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PUNISHING PUBLIC SCHOOL STUDENTS FOR BASHING PRINCIPALS, TEACHERS & CLASSMATES IN CYBERSPACE: THE SPEECH ISSUE THE SUPREME COURT MUST NOW RESOLVE

CLAY CALVERT*

INTRODUCTION

The United States Supreme Court ended a nearly 20-year hiatus from resolving student expression cases when it handed down its splintered 2007 ruling in Morse v. Frederick. Although Morse certainly featured funny, far-fetched facts about bong hits that made for a

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* John & Ann Curley Professor of First Amendment Studies and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Patrick Hanifin and Thomas Markey of The Pennsylvania State University for their comments on early drafts of this article.

1. 127 S. Ct. 2618 (2007). Prior to Morse, the High Court’s most recent ruling on student expression rights was in 1988. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding, in the context of the censorship of two articles in a high school newspaper, “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

2. Morse centered on a high school student who was suspended for ten days after he unfurled, while standing on a sidewalk across from his school as the Olympic torch relay passed by, a 14-foot banner bearing the words “Bong Hits 4 Jesus.” Morse, 127 S. Ct. at 2622. Calling it “a school-sanctioned and school-supervised event,” Chief Justice John Roberts concluded for a narrow majority of the High Court:

that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as
"lively," oral argument punctuated by paroxysms of atypical laughter, it did nothing to resolve a much more pervasive and pernicious First Amendment problem cropping up at schools across the country that the High Court has never considered. That issue is whether, consistent with encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

See generally Sonja R. West, Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate, 12 LEWIS & CLARK L. REV. 27 (2008) (analyzing the Supreme Court’s opinion in Morse).

3. See Linda Greenhouse, Court Hears Whether a Drug Statement Is Protected Free Speech for Students, N.Y. TIMES, Mar. 20, 2007, at A 16 (describing the oral argument as a “lively hour” involving “a series of hypothetical questions from the justices”).

4. The official transcript from the oral argument in Morse includes the notation “laughter” after Justice Stephen Breyer queried an attorney, “Suppose that this particular person had whispered to his next door neighbor, ‘Bong Hits 4 Jesus, heh heh heh,’ you know. Supposed that’s what had happened?” Transcript of Oral Argument at 21, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), available at http://www.supremecourtus.gov/oral-arguments/argument_transcripts/06-278.pdf (last visited Apr. 3, 2009). See Mark Sherman, Court Probes Limits on Student Speech in “Bong Hits 4 Jesus” Case, ASSOC. PRESS & LOCAL WIRE, Mar. 19, 2007, available on LexisNexis Academic (writing that “laughter filled the courtroom” when Justice David Souter asked “If the kids look around and they say, well, so and so has got his bong sign again. They then return to Macbeth. Does the teacher have to, does the school have to tolerate that sign in the Shakespeare class?”).

5. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The free speech and free press clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

6. The United States Supreme Court has considered a quartet of cases, including Morse, that focus on the free expression rights of public school students. In its seminal student-speech ruling in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the High Court protected the right of public school students in Iowa to wear black armbands to school as a form of protest against the war in Vietnam and as a call for a truce in that conflict. The Court in Tinker held that schools may censor such student displays of political expression only when there is actual evidence the speech in question “materially
the constitutional guarantee of free expression, public school officials may permissibly punish students for speech that defames, disparages or threatens teachers, administrators and students when that speech is created off campus, during non-school hours and posted on the internet. Embedded in this issue are two related questions—the first jurisdictional, the second substantive—that lower courts are grappling with:

disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Id.* at 513. The Court added, in language highly favorable to student speech rights, that the government “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509. Similarly, the Court noted that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 508. Ultimately, the Court in *Tinker* concluded that “the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.” *Id.* at 514.

More than fifteen years later, the Supreme Court held, in a case involving a high school student who gave a speech loaded with sexual innuendoes, that:

The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986). In upholding the school’s discipline of the student, who made the speech in a captive-audience situation before about 600 other students, the High Court added that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” *Id.* at 683.

In 1988, in a case involving censorship in a high school newspaper of student-written articles about pregnancy and divorce, the Supreme Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). The Court suggested such pedagogical concerns include “speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” *Id.* at 271.

*See generally* Melinda Cupps Dickler, *The Morse Quartet: Student Speech And The First Amendment*, 53 LOY. L. REV. 355 (2007) (providing an overview and analysis of the Supreme Court’s opinions in *Tinker, Fraser, Kuhlmeier and Morse*).
1. When may school officials properly assert jurisdiction and disciplinary authority over student speech that is created and published off campus, on technologies like computers and cell phones, and that refers to fellow students, teachers and/or administrators?

2. If school officials do have proper jurisdictional and disciplinary authority over such off-campus speech in a given case, then which substantive standard or test from the Supreme Court's four rulings on student expression is the most appropriate to apply to determine if the speech is protected?

It is the first of these two questions—the foundational query of when school officials may properly assert in-school disciplinary authority over high-tech, off-campus-created expression—that is the focus of this article. Without such threshold jurisdictional authority over the off-campus-created expression, one never reaches the second issue about which substantive rules from Supreme Court cases like Tinker v. Des Moines Independent Community School District and Bethel School District v. Fraser should be applied to a given case. Put more bluntly, the threshold question addressed here is whether the jurisdictional authority of schools properly extends outside and beyond the geographic boundary of "the schoolhouse gate" referred to in Tinker and reaches into private homes and other off-campus venues where students create, post and transmit internet messages. The problem is real because, as Nadine Strossen, president of the American Civil Liberties Union observed, "schools have been suspending and expelling students just for creating their own Web sites on their own home computers on their own

7. See supra notes 2 and 6 (describing the U.S. Supreme Court's rulings in these four cases).
10. Tinker, 393 U.S. at 506.
time" because the students "dared to express views that were critical of the school or of particular teachers."

Although the quandary regarding the permissibility of on-campus punishment for off-campus speech conveyed on new technologies has plagued courts for a decade now, it has yet to be


12. Id.

13. The word “quandary” seems appropriate to describe the situation, as at least one legal scholar has observed that the “interrelationship between the Internet and the First Amendment rights of public school students is a complex topic” and that “even more difficult questions are raised when the student’s Internet activities are completely disassociated from the school environment.” Leora Harpaz, Internet Speech and the First Amendment Rights of Public School Students, 2000 BYU Educ. & L. J. 123, 124, 126.

14. In a recent law journal article, attorney Justin P. Markey contends that “student Internet speech is never truly ‘off-campus’” because “when a student posts information on the Internet, that information may be accessed by anyone, both inside and outside the schoolhouse gates.” Justin P. Markey, Enough Tinkering With Students’ Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech, 36 Can. U.L. Rev. 129, 149 (2007). This article focuses its analysis on speech that is created off campus by students, during non-school hours and on non-school computers, regardless of whether that speech later can be received, viewed or downloaded on campus. It is taken as a given, in fact, that any website, absent filtering software, can be downloaded either on campus or off.

15. The first federal court opinion addressing a school’s ability to punish a student for off-campus created speech posted on the internet was handed down in 1998. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998). That dispute involved a website created by a Missouri high school student named Brandon Beussink at home, on his own computer and during non-school hours. Id. at 1177. The site featured crude and vulgar language that was highly critical of the administration at the student’s high school. Id. In ruling in favor of the student, who had been suspended for ten days, U.S. District Judge Rodney W. Sippel applied the United States Supreme Court’s substantial-and-material disruption standard adopted in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Beussink, 30 F. Supp. 2d at 1180. In rather robust language extolling the importance of freedom of expression, Judge Sippel reasoned that “it is provocative and challenging speech, like Beussink’s, which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure.” Id. at 1182. The judge added that “the public interest is not only served by allowing Beussink’s message to be free
from censure, but also by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work." \textit{Id.}

Examples of other early federal cases addressing online student speech rights include: Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (ruling in favor of a high school student who was disciplined by his school for creating a website, at home and without school resources, that featured mock, tongue-in-cheek obituaries of fellow students and that "allowed visitors to the web site to vote on who would ‘die’ next—that is, who would be the subject of the next mock obituary"); Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) (ruling in favor of a student who was disciplined for creating and emailing, from his home computer, a top-ten list critical of his high school’s athletic director); Coy v. Bd. of Educ. North Canton City Sch., 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002) (involving a student who was disciplined for creating, on his home computer on his own time, a website that called several classmates “losers,” included “a sentence describing one boy as being sexually aroused by his mother,” and “contained two pictures of boys giving the ‘finger,’ some profanity, and a depressingly high number of spelling and grammatical errors”); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 781, 786 (E.D. Mich. 2002) (ruling in favor of student who was disciplined for contributing content to a website called “Satan’s web page” that was created by another student, and concluding that school officials’ “regulation of Plaintiff’s speech on the website without any proof of disruption to the school or on campus activity in the creation of the website was a violation of Plaintiff’s First Amendment rights”); Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 706 (W.D. Pa. 2003) (holding, in the context of a case involving a student who posted insulting messages on a website message board regarding an upcoming volleyball game with another high school, that a high school’s policies regarding abusive speech were both “unconstitutionally overbroad and vague because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity.”).

