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# Disorder in the Courts: Public School Student Expression on the Internet

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## I. INTRODUCTION

A Pennsylvania high school student hates his school's athletic director. In an attempt to be funny, and to get back at the athletic director in the only way the student knows how, the student creates a "Top Ten" list at home. The list, which contains crude remarks and humiliating observations about the athletic director, is emailed to a number of the student's friends. The student's friends think the list is hilarious, and at least one person prints the email out at home and brings it to school to show more people. Eventually, the athletic director comes across the list. Outraged by the content of the email, the athletic director shows the list to other school officials, and the student is threatened with suspension. The student insists he never meant for the list to come to school, much less be seen by the athletic director, and that he only meant for the original email recipients to see it. Despite these pleadings, the student is suspended from school.[1]

The American adult population enjoys a broad sense of the right to freedom of speech, as defined by the Supreme Court over the course of American history.[2] However, the Court's opinion

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1. *See generally* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 449 (W.D. Pa. 2001).

2. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (invalidating a city law that prohibited racially discriminatory speech).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because

changes when considering speech on school grounds. Over the past three decades, the Supreme Court has given broad power to local school boards to regulate student expression. School officials can now regulate student speech that causes a material or substantial disruption,[3] that is lewd or indecent,[4] or that is related to school sponsored activities.[5] While the Court's decision to grant such regulatory power over student expression to the local school boards has been upheld by subsequent courts over the past three decades, American courts are now faced with a new dilemma—the Internet.

Using the Internet, students have the ability to easily "speak" with virtually any fellow student at any time. This new medium of communication is causing disruption in the flow of the classroom. Students are creating websites, sending emails, or simply "speaking" in chat rooms with fellow students about school-related issues ranging from teacher approval to local athletic team rivalries.[6] To complicate matters, the integration of technology into

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society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989) (holding that burning an American flag was individual speech protected by the First Amendment).

"[I]t is . . . often true that one man's vulgarity is another's lyric." Cohen v. California, 403 U.S. 15, 25 (1971) (holding that a man in a courthouse wearing a jacket bearing the slogan "Fuck the Draft" was protected by the First Amendment).

"Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (invalidating a city ordinance prohibiting distribution of literature without a permit).

3. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

4. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

5. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

6. *See, e.g.*, *Deeper in My Depression*, *at* http://www.oops-faking.blogspot.com (chronicling through poetry one student's personal experiences at school) (last visited Mar. 31, 2004) (on file with the First Amendment Law Review); Danielle "Psychochick", *I Did It!*, *at* http://www.ujournal.org/users/psychochick/1012.html (publishing her school report card along with explicative-laden commentary on her teachers as part of an online journal) (June 26, 2002) (on file with the First Amendment Law Review); *RateMyTeachers.com*, *at* http://www.ratemyteachers.com (providing

the classroom has made the Internet more accessible from school than ever before. Thus, disruptive student Internet speech frequently spills into the classroom, whether it is intended to go there or not.[7] As a result, some school officials have punished student Internet speakers in order to maintain a more orderly educational environment. Recent cases in Pennsylvania exemplify the current confusion among the lower courts regarding student Internet speech.[8] This note examines whether public school officials can regulate Internet speech created off-campus by public school students. This Note concludes that all student speech created off campus should be fully protected by the First Amendment. Student Internet speech, created off campus, should also retain its off campus classification unless the student author intends or takes action to bring his or her speech on campus. Finally, if the standard set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District*[9] is applied to on-campus Internet speech, the court should view the *Tinker* test through the eyes of a reasonable person.

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a forum for students to "publicly expose ineffective teachers and broadcast praise for stellar teachers") (last visited Mar. 31, 2004).

7. *See also* Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 140 (2003) ("Today, the threat of disruption from off-campus student speech has risen significantly because of the advent of the internet and continued efforts to integrate the medium into the classroom setting.").

8. *See generally* Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003) (holding that a student handbook policy that did not geographically limit school officials' authority to discipline student speech to the school premises or school-sponsored events was unconstitutionally vague); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) (applying *Tinker* to off-campus speech and holding that a student's suspension for writing an offensive email targeting a school official was unconstitutional); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (holding that a student website that contained threatening messages about teachers was on-campus speech that disrupted the school community).

9. 393 U.S. 503, 513 (1969) (holding that student speech that "materially disrupts class work or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment).

## II. THE STUDENT SPEECH TRIUMVIRATE

Students' free speech in the school environment is restricted when compared to other forms of speech in American society. Courts have given school boards the ability to limit student speech in ways that ordinarily would not be permissible when applied to adults speaking in a traditional public forum.[10] Specifically, the United States Supreme Court has decided three cases that set the basic guidelines for lower courts and school boards to follow when addressing student speech in public schools.

First, in the landmark decision, *Tinker v. Des Moines Independent Community School District*,[11] the Court held that a school could not punish students for wearing armbands in protest of the Vietnam War.[12] Justice Fortas, writing for the Court, stated 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."[13] The Court noted the importance of free speech in society[14] and established that in restricting a student's

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10. *See, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."); New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 968 (5th Cir. 1972) ("There is, of course, a substantive difference between schools and the street corner in terms of weighing the sometimes competing interests of a completely free flow of any and all expression with the requirement that there be order and discipline.").

11. 393 U.S. 503 (1969).

12. *Id.* at 512–13.

13. *Id.* at 506.

14. *Id.* at 508–09. The Court observed:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious,

speech, a school must show that "its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[15] Although the Court acknowledged that "students are entitled to freedom of expression of their views,"[16] it recognized other meritorious considerations in educational settings and created a test to determine whether school officials can restrict the speech of its students:

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[17]

The Court added that a school may also restrict certain speech if it has "reason to anticipate that [the speech] would substantially interfere with the work of the school or impinge upon the rights of other students."[18] This test has become the benchmark used by courts in determining whether a school can regulate a student's speech or expression.

The Court was again asked to determine the constitutionality of a school board's restraint of student speech in *Bethel School District v. Fraser*.[19] In that case, a student was suspended for making a speech at a school assembly using various sexual innuendoes that the school found inappropriate.[20] While the

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society.

*Id.* (citing Terminiello v. Chicago, 337 U.S. 1, 31 (1949).

15. *Id.* at 509; *see also* Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("[T]he Ninth Circuit has held that student distribution of non-school-sponsored material cannot be prohibited 'on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials.' " (quoting Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988))).

