

BEYOND THE SCHOOLHOUSE GATES:

STUDENT SPEECH RIGHTS FROM
A COMMUNITARIAN PERSPECTIVE

by

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To my parents, Mark and Claire Morley

for their continuous love and support

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CHAPTER ONE: FREEDOM OF SPEECH IN PUBLIC SCHOOLS

While sitting at his home computer in the spring of 1998, an eighth grade student, Justin Swidler, created a Web site entitled “Teacher Sux.”¹ The site specifically targeted the creator’s algebra teacher, Mrs. Kathleen Fulmer and school principal, Mr. A. Thomas Kartsosis.² Swindler’s Internet pages consisted of graphics, words, and sound clips that could have easily understood to be offensive, profane, derogatory and even threatening to these individuals. Visitors were greeted with a page titled “Why Fulmer Should be Fired” accompanied by text and graphics that highlighted her physique and disposition as grounds for ending her employment at the school. A disturbing animation of Mrs. Fulmer’s face morphing into that of Adolph Hilter’s was captioned by “The new Fulmer Hitler Movie. The similarities astound me.”³ Additionally, a sound page played a song entitled “Mrs. Fulmer is a B___, in D minor.” The most shocking page ran the headline, “Why should she Die?” Further text asked the reader to consider the reasons given and then provide \$20 to hire a hit man to kill Mrs. Fulmer.⁴ Among the traits that justified killing Mrs. Fulmer were (1) Is it a rug, or God’s mistake? (2) Puke green eyes (3) Zit! And (4) Hideous smile.⁵ Following this was a “diminutive” picture of Mrs. Fulmer with a severed head and blood dripping down her neck.

This Web site was in no way affiliated with a school project or sponsored by Swindler’s school, Nitschmann Middle School. Prior to entering the Web site, a visitor

¹ *J.S. v. Bethlehem Area School District*, 569 Pa. 638 at 644 (Pa., 2002).

² 569 Pa. 638 at 644 (2002).

³ 569 Pa. 638 at 645 (2002).

⁴ 569 Pa. 638 at 645 (2002).

⁵ 569 Pa. 638 at Footnote 4 (2002).

was instructed to read the disclaimer, and agree that “the visitor would not tell any employees of the School District about the site, that the visitor was not a member of the School District's ‘Staff,’ and that the visitor would not disclose the Web site to School District employees or administration, disclose the identity of the Web site creator or intend to cause trouble for that individual.”⁶ Although the visitor was required to “click through” this disclaimer, the Web site was not password protected and anyone could access it. When the school principal, Mr. Kartsotis, received notice of this Web site, he convened the faculty and contacted local police authorities as well as the Federal Bureau of Investigation. After investigation of the Web site and the creator, law enforcement agencies declined to file criminal charges against Swindler, who is referred to as J.S. in court documents.⁷

At the end of the 1998 school year, the School District informed J.S. and his parents of its intention to suspend him for three days. After the suspension hearings, the school extended the sentence to ten days, and subsequently began expulsion hearings. By the summer of 1998, J.S.’s parents had already enrolled him in an out-of-state school for the upcoming year.⁸ In response to the school’s actions, the student, by and through his parents, brought suit against the school district in *J.S. v. Bethlehem Area School District* boasting his First Amendment right to freedom of speech as his defense.

This case raises important questions regarding a student’s right to the freedom of expression. In this scenario, an eighth grader used his home computer to create a Web

⁶ 569 Pa. 638 at 644 (2002).

⁷ 569 Pa. 638 at 646 (2002).

⁸ 569 Pa. 638 at 647 (200).

site soliciting funds to kill his Algebra teacher. With the prevalent use of the Internet, students are able to communicate with fellow peers and the larger community with considerably more range and flexibility than in the past. Criticism and rancor towards teachers and peers that can unfortunately be a topic of conversation among middle school and high school students is no longer confined to the parameters of the bathroom stalls. More and more students are expressing their opinions through blogs, e-mail, and personal home pages. This type of speech is most often offensive and demeaning to others, but what are the limits of this type of student expression? Many school officials are intervening, as did those in the *J.S.* case, to remove the speaker for the school environment. Yet, when the speech takes place off-campus and is not directly affiliated with the school, the lines which sanction a school's authority to punish are blurred. In order to analyze these more recent cases involving student speech, an understanding of the First Amendment's origin must be established.

The First Amendment states "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances."⁹ As stated in 1969 by the Warren court in *Tinker v. Des Moines Independent Community School District*, "students do not shed their First Amendment rights at the schoolhouse gates." Following this ruling, students in public schools have consistently asserted their First Amendment rights in the face of disciplinary action with greater frequency. The Internet is becoming a popular medium for student expression of their emotions regarding teachers,

⁹ US Constitution, First Amendment.

administrators, and other students. Although First Amendment rights are extended to all individuals, including students, the speech that is protected under this amendment is far from limitless. Speech which is not awarded protection under the First Amendment includes “fighting words,”¹⁰ speech that incites others to imminent lawless action,¹¹ obscenity,¹² certain types of defamatory speech,¹³ and true threats.”¹⁴ The Supreme Court has stated that these types of speech are not worthy of protection under the umbrella of the First Amendment. In addition, many courts recognize the schools are a unique setting and require unique rules for assessing speech. Although these categories are clearly defined as unprotected speech, courts also contend that speech within the schoolhouse can be regulated to some extent in an effort to provide order during the academic day. In *Hazelwood v. Kuhlmeier*, the Court reflected and commented on the intersection of freedom of speech and the school setting. It asserted that student speech rights are unique to the school setting and “not automatically coextensive with the first amendment rights of adults in other settings.”¹⁵ Thus, the case of *J.S. v. Bethlehem* must be considered in reference to First Amendment doctrine while also observing the unique interpretations of the freedom of speech within a school.

¹⁰ *Chaplinsky v. new Hampshire*, 315 U.S. 568 (1942).

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹² *Miller v. California*, 413 U.S. 15 (1973).

¹³ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁴ *Watts v. United States*, 394 U.S. 705 (1969).

¹⁵ *Hazelwood School District et. Al v. Kuhlmeier et Al.* , 484 U.S. 260 at 266 (1988).

Three Ways of Looking at J.S. 's Speech

The case of *J.S. v. Bethlehem Area School District* can be viewed under three distinct lines, each worthy of consideration. To begin, the court may consider the nature of the speech on the Web site, assessing whether or not it constitutes a threat against the student's math teacher rendering it unprotected under the First Amendment. A second approach would be to address this type of speech in light of the traditional school speech standards set forth by two landmark cases of *Tinker vs. Des Moines Community School District* and *Bethel School District vs. Fraser*. Finally, the court may consider the speech as a form of co-curricular expression, affiliated with the school and would thus fall under the *Hazelwood School District v. Kuhlmeier* standard.

True Threats

A preliminary way of viewing the *J.S.* case would be to assert that the speech on the Web site was a "true threat" and therefore is not privileged under the First Amendment. The most general federal statute of "true threats" states that it is a crime to transmit in commerce, "any communication containing...any threat to injure the person of another."¹⁶ This preliminary definition of a true threat was derived by the U.S. Supreme Court in 1969 as they considered *Watts v. United States*. In *Watts*, an eighteen year old man made a comment at a political rally in Washington, stating, "They always holler at us to get an education. And now I have already received my draft classification . . . If they ever make me carry a rifle the first man I want to get in my sights is L.B.J,"

¹⁶ 394 U.S. 705 at 755 (1969).

responding to a suggestion that people should get an education before expressing opinions about the Vietnam War.¹⁷ Watts was brought to court under the standard, which prohibits the knowing and willful making of “any threat to take the life of or to inflict bodily harm upon the President of the United States.” The court acknowledged that speech which constituted a true threat was not protected under the First Amendment, yet they found Watts’ speech to be mere political hyperbole, not a true threat. In analyzing the true meaning of Watts’s comment, the court took into consideration the context of the situation and the reaction from the crowd. Since his statement was responded to with laughter from the audience, the court concluded that Watts’ speech, although crude and offensive did not constitute a “true threat” on the President. The two major focal points in this decision were based on the fact that Watts’ speech was received in a particular context and demonstrated mere “hyperbole”, providing protection under the First Amendment.

Although the Supreme Court seemed to have defined the standard of a “true threat,” subsequent cases arose in which lower courts were called to interpret this somewhat vague standard. Due to the fact that Watt’s speech was orally transmitted to a crowd which clearly interpreted it to be an attempt at humor, the court had little trouble finding that Watts’ speech was not a “true threat.” The *Watts* case was fairly unambiguous compared to later cases which involve a more complicated set of facts. An example of when a lower court was forced to interpret the Watts decision was in 1997

¹⁷ Scott Hammack, “The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts’ Approach to “true threats” and Incitement”, *Columbia Journal of Law and Social Problems* 65 (2002): 641.

when the issue of “true threats” was revisited in *United States v. Alkhabaz*.¹⁸ This case involved a potential threat made in cyberspace via e-mail. Given this case’s congruent fact pattern to *J.S.*, it may offer insight into the *J.S.* case.

In this case, two parties communicated via the Internet exchanging stories in which they described sadistic sexual fantasies. The case was brought to court under the pretense that the e-mails exchanged between the two parties, Baker and Arthur Gonda, were explicit and cited the name of a female who lived in the Michigan University dorms with one of the parties. The defendant, Baker, claimed that the e-mails were not intended for the victim to see or hear. They were having a mere fantasy and they had no intention of carrying it out. The two parties transmitted e-mails depicting a shared interest in sexual abuse and torture of women and young girls. The Government argued that these messages represented an evolution from shared fantasizes into a firm plan to kidnap, rape, and murder a female person and, as such, were threats transmitted in interstate commerce and prohibited under Title 18, United States Code, Section 875(c).¹⁹ Under this title, the government must allege and prove three elements to support a conviction: “(1) a transmission in interstate [or foreign] commerce; (2) a communication containing a threat; and (3) the threat must be a threat to injure [or kidnap] the person of another.”²⁰ As noted in the case, the first and third elements cannot be seriously challenged by the defendant. Accordingly, the majority recognized that the transmissions attributed to Baker expressed threats to injure or kidnap a person (element 3), yet subsequently ruled

¹⁸ *United States v. Alkhabaz*, 104 F.3d 1492, 1496-1507 (6th Cir., 1997).

¹⁹ 104 F.3d 1492 at 1494 (1997).

²⁰ 104 F.3d 1492 at 1494 (1997).

that these threats nonetheless were not section 875(c) “threats” simply because Baker did not issue them with the intent to intimidate anyone (a requirement which the majority reads into element 3).²¹ As the Sixth Circuit Court of Appeals decided that Baker’s speech was protected by the First Amendment since he did not intend to intimidate the victim, they also created a new novel two-prong test for determining when speech is a threat. This new test stated that speech is an unprotected threat if a reasonable person: “(1) would take the statement as a serious expression of an intention to inflict bodily harm...and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation.”²² The majority determined that the core purpose of a threat is the intent to achieve a goal through intimidation, and it reasoned that because of this, a communication objectively indicating an intent to harm cannot be a threat unless it is also conveyed for the purpose of furthering a goal through intimidation.²³

The dissent from Judge Krupansky provides a compelling argument that the majority erred in their protection of Baker’s speech. Krupansky suggested that a more appropriate test would be whether, in the context of the statement, a reasonable recipient would believe that the speaker was serious about carrying out his alleged threat, regardless of the speaker’s actual motive.²⁴ With the Sixth Circuit court’s new two prong test, the court was essentially looking at the speaker’s intent in making the alleged threat, which becomes a very subjective element. Instead, if the court had used Judge

²¹ 104 F.3d 1492 at 1496 (1997).

²² 104 F.3d 1492 at 1496 (1997).

²³ Jennifer Brenner, “True Threats - A More Appropriate Standard for Analyzing First Amendment Protection,” *North Dakota Law Review* (2002): 774.

²⁴ Brenner, 780.

Krupansky's test, they would have considered the effect that these e-mails had on the identified female. Testimony offered by the woman, whose name is omitted from the documentation of the case, served to prove that she was both traumatized and was referred to psychological counseling.²⁵ As Brenner notes, "If the court had considered how an objective listener would have perceived the threat, as Judge Krupansky, suggested, the jury would have had an easier time convicting Baker."

Depending on which court a "true threats" case is tried in, the subjective or objective test may be implemented. In more modern cases, certain speech that appears to be a threat is most often protected until it actually becomes real or the court can be sure that the speaker clearly intended to illicit harm on the victim. After viewing the Web site in the *J.S.* case, an objective viewer would probably assert that the eighth grader was clearly soliciting to hire a hit man to kill his teacher. Viewed from an objective standpoint, the student was explicitly threatening to kill his teacher. In this scenario, the likelihood that an eighth grader could actually have the means to hire a hit man is quite unlikely. Perhaps under other circumstances, for instance if a wealthy divorcee plotted to kill her husband, a similar Web site solicitation may be more subjectively plausible. But, given the age and maturity level of this student, the plausibility of his plan is quite questionable. This subjective element becomes a significant factor in determining whether or not the speech in the *J.S.* case was a "true threat."

