. It does not require a court or administrator to guess a student’s subjective intent, but only requires that a reasonable person—the principal, perhaps—would believe “that the student [meant] to *guarantee* [that] his [message] reached the school.”⁵⁵ This is a substantial, but not insurmountable, burden. At the same time, this framework incorporates a theoretically infinite number of proposed factors into the analysis. For example, another standard analyzes online profiles according to whether they are public or private.⁵⁶ Under Patrick’s standard, the privacy setting of a profile would be one of a number of factors the reasonable person would consider.⁵⁷ A decision to post

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

54. Patrick, *supra* note 17, at 888 (footnotes omitted); *see also* Philip T.K. Daniel & Scott Greytak, *A Need to Sharpen the First Amendment Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21, 42 (2011) (examining Patrick’s proposal).

55. Patrick, *supra* note 17, at 888 (emphasis added).

56. Kara D. Williams, Comment, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 709, 726 (2008).

57. Patrick, *supra* note 17 at 888; *see also* Williams, *supra* note 56, at 726.

privately would impact the question of whether the student intended to guarantee that his speech reached the school.

Unfortunately, Patrick's approach to regulation of off-campus speech is less appealing. If speech is deemed off-campus, Patrick suggests that schools may regulate it only if they can articulate a compelling state interest to do so or if the speech "falls outside the protection of the First Amendment."⁵⁸ This calculus has the benefit of being comprehensive, but it has the drawback of forcing administrators to act as constitutional law scholars. School administrators rarely have the time, resources, or knowledge to make such determinations, which suggests that this element of Patrick's framework has little practical value.

b. Additional Intent-Based Approaches

Professor Clay Calvert suggests considering all online speech that originates off campus as off-campus speech.⁵⁹ School officials should not regulate such speech unless the student speaker, or another student, downloaded his online speech onto a school computer.⁶⁰ Similarly, commentator Alexander Tuneski proposes that speech be regulatable only if students "take additional steps to bring the material to [the] school campus"—a proxy for speaker intent.⁶¹ Another author, Kenneth Pike, suggests a novel concept for the familiar framework with a test that distinguishes "active versus passive telepresence."⁶² Pike asks whether the off-campus communication was intended for simultaneous on-campus consumption, like a phone call from home to school.⁶³ However, when applied to online postings, the question becomes the same as others: whether the student intended his online posting to be accessed at the school.⁶⁴ Finally, for off-campus speech to be regulated, Benjamin

58. Patrick, *supra* note 17, at 888-89.

59. See Calvert, *supra* note 18, at 252-53.

60. See *id.*

61. See Tuneski, *supra* note 18, at 177-78; see also Daniel & Greytak, *supra* note 54, at 25, 40 n.173 (evaluating the practicality of Tuneski's position).

62. Pike, *supra* note 16, at 1001 (cited in *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009), *rev'd*, 642 F.3d 334 (2d Cir. 2011)).

63. *Id.* at 1002.

64. *Id.* at 1004-05.

Ellison requires that: (1) the student intend for the speech to reach the school; (2) the speech actually reach the school; and (3) the speech fall into a category less protected than First Amendment speech.⁶⁵

These commentators each rely on the intent of the speaker to answer the on-/off-campus question, but, like Patrick, they do not adequately distinguish regulatable from protected off-campus speech after doing so.

c. Scope of a Student

In another variation on the theme, commentator Erin Reeves proposes a but-for test to establish the on-campus connection.⁶⁶ In Reeves's test, if the speech would not have occurred but for the speaker's status as a student, then the speech is considered on-campus.⁶⁷ If the speech would have occurred regardless of the speaker's status as a student, it is considered off-campus, and the school must show that the speech was of such low value that it did not warrant First Amendment protection.⁶⁸ For example, off-campus expression of disagreement with United States foreign policy—similar to the speech in *Tinker*—would pass the but-for test and would have sufficient value to be deemed protected. Off-campus expression of disagreement with school parking policy, however, would not. This standard, though novel, fails to provide a practical limiting principle for distinguishing on- from off-campus speech. The but-for test does not prevent administrative censorship and viewpoint discrimination because virtually anything administrators would wish to regulate will fail that test.

Many of these analyses look at similar variables to determine the speaker's intent, and most agree that an objective test is necessary.⁶⁹ Where many analyses fall short is in their limited treatment of speech deemed off-campus. Indeed, none of these

65. Ellison, *supra* note 52, at 842-43; *see also* Daniel & Greytak, *supra* note 54, at 40 n.173 (describing Ellison's proposal as "courageous").

66. Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1157-58 (2008) (cited in *Doninger*, 594 F. Supp. 2d at 223).

67. *Id.*

68. *Id.* at 1158.

69. *See* discussion *supra* Part I.B.1.

commentators propose any regulation for such speech beyond what is already permissible under the First Amendment.⁷⁰ The next subset of proposals addresses this secondary question more thoroughly.

2. *Regulatable vs. Protected Off-Campus Speech*

In a departure from the on-/off-campus analysis, some scholars advocate for the regulation of student speech based solely on its content and effects.⁷¹ These analyses deal with the impact of the speech on a student's ability to learn, particularly in the context of cyberbullying.⁷² They provide a clear rationale for restricting certain kinds of student speech and factor heavily into this Note's proposed framework.

a. *Speech that Interferes with the Rights of Others*

In her commentary on "the second prong of *Tinker*," Professor Martha McCarthy bases a line of reasoning on the final clause of *Tinker*'s holding.⁷³ The court held that a student "may express his opinions ... if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and *without colliding with the rights of others*."⁷⁴ This second prong supports McCarthy's assertion that *Tinker* protects students from off-campus harassment, regardless of whether that harassment caused an on-campus disruption.⁷⁵ In sum, *Tinker* provides the authority for courts to prevent students' educational rights from being "impaired because of degrading and

70. *See id.*

71. *See, e.g.,* McCarthy, *supra* note 49, at 1-2.

72. *See id.* at 12; Willard, *supra* note 5, at 75.