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

17. *Id.* at 513.

18. *Id.* at 509.

19. 478 U.S. 675 (1986).

20. *Id.* at 678.

Court again recognized that students have free speech rights in school, it found that a school could restrict student speech if the speech was "lewd, indecent, or offensive."[21] Additionally, the Court noted that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[22] The Court justified this more restrictive view of student speech by balancing the free speech rights of the students against society's interest in educating its youth.[23] Thus, as a result of *Fraser*, a school has the power to determine what is or is not appropriate for student speech within the school itself in light of its basic educational mission.[24]

Finally, the Court decided in *Hazelwood School District v. Kuhlmeier*[25] that a school principal has the authority to censor the school newspaper and its student-writers, despite the students' First Amendment rights.[26] The Court determined that when a school newspaper was involved, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[27] Additionally, the Court refused to classify

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21. *Id.* at 683.

22. *Id.* at 682.

23. *Id.* at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").

24. *Id.* at 683. The Court stated:

> The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.... The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

*Id.; see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission.' " (citing *Fraser*, 478 U.S. at 685)).

25. 484 U.S. 260 (1988)

26. *Id.* at 274–75.

27. *Id.* at 273.

the school newspaper as a traditional public forum, granting the State more power to regulate the speech occurring therein.[28] The Court felt that the school need not "lend its name and resources to the dissemination of student expression."[29] As a result of this ruling, a school board only needs a "valid educational purpose" to justify its restriction of student speech occurring within a school sponsored activity.[30]

As a result of the Supreme Court's triumvirate of student speech cases, a school may restrict or punish student speech when the speech materially or substantially interferes with normal classroom procedures or when the school has reason to anticipate such disorder.[31] Further, a school may also restrict or punish student speech that is "lewd, indecent, or offensive"[32] or that is involved in a "school-sponsored expressive activit[y],"[33] without examining whether the speech materially or substantially interfered with daily school procedures.

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28. *Id.* at 267. The Court stated:

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assemble, communicating thoughts between citizens, and discussing public questions." ... If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on speech of students, teachers, and other members of the school community.

*Id.* (quoting from *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939), and *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983)) (citations omitted).

29. *Hazelwood Sch. Dist.*, 484 U.S. at 272–73.

30. *Id.* at 273.

31. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

32. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

33. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

## III. THE DISTINCTION BETWEEN ON-CAMPUS AND OFF-CAMPUS SPEECH

Lower courts have attempted to define the boundary between on-campus and off-campus speech by using the language in *Tinker*, *Bethel*, and *Hazelwood*. However, without a clear Supreme Court precedent, lower court decisions have landed all over the spectrum.[34]

The Court stated in *Tinker* that speech, whether "in class or out of it,"[35] which causes a material or substantial disruption in school activities could be regulated by school officials. Taken literally, one might infer the Court intended this standard to apply to off-campus speech. When read as a whole, however, the language of the *Tinker* decision suggests that the Court did not equate "out of class" with "off campus."[36] A broad application of *Tinker* to off-campus speech is undermined by the Court's description of outside the "classroom hours"[37] as "in the cafeteria, or on the playing field, or on the campus during authorized hours."[38] Thus, the Court's definition of "out of class" is more accurately understood to mean beyond the classroom but still on school grounds. The Court also stated that they had consistently

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34. *See* Louis John Seminski, Jr., *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 172 (2001) ("[T]he courts' holdings have been vague at best, resulting in a plethora of inconsistent decisions in the lower courts.").

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

36. *See* Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLIAMETTE L. REV. 93, 141–42 (2003). Caplan argues:

> [The *Tinker* Court's] reference to student conduct "out of class" does not mean "out of school" because the entire discussion deals with student conduct "on the campus during the authorized hours" . . . *Tinker*'s "in class or out of it" language hardly suggests that school administrators may apply the same level of control to students in the world at large as they do within school grounds.

*Id.* (quoting *Tinker*, 393 U.S. at 512–13).

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

38. *Id.* at 512–13.

reaffirmed the power of schools "to prescribe and control conduct *in* the schools."[39] When the *Tinker* Court referred to events outside of the normal classroom hours, it was not extending its ruling to speech occurring off school grounds.[40]

The other cases of the triumvirate have also recognized that permissible restrictions are limited to on-campus speech. Justice Brennan, in a concurring opinion in *Fraser* and relying on the Court's decision in *Cohen v. California*,[41] noted in dicta, "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[42] The *Hazelwood* Court also echoed Justice Brennan's concurrence in drawing its own distinction between on-campus and off-campus student speech,[43] and the holding in *Hazelwood* was again restricted to speech occurring on school grounds.[44]

In attempting to apply the language of these Supreme Court decisions to modern situations, lower courts have recognized this difference between on- and off-campus speech. Their application of this distinction to the Internet, however, has produced various

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39. *Id.* at 507 (emphasis added).

40. *See* Caplan, *supra* note 36, at 141–42.

41. 403 U.S. 15, 24–26 (1971) (deciding that a man wearing a jacket with the words "Fuck the Draft" on the jacket was engaging in expression protected by the First Amendment).

42. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring).

43. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("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." (quoting *Fraser*, 478 U.S. at 685)).

44. *Id.* The Court stated:

> [Students] cannot be punished merely for expressing their personal views *on* the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours"—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

*Id.* (emphasis added) (citations omitted).

results.[45] The Pennsylvania Supreme Court noted that "a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?"[46] Yet, in the same case the Pennsylvania court held that a website created off campus became on-campus speech because the site was accessed on campus.[47]

Federal appellate courts have varied in their application of this distinction as well. In 1972, the Fifth Circuit overtly passed on an opportunity to issue an opinion regarding the differences between on- and off-campus student speech, illustrating its reluctance to take on such an important yet ambiguous subject.[48] However, while the Court of Appeals for the Fifth Circuit found in *Shanley* that it was not necessary to define a rule regarding off-campus student speech, the court still stated "that it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts,"[49] and that "the width of a street might very well determine the breadth of the school board's authority."[50] The Fifth Circuit thus suggested that it is open to the possibility that a student's freedom of speech differs when the student is outside the school's walls. The court recognized that a person between the ages of five and sixteen has two identities—student and citizen—which subject the person to two separate bodies of law.[51] These separate identities, assigned

45. *See* Seminski, *supra* note 34, at 167–68.

46. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002).

47. *Id.* at 864–65.

48. Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 974 (5th Cir. 1972). The court in *Shanley* held an underground student newspaper, created and distributed off campus, could not be regulated by school officials, even though the newspaper was brought on school grounds by its readers. However, instead of establishing a line between off-campus and on-campus student speech, the court stated, "[W]e do not feel it necessary to hold that *any* attempt by a school district to regulate conduct that takes place off the school ground and outside school hours can never pass constitutional muster." *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 974; *see infra* note 52.

to the individual by the environment the person presently finds himself or herself, should not interfere with each other in the context of free speech.[52] If a young person is classified at all times as a student, and thus subjected to the broader restrictions of student speech, the ability of young people to function in society as private citizens is greatly diminished. In recognition of students' identity as citizens, the Ninth Circuit has found that non-school-sponsored material, such as Internet expression created by students, is "entirely outside the school's supervision or control," even if the target audience was the school's students.[53]

With the exception of the Ninth Circuit, courts that have had ample opportunity to state an opinion on off-campus speech have not elaborated their thoughts on the distinction.[54] Instead, courts have either restricted their rulings to address only on-campus speech activity or have avoided this conflict by characterizing off-

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52. *See id.* The court reasoned:

> An offense against one authority that it perpetrated within the jurisdiction of another authority *is usually punishable only by the authority in whose jurisdiction the offense took place*. . . . Students, as any other citizens, are subject to the civil and criminal laws of the community, state, and nation. A student acting entirely outside school property is potentially subject to the laws of disturbing the peace . . . and so forth, whether or not he is potentially subject to a school regulation that the school board wishes to extend to off-campus activity.

*Id.* (emphasis added).

53. Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000).

*Emmett* concerned a student, Nick Emmett, who created a website of mock obituaries of fellow students at Emmett's high school. *Id.* at 1089. The site stated the content was not sponsored by the school and was for entertainment purposes only. *Id.* It also allowed visitors to vote on who would "die" next—meaning whose mock obituary would be posted. *Id.* The *Emmett* court found this type of student speech outside the control of school officials. *Id.* at 1090.

54. *See generally* Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972) (refusing to create a distinct boundary between on-campus and off-campus speech); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) (applying the *Tinker* test to off-campus speech without articulating a distinction between the two settings).

campus speech as on-campus speech because the speech unintentionally reached school grounds or the school population.[55] Courts seem to be confused with the application of precedent in the context of Internet off-campus speech.

## IV. THE UNIQUE CHARACTERISTICS OF THE INTERNET.

"The internet has emerged as a forum where students can gossip, express criticisms, vent their frustrations, and challenge the status quo."[56] This speech occurs both on-campus and off-campus, but a number, and arguably the most significant, of cases arising today concern a student's creation of Internet material off school grounds. A student uses his or her own resources to express him or herself, and thus the expression is not connected with the school in any way. A connection occurs only when the speech concerns the school or its officers or is brought onto the campus through access to the Internet. The Internet creates a number of novel issues involving the public's right to freedom of speech because of its unique accessibility and potential for discourse, as well as potential for defamation.[57]

The United States Congress has recognized that the Internet "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[58] While Congress seems excited about the

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55. *See, e.g., Killion*, 136 F. Supp. 2d at 455 (holding that speech originating off campus but unintentionally arriving on campus could be punished if it satisfied the *Tinker* test). *Contra* Flaherty v. Keystone Oaks Sch. Dist, 247 F. Supp. 2d 698 (W.D. Pa. 2003) (holding that a student handbook policy which did not geographically limit school officials' authority to discipline student speech to school premises or school-sponsored events was unconstitutionally vague).

56. Tuneski, *supra* note 7, at 143.

57. *See* Philip T.K. Daniel & Patrick Pauken, *The Electronic Media and School Violence: Lessons Learned and Issues Presented*, 164 ED. LAW REP. 1, 2 (2002) ("The difficulty here is for educators to control dangerous and violent Internet conduct and in striking a proper balance between the traditional notions of education in a democracy and the exponential growth and speed of largely unregulated communication in cyberspace.").

58. 47 U.S.C. § 230(a)(3) (1998).

potential of the Internet, it does encourage the development of filtering programs to be used on the Internet, which would screen what type of information is received by families or schools.[59] In order to receive funds to purchase Internet-accessible computers, Congress has required school libraries to use Internet filtering programs that would protect students from receiving information that is "obscene"[60] or "harmful to minors."[61]

Different speech regulations can be applied depending on the type of forum in which the speech is made.[62] Already, the Supreme Court has found that Internet speech is deserving of First Amendment protection.[63] However, as with other forms of speech,

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59. *See* 47 U.S.C. § 230(b)(3)–(4) (1998).

60. 20 U.S.C. § 9134(f)(1)(A)(i)(I) (2000).

61. 20 U.S.C. § 9134(f)(1)(A)(i)(III) (2000).

62. *See, e.g.*, Draudt v. Wooster City Sch. Dist. Bd. of Educ., 246 F. Supp. 2d 820, 826–27 (N.D. Ohio 2003). The court observed:

> For purposes of free speech analysis, the Supreme Court has identified three types of fora: 1) the traditional public forum; 2) the limited public forum or designated public forum; and 3) the non-public forum.... Generally, the law does not consider public schools to be traditional public fora.... In traditional and limited public fora, the government may impose content-based restrictions on speech only if they are necessary to serve a compelling state interest and are narrowly tailored to that end.... Conversely, in nonpublic fora, restrictions on speech need only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

*Id.* (quoting Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37, 46 (1983)) (citations omitted).

63. *See* Reno v. ACLU, 521 U.S. 844, 868–70, 885 (1997). In *Reno*, the Court held that the Communications Decency Act was unconstitutionally overbroad and that the Internet should not be equated with other mediums of communication for determining the level of First Amendment scrutiny applicable. In deciding Internet speech was worthy of First Amendment protection, the Court observed:

> In [previous] cases, the Court relied on the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its "invasive" nature. Those factors are not

the Court might very well decide that the standards for restriction of Internet speech "are lower in a public school,"[64] and that a school can regulate speech occurring on school grounds or in connection with the school.[65] For example, the school's policy toward the student paper in *Hazelwood* was to "not restrict free expression or diverse viewpoints within the rules of responsible journalism."[66] However, the Court found:

> School officials did not evince either "by policy

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> present in cyberspace. Neither before nor after the enactment of the [Communications Decency Act] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry . . . .
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> . . . "[T]he content on the Internet is as diverse as human thought."
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> . . . The dramatic expansion of this new marketplace of ideas contradicts the [Government's assertion that regulation of Internet speech is required to attract more Internet users]. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

*Id.* at 868–70, 885 (quoting ACLU v. Reno, 929 F. Supp. 2d 824, 842 (1996)) (citations omitted).

