

## WARNING! SPEAK AT YOUR OWN RISK: FIRST AMENDMENT RESTRICTIONS ON OFF-CAMPUS PHYSICAL, EMOTIONAL, OR CYBER BULLYING

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“Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.”

- Harry Truman, *Special Message to the Congress on the Internal Security of the United States*, August 8, 1950

### I. INTRODUCTION

You are upset and frustrated after a student called you a string of rude, offensive names. Your parents always told you that “sticks and stones may break my bones, but names will never hurt me,” and you are not hurt; you are devastated. To feel better, you create a new blog website—Bullies Who Bully—and begin typing your first post, pouring every graphic detail of today’s events into the computer without naming names. After a few minutes, you post it.

The next morning, you wake feeling terrible again; you relived the horrible ordeal all over again in a dream. Hoping to feel better, you open your blog to re-read your post from last night, and, to your surprise, the post has twenty comments, a few of which recount similar ordeals! You read through the comments and realize that they are all from other students at your school: the descriptions of the school hallways, the other students, and even the school mascot are vividly described. Inspired, you open the blog so others can post their own stories.

Over the next few months, the number of blog posts skyrockets, each one vividly and anonymously describing and tormenting at least one student from your school. Some posts even include drawings that depict the events either described in that specific post or in relation to another post on the blog. You created an outlet for students to rant and blow off steam; however, not everyone sees it that way.

The next morning, the principal calls you into office and shows you page after page of the posts from your blog, including the very first one that you composed. You are horrified. The principal explains to you that the student that you described—initials B.W.B.—told his parents, who

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in turn told the principal. An investigation into the blog and your conduct follows and, eventually, you are suspended for the content that you posted on the blog. You and your parents hire an attorney. The attorney then files a lawsuit against the school district, alleging a violation of the First Amendment Free Speech rights because you were suspended for what you posted on the blog. Furthermore, your attorney explains that this never should have happened because your conduct occurred off of school property and was not during a school-sanctioned activity.

Although the history of case law regarding the freedom of speech has primarily pertained to school speech on campus, “the way students communicate both inside and outside the school has changed dramatically.”<sup>1</sup> As a result, a wave of recent cases pushed the boundaries of free speech, wherein numerous circuit courts analyzed whether schools could restrict students’ freedom of speech relating to off-campus speech.<sup>2</sup> With an increased usage of technology in the home and in the classroom, the courts must now consider how the freedom of speech is affected not only in the physical context—e.g., talking to another person or a physical banner—but also in electronic interactions—e.g., posting inappropriate photos of another student online, sexting, cyber bullying, etc.

The main issue in contention between the circuit courts is whether the First Amendment protects off-campus speech that is perceived as harassing or intimidating, via either violent or sexual suggestions. In determining whether the speech is protected, the circuit courts chose to apply different tests: the Nexus test, the reasonably foreseeable test, or a fusion of the two. Thus, the main question boils down to what test should be applied when a court considers whether off-campus speech is protected under the First Amendment, especially when that off-campus speech is perceived as harassing or intimidating.

Before delving into a discussion as to what test or tests should apply, this article briefly reviews the history and evolution of applying Free Speech in schools. Next, this article discusses the circuit court decisions that created the circuit split. After the circuit split analysis, this article argues that the Supreme Court should create a new test specifically for off-campus speech. This article then analyzes how a possible restriction of off-campus speech intersects with the parental right to raise children, followed by a consideration of how this affects children, students, and individuals in general, as well as the effects of free-speech-suspension

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1. Jessica K. Boyd, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection is Off-Campus Student Speech Awarded under the First Amendment?* 64 ALA. L. REV. 1215, 1215 (2013).

2. *Infra*, notes 14, 15, 16, 17.

on the youth. In conclusion, this article suggests that a reasonably foreseeable test should be applied to off-campus speech, specifically for the adolescent youth.

## II. HISTORY OF FREE SPEECH: A DISCUSSION OF THE APPLICABLE TESTS

“Congress shall make no law . . . abridging the freedom of speech.”<sup>3</sup> While not everyone can recite the entirety of the First Amendment, most can probably list the general freedoms it grants them: freedom of religion, freedom of speech, and peaceful assembly.<sup>4</sup> However, to what extent is our freedom of speech a protected constitutional guarantee?

Generally, students have a broad freedom of speech in schools:

Students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. They cannot be punished merely for expressing their personal views on the school premises—whether in the cafeteria, or on the playing field, or on the campus during the authorized hours . . . .<sup>5</sup>

However, this freedom is not absolute. When reviewing alleged constitutional violations of a student’s freedom of speech, the Supreme Court has historically looked to speech inside the schoolhouse gates. Specifically, the Court created exceptions for speech in special contexts or restricted environments where ordinary speech-protected rules were either not applied or were applied in a materially different, and often greatly diminished, fashion. However, the freedom of speech may not be restricted unless school “authorities [have] reason to anticipate that [such expression will] substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>6</sup>

For example, in *West Virginia State Board of Education v. Barnette*, the Supreme Court held that school children were not required to participate in a salute to the flag or to say the pledge of allegiance because such compulsion “transcend[ed] constitutional limitations on [local authorities’] power and invad[ed] the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.”<sup>7</sup> In *Tinker v. Des Moines Independent Community*

3. U.S. CONST. amend. I.

4. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

5. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (internal quotations omitted).

6. *Tinker*, 393 U.S. at 509.

7. 319 U.S. 624, 642 (1943).

