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## Exploring the social implications of freedom of speech on the internet

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## Exploring the social implications of freedom of speech on the internet

### Abstract

Freedom of speech is one of the most basic rights given to citizens of the United States. Over the years, courts have defined what is considered speech and what speech and forms of expression are protected and from whom. These definitions have evolved with each new form of media, from print to radio to television, however the Internet has presented a unique challenge to regulate given its international nature. Using the legal definitions of protected and unprotected speech, this paper will explore the different perceptions of freedom of speech online and offline, how these definitions have evolved to encompass the Internet, and the unique issues that the Internet presents to protecting and regulating speech. Using the evolving legal definition this paper will attempt to illustrate how communication has changed in the United States and what this change will mean for freedom of speech as the Internet becomes a larger part of our lives.

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By

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A Senior Thesis Submitted to the

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in Partial Fulfillment of the Requirements for Graduation

with Honors in Computer Science

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EXPLORING THE SOCIAL IMPLICATIONS OF FREEDOM OF SPEECH ON THE  
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By Gwennyth Andrusiak

A Senior Thesis Submitted to the Eastern Michigan University Honors College in Partial  
Fulfillment of the Requirements for Graduation with Honors in Computer Science

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## **I. Introduction**

The First Amendment of the United States Constitution states, among other things, that “Congress shall make no law ... abridging the freedom of speech” (U.S. Const. Amend. XIX). Throughout the history of the United States, freedom of speech has been one of the central principles of our society. That is not to say that there are no restrictions on what is protected by the First Amendment. Courts have long grappled with how to balance freedom of speech with potentially threatening, obscene, offensive, or untrue speech and expression. On the one hand, too little regulation could harm citizens and businesses, while on the other, vague or overbroad regulation could “chill” perfectly legal speech. Therefore, courts have often had the unenviable position of attempting to define what speech is protected and what is not.

With the birth of the Internet, our societies have become more interconnected and much more complex. Like radio and television before it, the Internet has new implications on how freedom of speech is regulated in the United States. However, the Internet poses a unique challenge to regulate, not just because of its far-reaching influence, but also because it has changed the way average citizens communicate. In the past, it was much more difficult for a single person to reach so many people instantaneously. The average citizen could not, for example, broadcast their own opinions on television whenever the mood struck them. Additionally, in the past few citizens’ speech was preserved for public consumption. On the Internet, it is possible for speech to live on in caches or downloaded to storage long after a post has been deleted. The average citizen’s speech may now be seen by the public long after the event that inspired

it has been forgotten. Therefore, the speaker's thoughts may now live on and reach more people than the speaker may have originally intended. These two characteristics of Internet speech have allowed the average citizen to reach a much larger audience than ever before.

Moreover, the decentralized nature of the Internet makes it much harder to guarantee the authenticity of both information and others' identities. While these concerns are not new issues, advances in technology and the spread of the Internet have increased the reach of these issues. Fraud may now reach much wider audiences. Hackers and fraudsters now have access to users around the world from the comfort of their homes. Unsurprisingly, the Internet poses many questions about freedom of speech for regulators, including how to limit harm to users without chilling speech and how to regulate speech on a forum that has very few geographical or national boundaries.

This thesis aims to explore whether the Internet and related technology have changed the way courts and citizens think of protected speech as well as explore the evolving legal definitions of protected speech. The first section of this paper will introduce a short history of freedom of speech through a selection of relevant court cases. This section will describe some of the most fundamental doctrines defining freedom of speech in the United States and discusses the shifting goals and attitudes of the court throughout United States history. The subsequent two sections will explore two controversies in defining protected speech, the definition of true threats and protection of student speech, and examine what implications court decisions related to these topics have on freedom of speech. This analysis will focus on how previous standards have been

successfully and unsuccessfully applied to Internet speech and how regulation of Internet speech differs from speech on other platforms. The final section of this paper will discuss the implications of the cases in the preceding two sections and summarize the central points explored in this paper.

## **II. Freedom of Speech: Relevant cases**

The First Amendment grants Americans the right to freedom of speech but does little to define what privileges are entailed. While courts agree that the government is given the right to restrict some expression, it is difficult to determine precisely what speech is protected and what is not. The government may limit speech only in cases in which doing so provides substantial benefit to the public or serves some critical government function. However, defining exactly how much benefit the limitation must provide to outweigh the rights of the speaker is difficult to define. As Sara Baase (2003) indicates in *The Gift of Fire*, the First Amendment protects speech that may be offensive or controversial in particular. If speech were not controversial then there would likely be no reason for the government to censor it (p. 138). Meaning that courts must ensure when they restrict speech they are doing so in a way that demonstrates a balance between the right of the speaker and the interests of the government (Rossum & Tarr, 2013).

While not all speech is protected in the United States, over time, our laws have shifted back and forth, trying to strike a balance between protected and unprotected speech. One of the most important forums for these decisions has been the courts. While the First Amendment grants the rights to the citizens and state and national law have further defined speech, it is the courts that attempt to review these regulations and

prescribe methods to determine whether speech is protected. To give a general overview of how these decisions have shaped our definitions of protected speech, this portion of the paper will discuss some cases that helped to establish our understanding of freedom of speech in the United States.

One of the earliest cases establishing limits on the freedom of speech was *Schenck v. the United States* (1919), in which Charles Schenck appealed his conviction of violating the Espionage Act of 1917. Charles Schenck was convicted for the creation and distribution of pamphlets, which claimed the draft was like slavery and, therefore, unconstitutional. Additionally, he urged men to “assert their rights,” which was interpreted as a call to insubordination from potential draftees (Rossum & Tarr, 2013, p. 135). The Espionage Act of 1917 attempted to “suppress antiwar activity” (Hudson, 2017) through the regulation of specific political speech and expression, as well as criminalizing other acts that might harm the U.S. war efforts. This case ultimately helped to affirm that not all communication is protected by the Constitution. In his opinion, Justice Oliver Holmes issued his now-famous statement, “[t]he most stringent protection of free speech would not protect a man from falsely shouting fire in a theater and causing a panic” (*Schenck v. the United States*, 1919). Moreover the case established the “clear and present danger rule,” which provided a new guideline determining whether speech should be protected under the First Amendment. The test states that for speech to be punished, the court must show that the statement in its context posed the threat of danger, which the government has an interest in preventing (Rossum & Tarr, 2013, p. 135).

Specifically, this meant that courts would need to prove that the speech in question would lead to considerable harm in the near future.

Throughout the 1950s and 60s, courts moved away from relying solely on the “clear and present danger” standard towards ruling on a case-by-case basis in order to balance the rights of the citizen with the government’s goals. Courts still make rulings in much the same way today. Courts judge regulations on speech based on whether they are “content-neutral” (i.e., regulate the speech based on criteria that is not connected to the message, like time or place). Additionally, they must demonstrate that the regulations set are the “least restrictive” way to accomplish the intended goal (Rossum & Tarr, 2013, p. 136). To do so, the courts may examine whether a regulation is “overboard,” meaning that it restricts both protected and unprotected speech. Alternatively, they may find it “void-for-vagueness,” signifying that the regulation is so vague a reasonable person may be deterred from engaging in protected expression for fear of punishment under the law (Rossum & Tarr, 2013, p. 136). In applying these doctrines, the goal of the court is to avoid a substantial chilling effect on speech.

