ADJUSTING THE LAW TO REFLECT REALITY: ARGUING FOR A NEW STANDARD FOR STUDENT INTERNET SPEECH*

I. INTRODUCTION

Twitter helps people "create and share ideas and information instantly, without barriers."[1] Despite this broad mission statement, Twitter's self-proclaimed speed and simplicity can be dangerous for some high school students. In 2012, Austin Carroll, a then second-semester senior at Garrett High School in Indiana, was subjected to disciplinary action after a tweet he posted found its way into the hands of high school administrators.[2] Austin was consequently forced to finish his high school career at an alternative school.[3] In the wake of his expulsion, the original location of his tweet became hotly debated—with Austin claiming that he sent it from a personal computer outside of school hours, and the school claiming that it was sent either from his school-issued computer or a school network.[4]

Is the original location of the tweet really what matters? Does whether Austin sent the tweet from a personal or school-issued computer fundamentally change the nature of his message or its effect on his listeners? Perhaps school administrators should be asking a different a question—*why* did Austin send that tweet? Did he do it intending to disrupt the classroom environment at his high school? Or rather, did he do it, as he simply puts, to "try[] to be funny?"[5] The answer is most likely that Austin did not have *any* specific intention when tweeting his message. Like many high school students, as Austin was expressing his thoughts "instantly,"[6] he probably tweeted without thinking or weighing the long-term consequences of his actions.

This Comment suggests that the debate surrounding the constitutionality of regulations of high school speech needs to be reframed. It observes that the advent of the Internet has fundamentally changed the way individuals communicate. This Comment then discusses the unique problem the Internet has presented for courts attempting to discern under what circumstances schools can restrict students' off-campus Internet speech without running afoul of the First Amendment. Under the current law, courts employ a test that weighs the interests of the school against the

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1. *About Twitter*, TWITTER, https://about.twitter.com (last visited Nov. 4, 2014).

2. Charles Wilson, *Austin Carroll, Indiana Student Expelled for Profane Tweet, Thrust into National Free-Speech Debate*, HUFFINGTON POST (Apr. 3, 2012, 3:46 PM), http://www.huffingtonpost.com/2012/04/03/students-profane-tweet-st_n_1400695.html.

3. *Id.*

4. *Id.*

5. *Id.*

6. *About Twitter*, *supra* note 1.

interests of the student to determine whether regulation of speech is permissible.[7] This Comment suggests that this balancing test favors schools' interests over students'. Therefore, like the Supreme Court has done in many instances,[8] this Comment looks to psychological research to help even out the scales in this arena. Psychological research shows that adolescents have diminished decision-making capabilities. This Comment argues that this reality must be considered when courts are determining whether schools can permissibly regulate student speech. It accordingly suggests two specific changes to the current standard to ensure that the law appropriately reflects reality.

This Comment proceeds in three main Sections. Section II gives an overview of the current law surrounding the debate over students' First Amendment rights. The Section first provides an overview of First Amendment jurisprudence and discusses examples of the limited instances in which courts have held that restrictions of speech are constitutional. The Section next examines these restrictions in the special context of the school setting, focusing on the "substantial disruption" standard first articulated in *Tinker v. Des Moines Independent Community School District*[9] and its subsequent treatment by both the Supreme Court and lower courts. This Section pays particular attention to modifications of the *Tinker* test developed by courts to address issues related to off-campus and Internet speech. It concludes by identifying questions that courts have left unanswered, specifically the question of what standard governs students' off-campus Internet speech.

Section III then discusses the intersection of psychology and the law. It first analyzes various instances where courts have employed psychological research to aid them in their decision making. Section III also responds to criticisms of this approach. It then discusses a particular body of psychological research that is relevant to the problem of off-campus Internet speech. The Section provides an overview of neurological and cognitive psychological studies that suggest that certain major changes in the brain take place during adolescence. This research shows that adolescent psychological development is inferior to that of adults in a way that undermines appropriate decision making.[10] The Section then concludes by noting that the unique nature of Internet speech makes this research particularly relevant in the debate over high school students' First Amendment rights.

Section IV argues that the *Tinker* test is an inappropriate response to the problem that courts face when determining whether schools can constitutionally regulate students' Internet speech. Variations of the *Tinker* inquiry focus on either (1) the character of the student's speech[11] or (2) the level of disruption the speech causes.[12]

7. See *infra* Section II for a discussion of this balancing test—beginning with its establishment in 1969 and concluding with the problems courts have faced in applying the test in the context of student off-campus Internet speech.

8. See *infra* Part III.A for a discussion of courts' use of psychological research to aid in legal decision making.

9. 393 U.S. 503 (1969).

10. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003).

11. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (providing a separate standard for speech that is lewd or obscene).

This Section argues that those factors represent only the schools' interests, resulting in an off-kilter balancing test that fails to properly protect students' right to expression, particularly in instances of off-campus Internet speech. The Section then analyzes scholars' suggested modifications to the *Tinker* test that would better protect students' rights to expression. Section IV specifically discusses two separate approaches that have been proposed: (1) intent-based tests and (2) nexus tests that include an intent prong. The Section acknowledges that both of these approaches compel a better result than the *Tinker* standard because they more fairly represent students' interests—but argues that these approaches could be further developed if they took into account the psychological realities surrounding adolescents discussed in Section III.

Section IV concludes by making two suggestions to courts currently facing the question of the constitutionality of regulations of student Internet speech. It first recommends that courts abandon the *Tinker* test in the context of off-campus Internet speech and instead employ an inquiry that begins with the intent of the student speaker. It suggests that courts refine this intent-based approach by considering psychological research regarding adolescent development when making their determinations of student intent. Second, it recommends that schools limit their punishments of students to avoid suspension or expulsion, focusing instead on promoting education of students on proper Internet usage, in an effort to continue to foster and develop the education of high school students.

II. AN OVERVIEW OF THE FIRST AMENDMENT RIGHTS OF STUDENTS

This Section provides an in-depth analysis of the law surrounding the debate over the First Amendment rights of students. It begins with an overview of First Amendment jurisprudence as a general matter and then proceeds to discuss the role of the First Amendment in the unique context of schools. It analyzes the evolution of the standard governing when schools' regulations of student speech are permissible—starting in 1969 with the *Tinker* standard and concluding in 2011 with the unanswered question of what standard governs off-campus student Internet speech.

A. The First Amendment

The United States Constitution prohibits Congress from "abridging the freedom of speech."[13] There is not a universal consensus as to what the Framers' intent was regarding the First Amendment.[14] Some courts have held that the Framers intended only to abolish prior restraints on speech.[15] However, the broad interpretation of the First Amendment as encompassing all forms of pure speech demonstrates the general

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

13. U.S. CONST. amend. I.

14. *Compare* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (stating that the main purpose of the First Amendment is to prevent all prior restraints upon publications as had been practiced by previous governments), *with* Texas v. Johnson, 491 U.S. 397, 404 (1989) (holding that the First Amendment protects not only speech but also expressive conduct).

15. *E.g.*, *Patterson*, 205 U.S. at 462.

rejection of this view by courts.[16]

Despite the inconclusiveness of the historical debate over the Framers' intent regarding free speech, four major policy justifications for an extensive protection of freedom of speech consistently appear in First Amendment jurisprudence.[17] The first argues that free speech is an essential element of self-governance, or that speech must be protected in order for individuals in a democracy to make informed choices.[18] The second invokes the marketplace of ideas metaphor and contends that protecting speech is essential for the discovery of truth.[19] The third argues that the protection of free speech promotes tolerance by helping to shape the intellectual character of society.[20] The final policy justification contends that free speech deserves protection in order to preserve individual autonomy by allowing individuals to engage in self-expression without fear of suppression by the government.[21]

The First Amendment is an especially important safeguard for unpopular speech. The Supreme Court has stated that the very core of the First Amendment is the principle that the government cannot regulate speech based on its content.[22] For this reason, the Supreme Court has made a marked distinction between restrictions of speech that are content based versus those that are content neutral.[23] The Supreme Court has deemed restrictions on speech that are content based to be presumptively invalid and has therefore examined them under the highest level of scrutiny.[24]

While most forms of speech, and particularly unpopular speech, are afforded broad protection, the Supreme Court has limited this protection by holding that the right to free speech is not absolute.[25] Under appropriate circumstances, the government

16. *See, e.g.*, *Johnson*, 491 U.S. at 406 (holding that the act of burning the American flag constituted expressive speech).

17. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

18. Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521, 554–55 (1977).

19. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

20. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 10 (1986) ("[The free speech principle] involves a special act of . . . self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.").

21. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978).

22. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972) (holding that the government has no power to restrict expression based upon its message, idea, subject matter, or content).

23. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (holding that the First Amendment prohibits the government from restricting speech based on its content in a case involving a person who was charged with violating a city ordinance prohibiting bias-motivated disorderly conduct).

24. *See id.* at 403 (holding that content-based restrictions on speech must pass the strict scrutiny standard in order to be constitutional). The strict scrutiny test is two pronged: the government must have a compelling reason for regulating the speech, and the restriction must be narrowly tailored to achieve that objective. *See* Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002) (holding that state law prohibiting candidates for elected judicial office from making statements about disputed political or legal issues did not meet strict scrutiny standard as judicial impartiality was not a compelling state interest).

25. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982) (upholding state law regulating the distribution of child pornography because when a certain class of material adversely impacts the welfare of children, it is permissible to consider the materials without the protection of the First Amendment); Miller v. California, 413 U.S. 15, 23 (1973) (upholding California state law prohibiting the mailing of unsolicited

may be justified in its regulation of particular categories of speech.[26] The Supreme Court has identified certain types of speech that are not afforded the full constitutional protections of the First Amendment.[27] When determining whether government regulation of these categories is constitutional, the Supreme Court has used a balancing inquiry and has weighed the justifications for regulating the speech against the value of the expression.[28] For example, political speech is highly valued because it allows individuals in a democracy to make informed choices.[29] On the contrary, speech that incites illegal activity does not have as much inherent value because it promotes a lack of adherence to laws.[30] Accordingly, the Supreme Court has held that speech inciting illegal activity can be regulated by the government so long as certain conditions are met.[31] "Fighting words" jurisprudence is another example of the Supreme Court's use of a balancing test to determine the constitutionality of government regulation of speech.[32] There, the Court has found that fighting words can be regulated because the justifications for regulating the speech are generally strong and the value of the speech is generally slight.[33] Thus, although free speech is one of the country's most cherished constitutional rights, it is not boundless. In order to define its boundaries, the Supreme Court has relied on balancing tests.

B. The First Amendment in the School Setting

In certain areas of First Amendment jurisprudence, justifications for government regulation of speech are not easily adduced. One such area involves speech within the confines of a school.[34] School restriction of student speech creates First Amendment issues because of the inherent tension between students' constitutional right of free

sexually explicit material based on principle that obscene material is not protected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (holding that freedom of speech is not absolute at all times and that fighting words are not granted constitutional protection).