*School District*, the Court held that the students had a First Amendment right to wear black arm bands in school as a protest against the Vietnam War because there were no facts on record that would reasonably have led school officials to foresee a “substantial disruption of or material interference with school activities.”<sup>8</sup>

In contrast, the Supreme Court, in *Bethel School District v. Fraser*, held that the First Amendment did not prevent a school district from disciplining high school students who gave a lewd speech at high school assembly because “[t]he First Amendment does not prevent the school officials from determining that to permit vulgar and lewd speech such as [the student’s] would undermine the school’s basic educational mission.”<sup>9</sup> Similarly, in *Hazelwood School District v. Kuhlmeier*, the Court held that the First Amendment did not prevent school officials from “exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions [were] reasonably related to legitimate pedagogical concerns.”<sup>10</sup>

In addition, schools may be able to restrict speech that occurs outside the schoolhouse gates if the speech occurs (1) during normal school hours, and (2) during a school-sanctioned event.<sup>11</sup> If this is the case, then the school’s rules of student conduct expressly apply; the student may be restricted from making certain comments; and the school will not violate that student’s constitutional right to free speech.<sup>12</sup> Specifically, the Supreme Court held, in *Morse v. Frederick*, that “[b]ecause schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials . . . did not violate the First Amendment by confiscating the pro-drug banner and suspending [the student].”<sup>13</sup>

But what happens when a student speaks off campus and is not attending a school-sanctioned or school-sponsored event or is not part of the school’s mission to safeguard students from pro-drug paraphernalia? Although the general rule might be that the school cannot restrict this type of off-campus speech, numerous circuit courts have held that schools may restrict certain off-campus speech.

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8. 393 U.S. at 514.

9. 478 U.S. 675, 685 (1986).

10. 484 U.S. 260, 273 (1988).

11. *Morse v. Frederick*, 551 U.S. 393, at Syllabus (2007) (permitting schools to restrict student speech that occurs outside the school if the speech occurred during normal school hours and occurred during a school-sanctioned event as an approved social event).

12. *Id.*

13. *Id.*

### III. MODERN CASES WHERE STUDENT SPEECH DID NOT OCCUR ON SCHOOL PROPERTY

Circuit courts have recently decided cases arising under the First Amendment—alleging violations of students’ freedom of speech—in four different ways: some courts adopt the Nexus test;<sup>14</sup> other courts adopt the reasonably foreseeable test;<sup>15</sup> some initiate their own tests;<sup>16</sup> and still others refuse to pick and instead apply both.<sup>17</sup>

#### A. *The Fourth Circuit’s Application of the Nexus Test*

In *Kowalski v. Berkely County Sch.*, a high school suspended a senior student for creating and posting to a social media page on MySpace, “which was largely dedicated to ridiculing a fellow student.”<sup>18</sup> The title of the webpage read: “No No Herpes, We don’t want no herpes” and, although the student alleged that that acronym “S.A.S.H.” stood for “Students Against Sluts Herpes,” a classmate claimed “S.A.S.H” really stood for “Students Against Shay’s Herpes,” a fellow student at the high school who was also the main topic of discussion on the webpage.<sup>19</sup> After creating the page and inviting others to join, about twenty-four students from the same high school posted and responded to texts, comments, and photos on the webpage.<sup>20</sup> Of the posts, certain photos had red dots drawn on a student’s “face to simulate herpes and added a sign near her pelvic region, that read, ‘Warning: Enter at your own risk’; another post included a photo of the same student’s “face with a sign that read, ‘portrait of a whore.’”<sup>21</sup> Once the webpage was brought to the high school administration’s attention, it quickly determined that the student had created a “hate website,” and suspended the student for violating “the school policy against ‘harassment, bullying, and intimidation.’”<sup>22</sup>

In her complaint, the student alleged that she was unconstitutionally expelled for five days and that the school “was not justified in regulating her speech because it did not occur during a ‘school-related activity,’ but rather was ‘private out-of-school speech.’”<sup>23</sup> However, the district court

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14. See generally *Kowalski v. Berkely Cnty Sch.*, 652 F.3d 565 (4th Cir. 2011).

15. See generally *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012).

16. See generally *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015).

17. See generally *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016).

18. 652 F.3d at 567.

19. *Id.*

20. *Id.*

21. *Id.* at 568.

22. *Id.* at 568-569 (internal quotations omitted).

23. *Id.* at 567.

granted summary judgment for the school “because [the student’s] webpage was created for the purpose of inviting others to indulge in disruptive and hateful conduct, which caused an in-school disruption.”<sup>24</sup> Justifying its conclusion, the district court stated “(1) that [the student] was on notice that she could be punished for her off-campus behavior [because she “had received a Student Handbook which included the School District’s Harassment, Bullying, and Intimidation Policy, as well as the Student Code of Conduct”] and (2) that she was provided with an opportunity to be heard prior to her suspension.”<sup>25</sup>

On appeal, the student argued that the school violated her First Amendment Free Speech rights because her speech involved “off-campus, non-school related speech.”<sup>26</sup> However, the Fourth Circuit affirmed the district court’s decision that the school’s actions and sanctions imposed on the student were permissible:

[T]he School District was authorized . . . to discipline [the student], regardless of where her speech originated, because . . . [the student] used the internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District’s recognized authority to discipline speech which “materially and substantially interfere[es] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others.”<sup>27</sup>

Thus, even though a student’s speech may occur off-campus, such speech may be restricted by the school if, “[g]iven the targeted, defamatory nature of the [student’s] speech, aimed at a fellow classmate, it created ‘actual or nascent’ substantial disorder and disruption in the school.”<sup>28</sup> Finally, when a student “fails to see that such harassment and bullying is inappropriate and hurtful[,] . . . it must be taken seriously by school administrators in order to preserve the appropriate pedagogical environment.”<sup>29</sup> As such, “where such speech has a sufficient nexus with the school [regardless of whether it is on-campus or off-campus], the Constitution is not written to hinder school administrators’ good

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24. *Id.* (internal quotations omitted).

