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STUDENTS' FREE SPEECH RIGHTS SHED AT THE CYBER GATE

By Vivian Lei*

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INTRODUCTION

[1] Education is one of the most important functions of the government.¹ Because public schools are under the control of state and local authorities,² the administrators and teachers of these schools are subject to requirements established in the United States Constitution. For example, for more than thirty years, the Supreme Court has supported the due process rights³ of students facing a deprivation of liberty and property interests in education.⁴

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¹ See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

² See *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

³ U.S. Const. amend. XIV.

⁴ See *Goss*, 419 U.S. at 574.

[2] First Amendment⁵ or free speech jurisprudence has been constantly evolving in the context of school settings.⁶ While the Supreme Court first held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”⁷ it later held that First Amendment protections for students “are not automatically coextensive with the rights of adults in other settings.”⁸ This is because protections afforded to students through the First Amendment are contorted and limited by the special characteristics inherent in a school environment.⁹ Although administrators and teachers, as agents of the government, cannot “censor similar speech outside the school,” the Court has determined that a school does not have to “tolerate student speech that is inconsistent with its ‘basic educational mission.’”¹⁰

[3] Use of the Internet as a medium for students to voice their opinions adds new “spins” in the legal analysis of student speech cases.¹¹ While the Supreme Court held in the landmark decision of *Reno v. ACLU* that Internet speech is protected speech by the First Amendment,¹² many

⁵ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

⁶ See Thomas Fischer, *The Law and Education: Supreme Court Doctrine Reaches Critical Mass*, 13 MISS. C. L. REV. 287, 288-90 (1993) (discussing the evolution of school law).

⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

⁹ *Tinker*, 393 U.S. at 506.

¹⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding that the school did not violate the student’s First Amendment rights by censoring his articles on the student newspaper because it was reasonably related to legitimate pedagogical concerns) (quoting *Fraser*, 478 U.S. at 685).

¹¹ Michael J. O’Connor, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse?*, 11 U. PA. J. CONST. L. 459, 477 (2009).

¹² 521 U.S. 844, 849 (1997).

questions remain with regard to cyberspace law behind schoolhouse gates. For example, if schools may censor a lewd or substantially disruptive student speech delivered at a school assembly or published in the school newspaper, may schools similarly censor a lewd or substantially disruptive student speech that occurred on the Internet?¹³ If so, under what circumstance is it permissible for a school to exercise this authority, and what standard should the court apply in adjudicating these cases? This comment aims to address these questions.

[4] Part I of this article reviews the three standards the U.S. Supreme Court set out for limiting First Amendment protection of student speech.¹⁴ Part II compares the application of these three standards to two recent student speech cases¹⁵ and argues that courts inadequately apply these pre-Internet legal limits to cases arising from student speech on the Internet. Part III addresses various viewpoints on the issue of student Internet speech and proposes a new standard for resolving such cases.

I. PRE-INTERNET STANDARDS FOR STUDENT SPEECH

[5] Before the age of the Internet, the Supreme Court handed down three landmark decisions regarding student speech: *Tinker v. Des Moines Independent Community School District*,¹⁶ *Bethel School District No. 403 v. Fraser*,¹⁷ and *Hazelwood School District v. Kuhlmeier*.¹⁸ These cases articulate three different standards regarding student speech.

¹³ See O'Connor, *supra* note 11, at 472.

¹⁴ See *Fraser*, 478 U.S. at 685 (articulating a lewdness standard); *Kuhlmeier*, 484 U.S. at 276 (articulating a school curriculum standard); *Tinker*, 393 U.S. at 514 (articulating a "substantial disruption" standard).

¹⁵ See generally *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp.2d. 1175 (E.D. Mo. 1998); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

¹⁶ 393 U.S. 503.

¹⁷ 478 U.S. 675.

¹⁸ 484 U.S. 260.

A. THE SUBSTANTIAL DISRUPTION STANDARD

[6] *Tinker v. Des Moines Independent Community School District* is a landmark decision regarding student free speech.¹⁹ *Tinker* arose from the suspension of three students for wearing black armbands on school grounds in protest of the Vietnam War.²⁰ The Court held that student speech that interferes “materially and substantially” with a school’s ability to educate or affects “the rights of others” was not protected by the First Amendment.²¹ The Court explained, however, that a student’s right to freedom of expression cannot be defeated by “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²² Noting that “[s]chool officials do not possess absolute authority over their students,” the Court concluded: “In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”²³

B. THE LEWDNESS STANDARD

[7] The Supreme Court limited the liberal reach of *Tinker* in *Bethel School District No. 403 v. Fraser*.²⁴ In *Fraser*, the school suspended a student for delivering a sexually explicit speech at a school assembly.²⁵ While the Court ultimately determined that a school may regulate a

¹⁹ See 393 U.S. at 505-06.

