Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet

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by

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Introduction

Fear and love of the Internet have been strange bedfellows since the beginning, each growing in leaps and bounds to match pace with the other. The introverted heroine played by Sandra Bullock in the film, "The Net,"\(^1\) is victimized by her use of and attachment to the Internet, which allows anarchist computerphobes to erase her life and identity electronically.\(^2\) At the same time, affinity for the Internet has been exploding, with the Internet more than tripling in size in the space of two years.\(^3\)

While the fears of potential hazards of the Internet are largely exaggerated by media portrayal,\(^4\) one of the genuine pitfalls of the Internet is one accompanying any mode of communication—its potential to be used to transmit offensive and/or undesired expression. In the context of educational institutions, which constitute the second largest segment of the Internet,\(^5\) this has been a particular problem.\(^6\) Accordingly, schools have taken sometimes extraordinary steps to prevent or react to such problems.

For example, in March 1998, sixteen-year-old Ohio high school student Sean O'Brien created a Web site to complain about his high-school band teacher, Raymond Walczuk, at www.raymondsucks.org.\(^7\)

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2. THE NET (Columbia Pictures 1995). Cf. LAWNMOWER MAN (New Line Cinema 1992); LAWNMOWER MAN II: BEYOND CYBERSPACE (New Line Cinema 1996) (both depicting a villain who stands to dominate the world by becoming “one” with cyberspace, thereby becoming able to control all activities currently run by computers).

3. Cynthia Bournellis, Internet '95, INTERNET WORLD, November 1995, at 47. The size of the noncorporeal and amorphous Internet is an abstraction, at best. Size here was measured by counting the number of registered host computers connected to the Internet. Id. See also discussion infra Part I.A-B.


5. Bournellis, supra note 3, at 47. The educational domain has been growing at extraordinary rates, mirroring what is going on with the rest of the Internet; it grew from 856,243 hosts in July 1994 to 1.4 million in July 1995. Id.


The Web site featured a photograph of Walczuk, described him as "an overweight middle-aged man who doesn't like haircuts," characterized him as a busybody who "likes to involve himself in everything you do, demands that band be your No. 1 priority, and favors people," and listed Walczuk's home address and telephone number. School administrators recommended expelling O'Brien, but the school district overseeing O'Brien's school opted to suspend him for ten days. O'Brien sued successfully for reinstatement, obtaining an injunction against the school.

Similarly, Texas middle schooler Aaron Smith created a Web site for "the Chihuahua Haters of the World," featuring shared stories about hating the dogs, such as one in which a seven-foot boa constrictor eats one. The Web site mentioned it was created in the school computer lab. The school officials of the middle school suspended him for one day and removed him from his computer lab class. Smith sued, though he and the school settled the matter short of trial with Smith returning to the computer lab class and no mention of the incident on his scholastic record.

In Fall 1996, Princeton University effected a blanket prohibition of its students' and staff's use of the Internet for "political purposes." The ACLU urged Princeton University to end this
policy. Finally, Princeton relented and stated, "It is not Princeton's policy to prohibit individual members of the university community from using Princeton's computer network for personal political discourse."

In Fall 1995, a Virginia Tech student posted a message calling for gays to be castrated and to "die a slow death" on a gay men's Internet site titled, "Out and Proud." The university punished the student but refused to release the details of the sanctions imposed.

At about the same time, four freshmen at Cornell University sent an e-mail message listing "75 reasons why women should not have freedom of speech" to about twenty of their friends; the message was forwarded, almost like a chain letter, to countless people across the country. It included lines such as, "If she can't speak, she can't cry rape," and, "Of course, if she can't speak, she can't say no," and vulgar references to oral sex. Cornell was bombarded with public outrage in the form of so many complaining e-mails that its computer system crashed. The four students apologized and expressed "deep remorse" for their "stupid actions" in a letter printed in Cornell's student newspaper.

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17. Princeton University Revokes Ban on Political Speech, supra note 15 (internal quotation marks omitted).


19. Id.

20. See, e.g., E-mail Mischief Gets Cornell in Instant Trouble, S.F. CHRON., Nov. 15, 1995, at A5.

21. Marco R. della Cava et al., Cornell Punishes Misogynist E-mail, USA TODAY, Nov. 21, 1995, at 6D. David Lambert, the university vice-president, reported receiving nearly 1000 e-mail complaints before he stopped reading them, and the four students reported receiving fifty to sixty "threatening responses" per week. See E-mail Mischief Gets Cornell in Instant Trouble, supra note 20, at A5. People did speak on behalf of the students, raising First Amendment concerns. See della Cava et al., supra note 21, at 6D; Letter from Robert B. Chatelle, Political Issues Chair, National Writers Union, to Barbara Krause, Judicial Administrator, Cornell University (Nov. 19, 1995) (visited Dec. 29, 1996) <http://world.std.com:80/~kip/cornell.html>.

22. della Cava et al., supra note 21, at 6D.
The university charged the students with sexual harassment and misuse of computer resources. While the disciplinary board ostensibly decided not to punish the students, the students agreed to attend Cornell’s “Sex at 7” program, which deals with acquaintance rape; perform of 50 hours of community service, if possible at a nonprofit agency focusing on sexual assault or similar issues; and meet with a group of Cornell senior administrators to apologize.

In Spring 1995, seventeen-year-old high school student Paul Kim created a satirical “Unofficial Newport High School Home Page” and posted it publicly on the Internet. On the page, Kim poked fun at his peers for being “preoccupied by sex and for majoring in football.” The page also included links that could bring an observer of the page to other pages on the Internet, in particular, ones with material about oral sex and masturbation and a picture of a Playboy centerfold. Upon discovering the page, Newport High School administrators withdrew the school’s support for Kim’s National Merit finalist candidacy and endorsement of their letters of recommendation to seven universities to which he had applied, including Harvard, Stanford, and Columbia, without notifying Kim. Kim had earned a 3.88 GPA through high school and was popular among and well-liked by his teachers. Fortunately for Kim, the American Civil Liberties Union stepped in on his behalf and threatened to sue the

23. E-mail Mischief Gets Cornell in Instant Trouble, supra note 20, at A5.
24. Nancy Garland, Student penalized for online threats UM teen-ager faces community service, BANGOR DAILY NEWS, ME., Oct. 30, 1997. Interestingly, the title of a USA Today article characterized this “agreement” more as disciplinary measures handed down by the university. See della Cava et al., supra note 21, at 6D.
25. della Cava et al., supra note 21, at 6D.
31. See Internet Sex Note Hurts College Hunt, supra note 26 (twelve teachers signed a letter to prompt the administration to reconsider its actions; English teacher Janet Sutherland said she was “very upset” at the turn of events and described Kim as “brilliant.”).
school.\textsuperscript{32} The matter was settled out of court, with the Bellevue School District issuing a formal apology to Kim, paying Kim for the value of the potentially lost National Merit scholarship, and reinstating Kim as a National Merit finalist.\textsuperscript{33}

In 1993, a University of Texas at Dallas student made a series of postings on Russian and Ukrainian politics. In so doing, he made liberal use of terms such as “holhol,” which many Ukrainians consider to be a racial epithet, compared the Ukrainian national symbol, the trident, to a sexual device, and implied a homosexual relationship between Russian President Boris Yeltsin and Ukraine President Leonid Kravchuk. The university revoked his Internet connection. The student filed a lawsuit against the university charging violation of his rights of free speech.\textsuperscript{34}

Perhaps the most notoriety has been afforded Jake Baker, a student at the University of Michigan who posted a perverse sexual fantasy describing the abduction, rape, and torture of a woman, named after a classmate, and exchanged e-mails with a man in Ontario about such topics.\textsuperscript{35} The university first took away his computer privileges. It then asked him to withdraw voluntarily from the university though he could return at a later date, if he got “help.”\textsuperscript{36} He was never given a chance to make that decision. On February 2, 1995, armed University of Michigan officers presented him with a letter from the university President authorizing his suspension and removed him from campus.\textsuperscript{37} On February 9, FBI agents arrested Baker and

\begin{itemize}
\item \textsuperscript{32} Cooper, \textit{supra} note 27, at A1.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} See, e.g., \textit{Lawsuit Seeking Limits of Computer Free Speech}, \textit{Houston Chron.}, November 15, 1993, at 16. The suit was subsequently dismissed by U.S. District Court Judge Jorge A. Solis, who found that “Mr. Steshenko's use of the Net strayed from any possible academic purpose.” Tom Steinert-Threlkeld, \textit{North Texas Free Net, and Other Wandering}, \textit{The Dallas Morning News}, May 28, 1994, at 2F.
\item \textsuperscript{36} Megan Garvey, \textit{Crossing the Line on the Info Highway: He Put His Ugly Fantasy on the Internet. Then He Ran Smack into Reality}, \textit{Wash. Post}, March 11, 1995, at H1.
\item \textsuperscript{37} \textit{Id.}
charged him with transmitting threatening communications across state lines.\textsuperscript{38} The charges were dismissed,\textsuperscript{39} but the United States Attorney's Office announced it would appeal.\textsuperscript{40}

In every one of these cases the Universities have been accused of overstepping the First Amendment's protection of expressive speech. As Michael Froomkin, an associate law professor at the University of Miami, puts it, "Most universities err wildly, and in many cases, illegally on the side of control, and they give the users no rights at all."\textsuperscript{41} Likewise, Ann Beeson, an attorney with the American Civil Liberties Union, notes the disturbing "trend where the first instinct of the school is to censor the speech."\textsuperscript{42}

How much legal authority do educational institutions really have in these situations? This seemingly simple question sits at the crossroads of general First Amendment jurisprudence, the context of the school as it affects constitutional and other law, and the Internet as a medium of communication. Each of these prongs is itself convoluted, somewhat unsettled, and often misunderstood. The question being thus triply complicated, it is no wonder that schools

\begin{footnotesize}
\footnote{38} Id.

States, too, are enacting laws against transmitting "indecent" materials to youth over the Internet. See \textit{Multimedia Strategist}, Sept. 1996, at 5. The list of states currently includes New York, Georgia, Virginia, Illinois, Kansas, Montana, Oklahoma, and Maryland. \textit{Id.} As some of the state laws were promulgated after the CDA encountered difficulties, they were written with CDA's constitutional problems in mind; thus, some of them may survive constitutional scrutiny. See \textit{id}.
\footnote{42} Theiss & Harter, \textit{supra} note 7.
\end{footnotesize}
appear to act blindly and rashly, without regard to student rights. After all, what are the student rights? Thus far, there has been no court opinion to guide analysis.43

This Comment attempts to distill the proper legal standards to be applied to restrictions placed by educational institutions on various types of Internet expressions by their students. This Comment confines itself specifically to the expression44 of students45 in public educational institutions.46

43. The O’Brien case mentioned above seems to be the first and only even to reach judgment. See discussion supra note 10. However, it apparently did not yield an opinion; my searches of LEXIS failed to reveal anything but news articles on the case, and I was unsuccessful in reaching O’Brien and/or his attorneys to verify there had been no opinion issued.

44. I limit discussion to proactive expression, that is, the right to “speak” rather than the right to receive information. The latter is also subsumed in First Amendment protections. Cf. Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (students have a “right to receive information and ideas”); Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners . . . which is paramount . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . .”); Fox v. Board of Trustees of State Univ. of N.Y., 841 F.2d 1207, 1211 (2d Cir. 1988) (“One of the constitutional rights enjoyed by students, of course, must be the right to receive information.”). It also raises particular concerns with regard to the Internet in schools. For example, in 1994, Carnegie Mellon University restricted school Internet accounts so they could no longer access certain newsgroups containing sexually explicit materials. See, e.g., Declan B. McCullagh, It’s About Cyberfreedom: Central to Launching the Internet, CMU Must be a Free-Speech Absolutist on its Use, PITTSBURGH POST-GAZETTE, Nov. 19, 1994, at B3; ACLU Urges Carnegie Mellon To Reverse Internet Censorship; Letter to University President Says Students Must Have Access to Information (visited Dec. 29, 1996) <http://www.aclu.org/issues/cyber/censor/cyber2.html>; cf also, Loving v. Boren, No. 97-6086 (10th Cir., Jan. 7, 1998) (professor sought to sue over university policy denying access to certain Internet newsgroups); ACLU, ACLU Enters VA Library Internet Lawsuit on Behalf of Online Speakers (visited Apr. 17, 1998) <http://www.aclu.org/news/n020698a.html>; L. A. Lorek & Patricia Horn, Free-Speech Issue Lurks Behind Bill to Filter Internet Smut in Schools, SUN SENTINEL, Feb. 16, 1998, at 1G (discussing bill to limit access to certain Internet sites); Natalie Patton, College Student, 23, Chased Off Internet While Looking at Nudes, LAS VEGAS REV. J., Dec. 5, 1997, at 1B (photography student viewing Internet art gallery, including nude photos, asked to leave computer lab); Peter H. Lewis, Group Pushes to Keep Racism Off the Net, S.F. CHRON., Jan. 10, 1996, at A1 (Jewish human rights group asks universities to refuse to carry racist materials); John Markoff, On-Line Service Blocks Access To Topics Called Pornographic, N.Y. TIMES, Dec. 29, 1995, at A1 (Compuserve Internet service provider blocks access by subscribers to “more than 200 sexually explicit computer discussion groups and picture data bases.”).

45. Many of the same concerns and law that apply to students will also apply to faculty and staff. However, as employees of the educational institution, the expression of faculty and staff raise some additional issues that play out somewhat differently. For example, how a teacher’s expression affects her teaching efficiency in the classroom may be a valid consideration that is not present for students. See generally Donna Prokop, Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests, 66 S. CAL. L. REV. 2533 (1993). To the extent such academic freedom issues are raised for students, this Comment does attempt to address them.
Part I of this Comment provides a factual framework by discussing the relationships between and among public schools, students, and the Internet. Part II outlines how First Amendment cases have played out in the context of schools. In the broad scheme of First Amendment jurisprudence, public schools have broad power to regulate students qua students. Thus, in particular, Part II explores how to determine what can be categorized as a valid regulation of students qua students, drawing from cases and commentary. This determination turns on how a regulation at issue furthers the school's educational mission.

Part III examines the cases in which school actions do not fall under their power to regulate students qua students, thus triggering a more "standard" First Amendment analysis. In that analysis, the context of the Internet is the novelty. Part III first argues that the power and capabilities of the Internet do not justify treating it as qualitatively different than other media of communication, and then looks at how "standard" First Amendment doctrines such as "public forum" analysis apply to Internet communications.

Part IV attempts to extract the relevant and most useful legal standards from Parts II and III to develop an approach to analyzing a public school regulation or action that restricts student Internet expression. Finally, Part V illustrates this approach by applying it to three case examples and by its conclusions suggesting that certain restrictive measures being implemented by schools are likely unjustified and illegal.

See discussion infra Part II.C.

46. Private educational institutions are not bound by the First Amendment, making discussion of their ability to restrict expression somewhat purposeless. See, e.g., Lloyd v. Tanner Corp., 407 U.S. 551, 567 (1972) ("First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property ..." [emphasis in original]). However, state legislation can extend certain rights of freedom of expression to private educational institution contexts. In California, the so-called "Leonard Law" dictates that a private university student has the same right to free speech on campus as she enjoys off campus. CAL. EDUC. CODE § 94367 (West 1997). California seems to be the only state with such a law. See Kathy Barrett Carter, Appeals Court Upholds Expulsions for E-mail Slurs at Private School, THE STAR-LEDGER, Aug. 16, 1995, available in WESTLAW, 1995 WL 8872232.
I
Framing the Problem: The Internet in Schools

A. The Nature of the Internet

As *Newsweek* flamboyantly proclaimed in a subtitle spanning four pages in its year-end article on the Internet, "This Changes . . . Everything."47 But why? What is the Internet, what can it do, and how does it differ from other contexts?

The Internet is often romanticized as a "place," occupying physical space. People "surf" the 'Net and the Web48 and speak of visiting "sites." These physical metaphors were at least in part originated by the term, "cyberspace," which was coined in an award-winning novel about a not-so-distant future in which computer cowboys interfaced directly with computers and enter "cyberspace."49 The reality of cyberspace may be drawing closer as we speak.

In less romantic terms, the Internet is a network of networks.50 Each network is a "system of computers interconnected by telephone wires or other means in order to share information."51 The backbone that connects these networks to each other are high-speed lines originally designed to connect the National Science Foundation supercomputers.52 These lines consist of high-capacity telephone links, microwaves, lasers, fiber optics, and satellites.53 In sum, the Internet connects computers all over the world and is thus often called the "Global" Internet.54

A person accesses the Internet via a computer directly connected to (or which is part of) the Internet, often called a "host" computer.55

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48. "Web" and "WWW" are commonly used short terms for "World Wide Web," which is, in some senses, a subset of the Internet. See discussion *infra* this section.
53. *Id.*
55. See, e.g., Levy, *supra* note 41, at 21; COMER, *supra* note 54, at 129 n.†. It is also called a "server." E.g., INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, 90 [hereinafter "NII REPORT"]. The NII REPORT has also been coined the "White Paper."
However, more commonly, she uses a computer connected to a host, or a computer even further removed from the direct connection to the Internet.56 These degrees of separation are often navigated by high-speed computers and the aforementioned high-speed lines, making the separation almost invisible. Once connected to the Internet, the computer user may then send or retrieve information through the Internet. Depending on the interface she has, composed of the computer and the software program it runs, she may interact with the Internet and see her information via text or graphics.

A person needs a particular type of computer "account" before she can access the Internet. This account serves both as her entry pass and her identification card. The account allows the person to use the computer or "host" that connects her to the Internet. For example, typically, a person must type in the password linked to her account before being allowed to use the computer that will connect to the Internet. Furthermore, the account is also named and thus identifies the user of the account and becomes the "handle" of the person using the account, much like a "handle" used by shortwave or CB radio enthusiasts. The full name of the account will also identify the host computer, which may mark the location of the user. For example, the account "ice@cs.stanford.edu" is the user whose account is named "ice" operating out of the computer system at "cs.stanford.edu."57

The World Wide Web has garnered considerable public attention along with the Internet. The World Wide Web is a subset or underlying neighbor of the Internet, depending on one's viewpoint. The Web is a scheme whereby users all have interfaces that allow them to see graphic images, and sometimes to even hear sound and see video, and they visit Web "sites" where the computers are ready to send them graphic information in line with their interface.58 The use of graphics makes the interface much easier to use as a user may point and click on graphical buttons rather than memorize obscure text commands.59

56. See, e.g., NII REPORT, supra note 55, at 90.
57. The host computer is identified by the hostname and the domain. In this example, the hostname was "cs", which is the name of a particular host at Stanford University. Further, "Stanford" marks the domain as Stanford University. Finally, "edu" denotes an educational institution.
58. NII REPORT, supra note 55, at 91.
59. See id. (on the graphical nature of the World Wide Web). The most common text interfaces involve the UNIX operating system, which requires use of obscure shorthand text commands, such as "cat" to view the contents of a file. Huge books exist and are necessary to master the commands in UNIX. See generally, e.g., GRAHAM GLASS, UNIX FOR PROGRAMMERS AND USERS (1993); BRIAN W. KERNIGHAN & ROB PIKE, UNIX
B. The Relationships Between Educational Institutions, Students, and the Internet

Many educational institutions, especially postsecondary schools, provide free Internet access to their students. Students may register for Internet accounts and then access the Internet via school computers tapped into host computers connected to the Internet or from home computers using modems to call into host computers. These accounts are tagged with the names of the schools and thus identify communications from students as being from particular schools. For example, going back to the previous example, when the student whose account and address is “ice@cs.stanford.edu” sends e-mail to someone, the message is clearly marked as having come from “ice@cs.stanford.edu.” In this particular example, this tag indicates not only the school, Stanford University, but the department of the student using the account, as “cs” stands for “computer science.”

