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THE NEED FOR A NEW, UNIFORM STANDARD: THE CONTINUED THREAT TO INTERNET- RELATED STUDENT SPEECH

I. INTRODUCTION

The tragic events of September 11, 2001,¹ the massacre at Columbine High School,² the bombings in London,³ and the current war in Iraq all have one thing in common: they all involve acts of horrific violence. As a result of these events, one cannot help but conclude that the world today presents many grave dangers. The tragedy at Columbine High School created perpetual fear amongst educators and students that another unsuspected, horrific event like Columbine could happen again.⁴ Exacerbating this fear are statistics that indicate, for example, that every year about “85,000 Americans are wounded by firearms ‘with teens representing a disproportionate[] . . . number of the perpetrators and victims.’”⁵ Furthermore, in 2002, 659,000 violent crimes including rape, sexual assault, robbery, aggravated assault, and simple assault involved student-victims and occurred while on school property.⁶ Also, in 2003, thirty-three percent of students in grades nine through twelve reported

1. See Shawn Boyne, *Law, Terrorism, and Social Movements: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation*, 12 CARDOZO J. INT'L & COMP. L. 41, 75–76 (2004) (stating that members of the al Qaeda terrorist group bombed the twin towers of the World Trade Center and attacked the Pentagon).

2. See Jerome H. Ehrlich, *Columbine-Type Threats Raise Safety and Discipline Issues*, 229 N.Y.L.J. 16, 16 (2003) (explaining that on April 20, 1999, two students killed their fellow classmates and teachers at Columbine High School).

3. *3rd Roundup: Scotland Yard Catches Chief Terror Suspect*, DEUTSCHE PRESSE-AGENTUR, July 27, 2005 (stating that fifty-six people died and seven hundred people were injured on July 7, 2005 when London's public transport system was bombed); see also *7 July 2005 Bombings*, WIKIPEDIA THE FREE ENCYCLOPEDIA, available at http://en.wikipedia.org/wiki/7_July_2005_London_bombings.

4. Ehrlich, *supra* note 2, at 16.

5. Preston M. Browning, Jr., *Struggling for the Soul of One's Country: American Pathologies and the Response of Faith*, CROSS CURRENTS, Jan. 1, 2005, at 80.

6. J.F. DEVOE ET. AL., U.S. DEP'TS OF EDUCATION AND JUSTICE, INDICATORS OF SCHOOL CRIME SAFETY: 2004 10 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iscs04ind.pdf>.

being in a fight either on or off campus.⁷ In addition, from 1993 to 2003, about seven to nine percent of students reported being threatened or injured with a weapon, such as a gun or knife, while on school property.⁸ Children's constant exposure to violent images on television, video games, and movies is another cause for concern.⁹

Helping to perpetuate this fear of violence amongst children, courts have ruled in favor of schools in cases where students allegedly threatened to commit violent acts against school administrators, teachers, and students.¹⁰ This Comment will focus on Internet-related student speech cases.¹¹ The primary issue addressed in Internet-related student speech cases is whether the school violated the student's First Amendment¹² rights when it disciplined the student for posting allegedly vulgar, violent, or lewd material on the Internet unrelated to any school-sponsored activity or event.¹³ Many of these cases cited the Columbine tragedy to support the proposition that schools must be given greater authority to effectively minimize violent student behavior.¹⁴ However, the problem with the holdings of Internet-related student speech cases is that they address a misplaced fear. Although American society is violent, tragic events like Columbine and September 11th are infrequent.¹⁵

Presently, there is a risk that students' First Amendment rights will be infringed¹⁶ because courts are placing too much emphasis on the

7. *Id.* at 18.

8. *Id.* at 16.

9. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 44 (Richard Delgado & Jean Stefancic eds., 2003).

10. Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1091 (2003) [hereinafter Richards & Calvert].

11. The phrases, "Internet-related student speech cases" or "Internet-related student speech" refer to only those cases involving student speech and the Internet, and do not involve school-sponsorship of the student's website or the student's Internet-related activity.

12. U.S. CONST. amend. I.

13. See discussion *infra* Part III. (discussing the various Internet-related student speech cases).

14. See discussion *infra* Part IV.B.

15. Richards & Calvert, *supra* note 10, at 1110; see also Theresa Walker, *The 'Found' Generation*, ORANGE COUNTY REGISTER, Jan. 5, 2004, at Life, etc. 1 (stating that since the 1970s the overall rate of violent youth crime has actually declined in Orange County); see also DEVOE, *supra* note 6, at 1 (stating that between July 1, 1999 through June 30, 2000, "there were thirty-two school-associated violent [student] deaths in the United States.").

16. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 528 (2000) (stating that since *Tinker v. Des Moines Independent Community School District* was decided, schools have won practically every constitutional claim involving students' rights to free speech); See *id.* at 529 ("There simply are hardly any Supreme Court cases in the past thirty years protecting students'

Columbine tragedy without considering the well-known adage, “kids will be kids.” Additionally, there have been conflicting standards among the lower courts¹⁷ because the United States Supreme Court has not revisited the issue of student speech rights, let alone Internet-related student speech rights, since 1988.¹⁸ Due to these conflicting standards, there is a lack of uniformity amongst the decisions rendered by the lower courts. Whereas one court might hold that a student’s Internet-related speech should be restricted, another court, looking at the same set of facts but using a different standard, might decide that the same student’s Internet speech should be protected.¹⁹ As a result, schools and students have very little guidance when trying to determine what type of speech is protected. Courts must ensure that Internet-related student speech will receive some form of protection, because the Internet is a unique medium, offering anonymity and allowing people to easily exchange ideas at the click of a button.²⁰

This Comment argues that a new standard is needed for Internet-related student speech cases that do not involve any school-sponsorship of the Internet-related activity. Part II gives background on the U.S. Supreme Court’s evolving standards regarding student speech. Part III discusses several recent state and federal cases that apply the U.S. Supreme Court’s standards regarding student speech. Part IV argues that a separate, uniform standard is needed for Internet-related student speech cases. Part V presents the new standard for Internet-related student speech cases. Part VI applies this new standard to the Internet-related student speech case, *J.S. v. Bethlehem Area School District* (“*J.S. II*”).²¹ Part VII concludes that the U.S. Supreme Court must set a new standard for Internet-related student speech cases because both the lower courts and the public need guidance in this area of law.

II. HISTORICAL DEVELOPMENT OF STANDARDS REGARDING STUDENT SPEECH

Three landmark U.S. Supreme Court decisions that articulate the

constitutional rights.”).

17. See discussion *infra* Part IV.A.

18. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

19. Chemerinsky, *supra* note 16, at 542 (stating that lower federal courts have not followed a consistent pattern regarding student speech—some have been protective of student speech while others have been restrictive of student speech); see also *id.* at 543 (pointing out that circuits have decided cases differently from each other even though these cases involve nearly identical facts).

20. See discussion *infra* Part IV.E.

21. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) [hereinafter *J.S. II*].

standards regarding student speech must be discussed in order to understand why a new standard is needed for Internet-related student speech: *Tinker v. Des Moines Independent Community School District*,²² *Bethel School District No. 403 v. Fraser*,²³ and *Hazelwood School District v. Kuhlmeier*.²⁴

A. The Tinker Standard

*Tinker v. Des Moines Independent Community School District*²⁵ is a pivotal 1969 U.S. Supreme Court decision regarding student speech. Three students, John F. Tinker, Christopher Eckhardt, and Mary Beth Tinker decided to publicize their objections to the Vietnam War by wearing black armbands to school.²⁶ The school, forewarned of the students' plan, instituted a policy, which stated that a student who wore "an armband to school would be asked to remove it."²⁷ If the student refused, then the student would be suspended until the student returned to school without wearing the armband.²⁸ These three students wore the black armbands at school and were subsequently suspended.²⁹ After the suspension, the students sued the school district.³⁰

Faced with the issue of whether the school's disciplinary actions violated the students' First Amendment speech rights, the *Tinker* Court ruled in favor of the students, stating that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."³¹ Finding that this symbolic speech did not interfere with the school's work or interfere with the rights of other students to be left alone,³² the Court formulated what is now known as the "substantial disruption test."³³ The "substantial disruption

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

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

24. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

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

26. *Id.* at 504.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506; *id.* at 505-06 (classifying the speech as "pure speech," thereby entitling it to full protection under the First Amendment).

32. *Id.* at 508. *Contra id.* at 518 (Blackmun, J., dissenting) ("Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker 'self-conscious' in attending school with his armband.").

33. *Id.* at 513; Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student*

test” states that the First Amendment does not protect speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”³⁴ Furthermore, “undifferentiated fear . . . of [a] disturbance is not enough to overcome the right to freedom of expression.”³⁵

Another limitation that the *Tinker* Court placed on the authority of schools to prohibit speech was that schools had to show that their actions were prompted by more than a mere desire to avoid unpopular viewpoints.³⁶ As a result of applying these limitations and the “substantial disruption test,” the Court held that wearing the armbands would not substantially interfere with the functioning of the school nor interfere with students’ rights.³⁷

The *Tinker* Court emphasized the importance of students’ rights to free speech.³⁸ Although the Court recognized that the school’s urgency in banning the wearing of armbands was based on a wish to avoid the Vietnam War controversy—a controversy that had incited protest marches against the war and draft card burnings³⁹—the Court stated that state-operated schools cannot be “enclaves of totalitarianism.”⁴⁰ The Court also stated that “[s]chool officials do not possess absolute authority over their students,” and that in the absence of a constitutionally valid reason for regulating student speech, students are entitled to express their views.⁴¹ Additionally, the Court observed that to train future leaders, the country

Internet Speech, 89 VA. L. REV. 139, 147 (2003); Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1226 (2003) (stating that the “substantial disruption test” has also been called the “material disruption standard”); see, e.g., *J.S. II*, *supra* note 21, at 867–69 (applying the substantial disruption test).

34. *Tinker*, 393 U.S. at 513.

35. *Id.* at 508.

36. *Id.* at 509; see, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (using the *Tinker* holding to conclude that for school officials to justify a prohibition of a certain expression, the school “must be able to show that its action was caused by something more than a mere desire to avoid . . . discomfort”).

37. See *Tinker*, 393 U.S. at 509–10 (noting that the school district did not prohibit students from wearing all controversial symbols such as the Iron Cross—a traditional Nazi symbol—which some students wore to school without protest).

38. See *id.* at 512–13; see also Servance, *supra* note 33, at 1226 (“The key to the *Tinker* holding is that absent a showing by the school of a valid reason for restricting student speech, schools must allow students to exercise their constitutional right to free speech.”).

39. *Tinker*, 393 U.S. at 510 n.4; Louis Freedberg, Editorial, *Back to Vietnam*, S. F. CHRON., Oct. 4, 2004, at B6 (noting that Vietnam War protests were continuous and they “reached their peak at UC Berkeley and hundreds of other campuses around the United States in 1970”).

40. *Tinker*, 393 U.S. at 511.

41. *Id.*

must encourage a “robust exchange of ideas” through a “multitude of tongues,” instead of through an “authoritative selection” of sorts.⁴² These ideas are in accord with the “marketplace of ideas” theory, which states that more open discussions about particular issues increases the likelihood that the truth may be obtained.⁴³

A notable law professor, Erwin Chemerinsky, points out that *Tinker* is based on three main principles concerning the First Amendment and schools: (1) student speech is constitutionally protected, (2) schools are allowed to punish expression only if there is a substantial disruption, and (3) the courts have an important role in making sure that students are punished only if this standard is met.⁴⁴ He argues that such “themes have been totally absent from subsequent U.S. Supreme Court decisions and most lower court cases involving student speech.”⁴⁵ The following is a discussion of the subsequent U.S. Supreme Court decisions regarding student speech.

B. The Fraser Standard

In 1986, the U.S. Supreme Court limited the extent of the *Tinker* decision in *Bethel School District No. 403 v. Fraser*.⁴⁶ The *Fraser* case involved a student named Matthew N. Fraser who delivered a sexually suggestive nominating speech at a school election assembly.⁴⁷ According to a counselor at the school assembly, “some students hooted and yelled” in reaction to the speech, while others were “bewildered and embarrassed.”⁴⁸ As a result, the school suspended Fraser for three days and removed his name from the list of candidates to speak at graduation.⁴⁹

In response to this punishment, Fraser sued the school district claiming that his First Amendment rights had been violated.⁵⁰ The district court ruled in favor of Fraser, holding that the school’s rule against

42. *Id.* at 512.