The First Amendment does not only protect citizens’ right to speech but also their right not be compelled to speech unless doing so satisfies a prevailing government interest. A person cannot be coerced into expressing ideas or, by extension, performing symbolic actions with which they do not agree unless courts can demonstrate a substantial public benefit for doing so. One classic example of this doctrine is embodied by *West Virginia State Board of Education v. Barnette* in 1943, which centered on a state regulation requiring schoolchildren to salute the flag and say the Pledge of Allegiance

while in school (“*West Virginia State Board of Education v. Barnette*,” nod). The case involved children who refused to participate in the Pledge of Allegiance at school based on their religious beliefs and had subsequently been expelled from school. The children’s religion forbade them, among other things, saluting symbols including the flag. The court, rather than basing their decision on the freedom of religion granted in the same amendment, chose to rely on the freedom speech clause, maintaining that the state could not compel anyone regardless of religion to express themselves in such a manner (“*West Virginia State Board of Education v. Barnette*,” nod). As a result of this case, two ideas were introduced: the government can compel specific speech, and that First Amendment rights extend to children in school.

However, there are instances in which the government can compel speech to attain its goals. For example, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) affirmed that the government might force doctors who perform abortions to tell the women the risks of the procedure and childbirth as well as the “probable gestational age of the unborn child” (Volkh, 2018). The ruling in this case was later overturned, but it demonstrates the importance of continuous court reevaluation of compelled speech rulings. Other examples of compelled speech include notices in businesses which state that companies cannot discriminate against employees and sheets in prescriptions detailing side effects of medications. These forms of speech are seen as beneficial to the needs of the government to inform citizens, and therefore the government can compel companies’ speech to accomplish this goal (Vuolo & Schwartz, 2019).

The definition of speech has come to encompass more than just what one says. Speech has come to cover a large number of expressive actions as well as different types of media, from print, to radio, to the television, and most recently to the Internet. With each new form of media, new standards for regulation have been established to define what speech and expression is protected on the platform. The question of how to regulate speech on different media platforms has been decided using factors like the immediacy impact and the size of the audience. In his opinion on *Kunz v. New York* (1951), Justice John Roberts expressed that “the vulnerability of various forms of communication to community control must be proportional to their impact upon other community interests.”

Historically, the printed word has had more protection than any other form of media and occasionally more than even spoken speech and expression. As Rossum and Tarr (2013) explain, the written word is more protected mainly because verbal statements are believed to have a more immediate impact on an audience than print (p. 139). Print has long been considered an outlet for people to share news and political opinions without impacting their audience immediately, therefore it is in the public’s interest to regulate print less heavily. Sara Basse (2003) points out that the government has decided to regulate television and radio more heavily than print in spite of its importance as a source of news for Americans. Television and radio regulations have been justified due to the limited number of possible broadcast frequencies and the difficulty in filtering out controversial speech when listening or watching at home (p. 136). By comparison, cable networks have been granted more rights than broadcasters and radios, but are not as protected as print.

The difficulty with regulating the Internet is that it vastly outpaces all other forms of media in its reach. In the United States, Internet regulation has often been characterized by much debate, mostly centered on regulating users' and companies' actions. The United States has often treated the Internet as an open forum for the exchange of goods, opinions, and information. Many people are hesitant to regulate the Internet too heavily, believing that it will lead to a stagnation in innovation and censorship. Consequently, there is a large amount of freedom on the Internet. In general, the Internet has attained a level of protection similar to print media, the highest level of protection (Basse, 2003, p. 143). Despite the high potential for the Internet to be used as a tool by malicious users to steal others information or defraud other users, the courts have largely protected the speech of individual citizens online.

One area in which there has been a large amount of activity is the regulation of obscene and explicit material online. The current test for obscene materials originated in *Miller v. California* (1973). Before this test, the government could only consider something obscene if "it was utterly without redeeming social value" (Vile & Schultz, 2005, p, 625). The new test included three parts:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest ... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (*Miller v. California*, 1973)

The test is worded to be intentionally subjective, allowing more conservative communities to regulate themselves more strictly than more liberal communities.

In 1997, the Supreme Court ruled on regulations that were intended to limit the amount of obscenity which minors were exposed to. The policies in question were part of the Communications Decency Act (CDA) of 1996. The provisions stated a person could not knowingly send indecent or obscene messages or images to someone under the age of eighteen. Additionally, they could not consciously send or display indecent or obscene materials in a way that someone under eighteen could gain access to them (Vile & Schultz, 2005, p. 790). In *Reno v. American Civil Liberties Union* (1997), the court unanimously struck down the provisions in question using the void-for-vagueness doctrine since the rules did not offer any definition of what materials were considered indecent. Moreover, because engaging with content on the Internet required an active participant, the Supreme court afforded the Internet full protected status in order to avoid chilling expression.

That is not to say that the First Amendment protects all speech on the Internet. Speech that is generally unprotected in other forms of media and expression is still unprotected online, for example, true threats. There have also been some regulations that attempt to limit obscenity online which have, unlike the CDA, been passed and remain in place today. For example, the Children's Internet Protection Act (CIPA) requires schools and libraries which receive specific forms of aid from the government to install filtering software on their computers to restrict access to materials that would be harmful to minors. The CIPA was deemed constitutional by the Supreme Court because the

restrictions did not punish people who posted or created materials online and was only enforced in institutions that chose to receive certain government funds. Additionally, adults could request the filters be turned off if need be, meaning that adult expression and consumption of Internet content was not limited to material appropriate for minors (Baase, 2003, p. 143).

The Internet has changed the way we interact and communicate in the United States substantially. While the Internet provides us with many advantages in our daily life, it is not without its problems. It is difficult to thoroughly understand the impact that the Internet will have on life in the United States as it expands. This impact is especially significant when examining how freedom of speech is protected in the U.S. since one of the most significant influences the Internet has had is on the ways we contact others and share ideas. Therefore, the next two sections will examine two cases which illustrate how the Internet is changing the ways we communicate, how this is changing what speech is protected, and what the implications of those changes are.

### **III. Case: True Threats**

As previously discussed, several types of speech are considered unprotected by the First Amendment. One of these categories is what is called a true threat. Until now, there is no consensus on what exactly constitutes a true threat, though courts have reviewed several cases dealing with threats and proposed guidelines to define when a threat is no longer protected by the Constitution.

