ARTICLE

OFF-CAMPUS SPEECH, ON-CAMPUS PUNISHMENT: CENSORSHIP OF THE EMERGING INTERNET UNDERGROUND

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I. INTRODUCTION

The twin fine arts of extracurricular adolescent creative writing—notebook marginalia castigating teachers and scandal sheets criticizing schools—today are reaching new heights and a new medium thanks to industrious and technology-savvy students. Mocking teachers in print has always been risky business,[1] but a new generation of malcontent minors weaned on the Internet believes it has found a way to avoid trouble. As a September 2000 story in the *Washington Post* observed, "Thousands of high school students across the country have discovered the same way around school censorship. Just post the stories on the Web and spread the word."[2]

Unfortunately, in a post-Columbine period,[3] it's not quite that simple; this high-tech variation of a primitive underground press is *not* always able to escape school censorship.[4] In fact, the long arm of a school official all-too-

[1] Some teachers who object to statements published about them in school newspapers are prone to file lawsuits. *See, e.g.*, Moyer v. Amador Valley Joint Union High Sch. Dist., 225 Cal. App. 3d 720, 722 (Cal. Ct. App. 1990) (involving a teacher who filed a twelve-count complaint based upon a story in the high school newspaper that called him "a babbler" and "the worst teacher"). Some high school security officers also have been known to be litigious and thin-skinned individuals. *See, e.g.*, Couch v. San Juan Unified Sch. Dist., 33 Cal. App. 4th 1491, 1494-96 (Cal. Ct. App. 1995) (involving a lawsuit filed by a campus security monitor stemming from a satirical article in the school newspaper that he contended was racist and suggested that he was both a murderer and a drug dealer). Although the student-defendants in the above-referenced cases ultimately prevailed, they were forced to spend both time and money on attorneys' fees to defend their First Amendment rights.

[2] Emily Wax, *Censored Students Post Their Exposes Online: Sites Pose Dilemma for School Officials*, WASH. POST, Sept. 19, 2000, at B1; *see also* Bill Cole, *Students Using Internet as Legal Shield for Cheap Shots*, CHI. DAILY HERALD, June 19, 2000, at 1, *available in* LEXIS, News Library, Chdly File (describing the growing use of the Web by students as a place to attack other students and teachers).

[3] *See generally* James Brooke, *Terror in Littleton: The Overview*, N.Y. TIMES, Apr. 21, 1999, at A1 (describing "the deadliest school massacre in the nation's history" in which two gun-toting students wearing ski masks, Eric Harris and Dylan Klebold, fired semiautomatic weapons at fellow students and hurled explosives).

[4] "[U]nderground newspapers are written *by* the alienated *for* the alienated." ROBERT J. GLESSING, THE UNDERGROUND PRESS IN AMERICA 3 (1970). This description of the underground press seems appropriate for teenage high school students who sometimes feel alienated from society and who are repulsed by the often establishment-based beliefs and

often reaches far off campus into private homes to punish students who create—on their own time and with their own computers—Web sites that assail administrators and tweak teachers.[5] In 2000 alone, a wave of cases throughout the United States involving on-campus punishment for off-campus expression began to swell.[6] In some instances, students' First Amendment speech rights were trounced not only by schools that expelled them, but by courts that refused to protect them.[7]

Although the facts differ among the recent cases described in this article, collectively they raise a very timely question of constitutional importance: *When, if ever, is on-campus punishment appropriate for off-campus speech?*

Parsed differently, if traditional and generally applicable *off-campus* civil law remedies such as libel are available for teachers and principals who feel defamed by student speech that originates off campus, then why should school administrators be able to mete out a second, *in-school* punishment against those students? Likewise, if generally applicable criminal threat statutes exist to punish students for off-campus expression that allegedly menaces school personnel or other students, why should a school be able to double-dip and punish those students as well?[8] After all, if a student is arrested for making a Web-based threat and serves time in an adult or juvenile detention facility, there is no need for a school suspension. It is hard to attend class from a holding cell. The bottom line is that sufficient remedies and redress in the

values of their principals and teachers. Non-school-sponsored publications are "commonly referred to as 'underground' publications" by courts. Burch v. Barker, 861 F.2d 1149, 1157 (9th Cir. 1988).

[5] A discussion of cases in which students created offensive or threatening Web sites during school and/or on school computers is beyond the scope of this article. For more on this issue, *see, e.g.*, Paul Dellinger, *Teen Charged in Web Threats*, ROANOKE TIMES & WORLD NEWS, Apr. 21, 2000, at A1, *available in* LEXIS, News Library, Roanok File (describing the case of a 15-year-old girl charged with the felony of "attempting threats by electronic communication to kill or injure people" after she created a Web page in a school computer lab during class).

[6] *See infra* Part II. The cases described later in this article stretch from Washington state in the Pacific Northwest to Pennsylvania in the Northeast and to Arkansas in the South.

[7] *See infra* Part II. The First Amendment to the United States Constitution provides in relevant 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 have been incorporated 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).

[8] For instance, a high school freshman from Ocean Township, New Jersey, was arrested for making death threats on his Web site that included a list called "the losers I would love to shoot, and freshman girls I would love to kill." Georgia East, *Web Threats May Yield More Arrests*, ASBURY PARK PRESS (Neptune, N.J.), Nov. 10, 1999, at A1, *available in* LEXIS, News Library, Asbury File. In this case, the criminal and juvenile justice systems came into play to address a case of off-campus, Web-based expression. *See id.* This remedy, rather than in-school punishment, is the proper response to such speech that occurs in the real world.

civil, criminal, and juvenile justice systems already exist for off-campus expression that causes harm.

A lesson learned in these "real world" justice systems surely is a far more powerful one and a more appropriate remedy for abusive off-campus expression than in-school punishment. And what is that lesson? *Real-world speech carries real-world consequences.* In other words, if you act in the adult world (the off-campus world), you will be treated like an adult and subjected to the same forms of adult redress, punishment and justice.[9]

But some schools are not teaching students this significant lesson. They are, instead, teaching them another principle: *Be careful what you say in the real world; we can punish you for that too*.

Consider the case of young Justin Swidler from the steel-mill town of Bethlehem, Pennsylvania. His situation made national news when it caught the attention of controversial conservative talk radio host, Dr. Laura Schlessinger, who dubbed Swidler on-air as a "little creep."[10]

In July 2000, a Pennsylvania appellate court affirmed the permanent expulsion of the former middle-school student who, as the court wrote, created a Web site at home called "Teacher Sux" that "consisted of several web pages that made derogatory comments about [Swidler's] algebra teacher," Kathleen Fulmer, and his principal, A. Thomas Kartsotis.[11] Swidler's site—blatantly sophomoric and crass, and demonstrating an apparent phobia for the calorically consumed—called Fulmer, among other things, a "Stupid Bitch,"[12] a "fat fuck,"[13] and a "fat bitch"[14] who "shows off her fat fucking legs."[15] It featured

[9] The case of Ian Lake, a student at Milford High School in Utah, illustrates the point that off-campus redress in the criminal and civil justice systems for off-campus speech suffices to teach students a real-world lesson even when no school discipline occurs. Lake was charged in 2000 with criminal libel and faced a civil defamation suit filed by his former principal, Walter Schofield, whom Lake had called the "town drunk" on Lake's Web site. *See* Joe Baird & Thomas Burr, *Boy's Lawyers Ask Judge to Dismiss Libel Charge*, SALT LAKE TRIB., Aug. 2, 2000, at B2, *available in* LEXIS, News Library, Sltrib File. Lake had used a home computer to create the site on which he posted derogatory comments about the principal, faculty and students at his school. *See generally* Hilary Groutage, *Is Web Diatribe Libel?*, SALT LAKE TRIB., May 27, 2000, at B1, *available in* LEXIS, News Library, Sltrib File. Lake spent seven nights in a juvenile detention facility before a judge allowed him to move to California to live with his grandparents. *See id.* Lake, essentially, was run out of town after completing his junior year at Milford High School before any in-school punishment could occur. Joe Baird, *Milford Teen Charged With Internet Libel*, SALT LAKE TRIB., June 21, 2000, at A1, *available in* LEXIS, News Library, Sltrib File; *see also* UTAH CODE ANN. § 76-9-502 (1999) (defining criminal libel and classifying it as a class B misdemeanor).

[10] Christian D. Berg, *'Dr. Laura' Rips 'Scummy' Web-Threat Teen*, MORNING CALL (Allentown, Pa.), May 21, 1999, at A1, *available in* LEXIS, News Library, Mrncll File.

[11] J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 415 (Pa. Commw. Ct. 2000).

[12] *Id.* at 416.

[13] *Id.*

"a diagram of Mrs. Fulmer with her head cut off and blood dripping from her neck."[16] Swidler even asked, rhetorically, why Fulmer should die and then admonished visitors to "give me $20.00 to help pay for the hitman."[17] The youth, fiendishly fond of the word fuck in all of its many derivations,[18] added that Principal Kartsotis "fucks" a female principal from another school in the same district.[19]

Although Swidler did not download his Web site at school, his online vituperations did not go unnoticed or unpunished.[20] They allegedly caused Kathleen Fulmer to suffer a plethora of physical and psychological problems, including headaches, fright, stress, and anxiety, as well as a loss of appetite, sleep and weight.[21] She took anti-anxiety/anti-depressant medication to cope with these ills, was unable to complete the academic year in the classroom, and, ultimately, applied for a medical sabbatical for the next year.[22]

Did Fulmer have an off-campus remedy for this distasteful and possibly threatening off-campus speech? Of course she did—she could turn to the civil justice system for redress. Fulmer, in fact, did just that. She sued Swidler for defamation,[23] interference with contractual relations,[24] invasion of privacy and

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[14] *Id.* at 425.

[15] *Id.* at 416.

[16] *Id.*

[17] *Id.*

[18] *See supra* text accompanying notes 13 and 15 (illustrating Swidler's use of the word "fuck").

[19] *J.S.*, 757 A.2d at 416.

[20] The school district apparently learned about Swidler's site after a student notified a school guidance counselor. Kathleen Parrish, *Web Threat Shown Off at School*, MORNING CALL (Allentown, Pa.), Oct. 26, 1998, at A1, *available in* LEXIS, News Library, Mrncll File.

[21] *See J.S.*, 757 A.2d at 416.

[22] *See id.* at 416-17.

[23] Kathleen Parrish, *Web Site Included 'Opinion,'* THE MORNING CALL (Allentown, Pa.), Dec. 31, 1998, at B1, *available in* LEXIS, News Library, Mrncll File. Defamation includes both the libel and slander torts. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). The basic elements to state a cause of action for defamation include: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1976); *see also* 42 PA. CONS. STAT. ANN. § 8343 (West 1998) (setting forth the burdens in defamation law in Pennsylvania that were applied in the lawsuit against Justin Swidler).

[24] *See* Parrish, *supra* note 23; *see also* RESTATEMENT (SECOND) OF TORTS § 766 (1977) (providing the criteria for a cause of action for intentional interference with the performance of a contract by a third party). To set forth a cause of action under Pennsylvania law for intentional interference with contractual relations, one must allege four elements, including:

loss of consortium.[25] What's more, Principal Kartsotis filed a defamation lawsuit of his own, claiming the site defamed, humiliated and threatened him.[26]

The civil justice system thus provided an avenue for potential redress for the targets of Swidler's off-campus expression. In addition, the criminal justice system came into play. Both the local police and the Federal Bureau of Investigation (FBI) conducted investigations to determine if Swidler's site constituted a true threat of violence.[27] Both agencies, however, declined to pursue criminal charges.[28] The county attorney believed the threat to hire a hitman simply was not serious.[29]

Given these facts, one might reasonably conclude that no further action would be taken against Justin Swidler. Why draw this conclusion? *Because off-campus justice was pursued for off-campus speech*.

After all, both the civil and criminal legal systems were fully deployed in the matter. The aggrieved school personnel—Fulmer and Kartsotis—used the civil justice system to seek compensation for injuries the offending Web site allegedly caused, while two separate agencies in the criminal justice system simultaneously investigated the matter and concluded there was no criminal conduct—no threat of violence—worthy of prosecution.

Unfortunately for Swidler, an extending third arm of the justice system—the school district's arm—reached out and punished him *in* school for his out-of-school expression. The school district simply reasoned that Swidler's off-campus speech caused on-campus effects. In particular, it contended that his site "had a demoralizing impact on the school community."[30] The school district also found that Swindler's Web site caused an "effect on the staff at Nitschmann Middle School [that] was comparable to the effect on the school community for the death of a student or staff member because there was a feeling of helplessness and a plummeting morale."[31] The school district also

(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987).

[25] *See* Parrish, *supra* note 23.

[26] *See Principal's Lawsuit vs. Pupil Allowed by Judge to Proceed*, THE MORNING CALL (Allentown, Pa.), Aug. 28, 2000, at B1, *available in* LEXIS, News Library, Mrncll File.

[27] *See J.S.*, 757 A.2d at 415.