64. *Draudt*, 246 F. Supp. 2d at 827; *see also* Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973) ("In the secondary school setting first amendment rights are not coextensive with those of adults and while such rules of prior restraint may be valid, they nevertheless come to this court with a presumption against their constitutionality.").

65. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988). The Court in *Hazelwood* focused on this issue and based their opinion on the finding that a school newspaper, as a facility of the school, is a limited public forum, thus establishing that certain types of speech restrictions are allowed if they are "reasonable." *Id.*; *see supra* note 28.

66. *Hazelwood Sch. Dist.*, 484 U.S. at 269.

> or by practice" any intent to open the pages of [the student paper] to "indiscriminate use" by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]" as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of [the student paper] in any reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case.[67]

Thus, as a limited public forum, schools are allowed to impose "reasonable restrictions"[68] on all speech occurring in a school sponsored activity. This includes speech in a student newspaper, at an assembly, during a school field trip, and potentially, speech occurring on the Internet. Until the Supreme Court addresses whether off-campus Internet speech is within a school's control and develops parameters for determining when speech crosses onto campus, the lower courts must continue to guess at what is constitutionally permissible.[69]

## V. RECENT DEVELOPMENTS IN PENNSYLVANIA

Since 2001, three cases have been decided in Pennsylvania regarding schools' attempts to punish and restrict students' speech occurring over the Internet. The first of these cases, *Killion v. Franklin Regional School District*,[70] concerned a student who was suspended for creating a humiliating "Top Ten" list about the

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67. *Id.* at 270 (citations omitted).

68. *Id.* at 267.

69. *See* Seminski, *supra* note 34, at 176 (suggesting that higher courts should review this new issue because "electronic publication portends the emergence of new cases not addressed by the dated traditional student free speech standards. Consequently, any application of these standards by any court is misplaced. Without a thorough review of this new medium . . . these cases cannot withstand scrutiny.").

70. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

school's athletic director.[71] Comments ranging from the athletic director's appearance to the size of his genitals were included on the list.[72] The list was created by the student at home and sent via email to a number of his friends.[73] A printed copy of the list eventually made it to school grounds, though the student creator insisted that he never brought the list to school himself.[74] Nevertheless, the school suspended the student for ten days for committing verbal or written abuse of a school official.[75]

The district court in *Killion* chose to apply the standard set forth in *Tinker* to both on-campus and off-campus speech.[76] The court found that because the "Top Ten" list was eventually brought to campus, *Tinker* applied.[77] Applying the *Tinker* standard, the court found that the school had violated the student's free speech rights. The school "failed to satisfy *Tinker's* substantial disruption test"[78] because the speech was not threatening nor did it lead to any "actual disruption."[79] The court cited *Beussink v. Woodland R-IV School District*[80] for the proposition 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*."[81] In summary, the *Killion* court was willing to apply the *Tinker* standard to off-campus speech, but it found that the speech in question did not materially disrupt the school.

The court in *Killion* also examined whether the student's speech was lewd or vulgar, in which case the school's restriction or punishment of the speech would be justified under *Fraser*.[82] In this

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71. *Id.* at 448–49.

72. *Id.* at 448.

73. *Id.*

74. *Id.* at 448–49.

75. *Id.* at 449.

76. *Id.* at 455 ("The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*.").

77. *Id.*

78. *Id.*

79. *Id.*

80. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

81. *Killion*, 136 F. Supp. 2d at 455 (citing *Beussink*, 30 F. Supp. 2d at 1180).

82. *Id.* at 456–58. The court noted, "In *Fraser*, the Court made clear that

part of its analysis, the court did draw a line between on-campus and off-campus speech, stating that "courts considering lewd and obscene speech occurring off school grounds have held that students cannot be punished for such speech, absent exceptional circumstances."[83] The court emphasized that "we cannot ignore the fact that the relevant speech . . . occurred within the confines of [the student's] home, far removed from any school premises or facilities."[84] The court determined that because the expression occurred off campus, the school could not sanction it on vulgarity grounds. As a result, the court held the school board's policy of speech regulation to be unconstitutionally vague and overbroad, in part because the policy "could be read . . . to cover speech occurring without school premises."[85]

In 2002, the Pennsylvania Supreme Court addressed a similar issue in *J.S. v. Bethlehem Area School District*.[86] A student had created a profanity-ridden website mocking his principal and his teacher in various ways, including morphing the teacher's image into Adolf Hitler and suggesting that students pitch in twenty dollars for a hitman.[87] The student accessed the website from school to show a classmate.[88] Eventually an instructor learned of the website and informed the school principal, who viewed the site.[89] After the targeted teacher viewed the website, she suffered severe emotional distress and took a leave of absence from her job. The school was required to hire numerous substitutes to fill in for

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school officials may punish explicit, indecent, or lewd speech . . . ." *Id.* at 456 (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

83. *Id.* at 456–57. In making this determination, the court relied on *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2d Cir. 1979), which concerned an off-campus student newspaper "specializing in sexual satire." The court in *Thomas* explained, "Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." *Thomas*, 607 F.2d at 1052.

84. *Killion*, 136 F. Supp. 2d at 457.

85. *Id.* at 459.

86. 807 A.2d 847 (Pa. 2002).

87. *Id.* at 851.

88. *Id.* at 852.

89. *Id.*

the absent teacher throughout the rest of the year.[90] The student-creator was expelled from his school after the conclusion of the school year on the grounds that his speech was a threat that resulted in actual harm.[91]

After reviewing the content of the website, the *J.S.* court made the preliminary determination that the student did not intend to convey a "true threat" toward his teacher.[92] If the statements had been classified as a "true threat," the speech would not have been protected by the First Amendment.[93] The court also expressly noted that the Internet speech must be classified as on-campus or off-campus speech before their analysis continued.[94] In this statement, the court implied that different rules apply to speech that takes place off campus. Because the student accessed his website from a school computer, however, the court classified the student's activity as on-campus speech.[95] In support of that determination, the court said:

> [The student]... facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing

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90. *Id.*

91. *Id.* at 852–53.