Can school officials afford to wait until something that appears to be a threat actually becomes real and similarly should they take certain speech "with a grain of salt"

²⁵ 104 F.3d 1492 at 1513 (1997).

in light of the circumstances? The standard for “true threats” becomes increasingly harder to apply in the setting of public schools where children and parents rely on the judgments of school officials to maintain a safe learning environment. Later in this chapter, *J.S. v. Bethlehem* will be further considered given the aforementioned “true threats” standards.

The Schoolhouse Gates

Another approach when considering the J.S. case would be to acknowledge that the speech involved the school community and therefore would fall under the standards set forth by *Tinker v. Des Moines Community School District* and *Bethel School District v. Fraser*; the former in the sixties and the latter in the eighties.

In 1969, students arrived at school wearing black armbands as a symbol of their opposition to the Vietnam War. Citing the school dress code, school officials banned the armbands and warned that any student wearing an armband would be asked to remove it, or suspended. On December 16th, three students, John Tinker and Christopher Eckhardt, along with John’s thirteen year old sister, Mary Beth, wore armbands and were suspended. Although they aware of the school’s policy, they claimed they were mourning those who had died in Vietnam.²⁶ The students brought a civil rights suit against Des Moines Independent Community School District, in *Tinker v. Des Moines Community School District* seeking nominal damages and injunctive relief.²⁷ The district

²⁶ Sarah E. Redfield, “Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection,” *Brigham Young University Education and Law Journal* (2003): 673.

²⁷ *Tinker v. Des Moines Community School District.*, 258 F. Supp. 971 (S.D. Iowa, 1966).

court dismissed the students' complaint, ruling that the school's action was constitutional and then the Eighth Circuit was evenly divided, leaving the district court's ruling to stand.²⁸ Yet, after the further review, the Supreme Court reversed the decision finding that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in [the protest]. It was closely akin to 'pure speech,' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."²⁹

Although the district court had ruled that the school's actions were justified on grounds of fear of disruption, the Supreme Court held that "undifferentiated fear or apprehension of disturbance" is simply "not enough to overcome the right to freedom of expression."³⁰ The Supreme Court wanted to clearly state that the school district did not have a significantly compelling interest to disallow the use of black armbands, and consequently its actions were found to be unconstitutional. The protest involving armbands was an expressive conduct that could not be prohibited based on potential disruption that officials could not clearly foresee. In this benchmark case, the Supreme Court constructed a clearly defined standard of substantiality: "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."³¹

²⁸ *Tinker*, 393 U.S. 503 at 505 (1969).

²⁹ 393 U.S. 503 at 505-506 (1969).

³⁰ 393 U.S. 503 at 508 (1969).

³¹ 393 U.S. 503 at 509 (1969).

Additionally, a two-prong test was set up by the *Tinker* Court in order to first decide whether the speech is protected by the First Amendment and then to decide whether or not a school may discipline students for certain speech. The first prong asks whether or not the student intended to convey a particularized message and then considers whether there is a reasonable likelihood that those who viewed it would understand this message.³² Only when both of these conditions are met is the speech entitled to constitutional protection. Under the second prong, a school may only restrict speech if it can demonstrate a sufficiently compelling interest by establishing that “there were facts that reasonably led them to forecast substantial disruption of or material interference with school activities or if school officials can prove that the activity did in fact materially or substantially disrupt the school.”³³ In *Tinker*, the speech was found to be protected under the first prong, and the school could not sufficiently convey a substantial threat of interference with the operation of the school, required for disciplinary action under the second prong. Subsequent cases dealing with freedom of expression in public schools hinged on this initial two-prong test.

Following *Tinker*, the Supreme Court was faced with another milestone case involving student speech seventeen years later. In *Bethel School District v. Fraser* when a senior in high school was disciplined for making “an elaborate, graphic, and explicit sexual metaphor in front of 600 students” during a school election speech.³⁴ According to a school rule, “conduct which materially and substantially interferes with the

³² Wheeler, 14.

³³ 393 U.S. 503 at 505 (1969).

³⁴ *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

educational process is prohibited, including the use of obscene, profane language or gestures.”³⁵ The assistant principal of the school suspended Matthew Fraser, the orator of the speech, in accordance with this rule. Although the Ninth Circuit ruled in favor of Fraser concluding that the school’s rule was too vague and overly broad in violation of his constitutional speech and due process rights, the Supreme Court reversed, while still affirming *Tinker*. The Supreme Court found that the speech was distinguishable from the political speech of *Tinker*. The *Fraser* Court considered the election speech in regards to the purpose of public education. Given the nature of the environment and duties of the school officials, the Court found that a mandatory high school assembly was “no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”³⁶

Furthermore, the school was entirely appropriate in its disciplinary action in order to disassociate itself from the vulgar language, which ran counter to the school’s mission. The Court specifically noted that although some offensive speech is protected for adults, it does not necessarily follow that such speech would be acceptable among students in school settings.³⁷

The paramount judgment that sprung from *Fraser* was that speech which is “vulgar, disruptive, or indecent...can be punished and prohibited in classrooms, assemblies, and other school-sponsored educational activities, as such speech runs

³⁵ 478 U.S. 675 at 678 (1986).

³⁶ 478 U.S. 675 at 685-686 (1986).

³⁷ 478 U.S. 675 at 682 (citing *Cohen v. Cal.*, 403 U.S. 15 (1971) (wearing jacket that said “F- the Draft” in the courthouse)) (1986).

counter to the educational objectives in schools.”³⁸ The Court wrote, “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. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’”³⁹ Through *Fraser*, while still affirming *Tinker*, the Court set limits on how far students can go in exercising their freedom of speech rights. *J.S. v. Bethlehem* will be considered under the *Tinker* and *Fraser* precedents later in this chapter.

Co-Curricular Activities

The third and final way of looking at the *J.S.* case would be to consider the speech as co-curricular activity which would place in it another category with specific standards. Following *Tinker* and *Fraser*, the court faced yet another landmark case involving student speech in 1988. Instead of dealing with the permissibility of certain speech, this new case, *Hazelwood School District v. Kuhlmeier*, dealt more specifically with whether or not a school had to promote speech with which it disagreed.⁴⁰ In *Hazelwood*, a school newspaper in St. Louis, Missouri wished to print articles pertaining to three non-fictional sexual encounters, birth control, and divorce. The newspaper was written in a journalism

³⁸ Wheeler, 14 (citing *Bethel v. Fraser* at 684).

³⁹ 478 U.S. 675 at 684 (1986).

⁴⁰ 484 U.S. 260 (1988).

class as part of the school curriculum. This course was taught by a faculty member and during school hours, with students receiving grades and academic credit for their performance in the course.⁴¹ School board policy declared that school- sponsored publications were (1) not to restrict free expression or diverse viewpoints within the rules of responsible journalism and (2) were to be developed in accord with the curriculum and educational implications.⁴²

On May 10, 1983, a new advisor of the journalism course submitted the May 13th edition proof to the principal for approval prior to printing. Upon review, the school principal removed the aforementioned articles prior to publication under grounds that the sexual references may be inappropriate for the high school audience. The principal removed the pregnancy story as he was afraid of identifying the involved students, although the pregnant student was not named directly.⁴³ Additionally, a story involving divorce was deleted because a student criticized her father by name and the principal thought the parents of the child should have been given the opportunity to respond or consent to the remarks.⁴⁴ As the principal did not think there was sufficient time to edit the articles and remove only the necessary parts, he deleted entire pages from the issue. When brought to court in the United States District Court for the Eastern District of Missouri, the court did not grant injunction to the staff of the paper, stating that the principal's actions were reasonable. Yet, after appeal, the Eighth Court held that the

⁴¹ 484 U.S. 260 at 260 (1988).

⁴² 484 U.S. 260 at 260 (1988).

⁴³ 484 U.S. 260 at 260 (1988).

⁴⁴ Redfield, 677.

newspaper was a public forum and the school officials were entitled to censor the articles, only if publication could result in tort liability for the school.⁴⁵

In 1987, this case was brought to the United States Supreme Court, where the majority found that the school newspaper was not a public forum for public expression. Although the students asserted a violation of their First Amendment rights under *Tinker* standards, the Court ruled that the political speech protected in *Tinker* was quite different than the case at hand.⁴⁶ The control that the principle asserted over this newspaper, and other possible school-sponsored activities, that might reasonably be perceived to bear the imprimatur of the school is greater than the control, governed by the standard articulated in *Tinker*, which educators may exercise over a student's personal expression that happens to occur on the school premises.⁴⁷ The *Hazelwood* ruling asserts that the rights of students in public schools “are not automatically coextensive with the rights of adults in other settings and must be ‘applied in light of the special characteristics of the school environment.’”⁴⁸

Most importantly, the Court found that a school is not required to promote certain speech, and considering the newspaper was run by the school, this granted the principal jurisdiction over the speech. In instances where schools wish not to lend its name and resources to promote certain speech, the Court found that “Educators do not offend the First Amendment...so long as their actions are reasonably related to legitimate

⁴⁵ 795 F.2d 1368.

⁴⁶ Redfield at 270-271.

⁴⁷ 484 U.S. 260 at 271 (1988).

⁴⁸ 484 U.S. 260 at 266 (1988).

pedagogical concerns.”⁴⁹ The court held that the principal acted reasonably and the First Amendment rights of the students were not violated. *Hazelwood v. Kuhlmeier* used the backbone of *Tinker*, but narrowed the scope of student free expression as it pertained to school-sponsored activities. This case set the standard for future cases involving co-curricular, school-sponsored activities such as student theater productions, publications, and television broadcasts. As long as the school can prove that the activity was facilitated through the use of school faculty, facilities, and time, the school officials are entitled to censor expression that raises “legitimate pedagogical concerns” and bears the imprimatur on the school.

The J.S. Decision

With an understanding of the three ways of addressing the *J.S.* case, it is necessary to consider the Courts decision.

Not a True Threat

In order to be deemed a “true threat” the speech must have been communicated to an intended audience and the victim must have reason to believe that the threat will be carried out. As discussed earlier, lower courts have interpreted the *Watts* standard of true threats and have applied both objective and subjective tests in order to determine the constitutional protection of threatening speech. Particularly in the *J.S.* case, the court

⁴⁹ 484 U.S. 260 at 272-273 (1988).

could have concluded that J.S. made a threat based on an objective test. Given the language used on the Web site and the solicitation of a hit man to kill Mrs. Fulmer, a reasonable person would likely “take the statement as a serious expression of an intention to inflict bodily harm.” Yet, after applying the second prong of the test in *United States v. Alkhabaz*, the more subjective element, a reasonable person would likely *not* perceive J.S.’s speech “as being communicated to effect some change or achieve some goal through intimidation.” Given the circumstances under which the speech was expressed, and the maturity of the speaker, a reasonable person would conclude that J.S. could not effectively execute his plan to kill his teacher. Additionally, the speech, although naming teachers and the principle specifically, was never sent directly to the mentioned individuals. Therefore, a reasonable person would not conclude that J.S. was intending to intimidate the individuals he named. The Pennsylvania court employed this subjective test in their consideration of the speech. In *J.S.*, the court found that the speech was not a “true threat” because “the Web site was not sent to the teacher and was designed specifically to preclude access by teachers and administrators,” referring to the disclaimer on the first page.⁵⁰ After thorough consideration, the court noted, “we conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the Web site, taken as a whole was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody.”⁵¹ Additionally the facts of the case state that school officials did not ask J.S. to

⁵⁰ Thomas E. Wheeler, III. “Slamming in Cyberspace: The Boundaries of Student First Amendment Rights,” *The Computer & Internet Lawyer*, Vol. 21, (April 2004).

⁵¹ *J.S.*, 807 A.2d at 859 (2002).

take down the Web site, nor did they request that he seek psychological evaluation. Due to this fact pattern, the school officials must not have concluded that the Web site was threatening the well being of anyone in their community. Only later, approximately one week after Mr. Kartsosis was aware of the Web site, did J.S. remove the site from the Internet on his own accord. J.S. continued to attend classes and participate in extracurricular activities. No disciplinary action was taken until the end of the school year, when school officials sent a letter to J.S.'s home and parents alerting them of their future plans to suspend him.

Clearly, neither school authorities nor law enforcement authorities found it necessary to take action against J.S. immediately making it difficult to conclude that this speech was in fact a "true threat." In addition, J.S.'s speech can not be considered a "true threat" after applying a more subjective test which considers the speakers intention to intimidate and the plausibility of the speaker carrying out the threat. Therefore, one viewing J.S.'s speech through a "true threat" line may allow for its protection under the First Amendment, yet it would ignore the many facets of this case. Rather, a look to the two other lines will further elucidate this case.