More and more instructors now require their students to use the Internet. This ranges from requiring use of Internet resources to complete assignments to requiring use of Internet-based discussion groups or electronic mail by holding students accountable for the information distributed through those means. For example, computer science and other engineering majors at many postsecondary schools must use their Internet accounts to access UNIX programming tools that are on-line to be able to do their homework; there are usually no

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60. See, e.g., Reno v. ACLU, 117 S. Ct. 2329, 2334 (“Most colleges and universities provide access for their students and faculty.”). Secondary and earlier-level schools have not traditionally provided such services, but this is rapidly changing. See, e.g., Susan Yoachum & Edward Epstein, Clinton Goal — Internet in Every School, S.F. CHRON., Sept. 22, 1995, at A1. Even so, secondary and earlier-level schools are probably unlikely to provide the individual Internet accounts postsecondary institutions have typically provided because of cost and lesser resources. Even some universities are having trouble keeping up with the demand and may have to pass some of the cost on to their students. See Michelle Quinn, State Colleges Turn to Firms for Internet Access, S.F. CHRON., Nov. 3, 1995, at B1 (“After two decades of free access to the Internet, university students will soon have to pay private industry . . . .”); Rob Zazueta, UC Online Deal Reflects a Growing Campus Trend: Heavy demand and not enough lines, DAILY CALIFORNIAN, Nov. 7, 1995, at 1.

61. See id. (“Their domain name—the part of the address used when sending mail—will . . . read ‘berkeley.edu.’”).

62. Likewise, with other forms of Internet communications such as “write” and “talk,” the communicator is identified by her account and Internet address. See discussion supra Part II.C.2; GLASS, supra note 59, at 304-05. However, increasing numbers of clever computer manipulators have learned to mask such identifications and make their communications anonymous. Some such deceptions are easy to detect and trace back to the perpetrator, but some are nearly impossible to expose.
alternatives to working on and through the Internet. On a similar note, some instructors make heavy use of newsgroups or mailing lists to distribute information about the class and will hold students accountable for any message posted to the newsgroup or e-mailed to them. Notices about changes to an assignment’s parameters or page limits, for example, or to deadlines, are posted to an Internet-based newsgroup or distributed via an e-mail mailing list.

In fact, even where use of the Internet is strictly optional, some students consider the Internet an indispensable tool for procuring information. E-mail is often a much quicker and easier method of getting in touch with an instructor or teaching assistant and receiving a rapid response. Moreover, students have quick and easy access to each other over the Internet, and where cooperation is allowed, they are often able to find answers to their questions via e-mailing each other or checking a newsgroup. They may find that other students had the same questions and that a newsgroup discussion was already taking place on the subject. To this end, as well as for administrative purposes alluded to before, many classes may have newsgroups set up specifically for class use. 64

Non-technical classes and even law schools are following the lead of the technical majors in their use of the Internet and Internet paradigms. In 1995, Professor Eleanor Swift and a few other professors at Boalt Hall School of Law, University of California, Berkeley, began using TWEN, 65 a WESTLAW-based discussion group much like a newsgroup on the Internet. 66 Professor Swift’s Evidence students were required to post their answers to problems on the definition of hearsay to the discussion group; this was to be the only coverage of the definition of hearsay, and students were responsible for the answers of all of their classmates to all of the problems on the final examination. 67 In 1997, Professor Pamela Samuleson’s Cyberlaw students could access their syllabus and weekly reading assignments only through the class Web site. Likewise, class discussion was continued outside of class via an e-mail mailing list, and

64. E.g., su.class.cs106a (discussion group for Computer Science 106a at Stanford University). Such discussion groups are typically local and can be accessed only from university accounts.
65. TWEN stands for The West Educational Network.
66. The discussion group was functionally very similar to an Internet newsgroup. However, it was based in WESTLAW networks and was not actually “in” the Internet.
67. Law professors may still feel a little discomfort with leaving such a discussion exclusively in an Internet paradigm! Here, Professor Swift eventually handed out photocopies of a printout of the entire discussion, i.e., every student’s answer to each problem as posted to the discussion group, with her comments handwritten in the margins.
Professor Samuelson used e-mail exclusively to acknowledge receipt of the first paper assignment and to give her feedback on those papers.

At Stanford University, the use of Internet accounts has actually become intertwined with all university computer resources. There, all students need an Internet account to use any university computer. All computers have a "login" screen requiring entering the name of a valid Internet account and the accompanying password before allowing use of the computer. The passwords on the accounts ensure that university computer resources are used only by authorized people, and the account itself further does bookkeeping by keeping track of any charges that accrue by use of computer resources, such as laser printing.

In sum, educational institutions have several major relationships with their students in the context of the Internet. First, they are often the providers of Internet access to their students. Second, the names of their institutions usually appear with any Internet communications made by their students. Finally, their students make extensive use of the Internet for academic purposes.

C. How Students Use the Internet Apart From Mandated Academic Purposes

Of course, the vast bulk of all student use of the Internet is personal use.68 Students use the Internet extensively as a mail or phone service, keeping in touch with friends and family across the country for free or even leaving messages for classmates just across campus. In fact, some students say their e-mail has become as indispensable as their phones, and they use it to "flirt, spread the word about parties, discuss class work with professors and each other, . . . or sell used futons."69

Thus, students socialize on the Internet, sometimes meeting new people or finding international "pen pals." They discuss topics of interest on newsgroups. They "surf" the 'Net70 to find interesting research and information,71 download free computer software,72

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68. "Personal," as used here, includes all purposes other than class-based academic reasons.
70. The phrase "surf the 'Net" is slang used to mean "using Internet services to browse information." COMER, supra note 54, at 303.
71. See generally id., at 189; EDDINGS, supra note 50, at 155. The Web has become a remarkable source of information, and sometimes it is the only place to find current up-to-the-minute data.
entertaining pictures and sound clips; perform errands or tasks such as looking for housing; sending flowers; or making airline reservations without ever leaving their rooms. They check the Web for sports scores or updates on their favorite television shows. They look for interesting Web pages or create their own, as an act of self-expression or to reach out to others. For further entertainment, they may play games on the Internet, ranging from arcade-style action to multi-user interactive adventures.

While such personal uses may not directly serve the educational missions of schools, they serve the dual purposes of interesting students in education and training the students in use of computers and the Internet. Internet skills may feasibly be important for jobs and general technical competency as the prevalence of the Internet continues to grow.

72. See EDDINGS, supra note 50, at 59.
73. Id. at 59-60.
74. See, e.g., <http://www.homefindersbulletin.com> (housing listings); <http://www.iflyswa.com> (Southwest Airlines fares and flight information).
75. See, e.g., <http://www.nba.com> (shows current scores of NBA professional basketball games).
76. See, e.g., Shen, supra note 69, at A1.
77. Cf. President Clinton, Meeting with Students in San Francisco, Sept. 21, 1995, quoted in Yoachum & Epstein, supra note 61, at A1 ("I want to get the children of America hooked on education through computers.")
78. Cf. Yoachum and Epstein, supra note 61, at A1 (while talking about his goal of all schools being on the Internet, President Clinton goes on to say he had a plan to achieve "technological literacy" nationwide).
79. The number of businesses making use of e-mail and the Internet is becoming increasingly large. See, e.g., NII REPORT, supra note 55, at 5 ("The NII can boost the ability of U.S. firms to compete and succeed in the global economy.... More than half of the U.S. work force is in information-based jobs.... New job opportunities can be created in the processing, organizing, packaging and dissemination of the information and entertainment products flowing through the NII."). Already, some people even "telecommute" into work rather than leave their homes. See Cass R. Sunstein, The First Amendment in Cyberspace, 104 YALE L.J. 1757, 1758 (1995) (quoting Administrative Policy Statement, 58 Fed. Reg. 49,026 (1993)).
80. Many commentators speculating about the "future" of the Internet envision a number of everyday functions becoming faster and more efficient through the Internet. For example, seeing the latest movies, playing the hottest video games, banking, and shopping might all be done from home, via the Internet. See id. See generally NII REPORT, supra note 55, at 4-5. As such uses of the Internet become more commonplace, Internet competency may become a very important skill. If such computerized utopias become reality, perhaps Internet use will become regarded as on the same level as programming a VCR.
D. What Schools Are Doing in Regulating Internet Expression

Many educational institutions who provide Internet accounts to their students have general guidelines on the use of those Internet accounts. These typically govern technical use and inappropriate use of resources.\(^{81}\) Oftentimes, a student registering for an Internet account must read and agree to the guidelines online, while setting up an account; a written copy may also be provided to the student or be otherwise available.

Increasingly, universities are promulgating content-based regulations on use of the Internet as well. This may take the form of explicitly linking use of Internet back to other student conduct policies. However, following the mindset of federal legislation,\(^{82}\) more university policies on use of the Internet are becoming more restrictive and apply specifically to the Internet.\(^{83}\) For example, a 1995 draft of proposed guidelines at the University of California, Berkeley, begins: “The intent of [these guidelines] is to assure that: 1. the use of the University email is related to University purposes; 2. University resources are used effectively; 3. disruptions to University activities are avoided; and 4. the University community is informed about confidentiality, privacy, and acceptable use of email.”\(^{84}\)

The first of these goals is particularly noteworthy considering first that much student use is personal and second that what constitutes “University purposes” is fairly ambiguous. The draft policy does go on to detail:

The University provides access to email systems for the conduct of University business. Incidental and occasional personal use of email is permitted within the University so long as such use does not disrupt or distract the conduct of University business (i.e. due to volume or frequency). Incidental and occasional use of email is subject to campus regulations.\(^{85}\)


\(^{82}\) See discussion supra note 41 (discussing Communications Decency Act).

\(^{83}\) See Shear, supra note 18, at A1 (Former law school dean Lee Bollinger notes “universities are reinventing the same kinds of codes [as the speech codes at the University of Michigan and Stanford that were struck down by the courts] for cyberspace.”); see also, e.g., Princeton University Revokes Ban on Political Speech, supra note 15. For a good overview of various forms of Internet censorship taking place at a number of universities, see Sex, Censorship and the Internet (visited Dec. 29, 1996) <http://www.eff.org/CAF/cfuiuc.html#iastate>.

\(^{84}\) Electronic Mail Guidelines, University of California, Office of the President, Information Systems & Administrative Services (Draft 8/21/95).

\(^{85}\) Id.
This elaboration is helpful but still leaves open to wide interpretation what "incidental and occasional" mean. At least one student considered the draft policy to be a "blatant attack on the unions on campus" that followed "on the heels of a ruling against the university . . . . that found that the university was reading union members' email and thus discriminating against the union . . . ."86 This is borne out by the fact that the draft policy's one clear statement on non-University purposes explains employee union representatives may not be provided access to university e-mail facilities.87

Moreover, the consequences of violations in the draft policy are severe, resulting in "revocation of the account and/or disciplinary action up to and including termination, if the violator is an employee, or dismissal, if a violator is a student . . . ."88

The University of California's proposed policy is not unusual, nor is it the most stringent, although in the end, this proposed policy was rejected.89 However, as mentioned, Princeton University actually implemented a policy prohibiting political speech on the Internet, until this policy too was rejected under intense pressure. As mentioned, Princeton University essentially prohibited political speech on the Internet.90 A California school district prohibits Internet speech which may damage the school's reputation.91 A Minnesota school district prohibits "any action that is determined by their classroom teacher or a system administrator to constitute an inappropriate use of the Internet."92

The enforcement of existing disciplinary measures in educational institutions regarding censurable Internet expressions echoes this severity.93 As mentioned previously, Jake Baker was effectively expelled from the University of Michigan for posting a perverse sexual fantasy about the abduction, rape, and torture of a woman named after a classmate.94 Four Cornell University freshmen ended up

86. See E-mail Letter from Roger Berkowitz, Student, University of California, Berkeley, to Kwuan (Oct. 5, 1995) (on file with author).
87. Electronic Mail Guidelines, supra note 84, at § III.A.
88. Id., at § III.E.
89. For the current policy, see Computer Use Policies, University of California, Berkeley (visited Oct. 15, 1998) <http://www-uclink.berkeley.edu/polices.html>.
90. See discussion supra notes 15-17 & accompanying text.
92. Id. (emphasis supplied) (internal quotation marks omitted).
93. See generally discussion infra Introduction.
94. See supra discussion and text accompanying notes 35-40; see also Garvey, supra note 36, at H1.
performing fifty hours of community service each and attending programs on acquaintance rape for originating an e-mail message listing sexist and vulgar reasons why women should not have freedom of speech. A high school student in Ohio was suspended for ten days for calling his band teacher "an overweight middle-aged man who doesn't like haircuts" on his Web site. Only a few schools seem to tread carefully around the First Amendment.

The typical severity of school actions in these types of situations—both when schools promulgate Internet-specific policies restricting student expressions and when they punish students for their Internet expressions—demands closer examination to ensure that the rights of students are not being unconstitutionally trammeled.

II

Regulation of Students Qua Students

That the First Amendment applies in public schools is very clear. Exactly how it applies, however, is not. After the Court's early declaration upholding the strong rights of public school students to free expression in Tinker v. Des Moines Independent Community School District, the Court has in some senses backed away and now shows considerable deference to schools. Generally, schools seem to have broad latitude to regulate students qua students, even when this encompasses restriction of expression.

A. "The Schoolhouse Gate"

Three seminal cases outline much of the Supreme Court jurisprudence on the First Amendment in the context of schools: Tinker v. Des Moines Independent Community School District, Bethel School District Number 403 v. Fraser, and Hazelwood School...
District v. Kuhlmeier. An understanding of the facts and rationale in those cases is necessary before proceeding.

The Court’s opinion in Tinker is the source of the oft-cited passage: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

In Tinker, some students in Des Moines, Iowa decided to wear black armbands to their schools from approximately mid-December until New Year’s Day to publicize their desire for peace and objections to the Vietnam War. The principals of the Des Moines schools learned of the plan beforehand and adopted a policy prohibiting wearing armbands to school, violation of which resulted in suspension until the student was willing to return to school without any armbands. The students wore the armbands to school anyway and were suspended.

In holding the principals’ actions unconstitutional, the Court found there was no evidence that the armbands created any disturbance and noted “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” There must be more than “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”; rather, there must be a finding that the expression would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”

Although Tinker seems to indicate that the school can interfere with student First Amendment rights only in the case of a “material and substantial interference,” Tinker has been limited in many ways by opinions continuing to allow limitation of students’ First Amendment rights in school. Justice Stewart’s concurring opinion

103. 393 U.S. at 506. Moreover, “[a] student’s rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . .” Id. at 512-13.
104. Id. at 504.
105. Id.
106. Id.
107. Id. at 508.
108. Id. at 509.
109. Id. (internal quotation marks omitted); see also id. at 511-13.
110. See Westbrook v. Teton County Sch. Dist. No. 1, 918 F. Supp. 1475, 1493 n.13 (D. Wy. 1996) (citing to commentary arguing that Tinker was the “highwater mark for student
in *Tinker* contained the caveat, "I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."\(^{111}\) Likewise, even the landmark passage from *Tinker* is carefully qualified by the clause "in light of the special characteristics of the school environment."\(^{112}\) Thus, many post-*Tinker* decisions have found ample room to accord great deference to school administrators.\(^{113}\)

In *Bethel School Dist. No. 403 v. Fraser*,\(^ {114}\) the Court sustained a school's penalizing Matthew Fraser by giving him a three-day suspension and removing his name from the list of candidates for graduation speaker.\(^ {115}\) Fraser had delivered a sexually suggestive speech nominating a fellow student to student government before a voluntary assembly of approximately 600 students, many of whom were 14-year-olds.\(^ {116}\) The Court noted the values in tolerating divergent views and speech "must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."\(^ {117}\) Therefore, the free speech rights of students must be balanced against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior"\(^ {118}\) and "in protecting minors from exposure to vulgar and offensive spoken language."\(^ {119}\)

Fraser's speech was vulgar, offensive, insulting to teenage girl students, and potentially damaging to younger students.\(^ {120}\) Moreover, it was directed at an "unsuspecting audience of teenage students."\(^ {121}\)

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\(^{111}\) 393 U.S. at 514-15 (Stewart, J., concurring).

\(^{112}\) Id. at 506.

\(^{113}\) See infra notes 114 - 142 and accompanying text; cf., e.g., Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere."); New Jersey v. T.L.O., 469 U.S. 325, 341, 342 & n. 9 (1985) ("Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not."); Goss v. Lopez, 419 U.S. 565 (1975) (students do not have same due process rights as adults).

\(^{114}\) 478 U.S. 675 (1986).

\(^{115}\) Id. at 678, 687.

\(^{116}\) Id. at 677-78.

\(^{117}\) Id. at 681.

\(^{118}\) Id.

\(^{119}\) Id. at 684.

\(^{120}\) Id. at 683, 685.

\(^{121}\) Id. at 685.
Accordingly, the school’s interest in disciplining such speech won out. The Court also addressed its earlier holdings in *Tinker*.

Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. “The First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission.”

Additionally, the Court echoed the language of Justice Stewart’s concurrence in *Tinker* in pointing out that “the constitutional rights of students are not automatically coextensive with the rights of adults in other settings.”

In *Hazelwood School Dist. v. Kuhlmeier*, the Court sustained a high school’s censorship control over the contents of the school newspaper produced as part of the school’s journalism course curriculum. The principal reviewed the page proofs of the school newspaper before publication; for the case at hand, he removed the pages containing two stories. The first described three students’ experiences with pregnancy, about which the principal was concerned that the identities of the students were not sufficiently disguised, and that the article contained references to sexual activity and birth control inappropriate for some of the younger students. The second discussed the impact of divorce on students and mentioned a particular student criticizing her divorced father for not spending time with the family, about which the principal felt the parent should have had opportunity to respond.