92. *Id.* at 859. In analyzing whether a true threat is present, the court noted:

> Factors to be considered included how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the makers of the threat had made similar statements to the victim on other occasions; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

*Id.* at 858. Using these factors, the court concluded that "the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm." *Id.* at 859.

93. *Id.* at 856 ("In *Watts*, the United States Supreme Court first announced that 'true threats' fell outside of the protection of the First Amendment."); *see* Watts v. United States, 394 U.S. 705, 708 (1969).

94. *J.S.*, 807 A.2d at 864; *see supra* text accompanying note 46.

95. *Id.* at 865.

> the site to another student, and by informing other students at school of the existence of the website.... Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property. We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.[96]

Once it decided that the student's speech occurred on campus, the court applied the *Tinker* standard in order to determine whether the student's speech caused a "material disruption" or created "substantial disorder" in the school's activities.[97] The court determined that the "web site caused actual and substantial disruption of the work of the school,"[98] and therefore the school's act of expelling the student speaker was justified under *Tinker*.[99]

In 2003, the same federal district court that decided *Killion* ruled on a related matter in *Flaherty v. Keystone Oaks School District*.[100] In this case, a student had posted messages on an Internet message board[101] regarding the school's volleyball team, of which the student was a member.[102] The student posted messages both from home and from school, using language that the school deemed offensive.[103] The school discovered the student's posts and took disciplinary action against the student.[104] School disciplinary policy permitted "punishment of speech [by the school] that school

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96. *Id.*

97. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

98. *J.S.*, 807 A.2d at 869.

99. *Id.* at 868–69.

100. 247 F. Supp. 2d 698 (W.D. Pa. 2003).

101. *Id.* at 700.

102. *Id.* at 700 n.1.

103. *Id.* at 700–01.

104. *Id.*

officials deem to be 'inappropriate, harassing, offensive or abusive' without defining those terms or limiting them in relation to geographic boundaries."[105]

Although the parties had reached a settlement regarding the student's academic future before the court released an opinion on the school's punishment,[106] the court struck down the school board's policy on regulating student speech as unconstitutionally vague and overbroad "because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity. Simply put, the Student Handbook policies could be interpreted to prohibit a substantial amount of protected speech."[107]

In holding the school policy unconstitutional, the court focused on the policy's lack of geographical limitations.[108] The court found the policy could be read to cover off-campus speech and speech unrelated to the school and was therefore unconstitutionally vague and overbroad.[109]

## VI. DISORDER IN THE COURTS

The various and inconsistent outcomes among lower courts in attempting to apply precedent to this emerging area of law[110] necessitate action by higher courts in determining specifically what standards apply to Internet speech.[111] The unique nature of the

105. *Id.* at 702.
106. *Id.* at 701 n.2.
107. *Id.* at 706.
108. *Id.* at 705–06.
109. *Id.*
110. *See, e.g., id.*; Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088 (W.D. Wash. 2000); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (granting preliminary injunction against school district for suspending a student from school for his off-campus creation of a website that was critical of the school administration and was viewed on campus); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002); *see supra* notes 8, 53 and text accompany notes 86–92.
111. *See* Seminski, *supra* note 34, at 176–77.

Internet may require higher courts to create an entirely new standard for both off-campus student expression and Internet speech.[112] The Internet is a forum unique to itself; as such, the courts' "traditional language such as 'schoolhouse gates' and 'behind the counter' are lost in cyberspace."[113] The courts may have to realize that certain standards and tests created for traditional forums are inadequate to meet the challenges raised by this new medium.

The Supreme Court has already established that Internet speech is protected under the Constitution.[114] Lower courts need the Supreme Court to evaluate Internet speech in the school context and establish a test that distinguishes between on- and off-campus speech.[115] Such a test would help eliminate inconsistencies among the lower courts in defining what is and is not on-campus speech. Further, the Court's consideration of this issue will confirm whether purely off-campus student speech has full protection under the First Amendment.

A two-part test would help the courts in analyzing these new challenges presented by the Internet. First, the court should look at student intent.[116] If it can be proven that the student intended the speech to reach school grounds, the speech is properly classified as on-campus speech and is subject to school regulation.

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112. *Id.* at 182 ("The Internet is a new medium and should be treated as such. Applying old standards to such an interactive medium is improper; what is necessary is some new constitutional standard, not merely a new way in which current standards are portrayed.").

113. *Id.* at 180 ("It is virtually impossible to speak of [the Internet] in tangible terms because it does not exist in a tangible way.").

114. *See generally* Reno v. ACLU, 521 U.S. 844 (1997) (holding that Internet speech is afforded constitutional protection).

115. Tuneski, *supra* note 7, at 142 ("[C]ourts should employ a bright-line rule clearly distinguishing between on- and off-campus speech by focusing on the place of origination and dissemination.").

116. *See id.* at 177 (arguing that the intent of a student speaker is the key to whether a student's speech should be considered on-campus speech. "If . . . the off-campus expression reaches the school passively without any intentional efforts by the author to disseminate the speech on campus, schools would be prevented from sanctioning the student for the effects of the speech, even if it was reasonably foreseeable that it would reach the school.").

In assessing the difficult task of determining intent, the court should consider the actions taken by the student as evidence of intent. Any action taken on school grounds to spread the content of the website would make the site on-campus speech. Thus, if the student accessed his or her website on campus and showed it to a number of friends, the speech becomes on-campus speech, even if the site had been created off campus. However, if the student sent an email from home to friends about the website and never intended the site to be accessed on school grounds or spread through the school population, the action of sending the email should not make the website on-campus speech.

Once a determination is made as to the nature of the speech, the standard for assessing its protections must be determined. Student authors of Internet speech created and disseminated solely off campus should receive full First Amendment protection, much like the protection given to completely off-campus underground newspapers.[117] Once the speech becomes on-campus speech, a court must apply one of the three standards established by the Court for regulation of student speech. It will be argued that the *Tinker* standard, while the most applicable, might not be the most appropriate to use for Internet student speech.