43. SAUNDERS, *supra* note 9, at 30.

44. Chemerinsky, *supra* note 16, at 545.

45. *Id.*

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

47. *Id.* at 677–78; *see also id.* at 687 (illustrating how Fraser’s speech incorporated sexual innuendos, such as, “‘Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.’”).

48. *Id.* at 678.

49. *Id.*; *see also id.* at 679 (stating that Fraser was allowed to return to school after serving two days of suspension).

50. *Id.* at 679.

disruptive conduct was vague and the removal of the student's name from the list was a constitutional violation.⁵¹ The Court of Appeals for the Ninth Circuit affirmed the judgment and held that Fraser's speech was indistinguishable from the speech in *Tinker*.⁵² The U.S. Supreme Court reversed the Ninth Circuit's decision.⁵³

The U.S. Supreme Court made a distinction between the political message involved in *Tinker* and the sexually suggestive speech involved in *Fraser*.⁵⁴ The Court departed from the *Tinker* decision by stating that the freedom to advocate controversial views must be balanced by society's interest in teaching students socially appropriate behavior.⁵⁵ Narrowing the scope of students' constitutional rights, the Court stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."⁵⁶ Furthermore, the Court emphasized that the school board had the authority to determine what manner of speech was inappropriate in the classroom or at a school assembly.⁵⁷ The Court—influenced by precedent that recognized a compelling governmental interest in protecting children from sexually explicit, indecent, or lewd speech⁵⁸—held that threatening or highly offensive speech had little value at schools and schools may limit such speech.⁵⁹ Overall, the Court was deferential to school authorities and allowed them to prohibit speech that undermined the school's educational

51. *Id.*; *see id.* at 692 (Stevens, J., dissenting) (arguing that Fraser, a young man with a good academic record, was in a better position to determine whether an audience of his peers would be offended by a sexual metaphor "than [] a group of judges who are at least two generations and 3,000 miles away from the scene of the crime").

52. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 679; *see also* Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1361 n.4 (9th Cir. 1985) (stating that there was "no evidence in the record indicating that any students found the speech to be offensive").

53. *Fraser*, 478 U.S. at 680.

54. *Id.* (distinguishing between using lewd and obscene speech to nominate someone and the wearing of armbands as a form of protest).

55. *Id.* at 681 ("Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."). *But see id.* at 692 n.2 (Stevens, J., dissenting) ("As the Court of Appeals noted, there 'is no evidence in the record indicating that any students found the speech to be offensive.'").

56. *Id.* at 682.

57. *Id.* at 683.

58. *Id.* at 684; *see id.* at 689 n.2 (Blackmun, J., and Brennan, J., concurring) (stating that Fraser's speech "was no more 'obscene,' 'lewd,' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema").

59. *See* Servance, *supra* note 33, at 1228 (citing *Fraser*, 478 U.S. at 685); *id.* at 1231 ("*Fraser* allows schools to regulate speech deemed inappropriate for the school setting, even when the same speech is protected outside of school.").

mission.⁶⁰

The *Fraser* decision indicates that the U.S. Supreme Court made a noticeable departure from its decision in *Tinker*. While the *Tinker* Court emphasized students' rights to express their views freely, the *Fraser* Court stated that the freedom to advocate unpopular views had to be balanced against society's interest in teaching students appropriate behavior.⁶¹ Essentially, the *Fraser* Court gave school officials the constitutional authority to punish students for vulgar or lewd speech, even though that same speech, if made by an adult, would be protected outside the school's gates.⁶² One rationale for the Court's departure from *Tinker* is that traditional First Amendment analysis was inappropriate for the school setting.⁶³

The impact of the *Fraser* decision continues to be felt long after the Court issued its decision.⁶⁴ Some lower courts have applied the *Fraser* decision to student expression that is school-sponsored, whereas others have applied the decision to any student speech that is considered vulgar or lewd.⁶⁵ According to one legal scholar, *Fraser* allows schools to prohibit vulgar and lewd speech at school-sponsored functions.⁶⁶

C. The Kuhlmeier Standard

The U.S. Supreme Court continued to limit the *Tinker* decision with *Hazelwood School District v. Kuhlmeier*.⁶⁷ In *Kuhlmeier*, three students, who were staff writers on their school newspaper, filed an action against the Hazelwood School District for violating their First Amendment rights.⁶⁸

60. *Fraser*, 478 U.S. at 685–86 (noting that it was appropriate for a school to disassociate itself from vulgar or lewd speech if it was inconsistent with the fundamental values of public school education).

61. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (stating, in part, that students should be able to express their opinions at school, even on controversial subjects like the Vietnam War); see *Fraser*, 478 U.S. at 681; see also Carol M. Schwetschenau, Note, *Constitution Protection for Student Speech in Public High Schools: Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), 55 U. CIN. L. REV. 1349, 1364 (1987).

62. Schwetschenau, *supra* note 61, at 1364.

63. *Id.* at 1365–66.

64. David Hudson, *Matthew Fraser Speaks Out on 15-Year-Old Supreme Court Free-Speech Decision* (April 17, 2001), <http://www.freedomforum.org/templates/document.asp?documentID=13701> (stating, for example, that several years after the *Fraser* decision, Fraser, now a debate coach at Stanford University, still maintains that his conduct did not merit a suspension).

65. *Id.*

66. *Id.*

67. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

68. *Id.* at 262.

The basis for their claim was that two articles had been removed from the paper in violation of their right to free speech: the first discussed three Hazelwood East High School students' experiences with pregnancy, and the second discussed the impact of divorce on students at the school.⁶⁹ The principal, concerned that the text of the article revealed the pregnant girls' identities and that the divorce story should have included the parent's perspective, withheld two pages of the newspaper from publication.⁷⁰

Upon review, the district court held that school officials may restrain student speech when it is "an integral part of the school's educational function."⁷¹ However, the Court of Appeals for the Eighth Circuit held that the student newspaper was not just part of a school-adopted curriculum, but it was also a public forum because it operated as a medium for student viewpoints.⁷² Consequently, the Court prohibited school officials from censoring the content unless it substantially interfered with schoolwork or discipline.⁷³

The U.S. Supreme Court reversed the court of appeals decision, holding that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."⁷⁴ The Court stated that the newspaper was not a forum for public expression because it had always been a part of the educational curriculum and a regular classroom activity.⁷⁵ Although the Statement of Policy for the newspaper stated that "as a student-press publication, [the newspaper] accepts all rights implied by the First Amendment," according to the court, this just meant that school officials would not interfere with First Amendment rights conferred on

69. *Id.* at 263; see also Brief for the Student Press Law Center et al. as Amici Curiae Supporting Respondents, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836), 1987 WL 864179 (explaining that these articles were part of a two-page spread that focused on current teen problems such as teenage marriage, runaways and the effects of divorce on children).

70. *Kuhlmeier*, 484 U.S. at 263-64; see *id.* at 264 n.1 (stating that the two pages also included articles on teenage marriage, runaways, and juvenile delinquents, which the principal did not find objectionable but simply deleted because they were on the same pages as the objectionable articles).

71. *Id.* at 264 (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1052 (E.D. N.Y. 1979)).

72. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372-73 (8th Cir. 1986) (stating that the newspaper "was a 'student publication' . . . [because] students chose the staff members, determined the articles to be written and printed, and determined the content of those articles." Further, "the newspaper was distributed to the school and the public.").

73. *Kuhlmeier*, 484 U.S. at 265.

74. *Id.* at 266 (citation omitted).

75. *Id.* at 270. *But cf. Kuhlmeier*, 795 F.2d at 1372 (explaining that the newspaper was a public forum "because it was intended to be and operated as a conduit for student viewpoint," covering topics of student interest).

school-sponsored newspapers.⁷⁶ The newspaper was supposed to be a “supervised learning experience” and thus school officials were authorized to regulate its contents “in any reasonable manner.”⁷⁷

Additionally, the Court held that “the First Amendment [did] not require schools to promote speech that conflict[ed] with the values held by the school system.”⁷⁸ Furthermore, the Court held that a student’s right to free speech must be construed “in light of the special characteristics of the school environment.”⁷⁹ As a result, the *Kuhlmeier* standard entitled educators to exercise control over the content of student speech in school-sponsored expressive activities so long as their actions were related to “legitimate pedagogical concerns.”⁸⁰ *Kuhlmeier* thus created yet another standard, distinguishable from the standards established in *Fraser* and *Tinker*.⁸¹

After the *Fraser* and *Kuhlmeier* decisions, the veracity of the *Tinker* decision has been called into doubt.⁸² Although the U.S. Supreme Court has not expressly overruled *Tinker*, *Fraser* and *Kuhlmeier* have altered the impact of its holding.⁸³ According to Professor Chemerinsky, the *Fraser* and *Kuhlmeier* decisions are more closely aligned with Justice Black’s dissent in *Tinker*.⁸⁴ Justice Black argued that student speech is only minimally protected by the First Amendment and courts should defer to school officials when deciding which type of speech should be protected or punished.⁸⁵ Professor Chemerinsky argues that based on these subsequent decisions, the U.S. Supreme Court “views schools as authoritarian institutions and it therefore will greatly defer to school officials in student

76. *Kuhlmeier*, 484 U.S. at 269.

77. *Id.* at 270.

78. Servance, *supra* note 33, at 1229–30 (citing *Kuhlmeier*, 484 U.S. at 270–71, wherein the Court distinguished the issue in *Tinker*—whether the First Amendment requires a school to tolerate particular student speech, from the issue in *Kuhlmeier*—whether the First Amendment required a school to promote a particular student speech).

79. Servance, *supra* note 33, at 1230 (citing *Kuhlmeier*, 484 U.S. at 266).

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

81. *See id.* at 272–73; *see also* Servance, *supra* note 33, at 1230 (stating that subsequent to *Kuhlmeier*, “a school can regulate speech that not only materially and substantially disrupts the school’s educational function but can also regulate school-sponsored speech that does not meet the standards that the school deems necessary.”).

82. *See* Chemerinsky, *supra* note 16, at 541.

83. *Id.* (noting, that *Tinker*’s narrow holding—that “students have a First Amendment right to wear symbols . . . to communicate political messages, unless there is proof of a likely disturbance to school activities”—remains undisturbed).

84. *Id.*

85. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 517 (1969) (Black, J., dissenting).

speech cases.”⁸⁶

Other commentators argue that the *Fraser* and *Kuhlmeier* decisions did not diminish students’ free speech rights but vested school officials with the power to promote core First Amendment values by actively directing the educational process.⁸⁷ They argue that the *Kuhlmeier* Court gave schools discretion to disassociate themselves from objectionable material in order to inculcate proper values and decorum.⁸⁸ Additionally, they argue that *Kuhlmeier* and *Fraser* affirmed the proposition that students retain free speech rights in the classroom and hallways of schools.⁸⁹ They concede, however, that certain factors, such as whether the speech was school-sponsored, will determine whether the school can restrict the student’s speech.⁹⁰

Irrespective of these views, the U.S. Supreme Court has created three standards for student speech cases, which have set the stage for how subsequent Internet-related student speech cases should be interpreted by lower courts.

III. APPLICATION OF STANDARDS IN SUBSEQUENT INTERNET-RELATED STUDENT SPEECH CASES

Lower state and federal courts have applied the *Tinker*, *Fraser*, and *Kuhlmeier* standards when determining whether the First Amendment protects a student’s speech.⁹¹ In making this determination courts also consider whether the speech occurred on or off campus, because off-campus speech is afforded greater First Amendment protection than on-campus speech.⁹² Courts also consider whether the speech constituted a “true threat,” because if the speech was deemed a true threat then it can be restricted without violating the First Amendment.⁹³

The following subsections focus on four Internet-related student

86. Chemerinsky, *supra* note 16, at 541.

87. See Benjamin Wattenmaker, Note, *Yeo v. Lexington: Abridging Rights of Publication in the Student Press*, 40 B.C. L. REV. 573, 598–99 (1999).

88. See *id.*

89. Lynda Hills, “Zero Tolerance” for Free Speech, 30 J.L. & EDUC. 365, 368 (2001).

90. See *id.*

91. See, e.g., *J.S. II*, *supra* note 21; *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

92. *J.S. II*, *supra* note 21, at 864.

93. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam); see generally *J.S. II*, *supra* note 21, at 856–57 (discussing the factual background and holding of the *Watts* decision).

speech cases: *J.S. v. Bethlehem Area School District*,⁹⁴ *Beussink v. Woodland R-IV School District*,⁹⁵ *Emmett v. Kent School District No. 415*,⁹⁶ and *Mahaffey v. Aldrich*.⁹⁷ These cases demonstrate how courts are divided over the definitions of on-campus speech and true threat, and on which standard—*Tinker*, *Fraser*, or *Kuhlmeier*—should be applied.

A. *J.S. v. Bethlehem Area School District*

Both the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania held in favor of the school district and against the student in *J.S. v. Bethlehem Area School District*.⁹⁸

1. J.S.'s "Teacher Sux" Website

J.S., an eighth grade student at Nitschmann Middle School, created a website using his home computer and posted it on the Internet sometime before May of 1998.⁹⁹ The website was neither sponsored by the school nor part of a school project.¹⁰⁰ It consisted of words, pictures, animations, and sound clips.¹⁰¹ The website, entitled "Teacher Sux," contained "derogatory, profane, offensive and threatening comments," primarily directed towards J.S.'s algebra teacher, Mrs. Fulmer, and the school's principal, Mr. Kartsotis.¹⁰² The website had a disclaimer, which warned that by entering the website the visitor agreed: (1) not to tell the employees of the school district about the website, (2) that the visitor was not a staff member of the school district, and (3) that the visitor would not disclose the website creator's identity nor try to cause him trouble.¹⁰³

The most problematic part of the website was a page entitled "Why Fulmer Should be Fired."¹⁰⁴ This page stated in degrading terms that Mrs. Fulmer should be fired because of her physique and disposition.¹⁰⁵ On another web page there was an animated picture of Mrs. Fulmer with

94. *J.S. II*, *supra* note 21.

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

96. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

97. *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

98. *J.S. II*, *supra* note 21, at 850; *see also J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 415 (Pa. Commw. Ct. 2000), *aff'd*, 807 A.2d 847 (Pa. 2002), [hereinafter *J.S. I*].

99. *J.S. II*, *supra* note 21, at 850.

100. *Id.*

101. *Id.* at 851.

102. *Id.*

103. *Id.*

104. *Id.*; *see also Richards & Calvert*, *supra* note 10, at 1100.

105. *See Richards & Calvert*, *supra* note 10, at 1100.

images from the “South Park”¹⁰⁶ cartoon which stated, “She’s a bigger b[itch] than your mom.”¹⁰⁷ However, the most controversial component was a caption entitled, “Why Should She Die?”¹⁰⁸ The text to the caption told visitors to “[t]ake a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hit man.”¹⁰⁹

Before long, students, faculty, and administrators, including Mrs. Fulmer and Mr. Kartotis, discovered the website.¹¹⁰ Believing that the threats were real, the principal contacted the local police and the Federal Bureau of Investigation.¹¹¹ Mrs. Fulmer claimed that after she viewed the website, she suffered stress, anxiety, loss of appetite, and headaches.¹¹² She also applied for a medical leave for the remainder of the school year, and three substitute teachers were required to fill her absence.¹¹³ Further, the principal claimed that due to J.S.’s website, staff and student morale was at an all-time low.¹¹⁴ Despite this, however, both the local police and the Federal Bureau of Investigation declined to file charges against J.S.¹¹⁵

During this time, J.S. continued to attend classes and participate in extra-curricular activities.¹¹⁶ The school district did not ask J.S. to remove the website; instead, J.S. removed the website on his own—about one week after the principal became aware of the website.¹¹⁷ Additionally, during the rest of the school year, the school district took no action to punish J.S. for his website, nor did it refer J.S. for a psychological evaluation.¹¹⁸ The school district finally took action at the end of the school year by

106. See Katherine Blok, *South Park Cartoon Makes Its Move Into Merchandising*, J. REC., Aug. 31, 1998, at 1. “South Park” is an animated program which takes place in a fictional town, South Park, Colorado, and its characters, Kyle, Stan, Kenny, and Cartman, are sometimes crude and profane. *Id.* Since its debut in 1997, it has been regarded as one of the most popular cable-network series. *Id.*

107. *J.S. II*, *supra* note 21, at 851.

108. *Id.*; see also *id.* at 851 n.4 (stating that there was a diagram that consisted of a picture of Mrs. Fulmer and aspects of the picture were connected to statements, telling the visitor that Mrs. Fulmer should die because she has a “zit” or “hideous smile”).

109. *Id.* at 851.

110. *Id.* at 851–52.

111. *Id.* at 852.

112. *Id.*

113. *J.S. II*, *supra* note 21, at 852.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*; see also *J.S. I*, *supra* note 98, at 427 (Friedman, J., dissenting) (“The School District did not decide to charge [J.S.] with any offense until July of 1998, and it was not until August 5, 1998, that anyone from the School District notified [J.S.’s] parents about the web site.”).

suspending J.S. for three days, which was later increased to ten days.¹¹⁹ Thereafter, the school district voted to expel J.S.¹²⁰

2. The Commonwealth Court of Pennsylvania's Decision

J.S., through his parents, sought review of the decision from the Court of Common Pleas of Northampton County, which had affirmed the school district's decision to punish J.S. for his website.¹²¹ J.S. subsequently appealed the decision to the Commonwealth Court of Pennsylvania on the ground that the school had violated his First Amendment rights.¹²² The Commonwealth Court observed that there was prior case law, which authorized schools to discipline students for conduct that took place off school premises, so long as the conduct materially and substantially interfered with the educational process.¹²³ The Commonwealth Court held that J.S.'s speech occurred off-campus¹²⁴ and that his conduct did cause a material disruption because "a reasonable person could be both physically and emotionally disturbed after viewing" J.S.'s website.¹²⁵ The Commonwealth Court concluded that J.S.'s First Amendment rights had not been violated due to the content of the website, the impact it had on Mrs. Fulmer, and the effect it had on the school community.¹²⁶

Judge Friedman, in her dissent, stated that J.S.'s First Amendment rights had been violated because his website was not a true threat.¹²⁷ As announced by the U.S. Supreme Court in *Watts v. United States*,¹²⁸ the First

119. *J.S. I*, *supra* note 98, at 415.

120. *J.S. II*, *supra* note 21, at 853 (explaining that the school district concluded that J.S.'s request for twenty dollars to pay for a hit man was a threat and J.S.'s statements "caused an actual harm to Mrs. Fulmer, as well as to other students and teachers").

121. *J.S. I*, *supra* note 98, at 412.

122. *Id.* at 417.

123. *Id.* at 421. Here, the Commonwealth Court cites *Beussink v. Woodland R-IV School District* as support for the claim that courts have allowed schools to discipline students for off-campus conduct, but the *Beussink* court suggested in a footnote that it considered *Beussink*'s speech on-campus, thereby triggering the *Tinker* substantial disruption test. See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 n.4 (E.D. Mo. 1998).

124. *J.S. I*, *supra* note 98, at 419.

125. See *id.* at 421 (stating that if a reasonable person saw a picture of his head severed and dripping with blood on a website such a person would find that disturbing).

126. *Id.* at 422 ("Regrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students.").

127. *Id.* at 426 (Friedman, J., dissenting) (stating that the record showed that the school district did not consider J.S.'s website a true threat).

128. *Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

Amendment does not protect speech that constitutes a true threat.¹²⁹ Judge Friedman observed that the proper means of evaluating whether a student's website constitutes a true threat was to determine "whether a reasonable person in [a] [s]tudent's position would foresee that viewers of the web site would interpret it as a serious expression of intent to harm."¹³⁰ Applying this "reasonable speaker test," Judge Friedman found that "a reasonable eighth grader would not necessarily foresee that the web site . . . would be interpreted as a serious expression of intent to harm . . ."¹³¹ Additionally, the school district's failure to take immediate action against J.S. indicated that J.S.'s website was not a true threat.¹³² Although Mrs. Fulmer was personally affected by the website, "there was no evidence that the [website] 'materially disrupt[ed] classwork,'" and therefore J.S.'s speech should be constitutionally protected.¹³³

An alternative approach to determining what types of speech constitute a true threat was announced by the Court of Appeals for the Eighth Circuit in *Doe v. Pulaski County Special School District*.¹³⁴ The *Pulaski* court used an approach known as the "reasonable recipient approach."¹³⁵ Although both the reasonable speaker and reasonable recipient approaches use an objective test, focusing on whether a reasonable person would have interpreted the alleged threat as a serious intent to harm; the two approaches diverge when determining from whose

129. *See id.* at 707–08.

130. *J.S. I, supra* note 98, at 426 (Friedman, J., dissenting) (articulating a standard that is established by the Ninth Circuit in *Lovell ex rel. Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996)); *see Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785 (E.D. Mich. 2002) (explaining the definition of true threat used by the Sixth Circuit); *see also J.S. II, supra* note 21, at 857 (explaining that to determine whether certain speech constituted a true threat based on the reasonable speaker approach, the Ninth Circuit in *Lovell* considered the factual context of the alleged threats, the surrounding events, the listeners' reactions, and whether the threats sounded equivocal, conditional, and immediate).

131. *J.S. I, supra* note 98, at 426 (Friedman, J., dissenting); *see id.* at 428 (pointing out that J.S. did not intend for school officials to view the website and that members of the intended audience who visited the website had these reactions: "[M]akes me crack up every time I read it." and "Go here anytime you need a good laugh."); *see also id.* at 428 n.7 (noting that none of the students who were interviewed by the school indicated that J.S. intended to harm anyone).

132. *J.S. I, supra* note 98, at 426 (Friedman, J., dissenting).

133. *Id.* at 426 n.1 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)); *see id.* at 428 ("[W]e must strike a delicate balance between recognition of the dangers that, unfortunately, exist in our schools today and the reality that children, no matter how sophisticated their knowledge may be, are nevertheless children, immature and naive."); *see also id.* at 428 n.6. (stating in regard to J.S.'s website: "This type of sick humor can be found in some of today's popular television programs, such as *South Park*.").

134. *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002).

135. *Id.* at 622–23.

viewpoint the statement should be interpreted.¹³⁶ As mentioned previously, the reasonable speaker approach focuses on whether a “reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat”¹³⁷ On the other hand, the reasonable recipient approach asks whether “a reasonable person standing in the recipient’s shoes would view the alleged threat” as a serious expression of intent to cause present or future harm.¹³⁸ The Eighth Circuit adopted several factors to determine how a reasonable recipient would view the purported threat, such as the listener’s reactions and whether the threat was conditional.¹³⁹

The *Pulaski* court recognized that some circuits, like the First Circuit, have rejected the reasonable recipient approach, because there is a risk that a speaker’s First Amendment rights could be abridged simply because the recipient had an unusual sensitivity unbeknownst to the speaker.¹⁴⁰ Ultimately, however, the *Pulaski* court adopted the reasonable recipient approach, stating “[t]he debate over the approaches appears . . . to be largely academic because in the vast majority of the cases the outcome will be the same under both tests.”¹⁴¹

Judge Friedman’s dissent presents an alternate and opposing view that J.S.’s speech was constitutionally protected.¹⁴² Instead of concluding that J.S.’s speech was not protected by the First Amendment due to its crude nature and Mrs. Fulmer’s reaction, Judge Friedman considered all the circumstances: the school’s response to the speech, the listeners’ responses, and the speaker’s perspective.¹⁴³

136. *See id.* at 622; *see also* Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 785 n.5 (E.D. Mich. 2002) (discussing the conflicting approaches).

137. *Pulaski*, 306 F.3d at 622.

138. *Id.*; *see also* United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

139. *See Pulaski*, 306 F.3d at 623 (stating that other factors, not considered in *Lovell*, include whether the speaker had a history of making threats against the alleged victim and whether the recipient had a reason to believe that the speaker had an inclination to be violent).

140. *See id.* at 623 (explaining that the First Circuit rejected the reasonable recipient approach because it feared that it would not promote “the robust and open public debate envisioned by the First Amendment”).

141. *Id.* (“The result will differ *only* in the extremely rare case when a recipient suffers from some unique sensitivity *and* that sensitivity is unknown to the speaker.”) (emphasis added).

142. *See J.S. I*, *supra* note 98, at 426 n.1 (Friedman, J., dissenting) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)) (stating in effect that J.S.’s website should have been protected by the First Amendment).

143. *See id.* at 428–29 (applying the reasonable speaker approach to the facts).