25. *Id.* at 569-570.

26. *Id.* at 570.

27. *Id.* at 574. 567 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969)).

28. *Id.* at 574 (quoting *Tinker*, 393 U.S. at 508).

29. *Id.* at 577.

faith efforts to address the problem.”<sup>30</sup>

*B. The Eighth Circuit Application of the “Reasonably Foreseeable” Test*

In *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, twin brothers were suspended for 180 days after they created a blog intended “to discuss, satirize, and ‘vent’” about events at their high school.<sup>31</sup> Although the website used an international domain site that prevented users in the United States from finding the website via a general search, anyone could access the website if they knew the web address.<sup>32</sup> A few of their “posts contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name.”<sup>33</sup> Although non-school computers were used for the majority of the events surrounding the website, one of the students “used a school computer to upload files needed to create [the website].”<sup>34</sup> The twin brothers were suspended from school for 180 days after the school administrators discovered the website and its contents.<sup>35</sup>

Even though the district court noted that the website “caused considerable disturbance and disruption,” it also determined that the students’ inability to participate in extracurricular activities or attend honor classes “constituted irreparable harm.”<sup>36</sup> Thus, the district court granted the students’ motion for preliminary injunction and allowed them to return to the school; however, on appeal, the Eighth Circuit reversed the preliminary injunction because, among other reasons, the plaintiffs “[were] unlikely to succeed on the merits.”<sup>37</sup>

Regarding the plaintiffs’ likely success on the merits, the Eighth Circuit analyzed the protection of off-campus speech under *Tinker*,<sup>38</sup> stating it was unlikely the plaintiffs would succeed on the merits because the plaintiff’s website “posts caused a substantial disruption.”<sup>39</sup> “Thus, student speech that causes a substantial disruption is not protected.”<sup>40</sup>

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30. *Id.*

31. 696 F.3d 771, 773 (8th Cir. 2012).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 774.

36. *Id.* at 775.

37. *Id.* at 775-776.

38. *Id.* at 777.

39. *Id.*

40. *Id.* at 777.

C. *The Fifth Circuit Application of the “Reasonably Foreseeable” Test*

In *Bell v. Itawamba Cnty. Sch. Dist.*, the Fifth Circuit held that summary judgment was appropriate for a lawsuit pertaining to a high-school student’s rap song, recorded off-campus with the use of school equipment and posted on social media, when (1) the song described “threatening, harassing, and intimidating language” towards two coaches;<sup>41</sup> and (2) the student intended for the song to be heard by the school community.<sup>42</sup>

First, the Fifth Circuit established “the extent to which off-campus student speech may be restricted without offending the First Amendment.”<sup>43</sup> Via a brief discussion by the court, “*Tinker* applies to off-campus speech in certain situations.”<sup>44</sup> Furthermore, *Tinker* applies as a particular response to “the paramount need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community.”<sup>45</sup>

Second, the Fifth Circuit delved into answering the question, “under what circumstances may off-campus speech be restricted.”<sup>46</sup> As previously noted by the court, “over 45 years ago, . . . the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.”<sup>47</sup> Thus, “schools can be places of special danger,” especially with the increased use of technology.<sup>48</sup> Acknowledging that threatening, intimidating, and harassing language creates “tension between a student’s free-speech rights and a school official’s duty to maintain discipline and protect the school community,”<sup>49</sup> the court concluded:

The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by [the plaintiff], “mak[ing] any effort to trace First

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41. 799 F.3d 379, 384-385 (5th Cir. 2015).

42. *Id.* at 383 (the plaintiff posted the recording “on the Internet (first on his publicly accessible Facebook profile page and then on YouTube), intending it to reach the school community.”).

43. *Id.* at 393.

44. *Id.* at 394.

45. *Id.* at 393.

46. *Id.* at 394.

47. *Id.* at 392.

48. *Id.*

49. *Id.*

Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.” Accordingly, in the light of our court's precedent, we hold Tinker governs our analysis, as in this instance, when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.<sup>50</sup>

Thus, the school officials acted reasonably, and summary judgment was appropriate because “the school board reasonably could have forecast a substantial disruption at school, based on the threatening, intimidating, and harassing language” in the song.<sup>51</sup>

*D. The Ninth Circuit Application of Both the Nexus Test and the “Reasonably Foreseeable” Test*

In *C.R. v. Eugene Sch. Dist. 4J*,<sup>52</sup> the Ninth Circuit did not join either side of the current circuit split but instead paved its own course, holding that both tests apply. In making its decision, the court reviewed the pertinent facts: over several days, the defendant along with a few other seventh-grade boys followed and teased two sixth-grade students on their way home from school.<sup>53</sup> Both of the sixth-grade students were disabled, and the “teasing” occurred as the students traveled along the same route from the school to their homes, including along an area the school administrators called “the back field.”<sup>54</sup> Eventually, the “teasing” escalated: the defendant, accompanied by the other seventh graders, gave the six-graders vulgar nicknames, and made sexual jokes, a series of which referred to oral sex.<sup>55</sup> When the school was informed and after an internal investigation, wherein all the alleged participants and victims were interviewed, all the participants were disciplined; the defendant received a two-day, out-of-school suspension.<sup>56</sup> The defendant’s parents

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50. *Id.* at 395-396. (quoting *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-221 (3rd Cir. 2011) (Jordan, J., concurring)).

