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INTERNET SPEECH AND THE FIRST AMENDMENT RIGHTS OF PUBLIC SCHOOL STUDENTS

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I. INTRODUCTION

When I first decided to write about the increasing incidence of public school students disciplined because of Internet use, it was months before the school shootings in Littleton, Colorado and the copycat incidents that have since occurred throughout the country.[1] Rightly or wrongly, the events in Littleton created a sense of urgency about the issue of student Internet use because one of the student shooters had a Web site. That site contained comments which, read with the benefit of hindsight, seem to forecast his actions.[2] The discovery of the site prompted renewed concern over student Internet use.[3]

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1. On April 20, 1999, two students, Eric Harris and Dylan Klebold, went on a shooting spree in their suburban Denver high school killing fourteen students and one faculty member and wounding at least twenty other students before killing themselves. See Tom Kenworthy, *A Day of Death and Fear in Colorado*, WASH. POST, Apr. 21, 1999, at A1. A month later, in an Atlanta, Georgia suburb, a 15 year-old sophomore armed with a rifle and a handgun shot and wounded six of his high school classmates. See Sue Anne Pressley, *6 Wounded In Shooting at Georgia High School; Student Was Apparently Upset Over Breakup*, WASH. POST, May 21, 1999, at A1.

2. Eric Harris had a Web site hosted by America Online (AOL). His Web site described how he used his paychecks to purchase fuses and ammunition. He also described acts of vandalism against his enemies. An earlier version of the site described how Harris and Klebold made four pipe bombs. See Lorraine Adams & Cheryl W. Thompson, *Gunmen's Friends Focus of School Shooting Probe*, WASH. POST, May 14, 1999, at A1.

3. By 11 P.M. on the day of the Littleton shootings, AOL deactivated Eric Harris' account. See Linton Weeks, *When Death Imitates Art; The Electronic Co-conspirator*, WASH. POST, Apr. 22, 1999, at C1. Subsequently, rumors spread about the role the Internet played in the shootings. *See id.*. According to a CNN/USA Today/Gallop Poll,

Thus far, school discipline of students for Internet use has resulted in only one published judicial opinion. In *Beussink v. Woodland R-IV School District*,[4] the United States District Court for the Eastern District of Missouri issued a preliminary injunction against the school district ordering it not to impose any academic sanctions on a student who had created a Web site that was critical of the school. Other instances of Internet-based student discipline have likewise resulted in settlements in favor of student Internet users.[5] This first rash of cases resulting in reversals of school disciplinary decisions suggests that schools have been quick to react to student Internet use by imposing disciplinary sanctions without adequately considering the scope of student free speech rights that apply to the Internet. This is possibly an overreaction which fails to take into account the United States Supreme Court's decision in *Reno v. American Civil Liberties Union*,[6] a case which held that the Internet was a fully-protected method of communication more akin to print than to broadcast.[7]

The interrelationship between the Internet and the First Amendment rights of public school students is a complex topic. The complexity persists partly because the Internet is not a monolithic mode of communication. Internet service can be part of a school's curriculum and can therefore entitle the school to regulate access, much as the Supreme Court permitted in *Hazelwood School District v. Kuhlmeier*.[8] Alternatively, Internet

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34% of those surveyed blamed the Internet a great deal for recent school shootings and 30% held the Internet responsible a moderate amount. *See Poll: More parents worried about school safety* (poll taken Apr. 22, 1999) <http://cnn.com/ALLPOLITICS/stories/1999/04/22/school.violence.poll/>.

4. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

5. At a high school near Cleveland, Ohio, a high school student was suspended from school for ten days for insulting his band teacher on his Web site. After the student filed suit and a judge issued a preliminary injunction directing the school to reinstate the student, the school agreed to settle the case and pay the student $30,000. See Robyn Blumner, *Censoring Students in Cyberspace*, ST. PETERSBURG TIMES, Sept. 13, 1998, at 4D. In another case, a school suspended a student for a day and transferred him out of a computer class because animal rights activists complained about his Web site. After the ACLU intervened, the school expunged the discipline from his record and allowed him to return to the class. See Evelyn Theiss & Kevin Harter, *Access to Web Lifts Lid from Student Expression*, PLAIN DEALER, Mar. 21, 1998, at 1B.

6. 521 U.S. 844 (1997) (striking down several provisions of the Communications Decency Act).

7. *See id.* at 870.

8. 484 U.S. 260 (1988). For a discussion of *Hazelwood*, *see infra* notes 34—49 and accompanying text.

access can originate wholly outside the schoolhouse, yet have serious repercussions within the school. Wherever the physical location, student use of the Internet can involve a variety of uses. A student can access material written by others, send or receive e-mail, participate in a chat room or forum, or create content that is posted to the school's official Web site or to the student's own Web site. If the student is a content provider, that content can be created on a computer available at school, at home, or at some other location. Moreover, as in all free speech cases, the exact content of the student's communication will affect the outcome. Some student Internet speech, such as true threats, may be outside the scope of First Amendment protection altogether.

These myriad factual variations involving student Internet use raise a wide range of speech questions, some that have obvious answers based on analogies to the non-Internet universe of speech and others that have no clear answers even outside the Internet context. Analysis is easiest when a computer teacher instructs each student to create a Web site on computers provided by the school. In that educational context, the school is free to restrict the content of the site in order to avoid types of speech that are inconsistent with the school's educational objectives. It can also ban foul language, sexual references, insults, threats, and other offensive speech as a way of furthering the lessons of civility that it wishes to teach throughout its educational program.

Difficulties in free speech analysis arise as the speech moves away from having a direct connection to the school's curriculum. This can occur where the student's Internet activities make use of a facility provided by the school, such as its computer lab or its Internet server, but does not engage in the use as part of a school-sponsored activity. For example, the school could make its computer lab available to students after school hours and allow them to use the lab's computers for personal projects. Under such an arrangement, questions would arise about the school's ability to discipline a student based on the content of the student's Web site if the student created the Web page at school and later arranged to have a commercial Internet service provider host it. In this situation, the school can claim some connection to the creation of the site, but that connection involves neither supervision of the student's work nor broadcast of the site. Such a hybrid situation makes it difficult

to identify the proper First Amendment standard to use in reviewing disciplinary action by the school.

Even more difficult questions are raised when the student's Internet activities are completely disassociated from the school environment. It is much less clear that the school's disciplinary arm should be able to extend to a student's activities in his or her home where the school does not provide any of the facilities the student employs in making use of the Internet. Nevertheless, it is easy to see why a school would argue that off-campus Internet use can effect the atmosphere at school. If a student posts a series of insulting messages directed at other students at the school, the insulted students may be too embarrassed to come to school or, even if they decide to attend, may be unable to concentrate on their schoolwork.

In exploring the range of the First Amendment issues raised by school efforts to discipline students for Internet activities, this article first will examine Supreme Court and lower court precedent involving student speech outside of the Internet context. It will then look at *Beussink*, the first reported decision to involve discipline of a student for Internet speech. It will also discuss other Internet situations in which schools have sought to impose sanctions on students. In its final section, it will apply free speech methodology to a range of Internet situations. This exploration will identify some situations where a school is free to control speech that it believes may harm the school environment and others where the free speech rights of students preclude school disciplinary action. For those situations where there is no clear answer as to whose rights are paramount, the article cannot provide firm answers, but will at least raise some of the critical questions.

II. THE FIRST AMENDMENT RIGHTS OF PUBLIC SCHOOL STUDENTS BEFORE THE INTERNET

The United States Supreme Court has decided a number of cases involving the First Amendment claims of public school students including *Tinker v. Des Moines Independent Community School District*,[9] *Bethel School District No. 403 v. Fraser*,[10]

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

10. 478 U.S. 675 (1986).

and *Hazelwood School District v. Kuhlmeier.*[11] While these cases have resolved some questions about the scope of student rights and the power of public schools to ban certain types of speech or punish students for various forms of expression, they have left many questions unanswered with which the lower courts are struggling. This section will look at these major Supreme Court cases as well as several key lower court decisions that raise issues analogous to questions likely to be raised when public schools discipline students for their use of the Internet.

A. United States Supreme Court Cases

United States Supreme Court rulings establishing the framework within which to evaluate the First Amendment claims of public school students have been the subject of much commentary.[12] Those cases, including the trilogy of *Tinker*, *Fraser* and *Hazelwood*, create a confusing picture of students' rights to free speech versus school officials' rights to discipline students for that speech. This article will briefly review that case law since it serves as a necessary backdrop to consideration of student rights of Internet speech, but it will leave a more extensive consideration of the cases to others.

Thirty years ago the Supreme Court decided *Tinker v. Des Moines Independent Community School District.*[13] The case arose in the heated context of the Vietnam War. Mary Beth Tinker and a group of other students agreed to participate in a protest against the War by wearing black armbands to school. The school authorities learned of the planned action and adopted a rule banning the wearing of such armbands. After Mary Beth and four other students wore their armbands to school, the school acted quickly to suspend them.

When the case came before the Supreme Court, the Court established for the first time that a public school building was not off-limits to free speech rights by stating: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-

11. 484 U.S. 260 (1988).

12. *See, e.g.*, Symposium, *Tinker, Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365 (1995).

13. 393 U.S. 503 (1969).

house gate."[14] In light of its decision to recognize student expressive rights, the Court imposed a significant burden on the school to justify punishment of speech by demonstrating "that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[15] Since there was little evidence on which school authorities could have based a forecast of disruption,[16] or evidence that the students' behavior had created any actual disruption in the school,[17] the Court held that the school had not satisfied its burden. It was not constitutionally adequate for the school to rely on "undifferentiated fear or apprehension of disturbance."[18] Instead the school needed evidence that such disruption had occurred or was highly likely to occur, evidence which it did not have.