*Watts v. the United States* (1969) was one of the first cases dealing with the definition of true threats. The case centered on a statement made by an eighteen-year-old

at a public rally during a discussion about police brutality. An exact account recorded him having said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J” (Hudson, 2017). He was charged with a felony for threatening the President of the United States. The Supreme Court reversed the charge, noting that his speech was most likely dramatic hyperbole and that those who were listening to him laughed. This case established “Watts Factors,” which give some example criteria to define true threats. These factors include whether or not the threat is conditional, the context in which the threat is issued, and the reactions of the audience (O’Neill, 2017). Aside from these factors, this case also served to affirm that the Constitution does not protect all threats. However, those threats must rise to a certain level before they lose Constitutional protections, meaning that it was not merely enough for a speaker to make a threat, the government must prove that the statement rises to the level of a true threat to be considered unprotected (O’Neill, 2017).

One of the most explicit definitions of true threat comes from the *Virginia v. Black* (2003) case, which struck down a Virginia law banning cross burning. This law defined cross burnings as an act where those involved were threatening or intimidating a person or group of people regardless of whether the threatened group was identified or present. The court ruled that the provision in the law which made cross burnings prima facie evidence of intent to intimidate was unconstitutional. The court explained that there were other symbolic or ideological reasons that someone might hold a cross burning. Therefore, cross burnings do not automatically meet a definition of a true threat (Schultz & Vile, 2005, p. 1006). The description given by the court stated that intimidation is a

type of threat, and true threats are directed at a person or persons to make them fear unlawful harm or violence (O'Neill, 2017). In this case since there was no discernable audience who was being threatened there act of burning a cross alone could not be considered a threat (Vuolo & Schwartz, 2019). This description reiterates some of the sentiments of Watts factors, which take the audience's interpretation of the threat into account when deciding whether or not it is a true threat. However, in this instance, the definition relies on the perceptions of the person being threatened.

Since both of these definitions are somewhat vague, courts generally struggle with the issue of defining when a threat has risen to the level of true threats. This issue may be made slightly more difficult with the introduction of the Internet. In the past, there were very few ways people could communicate with each other instantaneously, but the speed of the Internet has changed that. Another added layer of complexity is that of the Internet's anonymity, which many believe provides users with the incentive to say and do things that they would not say or do in face-to-face interactions. Many people today are not surprised when they read or see extremely negative comments made about others online. One example is the Gamergate scandal, which happened online in August of 2014 when Internet users used their anonymity to stalk and harass journalists, feminists, and others online using social media (Marwick, 2017, p. 180). While many people were shocked and outraged by the treatment of the victims, still others reported that this kind of behavior is not uncommon on the Internet. But at what point is offensive speech no longer protected by the Constitution, and at what point does an online threat rise to the level of a true threat? Several cases brought to the court have included Internet speech,

and they present an interesting perspective on how Internet speech is changing the legal precedent regarding true threats

The first case examined is *United States v. Turner* (2009), in which radio host Harrold C. Turner was charged with threatening federal court judges in a post on his blog. The blog post in question included the statements like “These judges deserve to be killed. Their blood will replenish the tree of liberty,” and “apparently the [Seventh United States] Circuit Court didn’t get the hint after those killings. It appears another lesson is needed,” referring here to the murder of another judge by a gunman after the decision in the “Mat Hale Case.” This post was later updated with personal information about the judges in question. These updates contained, among other things, photos of the judges, their work addresses, and maps of the building housing the Appeals court for the Seventh Circuit including arrows pointing to “anti-truck bomb barriers” (Brown, 2011, pp. 282-284). The decision of the court was based mainly on the idea that incitement and true threats are equivalent, and Turner had incited the harm of the judges. Brown discusses in his article that the court’s decision treated incitement and true threats as the same crime. He contends that this is largely unsupported by legal precedent and should not have been used in this case.

In *Elonis v. United States* (2015), Anthony Elonis was charged with threatening his wife and a federal agent in raps posted on his Facebook page under the pseudonym “Tone Dougie.” Elonis argued that the charges were unconstitutional since there was no proof that he had any intention to carry out the threats in question. Elonis’ raps included phrases like “Fold up your [protection-from-abuse order] and put it in your pocket / Is it

thick enough to stop a bullet?” and “Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined" (*Elonis v. United States*, 2015). These raps which were available publicly on his Facebook were posted with disclaimers stating they were not meant to be taken seriously and were only intended to be a way for Elonis to vent his frustrations. However, he was still charged with threatening his ex-wife under a law which bars sending “any communication containing any threat . . . to injure the person of another " in interstate commerce (18 U. S. C. §875(c)). In the original sentencing Elonis was found guilty by a jury was instructed to determine Elonis’s guilt based on whether a reasonable person would be threatened by the raps. This kind of test is generally referred to as an objective test because it relies on what reasonable people would think of the statements in question. However, in reexamining the case, the Supreme Court found that it was not merely enough for the threat to be deemed a true threat by applying an objective test. Elonis argued that the very definition of a threat includes the intent of the speaker to threaten or carry out harm. The Supreme Court affirmed in this case that if there was no provable intent on Elonis’s part to threaten those referenced in his raps, then his charge was unconstitutional. Since Elonis simply posted his raps on his public Facebook page and claims not to have sent them to the people referenced in them, this implies that simply making threats online does not necessarily prove intent. The requirement of intent is similar to the idea of mens rea or the intent to commit an illegal act, which dates back to English law. This definition of threats would require an objective test to discern if the speaker had the intent to threaten when speaking, rather than the subjective test which had been applied in the past.

Another case which dealt with raps posted online was *Commonwealth v. Knox* (2018). In *Commonwealth v. Knox*, Jamal Knox was charged with making terroristic threats and attempting to intimidate witnesses by posting a rap to Youtube under the pseudonym Beaz Mooga. The rap included the names of two officers who were scheduled to testify against Knox. It included lyrics like “You want beef, well cracker I’m wit it, that whole department can get it / All these soldiers in my committee gonna fuck over you bitches,” and “Let’s kill these cops cuz they don’t do us no good” (*Commonwealth v. Knox*, 2018). Knox argued that his rap should be protected under the First Amendment since it did not rise to the level of true threat. He argued that since there was no proof of requisite mens rea his raps could not be true threats, similar to the final ruling in *Elonis*. In this case, the Supreme Court agreed that in light of the general trends in other court decisions, to decide whether this speech was considered a true threat, they would use a subjective test to determine if Knox demonstrated intent to intimidate the police officers. However, the judges found that Knox’s raps did “not merely address grievances about police-community relations,” but included threats directed at specific officers and portrayed violence directed toward the police (*Commonwealth v. Knox*, 2018).

All three cases discussed before have interesting ramifications regarding freedom of speech. One of the most important is the inclusion of mens rea or intent to threaten and subjective tests within the rulings. The use of intent in defining a true threat has been growing both in online and offline cases. Since *Virginia v. Black* (2003), courts have struggled with the question of whether to apply an objective test as was used in the past,

or whether a subjective test of intent should be used in making the final decision. On the one hand courts wish to avoid chilling speech, but on the other it is undeniable that threats impact their targets whether the speaker intends to harm them or not.