Not a Co-Curricular Activity

The J.S. case could have also been considered under the standards set forth by *Hazelwood* which established the extent of student's free expression when coupled with a school sponsored activity. The court recognized that the school is not required to support speech that runs counter to the mission of the school. Taking this into account, schools

have the right to halt production or printing of newspapers, yearbooks, or any other school-sponsored activity that could potentially discredit the school's name.

Additionally, the court found that school officials may restrict certain speech affiliated with the school if they act based on "legitimate pedagogical concerns."⁵² The main element of this case was that the speech under consideration was clearly associated with the school since it used resources, facilities, and personnel from the school. The newspaper undeniably was a co-curricular activity, and therefore the principal was justified in his act. Unfortunately, recent cases involving student speech are increasingly occurring devoid of school sponsorship. The courts are attune to this problem, and rightfully cannot apply the *Hazelwood* standard in all cases.

In *J.S. v. Bethlehem*, the speech considered was created outside of school, not during school hours, and did not use any school resources. Although the speech involved the names of certain faculty at the school, in no way did J.S. solicit assistance from a faculty member to post the Web site. Similarly, the activity J.S. engaged in was not part of school curriculum and therefore would not have to adhere to guidelines set forth regarding the school's policy on freedom of expression in these activities. J.S.'s speech was clearly articulated in a public forum, maybe arguably the most public of all forums, the Internet. The Web site was unmistakably created outside of school, and although his intended audience may have been students in the school, this does not make the speech a co-curricular activity in the least. Thus, it is difficult to conclude that precedents in *Hazelwood* would have any bearing on the First Amendment rights of J.S. These cases

⁵² 484 U.S. 260 at 272-273 (1988).

are drastically different in their fact patterns. Rightfully, the court did not consider J.S.'s speech a co-curricular activity stating, "There is no suggestion that the School District sponsored the speech, giving it editorial license to restrict its content, like in *Hazelwood v. Kuhlmeier*."⁵³ Therefore the court dismissed the *Hazelwood* line as an inappropriate way of considering J.S.'s speech. Instead the court looked to the *Tinker* and *Fraser* lines in assessing the protection of the speech. As the court noted, "In essence, the type of speech at issue in this case straddles the political speech in *Tinker*, and the lewd and offensive speech expressed at an official school assembly in *Fraser*."⁵⁴ Hence, the further analysis of the speech under the standards set forth in these two cases.

Opening the Schoolhouse Gates

Although the court found that the speech did not constitute a "true threat," the expulsion was upheld since the school was able to successfully demonstrate that the Web site created substantial disruption in the school. Under the *Tinker* test, a school has a "compelling interest in having an undisrupted school session conducive to the students' learning."⁵⁵ Consequently, a school may regulate student speech if there are "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."⁵⁶ According to the facts of the J.S. case, after viewing the Web site, Mrs. Fulmer was severely affected both physically and emotionally. She suffered from stress, anxiety, loss of appetite, loss of sleep, loss of

⁵³ 569 Pa. 638 at 669 (2002).

⁵⁴ 569 Pa. 638 at 669 (2002).

⁵⁵ Wheeler at n38, citing *Grayned v. City of Rockford*, 408 U.S. 104, (1972) (citing *Tinker*, 393 U.S. 503 at 513 (1969)).

⁵⁶ 569 Pa. 638 at 514 (2002).

weight and a general loss of well being. She seriously feared her life, and received a medical leave of absence for the remainder of the academic year. As a result of her absence, three substitute teachers were hired which unquestionably disrupted the delivery of instruction to students and adversely impacted the education environment.⁵⁷ As noted in the case, the effect on the morale of the students and staff at Nitschmann Middle School was comparable to the death of a student or staff member.⁵⁸

In addition, although the speech was created off-campus, the Court found that there was a significant nexus between the Web site and the school campus to consider it “on-campus” speech. The Web site was aimed at specific members of the community in the school district, and therefore would raise awareness and concern on school campus. The Court held that “where speech that is aimed at a specific school and/or its personnel is brought onto school campus or accessed at school by its originator, the speech will be considered on-campus speech.”⁵⁹ While it is less certain exactly what portions of the Web site the student viewed, J.S., nevertheless, facilitated the on-campus nature of the speech by accessing the Web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the Web site.⁶⁰

In its consideration, the Court implemented a combination of both *Fraser* and *Tinker*. Under *Fraser*, a ruling in favor of the school district is fairly straightforward given the nature of the speech. The Court held that the speech on the “Teacher Sux” Web

⁵⁷ 569 Pa. 638 at 674 (2002).

⁵⁸ 569 Pa. 638 at 674 (2002).

⁵⁹ Wheeler at n37, citing *J.S.*, 807 A. 2d at 866 (1998).

⁶⁰ 569 Pa. 638 at 668 (2002).

site was no less lewd, vulgar, and offensive than the speech used by Fraser. The Court plainly states, "...were we to solely apply Fraser, we would have little difficulty in upholding the School District's discipline."⁶¹

Yet, the Court does recognize that the speech at bar in *J.S.* does not neatly fit into the box of unprotected speech as it was not given on speech and was not articulated on school premises and was not a school-sponsored activity. It is upheld that the speech becomes "on-campus" speech due to the link between the Web site and the school community. Once we assert that the speech is on-campus, the Court goes on to apply the *Tinker* test in order to assess its protection under the First Amendment. Citing *Tinker*, the Court states that it "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."⁶² Thus considering the freedom of expression awarded to the students in *Tinker*, as well as the limitations to speech which could substantially disrupt the school day, the Court addressed J.S.'s speech.

Although J.S. and his parents asserted that the disruption in the school due to the Web site was minimal, school officials and subsequently the Court held otherwise. After considering the emotional and physical trauma that Mrs. Fulmer had to endure, as well as the changes in the school environment, the Court found that "... the School District has adduced sufficient evidence that the communication contained in the 'Teacher Sux' Web

⁶¹ 569 Pa. 638 at 673 (2002).

⁶² 569 Pa. 638 at 673 (2002).

site caused actual and substantial disruption of the work of the school.”⁶³ In addition to the disruption in Mrs. Fulmer’s life, the Court noted that the students were also “adversely affected.” Some students expressed concern about their safety, while others sought out counselors to discuss anxiety revolving around the issue of the Web site. The overall morale of the school was said to be very low, comparable to if a prominent member of the community had died. Additionally, parents were concerned about the safety and education of their children. The final words of the Court illustrate their reliance on and application of *Tinker* standard for disruption:

In sum, the Web site created disorder and significantly and adversely impacted the delivery of instruction. Indeed, it was specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval. Based upon these facts, we are satisfied that the School District has demonstrated that J.S.'s Web site created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of *Tinker*. Thus, for the reasons stated above, we find that the School District's disciplinary action taken against J.S. did not violate his First Amendment right to freedom of speech.

Although the outcome of this case is not contested, the reasoning used by the Court is. The J.S. Court applied the *Tinker* and *Fraser* cases to an incident that shared little similarity. Even the Court conceded that “However, even after this threshold consideration of the location of the speech is established, the type of speech, the unique setting and manner in which the speech was circulated, and the personal nature of the speech make it difficult to apply any one of the three United States Supreme Court cases above.[referring to *Tinker*, *Fraser*, and *Hazelwood*].”⁶⁴

⁶³ 569 Pa. 638 at 673 (2002).

⁶⁴ 569 Pa. 638 at 668 (2002).

First of all, the Court asserts that the speech is on-site speech. Although still a point of contention, even if we are to allow for this fact, the J.S. case is distinct from both *Tinker* and *Fraser*. The speech on the “Teachers Sux” Web site may have been similar in the vulgarity of the speech in *Fraser*, it was in no way given on-campus at a political campaign or school-sponsored activity. The speech at hand required a viewer to “affirmatively access” the Web site and then discussion about the Web site found its way back into the school.

Even after reflecting on the divergence of *J.S.* from *Fraser*, the Court then applied *Tinker* which is also not analogous to the case at hand. The Court even notes itself, “Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media Web site, accessible to fellow students, teachers, and the world.”⁶⁵ The thought of applying a case which dealt with passive resistance political speech in the seventies seems quite insufficient in a case dealing with an aggressive personal attack via the Internet. Is the *Tinker* ruling pliable enough to withstand the complexity of communication and expression that are born from technological advancement? Is it not the duty of the Court to interpret old standards, and set new precedents which reflect the changes in our society? Although *Fraser*, *Tinker*, and *Hazelwood* have provided building blocks for cases involving student speech, they are reduced to just that, building blocks which lack stability when the weight of newer cases is applied to them.

⁶⁵569 Pa. 638 at 664 (2002).

With each new case, the Court must revisit the standard, yet re-craft it with novel distinctions to pertain to fresh cases. Each case challenges the court to maintain a balance between the rights of student's free expression and the authoritative role duty of school officials to maintain an equitable learning environment. The Supreme Court was careful not to award too much power to the schools, yet it does acknowledge that due to the school board's role as decision makers: it is the primary place for decisions as to the appropriateness of speech, not the federal courts.⁶⁶

Student Speech in the Cyber Age

As we saw in *Tinker* and *Fraser*, speech that is political in nature, and does not cause significant disruption during the academic school day certainly deserves protection under the First Amendment. Yet, with new lines of communications, particularly the Internet, student expression is taking on new shapes after the school day is over and lacking affiliation with the school. Due to the pervasiveness of school violence, officials cannot be certain of a student's capabilities to hurt their fellow peers or teachers. Student speech is no longer simply confined to the time when the bell rings at the start of classes until dismissal in the afternoon. Courts are encountering instances where student speech has gross effects on the school community despite the conditions under which the speech originated.

As displayed by *J.S. v. Bethlehem Area School District*, although some speech may not constitute a "true threat", the Court can rule in favor of the school district who

⁶⁶ 484 U.S. 260 at 267 (1988).

took disciplinary action against student offenders. Obviously the larger issue that must be addressed is the implications that certain speech, regardless of its technical nature or place of origin, has on the school community. Though some offensive speech can be tolerated in the “real world,” the public school environment serves as a unique setting for speech. Many factors including the maturity of the students, the closeness of community, and duty of the faculty as educators, makes a school significantly different from the “real world” schools require specific standards of speech that may seem oppressive or unconstitutional at first glance, but are ultimately protecting the freedom of the community members to live and learn in a safe, unthreatening environment.

With further discussion, it will become clear that prior cases have set precedents and are considered, yet are insufficient when assessing more modern forms of student. Our court system often looks to the milestone cases of *Tinker*, *Fraser*, and *Hazelwood* to extrapolate and apply precedents when ruling current student speech cases. Are these cases really malleable to the current cases at hand? Unfortunately, the newly developed intersection of free speech, the Internet, and public schools has raised serious questions involving First Amendment rights of students.

Particularly in the wake of catastrophic school shootings such as Columbine, and more recently Virginia Tech, school officials are taking a more diligent approach in combating speech that menaces individuals in their school systems. To complicate matters, the prevalent use of the Internet by school children has raised new difficulties regarding the protection of speech that is not directly affiliated with the school, but can have extreme effects on the school community. Does a student have the right to post a

Web site which threatens the reputation, well being, or even life of another individual in the school? As we move into an age where communication becomes more instantaneous and farther reaching, the extensions of the First Amendment will continuously be called into question. Courts have begun to see an influx of cases involving student speech and the Internet, and proceeding with great caution as they are quite unprecedented.

In the remainder of this piece, a careful analysis of the *Tinker* line will be undertaken in order to illustrate how it has provided a foundation for so many other cases of student speech in the past fifty years. The possible viability of *Tinker* is critiqued as more recent cases are significantly diverging from *Tinker* mold. Courts have stretched the standards of *Tinker* in ways that are not entirely appropriate given the novelty of the circumstances. The matrix of *Tinker* may suffice in some cases, but as we look to the future with more students using homepages, email, instant message and Youtube to communicate their ideas, *Tinker's* calculus cannot be as easily applied. In the second chapter, an investigation of *Tinker's* shortcomings will be undertaken. These limitations will require an act of balancing on the part of the courts in order to maintain security among school communities, while simultaneously promoting the free exchange of ideas among students. Given the special setting of schools, courts are challenged to not only consider the First Amendment rights of students but also take into consideration the context and impact of the speech on the community. The final chapter of this work will seek to establish a new test of consideration which can be applied in future student speech cases.