The *Tinker* case was important for several reasons. First, its view of the educational process was that it was designed to encourage the free exchange of ideas among students and not one in which students should be treated as passive vehicles for the reception of school-approved ideas.[19] Second, the Court imposed a significant burden on the school to justify silencing student speech despite the need for school authorities to exercise substantial control over students during the school day. Third, despite the relatively young age of the students involved in *Tinker*,[20] the Court recognized that the students had the right to express controversial political ideas.

Tinker did not resolve all issues of student rights to freedom of expression. Mary Beth Tinker had engaged in a speech act that was, in the Court's words, "akin to 'pure speech.'"[21] It was dignified, silent, and involved no foul language or insult to any particular individual. In addition, the school's evidence of

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14. *Id.* at 506.

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

16. *See id.* at 509 n.3.

17. *See id.* at 508 "There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises." *Id.*

18. *Id.*

19. *See id.* at 511 ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

20. *See id.* at 504. At the time of the protest, John Tinker was 15 years old, Christopher Eckhardt was 16 years old and Mary Beth Tinker was a 13 year-old junior high school student.

21. *Id.* at 508.

disruption was meager at best and did not include any showing that the armbands had interfered with the school's ability to achieve its educational objectives.[22] Moreover, Mary Beth made no use of school facilities for her personal act of self-expression other than wearing the armband to school. The Court did not make clear whether the rights it recognized would still exist if some of the factual elements present in *Tinker* were missing.

The Court did not revisit directly the questions left open by *Tinker* for more than fifteen years.[23] In 1986, the Court distinguished *Tinker* when it decided *Bethel School District No. 403 v. Fraser*.[24] In *Fraser*, Matthew Fraser, a high school student, was disciplined for a speech he gave nominating a classmate who was a candidate for student government. The speech was delivered at an official high school assembly in front of 600 students who ranged in age from fourteen to eighteen. The speech Fraser gave included deliberate sexual innuendo and provoked a wide range of reactions from those in the audience including yelling, mimicry, bewilderment and embarrass-

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22. The only evidence of any reaction to the armbands was that a few students made hostile remarks. *See id.* at 508. Moreover, the record made it clear that the decision to expel students wearing armbands had been made in advance of their attendance at school and not as a result of actual reactions by other students. The school's decision to adopt a rule banning the wearing of armbands to protest the Vietnam War was not based on any specific knowledge of planned counter demonstrations, but instead relied on the general fact that strong opinions existed about the War. *See id.* at 509—10. This absence of any serious attempt at justification by the school district meant that the Court did not need to look carefully at how difficult it would be for schools in general to satisfy the *Tinker* standard. A contrary view of the adequacy of the school's justification was expressed by Justice Black in his dissenting opinion. Justice Black concluded that the armbands "took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War." *Id.* at 518 (Black, J., dissenting).

23. While during this period the Supreme Court did not decide any cases involving a public school's right to discipline one of its students for speech, it did decide several cases that raised First Amendment issues in an educational setting. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) (per curiam), the Court overturned the expulsion of a graduate student for distributing a newspaper on-campus. The University had characterized the paper as containing "indecent speech," in violation of a University bylaw. *See id.* at 668 n.2. The Court rejected the University's argument that it was free to regulate such speech and stated that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670. Nine years after *Papish*, the Court considered the issue of under what circumstances a school district's decision to remove books from a school library could violate the First Amendment rights of students at the school. Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion).

24. 478 U.S. 675 (1986).

ment.[25] The day after the assembly, Fraser was notified that he had violated a school disciplinary rule that prohibited "'[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures.'"[26]

Early in its opinion, the Court departed significantly from the student autonomy theme it had emphasized in *Tinker*. Instead, when describing the purpose of public education, the Court stressed the need to "'prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility.'"[27] Civility, according to the Court, required that "[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."[28] Moreover, qualifying its holding in *Tinker* that students do not lose their constitutional rights at the schoolhouse gate, in *Fraser* the Court stressed that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[29] One of the distinctions between adults and children stressed by the Court was the legitimacy of protecting minors from exposure to vulgar language. These twin decisional principles, the validation of the school's role in teaching civilized behavior and the lesser First Amendment rights of minors, caused the Court to conclude that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."[30]

Fraser was distinguishable from *Tinker* on a number of grounds. Unlike Mary Beth Tinker, Matthew Fraser was not disciplined because he expressed a controversial political view-

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25. *See id.* at 678.

26. *Id.*

27. *Id.* at 681 (quoting from CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

28. *Fraser*, 478 U.S. at 681.

29. *Id.* at 682. In making this distinction, the Court quoted with approval the statement of Judge Newman in *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring), who remarked that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." The reference to Cohen's jacket referred to *Cohen v. California*, 403 U.S. 15 (1971), in which the Supreme Court upheld the right to protest the Vietnam War by wearing a jacket with the slogan "F—- the Draft" written across its back in the corridors of the Los Angeles County Courthouse.

30. *Fraser*, 478 U.S. at 683.

point. Moreover, Mary Beth did not express her viewpoint by speaking at an assembly scheduled by the school administration in connection with an official school activity. Further, Mary Beth's wearing of her armband produced no discernible reaction from her fellow students. In *Fraser*, students reacted to the speech in a variety of ways including hooting and hollering, graphic gestures, embarrassment and bewilderment.[31] Fraser's speech was even the subject of a discussion in one class on the following day.[32] Finally, the school in *Tinker* adopted a rule specifically banning the wearing of black armbands only after it learned of the scheduled antiwar protest and before it knew whether the protest would cause any noticeable reaction. By contrast, Fraser's punishment followed the reactions to his speech and was based on an existing school rule.

These myriad distinctions make it possible to conclude that *Fraser* and *Tinker* are not inconsistent with each other. However, the Court did not rely specifically on most of these distinctions in writing its opinion. The main theme stressed was the inappropriateness of vulgar language in a school setting: "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others."[33] While the Court distinguished the political speech in

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31. *See id.* at 678.

32. *See id.*

33. *Id.* at 683. The distinction drawn by the Court between controversial political ideas and vulgar and profane language had been critical in one earlier case arising in the setting of a public school. In *Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (plurality opinion), the Court affirmed a decision by the Second Circuit overturning the district court's grant of summary judgment for the defendants in a case in which a school district was sued for removing a group of books from its school libraries. To provide guidance to the district court on remand, the Court focused on the reasons why the books had been removed. If the removal had been based on the vulgar content of the books, such a removal would raise no First Amendment issue. *See id.* at 871. By contrast, a plurality of the Court found unacceptable removal decisions based on the political ideas contained in the books. *Id.* at 870—71. Since the evidence did "not foreclose the possibility that petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on petitioners' part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy," *id.* at 875, the Court was unwilling to grant summary judgment in favor of petitioners. On the subject of school library book removal, *see* Leora Harpaz, *A Paradigm of First Amendment Di-*

Tinker, it did not specifically rely on any of the other distinctions between the two cases. Moreover, the theme of individuality emphasized in *Tinker* was nowhere to be seen.

Two years after *Fraser*, the Court again returned to the subject of the First Amendment rights of public school students. This time the context was the decision of a school principal to censor several student-authored articles scheduled to be printed in Spectrum, the school newspaper. In upholding the censorship decision in *Hazelwood School District v. Kuhlmeier*,[34] the Court first considered the possibility that the newspaper might be a public forum, thereby limiting the school's ability to control the content of the paper. According to the Court, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public'. . . or by some segment of the public, such as student organizations."[35] Examining the school's policy toward Spectrum, the Court concluded that the newspaper had not been intended for "indiscriminate use" by its students and was, therefore, not a public forum.[36] Instead, the school's intent was to create "a supervised learning experience for journalism students."[37]

Since Spectrum was part of the school's curriculum, the Court was once again able to distinguish *Tinker*. This time the distinction was rooted in the fact that *Tinker* involved speech that was the personal self-expression of the student and not speech that occurred as part of an official school activity:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question ad-

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lemmas: Resolving Public School Library Censorship Disputes, 4 W. NEW ENG. L. REV. 1 (1981); Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527 (1984).

34. 484 U.S. 260 (1988).

35. *Id.* at 267 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

36. *See Hazelwood*, 484 U.S. at 270. The Court reversed the Eighth Circuit's decision in *Hazelwood*. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986). The Eighth Circuit had characterized Spectrum as a public forum. *See id.* at 1372. Having decided that the Spectrum was a public forum, the court applied the *Tinker* test to judge the constitutionality of the school's actions. *See id.* at 1374. The court concluded that the test was not satisfied. *See id.* at 1375.

37. *Hazelwood*, 484 U.S. at 270.

> dresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[38]

Since it lacked the characteristics of a public forum, the Court was able to classify the publication of the school newspaper as within this second category of school-sponsored speech.[39]

The Court allowed school officials much greater control over speech within this second category "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[40]These concerns go way beyond the ability of the school to punish *Tinker*-type personal expression if it creates substantial disruption or interference with the rights of other students.[41] In this second category, the school newspaper can limit the content of speech to exclude "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[42] In its holding, the Court stressed that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[43]

In applying these standards to the facts of *Hazelwood*, the Court accepted as reasonable the principal's explanation for his censorship of two articles. One article was about pregnant students and the principal worried that the students would be

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38. *Id.* at 270—71.

39. *See id.* at 270.

40. *Id.* at 271.

41. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969).

42. *Hazelwood*, 484 U.S. at 271.