²⁰ *Tinker*, 393 U.S. at 504.

²¹ *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); see *id.* at 514 (finding the wearing of black armbands did not interfere with the school’s work or with the rights of other students to be left alone).

²² *Id.* at 508-09.

²³ *Id.* at 511.

²⁴ See generally 478 U.S. 675 (1986).

²⁵ *Id.* at 677-78.

student speech that is vulgar or lewd,²⁶ it cautioned that 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.”²⁷ This pivotal decision gave school officials the constitutional authority to punish students for their speech, even though that same speech, if made by an adult, would be protected outside the school’s gates.²⁸

C. THE SCHOOL CURRICULUM STANDARD

[8] The Court continued to narrow the scope of *Tinker* in *Hazelwood School District v. Kuhlmeier*.²⁹ In *Kuhlmeier*, two student articles were withheld from publication in the school newspaper; one dealt with “the impact of divorce on students at the school,” and the other discussed “students’ experiences with pregnancy.”³⁰ The principal withheld publication because he thought the articles were inappropriate for younger students and because he was concerned about the anonymity of the students interviewed in the articles.³¹

²⁶ *Id.* at 685-86 (holding that the school district did not violate the student’s First Amendment rights by suspending him based on a speech he had made at a school-sponsored event because the speech contained elaborate, graphic, and explicit sexual metaphors).

²⁷ *Id.* at 681 (“Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.”). *But see id.* at 692 n.2 (Stevens, J., dissenting) (“As the Court of Appeals noted, there “is no evidence in the record indicating that any students found the speech to be offensive.”) (quoting *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1361 n.4 (9th Cir. 1985)).

²⁸ See Carol M. Schwetschenau, Note, *Constitutional Protection for Student Speech in Public High Schools: Bethel School District No. 403 v. Fraser*, 106 *S. Ct.* 3159 (1986), 55 U. CIN. L. REV. 1349, 1364 (1987).

²⁹ 484 U.S. 260 (1988).

³⁰ *Id.* at 263.

³¹ See *id.* at 263-64.

[9] The Court held that when a newspaper is part of a school curriculum, rather than a public forum, the content therein is subject to greater control by school administrators and teachers,³² but any action taken must be “reasonably related to legitimate pedagogical concerns.”³³ Therefore, as long as these two requirements are met, educators may exercise editorial control over the style and content of student speech without violating the First Amendment.³⁴

[10] The standards of substantial disruption, lewdness, and curriculum set the stage for student Internet speech cases. Without a new and clearer standard, these cases serve as the only guidelines for lower courts to adjudicate student speech cases relating to the Internet.

II. CASE STUDIES: APPLICATION OF PRE-INTERNET STANDARDS TO TWO STUDENT INTERNET SPEECH CASES

[11] In accordance with the growth of the Internet, more and more student speech cases involve student speech that takes place on this relatively new intangible medium. Because the Supreme Court has not specifically addressed how the mainstream use of the Internet by students modifies pre-Internet law, courts stick with and even reinvent the standards of *Tinker*, *Fraser*, and *Kuhlmeier*. To determine whether the First Amendment protects a student’s speech in cyberspace courts will focus on the level of disruption caused by the student speech (*Tinker*), the lewdness of student speech (*Fraser*), or whether the student speech is part

³² *Id.* at 270 (explaining that the newspaper is part of a school curriculum because it had always been a part of the educational curriculum and a regular classroom activity). *But cf.* *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372 (8th Cir. 1986) (explaining that the newspaper was a public forum “because it was intended to be and operated as a conduit for student viewpoint,” covering topics of student interest).

³³ *Id.* at 271.