At the state court level, a major early opinion on the issue of internet-posted student speech was handed down by the Pennsylvania Supreme Court in 2002. See J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (holding that a school district’s disciplinary action against a student who created a website at home that contained derogatory, profane, offensive and threatening statements directed toward one of the student’s teachers and his principal did not violate the student’s First Amendment rights).

Several legal scholars have addressed these early cases. See generally Clay Calvert, \textit{Off-Campus Speech, On-Campus Punishment: Censorship Of The Emerging Internet Underground}, 7 B.U. J. SCI. & TECH. L. 243 (2001) (providing a review and analysis of some early judicial opinions addressing the power of school authorities to punish students for internet content created off campus); Aaron A. Caplan, \textit{Public School Discipline For Creating Uncensored Anonymous Internet Forums}, 39
resolved and, in fact, it has picked up substantial steam at the federal court level since the High Court handed down Morse less than two years ago.

In particular, the U.S. Court of Appeals for the Second Circuit in May 2008 held in Doninger v. Niehoff that school officials did not violate the First Amendment speech rights of student Avery Doninger when they prohibited her from running for senior class secretary after she posted statements, while off campus, on a blog that referred to school administrators as "douchebags in central office" and encouraged classmates to call one administrator "to piss her off more." The Second Circuit noted the High Court's failure to address such an off-campus speech issue, writing that "the Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event." As Avery Doninger's mother, Lauren Doninger, told a reporter after the appellate court ruled against her daughter, "We need to really explore student speech rights at the judicial level in the age of the Internet."

The High Court, in fact, recently passed up just such an opportunity to address this question when it denied a petition for a writ of certiorari in March 2008 in Wisniewski v. Board of Education of Weedsport Central School District. The U.S. Court of Appeals for the
Second Circuit in *Wisniewski* in July 2007—less than one full month after the High Court's decision in *Morse*—ruled in favor of school officials and rejected "a First Amendment challenge to an eighth-grade student's suspension for sharing with friends via the Internet a small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed." The Second Circuit noted that the Supreme Court in *Morse* "had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities."23

But the Second Circuit is not the only federal court post-*Morse* to address the jurisdictional authority of schools over off-campus-created speech conveyed on the internet. For instance, a federal judge in the Western District of Pennsylvania considered the issue in *Layshock v. Hermitage School District*, a decision appealed to the U.S. Court of Appeals for the Third Circuit in 2008 and still pending at the time this article was written. *Layshock* involves a student, Justin Layshock, who was suspended from school for creating a scathing and fake MySpace profile of his principal, Eric Trosch, "by using his grandmother's computer, at her home, during non-school hours. No school resources were used to create the profile."26 As described later in this article, the district court judge in *Layshock* seemed to be much more hesitant in extending jurisdictional authority to school officials over off-campus-created internet speech targeting teachers, principals and students than was the Second Circuit in both *Doninger* and *Wisniewski*.

Finally, and most recently, in September 2008, a federal court in the Middle District of Pennsylvania in *J.S. v. Blue Mountain School District* ruled in favor of school officials who suspended a student for creating, from her home computer and during non-school hours, a fake MySpace profile of her principal that stated the principal "is a pedophile

23. *Id.* at 39 n.3.
and a sex addict."  

Although U.S. District Judge James M. Munley acknowledged "that the line between on-campus and off-campus speech is blurred with increased use of the Internet," he nonetheless found there was a sufficient "connection between the off-campus action and on-campus effect" that the school possessed disciplinary jurisdiction over the student's web-based expression.

The need to examine the issue of the jurisdictional authority of public schools over high-tech, off-campus-created student expression thus is both paramount and timely. It is so, in part, because "the [i]nternet has become a school’s new bathroom wall" where "a student’s strategic online postings today can destroy reputations, end relationships and intensify negative feelings." Courts, in turn, are scrambling to deal with the situation, but without guidance from the U.S. Supreme Court. As a writer for the non-profit Student Press Law Center in Arlington, Virginia, put it in the organization's Fall 2008 report:

Despite the explosion in the popularity of social-networking sites and blogs—and in the number of disciplinary sanctions doled out to students for online expression—the Supreme Court has yet to decide a student Internet speech case. So lower courts have been left to their own, often contradictory, interpretations in mulling how far school authority extends.

28. Id. at 1-2.
29. Id. at 13 n.5.
30. Id. at 14.
32. Id.
33. See Kara D. Williams, Comment, Public Schools vs. Myspace & Facebook: The Newest Challenge To Student Speech Rights, 76 U. CIN. L. REV. 707, 710 (2008) (writing that "[w]hile the Supreme Court has yet to rule on a case involving student speech on the Internet, the lower courts have decided multiple cases on this specific issue.").
34. Kelsey Beltramea, Tangled Web: Courts Conflict in Efforts to Define Schools’ Power Over Online Speech, REPORT (Student Press Law Center, Arlington, Va.), Fall 2008, at 10.
In the absence of a ruling from the U.S. Supreme Court, some schools are filling the judicial vacuum and seizing the opportunity for censorship. They are now adopting policies that attempt to restrict the online, off-campus speech of their students. As the Grand Rapids Press reported in December 2007, the Grand Blanc School District in Michigan adopted a policy that “regulates students’ after-school postings on the Internet.” That policy drew the wrath of the local American Civil Liberties Union chapter for its intrusion upon the First Amendment right of free expression. Other school districts have adopted similar policies that punish students for comments they post online while at home. Some school districts are claiming jurisdiction over off-campus-created internet speech on the flimsiest of grounds, legal or otherwise. For instance, in June 2008 a senior at Braden River High School in Manatee County, Florida, was not allowed to attend his graduation ceremony. The reason? Because “profanity, sexual innuendo and threats of violence” were allegedly included in a song that the student

35. See Christi Cassel, Note, Keep Out of Myspace!: Protecting Students from Unconstitutional Suspensions and Expulsions, 49 WM. & MARY L. REV. 643, 646 (2007) (asserting that “with little judicial guidance, school officials are taking matters into their own hands, frequently overstepping constitutional boundaries.”).

36. See generally As bullies go online, schools start cracking down, THE CAPITAL (Annapolis, Md.), Dec. 24, 2007, at B5 (reporting that “[s]tates from Rhode Island to Arkansas to Oregon have proposed legislation that would make cyberbullying between students subject to expulsion or prosecution—whether committed at school, at home or via cell phone text message” (emphasis added)), available on LexisNexis Academic.


38. Id.

39. See Michael W. Hoskins, Courts Grapple with Issues Arising from Internet, Blogs, INDIANAPOLIS BUS. J., Mar. 12, 2007, at 20 (writing that “[a]s officials recognize that off-campus activity can spill into school hallways and classrooms, many are looking to policies that can prevent those actions outside school from impacting student safety or the overall educational process,” and noting that in Indiana, “Carmel High School has used its policy against harassment and bullying to punish students for online comments.”).

40. Editorial, School Fails Basic Free Speech Test, ST. PETERSBURG TIMES (Fla.), June 7, 2008, at 8A.
had recorded himself and then uploaded on MySpace. He never sang the song in school, but school officials "said they had jurisdiction because some students had listened to the song at school on iPods." In other words, simply because other students downloaded the song, put it on their iPods and then listened to it on school grounds, the school claimed it could punish the singer-student.

Other school districts simply do not know what to do, given the lack of definitive precedent from the High Court. As Emily J. Leader, deputy chief counsel for the Pennsylvania School Boards Association, stated, "'[T]he biggest problem with cyberbullying is, do we have jurisdiction? Whether we can discipline is a gray area that hasn't been completely tested in the courts.'"

This article analyzes and examines judicial approaches used by federal courts in 2007 and 2008 for addressing the jurisdictional question of a school's ability to discipline its students for speech about classmates, teachers and administrators that they create off campus, on their own time and without the use of school resources. Initially, Part I of the article briefly describes the absence of U.S. Supreme Court opinions on this issue, and it also illustrates how courts have treated the scope of school authority over off-campus speech in contexts other than the internet. Furthermore, Part I emphasizes an important point: that teachers, administrators and students would not be left remediless if the Supreme Court were to eventually hold that schools lack jurisdiction over off-campus-created internet speech that a student does not download on campus.

Part II then extensively examines the opinions in Doninger, Wisniewski, Layshock and J.S. as they relate to the threshold jurisdictional issue. In particular, this part exposes what the author of this article believes are serious flaws and weaknesses with the approach

41. Id.
42. Id.
43. Rebecca Vandermeulen, Cyberbullying: The Schoolyard has Moved to the Internet as a Bullying Ground for Youngsters, READING EAGLE (Reading, Pa.), Nov. 2, 2007, at A1. See generally Dan Hansen, Schools Address High-Tech Bullying, SPOKESMAN-REV. (Wash.), Aug. 4, 2008, at 1A (describing incidents of cyberbullying and noting efforts of both legislative bodies and schools to restrict it).
44. Infra notes 48–74 and accompanying text.
45. Infra notes 75–179 and accompanying text.
adopted by the Second Circuit in both Doninger and Wisniewski, as well as in the method embraced by the federal district court judge in J.S. In contrast, the language in the district court’s opinion in Layshock is much more favorable to the off-campus speech rights of minors who post content about schoolmates, teachers and administrators.