43. *Id.* at 273.

identifiable despite the fact their names were not used. The ability to identify the students would violate the promise of anonymity that had been made to the students and might involve invasion of the privacy interests of boyfriends and parents.[44] Interestingly, the Court expanded on the justifications actually offered by the school to conclude that frank talk about sexual activity leading to pregnancy could be viewed as unsuitable in a school-sponsored publication.[45] The second article was about divorce and included comments by a named student that were critical of the student's father. The Court found that the principal could have formed a reasonable belief that the article did not satisfy the standards of journalistic fairness because the parent was not given an opportunity to respond to the comments.[46]

In addition to distinguishing *Tinker* as involving personal expression and not school-sponsored speech, the Court also referred to *Fraser*. However, its efforts to classify *Fraser* were more confusing than illuminating. *Fraser* became a pawn in an argument between the majority and the dissent. The dissent strongly argued that the distinction between personal expression and school-sponsored speech was not a legitimate one and had no grounding in earlier decisions of the Court.[47] In an effort to support this argument, the dissent claimed that *Fraser* applied the same standard as *Tinker*, reaching a different result because Fraser's speech had a disruptive effect on its young audience.[48] In a footnote, the majority responded to the dissent's characterization of *Fraser*. Instead of accepting the dissent's reliance on the disruption rationale, the majority found "*Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly."[49]

This comment fails to eliminate either of two possible explanations for the majority's effort to distinguish *Tinker* and *Fraser*. The first explanation is that *Fraser* involved school-sponsored speech delivered at an official school assembly and, therefore, the school only had to satisfy the reasonableness test

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44. *See id.* at 274.
45. *See id.* at 274—75.
46. *See id.* at 275.
47. *See id.* at 282—89 (Brennan, J., dissenting).
48. *See d.* at 281—82 (Brennan, J., dissenting).
49. *Id.* at 271 n.4.

of *Hazelwood*, which it clearly could because of the lewd nature of the speech. The second is that the personal expression/school-sponsored dichotomy does not apply to vulgar and lewd speech which can be prohibited in the school setting entirely. If this latter interpretation is the more accurate one, it raises the issue of what other kinds of speech, distinguishable from the dignified expression of a political viewpoint at issue in *Tinker*, might also be inappropriate in the school setting.

These two plausible explanations create confusion as to the proper interpretation of the *Tinker*, *Fraser*, and *Hazelwood* trilogy. And they are not alone in creating such confusion. While the *Hazelwood* Court goes to great lengths to preserve *Tinker*, as the Court did earlier in *Fraser*, it is not clear what remains of *Tinker*. The *Hazelwood* Court's statements about the role of education in awakening students to "the shared values of a civilized social order,"[50] seem at odds with the *Tinker* Court's characterization of education as training future leaders through "robust exchange of ideas"[51] and not through "authoritative selection."[52] With such fundamentally disparate views of the goals of public education, reconciliation seems elusive.[53]

Moreover, many questions remain unaddressed in the wake of the Court's decisions. While its holdings place dignified, political expression and sexual innuendo at the opposite ends of a speech continuum, the Court gives no hint of where on that continuum it would place speech that is insultingly critical of teachers and school administrators. Further, the Court has not determined the limits of key concepts such as "school-sponsored activities" and "legitimate pedagogical concerns." Perhaps more importantly, the Court has not spoken at all on the issue of whether its decisions are limited to speech in the schoolhouse

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50. *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

51. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

52. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

53. More recently in *Veronia School District, 47J v. Acton*, 515 U.S. 646 (1995) (upholding constitutionality against a Fourth Amendment challenge of school district policy subjecting student athletes to random drug testing), the Court cited both *Fraser* and *Hazelwood* with approval, noting that those cases had qualified its earlier statement in *Tinker*: "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." *Id.* at 655—56 (quoting *Tinker*, 393 U.S. at 506) (internal citation omitted).

or whether schools also have the ability to control off-campus speech that could disrupt the school environment. These questions and others that remain in the wake of *Hazelwood* have not been resolved by the Supreme Court. It has been left to the lower courts to struggle with some of these unresolved issues.

B. Lower Court Cases

This section will not review every case in which a lower federal court has wrestled with the issues raised by Supreme Court student speech rights precedent.[54] It will look selectively at three categories of cases that grapple with key issues likely to effect the treatment of student Internet speech. One category of cases focuses on the reach of the *Hazelwood* concept of reasonable pedagogical objectives and whether a school can insulate itself from student criticism under that guise. A second category focuses on cases, like *Tinker*, where the speech at issue is the personal expression of the student and is unrelated to any official school activity. The key difference between *Tinker* and these cases is that the content of the speech at issue differs from the classic political speech in *Tinker*. Given that difference, the critical question is whether a school must nevertheless satisfy the *Tinker* standard of "material and substantial disruption." A third category involves speech that occurs off school grounds, but which is nevertheless the subject of disciplinary action. In this category, the key question is whether off-campus speech can be punished under the *Tinker* disruption standard or whether the school must satisfy an even more heightened standard.

1. The Reach of Hazelwood*'s Reasonableness Standard*

In censoring articles in the school newspaper, the principal in *Hazelwood* acted to protect students and members of their families. Similarly, in *Fraser*, the school acted in the best interests of its students to avoid speech that was improper for its immature audience. In neither case did the school act to protect itself from the sting of critical student comments. By contrast, in *Poling v. Murphy*,[55] the Sixth Circuit struggled with how to

54. For a thorough examination of lower court applications of *Hazelwood*, see Bruce C. Hafen & Jonathan O. Hafen, *The* Hazelwood *Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379 (1995).

55. 872 F.2d 757 (6th Cir. 1989).

apply *Hazelwood* to student speech that contained insulting comments about the school's assistant principal.

The facts of *Poling* are remarkably similar to *Fraser* in terms of the circumstances of the student speech. In *Poling*, Dean Poling was a candidate for president of the student council at his high school. Like other candidates, at a mandatory assembly for all students at the high school, he was allowed to give a speech encouraging students to vote for him.[56] Before giving his speech, Dean was required to have it approved by Mrs. Ollis, a faculty sponsor of the student council. Mrs. Ollis asked Dean to change a reference to the school "administration's iron grip," but allowed him to say that "[t]he administration plays tricks with your mind."[57] When giving his speech, Dean eliminated the "iron grip" reference, but added a comment about the stuttering of Mr. Davidson, an assistant principal at the high school.[58] Ellis Murphy, the principal of the school, found Dean's speech to be "'inappropriate, disruptive of school discipline, and in bad taste.'"[59] After consulting with several faculty members, the principal declared Dean to be ineligible to run for student council president.

In upholding the decision to discipline Dean Poling, the Sixth Circuit characterized the school assembly at which he spoke as a school-sponsored activity, in contrast to the situation in *Tinker*.[60] The only issue to be resolved, according to the court, was whether school officials acted to enforce "legitimate pedagogical concerns."[61] The court first incorporated *Fraser*'s recognition of the need to teach "the shared values of a civilized social order" into the range of *Hazelwood*'s legitimate pedagogical objectives, recognizing that such objectives can go beyond academic teaching.[62] According to the court, "[t]he art of stat-

56. *See id.* at 758.

57. *Id.* at 759.

58. In his speech, Dean Poling stated, "The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment." *Id.* at 759. The meaning of this remark was unclear to the court: "we are at a loss even to understand the full significance of Dean Poling's reference to Mr. Davidson's 'stutter.' (The affidavit of Mrs. Ollis says, without contradiction, that Mr. Davidson does not stutter.)" *Id.* at 761.

59. *Id.* at 759.

60. *See id.* at 762.

61. *Id.*

62. *Id.*

ing one's views without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum."[63] Giving great deference to the judgment of local school administrators, the court was unwilling to overturn the school's decision about the proper balance between "independence of thought" and "discipline, courtesy and respect for authority."[64]

The Sixth Circuit panel did not reach a unanimous decision in *Poling*. In his dissent, Judge Merritt disagreed with the majority's reliance on *Hazelwood*. Instead, he found *Tinker* to be the applicable precedent because Dean Poling's speech was "'political speech,' pure and simple."[65] Because Poling had made a political speech in a forum created by the school for such purposes, Judge Merritt believed that the school could only discipline him for the content of his speech if it satisfied *Tinker*'s "substantial disruption" standard. According to Judge Merritt, that standard could not be satisfied in *Poling*. While the students in the audience cheered his speech, there was no disruption of the assembly or any other school activities.[66] Judge Merritt ended his opinion with a rhetorical question: "If the school administration can silence a student criticizing it for being narrow minded and authoritarian, how can students engage in political dialogue with their educators about their education?"[67]

The *Poling* case raises the question of the reach of *Hazelwood*'s "legitimate pedagogical objectives." If defined broadly, virtually any student speech occurring in the course of school-sponsored activities could be punished by the school. This seems particularly objectionable in the context of a forum created by the school for the expression of the views of candidates for student elective office where no clear academic principle is at stake. While in *Hazelwood*, the school could tie its censorship of the school newspaper to the teaching of proper journalistic behavior,[68] no similar relationship to curricular objectives existed in *Poling*.

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63. *Id.* at 763.
64. *Id.* at 762.
65. *Id.* at 765.
66. *See id.* at 766.
67. *Id.*
68. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 275 (1988).