26. *E.g.*, *Ferber*, 458 U.S. at 763–64; *Miller*, 413 U.S. at 23; *Chaplinsky*, 315 U.S. at 571–72.

27. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement of illegal activity); *Chaplinksy*, 315 U.S. at 571–72 (fighting words).

28. *See, e.g.*, *Ferber*, 458 U.S. at 763–64 (weighing the expressive interest at stake in child pornography against the need to protect the children involved in its production and concluding that the balance strikes in favor of protecting children); *Brandenburg*, 395 U.S. at 447 (noting that the fundamental inquiry in determining whether words inciting illegal activity are protected centers on balancing the need for social order against the desire to protect freedom of speech).

29. *See* Blasi, *supra* note 18, at 597 (discussing the constitutional protections afforded to newsgathering and noting its importance in preserving "the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner").

30. *See Brandenburg*, 395 U.S. at 447 (explaining that states can prohibit advocacy where it is directed toward inciting imminent lawless action and has a high likelihood of producing such action).

31. *Id. Brandenburg* established that a conviction for incitement of illegal activity can only be upheld if (1) the speech promotes imminent harm; (2) there is a likelihood that the speech will produce illegal action; and (3) there is an intent to cause imminent illegality. *Id.*

32. *See, e.g.*, *Chaplinsky*, 315 U.S. at 572 (holding that fighting words have such little value as a step to truth that any benefit they may have is outweighed by a social interest in order and morality).

33. *Id*.

34. *See*, *e.g.*, Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506–07 (1969) (stating that whether students' First Amendment rights have been violated when speech is regulated by school authorities must be decided within the unique context of the school setting).

speech and schools' rights to promote their work and control their classrooms.[35] Student speech cases are typically decided using an interest-balancing inquiry that examines the competing rights of the students and schools in particular circumstances.[36]

1. The Substantial Disruption Standard: *Tinker*

The most notable instance of the Supreme Court's recognition of students' First Amendment rights occurred in 1969. In *Tinker v. Des Moines Independent Community School District*, three students and their families devised a plan to wear black armbands throughout the holiday season to publicize their disapproval of the Vietnam War and their hope for a truce.[37] School authorities heard of the plan and subsequently passed a resolution banning the wearing of black armbands at school.[38] Despite the resolution, the three students wore their armbands to school, were sent home, and were suspended until they returned without the armbands.[39] The students did not return to school until after the holiday season and filed suit against the school in federal district court, alleging that their First Amendment rights had been violated.[40]

The Supreme Court ultimately decided the case in 1969, in an opinion that established the roadmap for deciding claims of First Amendment violations in school settings.[41] Among the various principles set forth in its holding, *Tinker* ultimately sided with the students and established the general proposition that students and teachers alike do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[42] It also clearly stated that students, both in and out of school, are "persons" under the United States Constitution.[43] This holding is significant for children because it was one of the first times that their constitutional rights were expressly upheld by the Supreme Court.[44] However, the Court limited its statements by noting that it was bound to apply these First Amendment rights in light of the special characteristics of a school environment.[45] Therefore, *Tinker* recognized that the

35. *See id.* at 507 ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.").

36. *See id.* at 506–07 (noting that while students are entitled to constitutional rights within the confines of a school, those rights must be balanced with the school's authority to control conduct within the schools).

37. *Id.* at 504.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* at 509 (establishing that student speech could only be restricted if it would substantially interfere with the work of the school).

42. *Id.* at 506.

43. *Id.* at 511.

44. *See* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2101–02 (2011) ("'[A]utonomy rights,' . . . [are] adult rights given to older children based on their increasing capacity for autonomous choice. . . .The seminal cases in this view are *Tinker v. Des Moines Independent Community School District* and *In re Gault*, which held that older children have adult constitutional rights for purposes of speech in school and juvenile proceedings, respectively.").

45. *See Tinker*, 393 U.S. at 507 (recognizing the need to affirm the authority of school officials to proscribe certain conduct in the public schools).

fundamental rights-balancing inquiry in school speech cases involves the collision of students' First Amendment rights with the schools' authority to control conduct and behavior.[46]

Tinker then established the following test for determining whose interests—the students' or the schools'—weigh more heavily in a particular instance: "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[47] *Tinker* found that the students' wearing of black armbands would not have substantially interfered with the work of the school or infringed upon the rights of other students.[48] While the *Tinker* standard has remained the keystone for deciding First Amendment cases involving student speech for over forty years, it has not been deemed universally applicable, and lower courts have slowly chipped away at the *Tinker* doctrine over time.

2. The Erosion of the *Tinker* Doctrine: *Fraser*, *Kuhlmeier*, and More

Tinker established that determining whether school authorities' regulation of student speech is justified depends on whether the speech materially interferes with the work of the school.[49] However, not long after the *Tinker* decision, exceptions to its principles began to appear in various First Amendment decisions. Courts have held that the *Tinker* test does not apply to certain types of speech, including obscene speech, school-sponsored speech, speech discussing illegal drugs, and speech constituting a true threat.

a. An Exception for Obscenity: Fraser

The first of these exceptions occurred in 1986 when the Supreme Court heard *Bethel School District No. 403 v. Fraser*.[50] In *Fraser*, a high school student gave a speech in front of approximately 600 other students at a high school assembly.[51] During his speech, the student used an elaborate and graphic sexual metaphor to describe another student's candidacy for student government.[52] He was subsequently suspended for three days and removed from the list of candidates for graduation speaker.[53]

46. *Id.* at 511.

47. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

48. *See id.* at 514 (finding that the armbands caused some discussion outside of the classrooms but no disruption). Note that the phrase "work of the school" has been given several different meanings by various courts and scholars. For an excellent discussion of the various meanings of this phrase, see generally Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269 (1991).

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

50. 478 U.S. 675 (1986).

51. *Fraser*, 478 U.S. at 677.

52. *Id.* at 677–78.

53. *Id.*

In its decision upholding the school's punishment of the student, the Supreme Court did not rely on *Tinker*.[54] Rather, the Court factually distinguished *Fraser* from *Tinker*, noting that the lewd and offensive language in *Fraser* differed vastly from the peaceful demonstration of *Tinker*.[55] Relying on established precedent, *Fraser* held that the school's actions did not violate the student's First Amendment rights.[56] According to *Fraser*, "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [the student's] would undermine the school's basic educational mission."[57] *Fraser* established that when speech is particularly lewd or offensive, the speech does not have to materially disrupt the work of the school in order for the school to regulate it.[58] Thus, the *Fraser* decision marks the Supreme Court's first exception to the *Tinker* standard in determining whether a school's regulation of speech violates a student's First Amendment rights.

b. An Exception for School-Sponsored Speech: Kuhlmeier

Shortly after the Supreme Court's decision in *Fraser*, another exception to the *Tinker* test appeared in *Hazelwood School District v. Kuhlmeier*.[59] In *Kuhlmeier*, a school pulled two articles from the school newspaper because they allegedly contained inappropriate content.[60] The student authors sued the school, alleging First Amendment violations.[61] The Supreme Court found for the school district, and while it began its analysis with the *Tinker* decision, it did not ultimately rely on *Tinker* to make its determination.[62]

54. *Id.* at 684–85.

55. *Id.* at 684.

56. *Id.* The Court relied on two cases in making its determination. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 871–72 (1982) (holding that a school board has the authority to remove books from the school library that it determines are vulgar); Ginsberg v. New York, 390 U.S. 629, 636–37 (1968) (upholding a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults).

57. *Fraser*, 478 U.S. at 685; *see also id.* at 681 (defining the school's basic educational mission as the inculcation of the "habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" (quoting CHARLES BEARD & MARY BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))).

58. *Id.* at 683; *see also* R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 541 (2d Cir. 2011) (holding that it was within school's authority to refuse to print sexually explicit cartoon in school newspaper because it was lewd and offensive); Barr v. Lafon, 538 F.3d 554, 563–64 (6th Cir. 2008) (noting that while *Fraser* gives schools the right to categorically ban lewd or offensive speech, a student's wearing of a Confederate flag t-shirt was not lewd or offensive and therefore must be decided under the *Tinker* standard).

59. 484 U.S. 260 (1988).

60. *See Kuhlmeier*, 484 U.S. at 262–63. The two articles that were excluded from the paper addressed students' views and opinions relating to teen pregnancy and divorce; the teacher and principal who ultimately pulled the articles from the school publication did so because they believed that the articles revealed the identities of the individuals discussed within them, among other reasons. *Id.*

61. *Id.*

62. *See id.* at 270–71 (noting that the question in *Tinker* is different from whether a school must affirmatively promote student speech).

The Supreme Court began its analysis by noting the principle established in *Tinker* that students do not shed their constitutional rights when they enter a school.[63] However, the Court also noted that students' rights are not equivalent to adults' First Amendment rights, as students are typically minors and historically have not been afforded the same constitutional protections as adults.[64] The Court then relied on its holding in *Fraser* to justify its decision to create yet another category of school speech that is distinct from the speech evaluated under the *Tinker* test: speech that could be viewed as school sponsored.[65] The Court concluded that a school may regulate student expression that may be viewed as "school-sponsored" speech so long as the school's actions are reasonably related to valid didactic concerns.[66] Thus, speech that outsiders may view as part of the school curriculum is not subject to the *Tinker* inquiry.[67] Rather, schools can regulate this kind of speech without regard for whether it disrupts the school environment, so long as the regulation is in reasonable pursuit of furthering the educational goals of the school.[68]

c. Other Exceptions: Illegal Drug Use and True Threats

Another context in which the Supreme Court has elected not to use the *Tinker* inquiry is where speech can be interpreted as promoting illegal drug use. In *Morse v. Frederick*,[69] a principal saw students at a school event holding a banner reading, "BONG HiTS 4 JESUS," which the principal read as promoting illegal drug use.[70] *Morse* relied on *Fraser*,[71] *Kuhlmeier*,[72] and the government's interest in stopping drug

63. *Id.* at 266.

64. *See id.* (recognizing that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986))).

65. *See id.* at 271 (concluding that the standard articulated in *Tinker* for determining when a school may punish student expression is not the standard for determining when a school may refuse to sponsor certain expression).

66. *See id.* (explaining that educators should be able to exercise greater control over speech that could be viewed as reflecting the beliefs or opinions of the school itself); *see also* Poling v. Murphy, 872 F.2d 757, 762–63 (6th Cir. 1989) (applying the reasoning in *Kuhlmeier* to make the finding that a school was justified in its punishment of a student for making inappropriate comments about faculty and administration during a student council nomination speech).

67. *Kuhlmeier*, 484 U.S. at 273.

68. *Id.*; *see also* R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 541 (2d Cir. 2011) (holding that it was within school's authority to refuse to print a sexually explicit cartoon in school newspaper because the public might reasonably believe that the cartoon was school sponsored); Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 96 (3d Cir. 2009) (holding that a school could prohibit student's mother from reading from the Bible during school-sponsored extracurricular activity as the reading conflicted with the schools pedagogical concerns); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 695 (4th Cir. 2007) (holding that a school could restrict a teacher's postings on bulletin board outside of classroom as the postings could be viewed as school-sponsored speech).