Discussing the Turner case, Casey Brown (2011) examines the difficulty in defining intent using current standards. The law under which Turner was charged in 2009, includes the language “with the intent to impede, intimidate or interfere” (18 U.S.C. §115(B), 2006). This wording raises the question of whether the court should have proven that Turner intended to threaten the judges when he made his blog post. The definition given by the court in *Virginia v. Black* states a true threat is:

Those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals (2003).

The description gives no specific guidance on whether an objective or subjective test should be used. In the past most lower courts have used the objective “reasonable person” test.

*United States v. Cassel* (2005) and *United States v. Stewart* (2005) both used the idea of intent in their decisions. The court in *Cassel* argued that under their interpretation of the *Black* definition, the speaker’s intent to threaten must be proven for the speaker’s speech to be considered a true threat. *Stewart* expanded this idea stating that for a conviction under §115, there must be a demonstrable intent of the speaker to be threatening (Brown, 2011). However, in *United States v. Cope*, the court criticized the ruling of *Cassel* stating there was no subjective intent requirement in the law under

which Cassel was convicted (Brown, 2011). Despite this, Brown points out that nearly every circuit court has found there is a requirement to determine specific intent or mens rea under §115 (2011, p. 296). In light of these decisions, it would imply that when courts choose to regulate threatening speech, the wording of the law is an important deciding factor in whether or not intent is a requirement for conviction.

Michael Pierce (2016) discusses the issue of implementing a requirement for intent in the *Elonis* case. He cites three significant definitions for intent used in the *Elonis* cases and discusses the implications of using each of them. The first includes “specific intent,” in which the court must prove that the defendant specifically intended to threaten a particular person or group with their statements. The possible issue with this definition is that it might protect speech that has harmful effects on its targets. Pierce points out that “the damage to victims, including long-lasting psychological harm, does not depend on the speaker’s state of mind” (2016, p. 1000). The reaction of the target is a consideration of the court since threats, through the use of intimidation, also have a chilling effect on the speech of their targets. This chilling effect is a sentiment echoed by Marwick in which she points out that women experience a large amount of harassment online, leading to a chilling-effect because women are more likely to censor themselves to avoid harassment (2017, p. 179). Because this harm is present regardless of the intent of the speaker threats may be defined based on the feelings of the target or through an objective test. However, using this standard offers fewer protections to speakers.

In light of this issue, Peirce introduces the idea of general intent, which was affirmed by Justice Thomas, stating that these concerns and the concerns of intent can be

adequately addressed using the objective “reasonable person” test. On the other hand, this test would also have implications on currently standing public opinions, one of which is the distinction between private and public figures in speech. This distinction is made because it highlights the fact that offensive speech directed at public figures like politicians, religious leaders, and celebrities is generally more political in nature and therefore important to public discourse. This means that speech directed towards private figures receives more protection than it might otherwise. The case of *Hustler v. Falwell* (1988) established this by making a distinction between speech relating to public concerns and speech related to private matters, offering more First Amendment protection to statements about public figures. Under the general intent doctrine, speech directed towards public figures would also be tested through objective means, which may have a chilling effect on discourse about public figures, which is undesirable.

The third test standard of intent discussed by Pierce is recklessness. Proposed in *Elonis*, Justice Alito asserts that “recklessness regarding the risk of serious harm is wrongful conduct” (*Elonis v. United States*, 2015). This test would require the courts to provide evidence of the defendant’s recklessness when issuing the threat before punishing them for their speech. After examining these three definitions and their limitations, Pierce prescribes a hybrid test. In this test, courts should require proof of intent, but should examine whether the target is a public figure or not and impose a higher standard of necessary mens rea if the person is a public figure (2011, p. 1004). Pierce takes this stance using libel law as the model for this test. He argues that of the other types of unprotected speech namely libel, obscenity, and fighting words, threats

most resemble libel in that they are directed at a target (unlike obscenity), and regulation is intended to protect the target rather than the speaker (unlike fighting words) (p. 1001). Since under libel law, public figures are considered better able and expected to withstand offensive speech, Pierce concludes that the same standard should be used for defining true threats.

Pierce notes in his essay that while in-person threats also chill the speech of their targets, the public nature of online threats may have a more significant chilling effect on their targets. The question to be addressed is how might threats on the Internet like those in the discussed cases differ from those that happen offline. John Villasenor (2016) argues that the Internet's impact on our lives as a new public forum has changed the requirements of intent substantially. The ease with which information can be spread and the relative permanence of speech online has caused context to become more important than ever when addressing the protection of speech. It is very easy to see how this might be true. Technology has, for example, made it very easy for people to copy information from one source and post it to another, removing the context of the original speaker entirely from the speech.

Villasenor traces some of the issues relating to freedom of speech online, pointing out content online is not fully controlled by the original poster. Since speech on the Internet has the possibility of being spread beyond its original context and has the potential to live on even after the poster has removed it or changed their views, he argues the intent of the speech is more important. He bases this assertion on legal scholar Leslie Kendrick's idea of the "unknowing inciter." Kendrick presents a situation in which an

individual wearing an incendiary t-shirt unknowingly walks into a crowd and the crowd is urged to violence by the message on their shirt. Assuming that the person sincerely had no idea what effect the message on their shirt would have, Kendrick argues that it would not be right to convict that person for incitement. If an unknowing inciter does not know they are inciting lawlessness, it would imply that since the person had no intent to incite violence, they are not guilty of incitement. By this argument *mens rea* is a requirement to find someone guilty of incitement.

Using this example as a framework, Villasenor presents several similar situations that illuminate why the question of intent may be more important online. First, he poses a situation in which a person A posts a statement to Twitter in reaction to news of a riot occurring in some city by urging their followers to “get down there and do their part.” He points out that this could hypothetically be seen as an attempt to incite people into joining a violent riot and, therefore, an act of incitement. However, he states that the message could be seen differently if person A then called their friends to help organize people to help clean up the city and coordinate safe areas with them. In this case, the statement does not seem like an act of incitement regardless of if certain people take it that way. The question of whether this statement rises to the level of incitement is difficult. Villasenor contends that in both cases understanding the intention of the poster does change the way the speech is interpreted.

Villasenor also offers a second set of hypothetical situations that build off this one. Take, for example, people who might tweet about the original poster. Say one of person A’s followers, person B, makes a tweet that praises person A and urges people to

listen to their message. Person B's post could also be perceived as a threat or incitement if people followed person B's tweet back to person A; they might feel that poster B is endorsing a message to riot. However, what if poster B had tweeted praise for the original poster before the tweet inciting violence was made or what if person B had not read the incitement tweet before making the endorsement? Could person B's post also rise to the level of incitement? Finally, what if person B had created a bot that simply responded to tweets about certain cities with a phrase like "sounds good!" Would the creator be responsible if people assumed that the bot was a real person inciting violence? (Villasenor, 2016)

While these examples do not necessarily explain how intent should be applied to true threats within the courts, they do emphasize how the Internet has made the issue of speech more complex. Villasenor's examples demonstrate how vital context, in particular, is to understand these situations fully. He concludes that while the general trend in the courts would indicate that we have agreed that intent is necessary for rulings regarding true threats and incitement, we still have not fully defined how and when to apply intent online. Brown (2011) also pointed out this issue when examining *United States v. Turner*, asserting that context was taken into account when examining Turner's statements, a precedent that came from the Watts case. He argues that the court misapplied this ruling because the court "unfairly expands the context in which Turner's statements were made" (p. 298). The court stated that the context was extended in this way because, in our community, "speech has no geographical boundaries" (*United States v. Turner*, 2009). Therefore, we see that the idea of context itself can be somewhat tricky

in determining cases dealing with true threats. The Internet may create the problem of overextending the context to encompass unrelated subjects. On the other hand, narrowing the context may create other issues such as fewer protections for people targeted by these threats.