³⁴ *Id.* (explaining that activities such as “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 . . . may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting . . .”); *id.* at 273.

of the school curriculum (*Kuhlmeier*).³⁵ Although these three standards have set the stage for student Internet speech cases, this section argues that a new and clearer definition of the scope of students' freedom of speech rights is needed by contrasting two 1998 student Internet speech cases, *Beussink v. Woodland R-IV School District*³⁶ and *J.S. v. Bethlehem Area School District*.³⁷

A . BEUSSINK V. WOODLAND R-IV SCHOOL DISTRICT

[12] During his senior year at Woodland High School in Missouri, Brandon Beussink created a website on his home computer during his own time.³⁸ Brandon's website was very critical of Woodland High School's administration,³⁹ using "vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage."⁴⁰ Beyond stating an opinion, Brandon's website "invited readers to contact the school principal and communicate their opinions regarding Woodland High School."⁴¹

[13] After a classmate, Amanda Brown, was invited to view the website on Brandon's home computer, the two had an argument.⁴² Amanda subsequently accessed Brandon's website at school and brought it to the attention of a teacher, who then notified the principal.⁴³ The principal,

³⁵ See, e.g., *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp.2d 1088, 1090 (W.D. Wash. 2000) (discussing the three standards and using them for guidance).

³⁶ 30 F. Supp.2d 1177 (E.D. Mo. 1998).

³⁷ 807 A.2d 847.

³⁸ *Beussink*, 30 F. Supp.2d. at 1177.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1177-78.

upset that a student had displayed Brandon's website in a classroom, initially suspended Brandon for five days; however, he later increased the suspension to ten days.⁴⁴ Furthermore, Woodland High School maintained a policy which lowered "students' grades by one letter grade for each unexcused absence in excess of ten days."⁴⁵ Due to a combination of prior unexcused absences and serving the suspension of ten days, Brandon was failing all of his classes.⁴⁶

[14] During trial, the *Beussink* court did not find "evidence of a disturbance" because there was "only one other student in the room" when Amanda showed Brandon's website to the computer teacher and that "student did not view the screen."⁴⁷ It was also determined that although other students viewed the website on-campus the same day, the computer teacher had "granted them permission to do so."⁴⁸ Applying the *Tinker* standard, the *Beussink* court concluded that the school's punishment of Brandon violated his free speech rights under the First Amendment because, even though students discussed the incident at school, Brandon's website did not substantially interfere with school administration.⁴⁹

B. J.S. v. BETHLEHEM AREA SCHOOL DISTRICT

[15] Justin Swidler, an eighth grader at Nitschmann Middle School in Pennsylvania, also developed a website on his home computer during his own time.⁵⁰ Justin named the website "Teacher Sux." It contained extremely "derogatory, profane, offensive and threatening comments"

⁴⁴ *Id.* at 1178-79.

⁴⁵ *Id.* at 1179-80.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1178.

⁴⁸ *Id.*

⁴⁹ *See id.* at 1180.

⁵⁰ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002).

about both his algebra teacher, Mrs. Kathleen Fulmer, and his school's principal, Mr. A. Thomas Kartsois.⁵¹ After creating the website, Justin openly bragged about it and showed it to the other students at school.⁵² An anonymous e-mail subsequently reported the website to a teacher at the school, who immediately informed the principal.⁵³ At the end of the school year, the school district expelled Justin permanently.⁵⁴

[16] According to the record, after viewing the website Mrs. Fulmer claimed that she sustained “stress, anxiety, loss of appetite, loss of sleep, loss of weight, . . . short-term memory loss, . . . an inability to go out of the house and mingle with crowds, . . . headaches and a general sense of loss of well being,”⁵⁵ rendering her temporarily incapable of fulfilling her duties as a teacher.⁵⁶ Her condition was so severe it required her to be medicated⁵⁷ and resulted in her taking medical leave for the entirety of the following school year.⁵⁸ Additionally, it was claimed that Justin's website

⁵¹ *Id.* at 851. For example, one page on the website, stated that Mrs. Fulmer was a “bitch” and should be fired for “show[ing] off her fat fucking legs.” *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416 (Pa. Commw. Ct. 2000). Elsewhere on the site, Justin combined pictures of Mrs. Fulmer with images and quotes from the cartoon “South Park” which said: “She’s a bigger bitch than your mom.” *J.S.*, 807 A.2d at 851. “Yet another page morphed a picture of Mrs. Fulmer’s face into that of Adolph Hitler and stated ‘The new Fulmer Hitler movie. The similarities astound me.’” *Id.* More controversial pictures depicted “Mrs. Fulmer with her head cut off and blood dripping from her neck” and told visitors to “take a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman.” *Id.*

⁵² *J.S.*, 807 A.2d at 852.

⁵³ *J.S.*, 757 A.2d at 415.

⁵⁴ *J.S.*, 807 A.2d at 853.

⁵⁵ *Id.* at 852.

⁵⁶ *Id.* at 869.

⁵⁷ *Id.* at 852.

