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UNCERTAINTY AT THE “OUTER BOUNDARIES” OF THE FIRST AMENDMENT:

EXTENDING THE ARM OF SCHOOL AUTHORITY BEYOND THE SCHOOLHOUSE GATE INTO CYBERSPACE

MATTHEW I. SCHIFFHAUER*

INTRODUCTION

In 1979, school officials attempted to shut down an underground student newspaper, sold off campus, which ridiculed school lunches, cheerleaders, students and teachers.¹ Today, bullies have taken to the Internet to “mock, parody and even threaten” other students, teachers and school personnel.² For example, recent litigation has concerned matters including: an AOL Instant Messenger buddy icon that depicted a named teacher being shot,³ a MySpace parody profile that contained crude answers to questions that appeared to be by and about a school principal,⁴ and a message posted on a social networking website which called on students and their parents to write a school superintendent in order to “piss her off more.”⁵

As student Internet usage increases, school administrators are exerting

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¹ Thomas v. Bd. of Educ., 607 F.2d 1043, 1045-46 (2d Cir. 1979).

² William Glenn, *Regulating Student Created Websites: Free Speech in Cyberspace*, CONNEXIONS, May 31, 2007, <http://cnx.org/content/m14559/latest/>. See Tim Grant, *Bullies Take Intimidation to Cyberspace*, PITTSBURGH POST-GAZETTE, June 26, 2006, at A-1, available at <http://www.post-gazette.com/pg/06177/701250-51.stm> (“Bullies of yesteryear spread ugly rumors and abused their peers in schoolyards, cafeterias and bus stops. Now some of them are using high technology to inflict pain and misery through . . . computers even when their victim is safe at home.”).

³ Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007) (stating that beneath the picture were the words “Kill Mr. VanderMolen.”), *cert. denied*, 128 U.S. 1741 (2008).”

⁴ Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007) (indicating that the profile was sent to many students in the district).

⁵ Doninger v. Niehoff, 514 F. Supp. 2d 199, 202 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. Conn. 2008).

more control over student web users.⁶ Students around the country have been punished for their off-campus web postings that have offended school officials.⁷ Indeed, the growing prevalence of Internet use among school children has presented a unique First Amendment question for public schools: in what circumstances can school officials “extend their authority from the schoolhouse gate to students’ personal computers”?”⁸

The United States Supreme Court has not yet decided a case regarding the limits of school regulation of off-campus student Internet expression.⁹ Moreover, the Court’s recent school-speech decision in *Morse v. Frederick*¹⁰ has only added to the uncertainty and left major issues open in this “premier First Amendment battleground.”¹¹ Lower courts have already disparately interpreted *Morse* in deciding student Internet speech cases with

⁶ See Christi Cassel, *Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 646 (2007) (noting that as student MySpace usage rises, school officials are “taking matters into their own hands” to discipline students for their Internet activity); see also Anita Ramasastry, *Can Schools Punish Students for Posting Offensive Content on MySpace and Similar Sites?*, FIND LAW, May 1, 2006, <http://writ.news.findlaw.com/ramasastry/20060501.html> (stating that the growth of popular social networking websites and blogs have created disciplinary problems for educators).

⁷ See Nancy Buczek, *Schools Discipline Students over Internet Content: Four at SU Get Probation for “Extreme” Language Critical of Teaching Assistant*, THE POST-STANDARD (Syracuse), Feb. 22, 2006, at A1, available at <http://www.thefire.org/index.php/article/6855.html> (giving examples of students from three universities and one high school that were punished for postings on the Internet, especially social networking sites); see also Jason Cato, *Online Snooping Raises Free-Speech Questions*, PITTSBURGH TRIBUNE-REVIEW, Feb. 3, 2006, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_420112.html (reporting that students nationwide are being punished for Internet expression that school administrators “don’t like,” which is created on “Web sites they don’t control,” and “computers they don’t own”).

⁸ See David L. Hudson, Jr., *Cyberspeech Overview*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=cyberspeech> (last visited Mar. 9, 2008) (noting that the growth of the Internet has “complicated analysis of restrictions on speech” and, despite uncertain guidelines, some school officials have “extended their authority” by punishing students for off-campus Internet speech). See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (announcing that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

⁹ See DAVID L. HUDSON, JR., FIRST AMENDMENT CENTER, *STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPACE MEAN FOR STUDENTS’ FIRST AMENDMENT RIGHTS?* 1 (2006), available at <http://www.firstamendmentcenter.org/PDF/student.internet.speech.pdf> (“The U.S. Supreme Court has never decided a student Internet-speech case.”); See Clay Calvert & Robert D. Richards, *Student Speech Rights on Internet Cry Out for Supreme Court Review*, L.A. DAILY J., July 24, 2007, at 6, available at <http://comm.psu.edu/first/latimesjuly2007.pdf> (arguing that the Supreme Court must hear a case that involves school discipline for a student’s off-campus internet use).

¹⁰ 551 U.S. 393 (2007) (holding a school did not violate the First Amendment by suspending a student who displayed a banner reading “BONG HiTS 4 JESUS” at a school-supervised event because the school may take steps to safeguard those entrusted to their care from speech considered to encourage illegal drug use).

¹¹ See Hudson, *supra* note 8 (“[T]his speech-enhancing medium has led to numerous controversies, causing many people to view the Internet as the premier First Amendment battleground.”); see also Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 154 (2003) (discussing the tension between schools’ need to respond to new challenges created by the internet and the protection of students’ First Amendment rights).

similar facts.¹² With little judicial guidance, school administrators are left with the difficult task of deciding when they can discipline students with regard to Internet expression. This note will argue that, in the absence of Supreme Court guidance, a new method of implementing the principles set forth in *Tinker v. Des Moines Independent Community School District*¹³ is required to strike a balance between preserving school safety and protecting students' constitutional rights in cases involving student Internet speech.

Part I focuses on the implications of the rise in student Internet usage and highlights several examples of student Internet activity that have led to school discipline across the country. Part II examines the traditional United States Supreme Court jurisprudence regarding when public school officials may limit a student's right to free expression. Part III analyzes the disparate application of those traditional standards by lower courts in Internet-related student speech cases. Part IV suggests that the ad hoc approach taken by lower courts in determining the proper bounds of school authority over student Internet speech has failed to strike the appropriate balance between school authority and students' First Amendment rights. Part V acknowledges that school authority over student Internet expression is not unlimited and identifies alternatives to harsh and potentially unconstitutional punishments. Part VI suggests that a new test is necessary to evaluate the constitutionality of school discipline based on student Internet speech. This test employs both prongs of the *Tinker* standard in deciding Internet-related student speech cases.

I. THE RISE IN STUDENT INTERNET USAGE AND THE CORRESPONDING EXTENSION OF THE SCHOOL ARM OF AUTHORITY INTO CYBERSPACE

The Internet is a "speech-enhancing medium"¹⁴ that allows people to "correspond instantaneously at relatively low cost."¹⁵ Indeed, the Internet has "revolutionized communications and amplified educational

¹² Compare *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007) (finding that, "as in *Morse*," a student was not disciplined for off-campus conduct that was "merely offensive" or "merely in conflict with some view of the school's educational mission"), with *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007) (explaining that "*Morse* does not permit school officials unfettered latitude to censor student [Internet] speech under the rubric of interference with the educational mission because that term can be easily manipulated.") (internal quotation marks omitted).

¹³ 393 U.S. 503, 513 (1969) (holding that student expression may not be suppressed unless it would "materially and substantially disrupt the work and discipline of the school" or "collide with the rights of others").

¹⁴ *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (Dalzell, J., dissenting) (describing the Internet as a medium "in which citizens from all walks of life have a voice").

¹⁵ *Hudson*, *supra* note 8.

opportunities” for students.¹⁶ Students are accessing the Internet more frequently to create their own homepages on social-networking sites, such as MySpace and or Facebook, and to communicate with others in chat rooms and with programs like AOL’s Instant Messenger.¹⁷ However, the Internet has also become an “instant slam book,” in which kids taunt or insult peers on social-networking sites or via instant messages.¹⁸

Increasing use of the Internet by students has led to monitoring of student Web activity by school officials.¹⁹ Some school administrators have stretched the boundaries of their traditional authority by punishing students for online expression even though it occurred off-campus.²⁰ In light of the growing violence among students today, schools often claim that hostilities expressed on the Internet can “result in conflicts that spill onto the school campus” as a justification for extending the reach of their authority to students’ personal computers.²¹

The following are recent examples of incidents involving the Internet that have led public schools to discipline students. In February 2006, a student at TeWinkle Middle School in Costa Mesa, California, was suspended and told that he faced expulsion for allegedly creating a

¹⁶ See Hudson, *supra* note 9, at 1.

¹⁷ See Hudson, *supra* note 8 (explaining that students’ frequent use of social-networking sites, like MySpace and Facebook, complicates analysis of restrictions of speech); see also Ramasastry, *supra* note 6 (discussing the growth of student use of social networking sites, such as MySpace and Facebook, and the popularity of student blogging on the Internet).

¹⁸ *States Pushing for Laws to Curb Cyberbullying*, FOX NEWS, Feb. 21, 2007, <http://www.foxnews.com/story/0,2933,253259,00.html>. See Kelli Kennedy, *Not-So-MySpace Any More*, THE LEDGER (Lakeland, Fla.), Apr. 23, 2006, <http://www.theledger.com/apps/pbcs.dll/article?AID=/20060423/NEWS/604230392/-1/NEWS0101> (“[B]ullies [have] move[d] from punching someone on the playground to writing nasty and sometimes libelous postings about classmates, teachers and school officials on the Internet, where everyone can read them.”).

¹⁹ See Cassel, *supra* note 6, at 680 (arguing that “[i]n light of heightened student [Internet] activity, schools have become increasingly involved in monitoring and disciplining students’ online social-networking behavior.”); see also Cato, *supra* note 7 (stating that much “cyber-snooping,” is currently being done by schools rather than parents in order to keep tabs on students’ Internet activity).

²⁰ See Hudson, *supra* note 8, at 1 (asserting that some school administrators have “overreacted” to student Internet speech, created privately and off campus, by “clamping down on student online expression with a vice grip”); see also William Bird, *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002), 26 U. ARK. LITTLE ROCK L. REV. 111, 127 (2003) (stating that “[a] fast-growing category of cases involving on campus punishment for arguably off campus expression is that concerning student speech on the Internet.”).

²¹ Grant, *supra* note 2. “The Internet just amplifies the speech, so the consequences are far greater.” *Id.* “Schools sometimes argue that a student’s Internet speech should be disciplined because it adversely affected the educational process within the school.” Caplan, *supra* note 11, at 163”. Some scholars opine that censorship of student expression which school administrators “deem too controversial or offensive,” is an escalating trend in light of numerous school shootings at places like Columbine High School in Colorado. See David L. Hudson, Jr. & John E. Ferguson, Jr., *A First Amendment Focus: The Courts’ Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 181 (2002).

MySpace group²² titled "I hate [girl's name]," which included an expletive and a racial reference.²³ Twenty of the student's classmates were also suspended for merely viewing the post.²⁴ A school official explained that the punishments were justified because the MySpace group caused concerns about school safety.²⁵ Apprehensive parents, however, "questioned whether the school overstepped its bounds by disciplining students for actions that occurred on personal computers, at home and after school hours."²⁶

Five high school students from Belleville, Michigan, were expelled after school officials saw them brandishing "look alike" weapons and drugs in MySpace photographs.²⁷ Administrators characterized the photos as "gang activity" and "intimidation" and claimed the expulsions were necessary because school officials "can't take that chance of something coming onto campus and people getting hurt."²⁸ In response, the students' attorney claimed that school officials failed to see the "changing climate" of what has become socially acceptable.²⁹

Preventing controversial Internet expression from spilling over into school was also a concern in West Lafayette, Indiana, in October 2007, when West Lafayette school officials punished several students because of comments posted on a Facebook group created in support of a student who

²² See MySpace, Create or Join MySpace Groups, http://faq.myspace.com/app/answers/detail/a_id/202 (last visited April 19, 2009) (explaining how to create a group, which then allows the creator to "add images, post bulletins, invite friends . . . [and] change privacy settings"); see also Linda Roeder, *Create a MySpace Group Page*, ABOUT.COM, <http://personalweb.about.com/od/myspacecom/ss/grouppage.htm?p=1> (last visited Apr. 19, 2009) (providing detailed instructions on how to create a MySpace group page).

²³ Brian Dakss, *20 Youths Suspended in MySpace Case*, CBS NEWS, Mar. 3, 2006, <http://www.cbsnews.com/stories/2006/03/03/tech/main1364880.shtml?CMP=Ilc>; Gil Kaufman, *Twenty Students Suspended in Latest Round of MySpace-Related Busts*, MTV NEWS, Mar. 3, 2006, http://www.mtv.com/news/articles/1525313/20060303/id_0.jhtml.

²⁴ Dakss, *supra* note 23; Kaufman, *supra* note 23.

²⁵ Dakss, *supra* note 23; Kaufman, *supra* note 23.

²⁶ Dakss, *supra* note 23.

²⁷ Andrea King, *Last Belleville 'MySpace' Student Suspended*, J. NEWSPAPERS ONLINE, Dec. 13, 2007, available at <http://www.journalgroup.com/Belleville/6562/last-belleville-myspace-student-suspended>; Karen Bouffard, *Columbine Dad Backs Students Expulsions; Parents of Teens Shown on MySpace with Guns, Drugs Plan to Sue District*, DETROIT NEWS, Nov. 13, 2007, at 2B.

²⁸ King, *supra* note 27. See Marjorie Kauth-Karjala, *Belleville Student Banned Again*, ANN ARBOR NEWS, Dec. 12, 2007, available at http://blog.mlive.com/annarbornews/2007/12/4th_student_in_myspace_case_re.html (noting that the race card might have been used by the accused and their families).