Drawing heavily from *Tinker* and *Fraser*, but also carefully distinguishing *Tinker*, the Court held that schools are entitled to greater control over student speech they affirmatively promote or sponsor, such as school publications or theatrical productions. Thus, “the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources

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122. *Id.* at 685-86.
123. *Id.* at 685; *see also id.* at 680 (“The marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of respondent’s speech in this case seems to have been given little weight by the Court of Appeals.”)
124. *Id.* at 682.
126. *Id.* at 262, 276.
127. *Id.* at 263-64.
128. *Id.* at 263.
129. *Id.*
130. *Id.* at 270-72.
to the dissemination of student expression." 131 Finally, the Court underscored the deference to be accorded schools in stating, "the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 132

These three seminal cases on the First Amendment in schools all involve public secondary or lower schools. Thus, it is possible that the seeming withdrawal from Tinker in Bethel and Kuhlmeier is tied to the age of students in secondary and lower schools. The Court has been somewhat more vigilant in protecting First Amendment rights of students at the college and university level. For example, in Papish v. Board of Curators of the University of Missouri, 133 the Court disallowed the university’s expulsion of a graduate student because of the content of her newspaper, which she distributed on the university campus. 134 In particular, one issue reproduced a political cartoon in which policemen were shown raping the Statue of Liberty and Goddess of Justice and contained an article entitled, "M——f—— Acquitted." 135 The Court reaffirmed that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” 136 Moreover, the “mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” 137 As the cartoon and article title were not constitutionally obscene and thereby unprotected speech, 138 and as “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech,” 139 the Court required the university to reinstate the student.

Therefore, the difference among educational contexts is a factor in considering whether educational concerns justify restrictions on speech. The Court looks at the university as a haven for intellectual discourse and debate in need of the greatest First Amendment protections. 140 On the flip side, the younger, more impressionable, and

131. Id. at 272-73.
132. Id. at 273.
134. Id. at 667-68, 671.
135. Id. at 667-68.
136. Id. at 669-70 (quoting Healy v. James, 408 U.S. 169, 180 (1972) (internal quotation marks omitted).
137. Id. at 670.
138. Id.
139. Id. at 671.
140. Cf. Keyishian v. Board of Regents of the Univ. of New York, 385 U.S. 589, 603
less developed students in elementary and secondary schools warrant more paternalistic constraints on certain types of expression.\textsuperscript{141}

B. The Educational Mission

While the Court has left some tension between its decision in \textit{Tinker} and its decisions in \textit{Bethel} and \textit{Hazelwood}, especially with regard to the amount of judicial deference to be accorded school administrators, there is a recurring theme in these and most all of its decisions regarding the First Amendment in schools: the role of education.

For example, in \textit{Tinker}, the Court describes its views of the educational process:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.\textsuperscript{142}

The Court echoes the importance of intercommunication in \textit{Bethel}: "These fundamental values [to be taught in public education] must, of course, include tolerance of divergent political and religious views, even when these views expressed may be unpopular."\textsuperscript{143}

However, \textit{Bethel} also counterbalances the importance of free communications against another role of education:

\begin{quote}

\textsuperscript{142} \textit{Tinker}, 393 U.S. at 512.

\textsuperscript{143} \textit{Bethel}, 478 U.S. at 681 (internal quotation marks omitted).
\end{quote}
Public education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation. . . . [Education] must . . . take into account consideration of the . . . sensibilities of fellow students . . . [and consider the] interest in teaching students the boundaries of socially acceptable behavior.144

The Court continues that “[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.”145

Likewise, in Hazelwood, the Court upholds the school’s restriction largely based on the importance of the restriction to the school’s educational mission: it emphasizes that schools must be able to set high standards for and retain significant control over student speech which is likely to be attributed to the school, for “[o]therwise, the schools would be unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”146

The theme we can distill from these cases is that schools have more latitude to regulate student speech where the speech interferes with the school’s educational mission. This is almost exactly the language in Bethel: “The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”147 Likewise, in other First Amendment contexts, the Court has held that a university does not have to allow First Amendment “associational activities . . . where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”148 While these opinions phrase the school’s powers to regulate negatively, the Court goes a bit further in Widmar v. Vincent,149 writing, “[a] university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable

144. Id. (internal quotation marks omitted).
145. Id. at 683.
146. 484 U.S. at 272 (internal quotation marks omitted).
147. Bethel, 478 U.S. at 685.
regulations compatible with that mission upon the use of its campus and facilities.\textsuperscript{150} This characterizes the school's power positively, granting the power to regulate so long as the regulation is compatible with the educational mission and is reasonable, which is broader than having only the power to prohibit interference.

In other words, a public school may regulate students qua students in the furtherance of its educational mission.\textsuperscript{151} This allows us to tie together and to some extent resolve tensions among the decisions in \textit{Tinker}, \textit{Bethel}, and \textit{Hazelwood}. In \textit{Tinker}, the educational mission was the general operation of the classroom; the wearing of armbands did not disrupt this and was therefore allowed. In \textit{Bethel}, the educational mission was the promotion of values of civility in social discourse; vulgarity and lewdness operate contrary to this. In \textit{Hazelwood}, the educational mission was likewise the promotion of cultural values; the school affirmatively promoting or sponsoring controversial speech worked against its credibility in the community, which in turn harmed its ability to promote cultural values.

Of course, there is the further tension in \textit{Bethel} in that there are actually two goals that were part of the educational mission: first, the aforementioned promotion of values of civility in social discourse; and second, the promotion of intercommunication and tolerance of divergent views. In \textit{Bethel}, the two educational goals worked against each other, so the Court balanced the two.\textsuperscript{152} Essentially, it found that

\textsuperscript{150} \textit{Id.} at 268 n.5.


\textsuperscript{152} That the Court in \textit{Bethel} simply balanced two educational goals does not completely resolve the tension between \textit{Bethel} and \textit{Tinker} because \textit{Tinker} rejected civic education as a goal. See \textit{Tinker} v. Des Moines Indep. School Dist., 393 U.S. 503, 511 (1969); Post, \textit{supra} note 151, at 321. As \textit{Bethel} is the later decision, and the trend of the Court is to limit the broad language of \textit{Tinker}, civic education seems to have been revived as a valid conception of the public educational mission.

Some lower courts have characterized student-speech cases in three categories rather than finding one coherent theme under which analysis proceeds:

First, "vulgar" or plainly offensive speech ([\textit{Bethel}] type speech) may be
vulgarity and lewdness were not very important to intercommunication - versus, for example, expression of divergent political views - and that prohibiting vulgarity and lewdness was very important to the promotion of civility (and the protection of minors). Thus, there is another layer to the ability of public schools to regulate students qua students where there are competing educational objectives.

This leaves as the central question how to determine whether regulations are reasonable regulations of students qua students in furtherance of the educational mission. Following an approach suggested by Professor Robert Post, three factors bear out the answer: “(1) the nature of the educational mission of the [school]; (2) the instrumental connection of the regulation to the attainment of that mission; and (3) the deference that courts ought to display toward the instrumental judgment of institutional authorities.”

In regard to the first, Professor Post outlines three different conceptions of the mission of public educational institutions which the courts have recognized thus far: (1) civic education; (2) democratic education; and (3) critical education. The nature of the educational mission can often be characterized within this framework.

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154. The court in *Poling v. Murphy* noted:

Schools must teach by example the shared values of a civilized social order . . . . Sometimes, of course, these “shared values” come into conflict with one another; independence of thought and frankness of expression occupy a high place on our scale of values, or ought to, but so too do discipline, courtesy, and respect for authority.


156. *Id.* at 319-25. Compare Professor J. Peter Byrne’s three moral commitments of the university, to the values of truth, humanism, and democracy. Byrne, *supra* note 151.
Civic education is basically that outlined in *Bethel* as the inculcation of civic values, described above. In short, schools must teach the values, skills, and "self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable."  

Democratic education is that emphasized in *Tinker*, where the purpose is "to prepare students for the 'sort of hazardous freedom...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.'" Democratic education is its tendency to assimilate speech within public educational institutions to a model of public discourse.

Critical education "views the university as an institution whose distinctive 'primary function' is 'to discover and disseminate knowledge by means of research and teaching.'" One of its central tenets is "the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengable." While critical education is more geared toward postsecondary institutions, under the theory that younger, more impressionable children are not ready for wide-open robust debate, Professor Richard Roe argues that there is a place for critical education with younger children as well.

Once the nature of the educational mission at issue is established or, as may be the case, competing educational missions are recognized, the instrumental connection of the regulation to the attainment of that mission or missions is examined. The more tenuous the connection, the less latitude a school should have to regulate. For example, preventing disturbance in the classrooms is a legitimate objective, under any view of the educational mission; however, what type of restrictions may be justified under this objective is a more complicated

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157. See supra notes 114 - 124, 143 - 145 and accompanying text.
160. Id.
161. Id. at 322.
162. Id. (internal quotation marks omitted).
163. See generally Roe, supra note 141.
164. Post, Racist Speech, supra note 151, at 318.
question. A school has the “right to preclude disruption... through
the creation of a hostile learning environment,”165 but cannot simply
sweep any regulation under this ambit. The connection between
prohibiting the peaceful wearing of black armbands and a hostile
learning environment is too tenuous and is merely an
“undifferentiated fear or apprehension of disturbance.”166 On the
other hand, the values of civic education to promote civility are well-
and directly–served by the prohibition of the “use of vulgar and
offensive terms in public discourse,” since such discourse “disfavor[s]
the use of terms of debate highly offensive or highly threatening to
others.”167

Finally, the trickiest question remains: how much deference
should courts give to the instrumental judgment of institutional
authorities?168 This becomes pivotal in establishing the burden on a
public school in showing the instrumental link of its regulation to its
mission and where there are competing educational objectives. The
courts should defer to the schools where the subject of the regulation
“requires insulation from routine judicial oversight for its effective
functioning.”169

For example, in Bethel, the Court deferred to the school’s
determination as to what is necessary to promote the civic education
goals at issue: “The schools...may determine that the essential
lessons of civil, mature conduct cannot be conveyed in a school that

Cal. 1995).
167. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); see also, e.g.,
Bystrom v. Fridley High Sch., 822 F.2d 747, 753 (8th Cir. 1987).
168. Post, Between Governance, supra note 151, at 318.
169. Id., at 1783. Similarly:
Local school officials, better attuned than we to the concerns of the
parents/taxpayers who employ them, must obviously be accorded wide latitude in
choosing which pedagogical values to emphasize, and in choosing the means
through which those values are to be promoted. We may disagree with the
choices, but unless they are beyond the constitutional pale we have no warrant to
interfere with them. Local control over the public school, after all, is one of the
nation’s most deeply rooted and cherished traditions.
(quoting Poling v. Murphy, 872 F.2d 757, 762-63 (6th Cir. 1989)) (internal quotation marks
omitted); see also Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1536 (E.D. Va.
1992). Some courts are more moderate in their language here, allowing only for a “cautious
deferece to the expertise of educational officials within the academic environment.”
Thomas v. Board of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979)
(emphasis supplied).
tolerates lewd, indecent, or offensive speech and conduct . . . ."170 This concern outweighed the concern for toleration of speech, given that the speech at issue "was plainly offensive to both teachers and students" and "could well be seriously damaging to its less mature audience."171

Similarly, where a school promotes or sponsors speech such as the curricular newspaper in *Hazelwood*, it is "entitled to greater control over this . . . expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."172 The Court reinforced its "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."173 Therefore, in this context, the deference afforded the school is very high, and the regulation of expression must have "no valid educational purpose . . . to require judicial intervention to protect students' constitutional rights."174

However, in *Tinker*, "the Court concluded that the mission of education did not depend upon the exercise of pervasive, managerial authority."175 While the Court noted its historical emphasis on "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards,

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171. *Id.*. Courts will on occasion step in on a school's balancing of competing educational objectives. For instance, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, the court found that the censored behavior did undermine:

the education of minority and women students, the university's mission to promote learning through a culturally diverse student body, the university's mission to eliminate racist and sexist behavior on campus and the university's mission to accomplish maximal desegregation of its student body. Although the university has these interests, there has been no substantial or material disruption of [the] educational mission. [Citations omitted.] The student activity at issue . . . is consistent with [the] educational mission in conveying ideas and promoting the free flow and expression of those ideas.

*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 794 (E.D. Va. 1991). This could also be seen as the court finding the university's restriction of the activity in question to be too tenuously connected to the educational goals proffered rather than a second-guessing of the university's prioritization of these goals.

173. *Id.* at 273.
174. *Id.*
175. *Post, Between Governance, supra* note 151, at 1779 (likening *Tinker* to *Widmar v. Vincent*, 454 U.S. 263 (1981)).
to prescribe and control conduct in the schools,"\textsuperscript{176} such regulation does not require complete insulation from judicial intervention. Thus, the public school authority must meet the heavy burden of showing its regulation was promulgated out of "more than a mere desire to avoid . . . discomfort and unpleasantness"\textsuperscript{177} and further showing the "conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."\textsuperscript{178}

C. Academic Freedom

The question of whether a regulation is valid because it is a reasonable regulation of students qua students in furtherance of the educational mission can also be approached from the other side, that is, whether the student expression being regulated is protected by the rights of academic freedom. In \textit{Keyishian v. Board of Regents of the University of the State of New York},\textsuperscript{179} the Court wrote:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.\textsuperscript{180}

Similarly, in \textit{Sweezy v. New Hampshire}\textsuperscript{181} the Court notes:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.\textsuperscript{182}

These and other allusions to "academic freedom" have largely been in this type of sweeping language and rhetoric.\textsuperscript{183} As a result, the

\begin{itemize}
  \item \textsuperscript{176} \textit{Tinker}, 393 U.S. at 507.
  \item \textsuperscript{177} \textit{Id.} at 509.
  \item \textsuperscript{178} \textit{Id.} (internal quotation marks omitted).
  \item \textsuperscript{179} 385 U.S. 589 (1967).
  \item \textsuperscript{180} \textit{Id.} at 603.
  \item \textsuperscript{181} 354 U.S. 234 (1957).
  \item \textsuperscript{182} \textit{Id.} at 250.
  \item \textsuperscript{183} See J. Peter Byrne, \textit{Academic Freedom: A "Special Concern of the First Amendment"}, 99 YALE L.J. 251, 257 (1989).
\end{itemize}
doctrine surrounding academic freedom rights is somewhat incomprehensible. "There has been no adequate analysis of what academic freedom the Constitution protects or why it protects it." In turn, it is quite unclear when rights of academic freedom are triggered and under what circumstances they are violated. Professor J. Peter Byrne outlines the confusion as follows:

Isolating [the] legal right has proven difficult, in part because courts have employed several legal doctrines that are not themselves based on academic freedom to protect the liberties of professors and students. At the same time, courts have declined to recognize a constitutional shield for many forms of classroom speech that seem at first blush to implicate general principles of free expression. This confusion has led some commentators to put a large array of legal principles under the umbrella of academic freedom, but it has led others to doubt that the law recognizes an independent right of academic freedom at all.

Nonetheless, a few situations seem generally accepted as involving academic freedom. The prototype is the teacher's or professor's right to teach or research what she pleases without undue interference from trustees, regents, or other laypersons. For example, the Court in Keyishian was concerned with regulations that would chill a professor's speech on controversial or politically sensitive topics. The extent to which students enjoy academic freedom rights, however, is dubious. In fact, Professor Byrne argues that students do not and should not have any rights of academic freedom:

[N]o recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning. Cases allowing public school students to wear armbands, demonstrate in good order, distribute newspapers, and form political organizations grant students rights against public education officials plainly analogous to those enjoyed generally by citizens against government. Moreover, such activities have little to do with the formal academic training of the students; even if the activities so protected have learning value, the learning seems more the product of experience than of intellectual training . . . . Courts have also refused to review academic evaluations of students by universities. In short, while student civil rights enforce social norms against schools, constitutional academic freedom enforces academic norms against society. Thus, while the Constitution affords students at

184. Id. at 252.
185. Id. at 256; see also id. at 295-98.
186. Id. at 273, 278-79.
187. See Keyishian, 385 U.S. at 601-02.
public institutions extensive civil rights, it affords them no rights of academic freedom at all.\textsuperscript{188}

Rather, Professor Byrne argues "academic freedom should be understood to include only rights unique or necessary to the functions of higher education."\textsuperscript{189}

Regardless of whether Professor Byrne is right about whether students \textit{should} fall under academic freedom, the case law is ambiguous and confused, leaving some room for student rights of academic freedom. Sweezy indicates "[t]eachers \textit{and} students must always remain free to inquire . . . ."\textsuperscript{190} Even under Professor Byrne's definition, students' ability to inquire freely could be considered "unique or necessary to the functions of higher education"\textsuperscript{191} since the classroom "marketplace of ideas" involves an interchange both between teacher and student and among students, in any case, requiring student participation.

But even if students do enjoy the constitutional right to academic freedom, it is unclear what that means in a practical sense. Teachers have tried to use it in situations as varied as retaliatory dismissal or denial of tenure, charges of discrimination, and disclosure of confidential university files during discovery.\textsuperscript{192} Seemingly, though, "academic freedom does not insulate speakers from being penalized for the content of their speech. Academic freedom only requires that speakers be evaluated by their peers for relative professional competence and within the procedural restraints of the tenure system."\textsuperscript{193}

Given that the viability of student rights to academic freedom is in question, and that the scope of and standards governing any such rights are unclear, it makes sense not to approach the question of student speech from the student academic freedom angle. Rather, these concerns can be handled in analysis of whether a regulation is a valid regulation of students qua students. As that analysis requires scrutiny of the instrumental connection between a regulation and the educational mission, it should in theory subsume the issues raised under academic freedom.

\begin{itemize}
\item \textsuperscript{188} Byrne, \textit{supra} note 183, at 262.
\item \textsuperscript{189} Id. at 264.
\item \textsuperscript{190} 354 U.S. at 250 (emphasis supplied).
\item \textsuperscript{191} Byrne, \textit{supra} note 183, at 264.
\item \textsuperscript{193} Byrne, \textit{supra} note 183, at 283.
\end{itemize}
For example, if a teacher prohibited a student from raising her hand during a history discussion to talk about why she thought the Holocaust never took place, the academic-freedom issues would probably include the student asserting an academic-freedom right to have her comments judged by her peers, or other teachers, for their academic value. Also, the teacher’s academic freedom and right to control her classroom would conflict with the student’s rights.