3. The Supreme Court of Pennsylvania's Decision

J.S. appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania, and argued that the school district had violated his First Amendment rights.¹⁴⁴ The Pennsylvania Supreme Court first considered whether the website constituted a true threat. If deemed a true threat, the speech would not be protected by the First Amendment and the school district would be authorized to discipline J.S.¹⁴⁵ However, even if J.S.'s speech was not a true threat, the school was authorized to discipline J.S. if the speech "disrupted school work or invaded the rights of others."¹⁴⁶ After employing the reasonable speaker approach and considering the totality of the circumstances, the Pennsylvania Supreme Court held that J.S.'s statements did not constitute a true threat.¹⁴⁷ The court held instead that the website and the speech contained therein, when "taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody."¹⁴⁸

Due to the U.S. Supreme Court's failure to readdress the scope of students' First Amendment rights since *Hazelwood School District v. Kuhlmeier*,¹⁴⁹ the Pennsylvania Supreme Court's ability to clearly define the constitutional protection afforded to Internet-related student speech was complicated.¹⁵⁰ The court determined that if J.S.'s speech was considered on-campus—a status which would entitle J.S. to less First Amendment protection¹⁵¹—other factors drawn from the three prior U.S. Supreme Court decisions on student speech had to be considered: the form of the speech, i.e. political or lewd; the speech's level of disruption; the setting of the speech; and whether the speech was school-sponsored.¹⁵²

144. See *J.S. II*, *supra* note 21, at 853.

145. See *id.* at 856 ("[I]f the speech authored by J.S. constituted a true threat, as defined by the case law, it receives no constitutional protection. Unprotected by the First Amendment, the School District would have the authority to discipline J.S. for such speech and our inquiry would end.").

146. *Id.* at 856 ("However, even if not a 'true threat,' the School District might not have violated J.S.'s constitutional right to free speech by disciplining him if the speech was otherwise protected, but it in some fashion disrupted school work or invaded the rights of others.").

147. *Id.* at 859–60 (explaining that the majority based its decision after finding that the website was not intended for school officials to view, that J.S. had not made similar comments in the past to Mrs. Fulmer, and that it was unclear whether Mrs. Fulmer had any reason to believe that, when compared to his peers, J.S. was more inclined to engage in violence).

148. *Id.* at 859.

149. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

150. See *J.S. II*, *supra* note 21, at 863–64.

151. *Id.* at 864.

152. *Id.* (articulating factors based on the *Tinker*, *Fraser*, and *Kuhlmeier* decisions).

Ultimately, the Pennsylvania Supreme Court held that there was a sufficient nexus between the website and the school campus to hold that J.S.'s speech was on-campus speech.¹⁵³ The court went on to declare that speech is on-campus speech when it "is aimed at a specific school and/or its personnel [and] is brought onto the school campus or accessed at school by its originator."¹⁵⁴

The court also had to decide which standard to apply—*Tinker*, *Fraser*, or *Kuhlmeier*.¹⁵⁵ The court observed that student speech cases that do not involve the Internet have been analyzed using either the *Tinker* or *Fraser* standards or both.¹⁵⁶ However, Internet-related student speech cases have typically been reviewed using the *Tinker* standard.¹⁵⁷ Ultimately, the *J.S. II* court used both the *Tinker* and *Fraser* standards.¹⁵⁸

In applying the *Fraser* standard, the court found that J.S.'s punishment for using lewd and offensive language conformed with the *Fraser* Court's decision, which permitted schools to punish students for lewd or offensive speech that "undermine[d] the basic function of a public school."¹⁵⁹ Deferring to school authority, the court stated, "[I]t is for school districts to determine what is vulgar, lewd or plainly offensive."¹⁶⁰

When applying *Tinker*, the majority determined that the website caused a substantial disruption to the operation of the school.¹⁶¹ The disruption was considered substantial because Mrs. Fulmer was unable to

153. *Id.* at 865; *see also id.* at 864 n.11 (noting that purely off-campus speech could be subject to punishment by the school district if the substantial disruption test was met).

154. *Id.* at 865 (explaining that the speech was considered on-campus because (a) the website was accessed by J.S. at school and shown to another student, (b) the website was intended for students to view, and (c) the subjects of the website were Mrs. Fulmer and the principal).

155. *See id.* at 865–66 (explaining that because of the type of speech, the unique setting of the speech, and the manner in which the speech was disseminated, the application of the *Tinker*, *Fraser*, and *Kuhlmeier* standards was difficult; unlike the speech in *Tinker*, *Fraser*, and *Kuhlmeier*, J.S.'s speech was not a political speech, it did not take place at a school assembly, and the speech was not school sponsored.).

156. *See J.S. II*, *supra* note 21, at 867.

157. *Id.* at 866; *see, e.g.*, *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

158. *J.S. II*, *supra* note 21, at 867–68.

159. *Id.* at 868 ("The statements made in the 'Teacher Sux' web site are no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly and held subject to discipline in *Fraser*.") (noting further that issues exist as to the applicability of *Bethel School District No. 403 v. Fraser* to *J.S. II* but that ultimately *Fraser* was applicable because *Fraser* was about the unique needs of the school environment and concern for the educational mission of the school); *see also Servance, supra* note 33, at 1228 ("[P]ublic education has as its primary mission the goal of preparing students to participate in our democratic society.").

160. *J.S. II*, *supra* note 21, at 868 n.13.

161. *Id.* at 869.

complete the school year after viewing the website, and her absence adversely affected the educational environment, requiring three substitute teachers to replace her.¹⁶² According to the majority, the school district's punishment of J.S. comported with the First Amendment.¹⁶³

J.S. I and *J.S. II* indicate that courts differ in their application of the three standards for Internet-related student speech cases. These cases also show that having to decide whether a student's website is constitutionally protected speech is a difficult decision, fraught with many important considerations.

B. *Beussink v. Woodland R-IV School District*

In *Beussink v. Woodland R-IV School District*,¹⁶⁴ a high school student named Brandon Beussink created and posted an Internet homepage.¹⁶⁵ There was no indication that Beussink created his homepage using school resources or facilities.¹⁶⁶ Beussink's homepage used vulgar language to criticize school officials.¹⁶⁷ Beussink's friend, in an act of retaliation, intentionally accessed Beussink's homepage while at school and showed it to the high school's computer teacher.¹⁶⁸ The computer teacher informed the principal about Beussink's homepage, and the principal, upset that the homepage had been displayed in one of the classrooms, immediately disciplined Beussink.¹⁶⁹ Other students viewed the homepage on campus that same day but only because a teacher allowed them access.¹⁷⁰

162. *Id.* at 869 (“The web site posted by J.S. in this case disrupted the entire school community—teachers, students and parents.”). *Contra* Richards & Calvert, *supra* note 10, at 1113–14 (stating that having to find substitute teachers was not a disruption, but rather was just the “replacement of one teacher by other teachers”).

163. *J.S. II*, *supra* note 21, at 869.

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

165. *Id.* at 1177; see David Hudson, *Cyberspeech*, <http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=cyberspeech> (last visited Sept. 29, 2005) [hereinafter *Hudson I*] (stating that Beussink's homepage contained vulgar language that criticized the principal, faculty, and other aspects of the school).

166. *Beussink*, 30 F. Supp. 2d at 1177.

167. *Id.*

168. *Id.* at 1177–78 (explaining that besides Beussink's friend, only one other student was in the classroom, and Beussink's friend did not access the homepage at school at Beussink's behest, authorization, or with his knowledge); see Tuneski, *supra* note 33, at 154 (noting that besides Beussink's friend viewing the website, the website caused no disruption).

169. *Beussink*, 30 F. Supp. 2d at 1178. Such disciplinary action was taken despite Beussink's contention that he created the homepage simply to voice his opinion and had no intention that the website be accessed on campus. See *id.* at 1177.

170. *Id.* at 1179.

The principal initially suspended Beussink for five days but later increased his suspension to ten days.¹⁷¹ Further, after the principal told him to remove the website, Beussink removed his homepage when he arrived home from school.¹⁷² The high school also had a policy that lowered “students’ grades in each class by one letter grade for each unexcused absence in excess of ten days.”¹⁷³ Beussink had already accumulated prior unexcused absences, and by the time he had served his suspension, he was failing all of his classes.¹⁷⁴

The *Beussink* court applied the *Tinker* standard, stating that if the speech did not materially interfere with the school’s operations then the school’s prohibition would be overruled.¹⁷⁵ The court applied the *Tinker* standard because it found that Beussink’s speech occurred on-campus, and not in the context of a school-sponsored event.¹⁷⁶ The court held that there was no significant disruption to school discipline, even though students discussed the incident.¹⁷⁷ The court further noted that the principal disciplined Beussink because he was upset by the homepage, but added that “[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.”¹⁷⁸

The court concluded that Beussink’s speech was constitutionally protected because, although his speech might have been unpopular, it did not interfere with school discipline.¹⁷⁹ The court stated that provocative speech, like Beussink’s, deserved constitutional protection because

171. *Id.*

172. *Id.*; see also Tuneski, *supra* note 33, at 154.

173. *Beussink*, 30 F. Supp. 2d at 1179.

174. *Id.* at 1179–80; see *id.* at 1181 (noting that “[t]he loss of these credits [would] potentially delay Beussink’s graduation with his class at the end of this school year”).

175. *Id.* at 1180; see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

176. See *Beussink*, 30 F. Supp. 2d at 1180 n.4; see also Tuneski, *supra* note 33, at 154 (explaining that by applying the *Tinker* standard the *Beussink* court suggests that Beussink’s speech occurred on-campus); see also Servance, *supra* note 33, at 1236 (arguing that the on-campus, off-campus distinction is tenuous because even though Beussink created his website off-campus and did not use any school resources to create his website, the *Tinker* analysis was triggered because another student accessed the website on campus without his permission).

177. *Beussink*, 30 F. Supp. 2d at 1181; see Tuneski, *supra* note 33, at 154 (noting that “by applying the substantial disruption test, the *Beussink* court clearly suggested that had the defendant’s website caused a stir on-campus, the school may have been justified in punishing him for what would otherwise be protected speech”).

178. *Beussink*, 30 F. Supp. 2d at 1180. The principal testified: “When I viewed [the website] and it was explained that it had been seen by other students, yes, sir, I was upset.” *Id.* at 1178. The principal also testified that he had not spoken to any other students before making the decision the discipline Beussink. *Id.*

179. *Id.* at 1182.

unpopular speech invites censure and the First Amendment was designed to protect such speech.¹⁸⁰

C. Emmett v. Kent School District No. 415

*Emmett v. Kent School District No. 415*¹⁸¹ involved a high school student, Nick Emmett, who posted a web page on the Internet, which he created from his home without using the school's resources or time.¹⁸² The website contained disclaimers telling visitors that the website was not sponsored by the school and that its purpose was solely for entertainment.¹⁸³ The problematic part of the website was where Emmett, inspired by his creative writing class, wrote mock obituaries of his friends and posted them on the Internet.¹⁸⁴ The website also asked visitors to vote on who would "die"—in other words, who would be the subject of the next mock obituary.¹⁸⁵ Students, faculty, and administrators discussed the website at the high school.¹⁸⁶ A television news story then characterized Emmett's website as containing a "hit list," even though those words did not appear on the website.¹⁸⁷ Further, although Emmett immediately removed the website after the news story aired, the school placed him on emergency expulsion, which it later modified to a short-term suspension of five days.¹⁸⁸

The U.S. District Court considered the *Fraser* and *Kuhlmeier* standards and found that Emmett's speech was neither "at a school assembly as in *Fraser* nor was it in a school sponsored newspaper as in *Kuhlmeier*."¹⁸⁹ For this reason, the court held that Emmett's "speech was entirely outside the school's supervision or control."¹⁹⁰ In other words, the speech was off-campus speech and therefore entitled to greater First Amendment protection.¹⁹¹ The court ruled in favor of Emmett because

180. *Id.*

181. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

182. *Id.* at 1089 (noting that Emmett had a 3.95 grade point average and was the co-captain of his basketball team).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

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

188. *Id.*

189. *Id.* at 1090.

190. *Id.*; see Servance, *supra* note 33, at 1239–40.