²⁹ See King, *supra* note 27 (explaining that Sykes's attorney warned the school that it is society's culture we must be afraid of and not the expelled kids); see also Kauth-Karjala, *supra* note 28 (stating that the students' attorney brought up the issue of race before and after the hearings because the expelled students are all black and the school board's members were all white).

had been suspended.³⁰ After a fight broke out at the school, a student was suspended for posting a video of the fight on the Internet site YouTube.³¹ Several students then started a chat group on Facebook protesting the administration's actions, which they believed to be unfair.³² Although none of the Facebook postings occurred on campus, administrators suspended the student-protestors under the school's "Student Conduct Code [which] could be applied whenever students are writing about administrators, teachers or students online."³³ However, some parents have questioned similar the punishments and their implications for students' constitutional rights in similar cases.³⁴ As one parent stated, "[i]f [the schools would] spend as much time teaching as they spend telling parents how to parent, maybe we'd have smarter kids coming out of their schools."³⁵

These examples are only a few of the many punishments that have recently been doled out by public school officials for students' off-campus Internet behavior. Schools have a substantial interest in keeping students and staff safe and in maintaining the integrity of their educational environment. Indeed, school safety has become of paramount concern following tragic shootings at schools across the country, including Virginia Tech University and Northern Illinois University. However, schools must

³⁰ *Indiana High School Student Punished for Calling Administrator an 'Ass' on Facebook*, STUDENT PRESS L. CENTER, Oct. 12, 2007, http://208.106.253.91/newsflash_archives.asp?id=1627&year=2007 [hereinafter *Indiana High School Student Punished*] (noting that the student received an in-school suspension for her comments); *Student Suspensions Over Web Comments Spur Debate*, INDY CHANNEL, Oct. 10, 2007, <http://www.theindychannel.com/education/14312781/detail.html> [hereinafter *Student Suspensions Spur Debate*] (stating that suspensions were levied because of the fight and because of 'Mr. Cassidy's comments directed at the principal).

³¹ See *Indiana High School Student Punished*, *supra* note 30 (reporting that a student was "punished for posting a video of the altercation online"); see also *Student Suspensions Spur Debate*, *supra* note 30 (discussing the suspensions related to the altercation, and adding that one student was suspended for posting the fight on YouTube).

³² See *Indiana High School Student Punished*, *supra* note 30 (claiming that the "students expressed anger in their posts that the student who initiated the altercation in the computer lab was not punished"); see also *Student Suspensions Spur Debate*, *supra* note 30 (noting that the suspensions motivated students to form a Facebook group and comment on the "punishment meted out by assistant principal Ron Shriner").

³³ *Indiana High School Student Punished*, *supra* note 30. The district's superintendent added that "the district also scrutinizes off-campus speech if it 'causes a disruption in the educational process.'" *Id.* "A code of conduct, posted on the school district's Web site, does not directly address postings on the Internet, but does say existing rules about conduct apply both on and off school grounds." See *Student Suspensions Spur Debate*, *supra* note 30.

³⁴ See Alan Gomez, *Students, Officials Locking Horns over Blogs; What is Posted from Home Brings Punishment at School*, USA TODAY, Oct. 26, 2006, at 8D (describing a free-speech debate with students, their parents, and First Amendment advocates on the side that is worried schools may be overstepping their bounds by punishing students for Internet activity done off campus); see also Editorial, *Facebook Smear No Mere 'Prank'*, CINCINNATI ENQUIRER, Dec. 26, 2007, at 8B (discussing a case in which the parents of students punished for posting insults about a teacher on the Internet hired lawyers and claimed the punishments violated the students' First Amendment rights).

³⁵ Gomez, *supra* note 34.

be mindful of the fact that students have First Amendment rights and the freedom accorded to Internet expression that occurs off campus and on one's personal computer is "at its zenith."³⁶ In order to strike a balance between preserving school safety and protecting students' constitutional rights, more concrete guidelines are needed in this "muddled area"³⁷ concerning the punishment of students for their expression on the Internet.

II. DEVELOPMENT OF UNITED STATES SUPREME COURT STANDARDS REGARDING STUDENT SPEECH

Freedom of speech is a right that is highly valued and essential to the vitality of our nation's democratic system of government.³⁸ The First Amendment to the United States Constitution protects this cherished right by restricting the Government from "abridging the freedom of speech" of its citizens.³⁹ However, an important function of public schools is to "inculcate [their pupils with] the habits and manners of civility."⁴⁰ At times, student expression may conflict with the values that schools aim to edify.⁴¹ In such situations, schools must balance their interest in value indoctrination with students' First Amendment rights of free speech and free expression.⁴²

³⁶ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979). "[Where] school officials have ventured out of the school yard and into the general community . . . the freedom accorded expression is at its zenith . . ." *Id.* "The right of public school students to speak freely in public and private places off-campus should not be limited because they are subject to compulsory attendance laws for part of the week." Caplan, *supra* note 11, at 140.

³⁷ See Hudson, *supra* note 8 (noting that "[t]he area remains muddled because the Supreme Court has never addressed a student Internet speech case and has not addressed a pure First Amendment student speech/press case since 1988."); see also Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1129-30 (2008) (proclaiming that while the Supreme Court has decided three landmark student speech cases and one seminal Internet speech case, it has yet to decide a student Internet speech case").

³⁸ See James M. Dedman IV, *At Daggers Drawn: The Confederate Flag and the School Classroom-A Case Study of a Broken First Amendment Formula*, 53 BAYLOR L. REV. 877, 926 (2001) (discussing the importance of the First Amendment as a "protection of the expression of unpopular sentiments from governmental reprisals or censorship."); see also Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 624 (2002) (noting that "freedom of expression is the 'touchstone of individual liberty and, in turn, democracy'" (quoting Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1949 (1997))).

³⁹ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

⁴⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

⁴¹ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 279 (1988) (Brennan, J., Dissenting) ("Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions."); see also Cassel, *supra* note 6, at 653 (positing that school value inculcation "may be at odds" with students' First Amendment rights of free speech and free expression).

⁴² See *Fraser*, 478 U.S. at 681 ("The 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."); see also Miller, *supra*

In the seminal case, *Tinker v. Des Moines Independent Community School District*,⁴³ the United States Supreme Court set the standard for when a school district may limit a public school student's right to free expression.⁴⁴ Although the *Tinker* Court declared that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"⁴⁵ there has been much uncertainty as to the scope of those rights during the forty years following that decision.⁴⁶ The Court created vague exceptions to *Tinker's* general rule in *Bethel School District No. 403 v. Fraser*⁴⁷ and *Hazelwood School District v. Kuhlmeier*.⁴⁸ Moreover, the growth of student Internet use and corresponding attempts to punish Internet expression by school administrators has only compounded the ambiguity of the standard.⁴⁹ Indeed, the Court's most recent school-speech decision, *Morse v. Frederick*,⁵⁰ has further demonstrated why a new uniform method of implementing *Tinker* is imperative for resolving Internet-related student speech cases.⁵¹

note 38, at 653 (emphasizing the importance of striking a compromise "between the schools' interest in maintaining a safe and educational environment and the students' interest in free expression.").

⁴³ 393 U.S. 503 (1969).

⁴⁴ *Id.* (holding that a school cannot infringe a student's right to free speech unless that speech would be materially and substantially disruptive).

⁴⁵ *Id.* at 506.

⁴⁶ See Miller, *supra* note 38, at 646 (stating that "*Tinker* and its progeny have left the lower courts in a state of confusion"); see also Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 67 (2005) (arguing that disparate interpretations of the *Tinker* line of cases have left schools and students with very little guidance when trying to determine what speech is protected).

⁴⁷ 478 U.S. 675, 685 (1986) (stating that it was appropriate for the school to limit the student's lewd and indecent speech because it would undermine the school's educational mission, and, unlike the speech in *Tinker*, this speech lacked a political viewpoint). Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1045-46 (2008) (noting the Court was less concerned with students' free speech as it allowed school officials to censor speech to promote "socially appropriate behavior" (quoting *Fraser*, 475 U.S. at 681)).

⁴⁸ 484 U.S. 260, 272-73 (1988) (stating that the *Tinker* standard does not have to be applied when determining whether a school may refuse to lend its name and resources to the dissemination of student expression). See Papandrea, *supra* note 48, at 1049 (distinguishing *Tinker* by holding that schools have broad authority to restrict the "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (quoting *Kuhlmeier*, 484 U.S. at 271)).

⁴⁹ See Glenn, *supra* note 2. "[T]he seminal cases involving student expression concerned on campus speech . . . This leaves school administrators and courts in the position of extrapolating rules from case law that do not necessarily apply to off campus [Internet] speech." *Id.* "[T]he advent of the Internet has complicated analysis of restrictions on [student] speech." Hudson, *supra* note 8.

⁵⁰ 127 U.S. 2618 (2007) (holding that a school can restrict student speech that promotes illegal drug use in violation of a school policy). See Papandrea, *supra* note 48, at 1050-51 (noting that the decision to limit student speech did not arise out of an "abstract desire to avoid controversy," but rather to limit the danger in promoting illegal drug use (quoting *Morse*, 127 U.S. at 2629)).

⁵¹ See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) ("The five separate opinions in *Morse* illustrate the complexity and diversity of approaches to this evolving area of

A. *The Tinker Standard – The General Rule*

In December 1965, a group of students plotted to convey their objections to the Vietnam War by wearing black armbands to school.⁵² When Des Moines school officials became aware of the plan, they adopted a policy that any student wearing an armband to school would be asked to remove it, and if the student refused he would be suspended until he returned without the armband.⁵³ Subsequently, three students wore black armbands to school and were suspended until they agreed to return to school without wearing them.⁵⁴

Faced with the question of whether the school's disciplinary actions violated the students' First Amendment rights, the Court ruled in favor of the students, stating that "*First Amendment* rights, applied in light of the special characteristics of the school environment, are available to teachers and students."⁵⁵ Recognizing both the school's need for authority to prevent disruptions on campus and the students' First Amendment rights,⁵⁶ the Court established what is now known as the *Tinker* standard. This standard provides that school officials may only suppress student expression if they can reasonably foresee that the expression will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" . . . "or collide with the rights of others."⁵⁷ Further, the Court held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."⁵⁸

The *Tinker* Court emphasized that students are "'persons under our Constitution" who are "possessed of fundamental rights which the State must respect."⁵⁹ Although the Court recognized that the school's action was based upon the desire to avoid the controversy which might result from

law."); see also Calvert & Richards, *supra* note 9 (arguing that "*Morse* did nothing" to resolve the issues raised when a student is punished for off-campus Internet expression).

⁵² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

⁵³ *Id.* at 504.

⁵⁴ *Id.* at 504. The suspended students did not return to school until after the planned period for wearing armbands had expired. *Id.*

⁵⁵ *Id.* at 506.

⁵⁶ *Id.* at 507 ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.").

⁵⁷ *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

⁵⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

⁵⁹ *Id.* at 511 (declaring that public schools "may not be enclaves of totalitarianism," and that "[s]chool officials do not possess absolute authority over their students"). See Hudson, *supra* note 8, at 8 (describing the *Tinker* decision as the culmination of the "trend toward greater respect for students' First Amendment rights").

expression of opposition to the Vietnam War – a conflict that caused protest and unrest across the country⁶⁰ – the Court stated that the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not enough to justify a prohibition on student expression.⁶¹ Further, “[a] student’s rights . . . do not embrace merely the classroom hours.”⁶² Because “intercommunication” among students is an integral part of the educational process, students may express their opinions, even on controversial subjects, “in the cafeteria, or on the playing field, or on the campus during the authorized hours.”⁶³

B. The First Exception to Tinker: The Fraser Standard

In 1986, the Supreme Court carved out the first exception to *Tinker* in *Bethel School District No. 403 v. Fraser*.⁶⁴ In *Fraser*, the Court held that public school officials may prohibit “offensively lewd and indecent speech” if the speech “undermine[s] the school’s basic educational mission.”⁶⁵ Matthew Fraser, a high school junior, delivered a speech containing sexual innuendos at a school-sponsored election assembly.⁶⁶ During Fraser’s speech “[s]ome students hooted and yelled” in response, while others “appeared to be bewildered and embarrassed.”⁶⁷ Although his speech caused no real disruption,⁶⁸ Fraser was suspended for three days under a school disciplinary rule prohibiting the use of obscene language at

⁶⁰ See Jeff Leen, *Washington Comes of Age; The Vietnam Protests: When Worlds Collided*, WASH. POST, Sept. 27, 1999, at A01A1 (stating that during the Vietnam era the nation endured what was “perhaps “its greatest turmoil since the Civil War”). See generally Michael Corcoran, Op-Ed., *Why Kent State is Important Today*, BOSTON GLOBE, May 4, 2006, at A11 (describing the 1970 shooting of thirteen students protesting the Vietnam War by National Guardsman at Kent State University as an example of “what happens when a grossly misguided war divides a country”).

⁶¹ *Tinker*, 393 U.S. at 509.

⁶² *Id.* at 512.

⁶³ *Id.* at 512-13.

⁶⁴ 478 U.S. 675 (1986) (holding that a student’s free speech rights were not violated when he was suspended for making a sexually suggestive speech during a school assembly).

⁶⁵ *Id.* at 685 (asserting that the School District acted within its “permissible authority” in disciplining Fraser).

⁶⁶ *Id.* at 677-78. The school was holding student elections in order to teach the students about self-government, and Fraser was giving a speech nominating a fellow student. *Id.* at 677.

⁶⁷ *Id.* at 678. Students were required to either attend the assembly at which Fraser gave his innuendo laden speech or report to study hall. *Id.* at 677.

⁶⁸ See *id.* at 690 (Marshall, J., dissenting) (stating that the school district failed to show that Fraser’s speech caused a disruption in the school); see also *id.* at 694-95 (Stevens, J., dissenting) (positing that although Fraser’s sexual innuendo may have been offensive to some listeners, it did not materially disrupt school activities); Sara Slaff, *Silencing Student Speech: Bethel School District No. 403 v. Fraser*, 37 AM. U. L. REV. 203, 217-18 (1987) (declaring that the facts of *Fraser* “do not demonstrate the requisite material disruption” that would permit a school to restrain student expression).

school.⁶⁹

The Supreme Court identified a "marked distinction" between the political message in *Tinker* and the sexual content of the speech in *Fraser*.⁷⁰ It declared that the purpose of the public school system is to inculcate students with the fundamental values necessary to maintain a democratic political system.⁷¹ Departing from *Tinker*, the Court stated that the "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."⁷² Schools may determine that such fundamental values "cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."⁷³ Thus, "[t]he determination of what manner of speech in the classroom or in [a] school assembly is inappropriate properly rests with the school board."⁷⁴

C. The Second Exception to *Tinker*: The *Kuhlmeier* Standard

The United States Supreme Court further limited the *Tinker* decision in *Hazelwood School District v. Kuhlmeier*.⁷⁵ In that case, the principal of Hazelwood East High School removed two pages of student-written articles, two of which regarded pregnancy and divorce, from the school newspaper, which was published as part of the school's journalism class.⁷⁶ The principal claimed he was concerned about protecting the pregnant students' identities and the lack of opportunity for parents

⁶⁹ See *Fraser*, 478 U.S. at 678-79. Fraser took the opportunity to appeal his punishment, which also included his removal from the list of students eligible to speak at graduation, but the hearing officer upheld the disciplinary measures. *Id.* at 679.