Through these cases, it would seem that while the Internet has added complexity to speech and communication within society, cases dealing with online speech have generally been treated as an extension of offline rulings. Through these cases the standards applied in true threat cases have come to include considerations like the intent of the speaker and the context of the speech. However, it is also clear that there are added difficulties in examining online speech. In particular, these difficulties may include, how many people the speech may reach at one time and how speech may be misinterpreted or manipulated to remove its original context. The ability of users to manipulate information may imply that a more critical examination of how to define intent and context online is crucial to speech cases online. While there does not seem to be a dramatic shift in rulings simply based on the inclusion of the Internet in these cases, there is another area where speech on the Internet is raising some more serious questions. This area will be explored in the next section.

#### **IV. Case: Students' Rights**

The introduction of the Internet and social media has not only had a great effect on the right of adults in the United States, but also on the rights of minors, especially students. Student's rights have been an issue in the debate for freedom of speech for decades. The *Tinker v. Des Moines* (1969) Supreme Court case was one of the first to

shed light on what rights students have on school campuses. However, the issue of off-campus speech has been largely absent from Supreme Court rulings, leaving it a grey area that has been handled somewhat inconsistently in lower courts. Even before the Internet, there was concern about whether student speech off school campus could be punished by school officials. Following the Columbine school shooting in 1999, the issue of student speech has become linked with the issue of balancing the rights of students with the interests of the school in addressing threats to the student population.

While schools have generally been given a large amount of power to regulate what expression and speech are appropriate on their campuses, the protection afforded to student speech is more difficult to define when student's speech is made off the campus and outside school-sanctioned events. Many of the previous cases dealing with off-campus student speech have been focused on hostile or dissenting speech about the school or school officials. The popularity of the Internet and social media among students has somewhat exacerbated the issue by blurring the lines between school and personal life. Waldman points out that as of 2011, around 60% of students using social media discuss their opinion and feelings about the school online. More recently the Pew Research Center reports that around 95% of American teens age 13 to 17 have access to a smart phone and 45% of them report that they are online on a "near constant basis" (Anderson & Jiang, 2018). Therefore, it is unsurprising that the internet has become a large concern for educators and courts when defining the rights of minors in school.

The main reason for this being the way in which the Internet is perceived as nearly borderless. Because it is accessible virtually everywhere, it blurs the line between

on and off-campus speech in a way that is difficult for school officials and courts to address. Schools have long been given the ability to regulate speech on their campuses to help accomplish goals of school in providing a safe and effective learning environment. Still, Waldman argues that depending on how we perceive the goal of school in educating children, student speech off-campus may receive too much protection or too little. For example, some believe that the goal of the school is to train students in good citizenship and morality implying schools should punish disrespectful or insubordinate behavior. In contrast, others argue that schools must train students on critical thinking and analysis skills necessary to adults by allowing students to express dissent and engage in debate in a learning environment. Depending on the views of the school in their role to teach students, there may be wildly differing opinions on what constitutes appropriate behavior of students regarding expression both on and off-campus.

The subsequent section of this paper will focus on outlining what rulings have been made about student's speech related to the school environment. It will begin with a general overview of some pertinent cases. Since the Supreme Court rulings in this area are sparse, this portion will focus on rulings from the lower courts. The next portion will then attempt to analyze the role the Internet has played in changing school's regulation of student speech and what clarifications may be necessary to regulate speech in school environments.

As previously discussed, *West Virginia State Board of Education v. Barnette* (1943) affirmed that students retain some First Amendment rights even when in the classroom. The extent of these rights was clarified in *Tinker v. Des Moines* (1969). In this

case, students were suspended from school after violating a new school rule prohibiting the students from wearing black armbands at school in protest of the Vietnam war. The rule was created when school administration learned that students planned to make use of these armbands in protest. The students were allowed to wear other symbols, but black armbands became prohibited under the new rule (Hudson, 2017, p. 78). In the *Tinker* ruling the court held that the students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (Hudson, 2017, p. 79). The court also established a two-pronged approach for determining if a student’s speech is to be protected by the constitution. It stated that if schools wished to suppress student speech, they must prove the speech in question would cause extensive disruption to the function of the school or interfere with the rights of other students. This standard has been largely applied to other cases dealing with students' speech though few other cases have reached the supreme court. Cases which have reached the Supreme Court have added some exceptions to the *Tinker* standard.

*Bethel School District No. 403 v. Fraser* (1986) created an exception stating that school may regulate on-campus speech the school finds “lewd or vulgar” (Begovic, 2016). This exception came from an instance when a student made a speech laden with sexual innuendo endorsing a student government candidate at a school assembly.

*Hazelwood School District v. Kuhlmeier* (1988) held that the school may censor student speech in the school environment when it was regarding a “pedagogical concern” (Begovic, 2016). In this case, the court decided that the school in question had not infringed on a student's rights by refusing to publish articles about pregnancy and divorce

in the school newspaper. Since the newspaper was sponsored by the school, courts decided the school was within its rights to regulate the articles published in the newspaper. The last case which adds to these exceptions was *Morse v. Frederick* (2007), which found that schools could regulate speech, which promoted illegal drug use. Interestingly, in this case, the student argued that the speech in question, a banner which read “BONG HiTS 4 JESUS,” should not be regulated by the school since it took place across the street from the campus. However, since the incident was during what the court considered to be a school-sanctioned event, it was considered within the school’s interests to regulate this speech on the grounds that it could promote illegal drug use to students.

These three cases make up the exceptions to the *Tinker* rule, and they represent the Supreme Court’s rulings in student speech cases. While they do carve out certain protections for students, they leave the issue of student’s speech somewhat vague, especially when discussing off-campus student speech. That is the main issue involved in regulating student speech online. While the courts have recognized students’ rights are much more limited within school than they are off-campus, it is argued that Internet speech has a much higher potential to disrupt school therefore may require school regulation. Off-campus speech has been addressed by lower courts prior to widespread Internet use. The lower courts have not been unified in their ruling on whether or not *Tinker* applies to off-campus speech. *Thomas v. Board of Education* (1979), dealing with a student printed newspaper created and distributed outside of school, was not evaluated under *Tinker* with the court noting, “all but an insignificant among of relevant activity, in

this case, was deliberately designed to take place beyond the school gate.” Another case *Porter v. Ascension Parish School Board* (2004), a student drew a violent picture showing the school under siege. The picture was stored in a closet at home and would not have been seen at the school if the student’s younger brother had not found it three years later and brought it to his school (Sternberg, 2014). The courts, in this case, determined that the picture in question could not have been directed at the campus since it would likely not have been seen if not for the brother finding it and did not constitute a true threat to the school.