191. Servance, *supra* note 33, at 1239–40 (stating that the *Emmett* court determined that the website was created off-campus and thus none of the traditional tests applied).

there was no indication that the website was intended to harm anyone, nor was there any evidence that people felt threatened by the website.¹⁹² Although the *Emmett* court recognized that in a post-Columbine era school districts had reason for caution, the court concluded that the subjects of the mock obituaries were friends of Emmett, and these friends did not feel threatened by his website.¹⁹³

D. Mahaffey v. Aldrich

*Mahaffey v. Aldrich*¹⁹⁴ is a case where Joshua Mahaffey and his friend created a website “‘for laughs,’ because they were bored.”¹⁹⁵ The website was entitled “Satan’s web page” and listed “people I wish would die” and “people that are cool.”¹⁹⁶ The website stated, “SATAN’S MISSION FOR YOU THIS WEEK: Stab someone for no reason then set them on fire Killing people is wrong don’t do It [sic] PS: NOW THAT YOU’VE READ MY WEB PAGE PLEASE DON’T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?”¹⁹⁷ Mahaffey admitted that a high school computer might have been used to create the website.¹⁹⁸ After the school discovered the website, he was suspended.¹⁹⁹

Before applying *Tinker*, the district court first inquired whether the speech occurred on school property.²⁰⁰ The court determined that Mahaffey’s statement, regarding his possible use of the high school’s computers, was equivocal and therefore, Mahaffey’s speech occurred off-campus.²⁰¹ The court stated, however, that if Mahaffey’s conduct had occurred on-campus it would have applied the *Tinker* standard; but according to the court, even under this standard there was no evidence that the website interfered with the school’s operations or that any other student’s rights were invaded.²⁰² Then, the court used the reasonable speaker approach and concluded that a reasonable person in Mahaffey’s

192. *Emmett*, 92 F. Supp. 2d at 1090 (“The defendant, however, has presented no evidence that the mock obituaries and voting . . . were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.”).

193. *Id.*

194. *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

195. *Id.* at 781.

196. *Id.* at 781–82.

197. *Id.* at 782.

198. *Id.*

199. *Id.* at 782–83 (stating that the school recommended expelling him but this recommendation was later withdrawn).

200. *Mahaffey*, 236 F. Supp. 2d at 783–84.

201. *Id.*

202. *Id.*

place would not foresee that the statements were a serious expression of intent to harm.²⁰³ The court held that regulation of Mahaffey's conduct violated his First Amendment rights because the speech was considered off-campus speech and there were no signs of disruption to the school.²⁰⁴

The cases discussed in this section show that courts are divided on important issues: whether school officials are constitutionally authorized to regulate Internet-related student speech that is created off-campus, whether school officials may regulate off-campus speech that is either accessed on campus by the speaker or other students,²⁰⁵ and to what extent the *Tinker*, *Fraser*, and *Kuhlmeier* standards are applicable.

IV. A SEPARATE STANDARD IS NEEDED FOR INTERNET-RELATED STUDENT SPEECH

The cases previously discussed show that Internet-related student speech is given inconsistent treatment by the courts.²⁰⁶ While some courts primarily focus on the *Tinker* standard, other courts focus on both the *Fraser* and *Tinker* standards.²⁰⁷ Amidst this confusion is some courts' adherence to the off-campus, on-campus distinction, which is inapplicable when dealing with Internet-related student speech.²⁰⁸ This section lists several reasons for the need of developing one, uniform standard for Internet-related student speech cases that do not involve school sponsorship of the student's Internet activity.

203. *Id.* at 786; see also Richards & Calvert, *supra* note 10, at 1106 (explaining that the court held that the website was not a true threat because of Mahaffey's disclaimer, Mahaffey only listed students' names but did not threaten the students, and Mahaffey said that the website was only for laughs).

204. *Mahaffey*, 236 F. Supp. 2d at 786. *Contra* Servance, *supra* note 33, at 1242-43 (proposing a "harmful impact standard" and arguing that the *Mahaffey* court should not have simply assumed that Mahaffey did not tell others about the website, but rather should have provided proof of whether other students actually felt threatened by the website).

205. *Hudson I*, *supra* note 165.

206. See discussion *supra* Part III.

207. See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying the *Tinker* standard only); *J.S. II*, *supra* note 21, at 867-68 (applying both *Tinker* and *Fraser* standards).

208. See discussion *supra* Part III. However, the issue of whether the off-campus, on-campus distinction applies to cases that involve school sponsorship of the student's Internet-related activity is beyond the scope of this comment.

A. Discrepancies Between Courts' Use of the *Tinker*, *Fraser*, and *Kuhlmeier* Standards

Because the U.S. Supreme Court has not revisited student speech issues since 1988²⁰⁹ and has not created a separate standard for Internet-related student speech cases, courts have differed on which standard to apply in Internet-related student speech cases.²¹⁰ The majority in *J.S. v. Bethlehem Area School District*,²¹¹ though acknowledging that applying any of the three U.S. Supreme Court standards was problematic because *J.S. II* was factually distinguishable, applied both the *Tinker* and *Fraser* standards.²¹² On the other hand, the court in *Beussink v. Woodland R-IV School District*²¹³ only applied the *Tinker* standard.²¹⁴ Further, unlike the *J.S. II* court, which applied the *Fraser* standard because J.S.'s speech was lewd and offensive,²¹⁵ the *Emmett* court did not apply the *Fraser* standard because Emmett's speech was not at a school assembly.²¹⁶ As long as these three standards exist and courts disagree over which standard to apply,²¹⁷ courts will remain divided on decisions involving Internet-related student speech until the U.S. Supreme Court steps in and develops a new, uniform standard.²¹⁸

1. Discrepancies May Lead to Unconstitutional Restrictions on Student Speech

Without a clear, new standard, courts such as the *J.S. II* court will continue to misinterpret the *Tinker* standard, thereby unconstitutionally

209. The last main student speech case decided by the U.S. Supreme Court was *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); Chemerinsky, *supra* note 16, at 528 (stating that there have been few rulings concerning student speech even though many lower courts have dealt with this topic).

210. See Chemerinsky, *supra* note 16, at 542–43; see also discussion *supra* Part III.

211. *J.S. II*, *supra* note 21.

212. *Id.* at 867–68.

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

214. *Id.* at 1180.

215. *J.S. II*, *supra* note 21, at 868.

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

217. See discussion *supra* Part III.

218. See Shannon P. Duffy, *State, Federal Courts Differ on Student Discipline Over Electronic Speech: Western District Court Judge Reverses Suspension; Pa. Supreme Take Up Web Site Case*, PA. L. WKLY., April 16, 2001, at 5 (discussing the different outcomes state and federal courts reach when determining whether student Internet speech is constitutionally protected); see also discussion *supra* Part III (discussing a state case that held student speech unprotected and discussing federal cases that held student speech protected).

restricting student speech.²¹⁹ To illustrate a misapplication of the *Tinker* standard, two law professors have argued that Mrs. Fulmer had a thinned-skin reaction to J.S.'s website and thus her reaction should not have been construed as a substantial and material disruption of the school's operations.²²⁰ Another legal expert echoed this view, stating that "[w]e all just have to remember that you need a thick[-]skin It's a matter of common sense. You have to decide what's a real threat and what's a joke. If you take absolutely every threat seriously, you'll end up missing the serious ones because your resources will be exhausted."²²¹ In *J.S. II*, although the school had to find substitute teachers to replace Mrs. Fulmer, this should not constitute a disruption of the school environment because it was merely "a replacement of one teacher by other teachers."²²²

2. Student Speech Enables Students to Appreciate Democratic Values

Discrepancies and misinterpretations in this area of law may potentially inhibit student speech, thereby preventing students from developing a capacity to be critical of higher authority, which is an important aspect of living in a democratic society where individuals retain political sovereignty.²²³ Individuals must be able to think for themselves in order to exercise their political rights in a democratic society.²²⁴ Moreover, if schools fail to teach students the value of free expression, then these students will fail to appreciate the participatory character of a democratic society and will instead feel alienated, thinking the government is being arbitrary.²²⁵

219. See Richards & Calvert, *supra* note 10, at 1113 (arguing that the Supreme Court of Pennsylvania misinterpreted the substantial disruption test in *J.S. v. Bethlehem School District*, 807 A.2d 847 (Pa. 2002)).

220. *Id.* at 1113 ("It turns *Tinker* on its head to think that a teacher's absence from school can constitute a material disruption of the educational process in school.").

221. Duffy, *supra* note 218, at 15 (quoting Larry Frankel, the executive director of the American Civil Liberties Union (ACLU)).

222. Richards & Calvert, *supra* note 10, at 1114 (arguing that the impact of the *J.S. II* court's decision was that anytime a teacher reacts adversely to a student's speech then such a reaction will constitute a substantial and material disruption).

223. SAUNDERS, *supra* note 9, at 228 (quoting Amy Gutmann).

224. See *id.*

225. *Id.* at 248 (quoting Betsy Levin); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular." (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968))).

B. Without a New, Defined Standard, Student Speech Might be Further Curtailed as Courts Justify These Restrictions Based on the Columbine Tragedy

Courts have recognized, in their decisions of Internet-related student speech cases, the growing violence among students today and often cite the Columbine tragedy.²²⁶ In *J.S. v. Bethlehem Area School District*,²²⁷ although the Pennsylvania Supreme Court did not find J.S.'s website a true threat, it acknowledged that school violence was an all too common event, especially after the horrific event at Columbine High School.²²⁸ Even though the courts do not base their decisions solely on the Columbine tragedy, it factors into their decision-making.²²⁹ In reality, events like Columbine, although very tragic, are rare.²³⁰ According to the Department of Justice's Bureau of Justice Statistics and the Department of Education's National Center for Education Statistics, between July 1, 1992 and June 30, 2000, youth between the ages of five to nineteen were at least seventy times more likely to be murdered away from school than at school.²³¹ It has also been reported that from 1995 to 2003, the percentage of students who reported being victims at school declined from ten percent to five percent.²³² Moreover, children are exposed to music, movies, and video games, and their speech is merely a reflection of their exposure to these mediums, and not necessarily an indication that they want to commit violent acts.²³³

Accentuating this judicial misconception is the generation gap between judges and students—many judges do not understand popular culture and thus are unable to grasp the student's perspective.²³⁴ Two law

226. Richards & Calvert, *supra* note 10, at 1093 (stating that the Columbine tragedy has impacted the schools and the courts).

227. *J.S. II*, *supra* note 21.

228. *Id.* at 860.

229. Richards & Calvert, *supra* note 10, at 1110.

230. *Id.*; see *supra* note 15. *Contra* Louis John Seminski, Jr., *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 169–70 (2001) (“[T]he fact is that these occurrences are more than isolated incidents and such dangerous Internet-related conduct is not limited to only these deadly threats.”).

231. DEVOE, *supra* note 6, at 6.

232. *Id.* at 14–15.

233. See, e.g., *J.S. I*, *supra* note 98, at 428 n.6 (Friedman, J., dissenting) (stating that the humor found on J.S.'s website can be found on today's television shows like “South Park”); see, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 689 n.2 (1986) (Blackmun, J., and Brennan, J., concurring) (“[Fraser's] speech was no more ‘obscene,’ . . . than the bulk of programs currently appearing on prime time television or in the local cinema.”).

234. See *Fraser*, 478 U.S. at 692 (1986) (Stevens, J., dissenting) (arguing that Fraser was in a better position to determine whether his peers would be offended, rather than having a group of

professors have argued that judges are so generationally removed from popular teen culture that they have difficulty understanding the culture.²³⁵ Instead of recognizing that teens are immersed in this culture and are inundated with violent and profane imagery every day, judges are focused on uncommon, tragic events like Columbine.²³⁶ For example, Eminem, a popular rap artist among teenagers, has produced songs that contain “violent, misogynistic, and homophobic lyrics,” and yet he has sold millions of albums.²³⁷ Judges need to remember that children are impressionable and that although their speech may at times appear crude and even violent, they are really imitating artists such as Eminem or popular teen culture in general.²³⁸

C. There Are Different Approaches to Determining Whether a Student’s Internet Speech is a True Threat

Another reason for the necessity of a new standard regarding Internet-related student speech cases is that courts have differed on whether to use the reasonable speaker approach or the reasonable recipient approach, a critical decision in determining whether a student’s speech constitutes a true threat.²³⁹ The two approaches, when applied, can produce different results.²⁴⁰ For example, in *J.S. v. Bethlehem Area School District*,²⁴¹ the Supreme Court of Pennsylvania used the reasonable speaker approach²⁴² and came to the conclusion that J.S.’s website was not a true threat.²⁴³ Judge Friedman, applying the same approach in the *J.S. I* dissent,

older judges make that determination); see also Richards & Calvert, *supra* note 10, at 1110–11.