2. Personal Self-Expression Cases Without the Tinker *Test*

Several interesting examples of school decisions to punish student speech that does not occur in the context of any official school activity, thus falling within the *Tinker* category of personal self-expression, are worth examining for the light they shed on the reach of *Tinker* and its relationship to *Fraser*. One such case is *Pyle v. South Hadley School Committee*.[69] In that case, two high school students wore a series of T-shirts to test the limits of the school's newly adopted dress code. The code banned "lewd, obscene or vulgar" clothing as well as clothes that "harass, threaten, intimidate, or demean an individual or group of individuals, because of sex, color, race, religion, handicap, national origin, or sexual orientation."[70] The school found some of the T-shirts to violate its restriction on vulgar clothing. Among the prohibited shirts were a series of "Coed Naked" T-shirts that contained logos such as "Coed Naked Band: Do It To The Rhythm" and a T-shirt with the slogan "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick." T-shirts with "political" messages, such as "Coed Naked Civil Liberties: Do It To The Amendments"[71] and "Coed Naked Censorship—They Do It In South Hadley," were permitted by the school.

In reviewing a First Amendment challenge to the school dress code, the United States District Court for the District of Massachusetts examined the relevant Supreme Court precedents, focusing particularly on the relationship between *Tinker* and *Fraser*. The court concluded that the *Tinker* test of material and substantial disruption did not apply to vulgar speech, even if that speech did not take place at an official school function like the school assembly in *Fraser*.[72] According to *Pyle*, the school has an absolute right to prohibit "'vulgar' or plainly of-

69. 861 F. Supp. 157 (D. Mass. 1994), *vacated*, 55 F.3d 20 (1st Cir. 1995) (court of appeals deferred ruling on federal constitutional question addressed by district court and certified question of state law to the Massachusetts Supreme Judicial Court).

70. *Id.* at 162. Under the code, the school also banned clothing that "[a]dvertises alcoholic beverages, tobacco products, or illegal drugs." It permitted clothes that expressed political viewpoints "as long as the views are not expressed in a lewd, obscene or vulgar manner."

71. *Id.* at 162—63. Several school administrators originally concluded that the "Coed Naked Civil Liberties" shirt violated the dress code, a view that was confirmed by the school committee. The principal later decided that it did not violate the dress code.

72. *See id.* at 166.

fensive speech (*Fraser*-type speech)."[73] So long as the school does not attempt to ban a message on a T-shirt because of the viewpoint it expresses, as opposed to the manner of expression, the school does not have to satisfy the *Tinker* standard.

While accepting the ban on vulgarity as governed by *Fraser*, the court took a different view of the harassment provision. The harassment provision in the code was viewed as "aimed directly at the content of the speech, not at its potential for disruption or its vulgarity."[74] The court found such a general prohibition to be unconstitutional viewpoint discrimination under *R.A.V. v. City of St. Paul, Minnesota*.[75] Under the holding of *Tinker*, the *Pyle* court did allow the school to ban particular demeaning clothing if the school "reasonably concluded that the message would cause a substantial and material disruption to the daily operations of the school."[76] However, the general prohibition in the current dress code was found to be unconstitutional.

Similar conclusions have been reached by other courts. In *Chandler v. McMinnville School District*,[77] two students wore various buttons and stickers to school to support striking teachers and to oppose the school's hiring of replacement teachers.[78] One of the buttons had the word "Scabs" printed on it with a line drawn through the word. Another said "I'm not listening scab." The stickers stated "Scab we will never forget." The students were asked to remove all buttons and stickers with the word "scab" on the grounds that they were "offensive" and "inherently disruptive."

In reaching its decision to overturn the district court's dismissal of the students' complaint, the Ninth Circuit, broadly

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73. *Id.*

74. *Id.* at 171.

75. 505 U.S. 377 (1992) (striking down St. Paul ordinance banning certain types of hate speech). Courts have also struck down university speech codes that ban hate speech. *See, e.g.*, Dambrot v. Central Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); UWM Post, Inc. v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). *See also* Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

76. Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 173 (D. Mass. 1994).

77. 978 F.2d 524 (9th Cir. 1992). *See also* Broussard v. School Bd. of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992) (upholding suspension of student for wearing shirt that had the words "Drugs Suck" on the front and that was considered by the school to be offensive).

78. *Chandler*, 978 F.2d at 526.

interpreting *Fraser*, concluded that public schools "may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to 'substantially interfere with [the school's] work.'"[79] By contrast, other speech that does not occur in the context of a school-sponsored event must satisfy the *Tinker* disruption standard. Despite this broad interpretation of *Fraser*, the court was unwilling to give public schools unlimited discretion to classify speech as falling within the *Fraser* category. Taking into account the recognized use of the word "scab" in labor disputes, the court was "satisfied that these buttons cannot be considered per se vulgar, lewd, obscene, or plainly offensive within the meaning of *Fraser*. At this stage in the litigation, the school officials have made no showing that the word 'scab' reasonably could be so considered."[80] The court also concluded that the buttons were not "inherently disruptive" under *Tinker*,[81] but took no position on whether, on remand, the school would be able to prove "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[82]

A second type of speech that has also been excluded from the reach of *Tinker* is the category of threats. In *Lovell v. Poway Unified School District*,[83] a high school student was suspended for allegedly threatening to shoot a guidance counselor if the counselor did not make requested changes to the student's schedule. The case was complicated by the fact that there was a conflict in testimony as to what the student actually said to the counselor. The counselor's version had the student uttering a "true threat," a category of speech not protected by the First Amendment.[84] The student's version was that she

79. *Id.* at 529 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969)). This broad view of *Fraser* was not shared by Judge Goodwin in his concurring opinion. In Judge Goodwin's view, a critical element in *Fraser* was the fact that he gave a public speech before a captive audience. *See id.* at 531—32 (Goodwin, J., concurring).

80. *Chandler*, 978 F.2d at 530.

81. *See id.*

82. *Id.* at 529 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969)).

83. 90 F.3d 367 (9th Cir. 1996).

84. According to the guidance counselor, Sarah Lovell said, "If you don't give me this schedule change I'm going to shoot you." *Id.* at 369 n.1. The court interpreted this to be a "true threat" under the Supreme Court's holding in *Watts v. United States*, 394 U.S. 705 (1969), a category of speech not protected by the First Amendment: "What is a

generally expressed her feelings by saying that she was so angry she could shoot someone, but that she never specifically mentioned the counselor in her statement.[85] To resolve this dispute in testimony, the court relied on the burden of proof. The court concluded that the student had the burden of proving that her First Amendment rights were violated.[86] Since "true threats" are not protected by the First Amendment, the student had to prove she had not uttered a true threat. Since the evidence was in equipoise as to what was said, the student failed to carry her burden.[87]

These cases identify several important varieties of speech that can be punished by a school even if the student's comments are not part of a school-sponsored activity and even if the school can produce no evidence of disruption or other interference with its educational program. Both circumstances are likely to be significant in the context of the Internet.

3. Off-campus Speech

The third category of case arises where the student speech occurs off-campus, but where the school nonetheless disciplines the student. This situation has not arisen in any of the Supreme Court cases reviewing public school student discipline in the face of First Amendment challenges. In fact, the clear inference to be drawn from the Court's cases is that it is assuming the school's authority over the speech of its students ends as the student leaves the schoolhouse.[88] To overcome this inference, schools attempt to link the off-campus speech to some

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threat must be distinguished from what is constitutionally protected speech." *Id.* at 707. In interpreting *Watts*, the court relied on an earlier Ninth Circuit decision defining a "true threat:" "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990). Using the *Orozco-Santillan* definition, the court concluded that the student had uttered a "true threat" if the student's words were the ones reported in the guidance counselor's version of the facts. *See Lovell*, 90 F.3d at 372.

85. *See Lovell*, 90 F.3d at 369.

86. *See id.* at 373.

87. *See id.*

88. In *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969), the Court coined its oft-quoted statement that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. This statement draws a distinction between the rights of students outside of school and their treatment while in school, suggesting that their rights are greater while they are away from school.

on-campus event; either the speech reaches the campus through some means or the off-campus speech has some effect on-campus.

Some of the cases in this category involve fact patterns that allow the school to show some presence of the speech on-campus. For instance, an underground newspaper may have been written away from school, but copies are distributed at school. The school, therefore, can attach its disciplinary action to the on-campus behavior of distribution. An example of this kind of on-campus connection to off-campus speech occurred in *Donovan v. Ritchie*.[89] In *Donovan*, fifteen high school students met in one of the students' homes and someone created a document called "The Shit List." It listed 140 students with a crude, insulting comment following each name on the list. The comments focused on personal appearance, behavior or sexual conduct. Several days later, three students made photocopies of the list and arranged to have the copies delivered to school. After the principal saw the list and identified the students involved in its distribution,[90] they were suspended for 10 days for violation of several school rules prohibiting harassment and obscene language.[91]

Another example of punishment for off-campus speech occurred in *Boucher v. School Board of the School District of Greenfield*.[92] In *Boucher*, a school district expelled a high school student who authored an article in an underground newspaper that was distributed on-campus. The article provided information about how to hack into the school's computers. Although Boucher wrote the article, there was no evidence that he had participated in the on-campus distribution of the paper. Boucher sued claiming that the school had violated his free speech rights under the federal and state constitutions and sought a preliminary injunction to prevent the enforcement of the expulsion order.

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89. 68 F.3d 14 (1st Cir. 1995).

90. *See id.* at 16. The principal also met with all 15 students who had been present when the list was created and their parents. At that meeting, he expressed his view that the list violated the school's rules. The opinion does not indicate whether all 15 were disciplined in any fashion.

91. *See id.* at 17. The First Circuit review of the case did not consider any First Amendment challenge to the discipline. Instead, the issues before the court related to whether the student's due process rights were violated by the procedures employed in imposing the suspension. The court concluded they were not.

92. 134 F.3d 821 (7th Cir. 1998).