69. 551 U.S. 393 (2007).

70. *Morse*, 551 U.S. at 397.

71. *See id.* at 405 (noting that *Fraser* established two major principles: (1) that the constitutional rights of students in public schools are not automatically equivalent to the rights of adults; and (2) that the mode of analysis established in *Tinker* is not the only method of interpreting high school student First Amendment cases).

abuse in making its determination.[73] *Morse* held that the unique characteristics of the public school environment, combined with the strong government interest in decreasing illegal drug abuse, allows schools to restrict student speech that can reasonably be read as encouraging this exact type of illicit activity.[74]

A lower court has noted an additional instance in which the *Tinker* test may not apply: where speech involves a true threat. In *Emmett v. Kent School District Number 415*,[75] a school placed a student under "emergency expulsion" after he created a website detailing mock obituaries for other students.[76] The district court in *Emmett* granted the student's request for a temporary restraining order against the expulsion because it found that the student had established likely success on both the merits and the issue of irreparable harm.[77] *Emmett* noted in its reasoning that the school district should be able to punish students for off-campus speech that constitutes a true threat; however, the court found the speech in that case did not constitute such a threat.[78] While the court's decision in *Emmett* turned on whether the speech constituted a true threat, and not whether it was off campus, what standard should apply to off-campus speech has been an ongoing issue in student speech cases.

3. Beyond the Schoolhouse Gates: Off-Campus Speech

With one exception, the cases discussed *supra* in Part II.B.2 all involved speech that occurred within the geographical confines of a school.[79] The question of whether, and under what circumstances, a school can regulate a student's off-campus speech involves further inquiry. Courts have not provided a satisfactory answer to this question. In certain instances, courts have extended the *Tinker* standard beyond the schoolhouse gate and have applied it to off-campus speech.[80] However, these courts diverge as to whether there is a requirement that the student must bring the off-campus speech onto campus in order to be punished.[81] The following two cases illustrate this

72. *See id.* (noting that while *Kuhlmeier* does not control the case as Morse's speech could not reasonably be read to be attributable to the school, *Kuhlmeier* is still relevant and important in relation to Morse's actions because it confirmed the *Fraser* principles that high school students do not automatically have the same rights as adults and courts can determine whether those rights were violated using tests other than *Tinker*).

73. *See id.* at 406–07 (noting that Congress has declared that a school's role encompasses educating its students about the perils of drug abuse).

74. *Id.*

75. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

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

77. *Id.* at 1090. To obtain a temporary restraining order, a plaintiff must establish that failure to obtain one would result in irreparable harm to him or her. Fed. R. Civ. P. 65(b).

78. *Emmett*, 92 F. Supp. 2d at 1091.

79. See *supra* Part II.B.2 for a discussion of the individual circumstances of each case. While the speech in *Morse* technically took place across the street from the actual school, the Court expressly declined to allow that fact to influence its reasoning. *Morse*, 551 U.S. at 400–01.

80. *See, e.g.*, Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821, 828–29 (7th Cir. 1998) (noting that the *Tinker* standard applies where there is an on-campus distribution of off-campus material).

81. Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard To Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 139–40 (2007).

divergence.

In *Thomas v. Board of Education*,[82] four students wrote and published an underground newspaper.[83] Throughout its publication, the students used school typewriters and even stored copies of the newspaper on campus.[84] While the students did limit the newspaper's distribution to strictly off campus, the paper ultimately appeared on campus.[85] The school subsequently imposed various sanctions on the students, including a five-day suspension.[86] Despite the clear connection to the school's resources and the appearance of the newspaper on campus, the *Thomas* court found for the students.[87] In finding that the school's punishment of the students was unconstitutional, *Thomas* distinguished its facts from the facts in *Tinker* based upon the students' attempts to sever the newspaper's relationship from the school.[88] *Thomas* noted that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."[89]

The Seventh Circuit reached a different conclusion in *Boucher v. School Board of Greenfield*.[90] In *Boucher*, a student wrote an article entitled, "So You Want to be a Hacker?" that purported to teach other students how to hack into the high school's computer system.[91] The student wrote the article entirely off campus and did not participate in its on-campus distribution.[92] Upon the school's discovery of the article, the school expelled the student.[93] *Boucher* found that the student's First Amendment rights were not violated.[94] In its reasoning, the court noted that the *Tinker* standard applies where there is an on-campus distribution of material that was created off campus.[95] Using the *Tinker* standard, the court found that it was reasonable for the school in this instance to find that this material would substantially disrupt the school, and that the material consequently did not deserve First Amendment protection.[96]

4. On Campus or Off? The Unique Problem of Internet Speech

Despite the exceptions noted in the Parts above, the *Tinker* inquiry has remained the standard for determining whether student speech should be punishable by school

82. 607 F.2d 1043 (2d Cir. 1979).
83. *Thomas*, 607 F.2d at 1045.
84. *Id.*
85. *Id.* at 1045–46.
86. *Id.* at 1046.
87. *Id.* at 1050.
88. *Id.*
89. *Id.*
90. 134 F.3d 821 (7th Cir. 1998).
91. *Boucher*, 134 F.3d at 821–22.
92. *Id.*
93. *Id.* at 823.
94. *Id.* at 828–29.
95. *Id.* at 829.
96. *Id.*

authorities in most circumstances.[97] However, due to advances in technology, and in particular the advent of the Internet, the *Tinker* inquiry has become more complicated in recent years. One of the major issues currently facing lower courts is how to address whether school authorities can constitutionally punish a student for speech on the Internet that was written outside of the school. The Second and Third Circuits have addressed this issue.[98]

In their decisions, both the Second and Third Circuits focused on the off-campus nature of the speech and corresponding precedent.[99] While both circuits expressed concern about the scope of a school's authority to punish off-campus Internet speech, neither circuit distinguished off-campus Internet speech from other types of off-campus speech.[100] Accordingly, these decisions have left many questions pertaining to off-campus Internet speech largely unanswered,[101] specifically whether courts should employ a distinct standard when determining whether school regulations of this type of speech are constitutional.

a. The Second Circuit Approach: Wisniewski *and* Doninger

The Second Circuit has used the *Tinker* test to allow schools to regulate certain types of Internet speech by holding that the speech in question had the effect of disrupting the classroom.[102] The Second Circuit first addressed whether schools can regulate student Internet speech occurring entirely outside of the school in *Wisniewski v. Board of Education of Weedsport Central School District*.[103] In *Wisniewski*, an eighth-grade student had an AOL Instant Messenger profile icon that depicted a pistol firing bullets at a person's head, above which were red dots meant to represent blood.[104] Beneath the picture were the words, "Kill Mr. VanderMolen."[105] VanderMolen was the student's English teacher.[106] The student was suspended from school for one semester, and his family moved from their town in response to community hostility that occurred in the wake of the incident.[107]

97. *See, e.g.*, Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1248 (11th Cir. 2003) (noting that school officials are on their most "solid footing" when they are able to restrict student speech under the *Tinker* theory).

98. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).

99. *Layshock*, 650 F.3d at 216; *Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 39.

100. *Layshock*, 650 F.3d at 216; *Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 39.

101. *See, e.g.*, *Doninger*, 527 F.3d at 49–50 (not deciding whether the reasoning in *Fraser* can be extended to cases involving out-of-school Internet speech and not defining the precise parameters of when a school's authority can reach beyond the schoolhouse gate).

102. *See, e.g.*, *Wisniewski*, 494 F.3d at 39–40 (holding that student's actions in creating and transmitting drawing depicting shooting of teacher posed reasonably foreseeable risk drawing would come to attention of school authorities and would materially and substantially disrupt work and discipline of school).

103. 494 F.3d 34, 35 (2d Cir. 2007).

104. *Wisniewski*, 494 F.3d at 36.

105. *Id.*

106. *Id.*

107. *Id.* at 37.

In determining that the student's punishment was justified, the Second Circuit relied entirely on *Tinker*.[108] *Wisniewski* held that it was reasonably foreseeable that the student's icon would have come to the attention of school authorities and materially disrupted the work of the school.[109] In its reasoning, the Second Circuit addressed the fact that the speech occurred off campus, but it did not specifically address whether the fact that the speech was on the Internet should have an impact on its determination.[110]

One year later, the Second Circuit addressed a similar issue in *Doninger v. Niehoff*.[111] In *Doninger*, Avery Doninger, a high school student, was disqualified from running for senior class secretary after she posted a misleading and vulgar message on an independently operated, publicly accessible blog about the supposed cancellation of an upcoming school event.[112] The school prohibited Avery from running for class counsel in response to her post.[113] In its reasoning, *Doninger* noted that courts had not yet fully defined the circumstances under which school authorities could punish off-campus speech.[114] Nonetheless, it relied on *Wisniewski* to determine that Avery's punishment was justified because the school authorities could have reasonably foreseen that her speech would materially disrupt school.[115] Again, the Second Circuit noted in its reasoning that the speech was off campus, but it did not specifically address the fact that the speech occurred on the Internet.[116]

b. The Third Circuit Approach: Layshock

The Third Circuit addressed issues similar to those addressed by the Second Circuit in *Doninger* when it decided *Layshock ex rel. Layshock v. Hermitage School District*.[117] In *Layshock*, Justin Layshock used his grandmother's computer to create a fake Internet profile of his principal.[118] Justin gave some of his classmates access to the profile by listing them as "friends" on the website.[119] The profile became instantly popular among the students, and three other parody profiles followed in its wake.[120] The school punished Justin after school authorities discovered that he created the profile.[121]

108. *Id.* at 38–39.

109. *Id.*

110. *Id.* at 39.

111. 527 F.3d 41 (2d Cir. 2008).

112. *Doninger*, 527 F.3d at 44.

113. *Id.* at 46.

114. *Id.* at 50.

115. *See id.* at 49 (finding that school authorities appropriately punished Avery as they reasonably foresaw that Avery's speech could disrupt school, emphasizing three factors: (1) its vulgarity; (2) the fact that it was misleading; and (3) the minimal degree of punishment Avery received).

116. *See id.* at 50 (noting that speech's off-campus nature does not insulate a student from discipline but failing to explain how to categorize Internet speech as either on campus or off campus).

117. 650 F.3d 205 (3d Cir. 2011).

118. *Layshock*, 650 F.3d at 207.