51. *Id.* at 400.

52. 835 F.3d 1142 (9th Cir. 2016).

53. *Id.* at 1146.

54. *Id.* (internal quotations omitted). Each child involved took the same route home from school: “a bike path leading from the school, across a public park, to a neighboring street. The park borders the school’s athletic fields, but there is no visible boundary to indicate where school property ends and the park begins. On the far side of the park, across from the school, is a track belonging to the School District. The school’s administrators casually refer to the park, track, and fields collectively as ‘the back field.’” *Id.*

55. *Id.*

56. *Id.* at 1145-1147.

sued the school district, alleging violations of the defendant's First Amendment and due process rights.<sup>57</sup>

Affirming the district court's decision to grant summary judgment for the school district, the Ninth Circuit concluded that the defendant's suspension by the school district was permissible,<sup>58</sup> and it also noted:

To determine whether a school properly disciplined a student for off-campus speech requires us to answer two questions: First, we consider the threshold question of whether the school could permissibly regulate the student's off-campus speech *at all*. Next, we consider the question of whether the school's regulation of the student's speech complied with the First Amendment's requirements.<sup>59</sup>

Thus, the Ninth Circuit analyzed to what extent a school may regulate and restrict student speech, and then whether the school district had the authority to restrict the defendant's off-campus speech.<sup>60</sup>

The Ninth Circuit first recognized that there are four types of student speech that schools may regulate and restrict: "(1) vulgar, lewd, obscene, and plainly offensive speech"<sup>61</sup>; "(2) school-sponsored speech"<sup>62</sup>; "(3) speech promoting illegal drug use"<sup>63</sup>; and "(4) speech that falls into [none] of these categories . . . ."<sup>64</sup> However, the Ninth Circuit acknowledged that these four types of speech pertained to on-campus speech, and the Supreme Court had yet to answer how courts should treat off-campus speech.<sup>65</sup>

The Ninth Circuit continued by distinguishing the facts at hand from those of other circuits: "the vast majority of law in this area concerns school officials' authority to discipline students for internet speech. In this case, nothing was put into writing, and the students' speech was never shared online."<sup>66</sup> To determine whether off-campus student speech could be restricted, the court looked to both the Nexus test and the "reasonably foreseeable" test. Under the Nexus test, the Ninth Circuit

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57. *Id.* at 1147.

58. *Id.* at 1148.

59. *Id.* (emphasis in original).

60. *Id.* at 1148-1152.

61. *Id.* at 1148 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

62. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n. 4 (1988)) (internal quotations omitted).

63. *Id.* (quoting *Morse v. Frederick*, 551 U.S. 393, 396 (2007)) (internal quotations omitted).

64. *Id.* at 1149 (quoting *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013)) (internal quotations omitted).

65. *Id.*

66. *Id.* at 1150.

determined, “[a]lthough the harassment at issue in this case took place off school property, it was closely tied to the school.”<sup>67</sup> Thus, the court held that it was “a reasonable exercise of the School District’s *in loco parentis* authority to be concerned with its students’ well being as they beg[a]n their homeward journey at the end of the school day.”<sup>68</sup> Similarly, the Ninth Circuit determined that the “reasonably foreseeable” test applied: “[b]ecause the harassment happened in such close proximity to the school, administrators could reasonably expect the harassment’s effects to spill over into the school environment” and “[a]dministrators could also reasonably expect students to discuss the harassment at school.”<sup>69</sup>

Thus, the Ninth Circuit applied both the Nexus and “reasonably foreseeable” tests mentioned in *Wynar v. Douglas Cty. Sch. Dist.*,<sup>70</sup> concluding “that under either test, the School District had the authority to discipline [the defendant] for his off-campus speech.”<sup>71</sup>

#### *E. LaVine & Wynar: Additional Ninth Circuit Cases Dealing with First Amendment Restrictions on Off-Campus Speech*

In *LaVine v. Blaine Sch. Dist.*, a student wrote poem from the perspective of the school shooter.<sup>72</sup> A few months later, the student found the long-forgotten poem and brought it into school for his teacher’s feedback.<sup>73</sup> Disturbed by the poem’s content, the teacher brought it to the attention of the school’s administration, who decided to “emergency expel” the student out of extreme caution.<sup>74</sup> In a suit brought by the student, alleging a First Amendment violation, the Ninth Circuit held that the student’s expulsion was not a violation of his First Amendment rights because of its violent content.<sup>75</sup> The Ninth Circuit did not discuss how the poem’s creation off-campus played into their decision; however, off-campus origins was later considered and discussed by the Ninth Circuit in 2013: “the location of the speech can

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67. *Id.*

68. *Id.* at 1151.

69. *Id.*

70. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013) is discussed later in this article.

71. *Eugene*, 835 F.3d at 1150. The court continued, stating “Our decision is necessarily restricted to the unique facts presented by this case: The speech at issue occurred exclusively between students, in close temporal and physical proximity to the school, on property that is not obviously demarcated from the campus itself. A school may act to ensure students are able to leave the school safely without implicating the rights of students to speak freely in the broader community.” *Id.* at 1152.

72. 257 F.3d 981, 983-984 (9th Cir. 2001).

73. *Id.* at 984.

74. *Id.* at 984-985 (internal quotations omitted).