Vacating the district court's grant of preliminary injunctive relief, the Seventh Circuit's opinion focused in part on issues relevant to the grant of preliminary injunctive relief and not related to the First Amendment issue on the merits. However, because one of the criteria for preliminary injunctive relief was the likely outcome on the merits, the court considered the free speech claim raised by Boucher. One of Boucher's arguments was "that school officials' authority over off-campus expression is much more limited than it is over expression on school grounds."[93] Boucher argued that his speech should be analyzed under the test in *Brandenburg v. Ohio*,[94] a test designed for use outside the school environment to evaluate the protected status of speech advocating lawless action.[95] Boucher claimed that his speech was protected under the *Brandenburg* test and that the school should not be permitted to punish him based on any lesser standard, including the *Tinker* disruption test.

The issue raised by *Boucher* is the critical question about off-campus speech. One view is that the school should only be able to punish the speech if it could be punished under traditional free speech analysis and not under the lesser standards applicable in the special environment of the public school. The other view is that the speech should be reviewed under the *Tinker* test. So long as school officials can "forecast substantial disruption of or material interference with school activities" or show that "disturbances or disorders on the school premises in fact occurred," they should be able to punish the speech.[96] The Seventh Circuit resolved this issue in favor of the use of the *Tinker* test. It was able to reach this conclusion because the speech was distributed at school, although not by Boucher, and because the speech advocated an on-campus activity.[97] Given the destructive potential of the information contained in the article, the school could easily prove that the speech would create

93. *See id.* at 828.

94. 395 U.S. 444 (1969).

95. *Id.* at 447. Under the *Brandenburg* test, speech can be punished only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* It is possible that Boucher's article could satisfy this test because the article was more than the neutral provision of information about how to accomplish unauthorized access to the school's computers. Instead, the article, at least, advocated illegal behavior and provided such specific instructions that it was likely that its instructions would be followed.

96. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969).

97. *See Boucher*, 134 F.3d at 829.

the material disruption of school functions required by *Tinker*.

In another case involving discipline of a student for off-campus speech, the student plaintiff was more successful in convincing the court that his First Amendment rights had been violated. In *Klein v. Smith*,[98] a student gave one of his teachers the finger when he encountered him in a restaurant parking lot. The student sued after being suspended for 10 days for violating a school rule that prohibits "'vulgar or extremely inappropriate language or conduct directed to a staff member.'"[99] The United States District Court for the District of Maine overturned the suspension because it found that the relationship between the student's vulgar gesture while away from school and the operations of the school was "too attenuated to support discipline" of the student.[100] Nevertheless, the court's opinion makes clear that it would have upheld the suspension, just as in *Boucher*, if the court had found the off-campus activity materially disrupted the work of the school.

III. SCHOOL DISCIPLINE OF STUDENTS FOR INTERNET USE

While only one federal district court has thus far issued a published opinion in a public school Internet case, newspapers have reported on a large number of situations in which schools have disciplined students whose misconduct involved use of the Internet to disseminate material they had written. This section will discuss both *Beussink v. Woodland R-IV School District*[101] and a number of other reported incidents.

A. The Federal Courts Tackle Their First School Internet Disciplinary Case: Beussink v. Woodland R-IV School District

In December, 1998, a federal court for the first time issued a decision in a case involving a public high school's discipline of a student based on the student's use of the Internet. The deci-

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98. 635 F. Supp. 1440 (D. Me. 1986).

99. *Id.* at 1441.

100. *Id.* The court also rejected two arguments intended to deprive the student's gesture of any First Amendment protection. It refused to find that the gesture lacked a "communicative purpose or expressive content and is, therefore, not 'speech' entitled to First Amendment protection." *Id.* at n.2. It also dismissed an argument that the speech could be classified as "fighting words" and, therefore, not protected by the First Amendment. *See id.* at 1442 n.3.

101. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

sion was a victory for student Internet rights and a defeat for the school's disciplinary efforts.[102] In *Beussink v. Woodland R-IV School District*,[103] the United States District Court for the Eastern District of Missouri issued a preliminary injunction to enjoin the school's discipline of the student pending a decision on the merits of the case. In the circumstances of the case, the court rejected the school's effort to justify its discipline of the student and upheld the student's right to freedom of expression.

The *Beussink* litigation arose because Brandon Beussink created a Web site and posted it on the Internet. The site was created on his own computer and not a computer at the high school. The connection between the Web site and the high school was that the content of the site was very critical of the school and included criticism of the school principal, teachers at the school and the high school's own Web site. That criticism was expressed in vulgar language. The site also contained a link to the school's site. Beussink did not display the site to students at school, however, a friend of his found out about the site when she used his home computer. Beussink's friend was angry at him, and in order to retaliate against him, she accessed the site at school and showed it to the school's computer teacher. The computer teacher went to the principal and together they viewed the site on a computer in the school's computer lab. After viewing the Web site, the principal immediately made the decision to discipline Beussink.[104]

In considering whether Beussink was likely to succeed on the merits of his case, the court relied on the Supreme Court's decision in *Tinker*. Using the *Tinker* standard of material and substantial interference, the court found that the principal had made the decision to discipline Beussink immediately after viewing his Web site solely as a result of his offense at its con-

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102. The decision was not a victory on the merits of the case. The case came before the court at a preliminary stage when the student sought a preliminary injunction preventing the school from enforcing its disciplinary sanctions against him during the pendency of the case. However, because one of the criteria for the grant of preliminary injunctive relief is the likelihood of success on the merits, the court's decision was in large part based on its consideration of the First Amendment rights of the student as contrasted with the school's disciplinary authority.

103. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

104. *See id.* at 1179. Later in the day, the principal sent Beussink a disciplinary notice suspending him from school for five days. After reconsidering the length of his suspension, the principal later increased the length of his suspension to ten days.

tent and not because there had been any material disruption resulting from the Web site or because the principal had a reasonable basis for fearing such disruption.[105] According to the court, "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."[106]

In addition to finding that Beussink's speech was not disruptive as required by the *Tinker* standard, the court also appeared to classify the speech as fully protected speech despite its use of foul language, a category of speech courts have permitted schools to sanction.[107] The court categorized Beussink's speech as "provocative and challenging" and, therefore, "most in need of the protections of the First Amendment."[108]

The court did not explain why it found *Tinker* to be the relevant precedent. However, it did classify the speech at issue as "[s]tudents' personal expressions which happen to take place on school property," as contrasted to speech sponsored by the school which would be analyzed according to the more restric-

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105. *See id.* at 1180.

106. *Id.* In addition to finding that Beussink was likely to succeed on the merits of his action, the court also found that the other factors relevant to a decision whether to grant preliminary injunctive relief weighed in his favor. Beussink suffered a threat of irreparable injury not only because his First Amendment rights were violated, but also because the discipline had the potential to delay his date of graduation due to the school's use of unexcused absences to reduce the grades students received in their courses. *See id.* at 1181. Moreover, the court viewed the harm that would be suffered by Beussink if it refused to grant a preliminary injunction as vastly outweighing the harm to the school if preliminary relief was granted. Since the school suffered no harm to school discipline and no disruption of the education it provided, the court was able to conclude that there would be no harm to the school. *See id.* Indeed, the court suggested that the principal's decision to discipline Beussink may have been influenced less by his Web site and more by other behavior Beussink had engaged in prior to the Web incident, but for which he had only received a mild sanction. *See id.* Finally, the court concluded that the public interest would be served by protecting the right to disseminate ideas. *See id.* at 1181—82.

107. *See, e.g.*, Broussard v. School Bd. of City of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992), interpreting *Fraser* to allow the school to ban offensive language even if that language is not sexual in nature: "Speech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation." *Id.* at 1536.

108. *Beussink*, 30 F. Supp. 2d at 1182. In reaching this conclusion, the court quoted from the Supreme Court's decision in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949): "One of the core functions of free speech is to invite dispute. 'It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.'" *Beussink*, 30 F. Supp. 2d at 1181—82 (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949)).

tive standard of *Hazelwood*.[109] In describing this dichotomy, the court did not offer any reasons why it considered the speech to have taken place on school property. In looking at that question, however, it is useful to note the connections that existed between the speech and the school. First, and most obviously, the school was the subject of the speech. Second, Beussink's Web site contained a hyperlink to the school's Web site. In addition, the site was seen by the computer teacher and the principal in the school's computer lab after it was accessed by Beussink's classmate. Indeed, the principal testified that "he was upset that the homepage's message had been displayed in one of his classrooms."[110] Further, there was evidence that later that same day other students learned of the site and accessed it in the computer lab with the permission of the computer teacher.[111] Moreover, there was disputed testimony by the school librarian that Beussink accessed the site on a library computer on the same day it was seen by the principal.[112] However, the librarian did not claim Beussink showed the site to other students. Finally, there was testimony in the case that after he received his suspension notice, Beussink showed a copy of the site to his civics teacher for advice on whether he could be disciplined based on its content.[113]

Other than the disputed incident in the school library, none of the displays of the site on the school's computers came about because of Beussink's own actions. In that sense, what happened is no different than if he wrote a story critical of the school in his room at home and that story was taken from his room by a fellow student without his permission and shown to the school principal. It is hard to see how Beussink can be blamed for the presence of his Web site on the school's computers when he did nothing to facilitate its display and was unaware that it would be displayed at school. Indeed, Beussink never gave the address of his Web site to any other student, it was only discovered accidentally by a friend who visited his

109. *Beussink*, 30 F. Supp. 2d at 1180 n.4.

110. *Id.* at 1178.

111. *See id.* at 1179.

112. *See id.* at 1178. This testimony was denied by both Beussink and Amanda Brown, the friend who disclosed the existence of the site when she displayed it for the computer teacher.