The courts in *J.S.* and *Flaherty* recognized a difference between on-campus and off-campus speech.[118] But the *J.S.* court focused the facts on one solitary student action which made the student's off-campus speech "on campus," thus bringing the speech under the jurisdiction of the school.[119] The lack of clarity as to what acts change originally off-campus Internet speech to on-campus speech increases the need for established guidelines. Classifying Internet speech as on-campus speech threatens the potential for

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117. Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 974 (5th Cir. 1972) (holding unconstitutional a school board's attempt to prohibit distribution of an entirely off-campus newspaper).

118. Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 705–06 (W.D. Pa. 2003); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

119. *J.S.*, 807 A.2d at 865.

expression embodied and offered by the Internet medium.[120]

The resource used to access the Internet should not automatically determine whether the speech has become on-campus speech. Under a factual situation like *J.S.*, the student's personal access of his or her site on campus should not consequentially make the speech on-campus. Still, the court classified the student speech as on-campus speech partially because the student speaker accessed the website at school.[121] As a guideline, a court should consider the student speaker's intention in accessing his or her site on campus.[122] Much like a personal diary written with a school-owned pen, a student who accesses his or her website with no intention to release the site's content into the school setting should not be subjected to punishment by school officials. Along the same lines, a student who creates Internet speech off-campus and clearly intends the speech to reach school

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120. Tuneski, *supra* note 7, at 165. Tuneski concludes:

> [C]lassifying internet speech as on-campus expression threatens to chill speech that would be fully protected if not spoken in the context of the school environment. If permitted to punish students for websites created from home, schools would be afforded significant powers which could annihilate the First Amendment and privacy rights of students. A student's comments or criticisms posted on websites, in chat rooms, or in e-mails could all lead to school sanctions if the content of the expression were to somehow disrupt the smooth functioning of the school campus. . . . Hence, by failing to classify student internet speech as off-campus expression, courts take the risk that student speech will be chilled by the efforts of some school officials to limit the ability of students to freely exercise their First Amendment rights in online media.

*Id.; cf.* Robert E. Simpson, Jr., *Limits on Students' Speech in the Internet Age,* 105 DICK. L. REV. 181, 204 (2001) ("The creator of a website posted on the Internet without password protection or other security has no reasonable expectation of privacy.").

121. *J.S.*, 807 A.2d at 865. The court suggested that the content of the site indicated it was aimed "not at a random audience, but at the specific audience of students and others connected with [the] particular School District." *Id.*

122. *See* Tuneski, *supra* note 7, at 177.

grounds has crossed the threshold to on-campus speech.

If intent cannot be identified, a court should look at any actions taken by the student speaker. After accessing the website, for example, if the student set the site as a bookmark in the school computer or pointed the site out to another student, he or she has created on-campus speech. Spreading the content of the website to other students at school creates on-campus speech, but solitary access of a website should not be considered on-campus speech solely because the student uses a school-owned computer.[123]

The Internet is a window to the world, not an electronic poster. As such, courts may find it useful to focus on "where the expression originated and how it was disseminated"[124] in determining whether the speech is on- or off-campus speech. If a student's site originates off campus, it should remain off-campus speech unless the author takes some action to spread the website's content throughout the school.[125] Under this theory, only students who spread the website's content are subject to regulation.[126] The

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123. *Id.* at 141 ("Allowing internet speech to be considered 'on-campus' merely because it is viewed at school would circumvent the Court's clear intention of providing varying degrees of First Amendment protection to speech according to the environment in which it is expressed."). *But see* Rhoda J. Yen, *Free Speech on the Internet: Regulating Web Authorship by Students,* COMPUTER L. REV. & TECH. J., Spring 2000 at 71 ("If a school owns the equipment and the system resources that enable its students to create webpages, then the school should enjoy broad rights to monitor and control the content of those webpages.").

124. Tuneski, *supra* note 7, at 177. Tuneski argues:

> The line between on- and off-campus expression should be based on where the expression originated and how it was disseminated. Authors of controversial or offensive material created and disseminated off school grounds should only be subjected to the jurisdiction of school authorities when they take additional steps to bring the material to a school campus. By taking this additional step, a speaker decides whether she wishes to subject herself to the jurisdiction of school officials.

*Id.*

125. *Id.*

126. Caplan, *supra* note 36, at 163 ("If students are gossiping loudly about another student's off-campus activities instead of paying attention in

author of such speech could not be punished when it "reaches the school passively . . . even if it was reasonably foreseeable that [the speech] would reach the school."[127] This perspective on student speech has already been adopted by some jurisdictions[128] and maintains the Court's idea that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[129] However, a student who creates a site, accesses it by himself, and shows it to one friend during the school day should typically not evoke the "substantial disruption" category established by *Tinker*. In the rare case where communication of a website's content between two students does create a substantial disruption, *Tinker* may very well be called upon.

As an example of a lower court attempting to apply traditional standards to new challenges, the *Killion* court held that the *Tinker* standard should apply to both on- and off-campus student speech, basing its opinion on an "overwhelming weight of authority."[130] However, later decisions in the wake of *Tinker* have made it clear that the Court did not intend for the *Tinker* standard to extend beyond the school setting.[131] Decisions from lower courts

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class, the gossipers should be disciplined, not the subject of the gossip.").

127. Tuneski, *supra* note 7, at 177.

128. *See* Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 968 (5th Cir. 1972); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

129. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

130. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

131. *See* Caplan, *supra* note 36, at 142. Caplan contends the *Tinker* Court's mention of "out of class" did not mean "out of school" based on the context of the Court's opinion. He argues:

> Numerous later decisions make clear that the *Tinker* standard does not apply to students' off-campus lives. A decision issued a few months after *Tinker* explained:
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> > [I]t makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have

and analysis by commentators suggest Internet speech is most appropriately classified as off-campus speech.[132] Contrary to the *Killion* court's "overwhelming weight of authority[,]"[133] a number of courts have respected the distinction between a student's private speech and his or her on-campus speech.[134] The court in *Killion* is an example of lower courts attempting to derive from precedent some sort of constitutional standard for off-campus Internet speech. As a result of its virtually blind grasp for a rule, the *Killion* court "may be taking *Tinker* . . . *Fraser* . . . and *Hazelwood* . . . to places where the Supreme Court had not intended to go."[135]

The *Tinker* standard also gives the government more control over a person's speech as compared to the general public's

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> jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations during his private life away from the campus.