75. *Id.* at 990.

make a difference . . . not . . . all off-campus speech is beyond the reach of school officials.”<sup>76</sup>

In *Wynar v. Douglas Cty. Sch. Dist.*, a student sent a series of messages to friends via social media, threatening to commit a school shooting.<sup>77</sup> Even though the messages were composed and sent from the student’s home computer, the Ninth Circuit held that the school did not violate the student’s First Amendment rights by suspending him because, “when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech.”<sup>78</sup> Thus, the Ninth Circuit declined to choose between the Fourth Circuit’s application of the Nexus test and the Eighth Circuit’s application of the “reasonably foreseeable” test.<sup>79</sup> Instead, the court decided both were satisfied when a student threatens a school shooting.<sup>80</sup>

#### IV. ARGUMENT

Due to the current circuit court split, the main question is whether the First Amendment protects off-campus speech that is perceived as harassing or intimidating, via either violent or sexual suggestions. As demonstrated, the circuits that have already heard and decided this issue have applied the Nexus test, the “reasonably foreseeable” test, or both.

As the Ninth Circuit mentioned in *Eugene*, there are four general tests applicable to on-campus speech: “(1) vulgar, lewd, obscene, and plainly offensive speech”<sup>81</sup>; “(2) school-sponsored speech”<sup>82</sup>; “(3) ‘speech promoting illegal drug use’”<sup>83</sup>; and “(4) speech that falls into [none] of these categories . . . .”<sup>84</sup> At the very least, any court going forward should consider whether a school district’s restriction on a student’s off-campus speech is a violation of the student’s First Amendment rights under *Tinker*. However, this should not become the court’s sole tool in its analysis; the courts should also consider the student’s intent for the speech when applying the First Amendment tests. Furthermore, courts could draw a symbolic line in the sand between off-campus and on-

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76. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013).

77. *Id.* at 1065.

78. *Id.* at 1069.

79. *See id.*

80. *Id.*

81. *Eugene*, 835 F.3d at 1148 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n. 4 (1988)) (internal quotations omitted).

82. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n. 4 (1988)) (internal quotations omitted).

83. *Id.* (quoting *Morse v. Frederick*, 551 U.S. 393, 396 (2007)) (internal quotations omitted).

84. *Id.* at 1149 (quoting *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013)) (internal quotations omitted).

campus speech, “having no authority to regulate any speech or expression that does not occur on school grounds or at a school-sanctioned event.”<sup>85</sup> Nonetheless, this solution is too extreme because “speech uttered exclusively outside of the confines of the school could still disrupt the school in its task of educating children as much as speech spoken in the classroom.”<sup>86</sup> Thus, it will behoove courts, including the Supreme Court, to create a different, albeit similar, test to help navigate the crossroads of off-campus speech and First Amendment Free Speech as technology becomes increasingly more prevalent in everyday life.

*A. The Supreme Court Should Create a New Off-Campus Speech Test*

Aside from *Morse*, the Supreme Court developed all of the free speech tests almost 30 years ago, during a time when computers were not in every household and when smartphones, tablets, the Internet, etc. were non-existent.<sup>87</sup> In response to the rise of technology and the plethora of violence therefrom, the circuit courts attempted to apply the current Free Speech tests; however, this application—specifically the Nexus and “reasonably foreseeable” tests—may give the school districts too much leniency in determining when a student crosses the line into unprotected speech. Therefore, the Supreme Court should create a new test wherein the multiple elements considering whether a student’s speech is or is not protected are balanced against each other. Generally, “[s]chools must tolerate students’ unpopular religious and political opinions within the school and at school-sanctioned activities”; however, “students’ rights in the school context are not automatically ‘coextensive’ within the rights of adults in a public setting.”<sup>88</sup> Thus, the courts must balance the priorities of both the students and the school district.<sup>89</sup>

Element 1. What is the Student’s Intent Behind the Off-Campus Speech?

As demonstrated in the circuit court cases above, “on-campus and off-campus distinction is becoming increasingly difficult with the

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85. Boyd, *supra* note 1 at 1232.

86. *Id.*

87. *Id.* at 1217.

88. *Id.* at 1231.

89. *Id.* at 1231-1232 (“A students’ right to freely express his political and religious beliefs inside the school has to be weighed against the school’s task of ensuring its students learn ‘socially appropriate behavior’ in order to function in our society.”) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

instantaneous nature of the Internet.”<sup>90</sup> Therefore, almost any communication can “foreseeably make its way to a school campus,”<sup>91</sup> creating an insurmountable difficulty for school officials and the courts. By looking to the student’s intent behind the off-campus speech, school officials can determine whether it “has sufficient basis for jurisdiction” and can, therefore, restrict the student’s speech.<sup>92</sup> Furthermore, the intent behind the student’s speech could, theoretically, “protect more students from schools overstepping their jurisdictional bounds to punish off-campus communication.”<sup>93</sup> Nevertheless, a student’s intent, by itself, may not be enough to satisfy a new test: “schools should not be able to use [intent] as an excuse to regulate everything a student says.”<sup>94</sup> However, “students should not be allowed to have free reign to cause significant disruptions at school from the privacy of their own homes and never suffer any type of consequence.”<sup>95</sup>

Therefore, the main questions regarding intent should be: (1) whether the student intended for other students at her school to read her blog posts off-campus; (2) whether the student intended for her speech to reach students both on- and off-campus; and (3) whether the student intended for the speech to mean more than an adolescent equivalent of blowing off steam. These three issues are suggestions of ways a court can analyze a student’s intent behind off-campus speech. Recognizing that a statement may be rehearsed and prepared with the assistance of counsel, the court should, at the very least, hear and consider a statement made by the student whose off-campus speech resulted in an alleged First Amendment violation.