113. *See id.* at 1179. There was a dispute in the testimony as to the source of the copy that Beussink showed his teacher. He claimed the copy was attached to the disciplinary notice. The school secretary denied that a copy was included with the notice.

home.[114]

Nevertheless, the ubiquitous-ness of the Internet may have influenced the principal's actions. Beussink's behavior in creating the story was different from the behavior of a student writing at home because of the universality of posting his writing to a Web site. Beussink's dissemination of his vitriol against the school could have been seen, both from computers at the school as well as computers at other locations, by every student, teacher and administrator at the school as well as countless others not connected to the school. Though there is no way to know whether the nature of Beussink's distribution of his attack on the school fueled the principal's strong reaction to his conduct and resulted in immediate discipline of Beussink, it would not be surprising if this was at least a contributing factor.

Beussink is an interesting beginning for the courts' foray into the subject of student Internet speech. It applies the traditional dichotomy between student personal expression and school-sponsored speech, relying as it does on the *Tinker* test of material disruption. In that sense, it breaks no new ground and does not create a new law of the Internet. On the other hand, it appears to allow the attributes of the Internet, particularly the irrelevance of physical location, to break down the barriers between speech at school and speech at home.

B. Other Examples of Internet-Based Student Discipline

While *Beussink* is the only student Internet case to result in a published opinion, many other examples of school discipline for Internet activities have been reported in the media. The student Internet cases include a range of content from threats

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114. It is interesting to compare Beussink's actions to the facts in *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821 (7th Cir. 1998). For a discussion of *Boucher*, see *supra* notes 92—97 and accompanying text. In *Boucher*, the school disciplined the writer of an article in an underground student newspaper, even though he had not participated in the distribution of the paper at school. The connections between Boucher's actions and on-campus events were that the paper was distributed at school and the article gave instructions about how to hack into the school's computer system. This is similar to the connections in *Beussink* since his Web site was viewed at school and his site criticized school personnel. However, the writer in *Boucher*, unlike Beussink, at least participated in an enterprise which he had reason to know would result in distribution of the paper to students at school. Beussink had no such knowledge because he had no reason to believe his Web site would be discovered by any other student.

and insults directed at students and teachers to sophomoric humor directed at animals. In addition, they involve an array of connections between the school and the communication. Some of these Internet situations have resulted in the filing of lawsuits, several of which the schools involved have been quick to settle.[115] This section will review some examples of such Internet-based discipline.

One of the most widely publicized examples of student discipline arising from use of the Internet occurred in McKinney, Texas. The incident began when thirteen-year-old Aaron Smith made a drawing in the Dowell Middle School computer lab as part of a slide presentation for a school project.[116]His friends decided the drawing looked like a Chihuahua and, as a spoof, Aaron and his friends formed a club, the Chihuahua Haters of America. Aaron eventually turned the drawing into the beginning of a Web site he designed on his home computer. The Web site was called CHOW which stood for Chihuahua Haters of the World. It contained humorous attacks on Chihuahuas.

The CHOW Web site came to the attention of a Chihuahua breeder who contacted Aaron and the superintendent of the public school system in McKinney, Texas. The Chihuahua breeder threatened to stage an animal-rights protest if the school did not take action. The superintendent eventually received 50 e-mails protesting the site.[117] Aaron and other club members were called to the principal's office and were disciplined for "'creating a Web page implicating a Dowell animal hate group.'"[118] Aaron's discipline included removal from his Emerging Technology class and a one-day suspension for refusing to delete his Web site. The ACLU intervened on Aaron's behalf and he was reinstated into his computer class and the disciplinary action was expunged from his record.[119]

Aaron Smith's story demonstrates the power of the Internet to distribute information widely and to reach people who are most likely to react strongly to what they see and read. It is unlikely the school would have decided to discipline Aaron un-

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115. *See supra* note 5.

116. *See* Tracey Cooper, *Boy's Pet Web Page Spoof Comes Back to Bite Him*, ORANGE COUNTY REGISTER, Mar. 7, 1998, at A11.

117. *See* New York Times Service, *Schools Challenge Freedom of Cyberspeech*, SUNDAY GAZETTE-MAIL, Mar. 8, 1998, at 19A.

118. Cooper, *supra* note 116 (quoting from the school's disciplinary report).

119. *See* Theiss & Harter, *supra* note 5.

less a McKinney school system official had been contacted by Chow breeders and animal rights activists. The only connections between Aaron's Web site and his school were that the genesis for the CHOW idea was a project Aaron did for school and that his Web site referred to the fact that the site had evolved from his Dowell Middle School computer lab project. The site was not linked to any Web site maintained by the school nor did it suggest it was an official site of the school. Moreover, there is no reason to believe Aaron's site would have disrupted activities at his school. The site did not threaten or insult students or teachers and did not contain vulgarity. In addition, even though its subject was a satiric look at Chihuahuas and not a more weighty political topic, it clearly fell within the category of fully protected expression. Despite all these reasons not to take any action, his school decided to discipline Aaron and did not reverse its decision until after the intervention of the ACLU.

At the opposite extreme of Aaron Smith's CHOW site are a variety of student Internet cases where students make threats of violence directed at the school, other students or teachers. For example, in Pennsylvania, a Quakertown Community High School student was disciplined for posting on his Web site the names of two teachers and two classmates on a list of people who should be shot.[120] Criminal charges for making terroristic threats were also brought against the student by the Bucks County district attorney.[121] In another incident in Pennsylvania, the Bethlehem School Board expelled a student who used his Web site to solicit funds to hire a hitman to murder his mathematics teacher.[122] A second student was expelled for using the same site to threaten his German teacher.

Cases similar to these have proliferated in the aftermath of the Littleton, Colorado shootings. One recent example occurred in Wilbraham, Massachusetts, where the principal of Minnechaug Regional High School recently announced it was likely the school would take disciplinary action against a sophomore who used his mother's account to gain access to a Web site

120. *See* Lawrence C. Hall, *Internet Threats Punished*, ALLENTOWN MORNING CALL, Sept.11, 1998, at B1.

121. *See id.* at n. 120.

122. *See* Kathleen Parrish, *Expelled Web-Threat Teens Change Schools*, ALLENTOWN MORNING CALL, Sept. 2, 1998, at B3.

sponsored by the Massachusetts Department of Education.[123] Using the account, he participated in an on-line discussion about the murders at Columbine High School, posting several threatening messages in the course of the discussion.[124] According to a newspaper account of the case, he commented that "if I had been planning for a year, had shotguns and semi-autos, in a crowded caf-library, I could have taken down a [expletive] of a lot more than 15" and threatened another student who he claimed had called him a "geek."[125] He reportedly said of the student, "I told her to 'watch out, I might gun you down someday' and the little bitch was really scared!"[126]

In between humor about dead Chihuahuas and threats of violence are cases in which students and teachers are ridiculed, as in *Beussink*. One other example occurred as a result of Sean O'Brien's Web site. Sean was a seventeen year-old student at a school near Cleveland, Ohio. His Web site poked fun at his band teacher whose picture was included on the site and who was described on the site as "an overweight middle-age man who doesn't like to get haircuts." Sean was suspended from school for ten days and threatened with expulsion if he didn't remove the material from his site. Sean filed suit and a judge issued a temporary restraining order (TRO) preventing the school from carrying out its disciplinary sanctions. Soon after the issuance of the TRO, the school district settled the suit and agreed to apologize to Sean and pay him $30,000.

While most of the reported incidents involve punishment for creating and broadcasting Internet content, there are exceptions. For example, Mikey Driscoll, an eleven-year-old student in Santa Barbara, California, was suspended for one day and lost his Internet privileges for one month because he viewed a Web site that displayed a picture of a naked woman from a computer terminal in the school library.[127] The discipline occurred because the screen display was spotted by a teacher

123. *See* Joseph Mallia, *Mass. Student Taken to Task for Implied Internet Threats*, BOSTON HERALD, May 14, 1999, at 16.

124. *See* Joseph Mallia, *Federal, Local Officials Eye Threats Via State E-mail*, BOSTON HERALD, May 13, 1999, at 6.

125. Mallia, *supra* note 123.

126. Mallia, *supra* note 124.

127. *See* John Schwartz, *Lessons in Policing Online Porn Access at School*, WASH. POST, May 12, 1997, at F19. The site was accessed by a friend of the boy who typed in the Internet address of the site, saying, "I want to show you something" without revealing the contents in advance. *Id.* The friend was disciplined as well. *Id.*

walking through the library. The school originally put a notation on the boy's record that he was suspended for "pornography." Eventually, the school changed the listed offense to "Inappropriate Use of the Internet."

Beussink and the other situations described, from Aaron Smith's sophomoric humor to death threats directed at teachers and students to Mikey Driscoll's "naked lady,"[128] indicate the wide range of Internet speech that has resulted in discipline of public school students. Many, but not all, of these cases involve speech with content that would frighten most reasonable school officials, but which would be protected by the First Amendment if uttered by adults outside of a school setting. Most of the cases involve speech that does not occur at school, except by an unreasonable stretch of the imagination.

IV. FREE SPEECH METHODOLOGY AS APPLIED TO STUDENT INTERNET USE

Student rights of expression vary with three elements: (1) whether the speech can be categorized as school-sponsored or the personal expression of the student; (2) the content of the speech; and (3) whether the speech occurs on or off school grounds. These dividing lines are made reasonably clear by the Supreme Court cases involving student speech rights and the lower court cases interpreting them. This section will examine a wide array of student Internet speech situations and apply First Amendment principles as discerned from *Tinker*, *Fraser*, *Hazelwood* and their progeny to those situations.