235. Richards & Calvert, *supra* note 10, at 1110.

236. *Id.* (“Many judges simply ignore the pervasive social reality of music, movies, and violent video games in which teens develop, while they concentrate instead on a few random school shootings to justify their opinions.”).

237. *Id.* at 1110–11.

238. See generally *id.* (discussing the impact of popular culture on teenagers).

239. Compare *J.S. I*, *supra* note 98, at 426 (Friedman, J., dissenting) (stating that the proper test is the reasonable speaker approach), with *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (stating that the court will view an alleged threat using the reasonable recipient approach).

240. See *Pulaski*, 306 F.3d at 623 (explaining that the First Circuit has rejected the reasonable recipient approach because there is a risk that a speaker’s First Amendment rights could be abridged).

241. *J.S. II*, *supra* note 21.

242. *J.S. II*, *supra* note 21, at 857–58 (discussing two cases—*Lovell ex rel. Lovell v. Poway Unified School District* and *In the Interest of A.S.*—that apply the reasonable speaker approach, and concluding that these cases serve as guidance on the issue of whether J.S.’s speech constitutes a true threat).

243. *Id.* at 859–60.

concluded that a reasonable eighth grader in J.S.'s position would not think the website was a true threat.²⁴⁴ Conversely, if one were to apply the reasonable recipient approach to that case, J.S.'s speech would likely constitute a true threat and lose First Amendment protection, because Mrs. Fulmer, the recipient, would have believed that J.S.'s website showed that he planned to hurt her presently or in the future.²⁴⁵ Because these two approaches produce conflicting consequences, a result that threatens a student's right to speak freely, the U.S. Supreme Court must set a new standard that helps establish which approach should be used.

D. The On-Campus and Off-Campus Distinction is Inapplicable in Internet Student Speech Cases

Some courts have used the on-campus, off-campus speech distinction based on the belief that if the speech is considered off-campus speech, it is less likely that the student's speech disrupted the school environment.²⁴⁶ However, some courts, like the court in *J.S. v. Bethlehem Area School District*,²⁴⁷ define on-campus speech in such an expansive manner that practically any Internet-related student speech will be deemed on-campus speech in the future.²⁴⁸ In a concurring opinion in *J.S. II*, Justice Zappala states that "the fact that a web site is merely *accessed at school by its originator* is an insufficient basis" to call the speech on-campus speech.²⁴⁹ The standard formulated by the *J.S. II* majority is too broad. Under this standard a student's speech would be considered on-campus speech even though the student created the website in the privacy of his own home, and the student accessed his website at school just for a few minutes.

As another example, in *Beussink v. Woodland R-IV School District*,²⁵⁰ even though Beussink created his website at home, the court considered his speech on-campus simply because another student, without his permission,

244. *J.S. I*, *supra* note 98, at 426.

245. Richards & Calvert, *supra* note 10, at 1114 (stating that Mrs. Fulmer testified she was afraid someone would try to kill her after she saw the website).

246. See Servance, *supra* note 33, at 1234-35 (stating "that where speech occurs off campus, the nexus between speech and school disruption diminishes, and student rights to free speech increase").

247. *J.S. II*, *supra* note 21.

248. See *id.* at 865 ("We hold that where speech that is aimed at a specific school . . . is brought onto the campus or accessed at school by its originator, the speech will be considered on-campus speech.").

249. *Id.* at 870 (Zappala, J., concurring) (explaining that deeming a student's speech as on-campus speech just because the website was accessed at school is inappropriate).

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

accessed his website on-campus.²⁵¹ Additionally, although courts generally protect off-campus speech, the standards are so malleable that a court could possibly justify punishing a student even if the speech actually occurred off-campus.²⁵²

Furthermore, the off-campus and on-campus speech distinction should not be applied because the Internet is a borderless medium.²⁵³ The Internet differs from other traditional mediums of expression, such as flyers, newspapers, and public speeches, for several reasons: (1) it is pervasive, (2) it allows users to disseminate information to millions of people immediately and easily, and (3) it can be accessed anywhere.²⁵⁴ One commentator points out the futility of pinpointing a website's geographical location because "[g]iven [the Internet's] inherently different mode of expression, the old distinctions physically demarcating authority over student speech to on or off-campus are not adequate, especially as applied to children in a school setting."²⁵⁵ Deeming some speech as on-campus merely because the website's creator or other school official accessed the website on-campus is misguided²⁵⁶ because then all Internet-related student speech would be considered on-campus speech, since the Internet is ever-present and easily accessible.²⁵⁷

E. A Separate Standard is Needed to Protect Students' Free Speech on the Internet

Because the Internet is a unique medium²⁵⁸ that allows people to anonymously express their views, thereby encouraging free speech and ideas, a separate standard is needed to ensure that the anonymous expression of students' views over the Internet will be protected.²⁵⁹ The

251. Servance, *supra* note 33, at 1236; *see also* *Beussink*, 30 F. Supp. 2d at 1177–78.

252. *See* Tuneski, *supra* note 33, at 153; Hudson I, *supra* note 163 (“[S]ome school officials have suspended students for their off-campus [Internet speech] that lampooned or criticized school officials.”).

253. *See* Servance, *supra* note 33, at 1235–36.

254. *Id.* (“Internet content is not limited by geography.”).

255. *Id.* at 1235; *id.* at 1237 (“Speech should not be defined by the computer on which it originates. Courts should instead apply the principle that is intuitive to most Internet users: Internet speech resides in cyberspace, which is borderless and exists wherever there is a connection to the Internet.”).

256. *See, e.g., id.* at 1236.

257. *Id.* at 1235 (“Not only is Internet speech ever-present but one can also quickly and easily disseminate its content to an infinite number of people.”).

258. *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (“The Internet is a ‘unique and wholly new medium of worldwide human communication.’”).

259. *See* Chemerinsky, *supra* note 16, at 545 (stating that courts have a duty to ensure that

Internet has made anonymous communication much easier.²⁶⁰ This anonymity has motivated people to select the Internet as their medium of expression because they believe that anonymity will prevent official retaliation, social ostracism, and an invasion of privacy.²⁶¹ The cases discussed in Part III indicate that students are concerned about these issues.²⁶² This anonymity enables students to explicitly state their thoughts and allows them to use the Internet not only as a cathartic expression of their frustrations and artistic sensibilities, but also as a diversion.²⁶³ One author stated that students have made negative comments about faculty for decades, but it is now a controversial issue simply because the Internet has made such comments more easily accessible and harder to remove.²⁶⁴

According to another author, speech on the Internet must be protected because it is the most significant tool in changing society and shaping the way people think about social and political issues.²⁶⁵ He stated, "The protections of the First Amendment must necessarily extend to this revolutionary 'phenomenon' in order to ensure every citizen of his or her individual rights and to foster the growth and improvement of our

schools punish student speech only when constitutionally permitted).

260. Noah Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1528 (1996); see *id.* at 1531 (explaining that "a three-judge panel in the Eastern District of Pennsylvania affirmed[,] '[as] the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion'"); see also *Reno*, 521 U.S. at 850 (stating that 40 million people used the Internet in 1996 and that this number is expected to mushroom to 200 million by 1999).

261. Jay Krasovec, Comment, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 126 (1997).

262. See, e.g., *J.S. II*, *supra* note 21, at 851 (containing a disclaimer that said in effect the visitor would not report his website to school officials); see *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (stating that Beussink had no intention of having his website accessed at school); see also *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (including a disclaimer that said the website was not sponsored by the school); see also *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002) (stating that Mahaffey did not want anyone to do something and then blame it on him).

263. See discussion *supra* Part III.A.1 (indicating that the website was an opportunity for J.S. to express his frustrations for having Mrs. Fulmer as his teacher and an opportunity to be creative); see, e.g., *Emmett*, 92 F. Supp. 2d at 1089 (explaining that Emmett's website was inspired by his creative writing class); see, e.g., *Mahaffey*, 236 F. Supp. 2d at 781 (stating that the students created the website because they were bored and wanted some laughs); see also *Beussink*, 30 F. Supp. 2d at 1177 (giving Beussink an opportunity to voice his criticisms about school officials); see also Krasovec, *supra* note 261, at 144-45 ("The sharing of ideas . . . on virtually every social and political issue are all fostered by the ability of the Internet-user to feel secure, for whatever reason, in not revealing his or her identity.").

264. Duffy, *supra* note 218 (stating that the ease of setting up websites and sending emails have elevated sophomoric humor to new levels).

265. Krasovec, *supra* note 261, at 124.

government and society.”²⁶⁶ Student expression over the Internet enables people to think differently about social and political issues, and at the very least, allows students who find other traditional modes of expression risky or invasive to express themselves freely.²⁶⁷

F. The U.S. Supreme Court Should View Congressional Laws Regulating the Internet as A Signal That It Should Establish A Unique Standard For Internet-Related Student Speech

Due to the heightened use of the Internet and the emergence of Internet-related crimes,²⁶⁸ state and federal regulation of the Internet has increased.²⁶⁹ Congressional regulation of the Internet should signal to the U.S. Supreme Court a need for a standard that exclusively governs Internet-related student speech cases. One such regulation is the Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act.²⁷⁰

Congress enacted the CAN-SPAM Act on January 1, 2004²⁷¹ as a response to the plethora of unsolicited commercial e-mail advertisements,²⁷² otherwise known as “SPAM,” that people were receiving.²⁷³ Principally, this regulation affects businesses engaged in e-mail advertisements.²⁷⁴ Congress passed the proposal because it found a substantial government interest in regulating SPAM.²⁷⁵ The CAN-SPAM Act aims to prevent fraudulent SPAM and ensures that recipients have the

266. *Id.* at 124–25; *id.* at 125 (explaining that some advantages of anonymous online communication are that anonymity promotes increased communication among large audiences and society might ultimately benefit by sharing delicate information).

267. *See id.* at 124; *see, e.g., id.* at 126 (stating that people choose to express themselves over the Internet because of the anonymity it provides).

268. *See* Krasovec, *supra* note 261, at 104–05, 113 (stating that the Internet has an estimated ten percent increase in users every month and noting that some examples of crimes over the Internet are those involving child pornography and hate crimes).

269. *Id.* at 118 (“Therefore, with the increased use of computers and the Internet in the participation of such [Internet-related] crimes, the perception for the need for regulation has also increased resulting in both state and federal legislation attempting to regulate the Internet.”).

270. 15 U.S.C. § 7704 (2003).

271. Jonathan Bick, *Staying Within the Limits of the CAN-SPAM Act*, LEGAL TIMES, Nov. 1, 2004, at 24.

272. *Id.* (stating that that “Spam persists because it is simple and cost-effective”).

273. *See* Sameh I. Mobarek, *The CAN-SPAM Act of 2003: Was Congress Actually Trying to Solve the Problem or Add to It?*, 16 LOY. CONSUMER L. REV. 247, 256 (2004).

274. Richard E. Wiley & Rosemary C. Harold, *Contentious Times in a Shifting Landscape*, in PRAC. L. INST., 2 COMMUNICATIONS LAW 2004 109, 241 (2004).

275. Mobarek, *supra* note 273, at 257.

right to exclude future SPAM from the same source.²⁷⁶ The Act also targets SPAM “that contains materially false or misleading header information.”²⁷⁷ Additionally, the CAN-SPAM Act requires warning labels for sexually explicit content.²⁷⁸

The CAN-SPAM Act is significant for three reasons: (1) Congress fashioned a regulation that did not aim to limit free speech *per se*, but rather intended to limit speech that would damage the recipient;²⁷⁹ (2) Congress recognized a problem and tailored a remedy specifically to address that problem;²⁸⁰ and (3) Congress developed a uniform law regarding commercial e-mail advertisements that preempted more than thirty inconsistent state laws on SPAM.²⁸¹ The U.S. Supreme Court should follow Congress’ path and construct a standard that aims not at limiting students’ free speech rights, but rather aims at protecting both students and schools from disruptive speech. The Court too, must recognize that remedies must be specifically tailored to meet Internet-related problems; in this circumstance, judicial standards must be tailored so that Internet-related student speech will not be unduly curtailed. Furthermore, by following in Congress’ footsteps, the Court can develop a uniform, consistent standard that would supersede the varied standards that have been developed by the Court in the past—the *Tinker*, *Fraser*, and *Kuhlmeier* standards.²⁸²

However, the U.S. Supreme Court has protected Internet speech in the past.²⁸³ It held in *Reno v. ACLU*²⁸⁴ that the Communications Decency Act of 1996 (“CDA”),²⁸⁵ which prohibited the knowing transmission of indecent material to those under the age of eighteen,²⁸⁶ was unconstitutional

276. *Id.* at 257–58 (explaining that the Act focused on the narrow segment of Spam messages that perpetrated a type of fraud).