⁷⁰ *Id.* at 680 (contrasting the armband in *Tinker*, which the Court considered "a form of protest or the expression of a political position," with the "lewd and obscene speech" used by Fraser to make what he "considered to be a point").

⁷¹ *Id.* at 681. "[W]e echoed the essence of this statement of the objectives of public education as the '[inculcation of] fundamental values necessary to the maintenance of a democratic political system.'" *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)). "[T]hese 'fundamental values' must also take into account consideration of . . . the sensibilities of fellow students." *Id.* (quoting *Ambach*, 441 U.S. at 77).

⁷² *Id.*

⁷³ *Id.* at 683 (holding that the schools, "as instruments of the state," may decide that the teaching of civility and mature conduct is undermined by the use of such coarse language).

⁷⁴ *Id.* (stating that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.").

⁷⁵ 484 U.S. 260 (1988) (holding that the high school paper, published by students in class, did not constitute a public forum, so school officials could reserve the right to reasonably restrict the student's speech in the paper).

⁷⁶ *Id.* at 264. One of the stories described three unidentified Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on named students at the school. *Id.* at 263.

mentioned in the divorce story to respond to the remarks.⁷⁷ Former students, who had been staff members on the newspaper, sued the school district for violating their First Amendment rights.⁷⁸

In *Kuhlmeier* the Court ruled in favor of the school district, declaring that the First Amendment does not “require a school affirmatively to promote particular student speech.”⁷⁹ The Court noted that the *Tinker* standard does not determine “when a school may refuse to lend its name and resources to the dissemination of student expression.”⁸⁰ Instead, Justice White, writing for the Court, articulated the *Hazelwood* standard for school-sponsored speech: “[e]ducators 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.”⁸¹

D. Morse – The “High Court” Issues Esoteric Precedent in “Bong Hits 4 Jesus” Case

In 2007, nearly twenty years after *Fraser*, the Supreme Court again addressed a student free-expression case in its fractured decision in *Morse v. Frederick*.⁸² In January, 2002, “the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah.”⁸³ While school was in session, the torchbearers were to proceed along the a street in front of the high school attended by Joseph Frederick.⁸⁴ The school’s principal allowed students and staff to leave class to observe the relay “as an approved social event or class trip.”⁸⁵ Frederick watched the

⁷⁷ *Id.* at 263. “[The principal] also believed that the [student pregnancy] article’s references to sexual activity and birth control were inappropriate for some of the younger students at the school.” *Id.*

⁷⁸ *Id.* at 262 (noting the former staff members’ contention that their First Amendment rights were violated when school officials deleted two pages of articles from the student paper).

⁷⁹ *See id.* at 270–71 (stating that the question addressed in *Tinker*, whether the First Amendment requires a school to “tolerate particular student speech,” is distinct from the question posed in *Kuhlmeier*) (emphasis added).

⁸⁰ *Id.* at 272–73. In distinguishing *Tinker*, the Court granted school officials broad 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.” *Id.* at 271.

⁸¹ *Id.* at 273.

⁸² 127 U.S. 2618 (2007). In *Morse*, Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas and Alito joined; Justice Thomas filed a concurring opinion; Justice Alito filed a concurring opinion, in which Justice Kennedy joined; Justice Breyer filed an opinion concurring in the judgment in part and dissenting in part; Justice Stevens filed a dissenting opinion, in which Justices Souter and Ginsburg joined. *Id.* at 2621.

⁸³ *Id.* at 2622.

⁸⁴ *Id.*

⁸⁵ *Id.* Students were allowed to observe the relay from either side of the street and school officials

event from across the street and, as the torchbearers and camera crews passed by, Frederick and his group of friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS."⁸⁶ The principal confiscated the banner and suspended Frederick for ten days.⁸⁷

Frederick brought suit alleging that the school board had violated his First Amendment rights.⁸⁸ The district court granted summary judgment in favor of the school, finding that the principal "reasonably interpreted the banner as promoting illegal drug use," which gave her the "authority, if not the obligation, to stop such messages at a school-sanctioned activity."⁸⁹ However, the Court of Appeals for the Ninth Circuit applied the *Tinker* standard and reversed.⁹⁰

The Supreme Court reversed the Court of Appeals' judgment, holding that school officials have the authority to "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."⁹¹ Recognizing that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents," the Court quickly dispensed with Frederick's argument that this was not a school speech case.⁹² However, the Court also determined that none of its prior student speech cases were controlling.⁹³

In an ad hoc manner, the Court drew on various principles from its earlier school speech cases to find that "detering drug use by

were responsible for monitoring the students' actions during the event. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* On administrative appeal, Frederick's suspension was reduced to eight days, but the school district's superintendent concluded that the principal's actions were permissible under *Fraser* because Frederick's banner was "speech or action that intrudes upon the work of the schools." *Id.* at 2623 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680). Specifically, the superintendent determined that the banner "appeared to advocate the use of illegal drugs" and, therefore, it was "inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use." *Id.*

⁸⁸ *Id.* (stating that, in his suit, Frederick sought "declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees").

⁸⁹ *Id.* at 2623.

⁹⁰ *See id.* ("[T]he [Ninth Circuit] . . . found a violation of Frederick's *First Amendment* rights because the school punished Frederick without demonstrating that his speech gave rise to a risk of substantial disruption.") (internal quotation marks omitted).

⁹¹ *Id.* at 2625.

⁹² *Id.* at 2624. The Court agreed with the district superintendent "that "Frederick cannot stand the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Id.* (internal quotation marks omitted).

⁹³ *See id.* at 2625-29. *Kuhlmeier* did not control because "no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Id.* at 2627. Unlike the armbands in *Tinker*, Frederick's banner did not convey any sort of political or religious message. *Id.* at 2625. In fact, the Court noted that *Morse* was "plainly not a case about political debate over the criminalization of drug use or possession." *Id.* Further, *Fraser* did not control because the school officials' "concern [in *Morse* was] not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use." *Id.* at 2629.

schoolchildren is an 'important and . . . perhaps compelling 'interest' of school officials.⁹⁴ The Court stated that *Fraser's* holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."⁹⁵ However, the Court was careful to note that Frederick's speech was not proscribable under *Fraser* merely because it was "plainly offensive."⁹⁶ Moreover, as *Kuhlmeier* and *Fraser* demonstrate, *Tinker* is not the sole basis for restricting student speech.⁹⁷ Finally, the Court applied the "special characteristics of the school environment" language of *Tinker* and found that preventing student drug abuse "extends well beyond an abstract desire to avoid controversy."⁹⁸

In his dissenting opinion, Justice Stevens stated that "it is one thing to restrict speech that *advocates* drug use[, but] another thing entirely to prohibit an obscure message with a drug theme."⁹⁹ Justice Stevens argued that prohibiting speech because it supposedly advocates illegal drug use, unless it is likely to provoke the harm sought to be avoided by the government, violates the First Amendment because it impermissibly discriminates based upon content.¹⁰⁰ Further, Stevens stated that even if the school had a compelling interest to prohibit such speech, Frederick's banner was so vague that a reasonable person could not assume that it advocated illegal drug use.¹⁰¹ Finally, Justice Stevens took issue with the majority's deference to the school principal's "ostensibly reasonable judgment" that "Frederick's sign qualified as drug advocacy."¹⁰² According to Stevens, this "would permit a listener's perceptions to determine which speech deserve[s] constitutional protection."¹⁰³

⁹⁴ *Id.* at 2627-2826 (quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

⁹⁵ *Id.* at 2646 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

⁹⁶ *See id.* at 2629 (noting that if this was deemed plainly offensive "[it would] stretch *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive'").

⁹⁷ *Id.* at 2627 (stating that "the mode of analysis set forth in *Tinker* is not absolute").

⁹⁸ *Id.* at 2629 (quoting *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁹⁹ *Id.* at 2646 (Stevens, J., dissenting).

¹⁰⁰ *Id.* at 2644-2645-47. "[J]ust as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too [the school here] must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana." *Id.* at 2647.

¹⁰¹ *See id.* at 2643 (finding that "the school's interest in protecting its students from exposure to speech 'reasonably regarded as promoting illegal drug use' cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs.") (citation omitted); *see also id.* (remarking that the majority held otherwise "after laboring to establish two uncontroversial propositions.").

¹⁰² *Id.* at 2647.

¹⁰³ *Id.* at 2647-48. *See id.* at 2648 (stating that it "would 'pu[t] the speaker in . . . circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference

Prior to *Morse*, courts and school officials were unable to apply the standards of *Tinker*, *Fraser*, and *Kuhlmeier* consistently.¹⁰⁴ It appears that *Morse* is merely another decision in this line of misguided "ad hoc exceptions" to the central premise of *Tinker*.¹⁰⁵ After *Morse*, the boundaries of school authority and the extent of students' free speech rights have delved further into a state of uncertainty.¹⁰⁶ Although Justice Alito's concurring opinion purports to limit the breadth of *Morse* to the context of non-political, pro-drug student speech,¹⁰⁷ this is no guarantee that *Morse* will not be interpreted broadly in the future to further cut away at students' First Amendment rights.¹⁰⁸

Regardless, the Supreme Court has now set forth four different standards for student speech cases. The interpretation of this new *Tinker* quartet is vital to how lower courts will decide future student Internet speech cases.

may be drawn as to his intent and meaning"). "

¹⁰⁴ See Hudson & Ferguson, *supra* note 21, at 208 (positing that "[l]ower courts apply the trilogy of *Tinker*, *Fraser* and [*Kuhlmeier*] randomly, selectively siphoning passages to fit desired ends") (internal quotation marks omitted); see also Miller, *supra* note 38, at 646 (noting that the rules espoused in the *Tinker* trilogy have become "nebulous and unpredictable" and that *Fraser* and *Kuhlmeier* have been "vigorously stretched" to allow pervasive regulation of student expression under their "more lenient standards").

¹⁰⁵ *Morse* 127 U.S. at 2636 (Thomas, J., concurring). See *id.* (observing that "[t]his doctrine of exceptions creates confusion without fixing the underlying problem . . .").

¹⁰⁶ See Douglas Lee, *Lower Court Takes Narrow View of 'Bong Hits' Ruling*, FIRST AMENDMENT CENTER, July 18, 2007, <http://www.firstamendmentcenter.org/commentary.aspx?id=18814> (stating that efforts to interpret the ramifications of the *Morse* decision have already begun, but it may not threaten student rights as much as some had feared); see also Martin A. Schwartz, *Supreme Court Restricts Student Speech*, N.Y. LAW J. 3 (2007) (finding that *Morse* "does not articulate a standard of judicial review. . . . leav[ing] lower courts, litigants and their attorneys without guidance for evaluating claims not on 'all four' with any of the Court's student speech precedents.").

¹⁰⁷ See *Morse*, 127 U.S. at 2637 (Alito, J., concurring) (stating that he "join[s] the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions."); see also Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007) (finding that "Alito's concurrence in *Morse* clarifies that *Morse* does not permit school officials unfettered latitude to censor student speech"). See generally Calvert & Richards, *supra* note 9 (arguing that the *Morse* concurrence of Justices Alito and Kennedy "confines the majority's opinion").

¹⁰⁸ *Morse*, 127 U.S. at 2639 (Breyer, J., concurring in the judgment in part and dissenting in part). Indeed, the dissenters in *Morse* recognized this danger. In his dissent, Justice Breyer argued that "while the holding is *theoretically* limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions." *Id.* (emphasis added). Even more skeptical of the *Morse* majority's reasoning was Justice Stevens, who posed the question: "Under the Court's reasoning, must the *First Amendment* give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers?" In response to his own question, Justice Stevens stated that the "breathhtaking sweep" of the *Morse* opinion suggests that the Court would support punishing a student for unfurling a "WINE SIPS 4 JESUS" banner. *Id.* at 2650 (Stevens, J., dissenting).

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

In the absence of Supreme Court guidance, there has been much confusion amongst lower courts in determining the boundaries of school authority and the extent of students' First Amendment rights in Internet speech cases.¹⁰⁹ Courts have applied the *Tinker*, *Fraser*, *Kuhlmeier* and, now, *Morse* standards in varying ways to decide Internet student speech cases.¹¹⁰ Moreover, some courts have found that school officials lack disciplinary authority over student Internet expression altogether because of the expression's off-campus nature.¹¹¹ Adding further confusion into the equation is the issue of "true threats." If student Internet speech constitutes a "true threat," *Tinker* and its progeny do not apply because threats are not entitled to First Amendment protection.¹¹²

A. Pre-Morse Student Internet Speech Cases

In *Beussink v. Woodland R-IV School District*,¹¹³ a federal district court applied *Tinker* to find that a student's First Amendment rights had been violated.¹¹⁴ The student was suspended for ten days for posting a homepage on the Internet which was critical of the school and included crude and vulgar language.¹¹⁵ Although several students saw the homepage and

¹⁰⁹ See Bird, *supra* note 20, at 128 (determining that "the state of the law concerning off campus Internet speech remains an open question."); see also Calvert & Richards, *supra* note 9 (showing that "[l]ower courts, in brief, are left . . . to fathom for themselves which rules apply to determine when [student Internet] speech can be punished.").

¹¹⁰ See Hudson, *supra* note 9, at 19 (stating that "lower courts have applied school-related First Amendment rulings to reach different results [in Internet-related student speech cases]."); see also Bird, *supra* note 20, at 128 (observing that the *Tinker* line of cases has "failed to establish clear guidance" in Internet student speech cases and, as a result, "courts have showed little consistency in the analyses used to reach their decisions"); see also Li, *supra* note 45, at 75 (noting that, before *Morse*, lower courts applied *Tinker*, *Fraser*, and *Kuhlmeier* in determining whether a student's Internet speech is protected by the First Amendment).

¹¹¹ See Hudson, *supra* note 9, at 24 (noting that lower courts are divided on the issue of whether school officials can punish students for off-campus Internet expression); see also Bird, *supra* note 20, at 128 (stating that some courts have refused to recognize the school's disciplinary authority over student Internet speech "simply because of the speech's off campus origin.").