*Id.* (citing Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1340–41 (S.D. Tex. 1969)).

132. *See Emmett*, 92 F. Supp. 2d at 1088; Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1178 (E.D. Mo. 1998); Caplan, *supra* note 36, at 151 ("The rapidly emerging consensus among courts and commentators is that Internet speech should be treated as if it occurs off-campus." (citing Coy v. Bd. of Educ., 205 F. Supp. 2d 791 (N.D. Ohio 2002)); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 160–62; Jennifer Kathleen Swartz, *Beyond the Schoolhouse Gates: Do Students Shed Their Constitutional Rights When Communicating to a Cyber-Audience?*, 48 DRAKE L. REV. 587, 602–04 (2000). *But see* Simpson, *supra* note 120, at 198 (arguing, "Language in a student website created at school or at home is not protected if it causes material disruption at school or if material disruption at school can be reasonably forecast.").

133. *Killion*, 136 F. Supp. 2d at 455.

134. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 974 (5th Cir. 1972) ("[T]he width of a street might very well determine the breadth of the school board's authority."); *Emmett*, 92 F. Supp. 2d at 1090 (declaring Internet material created by a student at home is "entirely outside of the school's supervision or control").

135. Bettina Brownstein, *Student Rights and the Internet*, ARK. LAW., Winter 2002, at 11–12.

speech standards.[136] In fact, as the court in *Thomas v. Board of Education, Granville Central School District* noted, it is because the school's power in regulating speech is confined to exist only within their walls that schools are given such a great power over their student population, a power which would normally infringe the rights of the public.[137] To apply *Tinker* outside of the school walls would be to subject a portion of our citizens to a lower standard of freedom of speech, and, in effect, subjecting them to a separate Bill of Rights.[138] Just as the "less stringent" rules for conducting student

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136. *Cf.* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in Public Schools*, 65 GEO. WASH. L. REV. 49, 98 (1996). Professor Dupre argues the *Tinker* Court took away power from public school officials by restricting regulation of student speech to only those instances where the speech substantially disrupts school activity. She writes:

> Requiring substantial interference or material disruption to the education process to occur before a teacher can discipline a student for expression simply does not allow schools to create an environment where serious learning will consistently occur. Even a 'slight' disruption can derail a class for a significant period of time. Thus, the Tinker Court's substantial interference standard was based on a fundamentally flawed perception of the reality of the classroom. Although the Court seemed to concede that the school has certain pedagogical concerns, it erred when it second-guessed the school officials' judgment about the effect of the Vietnam protest on school students and the education process.

*Id.*

137. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 (1979) ("Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.").

138. *See* Tuneski, *supra* note 7, at 172. Tuneski notes:

> [I]t stands to reason that any number of things during the course of a day cause similar distractions that interfere somewhat with the smooth functioning of a classroom. Such a low and indefinite threshold for punishing expression may be justifiable in the context of on-campus speech, but applying such an easily satisfied standard to off-campus speech would have a chilling effect on speakers in otherwise fully protected forums.

*Id.*

searches are limited to on-campus or school-sponsored events, so too should the "less stringent" rules for regulating student speech be confined to school grounds.[139] Considering the fact that school attendance is mandatory in all states, some courts have created a situation where citizens between the ages of five and sixteen are governed by a more restrictive speech code solely because of their youth. Whether the speaker is a child or an adult, "it is provocative and challenging speech . . . which is most in need of the protections of the First Amendment. . . . The First Amendment was designed for this very purpose."[140] Neither the *Tinker* standard, nor any other speech restrictive standard, should be applied to speech uttered off school grounds. The restrictions on a student's right to freedom of speech were reasonably created to give schools the ability to foster a more educational atmosphere *at* school. They were not, however, created to give schools the power to conform the minds and mouths of America's youth to whatever is acceptable for a local school board.[141]

The *Killion* court could have made its decision regarding the "Top Ten" list by looking at the intent and action of the student speaker. Using the previously proposed test, the court would find that there is little evidence of an express intent by the student to bring his speech onto the school grounds.[142] The student did,

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139. Caplan, *supra* note 36, at 147.

140. Beussink v. Woodland R-IV School District, 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998).

141. *See e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). The Court declared:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

*Id.*

142. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001).

however, send the list to a number of his friends.[143] The sending of emails by itself does not establish student intent for the list to reach school grounds. It would seem that the student only meant for the list to be viewed by a select few. Barring evidence showing the student speaker intended otherwise, such as telling his friends to pass along the email to everyone they knew, the student's speech should have retained its off-campus status and therefore its full First Amendment protection. It therefore seems incorrect to apply *Tinker* to off-campus speech as the *Killion* court did.

If a court wishes to apply *Tinker* to student Internet speech classified as on-campus speech, it should do so by applying an objective-reaction test to determine if the disruption caused by the speech was material or substantial. As an illustration of the need for a objective-reaction test, consider the teacher's reaction in *J.S.* The court in *J.S.* seemed too quick to call the website a material disruption by looking only at the arguably irrational reaction of one individual.[144] The court determined that the student website caused a substantial disruption in the school because of the reaction it invoked from a teacher.[145] A website that directs incredible negativity toward a teacher can very reasonably cause "substantial disorder" or a "material disrupt[ion]"[146] in schools, especially in the wake of Columbine and other incidents of school violence.[147] However, based on the court's classification of the student website as a "misguided attempt at humor" and not a "true threat,"[148] the

143. *Id.*

144. *See* Tuneski, *supra* note 7, at 171 ("While the content of the student's site [in *J.S.*] cannot be condoned, police investigators concluded that the threats . . . were not true threats of danger. Because there was no actual threat to the teacher's life, it could be argued that the teacher's response was not a rational or foreseeable reaction to the student's site.").

145. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002).

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

147. *J.S.*, 807 A.2d at 860.