CHAPTER 2: THE INADEQUACIES OF THE *TINKER* DECISION

The case of *J.S.* reveals the difficulties encountered by the court as it attempts to apply past precedents to a more complicated multi-media student speech case. The majority in *J.S.* concedes in its opinion, “Unfortunately, the United States Supreme Court has not revisited this area [student speech] for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech.”⁶⁷

As we have established through *Hazelwood*, First Amendment rights can not be extended to students in public schools unequivocally. In the “real world,” outside of schools, much speech including that which offends others is tolerated due to the nature of political discourse. Our nation rests on the fundamental democratic notion that citizens have the right and almost the duty to question our government’s policies while expressing their own opinions. This idea gives rise to the foundation of the First Amendment, as it promotes the freedom of expression. Under the endorsement of political discourse the student’s hedged their defense in *Tinker v. Des Moines*.

Although *Tinker* is the principal case for student speech, its viability may be deficient in our modern era. In this chapter, three shortcomings of the application of *Tinker* to modern cases will be addressed. To begin, the *Tinker* case appears quite romantic in comparison to the cases that courts are currently addressing. *Tinker* dealt

⁶⁷ *J.S. v. Bethlehem Area School District*, 569 Pa. 638 at 665 (Pa., 2002).

with a passive resistance movement to the Vietnam War in the sixties. Our school systems today are facing more instances of violence and hate crimes which underscore the need for courts to recognize the ominous backdrop of student speech cases. Additionally, *Tinker* was designed to address “in school” speech, yet recent courts have attempted to stretch the *Tinker* standards to apply them to speech that has taken place off school premises. Again, *Tinker’s* applicability may fall short when addressing student speech that does not specifically happen during the school day. Finally, the court in *Tinker* and *Fraser* specifically focused on the *speaker’s* First Amendment rights. Consequently, when assessing new cases, both district and Supreme courts have similarly focused on the rights of the speaker. This approach tends to neglect the rights of individuals in the community who are adversely affected by the speech. A strictly speaker focused ruling may undermine justice and be detrimental to those in the community.

A Romantic View of Education

As asserted by the *Tinker* court, “the problem posed by the present case does not relate to the regulation of the length of skirts, or the type of clothing, to hair style, or deportment... It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to “pure speech.”⁶⁸ The arm band demonstration is considered pure speech due to its political nature. The court explicitly states that this is the type of speech that the First

⁶⁸ *Tinker v. Des Moines*, 393 U.S. 503 at 507-508 (U.S., 1969).

Amendment was set up to protect in order to ensure that our citizens maintain the freedom and strength to dispute majority opinions. Similarly, attention is called to the unique environment of the schools, which serves to foster the growth of young minds through inquisition and discussion. Mr. Justice Brennan is quoted as explaining, “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁶⁹ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”⁷⁰ After underscoring the unique environment of schools, the Court describes the quite tranquil conditions under which the *Tinker* speech was pursued. It notes, “These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide.”⁷¹ Clearly these students were displaying a passive resistant message which did not interfere with the daily activity at the Des Moines, Iowa school. Additionally, *Tinker* was decided at the end of the sixties which has been recognized for its youth radical movements, whose behavior and opinions ran counter to the majority of society. *Tinker* involves political speech set in a time where authority was constantly in question and new cultures were emerging. The Court undoubtedly wanted to preserve this manifestation of expression, especially in the classrooms, which were considered a cherished “marketplace of ideas.” This case clearly

⁶⁹ *Shelton v. Tucker*, 364 U.S. 479 at 487 (1960).

⁷⁰ 393 U.S. 503 at 512, citing *Keyishian v. Board of Regents*, 385 U.S. 589 at 603 (1967).

⁷¹ 393 U.S. 503 at 514 (1969).

highlights the school as a forum where tolerance of controversial speech should be paramount as long as it does not cause a disruption in schools. Although our schools today are no doubt trying to foster a similarly tolerant environment, unfortunately the serenity of *Tinker* is often absent from today's public school.

In the wake of rising school violence in the past decade, our schools' role as guardians and protectors of our society's youth is mounting. Many of our citizens would agree that values that "support a commitment to truthfulness, a respect for authority, a concern for others, a sense of fairness, and a dedication to common decency" should be upheld.⁷² Yet, are we successfully promoting these values in the lives of our youth? A report in the spring of 1993 by the *Congressional Quarterly Researcher* describes the grave issue of civil obedience in many of our public schools. "In 1940 public school teachers named gum chewing, littering, breaking in line, violating dress codes, talking too loudly, and running in the halls as their students' major behavioral shortcomings. By 1990 the list of student conduct disorders had become considerably more [worrisome]. Teachers at the beginning of the 1990s [were concerned] about suicide, assault, robbery, rape, premature pregnancy, alcoholism, and drug abuse."⁷³ Schools are challenged to raise children who learn the values of moral decency and communal respect. Simultaneously, they are challenged to allow for the expression of controversial topics. But these challenges are demanding as school violence escalates. In a 2003 survey of high school students, 17.1% had carried a weapon to school during the thirty days

⁷² William Damon, "Moral Guidance for Today's Youth, In School and Out," in *Rights and the Common Good: The Communitarian Perspective*, Amitai Etzioni, 151-161. (New York: St. Martin's Press, 1995).

⁷³ Damon, 151.

preceding the survey.⁷⁴ Additionally, according to a survey done by the Education Statistical Services Institute, *Violence in U.S. Public Schools: 2000 School Survey on Crime and Safety*, 71% of public elementary and secondary schools experienced at least one violent incident during the 1999-2000 school years, according to school principals.⁷⁵

In 2003, the U.S. Secret Service and the U.S. Department of Education reported that, “to put the problem of targeted school-based attacks in context, from 1993 to 1997 the odds that a child in grades nine through twelve would be threatened or injured with a weapon in schools were 7 to 8 percent, or one in thirteen or fourteen.”⁷⁶ Furthermore, “in 1998, students in grades nine through twelve were the victims of 1.6 million thefts and 1.2 million nonfatal violent crimes, while in this same period sixty school-associated violent deaths were reported for this student population.”⁷⁷ Fortunately, the odds that a child would die in school by homicide or suicide were reported as no greater than 1 in a million.⁷⁸

Yet, in the wake of the Columbine massacre, school violence is seen through a new lens. On April 20, 1999, in Littleton, Colorado, two high school students, Eric Harris and Dylan Klebold, executed a shooting rampage on their peers and teachers at Columbine High School resulting in the death of twelve students and one teacher. Both boys subsequently committed suicide on school grounds. In the aftermath, investigators

⁷⁴ Jo Anne Grunbaum Ed.D. et al., *MMWR Surveillance Summaries 2003*, May 21;53(2):1-96, <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5302a1.htm> (accessed April 6, 2007).

⁷⁵ Amanda K. Miller, Education Statistical Services Institute, National Center for Education Statistics, “Violence in U.S. Public Schools: 2000 School Survey on Crime and Safety,” October 22, 2003, <http://nces.ed.gov/pubs2004/2004314.pdf> (accessed April 6, 2007).

⁷⁶ Bryan Vossekuil et al., “The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States ii, 3 & Appendix A (U.S. Secret Serv. & U.S. Dept. of Educ. May 2002) [http://www.secretservice.gov/usss/ntac/ssi final report.pdf](http://www.secretservice.gov/usss/ntac/ssi%20final%20report.pdf) (accessed April 6, 2007).

⁷⁷ Vossekuil.

⁷⁸ Vossekuil.

discovered warning signs of the boys' plot to kill as early as 1996 when Harris set up a Web site on America Online, which contained instructions on how to make explosives and death threats directed at students and teachers of Columbine High School.⁷⁹ Since this tragic occurrence, school officials are more cautiously tending to troubling messages whether they occur on or off school premises. There is a heightened awareness as to the violent capabilities of one disturbed child, and subsequent ramifications on the school.

In their consideration of student's rights of expression, modern courts are more sensitive to the conditions of increasing school violence. The passive resistance movement that the three teenagers engaged in as they placed black armbands over their sports coats is widely divergent from the aggressive speech that students are exercising via the Internet. Although the *Tinker* speech can be viewed as purely political, the student speech arising today has little to do with the government. Schools are all too frequently confronted by troubled teens who express their discontent with the school and its members using a wide array of media. Though these cases may include student speech, the complexity and danger of them go beyond the bounds of *Tinker*.

In 1969, when the Court addressed *Tinker*, it was considering speech that was akin to "pure speech" with the context of what many would agree to be a civilized political movement. Provided that the backdrop of *Tinker* was a community of well-mannered middle school and high school children who were courteously expressively their opposition to the Vietnam War. The simplicity of the context and nature of the speech in *Tinker* provided a clear path to a decision. The two-prong test can be applied

⁷⁹ "Columbine High School Massacre," Wikimedia Foundation, Inc.
http://en.wikipedia.org/wiki/Columbine_High_School_massacre (accessed April 11, 2007).

when confronted with similar situations. Unfortunately, the situations arising today are quite dissimilar. The assumption that student speech is passive aggressive and is not intended to impinge on the school day, like that in *Tinker*, ignores the abrasive truth of modern student speech. Given the rise in violence and animosity that exists in our schools, we must reconsider this idealistic notion that the *Tinker* standard assumes. The *Tinker* Court may have accurately assessed the speech at hand, yet the decision can neither account for nor extend to all of the student expressions of today. Although an effort to preserve the marketplace of ideas must continue, we do not have the luxury of treating schools solely as a marketplace of ideas during this time of heightened violence. In an unequivocal application of *Tinker*, the courts may err in their judgment due to a clear disparity between the romantic, tranquil view of public schools through *Tinker* and the disturbing facts of modern day affairs. The Court must confront contemporary cases with a critical eye and focus on approach that balances the free expression of students with the reality of today's school environment.

A Schoolhouse without Gates

Lower courts have also attempted to extend *Tinker* to address speech that does not occur on-campus, yet impinges on matters within the school day. Since the Supreme Court ruling of 1969, there has been no ruling which clearly defines the rights of student expression when it takes place outside the school day. Consequently, the rulings across our nation have been inconsistent and speculative regarding student speech off-campus. The test derived in *Tinker* was established in the context of that case, which was

exclusively on-campus. *Tinker*, and even later, *Fraser* and *Hazelwood*, do not address the issue of student speech that originates off-campus. In an effort to cope with new challenges, lower courts have applied *Tinker*, even in cases where the origin of the speech was off-campus. Many courts are making the assumption that if speech inflicts on the school day in any way, then it has become “on-campus,” thus making it appropriate to apply the *Tinker* standard. This leap that the lower courts are taking is in an attempt to reconcile the case of *Tinker* with cases today, which share little similarity. As student expression is more frequently documented on the Internet, outside of the school day and without school resources, the parallel to past student speeches becomes harder to identify and calls for a clarification of the extent to which schools can regulate this type of speech.

A look at a few recent cases involving student speech that is “off-campus” will illustrate the inconsistencies in lower court rulings. The line of cases involving off-campus speech began in 1979 with *Thomas v. Board of Education, Granville Central School District* when five high school students were suspended for publishing and distributing an off-campus magazine. School officials claimed that the magazine contained “morally offensive, indecent, and obscene” material.⁸⁰ The United States Court of Appeals for the Second Circuit overturned the suspensions, finding that the school had exceeded its authority in disciplining the students for what amounted to off-campus speech.⁸¹ The court, acknowledging that school officials may only punish speech on school property, held that a student is “free to speak his mind when the school day

⁸⁰ *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979).

⁸¹ 607 F.2d 1043 (1979).

ends.”⁸² Clearly, the courts are still grappling with the limits of schools’ authority to punish off-campus expression. This lower court was careful to withhold school’s command over off-campus speech unless it significantly disrupts campus activities or it is linked to a campus sponsored event.

In contrast to the *Thomas* ruling, some lower courts, while still applying *Tinker*, have sided in favor of the school by finding that the speech has a disruptive effect on-campus. For example, in *Boucher v. School Board of the School District of Greenfield*, the Seventh Circuit vacated a temporary injunction in favor of a student who had been expelled for writing an article in an underground newspaper instructing readers how to hack in to the school computers.⁸³ Although the author did not use any school resources to create the article, nor was the paper distributed on-campus, the court found that the school was justified in its expulsion of the student. The school was able to display a reasonable forecast of disruption on school premises from the speech thereby justifying its disciplinary action.⁸⁴ This case dealt with speech that clearly originated outside of school, yet the court applied the *Tinker* analysis.

In a more recent case, one district judge ruled in favor of a student who accused his high school of violating his First Amendment rights. In December 1998, Brandon Beussink, a junior at Woodland High School, posted a webpage from his home computer containing vulgar and crude language criticizing his high school in Missouri.⁸⁵ Beussink created the Web site from his home computer, not using school resources, and not during

⁸² 607 F.2d 1043 at 1052 (1979).

⁸³ *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821 (7th Circ. 1998).

⁸⁴ 134 F.3d 821 at 822-23 (1998).