⁵⁸ *Id.* at 869.

“had a demoralizing impact on the school community.”⁵⁹ According to the principal, “the effect was worse than anything that he had encountered in forty years of education.”⁶⁰

[17] The *J.S.* court applied both the *Fraser* and *Tinker* standards, ultimately finding in favor of the school.⁶¹ When applying the *Fraser* standard, the court found that Justin’s “punishment for the use of lewd, vulgar and plainly offensive language, including the personal attacks on Mrs. Fulmer and Principal Kartotis, fits easily within *Fraser’s* upholding of discipline for speech that undermines the basic function of a public school.”⁶² Given Mrs. Fulmer’s impaired physical and mental health and her absence, which “adversely impacted the educational environment,” when applying *Tinker*, the court also determined that Justin’s punishment comported with the First Amendment because his website caused a substantial disruption to the operation of the school.⁶³ Accordingly, the court upheld the school district’s permanent expulsion with “little difficulty.”⁶⁴

III. ANALYSIS

A. THE SUBSTANTIAL DISRUPTION STANDARD APPLIED TO STUDENT INTERNET SPEECH

[18] *Tinker’s* substantial disruption standard is inadequate for student Internet speech cases for two reasons. First, the standard is difficult to apply because it provides little guidance to school officials to determine

⁵⁹ *Id.* at 852.

⁶⁰ *Id.*

⁶¹ *Id.* at 867-68.

⁶² *Id.* at 868.

⁶³ *Id.* at 869.

⁶⁴ *Id.*

what constitutes a sufficient disruption to warrant school punishment.⁶⁵ While most would agree that “[e]ducators should refrain from disciplining students for creating webpages that fall on the relatively innocuous end of the content spectrum,” without clearer standards it is difficult to determine which types of student Internet speech “reach the level of harmfulness or offensiveness that warrant school censorship.”⁶⁶ Second, “the substantial disruption test grants school officials and courts too much leeway to restrict protected student speech,” and “the imprecision of the standard threatens impermissibly to chill the speech of students who may fear that their expression will lead to punishment.”⁶⁷

[19] Contrasting *Beussink* and *J.S.* illustrates the difficulty in reaching a consistent conclusion about what constitutes a substantial disruption. The *Beussink* court, consistent with *Tinker*’s instruction that disliking or being upset by the content of a student speech is not an acceptable justification for limiting student speech, concluded that the school’s disciplinary actions violated Brandon’s First Amendment rights because they were based on the principal’s immediate distress upon seeing Brandon’s website and not on a reasonable fear of disruption with school discipline.⁶⁸ By also relying on *Tinker*, however, the *J.S.* court found the school’s disciplinary actions did not violate Justin’s First Amendment rights

⁶⁵ See Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 636-39 (1984).

⁶⁶ Rhoda J. Yen, *Free Speech on the Internet: Regulating Web Authorship by Students*, 2000 COMP. L. REV. & TECH. J. 61, 65 (2000) (“While such sites are obviously distressing to those being targeted, they contain merely personal impressions and opinions, which have traditionally been strongly protected under the First Amendment.”).

⁶⁷ Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 170 (2003).

⁶⁸ *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp.2d. 1175, 1180-82 (E.D. Mo. 1998).

because the website disrupted the school by causing morale problems in the school.⁶⁹

[20] The *J.S.* court relied heavily on the principal's testimony that Justin's website had a "demoralizing impact on the school community."⁷⁰ But the *J.S.* opinion is void of details of such an impact. In fact, it indicates the lack thereof:

During this time, [Justin] continued to attend classes and participate in extra-curricular activities, including a band trip. The School District did not request that [Justin] remove the site. Evidently, [Justin], on his own, removed the web site approximately one week after [the principal] became aware of the site. Moreover, the School District took no action to confront or to punish [Justin] in any manner during the remainder of the school year. Finally, the School District did not refer [Justin] for any type of psychological evaluation and did not request that his parents have any such evaluation conducted.⁷¹

[21] A distinction between the two cases based on the negative effects they had on the "listeners" cannot be drawn. Like Justin's website, which caused a viewer, Mrs. Fulmer, to complain of a plethora of physical and psychological symptoms,⁷² Brandon's website also had negative effects on the computer teacher who saw his website.⁷³ Upon reading the content of Brandon's website, the computer teacher became very upset and

⁶⁹ *J.S.*, 807 A.2d at 869. The Pennsylvania Supreme Court finding is consistent with that of the Commonwealth Court. *See J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 417 (Pa. Commw. Ct. 2000).