73. McCarthy, *supra* note 49, at 13.

74. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (emphasis added) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

75. McCarthy, *supra* note 49, at 13 ("The second prong of *Tinker* provides a justification for curtailing expression that violates antiharassment policies even though *not* linked to a disruption.").

intimidating comments from classmates delivered in person or electronically.”⁷⁶

b. Speech that Impedes Learning

In a thorough analysis focused on bullying and cyberbullying, practitioner Nancy Willard suggests that off-campus speech may be regulated “only when [its] impact ... has or could come back through that ‘schoolhouse gate’ and significantly interfere with the rights of other students.”⁷⁷ Willard points to lower court cases addressing off-campus student speech, noting that “courts have always focused on the potential impact on students.”⁷⁸ This supports the idea that students alone—not teachers or administrators—should be protected from the adverse effects of off-campus speech. Indeed, according to Willard, “Thus far, no court has upheld the discipline of a student where the only disruption ... has been directed at a school staff member.”⁷⁹

Together, McCarthy and Willard support the proposition that the only permissible goal of regulating off-campus student speech is to protect every student’s educational opportunities. That proposition forms the foundation for this Note’s framework: if student education is more important than certain forms of student speech, then those forms of student speech must not be allowed to interfere with student education.

Though this policy consideration adds to the analysis, McCarthy and Willard alone do not solve the off-campus student speech problem because they do not reliably distinguish on- from off-campus speech. A more comprehensive answer is needed.

76. *Id.* at 15.

77. Willard, *supra* note 5, at 91. Willard is the Director of the Center for Safe and Responsible Internet Use.

78. *Id.* at 95.

79. *Id.* The meaning of Willard’s statement is slightly unclear. Several courts, both before and after Willard’s article was published, punished students for off-campus Internet speech directed at faculty and administration. *See* discussion *infra* Part II.D-E. For present purposes, this quote is used to support the proposition that off-campus speech that only *disrupts* school staff should be protected from regulation.

3. *Highlighting the Need for Simplicity*

Finally, with a standard that seeks to streamline the analysis, commentator Kyle Brenton proposes a truly novel approach to the off-campus question. Brenton proposes that, before addressing the intent, content, and effect of student speech, a school should answer the threshold question of whether the speech has such minimum contacts with the school that its regulation would not offend “notions of fair play and substantial justice.”⁸⁰ This hallmark of personal jurisdiction has utility for a court determining after the fact whether a particular student’s speech is regulatable. It is extremely difficult for anyone without legal training to apply, however, and thus provides little guidance for the untrained students, parents, teachers, and administrators whom it would affect.

4. *Combining Key Elements*

The commentary above provides structure for this Note’s proposed framework. Patrick’s objective intent standard, which asks whether a reasonable person would think that the student intended to guarantee that his speech reached school, forms the backbone of the on- or off-campus distinction. McCarthy and Willard’s focus on the rights and educational opportunities of students provides the basis for the second prong, which distinguishes protected off-campus speech from regulatable off-campus speech. And Brenton’s personal jurisdiction framework highlights the need for simplicity in the busy lives of students, parents, teachers, and administrators.

Though each proposal contributes importantly to this Note’s framework, each lacks the comprehensiveness, simplicity, or applicability to solve the off-campus student speech problem on its own. The next Part will show how the proposed framework combines

80. See Brenton, *supra* note 51, at 1234-40 (cited in *Doninger v. Nieoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009), *rev’d*, 642 F.3d 334 (2d Cir. 2011)); see also *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[I]n order to subject a defendant to a judgment *in personam* ... he [must] have certain minimum contacts ... such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

the best elements of each proposal with additional nuances to provide a comprehensive solution to the off-campus student speech problem.

II. LOWER COURT CASES AND PROPOSED FRAMEWORK

First, this Part will describe this Note's proposed framework for regulating off-campus student speech. Next, this Part will show how the framework would apply to the types of speech it addresses: (1) speech that is deemed on-campus; (2) threatening speech that is deemed off-campus; (3) nonthreatening off-campus speech about other students; and (4) nonthreatening off-campus speech about teachers and administrators. For each type of speech the framework addresses, this Part will review the pertinent case law and discuss how the framework would apply in each case.

A. Proposed Framework

The proposed framework adopts Patrick's objective intent test to determine whether speech is on- or off-campus.⁸¹ Included in the on-campus category is all speech that advocates on-campus activity,⁸² notwithstanding that a reasonable person may believe that the student speaker did not intend for his actual speech to reach the campus.⁸³ If the speech is deemed on-campus, *Tinker* and related

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

82. This category includes advocating for communication with school administrators, as in *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), discussed *infra* notes 158-63 and accompanying text.

83. This distinction comes from *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) ("[The contested speech] is a call to action detrimental to the tangible interests of the school."). See discussion *infra* Part II.E.3 for application and further explanation. Outside the school context, this distinction is of questionable validity. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech ... do not permit a State to forbid ... advocacy of ... law violation except where such advocacy is directed to inciting ... imminent lawless action and is likely to incite ... such action."). However, "the Court has repeatedly emphasized the ... comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). As held in *Kuhlmeier*, the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings." 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (internal

cases control.⁸⁴ But if the speech is deemed off-campus, whether it can be regulated will depend on the speech's type.

Bearing in mind the grant of administrative responsibility and authority to prevent violence in school,⁸⁵ under this Note's framework, all threatening speech that could reasonably foreshadow violence can be regulated at the discretion of school administrators.⁸⁶ Such a rule gives administrators the authority to regulate speech that could lead to violence without granting overbroad plenary power to censor all harshly worded speech.

With regard to speech that is not likely to lead to violence, this Note's adopted framework applies a modified *Tinker* test to off-campus student speech about other students. Specifically, off-campus student speech about other students can be regulated if a reasonable person would expect it to cause a substantial disruption of targeted students' school activities. This test is broad enough to protect individual students from speech that would not otherwise disrupt the entire school, but narrow enough to prevent administrators from punishing or regulating without cause.

Finally, to protect and promote discourse about matters of public concern, nonthreatening off-campus speech about teachers and administrators will have normal First Amendment protection.⁸⁷ This also serves as a "safety valve" function by protecting student "venting" about teachers and administrators as long as it does not

quotation marks omitted). Thus, the distinction is valid within the school context. *Id.*

84. See *supra* Part I.A.

85. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring) ("[S]chool officials must have greater authority to intervene before speech leads to violence."); *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.... [T]he school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence."); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 860 (Pa. 2002) ("[S]chool officials are justified ... in taking student threats against faculty or other students seriously.").