Under the opposite-angle analysis, the educational mission might be civic education, under which the teacher asserts that the racial slurs implicit or explicit in the student’s comments denigrate the values of civil discourse. Determining this might be facilitated by looking into or conjecturing about the views of the student’s peers, or other teachers, on whether the comments were within the bounds of civility necessary for the educational mission at that school. Moreover, the goals of democratic and critical education would work counter to civic education, mirroring the tension between the student’s and teacher’s rights in the academic-freedom analysis. In other words, the school-perspective analysis will largely address the concerns of academic-freedom analysis. Therefore, for clarity, this Comment concentrates on the school-perspective analysis.

D. The Special Case of University Speech Codes

One of the most powerful illustrations of restrictions on free speech in educational contexts has been the promulgation of “campus speech codes.” I treat them separately because they have often raised issues of vagueness and/or overbreadth in violation of due process, issues preempting the constitutional analysis raised in sections A-C of this Part.

Campus speech codes were enacted by a number of institutions of higher learning in the 1980s to fight the tide of rising racism and intolerance.\(^\text{194}\) While all make specific reference to factors such as race, gender, ethnicity, religion, and sexual orientation, campus speech codes typically take one of two basic forms: (1) a policy prohibiting direct face-to-face acts of verbal or physical abuse against others; or (2) a broader policy prohibiting racially or sexually offensive behavior without regard to whether it is directed to particular individuals.\(^\text{195}\)

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\(^{195}\) See Cammack & Davies, supra note 141, at 146. I address in particular only these types of speech codes and regulations here; there are, of course, others, especially in secondary and lower schools. See generally, e.g., Stephenson v. Davenport Community Sch.
The broader policies seem to be more common\textsuperscript{196} and also more problematic.

The broader campus speech codes have run afoul of the First Amendment in two ways. First, they suffer problems of overbreadth. A restriction is overbroad when it prohibits too much, that is, even though it prohibits activities which it may constitutionally prohibit, it also prohibits activities protected by the First Amendment.\textsuperscript{197} If there is no satisfactory way to sever the unconstitutional prohibitions from the scope of the restriction, the entire restriction is unconstitutional.\textsuperscript{198}

Second, campus speech codes do not, as defending universities have contended, meet the criteria for the “fighting words” exception to protected expression. “Fighting words” are those that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”\textsuperscript{199} However, determination of “fighting words” has come to emphasize the actual words less than the context in which the words are spoken.\textsuperscript{200} Thus, speech codes which emphasize the actual words are unlikely to be upheld under “fighting words” doctrine.

Consequently, those broader campus speech codes which have been challenged seem to have all been found unconstitutional. The first domino was the broad speech code at the University of Michigan struck in 1989 by the District Court in \textit{Doe v. University of Michigan}.\textsuperscript{201} The University of Michigan established a three-tier policy in which greater restrictions were imposed depending on the location where the speech or conduct occurred.\textsuperscript{202} There were the least

\textsuperscript{196} See Cammack & Davies, supra note 141, at 146-47


\textsuperscript{198} See, e.g., Maryland v. Joseph H. Munson, Inc., 467 U.S. 947, 965-66 (1984) (“no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits”). This is not to say that the amount and significance of the inclusion of protected expression has no bearing. In particular, where a restriction governs “conduct” rather than “pure speech,” there must be substantial overbreadth before the restriction will be voided. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also TRIBE, supra note 197, § 12-28, at 1025.


\textsuperscript{200} Cf. Cohen v. California, 403 U.S. 15, 20 (1971) (noting that “no individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult”); see also TRIBE, supra note 197, § 12-10, at 852.


\textsuperscript{202} Id. at 856.
restrictions in designated “public” parts of campus and the most in
“educational and academic centers, such as classroom buildings,
libraries, research laboratories, recreation and study centers.” The
greatest restrictions subjected persons to discipline for verbal and
physical behavior that “stigmatizes or victimizes an individual on the
basis of race, ethnicity, religion, sex, sexual orientation, creed,
national origin, ancestry, age, marital status, handicap or Vietnam
veteran status,” among other things. The court held the policy to be
unconstitutional for its problems of overbreadth and vagueness.
The court noted that it was “sympathetic to the University’s obligation
to ensure equal educational opportunities for all of its students, [but]
such efforts must not be at the expense of free speech.”

Two years later, a similar policy at the University of Wisconsin
was struck down by the District Court in UWM Post, Inc. v. Board of
Regents of University of Wisconsin. That rule disciplined students
for:

racist or discriminatory comments, epithets or other expressive
behavior directed at an individual or on separate occasions at
different individuals, or for physical conduct, if such comments,
epithets or other expressive behavior or physical conduct
intentionally:

1. Demean the race, sex, religion, color, creed, disability,
sexual orientation, national origin, ancestry or age of the
individual or individuals; and

2. Create an intimidating, hostile or demeaning
environment for education, university-related work, or other
university-authorized activity.

The court again found that the policy in question was
unconstitutionally overbroad and vague and failed to qualify for the
“fighting words” exception.

203. Id. Publications sponsored by the University were not covered by the policy. Id.
204. Id. (quoting the University of Michigan Policy on Discrimination and
Discriminatory Harassment).
205. Id. at 866, 867.
206. Id. at 868. First Amendment protections come into tension with Fourteenth
Amendment equal protection concerns in the realm of speech codes; under current
doctrines, the First Amendment concerns seem to hold the upper hand, as can be seen by
this statement by the Doe court. Some espouse departing from conventional views to allow
more latitude for speech codes. For example, one commentator suggests reframing the
issues into an affirmative action mold. See Alice K. Ma, Comment, Campus Hate Speech
208. Id. at 1165 (citations omitted).
The discriminatory harassment policy at Central Michigan University fell next in *Dambrot v. Central Michigan University*,210 and the speech code at Stanford University followed suit in 1995 in *Corry v. Leland Stanford Junior University*.211 Both policies were reminiscent of those in the University of Michigan and the University of Wisconsin. For example, the Central Michigan University policy prohibited racial and ethnic harassment, defined as:

Any intentional, unintentional, physical, verbal, or non-verbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.212

The District Courts in *Dambrot* and *Corry* both faulted the policy in question for overbreadth and vagueness and did not find “fighting words” to apply.213 Both decisions also considered the effect of the more recent United States Supreme Court decision in *R.A.V. v. St. Paul*.214 *R.A.V.* further narrowed the use of the “fighting words” doctrine to defend such speech codes by holding that under most circumstances a regulation of fighting words may not favor a particular viewpoint.215 Stanford attempted to circumvent this limitation by claiming its policy fell under any of five exceptions to the *R.A.V.* holding regarding “fighting words,” but the court rejected each argument in turn.216

*Dambrot* was the only one of these cases to go up to the court of appeals, but the Sixth Circuit affirmed that the Central Michigan

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209. Id. at 1168-81. In considering “fighting words,” the court also discussed a balancing test, parallels to Title VII, and a proposed limiting construction, and found that none saved the restriction. *Id.* at 1173-78.


211. No. 740309 (Cal. App. Dep't Super. Ct. Feb. 27, 1995). Stanford University is a private institution but is brought within the purview of the First Amendment by California Education Code section 94367, the so-called “Leonard Law.” See *id.* Part II.


213. *Id.* at 481-84; *Corry*, No. 740309, § I.


215. See *id.* at 283-85.

216. *Corry*, No. 740309, at Part I.B. The five exceptions were: (1) where the entire class of speech is proscribable; (2) where the proscribed subset of “fighting words” is more likely to provoke retaliatory violence than typical “fighting words”; (3) where the proscribed subset of “fighting words” is directed at certain persons or groups; (4) where the regulation is concerned with secondary effects associated with the proscribed subset rather than the offensiveness of the content; and (5) where no official suppression of ideas is afoot. *Id.*
University policy was facially invalid for vagueness and overbreadth without extensive discussion.\textsuperscript{217} The court wrote:

[T]here is nothing to ensure the University will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university. The broad scope of the policy's language presents a "realistic danger" that the University could compromise the protection afforded by the First Amendment.\textsuperscript{218}

It also borrowed liberally from the district court's opinion in \textit{Doe v. University of Michigan}:

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed .... Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.\textsuperscript{219}

Finally, the Sixth Circuit dismissed the "fighting words" claim under the principles of \textit{R.A.V.} in about two paragraphs, noting simply, "Under \textit{R.A.V.}, the CMU policy constitutes content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech."\textsuperscript{220} In sum, the only circuit court to consider the issue agreed heartily with the district court decisions on the subject.

Since the 1989 decision in \textit{Doe v. University of Michigan},\textsuperscript{221} there has been a marked decrease in the promulgation of similar speech codes.\textsuperscript{222} The continued rejection of such speech codes by the courts will presumably lead to further such self-restraint on the part of educational institutions. However, as none of the challenges to campus speech codes has reached the United States Supreme Court, the constitutionality of speech codes may not be settled. Numerous scholars and commentators have suggested approaches and philosophies under which typical university speech codes are (or should be) constitutional.\textsuperscript{223} As they have not defended speech codes

218. \textit{Id.} at 1183.
220. \textit{Id.} at 1184.
222. For a discussion of speech codes generally and reviewing the policies at some of the largest public universities, see Richard K. Page & Kay H. Hunnicut, \textit{Freedom for the Thought We Hate: A Policy Analysis of Student Speech Regulation at America's Twenty Largest Public Institutions}, 21 J.C. & U.L. 1 (1994).
in the same manner as was attempted unsuccessfully in Doe, Dambrot, UWM Post, and Corry, it is possible that appeals on these theories could succeed if a higher court were to adopt their viewpoints. In the meantime, however, the trend continues to go against the constitutionality of university speech codes.

III

Regulation of Students Sine Qua Non

Where a public school’s regulation of expression does not constitute a valid regulation of students qua students, the school context becomes less important to the constitutional analysis, and more “standard” First Amendment doctrines come into play. However, these too raise complexities. Student expression taking place on the Internet raises all the fears of the Internet as a new, advanced, and powerful medium of communication. Furthermore, it convolutes First Amendment “public forum” analysis by straining the conception of “where” the communication is taking place. Unfortunately, these concerns have triggered some alarm and have prompted premature departure from existing First Amendment jurisprudence and/or inconsistent application based on misunderstandings of the nature of the Internet.

A. The Internet as a Medium of Speech

1. The First Amendment’s Application in Different Media

The Court has consistently held that different media of communication raise different First Amendment concerns. The

224. See supra notes 2, 4, 41, 256-260.

225. Cf. Laurence H. Tribe, The Constitution in Cyberspace, Keynote Address at the First Conference on Computers, Freedom & Privacy (March 26, 1991) (transcript available at <http://cpsr.org/cpsr/free_speech/tribeconstitution_cyberspace.txt>) ("The Constitution's core values, I'm convinced, need not be transmogrified, or metamorphosed into oblivion, in the dim recesses of cyberspace . . . . [But] the danger is clear and present that they will be."). This danger arises because "Judges may not understand the novel situations, especially those involving the Internet." Sunstein, supra note 79, at 1792.

226. See, e.g., Southeastern Promotions v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); Red Lion Broad. v. FCC, 395 U.S. 367, 386-87 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."). For a discussion of why the Court should not treat different media differently, see Thomas G. Krattenmaker & L. A. Poe, Jr., Converging First Amendment Principles for Converging Communications Media, 104 YALE L.J. 1719 (1995). Krattenmaker and Poe argue that televisions, computers, telephones, and radios are “no longer distinct devices and . . . any differences
medium of the press has always been one of the most revered and most protected. Newspapers present a broad range of opinions to readers and engender a flourishing marketplace of ideas. Accordingly, the Court has been reluctant to entertain restrictions on the press. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a statute, that requires newspapers that assail a political candidate on his character or record to print that candidate's reply, as an unconstitutional control of speech. In so holding, the Court reaffirmed the broad deference to be afforded editorial judgments on what to publish, and observed:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with [the] First Amendment.

In marked contrast, the Court has upheld the "fairness doctrine" promulgated by the Federal Communications Commission, which requires that radio and television broadcasters carry discussion of public issues and give each side of those issues fair coverage. In *Red Lion Broadcasting Co., v. Federal Communications Commission*, the Court reviewed the fairness doctrine as it was applied to a radio station. The Court found that the characteristics of broadcast radio made it quite unlike the press. In particular, the scarcity of radio frequencies limits the number of people who may broadcast. Thus, "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." Cable television does not suffer from the scarcity problems of broadcast radio. Therefore, the Court in *Turner Broadcasting System*,

among them are ephemeral." *Id.* at 1719.

229. *Id.* at 244, 258.
230. *Id.* at 255-56.
231. *Id.* at 258.
234. See *id.* at 388 ("[I]t is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").
235. *Id.* at 390, 396-98.
236. *Id.* at 392.
Inc. v. Federal Communications Commission,\textsuperscript{237} held that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."\textsuperscript{238} Moreover, "[c]able television partakes of some of the aspects of speech and communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers."\textsuperscript{239} Nevertheless, the Court does not seem to consider cable television as protected as the press. In \textit{Turner}, cable television operators challenged Congressional must-carry laws requiring them to carry local broadcast television stations on their cable networks.\textsuperscript{240} The Court found the must-carry laws did "not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny,"\textsuperscript{241} and it applied only intermediate scrutiny before finding it necessary to remand.\textsuperscript{242}

Apart from "fairness" and must-carry provisions, the Court's jurisprudence has also examined the ability of the government to censor indecent\textsuperscript{243} material in different media. For example, in \textit{Federal Communications Commission v. Pacifica Foundation},\textsuperscript{244} the Court held the Federal Communications Commission has the power to regulate a radio broadcast that is indecent, though not obscene.\textsuperscript{245} The Court found that special treatment of indecent broadcasting was justified by the "unique" attributes of broadcasting.\textsuperscript{246} Notably, broadcasting is "uniquely pervasive" in the manner it intrudes upon the home without prior warning of content and is "uniquely accessible to children, even those too young to read."\textsuperscript{247}

However, the Court considered a similar issue in the medium of the telephone in \textit{Sable Communications of California, Inc. v. Federal Communications Commission}.\textsuperscript{248} In \textit{Sable Communications}, an adult

\begin{itemize}
\item \textsuperscript{237} 512 U.S. 622 (1994).
\item \textsuperscript{238} \textit{Id.} at 637.
\item \textsuperscript{239} Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986).
\item \textsuperscript{240} See \textit{Turner}, 512 U.S. at 622.
\item \textsuperscript{241} \textit{Id.} at 661.
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} "Indecent" is a step down from "obscene." While obscene materials do not receive constitutional protections, indecent materials do.
\item \textsuperscript{244} 438 U.S. 726 (1978).
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 748-49.
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} 492 U.S. 115 (1989).
\end{itemize}
telephone “dial-a-porn” message service challenged a rule prohibiting indecent telephone messages. The Court differentiated between the telephone medium and the broadcast medium because the telephone “dial-it” medium “requires the listener to take affirmative steps to receive the communication. There is no ‘captive audience’ problem . . . .” Thus, “[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”

2. How the Internet Compares to Other Media

It is not yet clear where the Internet as a medium of communication fits into these paradigms of First Amendment protection. However, there are many indications that people view the Internet as so different a medium of communication that it should be less protected than any previously existing media. If these views are given life by the courts, history will be repeating itself.

In 1915, the Supreme Court upheld a broad, content-based regulation of films, at least in part because moving pictures are “mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.”

Of course, thirty-seven years later, the Supreme Court reversed this position by striking down a similarly broad, content-based regulation of films. Now, films are commonplace, and the fear of their “power” to unduly influence or generate “evil” is relatively low.

Now, however, a new monster “capable of evil, having power for it” has reared its head, and it is the Internet. Much of the popular

249. Id. at 117-18.
250. Id. at 127-28.
251. Id.
252. Mutual Film Corp. v. Industrial Comm’n of Ohio, 236 U.S. 230, 244 (1915), overruled in part by Burstyn v. Wilson, 343 U.S. 495 (1951).
255. See Carlos Santos, 1990s Worries About Internet Parallel 1910, RICHMOND TIMES-DISPATCH, June 20, 1996, at B1 (comparing fears regarding Internet to early 1900s fears
portrayal of the Internet is misleading. For example, novels and movies often depict the Internet as a medium by which illicit individuals can take advantage of the world's reliance on computers to seize totalitarian power.\textsuperscript{256} Even news media dramatizes the Internet as a source of dangerous information and materials.\textsuperscript{257}

\textit{Time} magazine featured a cover story on the dangers and profusion of pornography readily available on the Internet.\textsuperscript{258} The bulk of the article was based on a study by an undergraduate at Carnegie Mellon University named Marty Rimm.\textsuperscript{259} Apparently, there were some concerns about the study before the article was published, but \textit{Time} went forward with the story.\textsuperscript{260} As a consequence, a wave of panic reverberated throughout the public as parents and well-intentioned citizens decried these dangers.

However, as the concerns about the study came to full light, the story sparked intense criticism. Numerous attacks on the article pointed to glaring problems with the study's research methodology and use of misleading statistics as well as general credibility problems of Marty Rimm.\textsuperscript{261} \textit{Time} eventually admitted to "damaging flaws" in its article.\textsuperscript{262}

The courts should thus be wary of following the lead of the general public and the media; instead, they should take guidance from the Court's conclusions after considering the medium of cable television in \textit{Turner Broadcasting System, Inc. v. Federal

\textsuperscript{256} See, e.g., \textit{LAWNMOWER MAN}, \textit{supra} note 2; \textit{LAWNMOWER MAN II}, \textit{supra} note 2; \textit{THE NET}, \textit{supra} note 2. One commentator called \textit{The Net} "technically accurate in some ways [but an] example[] of the disturbing emphasis on the seamer side or more foreboding aspects of the Internet presented in the mass media today." Geiger, \textit{supra} note 4, at B5.

\textsuperscript{257} See \textit{Vince Horuchi, Bomb Building Made Easy on the Internet}, \textit{SALT LAKE TRIB.}, Aug. 11, 1996, at A1. However, Professor Frank Tuerkheimer notes that, "[t]he Internet is not a source of information. It's a means of conveying information. Bomb-making information is incredibly available through other means." \textit{Id}. In fact, instructions for making bombs have been readily available in libraries and bookstores for many years. \textit{Id}.


\textsuperscript{260} See \textit{id}.


\textsuperscript{262} Geiger, \textit{supra} note 4, at B5.
Communications Commission. In that case, the Court refused to use a relaxed standard in scrutinizing a restriction on cable television. The Court noted:

This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not . . . . But whatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.

Likewise, the Internet is physically and technologically different than previous media of communication, but this should not necessarily relax the scrutiny afforded restrictions placed on expression "within" it.