*Tinker*, however, has been applied to similar off-campus cases like *Lavine v. Blaine School District* (2001) which upheld the expulsion of a student who had written a violent poem about the school. Despite the poem being written off-campus, courts decided the school was justified in its punishment of the student because the threat of violence was very likely to disrupt the school setting. *Tinker* has been used as a framework in many school speech cases, though threatening speech especially has been taken very seriously in off-campus cases in light of the Columbine shooting in 1999. There has been little to no guidance from the Supreme Court about whether online student speech should be handled differently than offline student speech made outside the school environment.

As discussed previously, threatening student speech is almost always dealt with harshly. Schools argue this is necessary to protect the rights of other students and prevent school violence. In light of school shootings, schools have tended to err on the side of caution adopting zero-tolerance type policies when it comes to student speech, even when

it takes place off-campus. Threatening cases have largely been examined under the true threats doctrine and the *Tinker* standard on the basis that threats are inherently disruptive to the school. Internet speech has also been examined in the lower courts, and similarly, most punishments for threatening speech directed at the school or officials have been deemed constitutional. Most courts have applied the *Tinker* standards in these cases as well by establishing whether “speech was reasonably likely to reach the school” (Waldman, 2011).

*J.S. v. Bethlehem Area School District* (2002) is one such case, where an eighth-grade student created a web page titled “Teacher Sux” about one of their teachers which included a section called “Why Should She Die?” and solicited people agreeing with them to donate \$20 “to help pay for the hitman.” Despite this webpage being created off the school campus, the court was able to apply the *Tinker* standard. The court did so by establishing that there was a strong link between the speech and the campus because the site focused on a teacher and was directed to an audience of other students. The student in question did access the account at school. However, the court said they would likely have made the same decision even if the website had never been accessed at the school because of the disruption it caused, including the teacher taking a leave of absence (Waldman, 2011). Another case *D.J.M. ex rel. D.M. v. Hannibal Public School District* (2011) deemed that the suspension of a student who had made threats through instant messages after school was constitutional. This particular case evaluated statements made by the student which included descriptions of people he wanted to kill and the weapons he would use. The statements were evaluated under both the *Tinker* standard and true

threats doctrine. *Tinker* was applied since the court thought that there was a large likelihood of the conversation reaching and disrupting that school.

An interesting intersection of this issue is student speech, which may be hostile but also addresses a public interest. In the United States, speech that is political in nature or addresses some public concern is generally afforded a much higher level of government protection. For example, Sternburg (2014) argues that if the *Morse* case had been ruling on a banner reading “Legalize Marijuana 4 Jesus” rather than “BONG HiTS 4 Jesus,” the courts may have come to a different conclusion. While the tone of the banner was in no way hostile, it is important to distinguish speech concerning political opinions or public concerns from other types of speech. Cases involving these types of speech are more difficult for courts to rule on because they blur the line between political speech which is generally protected speech and hostile speech which may not be protected.

Traditionally, courts afford speech relating to public interests to have the highest First Amendment protections. However, hostile student speech is treated particularly harshly. Moreover, Waldman points out courts have been indecisive about what treatment cases like these should receive, even on the school campus. One case that is extremely relevant in this respect is *Acevedo v. Sklarz* (2008). This case dealt with the suspension of a student who had challenged a police officer’s treatment of a fellow student during an arrest. Acevedo believed that the police officer was treating the student too roughly, and began filming the interaction. Acevedo was ordered to stop filming and ordered to the principal’s office. In light of his shouting and initial refusal to stop recording, he was suspended for insubordination. While his tone was hostile to the school and police officer

in general, he argued that the recording he was doing was in the public interest and denied that he had caused enough disruption to be punished under *Tinker* (Waldman, 2011). However, the courts decided in a summary judgment that Acevedo's suspension was justified under *Tinker* since there was evidence that his actions could cause major disruption to the school. In this case, there was no discussion directed toward exploring whether Acevedo's speech should be protected since he was raising concern about excessive force, rather focusing on his "lack of decorum" while doing so (Waldman, 2011).

Interestingly, in cases where vulgar speech is used, there are more mixed results. The lower courts have largely declined to extend the *Fraser* exception, which allows schools to regulate vulgar speech, to cover student speech off campus. For example, the *Layshock v. Hermitage School District* (2010) and *J.S. ex Rel. Snyder v. Blue Mountain School* (2011) cases both dealt with vulgar off-campus student speech in the form of students creating fake social media profiles of school officials. In *Layshock*, the student created a fake MySpace profile of his principal at his grandmother's house. The profile included answers to surveys which included answers like "Birthday: too drunk to remember," "Are you a health freak: big steroid freak," and "In the past month have you smoked: big blunt" (*Layshock v. Hermitage School Dist*, 2010). Initially, several students were shown the profile, but it spread through the school and was eventually brought to the attention of the principal. Though other students created similar profiles of the principal with varying degrees of vulgar language, Layshock was the only student punished. The Layshock family filed a complaint then arguing that their student's First

Amendment rights had been infringed. The court stated there was not enough evidence to believe that the profile constituted a large disruption to the school. The court further expressed that they were hesitant to extend the Fraser exception into situations outside the school.

*J.S. ex Rel. Snyder v. Blue Mountain School* (2011) examined a very similar case in which a student created a MySpace profile for her principal, which included a large amount of vulgar language and jokes made at the expense of the principal and his family. One section listed his interests as, among other things, “detention, being a tight ass, riding the fraintain, spending time with my child (who looks like a gorilla).” The student made the profile private the day after creating it, so only friends of the profile could view it. Eventually, it was brought to the attention of the principal, and the student was suspended. Similarly, the court found that there was no evidence of disruption great enough to interfere with the school’s goals.

These two cases helped to define precedent regarding how off-campus speech is handled, including important three points:

(1) student speech uttered off-campus is not rendered "on-campus speech" simply because it eventually reaches inside the school; (2) *Fraser* is inapplicable to off-campus speech; and (3) *Tinker* might apply to off-campus speech. (*B.L. v. Mahanoy Area Sch. Dist.*, 2019)

These points have been applied in later cases such as *B.L. v. Mahanoy Area Sch. Dist.* (2019) which dealt with a cheerleader removed from her squad after making a post to

Snapchat, which contained the message “fuck school, fuck softball, fuck cheer, fuck everything.”

As many have indicated, defining the rights of students, especially minors, have become more complex as students have begun to use social media. Since courts can no longer rely on the geographical location of the speech when determining these cases, courts have increasingly struggled to define when *Tinker* should be applied. It would appear that at least in the case of vulgar speech, schools have a limited ability to regulate student speech, while aggressive speech has been punished much more harshly there is still much dissent about whether students’ rights have been defined enough to provide sufficient guidance to schools.