148. *Id* at 859. The court concluded:

> Cognizant of the narrowness of the exceptions to the right of free speech, and the criminal nature of a true threat analysis, we conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site,

teacher's leave of absence and emotional distress over the website hardly seems a "rational or foreseeable reaction to the student's site."[149] The *J.S.* court contends that "[k]eeping in mind the unique nature of the school setting and the student's diminished rights therein, while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required for a school district to punish student speech."[150] However, under the *J.S.* court's rationale, if every teacher in the nation reacted the same way as the teacher in *J.S.*, regardless of the website's content, no student would be free from punishment in expressing dislike of a teacher.[151]

For the reasons stated above, an objective-reaction test would determine more effectively the extent of the disruption in a case like *J.S.*[152] Such a test would require a court to analyze student expression by considering first "how a reasonable person would perceive the specific utterance, before assessing whether the speech disrupts the educational environment."[153] Second, the court would complete "an objective evaluation of the language of the threat, under a reasonable person test."[154]

Considering the increase in the volume of communication

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> taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm.

*Id.*

149. Tuneski, *supra* note 7, at 171.

150. *J.S.*, 807 A.2d at 868 (citations omitted).

151. *See* Tuneski, *supra* note 7, at 171–72. Tuneski argues:

> If a student could be punished anytime that a teacher is upset by the magnitude and strength of the student's off-campus criticism, students would have little First Amendment protection. Setting the standard of First Amendment protection *on the reaction of listeners* threatens to abridge far more speech than is constitutionally permissible.

*Id.* (emphasis added).

152. *See* Seminski, *supra* note 34, at 181–82.

153. *Id.* at 182.

154. *Id.*

the Internet brings to the school setting, continued application of the original *Tinker* standard to the passive Internet medium "could be just another recipe for disaster without a clear precedent from the courts."[155] The Internet allows teachers to access private student thoughts, both innocent and harsh. Without an objective application of the *Tinker* test to these abundant student statements, a school might have the ability to restrict the most minute student speech which was never intended to be read by school officials, much less cause the disruption perceived by the school administration.

In short, purely off-campus speech should remain under the full protection of the First Amendment. Previously noted precedent holds that speech which occurs and is intended to remain off campus cannot be regulated by school officials, even if the speech leaks onto school grounds.[156] However, Internet speech is a type of off-campus speech that is more accessible on school grounds than any other communication medium. As such, schools have an interest in regulating speech coming from the Internet into their classrooms in order to maintain a proper learning environment. Because of its unique characteristics, the higher courts need to address the role of Internet speech in the school context, which may require a new test for restricting student Internet speech. One test would be to leave off-campus Internet speech as off-campus speech, and thus protected by the First Amendment, until the student speaker either intends and/or commits some act which brings the Internet speech to campus. Additionally, once the Internet speech has been classified as "on campus" due to the student's actions or established intentions, the *Tinker* standard should be applied in determining the speech's effect on the school. However, the *Tinker* test should be evaluated from a reasonable person's view; irrational disruptive reactions to student Internet speech should not bring about student punishment for the speech.

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155. *Id.*

156. Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 978 (5th Cir. 1972).

## VII. CONCLUSION

"The First Amendment recognizes a danger in governmental action having a chilling effect on speech because it gives rise to self-censorship and diminishment of the marketplace of ideas. Free speech needs breathing room to serve its purpose."[157] Even so, the courts feel it is just as important to foster a suitable educational environment. To reach a balance, the Court has allowed certain restrictions on student speech to achieve the state's basic educational mission.

However, the courts did not mean for school boards to have entire control over a student's expressive life. The Supreme Court in *Tinker* limited their ruling by recognizing that "[s]chool officials do not possess absolute authority over their students."[158] While courts have later identified these boundaries to include school sponsored events occurring off school grounds, the Supreme Court has never, nor should it ever, extended the power to regulate student expression occurring in private life outside of school. The *Tinker* standard should not be applied to off-campus speech.

Off-campus speech includes expression on the Internet, a forum that is created off campus but is easily accessible on campus. While Internet speech can potentially permeate the school walls, the origin of the speech and the intention of the author should be the ultimate factors for determining whether the speech classifies as on- or off-campus speech.[159] In other words, the student's actions should only qualify as on-campus speech if the student author creates the website at school or commits some other intentional act to spread the content of the website to the population of the school. Regardless of the student's intentions, if the student creates a site that is considered a true threat, that speech is not deserving of First Amendment protection.[160] Additionally, any student Internet speech that is both intended and actually brought onto campus

157. Caplan, *supra* note 36, at 148.

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

159. Tuneski, *supra* note 7, at 177.

160. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 856 (Pa. 2002).

should be subject to school discipline only if a reasonable person would consider the speech disruptive under the *Tinker* test. Only under these circumstances should the student's acts subject him or her to school regulation.

Schools historically have adapted and will continue to adapt to any new challenges, such as the Internet. However, such adaptations should not be made at the expense of the right to freedom of speech.[161] Schools have dealt with student expression for decades, be it through silent political demonstrations, speeches at school assemblies, or through student newspapers; schools have adjusted as needed to preserve the educational atmosphere. This country has yet to see a school crumble because of a student's crass or even personally damaging words. Fostering the school environment by ridding the school of disruptive speech is one thing, but stepping over court-defined boundaries into a student's private life "for the sake of the school environment" is not consistent with the current precedent. The *Tinker* Court noted, "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth, 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[162] Such a vision of the public school system cannot be attained by further suppressing student speech. Internet student speech occurring off school grounds contributes to the "marketplace of ideas." In doing so, Internet speech should remain off-campus speech, entitling the student speaker to full protection of the First Amendment, until the speaker takes action to bring the speech on campus.

There are a large number of speech issues presented by student use of the Internet that were left unexplored by this Note.

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161. Caplan, *supra* note 36, at 154 (citing Beidler v. N. Thurston Sch. Dist., No. 99-2-00236-6 (Wash. Super. Ct. July 18, 2000), *available at* http://www.aclu-wa.org/legal/Beidler-Court's%20Opinion.html (on file with the First Amendment Law Review)). The court in *Beidler* concluded, "Schools can and will adjust to the new challenges created by such students and the internet, but not at the expense of the First Amendment." *Id.*

162. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

However, before the minute details of this topic are addressed, a threshold between on- and off-campus Internet speech needs to be created. Additionally, the courts need to decide which student speech precedents are most appropriate to apply to the new Internet medium. When needed, the courts must adjust previous standards or create new tests to fully tackle the challenges created by the increased interaction of students and the Internet. Until the appellate courts take up this topic, lower courts will continue to produce inconsistent tests and results, and students will be left in the dark as to the extent of their speech rights in this new medium of communication.