119. *Id.*

120. *Id.*

121. *See id.* at 209–10. Justin's punishment included the following: (1) a ten-day suspension, (2) placement in a program for students with behavioral problems, (3) banishment from all extracurricular

The Third Circuit heard the case and applied the *Tinker* standard, finding that Justin's actions did not materially disrupt the school and therefore could not be punished.[122] According to the court, the school district violated Justin's First Amendment rights when it punished him for the speech.[123] In its reasoning, the Third Circuit answered the question that remained open in *Doninger*: whether the *Fraser* doctrine could be extended to off-campus speech.[124] The court limited *Fraser* to apply only within the school, noting that "punishment of Justin was not appropriate under *Fraser* because '[t]here is no evidence that Justin engaged in any lewd or profane speech *while in school*.'"[125] However, the Third Circuit did leave a separate question of its own unanswered in its reasoning. The court explicitly declined to define the "precise parameters of when the arm of authority can reach beyond the schoolhouse gate."[126] The Third Circuit also failed to address whether the fact that the student's speech took place on the Internet should impact the court's reasoning.

School restriction of student speech creates First Amendment issues because of the clear tension between students' paramount constitutional right of expression and schools' authority to control their classrooms and promote their educational goals.[127] Therefore, First Amendment cases involving student speech are typically decided using the interest-balancing inquiry established in *Tinker*.[128] However, the *Tinker* standard is not foolproof, and certain exceptions to the *Tinker* standard have developed in student-speech jurisprudence.[129] Despite the fact that *Tinker* is well established, whether the *Tinker* test universally applies to off-campus speech (in particular off-campus *Internet* speech) has yet to be fully resolved.[130]

activities, and (4) inability to participate in graduation ceremonies. *Id.* Justin was also considered for expulsion. *Id.*

122. *Id.* at 220.

123. *Id.* at 212.

124. *See* Doninger v. Niehoff, 527 F.3d 41, 49–50 (2d Cir. 2008) (not deciding whether the reasoning in *Fraser* can be extended to cases involving out-of-school Internet speech and not defining the precise parameters of when a school's authority can reach beyond the schoolhouse gate).

125. *Layshock*, 650 F.3d at 216 (alteration in original) (emphasis added) (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599–600 (W.D. Pa. 2007)).

126. *Id.* at 219.

127. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506–07 (1969).

128. *See id.* (stating that while students are entitled to constitutional rights within the confines of a school, those rights must be balanced with the school's authority to control conduct within the schools).

129. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 409–10 (2007) (creating separate inquiry for student speech that promotes illicit drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988) (explaining that educators should be able to exercise greater control over speech that could be viewed as reflecting the beliefs or opinions of the school itself); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (allowing schools to restrict speech that is lewd and offensive regardless of whether it would foreseeably disrupt the work of the school).

130. *Compare* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that school student's off-campus Internet speech did not create a foreseeable risk of material disruption), *with* Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008) (holding that student's off-campus Internet speech *did* create a foreseeable risk of material disruption).

III. THE INTERSECTION OF PSYCHOLOGY AND LAW

This Section examines the intersection of two disciplines: psychology and law. The Section focuses on the junction of these two fields to set the stage for this Comment's ultimate argument that psychological research should be used to determine whether a school can constitutionally restrict a student's off-campus Internet speech. The Section begins by providing a backdrop of the various contexts in which courts have employed psychological research to aid them in their decision making. The Section acknowledges that not all scholars and courts endorse this approach. It discusses two discrete criticisms of the use of psychology in legal decision making and presents counterarguments to those criticisms. This Section argues that the criticisms of using psychology in legal decision making are refutable and submits that psychology does have a proper place in law. The Section concludes by discussing a particular body of psychological research that is relevant to the problem of student off-campus Internet speech: cognitive psychological studies and neurological studies that suggest that certain major changes in the brain take place during adolescence.

A. Prior Uses of Psychological Research in Legal Analysis: School Segregation, Juvenile Punishments, and Beyond

The Supreme Court has relied on psychological research and studies for insight into how it should decide certain cases.[131] Many of the instances in which the Court uses psychological research involve adolescents.[132] The Court has utilized psychological research to answer two major constitutional questions involving adolescents: (1) whether school segregation violates the equal protection rights of African-American students,[133] and (2) whether imposing certain criminal punishments on individuals under the age of eighteen violates those juveniles' Eighth Amendment right to protection against cruel and unusual punishment.[134] Courts' use of psychological research is not limited to just these two instances; courts have used psychological research to aid their decision making in several areas beyond school segregation and juvenile criminal punishments.[135] Courts' historical use of psychology in legal reasoning can inform our understanding of the potential application of psychological research to students' rights related to Internet speech.

131. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (relying on psychological studies to determine that it is an Eighth Amendment violation for a juvenile to be sentenced to death); Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954) (using psychological research to determine the effects of school segregation on African American children).

132. *See Roper*, 543 U.S. at 569 (determining the culpability of adolescents under eighteen years of age); *Brown*, 347 U.S. at 493–94 (determining impact of segregation on school children).

133. *Brown*, 347 U.S. at 488.

134. *See* Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (relying on *Roper* and psychological research to prohibit life sentences without parole for juveniles convicted of homicides); Graham v. Florida, 560 U.S. 48, 50–51 (2010) (relying on *Roper* and psychological research to prohibit life sentences without parole for juveniles convicted of offenses other than homicide); *Roper*, 543 U.S. at 569 (relying on psychological research to prohibit the death penalty for juveniles).

135. See *infra* Part III.A.3 for a discussion of other instances in which courts have used psychological research to aid their decision making.

1. School Segregation: *Brown*

In 1954, in the midst of a politically charged climate surrounding the rights of African-Americans in the United States, the Supreme Court decided *Brown v. Board of Education*.[136] The main issue in *Brown* was whether the separate but equal doctrine established in 1896 in *Plessy v. Ferguson*[137] still applied in determining the constitutionality of school segregation in the United States in the 1950s.[138] In a unanimous opinion, the Court overturned *Plessy*.[139] In making that determination, the Court relied on psychological and sociological research.[140] The Court determined that school segregation violated the equal protection rights of African-American students.[141] The Court based this conclusion upon its finding that placing African-American children in separate schools generated a feeling of inferiority in those students that would do irreparable injury to them, negatively impacting their educational experience and ultimate opportunities in life.[142]

2. Juvenile Punishments: *Roper*, *Graham*, and *Miller*

In addition to the *Brown* decision, the Supreme Court has more recently relied on psychological research in determining whether juveniles can receive certain criminal punishments. In 2005, the Supreme Court decided the landmark case of *Roper v. Simmons*.[143] The case involved the punishment of Christopher Simmons, who committed murder at age seventeen.[144] Nine months after he turned eighteen, Simmons was tried and sentenced to death.[145] *Roper* held that the Eighth Amendment, as applied to the states through the Fourteenth Amendment, forbids imposition of the death penalty on offenders who were not yet eighteen years old at the time their crimes were committed.[146]

The Court reached this decision through reliance on psychological research.[147] *Roper* distinguished juvenile offenders from adults in three major ways.[148] First, a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and . . . . [t]hese qualities often result in impetuous and ill-

136. 347 U.S. 483 (1954).

137. 163 U.S. 537 (1896).

138. *See Brown*, 347 U.S. at 487–88 (stating that the question to be answered is whether a new standard must replace the *Plessy v. Ferguson* standard in determining whether public schools should be segregated).

139. *Id.* at 494–95.

140. *See id.* ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.").

141. *Id.*

142. *See id.* at 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

143. 543 U.S. 551 (2005).

144. *Roper*, 543 U.S. at 555.

145. *Id.*

146. *Id.* at 607.

147. *Id.* at 569.

148. *See id.* (noting that three general differences between juveniles and adults support the position that juveniles cannot be the worst criminal offenders).

considered actions and decisions."[149] Second, *Roper* noted that psychological research supported a finding that adolescents are more susceptible to negative influence and peer pressure than adults.[150] Finally, the Court found that the character of a juvenile is not as well formed as that of an adult, creating more of a possibility for rehabilitation of the offender.[151] The Court supported these three distinctions using established psychological research.[152] Accordingly, the decision in *Roper* was primarily based on the Supreme Court's interpretation of modern psychological research.[153]

The Court applied similar reasoning in subsequent decisions regarding criminal punishments for juvenile offenders. In 2010, the Court decided *Graham v. Florida*.[154] *Graham* held that juveniles could not be sentenced to life without possibility of parole sentences for nonhomicide offenses.[155] *Graham* partially grounded its decision in the same psychological principles relating to adolescent development discussed in *Roper*.[156] In 2012, the Court yet again used psychological research when it determined that mandatory life without possibility of parole sentences for juvenile homicide offenders were unconstitutional in *Miller v. Alabama*.[157]

3. Other Instances of Psychology in Law: From False Confessions to Same-Sex Marriage

In addition to school segregation and juvenile punishment cases,[158] courts have also relied on psychological research in making their determinations in other areas.[159] The American Psychological Association (APA) has recently filed amicus briefs in

149. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. 560 U.S. 48 (2010).

155. *Graham*, 560 U.S. at 69, 82.

156. *Id.* at 67–68; *see also* Rachael Frumin Eisenberg, Comment, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennsylvania Criminal Court After* Miller v. Alabama, 86 TEMP. L. REV. 215, 225 (2013) ("Relying on the adolescent development and neuroscience principles discussed in the *Roper* decision, the *Graham* court found scientific support for the three foundational distinctions that diminish the culpability of juvenile offenders: (1) immaturity, (2) vulnerability, and (3) changeability.").

157. 132 S. Ct. 2455, 2475 (2012). The Court noted in its opinion that the psychological research relied upon in *Roper* and *Graham* has grown stronger since those opinions. *Miller*, 132 S. Ct. at 2464 n.5; Eisenberg, *supra* note 156, at 227 n.18.

158. See *supra* Parts III.A.1–2 for a discussion of courts' use of psychology in the school segregation and juvenile punishment contexts.

159. *See, e.g.*, Warney v. New York, 947 N.E.2d 639, 646 (N.Y. 2011) (Smith, J., concurring) (looking to the psychological causes of false confessions when granting reparations to a mentally retarded man who was imprisoned after giving a false confession to a crime he did not commit); Marquez v. Superior Court, No. B221965, 2010 WL 1966323, at *1 (Cal. Ct. App. May 18, 2010) (relying on psychological research supporting the necessity of confidentiality in doctor-patient relationships to make decision to squash subpoena for defendant's medical and psychological records from alcohol abuse treatment center); *In re* Marriage Cases, 183 P.3d 384, 402 (Cal. 2008) (noting the psychological harm that treating homosexuals as "second-class citizens" could cause to those individuals when determining that California statutory scheme giving different designations to opposite-sex and same-sex marriages violated equal protection).

cases involving a wide range of legal issues.[160] Some of the issues—affirmative action, child abuse, and sexual orientation—involve the use of psychological research pertaining particularly to adolescents.[161] Courts often cite to the briefs and research provided by the APA.[162] These cases suggest a trend of courts' using psychology in legal analysis outside of the context of school segregation and juvenile punishments. This trend signals an opportunity for courts to use psychology to answer other legal questions, such as what is the proper scope of high school students' First Amendment rights.