¹¹² See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 854-55 (Pa. 2002) (stating that "true threats" are unprotected by the First Amendment; however, even if a statement is not a "true threat," otherwise protected speech may be subject to regulation in a school setting under the *Tinker* line of cases); see also Glenn, *supra* note 2, at 7 (noting that the "limitations on the regulation of free speech set forth in the *Tinker*, *Fraser*, and *Kuhlmeier* cases do not apply to threats because they are not protected speech under the Constitution."). See generally *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam) (holding that "true threats" are not constitutionally protected).

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

¹¹⁴ *Id.* at 1180 (holding that Beussink "ha[d] demonstrated a likelihood of success on the merits of his *First Amendment* claim").

¹¹⁵ *Id.* at 1177.

discussed it in the school's hallways, the court found that the homepage did not "materially and substantially interfere with school discipline."¹¹⁶ The court reasoned 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*."¹¹⁷

In *Emmett v. Kent School District*,¹¹⁸ a high school student was suspended for "intimidation, harassment, [and] disruption to the educational process" after posting a web page that contained "mock 'obituaries' and allowed visitors to 'vote on who would 'die next.'"¹¹⁹ Finding for the student, the District Court judge quickly rejected the application of *Fraser* and *Kuhlmeier*.¹²⁰ Although the judge discussed *Tinker*,¹²¹ he never actually applied it to the case.¹²² Rather, he held that the suspension violated the student's rights because the web page's "out-of-school nature" took the speech "entirely outside of the school's supervision or control."¹²³ Further, the judge found that the web site did not constitute a threat, despite the school's argument that schools are in an "acutely difficult position" after recent school shootings around the country.¹²⁴

The Supreme Court of Pennsylvania came to the opposite conclusion two years later in *J.S. v. Bethlehem Area School District*.¹²⁵ There, a student was expelled for creating a web site titled "Teacher Sux" from his home computer, which contained "derogatory, profane, offensive and

¹¹⁶ *Id.* at 1181.

¹¹⁷ *Id.* at 1180.

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

¹¹⁹ *Id.* at 1089. "[A]n evening television news story characterized [the student's] web site as featuring a 'hit list' of people to be killed, although the words 'hit list' appear[ed]" appeared nowhere on the web site." *Id.*

¹²⁰ *Id.* at 1090. "In the present case, [the student's] speech was not at a school assembly, as in *Fraser*, and was not in a school-sponsored newspaper, as in *Kuhlmeier*." *Id.*

¹²¹ *See id.* (mentioning that students do not lose their speech rights upon entering a school, but that school prohibition may be justified if the speech materially and substantially interferes with the operation of the school) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

¹²² *See* Caplan, *supra* note 11, at 153-54 (stating that the judge "relied explicitly on the limits of school authority" in holding for the student); *see also* Hudson, *supra* note 9, at 17 (positing that although "the judge at one point appeared to apply *Tinker* . . . at another point, [he] seemed to suggest that the case was simply beyond the power of school authorities to regulate at all").

¹²³ *Emmett*, 92 F. Supp. 2d at 1090 ("Although the intended audience was undoubtedly connected to [the school], the speech was entirely outside of the school's supervision or control.").

¹²⁴ *See id.* The court found the school's argument to be persuasive, and agreed that web sites "can be an early indication of a student's violent inclinations," but found that the school had "presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever." *Id.*

¹²⁵ 807 A.2d 847 (Pa. 2002) (finding that the school district did not violate the student's First Amendment Rights).

threatening comments” about the student’s algebra teacher and principal.¹²⁶ A portion of the web page, referring to the algebra teacher, was entitled “Why Should She Die?”¹²⁷ Under that heading was the phrase “give me \$20 to help pay for the hitman”; another page featured” a drawing that depicted the teacher “with her head cut off and blood dripping from her neck.”¹²⁸

Noting that “the Internet has complicated analysis of restrictions on speech,”¹²⁹ the Supreme Court of Pennsylvania held that the school district did not violate the student’s First Amendment rights by punishing him for the web site.¹³⁰ First, the court looked at the “totality of the circumstances” to find that the web page did not constitute a true threat.¹³¹ The court reasoned that “[d]istasteful and even highly offensive communication does not necessarily” rise to the level of a true threat, despite “the modern rash of violent crimes in school settings.”¹³²

Next, although there was no dispute that the web site was created off-campus, the court found “a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus.”¹³³ The court declared a broad definition of on-campus speech, stating 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.”¹³⁴

The court then decided that the school could punish the student under

¹²⁶ *Id.* at 851. The web site made claims that the algebra teacher, Mrs. Fulmer, “should be fired,” made fun of her appearance, and morphed a picture of Fulmer’s face into that of Adolf Hitler. *Id.*

¹²⁷ *Id.* (indicating that the student’s site went beyond mere insults, and that there was a severity to what the student was implying).

¹²⁸ *Id.* at 851.

¹²⁹ *Id.* at 863-64 (citing *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (plurality)).

¹³⁰ *Id.* at 850.

¹³¹ *Id.* at 859. The court noted the “criminal nature of a true threat analysis” and found that the web page “did not reflect a serious expression of intent to inflict harm.” *Id.* Rather, the court found, the web site was a “sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody.” *Id.*

¹³² *Id.* at 860. Of particular importance was that while the teacher was offended, “[t]he reaction of some [other] viewers was evidently quite different.” *Id.* at 859. Despite its repugnant message, many viewers found the site humorous and “laugh[ed]” about it. *Id.* Moreover, the school district’s “inaction” in not punishing the student until after the school year was over “belie[d] its assertion that the web site constituted a true threat.” *Id.*

¹³³ *Id.* at 865.

¹³⁴ *Id.* at 865. The court found that the student “facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the website.” *Id.* According to the Supreme Court of Pennsylvania, “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.” *Id.* However, in his concurring opinion, Chief Justice Zappala argued that the majority’s definition of on-campus speech was “overly broad and unnecessary to the resolution of this case.” *Id.* at 870 (Zappala, C.J., concurring).

both the *Tinker* and *Fraser* standards.¹³⁵ However, the court did not articulate which standard it actually based its decision on because "application of either case [would result] in a determination in favor of the School District."¹³⁶ The court stated that, like the speech in *Fraser*, the web site here was clearly "lewd, vulgar and plainly offensive," but noted that "questions exist as to the applicability of *Fraser*" to off-campus Internet speech.¹³⁷ In applying *Tinker*, the court found that the student's web site caused "actual and substantial disruption of the work of the school."¹³⁸ The web site "disrupted the entire school community" and caused "emotional and physical injuries" to the algebra teacher.¹³⁹

B. Post-Morse Student Internet Speech Cases

The cases previously discussed demonstrate the confusion in the state of the law regarding school authority over students' off-campus Internet speech.¹⁴⁰ Unfortunately, the Supreme Court's decision in *Morse v. Frederick*¹⁴¹ has done nothing to resolve that confusion.¹⁴² In *Morse*, the Court itself admitted that "there is some uncertainty at the outer boundaries" of when a school can regulate student speech.¹⁴³ Certainly, off campus student Internet expression stands at these "outer boundaries."¹⁴⁴

The following subsections focus on three Internet-related student speech

¹³⁵ See *id.* at 867-6968 (majority opinion) (holding that the speech at issue here was vulgar and plainly offensive, thus meeting the *Fraser* standard, and then applying the *Tinker* standard, that the speech caused actual and substantial disruption of schoolwork, because of the factual differences between *Fraser* and the instant case).

¹³⁶ *Id.* at 867 (asserting that it was not necessary to "definitively decide" which of the two standards upon which to base the holding).

¹³⁷ *Id.* at 868.

¹³⁸ *Id.* at 869.

¹³⁹ *Id.* at 869.

¹⁴⁰ See discussion *supra* Part III. A. (analyzing student Internet speech cases decided before *Morse*).

¹⁴¹ 127 U.S. 2618, 2624 (2007). (noting that there is uncertainty as to when courts should apply school-speech precedents).

¹⁴² See Calvert & Richards, *supra* note 9 (noting that *Morse* has been of little help to lower courts that have decided cases involving student Internet-related expression); see also David L. Hudson, Jr., *Student Expression – What's On the Horizon*, FIRST AMENDMENT CENTER, June 2007, http://www.firstamendmentcenter.org/speech/studentexpression/horizon.aspx?topic=student_expression_horizon

(stating that lower courts are divided on whether school officials can punish students for off-campus Internet expression and the Supreme Court "provided no guidance" on that issue in *Morse*).

¹⁴³ See *Morse*, 127 U.S. at 2624 ; *but cf.* 127 U.S. at 2638 (Alito, J., concurring) (describing the school's regulation of *Frederick's* banner as "standing at the far reaches of what the First Amendment permits").

¹⁴⁴ See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) ("The difficulty is in articulating the appropriate constitutional boundaries as to the breadth of public school disciplinary authority in [the student Internet expression] factual scenario."); see also Hudson, *supra* note 141 ("Some of this uncertainty extends to the arena of student online expression.").

cases that were decided after *Morse*: *Wisniewski v. Board of Education of Weedsport Central School District*,¹⁴⁵ *Layshock v. Hermitage School District*,¹⁴⁶ and *Doninger v. Niehoff*.¹⁴⁷ These cases demonstrate that courts remain divided, and have become further perplexed, over how to decide student Internet speech cases following *Morse*.

a. *Wisniewski v. Board of Education of Weedsport Central School District*

Aaron Wisniewski, an eighth grade student at Weedsport Middle School, created an AOL Instant Messenger buddy icon on his parents' home computer in April 2001.¹⁴⁸ The icon was "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing spattered blood."¹⁴⁹ Beneath the drawing appeared the words "Kill Mr. VanderMolen," Aaron's then English teacher.¹⁵⁰ The student intended the icon "as a joke," but school officials determined that it constituted a threat and suspended him for one semester.¹⁵¹

Although the student created and transmitted the icon off campus, it did not "insulate him from school discipline."¹⁵² The Second Circuit applied

¹⁴⁵ 494 F.3d 34 (2d Cir. 2007) (holding that a student's instant messenger icon of a student firing a bullet at a person's head was not protected speech under the First Amendment).

¹⁴⁶ 496 F. Supp. 2d 587 (W.D. Pa. 2007) (ruling that a student's Internet parody of his school principle is protected under the First Amendment).

¹⁴⁷ 514 F. Supp. 2d 199 (D. Conn. 2007) (deciding that the First Amendment does not protect a student's right to post internet opinions on her school's administration and its decisions).

¹⁴⁸ *Wisniewski*, 494 F.3d at 35-36. As the court explained, a buddy icon "permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name . . . [The icon] remain[s] on the screen during the exchange of text messages between the two 'buddies,' and each can copy the icon of the other and transmit it to any other 'buddy' during an IM exchange." *Id.*

¹⁴⁹ *Id.* at 36.

¹⁵⁰ *Id.*

¹⁵¹ *Wisniewski v. Bd. Of Educ. of Weedsport Central Sch. Dist.*, 494 F.3d 34, 36-37 (2d Cir. 2007). A police investigator and a psychologist determined that Aaron meant for the icon to be a joke and that he did not pose a real threat. *Id.* at 36. However, the school's attorney a designated superintendent's hearing officer found that "the icon was threatening and should not have been understood as a joke." *Id.* at 36.

¹⁵² *Id.* at 39. The court stated that the Second Circuit has "recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school." *Id.* (citing *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979)). However, the court's reliance on *Thomas* for extending the arm of school authority off school grounds is deceptive and unavailing. Indeed, *Thomas* stands for just the opposite proposition, as it declared that students' free expression rights are at their "zenith" for off-campus speech. *See Thomas*, 607 F.2d at 1050; *see also Papandrea, supra note 47 at 1061 n.279 (2008)*. Noting that it is impossible to reconcile the *Wisniewski* decision with *Thomas*, because in *Thomas* the student speech was protected, even where the students did some work on their papers at school, occasionally consulted with a teacher, and left some copies of the papers in a school closet. Papandrea, *supra note 47 at 1060, n. 279*. Moreover, the language that the *Wisniewski* court relied upon is pure dicta, a hypothetical buried within a footnote in *Thomas*. *See Thomas*, 607 F.2d at 1052 n.17.

Tinker and held that the suspension did not violate the student's First Amendment rights.¹⁵³ Relying on *Morse's* broad interpretation of *Tinker*,¹⁵⁴ the court found that "it was reasonably foreseeable that the IM icon would come to the attention of school authorities," and, once it did, "the risk of substantial disruption [was] not only reasonable, but clear."¹⁵⁵ The court reasoned that "as in *Morse*," the student was not disciplined "for conduct that was merely offensive," or merely in conflict with some view of the school's 'educational mission.'¹⁵⁶

b. *Layshock v. Hermitage School District*

Only five days after *Wisniewski* was decided, a federal district court took a much narrower view of school authority over student Internet speech in *Layshock v. Hermitage School District*.¹⁵⁷ Justin Layshock, a high school senior, used his grandmother's home computer to create a MySpace parody profile that ridiculed his school principal.¹⁵⁸ The profile contained "silly" and "crude" answers to questions, which appeared to be by and about the principal.¹⁵⁹ After administrators discovered that Justin had created the profile, he was suspended for ten days, placed in an alternative curriculum, and prohibited from participating in the school's graduation ceremony.¹⁶⁰

Declining to read *Morse* as expanding the deference permitted to school

¹⁵³ See *Wisniewski*, 494 F.3d at 38-39. The court rejected the application of the "true threat" standard of *Watts* because "school officials have significantly broader authority to sanction student speech than the *Watts* standard allows." *Id.* at 38.

¹⁵⁴ See *id.* at 38 ("Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school.") (emphasis added) (quoting *Morse v. Frederick*, 127 U.S. 2618, 2626 (2007)); see also *Student's Off-Campus Waft of Text Message Threatening Teacher Warrants Suspension*, 76 U.S.L.W. 1045 (July 17, 2007) [hereinafter *Student's Off-Campus Text Message*] (noting that the *Wisniewski* court applied a broad interpretation of *Tinker* "[a]s recently construed in *Morse v. Frederick*"). Cf. Allison Torres Burtka, *Student's IM Threat is Not Protected Speech, Second Circuit Says*, TRIAL, Sept. 2007, at 68, 70 (quoting an attorney for *Wisniewski's* school, arguing that because the *Wisniewski* court used a "reasonably foreseeable" test rather than a "true threat" test, "school officials [now] have broader authority" to impose discipline).