⁸⁵ *Brandon Beussink, v. Woodland R-IV School District* 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

school hours. The personal homepage invited viewers to contact school officials to communicate their opinions regarding the high school. Additionally, a hyperlink to the school's own homepage was included on Beussink's webpage. According to the court, "Beussink testified that he did not intend the homepage to be accessed or viewed at Woodland High School. He just wanted to voice his opinion."⁸⁶ On February 17, 1998, a friend of Beussink's, Amanda Brown, in an act of retaliation for a previous fight, showed Beussink's webpage to the high school computer teacher, Ms. Ferrell.⁸⁷ After viewing this Web site and becoming upset, Ms. Ferrell contacted the principal of the school, Mr. Yancy Poorman. Upon seeing the Web site, the principal immediately decided to take disciplinary action against Beussink, although no disturbance in the classrooms had been indicated. As noted in the case, "Principal Poorman made the decision to discipline Beussink before he knew whether any other students had seen or even had knowledge of the homepage."⁸⁸ No evidence of disruption appeared later in the day as a few students viewed the Web site throughout the day.

U.S. District Court Judge Rodney Sippel did not explicitly state that the speech considered was "off-campus" but he did note that the webpage was created using Beussink's home computer, at his home, not during the school day, and without the help of school resources.⁸⁹ Additionally, Beussink did not deliberately bring its contents on-campus (unlike in *J.S. v. Bethel*). Even despite the evidence that this speech was not on-campus, the court went on to apply the disruption standard put forth in *Tinker*, which

⁸⁶ 30 F. Supp. 2d 1175 at 1177 (1998).

⁸⁷ 30 F. Supp. 2d 1175 at 1177 (1998).

⁸⁸ 30 F. Supp. 2d 1175 at 1178 (1998).

⁸⁹ 30 F. Supp. 2d 1175 at 1179 (1998).

was designed to specifically address on-campus speech. William Bird, a J.D. candidate at University of Arkansas at Little Rock, emphasizes the lack of attention to the “on” versus “off-campus” speech prerequisite and notes, “Despite this finding, the court, *with little explanation*, applied the Tinker standard.”⁹⁰ Judge Sippel concluded that the Web site did not substantially interfere with school discipline and therefore found that the school had violated Beussink’s First Amendment rights. In this case, the off-campus speech was treated as though it was on-campus, allowing for an application of the *Tinker* standard of discipline. This ruling runs counter to that of *J.S.*, although they both include Web sites created by students off-campus.

Just recently, in March 2007, three high school students from Indiana were awarded a settlement of \$69,000 from their school district after winning a case asserting their First Amendment rights were violated.⁹¹ The three students, Charlie Ours, Issac Imel and Cody Overbay were expelled after creating a movie titled the “Teddy Bear Master,” where students mocked a character with the same last name as a seventh grade teacher according to the *Indianapolis Star*.⁹² In the movie, stuffed animals are ordered to kill this character due to a prior embarrassment. Attorneys for the school district contended that the film was a threat to the teacher and disrupted school activities.⁹³ On the other hand a lawyer for the American Civil Liberties Union, Jackie Seuss, commented

⁹⁰ William Bird, “Constitutional Law—True Threat Doctrine and Public School Speech—An Expansive View of a School’s Authority to Discipline Allegedly Threatening Student Speech Arising Off-campus. *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002).” 26 U. Ark. Little Rock L. Rev. 111. Fall, 2003.

⁹¹ Jared Taylor, “Students receive settlement after off-campus movie got them expelled: Video featured teddy bear killing teacher,” Student Press Law Center, <http://www.splc.org/newsflash.asp?id=1492&year=> (accessed April 5, 2007).

⁹² Taylor.

⁹³ Taylor.

that it is important to defend free expression rights.⁹⁴ In December 2006, a district court sided in favor of the students and allowed the students to return to school. Following this injunction, the school district agreed to the settlement on March 21, 2007.

In a similar case, involving off-campus speech, an Indianapolis Court of Appeals recently ruled that a juvenile girl's First Amendment rights were violated by school officials when she was put on probation for comments she made on MySpace.com. The young girl criticized her school principal on the Internet. This speech was clearly not during school or sponsored by the school. The court found that the language constituted political speech and thereby deserved protection under the umbrella of the First Amendment. The court did not even seem to consider the disruption standard of *Tinker*.

On the other hand, in *J.S. v. Bethlehem Area School District* the court considered the location of the speech as well as the disruption standard put forth by *Tinker*. J.S. and his parents contend that the speech is purely off-campus yet the school officials contend that the speech falls under on-campus standards, and is thus subject to Supreme Court case law. Due to the facts that J.S. accessed the Web site on-campus and other faculty members and school administrators similarly opened the page on-campus computers, the speech was considered on-campus. The court applied *Tinker* and *Fraser* as it held that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."⁹⁵ The *J.S.* court had to establish clearly the speech was considered on-campus before carefully applying the precedent. This point of contention, whether the

⁹⁴ Taylor.

⁹⁵ *J.S. v. Bethlehem Area School District*, 569 Pa. 683 at 668 (Pa., 2002).

speech constitutes on or off-campus, is one area where *Tinker's* application may be limited. Further consideration of these more convoluted circumstances will expose the confines of *Tinker*.

As exhibited by these cases, the courts vary in their application of *Tinker* in cases involving off-campus speech. There is still a lack of clarity as to how First Amendment rights should be extended in the protection of off-campus student speech. Many lower courts are wary of the ramifications that will ensue if schools start controlling student off-campus expression. In *O'Brien v. Westlake City Schools Board of Education*⁹⁶, U.S. District Court Judge John M. Manos admitted that his case involving a student's web page criticizing his band teacher would have been very different had the student "hurled obscenities at his teacher face-to-face on school grounds, in front of other students."⁹⁷ Judge Manos also recognized that "the involvement by the school in punishing plaintiff for posting an Internet Web site critical of defendant...raises the ugly specter of Big Brother."⁹⁸ The plaintiff's attorneys offer a compelling argument asking, "Is a student not permitted to sit in a coffee shop with friends and tell other students what he thinks of a particular teacher, for fear that if someone overhears and gets word back to the teacher that the student was 'disrespecting' that teacher, that he will be suspended?"⁹⁹

These cases involving off-campus speech, whether it is on or off the Internet, are illustrating the potential problems of applying the *Tinker* standard in such cases. As

⁹⁶ *O'Brien v. Westlake City School. Board of Education*, No. 1:98CV 647 (E.D. Ohio 1998).

⁹⁷ Complaint at 5, , No. 1:98CV 647 (1998).

⁹⁸ No. 1:98CV 647 Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order at 17 (1998).

⁹⁹ No. 1:98CV647 Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order at 17 (1998).

some courts so easily take *Tinker* outside of the school yards, others are quick to keep it within school grounds fearing its extension would impinge heavily on the First Amendment rights of students. Unfortunately, prior case law in *Tinker*, does not adequately address the issue of off-campus speech, thus leaving lower courts to their own discretion. According to the logic of *Tinker*, schools only have jurisdiction over speech that exclusively occurs on-campus. Regardless of whether speech that occurs off-campus can significantly hinder the affairs at school, under *Tinker*, school officials are not awarded the right to regulate speech that does not happen under their roof. This formula becomes particularly problematic as we encounter cases which involve speech that originated outside the school day, for example on a home computer, yet notably interferes and negatively permeates the school environment. The *Tinker* standard was established to adequately address speech that is on the premises of school, but its test becomes bleak in the face of speech that arises off-campus. Although courts must not allow for school's to take on a Big Brother persona, as Judge Manos warns, our courts do need to recognize the implications that off-campus speech can have on the school community and thus allocate some jurisdiction to the schools in this area. Therefore, given this inadequate, exclusively on-site test of *Tinker*, a new approach needs to be developed to assess the ubiquitous concerns of off-site student speech.

A Focus on the Speaker

The *Tinker* decision exposes another inadequacy as it fails to address the implications of student speech on the greater community. In an attempt to protect the

rights of the speakers, the *Tinker* Court may have wrongfully ignored the rights of members in the community who were harmed either physically or mentally from the speech. The Court only briefly considers the effects that the armband demonstration had on certain members of the community. Additionally, the Court simply argued that the political speech movement did not cause a significant disruption to the school day and therefore was protected under the students' First Amendment rights. The passive protest displayed by the young high school students could arguably have been one of the "great issues" during the late sixties. At that time, the United States was engaged in the controversial Vietnam War, which many Americans, both young and old opposed. The political expression by the *Tinker* defendants against the U.S. government seems to precisely emulate the type of speech which the First Amendment was intended to protect. From its inception, the First Amendment established that the freedom to dissent and challenge the government was a necessary pillar of democracy. The Court notes that although any speech dissenting from the majority opinion has the potential to cause disruption, we must allow space for this in order to preserve our nation's democratic foundation. As stated in *Tinker*, "Our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."¹⁰⁰ Given the nature of the passive political speech in question, the *Tinker* case quite easily lent itself to the courts decision. The

¹⁰⁰ 393 U.S. 503 at 508-509 (1969).

court in *Tinker* exclusively focused on the protection of the speech under the First Amendment and gracefully glazed over any effects that the speech imposed on the community. The consideration of disruption on the school grounds was exclusively considered and significantly evaded the implications on community members. Only in a footnote, does the court concede the seemingly insignificant fear of disorder involving other members of the community as possibly, “A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control. [Additionally] Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed.”¹⁰¹ The court concludes that the speech in *Tinker* did not significantly disrupt the normal affairs of the school day and the students had the right to engage in a political demonstration to show their opposition to the war in Vietnam. Under *Tinker*, speech is protected up until a point in time when it can be determined to cause or have the potential to cause a material disruption in the school day. The two-prong test developed in *Tinker* considers only whether the speech is protected under the Constitution and then whether or not it causes a disruption. Furthermore, the determination of “disruption” is quite speculative and is often at the discretion of the interpreter or the school. Justice Black points out in his dissent that the *Tinker* protest may have in fact caused a disruption.

In his dissent from the majority, Justice Black was convinced that the armband demonstration actually did exactly what the elected school officials and principals

¹⁰¹ 393 U.S. 503 at 509, n3 (1969).

foresaw it would, that is, it “took the students’ minds off their class work and diverted them to thoughts about the highly emotional subject of the Vietnam War.”¹⁰² He concedes that although no obscene remarks or boisterous and loud disorder occurred from the demonstration, evidence shows significant disruption on the school grounds. Justice Black stresses that “if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.”¹⁰³ In this warning, Justice Black recommends that the majority consider the greater community and the risks that this speech may impose on it.

Further in his dissent Justice Black reveals the possible negative implications that *Tinker’s* ruling would have on the greater school community and our nation’s public school systems. Justice Black states, “The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace.”¹⁰⁴ He goes on to assert that school discipline, along with parental involvement, is integral in the raising of children to be “good citizens.”¹⁰⁵ Noting that the students in *Tinker* crisply defied the orders of school officials who were attempting to maintain peace and ensure an orderly environment for pupils to learn in, Justice Black worries that the courts decision will solicit future public school students to engage in pickets, acts of civil disobedience, and

¹⁰² 393 U.S. 503 at 518 (1969).

¹⁰³ 393 U.S. 503 at 518 (1969).

¹⁰⁴ 393 U.S. 503 at 525 (1969).

¹⁰⁵ 393 U.S. 503 at 525 (1969).

protests against school authority. Justice Black goes as far as to say, “One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders.”¹⁰⁶ He warns that by siding in the students’ favor, the schools, teachers, and other pupils will be subjected to the “whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”¹⁰⁷ Justice Black firmly dissents reiterating that the Federal Constitution does in no way advocate surrendering the rule of the American public school system solely to these students.

In his dissent, Justice Black begins to address the implications that certain speech can have on the greater community of public schools. This is an issue that, as noted above was only briefly discussed in a footnote of the *Tinker* case. In the active protection and focus on the First Amendment rights of the speakers, John and Mary Beth Tinker and Christopher Eckhardt, the court ignores the larger implications that this speech may have on the community. Students attending the school could have potentially had brothers or close friends fighting in the Vietnam War, which could have been adversely effected by the armband demonstration. The discussions and conversations in response to the demonstration did most likely deter from learning in the classroom, yet the court found that any disruption was not significant enough to invalidate protection under the First Amendment. This ruling may have been sufficient for the *Tinker* case, conceding that no considerable damage to the community was reported, but when dealing with speech that expressly targets a specific group or individual in the community, courts should proceed

¹⁰⁶ 393 U.S. 503 at 525 (1969).

¹⁰⁷ 393 U.S. 503 at 525 (1969).

with caution before extending First Amendment rights to the speaker. The speech of a student cannot always warrant protection given the possible damages and injuries that could be incurred by the greater community. Blindly privileging the speaker will lead to a society that hastily accepts and stifles the rights of individuals who are equally deserving of protection.

Although some courts cite *Tinker* asserting that when speech is not specifically directed at an individual, creating a hostile environment, the school cannot intervene¹⁰⁸, other courts are declaring that student speech, even that which does not target one individual, can have greater implications on the larger community which may halt the protection of the speech.