[28] *See id.* at 415 n.2.

[29] *See* Parrish, *supra* note 20.

[30] *J.S.*, 757 A.2d at 417.

[31] *Id.* This statement seems terribly off base. To equate offensive speech with "the death of a student" is to conflate speech that mentions violence with violence itself. What's more, if one student's off-campus Web site can create a "feeling of helplessness" among intelligent and skilled adults at the school, then Swidler surely is a most powerful orator

asserted that because Kathleen Fulmer was unable to teach after discovering the site, "substitutes were utilized which disrupted the educational process of the students."[32] For this, the Bethlehem Area School District permanently expelled Swidler from its schools.[33]

In a two-to-one decision, a Pennsylvania appellate court upheld this action over Swidler's assertion that his First Amendment right of freedom of expression was violated.[34] The court concluded that the Web site, primarily because of its impact on Fulmer, "hindered the educational process."[35] This is an incredibly problematic conclusion, of course, not only because the speech that allegedly hindered the educational process originated off-campus and never called for disruptions on campus, but because it suggests that a single teacher's arguably thin-skull, personal reaction to commentary posted on an *outside* Web site dictates and controls what constitutes a disruption of the educational process *inside* a school. This is tantamount to a heckler's veto—the speaker's rights were trampled by the audience's reaction.

Even more disturbing, the appellate court seemed particularly and peculiarly concerned that the speech could change students' opinions of Fulmer and Kartsotis in a negative direction. The majority wrote that Swidler's Web "statements regarding the reasons he believes that Mr. Kartsotis and Mrs. Fulmer should be fired *have a negative effect on other students' perception of them*."[36] What does this mean? Apparently, it means that public school principals and teachers now somehow constitute a new, protected class in the Commonwealth of Pennsylvania who must be free from commentary that negatively affects students' opinions of them. That, if other courts adopt this logic, is a troubling lesson to teach students regarding the limits of freedom of expression. What's more, it is particularly ironic because public school principals and teachers, in defamation law, are often considered public officials[37]—the very class of individual about whom, according to the United

with linguistic skills far beyond his years. One must suspect, then, that this statement is somewhat hyperbolic. Finally, it is important to note that this statement relates only to the "effect on the staff" at the school—it does not suggest that students were disrupted in any way or that students caused disruptions or that their classes were disrupted.

[32] *Id.*

[33] *See id.* at 415.

[34] *See id.* at 415, 426.

[35] *Id.* at 421.

[36] *Id*. (emphasis added).

[37] State courts have split on whether public school principals and teachers are public officials for purposes of defamation law. *See, e.g.*, Jee v. New York Post Co., 671 N.Y.S.2d 920, 924 (N.Y. Sup. Ct. 1998) (concluding that public high school principals are public officials based on the reasoning that "[t]he importance of education to society and the legitimate concern that the public has in seeing that the educational process is properly administered cannot be disputed. Public school principals play an important role in shaping and administering the educational process"); Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978) (concluding that a coach-physical education teacher in a

States Supreme Court, speech should be "uninhibited, robust and wide-open . . . ."[38]

It is clear that it was *not* a belief by the Pennsylvania appellate court that Swidler's speech constituted a true threat[39]—a threat of violence not protected by the First Amendment—that caused it to rule against him. Why? The court noted that the solicitation for students to give Swidler twenty dollars—"*whether serious or otherwise*"—could be both physically and emotionally disturbing.[40] The words "or otherwise" indicate that it did not matter that the site might have been a joke not meant to be taken seriously. The court even added, "[i]t is of *no significance* that the local authorities and the FBI chose not to pursue the matter."[41] In other words, it did not make *any* difference to the court that off-campus student speech was protected from off-campus criminal punishment. The school still stepped in to play the role of a quasi-, make-shift prosecutor.

It was, then, simply the emotional and reputational harms, coupled with their physical symptoms, to a teacher and principal that most concerned the court's majority.[42] It made this clear in the following portion of the opinion expressing its belief why the school's evidence established that Swidler's speech had caused harm sufficient both to justify his expulsion and to thwart his speech rights:

> Without restating the previous analysis, we need only comment that Mr. Kartsotis and Mrs. Fulmer fully testified to their mental and physical reactions to the web-site. Mr. Kartsotis further testified as to the effects

public school is a public official); East Canton Educ. Ass'n v. Mcintosh, 709 N.E.2d 468, 475 (Ohio 1999) (observing that "[c]ourts in other jurisdictions are divided whether public school principals should be accorded public official status[,]" and concluding that, in Ohio, "principals are not public officials for purposes of defamation law"); Johnson v. Southwestern Newspapers Corp., 855 S.W.2d 182, 186 (Tex. Ct. App. 1993) (writing that courts "are not of one mind" on the issue of whether school teachers are public officials); Palmer v. Bennington Sch. Dist., 615 A.2d 498 (Vt. 1992) (observing that the courts that have considered whether school principals are public officials "are divided," but concluding that, "[b]ecause of the crucial role of public education in American society . . . a principal is a public official"). Although the United States Supreme Court never has considered the issue of whether a public school teacher is a public official, the late Justice William Brennan suggested that public high school teachers are public officials. *See* Lorain Journal Co. v. Milkovich, 474 U.S. 953, 957-65 (1985) (Brennan, J., dissenting).

[38] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The *New York Times* case held that public officials must prove actual malice in order to recover for defamatory statements regarding their official conduct. *See id.* at 279-80.

[39] *See generally* Robert D. Richards & Clay Calvert, *The "True Threat" To Cyberspace: Shredding the First Amendment for Faceless Fears*, 7 COMMLAW CONSPECTUS 291, 294-95 (1999) (discussing the true threats doctrine in the context of speech posted on the Internet).

[40] *J.S.*, 757 A.2d at 421 (emphasis added).

[41] *Id.* at 425 (emphasis added).

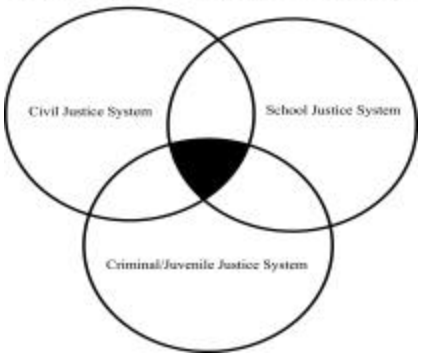
[42] *See id.* at 426.

> of the web-site on the school community as a whole. The School District found the testimony of Mr. Kartsotis and Mrs. Fulmer to be credible.[43]

The bottom line extrapolated from the case of Justin Swidler, then, is this: Despite the fact that off-campus civil and criminal remedies exist and may, in fact, be pursued to punish students' off-campus speech, and despite the fact that the off-campus speech neither calls for in-school disruptions nor constitutes a true threat of violence, some schools and courts remain willing to enforce in-school discipline and punishment. It is as if a school principal were living in each student's home, monitoring personal Web pages and doling out punishment for anything emotionally or physically disturbing to teachers or that may affect negatively other students' opinions of teachers.

The Venn diagram below illustrates a point that should now be evident: *three* separate justice systems—criminal/juvenile, civil, and school—increasingly are wrapped up in cases such as those involving Justin Swidler. More and more schools seem unwilling to leave problems of off-campus expression to off-campus methods of redress. Conceivably, then, a minor who speaks outside of school—*unlike* a non-student adult—faces a triple threat of redress, illustrated by the common, overlap portion among the three circles in the diagram. It is the school-enforced discipline that is most problematic when a student does not download his or her Web site in school or cause other students to download it on school-owned or school-controlled computers. If a student does not "bring" his personal Web site into the school, then this article contends that redress must be left to the civil and criminal/juvenile justice systems.

Methods of Redress Diagram: The Triple Threat



This article addresses First Amendment issues raised by the rash of cases like Justin Swidler's in which school districts have levied on-campus punishment for off-campus expression posted on decidedly non-curricular Web sites. Part II provides facts from four recent cases—cases in addition to that involving Swidler—that illustrate both the problem and the different

[43] *Id.*

approaches to it adopted by the courts.[44] As will become evident, not all courts adopt the same harsh stance that the Pennsylvania court took in Swidler's case. Indeed, some courts have issued injunctions against enforcement of internal school disciplinary measures.

Next, Part III identifies a number of variables from student Web site cases that provide a cohesive framework through which judges and school administrators can filter future cases in a more systematic manner.[45] Part IV then demonstrates that there is no United States Supreme Court precedent directly controlling this new breed of off-campus expression case.[46] It also contends that efforts to apply principles from prior Supreme Court rulings on student expression are misguided. This part then looks for guidance to decisions from lower courts involving off-campus student expression that was *not* Web-based, as well as to prior lower court decisions that have squarely addressed Web-based student expression issues. Next, Part V compares and analyzes the current situation involving the First Amendment rights of students for their off-campus expression with another area of constitutional concern — Fourth Amendment search and seizure issues[47]—in which the Supreme Court has addressed restrictions on students' rights.[48]

Part VI then proposes and analyzes a hypothetical fact situation in which a parent — *not* a student—creates a Web site similar to those now constructed by students.[49] The hypothetical illustrates problems with holding students accountable in school for off-campus expression that does not pose a true threat of violence. Finally, Part VII admonishes public school administrators to remember the safety-valve function of speech and not to forget that an important purpose of expression is to allow people (middle and high school students included) to vent their feelings and frustrations so they don't fester, bottle up and, perhaps, lead to the very type of violence that school administrators are attempting to prevent.[50]

The article concludes that there are very few circumstances in which school administrators are ever justified, in light of First Amendment concerns, for punishing students for their off-campus expression.[51] It is only when students

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[44] *See infra* text accompanying notes 53-111.

[45] *See infra* text accompanying notes 112-51.

[46] *See infra* text accompanying notes 152-221.

[47] The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[48] *See infra* text accompanying notes 222-33.

[49] *See infra* text accompanying notes 234-35.

[50] *See infra* text accompanying notes 236-54.

[51] *See infra* text accompanying notes 255-61.

deliberately bring their expression on campus—when they download their personal Web sites on school computers during school hours or encourage other students to do so—that schools may properly redress and punish the speech.

The conclusion also provides practical advice for school administrators on how to address and handle situations like those described in this article in order to minimize intrusions on First Amendment rights. In particular, the fears of a new technology—a technology about which students quite often know more than their teachers—cannot dictate administrators' responses. Administrators must remember that the best remedy for speech with which they disagree or find offensive is more speech—speech to counter the message and to educate its creator—not enforced silence.[52]

II. THE PERILS OF OFF-CAMPUS, WEB-BASED EXPRESSION: A QUARTET OF CURRENT CASES

This section examines four very recent cases—each was decided or settled in 2000—involving students who were disciplined by their schools for content posted on Web sites that they created on their own time and with their own computers. The cases here are merely illustrative—not exhaustive—of the incidents that have happened across the United States during just the past three years.[53] Despite a pair of 1998 decisions in favor of students' First

[52] *See, e.g.*, Kathleen Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 974 (1995) (describing "*more* speech" as "that old common cure for bad speech" but pointing out attacks on the counter-speech doctrine).

[53] For instance, Clayton Telles was suspended in October 2000 from Otsego High School in Ohio after the principal learned of a Web site that Telles created from his home computer satirizing students and faculty. *See Principal Hands Down 10-Day Suspension to Web Site Creator*, STUDENT PRESS L. CTR., Oct. 27, 2000, *available at* <http://www.splc.org/newsflashes/102700ohio.html> [hereinafter *10-Day Suspension*]. A letter sent to Telles' parents did not specifically mention the Web site, but cited "derogatory and inflammatory comments about Otsego High School students and staff." *Id.* Other cases from across the county abound. *See* Elizabeth Bell, *Student Protest Over Web Site Discipline*, SAN. FRAN. CHRON., Sept. 17, 1999, at A17, *available in* LEXIS, News Library, Sfcrn File (describing the five-day suspension of a Moraga, California high school student who created a private Web site with content that school administrators deemed inappropriate and a possible threat to campus safety); *Florida High School Rescinds Suspension of Senior Who Criticized School on Private Web Site*, STUDENT PRESS L. CTR., june 4, 1998, *available at* <http://www.splc.org/newsflashes/060498hialeah.html> (describing a case at Hialeah-Miami Lakes High School in Florida in which the ACLU intervened on behalf of a student who was suspended for creating a Web site that expressed the sentiment that the assistant principal had the "personality of sour milk"); Patti Puckett, *Family to Appeal School Suspension*, ATLANTA J. & CONST., Feb. 12, 1999, at 1D, *available in* LEXIS, News Library, Atljnl File (describing the case of a Georgia middle-school student who was suspended for eighteen weeks after he created a Web site on his home computer that allegedly encouraged students to disrupt class); *School Officials Reacting to Threats*,

Amendment rights of free speech on the Internet,[54] the four cases analyzed below suggest that some school administrators have failed to learn from the mistakes of the past and have continued to punish off-campus, Web-based expression.