B. Responding to Criticisms of Use of Psychology in Law

Despite the increased use of psychology in legal analysis by courts, not everyone agrees that psychological research has a place in making legal determinations.[163] This Part discusses two such criticisms of the use of psychological research in determining questions of law. The first of these criticisms is that the goals of psychological research are fundamentally incompatible with the goals of legal analysis.[164] The second of these criticisms is that psychological research is malleable, and therefore courts and psychologists can manipulate research to compel a desired result.[165] Each of these criticisms can be addressed and dismissed, thus preserving the place of psychological research in the field of law.

The first criticism noted above is that the goals of psychological research and legal analysis are fundamentally inconsistent.[166] As one scholar posits, "Like people from different cultures, lawyers and social scientists may have such different professional values that they simply cannot communicate effectively with each other."[167] Another scholar lists eight distinct differences between the goals of

160. *APA Amicus Briefs by Issue*, AM. PSYCHOL. ASS'N, http://www.apa.org/about/offices/ogc/amicus/index-issues.aspx (last visited Nov. 4, 2014). These areas include abortion, affirmative action, animal research, antitrust, battered women's syndrome, child abuse and child witnesses, child sexual abuse, civil commitment, competency, confidentiality, copyright, criminal defendants' rights to mental health assistance, death penalty, disability rights, duty to warn and protect, employment, environmental impact, ERISA, expert witness competency, eye witness identification research, false confessions, hospital privileges for psychologists, the insanity defense, Medicare, the right to refuse medication, the rights of the mentally ill and retarded, brain injury assessments, peer review, reimbursement for mental health services, residential treatment, scientific research, sexual harassment, sexual orientation, and use of psychological test data. *Id.*

161. *Id.*

162. *See, e.g.*, *In re* Marriage Cases, 183 P.3d at 401–02 (holding that California statutes that limit marriage to opposite-sex couples violate the California state constitution). In reaching this decision, the California Supreme Court cited the APA's amicus brief to explain the definition of "sexual orientation." *Id.* at 441 n.59. On its website, the APA provides descriptions and the full text of each of its recent amicus briefs. *APA Amicus Briefs by Issue*, *supra* note 160. It also provides an overview of the disposition of each case in which it filed an amicus brief, including a description of any reliance the court placed on the APA brief. *Id.*

163. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

164. J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. J. 137, 155 (1990).

165. *Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

166. Tanford, *supra* note 164, at 155.

167. *Id.* at 156.

psychology and the goals of the law in an attempt to show how incompatible the use of one discipline is in the other.[168] However, while these criticisms are correct in identifying the fact that there are certainly differences between psychology and law,[169] they are incorrect in assuming that these differences make the fields fundamentally incompatible.

One compelling solution is the theory that the communication barrier that arises from the differences between the two fields is easily overcome in three ways: (1) through lawyers' increased access to empirical data used by social psychologists, (2) through improvements in the way research is conducted and presented to lawyers, and (3) through training of social scientists in legal theory.[170] Therefore, while there are certainly inherent differences between the fields of psychology and law, these differences are not so extensive as to completely preclude one field's use of the other's research.[171]

Others contend that the use of social psychology by courts is inconsistent, and therefore courts will only rely on social psychology where the results support the decision the court wants to reach.[172] The prime example of this argument occurs in Justice Scalia's dissenting opinion in *Roper*.[173] In his dissent, Justice Scalia notes that the majority relied on psychological research showing that individuals under age eighteen lack the capacity to take responsibility for their decisions.[174] He then notes that the Court relied on conflicting psychological research in another case, involving adolescents' abilities to make medical decisions on their own behalf.[175] Justice Scalia concludes then, considering the limited records presented to courts, that the evaluation of psychological research is better left to legislatures.[176]

While at first blush Justice Scalia's argument seems to signal a resounding defeat for the psychological research relied upon by legal authorities, a closer look at the two bodies of research he mentions demonstrates that they are in fact not directly conflicting.[177] Specifically, the research relied upon by the Court in *Roper* shows that

168. Craig Haney, *Psychology and Legal Change: On the Limits of a Factual Jurisprudence*, 4 LAW & HUM. BEHAV. 147, 159–68 (1980)). The eight differences highlighted by Haney include the following: (1) social science is more innovative than the law; (2) social science's focus is on empirical data rather than precedent, which is the focus of the law; (3) the aims of the two disciplines differ, with social science seeking an objective answer and the law seeking an adversarial favorable determination; (4) social science's nature is descriptive, as opposed to the prescriptive nature of the law; (5) social sciences tend to generalize whereas the law is specific; (6) conclusions of social science are tentative whereas legal conclusions are certain; (7) social science is proactive, and law is reactive; and finally (8) social science is less tangible than the law. *Id.*

169. Tanford, *supra* note 164, at 155.

170. Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1, 23 (2002).

171. *Id.*

172. *See* John C. Brigham, *What Is Forensic Psychology, Anyway?*, 23 LAW & HUM. BEHAV. 273, 281 (1999) (discussing the Court's decision to rely on psychology in *Brown v. Board of Education*).

173. Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

174. *Id.*

175. *Id.*

176. *Id.* at 618.

177. Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. MED. & PHIL. 256, 262–63 (2013).

adolescents are more emotionally aroused when confronted by situations of peer pressure, like violent crimes and Internet speech, but not as emotionally aroused when confronted with less peer-influenced decisions, like medical ones.[178]

As described, in many instances courts have relied on psychological research and studies for insight into how they should decide certain cases.[179] Some of these instances involve adolescents.[180] While the use of psychology in law has been criticized in some legal scholarship, these criticisms are easily outweighed by the clear contributions that psychological research has made to the practice of law.[181] It is essential to understand these historical applications of psychology in making determinations of law in order to understand why it is appropriate to use psychological research to answer legal questions pertaining to students' Internet speech rights.

C. Cognitive and Neurological Psychological Research Supporting Adolescent Immaturity and Impulsivity

One body of psychological research is particularly relevant in determining whether student Internet speech that occurs entirely outside of school should be punishable. This Part discusses this body of research, focusing on two discrete areas: cognitive psychological research and neurological psychological research. Part III.C.1 examines cognitive psychological research suggesting that adolescents' decision-making abilities are inferior to those of adults.[182] Part III.C.2 then analyzes certain neurological research showing that the adolescent brain is not fully developed until later adolescence (typically after students have graduated from high school).[183] Part III.C.3 observes that, because both of these lines of research make observations about adolescent behavior as a general matter, they can be applied in the context of off-campus student Internet speech. This Part further argues that common sense principles indicate that the psychological realities discussed in Parts III.C.1 and 2 are particularly applicable in the student off-campus Internet speech context because of the unique nature of that speech.

1. Cognitive Psychological Research

The Supreme Court has used psychological research and studies for insight into how it should decide certain cases.[184] Accordingly, it would be appropriate to use

178. *Id.*

179. See *supra* Part III.A for a discussion of instances where the Supreme Court relied on psychological research to aid it in its legal decision making.

180. *See Roper*, 543 U.S. at 569 (determining the culpability of adolescents under eighteen years of age); Brown v. Board of Education, 347 U.S. 483, 493–94 (1954) (determining the impact of segregation on school children).

181. See *supra* notes 163–69 and 172–76 and accompanying text for a discussion of criticisms of the use of psychology in law.

182. Steinberg & Scott, *supra* note 10, at 1011.

183. *Id.*

184. *See, e.g.*, *Roper*, 543 U.S. at 569 (relying on psychological studies to determine that it is an Eighth Amendment violation for a juvenile to be sentenced to death); *Brown*, 347 U.S. at 493–94 (using psychological research to determine the effects of school segregation on African American children). *Roper* relied on

similar psychological research to determine another constitutional question: what standard should apply to determine whether school authorities' punishment of off-campus Internet speech constitutes a violation of those students' First Amendment rights. The well-known societal concepts that adolescents are immature and impulsive are supported by findings in the field of cognitive psychology related to decision-making outcomes.[185] This research states that adolescent judgment and decision making may differ from that of adults as a result of psychosocial immaturity.[186] The research examines four factors when determining what influences impact an individual's decision-making process: (1) susceptibility to peer influence, (2) attitudes toward and perception of risk, (3) future orientation, and (4) the capacity for self-management.[187] In contrast to the neurological functions described later, these social factors affect decision-making outcomes, rather than the decision-making process.[188]

The conventional wisdom that teenagers are more responsive to peer influence than adults is also firmly grounded in psychological studies.[189] Psychological studies support the proposition that adolescents have a more short-term view of risk than adults and therefore have a diminished ability to orient themselves toward the future.[190] Risk-reward studies demonstrate that adolescents do not weigh risks as heavily as adults

research that states:

> [A]dolescents' levels of cognitive and psychosocial development are likely to shape their choices, including their criminal choices, in ways that distinguish them from adults and that may undermine competent decision making. Second, because adolescents' decision-making capacities are immature and their autonomy constrained, they are more vulnerable than are adults to the influence of coercive circumstances that mitigate culpability for all persons, such as provocation, duress, or threat. Finally, because adolescents are still in the process of forming their personal identity, their criminal behavior is less likely than that of an adult to reflect bad character. Thus, for each of the sources of mitigation in criminal law, typical adolescents are less culpable than are adults because adolescent criminal conduct is driven by transitory influences that are constitutive of this developmental stage.

Steinberg & Scott, *supra* note 10, at 1011.

185. Steinberg & Scott, *supra* note 10, at 1012.

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.* ("Studies in which adolescents are presented with hypothetical dilemmas in which they are asked to choose between an antisocial course of action suggested by their peers and a prosocial one of their own choosing indicate that susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control, peaks around age 14, and declines slowly during the high school years." (citing Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608, 615 (1979); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986))).

190. *See id.* ("Studies in which individuals are asked to envision themselves or their circumstances in the future find that adults project out their visions over a significantly longer time frame than do adolescents. In addition, in studies in which individuals are queried about their perceptions of the short-term and longer term pros and cons of various sorts of risk taking . . . or asked to give advice to others about risky decisions . . . adolescents tend to discount the future more than adults do and to weigh more heavily short-term consequences of decisions—both risks and benefits—in making choices." (citing Anita Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99, 100 (1986); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 29 (1991))).

when making determinations based on a risk-reward calculus.[191] The widely held stereotype that adolescents are more impulsive than adults is supported by studies showing that impulsivity increases until early adulthood and then begins to decline.[192] Taken as a whole, these cognitive studies suggest that adolescents have a diminished decision-making ability—an assertion that is also supported by neurological research.

2. Neurological Support for Cognitive Research

Adolescence is a developmental period characterized by immaturity, impulsiveness, and increased reward-seeking behavior.[193] Recent neurological studies provide research and explanations that lend support and substance to these observations.[194] In particular, recent studies support the proposition that the human brain's ability to process decisions is not fully developed until the end of adolescence because throughout adolescence major changes are still taking place within the brain.[195] These studies indicate that some major changes in brain activity do not occur until late adolescence, or even until individuals are in their midtwenties.[196]

There are four significant structural changes that occur in the brain during adolescence that contribute to the idea that adolescents are less mature than adults and thus more likely to make impulsive decisions.[197] The first of these structural changes is the decrease in gray matter in the prefrontal cortex that occurs during adolescence.[198]

191. *See id.* ("In general, adolescents use a risk–reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults. When asked to advise peers on making a potentially risky decision, for example (e.g., whether to participate in a study of an experimental drug), adults spontaneously mentioned more potential risks than did adolescents." (citing Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision*: *Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCH. 257 (2001))).