⁷⁰ *J.S.*, 807 A.2d at 852.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Beussink*, 30 F. Supp.2d at 1178.

immediately brought it to the attention of the principal.⁷⁴ The principal later testified that, when the computer teacher came to him, he could tell by her demeanor and rapid speech that she was obviously agitated.⁷⁵ Specifically, he believed the computer teacher was offended by Brandon's website.⁷⁶ The principal himself was also distressed that other students had viewed its content.⁷⁷

[22] One may defend this inconsistency by arguing that Justin's website is more disruptive than Brandon's because, while Brandon's website generally "convey[ed] his opinion regarding the teachers, the principal and the school's own homepage,"⁷⁸ Justin's website specifically targeted his math teacher, Mrs. Fulmer, and the principal, Mr. Kartsotis.⁷⁹ Other student Internet speech cases would not support such reasoning.

[23] For example, in *Layschock v. Hermitage School District*,⁸⁰ a Pennsylvania court found a high school lacked the authority for disciplining a seventeen year-old student for creating an unflattering "parody profile" of the principal on MySpace.⁸¹ The court concluded that the school failed to establish a sufficient nexus "between [the student]'s speech and a substantial disruption of the school environment."⁸² In another case, a Washington judge ruled in favor of a high school student holding that a website ridiculing the assistant principal was not

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1177.

⁷⁹ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002).

⁸⁰ 496 F. Supp.2d 587, 606 (W.D. Pa. 2007).

⁸¹ *Id.* at 601.

⁸² *Id.* at 600.

substantially disruptive.⁸³ In yet another case, an Ohio judge ordered the reinstatement of a student who the school had suspended for creating a webpage critical of his band teacher.⁸⁴ Because the student created the webpage at home, the school administrators admitted the punishment was a mistake, and the case settled before trial.⁸⁵ Commentators have remarked, “[s]ites . . . which feature insults against a teacher, do not reach the level of harmfulness or offensiveness that warrant school censorship.”⁸⁶ “While such sites are obviously distressing to those being targeted, they contain merely personal impressions and opinions, which have traditionally been strongly protected under the First Amendment.”⁸⁷

[24] Arguably, without an actual threat to Mrs. Fulmer’s life, her response to Justin’s website was neither rational nor foreseeable.⁸⁸ Establishing a “standard of First Amendment protection on the reaction of listeners threatens to abridge far more speech than is constitutionally permissible.”⁸⁹ Therefore, punishing students “anytime that a teacher is upset by the magnitude and strength of the student’s off-campus criticism” only reduces the students’ freedom of speech.⁹⁰

⁸³ See Joshua Robin, *Judge Upholds Student Who Posted Web Parody*, SEATTLE TIMES, July 19, 2000, at B5, available at <http://community.seattletimes.nwsourc.com/archive/?date=20000719&slug=4032527>. Among other things, Beidler allegedly placed in phony ads for Viagra the superimposed images of the assistant principal having sex with Homer Simpson, a television cartoon character. See *id.*

⁸⁴ See Mark Rollenhagen, *Westlake Schools to Pay \$30,000 to Settle Net Suit*, PLAIN DEALER, Apr. 14, 1998, at 1A.

⁸⁵ *Id.* O’Brien’s webpage included a photo of his band teacher and characterized him as “an overweight middle-age man who doesn’t like to get haircuts.” *Id.*

⁸⁶ Yen, *supra* note 66, at 65.

⁸⁷ *Id.*

⁸⁸ Tuneski, *supra* note 67, at 171.

⁸⁹ *Id.* at 172.

⁹⁰ *Id.* at 171-72.

[25] By contrast, the *Beussink* court found Brandon's discipline impermissible because it was merely based on the principal's distress upon viewing Brandon's website rather than a potential disruption to the administration of the school.⁹¹ It has been argued that this conclusion, however, is "not a question of law, but opinion."⁹² As one scholar has noted, it is not the reaction to the content of a website that matters, "but rather to its disruptive effect on the effective governance of the school environment."⁹³

[26] Knowledge of the Internet speech on the part of school members does not explain why the *Beussink* court concluded that "classes are not materially or substantially disrupted" while the *J.S.* court found the contrary.⁹⁴ As in *J.S.*, students, faculty, and administrators at Brandon's school were all aware of his website.⁹⁵ Arguably, the disruption arose in *Beussink* when students viewing Brandon's website were instructed to leave the site.⁹⁶ After all, "minor attention problems in classrooms [have] been considered . . . substantial disruption."⁹⁷ In fact, "nearly any controversial or offensive expression that stirs debate or humors students

⁹¹ See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp.2d 1175, 1182 (E.D. Mo. 1998).