A. Karl Beilder, Marge Simpson and Viagra: Censorship at Timberline High

In July 2000—the same month that a Pennsylvania court ruled against Justin Swidler—a Washington judge ruled in favor of a high school student, Karl Beidler, who created a Web site at home on his own time that ridiculed his assistant principal.[55] Among other things, Beidler allegedly superimposed a yearbook image of the assistant principal, Dave Lehnis, having sex with Marge Simpson, a television cartoon character, and placed Lehnis in phony ads for a

ASSOC. PRESS STATE & LOCAL WIRE, May 4, 1999, *available in* Lexis-Nexis Academic Universe, News Library (describing the suspension of eleven Ohio high school students who created a Web site called "The Field Dominion of Freaks" that congratulated the shooters at Columbine and "discussed the group's hatred of athletes, prep students and certain teachers"); Mary Jane Smetanka, *10th-Graders Suspended Over Web Threat*, STAR TRIB. (Minneapolis, Minn.), May 27, 1998, at 7B, *available in* LEXIS, News Library, Strib File (describing the suspension of three students at a St. Cloud, Minnesota high school who created a Web site that contained an alleged "hit list" of teachers and staff members).

[54] In April 1998, Westlake High School in Ohio paid $30,000 to a student, Sean O'Brien, to settle a lawsuit resulting from the school's suspension of the O'Brien for creating, while off campus, a Web site that called a teacher "'an overweight middle-aged man who doesn't like to get haircuts.'" Mark Rollenhagen, *Westlake Schools To Pay $30,000 to Settle Net Suit*, PLAIN DEALER, Apr. 14, 1998, at 1A, *available in* LEXIS, News Library, Clevpd File. The school called the Web site disruptive to the educational environment and contended that it undermined the teacher's authority. *See id.* Before the settlement was reached, a federal judge issued an emergency order requiring the district to reinstate the student and not to interfere with his First Amendment rights. *See id.* At the time, the ACLU believed it was the first national case to explore how much control a school can exert over what its students write on Internet sites created on their home computers. *See id.* In a tragic epilogue to this case, O'Brien was killed along with his older brother in a car crash in Arizona in August, 1999. *See Crash Kills Student Involved in Internet Lawsuit Against Achool*, ASSOC. PRESS STATE & LOCAL WIRE, Aug. 17, 1999, *available in* Lexis-Nexis Academic Universe, News Library. Athough Sean O'Brien's case settled before any precedent could be set, another 1998 case involving a similar situation would be litigated in front of a federal court in Missouri. *See* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998). In that case, the judge ruled that student Brandon Beussink's home-created Web page, which criticized the high school administration and used vulgar language, was protected expression. *See id.* at 1182. The court issued a preliminary injunction protecting Beussink from school sanctions. *See id.* The court reasoned that, "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech [under existing First Amendment precedent.]" *Id.* at 1180.

[55] *See* Joshua Robin, *Judge Upholds Student Who Posted Web Parody*, SEATTLE TIMES, July 19, 2000, at B5, *available in* LEXIS, News Library, Seattm File.

popular erectile dysfunction drug, Viagra.[56] The Web site featured "a lengthy disclaimer identifying it as a joke."[57] Beidler even included a message that stated, "all pictures are parody pictures . . . ."[58]

The school district, however, did not take it as a joke, and expelled Beidler.[59] As the ACLU attorney who represented the youth would argue in court, school administrators "'reached into his [Beidler's] private home and punished him with school sanctions . . . .'"[60] The justification for these sanctions? According to the school's principal, Tony Hawkins, the site prompted other students to follow Beidler's lead and to create similar sites, which, in turn, caused "a substantial disruption in the education process at Timberline High School."[61]

This substantial disruption justification should sound familiar. It was the same justification asserted in the case of Justin Swidler.[62] Judicial precedent for this rationale comes from a 1969 United States Supreme Court decision, discussed later in Part IV, where the Court concluded that student speech in school settings is protected by the First Amendment unless it "would materially and substantially disrupt the work and discipline of the school."[63] As in Swidler's case, Beidler's off-campus expression allegedly created an on-campus disruption.[64]

Fortunately for free expression advocates, Washington Superior Court Judge Thomas McPhee rejected the school district's contention and accepted Beidler's argument that his First Amendment rights were violated.[65] McPhee opined:

Even with the vastly increased opportunity to speak and be heard created

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[56] *See* Karen Hucks, *Expelled Student Defends Parody*, NEWS TRIB. (Tacoma, Wash.), Feb. 13, 1999, at B1, *available in* LEXIS, News Library, Nwstrb File.

[57] *See* Robert Gavin, *A Case of Free Speech vs. School Discipline*, SEATTLE POST-INTELLIGENCER, May 13, 2000, at A1, *available in* LEXIS, News Library, Seapin File.

[58] *ACLU of Washington State Challenges Suspension for Student Parody*, ACLU NEWS, Apr. 7, 1999, *available at* <http://www.aclu.org/news/1999/n040799c.html>.

[59] *See* Hucks, *supra* note 57.

[60] Gavin, *supra* note 57. An copy of Karl Beidler's motion for partial summary judgment against the North Thurston School District can be found online. *See* Plaintiff's Motion for Partial Summary Judgment, Beidler v. North Thurston Sch. Dist. No. 3, No. 99-2-00236-6 (Wash. Sup. Ct. filed Mar. 1, 2000), *available at* <http://www.aclu-wa.org/legal/Beidler-Motion.3.1.00.html>.

[61] *Student Suspended for Web Site*, SEATTLE TIMES, Feb. 16, 1999, at B2, *available in* LEXIS, News Library, Seattm File.

[62] *See supra* text accompanying note 32.

[63] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969).

[64] *See supra* text accompanying note 61.

[65] *See Judge Says School District Cannot Punish Web Page Creator*, STUDENT PRESS L. CTR., July 20, 2000, *available at* <http://www.splc.org/newsflashes/072000 washington.html>.

> by the Internet, the exceptions to First Amendment protection for student speech remain narrowly drawn even for immature and foolishly defiant students such as Mr. Beidler . . . . Schools can and will adjust to new challenges created by such students and the Internet, but not at the expense of the First Amendment.[66]

McPhee's statement is important. It suggests that the creation and adoption of new speech-related technologies that *increase* the audience reach of a student's message off campus do not simultaneously *decrease* First Amendment protection for that speech on campus. In social science terms, there must not be an *inverse relationship* between the audience reach of student speech and the constitutional protection for student speech.[67] The fact that a student can post what amounts to cheap-shot notebook marginalia about teachers and classmates on the Web and thereby reach a bigger audience must not be controlling of First Amendment issues.

It is important to note that, to the extent the assistant principal found the site defamatory,[68] he could have filed a libel action, much as Kathleen Fulmer did in response to Justin Swidler's Web site.[69] McPhee's opinion did not preclude this option. Off-campus justice—not on-campus punishment—may be pursued for off-campus expression. In an editorial supporting this proposition published before Judge McPhee's decision, the editors of the *Seattle Post-Intelligencer* got it right when they observed:

> Away from school property, the school district has no legitimate grounds to punish Beidler's expression of his opinion about the assistant principal – or anyone else. Should the young man's comments run afoul of libel laws he may be subject to civil penalties. Should the Web site threaten violence or any other lawless activity, it is a matter for the police. A quick and clear ruling in Thurston County Judge William Thomas McPhee's courtroom should circumscribe the schools' power to punish behavior that occurs at school.[70]

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[66] *Id.*

[67] "An *inverse* (or *negative*) *relationship* exists when one variable increases while the other decreases." ROGER D. WIMMER & JOSEPH R. DOMINICK, MASS MEDIA RESEARCH: AN INTRODUCTION 253 (5th ed. 1997).

[68] Altered pictures such as those on Beidler's site may form the basis for a defamation action. *See* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 105 (3d ed. 2001) ("Particularly in this era of computer-generated images, defamation through modified pictures is a danger.").

[69] *See supra* text accompanying note 23.

[70] *Schools Lack Authority for Off-Campus Mischief*, SEATTLE POST-INTELLIGENCER, May 21, 2000, at F2, *available in* LEXIS, News Library, Seapin File. In February 2001, Beidler received a $62,000 settlement—$10,000 for himself and $52,000 for his attorney's fee—from the North Thurston School District. *See* Lisa Stiffler, *Ex-Student Awarded Damages In His Free-Speech Lawsuit*, SEATTLE POST-INTELLIGENCER, Feb. 21, 2001, at B1, *available in* LEXIS, News Library, Seapin File.

The twin fundamental dichotomies that now should be clear from the Swidler and Beidler cases—*off-campus speech v. on-campus speech; off-campus justice v. on-campus justice*—are pivotal in making sense of these and the cases that follow. With these distinctions in mind, this article now turns to another recent dispute—this one arising not in the Northeast like Swidler's case or the Northwest as in Beidler's situation, but in the Southeastern state of Arkansas—involving home-created Web expression.

B. Justin Redman: The Next Larry C. Flynt?

In one of the most important free-speech decisions in the past twenty-five years, the United States Supreme Court ruled in favor of *Hustler* magazine and its publisher, Larry C. Flynt, against Reverend Jerry Falwell in a lawsuit based on an ad parody.[71] It suggested that Falwell, the former leader of the Moral Majority, had his first sexual experience "during a drunken incestuous rendezvous with his mother in an outhouse."[72] The ad parody was the height of bad taste, but it was protected expression.[73]

Like Flynt, a junior high school student named Justin Redman from Jonesboro, Arkansas apparently was fond of sexual humor that is not always in good taste.[74] In fact, on his own time and from his home computer, he created a sexually explicit Web site that lampooned school officials and some students.[75] In one instance, he labeled a 14-year-old girl as "the school slut."[76]

Administrators at Valley View Junior High School didn't find the site, which also parodied the school's official site, amusing; they reprimanded Redman.[77] In particular, the school handed him a ten-day suspension that

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[71] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-57 (1988).

[72] *Id.* at 48. Anthony Lewis, the long-time columnist and Supreme Court reporter for *The New York Times* and who also worked as a Lecturer on Law at Harvard Law School from 1974 to 1989, described the case this way:

> The decision in *Hustler v. Falwell* was important for freedom of speech generally. It showed that the Supreme Court, including judges considered conservative, had an expansive sense of the kind of speech about public matters that the Constitution requires American society tolerate—not just George Washington as an ass but Jerry Falwell and his mother in an outhouse.

ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 233 (1991). For an excellent analysis of the case and the Supreme Court's opinion, *see generally* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603 (1990).

[73] *See Falwell*, 485 U.S. at 55-57.

[74] *See* Shareese Konda, *School to Admit Web Spoofer,* ARK DEMOCRAT-GAZETTE, Aug 17,2000 at B8, *available in* LEXIS, News Library, Arkdem File.

[75] *See id.*

[76] *Id*.

[77] *See* Linda Satter, *School sued for response to mockery*, ARK DEMOCRAT-GAZETTE, June 23, 2000, at B1, *available in* LEXIS, News Library, Arkdem File.

reportedly caused him to miss final exams and, in turn, fail the ninth grade.[78] Redman also was required to undergo sexual harassment counseling before he could return to school.[79] The school charged the youth with causing a "'disturbance in the school and disrupt[ing] the learning environment.'"[80]

How did Redman's off-campus-created Web site disrupt the in-school educational environment? The school district's attorney claimed the site "disrupted the school *by creating fear and rumors.*"[81] Equating the existence of in-school rumors with a disruption of the educational process is quite a stretch. Schools, like almost any organization or workplace are always filled with rumors. There is nothing abnormal about hallway gossip. The school district also claimed the off-campus-constructed site constituted in-school sexual harassment against its policies.[82]

As in the cases involving Justin Swidler and Karl Beidler, the targets of Justin Redman's speech could pursue off-campus remedies. For instance, the girl labeled a slut could sue for defamation.[83] Accusations that a person's sexual behavior deviates from generally acceptable standards usually are defamatory.[84]

But it was not enough for the school district that off-campus remedies existed for students defamed or humiliated by the off-campus expression. The school chose to play the part of an off-campus police officer and suspended Redman.[85] Redman then filed a federal lawsuit claiming his First Amendment rights were violated by the school district.[86] The lawsuit candidly admitted that the site was "often vulgar and generally impolite," but added that it was "devoid of any hint of violence."[87]

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[78] *See* Konda, *supra* note 74.

[79] *See* Melissa Nelson, *Jonesboro Teen to Start School With Classmates*, ASSOC. PRESS STATE & LOCAL WIRE, Aug. 16, 2000, *available in* Lexis-Nexis Academic Universe, News Library.

[80] *ACLU of Arkansas Sues School District on Behal of Student Expelled for Creating Off-Campus Web Site*, ACLU NEWS, June 22, 2000, *available at* <http://www.aclu.org/news/2000/no62200d.html>.

[81] *Hearing to Resume Wednesday in First Amendment Dispute*, ASSOC. PRESS STATE & LOCAL WIRE, Aug. 14, 2000, *available in* Lexis-Nexis Academic Universe, News Library (emphasis added).