#### Element 2. Does the Student’s Speech Create a True Threat to the Other Students, Teachers, or School Officials?

A court’s inquiry into whether a school’s restriction on a student’s off-campus speech violates the student’s First Amendment Free Speech rights should begin with the true threat doctrine once intent is considered.<sup>96</sup> Applying this doctrine “would ensure students’ threatening speech could be proscribed so schools can maintain a safe environment for their students and employees.”<sup>97</sup> Although the true threat doctrine

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90. *Id.* at 1236.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1237.

95. *Id.*

96. *Id.* at 1233.

97. *Id.*

traditionally applied only to “a serious expression of an intent to commit an act of unlawful violence,” the courts can expand it “in the school context to include threats of physical violence or harm as well as threats to harm a person’s reputation or other threats that are equally damaging mentally and emotionally that could be properly characterized as cyberbullying.”<sup>98</sup>

With the rise in technology, cyberbullying is becoming an ever-increasing threat to both the physical and mental safety of children.<sup>99</sup> Although bullying may likely be categorized as “more of a nuisance than a threat, . . . if a student bullies another student or teacher and that communication can be characterized as a threat, the school should be able to properly discipline that student without violating his or her free speech rights.”<sup>100</sup> Thus, if a school could protect bullying that reached the level of a true threat due to “damaging speech, students . . . would not be entitled to First Amendment protection and would be further deterred from taking their bullying from the schoolyard to cyberspace.”<sup>101</sup>

### Element 3. Does the Speech Have Special Educational Qualities?

The *Tinker* test “is not automatically implicated” simply “because the speaker is a student.”<sup>102</sup> In *Bell*, the Fifth Circuit analyzed the student speech from the point of view of the school, rather than from that of the student. As stated by Katherine E. Geddes, “[t]he Fifth Circuit’s initial starting point misses the mark”<sup>103</sup> because the Fifth Circuit analyzed the situation from the school’s perspective rather than the student’s perspective.<sup>104</sup> Thus, the Fifth Circuit improperly applied *Tinker* to the student’s rap lyrics because “*Tinker*’s holding is expressly grounded in the ‘special characteristics of the school environment.’”<sup>105</sup> As a result, the Fifth Circuit inappropriately applied *Tinker* to *Bell*’s rap lyrics “that inherently lack[] those special educational qualities.”<sup>106</sup> This

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98. *Id.* at 1234.

99. *Id.* (noting that “[a]ccording to recent statistics, approximately one million students were subjected to some form of cyberbullying on Facebook alone in the year 2011” and that “about 20% of students claim they have been bullied through the Internet”).

100. *Id.* (noting that “the student in *Kowalski* created a fake MySpace profile that was extremely degrading to a fellow student”).

101. *Id.*

102. Katherine E. Geddes, *First Amendment—Student Speech—Why Bell Tolls a Review of Tinker’s Application to Off-Campus Online Student Speech*, 69 SMU L. REV. 275, 280 (2016) (hereafter, “Geddes, *Bell Tolls a Review*”).

103. *Id.* at 279.

104. *Id.*

105. *Id.* (emphasis in original).

106. *Id.*

misapplication can easily be removed: before restricting a student's off-campus speech, the court should positively determine that the questionable student speech has "special educational qualities."<sup>107</sup>

To determine whether the speech has "special educational qualities," the court should consider whether (a) the student's off-campus speech (b) in its entirety and in its original context (c) will negatively affect the learning process. For example, in *Bell*, the rap lyrics targeted two coaches.<sup>108</sup> However, "while one of the coaches said the rap made him feel 'scared,' the other testified that the song was 'just a rap,' nothing to be threatened by."<sup>109</sup> This analysis would ensure that the student could be reprimanded for harassing, intimidating, or threatening speech, but only if the speech hinder the education of other students. Without "an analysis of the speech in its entirety" and "[w]ithout including a contextual analysis," courts applying the Fifth Circuit's holding "will likely have broad practical implications because it will regulate protected speech, chilling student speech overall."<sup>110</sup>

Thus, schools and courts should only restrict student speech "based on the message a speaker conveys"<sup>111</sup> in its entirety. A student's off-campus speech "may be offensive, perhaps even 'lewd' or 'lascivious,' but that alone should not provide a basis for banning it or sanctioning its use."<sup>112</sup> Similar to Justice Marshall Harlan's comment "one man's vulgarity is another's lyric . . . [,] one educator's moment of panic in the face of student speech that she disagrees with is another's opportunity to instruct . . . ."<sup>113</sup> Courts considering the "special educational qualities" of the student's speech would ensure that educators and school officials "use both judgment and reason to help students learn, rather than the cudgel of discipline to instill a reflexive rejection of speech (and ideas) that fall outside the collective norms."<sup>114</sup>

#### Element 4. How Many People Had Access to the Student's Speech; Did Anyone Access the Speech from Inside the School?

Stemming from the "special educational qualities" test, the number of

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107. *Id.*

108. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015) ("Bell, a student . . . posted a rap recording containing threatening language against two high school teachers/coaches on the Internet . . .").

109. Geddes, *supra* note 102, at 280.

110. *Id.* at 280-281.

111. Mark R. Killenbeck, *Special Remarks on Student Speech: Activities that Require Judgment and Reason?* 68 ARK. L. REV. 883, 891 (2016) (internal quotation omitted).

112. *Id.* at 893.