277. *Id.* at 258.

278. Bick, *supra* note 271.

279. Erin E. Marks, Comment, *Spammers Clog In-Boxes Everywhere: Will the CAN-SPAM Act of 2003 Halt the Invasion?*, 54 CASE W. RES. L. REV. 943, 949 (2003) (stating that Congress’s aim with regard to the CAN-SPAM Act was to “curb the widespread exploitation of the email system”).

280. *See id.* at 952 (“The CAN-SPAM Act will beneficially serve to deter spammers from sending fraudulent or misleading email messages . . .”).

281. Wiley & Harold, *supra* note 274, at 125.

282. *See discussion supra* Part IV.A.

283. *See generally* *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the Communications Decency Act was an unconstitutional restriction on speech).

284. *Reno v. ACLU*, 521 U.S. 844 (1997).

285. *See* 47 U.S.C. § 223(a), (d) (Supp. III 1994), *invalidated by* *Reno v. ACLU*, 521 U.S. 844 (1997).

286. *See Reno*, 521 U.S. at 859.

under the First Amendment because it was an overly broad content-based restriction on speech.²⁸⁷ *Reno* protected *adult* speech, holding that the CDA “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”²⁸⁸ On the other hand, Professor Chemerinsky points out that, with respect to *student* speech, the U.S. Supreme Court in *Bethel School District No. 403 v. Fraser*²⁸⁹ and *Hazelwood School District v. Kuhlmeier*²⁹⁰ stressed minimal protection for student speech and instead emphasized judicial deference to the expertise of school officials.²⁹¹

Due to the foregoing, the U.S. Supreme Court needs to develop a new standard for Internet-related student speech so that student speech rights will not be unjustly restricted. Professor Chemerinsky notes that because school officials will want to suppress student speech because it makes them feel uncomfortable²⁹² or because they dislike it, the judiciary has the responsibility of ensuring that this discomfort does not become the basis for punishing students.²⁹³

V. A NEW STANDARD FOR INTERNET-RELATED STUDENT SPEECH CASES CAN BALANCE THE COMPETING INTERESTS OF STUDENTS AND SCHOOL OFFICIALS

A new standard can ensure an appropriate balance between the two competing interests present in Internet-related student speech cases—protecting a student’s individual free speech rights and protecting schools from violent student behavior.²⁹⁴ The new standard amalgamates the legal doctrines previously described.

287. *See id.* at 874 (“Given the vague contours of the coverage of the [CDA], it unquestionably silences some speakers whose messages would be entitled to constitutional protection.”).

288. *See id.* (“That burden on *adult* speech is unacceptable . . .”) (emphasis added). *But see* Seminski *supra* note 230, at 180 (stating generally, without distinguishing between adult and student Internet speech, that the *Reno* Court held “*Internet speech* was protected speech under the Constitution”) (emphasis added).

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

290. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

291. Chemerinsky, *supra* note 16, at 539; *see also supra* text accompanying note 16.

292. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 278 (Brennan, J., dissenting) (stating that the principal violated the First Amendment by excising student articles that did not “materially and substantially interfere with the requirements of appropriate discipline,” but rather simply because they were “personal” and “sensitive”).

293. *See* Chemerinsky, *supra* note 16, at 546.

294. Servance, *supra* note 33, at 1237 (“It is true that schools must not become enclaves of totalitarianism, but they must not be powerless to confront harassers either.”).

First, it is important to emphasize that this new standard should only apply to Internet-related student speech cases that do not involve school-sponsored events or activities.²⁹⁵ Rather, this new standard should apply to cases like *J.S. v. Bethlehem Area School District*²⁹⁶ and *Beussink v. Woodland R-IV School District*²⁹⁷ where the school neither sponsored the students' websites nor showcased the students' websites at school-sponsored events.²⁹⁸ However, if the school sponsors the Internet-related student speech or includes it as part of a school-sponsored activity, then the *Fraser* and *Kuhlmeier* standards should apply, and schools should be able to exercise control over the activities they sponsor.²⁹⁹

Alternatively, some argue that having to determine which speech is part of the school curriculum and which speech is outside the school curriculum is an impractical distinction.³⁰⁰ To illustrate this point, one author gives the hypothetical example of a teacher who instructs a student to email a pen pal, and this student communicates on subjects beyond the scope of the teacher's instructions.³⁰¹ Although upon first glance, it appears that this situation obscures the school-sponsored distinction, in actuality one can easily determine that this is a school-sponsored activity.³⁰² The example falls within the definition of "school-sponsored" activity because the student emailed the pen pal only after the teacher instructed the student to do so.³⁰³ Thus, any subsequent emails sent during the duration of the class project can still be attributed to the school, even if the student discusses subjects outside the scope of the teacher's instructions.³⁰⁴

295. The definition of "school sponsorship" as used in this comment is defined narrowly, that is, a student's Internet speech is considered "school sponsored" if the student's Internet speech was presented at a school event, such as the school assembly in *Fraser*, or was part of a school-sponsored activity, such as an on-line student newspaper. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); see also Chemerinsky, *supra* note 16, at 538, (quoting Justice White who said that *Kuhlmeier* concerned the question of the "educators" authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the *imprimatur* of the school") (emphasis added).

296. *J.S. II*, *supra* note 21.

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

298. See, e.g., *J.S. II*, *supra* note 21; see also *Beussink*, 30 F. Supp. 2d 1175.

299. See discussion *supra* Part II.B-C.

300. Jennifer Kathleen Swartz, *Beyond the Schoolhouse Gates: Do Students Shed Their Constitutional Rights when Communicating to a Cyber-Audience?*, 48 *DRAKE L. REV.* 587, 601 (2000).

301. See *id.*

302. See *supra* note 295 and accompanying text.

303. See *supra* note 295 and accompanying text.

304. See Chemerinsky, *supra* note 16, at 538 (quoting Justice White's statement that to determine whether the First Amendment requires schools to promote a student's speech depends

Once a court determines that the *Fraser* and *Kuhlmeier* standards do not apply because the case only involves non-school sponsored Internet-related student speech, a court must then decide whether the speech constitutes a true threat under the reasonable speaker approach.³⁰⁵ When using this approach, a court should consider the totality of the circumstances, including the listeners' reactions, the speaker's intentions, the school's reaction,³⁰⁶ and whether the threats sound equivocal.³⁰⁷ When looking at the speaker's intentions, a court should consider several factors: the student's academic standing, the student's level of social activity,³⁰⁸ the student's psychological history, and the student's willingness and promptness to remove the Internet speech in question.³⁰⁹

If a court decides that the speech did not constitute a true threat, it should apply the *Tinker* test.³¹⁰ When applying the *Tinker* test,³¹¹ a court should keep in mind that the student's Internet speech must *substantially* disrupt the operations of the school; for example, merely having to substitute teachers would not be a material disruption.³¹² Further, in determining whether a student's Internet speech materially or substantially disrupted the operation of the school or invaded the rights of others,³¹³ courts should consider that overly broad generalizations are not sufficient.

on whether the expressive activities bear the imprimatur of the school).

305. See discussion *supra* Part III.A.2 (discussing the reasonable speaker approach in the true threat analysis and explaining that if the speech is considered a true threat then the speech is not constitutionally protected).

306. Lovell *ex rel.* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (citing *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989) and *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987)).

307. *Id.*

308. See, e.g., *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (indicating that Emmett was a star student and basketball player); see also *J.S. II, supra* note 21, at 852 (noting that during the controversy over his website, J.S. continued to attend classes and extracurricular activities).

309. See, e.g., *J.S. I, supra* note 98, at 428–29 (Friedman, J., dissenting) (stating that if J.S. was a true threat the school district should have required J.S. to get a psychological evaluation and by not doing so, it was shirking its responsibility); see also *J.S. II, supra* note 21, at 852 (stating that J.S. removed his website on his own about a week after the principal became aware of the website); see also *Beussink*, 30 F. Supp. 2d at 1179 (stating that Beussink removed his website after the principal told him to do so).

310. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (explaining the *Tinker* substantial disruption test); see also *J.S. II, supra* note 21, at 856 (explaining that even if the speech is not considered a true threat, one must consider whether the speech constituted a substantial disruption or invaded the rights of others).

311. The suggested new standard clarifies the definition and scope of the *Tinker* standard.

312. See *Richards & Calvert, supra* note 10, at 1113 (pointing out that teacher's absence from school is not a material disruption).

313. *Tinker*, 393 U.S. at 513 (articulating the substantial disruption test).

For example, describing the school's atmosphere as somber would not constitute a substantial disruption.³¹⁴ Instead, courts should require evidence that a specific person was affected by the speech.³¹⁵ Courts should also realize that being upset by the content of a student's speech, without first looking at the context of the speech, is not an appropriate justification for restricting that speech.³¹⁶ Also, a recipient's thin-skinned reaction to the speech will not be an acceptable justification either.³¹⁷ Judges must keep in mind that public schools cannot be "enclaves of totalitarianism"³¹⁸ and that students possess fundamental rights that states must respect.³¹⁹ Moreover, from a policy perspective, courts should refrain from immediately deferring to school authorities due to the fear of events like Columbine.³²⁰ Rather, courts should first ask whether the speech in question is merely a reflection of popular culture that pervades today's society.³²¹ If so, the courts should give greater protection to the student's speech.³²²

A. The Inapplicability of the Fraser Standard to Internet-Related Student Speech Cases

The *Tinker* standard, instead of the *Fraser* or *Kuhlmeier* standards, should be used in non-school sponsored Internet-related student speech cases for several critical reasons. First, the U.S. Supreme Court in *Bethel School District No. 403 v. Fraser*³²³ held that schools had the authority to

314. Compare *J.S. II*, *supra* note 21, at 869 (indicating that, due to J.S.'s website, the atmosphere of the entire school was as though "a student had died" and "there was a feeling of helplessness"), with *J.S. I*, *supra* note 98, at 428 (Friedman, J., dissenting) (mentioning that some students found J.S.'s site humorous).

315. *J.S. II*, *supra* note 21, at 869.

316. See *Tinker*, 393 U.S. at 508 (stating that undifferentiated fear is not enough to overcome a student's First Amendment rights); see also *J.S. II*, *supra* note 21, at 857 (listing factors considered in true threat analysis, which can also be used to look at the context of the student's speech: the surrounding events; the listeners' reactions; and whether the threats sounded equivocal, conditional, and immediate).

317. See *Richards & Calvert*, *supra* note 10, at 1113-14 (discussing Mrs. Fulmer's thin-skinned reaction to J.S.'s speech); see also *id.* at 1114 (emphasizing that private remedies are available for speech that one might find hurtful, and that Mrs. Fulmer took advantage of this private remedy by suing J.S.'s parents for negligent supervision of their son and recovered \$500,000).

318. *Tinker*, 393 U.S. at 511.

319. *Id.*

320. See discussion *supra* Part IV.B.

321. See discussion *supra* Part IV.B.

322. See discussion *supra* Part IV.B.

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

punish speech that they considered threatening or highly offensive—sexually explicit, indecent, or lewd speech.³²⁴ However, as the foregoing discussion has emphasized, the Internet is a unique medium that allows students to express themselves freely.³²⁵ The anonymity that the Internet provides, the ease with which messages can be sent, and its overall accessibility³²⁶ allow students to express themselves freely, particularly when traditional modes of expression seem less ideal.³²⁷ It is unjust to hold students who use the Internet as a cathartic medium of self-expression to the *Fraser* standard.³²⁸ The *Fraser* case involved circumstances that were factually distinct from the *J.S. II* line of cases:³²⁹ no Internet was involved, *Fraser* was speaking at a school-sponsored event, and there was more accountability because *Fraser* was not speaking anonymously.³³⁰ Furthermore, *Fraser* knew who his audience was—he was speaking directly to an assembly of his fellow students³³¹—whereas the audience for an Internet communication is potentially global.³³² Additionally, because Internet-related student speech is often a reflection of popular culture,³³³ it would be inappropriate to have judges who are removed from popular teen culture decide what is considered lewd or indecent.³³⁴ Justice Stevens argued in his dissent that *Fraser* could better determine whether his peers would be offended by a sexual metaphor, rather than a group of judges 3,000 miles away.³³⁵

324. See Servance, *supra* note 33, at 1228 (citing *Fraser*, 478 U.S. at 685); see also *Fraser*, 478 U.S. at 685–86 (“[I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent the ‘fundamental values’ of public school education.”)