[82] *See* Kondo, *supra* note 74.

[83] *See* Bryson v. News Am. Pubs., Inc., 672 N.E.2d 1207, 1215 (Ill. 1996) (concluding, in the context of a libel lawsuit, that the word "slut" implies an accusation of fornication and thus falls within a category of statements that are actionable per se).

[84] *See* KENT R. MIDDLETON ET AL., THE LAW OF PUBLIC COMMUNICATION 85 (5th ed. 2000).

[85] *See* Kondo, *supra* note 74.

[86] *See* Shareese Kondo, *District Settles Lawsuit by Teen Suspended for Web Site*, ARK. DEMOCRAT-GAZETTE, Aug. 18, 2000, at B4, *available in* LEXIS, News Library, Arkdem File.

[87] Satter, *supra* note 77.

In August 2000—just one month after the decisions in the cases of both Justin Swidler and Karl Beidler—Redman, represented by attorneys from the American Civil Liberties Union (ACLU), reached a confidential settlement agreement with the school district after the trial started.[88] Although the details of the settlement are confidential, the school district agreed to allow Redman to return to school.[89]

That it took a federal lawsuit to resolve this case is both problematic and educational. It is problematic because a school district was willing to waste time and the taxpayers' money to defend a case through the start of a trial rather than quickly reach an out-of-court settlement. What's more, it is problematic that a federal court's time was wasted by a school district's crabbed views of the First Amendment. Schools simply must not have the same authority over off-campus speech that they do over on-campus speech. As the executive director of the ACLU of Arkansas aptly put it, the school's suspension of Redman for his off-campus expression was "'equivalent to expelling a child for disparaging the principal at the local mall.'"[90]

On the other hand, the case was educational for young Justin Redman. He learned about his constitutional right of free speech and that the right is important enough to fight for in court. In addition, he learned that one can take on the authority of government—a public school district—and prevail. More generally, the case exposes the lengths to which some schools believe their pedagogical authority extends.

C. Nick Emmett and the Mock Obituaries: Feigned Death, Real Suspension

In February 2000, a federal judge in Washington state issued an order prohibiting Kentlake High School from suspending senior Nick Emmett for posting a Web page he created from his home without school resources.[91] What had Emmett done wrong?

The star basketball player and standout student included mock obituaries of other students on his Web site.[92] The students, however, *requested* their own

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[88] *See* Kondo, *supra* note 86.

[89] *See id.*

[90] Jamie Stengle, *Arkansas ACLU Sues School District on Behalf of Student*, ASSOC. PRESS STATE & LOCAL WIRE, June 22, 2000, *available in* Lexis-Nexis Academic Universe, News Library.

[91] Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp.2d 1088, 1090 (W.D. Wash. 2000).

[92] *See id.* at 1089; *see also All-League boys teams*, SEATTLE TIMES, Feb. 26, 2000, at C5, *available in* LEXIS, News Library, Seattm File (identifying Emmett as a first-team all-league player). Emmett maintained a 3.95 grade-point average. *See Emmett*, 92 F. Supp. 2d at 1089; *see also* Sandy Ringer, *Emmett Wins Court Reprieve on Suspension by Kentlake*, SEATTLE TIMES, Feb. 24, 2000, at D7, *available in* LEXIS, News Library, Seattm File. "[Emmett's] page posted mock 'obituaries' of at least two of [his] friends. The obituaries were toungue-in-cheek, inspired . . . by a cretive writing class last yearin which students were assigned to write their own obituary." *Emmett*, 92 F. Supp. 2d at 1089.

death notices be posted and Emmett actually obtained permission from the students before posting their photographs.[93] Visitors to the page could "vote on who would 'die' next—that is, who would be the subject of the next mock obituary."[94] The Web site included a disclaimer admonishing "'[t]his website is meant for entertainment purposes only. In no way, shape, or form is it intended to offend anybody. And to the KL (Kentlake) Administration, . . .We love you guys!'"[95] The "guys" apparently did not love it and, in fact, mistook the satirical death notices for an actual hit list.[96]

In his decision in favor of Emmett, Judge John C. Coughenour observed that "the speech was entirely outside of the school's supervision or control."[97] He dismissed the idea that Emmett's speech constituted a threat of violence, noting that the school district "has presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever."[98]

After the judge's order was issued, Emmett said that he learned more about his civil liberties in the courtroom than he ever learned in the classroom, adding "'I've learned to stand up for myself.'"[99] Unfortunately, unless more students are willing to stand up for themselves and the First Amendment in court—an often time-consuming and expensive proposition—schools such as Kentlake will continue to act in rash and unconstitutional fashion.

And what did the school learn from the incident? It reached an out-of-court settlement in March 2000 with Emmett that paid him only one dollar in damages but $6000 in attorneys fees.[100] Perhaps the school learned that it cannot easily and inexpensively censor students' off-campus expression. Or perhaps the school simply learned that there are better approaches to dealing with these situations. As Nick Emmett remarked in classic and mature understatement, "'They could have handled it better.'"[101]

D. The Girls of Gates Intermediate School: Vulgarity is Not Just a Boy Thing

Despite the pattern that seems to emerge from the cases described so far, offensive Web sites are *not* solely the province of adolescent males. A group

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[93] *See Judge Temporarily Halts Suspension of Student*, SEATTLE POST-INTELLIGENCER, Feb. 24, 2000, at B3, *available in* LEXIS, News Library, Seapin File.

[94] *Emmett*, 92 F. Supp. 2d at 1089.

[95] *Court Blocks WA School from Suspending Student Over Humorous Web Site*, ACLU NEWS, Feb. 23, 2000, *available at* <http://www.aclu.org/news/2000/n022300c.html>.

[96] *See* Jack Hopkins, *Kent Student Wins Case Linked to 'Obits' on Web*, SEATTLE POST-INTELLIGENCER, Mar. 28, 2000, at B3, *available in* LEXIS, News Library, Seapin File.

[97] *Emmett*, 92 F. Supp. 2d at 1090.

[98] *Id.*

[99] Lisa Pemberton-Butler, *Judge Won't Let District Suspend Student*, SEATTLE TIMES, Feb. 24, 2000, at B1, *available in* LEXIS, News Library, Seattm File.

[100] *See* Hopkins, *supra* note 96.

[101] *Id.*

of three eighth-grade girls from the Gates Intermediate School in Scituate, Massachusetts proved that assertion in March 2000, when they were suspended for creating a site on a home computer that contained obscenity-laced insults at fifteen classmates, almost all of whom were also girls.[102] One student at the school called the site "'awful. It was one of the worst things I had ever seen . . . . There was awful language about some of my friends . . . .'"[103] For instance, the site, which reportedly "was visited by more than 400 people[,]" called some students "anorexic" and criticized them for having "'frizzy hair and irregular boobs.'"[104]

Off-campus criminal justice was considered in the case. Local police investigated the Web site but decided not to pursue any legal action.[105] As Police Chief Thomas Nielen remarked, "'It's not a crime to call people names . . . . If there's a threat or a means to carry out a threat, then we could get involved, but the items contained here didn't rise to that.'"[106] Nielen concluded the site was created by "'a bunch of eighth grade girls being catty. Real nasty stuff.'"[107] Civil justice in the form of defamation suits by students targeted on the site, of course, could be pursued if this "nasty stuff" consisted of the type of defamatory factual assertion that could harm one's reputation.[108]

Even though the site did not constitute a criminal threat and despite the fact that individual students could pursue civil defamation actions, the school chose to take action against the off-campus expression. The students were suspended, regardless of the twin facts that the Web site was not created at school and that it was not seen, according to school officials, by students while at school.[109] Parents of some of the targeted students, however, "asked that the school step in if the police could not prosecute, saying that there should be some consequences for hate mail."[110] Such parental pressure cannot be overlooked as one factor that may cause school administrators to step into these situations.

Whether this is the proper role of a public school—to intervene as a third

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[102] *See* Tom Benson, *School Suspends 3 for Web Site: Girls Insulted Students on the Net*, PATRIOT LEDGER (Quincy, Mass.), Mar. 2, 2000, at 1, *available in* LEXIS, News Library, Ptledg File.

[103] Sandy Coleman, *Battling the Web's Dark Side*, BOSTON GLOBE, Mar. 27, 2000, at B1.

[104] *Id*.

[105] *See* Laurel J. Sweet, *Three Scituate girls suspended over insults on Web page*, BOSTON HERALD, Mar. 2, 2000, at 19.

[106] *Id.*

[107] *Id.*

[108] To succeed in a defamation action, the plaintiff typically must prove the existence of a false defamatory statement of fact. MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 295 (6th ed. 2000).

[109] *See* Tom Benson, *Web Site Mocked Local Girls*, PATRIOT LEDGER (Quincy, Mass.), Mar. 1, 2000., at 1, *available in* LEXIS, News Library, Patledg File.

[110] *Id.*

arm of justice to discipline minors for off-campus expression that police will not punish but that may form the basis of a civil defamation action—is in dispute and is a central issue of this article.[111] The next part of the article attempts to create a variable-based framework, premised on a number of dichotomies, for analyzing this issue and cases involving the First Amendment of students who create personal Web sites. The factual circumstances surrounding the cases of Justin Swidler, Karl Beidler, Justin Redman, Nick Emmett and the girls from Gates Intermediate School help to illustrate the application of this framework.

III. MAKING SENSE OF THE WEB-EXPRESSION MORASS: A VARIABLE-BASED APPROACH TO THE PROBLEM

This part of the article creates and proposes a five-factor process through which courts and school administrators should analyze and filter questions of free speech involving student-created Web sites. The factors are designed to allow a logical consideration of both students' free speech rights and the legitimacy of a school's intrusion upon those rights. The five factors that should be considered are:

- *The student's place of enrollment*
- *The place of origin of the speech*
- *The place of download of the speech*
- *The content of the speech*
- *The presence or absence of a site disclaimer/warning*

In some cases, analysis of the First Amendment rights of students need not involve consideration of all factors. As Section A below suggests in its analysis of the first factor (determination of the student's place of enrollment), the First Amendment rights of students may be non-existent if they are enrolled in a private school. In other cases, however, consideration of further steps may be important.

A. Place of Enrollment: Public School vs. Private School?

Peter Ubriaco was expelled from school in 1999 for creating a Web site that he contended "was funny and irreverent but that his school alleged was violent and pornographic."[112] The freshman from Albertus Magnus High School in Rockland County, New York, admonished visitors to his site to, among other things, "'walk into the local mall and shout the word 'penis' at the top of their lungs.'"[113] Although Ubriaco distributed leaflets at school to publicize the site,

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[111] One girl reportedly was called a "whore." *Id.* This is the type of allegation of sexual impropriety that is common fodder for defamation actions. *See, e.g.*, *supra* note 84 and accompanying text.

[112] Jim Fitzgerald, *Expelled Student Sues Over Web Site*, THE RECORD (Bergen Cty., N.J.), Nov. 10, 1999, at A5, *available in* LEXIS, News Library, Njrec File.

[113] Austin Fenner & Greg B. Smith, *Expelled Teen Sues in Cybercurse Case*, DAILY NEWS (N.Y.), Nov. 9, 1999, at 10, *available in* LEXIS, News Library, Dlynews File.

he created it, as his attorney put it, "'in the comfort and security of his own home.'"[114]

Outraged at the school's response to the Web site, Ubriaco filed a one million dollar lawsuit in federal court in November 1999.[115] He alleged that the expulsion violated his constitutional right to free speech.[116] Ubriaco's attorney contended the site did not contain either pornography or threats against the school, but merely "'served to entertain Peter [Ubriaco] and his friends with amusing anecdotes and other writings.'"[117]

In July 2000, however, Ubriaco's lawsuit was thrown out of court before the judge even examined the site's content.[118] The reason? Ubriaco's school was *private* and thus was not considered a state actor.[119] The federal district court for the Southern District of New York concluded that, although private schools are regulated by the state and may receive some funds from the state, "'such regulation and funding does not transform the acts of these institutions into acts of the state.'"[120] The court added that the "'school's action in expelling a student for what it considered to be inappropriate behavior cannot by any stretch of the imagination be considered state regulation of the Internet.'"[121]

Peter Ubriaco's attorney apparently forgot the basics of the state action doctrine and the public/private dichotomy. As Professor Matthew Bunker recently wrote:

> It is a truism of First Amendment doctrine that the constitutional free speech and free press clauses are triggered only by state action. That is, unless state or federal governments take some affirmative steps to limit free expression, the protections of the First Amendment simply do not apply to the case.[122]

The threshold question that courts must consider when addressing First Amendment claims in the context of Web-based student expression cases is seemingly straightforward*: Does the student attend a public school or a private school?* If the student attends a private school, then the school may punish expression on home-created Web pages without fear of violating the First Amendment. If the student attends a public school, however, the First Amendment *may* be implicated and a constitutional question of free speech rights may arise.

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[114] Fitzgerald, *supra* note 112.