113. *Id.*

114. *Id.*

people who had access and whether the student’s speech was accessed from inside the school ultimately pertain to whether schools, and therefore courts, can restrict students’ off-campus speech. First, while “[i]t is certainly true that some students may be especially immature and vulnerable . . . . [,] most students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy [and inappropriate speech] when they see [and hear] it.”<sup>115</sup> By considering the total number of students exposed to another’s off-campus speech, school officials and courts will better determine whether the student body as a whole would consider the off-campus speech as hindering their collective education. To consider other solutions and to “[t]reat[] [the students] otherwise is an insult to their intelligence and a disservice to them, their families, and the communities they will eventually live in and serve.”<sup>116</sup>

If, in addition to considering how many students accessed the off-campus speech in total, officials and courts consider how many accessed the speech at school, they will be better positioned to determine whether the student body as a whole was negatively affected. Specifically, by determining the number of students affected, school officials can easily turn a moment of offensive vulgarity into a moment of instruction on the value of free speech. Furthermore, if the off-campus speech was brought onto school grounds, school officials may have more control over how to react to the speech. By bringing the off-campus speech onto school grounds, the off-campus speech may inadvertently become on-campus speech. Therefore, school officials may have more leeway in restricting such speech.

### *B. Applying the Proposed Test*

Recall the scenario presented in this article’s Introduction, where a student created a blog, posted harmful comments, and allowed others to add their own comments and posts.

## V. HOW DOES THIS INTERSECT WITH THE PARENTAL RIGHT TO RAISE KIDS?

Kids fall from trees (because they climb them in the first place); they eat dirt (an average total of almost six pounds over a person’s life);<sup>117</sup>

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115. *Id.* (quoting *Morse v. Frederick*, 551 U.S. 393, 444 (2007) (Stevens, J., dissenting)) (internal quotations omitted).

116. *Id.*

117. *Strange Facts—The Average Person Eats 6 Lbs of Dirt in Their Lifetime*, HealthCareDailyOnline (April 29, 2015), <http://www.healthcaredailyonline.com/psychology/strange->

and they say adorable things. However, with “the recent trend toward ‘helicopter parenting’”<sup>118</sup> and others vehemently opposing it, strangers and law enforcement are beginning to believe some parents are “exposing their children to unacceptable levels of danger.”<sup>119</sup> As a result, public entities and individuals other than a child’s parents impose their own personal views on child rearing, a sudden breach of a parents’ Fourteenth Amendment rights.<sup>120</sup>

“At the core of the conflict is the ongoing debate about what constitutes responsible parenting in a world increasingly obsessed with child safety.”<sup>121</sup> As a result of increased media attention on child abduction, child abuse, and other potential dangers, parents are ever-increasingly erring on the side of overprotection.<sup>122</sup> Yet, “[t]here is mounting evidence that such overprotection does more harm than good, but parents . . . who resist the hyper-parenting trend, are running afoul of the legal system.”<sup>123</sup> Furthermore, “[t]he spate of news items suggests a trend toward enhanced, arguably invasive, scrutiny of parents, with the state second-guessing the parenting decisions they make, and intervening whenever they disagree with the parents’ judgment call.”<sup>124</sup> Although “[t]he intrusions are made in the name of protecting children from harm, a public policy objective that is both easy to defend and hard to dismiss,” the “disruption of the family in this way—removing or even threatening to remove kids from their families—can do tremendous harm to children, the very children the state is trying to protect, and in many cases contravene the family’s fundamental liberty interests . . . .”<sup>125</sup> In a similar vein, when a school restricts a student’s off-campus speech, parents may argue that the school is now intruding on the parental right to discipline and raise children as the parents see fit.

Consider a situation wherein parents allow their ten-year-old and six-year-old children to walk from the neighborhood playground back to their home; however, on their way home, a stranger calls the police, believing the children are in peril.<sup>126</sup> The police bring the children home

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facts-the-average-person-eats-6-lbs-of-dirt (last visited April 11, 2017).

118. David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 3 (2016).

119. *Id.*

120. *See id.* at 19 (“While the Supreme Court has recognized that parents enjoy a fundamental liberty interest in their decisions about how to raise their children, those Fourteenth Amendment rights are not being adequately protected.”).

121. *Id.* at 3.

122. *Id.*

123. *Id.*

124. *Id.* at 4.

125. *Id.* at 5.

126. *Id.* at 1 (“In January 2015, the [] children, ages ten and six, were permitted to do a short walk on their own, from the neighborhood playground back to their home in Silver Spring, Maryland. Their

and threaten to remove the children from the home.<sup>127</sup> Soon thereafter, the state commences an abuse and neglect investigation simply because the children walked, unsupervised, from a public playground back to their home.<sup>128</sup> Now compare this situation to the following one: parents allow their child to have unrestricted access to a personal laptop, even though their original intention was to give their child a computer for school use. Thereafter, their child proceeds to post threatening, harassing, or intimidating content about others students online. School officials hear about the content posted online by the child, proceed to expel the child because of the content, and even contact the police because the school believes the content rises to the level of violence against another child. The parents know nothing of these events until they attend the expulsion hearing at the school, and receive a personal visit by the police at their home. The police threaten to investigate and to proceed with legal action.