Fortunately, thus far, the Supreme Court has agreed, refusing to adopt different or relaxed standards for Internet censorship in striking down portions of the Communications Decency Act which prohibited transmission of "obscene or indecent" materials to minors over the Internet in Reno v. ACLU; the Court found the provisions in question were vague and overbroad in violation of the First Amendment and that the Government did not have a significant interest justifying the censorship. However, the reliance on vagueness and overbreadth makes the impact of Reno v. ACLU unclear for future Internet cases. Certainly, schools have not stopped adopting broad restrictions or punishments for Internet speech.

Moreover, the Internet will continue to challenge the traditional paradigms and analogies used to analyze First Amendment protections. Several factors may justify treating the Internet differently than other media for the purposes of the First Amendment: "Internet dissemination is fast (instantaneous, one would say) . . . it is global (almost) and the actual and potential audience is huge. It is also

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263. 114 S. Ct., 2445 (1994).
264. Id. at 2456-57.
265. Id. at 2457 (internal quotation marks omitted).
267. See generally Reno v. ACLU, 117 S. Ct. at 2329.
268. See discussion and text accompanying supra notes 1-43.
269. See Sunstein, supra note 79, at 1792.
less public: the same [potentially controversial or objectionable] images can be sent to your terminal in the privacy of your own room."\textsuperscript{270} "With a few brief touches of a finger, a speaker is now able to communicate to thousands or even millions of people . . . ."

However, the speed and reach of the Internet is not completely unlike those of broadcasting or cable television. Both broadcasting and cable television are virtually instantaneous and have the capacity to reach vast audiences. The most salient difference is that the Internet allows the average user essentially to be a broadcaster rather than just a listener or viewer. But this cuts in the positive direction as well as the negative. While the accessibility of the Internet increases the ability to spread offensive or objectionable expression, it likewise increases the ability to spread "desirable" expression.

Accordingly, several commentators have argued persuasively that the existing standards used to analyze First Amendment issues "generally seem an adequate start and must simply be adapted to new settings."\textsuperscript{272} Pointedly, while the Internet may offer some new risks, it has enormous potential for benefit as well.\textsuperscript{273}

"The Internet will be a superior First Amendment forum due to its immediacy and interactive nature . . . . Free and unfettered speech will be similar to that which Americans have long enjoyed. The only difference is digital speech will be more plentiful, more robust, and less regulated."\textsuperscript{274}


\textsuperscript{271} Sunstein, \textit{supra} note 79, at 1792.

\textsuperscript{272} \textit{Id.}; see also Laurence H. Tribe, \textit{The Constitution in Cyberspace}, Keynote Address at the First Conference on Computers, Freedom \\& Privacy <http://cpsr.org/cpsti/free_speech/tribe-constitution_cyberspace.txt>; Cass R. Sunstein, \textit{supra} note 79, at 1765; Jason Schwartz, \textit{UT Police May Have to Confront, Police Internet Abuse}, \textit{DAILY TEXAN}, Dec. 4, 1995, at 5 (quoting Professor Michael Froomkin: "By and large, most of the incidents involving the Internet can be solved if you look at them without considering the Internet.").

\textsuperscript{273} See Sunstein, \textit{supra} note 79, at 1804. See also, e.g., \textit{NII REPORT}, \textit{supra} note 55.

\textsuperscript{274} Robert J. Posch, \textit{A World Impregnated by American Ideals}, \textit{DIRECT MARKETING}, July 1, 1996, at 62. Paul Burton balances this against the need for censorship and concludes benefits and freedom win:

The Internet has the potential to free up information exchange in an unprecedented way . . . . and while we are still a long way from an information rich global society, that to me is a more important goal than the censorship of a relatively small proportion of the whole. For most of us using the Internet, there is always the choice not to read that material, just as we have the choice to switch off our television sets or not to buy printed publications.

Burton, \textit{supra} note 270.
This is reminiscent of newspapers presenting a broad range of opinions and engendering a flourishing marketplace of ideas; in this sense, the Internet seems worthy of greater protection, like the press.\footnote{275} Realistically, however, the courts do not seem likely to extend to any other medium the same protection as the press.\footnote{276}

Of course, the negative aspects of the speed and reach of the Internet are not strictly flights of fancy. "A libelous message, or grotesque invasions of privacy, can be sent [on the Internet] almost costlessly. Perhaps reputations and lives will be easily ruined or at least damaged."\footnote{277} Marty Rimm may have been a fraud, but the issue he raised—whether children can access pornography with ease—is certainly a legitimate cause for concern. However, recognizing these hazards does not equate to finding a need to rewrite existing First Amendment standards.\footnote{278}

In fact, technology is slowly but surely addressing these concerns. The latest version of Microsoft Outlook Express, a program used to read and organize electronic mail, has the capability of screening out junk mail or other undesired mail. A number of software programs allow parents to prohibit access to Internet Web sites with pornography or other objectionable material, and a number of the people who run such sites now require registration with an independent age-verification service before allowing access. Not every problem has been solved, of course, but it is premature to repeat the 1915 mistake of condemning motion pictures as "evil."

\footnote{275}{See discussion supra notes 227-231 and accompanying text. However, the marketplace of ideas is only one theoretical framework explaining the purposes of First Amendment freedom of expression. See Sunstein, supra note 79, at 1759-65 (discussing the marketplace-of-ideas, Madisonian, and Turner views of the First Amendment). In fact, Sunstein argues the Madisonian view is the best as a matter of constitutional law. Id. at 1762. While a full discussion of the ramifications of the Internet for different theoretical frameworks is impossible here, it is worth noting that the nature of Internet communications may reduce public deliberation and allow people to easily screen out objectionable ideas, both abhorrent to the Madisonian view and addressed by Sunstein. See id. at 1785-87.}

\footnote{276}{See Generally Red Lion Broad. v. FCC, 395 U.S.367(1969). Distinction between print media and broadcast media, since may have made sense when most communities had many daily newspapers and few radio/TV stations. Those distinctions currently are criticized because most communities have only one or two daily newspapers and many radio/TV stations, so variety of views likely to find way onto the airwaves without governmental intrusion.}

\footnote{277}{Sunstein, supra note 79, at 1792.}

\footnote{278}{Cf. id. ("At this stage, it remains unclear whether the conventional legal standards should be altered to meet such problems.").}
Therefore, courts should follow the lead of *Reno v. ACLU* and use existing First Amendment standards to examine Internet issues unless they prove untenable at a future date.

B. Forum Analysis

So while the Internet as a medium of communication does not merit an entirely novel approach to First Amendment protection, it still strains existing First Amendment jurisprudence. In particular, the noncorporeal nature of the Internet creates difficulties for "public forum" analysis.

1. The Convoluted Web of "Public Forum" Analysis

In considering restrictions on expression, the Court has traditionally been most concerned with whether the government is targeting a particular message or viewpoint, that is, emplacing content-based restrictions. When a restriction is content-neutral, however, the Court has often considered where the expression takes place. The amount of scrutiny the Court gives to a content-neutral restriction often depends on the location. The rationale is that certain locations play more important roles in communication and expression. For example, "public fora" such as streets and parks have "long been devoted to assembly and debate"\(^{279}\) and should be particularly open to free expression, especially since many people may lack access to more elaborate and expensive channels of communication.\(^{280}\)

By this "forum" analysis, locations can be grouped in three categories of public fora, according to their importance to speech: (1) traditional or specially designated public fora, such as streets and parks, which have traditionally been havens for expression; (2) limited public fora, which are open for the use of certain expressive activities; and (3) non-public fora, which are not designated for any type of public communications.\(^{281}\) When the government places a restriction on expressions within public fora, it receives the most (and strictest) scrutiny, and when it places a restriction on expressions within its own private properties, that is, non-public fora, it receives the least; thus, most restrictions in public fora fail constitutional scrutiny, and most in non-public fora pass.\(^{282}\)


\(^{281}\) Perry Educ. Ass'n, 460 U.S. at 45-46.

\(^{282}\) This implies that restrictions in limited public fora are the middle ground and would thus fail some of the time and pass some of the time. However, this may not be the case. Since *Perry Educ. Ass'n*, the Court has elaborated that the distinction between
As an example, consider the public university. In *Widmar v. Vincent*, the Court observed that public universities "possess many of the characteristics of a public forum" yet "differ[] in significant respects from public forums such as streets or parks or even municipal theaters." On the one hand:

> [t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas. Moreover, the capacity of a group or individual to participate in the intellectual give and take of campus debate... [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.

Yet a university also has authority to "impose reasonable regulations compatible with [its educational] mission upon the use of its campus and facilities." In sum, the Court seems to have categorized the public university a "limited public forum.”

Additionally, there are private fora, property not owned by the government but by private individuals or organizations. The importance of private fora to free speech seems to be low, relative to traditional public fora, and the government’s content-neutral restrictions can also burden expression in private fora so long as there are “ample alternative channels of communication of the information.”

There was some debate over whether the public nature of certain privately-owned properties should be considered as public property to which speakers should have access, but this seems to have been

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limited public and nonpublic fora depends on the government’s intent in creating the forum. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). If “a limited public forum is neither more nor less than what the government intends it to be, then a First Amendment right of access to the forum is nothing more than the claim that the government should be required to do what it already intends to do in any event.”

ROBERT C. POST, CONSTITUTIONAL DOMAINS ch. 6, at 227, originally published as Between Government in Management: The History and Theory of the Public Forum, in 34 UCLA L. REV. 1713 (1987). Thus, in practice, a limited public forum becomes like a nonpublic forum. *Id.* at 227-28. But cf. *Cornelius*, 473 U.S. at 819 (Blackmun, J., dissenting) (espousing continuing the separate notion of a limited public forum in saying, “[t]he line between limited public forums and nonpublic forums ‘may blur at the edges,’ and is really more in the nature of a continuum than a definite demarcation.”).

284. *Id.* at 268 n 5.
285. *Id.* (citations and internal quotation marks omitted).
286. *Id.*
primarily resolved in the negative.\textsuperscript{288} There remain two exceptions under which privately-owned property is considered public property for the purposes of the First Amendment: first, where the private owner has taken on an activity that has traditionally been the exclusive prerogative of the government, for example, running a city or holding public elections; and second, where the government is so entangled with the private entity as to make the two inseparable for purposes of the First Amendment.\textsuperscript{289} Both exceptions have been severely limited over the years and are rarely invoked successfully.\textsuperscript{290}

The continued development of different classifications of public fora and the exceptions used to treat private fora as public fora have resulted in some chaos. In fact, scholars and commentators have criticized using "forum" analysis at all and generally heaped upon it "universal condemnation."\textsuperscript{291} Professor Laurence Tribe points out "the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."\textsuperscript{292} Similarly, Professor Robert Post finds the doctrine both constitutionally unjustified and untenable in practice.\textsuperscript{293} In particular, he describes how the theoretical and practical difficulties with the "limited public forum" have rendered it invisible, and in a practical sense, the Court has moved back to the two-tier system of only "traditional public fora" and "non-public fora."\textsuperscript{294}

In the school context in particular, "[c]ourts and commentators are divided...over whether judicial 'forum analysis' should apply to regulations limiting students' personal, protected speech that occurs on school property during school hours."\textsuperscript{295} One case notes, "there is well-reasoned authority counseling the court to leapfrog public forum analysis and apply strict scrutiny to the content-based portions of the


\textsuperscript{289} David J. Goldstone, \textit{The Public Forum Doctrine in the Age of the Information Superhighway (Where are the Public Forums on the Information Superhighway?)}, 46 HASTINGS L.J. 335, 350 (1995).

\textsuperscript{290} Id. at 350-57.

\textsuperscript{291} Post, \textit{supra} note 151, at 1715-16.

\textsuperscript{292} TRIBE, \textit{supra} note 197, § 12-24, at 987.

\textsuperscript{293} POST, \textit{supra} note 282, at 199.

\textsuperscript{294} Id. at 219-28.

defendant school district's new policy," but in the next breath applies forum analysis essentially to cover itself under the confusing precedent.297

Despite the difficulties and confusion, however, courts continue to rely heavily on “public forum” analysis in free expression cases.298

2. Harnessing the Limited Usefulness of “Public Forum” Analysis

Besides the general criticisms leveled at “public forum” analysis as unworkable,299 “public forum” analysis also runs the danger of distracting from more important First Amendment concerns.300 Professors Daniel Farber and John Nowak draw attention to this by pointing to judicial opinions that run through an entire “public forum” analysis even where such analysis is irrelevant to the decision.301 Furthermore, they underscore the particular inadequacy of “public forum” analysis in considering so-called “hybrid” situational regulations that limit the content of speech but only in the context of a certain location, medium or speaker.302

For example, the Court in Cox v. Louisiana303 considered a law restricting commentary on the judicial process from public areas adjacent to courthouses.304 The Court relied on a “murky” distinction between speech and conduct in attempting to reconcile their decision with “public forum” doctrine.305 But the Court should have realized that the government has some latitude to regulate speech to protect

296. Id. at 291.

297. Id. (“Nonetheless, the Supreme Court’s application of forum analysis is ever-expanding, and some courts have applied a public forum analysis to Tinker speech. Therefore, the question remains: If a forum analysis is required and if the court performs such an analysis, is strict scrutiny of content-based regulations the appropriate standard of review?”) The court eventually concluded it would apply strict scrutiny under or not under forum analysis, not attempting to discern whether forum analysis was necessary or useful in this school context. Id. at 291-93.


299. See discussion supra notes 291-294 and accompanying text.


301. Id. at 1223.

302. Id. at 1226, 1233-35.


304. See Farber and Nowak, supra note 300, at 1233.

305. See Id.
the judicial process regardless of the type of fora involved.\footnote{306} The First Amendment "protects people, not places," making overreliance on forum analysis misleading.\footnote{307} Regulations of speech pertaining specifically to the Internet likely fall under Farber’s and Nowak’s “hybrid” category, so blind “public forum” analysis distracts from rather than aids their constitutional analysis.

In the Internet context, the very nature of the Internet causes problems with direct importation of “public forum” analysis. For starters, no one owns the Internet.\footnote{308} Schools who provide Internet access may own the computers connected to the Internet, but they do not own the Internet. They may own a “part” of the Internet; but Internet users can quickly “move” to a “part” of the Internet based in a computer located on the other side of the world. Thus, it is not necessarily the case that a school—or anyone—owns the relevant “forum” at all. As a consequence, perhaps none of the public forum classifications apply to the Internet.

Likewise, just “where” a communication on the Internet takes place is unclear, engendering similar confusions.\footnote{309} Physically, an Internet communication is a series of electronic data signals traveling through the wires and computer connections comprising the Internet. Thus, for example, if an e-mail originates in a student’s personal computer in her dormitory room in northern California, enters the university computer system, is forwarded out of the university to a computer network in southern California, is bounced to a computer network in Washington, D.C., is bounced again to the computer network at Oxford in England, and then finds its way off the Oxford computer network to another student’s personal computer, where is the communication and what constitutes the forum? In this sense, Internet communications are like telephone conversations, the mail, or perhaps cable television.\footnote{310}

Nevertheless, courts seem wed to the “public forum” doctrine,\footnote{311} so characterization of Internet communications as taking place in

\footnotesize
\begin{itemize}
\item \footnote{306} See Id.
\item \footnote{307} See Id. at 1234.
\item \footnote{308} See Harmon, supra note 41, at A7.
\item \footnote{309} Cf. Posch, supra note 274, at 62 (“There is no equivalent place in the Web. It cannot be legislated in the micro sense since there is no geographical nexus for netizens.”).
\item \footnote{311} See Farber & Nowak, supra note 300, at 1221-23 (“Public forum analysis appears to be increasing in importance.”).
\end{itemize}
“fora” necessarily becomes important. To the extent “public forum” analysis is useful in examining expression on the Internet, schools and courts should be wary of oversimplifying such analysis because of insufficient understanding of the nature of the Internet. To classify the Internet as a whole as one type of forum is probably inappropriate. David Goldstone argues persuasively that the Internet “should not be seen as a public or nonpublic forum, but as a more complex entity, like a city, that contains both public and nonpublic forums [sic] within it.”

Given the broad capabilities of the Internet and myriad different uses to which it is put, this accords with common sense. Thus, different types of Internet communications can be considered as “taking place” in different type of fora and thus draw the scrutiny corresponding to that forum. The most obvious way to go about characterizing different types of Internet fora is by analogy to traditional physical locations.

In fact, drawing analogies to traditional physical locations or media of communication is the most useful part to be gleaned from “public forum” analysis of the Internet. Professor Cass Sunstein explains it best, so I quote him at length:

In fact the legal culture has no way to think about the new problems except via analogies. The analogies are built into our very language: e-mail, electronic bulletin boards, cyberspace, cyberspaces, and much more.

Thus, for example, ordinary mail provides a promising foundation on which to build the assessment of legal issues associated with electronic mail. It is far from clear that the standards for libelous or fraudulent communication must shift with the new technologies. To be sure, there will be new and somewhat vexing occasions for evaluating the old standards. Judges may not understand the novel situations, especially those involving the Internet. In particular, the low cost of sending and receiving electronic mail, and of sending it to thousands or millions of people, may produce some new and unanticipated problems and put high pressure on old categories. Certainly it is likely that new and unanticipated problems will arise and a degree of judicial caution is therefore desirable in invoking the First Amendment.

312. Goldstone, supra note 289, at 379; see also id. at 382-83; Goldstone, supra note 298, at 10. Goldstone discounts the use of the limited public forum, but it may be appropriate for the Internet and might solve some of his other questions about newsgroups as public fora. See Goldstone, supra note 289, at 380 n.223.

313. Sunstein, supra note 79, at 1792; see also American Library Ass’n v. Pataki, 969 F. Supp. 160, 161 (S.D.N.Y. 1997) (“Not surprisingly, much of the legal analysis of Internet-
Accordingly, harnessing the limited usefulness of "public forum" analysis requires analogizing Internet communications to traditional communications taking place in traditional physical locations while keeping a careful eye to how such analogies fit and how such analogies fail. These analogies allow a greater understanding of the social context of the communication being regulated as well as allowing classification of Internet communications into fora, when that is necessary.

IV

Approach to Case Analysis

In congealing the discussion of the previous three Parts, I propose approaching the analysis of an educational institution's restriction of (or disciplining of) a student's expression on the Internet by engaging in a five-part inquiry. I then attempt greater explanation of each part of this inquiry.

First, is the restriction a written regulation or rule promulgated by the school? Formal, written policies and rules should be analyzed just as any regulations of speech. Broad restrictions are likely to run into the same vagueness and overbreadth problems university speech codes have encountered. 314

Second, what is the nature of the Internet communication? Analogizing the Internet communication to well-established, better understood communications, such as traditional postal service and the like, is instructive for all subsequent analysis. However, analogies will never be perfect and should serve only as a starting point. A careful eye must discern the new social practices of Internet communication and the new social context it generates.

Third, is the regulation a valid regulation of students qua students? This in turn involves the three-part sub-inquiry into the nature of the educational mission, the instrumental link between the regulation and the educational mission, and the appropriate amount of judicial deference to be accorded in the school's choice of regulation and definition of its educational mission.