Part III goes beyond these legal opinions to analyze the actual briefs filed in 2008 with the United States Court of Appeals for the Third Circuit by both Justin Layshock and his opponent, the Hermitage School District, in order to scrutinize the competing arguments made regarding the proper extent of school jurisdiction over off-campus-created internet expression. Significantly, Part III explores an important dichotomy in the way the First Amendment rights of off-campus minors are perceived by the parties in such litigation: the off-campus minor as a student against the off-campus minor as a citizen, with the former position advocated by schools and the latter view taken by the individuals and advocacy groups challenging the schools. Finally, Part IV not only urges the U.S. Supreme Court to soon consider a case like those that are the focus of this article, but it also calls for the High Court, if and when it does take on such a case, to reject the reasoning of both the Second Circuit in Doninger and Wisniewski and the federal district court in J.S.47

I. THE UNRESOLVED ISSUE OF OFF-CAMPUS EXPRESSION IN THE DIGITAL AGE

In its June 2008 friend-of-the-court brief filed before the United States Court of Appeals for the Third Circuit in Layshock v. Hermitage School District, the Student Press Law Center succinctly argued by analogy for application of precedent supporting public school punishment of out-of-school, internet-based speech:

The Supreme Court’s jurisprudence is clear, and technological innovation does not render it null. If the publication of a student’s speech does not take place on school grounds, at a school function, or by means of school resources, a school cannot punish

46. Infra notes 180–190 and accompanying text.
47. Infra notes 191–194 and accompanying text.
the student without violating his First Amendment rights. 48

Indeed, the Supreme Court has never considered a case directly on point.

The High Court has addressed scenarios involving the wearing on campus of black armbands, 49 a student speech made on campus, 50 and a high-school newspaper produced on campus as part of a journalism class. 51 More recently, where the speech at issue in Morse v. Frederick 52 involved a banner unfurled by a student while standing on the sidewalk across the street from his campus, the Supreme Court treated the speech as if it were on campus because it took place "during normal school hours", 53 and at "a school-sanctioned and school-supervised event," 54 in which "[t]eachers and administrative officials monitored the students' actions." 55 In other words, as suggested by the language cited above from the Student Press Law Center's brief, it was considered a "school function." 56

Importantly, Chief Justice John Roberts in Morse hinted, albeit in passing, at the problem facing courts with off-campus internet speech cases. He wrote that "there is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents." 57 For this proposition, Roberts cited a footnote in a 2004 opinion in which the U.S. Court of Appeals for the Fifth Circuit observed that it was "aware of the difficulties posed by state regulation of student speech that takes place

52. 127 S. Ct. 2618 (2007).
53. Id. at 2624.
54. Id. at 2622.
55. Id.
56. See SPLC Brief, supra note 48, at 6.
57. Morse, 127 S. Ct. at 2624 (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615, n.22 (5th Cir. 2004)).
off-campus and is later brought on-campus either by the communicating student or others to whom the message was communicated.\textsuperscript{58}

When students have engaged in much more primitive forms of speech off campus that are directed at teachers or fellow students, lower federal courts generally have protected the student expression.\textsuperscript{59} This should not come as a surprise because, as one attorney who has litigated cases involving student internet expression wryly wrote, "when Tinker said that students do not shed their First Amendment rights at the schoolhouse gate, it necessarily implied that they have the ordinary complement of First Amendment rights outside those gates. Otherwise, they would have nothing to shed (or not shed)."\textsuperscript{60} As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit observed in a case involving the out-of-school First Amendment rights of minors to access violent video games, "children have First Amendment rights."\textsuperscript{61}

For instance, in a case involving a student suspended from school after he gave the middle-finger salute\textsuperscript{62} to a teacher in an off-campus restaurant parking lot, a federal district court held that the student's First Amendment right of free expression was violated by the on-campus discipline.\textsuperscript{63} The court stated that the proper remedy for such

\textsuperscript{58} Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (5th Cir. 2004).

\textsuperscript{59} See Klein v. Smith, 635 F. Supp. 1440, 1442 n.4 (D. Me. 1986) (protecting against school punishment a student who raised his middle finger toward a teacher while off campus in a car in a restaurant parking lot, and writing that "the effective response to out-of-school misbehavior would be the swift application of that parental discipline which is here roundly deserved.").

\textsuperscript{60} Caplan, supra note 15, at 140. See supra note 6 (providing an overview of the Supreme Court's ruling in Tinker).


\textsuperscript{63} Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986) (concluding that a ten-day suspension imposed on a student for extending a middle finger toward a teacher while off school grounds was unconstitutional (citing Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976); Cohen v. California, 403 U.S. 15, 25-6
obstreperous speech should be left to parents, not school officials, as it wrote that "the effective response to out-of-school misbehavior would be the swift application of that parental discipline which is here roundly deserved." By analogy, many students who today create websites while off campus that mock school officials and fellow classmates are, in essence, hoisting a metaphorical middle finger at them—not in a restaurant parking lot, but in the vast reaches of cyberspace.

In a case involving an underground student newspaper that was "printed outside the school," not sold on campus, and for which "any activity within the school itself was de minimis," the U.S. Court of Appeals for the Second Circuit wrote three decades ago that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." Here, too, the Court noted that parents, not school authorities, should police off-campus conduct of minors, writing that:

the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of parens patriae.

As described later in Part III of this article, the distinction between parental control versus school control, made by the Court, draws from arguments made in 2008 by the attorneys for Justin Layshock in favor of treating minors, when they are off campus, as citizens rather than students.

(1971); Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503 (1969); State v. John W., 418 A.2d 1097 (Me. 1980)).

64. Id. at 1441 n.4.
66. Id.
67. Id.
68. Id. at 1051.
69. See infra notes 180–182 and accompanying text.
At this stage, it is important to raise one more point: were the United States Supreme Court eventually to hear a case like Doninger or Layshock and were it, in turn, to hold that schools lack jurisdictional authority to punish students for off-campus created speech that they do not download at school, this result would not leave the victims of their speech remediless. For instance, the principal in Layshock filed a defamation lawsuit against Justin Layshock based upon the same fake MySpace profile of Trosch that led to Layshock’s suspension from school.\footnote{70} In other words, off-campus remedies (civil lawsuits) already exist for the victims of off-campus speech. Similarly, a high school girl, falsely called a “slut” on a website created off-campus by a classmate, had an adequate remedy in defamation law against the classmate, regardless of whether the school punishes the classmate.\footnote{71} Indeed, “many lawsuits have been filed by people who say they were defamed by something that appeared online.”\footnote{72} Minors learn a very important lesson—one more profound than any possible classroom lecture on the subject—when they are sued for defamation or a related cause of action. These facts, of course, raise a very important question: why should schools be able to punish students for off-campus-created expression when the victims of that expression already have off-campus remedies for any harm they may suffer?

The fact that such real-world remedies do exist clearly militates against extending the jurisdictional authority of schools over such off-campus expression. Why should the courts, then, allow a student to be punished twice—once by a libel suit, once by a suspension? As the

\footnote{70. See Joe Pinchot, Principal Sues 4 Ex-Students Over Profiles on Myspace, HERALD (Sharon, Pa.), Apr. 4, 2007, at A1. The defamation lawsuit was still pending at the time this article was written.}

\footnote{71. See Stanton v. Metro Corp., 438 F.3d 119, 130 (1st Cir. 2006) (holding that a magazine article was reasonably susceptible “to the defamatory meaning” that the plaintiff “engages in sexually promiscuous conduct”); Bryson v. News Am. Publ’n, Inc., 672 N.E.2d 1207, 1218 (Ill. 2006) (finding that the term “slut,” as used in a magazine article, conveyed a defamatory meaning and noting that, “in the present age, the term ‘slut’ is commonly used and understood to refer to sexual promiscuity.”). See generally KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 105 (7th ed., 2009) (writing that “assertions that a person’s sexual conduct deviates from generally accepted norms usually are defamatory”).}

\footnote{72. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 160 (1st 2009).}
Student Press Law Center argues in its brief now before the Third Circuit in *Layshock*, "Principal Trosch should be left to pursue his private legal remedy; this Court should not legitimize the use of public power to settle private scores." 73 On the other hand, school administrators "are worried about the disruption of the learning process" 74 that off-campus, web-based speech can cause and thus want to censor it, regardless of whether the individuals attacked have their own private, civil-law remedies.

With both the abovementioned question and the counterresponses to it in mind, this article turns to the opinions in four post-*Morse* federal court cases that have dealt with in-school punishment for student speech created off campus and posted on the internet.