A. School-sponsored activities

The one situation where a public school is undisputably free to ban a wide array of expression is in the context of school-sponsored activities. Under the rationale of *Hazelwood*, a school could impose all reasonable restrictions on student speech in a computer class. This could probably preclude lewdness, offensiveness, vulgarity, insults, threats and other speech that is inconsistent with the values of civility and community

128. When Mikey Driscoll was interviewed on CBS This Morning, he was asked, "What did you see on the screen." He replied, "I saw a naked lady—a—picture of it." *CBS This Morning: Santa Barbara Student Punished for Visiting Pornographic Sites on the Internet* (CBS television broadcast, Mar. 20, 1997).

that a school could choose to impart to its students. It is likely that even Aaron Smith's humorous attack on Chihuahuas could be viewed as inconsistent with the educational goals of the school if his work had been done in the context of an academic activity. The school would, of course, be required to satisfy the due process requirement of notice in defining the range of unacceptable speech even in the context of a school-sponsored activity, but courts have been willing to accept broadly worded standards as sufficient to inform students of the kinds of speech that are proscribed.[129]

One issue yet to be considered is whether there are any limits on the concept of school-sponsored speech as it applies to the Internet. It is easy to conclude that a computer class is school-sponsored.[130] On the other hand, some schools make computer labs available for student use during non-classroom hours. Increasingly, computers in school computer labs will be connected to the Internet. While such a lab is a school facility, that does not necessarily mean that all use of the lab is school-sponsored. After all, the *Hazelwood* concept of school-sponsored activities distinguishes between designated public forums, opportunities that the school creates to encourage the personal expression of its students,[131] and speech that is under the control of the school and serves school-dictated goals.[132] Several examples of decisions recognizing the existence of public forums within a school are key to understanding this distinction. While these cases arise in the context of universities and not primary and secondary schools, they are still worth considering.[133]

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129. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

130. The school-sponsored designation has also been attached to various school extracurricular activities, McCann v. Fort Zumwalt Sch. Dist., 1999 WL 359777 (E.D. Mo. April 27, 1999) (a marching band's performances); Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989) (football games); Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (dramatic productions). Even attendance by a student at an athletic event participated in by a team from the student's school, but held at another school, has been considered to be school sponsored. *See e.g.*, Pirschel v. Sorrell, 2 F. Supp. 2d 930 (E.D. Ky. 1998). *But see* Altman v. Bedford Cent. Sch. Dist., 1999 WL 342467 (S.D.N.Y. May 21, 1999) (card game played by extracurricular club on school grounds after school hours was not endorsed by the school).

131. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

132. *See id.* at 271.

133. Whether cases involving the rights of students at colleges and universities are

In *Widmar v. Vincent*,[134] the Supreme Court declared the university classroom a public forum for student groups to use as meeting places, when the classrooms were not otherwise in use.[135] As a designated public forum, the university could not exclude a group from the use of university space on the basis of the content of the group's speech unless the university could satisfy the most demanding level of First Amendment scrutiny.[136] If allowing a student to use a school's computer lab to access the Internet when the lab is not being used for academic purposes is akin to making classroom space available, then the school may not be free to limit student use of the Internet in the same fashion as it can limit school-sponsored speech.

Another example of a university public forum possibly relevant to the computer lab is found in *Rosenberger v. Rector and Visitors of the University of Virginia*.[137] In *Rosenberger*, the University provided financial assistance to publications authored by student groups. A student group sued the University when it refused to fund its magazine because it promoted Christian values. The Court held that the university fund, even though not a physical space like most public forums, was still a forum for First Amendment purposes.[138] As a public forum, the University could not make viewpoint-based distinctions about which publications it would fund.[139] The one control that the University could impose was to require that student publications not appear to be official University publications. How-

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equally applicable to younger students attending public schools is far from clear. The Court in *Hazelwood* left unresolved the issue of whether its willingness to defer to the judgment of school officials would be equally "appropriate with respect to school-sponsored expressive activities at the college and university level." *Hazelwood*, 484 U.S. at 273—74 n.7. Certainly, later statements of the Court about the nature of universities seem inconsistent with the characteristics the Court ascribed to the public school education system in *Hazelwood*: "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).

134. 454 U.S. 263 (1981).

135. *See id.* at 267. *Widmar* makes clear that a single facility can be a public forum at some times, but not at others. *Accord* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (school auditorium). Thus, the computer lab need not be given a unitary characterization for all of its uses.

136. *Widmar*, 454 U.S. at 269—70.

137. 515 U.S. 819 (1995).

138. *See id.* at 830.

139. *See id.* at 832.

ever, since student organizations were required to include a disclaimer in their publications making clear that the views expressed were not the views of the University,[140] the University could not argue that the content of the magazine would be confused with its own official speech.[141]

Rosenberger supports the notion that a school can facilitate student speech through the provision of funds or printing presses without sponsoring the speech. It once again suggests a parallel to a computer lab made available to students for general use. The *Rosenberger* Court's reliance on a disclaimer to separate the school from the speech of its students could also be useful to public schools. The school could require a disclaimer be attached to a student's Web site if the student in any way revealed that he or she was a student at a particular school. For example, since Aaron Smith mentioned he was a student at the Dowell Middle School, he could be required to state that his Web site was not sponsored or approved of by the Dowell School and that the views he expressed were solely his own. Such disclaimers would at least avoid a public perception that the school was encouraging sites like Aaron's and might have reduced the number of angry e-mails received by the school superintendent.

Of course, the issue of whether the computer lab is considered to be a public forum or not is at least partially under the control of the school. As in *Hazelwood*, the court will look to evidence of any policies and practices adopted by the school in relation to the computer lab, such as whether lab use is supervised by a teacher.[142] If the school is anxious to avoid the public forum characterization, it can make sure none of the policies that relate to the lab suggest such a status.

One way for a school to to avoid public forum status is to limit lab use to student work on official school projects connected to a classroom assignment. If the lab's use is limited in this fashion, then the school will be able to argue that the lab is not a public forum available for the use of its students, but is

140. *See id.* at 849.

141. *See id.* at 850.

142. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) ("These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.").

instead part of the school's educational program. In this situation, *Hazelwood* will control all use of the lab. However, if the school allows students to use the lab without restriction, then the public forum status of the lab is a very real possibility.

Many schools have adopted acceptable use policies to control use of the school's computer system.[143] These policies preclude certain uses of the system, ranging from destruction of computer files to the sending of insulting e-mail. Each student user is required to comply with the policy controlling conditions of use. It is possible that the adoption of such a policy would encourage a court to classify all use of the computer lab, even for non-academic uses, as a school-sponsored activity. The policy tells students that their use of the lab is part of the school's educational program and must comply with the values the school is attempting to impart. A court might well agree.

In addition, the school may have some techniques available to control student use of the computer lab even if the computer lab is characterized as a public forum. First, because the school dictates the characteristics of the facility it provides, it would likely be acceptable for the school to employ filtering software on the school's computers to limit the range of Web sites students could access.[144] In addition, the school could take steps to prevent anonymous entry into its computer system. However, technological limits on the computer system will not prevent a student from creating offensive Internet content.[145]

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143. *See* Kristen J. Amundson, *Online Crime, Online Electronic School* (visited June 25, 1999) <http://www.electronic-school.com/0198f6.html> (reprinted from Electronic School, Jan. 1998) (describing the elements of an acceptable use policy).

144. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998) (denying defendants' motion to dismiss and motion in the alternative for summary judgment), a case challenging the use of filtering software in a public library, the court analogized the decision to provide Internet access to the decision to buy a set of encyclopedias so that "by purchasing one such publication, the library has purchased them all." *Id.* at 793. It is unlikely this same view would prevent a public school from utilizing such software in its computer lab for several reasons. First, the First Amendment status of the school library, given the Court's recognition of the school's need to provide only age appropriate material, is not the same as the status of the public library. *See id.* at 795. Second, in *Mainstream Loudoun*, the library used filtering software to limit both adult and child access. The court objected only to the former use. *Id.* at 797. Indeed, in a later opinion resolving the litigation in favor of the plaintiffs, the court suggested that one narrower alternative means available to the library to protect minors was to use filtering software only on computers set aside for use by minors. Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 567 (E.D. Va. 1998) (holding that seven intervenors had standing and granting plaintiffs' and intervenors' motions for summary judgment).

145. It is unlikely the school could effectively limit student use by limiting the

B. The content of the speech

Most of the cases of student discipline for Internet use do not involve the kind of expression of political ideas at issue in *Tinker*. Some of the publicized situations involve threats, vulgarities, and insults directed at students, teachers and school administrators. These situations may not need to be analyzed under the *Tinker* material disruption standard.

One obvious limit on student speech is that not all speech is protected by the First Amendment. If a school punishes a student for engaging in unprotected speech, the student cannot rely on the First Amendment as a defense to disciplinary action by the school. One such example is the category of the "true threat."[146] When the Supreme Court decided *Watts v. United States*,[147] it recognized that true threats, as compared to political hyperbole, are outside the range of protected expression. Since *Watts*, courts have struggled with how to distinguish between true threats and threatening statements that are protected by the First Amendment.[148] After all, many people, including students, make idle threats to communicate their depth

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software and/or functions it makes available. For example, even if the school does not provide its students with e-mail accounts, students could use a Web browser to gain access to their e-mail account on a Web-based mail system.