¹⁵⁵ *Wisniewski*, 494 F.3d at 39-40. The court reasoned that the "potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least foreseeable . . . if not inevitable." *Id.* It did not matter whether or not the student "intended his IM icon to be communicated to school authorities or, if communicated, to cause a substantial disruption." *Id.* at 40.

¹⁵⁶ *Id.* at 40 (citation omitted).

¹⁵⁷ 496 F. Supp. 2d 587 (W.D. Pa. 2007).

¹⁵⁸ *Id.* at 591.

¹⁵⁹ *Id.* at 591. For example, the profile characterized the principal as a "big fag," "big whore," and "big steroid freak" and stated that the principal had a "big keg behind [his] desk" and had smoked a "big blunt" in the past month. *Id.*

¹⁶⁰ *Id.* at 593-94.

officials, the court ruled for the student on his First Amendment claim.¹⁶¹ The court stated that school officials are not authorized to become “censors of the world-wide web”¹⁶² and must demonstrate an “appropriate nexus” between a student’s Internet speech and a substantial disruption of the school environment.¹⁶³ Moreover, the court did not defer to the conclusions of school administrators on this “threshold jurisdictional ‘question.’”¹⁶⁴ Thus, the court declared that the substantial disruption standard was not met through the school officials’ mere “fear of future disturbances.”¹⁶⁵

c. *Doninger v. Niehoff*

The Federal District of Connecticut extended the arm of school authority further into cyberspace in *Doninger v. Niehoff*.¹⁶⁶ There, a high school student posted an entry to her Livejournal.com¹⁶⁷ Internet blog to express frustrations at school officials over developments regarding a music festival she had been planning.¹⁶⁸ The post described school officials as “douchebags” and called on students and their parents to write the school superintendent in order to “piss her off more.”¹⁶⁹ Although the

¹⁶¹ *Id.* at 596—99 (stating that *Morse* does not permit school officials “unfettered latitude” to censor off-campus Internet speech and has “not changed th[e] basic framework” of the relationship between *Tinker* and the Supreme Court’s other seminal student-speech cases). See Lee, *supra* note 105 (arguing that the *Layshock* court’s reading of *Morse* and the cases that preceded it is “reasonable and fair” and stating suggesting that, if followed, “fears that *Morse* will expand to swallow students’ First Amendment rights will prove to be unfounded”).

¹⁶² *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

¹⁶³ *Id.* at 599-600. Here, in *Layshock*, there were “several gaps in the causation link” between the student’s MySpace page and any material and “substantial disruption of operations in the school.” Indeed, the school did not demonstrate “that the buzz” or discussions in the school were caused by Justin’s profile as opposed to the reaction of administrators.” *Id.* at 600.

¹⁶⁴ *Id.* at 599. Likening the facts of this case to those of *Thomas*, the court noted that “the actual charges made by the School District were directed only at [the student’s] off-campus conduct.” See *id.* at 601 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979)). Indeed, *Thomas* stands for the proposition that the reach of public school authority is not unlimited. See *id.* at 597. Thus, as in *Thomas*, administrators’ bald assertions that off-campus expression caused a material and substantial disruption in the school did not justify regulation of expression that had a “de minimis” connection to any activity within the school itself. See *id.* at 598 (citing *Thomas*, 607 F.2d at 1050).

¹⁶⁵ *Layshock*, 496 F. Supp. 2d at 601. “The actual disruption was rather minimal -- no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action.” *Id.* at 600 (emphasis added). Moreover, despite that fact that there were “some student comments” made about the MySpace profile, did not allow “the “[s]chool’s right to maintain an environment conducive to learning does not[to] trump [the student]’s right to freedom of expression” the student’s First Amendment rights. *Id.* at 600—01.

¹⁶⁶ 514 F. Supp. 2d 199 (D. Conn. 2007).

¹⁶⁷ *Id.* at 206. “[L]ivejournal.com is an online community that allows its members to post their own blog entries and comment on the blog entries of others.” *Id.* At the time the student posted her blog entry, her privacy setting was “public,” which meant that anyone could view the webpage. *Id.*

¹⁶⁸ *Id.* at 206 (discussing the comments posted by the student on her blog).

¹⁶⁹ *Id.* at 206. (“[G]et an idea of what to write if you want to write something or call [Ms. Schwartz] to piss her off more.”) (citing Defendants’ Exhibit C).

student was not suspended or removed from school, when school officials discovered the message, they disqualified her from running for class secretary during her senior year.¹⁷⁰

Stating that the blog interfered with the school's "highly appropriate function to prohibit the use of vulgar and offensive terms in public discourse," the court held that school officials were justified in punishing the student for her "offensive speech" under *Fraser* and *Morse*.¹⁷¹ The court recognized that this case was not "just like *Fraser*" because the blog was created off-campus.¹⁷² However, the court applied *Wisniewski*'s new "reasonably foreseeable" test to characterize the student's blog entry as "on-campus speech" and, thus, side-stepped this difficulty.¹⁷³ The court reasoned that it was "reasonably foreseeable" that the blog's message would reach campus because the content of the blog was "related to school issues," school community members "were likely to read it," and it was likely that school officials "would become aware of it."¹⁷⁴

IV. THE AD HOC APPROACH EMPLOYED BY COURTS IN INTERNET-RELATED STUDENT SPEECH CASES HAS UTTERLY FAILED TO STRIKE THE APPROPRIATE BALANCE BETWEEN SCHOOL AUTHORITY AND STUDENTS' FIRST AMENDMENT RIGHTS

As their decisions clearly demonstrate,¹⁷⁵ lower courts are left to their own devices in determining the proper bounds of school authority over student Internet speech.¹⁷⁶ Courts have disparately applied United States Supreme Court school speech precedents to student Internet-related speech cases. Moreover, some courts have incorporated the "true threat" standard

¹⁷⁰ *Id.* at 202 (mentioning that school officials advised Avery before the blog posting about of the proper way to address issues of concern with the administration).

¹⁷¹ *See id.* at 215-17 (D. Conn. 2007) ("There can be no question that teaching students the values of civility and respect for the dignity of others is a legitimate school objective.") (citing *Morse v. Frederick*, 127 U.S. 2618, 2626 (2007)).

¹⁷² *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 216 (D. Conn. 2007).

¹⁷³ *See id.* at 217 ("Under *Wisniewski*, . . . the Court believes that [the student]'s blog may be considered on-campus speech for the purposes of the *First Amendment*."); *see also id.* at 217 n.11 (stating that "[there is] no reason to deny the application of *Fraser* to off-campus speech that affects the school in a reasonably foreseeable manner and that would otherwise be analyzed under *Fraser* had it actually occurred on-campus.").

¹⁷⁴ *Id.* at 217. The court also emphasized that the blog was "purposely designed" by the student to "come onto the campus." *Id.* at 216.

¹⁷⁵ *See* discussion *supra* Part III. A-B. (analyzing *Wisniewski*, *Layshock*, and *Doninger*).

¹⁷⁶ *See* Calvert & Richards, *supra* note 9 (noting that lower courts must "fathom for themselves" which rules apply to determine whether when [student Internet] speech can be punished"); *see also* Cassel, *supra* note 6, at 663 ("[L]ower courts have used a variety of approaches to determine whether Internet speech is protected").

and others have struggled with the “on-campus/off-campus” distinction. Further, courts have focused on the epidemic of school violence in the United States, while failing to recognize the student’s perspective. Without a uniform standard for Internet-related student speech cases, it is inevitable that the line between school authority and students’ First Amendment rights will become unintelligible.

A. Haphazard Application of Supreme Court School Speech Precedents

School administrators and lower courts have applied the Court’s school speech cases arbitrarily to justify their desired ends in Internet-related student speech cases. Although most courts purport to apply *Tinker*,¹⁷⁷ other courts apply *Fraser* or a combination of *Tinker* and *Fraser*.¹⁷⁸ Moreover, courts have incorporated the reasoning of *Kuhlmeier* and *Morse*, which is highly deferential to school officials, into their decisions.¹⁷⁹ This ad hoc approach has rendered the scope of students’ First Amendment rights uncertain and will only lead to further ambiguity in the absence of a uniform standard.¹⁸⁰

B. Selective Application and Manipulation of the “True Threat” Standard

Public school officials may punish a student for off-campus Internet expression that constitutes a “true threat.”¹⁸¹ However, because the “true

¹⁷⁷ See Bird, *supra* note 20, at 127 (noting that many courts have analyzed student Internet speech “under the *Tinker* analysis of material and substantial disruption”); see also Hudson, *supra* note 9, at 21 (stating that most courts continue to apply *Tinker* to student Internet speech cases).

¹⁷⁸ See, e.g., *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 867–69 (Pa. 2002) (holding that a student’s suspension for off-campus Internet speech was justified under both *Tinker* and *Fraser*); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 216 (D. Conn. 2007) (finding that student speech posted on the Internet was “closer to *Fraser* than to *Tinker*”). See generally Hudson, *supra* note 9, at 19 (“[C]ourts disagree on whether to apply *Tinker*, *Fraser* or both . . .”).

¹⁷⁹ See, e.g., *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007) (discussing the level of severity of the student’s conduct in *Morse* which allowed for punishment by school officials); *Doninger*, 514 F. Supp. 2d at 217 (interpreting *Morse* expansively); but see *Layshock v. Hermitage Sch. Dist.* 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) (declining to read *Morse* expansively).

¹⁸⁰ See *Morse v. Frederick*, 551 U.S. 393, 309 (2007) (Thomas, J., concurring) (“[O]ur jurisprudence now says that students have a right to speak in schools except when they don’t – a standard continuously developed through litigation against local schools and their administrators.”); see also Richard V. Blystone, *School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?*, 2007 BYU EDUC. & L.J. 199, 215 (2007) (“With no clear indication in the law . . . that school administrators have the broadest discretion available to them, punished students are more likely to sue their local school board on the basis that their First Amendment rights were violated.”); Li, *supra* note 45, at 88–89 (arguing that in the absence of a “clear, new standard,” courts will continue to “misinterpret” *Tinker* and its progeny, thereby endangering students’ free speech rights).

¹⁸¹ See *Watts v. United States*, 394 U.S. 705, 707 (1969) (holding that true ‘threats’ are not protected by the First Amendment); see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (“[T]he government can proscribe a true threat of violence without offending the First

threat" standard places too heavy a burden on schools,¹⁸² courts have broadly applied *Tinker's* "substantial disruption" prong to uphold school regulation of off-campus Internet expression that would otherwise be subject to the "true threat" standard.¹⁸³ This tactic renders the protections of the "true threat" standard meaningless and leaves *Tinker's* "substantial disruption" standard with "no real effect."¹⁸⁴ Indeed, it allows school officials to regulate student speech "based solely on the emotive impact that its offensive content may have on a listener."¹⁸⁵ This flies in the face of *Tinker*, which articulates that the mere desire to avoid "discomfort" or "unpleasantness" is not enough to justify restricting student speech.¹⁸⁶

Undoubtedly, the growing trend of violence among students in our country has influenced courts' decisions to give school officials greater deference over student Internet speech.¹⁸⁷ Some courts have argued that

Amendment."); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371 (9th Cir. 1996) (noting that true threats are not entitled to First Amendment protection, "regardless of whether the conduct occurred on or off campus"); *Bird*, *supra* note 20, at 111 ("School districts surely have a right—even a duty—to discipline student speech that rises to the level of a threat.").

¹⁸² See *Wisniewski*, 494 F.3d at 38 (positing that "school officials have significantly broader authority to sanction student speech than the *Watts* standard allows."); see also *J.S.*, 807 A.2d at 859 (stating that the "criminal nature" of the true threat analysis makes it a narrow exception to the right of free speech stating that because of the "narrowness to the exceptions to the right of free speech" and the "criminal nature of a true threat analysis," the statements made by the student in *J.S.* "did not constitute a true threat"). See generally *Cassel*, *supra* note 6, at 672 ("The Supreme Court has not evaluated the true threat doctrine outside the criminal context").

¹⁸³ See *Wisniewski*, 494 F.3d at 38 (explaining that *Tinker* was the appropriate standard to evaluate "school officials' authority "to discipline a student's [Internet] expression reasonably understood as urging violent conduct"); *J.S.*, 807 A.2d at 860, 869 (holding that although a student's off-campus Internet expression did not constitute a "true threat," the school could regulate it under *Tinker* because its emotional impact on a teacher and the "expressed anxiety" of certain students constituted a "substantial interference with the work of the school"); but see *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784, 786 (E.D. Mich. 2002) (finding that a student's web page, which listed names of people the student "wish[ed] would die," did not constitute a 'true threat' and, thus, could not be regulated without "proof of disruption to the school" under *Tinker*).

¹⁸⁴ See *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) (reasoning that a broad interpretation of *Tinker* gives the *Tinker* rule "no real effect" because school administrators would be permitted to censure student speech merely on the basis of finding it "offensive and repugnant to their sense . . . of decency"); see also *Burtka*, *supra* note 153, at 70 (stating that the *Wisniewski* court used a "'reasonably foreseeable' test rather than a 'true threat' test" and, thus, allowed school officials broader authority to impose discipline for off-campus Internet speech).

¹⁸⁵ *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007) (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001)).

¹⁸⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (stating that "[a school] must be able to 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."). See *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008) (noting that unless a school can show considerable compromising of its operation, it may not suppress the controversial or unfavorable speech).

¹⁸⁷ See, e.g., *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (arguing observing that "school administrators are in an acutely difficult position after recent school shootings . . . Web sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people."); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 860

schools should have “boundless authority” to discipline Internet speech in the name of safety.¹⁸⁸ However, as *Wisniewski v. Board of Education of Weedsport Central School District*¹⁸⁹ demonstrates, this argument proves too much.¹⁹⁰ The Second Circuit heard *Wisniewski* just one day after the tragic shooting spree at Virginia Tech University in April 2007.¹⁹¹ Although a police investigator and a psychologist determined that the student meant his violent IM buddy icon “as a joke,” the court deferred to a school attorney’s determination that “the icon was threatening and should not have been understood as a joke.”¹⁹² Thus, the court allowed school officials’ “undifferentiated fear or apprehension” of disturbance” to overcome the student’s right to freedom of expression.¹⁹³

C. The On-Campus/Off-Campus Distinction is Unworkable in Student Internet Speech Cases

Attempts to distinguish between on-campus and off-campus Internet speech have complicated the analysis of Internet-related student speech cases, largely because the Internet is a “borderless medium.”¹⁹⁴ In order to

(Pa. 2002) (explaining that “in schools today violence is unfortunately too common and the horrific events at Columbine High School, Colorado remain fresh in the country’s mind.”). See generally Li, *supra* note 45, at 90 (noting that describing how tragic school shootings factor into courts’ decision-making in Internet-related student speech cases).