II. HOW COURTS AFTER MORSE ARE ADDRESSING SCHOOL AUTHORITY OVER OFF-CAMPUS-CREATED, INTERNET-BASED SPEECH

There have been four federal court rulings—two in 2007 and two in 2008—since the U.S. Supreme Court's opinion in *Morse* that have addressed the topic of in-school punishment for speech created by students while off campus and posted on the internet. They are addressed separately in Sections A, B, C and D below.

A. Wisniewski v. Board of Education of the Weedsport Central School District 75

In July 2007, the United States Court of Appeals for the Second Circuit determined that a public middle school had jurisdiction to punish a student, Aaron Wisniewski, for speech that he sent and created while instant messaging (IM) from his parents' home computer. The speech at issue was a disturbing IM icon, described by the appellate court as "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood." 76 Underneath the icon was the

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73. *See SPLC Brief, supra note 48, at 21.*
74. *Alan Gomez, Students, Officials Locking Horns Over Blogs, USA TODAY,* Oct. 26, 2006, at 8D.
76. *Id.* at 36.
message "Kill Mr. VanderMolen," a reference to Wisniewski's English teacher.77

Wisniewski sent the icon to fifteen members of his so-called buddy list, some of whom were fellow students, but he did not send it to VanderMolen or any other school officials.78 In fact, VanderMolen and school officials only discovered the icon through an indirect chain of events, several weeks after the icon had circulated, when they learned about it from a student who actually was never sent the icon by Wisniewski but who heard about it and, in blunt terms, ratted Wisniewski out.79 As the appellate court wrote:

it came to the attention of another classmate, who informed VanderMolen of Aaron's icon and later supplied him with a copy of the icon. VanderMolen, distressed by this information, forwarded it to the high school and middle school principals, who brought the matter to the attention of the local police, the Superintendent Mabbett, and Aaron's parents.80

In addressing the threshold question of whether the school had jurisdictional authority to possibly punish Aaron Wisniewski, the Second Circuit started from the pivotal premise that "[t]he fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."81 In brief, the long arm of school authority does not necessarily stop at the schoolhouse gate.

The question then became: how far does that arm stretch? The Second Circuit found it could stretch, rubberband-like, to Wisniewski's home-created speech because, on the facts of the case, there was "a reasonably foreseeable risk that the icon would come to the attention of school authorities . . . ."82 As the appellate court wrote, "it was reasonably foreseeable that the IM icon would come to the attention of

77. Id.
78. Id.
79. Id.
80. Id.
81. Id. at 39 (emphasis added).
82. Id. at 38.
school authorities and the teacher whom the icon depicted being shot.\textsuperscript{83} For the Second Circuit, the fact that the student did not intend for the icon to come to the attention of either his teacher or other school officials made no difference.\textsuperscript{84} As the appellate court put it, school discipline was permitted “whether or not Aaron intended his IM icon to be communicated to school authorities . . . .”\textsuperscript{85}

The rule, then, from Wisniewski appears to boil down to a rather primitive “if-then” formula: \textit{If it is reasonably foreseeable that student speech created off campus will come to the attention of school authorities, then school authorities may exert disciplinary authority over it.}

Applying this rule of what might be called \textit{reasonably foreseeable attention} to the facts of the case, the appellate court wrote that “[t]he potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron’s classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable.”\textsuperscript{86} It is important to note from this statement that the \textit{content of the speech} itself is a factor in determining whether it is reasonably foreseeable that the speech will come to the attention of school officials. The implicit relationship lurking in this formula appears to be that the more threatening or shocking the content, the more foreseeable it is that the speech will come to the attention of administrators. Other foreseeability factors apparently are the \textit{scope of distribution of the speech} (“the extensive distribution of it”)\textsuperscript{87} and the \textit{duration of publication} (“a three-week circulation period”).\textsuperscript{88}

There seemingly was some disagreement, however, among the three judges on the Second Circuit panel in Wisniewski about the precise nature of the jurisdictional rule that should apply. In writing the unanimous three-judge opinion, Circuit Judge Jon O. Newman observed that “the panel is divided as to whether it must be shown that it was

\begin{itemize}
\item \textsuperscript{83} Id. at 39.
\item \textsuperscript{84} Id. at 40.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. at 39-40.
\item \textsuperscript{87} Id. at 39.
\item \textsuperscript{88} Id. at 40.
\end{itemize}
reasonably foreseeable that Aaron’s IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability."\(^89\) Judge Newman dropped a footnote stating that:

"Judge [John M.] Walker, who otherwise fully concurs in this opinion and in the judgment, would hold that a school may discipline a student for off-campus expression that is likely to cause a disruption on campus only if it was foreseeable to a reasonable adult, cognizant of the perspective of a student, that the expression might reach campus."\(^90\)

Although Walker did not write a separate concurring opinion, his apparent concern, as interpreted and expressed by Judge Newman in that same footnote, was that application of the foreseeability test without also considering the perspective of the student “would raise substantial First Amendment concerns, as it might permit a school to punish a student for the content of speech the student could never have anticipated reaching the school, such as a draft letter concealed in his night-stand, stolen by another student, and delivered to school authorities."\(^91\)

From where does this concern arise? According to Judge Newman’s footnote,\(^92\) it comes from the holding of the United States Court of Appeals for the Fifth Circuit in *Porter v. Ascension Parish School Board.*\(^93\) That case, centering on a violently-themed drawing made by a student on a sketchpad, involved “off-campus speech brought on-campus without the knowledge or permission of the speaker."\(^94\) The Fifth Circuit in *Porter* held that “the fact that [the student’s] drawing was composed off-campus and remained off-campus for two years until it...

\(^89\) *Id.* at 39. Newman noted, however, that this disagreement did not affect the decision in any way, writing that “we are in agreement . . . that, on the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.”

\(^90\) *Id.* at 39 n.4 (emphasis added).

\(^91\) *Id.*

\(^92\) *Id.* (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004)).

\(^93\) 393 F.3d 608 (5th Cir. 2004).

\(^94\) *Id.* at 619 (emphasis added).
was unintentionally taken to school by his younger brother takes the present case outside the scope of Tinker and other Supreme Court precedents on student free expression. In other words, general principles of First Amendment jurisprudence applicable to all citizens (adults and minors) applied to the student-artist in Porter. The Fifth Circuit thus found that "expressions such as [the student's off-campus] drawing, provided that they do not constitute a true threat, are entitled to First Amendment protection." The true threats doctrine referred to in this statement is a rule of non-protection for certain speech that applies to all people, adults and minors, and thus is not a special school-only rule like Tinker.

It is unclear, however, just how much additional protection for student speech is brought by Judge Walker's suggestion that "the perspective of a student" must be taken into account by an adult in determining whether it is reasonably foreseeable that off-campus-created speech will come to the attention of school officials. No other details were provided, and Judge Walker, unfortunately, did not write a separate concurring opinion to elaborate on this point.

At this stage, then, it is important to unpack and dissect the Second Circuit's rule regarding a school's jurisdiction over high-tech, off-campus-created expression like Aaron Wisniewski's IM icon. Apparently the rule is that schools have jurisdiction to discipline students for such speech if it is reasonably foreseeable that the speech will come to the attention of school officials.

The notion of reasonable foreseeability that some result or consequence might transpire or occur—in this case, the reasonable foreseeability that the off-campus-created speech will capture the attention of school officials—invokes basic negligence principles, borrowed from tort law and applied here to a constitutional question of

95. Id. at 615 n.22.
96. Id. at 618.
97. See Virginia v. Black, 538 U.S. 343, 359 (2003) (defining true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" and noting that "the First Amendment also permits a State to ban a 'true threat'").
98. Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 n.4 (2d Cir. 2007).
First Amendment protection for student expression. In particular, under negligence standards, a person generally "has a duty to exercise reasonable care with regard to foreseeable risks of harm arising from one's conduct."\(^9\) It is axiomatic in tort law that "[f]oreseeable risks of harm are a predicate for liability"\(^10\) and that "[a] negligence lawsuit generally focuses on the foreseeable risks of harm arising out of one's conduct and whether, in light of those risks, the conduct or failure to act was reasonable or unreasonable."\(^11\) As the Supreme Court of California recently wrote, under general negligence principles, a "legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct."\(^12\)

This is very similar to the jurisdictional rule applied in *Wisniewski*, as one must ask whether there is a reasonably foreseeable risk or chance that the student speech that allegedly causes some harm will come to the attention of school officials. A student risks discipline (in-school liability, as it were) if it is reasonably foreseeable that his or her speech will come to the attention of school authorities.\(^13\)

Applying negligence principles to speech-based liability issues is not unusual. For instance, negligence is commonly applied as a fault standard in defamation law when the plaintiff is a private person.\(^14\) But negligence, when used as a fault standard in defamation law, does not focus on the reasonable foreseeability of results occurring, like a website coming to the attention of a school official; instead, negligence in

\(^10\) Id. at 44.
\(^11\) Id. (emphasis added).
\(^12\) Lugtu v. Cal. Highway Patrol, 28 P.3d 249, 256 (Cal. 2001) (emphasis added).
\(^13\) See *Wisniewski*, 494 F.3d at 38 (asking whether there is "a reasonably foreseeable risk that the icon would come to the attention of school authorities" (emphasis added)).
\(^14\) See, e.g., Magnusson v. N.Y. Times Co., 98 P.3d 1070, 1079 (Okla. 2004) (writing that "this Court determined that a reasonable balance between the right of the news media and the right of a private individual as against libel or slander was best achieved by a negligence test" (emphasis added)). *See generally* Paul Siegel, *Communication Law in America* 151 (2002) (writing that "[t]he majority of states require that private plaintiffs prove that defamatory remarks were made with negligence").
defamation law focuses on the reasonable care (or lack thereof) that a reporter took in writing a story,\textsuperscript{105} such that "reasonable care would likely mean those attributes that are common to sound journalism."\textsuperscript{106} There is, then, an important difference, between two uses of negligence principles: \textit{reasonable foreseeability} v. \textit{reasonable conduct}.