[115] *See id.*

[116] *See id.*

[117] *Id.*

[118] *See Lack of State Action Dooms Constitutional Claim Against Private School*, YOUR SCHOOL & LAW, Aug. 29, 2000, *available in* LEXIS, News Library, Newsletter Series File.

[119] *See id.*

[120] *Id*.

[121] *Id.*

[122] Matthew D. Bunker, *Constitutional Baselines: First Amendment Theory, State Action and the "New Realism,"* 5 COMM. L. & POL'Y 1, 1 (2000).

As every first-year law student quickly comes to realize, however, nothing in the law is ever that straightforward. In particular, states may have statutes that, by legislative fiat, transform private schools into public schools for purposes of student First Amendment protection. In California, for instance, secular private secondary schools are forbidden from violating students' First Amendment rights.[123] The so-called Leonard Law "guarantees free speech to students at California's secular high schools and colleges regardless of the public or private status of the institution they attend."[124] Had Peter Ubriaco's case occurred in California, however, the First Amendment *still* would not have applied under the Leonard Law because that article of legislation exempts from its application private secondary schools controlled by religious organizations.[125] Dominican nuns ran Ubriaco's school.[126]

Unless a state has a statute such as the Leonard Law or possesses a constitution that extends it own free speech protection against the actions of private actors,[127] there is little chance that any free speech claim would exist against a private school that punishes a student for expression on a home-created Web site. If the school is public, however, then a student may possess a viable First Amendment claim and it becomes necessary to proceed to the next step in the analysis described in Section B. Analysis of the cases of Justin Swidler, Karl Beidler, Justin Redman, Nick Emmett and the trio of girls from Gates Intermediate School would all move forward to the next step because these students all attended public schools.

B. Place of Origin of Speech: On Campus vs. Off Campus?

The second step involves a determination of the place of origin of the speech. If the Web site was created using school facilities and computers, then the school should be able to exercise greater control and authority over the speech because it controls the property that is used by the student.[128] The relevant constitutional standards for measuring free-speech protection for

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[123] *See* CAL. EDUC. CODE § 48950 (Deering 2000).

[124] Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. Rev. 1537, 1590 (1998).

[125] *See* CAL. EDUC. CODE § 48950(c).

[126] *See* Fitzgerald, *supra* note 112.

[127] "Despite open-ended text and the blessing of the United States Supreme Court, the vast majority of state courts consistently have declined to use their state constitutions as vehicles for transporting free speech norms to private actors." Eule & Varat, *supra* note 124, at 1579.

[128] *See* Rhoda J. Yen, *Censorship of Student Expression on the Internet and the First Amendment*, UCLA BULL. L. & TECH., Feb. 9, 2000, at *29 (arguing that "schools should enjoy certain property-related rights in sites created on school property using school accounts"), *available at* <http://www.law.ucla.edu/Students/StudentOrgs/BLT/fall99/i6-rjy.html>.

students in school settings were articulated by the United States Supreme Court in a trio of cases—*Tinker v. Des Moines Independent Community School District*,[129] *Bethel School District v. Fraser*,[130] and *Hazelwood School District v. Kuhlmeier*[131]—described later in Part IV. [132] These standards would seem to govern the on-campus-created Web site situation.

The United States Supreme Court, however, has *never* articulated standards regarding how much authority a public school may assert over off-campus student expression. Lower courts suggest that power is much less than in situations involving speech that originates on or is brought on to campus. The argument is made in Part IV that when students are not in school they are *not*, in fact, *students* but are, more generally, *citizens* of the United States governed by general principles of First Amendment jurisprudence.[133]

In the cases of Justin Swidler described in the Introduction and the students described in Part II, the offending Web sites were created off campus. This suggests, under the analysis articulated here, that these students' Web sites are entitled to more First Amendment protection. But even if the sites are created off campus, the analysis does not end there. Schools may still have authority to punish the speech. As Section C points out, expression created off campus may be brought into the school environment by its creator and thus take on some of the same characteristics of speech that originates on campus.

C. Place of Download of Speech: On Campus vs. Off Campus?

The third step in the analysis is critical. It involves a determination of whether a student who created a Web site while off campus intentionally and knowingly downloaded the site, or intentionally caused it to be downloaded by other students, on school-owned or school-controlled computers. The question, in other words, asks*: Did the student in question "bring" the off-campus speech on to campus?*

If a student intentionally downloaded his or her off-campus-created Web site while in school and/or encouraged other students to view it while in school, then this would be analogous to a student bringing onto campus an "underground" newspaper.[134] The school would start to have greater authority in this situation if, in fact, the in-school downloading of a personal Web site interfered with school operations and discipline. The non-school-sponsored speech would then exist in a pedagogical environment. Of the three United States Supreme Court decisions addressing student speech rights in school

[129] 393 U.S. 503 (1969).

[130] 478 U.S. 675 (1986).

[131] 484 U.S. 260 (1988).

[132] *See infra* Part IV.

[133] *See infra* Part IV.

[134] For a very recent case involving the First Amendment rights of a student expelled for distributing on-campus an underground newspaper, *see* Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275 (Or. Ct. App. 2000).

settings,[135] only one decision—*Tinker v. Des Moines Independent Community School District*[136]—involves student speech that was *not* sponsored or sanctioned by the school as part of its regular curriculum or programming activities.[137] The *Tinker* case, described later in Part IV, thus would control the situation in which a student, while in school, downloads or encourages other students to download his or her personal Web site on a school-owned or school-controlled computer during school hours.

An important point must be made here regarding the in-school receipt of the speech. When a teacher or principal hears about a student's off-campus-created Web site and then downloads it to a school computer for review, this act does *not* constitute the intentional downloading of the site in school by the student. The student has not brought the speech on campus. In this case, instead, it is the school administration that has brought the speech on campus. This act should *not* give the school legal grounds for claiming greater authority over the speech on the basis that it "appeared" on campus. In other words, the school must not be able to bootstrap jurisdiction over the speech with its own acts.

When a student does *not* download his Web site on a campus computer or encourage other students to do so, courts should consider the speech pure off-campus expression and not subject to school authority. It would be tantamount to a school censoring an underground student newspaper that is *not* distributed on campus.[138] Off-campus remedies are sufficient to redress off-campus expression. Schools overstep both their educational mission and authority when they attempt to punish off-campus speech.

In summary, it is only when a student "brings" his or off-campus Web site to school that schools may properly act as a quasi-official third arm of the justice system and punish that expression.[139] As long as the speech remains off

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[135] *See infra* Part IV (describing these three cases).

[136] 393 U.S. 503 (1969).

[137] *See id.* at 504-05; *Pangle*, 10 P.3d at 289 (Armstrong, J., concurring in part and dissenting in part) (observing that the other two United States Supreme Court decisions involving high school student's First Amendment rights—Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) and Bethel School Dist. v. Fraser, 478 U.S. 675 (1986)—both "involved a school district's ability to control what happened under the district's official sponsorship, an issue that is legally distinct from a district's ability to control what a student does acting entirely independently").

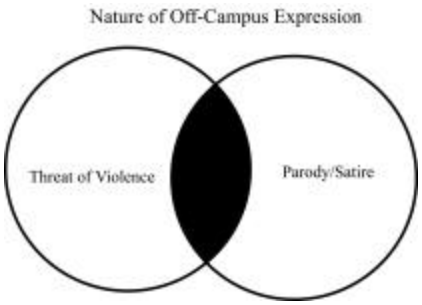
[138] For a federal appellate court decision involving the suspension of high school students who published and distributed off campus an underground newspaper, *see* Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972).

[139] This is similar to a public school's court-recognized authority to punish students who buy, while off campus, T-shirts bearing offensive messages and then wear those shirts on school grounds. In such cases, students literally bring the off-campus created (and purchased) expression into the school environment. *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 468-71 (6th Cir. 2000) (upholding, over a dissenting opinion, the authority of a high school to prohibit the wearing of Marilyn Manson T-shirts).

campus, however, schools should not be able to assert jurisdiction over it. What schools *should* do, however, is far different from what they actually *will* do. The cases described earlier in this article clearly suggest that school districts often are more than willing to assume authority over expression that not only is created off campus but that remains off campus.

D. Content of Speech: Caustic Commentary/Parody vs. True Threat?

The first three factors identified and described above have nothing to do with the actual content of a student's Web site. The fourth factor, however, requires an examination of the expression. In particular, the content on student Web sites that leads to internal school discipline typically falls into one of three categories: (1) threat of violence; (2) parody, satire, and caustic commentary; or (3) a combination of the first two categories. The Venn diagram illustrates these categories and demonstrates the potential for a Web site to include a hybrid.



Consider the content of Justin Swidler's Web site.[140] To the extent that Swidler's vituperations against both his principal and teacher are defamatory, the Web page falls into the category of parody, satire and caustic commentary.[141] The proper remedy in this case, assuming that Swidler did not download the Web site in school or encourage other students to do so, is a lawsuit for defamation. It will be recalled that both the principal and teacher who were the targets of Swidler's caustic commentary utilized this avenue of civil redress.[142] Off-campus remedies exist for parody and satire that rises to the level of libel.[143] If Swidler had downloaded his Web site at school or encouraged other students to do so, then the school would have authority—as described above in Section C—under the *Tinker* standard to seek internal

[140] *See supra* text accompanying notes 11-19 (describing the contents of Swidler's Web site).

[141] *See supra* text accompanying notes 11-19.

[142] *See supra* text accompanying notes 23-26.

[143] *See supra* note 23 (discussing the elements of the tort of defamation).

discipline.[144]

It will be recalled that school authorities also alleged that Swidler's site fell into the threat-of-violence category. To this extent, the Web site appears to fall into the shaded, overlapping portion of the two categories on the Venn diagram. Both the local police and FBI investigated the matter, however, and those agencies independently concluded that the site did not constitute a criminal threat.[145] The Swidler site thus, on further review, only falls in to the parody/satire category.

If a student's home-created Web site that allegedly threatens violence is called to a school administrator's attention, the administrator would seem to act within his or her scope of authority by alerting the police to the site. At this stage, however, it then should be left to the police to address and investigate the Web site. The school should *only* possess authority to punish the student's alleged threat if the student downloads the site on a school-owned or school-controlled computer. Unless and until this happens, however, the matter should be turned over and left to the criminal justice system to investigate and evaluate.

E. Site Disclaimer: Presence vs. Absence?

Even if a student never downloads his or her personal Web site on a school-controlled computer, or causes it to be downloaded there, it seems clear from the cases described in the Introduction and Part II that some schools will *still* try to claim jurisdiction over this off-campus expression.[146] If this is the case, the school should, at a bare minimum, consider whether or not the site in question includes a disclaimer or warning.

Justin Swidler, Karl Beidler and Nick Emmett, for instance, each included disclaimers and/or warnings on their Web pages.[147] The presence or absence of a disclaimer or warning should be something school administrators take into consideration in deciding whether to punish a student for the content on his or her personal Web site. Why? A disclaimer might specifically inform Web site visitors that the content is not to be taken seriously. This suggests, in turn, that posted comments should *not* be taken either as false factual assertions that might otherwise form the basis for a defamation lawsuit or as true threats of violence that might be subject to prosecution in the criminal justice system.

Consider the case of Clayton Telles, a student at Otsego High School in Ohio who was suspended in October 2000 after the principal learned of his personal Web site called "OtsegoSucks.Com."[148] Telles added the following disclaimer to the site *after* he was suspended: "This page is for entertainment

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[144] *See supra* Part III-C.

[145] *See supra* text accompanying notes 27-29.

[146] *See supra* Parts I, II.

[147] *See* J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 415 (Pa. Commw. Ct. 2000); *supra* notes 55-57, 95.

[148] *See 10-Day Suspension*, *supra* note 53.

purposes only. Some of the page's content is fictitious, satire, parody or opinion."[149] This disclaimer suggests the page must not be taken seriously—that it is "entertainment." This concomitantly indicates that there is no chance the site constitutes a true threat of violence and it implies that whatever criticism of school officials may exist only constitutes statements of opinion rather than factual assertions. In brief, the disclaimer tells the Web site visitor that its creator is only joking.

The posting of a disclaimer like the one used by Clayton Telles is especially important in a post-Columbine era in which administrators seem to take seriously any content that remotely hints at a threat of violence. It is an era in which a seventh-grade student in Ponder, Texas, was arrested for writing a violent Halloween horror story,[150] and a 17-year-old honors student in Leon, Kansas, was suspended for writing a short poem, told from the perspective of an angry individual whose dog has been killed, that she posted on a door inside the school.[151] Students posting Web pages may be wise to include disclaimers to ward off—or, at least, to attempt to ward off—similar actions.

With the five-factor framework articulated in this part in mind, the article now turns to legal decisions that affect the speech rights of public school students who create Web pages on their own time and with their own computers. As will become clear, there is little precedent directly on point to control the current wave of cases.