86. See, e.g., Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 260, 267, 276 (2008) (arguing that "the legal system [must] expand school district authority to punish cyberbullying incidents" because "[t]hreats of harm or violence constitute a good portion of [those] incidents" and the laws currently in place "do not help school children combat the ... problem").

87. This enforcement gap is best addressed by judicial remedies, like defamation and libel. For a discussion of legal remedies beyond the school context, see *infra* Part III.D and Erb, *supra* note 86, at 277.

cross the line into foreshadowing violence.⁸⁸ Allowing students to vent frustrations about the teachers and administrators who discipline them may make them less likely to have violent outbursts on campus.⁸⁹ For reasons discussed below, and consistent with *Hazelwood School District v. Kuhlmeier*, this protection will not extend to speech about coaches and other leaders of voluntary student activities.⁹⁰

As the cases below demonstrate, courts already seem to be applying the components of this test, even if they are not explicitly saying so.⁹¹

B. Threatening Speech

Under this Note's framework, all threatening speech that could reasonably foreshadow violence can be regulated at the discretion of school administrators. Unsurprisingly, courts have been extremely reluctant to restrict administrative action taken in response to threatening speech, either on- or off-campus, regardless of its object.⁹² Commentators have attempted to shoehorn threatening speech into a larger category of unprotected student speech,⁹³ but this Note proposes that it is best regulated as a category unto itself. Whereas virtually every other category of student speech impinges an intangible—if very real—attribute of a student, teacher, or administrator, threatening speech could foreshadow death or bodily harm and therefore requires close monitoring and a quick response.

88. See Calvert, *supra* note 18, at 282 (“That teenagers feel frustrated with ... their schools is not a new phenomenon. The Internet, however, provides a new medium on which students can express their frustrations and feelings. [One student] was using this medium as a passive outlet ... for his anger and rage. We should be thankful that he was using speech and not a gun to express his emotions.”).

89. See *id.*

90. 484 U.S. 260, 271 (1988); see also discussion *infra* Part II.E.1.

91. See discussion *infra* Part II.A-E.

92. See, e.g., *Wisniewski ex rel. Wisniewski v. Bd. of Ed. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39-40 (2d Cir. 2007); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002).

93. See Patrick, *supra* note 17, at 889 (including prevention of violence in the category of compelling school interests); Reeves, *supra* note 66, at 1158 (including “fighting words” as an example of off-campus speech that is categorically unworthy of First Amendment protection); Tuneski, *supra* note 18, at 182-83 (including “true threats” in the category of speech that is not constitutionally protected).

Finally, the Supreme Court has read into the First Amendment no protection for “fighting words,”⁹⁴ a subset of threatening speech that can be reasonably generalized in this context to include all threatening student speech.⁹⁵ The following instances of student speech would all be subject to regulation under the proposed framework.

1. *J.S. ex rel. H.S. v. Bethlehem Area School District*

In *J.S. ex rel. H.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court upheld punishment of a student who created a website off campus that listed reasons why his teacher should die, depicted his teacher with a severed head, and solicited donations for hiring a hit man to kill his teacher.⁹⁶ Because the student showed the website to other students at school, he clearly intended to guarantee that it reached campus.⁹⁷ But even without the dissemination of the website at school, this speech could be regulated under the proposed framework because it was threatening and reasonably foreshadowed violence.

Critics of this result may argue that the proposed framework would chill harmless student speech.⁹⁸ This criticism garners two responses. First, simply because an instance of speech does not actually lead to violence does not render it “harmless” by any definition. The emotional impact on the teacher and her family, the administrative costs incurred by the school and the authorities, and the disruption of the school environment are all very real harms that the proposed framework would have prevented. Second, the proposed framework would not exist in a vacuum; students, parents, teachers, and administrators would all be aware of the potential consequences of threatening student speech. Rather than chill harmless speech, this awareness would encourage students to be

94. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“[Prevention and punishment of] certain ... classes of speech ... have never been thought to raise any Constitutional problem. These include ... ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).

95. For a discussion of the limits and justifications of this generalization, see notes and accompanying text *infra* Part III.C.

96. 807 A.2d 847, 850-51 (Pa. 2002).

97. *Id.* at 852.

98. Local police and the FBI ultimately declined to file charges against the student. *Id.* at 852.

clearer when creating and disseminating speech that is in fact harmless but could be misconstrued to be threatening violence. The website in *Bethlehem* looked threatening enough to prompt the school principal to contact authorities and for the authorities to investigate, so clearly it crossed the line into threatening violence.⁹⁹

2. *Wisniewski ex rel. Wisniewski v. Board of Education of the Weedsport Central School District*

In *Wisniewski ex rel. Wisniewski v. Board of Education of the Weedsport Central School District*, the Second Circuit upheld the suspension of an eighth grader who created a threatening AOL Instant Messenger (AIM) icon¹⁰⁰ entirely from home and sent messages including the icon to fifteen of his friends over the course of three weeks.¹⁰¹ The icon depicted a small figure being shot, with the words “Kill Mr. VanderMolen” beneath it.¹⁰² The court held that administrators could reasonably foresee that the icon would cause a substantial disruption at school and that the suspension was justified.¹⁰³

Under the proposed standard, this speech would have been deemed off-campus.¹⁰⁴ Because the icon was created and disseminated exclusively from the student’s home, a reasonable person would likely not believe that the student intended to guarantee that the icon would reach campus. However, this decision was comfortably within the proposed boundaries of threatening speech because the icon reasonably foreshadowed violence. If the student had not advocated death or physical harm, but instead had shown a nonviolent photo of the teacher above the phrase “I hate Mr. VanderMolen,” for example, the threatening speech exception would not have applied, and the speech would not have been subject to regulation under the proposed framework.

99. *Id.*

100. 494 F.3d 34, 35-36 (2d Cir. 2007). For an explanation of AIM icons generally, see *id.*

101. *Id.* at 36.

102. *Id.* at 35-36. A classmate saw the AIM icon, brought a copy to school, and notified Mr. VanderMolen, the eighth grader’s English teacher at the time. *Id.* at 36.

103. *Id.* at 35.

104. Although the student was advocating an activity, killing his teacher, he was not necessarily advocating that the activity be done on campus.