One case which sparked a large amount of discussion about the rights of students was *Bell v. Itawamba County School Board* (2015). This case dealt with a student who, upon hearing about accusations of coaches’ inappropriate behavior made by female students in his school, wrote and recorded a rap. The rap included the names of the coaches accused and statements like “Think you got some game / cuz you fucking with some juveniles” and “you fucking with the wrong one / going to get a pistol down your mouth” (*Bell v. Itawamba Cnty. Sch. Bd*, 2015). The rap, predictably, was considered highly threatening to the coaches. The court determined in their examination of the case that the threats in the rap did not rise to the level of a true threat and, after rejecting all other exceptions, determined that the rap could be predicted to have a large disruption to the school environment. Therefore, Bell’s punishments were deemed constitutional under the *Tinker* standard.

The *Bell* case was interesting because it also showed speech that would normally be in the public interest presented in a hostile manner, by a student outside of school hours. Calvert (2019) points out that rap music is generally considered more threatening than other forms of music. He cites a study in which participants were likely to find certain lyrics more threatening if they were told that the lyrics came from a rap than a country song. Therefore, it is unsurprising that this rap was taken as a threat to the coaches involved. While several courts have expressed worry that considering lyrics in rap fully protected expression without considering their content will allow criminals to slip confessions in under the guise of art, the fact remains that rap lyrics are treated with special scrutiny in court cases. The *Bell* case made some feel that the laws which govern students are still too vague and therefore need to be clarified to give lawmakers and citizens more guidance. However, in light of the seriousness of cyberbullying and violence perpetrated in schools, it is difficult to fully balance the rights of students in online interactions off-campus with rational caution. Begovic explains the main problem in these interactions is the role of the schools stating schools. Begovic argues that schools are tasked with teaching students democratic principles in preparation for adult life, “But to maintain order and safety, schools need to operate as non-democratic entities” (2016). How then can students’ rights be defined to strike a balance between these issues?

In his opinion, Judge Jolly proposed a test in which student speech is unprotected if it contains an “actual threat” to students or school personnel, the threat is connected to the school environment, and it is communicated to the students, the school, or school personnel. This three-prong approach implies that student speech would have greater

protection when made outside the school while still balancing the interests of the school in protecting students and staff. While Judge Jolly's three-prong approach seems to cover many of the concerns of regulating student speech, there are several critiques of it.

Margaret Mallory (2016) agrees that the Jolly test goes a long way toward redefining the boundaries of *Tinker*. However, she identifies several aspects she sees as issues to fully applying the Jolly standard to future cases. The first of Mallory's objections is that Jolly provides no definition of "actual threat." If this definition is similar to true threats, then the phrase would be redundant since true threats are not protected by the Constitution. Ultimately the decisions will be carried out by administrators, so the test will most likely rely on a "reasonable person" test. Judge Grave stated that it might be better to have the courts examine the content of the speech to see if it is afforded protected status. Both of these measures in Mallory's view inject too much ambiguity into the system, though she believes that the Jolly test, being the more customary one, defines limits better. She contends that the best solution to this issue is to apply a more refined version of the Jolly test, allowing students protection and the schools the ability to address threats before violence.

A more lenient standard proposed by Katherine D. Landfried (2017) recommends that unless there is a strong possibility of substantial disruption, the student's speech should not be analyzed under *Tinker* or its exceptions. For example, she argues this proposed standard will stop teachers from punishing student's off-campus speech when they are offended rather than threatened, protecting students' right to state their opinions. This, she argues, balances rulings like *J.S. ex Rel. Snyder v. Blue Mountain School* where

speech may be offensive, but ultimately not that disruptive and cases like *J.S. v. Bethlehem Area School District* where the disruption was substantial. Landfried argues that if courts define a threshold for substantial disturbance, schools will not tread so far into the rights of their students out of school. Additionally, she argues that subjective intent is just as important in these cases as in true threat cases. Landfried asserts that understanding the reason for the speech and the medium over which it is expressed would give students more power to express themselves without having to fully predict exactly how and where their speech will be judged. She states that while this test would be concurrent with recent rulings, it would also provide a route in which Bell's rap could be considered protected speech based on his history as a rapper and the fact that no actual disturbance occurred.

Landfried recognizes some potential arguments against her standard. In case when student speech indicates a student plans to commit violence against themselves or others, the school can hardly be asked to ignore the speech if it is brought before them. In these cases, the school should have the ability to intervene to protect the student or community whether the speech is made on campus or not. However, Landfried contends that in these cases substantial disturbance could be predicted, allowing the school to intervene under her guidelines. Additionally, she points out the possibilities of relying on anti-cyberbullying legislation and existing solutions like interacting with parents about behavioral concerns. One potential issue with Landfried's standard is that it does little to explain cases in which disruption is foreseeable, instead of saying that these should be common-sense decisions. She does not explain who should make these decisions and

gives little guidance as to what common-sense decisions entail. It is possible that this may be applied similarly to the subjective, reasonable person test, but she gives little explanation of how she envisions these decisions being made. Landfried's standard presents the most protection for student speech outside of the school because it focuses on the ability of the administration to prove that substantial disturbance happened or will happen as a result of the student's actions.

Waldman's (2011) opinion mostly reflects the sentiments of Landfried's suggested standard though she primarily focuses on hostile student speech dissenting with or criticizing school officials. She suggests that officials narrowly define what is offensive and hostile while limiting the school's ability to regulate students under *Tinker* only in certain cases. By narrowly defining disruption, the school must differentiate more strongly between the speech that threatens or harasses and speech that simply offends.

A final critique of the current standards is given by Michael Begovic (2016). Begovic that the *Bell* court's ruling that Bell showed intention to have his speech reach the school does a disservice to the students. One of the most central issues with the Internet is its openness. Any speech put on the Internet will likely be reached by people who the speaker never intended to see it in the first place. Therefore, Begovic argues that it is an unrealistic standard to force students to predict all the people who might see their speech before they post. For example, a student sending a Snapchat may not expect that a screen capture of the message will be brought to school or shown to an official, as was the case in *B.L. v. Mahanoy Area Sch. Dist.* It would be unrealistic to think a student could fully predict both who would see their speech and how it will be interpreted, which

would chill student speech. Additionally, he argues that relying on administrators to make the decision does not offer students enough protection. It does not offer enough protection because “reasonable minds will differ” (*Bell v. Itawamba Cnty. Sch. Bd.*, 2015), meaning that it was reasonable that someone familiar with rap would find Bell’s rap unthreatening, while someone unfamiliar with rap would not. It was reasonable for Bell to think he had expressed himself well on the topic and it was reasonable for the administrators to find his expression threatening. Therefore, it is difficult to base this case on an objective rule when a reasonable interpretation of the speech varies.