⁹² Louis John Seminski, Jr., Note, *Tinkering With Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 177 (2001).

⁹³ *Id.*

⁹⁴ *Beussink*, 30 F. Supp.2d at 1178.

⁹⁵ Compare *Beussink*, 30 F. Supp.2d. at 1177-78 (describing how *Beussink* allowed various people to use his home computer and showed the homepage website), with *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851-52 (Pa. 2002) ("[S]tudents, faculty and administrators of [J.S.'s school] viewed the web site.").

⁹⁶ *Beussink*, 30 F. Supp.2d at 1179.

⁹⁷ Tuneski, *supra* note 67, at 172; see, e.g., *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 522 (C.D. Cal. 1969) (finding poor student attention in class caused by the reading of the off-campus newspaper, "Oink," was a substantial disruption).

could cause enough of a classroom interruption to satisfy the substantial disruption test.”⁹⁸

[27] A review of *J.S.*, *Beussink*, and other relevant case law shows that the substantial disruption standard, being indefinite, vague, flexible, and easily satisfied, can be used by overzealous school officials to justify punishing students for a wide array of their expression, even those that occurred off-campus. Furthermore, this standard provides courts with wide discretion with which to manipulate the standard to reach a desired conclusion. As noted by one scholar, whether or not courts abuse this discretion, “applying the substantial disruption test to off-campus speech threatens to abridge speech” rights in “otherwise fully protected forums.”⁹⁹

B. THE LEWDNESS STANDARD APPLIED TO STUDENT INTERNET SPEECH

[28] The lewdness standard set out by *Fraser* has not proven to be dispositive for deciding student Internet speech cases. While the *J.S.* court found it permissible for the school to restrict Justin’s Internet speech because it was lewd and offensive,¹⁰⁰ the *Beussink* court found it impermissible for the school to restrict Brandon’s Internet speech, even though it was similarly “crude and vulgar.”¹⁰¹ Not only is it difficult to decipher from the record that Justin’s website is, as a matter of law, more vulgar than Brandon’s, but the *J.S.* court may have exceeded *Fraser*’s lewdness standard “by applying the rationale to speech originating away from school or a school-sponsored event.”¹⁰²

⁹⁸ Tuneski, *supra* note 67, at 173.

⁹⁹ *Id.* at 170-72.

¹⁰⁰ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 867-68 (Pa. 2002).

¹⁰¹ *Beussink*, 30 F. Supp.2d at 1177.

¹⁰² Robert E. Simpson, Jr., *Limits on Students' Speech in the Internet Age*, 105 DICK. L. REV. 181, 195 (2001).

C. THE SCHOOL CURRICULUM STANDARD APPLIED TO
STUDENT INTERNET SPEECH

[29] As alluded to above, *Kuhlmeier*'s school curriculum standard is difficult to apply to student speech that occurs on the Internet.¹⁰³ The difficulty lies in the amorphous distinction between on-campus and off-campus student speech. While the *Beussink* court avoided addressing the issue of whether a website that was created on a home computer outside of school hours but viewed at school is an "on-campus" speech, the trial court in *J.S.*, the Commonwealth Court of Pennsylvania, found it "evident that the courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process."¹⁰⁴ And yet, the appellate court in *J.S.*, the Supreme Court of Pennsylvania, found "a sufficient nexus between [Justin's] web site and the school campus" because Justin's website was "aimed at a specific school and/or its personnel [and] brought onto the school campus or accessed at school by its originator."¹⁰⁵ Supreme Court of Pennsylvania

¹⁰³ See *supra* Part I.C.

¹⁰⁴ *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 421(Pa. Commw. Ct. 2000).

¹⁰⁵ *J.S.*, 807 A.2d at 865.

[T]he record clearly reflects that the off-campus web site was accessed by J.S. at school and was shown to a fellow student. While it is less certain exactly what portions of the web site the student viewed, J.S., nevertheless, 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 web site. Related thereto, faculty members and the school administration also accessed the web site at school. Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District; Mrs. Fulmer and [the principal] were the subjects of the site.

See *id.* at 864 n.11 (noting that "purely off-campus speech may . . . be subject to punishment by [the] school district if [the substantial disruption test] of *Tinker* [is] satisfied.").

therefore determined it was “inevitable” that a website created off-campus “would pass from students to teachers” on-campus.¹⁰⁶ Without a clearer distinction between what constitutes on-campus and off-campus speech, courts will continue to be divided.