3. *LaVine v. Blaine School District*

In *LaVine v. Blaine School District*, the Ninth Circuit upheld the emergency expulsion of a student who wrote, brought to school, and shared with some of his friends and his English teacher a poem¹⁰⁵ in which the narrator kills twenty-eight people and commits suicide.¹⁰⁶ The court applied *Tinker* and held that the administration had reasonably predicted a substantial disruption of the school environment due to the threatening nature of the poem.¹⁰⁷

LaVine involved speech that was created for the express purpose of being disseminated on campus.¹⁰⁸ Although the proposed framework supports the court's use of *Tinker* in this situation, where the student objectively intended to guarantee that his speech reached school, it is important to understand how the proposed framework could have led to the same result even if the student had not brought his poem to school. If, for instance, administrators found out about the poem through a friend or parent, they would still have authority to take action under this Note's proposed framework.

A student who feels inclined to write a poem like this, who has consulted his guidance counselor about suicidal inclinations,¹⁰⁹ and who is independently considered a danger to himself and others,¹¹⁰

105. 257 F.3d 981, 983-86 (9th Cir. 2001) (“[E]ntitled ‘Last Words[]’ [T]he [poem] reads [I] pulled my gun, from its case, and began to load it. I remember, thinking at least I won’t, go alone.... As I approached [sic], the classroom door, I drew my gun and, threw open the door, Bang, Bang, Bang-Bang. When it all was over, 28 were, dead, and all I remember, was not felling [sic], any remorse [sic], for I felt, I was, cleansing [sic] my soul ... as the bell rang, all I could here [sic], were screams ... as the students, found their, slayen [sic] classmates, 2 years have passed, and now I lay, 29 roses, down upon, these stairs, as now, I feel, I may, strike again. No tears, shall be shed [sic], in sorrow [sic], for I am, alone, and now, I hope, I can feel, remorse [sic], for what I did, without a shed, of tears, for no tear, shall fall, from your face, but from mine, as I try, to rest in peace, Bang!”).

106. *Id.* at 983-84.

107. *Id.* at 989.

108. *Id.* at 984 (detailing that the student shared many poems with his previous English teachers).

109. *Id.*

110. *See id.* at 988 (“[He] was not disciplined because of the poem, but was expelled based upon a confluence of factors, including the poem, that indicated he was a danger to the safety of the school and to himself.”).

is a prime candidate for emergency separation to ensure school safety. That some particular evidence of dangerousness—here, the poem—is not voluntarily disclosed to the school does not diminish its foreshadowing of violence. It is probative of a student’s danger to himself and others that he is contemplating murder and suicide, even if he does not choose to share that fact with his teacher. If he shares that fact with another student, who then notifies a teacher or administrator, administrators are more than justified in taking protective action.

Additionally, that this particular evidence was a “work of art” does not diminish the potential danger to the school. Neither the level of abstraction of the threat nor its use of past tense alters its status as a threat. If the student had simply written: “I killed twenty-eight classmates and committed suicide,” there would be little question that he was threatening himself and others. This is where the unique judgment of administrators factors into the proposed framework. Administrators can speak with people familiar with the student, examine the contents of the potential threat, and make a judgment for the safety of the school. To assert that this framework does not contemplate an exception for artwork is merely to assert that administrators will not have their hands tied because a particular threat is abstractly worded.

Given the potentially lethal consequences of ignoring threatening speech, and the administration’s responsibility to protect the school, all threatening speech that reasonably foreshadows violence is subject to administrative regulation under the proposed framework.

C. Student Speech About Other Students

Under the proposed framework, off-campus student speech about other students will be subject to regulation if a reasonable person would expect it to cause a substantial disruption of targeted students’ school activities. This standard empowers administrators to use their judgment because they are uniquely positioned to do so.

To be clear, under this Note’s proposed framework there are many instances of off-campus student speech about other students that administrators would not be able to regulate. For instance, if a student runs a club at school and lists other students as officers on

the club's website, administrators have no authority to regulate that speech because a reasonable person would not expect such a listing to substantially disrupt the listed students' school activities. However, if the same student lists one of his colleagues as "officer douchebag," administrators have good reason to investigate, and possibly get involved; a reasonable person would expect such online school-related ridicule to substantially disrupt the student-officer's school activities. This standard does not require administrators to monitor all student-managed websites; it merely empowers them to take action based on that content if the need arises.

As speech about fellow students receives growing attention from administrators, parents, and lawmakers,¹¹¹ there is reason to believe that all parties are interested in the same goals of reducing student victimization and improving the student educational experience.¹¹²

1. *Kowalski v. Berkeley County Schools*

A good example of such speech occurred in *Kowalski v. Berkeley County Schools*.¹¹³ In that case, the Fourth Circuit upheld the suspension of a student who made a MySpace discussion group that ridiculed one of her classmates.¹¹⁴ The court applied the second prong of *Tinker*, holding that the speech "collid[ed] with the rights of others."¹¹⁵ Under the proposed framework, this speech could be reached as on-campus or as off-campus speech about another student that could reasonably interfere with her school activity. But the court held the speech substantially disruptive without addressing whether it was on-campus.¹¹⁶ Consistent with the policy of the proposed framework, the court upheld regulation of the student's

111. *E.g.*, Willard, *supra* note 5, at 80 ("[R]ecently attention to bullying has increased dramatically.").

112. *See id.* at 83-84 (noting that forty-five states have antibullying laws, and 95 percent of school districts have antibullying policies).

113. 652 F.3d 565, 567-69 (4th Cir. 2011).

114. The student invited approximately one hundred MySpace users to view a web page, twenty-four of whom were classmates of the targeted student, which discussed a fellow student who allegedly had herpes. *Id.* at 567.

115. *Id.*

116. *Id.* at 572.

speech to protect the right of students to be free from ridicule and harassment.