¹⁸⁸ See Blystone, *supra* note 179, at 215–16 (arguing that “the First Amendment should take a back seat while teachers and administrators are given the broadest discretion permissible under the law to discipline students”); see also Burtka, *supra* note 153, at 70–71 (stating that school officials need the power to “mak[e] decisions quickly about a potential threat” and should not have to “be in the situation of parsing through whether [student Internet speech is] a joke”).

¹⁸⁹ 494 F.3d 34 (2d Cir. 2007).

¹⁹⁰ See Burtka, *supra* note 153, at 70 (suggesting that after *Wisniewski*, courts are ““heading toward zero tolerance””); see also Bird, *supra* note 20, at 140–41 (arguing contending that cases decisions giving school officials “boundless authority” to discipline off campus Internet speech create “dangerously broad precedent” and administrators faced with similar situations in the future “will be more likely to limit student speech upon any showing that student speech constitutes a threat”) (emphasis added).

¹⁹¹ See Burtka, *supra* note 153, at 69 (noting that “[t]he court heard the case the day after the Virginia Tech shootings in April.”); see also Ian Urbina and Suevon Lee, *For School, Several Ties to Shootings*, N.Y. TIMES, April 18, 2007, at A18 (indicating the date of the 2007 Virginia Tech campus shootings).

¹⁹² See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007). The school board’s attorney designated hearing officer at Wisniewski’s superintendent hearing “acknowledged the opinions of the police investigator and the psychologist,” but concluded that the student “did commit the act of threatening a teacher . . . [which] creat[ed] an environment threatening the health, safety and welfare of others.” *Id.* at 36–37.

¹⁹³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Indeed, the student was punished “for making a threat when no one thought it was a true threat.” See Burtka, *supra* note 153, at 69. Unfortunately, in *Wisniewski*, the only true victim here was the student. After he served his one semester suspension and returned to school, “school and community hostility” forced the student and his family to move to another town. *Wisniewski*, 494 F.3d at 37.

¹⁹⁴ See Li, *supra* note 45, at 93 (arguing that the Internet is a “borderless medium” because it is

bring off-campus Internet expression under the arm of school authority, some courts have given an overly -expansive definition to "on-campus" speech.¹⁹⁵ Other courts, however, have defined "on-campus" speech so narrowly that it has divested school officials of almost any meaningful disciplinary authority over student Internet speech.¹⁹⁶

Attempts to classify Internet speech as "on-campus" or "off-campus" overlook *Tinker's* focus on whether material disruptions in the school environment have occurred or are likely to occur. As a practical matter, the expression at issue in Internet-related student speech cases almost always occurs "off-campus."¹⁹⁷ However, the concern is the effect of the speech on the school environment, not merely where it was created.¹⁹⁸ Thus, students are free to express themselves from their personal computers however they choose, so long as they do so without materially and substantially disrupting the school environment.¹⁹⁹

"ever-present and easily accessible" and, thus, the "old distinctions physically demarcating authority over student speech to on or off-campus are not adequate"); see also Cassel, *supra* note 6, at 663 (stating that prevalent student Internet use has made distinguishing between on-campus and off-campus Internet speech "more difficult than in previous speech cases").

¹⁹⁵ See, e.g., *Wisniewski*, 494 F.3d at 38–40 (2d Cir. 2007) (holding that school officials could punish a student for his IM buddy icon because "it was "reasonably foreseeable" that the IM icon "would come to the attention of school authorities," regardless of whether or not the student actually "intended his IM icon to be communicated to school authorities"); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 216–17 (D. Conn. 2007) (finding that a student's Internet blog post was "on-campus speech" because the student "purposely designed [it] to come onto the campus," "the content of the blog was related to school issues," and "other [school] community members were likely to read it"); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (holding that "[w]here 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.").

¹⁹⁶ See, e.g., *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (finding that a student's web site was "off-campus speech" because it was not created on school property); *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (holding that although the intended audience of a student's web page was "undoubtedly connected" to the school, the page was "off-campus speech" because it was "not produced in connection with any class or school project").

¹⁹⁷ See *Bird*, *supra* note 20, at 127 (stating that most Internet-related student speech cases "involve situations where students create and maintain off campus websites"); see also Cassel, *supra* note 6, at 665 ("MySpace speech generally occurs as strictly off-campus speech."); *Kennedy*, *supra* note 18 (arguing that most accusations that a school district has violated a student's First Amendment rights for punishing Internet speech stem from postings made on an off-campus computer).

¹⁹⁸ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (noting that it is possible for a student to "incite" a material and substantial disruption within the school "from some remote locale"); see also *Grant*, *supra* note 2 (stating that Internet expression can often result in "conflicts that spill onto the school campus"); Paula Reed Ward, *Schools Perceive Threat to Authority in Student Internet Postings*, PITTSBURGH POST-GAZETTE, Feb. 5, 2006, available at <http://www.post-gazette.com/pg/06036/649819-104.stm> (positing that school officials have constitutional authority to limit student Internet expression when it "causes, or is likely to cause, substantial disruption . . . [no] matter where the offending speech occurs").

¹⁹⁹ See *Hudson*, *supra* note 9, at 21 (positing suggesting that the *Tinker* standard is "appropriate and workable" because it gives students the right to express their thoughts freely, until that expression "caus[es] substantial harm"); see also Cassel, *supra* note 6, at 665 (arguing that "unless the school can prove an actual disruption on-campus, the school should not punish or prohibit [Internet] speech.").

Solely because of its off-campus nature, some commentators argue that school officials have no authority to punish students for Internet expression.²⁰⁰ These authors fear that school administrators will arbitrarily use their authority to punish students for Internet expression that ridicules school personnel or deviates from the values that the school wishes to promote.²⁰¹ Although these fears are reasonable, they are an unavailing justification for adherence to the unworkable on-campus/off-campus distinction in Internet student speech cases. These arguments, however, overlook that schools sometimes have legitimate reasons for regulating Internet speech.²⁰² Moreover, these arguments fail to recognize *Tinker's* protection of student First Amendment rights against arbitrary and capricious action.²⁰³ *Tinker* declared that "school officials cannot suppress expressions of feelings with which they do not wish to contend."²⁰⁴ Indeed, *Tinker* strikes the appropriate balance between school authority and students' First Amendment rights in Internet student speech cases.²⁰⁵

²⁰⁰ See, e.g., Caplan, *supra* note 11, at 162 (stating that the argument that schools may discipline Internet speech because it "adversely affected the educational process within the school" is unfounded because "there are any number of off-campus activities a student might undertake that lead to gossip and distraction"); Cato, *supra* note 7 (noting that "[s]tudents aren't doing anything today they didn't do in decades past – they're simply using a different medium.").

²⁰¹ See Caplan, *supra* note 11, at 161 (arguing that "[s]chools that punish students for wearing Marilyn Manson t-shirts or waving confederate flags at school do not attempt to discipline students for doing so off-campus, yet off-campus criticism of school authority is far more likely to result in academic punishment."); see also Calvert & Richards, *supra* note 9 (noting that there are many cases appearing across the country where in which students have been punished "[i]n retaliation" for off-campus Internet speech that "attacks, criticizes or otherwise offends school officials, teachers or fellow students" and the school asserts that its authority extends far beyond "the geographic borders of the campus").

²⁰² See Hudson, *supra* note 9, at 21 (stating that "[c]ourts have knocked down schools when they rely on the 'I don't like the student speech' rationale But when schools [provide] evidence of how off-campus expression ha[s] a negative impact at school, the courts [are] much more deferential."); see also Li, *supra* note 45, at 104 (noting 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.").

²⁰³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (arguing explaining that "[s]chool officials do not possess absolute authority over their students [Students] may not be confined to the expression of those sentiments that are officially approved."); see also *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (positing 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*").

²⁰⁴ *Tinker*, 393 U.S. at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

²⁰⁵ See Hudson, *supra* note 9, at 21 (stating noting that Nancy Willard, head of the Center for Safe and Responsible Internet Use, believes that "*Tinker* is a good balance" between school authority and students' First Amendment rights in Internet-related student speech cases); see also Li, *supra* note 45, at 102 (arguing that "[The *Tinker* standard] 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.").

D. Courts Have Failed to Recognize that Sometimes "Kids will be Kids"

Courts have failed to achieve the "delicate balance" between the recognition of the growing trend of hostility in American schools and the reality that students in public schools are "nevertheless children."²⁰⁶ Students have engaged in childish banter and mocked teachers, school administrators and fellow students for decades.²⁰⁷ Today, students have opened their views to the world by venting frustrations and expressing opinions on the Internet.²⁰⁸ However, cultural changes have led today's students to express sentiments that are much more violent and "crude" than those of their predecessors.²⁰⁹ Failing to appreciate these societal changes, school administrators have "overreacted" and punished students for Internet expression that other students immediately recognize as nonsense or "sick humor."²¹⁰

Some judges have ignored this "cultural reality"²¹¹ in placing their imprimatur on rash punishments by school officials for student Internet expression. Indeed, judges are "so far removed" from popular teen culture

²⁰⁶ See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 428 (Pa. Cmmw. Ct. 2000) (Friedman, J., dissenting) (explaining that the court must "strike a delicate balance between the recognition of the dangers" that exist in schools today and the reality that no matter how sophisticated children today may be, they are, nevertheless, children); see also Li, *supra* note 45, at 91 (arguing that judges have focused on "uncommon, tragic events like Columbine," while failing to recognize that "children are impressionable" and often imitate "crude and even violent" speech to which they are exposed through popular teen culture). See generally Caplan, *supra* note 11, at 154 (noting that, although the Internet has greatly increased opportunities for "immature and foolishly defiant" students to be heard, schools must respect the First Amendment by in "adjust[ing] to the new challenges created by such students and the [I]nternet").

²⁰⁷ See Ward, *supra* note 197 (positing that "[i]t's a problem as old as schools themselves – students making fun of their teachers and administrators In the past, it could have been as simple as a sniggering comment behind someone's back. Or a drawing on a bathroom wall."); see also Grant, *supra* note 2 (stating that "[b]ullies of yesteryear spread ugly rumors and abused their peers in schoolyards, cafeterias and bus stops.").

²⁰⁸ See Calvert & Richards, *supra* note 9 (arguing noting that "messages that once were posted on bathroom walls, scrawled in notebooks and passed from classmate to classmate on spiral-bound paper are suddenly going online off-campus, waiting for all to see and read."); Cato, *supra* note 7 (explaining that "[s]tudents aren't doing anything today they didn't do in decades past – they're simply using a different medium Pictures and messages that used to be scribbled on paper and passed in class are now posted online.").

²⁰⁹ See 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, 1110 (2003) (stating that popular teen culture is "saturated with violent imagery and profane language" and the expression of those same ideas by students "is only a natural reflection of their environment"); see also King, *supra* note 27 (noting that "'[o]bscenity over the course of society has been a changing climate'").

²¹⁰ See *J.S.*, 757 A.2d at 45, & 45 n. 6 (Friedman, J., dissenting) (arguing that a school district failed to recognize the full context of the situation in punishing a student for his web site where fellow students undoubtedly perceived the site as the "type of sick humor [that] can be found in some of today's popular television programs, such as South Park"); see also Ward, *supra* note 197 (stating that school administrators "often tend to overreact" to student Internet speech in the name of "maintaining order").

²¹¹ Richards & Calvert, *supra* note 208, at 1112.

that they have difficulty understanding it.²¹² Many courts focus on tragic events like the Virginia Tech shootings, but “fail to grasp the student’s perspective.”²¹³ This failure to recognize the evolution of normal childhood behavior will only lead to greater deference for school officials to punish Internet expression that they do not understand or agree with.²¹⁴ As a result, students will be left without a remedy when a school’s “abuse of discretion” violates their First Amendment rights.²¹⁵

V. SCHOOL AUTHORITY OVER INTERNET-RELATED STUDENT SPEECH IS NOT UNLIMITED AND ALTERNATIVES TO HARSH AND POTENTIALLY UNCONSTITUTIONAL PUNISHMENTS EXIST

Although a school may regulate Internet expression where it causes a “material and substantial disruption,”²¹⁶ schools do not have unlimited authority over Internet speech merely because students are “subject to compulsory attendance laws for part of the week.”²¹⁷ School officials should recognize that the boundaries of school authority over student Internet speech are far from delineated.²¹⁸ Moreover, imprudent punishments for Internet speech have the potential to do more harm to

²¹² Richards & Calvert, *supra* note 208, at 1110 (observing that judges are generationally “so far removed” from teen popular culture that “they have trouble understanding it”). See Li, *supra* note 45, at 90 (noting that “[a]ccentuating this judicial misconception is discussing the “generation gap between judges and students – “ and suggesting that “many judges do not understand popular culture . . .”).

²¹³ See Li, *supra* note 45, at 90 (arguing that courts have factored tragic school shootings into their decision-making, but have failed to recognize that “teens are immersed in this culture and are inundated with violent and profane imagery every day”); see also Richards & Calvert, *supra* note 208, at 1110 (observing that “[m]any 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”).

²¹⁴ See Hudson & Ferguson, Jr., *supra* note 21, at 181–182 (noting that, after school shootings around the country, “censorship by school officials has only escalated” and many courts “sanction this conduct” by granting school officials more deference). See generally Bird, *supra* note 20, at 129 (discussing the hesitance of courts to “substitute their judgment for that of local school authority”).

²¹⁵ See Bird, *supra* note 20, at 129 (positing that the “general custom of deference” makes courts reluctant to step in and provide a remedy when a school’s exercise of authority results in an “abuse of discretion”); see also Hudson & Ferguson, Jr., *supra* note 21, at 181–82 (stating that deference to school administrators in the wake of school violence has resulted in a “reduced level of constitutional protection for student free-expression rights”).

²¹⁶ Cassel, *supra* note 6, at 674–78. See *supra* note 198 and accompanying text discussing the rights of students to express themselves off-campus so long as such expression does not have a significant harmful effect on others).