192. *See id.* at 1013 ("Studies using the Experience Sampling Method, in which individuals are paged several times each day and asked to report on their emotions and activities, indicate that adolescents have more rapid and more extreme mood swings (both positive and negative) than adults, which may lead them to act more impulsively." (citing Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. YOUTH & ADOLESCENCE 469, 488 (1980))).

193. Adriana Galvan, *Adolescent Development of the Reward System*, FRONTIERS HUM. NEUROSCIENCE, Feb. 12, 2010, at 1.

194. *Id.*

195. Steinberg & Scott, *supra* note 10, at 1011.

196. B.J. Casey et al., *Braking and Accelerating of the Adolescent Brain*, 21 J. RES. ADOLESCENCE 21, 21–23 (2011). The neurological studies relied upon in this article are based upon noninvasive brain imaging that allows the study of the brain during life. Nitin Gogtay & Paul M. Thompson, *Mapping Gray Matter Development: Implications for Typical Development and Vulnerability to Psychopathology*, 72 BRAIN & COGNITION 6, 6–15(2010).

197. Steinberg, *supra* note 177, at 259.

198. *Id.*; *see also* Gotgay & Thompson, *supra* note 196, at 6–7 (explaining the results of studies indicating a "rapid attrition of frontal lobe gray matter in late adolescence"). The prefrontal cortex or prefrontal lobe is the area of the brain associated with planning complex cognitive behavior, making decisions, and moderating social behavior. Yaling Yang & Adrian Raine, *Prefrontal Structural and Functional Brain Imaging Findings in Antisocial, Violent, and Psychopathic Individuals: A Meta-Analysis*, 174 PSYCHIATRY RES.: NEUROIMAGING 81, 81–82 (2009). Gray matter is a type of neural tissue whose primary purpose is to gather information from the sensory organs and pass that information along to other areas of the brain. *Gray Matter Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/gray%20

The decrease in this type of matter eliminates unused connections between neurons.[199] The elimination of these connections serves to create a more efficient information-processing network.[200]

Second, there are changes in the density and location of dopamine receptors[201] in the brain during adolescence that affect the areas of the brain that process rewards and punishments.[202] These changes tend to show that adolescents are more sensitive to rewards than adults.[203] This increased sensitivity to reward is often cited to explain why adolescents engage in risky behaviors such as fast driving, unprotected sex, or drug experimentation.[204] It has also been suggested that this increased sensitivity to reward is even more prevalent when adolescents are with their friends or peers.[205]

Third, there is an increase in white matter[206] in the prefrontal cortex of the brain that occurs during mid- to late adolescence.[207] This process, which ultimately increases adolescents' ability to weigh risks and plan ahead, continues well into late adolescence and even early adulthood.[208] Thus, adolescents' ability to weigh risks and plan ahead is

matter.

199. This process is also called synaptic pruning, the process by which the brain eliminates neurons and synapses, or the structures that permit neurons to pass chemical or electrical signals to other cells. Steinberg, *supra* note 177, at 259.

200. *Id.*

201. Dopamine receptors are a class of protein-coupled receptors that are used in many neurological processes, including motivation, pleasure, cognition, memory, learning, and fine motor control. Jean-Antoine Girault & Paul Greengard, *The Neurobiology of Dopamine Signaling*, 61 ARCH. NEUROLOGY 641, 641 (2004).

202. Steinberg, *supra* note 177, at 259; *see also* Galvan, *supra* note 193, at 2 ("Available evidence suggests that there are significant alterations in the dopamine system across development, and in particular, during adolescence. Dopamine levels increase in the striatum during adolescence."). In this article, Galvan reviews a variety of neurological tests (including studies conducted on various animals and neurological imaging studies performed on humans) undertaken in order to test hypotheses about adolescent developmental changes in the striatum, which is one of the regions of the brain implicated in reward processing. *See generally* Galvan, *supra* note 193.

203. Steinberg, *supra* note 177, at 260. From her review of the studies, Galvan concludes that it is undisputed that the reward system undergoes massive changes during adolescence and that there is strong support showing that the dopamine system is hyper engaged in response to rewards during the period of adolescence. Galvan, *supra* note 193, at 7.

204. Steinberg, *supra* note 177, at 260.

205. Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, DEVELOPMENTAL SCIENCE, 2011, at F1.

206. White matter is one of the two components of the central nervous system and consists mostly of glial cells and myelinated axons that transmit signals from one region of the cerebrum to another and between the cerebrum and lower brain centers. *White Matter Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/white%20matter.

207. Steinberg, *supra* note 177, at 259–60. This increase occurs as a result of myelination, a process by which nerve circuits are encased in myelin, which is a substance that improves the efficiency of brain circuits. *Id.*

208. *Id.* at 260; *see also* Thomas J. Eluvathingal et al., *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in Normally Developing Children and Adolescents*, 17 CEREBRAL CORTEX 2760, 2760 (2007) ("The protracted development of white matter appears to be related to myelination and is noted up to the third decade in adulthood."); Vincent J. Schmithorst & Weihong Yuan, *White Matter Development During Adolescence as Shown by Diffusion MRI*, 72 BRAIN & COGNITION 16, 24 (2010) (concluding that imaging research "shows clearly that development of brain white matter architecture

typically not fully developed while they are in high school.

Finally, there is an increase in the speed of the connections between the prefrontal cortex and the limbic system[209] during adolescence.[210] As the prefrontal cortex and the limbic system both involve the functions of the brain related to emotion regulation, an increase in the efficiency between these two areas increases one's ability to regulate his or her own emotions.[211] Put another way, an increased efficiency here equates to an increased ability to self-control.[212] Again, the timing of this brain development suggests that a typical adolescent's ability to self-control or regulate his or her own emotions is not yet fully developed while he or she is in high school. Each of these four changes (decrease in gray matter in the prefrontal cortex; changes in the density and location of dopamine receptors; increase in white matter in the prefrontal cortex; and increase in speed of connections between prefrontal cortex and limbic system) demonstrates that the adolescent brain's decision-making ability is not yet fully developed when students are in high school.

D. Applicability of Psychology in the Internet World

These two lines of research—cognitive psychological studies and the neurological support for those studies—make observations about adolescent behavior as a general matter. Accordingly, their findings can be applied to adolescent behavior in many contexts. It therefore follows that their findings are relevant to the debate surrounding regulation of students' off-campus student Internet speech. Further, principles of common sense indicate that the psychological realities discussed in Parts III.C.1 and 2 are *particularly* applicable in the student off-campus Internet speech context because of the unique nature of that speech.

Speech on the Internet is different from typical speech in two ways. First, the Internet requires little to no face-to-face communication between individual speakers and their listeners.[213] Put another way, the Internet has removed the need for human interaction from communications among individuals.[214] Common sense dictates that

continues during adolescence, [and] that this is related to cognitive ability").

209. The limbic system is the set of brain structures that supports various functions of the brain, including emotion, behavior, and motivation. *Limbic System Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/limbic%20system.

210. Eluvathingal et al., *supra* note 208, at 2760.

211. *Id.*

212. *Id.*

213. *See* Reno v. ACLU, 521 U.S. 844, 851 (1996) (noting that most Internet communication takes place in text format).

214. *Id.* This type of communication is unique among other forms of communication in that it allows individuals to communicate instantaneously with one another without having to ever interact on a human or interpersonal level. Further, email communication is different from a traditional letter in that it is instantaneous and different from a traditional conversation or even phone call in that there is no face-to-face communication between users, thus creating a certain sense of anonymity even when a user's "name" is attached to a document. Imagine, for instance, the relative ease of explaining a particularly offensive email by saying that another individual accessed your account. It would be much more difficult to explain away a similar comment made either via phone call or letter where the personalized touches of one's voice or handwriting reveal or more heavily suggest the identity of the speaker to the listener.

this lack of interaction—the absence of another human being's presence while the communication takes place—results in more impulsive communication via the Internet. Second, Internet speech differs from other forms of traditional speech because Internet speech can take place instantaneously. Whereas a letter requires several additional steps beyond the writing of the letter itself—placing the letter in an envelope, addressing it, buying a stamp, and actually mailing the letter—Internet communication can be disseminated with only the click of a finger. Email etiquette guides support these distinctions, as many such etiquette guides instruct readers to think before they click.[215] Accordingly, psychological research suggesting that adolescents have a diminished ability to control their impulses and are susceptible to peer influence clearly has a place in the discussion of high school Internet speech.

IV. THE NEED FOR A NEW STANDARD FOR OFF-CAMPUS INTERNET SPEECH

The *Tinker* "substantially disrupts" standard is an interest-balancing inquiry.[216] The *Tinker* test seeks to strike a balance between the rights of students to freedom of expression and the rights of schools to exercise authority and control over the classroom.[217] However, the current tests for school speech focus on either (1) the character of the speech, [218] or (2) the amount of disruption the speech has on the classroom.[219] These inquiries certainly focus on the interests of the school: limiting speech that is either inappropriate in character or disruptive.[220] However, the inquiries fail to fairly represent the interests of students, namely their right to freedom of expression.[221] Accordingly, lower courts' recent uses of the *Tinker* standard have yielded unsatisfactory and inconsistent results.[222]

In response to these unsatisfactory results, scholars have suggested alternative versions of the *Tinker* inquiry that seek to more fairly represent students.[223] This

215. *See, e.g.*, *Email Etiquette: Minding Your Electronic Manners*, MIZZOU WEEKLY (Sept. 12, 2013), http://mizzouweekly.missouri.edu/archive/2013/35-4/email/index.php ("Simmer down before you shoot off an email. If you sense yourself getting emotional while drafting an email, don't send it. Save the draft and read it again after you have had a chance to calm down.").

216. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 511 (1969).

217. *Id.*

218. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678, 685 (1986) (providing a separate standard for speech that is lewd or obscene).

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

220. *See Fraser*, 478 U.S. at 678 (providing a separate standard for speech that is lewd or obscene); *Tinker*, 393 U.S. at 509 (creating an inquiry that focuses on whether speech substantially disrupts a school).

221. See *supra* Part II.A for a discussion of the robust constitutional and judicial protection that has been granted to the right to free speech and expression.

222. *Compare* Doninger v. Niehoff, 527 F.3d 41, 44, 49 (2d Cir. 2008) (holding that it was constitutional for school to punish a student who posted from her home computer and encouraged others to complain about administrators' failure to allow school to host a "battle-of-the-bands" concert), *with* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216, 219 (3d Cir. 2011) (holding that it was *not* constitutional for school to punish a student who created a parody profile of principal from his home computer that led to several other imitation parody profiles).