D. DISCUSSION AND RECOMMENDATION

[30] Student Internet speech jurisprudence has two “spins”: the Internet spin and the school spin. On the one hand, by focusing only on the Internet spin, one would argue that student Internet speech, being *Internet* speech all the same, is protected by the First Amendment under *Reno*.¹⁰⁷ On the other hand, by focusing only on the school spin, one would argue that student Internet speech, being *student* speech all the same, is subject to regulation by the school under *Tinker*, *Fraser*, and *Kuhlmeier*.

[31] But those who see the Internet as a technological advance in communication, offering an “opportunity for robust, uninhibited self-expression”¹⁰⁸ would argue that students’ expression over the Internet, whether it be “cathartic expressions of their frustrations or artistic sensibilities,” should be protected by the First Amendment because the Internet is editor-less, interactive, and allows for students to express their views and ideas anonymously without fear of an “official retaliation, social ostracism, [or] an invasion of privacy.”¹⁰⁹ Some commentators argue that First Amendment protections “must necessarily extend” to student expression over the Internet to “ensure every citizen of his or her

¹⁰⁶ *Id.* at 865.

¹⁰⁷ See *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

¹⁰⁸ Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1137 (1996).

¹⁰⁹ Sandy S. Li, Comment, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 93-94 (2005).

individual rights and to foster the growth and improvement of our government and society.”¹¹⁰

[32] If schools can prohibit students from making substantially disruptive and/or lewd speech on-campus or in a school newspaper, they should similarly be able to impose their discretion on student speech on the Internet that has a foreseeable disruptive effect on campus ground. Given that dissemination of information on the Internet is both immediate and pervasive, an e-mail, a website, or a blog could potentially create more disturbance on school grounds than can a conversation between two students in the school cafeteria. If schools do not need to “tolerate student speech that is inconsistent with [their] basic educational mission” on-campus or in a school newspaper, then it makes little sense to require schools to tolerate student speech that occurred in a different and more injurious forum.¹¹¹

[33] Courts have resorted to the “off-campus” defense to counter this argument.¹¹² The “off-campus” defense assumes that student Internet speech is off-campus speech and, therefore, should be subject to a higher level of First Amendment protection.¹¹³

[34] Because the Supreme Court has never articulated standards regarding how much authority a school may assert over off-campus student expression, however, a lack of guidance has led to inconsistent conclusions among the lower courts. On one end of the campus property spectrum, some courts have concluded that “school officials are powerless

¹¹⁰ Jay Krasovec, *Cyberspace: The Final Frontier, For Regulation?*, 31 AKRON L. REV. 101, 124-25 (1997).

¹¹¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)) (holding that the school did not violate the student’s First Amendment rights by censoring his articles on the student newspaper because it was reasonably related to legitimate pedagogical concerns).

¹¹² *See, e.g., Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050-51 (1979).

¹¹³ *Id.*

to impose sanctions for expression” that occurred off of school property.¹¹⁴ On the other end of the spectrum, some courts¹¹⁵ have concluded that “when the bounds of decency are violated in publications distributed to high school students, *whether on campus or off campus*, the offenders become subject to discipline.”¹¹⁶ But scholars have warned that such conclusions are overreaching by granting schools the authority to discipline students who create websites at home.¹¹⁷

[35] There are also those who are somewhere in the middle of this campus property spectrum. These scholars suggest scrutinizing the physical location of the computer or server receiving the Internet speech¹¹⁸

¹¹⁴ *Id.* at 1050 n.13; *see* *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp.2d 1088, 1090 (W.D. Wash. 2000) (characterizing the student’s website as having an “out-of-school nature” and granting a temporary restraining order in favor of the student).

¹¹⁵ *See, e.g.,* *Doninger v. Niehoff*, 527 F.3d 41, 49, 52 (2d Cir. 2008) (finding the school’s punishment based on a student’s blog which was created off-campus to be permissible because the blog contained the “sort of language that properly may be prohibited in schools” and (b) the blog would “materially and substantially disrupt the work and discipline of the school.” (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp.2d 446, 459 (W.D. Pa. 2001) (holding that whether a student speech is on-campus or off-campus should be analyzed in accordance with *Tinker*’s substantial disruption standard).