²¹⁷ Caplan, *supra* note 11, at 140. See generally Bird, *supra* note 20, at 141 (arguing that school authority over student speech does not exist “around-the-clock”).

²¹⁸ See Bird, *supra* note 20, at 141 (noting that school officials are “searching for guidance” in determining boundaries of their authority over Internet speech); see also Cassel, *supra* note 6, at 680 (stating that “[d]ue to sparse and inconsistent judicial guidance, schools are unsure of the appropriate limits in disciplining [Internet] behavior.”).

students and the school environment than the expression itself.²¹⁹ To avoid the impact of unconstitutional punishments, schools must utilize less invasive means to deal with Internet expression that they find problematic.

First and foremost, school officials must avoid "knee-jerk" reactions to Internet speech that they simply do not like or find offensive.²²⁰ One cannot help but wonder if litigation would have been spared if school administrators had not overreacted to the Internet expression in cases like *Layshock v. Hermitage School District*²²¹ and *Doninger v. Niehoff*.²²² Further, although their authority over Internet speech "may be limited," school officials are not "bound to ignore harmful Internet content."²²³ Before exacting a potentially unconstitutional punishment, administrators should ask the student to remove the offensive expression from the Internet, speak to the student or notify the student's parents.²²⁴

Moreover, both courts and school officials have overlooked the importance of parents taking part in monitoring and disciplining student Internet conduct.²²⁵ Much of the expression that administrators find

²¹⁹ See Kathryn E. McIntyre, *Hysteria Trumps First Amendment: Balancing Student Speech with School Safety*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 39, 53 (2002) (explaining that "[arbitrarily] [c]losing the doors of an educational facility to a student by disciplining or punishing his expression . . . is not consistent with the goal of education or the First Amendment."); see also Cato, *supra* note 7 (positing that "[o]ne thing you can do to guarantee that everyone in the school will want to see a [web] site is to suspend someone over it."); Ward, *supra* note 197 (stating that school officials in *Layshock* might have gone too far by "sticking a reportedly good student in Alternative Education" for web expression that merely hurt someone's feelings).

²²⁰ Hudson, *supra* note 9, at 23. See Cato, *supra* note 7 (arguing that "[t]here are a lot of things kids will do that get under your skin . . . but you don't always have to react.").

²²¹ 496 F. Supp. 2d 587 (W.D. Pa. 2007). In *Layshock*, a school principal became very emotional over a student's MySpace parody profile, which mocked and ridiculed the principal. *Id.* at 591-592. As a result, the principal directed teachers to send all students who might have information about the profile to his office. *Id.* at 592. The court stated that it was likely that the "substantial disruption" that the school claimed was caused by the reactions of administrators, rather than the student's Internet expression. *Id.* at 600.

²²² 514 F. Supp. 2d 199 (D. Conn. 2007). In *Doninger*, a student's mother encouraged the school principal to "reconsider" a punishment that was triggered by the principal's immediate reaction to the student's Internet blog post. *Id.* at 208. The mother informed school officials that she felt the punishment was "an overreaching response with enormous consequences." *Id.* Instead, the mother urged the school officials to exert a "more appropriate punishment." *Id.* However, school officials refused because they felt that the student needed to be taught a lesson. See *id.* at 202. Surely, if school officials had been willing to work with the student's parents, the student and her parents would not have felt compelled to bring a law suit to vindicate the student's First Amendment rights.

²²³ Hudson, *supra* note 9, at 23. (discussing how educators might go about communicating with students and parents regarding informed Internet use).

²²⁴ *Id.* at 24 (suggesting actions school officials should take when faced with offensive Internet content posted by a student). Cf. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177-78 (E.D. Mo. 1998) (holding that a school district violated a student's First Amendment rights where the school's principal, upon viewing the student's homepage, became upset and immediately decided to discipline the student without speaking to the student first). See generally Ramasastry, *supra* note 6 (stating noting that "[MySpace] will remove fake profiles by impersonators – a remedy that can be used by faculty, administrators or students who discover fake profiles claiming to be theirs.").

²²⁵ See Hudson, *supra* note 8 (stating that courts have come to varying conclusions in student

objectionable is created in the home, during non-school hours.²²⁶ Indeed, parents are often in the best position to protect students from harmful Internet expression.²²⁷ However, arguments that regulation of student expression is solely the province of parents go too far.²²⁸ For example, arguments like “[schools] cannot play substitute parents when students are at home”²²⁹ focus wholly on the unworkable on-campus/off-campus distinction, while ignoring the effect that Internet expression may have on a school.²³⁰ Thus, regulation of student Internet expression is neither purely a matter of parental discipline, nor purely a matter of school discipline.

VI. A SOLUTION TO ENSURE A FAIR AND WORKABLE BALANCE BETWEEN STUDENTS’ FREE EXPRESSION RIGHTS AND SCHOOL DISCIPLINARY AUTHORITY IN INTERNET-RELATED STUDENT SPEECH CASES

Without Supreme Court guidance, an innovative method of implementing the principles of *Tinker v. Des Moines Independent Community School District*²³¹ is required to strike the appropriate balance between schools’ interest in maintaining an ordered education environment and students’ interest in protecting their free expression rights. Although *Tinker* was decided long before student Internet use was conceivable, its principles are highly relevant in Internet speech cases.²³² Indeed, some

Internet-related speech cases and that, in some situations, regulating Internet speech is a matter of parental discipline and not within the scope of school officials’ authority); see also Hudson, *supra* note 9, at 22 (noting that Justin Layshock’s mother punished Justin herself and believed that school administrators acted harshly and failed to recognize her parental right to punish her son as she “saw fit”).

²²⁶ See *supra* note 189–196 and accompanying text (explaining how the majority of student Internet expression with which school administrators take issue is posted at students’ homes during non-school hours); see also *States Pushing for Laws to Curb Cyberbullying*, *supra* note 18 (stating that most cyberbullying “isn’t going on at school . . . [i]t is going on at home”).

²²⁷ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (discussing the role of parents in “monitoring the “material to which a child is exposed after he leaves school each afternoon”); see also *States Pushing for Laws to Curb Cyberbullying*, *supra* note 18 (arguing that harmful Internet expression is not just a school problem and the solution “has to start at home”).

²²⁸ See e.g., Caplan, *supra* note 11, at 144 (stating that enforcing school rules for expression that “occurs under a parent’s roof” exceeds a school principal’s jurisdiction); Cassel, *supra* note 6, at 668 (claiming that “a school should not have the authority to regulate what a student views or reads on [the Internet] from her home computer The parents, not the schools, are responsible for monitoring and disciplining this behavior.”).

²²⁹ Grant, *supra* note 2 (discussing the roles and duties of parents and school administrators).

²³⁰ See discussion *supra* Part IV. C. (explaining the on-campus/off-campus distinction involved in student Internet speech).

²³¹ 393 U.S. 503 (1969).

²³² See Li, *supra*, note 45, at 103 (“[A]lthough the *Tinker* standard was formulated during the Vietnam War era, it remains an appropriate standard today.”); see also discussion *supra* note 190-91 and accompanying text (discussing the *Tinker* standard).

Internet expression has come inside the "schoolhouse gate"²³³ and this expression has the same potential to impact the school environment, as did the behavior at issue in *Tinker*. Moreover, *Tinker* ensures today's tech-savvy students the same First Amendment protection against arbitrary punishment that the students wearing black armbands received in 1969.²³⁴

A. Both Prongs of Tinker Must be Used in Deciding Internet-Related Student Speech Cases

To evaluate the constitutionality of suspensions and expulsions based on students' Internet speech, courts must consider both *Tinker's* "material and substantial interference" and "invasion of the rights of others" prongs.²³⁵ Courts have over-extended the "substantial disruption" standard to allow schools to respond to modern concerns like Internet harassment and school violence.²³⁶ However, this ad hoc approach has left students vulnerable to punishment for Internet expression that was merely "disagreeable" or "offensive."²³⁷ *Tinker's* "rights of others" prong" can provide the necessary middle-ground and prevent courts from rendering the "substantial disruption" prong meaningless.

The Ninth Circuit Court of Appeals recognized the utility of *Tinker's* "invasion of the rights of others" prong in *Harper v. Poway Unified School*

²³³ See Caplan, *supra* note 11, at 158 (noting that Internet technology has the ability to "penetrate school walls"); see also Cassel, *supra* note 6, at 674 (stating that it is possible for student Internet activity to cause a "valid on-campus concern").

²³⁴ See Caplan, *supra* note 11, at 154 (positing that "[e]ven with the vastly increased opportunity to speak and be heard created by the Internet," students are entitled to the same First Amendment protection today as they were in 1969, when *Tinker* was decided). See generally *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969) (explaining that "school officials cannot suppress expressions of feelings with which they do not wish to contend.").

²³⁵ See *Tinker*, 393 U.S. at 509 (holding that in order for school officials to justify a restriction on student expression, school officials must demonstrate that they had reason to anticipate that the conduct would "materially and substantially interfere with the work of the school or impinge upon the rights of other students").

²³⁶ See e.g., *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007) (finding that the punishment by school officials for an eighth grade student's IM icon depicting his teacher being shot above the words "Kill Mr. VanderMolen" was justified because it was "reasonably foreseeable that [the student]'s communication would cause a disruption within the school environment"); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852–53 (Pa. 2002) (holding that the school did not violate a student's First Amendment rights when it punished him for creating a web site that made derogatory remarks about his algebra teacher). See generally Richards & Calvert, *supra* note 208, at 1140 (noting that "[the substantial and material disruption] standard . . . is being abused by a judiciary that perhaps is sucked in by fears of Columbine-like violence or that is pandering to school administrators.").

²³⁷ See discussion *supra* Part IV. (analyzing the failure of the *ad hoc* approach employed by courts in attempting to strike an appropriate balance between school authority and students' First Amendment rights).

District.²³⁸ The *Harper* court held that a school district could prohibit a student from wearing t-shirts bearing anti-homosexual messages because the shirts were “injurious to gay and lesbian students and interfered with their right to learn.”²³⁹ The Ninth Circuit declared that “[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”²⁴⁰

Although the Ninth Circuit’s desire to prevent substantial harm to students’ education was well-founded, its “minority status” limitation failed to give adequate substance to *Tinker*’s “rights of other students” standard. Applying the Ninth Circuit’s approach, a number of students who do not qualify for “minority status” may be threatened or harassed by other students, but will not be protected from disruptions in their learning process.²⁴¹ Indeed, minority status does not determine whether expression has collided with the rights of other students “to be secure and to be let alone.”²⁴² However, if, as this Note suggests, *Tinker*’s “rights of others” prong is used to focus on the *effect* of expression on other students’ education,²⁴³ it can adequately balance students’ First Amendment rights with schools’ interest in protecting students from threatening and harassing Internet expression.²⁴⁴

²³⁸ 445 F.3d 1166 (9th Cir. 2006) (“*Tinker* does contain an additional ground for banning student speech, namely where it is an ‘invasion of the rights of others.’”). See generally Hudson, *supra* note 9, at 20 (stating that the Ninth Circuit “breathed new life into” *Tinker*’s “rights of others” standard in the *Harper* decision).

²³⁹ See *Harper*, 445 F. 3d at 1180. In *Harper*, a school district permitted a student group called the Gay-Straight Alliance to hold a “Day of Silence,” which was intended to “teach tolerance of others, particularly those of a different sexual orientation.” *Id.* at 1171. On the 2004 “Day of Silence,” a student wore a t-shirt to school which read “I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED,” on the front, and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27’” on the back. *Id.* On the following day, the student wore a similar t-shirt to school, and the back of the second shirt retained the same message as the first. *Id.* However, the front of the second shirt the back of which was the same as the first shirt, but the front of which read “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED.” *Id.* On both occasions, school officials requested that the student remove the shirt because administrators found the shirts “inflammatory.” and in violation of the school’s dress code. *Id.* The student refused and was required to remain in the school’s front office for the duration of both school days. *Id.*

²⁴⁰ *Id.* at 1178.

²⁴¹ *Id.* at 1200–01 (Kozinski, J., dissenting) (“[I]f ‘interference with the learning process is the keystone to the new right [announced by the *Harper* majority], how come it’s limited to those characteristics that are associated with minority status?’”).

²⁴² See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

²⁴³ See discussion *infra* Part VI.B.1– 2. (proposing a test for student Internet speech cases).

²⁴⁴ See Miller, *supra* note 38, at 646 (stating that “more precise definitions” are needed in order for *Tinker* to “create a workable and understandable framework for dealing with student expression”). See generally Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 60 (1996) (explaining that “[t]he [Supreme] Court correctly set up the problem—the need to reconcile the rights of the individual student that passed through the schoolhouse gate with the tradition of affirming school power—but never solved it.”).

B. A Suggested Test for Internet-Related Student Speech Cases

Under the proposed analysis, courts should first consider the school's proffered justification for punishing the Internet expression at issue. If the school claims that the expression was threatening, it should be analyzed under *Tinker's* "rights of others" prong.²⁴⁵ Although a school should be accorded *some* deference in this area, the court should perform an independent contextual analysis.²⁴⁶ If the school claims that the expression was harassment or had some type of serious emotive impact, it should also be analyzed under *Tinker's* "rights of others" prong.²⁴⁷

All other types of expression should be analyzed under *Tinker's* "material and substantial disruption" prong. For example, claims that Internet expression caused or was likely to cause a disturbance in the school would fall into this category.²⁴⁸ Moreover, if the court finds that the expression does not qualify as a threat or harassment under the "rights of others" prong, the expression should be subjected to the "material and substantial disruption" standard of *Tinker*. In this context, courts should not relax the "substantial disruption" standard as they have in previous Internet-related student speech cases.²⁴⁹ Indeed, any arguments for deference to the school will have been negated by the school's failure to justify the punishment under the more lenient "rights of others"

²⁴⁵ See *Tinker*, 393 U.S. at 508 (declaring that students have the right to "be secure" at school and students' wearing of black armbands in opposition to the Vietnam War did not cause "threats or acts of violence on school premises" to others present at the school); see also *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (stating that the right to be secure involves "freedom from physical attacks" and "students cannot hide behind the *First Amendment* to protect their 'right' to . . . intimidate other students at school."). See generally Blystone, *supra* note 179, at 214 (arguing that school administrators should respond to expression that impinges upon the rights of others in order to ensure an "environment that is safe and conducive for learning").

²⁴⁶ See discussion *supra* Part IV. D. (discussing the importance of realizing children's behavior in the context of these cases).