IV. BREAKING NEW GROUND OFF GROUNDS: WHY SUPREME COURT PRECEDENT DOES NOT CONTROL

The trio of United States Supreme Court decisions that have addressed the First Amendment rights of public school students—*Tinker v. Des Moines Independent Community School District*,[152] *Bethel School District v. Fraser*,[153] and *Hazelwood School District v. Kuhlmeier*[154]—fail to provide precedent that controls the home-created Web site cases that are the focus of this article. In particular, none of the three cases deals with speech occurring off-campus,

[149] *Id.*

[150] *See Halloween Tale Gets Boy an 'A,' and a Jail Stay*, WASH. POST, Nov. 3, 1999, at A20 (describing the arrest of 13-year-old Christopher Beamon for writing a fictional story about shooting two classmates and a teacher). The student's principal later disputed that the paper did not receive an "A" because it had not been graded. *See* Josh Romonek, *Violent horror essay lands student in jail*, AUSTIN AM.-STATESMAN, Nov. 4, 1999, at B6, *available in* 1999 WL 7430729.

[151] *See* Boman v. Bluestem Unified Sch. Dist., No. 00-1034-WEB, 2000 WL 297167, at 1-3 (D. Kan. Jan. 28, 2000); *see also Kansas Court to Hear ACLU Case of Honor Student Expelled for Displaying Artwork*, ACLU NEWS, Jan. 28, 2000, *available at* <http://www.aclu.org/news/2000/n012800a.html>.

[152] 393 U.S. 503 (1969).

[153] 478 U.S. 675 (1986).

[154] 484 U.S. 260 (1988).

rendering them each factually distinct from the cases of Justin Swidler and his ilk. What's more, only one case—*Tinker*—involves speech that did not take place as part of the school curriculum.

In *Tinker*, the United States Supreme Court considered whether a public school's suspension of students for wearing black armbands *in school* to "publicize their objections to the hostilities in Vietnam and their support for a truce . . ." violated the students' First Amendment rights of free speech.[155] In ruling in favor of the students, the Court emphasized that "state-operated schools may not be enclaves of totalitarianism" and that "students are entitled to freedom of expression of their views" when they are at school unless their conduct or speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ."[156] School authorities may punish such speech before material disruption or substantial disorder actually occurs if the factual circumstances suggest it is reasonable to forecast these outcomes.[157] The Court made clear, however, that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[158]

It is the material disruption and substantial disorder component of the Court's decision that schools seem most likely to use as precedent to justify the punishment of home-created, Web-based expression, and that courts, in turn, seem most likely to apply in their legal analyses.[159] The Court in *Tinker*, however, never suggested that this limitation on students' speech rights applied *outside* the school setting or that it gave schools the power to punish off-campus expression that never reached the campus confines. The children in *Tinker* brought their armbands on to campus;[160] Justin Swidler, however, did not download his Web page in school.[161]

Not only did the facts in *Tinker* deal with in-school expression by students, but also the Court indicated it was only concerned with on-campus expression when it reasoned, "First Amendment rights, applied in light of the *special characteristics of the school environment*, are available to teachers and students. It can hardly be argued that either students or teachers shed the constitutional rights to freedom of speech or expression *at the schoolhouse*

[155] *Tinker*, 393 U.S. at 504.

[156] *Id.* at 511, 513.

[157] *See id.* at 514.

[158] *Id.* at 508.

[159] The *Tinker* material and substantial interference standard, in fact, was used by a federal court in one of the first cases to consider whether a school's suspension of a student for material posted on his own Web site violated the student's right to freedom of speech. *See* Beussink v. Woodland R-IV Sch. Dist, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (citing the *Tinker* rule). In that case, the district court concluded that the "homepage did not materially and substantially interfere with school discipline." *Id.* at 1181.

[160] *See Tinker*, 393 U.S. at 504.

[161] *See supra* note 20 and accompanying text.

gate."[162] In the Web-based cases described in this article, all of the expression at issue was generated and created in the *home environment*—not the school environment—and it was posted *outside* the schoolhouse gate. Nick Emmett did not bring his Web site on campus; he did not download it on a school computer.[163]

The *Tinker* standard thus does not control these cases. *Tinker* is only applicable when, as described earlier in Part III-C, students "bring" their personal Web sites on campus by downloading them, or causing them to be downloaded, on school-controlled computers.[164]

The *Tinker* Court, it is important to emphasize, narrowly confined the role of schools in such a way as to suggest their authority does not reach past the schoolhouse gate. In particular, the Court observed, "The principal use to which the schools are dedicated is to accommodate students *during prescribed hours* for the purpose of *certain types of activities*."[165] The cases of Justin Swidler, Karl Beidler and the other students featured in this article all involve speech that was *not* part of a school-related activity and that did *not* occur during hours prescribed by the school.

The point to be taken away here is simple: When minors are engaged in off-campus, non-school-related activities during non-school hours, they are *not* students. They are, instead, people – people, in particular, outside the control of the school. As the *Tinker* Court observed, students are "'persons' under our Constitution."[166] It is important to add here that the wording of the First Amendment[167] "makes no distinction between children and adults. Thus, the language of the First Amendment provides no indication that it applies only—or even more strongly—to adults."[168]

In the second Supreme Court decision addressing the free speech rights of students, *Bethel School District No. 403 v. Fraser*,[169] the Court considered "whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly."[170] The Court's own phrasing of this issue makes it clear that the *Fraser* Court did *not* address the speech of minors in non-school-sponsored events or activities. Any rules articulated in this case thus do not control the Web-based cases described in this article. In the case involving Nick Emmett's Web site

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[162] *Tinker*, 393 U.S. at 506 (emphasis added).

[163] *See supra* text accompanying note 91.

[164] *See supra* Part III-C.

[165] *Tinker*, 393 U.S. at 512 (emphasis added).

[166] *Id.* at 511.

[167] *See* U.S. CONST. amend. I; *supra* note 7 (providing the relevant portions of the text of the First Amendment).

[168] DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 25 (1989).

[169] 478 U.S. 675 (1986).

[170] *Id.* at 677.

described in Part II,[171] Judge Coughenour acknowledged this point when he wrote that *Fraser* "does not suggest that the student's speech would be grounds for punishment if it was given outside the school setting."[172]

Although the Court in *Fraser* ruled against the speech rights of student Matthew Fraser,[173] there is additional language to suggest that its ruling does not affect out-of-school expression by minors. In particular, the Court observed that "[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board."[174] The offensive speech of the two Justins—Swidler and Redman—described earlier in the article, of course, did *not* occur either in the classroom or in a school assembly.

The Court in *Fraser* also reasoned that "[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an *unsuspecting audience of teenage students.*"[175] There is, of course, no similar captive audience situation with viewing a Web site. No one is forced to view the offending Web pages. What's more, the students and teachers who view the Web pages often do not constitute an "unsuspecting" audience. Why? Because the sites often include disclaimers or warnings. For instance, the site of Nick Emmett, described in Part II, "included disclaimers warning a visitor that the site was not sponsored by the school, and for entertainment purposes only."[176] Karl Beidler's Web site featured a disclaimer that everything on the site "'has been created out of my own imagination or someone I know's imagination' and that 'all pictures are parody pictures . . . .'"[177] Justin Swidler also included a disclaimer. According to the Pennsylvania appellate court that ruled against him:

> Prior to accessing the web-site, a visitor had to agree to a disclaimer. The disclaimer indicated, *inter alia*, that the visitor was not a member of the School District's faculty or administration and that the visitor did not intend to disclose the identity of the web-site creator or intend to cause trouble for that individual.[178]

In none of these cases, then, is there even a remote chance that the audience will be either captive or unsuspecting. This pushes these cases even further away from the factual situation in the *Fraser* case.

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[171] Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

[172] *Id.* at 1090.

[173] *See Fraser*, 478 U.S. at 685 (holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech").

[174] *Id*. at 683 (emphasis added).

[175] *Id.* at 685 (emphasis added).

[176] *Emmett*, 92 F. Supp. 2d at 1089.

[177] *ACLU of Washington State Challenges Suspension for Student Parody*, ACLU NEWS, Apr. 7, 1999, *available at* <http://www.aclu.org/news/1999/n040799c.htm>.

[178] J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 415 (Pa. Commw. Ct. 2000).

The third United States Supreme Court decision involving student free speech rights, *Hazelwood School District v. Kuhlmeier*,[179] focused narrowly on "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of a high school's journalism curriculum."[180] The case thus has everything to do with in-school and school-sponsored expression generated as part of the curriculum and nothing to do with expression created off campus and independent of the school's sponsorship. What's more, none of the cases that are the focus of this article deal with school newspapers; if anything, the Web pages here are more akin to a modern version of an underground newspaper completely unaffiliated with anything that carries the imprimatur of school authority. The Court in *Kuhlmeier*, in fact, observed that it was only considering "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[181]

Although, as the above-mentioned cases indicate, the United States Supreme Court never has squarely addressed the issue of whether public schools properly possess the power to punish the off-campus, Web-based expression of their students, a number of lower courts have addressed the issue of off-campus expression in slightly different circumstances. The following sections of this part of the article describe principles from these decisions and make analogies to the current wave of school-enforced cyber censorship.

A. Giving a Metaphorical Middle Finger to Teachers in Cyberspace

In April 1986, "in a restaurant parking lot far, removed from any school premises . . ." and after school hours, high school student Jason Klein engaged in a well-worn act of expressive conduct.[182] Spotting teacher Clyde Clark sitting in another car, "Mr. Klein extended the middle finger of one hand toward Mr. Clark."[183] The gesture, according to one dictionary of slang, means either "fuck you" or "up your ass."[184]

Clark, apparently cognizant of these meanings, was offended by the

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[179] 484 U.S. 260 (1988).

[180] *Id.* at 262.

[181] *Id.* at 271.

[182] Klein v. Smith, 635 F. Supp. 1440, 1441 (D.C. Me. 1986).

[183] *Id.*

[184] HAROLD WENTWORTH & STUART BERG FLEXNER, EDS., DICTIONARY OF AMERICAN SLANG 182 (2d Supp. ed. 1975). Gestures that are "obviously expressive conduct" should be protected in the same manner as words. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 11.3.6.1, at 867 (1997). "[T]he Supreme Court long has protected conduct that communicates under the First Amendment." *Id.* In particular, "conduct is analyzed as speech under the First Amendment if, first, there is the intent to convey a specific message, and second, there is a substantial likelihood that the message will be understood by those receiving it." *Id*. at 688.

gesture.[185] He was so offended, in fact, that he made sure Klein was suspended from school for ten days.[186] Klein, in turn, filed a motion in federal court both alleging that the in-school discipline for his off-campus expression violated his First Amendment right of free speech and asking the court to enjoin the school from enforcing the suspension.[187]

The school contended that the speech constituted fighting words,[188] which are not protected by the First Amendment.[189] The court rejected this notion, observing that it "can only conclude, contrary to what might be its reflexive, uninformed judgment, that 'the finger,' at least when used against a universe of teachers, is not likely to provoke a violent response."[190]

But the school did not give up there. It made another argument—that the out-of-school speech had "sapped [the teachers of] their resolve to enforce proper discipline upon [Klein] and other students *during school hours*."[191] Over sixty teachers and administrators, in fact, signed a letter endorsing this statement.[192] The school cited the *Tinker* standard described above to justify this rationale.[193] Once again, the federal court rejected the school's argument. Referring to the teachers' concerns that their power had been undermined, the court wrote:

> The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-

[185] *See Klein*, 635 F. Supp. at 1441 n.3 ("Mr. Clark said that on seeing the gesture, he wanted to respond violently against Klein."). "The only purpose the Plaintiff could have had in making the gesture to Mr. Clark was to communicate or express in a very low manner his disrespect for Mr. Clark. The record displays that Mr. Clark so understood the gesture and that he was immediately offended by it." *Id.* at 1441 n.2.

[186] *See id.* at 1441.

[187] *See id.*

[188] *See id.* at 1441 n.3. Fighting words, as defined by the United States Supreme Court in 1942, are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* Gooding v. Wilson, 405 U.S. 518, 524 (1972) (holding that the fighting words standard is limited to speech only if it has "'a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed'"); Cohen v. California, 403 U.S. 15, 20 (1971) (upholding an individual's use of a four-letter word on his jacket because there was no evidence the word could be taken "as a direct personal insult"). Supreme Court decisions have "made clear that the 'fighting words' exception to the first amendment protection must be narrowly construed." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 850 (2d ed. 1988).

[189] *See Klein*, 635 F. Supp. at 1441-42.

[190] *Id.* at 1441 n.3.

[191] *Id.* at 1441 n.4.

[192] *See id.*

[193] *See id.* at 1441-42.

> mannered boy. I know the prophecy implied in their testimony will not be fulfilled. I think they know that, too.[194]

This language exhibits a healthy amount of skepticism that courts today should embrace when evaluating a school's claim that material posted on a Web site constructed off-campus will cause the collapse of all authority in school. To blindly accept such an argument is to demean, as Judge Carter in the *Klein* case suggested, the ability of the teachers;[195] it is to suggest that one Web page is so powerful that its message can dictate and dominate the events in school despite the physical presence of teachers and administrators.