223. *See, e.g.*, Markey, *supra* note 81, at 129 (suggesting an intent-based test in lieu of the current *Tinker* standard).

Section evaluates two of these suggestions: (1) intent-based tests[224] and (2) nexus tests that include an intent element.[225] Each of these tests improves upon the *Tinker* standard because each involves the intent of the speaker, which is a more appropriate starting point for determining the value underlying the student's speech.[226] However, each test is incomplete in that it fails to account for the psychological realities surrounding student speech that provide insight into each student's intent while making Internet speech.[227]

A. Intent and Nexus Tests: One Step Closer to the Right Result

Scholars have recognized that applying the *Tinker* standard to Internet speech yields unsatisfactory results.[228] Thus, scholars have suggested various alternative tests that seek to compel more equitable results.[229] Two such suggestions are intent-based tests and nexus tests.[230] Different variations of these tests embrace the idea that whether a particular student intended for his speech to reach campus must be considered when determining if a school can constitutionally regulate student Internet speech. These tests compel a fairer result than the current *Tinker* standard because they give a more appropriate weight to the interests of the student when making this constitutional determination.

224. *See id.* (arguing for a test that creates a rebuttable presumption that student Internet speech is off campus unless the speaker intentionally or recklessly caused the speech to reach campus).

225. *See, e.g.*, Tracy L. Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1108 (2008) (suggesting a multifactor test based upon the test for regulation of government employee speech).

226. The First Amendment rights of students should be the starting point of this inquiry because the right to freedom of expression is a historically revered and fiercely protected right in the United States, as evidenced by its explicit mention in the Bill of Rights of the Constitution and the stalwart protection it receives from courts. *See, e.g.*, U.S. CONST. amend. I; Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." (citing Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring))). *Tinker* itself recognizes the free speech rights of students by acknowledging that student speech can only be regulated in limited circumstances, defined by the Court as when the speech has the effect of substantially disrupting the school environment. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 509 (1969). See also *supra* Part II.A for a discussion of the historical protection of the right to free speech.

227. See *supra* Part III.C for a discussion of the cognitive and neurological psychological research that suggests that adolescents' capacity to weigh long-term consequences and make appropriate decisions is not as fully developed as adults'.

228. *See* Markey, *supra* note 81, at 155 (noting that the current standard has the effect of chilling student speech).

229. *See, e.g.*, Adamovich, *supra* note 225, at 1108 (suggesting a multifactor test based upon the test for regulation of government employee speech); Markey, *supra* note 81, at 132 (suggesting an intent-based test in lieu of the current *Tinker* standard).

230. Adamovich, *supra* note 225, at 1108; Markey, *supra* note 81, at 150.

1. Where Is the Student Coming From? The Intent of the Speaker

While most suggested alternative tests for evaluating the constitutionality of student Internet speech incorporate the intent of the speaker in some capacity, certain scholars have proposed tests that hinge exclusively on this factor.[231] Different versions of intent tests rely on different factors in determining intent.[232] These tests can be grouped into two categories: subjective-intent tests and objective-intent tests.[233] Both types of intent tests suggest changes that would improve upon the current approach of lower courts of trying to fit student Internet speech cases within the confines of the *Tinker* inquiry.[234]

Subjective-intent tests focus on a particular court's subjective interpretation of whether the student in question intended for his speech to reach campus. One example of such a subjective intent test proposes a rule that creates a rebuttable presumption, subject to certain limitations, that student Internet speech is off campus and therefore not subject to school regulation.[235] The test then proposes that school authorities may only restrict this type of off-campus speech if the speaker intentionally or recklessly caused the speech to reach campus.[236] This type of subjective test differs from the typical *Tinker* inquiry currently employed by lower courts.[237] This test is an improvement upon the current practice of lower courts because its inquiry more fairly considers the rights of students.[238] Encouraging free speech and limiting the chilling effect that regulation may have on speech both serve to promote the fundamental goals

231. *See* Markey, *supra* note 81, at 150 (proposing a standard that creates a rebuttable presumption that Internet speech is off campus unless the speaker intentionally or recklessly causes it to reach campus); Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 177 (2003) (proposing a standard that would treat all Internet speech as off campus unless the speaker objectively manifested intent for the speech to reach campus).

232. *Compare* Markey, *supra* note 81, at 150 (relying on a subjective determination of a student speaker's intent), *with* Tuneski, *supra* note 231, at 177 (detailing a list of objective indicators to be evaluated when determining intent).

233. *See* Markey, *supra* note 81, at 150 (relying on a subjective determination of a student speaker's intent), *with* Tuneski, *supra* note 231, at 177 (detailing a list of objective indicators to be evaluated when determining intent).

234. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (affirming a district court holding that student's speech could not be punished because the school district did not establish a sufficient nexus between the speech and substantial disruption of the school environment).

235. *See* Markey, *supra* note 81, at 150 (noting that Internet speech should be treated as presumptively off campus so long as the speech is (1) created independent of school activities and resources, and (2) is not a true threat).

236. *Id.* The author then defines intentional speech as speech where the student either purposefully distributes or knows with substantial certainty that the speech will be distributed within the schoolhouse gates. *Id.* The author defines reckless distribution as production of speech by a student while conscious of the risk that the Internet speech will be produced on campus. *Id.*

237. The central focus of the *Tinker* inquiry is whether the speech had the effect of substantially disrupting the school environment, without any stated consideration of the underlying value of the expression in question. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 509 (1969).

238. *See* Markey, *supra* note 81, at 155 (noting the value of student expression by stating its hesitance to risk the possibility of school officials regulating speech based on its content in an effort to suppress controversy in a way that could potentially chill future student expression).

of the First Amendment.[239]

Another type of intent test is an objective-intent test. Objective-intent tests differ from subjective-intent tests because they rely on observable instances of student conduct to determine a particular student's intent. One example of an objective-intent test proposes a bright-line rule that treats Internet speech as off campus unless the speaker took some action to manifest intent for the speech to reach campus.[240] This objective test proposes a rule that suggests that Internet speech is off campus unless its speaker proactively took steps to ensure that the speech was read or disseminated on school grounds.[241] Under this test, if Internet speech is determined to be off campus, it is granted full First Amendment protection and is therefore not subject to the *Tinker* substantial disruption test.[242] This test suggests that a bright-line rule is necessary to ensure that both schools and students have guidance as to under what circumstances student Internet speech may be constitutionally regulated.[243]

This suggested test is also an improvement upon the current standard because, like the subjective test previously mentioned, it more evenly distributes the balance between the rights of schools and the rights of students.[244] However, unlike the subjective test, this test also provides clear guidelines for schools and courts to use when determining whether a particular student has manifested intent for the speech to reach campus.

2. More Than Just Intent: Nexus Tests

Other scholars have attempted to resolve the student Internet speech dilemma by suggesting alternatives to the *Tinker* test that consider not only the intent of the speaker but also a whole host of additional factors.[245] One example of such a test uses the standard for government employee speech as a proxy.[246] This test is specifically geared toward situations where off-campus Internet speech is brought to campus by a third

239. Markey, *supra* note 81, at 155; *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the importance of the First Amendment and its role in promoting the free exchange of ideas in society). See also *supra* Part II.A for a discussion of the goals of the First Amendment.

240. *See* Tuneski, *supra* note 231, at 142 (arguing for a bright-line rule declaring that off-campus expression is immune from punishment unless a speaker took additional steps to ensure that the message was accessed on campus).

241. *Id.* at 177.

242. *Id.* at 158.

243. *Id.* The test lists a series of actual examples that would constitute proactive steps by a student that would indicate a student's intent for speech to reach campus. *Id.* at 178. These factors include, "opening a web page at school, telling others to view the site from school, distributing a newspaper as students enter school, and sending e-mail to school accounts. Merely posting a web page or comments online would be a passive act that would be insufficient to make the expression fit into the category of on-campus speech." *Id.*

244. *See id.* (proposing a test that considers not only the school's interest in monitoring speech of a certain character or speech that is substantially disruptive but also looks to the intent of the speaker to determine whether regulation of speech is constitutional). See also *supra* note 226 for a discussion of the merits of protecting student freedom of expression.

245. *See, e.g.*, Adamovich, *supra* note 225, at 1095 (suggesting a multifactor test that applies to situations where a third party brings the speech to campus).

246. *Id.* at 1102–04.

party.[247] The test proposes that the determination of whether student Internet speech can be regulated should depend on four factors.[248] These factors include (1) the intent of the speaker for the speech to reach campus, (2) the number of listeners to the speech, (3) the nexus between the student speech and the operations of the school, and (4) the level of disruption that the speech inflicts upon the school's operations.[249] This multifactor test is an improvement upon the current *Tinker* standard because on its face, it more fairly represents the interests of both student speakers and schools.[250] Further, this type of multifactor test is attractive because it is similar to the approach that courts are currently employing on a case-by-case basis when determining off-campus Internet speech cases.[251]

Another proposed test uses the minimum contacts standard used to determine whether a state can exercise personal jurisdiction over a defendant as its proxy.[252] The proponent of this test argues that when examining off-campus Internet speech, courts should, by analogy to the rules of personal jurisdiction, consider the threshold question of whether a school's exercise of authority over certain speech is supported by a student's having minimum contacts with the school environment.[253] The proponent of this test breaks student Internet speech into four categories[254] and suggests an individualized rule for each of these four types.[255] The test also suggests imposing an additional requirement: that regulation of the speech must not offend notions of "fair play and substantial justice."[256]

This minimum contacts test also improves upon the current *Tinker* standard because it seeks to protect the rights of students in two ways: first, by incorporating a student's intent into the inquiry of whether a student established minimum contacts with the school; and secondly, by adding the addition fairness layer to the test to ensure

247. *Id.* at 1107.

248. *Id.* at 1108.

249. *Id.*

250. Of the four factors listed in Adamovich's approach, the first (intent of the speaker) represents the student's interest in the speech, the second and fourth (number of listeners and disruption of school) represent the interests of the school, and the third (nexus between speech and school) represents both the interests of the student and the school. *Id.* at 1095.

251. *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (considering a number of factors, including in-school access and location where the website was created, when holding that student's speech could not be punished because the school district did not establish a sufficient nexus between the speech and substantial disruption of the school environment).

252. *See* Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1231 (2008) (suggesting a multifactor test based upon the minimum contacts analysis used by courts to determine the constitutionality of a court's exercise of personal jurisdiction over a defendant).