In fact, some courts have expressed a strong presumption against employing negligence principles that relate to the reasonable foreseeability of a result occurring in speech-based cases. This is particularly true in lawsuits in which a speech product, such as a movie, video game, or book, is alleged to have caused its watchers or readers to commit violence against others. For instance, a California appellate court in 1981 specifically rejected applying negligence principles in determining whether a television network should be held civilly liable for a sexual assault that allegedly occurred because the attackers were inspired by a movie shown on the network.\textsuperscript{107} The court rejected imposing what it called "traditional negligence concepts"\textsuperscript{108} on the television network because of the "chilling effect"\textsuperscript{109} they would have on speech. The court wrote that "the deterrent effect of subjecting the television networks to negligence liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of public debate."\textsuperscript{110} Importantly, the California appellate court noted that while the United States Supreme Court has allowed the use of a negligence standard in defamation law cases involving private figures, the use of a negligence standard "does not

\textsuperscript{105.} See Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974) (Brennan, J., dissenting) (describing negligence, in defamation law, as a "reasonable-care standard"); Rutt v. Bethlehem's Globe Publ'g Co., 484 A.2d 72, 83 (Pa. 1984) (holding that "a private figure defamation plaintiff" is required to "prove that the defamatory matter was published with 'want of reasonable care and diligence to ascertain the truth' or, in the vernacular, with negligence" (emphasis added)). See generally John D. Zelezny, \textit{Communications Law: Liberties, Restraints, and Modern Media} 138 (5th ed. 2007) (discussing negligence as a "reasonable care" standard in defamation actions).


\textsuperscript{108.} \textit{Id.} at 494.

\textsuperscript{109.} \textit{Id.}

\textsuperscript{110.} \textit{Id.}
extend more broadly to tort liability for speech in areas outside the law of defamation.” The California appellate court, like courts in other cases involving very similar scenarios, thus chose to apply the incitement-to-violence standard, fashioned by the United States Supreme Court in Brandenburg v. Ohio, which focuses not on the reasonable foreseeability of an act occurring, but rather on whether the actor actually directed or intended for the act to occur. The Supreme Court has interpreted the word “directed” in the Brandenburg incitement test to mean “intended to produce.”

The bottom line, then, is that judicial adoption of a negligence-based, reasonable-foreseeability standard on the threshold jurisdictional question, like the standard adopted in Wisniewski, is far from an inevitable rule or a foregone conclusion. Negligence need not be adopted here and, indeed, as illustrated above, it has been rejected by

111. See, e.g., Sanders v. Acclaim Entm’t, Inc., 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (finding, in the context of a wrongful death action blaming video game manufacturers for the murders committed by Dylan Klebold and Eric Harris at Columbine High School, that defendants owed no duty of care to the plaintiffs under negligence law and holding, instead, that “Brandenburg remains the applicable standard even where the individual allegedly incited to commit unlawful acts is a minor”); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 182 (D. Conn. 2002) (ruling, in the context of a lawsuit claiming that the design and marketing of the video game Mortal Kombat caused the death of a 13-year-old boy who was stabbed by a person supposedly addicted to that game, that Brandenburg applied and precluded liability even assuming “that Mortal Kombat caused violence and physical harm to be visited upon” the deceased); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1000 (1988) (holding, in the context of a case in which a suicide was blamed on listening to an Ozzy Osbourne record, that, due to First Amendment concerns, liability could only be imposed on the record company under the test from Brandenburg, and that, as applied to this case, the plaintiffs had to prove “that Osbourne’s music was directed and intended toward the goal of bringing about the imminent suicide of listeners . . . ”).


113. The Supreme Court in Brandenburg held that the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Id. at 447 (emphasis added).

114. Id.

courts in other contexts in which constitutional concerns for freedom of expression were at stake.\textsuperscript{116}

This distinction—whether a result or outcome is merely \textit{foreseeable} or whether it is actually \textit{intended}—would make a vast difference on the jurisdictional question at issue in cases like Wisniewski. In a nutshell, it obviously is much easier for a school to obtain disciplinary jurisdiction when the question is whether it was reasonably foreseeable that a student’s off-campus-created website, web page or IM icon would come to the attention of school authorities. This rule, for instance, would not protect from disciplinary authority a student who not only does not subjectively intend for his off-campus website to come to the attention of school authorities, but who actually posts messages on the home page that objectively indicate that he does not want it coming to the school’s attention, such as “Please Do Not Tell School Officials About My Website” or “This Site is Intended for Student Use Only” or “Leave This Website Now If You Are a Teacher or School Official.”

In fact, some students have actually posted similar warnings or disclaimers, yet still faced in-school wrath. For instance, a school in Washington state punished a student for a website that “included disclaimers warning a visitor that the site was not sponsored by the school, and for entertainment purposes only.”\textsuperscript{117} The Commonwealth Court of Pennsylvania upheld the school’s punishment of the student for the website despite the fact that the site had a disclaimer.\textsuperscript{118}

On the other hand, a jurisdictional standard that focuses solely on the intent of the student—whether the student intended for the message to come to school officials’ attention—would clearly be more protective of speech. It seems doubtful, for instance, that a college-bound student who mocks a high school teacher or principal on a website actually wants that individual—the target of the student’s criticism, satire, or other defamation—to find out. Why? Because the student probably would fear precisely the type of in-school punishment—suspension, expulsion, or transfer to an alternative school—that schools

\textsuperscript{116} Supra notes 106-114 and accompanying text.


are, in fact, meting out. Such a disciplinary blemish on a high school record easily could jeopardize or threaten a potential offer of admission from a college or university. Student-created web pages that mock principals, teachers and students are much more likely intended for the mirth and amusement of other students (however childish the humor may be) than they are for grabbing the attention of the school authorities.

Returning to the jurisdictional standard actually adopted by the Second Circuit in Wisniewski, it is important to understand just how easy it is for schools to gain jurisdictional authority over off-campus-created internet expression when all that is necessary is for it to be "reasonably foreseeable"119 that the speech will "come to the attention of school authorities."120 There are, in this author's opinion, at least three reasons why it is reasonably foreseeable that nearly any and all controversial or provocative speech that is created and posted off campus by a student will come to the attention of school authorities:

1. **Tattletale Students**: It is reasonably foreseeable that at least one student in a school will play the role of whistleblower or snitch and reveal the misdeeds of others. Indeed, this is precisely what happened in Wisniewski, as the icon at issue came to the attention of a do-gooder student who did not actually receive it from Aaron Wisniewski but who felt compelled, for whatever reason, to tell the teacher and "later supplied him with a copy of the icon."121

2. **Curious Teachers/Administrators**: Given that school officials are now well aware of the types of internet postings that students today often create, it is reasonably foreseeable that some teachers and principals will proactively search online, via Google, Yahoo or other search engines, for postings about themselves or their school. Just as a college professor today might take a gander at the website RateMyProfessors.com122 to see what students are saying about him or

120. Id.
121. Id. at 36.
122. This website describes itself as: the Internet's largest listing of collegiate professor ratings, with more than 6.8 million student-generated ratings of over 1 million professors. Each year, millions of college students use the site to help plan their class schedules and rate current and past professors on attributes such as
her, so too might a curious middle-school or high-school teacher or principal go online to search for the good, the bad and the ugly, as it were, about themselves and their school. Police today actively search out social-networking sites like Facebook for evidence of crimes committed by college students, so it is quite foreseeable that high school administrators seeking to squelch trouble before it happens or to nip it in the bud would do the same.

3. In-School Buzz/Discussion: If a student has created a provocative website regarding classmates or teachers, there is certain to be some level of hallway gossip and buzz about it that, quite foreseeably, might be overheard by school officials. Indeed, in his September 2008 opinion in *J.S. v. Blue Mountain School District*, U.S. District Judge James Munley wrote that "[a]lthough the students created the profile at J.S.'s home, news of it soon spread to the school. The next day students were already discussing the website at school." The judge added that "[d]iscussion of the website continued through the day, and there was a general 'buzz' in the school with quite a few people knowing about it."