²⁴⁷ See *Tinker*, 393 U.S. at 508 (stating that the 'rights of others' standard includes the right "to be let alone"); see also *Harper*, 445 F.3d at 1178 (explaining that "[b]eing secure involves not only the freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.').

²⁴⁸ See e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007) (positing that "[i]t is clear that school administrators need not wait until a 'substantial disruption' has already occurred prior to taking action. Rather, school administrators may preempt problems if they have a 'specific and significant fear of disruption.'"); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213–14 (D. Conn. 2007) (noting that "schools are generally held to have the authority to censor on-campus speech that school authorities consider to be vulgar, offensive, or otherwise contrary to the school's mission to 'inculcate the habits and manners of civility,' without the need to show a 'substantial disruption' under *Tinker*.").

²⁴⁹ See *supra* note 228; see also notes 215–17 and accompanying text (suggesting that school officials need to realize that they do not have unlimited authority over any student Internet-related speech).

standard.”²⁵⁰

a. The Rights of Other Students Prong – Threatening Internet Expression

Because of the “special characteristics of the school environment,”²⁵¹ a student’s Internet expression need not rise to the level of a “true threat” to justify school regulation. Rather, the court should determine whether it was objectively reasonable to perceive the expression as threatening in light of the “entire factual context.”²⁵² This objective analysis must account for the punished student’s perspective, the school’s perspective, and other students’ perspectives at the time the claimed threat occurred.²⁵³

In evaluating the student’s perspective, courts should consider whether the student made the Internet expression in jest, where the speech was posted, and the tone of the speech.²⁵⁴ For example, it is more reasonable to perceive a letter posted on the Internet that expressly manifests a desire to harm a named student as “threatening” than it is to perceive parodies or offensive cartoons as such.²⁵⁵ However, even posting commentary on a web site may not be enough to justify punishment if other students clearly understood the expression as an attempt at humor.²⁵⁶ Additionally, a court should consider whether the school’s actions were reasonably consistent

²⁵⁰ See Miller, *supra* note 38, at 652–53 (stating that *Tinker* gives schools the deference that they require to maintain a “safe and educational environment,” but at the same time looks out for students’ free expression interests because the material and substantial interference standard is a “heavy burden [for schools] to carry”); see also Hudson, *supra* note 9, at 23 (noting that courts are “more deferential when it comes to questions of safety and potential threats,” but tend to be “very skeptical of school actions based on opposition to the content of a student’s expression”).

²⁵¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁵² *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (explaining that “alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.”) (internal quotation marks omitted). See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 428 (Pa. Cmmw. Ct. 2000) (Friedman, J., dissenting) (stating that in evaluating threatening conduct a court must recognize the “particular circumstances presented by a specific case”).

²⁵³ See discussion *supra* Part IV. D. (discussing the importance of realizing understanding modern children’s behavior in the context of these cases).

²⁵⁴ See, e.g., *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (finding that a student’s web page was not threatening where the student created the site “for laughs” and “never meant anyone else to see it”). See generally Richards & Calvert, *supra* note 208, at 1107 (describing humor and the manner of expression as important variables in determining whether student speech was threatening).

²⁵⁵ *Compare Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 626–27 (8th Cir. 2002) (finding that an offensive and vulgar letter that a student had prepared at home was threatening where the letter described how the student would rape, sodomize, and murder a named female classmate who had previously broken up with him), with *J.S.*, 807 A.2d at 859 (holding that a student’s web site was not threatening where the site poked fun at a teacher’s physique, utilized cartoon characters, hand drawings and song, and the web site, taken as a whole, was a “misguided attempt at humor or parody”).

²⁵⁶ *Compare Doe*, 306 F.3d, at 625 (finding that a student’s expression was threatening where most students “would be frightened by [its] the message and tone” and “fear for their physical well-being” upon seeing it), with *J.S.*, 807 A.2d at 859 (holding that a student’s web page was not threatening where a teacher felt threatened, but most students understood the page as humor).

with the perception of a threat.²⁵⁷ Thus, a school should not have deference to claim that student Internet expression was a threat when school officials did not treat it as one.

After weighing all of these factors, if the court determines that the Internet expression posed an objectively reasonable threat, the school disciplinary action should be upheld under *Tinker's* "rights of others" prong. However, if the court finds that it was not objectively reasonable to perceive the expression as a threat, the school must prove that the expression caused a "material and substantial disruption" of the school environment in order to justify its discipline of the student.

b. The Rights of Others Prong – Harassment

If the student's Internet expression constituted "severe, pervasive, and objectively offensive" harassment²⁵⁸ and interfered with another student's "opportunity to learn," then punishment will be justified under *Tinker's* "rights of others" prong.²⁵⁹ At a minimum, school officials must show that the punishment was caused by something more than a "mere desire to avoid discomfort and unpleasantness."²⁶⁰ Moreover, proof of a single instance of Internet harassment should not be enough to overcome a

²⁵⁷ See, *J.S. v. Bethlehem Area. Sch. Dist.*, 757 A.2d 412, at 428–29 (Pa. Cmmw. Ct. 2000) (Friedman, J., dissenting) (stating that "[i]f the School District here believed that any teacher, administrator or student was endangered by Student's action, the School District clearly shirked its responsibility by not suspending Student immediately [and] investigating the incident fully . . ."); see also *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007) (noting that a school district promptly had a police investigator and a psychologist interview a student after the district discovered the student's violent IM buddy icon).

²⁵⁸ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). Although *Davis* was decided in the Title IX peer sexual harassment context, it drew a workable line between mere "teasing and name-calling" among school children and behavior that has serious potential to create a "hostile environment" that is disruptive to the victim's education. See *id.* at 652. Indeed, its focus on the effects of the expression on the victim is ideal in giving *Tinker's* "rights of others" prong substance. It allows the school leeway to protect students, but at the same time protects a student from arbitrary punishment for engaging in childish banter. See generally *Fitzgerald v. Barnstable Sch. Comm.*, 129 U.S.788, 793 (2009). This recent Supreme Court case recites the same standard expressed ten years earlier in *Davis*. *Id.*

²⁵⁹ See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (holding that the First Amendment does not protect verbal assaults and intimidation that interferes with the victim's "opportunity to learn"); see also *Hudson*, *supra* note 9, at 20–21 (arguing that *Tinker's* "rights of others" standard gives school administrators authority over Internet speech that "cause[s] another student so much emotional distress that it [interferes] with the student's ability to fully participate in school").

²⁶⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (indicating that schools need the requisite justification to prohibit expression of even unpopular viewpoints). See generally *Miller*, *supra* note 38, at 658 (noting that "[i]t is a basic First Amendment principle that [a school] may not prohibit speech simply because someone in the audience may find the message offensive.").

student's First Amendment rights.²⁶¹ Rather, the school carries a heavy burden to demonstrate that the Internet harassment had a "systematic effect," which carried over into the school environment.²⁶²

For example, punishment should be justified where a student's "harmful and injurious" Instant Messenger attacks intimidate another student and cause that recipient to avoid attending school or to suffer a decline in grades.²⁶³ In contrast, merely posting a rumor or embarrassing photographs of another student or faculty member on the Internet should not justify a school official's punishment of a student.²⁶⁴ Moreover, the student's willingness and promptness to remove the Internet expression in question should weigh heavily in the student's favor.²⁶⁵

If the court finds that the student's Internet expression was not punishable harassment under *Tinker's* "rights of others" prong, then the school must prove that the expression caused a "material and substantial disruption."

c. The Material and Substantial Disruption Prong – All Other Speech

If the school does not claim that the student's Internet expression was threatening or constituted harassment, or if the school fails to justify its punishment under the "rights of others" prong, then the school must prove that the expression caused a "material and substantial disruption" in the school environment. Here, the punishment should be subject to strict

²⁶¹ See *Davis*, 526 U.S. at 652–53 (stating that a single instance of sexual harassment does not rise to the level of "severe, pervasive, and objectively offensive"); see also *Tinker*, 393 U.S. at 508 (explaining that a few "hostile remarks" were not enough to overcome a student's First Amendment rights).

²⁶² See *Davis*, 526 U.S. at 652–53 (indicating that only behavior substantial enough to interrupt one's equal access to education will suffice). See generally Hudson, *supra* note 9, at 21 (arguing that the effects of pervasive cyberbullying can spill over into the school and, "[i]f students do not think that school officials can help, they are going to suffer").

²⁶³ See *Cf. Harper*, 445 F.3d at 1178–80 (stating that *Tinker's* rights of others standard protects students from harassment that causes "academic underachievement, truancy, and dropout"); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (observing that, although "it is certainly not enough that speech is merely offensive to some listener," speech that "substantially interferes with a student's educational performance" may satisfy the *Tinker* standard).

²⁶⁴ See e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (finding that a school principal's adverse reaction to a student's MySpace profile, which parodied the principal, was not enough to justify punishment of the student under *Tinker*); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (holding that school officials could not punish a student for posting a rude and demeaning "Top 10" list about the school's athletic director on the Internet, even though the list caused the athletic director to become "very upset").

²⁶⁵ See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1179 (E.D. Mo. 1998) (stating that the punished student removed his website after the school principal asked him to do so); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852 (Pa. 2002) (noting that the student in question removed his website on his own approximately a week after school officials discovered the site absent any urging by the school district).

judicial scrutiny and courts should not relax the "substantial disruption" prong, as some have in prior Internet-related student speech cases.²⁶⁶ It will not suffice for the school to claim that the Internet expression had "an effect on the discipline or general welfare of the school."²⁶⁷ Moreover, school officials' mere desire to hold a student accountable for offensive expression does not justify punishment under the guise of a "material and substantial disruption."²⁶⁸ Indeed, the First Amendment provides students breathing space to express their opinions on "controversial subjects."²⁶⁹

Further, a school's "knee-jerk reaction" to Internet expression should weigh heavily against the finding of a "material and substantial disruption."²⁷⁰ Courts must not permit school officials to stir up a "buzz" in the school and then claim that a substantial disruption occurred.²⁷¹

²⁶⁶ See *supra* notes 175–76, 228–29 and accompanying text (recognizing the inconsistent application of the *Tinker* standard when assessing students' freedom of speech within an educational setting); See also K. Weng, Article, *Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet*, 20 HASTINGS COMM. & ENT. L.J. 751, 757–58 (1998) (discussing a case where a student at the University of Michigan posted internet excerpts of his sexual fantasies of masochistic and tortuous treatment of women which resulted in the student's subsequent suspension from the University and arrest by the FBI because the student "transmit[ed] threatening communications across state lines.").

²⁶⁷ See *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (reaffirming the *Tinker* standard, which states that students' internet-based speech must "substantially inter[fere] with the work of the school or imp[inge] upon the rights of other students."); see also *Layshock*, 496 F. Supp. 2d at 599 (stating that "[s]chool officials [do not have] unfettered latitude to censor student speech under the rubric of 'interference with the educational mission' because that term can be easily manipulated.").

²⁶⁸ See e.g., *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 208 (D. Conn. 2007) (explaining that while a teacher found a student's internet journal posting offensive, the student's expression did not cause wide a disruption within the school requiring punishment); *Morse v. Frederick*, 127 U.S. 2618, 2647–48 (2007) (Stevens, J., dissenting) (arguing that courts must not defer to a principal's "ostensibly reasonable judgment" because it would "permit a listener's perceptions to determine which speech deserved constitutional protection.").

²⁶⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969) (noting that a school setting encourages students to openly proclaim their opinions and perspectives about controversial or provoking social and political issues). *But see* Weng, *supra* note 265, at 755–56 (identifying four Cornell students who were charged with misuse of university resources and sexual harassment after they used the university's computer system to widely distribute an e-mail titled "75 Reasons Why Women Should Not Have Freedom of Speech.").

²⁷⁰ See discussion *supra* Part V. (underscoring the restrictive aspects of students' internet-based speech and limited expressive freedom); see also Lisa Pisciotta, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 648–49 (2000) (explaining the balancing test courts must employ when determining whether students' speech is constitutionally protected under the First Amendment or if the students' speech is outside of the First Amendment's protection because it will likely upset the integrity of the educational setting).

²⁷¹ See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600–01 (W.D. Pa. 2007) (distinguishing the administration's exaggerated reaction to the pupil's speech from the student body's apathetic reaction to the same pupil's speech); see also *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177–78 (E.D. Mo. 1998) (identifying a teacher's outrage at a student's internet homepage and the teacher's retaliatory decision to access the student's homepage, without the student's permission, and reveal its contents to the school principal); Li, *supra* note 45, at 100 (declaring that "a recipient's thin-skinned reaction to [student Internet] speech will not be an acceptable justification [for suppressing the expression]").

Moreover, courts must recognize that not all Internet expression which becomes a topic of discussion will amount to a "material and substantial disruption."²⁷² Indeed, the notion that every childish message expressed on the Internet would "actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible."²⁷³

CONCLUSION

In the absence of United States Supreme Court guidance regarding student Internet speech, an innovative way of implementing the principles of *Tinker v. Des Moines Independent Community School District* must be used to strike a balance between preserving school discipline and protecting students' First Amendment rights. An epidemic of school violence across the country has made it clear that school administrators need the flexibility to preempt threats to the safety and well-being of their students and employees. Moreover, non-threatening conduct that occurs in the confines of one's home can have a negative effect on the school environment and, in some limited circumstances, school officials should have the power to respond to this type of conduct. However, clearly delineated guidelines are needed to protect students' First Amendment rights from arbitrary infringement. School administrators do not have unfettered police power over students' Internet behavior. Most importantly, it must be kept in mind that, at times, "kids will be kids," and an unwarranted suspension or expulsion can severely damage a student's education and morale.

²⁷² See *Tinker*, 393 U.S. 503 at 510 (holding that an "urgent wish to avoid the controversy" that might result from students demonstrating their opposition to the Vietnam War was not enough to overcome the students' First Amendment rights); see also Leonard Niehoff, *Civil Rights in the Academy: The Student's Right to Freedom of Speech: How Much is Left at the Schoolhouse Gate?*, 75 MICH. BAR J. 1150, 1150 (1996) (recognizing that the majority of conduct falls outside of the First Amendment's protection because it lacks expressive content).

²⁷³ *Morse*, 127 U.S. at 2649 (Stevens, J., dissenting) (arguing that "[m]ost students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it."); McIntyre, *supra* note 218, at 44 (asserting that students are "not mere receptors of the States' [or others'] message; their education encourages them to challenge, analyze, and test the message and to express their own message.").