A recent case, *Harper v. Poway Unified School District*, involving a student's expression against homosexuality highlights the court's shift from narrowly focusing on the speaker's rights to more broadly, those of the community. On April 21, 2004, Tyler Chase Harper wore a T-shirt to school on which "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," was handwritten on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" was handwritten on the back.¹⁰⁹ Harper's wearing of the shirt coincided with the "Day of Silence" at the school in observance and tolerance of sexual orientation. Participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians. No evidence showed that school officials saw this Harper's t-shirt on April 21st.¹¹⁰ Yet, on April 22, 2004, Harper

¹⁰⁸ *Saxe v. State Coll. Area School District*, 240 F.3d 200 at 214 (3d Cir. 2001).

¹⁰⁹ *Harper v. Poway Unified School District*, 445 F. 3d 1166 at 1171(2005).

¹¹⁰ 445 F. 3d 1166 at 1171(2005).

wore the same T-shirt to school, except that the front of the shirt read “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED,” while the back retained the same message. Due to a prior history of confrontation surrounding homosexuality issues on-campus, the school principal asked him to remove his shirt due to its “inflammatory” nature and since it “created a negative and hostile working environment for others.”

Harper brought suit against the school district under the defense that the school violated his First Amendment rights to freedom of speech and free exercise and establishment of religion. The Court concluded that “Harper’s wearing of his T-shirt ‘collides with the rights of other students’ in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have the right to be free from such attacks while on school campuses.”¹¹¹ Citing *Tinker*, the court notes that students have the right to “be secure and to be let alone”¹¹² and “being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.”¹¹³ In this case, the court steers away from the focus on rights of the speaker and begins to address the rights of the community members and those who may be harmed by such anti-gay speech. The court explicitly states, “The School had a valid and lawful basis for restricting Harper’s wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian

¹¹¹ 393 U.S. 503 at 508 (1969).

¹¹² 393 U.S. 503 at 508 (1969).

¹¹³ 445 F. 3d 1166 at 1178 (2005).

students and interfered with their right to learn.”¹¹⁴ After this court was brought to the Ninth Circuit Court of Appeals, a 2-1 decision held that the school district was justified in banning Harper for wearing his T-shirt. Judge Alex Kozinski issued the dissenting opinion, asserting that school officials were wrong to censor Harper because there was no evidence gay students were harmed by his wearing of the T-shirt. This argument seems to have little weight, considering the majority already explicitly addressed the lack of “evidence.” The majority wrote, “it is simply not a novel concept, however, that such attacks on young minority students can be harmful to their self-esteem and to their ability to learn. Citing *Brown v. Board of Education*, the court notes that the “Supreme Court recognized that ‘a sense of inferiority affects the motivation of a child to learn.’”¹¹⁵ The majority also notes that “if a school permitted its students to wear shirts reading, “Negroes: Go Back to Africa,” no one would doubt that the message would be harmful to young black students.”¹¹⁶ It draws a parallel between this hypothetical situation and Harper’s T-shirt. In the school setting, although concrete evidence of the effect of Harper’s speech is not mentioned, the majority refers to much literature asserts the harmful effects of anti-gay harassment and discrimination. Judge Kozinski is essentially proposing that schools must wait until unequivocal evidence is present before banning speech that could be destructive and humiliating.

On another note, Kozinski asserts, “I have considerable difficulty with giving school authorities the power to decide that only one side of controversial topic may be

¹¹⁴ 445 F. 3d 1166 at 1180 (2005).

¹¹⁵ 347 U.S. at 494.

¹¹⁶ 445 F. 3d 1166 at 1180 (2005).

discussed in the school environment because the opposing point of view is too extreme or demeaning.”¹¹⁷ On the contrary, the majority was not suggesting that the Christian perspective on homosexuality be stifled, but rather in the context of the school and the vulnerability of some students, the manner in which Harper attempted to “discuss” his viewpoint significantly encroached on the rights of others in the community.

Additionally, it is important to note that according to *Hazelwood*, “A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”¹¹⁸ Schools are encouraged to promote discussion in a civil manner and similarly the court notes, “they may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.”¹¹⁹

Another student speech case which illustrates the choice of the court to focus on the rights of the speaker rather than the potential harmful effects on members in the community is *Doe v. Pulaski County Special School District*.¹²⁰ In this case, a high school student wrote a composition at home about his ex-girlfriend in which, “in the space of four handwritten pages, he used the F-word no fewer than ninety times, threatened four different times to kill his former girlfriend by lying in wait under her bed with a knife, and three times proclaimed that he would rape and sodomize her.”¹²¹ After a mutual friend gave the letter to the ex-girlfriend, she brought it to school authorities and

¹¹⁷ 445 F. 3d 1166 at 1201(2005).

¹¹⁸ *Hazelwood Sch. Dist. B. Kuhlmeier*, 484 U.S. 260 at 266 (1988).

¹¹⁹ 445 F. 3d 1166 at 1185 (2005).

¹²⁰ *Doe v. Pulaski County Special School District*, 306 F. 3d 616 (8th Cir. 2002).

¹²¹ 306 F. 3d 616 at 615-616 (2002).

the school subsequently expelled the writer for the entire year. The student contended that the school district violated his First Amendment rights.

After considering whether or not the speech constituted a “true threat” the trial court and the Eighth Circuit agreed that since he did not intend to ever give the letter to the girl in question, the speech was not a true threat. Although the speaker did not intend to give his ex-girlfriend the letter, on receipt of it, she was both physically and emotionally harmed. She did not attend school for fear of encountering him. She slept with the lights on and checked under her bed every night fearing he would kill her. This young girl was significantly precluded from her right to a safe public school education. In response to this case, the court should have more closely looked at the effects that this type of sodomizing speech can have on this young girl, and females in general. Although the speech may not have been a true threat, it still should be punishable after considering its violation of other’s rights, namely the speaker’s ex-girlfriend. If the court had approached this case through a more communitarian lens, as implemented in *Harper*, the lower court’s decision may have been reversed and the rights of the young female would not have been neglected.

In both of the aforementioned cases, *Harper* and *Doe*, the speech had the potential to significantly impinge on other students rights to learn and be “left alone.” Although *Tinker’s* test may have been sufficient for the simple case in Iowa, the speech that is coming from our students unfortunately has more considerable effects on the learning environment. An application of *Tinker* narrowly applies a disruption standard to conclude whether certain speech is permissible on-campus or not. Under *Tinker*, speech

is protected up to the point where it becomes disruptive. The focus is on the speech and its disturbing impact. This type of approach rules out the possibility that certain speech has gross consequences on other students and the school environment even if it does not impose an obvious disruption. Clearly the anti-homosexual T-shirts in *Harper* and the sexually explicit and sodomizing speech in *Doe* may not have caused a physical uproar from either gay students or the female student, but the consequences on these victims were great. Moreover, speech that targets individuals or specific groups in a threatening or hateful manner may intimidate the victims and hinder them from speaking in opposition, further precluding a disruption. A disruption standard that relies on the physicality will ignore the more subtle, yet just as devastating effects certain speech can have on community members.

After critiquing three essential components of the *Tinker* decision, the inadequacies of its application in modern cases are revealed. Although the *Tinker* court may have accurately protected the political demonstration of black armbands in the sixties, the standard set forth becomes problematic with the rise in school violence and the advent of the Internet. Current cases are considerably more convoluted and cannot easily fit into the *Tinker* formula. As school officials attempt to thwart off violence, they are exercising their power over student speech more readily than ever before. To many school officials and parents chagrin, our nations public schools are far from safe havens. The political demonstration of the sixties is vastly different from the hate speech, threatening speech, and violent speech that plague our schools today. Moreover, the perpetual school violence raises heightened awareness of speech that could critically

impact the community. It would be a drastic understatement to suggest that schools are “not quite the same” as they used to be. A frightening phenomenon of troubled children and adolescents reeking havoc on their peers has given rise to a perturbing ambience that student speech must realistically be considered in the context of.

Additionally, the Internet has become a provocative tool that students use to express their opinions which may both directly and indirectly affect members of the community. Yet, as articulated previously, speech that occurs outside of school grounds or hours, a characteristic of most student Internet speech, has historically been granted more protection under the First Amendment. Unfortunately speech that is taking place off-site is significantly filtering into the school day and therefore requires more scrupulous consideration. *Tinker* only addressed student speech that occurred within the school house gates. *Hazelwood* considered speech that was after school hours, but still co-curricular speech. Internet speech by a student which so often referred to as student speech falls under neither of these two categories. The decisions in *Tinker* and *Hazelwood* are rightfully deserving of merit, but the bound from these Supreme Court cases to the more convoluted cases has become increasingly larger. How can the standards set forth by previous cases survive the changing nature of our public schools and student speech?

The final call to *Tinker's* inadequacies considered the strictly speaker focused and disruption analysis of the speech. Given the community that exists in public schools, courts must head the effects that certain speech has on this unique population. The more we focus on the rights of the speaker, the more we potentially preclude the rights of other

individuals who may be adversely affected by the speaker's expression. In order to accurately assess the protection of speech under the First Amendment, all of the implications of the speech must be assessed, particularly in the school setting. *Tinker* cannot be contorted to accurately address the issues facing our courts today. The final chapter will project a new way of looking at student speech, given the proposed inadequacies of a distorted application of *Tinker*.

CHAPTER 3: BEYOND THE SCHOOLHOUSE GATES

Now that the limitations of *Tinker* have been exposed, it becomes necessary to develop a new approach with which to survey student speech cases. Although the *Tinker* decision to protect student speech was adequate, given the nature, context, and period of the case, more modern issues have arisen which call for a new assessment of the First Amendment rights of student speech. In a noble attempt to preserve the democratic foundation of our nation, courts have held freedom of speech as a coveted right. Given that many of the cases in question are decided in favor of the student, a strong tendency to protect the rights of the individual has prevailed.

Additionally, courts are continuously applying the *Tinker* standard to student speeches unequivocally as it is revered as the paramount Supreme Court decision. Yet, the breath of *Tinker* is quite narrow and cannot be stretched to tackle the more complex cases of today. The standards set out in *Tinker* were developed under certain pretenses and require that the student speech be both on-campus and materially disruptive to sanction any discipline by school officials. This narrow approach is insufficient when reflecting on student speech in our modern cyber age. Moreover, the *Tinker* court gave little attention to the effects of the speech on the community members. On the contrary, a more communal view of the speech, allowing for all possible implications and competing interests as a result of the speech would be more appropriate given the unique characteristics of a school setting. In life outside of the schoolhouse gates, individuals are not significantly precluded in their freedom of speech, but many cases involving

freedom of speech have given significant attention to the context of the speech. It is imperative that although schools are an essential environment for discourse and a flourishing “market place of ideas” student speech must not be viewed as an end in itself. When student speech is unexamined and awarded full protection, the rights of certain community members are often overlooked.

As displayed by prior court decisions, when freedom of expression is considered in a school setting, the arena of permissible speech becomes much narrower. Given the maturity level of students attending public schools, certain speech can be quite inappropriate and harmful to their education. There must be some sort of filter for speech when dealing with a younger and more naïve audience. As sculptors of moral intellect and character, schools have a duty to encourage discourse, yet curb hateful, disparaging, or threatening speech. In *Frugis v. Bracigliano*,¹²² the New Jersey Supreme Court recognized that school officials have an affirmative duty to protect children: “No greater obligation is placed on school officials than to protect children in their charge from foreseeable danger, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm in its care.”¹²³ Given the unique environment of the school, a new theory must be developed to balance both the rights of the speaker with the rights of the community members.

¹²² *Frugis v. Bracigliano*, 177 N.J. 250 (2003).

¹²³ Jeanne LoCicero, “Preventing bullying while protecting free speech,” *The New Jersey Lawyer* Special Supplement; In Re: Trial Law; Vol. 15, Nov. 41, 22 (accessed October 16, 2006). (citing *Frugis v. Bracigliano*)

A Communitarian Perspective on Student Speech

The proposed scheme will employ a more communitarian perspective on student speech. An understanding of historical evolution of communitarian ideas with further highlight the breath of this new approach. Through much of American history, until the 1960s, rights were neglected, including those of women, minorities, and the disabled. However, communitarians have shown that during the next generation, rights were pushed to the point that the public interest and the moral culture were undermined.¹²⁴ As of the early 1990s, a counter-correction set in, which arguably went overboard in the opposite direction, especially in the wake of September 11, 2001.¹²⁵

America's rights-tilt, developed between 1960 and 1990, is gradually being corrected in response to communitarian urging. Society has been willing be more mindful of social responsibilities, the common good, and the moral culture in comparison to prior decades.¹²⁶ Communitarians assert that an exclusive focus on the rights of individuals ignores the realities of social existence and personal responsibility of individuals in a community. Communitarianism shifts the focus away from individuals and more on communities and societies. Central to the communitarian theory are the positive rights of individuals, specifically rights or guarantees to certain things. These types of rights may include, but are not limited to, public education, a safe and clean environment, affordable housing, a social safety network and even universal health care. Communitarians share a quest for the moral, legal, and intellectual criteria that balance

¹²⁴ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

¹²⁵ Amitai, Etzioni, *Implications of Select New Technologies for Individual Rights and Public Safety*, 15 *Harvard Journal of Law and Technology* 257 (2002).