The *Klein* decision also is important because it is analogous to many of the Web-based cases that arise today. *Students create Web sites that give a metaphorical middle finger to teachers and administrators.* Just as Jason Klein flipped off a teacher in a parking lot, students today are doing the same in cyberspace. When Justin Swidler describes his teacher as a "fat fuck,"[196] it is the equivalent of Klein symbolically telling his teacher "fuck you." The *Klein* case thus should not be ignored today by school districts contemplating in-school discipline for off-campus speech that is offensive and disparaging towards faculty, staff and administrators.

B. A Question of Jurisdiction: On-Campus Students, Off-Campus Citizens

In the first post-*Tinker* federal case involving the issue of a school's authority to punish off-campus speech activities, a federal district court in Texas wrote:

> [I]t makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. *School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner.* A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations during his private life away from the campus.[197]

This passage is important for several reasons. Implicit in the statement that school officials "may not judge a student's behavior while he is in his home with his family" is the idea that *parental authority*—not *school authority*—should be the guiding force that deals with a student's behavior off-campus. Schools must not usurp or replace parental authority; parents and schools play important but distinct roles in the upbringing of children.[198] As the United

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[194] *Id.* at 1442 n.4.

[195] *See id.*

[196] *See supra* text accompanying note 13.

[197] Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1340-41 (S.D. Tex. 1969) (emphasis added).

[198] The United States Supreme Court has observed that "the education of the nation's

States Court of Appeals for the Second Circuit wrote in considering whether a school could punish students for an underground newspaper that "was conceived, executed, and distributed outside the school,"[199] "[p]arents 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*."[200]

In addition, the final sentence in the above-quoted block passage suggests that when children are not in school or participating in a school-related activity, they should not, in fact, be classified as *students* but are better considered as *citizens*. When off-campus, society must view minors not in what amounts to their occupational status as students—minors play the role of student, just as if they went to work on a job—but in their status as citizens of the United States. As the court points out in this sentence, minors, as citizens, are subject to generally applicable criminal and civil laws.

C. A Question of Due Process: When Schools are Prosecutor, Judge and Jury

In January 1979, four students from Granville Junior-Senior High School in upstate New York were suspended for publishing a satirical newspaper almost "exclusively in their homes, off campus and after school hours . . ."[201] that emulated "*National Lampoon*, a well-known publication specializing in sexual satire."[202] The objects of the satire were "cheerleaders, classmates, and teachers."[203] The students filed suit, claiming their First and Fourteenth Amendment rights were violated.[204]

In deciding for the students, the Second Circuit Court of Appeals suggested a fundamental due process problem with in-school punishment for out-of-school speech. In these situations, *"a school official acts as both prosecutor and judge* when he moves against student expression."[205] A school official, in turn, is not likely to be an impartial or fair judge because "[h]is intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy."[206]

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youth is primarily the responsibility of parents, teachers, and state and local school officials . . . ." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). It is important for schools to understand that parents have authority over their children when their children are not operating in the role of student.

[199] Thomas v. Board of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979).

[200] *Id*. at 1051.

[201] *Id.* at 1045.

[202] *Id.*

[203] *Id.*

[204] *See id.* at 1046.

[205] *Id*. at 1051 (emphasis added).

[206] *Id.*

Not only are schools officials likely to be biased in favor of censorship but, the court added, "they are generally unversed in difficult constitutional concepts such as libel and obscenity."[207] The court thus concluded that in-school punishments like the suspension handed out to the students for their off-campus expression can only be "decreed and implemented by an independent, impartial decisionmaker. Because the appellees do not satisfy this standard, we find that the punishments imposed here cannot withstand the proscription of the First Amendment."[208]

The Second Circuit's logic is fundamentally sound and should be considered by courts facing the same or similar issues today involving student Web sites. If a minor's First Amendment rights for off-campus speech are to be evaluated for possible restriction or redress, fundamental considerations of due process must occur. Both the civil and criminal/juvenile justice systems offer these processes. Too often, however, the in-school justice system lacks both the neutrality and knowledge essential for a fair and well-reasoned adjudication of one's constitutional rights.

The only way to ensure absolutely that due process occurs for off-campus expression by minors is to forbid schools from punishing it. While deference may be given to school administrators with regard to the speech they regulate *inside* a school setting, the same must not be true *outside* of that setting. Schools cannot play the role of police officer in both places. As the Second Circuit wrote, "our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power with the metes and bounds of the school itself."[209] There is, in other words, almost a quid pro quo situation—courts provide schools power in one setting (*on* campus) in return for limiting their power in another (*off* campus).

Although the cases cited in Sections A, B, and C of this part of the article have not squarely addressed the issue of home-created, Web-based student expression, the case described below is, perhaps, the seminal decision tackling the issue head on. Section D describes that case.

D. The Beussink *Precedent*

Brandon Beussink was a junior at Woodland High School in February, 1998 when he created a Web site at home on his own computer that "used vulgar language to convey his opinion regarding teachers, the principal and the school's own homepage."[210] He was suspended for ten days when school authorities discovered the site.[211] The principal, it seems, was "upset by the content of the homepage."[212]

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[207] *Id.*

[208] *Id*. at 1050.

[209] *Id.* at 1052.

[210] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

[211] *See id.*

[212] *Id*. at 1180.

Beussink, asserting a violation of his First Amendment right of free speech, went to federal court to seek a preliminary injunction preventing the school from penalizing him.[213] In ruling in the student's favor, the federal court cited and relied on the material and substantial interference and disruption standard from the *Tinker* case.[214] The court reasoned that "[s]peech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection."[215] It added an important piece of public policy dictum about the necessity of protecting the student's Web page:

> Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protection of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose.[216]

The public interest, the court added, was not served by censorship or suspension, but instead by giving the students at Beussink's high school the "opportunity to see the protections of the United States Constitution and the Bill of Rights at work."[217] The *Beussink* ruling is, as Professor Leora Harpaz writes in a recent law review article, "a victory for student Internet rights and a defeat for the school's disciplinary efforts."[218]

While the federal court in *Beussink* applied the *Tinker* standard, it clearly was under no obligation to do so. As noted earlier in Parts III and IV, the *Tinker* case involved speech that occurred in a school setting—the students intentionally brought their speech (black armbands) on to school grounds. Brandon Beussink's speech, however, was only brought into school when an angry ex-girlfriend "wanted to retaliate against Beussink . . . ."[219] In particular, Amanda Brown "purposefully accessed Beussink's homepage during the second hour of school and showed it to Delma Ferrell, the computer teacher at Woodland High School."[220] Ferrell was so "upset" that she told the principal who, in turn, viewed the site and was similarly upset.[221] A key difference, then, between *Tinker* and *Beussink* pivots on how the speech at issue arrived on school grounds. Because Brandon Beussink, unlike the *Tinker* children, did

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[213] *See id.* at 1177.

[214] *See id.* at 1180 (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969)). For a discussion of *Tinker*, *see supra* Part IV.

[215] *Id.* at 1182.

[216] *Id*.

[217] *Id.*

[218] Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 146 (2000).

[219] *Beussink*, 30 F. Supp. 2d at 1177-78.

[220] *Id*. at 1178.

[221] *See id.*

not intentionally bring his speech onto school grounds, there is no reason to view the Supreme Court's holding in *Tinker* as controlling precedent.

Courts facing future cases that are factually similar to *Beussink* might employ this distinction to distinguish *Tinker*. This, in turn, would allow these courts to break fresh ground and to fashion new rules designed to address a situation that clearly was neither addressed nor at issue in *Tinker*. The bottom line is that off-campus-created Web sites raise new issues and require new rules; they are not addressed either well or adequately by existing Supreme Court precedent, especially when a student does not "bring" the site on campus. The next part of this article makes a comparison between the constitutional speech rights of minors in non-school settings and their rights off-campus to be free from unreasonable searches and seizures.

V. A POINT OF CONSTITUTIONAL COMPARISON: SEARCH & SEIZURE LAW IN PUBLIC SCHOOL SETTINGS

Just as the United States Supreme Court has considered the scope of First Amendment protection for students in public school settings,[222] so too has it addressed the Fourth Amendment rights of public school students.[223] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[224]

The Court has held that, although students possess Fourth Amendment rights in school settings, "school officials need not obtain a warrant before searching a student who is under their authority."[225] The *T.L.O.* Court also held that such searches may be based on a standard of reasonableness rather than probable cause.[226] This watered-down Fourth Amendment right of students in public schools is consistent with the diminished First Amendment rights of public school students described in Part IV.

What is important to consider is the rationale for diminished Fourth Amendment rights in school settings. In particular, the Court has stated that school settings create a "special needs" exception to the general requirements

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[222] *See generally supra* Part IV.

[223] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-66 (1995) (considering whether a school district's policy of drug testing student-athletes violated the Fourth Amendment); New Jersey v. T.L.O., 469 U.S. 325, 333-43 (1985) (addressing the proper legal standard for searches conducted by public school officials).

[224] U.S. CONST. amend. IV.

[225] *T.L.O.*, 469 U.S. at 340.

[226] *See id.* at 341-42.

of a warrant and probable cause determination.[227] This is based, in part, upon "the schools' custodial and tutelary responsibility for children."[228] The Court has emphasized that this responsibility permits "a degree of supervision and control that could not be exercised over free adults."[229]

The Supreme Court's decisions do not suggest, however, that the Fourth Amendment rights of students are diminished when they are *off campus* and not under the custodial authority of the school. Indeed, the Court only has held that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different *in* public schools than elsewhere . . . ."[230] and that it is the *school setting* that justifies "modification of the level of suspicion" necessary to conduct a search.[231] When students are not in a school setting—when they are, in the word used above by the Court, "elsewhere"—school administrators no longer have custodial and tutelary responsibility for them.[232] That is left to parents.

Finally, the text of the Fourth Amendment uses the terms "people" and "persons."[233] From a textualist perspective, it does *n*ot distinguish between adults and minors. Taken literally, then, there is no reason to believe that minors in non-school settings have any fewer Fourth Amendment rights as "people" than adults.

The bottom line is that minors' Fourth Amendment rights are only diminished when they are acting in the role of student in a school setting. The same should be true of First Amendment rights of minors—those rights should only be diminished when minors are in the role of student in a school setting. Courts that consider the current wave of cases involving Web-based expression of minors should consider the Fourth Amendment analogy in their judicial analysis.

VI. THE PARENTAL WEB SITE HYPOTHETICAL: HOW FAR DOES A SCHOOL'S LONG ARM STRETCH?

The cases addressed in this article so far have focused on Web sites created at home by students that criticize teachers, principals and other school administrators. Schools have asserted jurisdiction over this expression because, even when the student does not download the site at school, the source of the speech—the student—spends about eight-to-nine hours each day on its property and under its pedagogical authority. It apparently makes no difference to many schools that the speech in question originates during the *remaining portion* of the day when the student is off campus and the school is

[227] *See Vernonia*, 515 U.S. at 653.

[228] *Id.* at 656.

[229] *Id.* at 655.

[230] *Id.* at 656 (emphasis added).

[231] *See T.L.O.*, 469 U.S. at 340.

[232] *Vernonia*, 515 U.S. at 656.

[233] *See* U.S. CONST. amend. IV; *supra* text accompanying note 224.

not acting *in loco parentis*.

To illustrate the problem of what might be considered the extra-territorial jurisdictional authority of public schools, consider the following hypothetical. A parent is angry at the manner in which she believes some teachers at the local school are treating her daughter-student. She thinks they insult her daughter's intelligence with sarcastic remarks about her. The mother also believes that the teachers allow other students to pick on her daughter.

The mother is upset by this situation. She is so perturbed, in fact, that she creates a Web site called "Teachers Suck" that lambastes teachers at her daughter's school. The site does not make any true threats of violence, but rather calls the teachers, among other things, "morons" who "clearly have no clue about teaching." The site includes photographs of certain teachers morphing into Adolph Hitler.[234] The page, in other words, is very similar to some of the Web sites created today by minors off campus that attack school personnel.

Some of the teachers are upset and file defamation actions against the mother. They are so emotionally and physically upset that, like Justin Swidler's teacher, they are forced to take some time off from work—the same situation that the state appellate court in Swidler's case said constituted a substantial and material disruption of school affairs sufficient to warrant Swidler's permanent expulsion.[235]

Would the school be able to punish the mother for her speech? The answer, of course, is no. It has no jurisdictional authority over the mother. Individual teachers, however, who feel aggrieved, possess remedies through the civil justice system to compensate for injuries to reputation and emotional well being they might have suffered. In other words, avenues of off-campus redress exist for this off-campus expression, and those avenues would suffice to remedy any civil wrong committed by the mother.

A second question then arises: Would the school be able to punish the mother's daughter in this situation? This would seem silly—seeking retribution against a daughter for the alleged off-campus sins of the mother. Both the mother and daughter thus escape direct retribution from the school.