It is possible, of course, for all three of the above influences to be at work and to coalesce in any given situation, making it just that much more foreseeable that an off-campus posting will come to the attention of school authorities. Hallway gossip about a website might inspire a tattletale student to come forward to school officials, for instance, or such gossip might trigger an inquisitive principal to either go

helpfulness and clarity. Online since 1999, RateMyProfessors.com currently offers ratings on college and university professors from over 6,000 schools across the United States, Canada, England, Scotland and Wales with thousands of new ratings added each day.


123. See Erica Perez, *Crime and Computers; Getting Booked by Facebook*, MILWAUKEE J. SENTINEL, Oct. 3, 2007, at A1 ("Facebook.com and MySpace.com are the newest crime-busting tools in a police officer's repertoire, particularly for campus police, who are using the sites to investigate student crimes and violations and gather information about where students live and whom they know. In some cases, the information they find is making its way into court.").


125. *Id.* at *3*.

126. *Id.* at *4*. 
online to find out what the discussion is about or to start asking students about it until, at last, the principal comes across the one obliging whistleblower student he or she is seeking.

Two more points about the Second Circuit’s application of its test in *Wisniewski* are important to mention. First, as noted earlier,\(^{127}\) in concluding that it was “at least foreseeable to a reasonable person, if not inevitable”\(^ {128}\) that the student’s IM icon would come to the attention of school authorities, the Second Circuit made reference to what it called “the extensive distribution of [the icon], which encompassed 15 recipients.”\(^ {129}\) If fifteen students constitutes “extensive distribution”\(^ {130}\) in a digital age, then anything posted on the internet—the “world” wide web—blows that away. Second, to the extent that the Second Circuit also focused, in its foreseeability determination, on the fact that there was “a three-week circulation period” of the icon, it must be pointed out that nearly anything posted on the internet can be downloaded, cached, or simply printed out, no matter how long the actual web page in question stays up. For instance, it is clearly foreseeable that a student—in particular, one who is troubled by something vicious posted online by another student—might print out the objectionable content and take it to school officials the next day, even if the webpage itself is taken down by its creator (perhaps because he or she had second thoughts about the content he or she was posting).

The bottom line is that it is reasonably foreseeable that almost any provocative form of student speech posted online that criticizes or castigates students, teachers, or administrators will come to the attention of school authorities. It is a jurisdictional standard that appears to be very easy for school officials to prove.

Ten months after its ruling in *Wisniewski*, the Second Circuit issued a second opinion addressing the off-campus student speech issue in a case called *Doninger v. Niehoff*.\(^ {131}\) That opinion, as it relates to the knotty jurisdictional issue, is described below in Section B.

\(^{127}\) *See supra* note 86 and accompanying text.
\(^{128}\) *Wisniewski*, 494 F.3d at 40.
\(^{129}\) *Id.* at 39.
\(^{130}\) *Id.*
\(^{131}\) 527 F.3d 41 (2d Cir. 2008).
B. Doninger v. Niehoff

This case centered on a publicly accessible blog entry, posted on a website called livejournal.com, that was made by a high school student named Avery Doninger “within the confines of her home.” The entry, which the appellate court described as “a vulgar and misleading message about the supposed cancellation of an upcoming school event,” resulted in Doninger being prohibited from running for the position of senior class secretary at Lewis Mills High School (LMHS). The posting referred to school administrators as the “douchebags in central office” and encouraged fellow students either to write or call the superintendent in order “to piss her off more.”

Citing its decision in Wisniewski, the Second Circuit wrote that “a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.” It is the latter, italicized portion of this statement that addresses the jurisdictional question; the former part, regarding substantial disruption, taps into the substantive rule from Tinker that applies once jurisdiction exists.

This phrasing of the jurisdictional rule in Doninger (whether the speech would “reach campus”) is slightly different from that in Wisniewski (whether the speech “would come to the attention of school authorities”). It is unclear whether “reach” means physically to come on to campus (like an underground student newspaper distributed on campus) or merely to reach the attention of administrators. Regardless of

132. Id. at 49.
133. Id. at 43.
134. Doninger was the Junior Class Secretary at the time of the incident. Id. at 44.
135. Id. at 45.
136. Id.
137. Id. at 48 (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)) (emphasis added).
138. See supra note 6 (describing the Supreme Court’s ruling in Tinker).
139. Doninger, 527 F.3d at 48.
140. Wisniewski, 494 F.3d at 38.
the semantics, however, the overriding focus is squarely on the reasonable foreseeability of possible outcomes occurring.

In applying its variation of the jurisdictional rule, the appellate court in *Doninger* wrote:

the record amply supports the district court's conclusion that it was reasonably foreseeable that Avery's posting would reach school property. Indeed, the district court found that her posting, although created off-campus, "was purposely designed by Avery to come onto the campus." The blog posting directly pertained to events at LMHS, and Avery's intent in writing it was specifically "to encourage her fellow students to read and respond." As the district court found, "Avery knew other LMHS community members were likely to read [her posting]." Several students did in fact post comments in response to Avery and, as in *Wisniewski*, the posting managed to reach school administrators. The district court thus correctly determined that in these circumstances, "it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it." 141

In unpacking this analysis and application of the reasonable foreseeability rule to the facts of the case, several factors seem to emerge. Most strikingly, the determination takes into account the intent of the writer, as the court focuses on how Avery Doninger "purposely designed" 142 the posting to come onto campus. In addition, the court discusses "Avery's intent." 143 This intent-infused focus on foreseeability seems to contrast with the statement made by the Second Circuit in *Wisniewski* that discipline was permissible "whether or not Aaron intended his IM icon to be . . . communicated to school authorities . . .

141. *Doninger*, 527 F.3d at 50 (citations omitted).
142. *Id.*
143. *Id.*
The reconciliation, however, between the two cases seems to be this:

- intent of the student-author *may* be a relevant factor on the foreseeability determination of whether the speech will reach campus or come to the attention of school officials;
- intent of the student-author for the speech *not* to come to the attention of school authorities, however, will *not* preclude a judicial finding that school officials have proper disciplinary jurisdiction over the speech.

It also is clear that the content of the blog entry made it reasonably foreseeable the posting would come to the attention of school authorities. In particular, Avery Doninger specifically urged her fellow students to contact the superintendent, thus making it likely that, at some point, the superintendent would inquire about why she was being bombarded with emails from students on the particular issue Avery Doninger addressed.

In summary, the Second Circuit has adopted, in both *Wisniewski* and *Doninger*, a jurisdictional test for school discipline over off-campus-created speech that focuses on the reasonable foreseeability of that speech either coming to the attention of school officials or reaching campus. Section A addressed problems with the expansive nature of such an approach in giving schools broad authority over off-campus-created student expression.

The next two sections focus on two federal district court opinions, both handed down after *Morse v. Frederick* and both arising from courts within the U.S. Court of Appeals for the Third Circuit.

**C. Layshock v. Hermitage School District**

In this July 2007 opinion by a federal court in the Western District of Pennsylvania, U.S. District Judge Terrence F. McVerry considered a case centering on the constitutionality of the in-school

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144. *Wisniewski*, 494 F.3d at 40.
punishment meted out to student Justin Layshock for creating a parody profile of his high school principal that he posted on MySpace. Layshock created the profile of Principal Eric Trosch "using his grandmother's computer, at her home, during non-school hours." One of four fake profiles created by students about Trosch, it was "viewed in-school by other students." The various profiles resulted in the school's technology coordinator devoting significant time to blocking access to them, and Trosch convened a teachers meeting about them (a meeting he left after he "became very emotional and could not continue"). It thus was, as Judge McVerry aptly put it, a case of "purely out-of-school conduct which subsequently carried over into the school setting."

In addressing the jurisdictional question—a task he called the "threshold, and most difficult, inquiry"—Judge McVerry began with language highly favorable to student expression rights:

The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.