¹²⁶ Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (1996).

concerns for our common good and for autonomy.¹²⁷ One such example of the communitarian position would be that in support of recycling. Although each individual has the right and autonomous freedom to litter and pollute the environment, the Communitarian position would harp on the moral responsibility that one has to the greater environment. Though there may not be an individual incentive for one person to recycle, the collective action by community members will promote a greater common good which will result in a safer, cleaner environment in the future.

Since the seventies, opponents of communitarians, called civil libertarians, have argued for and promoted individual rights, particularly free speech. Civil libertarians present the First Amendment as if it is semi-sacred, and any attempts to curb it as sacrilegious and outright offensive.¹²⁸ These critics of communitarians suggest that individual rights, especially the First Amendment, should trump all other considerations.¹²⁹ Yet, in the school environment, this mind-set can be extremely dangerous. Communitarians have warned against the moral implications of focusing on one's individual rights which then compromise the rights of the greater community. This warning should be particularly heeded when considering the hateful, threatening, and demeaning speech that can be detrimental to young adolescents. Communitarians assert that the victims of verbal abuse such as racism, sexism, and other slurs, cannot be ignored in attempts to uphold the First Amendment. Additionally, although Communitarians may

¹²⁷ A Communitarian green space between market and political rhetoric about environmental law, <http://www.lawnet.lk/docs/articles/international/HTML/BA58.html> (accessed May 3, 2007). citing Amitai Etzioni, *The Essential Communitarian Reader* xi (1998).

¹²⁸ Amitai Etzioni, "Symposium: Do Children Have the Same First Amendment Rights as Adults?: On Protecting Children from Speech," 79 *Chicago-Kent Law Review* 79 (2004), 40.

¹²⁹ Amitai Etzioni, 40.

propose a unique way of looking at speech, they are no less proponents of the First Amendment and that which it protects. The Communitarian perspective can provide some guidance in reconciling student speech cases of the past with those of today. The greater context and the implications of student speech on the community become crucial to the equation of balancing individual autonomy and a common good.

A judicious process needs to be undertaken which considers the broader audience of the speech, including students, faculty, parents, and ultimately a much larger community outside of just the school setting. As documented, students, especially those in high school, are at an age where defying authority often becomes “cool” and getting away with it is even “cooler.” Justice Black warned in his *Tinker* dissent that our schools are a place where school officials must command respect and order to ensure that our nation’s children are provided with a sound learning environment. Justice Black considers the slippery slope that the armband demonstration could provide in allowing students to run the schools, or as the saying goes to let “the idiots run the asylum.” Not only does a focus on the speaker’s rights often blur rights of members in the community, but it also potentially hinders our nation’s public schools from fulfilling their duties. A systematic examination of the specific speech through a series of questions will force our school administrators, legislators, and courts to approach student speech from a more Communitarian perspective. Some of the questions that should be addressed must be: “Was the speech directed at a specific group or individual?” “Would a reasonable person perceive the speech to be harmful to the community and or its members?” “Was there significant harm caused as a result of the speech?” “Will the protection of this speech

ignore the rights of others in the community to enjoy a peaceful education?” The answers to these questions must be carefully considered in order to fully understand the ramifications of the student speech. By approaching student speech with a more communal lens, courts will prevent exclusive protection of an individual’s rights in the school environment whose acts can have grave effects on the community as a whole. Given the web that intertwines students, teachers, faculty, parents and the greater community, ignoring these many facets of student speech would be insufficient and irresponsible.

It must be conceded that in proposing a more communal approach, student expression is not meant to be stifled unnecessarily. Instead, speech that is positively integrated into the school environment and may seem controversial cannot be struck down simply because the community may need to question its values, teachings, or actions. This only reinforces the necessity to look at the speech in the context of the communal environment. An important statement by the *Tinker* court still will hold considerable weight even given the communal argument. The *Tinker* court explicitly says that “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹³⁰ This stipulation should be adequately heeded to prevent school officials from making decisions based on viewpoint discrimination. In an attempt to encourage social enlightenment in schools, careful

¹³⁰ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 at 508 (U.S., 1969).

caution should be asserted to neither suppress nor punish speech that attempts to stir public discourse in a productive manner. The communitarian approach will in no way hinder the ability of schools to uphold the highly coveted “market place of ideas.”

Application of Communitarian Perspective

An application of the communitarian perspective to current cases becomes necessary in order to elucidate the value of it. In the following application, three different genres of student speech cases will be considered to highlight the versatility of this communitarian approach. The three genres that will be analyzed are hate speech, threatening speech, and “off-campus” speech.

Hate Speech

In order to provide a safe and equitable learning environment, school officials begin reprimanding students for derogatory comments at very young ages. Unfortunately, hate speech still occurs, maybe even more so in high schools when students try to establish a sense of security by degrading others. As guardians and caretakers, schools should be required to combat hate speech that could substantially impinge on a child’s character development. When the First Amendment was created, it was intended to encourage dialogue and questioning, but its purpose was hardly meant to protect hate speech. Although some tolerance for this type of speech is awarded protection outside of the school environment, there is no place for it in the school context. Schools should not be required to tolerate bigotry in name of the First Amendment. Regardless of whether the speech is directed at a minority or majority group, if the

message significantly degrades another student, the school officials should have the authority to ban it. A more communitarian approach will ensure that all groups are respected and the speech can be more accurately assessed.

Let us now consider a recent case that was quite similar to *Harper v. Poway Unified School District* in that it considers the protection of an anti-homosexual T-shirt worn during the school day. On April 17, 2007, a federal court denied a preliminary injunction request from two high school students wishing to wear T-shirts displaying the message, “Be happy, not gay,” in *Zamecnik v. Indian Prairie School District*.¹³¹ The students, Heidi Zamecnik and Alexander Nuxoll wanted to wear the T-shirts in opposition to the “Day of Silence” that was meant to observe the prejudices that homosexuals face. Zamecnik and Nuxoll argued that their shirts were in honor of the “Day of Truth” which is a nationwide silent protest against homosexuality. Additionally, they both attributed their protesting to their Christian beliefs. Although, the students claimed that the school suppressed their religious rights, the court did not find this to be substantially supported, “in light of the alternative forms of expression that will not be restricted.”¹³² These alternative forms of expression were, “messages positively expressing support for heterosexuality.”¹³³ The problem arises when the negative message can potentially be dangerous to other youth’s development. The message was clearly implying that homosexuals cannot be “happy” and in order to be happy, one must not be homosexual. This anti-message is quite different from a pro-message that

¹³¹ Erica Hudock, “Court rules students could not wear anti-gay T-shirt,” Student Press Law Center, April 20, 2007, <http://www.splc.org/newsflash.asp?id=1510&year=> (accessed May 2, 2007).

¹³² Hudock.

¹³³ Hudock.

may be awarded more tolerance. Attorney Jack Canna, representing the school district, noted that many community members were concerned about a ruling that would permit “problematic remarks” at school.¹³⁴ In response, Attorney Jonathan Scruggs of the Alliance Defense Fund, a Christian civil rights organization, said an appeal is being filed with the Seventh U.S. Circuit Court of Appeals. He also stated that “the school is attempting, in their words, to promote a community of tolerance, but when a message comes along that the school doesn’t like, it censors it. It has to protect speech in any case. You can’t suppress speech just because someone might find it offensive.”¹³⁵ Scruggs’ analysis is missing the point of this case entirely. His statement saying that schools should protect speech “in any case” can be particularly problematic and burn a path to bigotry, violence, and intolerance. The court recognizes the risk that accompanies this type of speech and therefore did not grant the preliminary injunction to allow the students to wear the T-shirts. In addition, if this case was considered through a communitarian lens, the fact that the speech did not cause the necessary disruption, does not exonerate the students and their expression. Regardless of whether a true disruption was caused from the speech, communitarianism calls attention to the common good, and cautions that protecting derogatory speech would undermine the community’s values and poison the learning environment. Although these two students are individuals with a certain level of freedom of expression, they are also individuals who are responsible for their speech which is detrimental to the greater community.

¹³⁴ Hudock.

¹³⁵ Hudock.

In this case, the focus was not exclusively on the speakers' First Amendment rights, but rather attention was given to the negative implications of the speech on the community. Additionally, although disruption was considered as a possible hazardous effect, the school and the court recognized that allowance of this type of speech could have harmfully affect the mental psyche of a homosexual child. In student speech cases, the disruption standard in *Tinker* should not be disregarded, yet, the court must also reasonably assess the severe damage to the self-esteem and self-worth that the speech could cause. In response to the anti-homosexual speech, the court in *Harper v. Poway Unified School District*, highlighted the importance of this necessary assessment. The *Harper* court noted that, "advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply 'unpleasant and' offensive' [but] it strikes at the very core of the young student's dignity and self-worth."¹³⁶

Additionally, the majority in *Harper* caution that using only the singular application of the disturbance standard, a school would be required to tolerate hate speech up until the targeted group responded physically to the speakers. Using explicit T-shirt examples stating, "Hitler Had the Right Idea" on one side and "Let's Finish the Job!" on the other, or "Hide Your Sisters – The Blacks Are Coming," the majority stated that, "Under the dissent's view, large numbers of majority students could wear such shirts to class on a daily basis, at least until the time minority members chose to fight back

¹³⁶ *Harper v. Poway Unified School District*, 455 F. 3d 1052 at 1053 (9th Cir., 2006).

physically and disrupt the school's normal educational process."¹³⁷ Clearly, this type of toleration would be detrimental to the learning environment of schools.

It is imperative to reiterate that regardless of whether the speech is targeted at minority or majority groups, if it significantly impinges on the safe, positive, and tolerating setting of the school it should not be granted protection under the First Amendment. Circuit Judge Gould's opinion in *Harper* highlights this idea as he so eloquently stated, "Hate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn, need not under Supreme Court decisions be given the full protection of the First Amendment in the context of the school environment, where administrators have a duty to protect students from physical or psychological harms."¹³⁸

Through the analysis of *Harper* and *Zamecnik*, a more communitarian theory will continue to promote tolerance and respect among students which will foster the growth of the population as a whole. It is clearly unnecessary to allow negative prejudices to prevail in the classroom, especially given the vulnerability of the students' self esteem and character. Although some may argue that children need to develop tough skin in preparation for the discrimination and prejudices of the "real world", a school has the responsibility to sculpt students into self-aware, respectful members of society. Condoning messages that attack another's character will significantly hinder this mission. Continuing the examination of student speech under a more communitarian lens, a look at cases involving threats will further identify the strengths of this approach.

¹³⁷ 455 F. 3d 1052 at 1053.

¹³⁸ 455 F. 3d 1052 at 1053-1054.

Threatening Speech

Another common case of student speech involves expressions to inflict physical harm on other students. As mentioned previously, one of the few forms of speech that does not receive protection under the First Amendment is that which is a “true threat.” Clearly, if a school can prove that the speech in question is a directed threat then discipline would be warranted. Unfortunately, due to the complexity and also ambiguity of the threats doctrine, it is often difficult to prove that speech is in fact a “true threat.” Consequently, should speech that is not necessarily a “true threat” be protected at all costs, regardless of the effects it has on the greater members of the community? Given the increasing violence in high schools across our nation, school officials are taking precautionary measures in order to prevent the occurrence of violence on their campuses.

Just recently a local Massachusetts high school began investigations after two lists of students, one of boys and one of girls, which had the words, “kill” “dismember” and “torture” (spelt torcher) after each name, were found in the school bathrooms.¹³⁹ At Central Catholic High School, a seventeen year old junior, Katie Koontz, is currently being charged with threatening to commit murder and bodily harm.¹⁴⁰ According to police, Koontz’s name was on the list of targeted girls, and she denied knowing anything about the lists. Additionally, a MySpace.com web page was found by students and parents displaying pictures of the students on the lists, more threats, and a poem threatening to kick or beat the girls saying “This isn’t school. This is life. Think it’s a

¹³⁹ Maria Cramer, “Threatening lists are found; Methuen teen faces charges: Friends describe her as well-liked,” *The Boston Globe*, sec. B, April 35, 2007.