¹¹⁶ *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969) (emphasis added); *see Doninger*, 527 F.3d at 54 (finding the school’s punishment based on a student’s blog which was created off-campus to be permissible); *Killion*, 136 F. Supp.2d at 459; *Fenton v. Stear*, 423 F. Supp. 767, 772 (W.D. Pa. 1976) (finding that calling a teacher a lewd name in a public place subjected the student to discipline by the school authorities).

¹¹⁷ *Simpson*, *supra* note 102, at 194.

¹¹⁸ *Yen*, *supra* note 66, at 68 (“Sites created on private servers, and on privately-owned computers at home, deserve a high degree of protection from censorship. Conversely, schools should retain discretion in regulating webpages created on school property, on school accounts, or with school computers.”); *cf. Killion*, 136 F. Supp.2d 459 (applying *Tinker*’s substantial disruption standard without resolving whether an email that was created off-campus but printed and carried on school grounds by others was an on-campus or off-campus speech).

or the foreseeability of an Internet speech reaching the school¹¹⁹ to determine whether or not student Internet speech is on-campus or off-campus.

[36] One solution “to protect the First Amendment rights of students, courts should establish a clear rule that off-campus speech is not subject to the jurisdiction of school officials.”¹²⁰ To make this restriction effective, a clear line must be drawn between on-campus and off-campus speech.¹²¹ Rather than focus on the physical place of reception of a website or an e-mail or how foreseeable it is that the Internet speech would arrive on school grounds, courts should focus on the student author’s role in publicizing or disseminating the website to demarcate the reach of schools’ authority.¹²² “By taking this additional step, a speaker decides whether she wishes to subject herself to the jurisdiction of school officials.”¹²³ “Such steps would include opening a web page at school, telling others to view the site from school, distributing a [printed version] as students enter school, and sending e-mail to school accounts.”¹²⁴ By contrast, merely posting a website or comments on the Internet would be a passive act that is insufficient for categorization as on-campus speech that is subject to a school’s censorship. “If the author does not take steps to encourage the dissemination at school, it can be presumed that the author

¹¹⁹ See, e.g., *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) (affirming the expulsion of a student for writing an article in an underground newspaper that provided instructions on how to hack into the school's computers since there was a reasonable likelihood of a punishable substantial disruption).

¹²⁰ Tuneski, *supra* note 67, at 177.

¹²¹ *Id.*

¹²² Yen, *supra* note 66, at 77 (“A student who aggressively disseminates the website's existence and content to other students, thereby intentionally causing a school disturbance, may be subject to different standards of restraint and discipline than a student who privately creates a website without publicizing it at school”); see Tuneski, *supra* note 67, at 187.

¹²³ Tuneski, *supra* note 67, at 177.

¹²⁴ *Id.* at 178.

intended the speech which originated off-campus to be viewed and received off-campus.”¹²⁵

[37] Finally, prohibiting schools from punishing students for their strictly off-campus speech would not turn schools into “madhouses of chaos” because alternative means of regulating student speech within schools are sufficient to maintain the proper order and decorum of the learning environment.¹²⁶ For example, the Supreme Court recognizes that the Fourteenth Amendment gives parents a broad power in the “care, custody, and management of [their] children.”¹²⁷ Of course, there are always the threats of civil and criminal prosecutions to keep the miscreants in line too.¹²⁸

CONCLUSION

[38] As the Internet is now an essential part of the everyday lives of students, more and more student speech cases that the lower courts are dealing with today involve Internet speech. Yet, the three pre-Internet standards of *Tinker*, *Fraser*, and *Kuhlmeier* set out by the Supreme Court have proven to be inadequately vague for this new and unique medium of communication.

[39] Drawing a bright line between on-campus speech and Internet speech would provide better guidelines for courts and school officials on the scope of the First Amendment. It is suggested that courts should focus on the role of the student author of that Internet speech in disseminating the content of that speech on-campus to determine whether a student speech that occurred on the Internet is subject to the school’s discretion. If

¹²⁵ *Id.* at 177-78.

¹²⁶ *Id.* at 180-81. See generally Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Merging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243 (2001) (discussing student speech and school methods of punishment).

¹²⁷ *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

¹²⁸ See Tuneski, *supra* note 67, at 142; Calvert, *supra* note 126, at 261.

a student takes a purposeful step to direct their speech towards the school, then that student's speech should be subject to the school's jurisdiction.

[40] Punishing students for the e-mails or websites they created off-campus during their own time poses an intolerable threat to the First Amendment rights of students. Such a threat cannot be justified by the need to maintain order in the schools as there are alternative methods to punish offensive speech and deter school disruptions.