The only real difference between this hypothetical scenario and the case of Justin Swidler—the only variable that has changed—is the *source* of the speech. Because one source—the student, Swidler—spends a large part of his day on the property of the school under its supervision, while the other source—the mother—does not spend any part of her day on school property, schools somehow feel they have jurisdiction to punish minors when they are neither on campus nor under the school's immediate supervision. It is as if schools were able to place teachers, standing like sentries or hall monitors, in

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[234] Justin Swidler's Web site morphed the likeness of his teacher into one of Adolph Hitler. *See* J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 421, 425 (Pa. Commw. Ct. 2000).

[235] *See id.* at 421-24.

the homes of every student to monitor behavior and that this presence gave them jurisdiction.

VII. SHOOTING OFF ONE'S MOUTH VS. SHOOTING OFF ONE'S GUN: THE SAFETY-VALVE FUNCTION OF SPEECH REVISITED

It is worth asking why some of the students involved in the controversies would take the time to create Web pages that criticize their teachers and schools. Why, for instance, would Justin Swidler bother constructing a Web site that called his teacher a "fat fuck"[236] and then illustrate it with, among other things, a picture of the teacher's face morphing into Adolph Hitler?[237]

The answer—a not altogether surprising one—given by his parents was that their son created the site to "vent frustration" with his teacher.[238] This is an important function of speech that some school districts apparently have forgotten. Speech may serve as a non-violent and passive method of blowing off steam. Legal scholar Rodney A. Smolla describes the notion of free speech "safety valves" this way: "If societies are not to explode from festering tensions, there must be valves through which citizens may blow off steam. Openness fosters resiliency; peaceful protest displaces more violence than it triggers; free debate dissipates more hate than it stirs."[239]

That teenagers feel frustrated with teachers (Swidler, for example, claimed he was humiliated and assaulted in class by his teacher)[240] and the structure of their schools is not a new phenomenon. The Internet, however, provides a new medium on which students can express their frustrations and feelings.[241] Swidler was using this medium as a passive outlet—he was not talking out loud in class—for his anger and rage. *We should be thankful that he was using speech and not a gun to express his emotions.*

The problem, of course, is that when speech even begins to hint at violent conduct, school administrators seem to consider it a true threat worthy of punishment and they concomitantly forget about the safety-valve function of speech. Part of this reaction may be attributable to post-Columbine jitters. Another part may be related to the problems in fathoming what constitutes a "true threat" of violence that lies outside the ambit of First Amendment protection.[242] As Professor Ashley Packard recently observed in her analysis

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[236] *See id.* at 416.

[237] *See id.* at 421, 425.

[238] Kathleen Parrish, *Parents: Son Wasn't Sole Victim*, MORNING CALL (Allentown, Pa.), Jan. 5, 2000, at B1, *available in* LEXIS, News Library, Mrncll File.

[239] RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 13 (1992).

[240] *See* Parrish, *supra* note 238.

[241] *See, e.g.*, Bell, *supra* note 53 (citing a 1999 Moraga, California case in which students defended a boy suspended for creating an allegedly offensive, off-campus Web site, by stating that the site gave them "a place to vent frustrations about their high school" and "an outlet to get their views across").

[242] *See* Richards & Calvert, *supra* note 38, at 291-94 (discussing the true threats

of the true threats doctrine, "[d]etermining what is and is not a true threat . . . is sometimes difficult. Threats are frequently implicit, rather than explicit. In such cases, the meaning of threats is dependent upon the context in which the speech takes place."[243]

The context increasingly is guided by a media-created perception—witness the wall-to-wall saturation coverage of events such as Columbine—that violence is escalating everyday in public schools.[244] This context, in turn, is viewed through the eyes of administrators and teachers—the same eyes that view, when brought to their attention, the offending personal Web sites of students.

But this is only *part* of the context that should be considered. Another context and another pair of eyes—those of the students who create these Web sites and the students for whom their viewing is intended—seem to be ignored in the determination of what constitutes a true threat of violence. As Judge Friedman wrote in dissent in Justin Swidler's case, it is essential to consider the position of "a reasonable eighth grader" in evaluating whether speech constitutes a true threat.[245] In other words, perspective taking is crucial. We must consider *both* the perspective of the *intended student audience* as well as the perspective of the frequently *unintended audience of school administrators*.

The other ignored context, as Friedman observed, is that we live in a world in which humor such as Justin Swidler's brand increasingly is common. As Judge Friedman wrote, "This type of sick humor can be found in some of today's popular television programs, such as *South Park*."[246] It may, in fact,

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doctrine).

[243] Ashley Packard, *Threats or Theater: Does Planned Parenthood v. American Coalition of Life Activists Signify That Tests for "True Threats" Need to Change?*, 5 COMM. L. & POL'Y 235, 237 (2000).

[244] *See generally* Ginger Casey, *Beyond Total Immersion*, AM. JOURNALISM REV., July-Aug. 1999, at 30, 30 (examining news coverage of the Columbine tragedy and calling that coverage a "News-a-thon").

[245] J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 426 (Pa. Commw. Ct. 2000) (Friedman, J., dissenting).

[246] *Id.* at 428 n.6 (Friedman, J., dissenting) (emphasis added). The animated television series *South Park*, shown on the Comedy Central cable channel and featuring foulmouthed grade-school children, carries a TV-MA parental advisory rating. *See Eying Complaints, J.C. Penny to End 'South Park' Tie-Ins*, DAILY NEWS (N.Y.), Apr. 29, 1999, at 119, *available in* LEXIS, News Library, Dlynws File. The opening musical sequence in the movie version of the television show features the use of variations of the word "fuck" approximately 30 times. *See* SOUTH PARK: BIGGER, LONGER & UNCUT (Paramount Pictures 1999); *see also* Karen Thomas, *Oh , my God! Parents Shocked Seeing 'Park'*, USA TODAY, July 15, 1999, at 1D. Ironically, the focus of the film version of *South Park* was on the dangers of censorship. Joe Williams, *"South Park's" Real Story is Serious: Its Focus is Censorship*, ST. LOUIS POST-DISPATCH, July 2, 1999, at D3, *available in* LEXIS, News Library, Slpd File.

represent the new lingua franca of today's school children.[247] The fact that the humor expressed by students off campus when they create Web sites may seem "sick" does not, taken by itself, give a school the right to punish it. This Internet-posted humor does *not* occur in the same context as the in-school assembly, stand-up-and-talk, captive-audience sexual humor of Matthew Fraser described earlier in the article.[248] It merely is offensive out-of-school speech posted on a Web site that could have been ignored just as easily as it was read.

And it is important not to forget that what may be offensive speech to teachers may be amusing humor to students.[249] The United States Supreme Court once famously observed that it is "often true that one man's vulgarity is another's lyric."[250] This maxim certainly seems to reflect the pedagogical situation today—that *one teacher's threat is another student's parody*. The case of Justin Redman described earlier in Part II illustrates this point.[251] One of Redman's fellow students testified that the site was "'pretty funny . . . People wanted to look on there and see what kind of jokes were on there, because they thought it was funny.'"[252] In stark contrast, the school district's former dean of students testified that the site was offensive and that he was angered by it.[253]

It also must not be forgotten that off-campus offensive expression *does* possess First Amendment protection, unless it rises to the level of obscene speech or a true threat. As the late Justice William Brennan wrote concerning another form of speech considered offensive to many—burning the flag of the United States—"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[254]

It is worth pausing here to consider Brennan's statement about "the idea" within the context of off-campus student ideas about teachers and school administrators. If students' ideas are defamatory, then there are off-campus civil remedies for the aggrieved school officials. If the ideas constitute true threats, then there are avenues of off-campus criminal redress through police and FBI investigation. But if the ideas merely are offensive, then students

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[247] *See* Karen S. Peterson, *Say WHAT? Pervasive Profanity Has Turned Self-Expression to $#@*!*, USA TODAY, Mar. 21, 2000, at 9D (quoting a fifth and sixth grade teacher from Tumwater, Wash., as stating that "'the f-word and the s-word are just huge on the playground'").

[248] *See supra* text accompanying notes 169-75.

[249] Visitors to Swidler's site had posted "the following reactions: '[M]akes me crack up every time I read it' and 'Go here anytime you need a good laugh.'" *J.S.*, 757 A.2d at 428.

[250] Cohen v. California, 403 U.S. 15, 25 (1971).

[251] *See supra* text accompanying notes 71-90.

[252] Nelson, *supra* note 79.

[253] *See id.*

[254] Texas v. Johnson, 491 U.S. 397, 414 (1989).

should be allowed to use their First Amendment rights of free speech and press as a safety valve for expressing their viewpoints. Administrators and courts must not ignore the principle that free speech functions as a form of release for teenage frustrations.

How might school officials implement this safety-valve principle? Perhaps by allowing students greater freedom to express themselves in in-house school publications, such as school newspapers and yearbooks. When students feel their First Amendment rights are stifled in such in-school publications, they naturally will turn to out-of-school publications, such as underground Web sites to state their claims. Easing up on in-school censorship, in other words, might lead to a concomitant reduction of the off-campus expression that is so disturbing to some school administrators today. On the other hand, if administrators are not willing to loosen the reins on in-school censorship, they must reasonably expect the type of commentary now posted on Web sites and accept it as a cathartic form of expression. When they choose to punish the speech, they risk calling more attention to it and, in so doing, turning its creator into a martyr. That surely is not the outcome school administrators desire.

VIII. CONCLUSION

Technology today is forcing schools to cope with new questions of free speech that the United States Supreme Court has yet to squarely address. This article suggests that schools are too quick to censor home-created student Web sites. School districts seem to ignore, simultaneously, the facts that off-campus remedies exist for off-campus expression and that their authority does not—must not—stretch to all aspects of a minor's life.

This article contends that it is only when a student "brings" his or her home-created Web site onto campus, either by downloading it on a school-controlled computer or by encouraging other students to do so, that a school should be able to assert discipline authority. And it is only in this situation that the *Tinker* substantial-and-material disruption standard would apply, given that *Tinker* is the Supreme Court's only decision addressing student speech that was not part of the school curriculum or part of a school-sanctioned activity. If the speech remains outside the proverbial schoolhouse gate, then administrators should not view juvenile Web site creators as students but, rather, as citizens who face the same legal repercussions in the civil and criminal justice systems as adults. School discipline becomes unnecessary in this situation.

School administrators also must not let either their fears about a new technology—the World Wide Web—or their worries about Columbine-like violence squelch off-campus student expression, no matter how sophomoric it may be. The best remedy for speech with which we disagree is *more* speech, not less speech. Justice Louis Brandeis, concurring nearly seventy-five years ago in *Whitney v. California*,[255] articulated the premise of what today is known

[255] 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

as the doctrine of counter speech.[256] When it came to expression that was perceived by some to be dangerous, threatening or harmful, Brandeis famously wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[257] At the core of the counter-speech doctrine is the principle that "whenever 'more speech' could eliminate a feared injury, more speech is the constitutionally-mandated remedy."[258]

Before punishing students for speech they create off campus on their own computers, school administrators should remember both the counter-speech doctrine and the safety-valve function of expression described in Part VII.[259] They also should bear in mind another famous quote uttered by Justice Brandeis in *Whitney*: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[260] Today, principals seem to fear the Internet and punish children.

A teachable moment arises when administrators have the chance to confront students about their speech activities. They must take advantage of that opportunity. They should inform students that the constitutional right of free speech carries with it a concomitant responsibility not to abuse it. Students should be taught about the limits of free expression—that defamatory speech and threats of violence sometimes are *not* protected speech, that some forms of speech merely pollute the metaphorical marketplace of ideas rather than contribute to a pursuit for the truth—before they are punished for testing those limits.[261]

Given the pervasiveness of the Internet and World Wide Web, the problems

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[256] *See* Michael Kent Curtis, *Oliver Wendell Holmes Devise Lecture Series Symposium: "Free Speech" and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 433 (1996) (observing that Justice Brandeis "insisted that in spite of dangers, the only appropriate remedy for much evil speech is counter-speech and reason").

[257] *Whitney*, 274 U.S. at 377.

[258] TRIBE, *supra* note 188, at 834.

[259] *See supra* Part VII.

[260] *Whitney*, 274 U.S. at 376.

[261] "The 'marketplace of ideas' is perhaps the most powerful metaphor in the free speech tradition." SMOLLA, *supra* note 239, at 6. The marketplace metaphor "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989). The metaphor is used frequently today, more than 75 years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition "that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see* also W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 40-48 (1996) (providing a recent review of the Court's use of the marketplace metaphor).

encountered by administrators in the cases described in this article are not likely to disappear anytime soon. Indeed, it seems very likely that more students will turn to the Web to express their feelings. Dealing with these sites through suspensions and expulsions ultimately accomplishes very little. The better solution is counter speech and a healthy recognition on the part of educators that sophomoric humor and verbal attacks on teachers will not be eliminated through suspensions and expulsions. The third arm of justice—the school's own internal discipline system—must be reined in before First Amendment rights are needlessly sacrificed.