146. Another possible example of unprotected speech for which a student might be disciplined is obscenity. However, the category of speech defined as obscenity as applied to adults is very narrowly defined under the test of *Miller v. California*, 413 U.S. 15 (1973). While obscenity is a variable concept and material can be obscene as applied to minors that is not obscene as applied to adults, Ginsberg v. New York, 390 U.S. 629, 636 (1968), it is doubtful that many of the reported cases have crossed the obscenity line, no matter how that line is drawn for minors. Even Mikey Driscoll's "naked lady," *see supra* notes 127—28 and accompanying text, was probably not obscene to children since not all nudity can be proscribed to children. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975). Instead, most of the cases involve foul language and sexual insults directed at particular students that are offensive but are unlikely to be obscene. However, in cases of graphic sexual descriptions that are engaged in by a student over the Internet, the school may be permitted to discipline the student because the speech they engage in is not protected by the First Amendment as applied to minors.

147. 394 U.S. 705 (1969). In *Watts*, the Court stated, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 707.

148. *Compare* United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (using an objective standard that focuses on whether a reasonable person receiving the threat would have perceived it as a serious threat of injury) *with* United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (using an objective standard that focuses on what the person making the threat should have foreseen about the likely reaction of its recipient).

of feeling without an intent to carry out the threat or a reasonable belief that the threat will be taken seriously. The cases suggest several requirements for speech to qualify as an unprotected true threat and if these criteria are satisfied, punishment of the threatening speech does not implicate the First Amendment.[149]

Aside from the school's right to punish unprotected expression, it is of course true that the school can punish on-campus personal expression if it can satisfy the *Tinker* burden of substantial disruption. Many instances of threatening comments directed against the school, its teachers, students or administrators, even if not "true threats" within the meaning of *Watts*, may be able to easily satisfy that test. In the wake of the Littleton shootings, instances of threats of violence directed at a public school have resulted in many students staying home from school.[150] Certainly, in such a situation a school can claim material disruption.

Even insulting speech may sometimes satisfy the *Tinker* standard. The school may be able to argue that the educational environment may be materially disrupted by insulting comments directed at particular students or teachers. When such remarks are widely disseminated by their appearance on a Web site or a forum, or even in an e-mail distributed to a large number of students, the school can argue that the insults will make it difficult for the victimized students to concentrate on

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149. In *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), the court distinguished between true threats and protected expression: "threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected 'vehement, caustic . . . unpleasantly sharp attacks on government and public officials.'" *Id.* at 1026 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). For other techniques for distinguishing between the true threat and the merely threatening, *see, e.g.*, United States v. Fulmer, 108 F.3d 1486, 1495—96 (1st Cir. 1997) (finding that ambiguous language does not preclude statement from being a threat and that the tone of a statement is to be taken into account when determining whether a statement constitutes a threat); United States v. Callahan, 702 F.2d 964, 966 (11th Cir 1983) (finding that using specific date, time and place in statement suggest that statement is a threat); Roy v. United States, 416 F.2d 874, 877—78 (9th Cir. 1969) (finding that statement is not a threat if "made in the context of levity, so that a reasonable person would interpret the words used to be mere hyperbole or jest" and not a serious threat).

150. For reports on post-Littleton threats and rumors that closed schools or kept numerous students home, see Anjetta McQueen, *Littleton Changes Rules for Schools*, ASSOCIATED PRESS NEWS SERVICE, May 4, 1999; Kenneth J. Cooper, *This Time, Copycat Wave is Broader*, WASH. POST, May 1, 1999, at A6.

their studies and that other students may be distracted as well. Even insults directed at teachers may disrupt the classroom by making the teacher a subject of mockery instead of an authority figure.

Even if the speech at issue is protected by the First Amendment and the school cannot demonstrate material disruption as required by *Tinker*, the school may still be able to ban the use of foul language and vulgar comments under the rationale of *Fraser*. As a number of lower courts have found, *Fraser* may not be dependent on the fact that Fraser spoke at an official school assembly. If this reading of *Fraser* is correct, a school would be free to ban all use of such speech on school grounds in order to transmit the values of civility in public discourse.[151] The *Fraser* rationale might also apply to gratuitous insults directed at students or teachers. The school may be able to claim that civilized discourse prohibits such invective,[152] an argument successfully advanced in *Poling v. Murphy*.[153] If this broad reading of *Fraser* is correct, many Internet cases, at least if they occur on school grounds, may fall within the educational objectives recognized by the Court in *Fraser*.

C. Off-campus speech

Courts have only rarely addressed whether a public school has the right to discipline a student for engaging in speech away from school and the standard under which such discipline would be justified. In *Boucher v. School Board of the School District of Greenfield*,[154] the student argued that the *Tinker* standard did not apply off school grounds, but, in the circum-

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151. If *Fraser* were more narrowly interpreted to require limitations on speech presented before a captive audience, a characterization that applied to the students who were required to attend the mandatory school assembly at which Fraser spoke, then the Internet may be a less apt analogy. Unlike the auditorium, the Internet is unlikely to involve the same possibility of a captive audience except in rare circumstances. Student use of the Internet generally involves autonomous decisions to access particular sites or create particular content. A closer analogy to a captive audience might exist if students were required to access a fellow student's Web site as part of a homework assignment for a computer class.

152. In some circumstances, insults may be unprotected speech because they can be classified as fighting words under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). However, since fighting words require a face to face exchange, *id.* at 573, insults delivered via e-mail or appearing on a Web site cannot satisfy this requirement.

153. Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989).

154. Boucher v. School Board of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998).

stances of the case, the court did not agree.[155] Most public schools have attempted to avoid basing discipline on solely off-campus activities and instead have attempted to tie their efforts to some on-campus aspect of the speech. In *Donovan v. Ritchie*,[156] for example, the discipline was justified because the list was distributed at school even though it was not written there.

The Internet compounds the already difficult nature of the on-campus/off-campus dichotomy. As many scholars have recognized, the Internet renders vestigial the concept of physical location.[157] Not surprisingly, therefore, the usual line between on-campus and off-campus speech is much more elusive in the context of the Internet. Once posted on the Net, the speech is instantly available everywhere, including the school building, without any special effort on the part of the student author. Unlike an underground newspaper, copies of a Web site do not need to be physically delivered to school. This lack of physical effort to move Internet speech from one location to another is both a blessing and a curse in the context of school efforts to discipline student speech. From the school's point of view, it may make discipline more difficult because it will be harder to punish the student for on-campus behavior if all affirmative acts occurred away from school. On the other hand, the fact that the speech can be so easily accessed on campus may mean the school will be more apt to prove that the speech has produced substantial interference with its operations.

This problem arose in *Beussink* when the school attempted to punish Brandon Beussink for the content of his Web site. The court found that the speech had taken place on-campus even though Beussink had not used school computers to create or host his site and had not urged his classmates to access his site at school or even from home. Since the speech was treated as in-school personal expression under *Tinker*, the school was required to satisfy the material disruption standard. The court found it had failed to satisfy that standard given the absence of any evidence of material disruption. Nevertheless, other in-

155. *See id.* at 828—29.

156. Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995).

157. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) ("Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location.").

stances of Internet insults might well result in material disruption satisfying the *Tinker* standard.

Interestingly, despite the *Beussink* court's effort to analogize its case to *Tinker*, a true *Tinker* case is unlikely to occur in the Internet context. Unlike the ability to wear an armband to school and engage in expression without any assistance from the school, the Internet cannot yet be worn to school like an article of clothing. Most often, student Internet speech originating at school necessitates the use of some school facility, such as a computer lab.[158] But even if students are permitted to bring their own laptop computers to school, the school will still need to provide an Internet connection. However, technology is changing this situation. In the not too distant future, students will bring to school hand-held computers that access the Internet through the use of wireless technology. When this occurs, Internet speech originating from school will be more comparable to the personal expression in *Tinker*.

V. Conclusion

Public schools across the country have recently begun to discipline students for a range of student Internet uses that the schools believe are damaging to their educational environments. In response, students are fighting some of these disciplinary decisions by asserting violations of their First Amendment rights. While the clash between a school's right to protect its educational community and a student's right to freedom of expression is not a new problem, resolution in the context of the Internet certainly tests the reach of established principles.

While only one court has thus far issued an opinion in a student Internet case, other courts are certain to be faced with a similar need to apply free speech principles to student Internet use. The issues that are likely to arise are varied, ranging from inflammatory political rhetoric on a student's personal Web site unconnected to any school facility to threats directed at students and faculty alike sent via an e-mail account provided by the school.

In resolving this varied mix of potential Internet disputes, public schools are most within their rights when they control speech that is part of an official school activity such as a com-

158. *See supra* notes 130-45 and accompanying text on the issue of whether a school's computer lab will always be characterized as a school-sponsored activity.

puter class. The school may also be able to rely on *Fraser* if it imposes a general ban on foul language, offensive speech, insults, and sexual badinage. In addition, if the speech occurs at school, the disciplinary actions of school officials are justified if the speech creates material disruption of school activities, thus satisfying the *Tinker* standard. Threats of violence, even if protected by the First Amendment, are also likely to meet that standard.

The most difficult issue likely to be faced by schools is that much Internet speech will originate outside the schoolhouse, but will still be seen by members of the school community, even without the active assistance of the student author of the speech. If the Internet speech affects students, teachers and administrators, the urge to punish the student speaker may be irresistible. At the very least, such punishment requires that the school demonstrate material disruption to justify reaching outside the school grounds. However, if the speech is protected expression as to minors and the school punishes the speaker because of the content of the speech, there is an argument that an even stricter standard than *Tinker* should apply. Schools should think carefully about reaching out to control student Internet speech when the student does not rely on any school-provided assistance to create or broadcast the speech. Despite the temptation on the part of school officials to react to speech they find offensive, restraint may be the preferable reaction in the long run. Refusing to leave control of student behavior to parents when the student is not at school and instead extending the reach of the school's disciplinary arm may create more problems than it solves.