253. *Id.*

254. *Id.* at 1234–39. These four categories include the following: (1) on-campus Internet speech, (2) off-campus Internet speech brought to school by the speaker, (3) off-campus speech brought to school by third parties, and (4) off-campus speech that foreseeably could have been brought to the school environment. *Id.*

255. *Id.*

256. *See id.* at 1240 (noting that this determination is made via a balancing inquiry between the rights of the students and the schools).

student protection.[257] The second layer of the test is particularly helpful when protecting the free speech rights of students because it provides courts with a discretionary power, but a discretionary power that can only be invoked to further protect, rather than punish, student speech.[258]

B. Stopping Short of the Finish Line: Shortcomings of Intent and Nexus Tests

Each of the aforementioned tests suggests improvements upon the *Tinker* standard because each compels courts to analyze the intent of the student speaker in some capacity.[259] Intent is a more appropriate starting point for determining the value underlying the student's speech.[260] However, each test fails to provide a complete solution to the problem posed by off-campus Internet speech because each test fails to reflect the psychological realities surrounding student speech that provide insight into each student's intent while making Internet speech.[261]

1. Intent Test Shortcomings

The two intent tests previously discussed in this Comment are an incomplete response to the question of student Internet speech because both fail to account for psychological research when determining students' state of mind. The subjective intent test allows schools to regulate speech where a student intentionally or recklessly allows the speech to be distributed on campus.[262] The definition of intent includes instances where a student "knows to a substantial certainty that the student's actions will cause the speech to be distributed inside the schoolhouse gates."[263] The definition of recklessness proposed in this test includes instances where a student chooses to distribute speech while he or she is "conscious of the risk that the Internet speech will be distributed on-campus."[264] A natural reading of both of these definitions necessarily involves a court making a determination of a student's knowledge of the risks and consequences of his Internet speech. However, psychological research suggests that adolescents have a diminished capability for determining the long-term consequences of their actions.[265] Therefore, in order to be accurate and equitable, a test that hinges on a judge's assessment of a particular student's knowledge of risks and consequences

257. *Id.* at 1234–40.

258. Because the second layer of the test can only be invoked after a student is determined to have established minimum contacts with the school, it cannot be used by judges to allow regulation where minimum contacts have not already been established. *Id.* at 1240.

259. See *supra* Part IV.A for a discussion of suggested alternatives to the *Tinker* standard.

260. See *supra* note 226 and accompanying text for a discussion of why students' interests should be at the center of the interest-balancing inquiry.

261. See *supra* Part III.C for a discussion of the cognitive and neurological psychological research that suggests that adolescents' capacity to weigh long-term consequences and make appropriate decisions is not as fully developed as adults'.

262. See Markey, *supra* note 81, at 150, for a discussion of the author's definitions of intent and recklessness.

263. *Id.*

264. *Id.*

265. See *supra* Part III.C for a discussion of the cognitive and neurological research that supports the assertion that high school students do not have fully developed decision-making abilities.

must incorporate this research into its parameters.

The objective intent test has some distinct differences from the subjective intent test, namely its reliance on clear, identifiable factors in determining intent.[266] However, in focusing on a limited set of objective manifestations, this test also inappropriately limits the amount and type of evidence that a court can consider when determining intent.[267] When adults such as a judge or a school administrator evaluate student intent, objective manifestations such as viewing a website at school or sending an email to student accounts may indicate that a student intended for certain speech to reach campus.[268]

Incorporating psychological research related to adolescent decision making into this test would compel better results. When one considers the fact that the decision-making capability of the average high school brain is inferior to that of an adult, the objective manifestations noted in the objective test may take on a different meaning. This objective test becomes less objective, as the actions could manifest very different intentions of a particular student, depending on the circumstances of the speech made by that individual student and her decision-making ability. Thus, while a test based upon objective intent does provide a more clear-cut approach to resolving issues of student Internet speech, it ultimately retains the same risk of compelling the incorrect result as both a subjective test and the *Tinker* standard.[269]

2. Nexus Test Shortcomings

While both nexus tests employ a different approach than intent-based tests, because they incorporate a variety of factors,[270] these tests are also insufficient to fully address whether schools can constitutionally regulate student Internet speech. In discussing the Adamovich multifactor test, it can first be noted that the test is flawed because it is based upon the test for government employee speech, which is fundamentally different from student off-campus Internet speech.[271] Establishing a connection between the two contexts based solely on the similarities between the interests of a school and of the government represents another instance in which an inquiry focuses solely on the administrator's interests and fails to account for the interests of the speaker.[272] The individual factors considered by the multifactor test are

266. Tuneski, *supra* note 231, at 178.

267. *See id.* (limiting a court's determinations of a student speaker's intent to objective manifestations of intent).

268. Markey, *supra* note 81, at 150.

269. See *supra* notes 262–65 for a discussion of the shortcomings of subjective intent tests, including their failure to incorporate psychological research into the proposed standard of review.

270. See *supra* Part IV.A.2 for a discussion of multifactor nexus tests.

271. Government employees are typically adults. This age difference is a key distinction between their speech and the speech of high school students, who have a diminished ability to weigh long-term consequences in evaluating the ramifications of their actions. The proponent of the test argues that the contexts of the speech are sufficiently similar because a school's need to maintain order resembles the government's need to maintain discipline. See Adamovich, *supra* note 225, at 1103–04, for this argument. While that contention may hold some truth, it is insufficient to justify the comparison.

272. *See id.* (failing to establish how the interests of a student in making Internet speech are sufficiently related to the interests of the government employee in speaking).

also insufficient to appropriately address the issue of student Internet speech.[273] In particular, while the test does consider the intent of the speaker, the failure to incorporate psychological research into this determination remains a fundamental criticism of the test.[274]

The minimum contacts test addresses many of the problems noted with the previous tests, particularly through its inherent check on courts' authority through the substantial fairness component of its inquiry.[275] However, in using intent in each of its four individual tests, the minimum contacts test also fails to account for psychological research related to adolescent immaturity. Therefore, the minimum contacts test also fails to provide a complete answer to the question posed by off-campus Internet speech. However, its identification of the substantial fairness prong presents a potential opportunity for a place for courts to incorporate psychological research.

C. Tying It All Together: A New Approach to Student Off-Campus Internet Speech

When determining whether a school can constitutionally regulate student speech, courts should employ an interest-balancing inquiry, like the one suggested in *Tinker*, that weighs the First Amendment rights of students against the need of the schools to control the classroom.[276] However, the focus, and therefore the starting point, for this inquiry should be the First Amendment right of students to freedom of expression.[277] Students' First Amendment rights should be the focus of the inquiry because the right to free expression is an inalienable, fundamental right of any United States citizen, as evidenced by its enumeration in the United States Constitution and the stalwart protection granted to it by courts.[278] Therefore, scholars who have proposed tests that use the intent of the student speaker as a primary factor in determining the constitutionality of a school's regulation of student speech are more properly structuring their tests than the current *Tinker* standard.[279]

273. For example, the use of number of listeners as a factor provides an opportunity for unclear and inconsistent results. For Internet speech, the number of listeners may be difficult to monitor and subject to frequent change. Further, the test does not specify a concrete number of listeners that is sufficient to justify regulation of the student's off-campus Internet speech.

274. See *supra* notes 262–65 for a discussion of the shortcomings of subjective intent tests. See *supra* notes 266–68 for a similar discussion of the shortcomings of objective intent tests.

275. See *supra* note 256 and accompanying text for a discussion of this aspect of the minimum contacts test.

276. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 509 (1969).

277. See *supra* note 226 and accompanying text for an explanation of why students' interests should be prioritized over schools' interests in this inquiry.

278. See *supra* Part II.A for an explanation of the historical importance of the First Amendment. It is important to note the fundamental protection given to this right when compared to the right of schools to control students, which is not expressed anywhere in the Constitution and is recognized by the courts only to the extent that it does not conflict with students' free speech rights. *See Tinker*, 393 U.S. at 506 (declaring that First Amendment rights to freedom of speech and expression are not shed by students and teachers at the schoolhouse gate).

279. See *supra* Part IV.A for a discussion of intent-based and nexus tests that use the intent of the student speaker as a primary factor in determining the constitutionality of schools' regulation of speech.

However, while these tests are properly structured, they are also incomplete.[280] Both cognitive and neurological research suggest that high school students have a limited capacity for weighing risks and rewards and making appropriate decisions under stressful or peer-influenced situations.[281] These psychological realities, combined with the unique communication forum provided by the Internet, make high school students particularly susceptible to making impulsive or frivolous statements on the Internet.[282] Therefore, in order to be a completely accurate standard, courts should follow the lead of the Supreme Court in other areas of the law involving adolescents[283] and incorporate psychological research into their legal analysis in determining the constitutionality of school regulation of student Internet speech.

In order to alter the inquiry to account for these psychological realities, courts can make two changes to their current practices. First, courts should switch from the current *Tinker* inquiry to a test that incorporates the intent of the speaker as a primary element in determining whether student Internet speech should be considered on campus and therefore subject to school sanctions.[284] This intent test should then view the intent of the speaker through the lens of psychological research, and courts should recognize that student Internet speech is often impulsive, frivolous, and irrational when conducting their determinations of a student's intent.[285] Therefore, courts should conduct their inquiries from a standpoint presuming that students do not intend Internet speech to reach campus because students rarely consider the consequences of their Internet speech beyond its initial dissemination.

Second, courts should prescribe limits to the punishments a student can receive for Internet speech determined to be on campus.[286] This proposed mandate would prohibit schools from either permanently expelling or temporarily suspending students from schools because of Internet speech. In lieu of suspension or expulsion, schools should be required to focus punishments on Internet-use education. Implementing these two changes would compel more accurate results, allowing schools to punish student Internet speech only when a speaker truly intended for it to reach campus and cause a disruption.

280. See *supra* Part IV.B for a discussion of the shortcomings of these intent-based and nexus tests.

281. See *supra* Part III.C for a discussion of the psychological research supporting this contention.

282. See *supra* Part III.D for a discussion of the unique opportunities for impulsive decision making that the Internet creates for high school students.

283. See *supra* Part III.A for a discussion of courts' use of psychology in other areas of the law.

284. See *supra* Part IV.A.1 for a discussion of the benefits of incorporating the intent of the speaker into courts' analyses of the constitutionality of regulating student off-campus Internet speech.

285. See *supra* Part III.C for a discussion of the psychological research supporting this contention.

286. The idea of limiting the types of punishments students can receive has its basis in the Supreme Court's limitation of certain criminal punishments for juveniles. See *supra* Part III.A.2 for a discussion of Supreme Court cases prescribing these limitations. It is important to note that this suggested restriction would not apply to the already carved-out exceptions to the *Tinker* inquiry, such as obscenity, school sponsorship, and true threats. See *supra* Part II.B.2 for a discussion of these exceptions.

V. CONCLUSION

The *Tinker* substantially disrupts standard is an interest-balancing inquiry. The *Tinker* test purports to balance the rights of students to freedom of expression and the rights of schools to maintain control over both students and the classroom. However, because current tests for school speech focus on either (1) the character of the speech or (2) the amount of disruption the speech has on the classroom, they fail to fairly represent the interests of students—namely their right to freedom of expression. Therefore, this test must be altered to more fairly represent the interests of students—by incorporating an element that reflects the psychological realities related to adolescent student Internet speech.