This language suggests not only that school officials cannot claim jurisdiction simply because a website can be downloaded in school, but it also recognizes that schools cannot usurp all parental control when minors are not on school grounds. But Judge McVerry carefully weighed the interests and did not conclude that school officials

146. Id. at 591.
147. Id. at 592.
148. See id. at 593 (explaining that the technology coordinator claimed he spent twenty-five percent of his time during a one-week period on issues related to the profiles, including the one created by Justin Layshock).
149. Id. at 592.
150. Id. at 595.
151. Id. at 597.
152. Id. (emphasis added).
are rendered completely powerless or impotent once students step foot outside the schoolhouse gate and off campus:

It is clear that the test for school authority is not geographical. The reach of school administrators is not strictly limited to the school’s physical property. For example, schools have an undoubted ability to govern student conduct at school-sponsored field trips, sporting events, academic competitions and during transit to and from such activities.\footnote{153}

In an analysis that far exceeded, in terms of both nuance and depth, that of the Second Circuit in either \textit{Wisniewski} or \textit{Doninger}, Judge McVerry noted that an alternative approach to a purely geographical determination of jurisdictional authority is a \textit{temporal} approach that defines the times (rather than the locations) when schools can exert authority, \textit{in loco parentis}, over their students.\footnote{154} He observed that the Pennsylvania Public School Code uses such a time-based approach, with school officials acting in the role of parents “during . . . time . . . they are in attendance, including the time required in going to and from their homes.”\footnote{155}

In addition to geographical and temporal approaches to jurisdictional authority, Judge McVerry suggested that the Supreme Court in \textit{Tinker} employed what he called “an operational test”\footnote{156} under which “student First Amendment rights do not embrace merely the classroom hours, but also extend to the cafeteria, the playing fields and on-campus conduct during authorized hours.”\footnote{157} The \textit{Tinker} operational

\begin{footnotes}
\item[153] \textit{Id.} at 598.
\item[154] \textit{See id.} at 598-99.
\item[155] \textit{Id.} at 599. The relevant Pennsylvania statute provides: Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.
\item[156] \textit{Layshock}, 496 F. Supp. 2d at 599.
\item[157] \textit{Id.}
\end{footnotes}
test, according to Judge McVerry, also includes consideration of substantial disruptions to, and interferences with, the school's operations. On this point, Judge McVerry appears to be blending the substantive rule from *Tinker* for determining when a school can censor student speech\(^{158}\) with the threshold question of when schools can assert jurisdiction over it in the first place.

He also noted that the High Court in *Morse* used what he considered to be "contextual factors" in determining that the speech of student Joseph Frederick was school related, such as the facts that the speech "occurred during normal school hours, at a sanctioned school event, in the presence of teachers and administrators charged with supervising students, the school band and cheerleaders performed, and the message was directed at most of the student body."\(^{159}\)

Judge McVerry, in a nutshell, considered multiple approaches to the jurisdictional question, including geographical, temporal, operational and contextual variables. In adopting a holistic rule that allows for consideration of all these factors, the judge concluded that "in cases involving off-campus speech, such as this one, the school must demonstrate an appropriate nexus. As the case law demonstrates, on this threshold 'jurisdictional' question the Court will not defer to the conclusions of school administrators."\(^{160}\)

This statement is striking for two reasons. First, Judge McVerry refuses to grant judicial deference to school administrators on a matter affecting the First Amendment speech rights of students. This is rather remarkable because, since the tragedy at Columbine High School in April 1999,\(^{161}\) courts have granted vast deference to school officials when it comes to squelching any speech that can be perceived as a threat

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158. The court in *Tinker* held that schools may censor such student displays of political expression only when there is actual evidence the speech in question "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

159. *Layshock*, 496 F. Supp. 2d at 599.

160. *Id.* (emphasis added).

of violence." Judge McVerry easily could have given similar deference to administrators on the jurisdictional question, accepting their arguments about the dangers of new technologies, the need to control cyberbullying and the desire to stop in-school disruptions allegedly caused by off-campus expression. For a point of comparison, the Second Circuit in *Wisniewski* and *Doninger* never expressed the sentiment that it would not defer to the conclusions of school administrators on the jurisdictional issue.

Second, Judge McVerry’s approach does not, unlike the Second Circuit in both *Wisniewski* and *Doninger*, adopt a test that focuses on the reasonable foreseeability of off-campus-created speech coming to the attention of, or reaching, school officials. As argued earlier, that test is very expansive and favorable toward giving school officials jurisdiction.

The obvious question, however, with McVerry’s "appropriate nexus" test is: An appropriate nexus between what and what? The first "what" component of the equation is easy—the initial "what" is the student’s off-campus-created speech. The second "what" appears to be an intrusion into the realm of the school’s alleged authority over the speech "based on [the speech’s] timing, function, context or interference with its operations. . . ."

The other problem, of course, is one of vagueness. In particular, what constitutes an “appropriate” nexus? How close of a connection must there be between the student’s speech and either the location where it was created (*geographical*), the time when it was created (*temporal*), the scope of school resources used in its creation or whether it was downloaded at school (*contextual*), or whether it interfered with the

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162. One federal court recently observed that, against the backdrop of school shootings like those at Columbine:

courts across the country have considered First Amendment challenges to discipline imposed on students for speech that school officials viewed as threatening. The overwhelming response has been deference on the part of courts to the judgment of educators as to whether a perceived threat should be taken seriously and met with discipline in order to ensure the safety of the school community.


164. *Id.* at 599.
operations of the school (operational)? Judge McVerry does little to clear up the problem of the ambiguity created by the phrase "appropriate nexus" when he later uses the term "sufficient nexus."\textsuperscript{165} Parsed differently, both "appropriate" and "sufficient" are terms rife with ambiguity. While, on the facts in \textit{Layshock}, Judge McVerry concluded that the school had not met its jurisdictional burden, and he ruled in favor of Justin Layshock,\textsuperscript{166} it is not clear how the appropriate nexus test would play out in other factual scenarios. What does seem clear is that the test accounts for the potential weighing and balancing of many different variables, not simply and solely an examination of the foreseeability of the speech reaching the attention of school officials.

\textbf{D. J.S. v. Blue Mountain School District\textsuperscript{167}}

As in \textit{Layshock}, this opinion came from a federal district court in Pennsylvania and, likewise, centered on a fake MySpace profile of a public school principal that was created by a student while off campus.\textsuperscript{168} But unlike Judge McVerry in \textit{Layshock}, U.S. District Judge James Munley took a rather cursory and radically different approach to the threshold jurisdiction question.

In particular, Judge Munley cited as authority on this question a federal district court decision dating back to 1976 and holding that:

\begin{quote}
when a high school student refers to a high school teacher in a public place on a Sunday by a lewd and obscene name in such a loud voice that the teacher and others hear the insult it may be deemed a matter for discipline in the discretion of the school authorities. To countenance such student conduct even in a public place without imposing sanctions
\end{quote}

\textsuperscript{165} \textit{Id.} at 600.

\textsuperscript{166} \textit{Id.} at 601 (concluding that "the School District has failed to demonstrate a sufficient causal nexus between Justin's conduct and any substantial disruption of school operations").


\textsuperscript{168} \textit{Id.} at 1-2.
could lead to devastating consequences in the school.\textsuperscript{169}

That case, \textit{Fenton v. Stear}, involved a student who called a teacher a "prick"\textsuperscript{170} while sitting in a car at a shopping center parking lot.\textsuperscript{171} The outcome in \textit{Fenton} stands in stark contrast to the opinion issued a decade later in \textit{Klein v. Smith} and described earlier in this article.\textsuperscript{172} Judge Munley only mentioned \textit{Klein} in a footnote;\textsuperscript{173} in contrast, he addressed and cited approvingly \textit{Fenton} in the actual text of his opinion.\textsuperscript{174} To his credit, however, Judge Munley acknowledged that "neither \textit{Klein} nor \textit{Fenton} are directly on-point with our case, and neither applies a rule of law set down from a higher court."\textsuperscript{175}

Applying \textit{Fenton} to the situation in \textit{J.S.}, Judge Munley found "much more of a connection between the off-campus action and on-campus effect" in \textit{J.S.} In concluding that the school had jurisdictional authority over student Jill Snyder's fake MySpace profile of her principal, the judge wrote:

\begin{quote}
The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff [student Jill Snyder] crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code.\textsuperscript{176}
\end{quote}

A close parsing of the first three sentences of this quotation suggests that if a student's off-campus-created speech targets a school official and its intended audience is comprised of fellow students, then schools likely have authority over it if the speech generates in-school

\begin{footnotes}
\item[170] \textit{Id.} at 769.
\item[171] \textit{Id.}
\item[172] \textit{See supra} notes 63-64 and accompanying text.
\item[173] \textit{J.S.}, \textit{supra} note 167 at 13 n.6.
\item[174] \textit{Id.} at 13.
\item[175] \textit{Id.} at 13-14 n.6.
\item[176] \textit{Id.} at 14.
\end{footnotes}
discussion. Factors thus include the target of the speech (in this case the principal), the audience for the speech (students), and the discussion created by the speech.

The problem with this trio of factors is that they give schools authority over almost all the off-campus-created speech that now is generating controversies. In particular, the target of the speech, almost invariably, is someone in school (a teacher, a principal, a student), the intended audience usually is fellow students (as suggested earlier, most students certainly don’t intend for teachers or administrators to read the off-campus, web-posted musings about them) and some level of in-school discussion is bound to take place. Importantly, Judge Munley did not require there to be any particular quantity or amount of discussion before jurisdiction is permissible; he merely considered the fact that “the website was discussed in school.”

The J.S. opinion was on appeal to the U.S. Court of Appeals for Third Circuit in 2009, with oral argument slated for early June 2009.

With the discussion and analysis of the quartet of opinions from Wisniewski, Doninger, Layshock, and J.S. in mind, the next part of this article examines the briefs filed in 2008 by the parties in Layshock with the U.S. Court of Appeals for the Third Circuit. That case is now pending with the Third Circuit, with oral argument having taken place on December 10, 2008. A decision had not yet been rendered when final editing of this article took place in early April of 2009.