325. See discussion *supra* Part IV.E.

326. See Levine, *supra* note 260, at 1528; see also Servance, *supra* note 33, at 1235–36 (describing the Internet as pervasive and easily accessible).

327. See *supra* discussion Part IV.E; see also Krasovec, *supra* note 261, at 126 (stating that people have chosen the Internet as their medium of expression due to the anonymity it provides).

328. See *supra* notes 262–63 and accompanying text; see also Servance, *supra* note 33, at 1228 (citing *Fraser*, 478 U.S. at 685) (articulating the *Fraser* standard).

329. See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

330. See discussion *supra* Part II.B.

331. See *Fraser*, at 677–78.

332. See Swartz, *supra* note 300, at 602.

333. See *J.S. I*, *supra* note 98, at 428 n.6 (Friedman, J., dissenting) (stating that *J.S.*’s humor can be found on popular television shows like “*South Park*”).

334. See discussion *supra* Part IV.B.

335. See *Fraser*, 478 U.S. at 692 (Stevens, J. dissenting).

B. The Inapplicability of the Kuhlmeier Standard to Internet-Related Student Speech Cases

Similarly, the *Kuhlmeier* standard is inappropriate for non-school sponsored Internet-related student speech cases because the cases discussed in this Comment are not connected to any school-sponsored activities or events.³³⁶ Unlike the cases discussed in Part III, *Hazelwood School District v. Kuhlmeier*³³⁷ created a standard where schools could exercise control over the content of student speech in school-sponsored expressive activities.³³⁸ Further, *Bethel School District No. 403 v. Fraser*³³⁹ involved a student's speech at a school-sponsored event.³⁴⁰ Due to these critical differences, neither the *Kuhlmeier* nor *Fraser* standards are applicable to Internet-related student speech cases, such as *J.S. v. Bethlehem Area School District*,³⁴¹ where there is no school-sponsorship of the websites.³⁴²

C. The Tinker Standard Is Most Applicable to Internet-Related Student Speech Cases

The *Tinker* standard is the most applicable standard for Internet-related student speech cases that do not involve school sponsorship, because it is both broad and flexible enough to balance the needs of a student's right to self-expression and the school's need to maintain an orderly and safe educational environment.³⁴³ The substantial disruption test enables school officials to punish a student for speech that "materially disrupts classwork or involves the substantial disorder or invasion of the rights of others."³⁴⁴ For example, suppose the following circumstances: student X posts a website that makes profane or abusive comments against student Y, the context of these comments indicates that student X is serious, and student Y does not feel free to leave the house due to these

336. See discussion *supra* Part III (discussing various Internet-related student speech cases).

337. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

338. See *id.* at 273. Cf. Swartz *supra* note 300, at 601-02 (explaining, in part, that one of the rationales for the *Kuhlmeier* decision was that educators should be able to protect underage readers from certain material, but because the Internet reaches a global audience this reasoning behind *Kuhlmeier* is eliminated).

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

340. *Id.* at 678.

341. *J.S. II*, *supra* note 21.

342. See discussion *supra* Part III.

343. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (stating that students may express their opinions as long as they do not materially interfere with school discipline or with the rights of others).

344. *Id.*

comments. Under this scenario, school officials would be able to punish student X using the *Tinker* substantial disruption test.³⁴⁵

Additionally, although the *Tinker* standard was formulated during the Vietnam War era,³⁴⁶ it remains an appropriate standard today.³⁴⁷ The *Tinker* Court had the foresight to recognize that it is important to protect a student's right to free speech, because future leaders must be trained in an arena where "a robust exchange of ideas" is promoted.³⁴⁸ The *Tinker* Court also recognized that a student's speech should not be restricted merely to avoid "unpopular viewpoints."³⁴⁹ The *Tinker* Court's considerations remain highly relevant today. Because people can express themselves over the Internet quickly and easily³⁵⁰ and engage in a participatory form of mass speech,³⁵¹ students' expressions over the Internet deserve some protection.

Moreover, although some would argue that *Tinker v. Des Moines Independent Community School District*³⁵² is factually distinct from the current cases on Internet-related student speech, it is actually analogous to them. In *Tinker*, students wore black armbands to symbolize their opposition to the Vietnam War.³⁵³ Similarly, in *Emmett v. Kent School District No. 415*,³⁵⁴ Emmett's website, which created mock obituaries of his friends, expressed his creative thoughts.³⁵⁵ In *J.S. v. Bethlehem Area School District*,³⁵⁶ although J.S.'s website could be considered crude or vulgar, it expressed his criticisms of the principal and Mrs. Fulmer.³⁵⁷ Even though the Internet-related student speech cases discussed in this article did not involve black armbands or the Vietnam War, they all involved web postings that articulated these students' feelings about issues they considered relevant.³⁵⁸

345. *See id.*

346. *Id.* at 503.

347. *Contra* Seminski *supra* note 230, at 177 ("[T]he courts will continue to apply the dated *Tinker* standard to these cases.") (emphasis added).

348. *Tinker*, 393 U.S. at 512.

349. *Id.* at 509.

350. *See* discussion *supra* Part IV.E; *see also* *Reno v. ACLU*, 521 U.S. 844, 850 (stating that the Internet has experienced extraordinary growth—the number of host computers, devices that store and relay information, has increased from 300 in 1981 to about 9,400,000 in 1996).

351. *See* Levine, *supra* note 260, at 1531.

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

353. *Id.* at 504.

354. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, (W.D. Wash. 2000).

355. *Id.* at 1089.

356. *J.S. II*, *supra* note 21.

357. *Id.*

358. *See id.*; *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *Emmett*, 92 F. Supp. 2d at 1088; *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D.

Overall, this new standard ensures a student's First Amendment rights will not be restricted due to inconsistent standards and arbitrary distinctions between off-campus and on-campus speech.³⁵⁹ The new standard is protective of both student speech and the school's interest in maintaining order.³⁶⁰ By incorporating the *Tinker* test, the new standard ensures that if a student's Internet-related student speech is violent or offensive enough to substantially disrupt the school's operations or violate the rights of others, the school may suspend or expel the student.³⁶¹

VI. APPLICATION OF THIS NEW STANDARD TO *J.S. V. BETHLEHEM AREA SCHOOL DISTRICT*

If the court had applied the new standard articulated in the preceding discussion, the ultimate result in *J.S. v. Bethlehem Area School District*³⁶² would have been different, but fair.³⁶³ First, the Supreme Court of Pennsylvania would have had to decide whether any school sponsorship was involved in the posting of J.S.'s website.³⁶⁴ After determining that the school did not sponsor the website³⁶⁵ and that J.S.'s speech did involve the Internet, the new standard would be applied.³⁶⁶ Then, the court would have to determine whether J.S.'s speech constituted a true threat by examining the totality of the circumstances.³⁶⁷ The court would have concluded that J.S.'s website did not constitute a true threat because there was some indication that the students, the intended audience, thought the website was humorous.³⁶⁸ Other factors indicating that J.S.'s website was not a true threat were (1) the speaker's intention to make a humorous website criticizing faculty at his school,³⁶⁹ (2) the school's delay in punishing J.S.

Mich. 2002).

359. See discussion *supra* Part IV.A–D.

360. But see Seminski, *supra* note 230, at 183–84 (suggesting a new standard that creates a lessened expectation of protective free speech in schools due “in light of the current problems and violence in schools”).

361. *Tinker*, 393 U.S. at 513 (articulating the *Tinker* standard).

362. *J.S. II*, *supra* note 21.

363. See discussion *supra* Part.V.

364. See discussion *supra* Part.V.

365. *J.S. II*, *supra* note 21, at 850.

366. *Id.*; see discussion *supra* Part.V.

367. See *J.S. II*, *supra* note 21, at 857 (reviewing Lovell *ex rel.* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996)).

368. See, e.g., *J.S. I*, *supra* note 98, at 428 (Friedman, J., dissenting) (noting that a visitor to J.S.'s website “cracked up” every time the student saw the website).

369. See *J.S. II*, *supra* note 21, at 851 (using animation, sound clips, and images from “South Park” for the website).

for his behavior,³⁷⁰ (3) the equivocal nature of the threats,³⁷¹ and (4) J.S.'s removal of the website on his own initiative after the principal became aware of the website.³⁷²

At this point, because J.S.'s website was not a true threat, the court would apply the *Tinker* standard.³⁷³ Under the *Tinker* standard, the court would have found that the website did not materially disrupt classwork since the disruption had to be substantial; Mrs. Fulmer's absence merely required the substitution of one teacher for another one.³⁷⁴ The court would have to also consider some caveats when applying the *Tinker* standard: whether the website affected a specific person, whether the recipient was upset by the content of the speech without considering its context, and whether the recipient merely had a thin-skinned reaction to the speech.³⁷⁵ Under the new standard, the court would have found that J.S.'s website did not substantially disrupt the operations of the school or invade the rights of others because (1) the principal's assertion that student morale was at an all-time low due to the website was a generalized assumption,³⁷⁶ (2) J.S. meant the website to be humorous,³⁷⁷ and (3) Mrs. Fulmer had a thinned-skinned reaction to the website.³⁷⁸ Finally, from a policy perspective, the court would have found that J.S.'s speech should be protected because it was a reflection of popular culture; for example, J.S. used images from "South Park" on his website.³⁷⁹ Thus, under this new standard, J.S.'s speech would have been protected.

VII. CONCLUSION

The courts have applied the *Tinker*, *Fraser*, and *Kuhlmeier* standards

370. *See id.* at 852, 860.

371. *See id.* at 859 (stating that the threats were equivocal because it was unclear whether Mrs. Fulmer had any reason to believe that J.S. had an inclination to engage in violence).

372. *Id.* at 852.

373. *See id.* at 860–61; *see also* discussion *supra* Part.V.

374. *J.S. I*, *supra* note 98, at 426 n.1 (Friedman, J., dissenting) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)) (stating that there was no evidence that the website materially disrupted class work); *see also* Richards & Calvert, *supra* note 10, at 1113–14 (stating that having to find substitute teachers was not a disruption, but rather is was just the replacement of one teacher by other teachers).

375. *See* discussion *supra* Part.V.

376. *J.S. II*, *supra* note 21, at 852.

377. *See J.S. I*, *supra* note 98, at 428 (Friedman, J., dissenting) (pointing out that those who visited the website had these reactions: "[M]akes me crack up every time I read it," and "Go here anytime you need a good laugh.")

378. *See* discussion *supra* Part IV.A.1.

379. *See* discussion *supra* Part IV.B.

in an inconsistent manner.³⁸⁰ Without a uniform standard, there is a strong possibility that Internet-related student speech will continue to be curbed in favor of school districts.³⁸¹

The new standard articulated in Part V ensures that students will not be punished for expressing their thoughts and beliefs when their speech is deemed harmless and there is no substantial disruption.³⁸² As technology continues to advance and the Internet becomes further ingrained in our lives,³⁸³ the U.S. Supreme Court must adapt and provide guidance to the lower courts and to the public on an area of law that remains murky at best.

Sandy S. Li*

380. See discussion *supra* Part IV.A.

381. See discussion *supra* Part IV.A.1; see also Chemerinsky, *supra* note 16, at 539 (stressing that since *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court has lessened the protection for student speech and deferred to the authority and expertise of school officials).

382. See *Tinker*, 393 U.S. at 513 (1969); see also discussion *supra* Part IV.

383. See *Reno v. ACLU*, 521 U.S. 844, 851 (stating that the methods of Internet communication and information retrieval methods over the Internet are constantly evolving); *id.* at 850 (stating that 40 million people used the Internet in 1996 and that this number is expected to mushroom to 200 million by 1999); see also Seminski *supra* note 230, at 165 n.1 (stating that the number of host computers had increased from 9.4 million hosts in 1996 to 36.7 million hosts in July 1998 (citing *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999))).

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