Fourth, if the answer to the third part takes the regulation outside of the school's broad latitude to regulate students qua students, we turn to "standard" First Amendment analysis: Does the regulation target the message or viewpoint of the speaker, that is, is it a content-related issues has focused on seeking a familiar analogy for the unfamiliar. . . . This case, too, depends on the appropriate analogy."). 314. See discussion supra Part II.D.
based regulation? If so, under standard First Amendment analysis, it must pass strict scrutiny, that is, be justified by a compelling interest of the school and narrowly tailored to that interest.

Fifth, if the regulation is content-neutral, in what type of fora does it occur? The physical analogies investigated earlier will also prove helpful here, in guiding the direction of “public forum” analysis. Again, however, analogies will never be perfect and therefore should not be blindly dispositive, for example, in wedding a particular Internet communication to a particular analogy and its corresponding “public forum” classification.

A. Vagueness and Overbreadth

Thus far, the analysis of broad, formal policies limiting speech in public educational institutions has followed standard discussions of vagueness and overbreadth. Likewise, the analysis of broad, formal policies limiting speech on the Internet has followed standard discussions of vagueness and overbreadth. Apparently, the context of the school and the context of the Internet, separately or in combination, do not raise novel issues for analyzing the facial validity of such policies. Therefore, so long as the courts continue on this path, there is little to add to the discussion here.

B. Understanding the Nature of Internet Communications

Understanding the nature of the Internet communication being regulated is a prerequisite to undertaking any First Amendment analysis with the possible exception of vagueness and overbreadth concerns. For example, in determining whether a regulation is a valid regulation of students qua students, an understanding of just what is being regulated is needed to be able to determine whether there is a connection between the regulation and the educational mission.

Analogies to traditional forms of communication, such as the U.S. Postal Service, are often a good starting point. Schools and courts are

315. See discussion supra Part II.D.
316. See supra notes 266-268 and accompanying text (discussing the unconstitutionality of Communications Decency Act).
317. However, some commentators have argued that the context of the school should change analysis of overbreadth or vagueness. For example, Professor J. Peter Byrne argues that “the university can be trusted to administer rules prohibiting racial insults because it has the proper moral basis and adequate expertise to do so” and therefore “vagueness concerns about such university rules are largely misplaced.” Byrne, supra note 151, at 441-42.
often more familiar with these than the Internet. Some likely analogies are noted in the following table:
| E-MAIL                  | • Postal Service mail  
|                        | • Other mail, messaging, and courier services  
|                        | • Hand-delivered note or letter  
|                        | • Fax  
| TALK/WRITE             | • Telephone  
|                        | • Fax  
|                        | • Hand-delivered note or letter  
|                        | • Passing notes  
| PERSONAL DISPLAYS      | • Dial-in telephone service  
| (Web sites, finger plans) | • Sign  
|                        | • Voicemail outgoing message  
|                        | • Book  
| POSTING                | • Bulletin board  
|                        | • Newsletter  
|                        | • Speaking in a public square  

However, Internet communications defy simple classification. The multiple possible analogies listed for each type of Internet communication indicate that the Internet communication shares commonalties with each possible analogy, not that it can be translated directly and fully as any one of those analogies.

For example, in the table above, U.S. Postal Service mail seems at first blush an adequate analogy to e-mail. However, the analogy does not always work because the ease with which one can send e-mail differs from that of sending U.S. Postal Service mail. In a case involving a former student, the issue of whether an e-mailed communication constitutes a credible threat may hinge on how much effort the former student had to expend in sending the e-mails. 318 In that case, the prosecuting attorney argued that:

[T]he threat was credible . . . because [the former student] had to manually type the e-mail address of each recipient. It’s as if he had typed and made numerous copies of one threatening letter, manually addressed each of the envelopes to his targeted victim, and then dropped the bundle of letters in the mail on the same day. 319

Of course, the former student did not have to manually address envelopes. Moreover, looking up e-mail addresses was probably much

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319. Id.
easier and faster than looking up mailing addresses, and the former student may have had only to copy and paste the e-mail addresses rather than typing them. Another lawyer commented:

The 'Net offers some characteristics that are not present in the mail stream or the phone. . . . If [the former student’s] attorney can show that dozens of people were party to this communication, then he could possibly claim it’s akin to a guy standing in the middle of the street yelling idle—and harmless—threats.320

The arguments become complicated; in this particular case, the former student was convicted by a jury.321

On the same note, none of the analogies listed in the table above for “personal displays” quite covers Internet communication. Personal displays are like a dial-in telephone service in that the receiver of the message must take affirmative steps to obtain the message, rather than happening upon it. Since personal displays can be interactive or allow for the receiver of the message to leave a responding message, they are somewhat like voicemail or answering machines. But since personal displays typically contain visual elements not present in any type of telephone communication, they are also like signs, perhaps hung on the communicator’s door or window—however, signs can “surprise” passersby unlike personal displays and may not be as accessible from as far away or to as broad an audience as Internet personal displays.

The following example illustrates exactly why schools and courts should be wary of relying on analogies too much. At Boston College, an administrator explained the school would treat a student home page on the World Wide Web “just like a sign hanging from a dormitory window.”322 Thus, while a “listener” in this situation must take affirmative steps to access a home page, including specifically choosing to access a particular home page, as opposed to a passerby who may have little choice but to be exposed to the message on a sign hanging from a window, Boston College indicates it will treat the two different “speakers” the same.

Consider further that a Web page may have many layers. That is, a “listener” would “tune in” to the Web site and be met by the first introductory Web page, often termed the “home page.” A viewer could then move to the rest of the Web site by clicking on the buttons

320. Id. (quoting Andrew H. Good) (internal quotation marks omitted).
321. California Case is First Online Hate-mail Conviction, NEWSBYTES, Feb. 12, 1998.
that link to other parts (or “pages”) of the Web site. In this sense, the Web site is too complicated to be a sign; it is more like a book.

Moreover, sites containing potentially objectionable material will often disclose this up front, on the home page, so someone who does not wish to view the material can decline to do so. Thus, if Boston College wished to regulate obscene material on student Web pages, the “sign hanging from a dormitory window” analogy is even further askew. A blown-up pornographic picture draped down from a dormitory window for all to see is quite a different thing than pornographic computer images viewed on a personal computer in the viewer's room after she clicked “Yes” in response to the question of whether she wanted to see pornography. In sum, the problems with Boston College’s imprecise analogy are of constitutional magnitude.\(^{323}\)

In such a situation, a school should go on to consider the social practices involved in the communication and the purpose of the regulation. If the purpose of the regulation is to protect adults who do no wish to view pornography from having to do so, and thus maintain their comfort levels and improve the educational environment, then the sign analogy is clearly inappropriate. In this scenario, the web site is more appropriately thought of as a dial-in telephone service with a menu to reach certain information. The fact that the information is visual as well as audio is not important to the regulation at issue, so the analogy works fairly well.

Of course, the Internet’s unique attributes will create communicative contexts quite unlike any traditional form of communication. For instance, private e-mail messages can be forwarded to many other recipients instantly, with barely a touch of a button. This has the practical effect of making the message reach many people, similar to a posting in a public newsgroup or on a public bulletin board. The original sender might then be held responsible for having sent an unsolicited communication to a private individual whom the message reached or be considered to have posted it in a public or semi-public place.

In some ways this is like a physical chain letter, or like the case where a person photocopies a letter she receives and mails the copies along to many others. But the ease in which this can be done on the

\(^{323}\) Cf. Sable Communications v. FCC, 429 U.S. 115, 127 (1989) (using a similar analysis of having to take affirmative steps to be exposed to a message to differentiate a dial-in service from radio broadcasting). The Supreme Court seemed to recognize the analogy of a Web page to a dial-in service in saying, “Each [Web page] has its own address— 'rather like a telephone number.'” Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 2335 (1997).
Internet makes it qualitatively different. A speaker has some idea that a person would have to go to some amount of trouble to photocopy a letter, and then address and stamp a number of envelopes, and then stuff the envelopes with the photocopies, and then put them all in the mail. Thus, the intent of the sender may have not been to achieve this promulgation at all. If such “innocence” of intent can be shown, the situation is like a person telling her secret to a friend who surprisingly betrays her confidence by telling the secret to everyone. Thus, such private Internet messages should also be considered to be private in every sense.

However, such “innocence” of intent may be very difficult to show. People familiar with the Internet are aware that messages are easily forwarded. In some cases, it may appear that the message sender knew that the message could or would be forwarded to many others. Analogously, a person telling her friend a joke may expect or reasonably anticipate that her friend might tell other people the joke. In a more extreme case, a person who is deliberately spreading rumors might actually intend that every person to whom she tells a rumor spread that rumor further. In such situations on the Internet, what starts out as a private Internet message should be considered public communication.

Nevertheless, knowledge that a message can be forwarded should not automatically be considered constructive knowledge that every message is likely to be forwarded, just as it should not be so considered for conversations in person or over the phone. Otherwise, every communication would have to bear a disclaimer or express instructions not to forward the message any further.  

If that were not enough, the Internet’s unique attributes create not only unique communicative contexts but also unique social contexts. People do not interact with each other the same way on the Internet as they do in “real” life; accordingly, their expectations within the Internet are also different. For example, many people understand the ease with which a speaker can put information on the Internet and that they often have no way of discerning the identity, credibility, or reputation of the speaker. That is, if you find a Web page titled, “Dr. Sally Li’s Medical Advice and Home Remedies,” you have no idea and possibly no way of determining whether Dr. Sally Li is actually a

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324. Interestingly, where communications have larger legal consequences, persons are including just such instructions and disclaimers in every e-mail message. Law firms in particular are increasingly programming their computers to automatically append such a warning at the bottom of all e-mails which leave the office. This practice has not become common practice for everyday Internet communicators though.
Stanford M.D., an herbal medicinist, or a ten-year old boy in Jackson, Tennessee. Thus, many people have learned to treat the Internet with a sense of healthy mistrust.325

This anonymity and ease of “speaking” on the Internet have also dulled senses of décor in that it is more commonplace and even accepted to be rude and insulting. A term called “flaming” has even sprung to being; it indicates a vicious tongue-lashing.326 As Sara Kiesler, a Carnegie Mellon professor of social science, tells it, a flame “is a common way to vent on the Internet, even among grown-ups and Harvard professors.”327 “People say things on the Internet they wouldn’t say otherwise.”328 In turn, people do not treat what they read, hear, or receive on the Internet the same way they would something told them in-person, on the phone, in a letter or that they read in a newspaper or see on television.

As can be seen, Internet communications can stretch analogies past their limit. In sum, every Internet communication must be examined not only through analogy but also in light of the new social practices surrounding it and the resulting new social context in which it takes place.

C. Regulation of Students Qua Students

Public schools have broad latitude to regulate students qua students in furtherance of their educational mission. Determining whether a particular regulation is a valid regulation of students qua

325. “Consideration also has to be given to the fact that readers of Internet postings are not mindless automatons . . . . [they should know] public postings on the Internet aren’t any more reliable than fliers on telephone poles.” Terry Roach, Editorial, Letter to the Editor: U. of Md., We Can’t Police the Internet, WASH. POST, Mar. 2, 1996, at A20 (written by Terry Roach, Chief Counsel for the University of Maryland at College Park, and Gary Pavela, Director of the University’s judicial programs). In fact, readers of Internet postings have learned public postings on the Internet may be less reliable than fliers on telephone poles. See Mary Leonard, Taming the Beast, BOSTON GLOBE, Feb. 8, 1998, at C1 (“The biggest rap on the Internet’s virtual reality is that it isn’t real. People can’t trust it.”).

326. A newspaper article defined a “flame” as “an Internet term for abusive or insulting e-mail.” Julie Chao, E-mail Conviction’s Impact Downplayed, S.F. EXAMINER, Feb. 12, 1998, at A10.

327. Id. (quoting Sara Kiesler). Some experts go so far as saying “people who log into a computer network accept the risks of encountering inflammatory speech, because the Internet is a domain where talk is cheap and ‘flame wars’—or vitriolic exchanges among computer users—are commonplace.” Maharaj, supra note 318, at A1.

students in furtherance of the educational mission demands a three-part inquiry: (1) the nature of the educational mission to be furthered by regulation; (2) the instrumental connection of the regulation to the furtherance of the educational mission; and (3) the amount of judicial deference to be accorded to the school in regard to its characterization of its educational mission and/or its choice of means to further that mission. 329

In regard to the first step, the nature of the educational mission at issue may be general, such as preventing direct disruption to the operation of the school or otherwise preventing activities which undermine the ability of the school to carry out its educational mission. The educational mission may also be characterized under theoretical frameworks such as civic education, democratic education, or critical education, as discussed earlier. 330 Moreover, there may be multiple objectives of the educational mission that may be in tension with each other. For example, democratic education's commitment to participation and critical education's relentless pursuit of "truth" may often come into conflict with civic education's occasional need to suppress certain types of speech for the purpose of civil discourse.

Examining the instrumental connection between the educational mission to be furthered and the means of the regulation may also require examination of the breadth or scope of the regulation. Schools "may have various educational functions with constitutionally distinct characteristics. Thus it is conceivable that public [schools] may be permitted to pursue the mission of civic education within their dormitories, but be required to follow the requirements of democratic education with regard to their open spaces." 331 In other words, a regulation of speech within dormitories may have a very strong connection to furthering a school's mission of civic education, and override competing educational goals; but that same regulation applied in open spaces may have a weaker connection to civic education, or fare worse when balanced against competing educational goals. On a similar train of thought, a regulation that applies to students completely outside school grounds may have a difficult time showing the requisite connection to the educational mission. 332

329. See discussion supra notes 142-178 and accompanying text.
330. See discussion supra notes 156-163 and accompanying text.
331. Post, Racist Speech, supra note 151, at 325.
332. Some courts seem to place considerable emphasis on when restrictions reach outside school grounds: "Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its
Determining the proper amount of judicial deference to grant the school operates in conjunction with examination of the educational mission and the means. Where the subject of regulation “requires insulation from routine judicial oversight for its effective functioning,” the court should defer to the judgments of the school as much as possible. On the opposite extreme, where a school characterizes a regulation of viewpoint or political speech as a necessary part of its educational mission, the courts should step in readily. In the case of public educational institutions restricting expressions of their students on the Internet, several most-likely scenarios come to mind. Possible goals of the educational mission in such scenarios are: (1) prevention of material disruption to the operation of the school and to the educational environment; (2) maintenance of the credibility of and high regard for the school in speech it affirmatively sponsors or promotes; and (3) inculcation of civility and civic values as preparation for citizenship (“civic zenith, their actions must be evaluated by the principles that bind government officials in the public arena. Thomas v. Board of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979). Some school officials and attorneys in the Internet student-speech cases have echoed these thoughts. One school superintendent said, “We can’t punish something that didn’t take place in school.” Rogers, supra note 97, at A1 (quoting Superintendent Murray Blueglass). Likewise, a law professor agreed: “Somebody outside of school certainly has full First Amendment rights on what he does on his own computer.” Id. (quoting Rutgers law professor Jonathan Mallamud). Likewise, in the Sean O’Brien case discussed above, O’Brien’s attorney compared the situation to “Sean talking to his friends in a coffee shop. Why can’t he say something critical of the band teacher? He’s on his own time, he’s on his own turf.” Banned Student Targets School’s Band Director, supra note 7, at B2.

As noted, I agree that a regulation that reaches outside school grounds is less likely to be sufficiently connected to the educational mission to pass constitutional muster. However, I would not draw the bright line between in-school and out-of-school that these comments suggest. For starters, a Web page is not like a coffee-shop conversation in that it can reach into the school grounds. Students could feasibly access the Web page from the school computer lab. In that way, a Web page is more like a student handing out flyers on school grounds. Thus, Internet expressions should not be so strongly tied to the computer from which they originated or where they are stored. Moreover, schools do have the authority to regulate behavior outside the school under certain circumstances where students are acting in their capacity as students, i.e., they may regulate students qua students. For example, students who go to an away football game and start fights in the bleachers are likely subject to discipline by their school, even though the behavior took place at another school.

333. Post, Between Governance, supra note 151, at 1783.

334. Id. at 1815 (“In fact the Court has given serious recognition to only one constitutional value that could potentially override warranted deference, and that is the value involved in prohibiting government institutions from making their resources available to the public in a manner that discriminates on the basis of viewpoint.”).
education").

Again, each of these will often be in some tension with other educational goals, such as participation, tolerance of speech, and criticism in pursuit of "truth."

The potential for disruption of the educational environment is a very real problem with student expression on the Internet. Disruption could come through an abuse of Internet resources overloading a computer system and slowing or halting the Internet activities of others or through inflammatory communications that create a hostile environment. Such "virtual" disruptions stretch the traditional physical paradigm of "disruptions" in case precedent.

For the first case, the abuse of Internet resources overloading computer systems does fit into a physical paradigm. Computer systems are physical in nature, and even the idea of overloading a system has many obvious physical analogies. Furthermore, the consequences of such abuses have readily tangible forms. For example, a computer system could crash as a result of a student's perpetuation of myriad electronic chain letters, and this might cause a number of students to be unable to complete homework assignments requiring use of the Internet.

Thus, a prohibition on electronic chain letters or limiting a student to sending one hundred or less e-mails per day has a strong connection to preventing disruption to the operation of the school. Moreover, the court is not in a good position to second-guess the school's assessment of its computer system's ability to handle many e-mail messages or the likely e-mail needs of its students, so it should

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335. Other goals are possible, of course. Unstated as obvious is the goal of education in and of itself, including control of the curriculum, grading, and the general academic and educational process itself. Courts have left such controls in the hands of the school exclusively almost without fail; for example, a student cannot assert a First Amendment right to write an assigned research paper on an unapproved topic. See generally Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995).

336. See. Kovaleski, supra note 6, at C1 ("Students who belong to radical groups ... are using school Internet access to spread their dogma through cyberspace . . . . "This is becoming one of the major battlefields in spreading racial intolerance and hate, as well as violence and mayhem.").

337. "Virtual" in the context of the Internet and cyberspace has become a buzz word removed from its original context in the term "virtual reality."

338. E.g., Shamloo v. Mississippi State Bd. of Trustees of Insts. of Higher Learning, 620 F.2d 516 (5th Cir. 1980).

339. Cf. Thomas Healy, Students' Web Pages Prove a Sticky Snare for Many Universities, NEWS & OBSERVER (Raleigh, N.C.), Feb. 16, 1996, at A1 (student's Web page featuring photos of supermodel Angie Everhart "was visited by so many people that it . . . nearly crippled one of the school's computer servers. Students had trouble accessing their web pages, and several computer classes were interrupted.").
give wide deference to the school's judgments. In sum, such regulations are valid regulations of students qua students.