2. *Emmett v. Kent School District No. 415*

Despite the broad administrative discretion granted under this prong, the decision in *Emmett v. Kent School District No. 415* illustrates some important limits. In that case, the Western District of Washington overturned the school's discipline of a student who had created a website depicting fake obituaries for two of his friends.¹¹⁷ Applying *Tinker*, the court held that the speech was off-campus in nature and not substantially disruptive.¹¹⁸

This speech also would have been protected under the proposed framework. The speech could not be considered "threatening" speech because the website did not reasonably foreshadow violence—the website itself stated that it was not serious.¹¹⁹ In the context of speech about other students, administrators may be excused for initially believing—based on sensationalistic journalism¹²⁰—that the website would cause a substantial disruption of those students' school activities. But more diligent research would have confirmed that was not the case; indeed, administrators ultimately conceded that their initial punishment was too severe.¹²¹

3. *J.C. ex rel. R.C. v. Beverly Hills Unified School District*

One student speech case does challenge this Note's proposed framework. In *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,¹²² the Central District of California overturned the punishment of a student who posted and publicized a four and one-half minute YouTube video in which she and her friends describe

117. 92 F. Supp. 2d 1088, 1089-90 (W.D. Wash. 2000).

118. *Id.*

119. *Id.* at 1089 ("The web page ... included disclaimers warning a visitor that the site was not sponsored by the school, and for entertainment purposes only.").

120. *See id.* ("[A] television news story characterized Plaintiff's web site as featuring a 'hit list' of people to be killed, although the words 'hit list' appear nowhere on the web site.").

121. *See id.* ("The emergency expulsion was subsequently modified to a five-day short term suspension.").

122. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

another classmate as “a slut,” “spoiled,” and “the ugliest piece of shit I’ve ever seen in my whole life.”¹²³

This case would have certainly been decided differently under the proposed framework. This speech was clearly an attack on the student victim, and a reasonable person would expect such an attack to cause a substantial disruption of that student’s school activities. Unlike the prank speech in *Emmett*, which was intended “for entertainment purposes only,”¹²⁴ no permissible use could be construed by administrators for the hurtful, ridiculing speech in this case.

Notably, the result in *Beverly Hills* has been widely criticized.¹²⁵ In a society where online presence and reputation are steadily gaining importance, the proposed framework protects students from victimization by enabling regulation of speech that would reasonably be expected to substantially disrupt their school activities.

D. Student Speech About Teachers

Under the proposed framework, nonthreatening off-campus speech about teachers will be presumed to be protected from regulation. Whereas threatening speech or speech about other students is unlikely to be productive or contribute to the public discourse, speech about teachers—particularly critical speech—can lead to an improved learning experience for that teacher’s students.¹²⁶ Three main reasons support this framework’s protection of off-campus student speech about teachers.

First, off-campus student speech may provide a “venting” function that allows students to express frustrations about their education in a productive way.¹²⁷ Second, administrators and teachers, rather

123. *Id.* at 1098.

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

125. Willard, *supra* note 5, at 102-04 (criticizing the court for lacking “full briefing of the case law related to a school’s response to student speech that harmfully targets another student,” and for “discount[ing] the emotional harm inflicted on [the victim]”).

126. *See, e.g.*, Ellen McCulloch-Lovell, *As Long as It’s About More than Scores*, N.Y. TIMES (Mar. 14, 2013), <http://www.nytimes.com/roomfordebate/2012/09/17/professors-and-the-students-who-grade-them/student-evaluations-work-as-long-as-theyre-about-more-than-scores> (“Student voices, when weighed and considered, influence teaching at places where ... effective teaching is highly valued.”).

127. Calvert, *supra* note 18, at 282 (discussing the “safety valve” function of speech).

than students, should be the targets of any necessary student venting. This added burden on staff and faculty is justified to the extent that it facilitates education without “collid[ing] with the rights of other[.]” students.¹²⁸ Administrators and teachers are physically and emotionally mature enough, as well as specially trained, to withstand necessary student venting.¹²⁹ Third, a robust discussion and critique of teachers’ performance can contribute to the public discourse. In the school context, such discussion could actually lead to educational improvements. Relevant case law suggests that courts are already applying such a standard to off-campus speech about teachers.

1. *Evans v. Bayer and Fenton v. Stear*

Relatively recently, in *Evans v. Bayer*, the Southern District of Florida overturned the punishment of a student for creating a Facebook group called “Ms. Sarah Phelps is the worst teacher I’ve ever met.”¹³⁰ The group was dedicated to criticizing the teacher, and actually led to a discussion wherein other students disagreed with the student and supported the teacher.¹³¹ Expressive discourse like this is precisely the type of speech that the proposed framework seeks to protect.

Prior to that decision, the court in *Fenton v. Stear* agreed with the result, if not the approach, of the proposed framework.¹³² In that case, a student was punished because his off-campus insult to a teacher was considered to constitute fighting words, and was thus unprotected under the First Amendment.¹³³ Though reasonable

128. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

129. See, e.g., LESLEY UNIVERSITY, GRADUATE AND ADULT BACCALAUREATE PROGRAM ACADEMIC CATALOG & HANDBOOK (2012-13), available at http://www.lesley.edu/provost/content/2011_2012_academic_grad_catalog.pdf (detailing various courses and programs of study that include specific training in classroom management).

130. *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367-77 (S.D. Fla. 2010).

131. *Id.* at 1367 (“The group’s purpose was for students to voice their dislike of the [sic] Ms. Phelps.... Three postings appeared on the page from other students supporting Ms. Phelps and debasing Evans for creating the group.”).

132. *Fenton v. Stear*, 423 F. Supp. 767, 769, 771 (W.D. Pa. 1976) (upholding punishment for a student who called his teacher a “big prick” off campus, but in public).

133. *Id.* at 771.

minds may disagree with the court's interpretation of the given insult as fighting words, the result clearly fits within the proposed framework. Because fighting words, by their definition, reasonably foreshadow violence,¹³⁴ they can be regulated as threatening speech under the proposed framework.

E. Student Speech About Administrators

Like off-campus speech about teachers, off-campus speech about administrators will be protected under the proposed framework for three main reasons: (1) students need a safe outlet to vent their frustrations; (2) administrators and teachers are appropriately equipped to absorb necessary student venting; and (3) criticism of administrators and teachers actually can lead to an improved educational experience.¹³⁵

The term "administrators" has thus far referred to a number of parties who represent the school in an administrative capacity. The following sections will address those parties more specifically. Section 1 will address athletic personnel and will illustrate why speech about leaders of voluntary student activities is not protected under the proposed framework; Section 2 will briefly address school principals; and Section 3 will clarify an important aspect of the framework's on-/off-campus prong by reviewing three cases about speech regarding administrators and school infrastructure.