¹⁴⁰ Cramer.

sick prank. Think Twice.”¹⁴¹ After being questioned, Koontz did admit to creating the MySpace.com web page under the tag, “cchs killa” but she denied having posted the pictures and poems. She claimed that she sent the link of the page to a friend, and implied that someone, possibly the friend, made changes to the page. Upon subsequent investigations of the laptops of both Koontz and her friend, police found that Koontz’s friend had not opened the MySpace page.¹⁴² Additionally, police found strong similarities between Koontz’s handwriting and that in the bathroom lists. Lawrence Police Chief John J. Romero said that there was no evidence that Koontz had any weapons indicating that she was going to carry out the threats.¹⁴³ Yet, as one would suspect, parents of the students on the lists and the students themselves were extremely frightened after they were alerted of the lists and Web site. Although the school principal David M. DeFillipio did not provide a comment, he handed out a letter to relay to parents that read, “I want to emphasize that the safety of our students, faculty, and staff are of the highest priority and that all aspects of our investigation and our response have been with this issue in mind.”¹⁴⁴ Many friends of Koontz defended her saying that she was a well-liked, involved student who would never threaten anyone on the list. In *The Boston Globe* report, Jack Leven, Northeastern University professor and director of the Brudnick Center on Violence and Conflict said police and school officials typically react strongly to threats in a post-Columbine world. Although the school may have been reacting

¹⁴¹ Cramer.

¹⁴² Cramer.

¹⁴³ Cramer.

¹⁴⁴ Cramer.

“strongly,” the investigation seems quite appropriate considering the possible crisis that a simple dismissal of the lists could have permitted.

In this case, the concern for the community, especially the members targeted by the lists, needs to be paramount. As Levin notes, “The problem is that there are a lot of students who threaten, who make idle threats. Most of those young people who kill their classmates never threaten anybody, and the most students who threaten never follow through. But it’s understandable...that principals, superintendents, and police officers would be especially sensitive to threats.”¹⁴⁵ Obviously, some critiques would be concerned that the school is “overreacting” to idle threats, but realistically how are school officials capable of discerning between idle and active threats? Consequently, a Communitarian perspective must be imposed in order to prevent the possible tragedies that could occur as a result of irresponsibility and inaction on the part of the schools.

Especially in the wake of the two tragic incidences on school campuses of Columbine and now Virginia Tech., school officials will undoubtedly have a heightened awareness and response to expressions of violence from students. A more Communitarian perspective would assert that school administrators need to more appropriately assess the effects that one student’s words can have on the greater community. In both incidents cited above, the speaker’s voice is threatening in nature, even if not determined to be a “true threat” by the court. Why should schools allow space for this type of speech? It does not serve to promote intellectual stimulation or conversation, it just serves to frighten and intimidate other members associated with the

¹⁴⁵ Cramer.

school, whether this is students and faculty or concerned parents. In an attempt to balance the First Amendment rights of a student speaker and the rights of the community, we must unfortunately bring all competing interests to the table, given the unique interlaced nature of school's population. Again this Communitarian approach would prove to be beneficial in cases addressing threatening speech. Further application of this approach will be presented given the increasing cases dealing with off-site speech, which can impose an undue burden on the school community.

Off-site Speech

The Supreme Court just recently heard oral arguments for *Fredrick v. Morse*, an off-site student speech case, on March 16, 2007. In this case, an eighteen year old, Joseph Fredrick, displayed a banner across the street from his high school, Juneau-Douglas High, as the 2002 Olympic torch relay passed the school. The banner read, "Bong Hits 4 Jesus." Fearing that this message would be associated with the school, the principal, Deborah Morse, crossed the street, grabbed the banner, and pulled it down. Morse has argued that the banner ran counter to the school's anti-drug policy. She did not want the school to be viewed as a drug endorsing institution. She subsequently suspended Fredrick for five days, but after Fredrick quoted Thomas Jefferson in protest, she suspended him for ten days. Fredrick brought suit against the school district for violation of his First Amendment rights. The federal court held that the speech was offensive under *Bethel School District v. Fraser* and the school had the right to censor the speech. On appeal, the Ninth U.S. Circuit Court of Appeals reversed the lower courts

decision, stating that the *Fraser* standard only applies when the speech is sexual in nature. Additionally, the court of appeals declared that Fredrick's speech could not be considered under *Hazelwood v. Kuhlmeier* because it was not on-campus or sponsored by the school. The court employed the disruption standard from *Tinker* and claimed that the school could not censor the speech because it did not cause a substantial disruption to the school's educational mission. Although the speech in question can be viewed as "nonsense," the notion that student speech occurring off school grounds can be stifled is of great concern. The Supreme Court agreed to hear the school district's appeal in March 2007. Seven organizations filed friend-of-the-court, or amicus curiae, briefs in this case. The spectrum of Fredrick supporters ran from right wing groups like Christian Legal Society to more left wing groups like Drug Policy Alliance. Regardless of their political and moral positions, the many proponents of Fredrick's speech seek to protect student expression and First Amendment rights. The groups fear that if the Supreme Court sides in favor of the school, the ruling could allow schools to excessively censor religious and political expression. The decision will have great implications for future free expression legislation.

On the other side, in support of the school district, National School Boards Association, an organization of school boards across the country, U.S. Solicitor General Paul Clement, and DARE America, an organization advocating drug education, filed briefs as well. These organizations claimed that school officials have the right to keep the environment safe and should be permitted to regulate speech that expressly undermines their core educational mission and interferes with maintaining a safe and

effective learning environment. DARE highlighted the prevalence of teenage drug use and stated that the Ninth Circuit Court of Appeals ruling “seriously, and erroneously, undermines our schools’ ability to carry out vital anti-drug policies.”¹⁴⁶

Oral arguments from either side were heard on March 19, 2007, as the U.S. Supreme Court addressed a student speech case for the first time in twenty years. Former Whitewater Special Prosecutor, Kenneth Starr, argued in favor of the school district citing that the Court has previously declared schools have the right to promote “civility and citizenship” and also to restrict expression that runs against the “fundamental” mission of the school.¹⁴⁷ In reference to the origin of the speech, Starr noted that although the students were dismissed from class early, the event was a school sponsored activity, akin to a field trip. He asserted that learning does not only happen in a classroom but also in museums and other places. Fredrick’s Attorney, Douglas Mertz, stated that regardless of the context of the speech, it was not disruptive to the learning environment. Mertz said that he is pleased with the outpouring support from a wide spectrum of organizations who advocate for the protection of freedom of expression.¹⁴⁸ He concluded by stating, “Free speech is a true core American value that everyone believes in and we’re hoping that includes the members of this court.”¹⁴⁹

¹⁴⁶ Erica Hudock, “Twenty-three organizations file briefs with the court in ‘Bong Hits 4 Jesus’ case: oral arguments to be heard March 19 in student free expression case.” March 9, 2007, <http://www.splc.org/newsflash.asp?id=1462> (accessed May 1, 2007).

¹⁴⁷ Erica Hudock, “Supreme Court hears oral arguments in ‘Bong Hits 4 Jesus’ case: School district attorney argues schools should have the right to restrict speech outside the classroom.” March 19, 2007. <http://www.splc.org/newsflash.asp?id=1480> (accessed May 1, 2007).

¹⁴⁸ Erica Hudock, “Supreme Court hears oral arguments in ‘Bong Hits 4 Jesus’ case: School district attorney argues schools should have the right to restrict speech outside the classroom.”

¹⁴⁹ Hudock, “Supreme Court hears oral arguments in ‘Bong Hits 4 Jesus’ case: School district attorney argues schools should have the right to restrict speech outside the classroom.”

Fredrick, now 23, commented in a recent conference call with reporters organized by the ACLU, “To me, its absurdly funny. The phrase was not important. I wasn’t trying to say anything about religion. I wasn’t trying to say anything about drugs. I was just trying to say something. I wanted to use my right to free speech, and I did it.”¹⁵⁰

Although Fredrick’s attorney is asserting that the speech did not cause substantial disruption on the campus, a communitarian perspective would look at the greater implications of this type of speech as opposed to just the disruption test. As stated by the defendant, his message was not directed at any one position; it was simply “funny.”

After hearing the oral arguments, two justices tried to determine the true nature of the speech. Associate Justice David Souter said, “Its political speech,” and Associate Justice Ruth Ginsburg agreed that although the message was alluding to drugs, it could be interpreted as anti-drug message or just “nonsense.”¹⁵¹

Rather than focusing on the disruption test as set forth by *Tinker*, or even the place of origin of the speech, a Communitarian perspective focuses on striking a balance between individual’s autonomy and the good of the community. Although Communitarians assert that teachers and school officials have a duty to provide effective learning environments for our youth, they also claim it is important to recognize the limitations of these authorities. An essential part of the equation is the greater implications on the greater community as a result of the speech. In this case, the speech

¹⁵⁰ Robert Barnes, “Justices to Hear Landmark Free-Speech Case: Defiant Message Spurs Most Significant Student 1st Amendment Test in Decades,” *The Washington Post*, March 13, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201699.html> (accessed May 1, 2007).

¹⁵¹ Hudock, “Supreme Court hears oral arguments in ‘Bong Hits 4 Jesus’ case: School district attorney argues schools should have the right to restrict speech outside the classroom.”

was neither harmful nor negative towards any other individual or group in the community. Due to the plethora of supporters nationwide, from both right and left wing advocates, the Court ought to recognize the ultimate common alliance in support of Fredrick's speech. As many advocates claim, a ruling in side of the school officials will unnecessarily permit them to regulate speech that they oppose whenever and wherever. A Communitarian approach would highlight the importance of communal values that promote discussion, dissent, and democracy. This case poses important questions as to how student speech will be regulated in the future, but a Communitarian application would elucidate the necessity to protect speech that simply runs against the grain and causes a slight controversy.

J.S. v. Bethlehem Area School District Revisited

Let us now return to the first controversial student speech case presented in this work, *J.S. v. Bethlehem Area School District*. Although *Fredrick v. Morse* and *J.S. v. Bethlehem* share a similar trait that the speech in question did not originate on-campus, the message in *J.S. v. Bethlehem* is arguably more detrimental to the community than that in *Fredrick v. Morse*. *J.S. v. Bethlehem* was decided in favor of the school district because the court found that the speech was “materially” and “substantially disruptive” to the learning environment under the *Tinker* standard. Although the decision in favor of the school district is commendable, the Court's reasoning needs to be reconsidered.

Regardless of whether or not the speech on J.S.'s Web site caused a significant disruption in school, this speech should not deserve protection under the First

Amendment. Communitarianism attempts to strike a balance between individual autonomy and societal responsibility. In this case, J.S. created a Web site that expressly attacked the character of Mrs. Fulmer, along with other school officials. Regardless of when and where this speech was created, a protection of this speech could imply that defiance and disrespect for school officials is tolerated and permitted. Additionally, not only would this ruling have implications for school officials, but also for students who could be future victims. Protecting speech that is hateful, demeaning, and threatening to members of the greater community will allow for animosity and subsequent violence to run rampant in our schools. Given that the speech was quite graphic, violent, and unequivocally callous, it cannot possibly be determined to promote a greater common good in the community. In accordance with our democratic foundation, our nation's schools must be tolerant of dissenting opinions and questions of authority, yet they are not required to tolerate speech that will significantly infringe on others' rights in the community.

After reviewing contemporary student speech cases from a Communitarian perspective, it becomes apparent that this approach would more graciously consider the differing opinions and implications of the student speech. Rather than simply questioning the level of disruption imposed, as many courts do in a narrow application of *Tinker*, a broader assessment of the effects that the speech will impose on the community's individuals and its values is required. As we enter into an age where the Internet becomes a pervasive tool of American students, the courts will be challenged to address the questions concerning a wide array of student expression. The freedom to

express one's opinions is a pillar of our nation that many Americans hold devotedly sacred. Yet, these same Americans hold in equal esteem the right to an education devoid of fear and harm.

This work addressed the inadequacies of applying the *Tinker* standard to contemporary cases. Given the specific criteria, nature, and context of the speech in *Tinker*, the ruling cannot be stretched to apply to all student speech. This dilemma has become quite evident in the past decade. As courts attempt to interpret *Tinker*, *Fraser*, and *Hazelwood*, new challenges regarding the jurisdiction of school officials to censor student speech continue to arise. Cases involving hate speech, threatening speech, and off-site speech, stress the need for a new approach to student speech cases.

The Communitarian perspective simultaneously takes into account the rights of student speakers, while also recognizing the unique environment of schools where an observance of others rights is essential to the educational process. A Communitarian approach will focus student speech cases with the intent of fostering a community that promotes tolerance, respect, and a common good that benefits all. This theoretical approach, though quite expansive, is necessary to dually determine the magnitude of freedom of expression awarded to students, as well as the magnitude of jurisdiction awarded to schools in restricting student expression. In a time when incidences of anti-homosexual T-shirts and Internet hit lists have littered our headlines, we, as a society, have the responsibility to critically examine speech that is toxic to the development of our youth and our nation as a whole. Employing a Communitarian perspective is an appropriate and vital starting point.