A student might argue that the school should not have the ability to limit access to its computer resources, because it harms the student's ability to communicate in the increasingly important medium of the Internet. However, the argument falters if the limitation is emplaced only to prevent system crashes, which would eliminate access for everyone. Furthermore, a student has many avenues for gaining access to the Internet besides through the school computer systems. She may sign up with an independent Internet service provider (ISP) and access the Internet from her own personal computer without relying on the school's computers at all.

Inflammatory communications on the Internet are a trickier case of disruption. The exact disruption is hard to predict or measure. *Tinker* allows schools latitude to prevent expression that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Additionally, schools must have some substantial basis for believing a material disruption will take place where they act in a preventive or regulatory manner before the expression has taken place; an "undifferentiated fear or apprehension" is insufficient.

Where the student Internet communication bears directly on class or curricular activities, disruption is much easier to show. An Internet newsgroup dedicated to class discussion needs norms of communication to allow the class discussion to proceed. Thus, a school could prohibit students from posting messages completely unrelated to class discussions; for example selling a used futon, or prohibit students from making unwarranted use of profanity. Such restrictions would be strongly linked to the educational mission.

However, the myriad personal communications students send out over the Internet are more complicated. A student sending an e-mail to another student threatening to physically harm that student is quite like a student who threatens another student outside of the Internet; schools must afford their students some degree of safety and comfort to create an environment conducive to learning, by being able to discipline threats. But if a student posts a message to a public, open-


341. *Tinker*, 393 U.S. at 508; *cf.* Healy v. James, 408 U.S. 169, 189-91 (1972) (lack of basis for believing a student club posed a threat of material disruption to the school precluded university from withholding approval of club).

342. Moreover, threats are not protected speech in the first place. See, e.g., *Lovell* v.
ended, non-class-based newsgroup that politely tells why she thinks the Holocaust never happened, the disruption is more subtle. There is not a physical threat, and there is not a threat directed at a single person. Yet, there is some harm to the learning environment in that many people will be offended by the message and feel less comfortable.

However, the courts have made clear that mere "discomfort and unpleasantness" is insufficient, especially in light of the goals of democratic education. Tinker has laid out only a limited deference to be given the school authorities. Therefore, regulation of that message is probably not linked strongly enough to the prevention of disruption to be a valid regulation of students qua students.

Even trickier, the maintenance of the credibility of and high regard for the school in speech a school affirmatively sponsors or promotes becomes extremely complex in the context of student Internet expressions. Hazelwood School District gave wide latitude for public schools to "refuse to lend its name and resources to the dissemination of student expression." Again, the names of educational institutions are often attached to any Internet expressions by its students. Thus, a school could attempt to place almost any manner of restriction on student Internet expressions made through school accounts by claiming furtherance of its mission to uphold its good name, credibility, and reputation which allow it to fulfill its "role as a principal instrument in awakening [students] to cultural values .....

However, this is very different from the situation in Hazelwood. In Hazelwood, the medium was a student newspaper that was part of the curriculum, produced through a regular class and under direct and constant supervision from teachers. Only under these circumstances were "school officials . . . entitled to regulate the contents of [the

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Poway Unified Sch. Dist., 90 F.3d 367, 371 (9th Cir. 1996) ("Threats of physical violence are not protected by the First Amendment under either federal or state law, and as a result, it does not matter to our analysis that [the plaintiff] uttered her comments while at school.").

343. See Tinker, 393 U.S. at 509.
345. See discussion supra Part II.A.
346. Id. at 570 (internal quotation marks omitted). See also Prokop, supra note 45, at 2550 (discussing university interest in maintaining its reputation and image in its community, as raised by the decision in Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972)).
newspaper] in any reasonable manner"\textsuperscript{348}, that is, under those circumstances, regulation of the content of the newspaper was a valid regulation of students qua students. The lending of the school's name as part of providing Internet service is a far cry from a curricular newspaper for which the school lends its faculty time and supervision and pays for printing and distribution. For example, the variable cost to the school for a student to send e-mails over the course of an entire year is negligible compared to the resources it would have to separately commit for a student newspaper.

Even aside from \textit{Hazelwood}, however, courts have recognized that schools have a legitimate concern over whether expressions are attributed to them. For example, while courts have generally protected the opinions of teachers expressed outside of the classroom, they allow that in certain situations the problems of misattribution and confusion merit some authority of schools to regulate such expressions.\textsuperscript{349} Thus, where Internet communications create a legitimate problem of misattributing a person's expressions to the school as an institution, there is precedent for allowing more restriction on Internet speech. Virginia Tech seems to agree: It takes "the position that if you use our [computer] server, then you have some responsibilities because you associate the name of the institution with what you say."\textsuperscript{350}

However, the appearance of the school's name as part of a person's account name and address by and large will not create such problems. Internet users understand that university e-mail accounts are used by individuals and do not generally reflect expressions endorsed by or attributable to the university. The appropriate analogy is the U.S. postal service. By my listing "Oakland, CA" as part of my return address on an envelope or a flyer I post in the middle of campus, no one considers my views as those of the city of Oakland. Similarly, I may receive mail at a student organization office at the

\begin{table}
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\caption{Example Table}
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Column 1 & Column 2 & Column 3 \\
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Data 4 & Data 5 & Data 6 \\
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\textsuperscript{348} Id. at 270.

\textsuperscript{349} See Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) ("[T]here lies some authority over the conduct of teachers in and out of the classroom . . . that gives the appearance of endorsement by the university.").

\textsuperscript{350} \textit{Bytes and Pieces: Free Speech and the Internet}, \textit{American Political Network Daily Report Card}, Oct. 25, 1995, at 7 (quoting Cathryn Goree, Dean of Students at Virginia Tech) (internal quotation marks omitted); see also Serge F. Kovaleski, \textit{Universities Vexed by Use of Their Internet Connections for Hate Mail}, \textit{Wash. Post}, Aug. 4, 1995, at A4 ("By having an educational institution's name listed on the header of an Internet posting, authors say they can give the appearance that their messages are endorsed by reputable schools—when in fact they are not—and that they carry credibility in mainstream thinking.").
University of California, Berkeley and list as part of my return address for communications on behalf of that student organization, "Name of Student Organization, Boalt Hall School of Law, University of California, Berkeley"; again, those views will properly be attributed to me and/or the student organization rather than the school as a whole. Likewise, e-mail from "ice@cs.stanford.edu" expresses the views of the person whose account name is "ice" rather than those of Stanford University. In general, unless a person identifies herself as an official employee, particularly an administrator or other spokesperson, of the educational institution, no reasonable person is likely to interpret the presence of the school name in the address as an endorsement by the school.351

Thus, given the social connotations of Internet communications, regulation of Internet speech solely to protect the name of the school should be accorded little deference, and the connection found too tenuous to be a valid regulation of students qua students.

As a final example, the inculcation of civility and civic values is the "civic education" discussed by Professor Post and the overriding educational mission found in Bethel School District v. Fraser. For example, a public school might prohibit lewd or indecent speech in all Internet communications by its students to promote the lessons of "civil, mature conduct." Ignoring, for the moment, any problems of vagueness or overbreadth, the regulation is likely overinclusive, thus weakening the instrumental connection between it and the civic mission. Prohibiting a student from making gratuitous use of filthy language in a message she posts to a newsgroup dedicated to furthering class discussions probably promotes "civil, mature conduct." It assumingly teaches the student that such language is inappropriate in certain contexts and mostly unhelpful in intellectual discussion. However, prohibiting that same student from sending a personal e-mail containing sexual innuendo to her twenty-one-year-old friend seems inappropriate.

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351. The "reasonable person" here is assumed to have at least a slight working knowledge of the Internet. See discussion supra note 325 and accompanying text.

352. Concededly, the analogies are not perfect. In particular, affiliation with a school connotes much more than affiliation with a city from living there. In the e-mail context, affiliation with the school implies you are an employee of the school or a student attending the school. However, this alone is insufficient to justify infringing on First Amendment rights. Only when the communication raises the danger of misattribution or gives the appearance of school endorsement should the school have more latitude to divorce itself from the expression.

353. See discussion supra notes 156-58.


355. Cf. id. at 683.
old next-door neighbor in the dormitory may be too strong a medicine, thus dulling the lesson; it might teach that such language is never acceptable under any circumstances or that one should be always fearful about what one says, even in private.

Thus, this broad of a regulation would probably be too weakly connected to the goal of civic education to be a valid regulation of students qua students. It would be more likely to pass muster if it prohibited lewd or indecent speech only in newsgroups dedicated to class discussions, similar to the prevention of disruption example above. Still, there may be a class newsgroup for a class which studies pornography, for which a robust discussion would necessarily refer to and thereby include lewd and indecent speech. This raises the competing goals of democratic and/or critical education, which would demand the inclusion of such lewd and indecent speech under these circumstances.

Of course, an often-found corollary to the inculcation of civic values is the goal of protecting minors from obscene speech, typically in secondary or lower schools. The Court’s decisions in *Bethel*356 and *Kuhlmeier*357 indicate a preoccupation with the school’s latitude to protect younger students from objectionable or mature material.358 Schools have greater ability to restrict student expression when that expression is directed toward or readily available to younger students and the expression is less suited to younger students. In contrast, the term “motherfucker” in a political cartoon distributed to college-age students was constitutionally protected by the Court’s decision in *Papish v. Board of Curators of the University of Missouri.*359

This indicates that civic education is a very strong, important goal in secondary and lower schools and therefore overrides goals of democratic or critical education when it comes to prohibiting lewd or indecent speech. Courts should give considerable deference to secondary and lower schools’ judgments about civic education. In the university setting, however, there is an implicit assumption that the students have already learned the basic civic lessons; thus, at that stage, the goals of democratic and critical education become more

356. *Id.* at 675 (allowing school to punish student who gave an indecent speech in front of much of the school in part because of concern for younger audience members).
358. *See* discussion *supra* Part II.B.1.
important and would be more likely to outweigh goals of civic education.

D. "Standard" First Amendment Analysis

Under "standard" First Amendment analysis, the threshold question is of course whether the regulation targets the message or viewpoint of the speaker. Such content-based regulations must be justified by a compelling interest and be narrowly tailored to that interest.

A public school would have more latitude, however, to promulgate content-neutral regulations affecting student expression on the Internet. Once a regulation is found to be content-neutral, courts apply "forum" analysis. Regulations of expression in public fora must be necessary to serve significant government interests. Regulations of expression in non-public fora must be necessary to serve a significant government interest if the interference with speech is substantial or serve a rational government interest if the interference is not substantial. The availability of adequate alternative channels of communication can render interference insubstantial. Finally, regulations which affect expression in private fora are acceptable unless they leave no adequate alternative channels of communication.

As discussed earlier, the classification of Internet communications into these fora classifications is an imprecise science at best. Nevertheless, analogies to traditional physical communications can be helpful. Using some of the analogies discussed previously "private communications between mutual and willing participants analogize most easily to private mail and should be considered a private forum belonging to the participants." The

360. See generally TRIBE, supra note 197, § 27, at 987.
361. See id.
362. See id.
363. See generally id. § 12-25, at 998-1003.
364. See GOLDSSTONE, supra note 289 (discussing private communications in the context of a conference and the exclusion of others from that conference); see also David Johnston, There is No Sheriff on the Cyber-Frontier, MONTREAL GAZETTE, June 18, 1995, at D10 (Gareth Sansom, Industry Canada policy advisor, notes, “E-mail on the Internet (person-to-person communication) would generally fall into the private sphere . . . .”); Larry Wheeler, Web Page Airs NASA's Dirty Laundry, MORNING NEWS TRIB. (Tacoma, Wash.), May 12, 1996, at A6 (Professor Donald Berman asks, regarding a Web page, “Let's forget about computers and pretend it really is a water cooler and you have a bunch of NASA employees standing around and talking about how upset they are about layoffs, . . . Do they have a right to engage in that type of conversation? If the answer is 'yes,' then the question becomes, should it matter if they go outside the office to carry on the same
involvement of the school or government as a mail deliverer is nominal.

Private communications where one party is not expecting the communication and/or is unwilling to receive the communication are somewhat different. Such situations are often analogous to receiving junk mail, advertising circulars, or political mail, and should be governed similarly.\(^{365}\) However, there is of course a point at which such communications are too personal to be considered junk mail, so frequent as to constitute harassment, or so offensive as to be considered threatening.\(^{366}\) Schools and governments can, of course, regulate under these circumstances.

Public communications are rather different. Many newsgroups inviting the free and open posting of communications are so public and accessible that they should be considered public fora.\(^ {367}\) David Goldstone is instructive as he spells out at length how to apply public forum analysis to fora on the Internet.\(^ {368}\) His definition of a public forum on the Internet is a forum that: "(1) is owned or controlled by the government; (2) is operated in a non-profit manner; (3) provides unrestricted access for message recipients, and (4) has viewpoint-neutral access to a reasonably large number of message senders."\(^ {369}\) Many newsgroups are operated out of computer systems owned or controlled by the government or public educational institutions; these newsgroups also operate without profit and provide unrestricted, viewpoint-neutral access. These newsgroups should be considered public fora.

\(^{365}\) See Amy Harmon, \textit{Student's Expulsion Over E-Mail Use Raises Concerns}, \textit{L.A. Times}, Nov. 15, 1995, at 1 ("Civil libertarians . . . note[] one can simply not read unwanted e-mail."). Whether one can simply not read unwanted e-mail the way one can toss junk mail in the trash without opening it is debatable. Before one "opens" and reads, one can typically see the e-mail address and/or real name of the sender and a subject header. Thus, in some ways, unwanted e-mail is easily identified, because one can see if the sender is a stranger and/or if the subject header has nothing to do with one's interests. However, like junk mail in plainly marked envelopes, it is not always clear whether a sender is a stranger, or an "unwanted" stranger, and subject headers may not reveal content.


\(^{367}\) See Goldstone, \textit{supra} note 289, at 379-80; \textit{see also} Johnston, \textit{supra} note 364, at D10 ("[M]essages on computer bulletin boards, which have a wider readership, could be construed as part of the public sphere . . . ").

\(^{368}\) \textit{Id.} at 388.

\(^{369}\) Id. at 383-402.
Of course, there are gray areas between strictly private and strictly public communications on the Internet. Private newsgroups and mailing lists may arbitrarily restrict who may view the messages and discussions therein. However, they may also be operated out of a computer system belonging to a government or public school. Furthermore, they are not as clearly exclusive as a conference held within the confines of a person's home. For example, it is not always easy to restrict who may send messages to the private newsgroup or mailing list, and thus, the private discussion might be intruded upon by outsiders fairly easily. As these private discussion groups are not designated for public communications and do not meet the Goldstone definition of an Internet public forum, they should also be considered the private fora of the discussion group members. Still, "they do not fit neatly into any established First Amendment box."

Many newsgroups are not private but are topical and intended to be restricted to discussions centered on that topic, though anyone is welcome to participate. These too fail the Goldstone definition of an Internet public forum. However, they sound very much like the limited public fora that are open for the use of certain expressive activities. Accordingly, these newsgroups fall in the in-between ground of limited public fora. Class newsgroups, for example, analogize to classroom discussions continued after class, and should be considered limited public fora.

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370. Cf. Johnston, supra note 364, at D10. Johnston quotes Gareth Sansom, an Industry Canada policy advisor and author of a federal study on the Internet, "If you have 10 people, all friends, and one of them operates the bulletin board out of his basement, is it public or private? A lot hinges on the distinction between public and private, and this presents questions when you move into the electronic realm."

371. See id. ("[I]t may depend on whether the BBS (bulletin board) is a closed-user group or an open-user group.").


373. See supra text accompanying note 369.

374. Goldstone, supra note 298, at 18.

375. See generally VIRGINIA SHEA, NETIQUE (Albion 1996).

376. See supra notes 280, 282, 370 and accompanying text; Perry Educ. Ass'n, 460 U.S. at 45-46.

377. This raises the problem of what the practical effect of a limited public forum is, which may be that it is the same as a nonpublic forum. See supra Part III.B.2. However, this problem is in large part due to the distinction between a limited public forum and a nonpublic forum being based on the intent of the government. Id. This intent-based difficulty might not arise in the context of Internet newsgroups, where the name of the newsgroup and sometimes its first few messages give a fairly clear indication of what the topic of the newsgroup is to be and the access to the non-physical forum is usually unfettered for any Internet user.

378. Cf. Gregory A. Clarick, Note, Public School Teachers and the First Amendment:
Finally, when using analogies to classify Internet communications into a particular type of forum, analysis must again consider both how the analogy corresponds to the analogized physical means of communication and how it differs, to avoid premature, inappropriate, or unnecessary classification into fora.

V

Case Examples—What They Should Have Considered

In this Part, I apply my approach to case analysis to three real situations in which a student was punished by his school for his expression on the Internet to outline some First Amendment concerns that may have been overlooked by the school in each case. Concededly, my access to all the facts was limited, so I fill in with conjecture and speculation out of necessity and for illustration.

A. The Infamous Jake Baker

In January 1995, a twenty-year-old sophomore at the University of Michigan named Jake Baker wrote a perverse story in which he and his friend break into a girl's apartment and proceed to torture, rape, mutilate, and ultimately murder her by dousing her with gasoline and lighting her on fire. The name of the victim was the same as a real classmate of Jake Baker's, who sat in his Japanese class the previous semester and on whom he had a crush. Baker posted the story to the alt.sex.stories newsgroup, an Internet-wide discussion group with "no imposed boundaries—just a loose culture of sex-talk in which almost anything goes." The story eventually came to the attention of university officials.

University officers contacted Baker, and he allowed them to search his room and e-mail account. On February 2, 1995, university officers, armed, were waiting for Baker outside of class. They notified him he was suspended, escorted him to his dormitory room to

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Protecting the Right to Teach, 65 N.Y.U. L. REV. 693, 714 n.136 (1990) ("E)ducation theory suggests that most classrooms should be comprehensively protected limited public forums.").


380. WALLACE & MANGAN, supra note 379, at 66.
381. Id. at 65.
382. See id. at 63.
383. Id. at 66.
384. Id. at 67; see also Garvey, supra note 36, at H1.
allow him to pick up a few of his belongings, and dropped him off at
the edge of campus, telling him not to return; the university president
had suspended Baker without a hearing using a little-known bylaw
which authorized the action in the name of maintaining "health,
diligence, and order among the students."\textsuperscript{385} The university eventually
held suspension hearings and upheld the suspension.\textsuperscript{386}

Baker's communication was a posting to an Internet newsgroup.
The newsgroup in question is public and open and accessible from
virtually "anywhere" on the Internet. The physical analogies might be
Baker posting his story on a world-accessible bulletin board devoted
to sex topics, or perhaps publishing it in a global or national sex
magazine. Control and ownership of the newsgroup are quite outside
the purview of the school.