1. Voluntary Competition Exception

The issue addressed in *Lowery v. Euverard* illustrates the limit of protection for speech about administrators under the proposed framework. In that case, the Sixth Circuit upheld the removal of students from a high school football team after they circulated and signed a petition stating that they hated their coach and did not want to play for him.¹³⁶ Unlike other instances of student speech

134. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("[F]ighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

135. See, e.g., *McCulloch-Lovell*, *supra* note 126.

136. 497 F.3d 584, 585 (6th Cir. 2007). The students intended to keep the petition secret from the coach until they gave it to the principal after the season, but the coach found out

about administrators, this case addressed student speech about the coach of a voluntary, competitive activity. As the court pointed out:

[S]tudent athletes are subject to more restrictions than the student body ... due to the differing natures of the classroom and playing field. One of the purposes of education is to train students to fulfill their role in a free society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints. The goal of an athletic team is much narrower.... [T]he immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal.¹³⁷

The same is true of other voluntary activities, especially in high school. A voluntary enterprise that accepts or rejects students based on their abilities, often for the purpose of competition,¹³⁸ cannot be categorically forced to tolerate divisive insubordination. Additionally, consistent with *Kuhlmeier*, student speech about a coach or other leader could be perceived as school-subsidized speech.¹³⁹ Therefore, student speech about leaders of voluntary student activities is unprotected under the proposed framework.¹⁴⁰

The limit to this exception is illustrated by the Western District of Pennsylvania's decision in *Killion v. Franklin Regional School District*.¹⁴¹ In that case, the court overturned school discipline for a student who created and e-mailed to several of his classmates a "Top Ten" list of insults about his school's athletic director.¹⁴² The speech was decidedly off-campus¹⁴³ and clearly targeted an adminis-

about the petition in-season. *Id.* at 585-86.

137. *Id.* at 589.

138. Some of the many examples of these voluntary enterprises include varsity sports, theater, and marching band.

139. 484 U.S. 260, 270-71 (1988) (holding that school administrators have greater control over speech that might "reasonably [be] perceive[d] to bear the imprimatur of the school").

140. This gap can appropriately be addressed by each school or district individually. A school policy that defines the limits of a coach or faculty advisor's power is recommended.

141. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

142. *Id.* at 448.

143. *Id.* ("[The student] did not print or copy the list to bring it on school premises because, after copying and distributing similar lists in the past, he had been warned that he would be punished if he brought another list to school."). Thus, a reasonable person would not believe that the student intended to guarantee that his speech reached campus.

trator without impacting the authority of the student's coach.¹⁴⁴ Because the athletic director was not leading or coaching the track team in any way, this speech was no different than a student complaining about the principal for cutting an activity's budget or a teacher for unfair discipline. This speech falls firmly within the proposed framework's category for off-campus student speech about administrators, and it would not be subject to administrative regulation.

2. School Principals

Unlike leaders of voluntary activities, school principals receive no protection from nonthreatening student speech under the proposed framework. In 2011, the Third Circuit decided two very similar cases regarding student speech about principals on MySpace.com.¹⁴⁵ In both cases, students created insulting fake MySpace profiles of their principals.¹⁴⁶ School administrators punished those students for their profiles,¹⁴⁷ and those punishments were overturned by the court.¹⁴⁸

Though neither profile was particularly respectful, nor contributed substantially to the public discourse, the record in *Snyder v. Blue Mountain School District* indicates that the MySpace profile may have served a venting function for that particular student.¹⁴⁹ Also, the profile reached the school only because the principal requested a copy.¹⁵⁰ This places the *Blue Mountain* profile clearly within the realm of off-campus student speech about an administrator. Under the proposed framework, such speech would be protected. In *Layshock ex rel. Layshock v. Hermitage School District*, however, the student accessed the profile while on campus and intended that

144. *Id.* (noting that the speech was precipitated by a student parking policy and various rules and regulations for the track team, of which the student was a member).

145. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

146. *Layshock*, 650 F.3d at 208-09; *Blue Mountain*, 650 F.3d at 920.

147. *Layshock*, 650 F.3d at 209-10; *Blue Mountain*, 650 F.3d at 920.

148. *Layshock*, 650 F.3d at 207; *Blue Mountain*, 650 F.3d at 920.

149. *See Blue Mountain*, 650 F.3d at 920 (noting that the student had never been disciplined in school until one month before she created the profile, when she was twice disciplined for dress code violations by the principal).

150. *Id.* at 921.

the speech reach the school.¹⁵¹ This speech can be considered on-campus, and thus subject to the *Tinker* standard under the proposed framework. Because the speech did not constitute a substantial disruption in this particular case, the punishment was overturned.¹⁵²

3. Clarifying the On-/Off- Prong Through Speech About Administrators and School Infrastructure

As noted previously, the proposed framework considers all student speech that advocates on-campus activity to be on-campus speech, regardless of where that speech actually takes place.¹⁵³ It is essential to remember that this nuance does not automatically leave unprotected all speech that advocates on-campus activity. By subjecting such speech to the *Tinker* test, rather than the object-of-speech test, this nuance leaves unprotected only that on-campus-advocating speech that could reasonably cause a substantial disruption of the school environment.

As the cases below demonstrate, this addition is a necessary corollary of protecting student speech about administrators and teachers. Without this addition to the on-campus framework, any student with enough influence to cause a substantial disruption could undermine administrators with impunity by advocating disruptive on-campus activity while she was off campus. As long as she remained off campus at the time of the speech, and did not intend that her speech reach school, her disruptive speech would be protected. For example, to regulate a private Facebook message that advocated vandalizing the school, administrators would need to decide that the message was intended to reach school grounds—an interpretation that would strain logic. However, few would disagree that administrators should have the authority to regulate such speech, even if the speaker herself did not vandalize the school.¹⁵⁴

151. *Layshock*, 650 F.3d at 209.

152. *See id.* at 214.

153. *See supra* notes 81-83 and accompanying text.

154. This Note does not argue that administrators should be allowed to demand Facebook passwords or other privately disseminated content from students. As in the discussion of *LaVine*, this hypothetical merely stipulates that the administration happened to find out about the speech in question. *See supra* Part II.B.3. A discussion of the merits of administrative access to student social media accounts is beyond the scope of this Note.