Begovic argues there is little need to apply the *Tinker* standard at all. He uses the *Ponce v. Socorro Independent School District* (2007) case as a basis. In this case, the court decided that a school could justify expelling a student whose journal showed plans to commit a Columbine style shooting without applying *Tinker*. The reason being the speech was so indicative of harm to the school that no one could refute it falls in the interests of the school to regulate. Therefore, Begovic argues that in the interests of not chilling student speech, a standard should be established, allowing schools to punish speech which threatens physical harm on the students. Begovic’s standard protects student speech that is offensive but does not threaten the safety of students or faculty. Begovic, like Landfried, believes that cyberbullying may be handled through other legislation, so if the physical harm standard cannot be extended to address the speech in question, there are other outlets.

The Internet had greatly blurred the boundary between the school environment and its surroundings. While there are ways for the school to regulate Internet use on

campus conduct through rules and network restrictions, once the speech is considered off-campus, regulation becomes more difficult. The *Bell* case sheds light on many of the weaknesses in our current definition of student rights. With emphasis put on the adviser's interpretation of speech and little definition of what defines significant disruption, there is a high chance of chilling student speech. One concern brought up by educators and school officials is that narrowing of definitions will provide students with less protection from harassment, cyberbullying, and other cybercrimes. It is an issue that will need to be weighed in the future. Ashley Powell (2016) describes some of the worries from the teachers' perspective. She focuses specifically on the issue of sexting among teenagers, but the worries are explicable elsewhere. She notes it is difficult for these issues to be addressed through criminal routes since it means students will also be affected by the laws which were created to protect them. *Tinker* does offer the teachers one outlet to help their students online.

Conversely, even if the definition of *Tinker* is found to be only applicable to speech that is posted or expressed on the school grounds, teachers are not completely helpless bystanders when they witness their students being harassed or bullied. In all likelihood, the bullying that Powell describes would spill over into the school. Moreover, as Landfried pointed out, there is nothing stopping school officials from reaching out to parents and sharing their concerns when they believe it is in the students' interests.

Waldman further explains that defining these matters relies on what the intention of our school is. Students are given the right to free speech even in school because schools are meant to teach students democratic principles for the future. Schools can

regulate speech because it allows them to protect students from harm and the school environment from disruption in order to accomplish this goal. However, how we define the school's role beyond this changes what student speech is regulated. One argument is that schools can regulate student's vulgar speech in order to teach them appropriate communication in adulthood. This standard is understandable when applied in the schoolroom. However, when speech takes place outside the school it is more difficult to define when this standard should be applied. Is it the school's role to train students how to speak respectfully to the members of their community outside the schoolroom, or is that the role of the parents? If the school may police students' civility and respect of officials outside of school, then there is a danger of the school censoring student's opinions. Justice Alito described this in regard to *Morse v. Frederick* writing:

The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups. (*Morse v. Frederick*, 2007)

Landfried argues that acting only in the interest of the school environment may have chilling effects. If a student expressing dissent with the school online is seen as hostile insubordination, how can a student learn the correct way to voice dissent as an adult? If students are unable to voice their displeasure with their school outside the school community for fear that it will reach school officials, then where can they complain?

Defining these issues greatly impacts the ability of students to express themselves and, by extension, how we will express ourselves in the future as students enter adulthood.

In more narrowly defining the role of the schools, *Tinker*, and its exceptions, the schools can protect their students while still affording them protections, which they will take with them into adulthood. As technology continues to change the way that we communicate, the boundaries of online and offline will likely recede even further. As that continues, it will be more important that we understand what exactly the limits of speech are to avoid chilling speech.

## **V. Conclusion**

As with many other legal issues in the United States today, it is difficult to predict how the framers of the Constitution would have reacted to modern technology, like Internet-based communication. The widespread adoption of the Internet as a tool for communication, business, and recreation has changed our society in ways which we are still trying to fully understand. Therefore, the implications of these changes are important when we reevaluate our laws. Our laws have had to be continuously evolved to provide a framework that will protect the rights of the citizens on new media platforms. As it stands now, the Internet has been granted a very high level of First Amendment protection, similar to that of the printed word. However, there are still many ambiguities in the way that officials define protected speech online. In the government's goal of fully defining protected and unprotected speech, the Internet presents a unique challenge because of the number of people using it and the way that it permeates all of our lives.

In true threat cases, it was discussed that there are many ways in which the Internet removes its context from our speech. Speech may remain long after the events which it described, making it difficult to understand how the speaker has changed or grown since they posted. Moreover, anonymity makes it much harder to prosecute crimes. In true threat cases, the general shift has been towards understanding threats based on the intention of the speaker rather than the feelings of the listener. This solution may have several weaknesses, including the fact that regardless of the intention of the speaker, listeners may still be hurt by speech. On the other hand, this shift reflects the arguments made by Villasenor, that the Internet especially is difficult to understand without taking into context the actual reason for a person's speech. For the government to accomplish its stated goals of using the least restrictive means to accomplish regulation of speech, it would appear that firmer definitions and standards are required to direct courts in determining the amount of regulation on the Internet.

This is a sentiment echoed in the writings about speech in schools. Protections for students have been in place in our courts since the 1960s, stemming from the *Tinker v. Des Moines* (1969) Supreme Court case. Since then, while there have been a few other cases that further defined exceptions to these standards, the Supreme Court has not been able to give much guidance on the role of the Internet in student speech. In the past, courts have been able to rely on the physical boundaries that defined in-school and out-of-school speech to guide them in regulation. However, the Internet has broken down that barrier. Speech that was not accessible in the past is now brought to schools whether or not the student intended it to be there. The need for school security has added an extra

layer of complexity to the issue. The inherent tradeoff between security and freedom has many worried about the future of student speech, especially since the Internet has given regulators more insight into the private lives of all citizens.

As it stands now, much of the regulation of student speech is still firmly rooted in the *Tinker* standard though applications to Internet speech have varied greatly in the lower courts. Regulation of speech within schools has largely been granted to school officials, but the overlap of off-campus speech and school is still relatively volatile. Threatening and hostile speech off-campus have largely been dealt with harshly, a nod to the necessity of schools to prevent school shootings and violence. Vulgar, rude, and dissenting speech has been less fully defined, allowing more protection for the students at the cost of having a definite rule.

Multiple standards have been proposed to help schools better balance the role of schools in the protection of their students and the student's freedom of speech. Many believe that the *Tinker* standards cannot be applied to out-of-school speech, for fear that the definition of "substantial disturbance" is not narrow enough to protect student speech. Cases like *Bell* bring worries that current rules do not look at the intent of students and unfairly limit their ability to bring issues into the public discourse. If the courts are to address this issue, then it is important to define the standards by which we define disruptions, the boundary between school and home, and when the interests of the school are so great that they outweigh the interests of parents to punish their children.

While the cases above give some idea of the Internet's effect on freedom of speech, there are many more issues beyond those discussions. This paper focuses on the

rights of Americans. Still, the problems with boundaries described in school speech cases are also observable in other cases such as national and international censorship. The nature of the Internet is widespread. It has little regulation considered to other forms of media, so the evolution of technology will continue to change our laws and lives.

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