Comparing both the “free-range kids” walking home and the “free-range kids” posting online, almost all “[p]arents caught in this nightmare are well advised to cooperate quickly, apologize profusely, and promise it won’t happen again . . . in order to avoid having their children taken away from them”<sup>129</sup> or to avoid their children receiving a school suspension or, worse yet, an expulsion. However, “protecting the rights of parents to parent as they see fit—safeguarding their discretion in parenting, including issues of risk-management for their children—is likely to do far more to advance the interests of the children than the emerging pattern of state intervention can hope to achieve.”<sup>130</sup>

“Free-range parenting” is applicable to numerous scenarios, including the two mentioned above. “Free-range parenting” is described as:

[A] reaction to the present-day obsession with child-safety, and the emerging parenting norms that reflect those fears. . . . Preteen babysitters, sandlot baseball, bike riding in the neighborhood, and tree-climbing, once staples of childhood in America, are now relics of history. . . . Free-range parents . . . mourn the loss of freedom for today’s kids, and argue that kids are actually far worse off because of these ‘safety’ measures. . . . [And] today’s coddled kids

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parents designed this exercise to help the children develop some independence and self-sufficiency, and did so only after the children had completed other smaller challenges to prepare them for this one. But the parenting lesson was quickly disrupted when someone saw the children walking alone and reported it to the police.”).

127. *Id.* (“The children were picked up by police, the father was threatened with removal of the children from his custody . . .”).

128. *Id.* (“[T]he State of Maryland commenced an abuse and neglect investigation.”).

129. *Id.* at 5.

130. *Id.* at 6.

not only lose a sense of discovery and exploration when they are kept home and under nonstop adult supervision, they are deprived of an opportunity to develop self-sufficiency and or to learn to take responsibility for themselves.<sup>131</sup>

Parenting is “an exercise in risk management.”<sup>132</sup> Allowing kids to walk to school, to wait alone at the bus top, “certainly exposes them to some risk; but keeping them indoors where they will be ‘safe,’ . . . certainly exposes them to a variety of other harms,”<sup>133</sup> including restrictions on their First Amendment Free Speech rights. “If parents face liability for exposing children to risk, they have lost before they begin, because the risks cannot be eliminated, only managed . . . .”<sup>134</sup>

As mentioned earlier, while “[i]t is certainly true that some students may be especially immature and vulnerable . . . [,] [m]ost students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy [and inappropriate speech] when they see [and hear] it.”<sup>135</sup> Thus, parents who grant their children unrestricted access to a computer do, in fact, expose their children to some risk; however, those risks are managed risks, hopefully designed by the parents to teach their children self-sufficiency, self-responsibility, and self-control. “In fact, there are many approaches to parenting . . . and parents should have a right to raise their children in a manner consistent with their means and . . . values.”<sup>136</sup> However, by imposing a loosey-goosey application of *Tinker* to off-campus speech, school officials and courts are wielding terrible power, restricting not only the student’s freedom of speech, but the parent’s Fourteenth Amendment right to life and liberty without state intervention, and the primary parental “right to raise their children according to the dictates of their own consciences,”<sup>137</sup> wherein exists a “private realm of family life which the state cannot enter.”<sup>138</sup>

## V. CONCLUSION

“[P]arents are empowered in order to protect children’s best

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131. *Id.* at 7, 9.

132. *Id.* at 11.

133. Pimentel, *supra* note 118, at 11.

134. *Id.*

135. Killenbeck, *supra* note 111, at 893 (quoting *Morse v. Frederick*, 551 U.S. 393, 444 (2007) (Stevens, J., dissenting)) (internal quotations omitted).

136. Pimentel, *supra* note 118, at 18-19.

137. Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 11 (2015) (internal quotations omitted).

138. *Id.* (internal quotations omitted).

interests,”<sup>139</sup> because “children lack the rationality to make key decisions or to care for themselves adequately.”<sup>140</sup> As such, “[t]he Supreme Court has found that there exists a private realm of family life which the state cannot enter.”<sup>141</sup> More so, this parental right extends not only to the state and other adults, but to the parents’ own children.<sup>142</sup> Therefore, the extent of parent rights extends not only to “how ideal parents exercise their power to provide the effective care and guidance children need,”<sup>143</sup> but also to “[t]he extent to what the law enables imperfect parents to do to their children.”<sup>144</sup> If courts impose either the “reasonably foreseeable” or “nexus” framework, they will inevitably restrict the ability of an adult to parent a child through the imposition of intensive parenting restrictions because “the system will effectively force people to curtail their family size, chilling the exercise of their fundamental right to procreate.”<sup>145</sup> This is because these restrictive “parenting norms [will] lead[] down a road [of] de facto prohibitions on large families [because] . . . low-income families cannot afford to level of intensive child care that would be required of them.”<sup>146</sup> However, the courts may avoid all of this by creating a new off-campus First Amendment speech test, rather than applying the tests applicable to First Amendment on-campus speech.

By creating a completely new test solely for off-campus speech, *Tinker* and the specific exception created by the Supreme Court would still apply to on-campus speech; however, the Supreme Court, and courts thereafter, would be able to distinguish between on-campus and off-campus speech and how best to handle any restrictions because “on-campus and off-campus distinction is becoming increasingly difficult with the instantaneous nature of the Internet.”<sup>147</sup> Furthermore, considering whether the student’s off-campus speech has “special educational qualities” will ensure that only student speech without those special qualities are restricted. Finally, a new test will guarantee that parental interest and rights in child rearing are not limited, restricted, or violated.

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139. *Id.* at 1.

140. *Id.* at 9-10.

141. *Id.* at 11 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (internal quotations omitted).

142. *Id.* at 17 (“Parents’ right to control nearly every aspect of a child’s life is held not only against the state and other adults, but also against their own children.”).

143. *Id.* at 10.

144. *Id.* at 10.

145. Pimentel, *supra* note 118, at 33.

146. *Id.*

147. Boyd, *supra* note 1, at 1236.