In a decision that puts this nuance in context, the Seventh Circuit upheld punishment of a student who wrote an underground newspaper article detailing the procedure for hacking into computers at his high school.¹⁵⁵ Although the paper was produced off campus, it was distributed on campus, so the court did not address the arguments that treated the article as off-campus speech.¹⁵⁶ Under the proposed framework, however, this speech could have been regulated even if it was not distributed on campus. Because the speech advocated on-campus activity, the article about hacking would have been considered on-campus speech regardless of where the speech actually took place. In either scenario, administrators could reasonably foresee a substantial disruption resulting from the speech, and they were justified in punishing it.¹⁵⁷

More recently, the Second Circuit decided *Doninger v. Niehoff*.¹⁵⁸ The court upheld punishment of a student for sending a mass e-mail from school computers advocating for local support for a student event and for subsequently responding to administrators' negative reaction to the e-mail that night on her blog.¹⁵⁹ The blog post at issue¹⁶⁰ was written and posted while the student was off campus and was not intentionally brought to the attention of the adminis-

155. *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998).

156. *Id.* ("Since the article was in fact distributed on campus, however, we need not reach [the off-campus speech] issue.")

157. *See id.* at 828. ("[A] reasonable forecast of disruption is all that would be required of the Board.... [The article] purports to be a blueprint for the invasion of Greenfield's computer system, along with encouragement to do just that. It is a call to action detrimental to the tangible interests of the school.")

158. 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

159. *Id.* at 338-42. "Jamfest," a battle-of-the-bands, was rescheduled against the will of the Student Council. Several of the students e-mailed a large number of people asking them to contact the superintendent about keeping the original date and urging them to forward the message "to as many people as you can." *Id.* at 339-40. Accounts of the student and principal differ as to what next happened, but it is clear that the principal reprimanded the student for her e-mail. *See id.* at 340.

160. *Id.* at 340-41 ("[J]amfest is cancelled due to douchebags in central office. [H]ere is an email [sic] that we sent out to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. [B]asically, because we sent it out, Paula Schwartz [superintendent] is getting a TON of phone calls and emails [sic] and such. [W]e have so much support and we really appreciate [sic] it. [H]owever, she got pissed off and decided to just cancel the whole thing all together.... [H]ere is the letter we sent out to parents. [letter reproduced in blog] ... And here is a letter my mom sent to Paula and cc'd Karissa [principal] to get an idea of what to write if you want to write something or call her to piss her off more. [I'm] down." [e-mail reproduced in blog]).

tration.¹⁶¹ However, the post included a copy of an e-mail previously sent to the administration for the stated purpose of giving “an idea of what to write if you want to write something or to call [the superintendent] to piss her off more.”¹⁶² Finally, at trial, the student testified that “[t]he purpose of her blog post[] ... was to encourage more people to contact the administration.”¹⁶³

Advocating for direct communication with administrators is considered advocacy for on-campus action under the proposed framework because that communication, like hacking, can cause a substantial disruption on campus.¹⁶⁴ In this case, the court determined that the speech reasonably could have caused a substantial disruption at the school, and it was thus subject to regulation.¹⁶⁵

Finally, in *Beussink v. Woodland R-IV School District*, the Eastern District of Missouri overturned punishment for a high school student who, entirely off campus, created a website dedicated to criticizing his school’s teachers, administration, and website.¹⁶⁶ Importantly, the site encouraged readers to contact the principal with their opinions about the school.¹⁶⁷

Because the student advocated on-campus action, his speech would be considered on-campus under the proposed framework. In fact, his speech was analyzed under the *Tinker* standard and deemed not to have caused a substantial disruption.¹⁶⁸

Like off-campus speech about teachers, off-campus speech about administrators can serve venting and public discourse functions.

161. *See id.* at 340 (“[F]rom her home, Doninger posted a message on her ... blog ... [which is] a website unaffiliated with [her high school].”).

162. *Id.* at 340-41.

163. *Id.* at 341.

164. Additionally, this nuance complements Pike’s “active telepresence” test. *See supra* notes 62-64 and accompanying text.

165. *Doninger*, 642 F.3d at 348 (“The undisputed facts—that Doninger’s blog post directly pertained to an event at LMHS, that it invited other students to read and respond to it by contacting school officials, that students did in fact post comments on the post, and that school administrators eventually became aware of it—demonstrate that it was reasonably foreseeable that Doninger’s post would reach school property and have disruptive consequences there.”).

166. 30 F. Supp. 2d 1175, 1177-78 (E.D. Mo. 1998). The student testified that he did not intend for the site to be accessed from school, there was no evidence that he used school resources to make the site, and the only reason the site was accessed on campus was because of another student’s retaliatory act. *Id.*

167. *Id.*

168. *Id.* at 1180.

Advocacy for on-campus action, including communication with administrators, is regulated under *Tinker* to prevent abuse of this framework's categorical distinction based on the object of student speech. Speech about coaches and other administrators of voluntary activities is unprotected and left to each school or district to regulate as they see fit.

F. Summary of Proposed Framework

Broadly, the proposed framework regulates student speech according to which of the following categories it falls into: on-campus speech, threatening off-campus speech, nonthreatening off-campus speech about other students, and nonthreatening off-campus speech about teachers or administrators.

Student speech is considered on-campus if (1) it actually takes place on campus; (2) it advocates on-campus action; or (3) a reasonable person would believe, given the circumstances, that the student intended to guarantee his speech reached the school.¹⁶⁹ If student speech is deemed on-campus, it may be regulated if it might reasonably cause substantial disruption of school activities.¹⁷⁰

Speech that does not meet the above standard is considered off-campus. Threatening off-campus speech may be regulated if it could reasonably foreshadow violence.¹⁷¹ Nonthreatening off-campus speech about other students may be regulated if a reasonable person would expect it to cause a substantial disruption of the targeted students' school activities.¹⁷² Nonthreatening off-campus speech about teachers and administrators is presumed to be protected unless it falls into one of the aforementioned categories, or is about a coach or other leader of a voluntary student activity.¹⁷³

By using these categorical distinctions, the proposed framework simply, but comprehensively, addresses all forms of off-campus student speech while conforming to Supreme Court case law.