III. Layshock on Appeal: Competing Arguments Regarding School Jurisdiction

In their appellate brief filed in April 2008 with the U.S. Court of Appeals for the Third Circuit, the attorneys for Justin Layshock completely reject the notion that school officials should ever have any authority over off-campus-created speech such as Layshock’s fake

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177. Supra note 117 and text immediately following.
In contending that any disciplinary authority over such speech belongs to parents and not government authorities, Layshock's attorneys write:

[Expansion of school officials' authority to discipline student speech to those times when students are not under school supervision would usurp the rights of their parents to direct their children's upbringing and would impose the more restrictive in-school standards on students' out-of-school speech. The School District . . . is insisting that it be given the unprecedented authority to punish students for speech, such as profanity, that otherwise would be constitutionally protected. That argument contravenes the well-established precedent holding that, outside the school environment, minors have substantial free-speech rights that sharply limit all government officials, including school administrators, from engaging in the type of censorship the School District advocates.]

The semantics here are important. When minors are away from campus and engaging in speech activities that are not supervised by the school, they are no longer students but are, instead, simply minors—indeed, citizens—with substantial rights. As Layshock's appellate brief contends, "[w]hen Justin posted the Trosch profile off of school grounds and during non-school hours, the School District had no authority over him and, thus, his expression was entitled to the same constitutional protection enjoyed by any other citizen."

Schools, however, are not entirely remediless here, according to Layshock's attorneys, who write that administrators "can inform students' parents if they have concerns about the students' off-campus speech; and they can even contact police if they believe the expression

181. Id. at 18-19.
182. Id. at 39 (emphasis added).
constitutes harassment or a terroristic threat. But school officials’
authority to use their state-conferred authority to punish ends at the
schoolhouse gate.”

What standard, then, would apply to censor the speech of a
minor when he or she is engaging in off-campus expression? For
Layshock’s attorneys, the answer is simple—the rigorous strict
scrutiny standard that applies to all content-based restrictions on
speech.

In stark contrast to this position, the attorneys for the Hermitage
School District contend that they should have jurisdiction over Justin
Layshock’s off-campus expression because a “sufficient nexus exists”
between the profile and the School District. Under its proposed
sufficient nexus test for jurisdiction, the school district specifically
advises the appellate court to consider that Layshock’s speech was
“aimed at” a school official and that it was “reasonably foreseeable

183. Id. at 41.
184. Under the strict scrutiny standard of review, the burden is on the
government to prove the censorship or regulation at issue furthers “a compelling
interest and is narrowly tailored to achieve that interest.” FEC v. Wisc. Right to Life,
Inc., 127 S. Ct. 2652, 2664 (2007). In deciding if a regulation is narrowly tailored
under the strict scrutiny test, the Supreme Court has held that “[i]f a less restrictive
alternative would serve the Government’s purpose, the legislature must use that
alternative.” United States v. Playboy Entm’t Group, 529 U.S. 803, 813 (2000). See also Sable Commc’ns Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (writing that the
government may “regulate the content of constitutionally protected speech in order
to promote a compelling interest if it chooses the least restrictive means to further
the articulated interest”).
185. See generally Wilson R. Huhn, Assessing the Constitutionality of Laws
That Are Both Content-Based and Content-Neutral: The Emerging Constitutional
Calculus, 79 IND. L.J. 801 (2004) (providing an overview of the differences between
content-based law and content-neutral laws, and examining the difficulties in
applying these two classifications).
186. Second-Step Brief, supra note 180, at 19.
Dist., Nos. 07-4465 & 07-4555, at 9 (3d Cir. Mar. 27, 2008), available at
%20School%20District%20Appellate%20Brief.pdf [hereinafter Brief of Appellant].
The brief uses the term “sufficient nexus” several times, apparently to reinforce the
point that this is the jurisdictional rule the School District is proposing. See id. at 9,
13 (using term “sufficient nexus”).
188. Id. at 9.
that the profile would come to the attention of the School District and the Principal."

The operationalization of a sufficient nexus test that is based on a reasonable foreseeability standard raises the precise problems already addressed above in the analysis of the Second Circuit’s 2007 opinion in Wisniewski v. Board of Education. As extensively argued in Part II, Section A, it is reasonably foreseeable that nearly any and all controversial or provocative speech that is created and posted off campus by a student will come to the attention of school authorities. Thus, it is quite logical that the Hermitage School District would argue for adoption of such a standard in Layshock, as it was used in favor of school officials in both Wisniewski and Doninger. The “aimed at” portion of the School District’s proposed sufficient nexus test adds little teeth to it, as it simply suggests that any off-campus speech that targets or merely is about someone on campus falls within the jurisdictional reach of the school. In addition to these problems with the School District’s proposed rule, there are profound vagueness difficulties in implementing any test that requires a “sufficient” or “appropriate” nexus of connection; Part II, Section C explored these problems in the context of Judge McVerry’s ruling in Layshock.

Finally, and not surprisingly, the appellate brief for the Hermitage School District does not address or even raise the issue of whether students should be treated as citizens when they are off campus. Instead, it focuses solely on Justin Layshock as a student, not as either a minor or a citizen.

IV. CONCLUSION

As this article has illustrated, there are serious disputes and disagreements today about when, if ever, public school officials have jurisdictional authority to punish students who create, while off campus and working from their own computers, internet-based messages that disparage, defame or otherwise criticize students, teachers and administrators. The only items here, in fact, that seem readily clear at

189. Id.
190. See supra Part II, Section A (analyzing Wisniewski).
this stage are that: 1) the U.S. Supreme Court needs, very soon, to hear a
case that directly deals with this issue, thus adding, in the process, a
critical fifth decision to its current quartet of rulings affecting student
free-expression rights; and 2) creating a clear, coherent and concise
jurisdictional test that not only is workable but also strikes a proper
balance between the First Amendment speech rights of off-campus
minors and the need of schools to function smoothly and effectively as
educational institutions will be a prodigious and staggering task. Adding
to this complex mix of competing interests are the rights of parents – not
simply schools – to control their children, however they see fit.

This article has identified multiple flaws and problems with all
of the approaches considered by the courts in Wisniewski, Doninger,
Layshock and J.S. In particular, an approach like that adopted by the
Second Circuit that relies solely on whether it is reasonably foreseeable
that the speech in question will come to the attention of school
authorities gives schools sweeping off-campus jurisdictional power. As
Judge McVerry suggested in Layshock, it is perhaps better to consider
multiple factors, be they geographic, temporal, contextual, and/or
operational, rather than employing a single-factor approach.\textsuperscript{191}
Such a
multiple-variable test allows for a more nuanced, context-specific
approach, recognizing that no two student-speech cases will be exactly
the same.

In addition, the fact that aggrieved students and school personnel
already have civil law remedies, such as libel suits, for off-campus
speech that causes them harm militates against the adoption of a standard
that easily provides schools with jurisdictional authority. Minors will
learn important, real-world lessons about the limitations of free speech
and the First Amendment (as well as lessons about the steep financial
costs of defending a lawsuit) when they are sued for defamation for
bloggings and MySpace postings, regardless of whether they are
suspended or expelled from school. What’s more, even if school
officials are not given jurisdictional authority to punish students, those
officials still possess the opportunity to inculcate important values. As
the attorneys for Justin Layshock argue in their brief filed with the Third
Circuit, “school officials may discuss with the student how the out-of-

\textsuperscript{191} Supra notes 152–159 and accompanying text.
school expression offended or affected others. . . .” Judge McVerry's profound reluctance to extend judicial deference to school officials on the threshold jurisdictional issue thus makes sense, given both the extant civil law and pedagogical remedies.

One somewhat subtle factor lurking in the background of all of this, in this author's opinion, is a fear of the power of relatively new technologies with which students are much more comfortable and familiar than many of their teachers and principals. MySpace profiles, IM icons and online blogs are undoubtedly new phenomena for many school administrators to have to face and confront. It's much easier, after all, for a janitor to scrub away graffiti from a bathroom wall than it is for a principal to cleanse the World Wide Web of unsavory expression. What's more, internet-posted messages certainly reach a far larger audience than any notebook marginalia or bathroom-stall scribblings. But the fear of the powerful, unknown or unfamiliar must not be used as a rationale to affect and reduce the First Amendment rights of minors when they embrace these technologies away from campus. As the attorneys for Justin Layshock assert, “the First Amendment does not permit the government to regulate a particular medium of speech solely because that medium is more effective than others.”

The bottom line is that it is time for the Supreme Court to move past hearing student-speech cases like Morse that feature relatively idiosyncratic fact patterns like Morse and to take up, instead, the challenge of an exceedingly difficult but very common issue now plaguing both minors and schools across the country.

192. Second-Step Brief, supra note 180, at 25.
193. See supra notes 159-160 and accompanying text.
194. Second-Step Brief, supra note 180, at 32 (emphasis in original).