With this as the backdrop, the educational mission at issue could
be any of the three most common ones mentioned in Part IV:
prevention of disruption to the educational environment, maintenance
of the credibility of and high regard for the school in speech it
affirmatively sponsors or promotes, and/or inculcation of civility and
civic values.\textsuperscript{387}

The first educational mission seems to be the university's
argument, since the university president acted to maintain "health,
diligence and order among the students."\textsuperscript{388} However, if the argument
is that Baker's story disrupted the educational environment by
offending readers, this is weak since the story appeared only in the
public newsgroup, which readers had to intentionally seek out to find
the story and about which readers should have known something of
the type of content found there. It is unclear that many students at the
university even knew about the story until the media attention began.

However, Baker's story may have constituted a threat toward
another university student, which would be a stronger case for
disruption. Again, this would be a factual issue. However, the story
was not sent to Baker's classmate, and in all likelihood, he probably
thought she would never see it. Baker was not convicted of having
threatened anyone under federal law, and in fact, even the United
States attorney thought it would be difficult to "construe a story as a
threat, particularly when it was clearly labeled as fiction," and

\textsuperscript{385} WALLACE & MANGAN, supra note 379, at 67.
\textsuperscript{386} See id. at 73.
\textsuperscript{387} See discussion supra Part IV.C.
\textsuperscript{388} WALLACE & MANGAN, supra note 379, at 67.
dropped that charge.\textsuperscript{389} Thus, regulation of Baker's behavior is somewhat removed from preventing disruption to the educational environment. Given Tinker's demand for articulable bases for fearing disruption and standards that interference be "material and substantial," the university would face an uphill battle on this line of argument.

The university could also claim it acted to protect the name of the school in punishing Baker. The story bears Baker's name and e-mail account, listed as "kiasyd@umich.edu," showing that it was sent from a University of Michigan e-mail account.\textsuperscript{390} After all, the reason the Baker story came to light at all was that it inadvertently found its way into the hands of Richard DuVal, a University of Michigan alumnus.\textsuperscript{391} DuVal thought the story "crosse[d] the line from bad taste to pathological"\textsuperscript{392} and "called the University of Michigan's President's office to ask why the school's account was disseminating such material."\textsuperscript{393}

However, while DuVal seems confused and thought that the school was "disseminating" such material, the average and reasonable Internet user would probably not reach that conclusion.\textsuperscript{394} Instead, the average user would understand that the sender (and author of the story) was at the University of Michigan, a student, faculty member, or staff person, but that that did not imply the school's endorsement in any way.

Therefore, the university's punishment of Jake Baker was probably not a valid regulation of students qua students. Under standard First Amendment analysis, the school's best bet would have been to argue that the story was obscene, in which case it receives little or no First Amendment protection. Obscenity would be a factual issue, however.

\textsuperscript{389} Id. at 76. Professor Cass Sunstein refers to the nature of this communication in specific reference to the Baker case: "At first glance it seems that the question should be resolved in the same way as any case in which a writer uses a real person's name in fiction of this sort . . . . Perhaps the ease of massive distribution of such materials, which can be sent to much of the world with the touch of a button, argues in favor of losing the constitutional constraints . . . ." Sunstein, supra note 79.

\textsuperscript{390} See Jake Baker Information Page, supra note 35 (reprinting Baker's stories).

\textsuperscript{391} WALLACE & MANAGAN, supra note 379, at 63. A sixteen year-old came across the story and showed it to her father, who showed it to Mr. DuVal. Id.

\textsuperscript{392} Id. at 63 (quoting Richard DuVal).

\textsuperscript{393} Id.

\textsuperscript{394} See discussion supra Part IV.C.
In sum, the university essentially expelled Baker for publishing a perverse story, which may very well have violated his First Amendment rights.

B. "Die a Slow Death"

In the fall of 1995, a student at Virginia Tech signed on to a World Wide Web home page for gay men entitled, "Out and Proud." He posted a message onto the page that called for gays to be castrated and to "die a slow death;" additionally, he posted four pictures of naked women. The university punished him for violating a two-year-old university policy prohibiting "use of mail or messaging services to harass, intimidate or otherwise annoy another person," although they refused to release the details of the punishment.

First, there is a formal school regulation here. It prohibited "the use of mail or messaging services to harass, intimidate or otherwise annoy another person." While prohibition of harassment or intimidation is well-ensconced in law and upheld in cases, the "otherwise annoy" language is problematic. A university cannot proscribe "speech simply because it [is] offensive, even gravely so, by large numbers of people," and annoying is assumably a step below offensive.

Moreover, a person "of common intelligence must necessarily guess at [the] meaning" of "otherwise annoy." There is no university definition of "language that otherwise annoys another person," so virtually anything could reasonably be encompassed within "annoying." An e-mail containing a solicitation or advertisement could be annoying. A message erroneously addressed, or repeated such messages, could be annoying to the unwilling recipient. The breadth of "annoying" is probably recognized by

396. Id.
397. Id. (internal quotation marks omitted).
398. Id.
399. Id. (internal quotation marks omitted).
401. Id. at 863.
403. Shear, supra note 18. (information from Cathryn Goree, Dean of Students) (internal quotation marks omitted).
404. For example, while I was at Stanford, there was another person in the computer science department who shared my last name "Weng." His friends often tried to mail him at "weng@cs.stanford.edu," which the computer server thought was me and forwarded to
other universities, whose regulations mirroring Virginia Tech’s here do not include the “otherwise annoy” language.405

Ignoring for the moment that the regulation suffers from vagueness and overbreadth, the regulation runs into further problems.

Continuing my approach to analysis, this particular Internet communication is somewhat hard to characterize without more facts. It does not quite fit into the “posting” category because it was posted to someone else’s Web page, rather than to a typical newsgroup. It is unclear whether the Web page invited comments of any sort or whether the student went out of his way to attach his message to the page. If the former, the communication is still fairly close to posting to a public newsgroup as the Web page opened itself to public responses; the physical analogy might be the student attaching his message and photos to a flyer praising gay life posted on a public bulletin board. If the latter, however, the communication is more like a trespass; it could be analogized to a student defacing a sign on another student’s door.

Nor is it clear where the Web page was “located,” that is, whether the Web page belonged to, was run by, or was frequented by other students at Virginia Tech, and thus housed in a Virginia Tech computer, or whether the Web page was elsewhere on the Internet. The answers to these questions might have implications for the effect of the student’s message and photos on disrupting the educational environment. If the Web page belonged to other Virginia Tech students or “Out and Proud” was also a Virginia Tech student organization, there was a question of disruption. If the Web page was elsewhere on the Internet, the code of conduct under which the student may have been punished might need to allow for punishing conduct off of school property.

It seems most likely that the “Out and Proud” site was not “located” at Virginia Tech nor run by Virginia Tech students. The newspaper article reporting the incident mentioned that “the student admitted using the university’s computer net”406 and then the site but did not mention any other students. Also, a search of the Web reveals

me. In fact, they should have been e-mailing him at “weng@leland.stanford.edu,” which was his proper e-mail address. I received messages from his friends fairly often, even though each time I would reply informing the sender of the mistake. As his friends seemed unable to grasp their mistake even after I explained it to them, I must admit the messages became annoying.

405. Shear, supra note 18, at A1 (describing George Mason University policy prohibiting students from using “computers to harass, threaten or abuse others” and University of Maryland policy prohibiting students from harassing others but not banning “annoying” messages).

406. Id.
a site entitled “Out and Proud” based in Concord, New Hampshire on the Bit-Net computer network.\textsuperscript{407} If this is the same site upon which the Virginia Tech student intruded, the site has no formal connection to Virginia Tech or its students whatsoever, although assumingly other Virginia Tech students could feasibly visit it or seek the social contacts or support available there.\textsuperscript{408} This site does not have a particular mechanism for publicly posting pictures or messages, although it does provide buttons to contact “Kirk” or “Jim” for more information, assumingly via personal e-mail.\textsuperscript{409}

This in mind, the educational mission to be furthered by the regulation could be any of the three most common ones mentioned in Part IV: prevention of disruption to the educational environment, maintenance of the credibility of and high regard for the school in speech it affirmatively sponsors or promotes, and/or inculcation of civility and civic values.\textsuperscript{410}

The regulation of the Internet communication here does not have a direct connection to preventing disruption to the educational environment. The communication was not aimed at other Virginia Tech students and did not take place within the campus around other Virginia Tech students. Given that the Web site was based in Concord, New Hampshire, it is not particularly likely that any appreciable number of Virginia Tech students had been logging on to or participating in the “Out & Proud” Web site.\textsuperscript{411} Thus, any effect on the educational environment would have come from the publicity afforded the event; that is, somewhat indirectly. The connection being somewhat tenuous, Virginia Tech would have trouble meeting the \textit{Tinker} standards of material and substantial interference and more than an “undifferentiated fear or apprehension.”\textsuperscript{412}

The maintenance of the credibility of and high regard for the school name is apparently the educational mission Virginia Tech itself has put out as justification for the regulation. Cathryn Goree, Dean of


\textsuperscript{408} The site notes it is “a social/support group for men exploring their sexuality. We provide a safe, supportive and confidential place to meet others and discuss issues of sexuality. You do not have to identify yourself as gay. You don’t have to be out (of the closet).” See \textit{id.} (emphasis in original).

\textsuperscript{409} See id.

\textsuperscript{410} See discussion \textit{supra} Part IV.C.

\textsuperscript{411} The site seems to be aimed largely toward local participants. For example, it spoke of the next event being a “Pot Luck supper year-end meeting.” See Out & Proud, \textit{supra} note 407.

\textsuperscript{412} 393 U.S. 503, 508-09 (1969).
Students, noted that Virginia Tech takes "the position that if you use our server then you have some responsibilities because you associate the name of the institution with what you say." However, Virginia Tech merely provided the server. It did not affirmatively promote or sponsor the speech. The speech was not remotely part of any curricular activity. As discussed previously, an Internet user would know that the speaker was a student, staff, or faculty member at Virginia Tech but would not think Virginia Tech endorsed the speech.

Consider that a Virginia Tech student could travel to New Hampshire, stand up in the middle of a public square, and loudly declare to all passersby, "I am a Virginia Tech student, and I say fuck the draft!" The student would have associated the name of the institution with her speech, but it seems unlikely the university would try to (or be able to) punish the student.

Thus, protection of the name of the school in the name of the educational mission, in and of itself, is too removed from the prohibition.

Inculcation of civility and civic values is a more interesting argument. The school might argue its educational goal was instilling lessons of "civil, mature conduct," necessitating prohibition of conduct well out of the bounds of civility and maturity, even well outside the university setting. This regulation would have a fairly strong connection to the stated educational mission. However, the school might receive less judicial deference here. As described earlier, civic education seems to be more strongly emphasized in secondary and lower schools than at the university level. A court would assumably be more ready to second-guess a school's judgment about the civic value needed for a twenty-year-old college junior than a secondary or lower school student. Still, this line of argument might be Virginia Tech's strongest.

As it seems likely that a school's regulation here is not a valid regulation of students qua students in furtherance of the educational mission, standard First Amendment analysis applies. The regulation, as it is phrased, is not targeted toward a particular viewpoint or message, so it is content-neutral. Given that the Web site does not seem to invite posting, per se, the student posting to the Web site is

413. Shear, supra note 18.
414. See discussion supra Part IV.C.
416. See discussion supra Part IV.C.
probably most like an unsolicited mailing to an individual or organization, or defacing a sign on the door of that individual or organization. Forum analysis is not particularly useful here. However, given the intrusion, the regulation may be allowable. If the student circumvented the way the Web page worked, that is, broke into the program that ran the Web page, to post his pictures and message, certainly this behavior can be prohibited. If not, however, the speech at issue, while offensive, cannot be generally prohibited.\textsuperscript{417} As one attorney put it, “This was really bad speech. Well, guess what? That’s exactly what is protected by the First Amendment.”\textsuperscript{418}

Thus, Virginia Tech was most likely over the constitutional line here.\textsuperscript{419} This is not to say schools are completely powerless in such situations. For starters, the university certainly has almost full latitude to rescind e-mail privileges for school computer networks, which would cut off an offender’s access to the Internet. It owns the computer networks and provides the service, and under most circumstances, it has little obligation to continue to provide the service. Moreover, at most schools a student agrees to abide by certain policies when she signs up for and receives a computer account. However, punishment beyond rescission of Internet privileges in a case exactly like this runs into constitutional problems.

C. “75 Reasons Why Women Should Not Have Freedom of Speech”

Also in the fall of 1995, four freshmen at Cornell University sent an e-mail message to about twenty of their friends.\textsuperscript{420} The message listed, “75 reasons why women should not have freedom of speech,” including such reasons as: “If she can’t speak, she can’t cry rape”; “Of course, if she can’t speak, she can’t say no”; and references to oral sex.\textsuperscript{421} The recipients of the message forwarded it along to others, and the message spread outward, like a chain letter, to people all over the country.\textsuperscript{422} So many people sent e-mails to Cornell complaining about the message that Cornell’s computer system became overloaded and crashed.\textsuperscript{423} Although the four students made a public apology for the

\textsuperscript{417} See supra text accompanying note 342.

\textsuperscript{418} Shear, supra note 18, at A1 (quoting Erich Shlachter, a California attorney) (internal quotation marks omitted).

\textsuperscript{419} See id. (quoting various authorities and attorneys on their opinions that Virginia Tech had infringed the First Amendment).

\textsuperscript{420} See, e.g., E-Mail Mischief Gets Cornell in Instant Trouble, supra note 20, at A5.

\textsuperscript{421} Id.

\textsuperscript{422} See id.

\textsuperscript{423} See id.; della Cava et al., supra note 21, at 6D.
message in Cornell's student newspaper, the university charged the students with sexual harassment and misuse of computer resources. The university disciplinary board decided not to punish the students but had them agree to attend a program on acquaintance rape and perform fifty hours of community service.

The Internet communication here is a private e-mail message sent to about twenty people. The most obvious analogy is a letter for which twenty copies were sent out, via U.S. mail. However, the Internet makes it very easy to send out twenty copies. A sender need only type out the twenty e-mail addresses, and the computer does all the "photocopying" work automatically and instantaneously. Moreover, each of the twenty recipients can take the message and easily send it out again, automatically, to everyone she knows, with the touch of a button.

This is exactly the difficult case broached previously and is exactly what happened. Each of the twenty recipients did indeed forward the message along, and in the end, the message found its way to people all over the country. This makes it unclear whether the original four authors and senders should be accountable for their friends forwarding the message along to every eventual recipient.

In this case, however, it seems that the four authors knew or should have known that the message was likely to be forwarded. In the first place, they sent it to twenty people, not one or two, which does not indicate an intent to keep some amount of privacy or control over the message. Second, the message was essentially a list of jokes, albeit offensive. To analogize, a person telling a joke to twenty people reasonably expects some or all of those people to repeat the joke elsewhere; that is the nature of a joke. Moreover, in the Internet particularly, numerous humor lists find their way around the country repeatedly, and it is common practice for friends and e-mail correspondents to forward these lists to each other. Thus, in this situation, the four authors should be considered to have performed the equivalent of posting the message in a public place.

An obvious case for disruption to the educational environment arises in that the complaints sent to Cornell in response to the message overwhelmed the Cornell computer network and caused it to

425.  della Cava et al., supra note 20, at 6D; see also discussion supra text accompanying notes 17-18.
426.  See discussion supra Part IV.B.
crash. This of course prevented students and faculty from using the computer network, for academic or personal use, for the duration of the crash. However, there is a causation problem in that it may have not been reasonably foreseeable that the message would be promulgated to as many recipients as transpired and that so many e-mail complaints would result. In terms of our analytical framework, the connection between regulating the students' behavior here is not strongly connected to preventing the computer network from crashing.

However, the university could also argue the more general disruption to the educational environment in the public posting or distributing a message full of misogynistic jokes. Since the nature of the message suggests the authors should be accountable for the message being forwarded to its many recipients, the situation is as if they had written the “75 reasons” down on a posterboard and put it up in their dormitory or the student union. The “75 reasons” create an environment hostile to women and less conducive to learning, and in fact, the university originally charged the authors with sexual harassment.

While the Tinker standards for disruption to the educational environment are quite rigorous and probably more forgiving of the “75 reasons,” this case also raises civic education as the educational goal. This type of message works counter to the civility and citizenship espoused by civic education. Moreover, Tinker's goal of democratic education is not particularly served by allowing the public distribution of “75 reasons why women should not have freedom of speech”; in fact, the message suggests a reduction of participation by eliminating women, contravening the ideals of democratic education. Likewise, the “75 reasons” do not contribute to the pursuit of the truth under critical education. The list is a series of jokes rather than any type of intellectual discourse. Thus, while the goals of democratic and critical education often counterbalance civic education, they do not here.

This would probably lead to factual issues, such as whether the message did constitute harassment or whether prohibiting the message is needed to promote civic education. However, Cornell has some healthy room to argue because the students agreed to the punishment rather than having it handed down from the disciplinary board. This avoided a First Amendment battle and was faithful to the educational goals.
VI
Conclusion

The Internet is growing by leaps and bounds, and its capabilities and versatility continue to unfold. The power and speed of communications on the Internet have the potential to dwarf those of all other communicative media. Still, the nature of communications on the Internet is not so fundamentally new or unprecedented to merit the creation of novel standards for restricting expression. Accordingly, existing First Amendment doctrines should govern restrictions on Internet expression.

Even under the existing First Amendment jurisprudence, public schools should press harder to understand the nature of the Internet before blundering forward. The Internet has engendered a whole new set of social practices and social norms. Regulating student Internet usage is not inherently and instantaneously a regulation of students qua students; schools must still show the regulation’s purpose and its link to furthering the educational mission.

Where schools treat Internet communications as fundamentally different than all other communications and discipline expression almost at will, they overstep the bounds of First Amendment protections. Rather, they should draft clear policies on Internet usage that distinguish different types of Internet expression. Just as they would treat an offensive statement made by a person in her dormitory bedroom different than the same statement being yelled out in the middle of a classroom during a lecture or in an administrative office, they should differentiate types of Internet expression. And, of course, they must avoid restrictions that violate the First Amendment freedom of speech.

Professor Laurence Tribe writes:

The Constitution’s architecture can too easily come to seem quaint, irrelevant, or at least impossible to take very seriously, in the world as reconstituted by the microchip . . . . [But] the Framers of our Constitution were very wise indeed. They bequeathed us a framework for all seasons, a truly astonishing document whose principles are suitable for all times and all technological landscapes.428

Educational institutions (and courts) should take note.

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428. Tribe, supra note 272.