169. See Patrick, *supra* note 17, at 888.

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

171. See *id.* at 508.

172. See *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998).

173. See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177-78 (E.D. Mo. 1998).

III. CRITICISMS

Some of the more salient potential criticisms of the proposed approach are addressed below.

A. Too Restrictive of Student Speech

Students are young, the argument goes, they make mistakes, they speak without thinking, more so than adults, so they should not be subject to restrictions simply for stating their opinions about fellow students. Further, school is supposed to prepare these students for the real world. How will they be prepared if they are insulated from every off-campus insult?

The difficulty of self-censoring at a young age is a legitimate concern and is one reason that students are not subject to regulation for off-campus speech about teachers or administrators. However, when balancing one student's difficulty controlling her insults against another student's educational experience and mental and emotional well-being, the calculus is clearly in favor of the latter.

As for preparing students for the real world, there is no question that harsh words are all-too-present in modern society. However, three points militate in favor of this proposal. First, students are exposed to plenty of harsh words by the interactions they have while on campus. Nothing in this framework proposes to change those interactions. Second, school officials have the discretion to refrain from regulating student Internet speech about other students. They are merely empowered, not required, to regulate under the proposed framework. Third, students are unlikely to succeed in the real world if they choose to harass their friends, relatives, and coworkers over the Internet. This framework will help break the habit of those who engage in misbehavior before it becomes self-destructive.

B. Too Much Power to Administrators

Some scholars point out that a low threshold for administrative action can create a “heckler’s veto” situation.¹⁷⁴ How does this standard protect against popular pressure for improper speech restriction, and what if the party deciding to restrict the speech is the party that objects most to it?

First, as a threshold matter, this framework distinguishes between on- and off-campus speech. Administrators have a high burden of showing that a reasonable person would believe that the student speaker intended to *guarantee* that his speech reached campus. Only after that burden is met may administrators determine whether a school-wide substantial disruption has occurred or is reasonably foreseeable as a result of that speech. This prevents both popular pressure and the individual administrator’s sensibilities from causing improper speech regulation.

Second, administrative discretion is not a blank check for administrative action. Instead it is a means by which administrators can implement policies already widely agreed upon, like anticyberbullying.¹⁷⁵ As with on-campus speech, the proposed framework both empowers and checks administrators’ discretion with each off-campus speech prong. Administrators are expected to be guided by their judgment and their unique position within the school, as well as their unique access to pertinent facts. As with most legal frameworks, however, if administrators abuse their discretion, courts will function as the check on that abuse.

174. Daniel & Greytak, *supra* note 54, at 41 & n.176 (describing the heckler’s veto as an instance wherein potentially disagreeable speech is restricted by a government actor to prevent third-party objections; if the objectors are sufficiently numerous or forceful, the government actor will be incentivized to prevent the objectionable speech—hence the hecklers have a veto).

175. Willard, *supra* note 5, at 83-84 (noting that thirty-four states have proposals or amended laws that include cyberbullying regulation).

*C. Threatening Speech and Fighting Words Are Not Necessarily
“True Threats”*

As any fan of *Twelve Angry Men* can attest, there is a significant difference between threatening speech and true threats.¹⁷⁶ Additionally, the Supreme Court has distinguished certain forms of threatening speech from true threats,¹⁷⁷ and this framework regulates speech that may not rise to that level.

Though threatening citizen speech may not be regulated under the First Amendment unless it rises to the level of a true threat,¹⁷⁸ the Supreme Court has held that student speech rights are not “automatically coextensive with the rights of adults in other settings.”¹⁷⁹ Also, as noted previously, students, parents, and administrators will know in advance that threatening speech may be subject to regulation, and they will curtail and clarify their speech accordingly.¹⁸⁰

Additionally, administrators will be expected to exercise their judgment and discretion when confronted with threatening speech. Most likely, administration will err on the side of a regulation or response—like contacting the police. In the same vein, students will have advance notice and should ensure that their speech is non-threatening. There is a clear line between insult and threat, and students will not be punished for off-campus speech about teachers and administrators unless they cross it.

D. Too Protective of Speech About Teachers and Administrators

Some may argue that school officials should have the power to regulate speech about teachers and administrators. After all, real emotional damage can happen to adult teachers and administrators at the hands of their students, and this framework does nothing to prevent it. Two important safeguards exist to protect teachers and

176. See REGINALD ROSE, *TWELVE ANGRY MEN* 43 (1983) (including an exchange wherein one character says the phrase “I’ll kill you!” but does not actually intend to kill the person he is addressing).

177. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (distinguishing a conditional, hyperbolic “threat” against the president as not a “true threat”).

178. *Id.*

179. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

180. See discussion *supra* Part II.B.1.

administrators from such harm. First, under the proposed framework, teachers and administrators may take action against disruptive student speech that occurs on campus.¹⁸¹ Second, civil remedies exist outside of the school for off-campus speech that causes emotional harm.¹⁸² To the extent that student speech causes actual damage without otherwise violating this framework, injured parties are encouraged to pursue judicial remedies outside the school context.

CONCLUSION

Off-campus student speech jurisprudence is in disarray. Lacking guidance, courts distort the framework of *Tinker* and subsequent Supreme Court cases to fit the facts before them, or they make up their own inconsistently applied and highly unpredictable frameworks.

This Note's proposed framework solves the off-campus student speech problem by: (1) establishing a clear method to distinguish between on- and off-campus student speech; (2) providing a categorical rule to distinguish between protected and unprotected off-campus speech; and (3) being simple enough to be applied by busy administrators who lack legal training.

By taking a categorical approach to *Tinker* and its progeny, the proposed changes to student speech law will enable students, parents, teachers, administrators, and courts to enjoy clarity, consistency, and a better academic environment for all.

*Scott Dranoff**

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

182. *See Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (2011).

* J.D. Candidate 2014, William & Mary Law School; B.S. 2011, *magna cum laude*, Northeastern University. I would like to thank John Hoke, for his tireless help with my numerous drafts; my family and friends, for asking me what I was working on enough times that I finally figured it out; and my wife, the best elementary school teacher I know, for her unconditional love and support. Many thanks to the *Law Review* staff for their hard work.